

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CENTER FOR BIOLOGICAL DIVERSITY,)
 WESTERN NEBRASKA RESOURCES)
 COUNCIL, and FRIENDS OF THE EARTH,)
 INC.,)
)
 Plaintiffs,)
)
 v.)
)
 U.S. DEPARTMENT OF STATE; HILLARY)
 CLINTON, Secretary, U.S. Department of State;)
 KEN SALAZAR, Secretary, U.S. Department of)
 the Interior; and U.S. FISH AND WILDLIFE)
 SERVICE,)
)
 Defendants.)

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

**Trial Requested in
Omaha, Nebraska**

INTRODUCTION

1. By this action for declaratory and injunctive relief, Plaintiffs, the Center for Biological Diversity (“Center”), the Western Nebraska Resources Council (“WNRC”), and Friends of the Earth (“FoE”), seek to halt illegal construction of the Keystone XL Pipeline (“Keystone XL” or “Pipeline”), a highly-controversial tar sands pipeline that would – if approved – transport tar sands crude oil from Alberta, Canada to Gulf Coast refineries across the Ogallala Aquifer and through the Sandhills in north-central Nebraska.

2. Upon information and belief, Defendants have authorized, and/or have refused to halt, illegal construction activities for Keystone XL in the Sandhills. These activities include clearing of rare, native grasses and trapping and relocating an endangered species. These

activities are ongoing and are having adverse environmental impacts and are being carried out before the environmental reviews for the Pipeline are complete and before a critical State Department permit and other Federal approvals have issued. Accordingly, Defendants are in violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (“NEPA”), NEPA’s implementing regulations at 40 C.F.R. Parts 1500-1508, and the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 706(1), 706(2)(A), (C), (D) (“APA”).

3. Plaintiffs seek declaratory relief that Defendants – the U.S. Department of State (“State Department”), Secretary of State Hillary Clinton, U.S. Department of Interior Secretary Ken Salazar, and the U.S. Fish and Wildlife Service – are carrying out and/or allowing Pipeline-related construction activities to proceed in violation of NEPA and NEPA’s implementing regulations. Defendants’ authorizations of these activities are arbitrary, capricious, an abuse of the agencies’ discretion, not in accordance with law, in excess of their statutory jurisdiction and authorities, and without observance of procedure required by law, in violation of Sections 706(2)(A), (C), and (D) of the APA, 5 U.S.C. §§ 706(2)(A), (C), (D).

4. In addition, Plaintiffs seek declaratory relief that, by failing to notify the Keystone XL proponent, TransCanada Keystone Pipeline, LP (“TransCanada”), that it and/or its contractors or consultants are taking actions that are having adverse environmental impacts or limiting the choice of reasonable alternatives, Defendants Secretary of State Clinton and the State Department are in violation of 40 C.F.R. § 1506.1(b). Their failure to do so is also agency action that is unlawfully withheld and/or unreasonably delayed in violation of Section 706(1) of the APA. 5 U.S.C. § 706(1).

5. Plaintiffs also seek an injunction immediately halting these activities unless and until such time that the required Federal authorizations have been obtained.

6. Plaintiffs seek an award of litigation costs, including reasonable attorneys' fees, in accordance with the Equal Access to Justice Act. 28 U.S.C. § 2412.

JURISDICTION

7. Jurisdiction is proper in this Court under the APA and 28 U.S.C. § 1331 because this action involves the United States as a defendant and arises under the laws of the United States, including NEPA and the APA. An actual, justiciable controversy exists between Plaintiffs and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201(a) and 5 U.S.C. §§ 705, 706.

VENUE

8. Venue is proper in the District of Nebraska pursuant to 28 U.S.C. § 1391(e). Defendant FWS maintains a field office in Nebraska that authorized the challenged construction activities in Nebraska.

PARTIES

9. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a nonprofit organization dedicated to the preservation, protection, and restoration of biodiversity, native species, and ecosystems. The Center was founded in 1989 and is headquartered in Tucson, Arizona. The Center maintains field offices in California, Minnesota, New Mexico, New York, Oregon, Vermont, Washington, and Washington, D.C. The Center has more than 42,000 members, including many who reside in Nebraska and explore and enjoy the Sandhills and the biological diversity found there. The Center brings this action on behalf of those members, including Nebraskans who grew up, work, live, and recreate in the Sandhills, and who study, photograph,

view, and enjoy the biological diversity and natural resources found there. Many of these people are Nebraskans who cannot speak publicly against these activities for fear of hurting their job prospects and professional relationships. These members' interests in the Sandhills are being harmed now, as a result of construction activities for the Keystone XL Pipeline. These activities are happening because Defendants have authorized them or have failed to stop them. The declaratory and injunctive relief that the Center is requesting will redress these harms.

10. Plaintiff WESTERN NEBRASKA RESOURCES COUNCIL ("WNRC") is a nonprofit organization formed in 1983 that is dedicated to preserving the quality of watersheds and native biomes while maintaining the lifestyle of Western Nebraska. WNRC members and staff work to accomplish its mission by educating the public and policymakers and through hands-on work. WNRC members enjoy the wild natural beauty within Nebraska beyond what words can describe. WNRC believes that it is necessary to stop further fragmentation of the fragile Sandhills and its native ecosystems. WNRC members' interests in protecting and preserving the Sandhills and its natural beauty are being harmed as a result of the illegal pipeline construction activities for the Keystone XL Pipeline. WNRC members regard the construction activities for the Keystone XL Pipeline in the Sandhills, prior to finalization of environmental reviews and issuance of required permits, as an assault to Nebraskans' native ecosystems, personal health and well-being. These activities are happening because Defendants have authorized them or have failed to stop them. The declaratory and injunctive relief that WNRC is requesting will redress these harms.

11. Plaintiff FRIENDS OF THE EARTH, INC., ("FoE") is a national, nonprofit environmental advocacy organization founded in 1969 and incorporated in the District of Columbia, with its headquarters in Washington, D.C. and an office in San Francisco, California.

FoE's mission is to defend the environment and champion a healthy and just world. FoE is the U.S. voice of the world's largest network of environmental groups – Friends of the Earth International – a federation of grassroots groups working in 76 countries on today's most urgent environmental and social issues. FoE brings this action on behalf of those members, including Nebraskans who grew up, work, and recreate in the Sandhills, and who study, photograph, view, and enjoy the biological diversity and natural resources found there. These members' interests in the Sandhills are being harmed now, as a result of ongoing pipeline construction activities for the Keystone XL Pipeline. These activities are happening because Defendants have authorized them or have failed to stop them. The declaratory and injunctive relief that FoE is requesting will redress these harms.

12. Defendant UNITED STATES DEPARTMENT OF STATE is a Federal agency that is administered by Defendant Clinton. The State Department receives and considers applications for transboundary permits for the construction and operation of facilities on the U.S.-Canada border – including tar sands pipeline facilities at the border – pursuant to Executive Order 13337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) (“EO 13337”). In considering applications for transboundary permits, the State Department must comply with NEPA, its implementing regulations, and the APA. The State Department is the lead agency for compliance with NEPA for the transboundary permit for Keystone XL.

13. Defendant HILLARY CLINTON is the Secretary of State and is sued in her official capacity. Secretary Clinton has supervisory responsibility over Defendant State Department. Secretary Clinton has authority to decide whether to issue permits for construction or operation of facilities at the U.S.-Canada border pursuant to EO 13337. Such permits are known as “transboundary permits” (they are also known as “Presidential permits”). In deciding

whether to issue transboundary permits pursuant to EO 13337, Secretary Clinton must ensure compliance with NEPA, NEPA's implementing regulations, and the APA.

14. Defendant KEN SALAZAR is the United States Secretary of the Interior. In that capacity, Secretary Salazar has supervisory responsibility over Defendant U.S. Fish and Wildlife Service. Defendant Salazar is sued in his official capacity.

15. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is a Federal agency within the Department of Interior. FWS is responsible for administering the Endangered Species Act, 16 U.S.C. §§ 1531-1544 with respect to terrestrial wildlife and issuing permits pursuant to the Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 ("MBTA") and the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 688-688d ("BGEPA"). Pursuant to these laws, FWS is responsible for deciding whether to provide Federal authorizations for the Keystone XL Pipeline. FWS maintains a field office in Grand Island, Nebraska that has explicitly or implicitly allowed construction activities for Keystone XL in the Sandhills to proceed before all Federal authorizations for the Pipeline have been provided, including FWS's own authorizations of the Pipeline pursuant to these statutes.

LEGAL BACKGROUND

A. The National Environmental Policy Act

16. NEPA is the "basic national charter for" environmental protection. 40 C.F.R. § 1500.1. Among the statute's goals are to "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken"; and to "help public officials make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.* § 1500.1(b)-(c). A core

purpose of NEPA is to “promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321.

17. To achieve these objectives, NEPA requires all agencies of the Federal government to prepare a “detailed statement” regarding all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This statement – known as the environmental impact statement (“EIS”) – must describe, among other things: (1) the environmental impact of the proposed action, and (2) any adverse environmental effects that cannot be avoided should the proposal be implemented. *Id.* § 4332(2)(C)(i), (ii).

18. The Council on Environmental Quality (“CEQ”), established under NEPA within the Executive Office of the President to be responsible for coordinating Federal environmental efforts, has promulgated regulations implementing NEPA. *See* 40 C.F.R. §§ 1500-1508. The State Department’s own NEPA regulations, which incorporate and supplement the CEQ regulations, are set forth at 22 C.F.R. §§ 161.1-161.12.

19. Pursuant to the CEQ regulations, an EIS must include, among other things: (1) a “full and fair discussion” of the significance of all “direct,” “indirect,” and “cumulative” effects of the action, 40 C.F.R. §§ 1502.1, 1502.16(a)-(b), 1508.25(c); and (2) a discussion of “means to mitigate adverse environmental impact.” *Id.* § 1502.16(h).

20. In addition to considering the effects of the agency’s proposed action, an EIS must also include a discussion of all “reasonable alternatives.” 40 C.F.R. § 1502.14. This is the “heart of the environmental impact statement” and “should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” *Id.*

21. Preparation of an EIS is typically done in two stages. The first stage is preparation of a “draft” EIS, which must satisfy to the fullest extent possible requirements for a “final” EIS, which is prepared during the second stage. 40 C.F.R. § 1502.9(a). After preparing the draft EIS and before preparing a final EIS, the agency must solicit comments from the public, “affirmatively soliciting comments from those persons or organizations who may be interested or affected.” *Id.* § 1503.1(a).

22. After the public comment period, the agency prepares a final EIS that responds to comments received from the public on the draft EIS, as well as from Federal, State, and local agencies and Tribes. *Id.* § 1503.4(a).

23. Following release of a final EIS (“FEIS”), an agency may make a final decision as to whether to undertake the major Federal action, or proceed under an alternative developed during the NEPA process, only by preparing a “concise public record of decision” (“ROD”) that states what the agency’s decision is, all of the alternatives that the agency considered, whether all practicable means to avoid or minimize harms from the decision have been adopted, and if not, why not. 40 C.F.R. § 1502.2.

24. Until the NEPA process is complete and the ROD is issued, “no action concerning the proposal shall be taken which would . . . [h]ave an adverse environmental impact” or “[l]imit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a). NEPA’s implementing regulations further prohibit agencies from “commit[ing] resources prejudicing selection of alternatives before making a final decision.” *Id.* § 1502.2(f). Moreover, if an agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency’s jurisdiction that would have an adverse environmental impact(s) or limit the choice of reasonable alternatives, “then the agency shall promptly notify

the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.” *Id.* § 1506.1(b).

B. The Administrative Procedure Act

25. The APA governs judicial review of an agency’s compliance with NEPA. The APA provides that a reviewing court shall “hold unlawful and set aside agency action that it finds to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction [or] authority,” or “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A). The APA also directs a reviewing court to “compel agency action” that has been “unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).

C. Transboundary Permits Under EO 13337

26. EO 13337 delegates to the Secretary of State the President’s authority to receive applications for permits for the construction, connection, operation, or maintenance of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels at the border of the United States, and to issue or to deny such permits upon a determination that the action to be permitted serves the national interest. This is called a “national interest determination.”

27. The State Department is a Federal agency. As such, its actions, including decisions of whether to issue transboundary permits pursuant to EO 13337, must comply with NEPA and all other applicable Federal laws.

FACTUAL BACKGROUND

A. The Keystone XL Pipeline

28. The Keystone XL Pipeline is a highly-controversial, proposed pipeline that, if granted a transboundary permit and other Federal authorizations, will transport synthetic crude

oil mined from the tar sands in northeastern Alberta, Canada, entering the United States in northeastern Montana, snaking south-southeast across South Dakota, the Sandhills and the Ogallala Aquifer in Nebraska, Kansas, and Oklahoma to refineries in Illinois, Oklahoma, and the Gulf Coast. Gulf Coast refineries would refine the synthetic crude into petroleum products, which would then be shipped and consumed by U.S. and international markets as global commodities.

29. Keystone XL consists of Phase 3 and Phase 4 of the Keystone Pipeline System. Phase 1 and Phase 2 (collectively “Keystone I”) have been operational since June 2010. Keystone XL would augment and interconnect with the existing Keystone I pipeline. Keystone I has leaked at least 14 times since it started operating, spilling more than 20,000 gallons of crude oil. Most of these leaks have occurred near pump stations.

30. In total, Keystone XL would consist of approximately 1,711 miles of new, 36-inch-diameter pipeline, including about 327 miles of pipeline in Canada and 1,384 miles in the United States.

31. Keystone XL would result in a 100-foot right-of-way (“ROW”) during construction and a 50-foot permanent ROW.

32. Keystone XL would require the construction of 30 new “pump stations” along its route, as well as 112 mainline valves and 50 permanent access roads and a new oil storage facility in Cushing, Oklahoma. Pump stations are facilities that take up areas about five to 15 acres in size, spaced along the proposed route, which pump the oil through the pipeline. New and upgraded electrical transmission lines and substations would be required in order to provide new power for the pump stations.

33. The Keystone XL Pipeline could transport up to 830,000 barrels per day (bpd) of Alberta tar sands crude oil. Like other tar sands pipelines including Keystone I, Keystone XL would transport a form of crude oil from the tar sands known as “bitumen”, a material that is similar to soft asphalt and which is either mined or extracted in situ. Two forms of bitumen would be transported via Keystone XL. The first is synthetic crude, which is produced by converting bitumen to lighter liquid hydrocarbons. The second is diluted bitumen, also known as “dilbit”, which consists of bitumen that is homogeneously mixed with a light hydrocarbon fluid that dilutes and reduces bitumen’s viscosity and removes sand, water, and impurities. Both synthetic crude and dilbit are similar to conventional crude oil.

34. Keystone XL is a \$7-billion project. TransCanada is a Canadian corporation and the project proponent for Keystone XL. TransCanada submitted an application for a transboundary permit for the Keystone XL Pipeline to the State Department on September 19, 2008. The State Department has not yet issued a Record of Decision regarding whether to grant a transboundary permit for Keystone XL.

35. In addition to obtaining a transboundary permit from the State Department, TransCanada must also obtain several additional Federal approvals, including permits from FWS, the U.S. Army Corps of Engineers, and the U.S. Bureau of Land Management (an agency with the U.S. Department of Interior). TransCanada must also obtain State and local regulatory permits for other aspects of the Keystone XL project.

B. The Keystone XL DEIS

36. The State Department released a draft environmental impact statement (“DEIS”) for Keystone XL pursuant to NEPA in April 2010.

37. The U.S. Environmental Protection Agency (“EPA”) rated the DEIS as “Inadequate” for lack of an analysis of the Pipeline’s significant impacts necessary for an informed decision as to whether to grant a transboundary permit for Keystone XL. The EPA stated that the analysis lacked information about oil spill risks to the Ogallala Aquifer, including in the Sandhills, where the water table is shallow and the aquifer is overlain by highly permeable soils. EPA requested adequate analysis of alternative routes for the Pipeline that would reduce risk by routing the Pipeline to avoid the Ogallala Aquifer.

38. EPA also criticized the DEIS for its inadequate analysis of the Pipeline’s likely impacts to wetlands and migratory bird populations such as whooping cranes, a critically endangered bird that has grown from just 15 birds in 1940 to about 338 birds today following decades of recovery efforts.

39. Whooping cranes migrate from Texas to their breeding grounds in northern Canada. Their 5,000-mile, primary annual migratory path overlaps with hundreds of miles of the proposed Pipeline route. Already rare, with just 338 remaining animals, the proposed Pipeline and the construction activities are destroying habitats, including native grasslands and wetlands, that provide important feeding and resting locations during the cranes’ fall migration through the Sandhills. Mowing a path for the proposed Pipeline adversely affects whooping cranes and other wildlife species including waterfowl, migratory birds, and eagles.

40. The DOI Secretary’s Office submitted comments on the DEIS which criticized it for lacking analysis of the Pipeline’s impacts to wildlife including whooping cranes and migratory birds.

41. The DOI also raised concerns about the American burying beetle, which is the largest burying beetle in North America and known for its shiny black body and red and orange

markings. Approximately once a year, a pair of American burying beetles buries a carcass and lays eggs and raises its young near the carcass underground. Researchers capture and study beetles during the breeding season by trapping them in “pitfall traps,” which consist of large, bucket-sized traps, baited with carrion. This practice is also used to move beetles out of the pathway of projects.

C. The Keystone XL SDEIS

42. The State Department released a supplemental draft environmental impact statement (“SDEIS”) for Keystone XL pursuant to NEPA in April 2011.

43. EPA rated the SDEIS as “Insufficient.” EPA expressed continued concerns about the Pipeline’s significant potential environmental impacts that must be avoided to provide adequate environmental protection. EPA also criticized the State Department for failing to consider reasonable alternatives in the SDEIS, including alternatives that would avoid the Ogallala Aquifer and the Sandhills.

44. The DOI’s Office of the Secretary also submitted comments on the SDEIS stating that the State Department had failed to respond to its concerns about the Pipeline’s effects to endangered species.

45. Plaintiffs submitted comments on both the DEIS and the SDEIS, raising issues about the proposed Pipeline’s adverse effects to public health, the global climate, threatened and endangered species, and other effects.

D. The Keystone XL FEIS and National Interest Determination

46. The FEIS was released for comment on August 26, 2011, the same week that protests began at the White House resulting in arrests of Bill McKibben (an environmental

scholar and author), Dr. James Hansen (a climatologist and head of NASA Goddard Institute for Space Studies), and about 1,200 others by the time they concluded on September 3, 2011.

47. When it released the FEIS, the State Department announced several public hearings and the start of a final comment period on the Pipeline as to whether the State Department's approval of a transboundary permit is in the national interest. This final comment period concludes on October 9, 2011.

48. Following the conclusion of the comment period, the State Department is required to circulate a "proposed National Interest Determination" ("NID") to several Federal agencies that will, in turn, have 15 days to decide whether they concur with the proposed NID. At that point, the permit will be issued or denied by the State Department, or if there is a disagreement among the Federal agencies about whether Keystone XL is in the national interest, the permit must be issued or denied by President Obama.

49. The FEIS states that clearing of vegetation including native grasses to create an unvegetated strip for the proposed Pipeline will destroy rare, native grasslands and prairies that may never be restored. These native grasslands and prairies provide important habitat for a range of wildlife species and migratory birds. In light of these impacts, the FEIS states that Federal authorizations would need to be obtained for Pipeline construction from FWS pursuant to the Endangered Species Act, Migratory Bird Treaty Act, and Bald and Golden Eagle Protection Act. The FEIS states that these authorizations pursuant to these laws would need to be obtained before Pipeline construction commenced.

E. Ongoing Pipeline Construction Activities

50. Following release of the FEIS, an article published in the *Omaha World-Herald* on September 4, 2011 reported that trapping and relocation of American burying beetles in the

Pipeline's proposed path had already begun, before the NID has been made, before the ROD has been issued, before any transboundary permit has been issued, and before FWS has provided necessary Federal authorizations for the adverse effects of Pipeline construction and operation to endangered species and migratory birds pursuant to the Endangered Species Act, Migratory Bird Treaty Act, and Bald and Golden Eagle Protection Act.

51. Upon information and belief, these relocation activities are being conducted in order to clear a 100-mile-long, unvegetated strip along the proposed Keystone XL Pipeline route in the Sandhills, where endangered beetles will no longer be allowed to survive. Once cleared using heavy equipment, the unvegetated strip will be maintained until the next stages of Pipeline construction – topsoil removal, grading, and trenching – begin. According to the *Omaha World-Herald* article, TransCanada is conducting these activities now, with FWS's knowledge and consent, because waiting until Federal approval for the Pipeline "might have delayed work a year."

52. A member of the Center completed a fly-over of the proposed Pipeline route through the Sandhills on September 20, 2011, and confirmed that mowing of native prairie grasslands has occurred in some areas, but could not document that mowing has yet been completed along the entire 100 miles of the proposed route.

53. In addition to being conducted in order to relocate endangered beetles away from the proposed Pipeline route, clearing of vegetation also constitutes the initial stages of Pipeline construction through the Sandhills. These activities are destroying rare, native grasslands and prairies that may never be restored and which provide important habitat for a range of wildlife species and migratory birds, about to begin migration.

54. Upon information and belief, the only Federal authority for TransCanada's relocation of American burying beetles prior to Federal approval for the Pipeline is a "research permit" provided to TransCanada's consultant, Dr. Wyatt Hoback of the University of Nebraska-Kearney, by FWS. Upon information and belief, FWS first issued this research permit to Dr. Hoback pursuant to section 10(a)(1)(A) of the ESA in 2001 and last renewed it in late December 2010 or early 2011. FWS has not made this permit publicly available.

55. The *Omaha World-Herald* reported that TransCanada has spent hundreds of thousands of dollars to hire Dr. Hoback and a crew of about 15 to 18 people to trap and relocate endangered American burying beetles in order to clear the Pipeline route.

56. Several Nebraska elected officials have announced opposition to Keystone XL due to its proposed route traversing the Sandhills, including Governor Dave Heineman, U.S. Senator Mike Johanns, and U.S. Senator Ben Nelson. Also publicly opposing the Keystone XL Pipeline are nine Nobel Laureates, 50 Members of Congress, 20 scientific experts, the Dalai Lama, and leaders from national environmental organizations.

CLAIM FOR RELIEF

Violation of NEPA and Its Implementing Regulations: Taking Action During The NEPA Process

57. Plaintiffs hereby incorporate by reference all preceding paragraphs.

58. NEPA requires all Federal agencies to consider the effects of their actions on the environment through compliance with its procedures. NEPA requires Federal agencies to "insure that environmental information is available to public officials and citizens *before decisions are made and actions are taken*"; and to "help public officials make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.* § 1500.1(b)-(c) (emphasis added).

59. Until the NEPA process is complete and the ROD is issued, “no action concerning the proposal shall be taken which would . . . [h]ave an adverse environmental impact” or “[l]imit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a). Moreover, if an agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency’s jurisdiction that would have an adverse environmental impact(s) or limit the choice of reasonable alternatives, “then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.” *Id.* § 1506.1(b).

60. Defendants are authorizing construction activities – including but possibly not limited to clearing of native grasslands and relocating endangered species – for the Keystone XL Pipeline, before a ROD has been issued, in violation of 40 C.F.R. § 1506.1(a). Such authorizations include, but are not necessarily limited to, FWS’s authorization of the mowing of vegetation, relocation of American burying beetles, and maintaining the absence of suitable carrion within the proposed Pipeline’s ROW under a research permit to Dr. Wyatt Hoback, a paid consultant for TransCanada.

61. FWS’s authorization of these activities is arbitrary, capricious, an abuse of agency discretion, and otherwise not in accordance with law within the meaning of Section 706(2)(A) of the APA, is in excess of statutory authority or short of statutory right within the meaning of Section 706(2)(C) of the APA, and without observance of procedure required by law within the meaning of Section 706(2)(D) of the APA. 5 U.S.C. §§ 706(2)(A), (2)(C), (2)(D).

62. Defendants Secretary of State Clinton and the State Department are considering an application from TransCanada, a non-Federal entity, and are aware that TransCanada is taking and/or is about to take actions in connection with Keystone XL Pipeline construction that are

having and/or will have adverse environmental impacts and/or are limiting and/or will limit the choice of reasonable alternatives to approval of the proposed Pipeline, without notifying TransCanada that the State Department will take appropriate action to insure that the objectives and procedures of NEPA are achieved, in violation of 40 C.F.R. § 1506.1(b). These Defendants' failure to so notify TransCanada constitutes agency action that has been unreasonably delayed and/or unlawfully withheld within the meaning of Section 706(1) of the APA.

RELIEF REQUESTED

A. Declare that Defendants' authorization of construction activities – including, but not limited to, vegetation clearing and relocating endangered species – for the Keystone XL Pipeline, before a ROD has been issued, is in violation of 40 C.F.R. § 1506.1(a) of NEPA;

B. Declare that Defendants' authorization of construction activities for the Keystone XL Pipeline, under the guise of a research permit and/or other actions, before a ROD has been issued, constitutes agency action that is arbitrary, capricious, an abuse of agency discretion, and otherwise not in accordance with law within the meaning of Section 706(2)(A) of the APA, is in excess of statutory authority or short of statutory right within the meaning of Section 706(2)(C) of the APA, and without observance of procedure required by law within the meaning of Section 706(2)(D) of the APA;

C. Declare that Defendants Hillary Clinton and the State Department are failing to take appropriate action to insure that the objectives and procedures of NEPA are achieved, in violation of 40 C.F.R. § 1506.1(b);

D. Enter such temporary and/or permanent injunctive relief as may be specifically sought hereafter by Plaintiffs;

E. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorneys' fees under applicable law; and

F. Grant Plaintiffs such further relief as may be just, proper, and equitable.

DATED this 5th day of October, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 5, 2011, he sent by United States certified mail, return receipt requested a true and correct copy of the foregoing to the following:

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