

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; DAN ASHE, Director, U.S. Fish and
Wildlife Service; U.S. FISH AND WILDLIFE
SERVICE; U.S. BUREAU OF LAND
MANAGEMENT; U.S. ARMY CORPS OF
ENGINEERS; WESTERN AREA POWER
ADMINISTRATION; and RURAL UTILITIES
SERVICE,

Defendants.

Case No. 11-cv-345

**FIRST AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. By this amended action for declaratory and injunctive relief, Plaintiffs the Center for Biological Diversity (“Center”), Western Nebraska Resources Council (“WNRC”), and Friends of the Earth (“FoE”) challenge Defendant U.S. Fish and Wildlife Service’s (“FWS”) concurrence in the conclusions of an environmental reviews for the Keystone XL Pipeline (“Keystone XL” or “Pipeline”) that was prepared pursuant to the Endangered Species Act, 16 U.S.C. § 1531-1544 (“ESA”) by Defendant Department of State (“DOS”) and other Defendants.

FWS unreasonably and unlawfully concurred that the Pipeline is “not likely to adversely affect” endangered and threatened species – *e.g.*, the critically-endangered whooping crane – despite an undisputed increase in the frequency of whooping crane collisions and electrocutions that will be caused by power lines that are connected to the Pipeline and a likelihood that the Pipeline cause spills, as frequently as about twice per year, every year, throughout the Pipeline’s 50-year lifespan. In a final “biological opinion” for the Keystone XL Pipeline (“Biological Opinion”) required under the ESA, FWS also unlawfully failed to fully consider the Pipeline’s true consequences for an endangered species, the American burying beetle, that was at one time abundant but today survives in only three areas including the Sand Hills of Nebraska. FWS also issued an “incidental take statement” for the beetle which fails to provide a means to monitor how many beetles are lost due to the Pipeline.

2. Additionally, Plaintiffs challenge, under Section 10(a)(1)(A) of the ESA, 16 U.S.C. § 1539(a)(1)(A), and Section 706(2) of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2), the FWS’s issuance of a scientific research permit under the ESA, 16 U.S.C. § 1538(a)(1)(A), to Dr. Wyatt Hoback, a professor of biology at the University of Nebraska-Kearney. To the extent that FWS issued this research permit for take incidental to the Keystone XL Pipeline, FWS’s issuance of the research permit to Dr. Hoback is arbitrary, capricious, an abuse of FWS’s discretion, contrary to the ESA and its implementing regulations, in excess of statutory jurisdiction, authority, or limitations, and/or short of statutory right. 5 U.S.C. § 706(2)(A), (C). Plaintiffs also challenge under the APA FWS’s failure to provide adequate notice to the public about the activities that the research permit could be construed to cover and the agency’s failure to invite the public to comment on those uses of the research permit, as

contrary to the agency's own procedural requirements for such permits as well as fundamental principles of administrative law. 50 C.F.R. § 17.22; 5 U.S.C. §§ 706(2)(A), (D).

3. Plaintiffs also challenge FWS's authorization for – and the other Defendants' refusal to stop – the massive relocation of thousands of endangered American burying beetles in the Pipeline's proposed route through the Sand Hills of Nebraska, which has occurred during the summer and fall of 2011, before federal authorizations for Keystone XL have been issued, in violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h ("NEPA"); 40 C.F.R. § 1506.1.

4. Keystone XL is a proposed tar sands pipeline that would, if permitted by Defendant DOS and other federal agencies, transport up to 830,000 barrels of tar sands crude oil each day from Alberta, Canada to refineries in the Gulf Coast. The nearly 1,700-mile-long Keystone XL pipeline would cross eastern Montana, South Dakota, the Sand Hills and Nebraska, through Kansas, Oklahoma, and Texas to the Gulf Coast.

5. Because Keystone XL would cross the United States-Canada border, Defendant DOS is deciding whether to grant Keystone XL's proponent, TransCanada Keystone, LLP ("TransCanada"), a "transboundary permit" for Keystone XL pursuant to Executive Order 13337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) ("EO 13337"). DOS is expected to make a decision on the proposed transboundary permit for Keystone XL in late 2011 or early 2012.

6. Several other federal agencies are considering whether to provide federal authorizations for the Keystone XL as well, including: (1) BLM, which is considering whether to grant TransCanada a right-of-way for the Pipeline to cross public lands in eastern Montana pursuant to the Mineral Leasing Act, 30 U.S.C. § 185(a); (2) the U.S. Army Corps of Engineers, which is considering whether to permit the pipeline under Section 404 of the Clean Water Act,

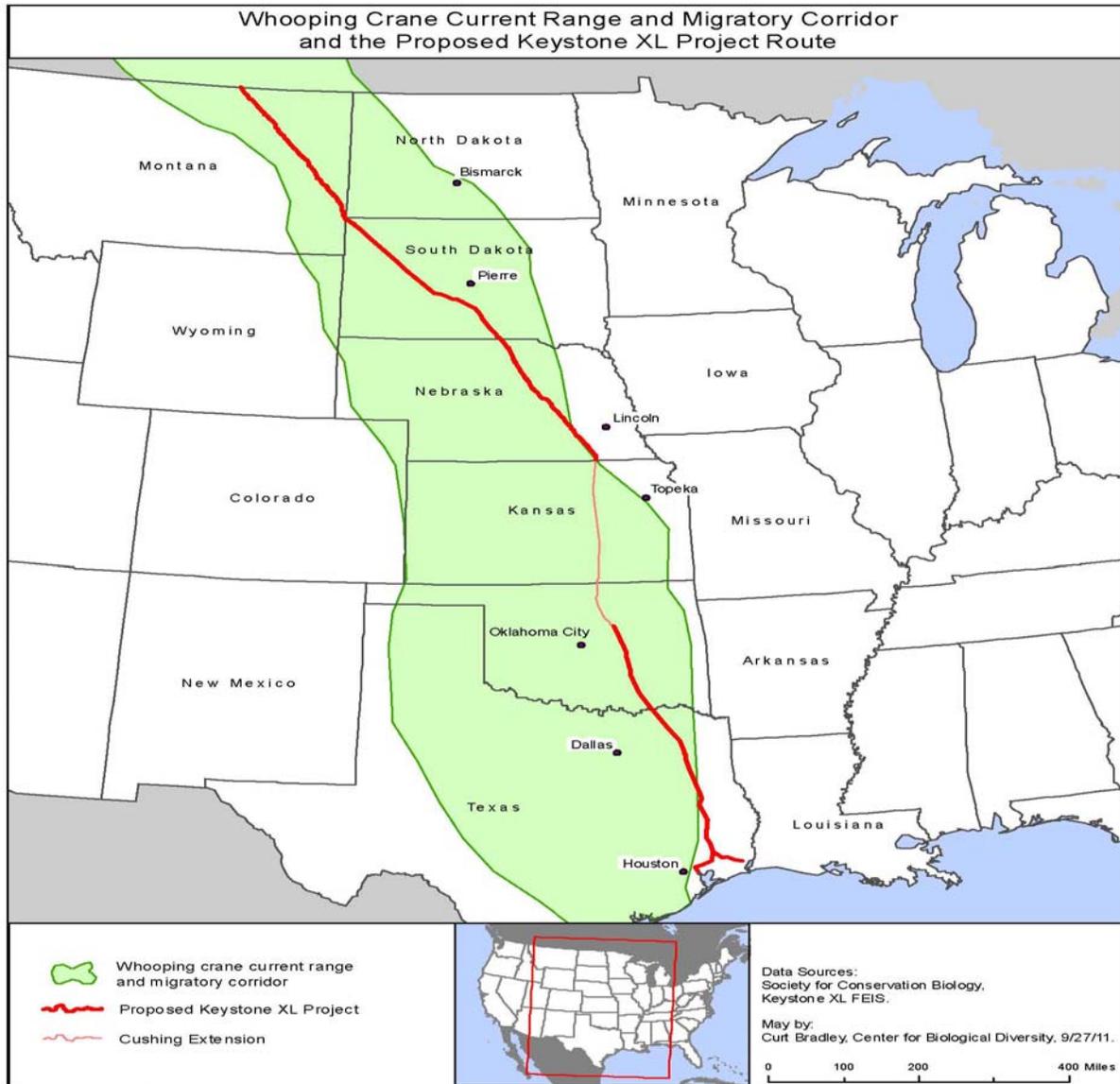
33 U.S.C. § 1344; (3) the Western Area Power Administration (“WAPA”), part of the Department of Energy, which in coordination with the Rural Utilities Service (“RUS”) would own a small section of an 230 kV electric power transmission line in southern South Dakota that would upgrade load capacity and support voltage requirements when the pipeline increases to full capacity; and (4) the RUS, an agency within the Department of Agriculture, which is considering whether to provide grants to fund construction certain power lines that may be built to provide power to the pipeline’s pump stations. DOS, BLM, the Corps, WAPA, and RUS are collectively referred to herein as the “Action Agencies.”

7. A final environmental impact statement (“FEIS”) for Keystone XL was released on August 23, 2011. The FEIS was prepared by a TransCanada contractor, on the Action Agencies’ behalf, in order to satisfy the requirements of NEPA. FWS was a cooperating Federal agency in preparation of the FEIS.

8. That same day, a final “biological assessment” for the Pipeline (“Biological Assessment”) was released. The Biological Assessment was prepared by a contractor for TransCanada on the Action Agencies’ behalf, in order to satisfy the requirements of the ESA. The Biological Assessment concluded that the Pipeline is “not likely to adversely affect” the whooping crane, interior least tern, piping plover, western prairie fringed orchid, pallid sturgeon, and Arkansas River shiner. The Biological Opinion was released on September 23, 2011 and was prepared by FWS’s Grand Island field office. FWS stated in writing that it formally “concurred”, pursuant to the ESA, with the Biological Assessment’s conclusions.

9. According to the FEIS, local power providers will upgrade existing and construct new electric power lines and associated facilities to supply electrical power for “pump stations” and remotely-operated valves and meters at many locations along the Pipeline route. The FEIS

states that these power lines will cause collisions with migratory birds such as the whooping crane, which is listed as “endangered” under the ESA and whose primary migratory flyway overlaps with much of the Keystone XL route in the Midwestern United States, as reflected in the following map:



10. FWS estimates that only about 338 whooping cranes currently survive in the wild. The FEIS states that power lines that are connected to Keystone XL will kill whooping cranes

due to collisions and/or electrocution, increasing an already-existing threat from “collision hazards”. FWS has estimated that there are 74 locations where new power lines to pump stations present collision hazards for migrating whooping cranes. In addition, the FEIS states that these powers lines will increase predation of other listed species, including the interior least tern and piping plover, by providing more vantage perches for raptors.

11. The FEIS states that spills from Keystone XL are “likely”. The FEIS states that a DOS contractor estimated that Keystone XL will result in about 1.78 to 2.51 spills of any size per year throughout its 50-year lifespan. The FEIS states that larger spills will likely migrate from the spill location, possibly to rivers and streams. Rivers and streams provide habitat for endangered and threatened species including the whooping crane, interior least tern, piping plover, pallid sturgeon, and Arkansas shiner. TransCanada’s other tar sands pipeline (Keystone 1) has spilled 14 times since it began operating in June 2010.

12. Although the Pipeline will increase the collision hazard for whooping cranes at dozens of locations in its primary migratory flyway and likely cause up to 90 spills, the Action Agencies concluded in the Biological Assessment” that the Pipeline is “not likely to adversely affect” the crane and many other endangered and threatened species. FWS – the consulting agency under the ESA – concurred in the conclusions in the Biological Assessment in writing. As a consequence, the Action Agencies and FWS have refused to consider the effects of Keystone XL’s power lines and spills to these endangered and threatened (*i.e.*, “listed”) species and their critical habitat in “formal consultation”, a process during which federal agencies considering taking actions that will affect listed species ensure – as they must, under the ESA – that their proposed actions will not jeopardize the continued existence of listed species or destroy or adversely modify their designated critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 400.

13. Thus, by this action Plaintiffs allege that FWS's conclusion that Keystone XL is not likely to adversely affect the whooping crane and other species that are listed as "endangered" or "threatened" under the ESA are arbitrary, capricious, an abuse of discretion, and contrary to law, in violation of the APA, 5 U.S.C. § 706(2)(A).

14. Plaintiffs also challenge the analysis in the Biological Opinion for the Pipeline, which FWS issued on September 23, 2011. Although it acknowledges that beetles will adversely affected by the Pipeline – indeed, that they will be removed from the Pipeline route, killed, dug up, and their habitat fragmented – the Biological Opinion does not adequately consider the full extent of the Pipeline's harms to American burying beetles. Based on conjecture and the wholly voluntary acts of TransCanada, FWS concludes that temporarily-disturbed areas will be fully restored to their prior condition, but there is no support for this conclusion. As a result, the Biological Opinion is blind as to the Pipeline's full effects, and its mitigation and minimization measures cannot therefore be said to be adequate. The Biological Opinion also fails to provide any way of monitoring how many beetles will be killed or moved during Pipeline construction and operation, in violation of the ESA. For these reasons, Plaintiffs challenge the Biological Opinion for the Pipeline as arbitrary, capricious, and contrary to the ESA, in violation of the APA. 5 U.S.C. 706(2)(A).

15. Plaintiffs also challenge, pursuant to the ESA and the APA, FWS's issuance of a scientific research permit to Dr. Wyatt Hoback of the University of Nebraska-Kearney under Section 10(a)(1)(A) of the ESA. 16 U.S.C. § 1539(a)(1)(A). By the plain language of Section 10(a)(1)(A), a research permit can only permit take that occurs in connection with scientific research or enhancement, and cannot authorize take of endangered species when that take is incidental to an agency action such as the Keystone XL Pipeline. Thus, Plaintiffs allege that

FWS's issuance of the research permit was arbitrary, capricious, an abuse of discretion, not in accordance with the ESA, and "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). Plaintiffs also challenge FWS's failure to disclose to the public that it was considering issuing a Section 10(a)(1)(A) permit to Dr. Hoback for take of American burying beetles that is incidental to Keystone XL, as a violation of the applicable notice and comment requirements and the APA. 50 C.F.R. § 17.22; 5 U.S.C. §§ 706(2)(A), (D).

16. Plaintiffs also allege that FWS has unlawfully authorized TransCanada to carry out a massive relocation of up to 2,400 endangered American burying beetles in the proposed Pipeline route – which has caused adverse environmental impacts, limited the choice of reasonable alternatives, and irreversibly and irretrievably committed resources – before the Action Agencies have decided whether to authorize the Pipeline through a Record of Decision, in violation of NEPA, 40 C.F.R. §§ 1501.2, 1502.5, 1506.1(a), (b). Plaintiffs seek declaratory relief that FWS's authorization of endangered beetle removal from the Pipeline route was arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of FWS's 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).

17. Lastly, Plaintiffs seek declaratory relief that, by failing to notify TransCanada that it and/or its contractors are causing adverse environmental impacts and/or limiting the choice of reasonable alternatives, and that they will take strong affirmative steps to ensure that the objectives and procedures of NEPA are achieved, the Action Agencies 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).

18. Plaintiffs intend to seek declaratory relief and vacatur of the challenged agency actions pursuant to the APA. 5 U.S.C. § 706(1). However, Plaintiffs may also seek an injunction halting any further beetle removal or other activities unless and until such time that all applicable legal requirements have been met.

19. 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

20. 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 the ESA, 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

21. 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 concurred in the Biological Assessment, authored the Biological Opinion, and authorized the challenged construction activities in Nebraska.

PARTIES

A. Plaintiffs

22. 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 members who reside in Nebraska and explore and enjoy the Sand Hills and the biological diversity found there.

23. 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 Sand Hills and its native ecosystems.

24. 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.

25. Plaintiffs bring this action on behalf of their members, including Nebraskans who grew up, work, live, and recreate in the Sand Hills, and who study, photograph, view, and enjoy the biological diversity and natural resources found there. These members include people who were born in the Sand Hills, who regularly visit the Sand Hills in order to view its wildlife including whooping cranes, interior least terns, piping plovers, western prairie fringed orchids, and American burying beetles, and people who view, study, or photograph these species in other

areas. These include landowners in the Sand Hills whose property is under threat of condemnation by TransCanada for the Pipeline, who have endangered beetles on their land and who view and enjoy other endangered and threatened species which live nearby. These members include ecologists and scientific experts on the American burying beetle, and who study beetles in the Sand Hills, who would have submitted comments to FWS objecting to the agency's proposal to issue a scientific research permit to Dr. Wyatt Hoback for American burying beetle removal activities for the Keystone XL Pipeline, had FWS notified the public that the proposed permit could be used for this purpose, and indeed, that the permit could be used to cover take incidental to the Keystone XL Pipeline even before the Pipeline is Federally-authorized. These members also include parents and grandparents who have been arrested for protesting the Pipeline in front of the White House in August or September 2011.

26. Plaintiffs' members' interests in viewing, studying, and photographing endangered and threatened species in the vicinity of the Keystone XL Pipeline are injured because FWS has arbitrarily and capriciously concluded that the Pipeline will not adversely affect whooping cranes, interior least terns, piping plovers, western prairie fringed orchids, pallid sturgeons, Arkansas River shiners, other species, or these and other listed species' critical habitat. Because of FWS's concurrence in the Action Agencies' determination that the Pipeline will not – despite its many new connected power lines and likelihood of spills and leaks – adversely affect these species or their habitat, Federal agencies are engaging in a public process to decide whether to authorize the Pipeline while uninformed as to its true consequences to these species. In this way, FWS's arbitrary and capricious concurrence in these conclusions is undermining any potential for an adequate environmental review process under the ESA or NEPA, or for an objective national interest determination under EO 13337.

27. Additionally, Plaintiffs' interests in recreating in, studying, and photographing the native grasslands and biodiversity of the Sand Hills have been and are being harmed now, as a result of the FWS's authorization of the relocation of thousands of American burying beetles. Through issuance of a "research permit" that, under the ESA, permits take resulting from scientific research or for a listed species' enhancement or survival, FWS has authorized the trapping and removal of hundreds and perhaps thousands of American burying beetles in 2011 from the Keystone XL right-of-way in the Sand Hills – for the convenience of TransCanada and to facilitate subsequent stages of Pipeline construction – before a final decision of whether to authorize the Pipeline has been made. These activities are causing adverse impacts and committing resources, including by mowing up to 100 miles of native prairie and removing hundreds and possibly thousands of American burying beetles, without any understanding of how many beetles will die during this process.

28. The injuries to Plaintiffs' interests in the Sand Hills resulting from the extensive beetle removal effort may be irreversible, regardless of whether the Pipeline is authorized and receives a transboundary permit from DOS. Thus, on the one hand, the permit(s) will be issued, in which case the Pipeline will (presumably) be constructed, unquestionably worsening these impacts and causing many other irreversible environmental consequences as well. On the other hand, the permit(s) could still be denied, in which case the affected areas will not be monitored to ensure that pre-existing conditions are achieved. This is because TransCanada is only required under the Biological Opinion to monitor the affected areas and ensure that they are recovered if it receives Federal authorization for the Pipeline. Thus, regardless of whether the Federal permit(s) are granted to TransCanada for Keystone XL, these activities have already

resulted in an irreversible commitment of resources, injuring Plaintiffs' interests in these resources.

29. Plaintiffs have also suffered injuries to their procedural interests in a public process for Keystone XL which is based on the best scientific data available, the comments received from the public, and which transparent and objective. Having participated in the environmental review process for Keystone XL under NEPA, Plaintiffs and their members regard the beetle removal activities for the Keystone XL Pipeline in the Sand Hills, prior to finalization of environmental reviews and issuance of required permits, as an affront to the public process for Keystone XL.

30. Moreover, Plaintiffs' interests in these species are harmed by FWS's issuance of the research permit itself. To the extent that it was issued by FWS to permit these activities, Dr. Hoback's ESA Section 10(a)(1)(A) scientific research permit is contrary to the plain language of Section 10(a)(1)(A). FWS's issuance of a Section 10(a)(1)(A) scientific research permit to Dr. Hoback is injuring Plaintiffs' interests in viewing, studying, photographing endangered and threatened species in the Sand Hills.

31. Finally, Plaintiffs' procedural interests in being informed of and provided an opportunity to meaningfully comment on the proposed actions of FWS, including issuance of Section 10(a)(1)(A) scientific research permits, are harmed by FWS's failure to notify the public and invite comment on a proposal to issue a Section 10(a)(1)(A) scientific research permit to Dr. Hoback to cover take that is incidental to the Keystone XL Pipeline.

B. Defendants

32. Defendant UNITED STATES DEPARTMENT OF STATE is a Federal agency that is administered by Defendant Clinton. DOS 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 EO 13337. In considering applications for transboundary permits, DOS must comply with the ESA and the ESA’s implementing regulations, NEPA and NEPA’s implementing regulations, the APA. DOS is the lead agency for compliance with the ESA and NEPA for the transboundary permit for Keystone XL.

33. Defendant HILLARY CLINTON is the Secretary of State and is sued in her official capacity. Secretary Clinton has supervisory responsibility over Defendant DOS. 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” (also known as “Presidential permits”). In deciding whether to issue transboundary permits pursuant to EO 13337, Secretary Clinton must ensure compliance with the ESA and the ESA’s implementing regulations, NEPA and NEPA’s implementing regulations, and the APA.

34. Defendant KEN SALAZAR is the United States Secretary of the Interior. In that capacity, Secretary Salazar has supervisory responsibility over Defendants FWS and BLM. Defendant Salazar is sued in his official capacity.

35. Defendant DAN ASHE is the Director of the U.S. Fish and Wildlife Service. In that capacity, Director Ashe has supervisory responsibility over Defendant FWS. Defendant Ashe is sued in his official capacity.

36. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is a Federal agency within the Department of Interior. FWS is responsible for administering the ESA 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 authorize the Keystone XL Pipeline. FWS maintains a field office in Grand Island, Nebraska that provided a written concurrence with DOS’s conclusions in the final Biological Assessment that the Pipeline will not adversely affect species like the whooping crane and other endangered and threatened species, authored the Biological Opinion, and authorized, and/or failed to notify TransCanada that it must cease, beetle relocation activities for Keystone XL in the Sand Hills to proceed before Federal authorizations for the Pipeline have been provided.

37. Defendant BUREAU OF LAND MANAGEMENT is a Federal agency within the Department of Interior. BLM is considering whether to grant TransCanada rights-of-way (“ROW”) for the Pipeline to cross public lands in eastern Montana pursuant to the Mineral Leasing Act, 30 U.S.C. § 185(a). In considering whether to provide ROWs for the Pipeline, BLM must comply with the ESA and the ESA’s implementing regulations, NEPA and NEPA’s implementing regulations, and the APA.

38. Defendant U.S. ARMY CORPS OF ENGINEERS is a Federal agency within the Department of Defense. The Corps is considering whether to permit the Pipeline under Section 404 of the Clean Water Act. 33 U.S.C. § 1344. In considering applications for Section 404 permits, the Corps must comply with the ESA and the ESA’s implementing regulations, NEPA and NEPA’s implementing regulations, and the APA.

39. Defendant WESTERN AREA POWER ADMINISTRATION is a Federal agency within the Department of Energy. In coordination with Defendant RUS, WAPA would own a small section of a 230 kV transmission line in southern South Dakota that would upgrade load capacity and support voltage requirements when the Pipeline increases to full capacity. In

considering whether to own the transmission line in South Dakota, WAPA must comply with the ESA and the ESA's implementing regulations, NEPA and NEPA's implementing regulations, and the APA.

40. Defendant RURAL UTILITIES SERVICE is a Federal agency within the Department of Agriculture. RUS is considering whether to provide grants to fund construction of some of the power distribution lines that may be built to provide power to the Pipeline's pump stations. In considering whether to provide these grants, RUS must comply with the ESA and the ESA's implementing regulations, NEPA and NEPA's implementing regulations, and the APA.

LEGAL BACKGROUND

A. The Endangered Species Act

41. Congress enacted the ESA in 1973 with the express purpose of providing a "means whereby the ecosystems upon which endangered and threatened species depend may be conserved" and "a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). Principal responsibilities for implementing the requirements of the Act for terrestrial species have been delegated to Defendant FWS, a Federal agency within the Department of the Interior. 50 C.F.R. § 402.01.

42. Once listed under the ESA by FWS as "threatened" or "endangered," species are accorded the Act's protections. For example, listed species are entitled to designation of "critical habitat" – *i.e.*, those specific geographical areas with physical or biological features that are "essential to the conservation of the species". 16 U.S.C. § 1532.

43. One of the ESA's most important protections is found in Section 9, which prohibits the unlawful "take" of endangered species. Section 9 makes it unlawful for any person

to “take” a listed animal without express authorization. 16 U.S.C. § 1538(a)(1)(B). “Take” includes any action that would “harass, harm ... wound, [or] kill,” a member of a listed species. *Id.* § 1532(19). Take is authorized in only two, specifically-defined circumstances, including (A) when it is being conducted specifically for the purpose of scientific research or to enhance the propagation or survival of the affected species (*e.g.*, for the establishment and maintenance of experimental populations), or (B) when it is incidental to an otherwise lawful activity. 16 U.S.C. §§ 1539(a)(1)(A), (B).

44. The ESA’s protections also include those found in Section 7(a)(2). Under Section 7(a)(2) of the ESA, all federal “action agencies” must, “in consultation with” FWS, “insure” that the actions that they fund, authorize, or undertake are “not likely to jeopardize the continued existence of any endangered species or threatened species” or “result in the destruction or adverse modification” of critical habitat; this is the agencies’ duty to “insure no jeopardy.” 16 U.S.C. § 1536(a)(2). The ESA’s regulatory definition of “action” is broad and includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.” 50 C.F.R. § 402.02. To “jeopardize” means to “means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of ... the survival [or] recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

45. The duty to insure no jeopardy is one of the ESA’s clearest cornerstones for the conservation of listed species. To ensure compliance with this duty, Section 7(a)(2) and its implementing regulations set forth a detailed process that must be followed before agencies take or approve actions that may affect a threatened or endangered (*i.e.*, “listed”) species or its critical

habitat. Fulfillment of this process is the only means by which an agency ensures that its affirmative duties under Section 7(a)(2) are satisfied. In fulfilling the requirements of Section 7(a)(2) and the procedural requirements set forth in 50 C.F.R. Part 400, agencies must “use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2).

46. Pursuant to this process, any agency considering whether to authorize, fund, or undertake an activity (*i.e.*, an “action agency”) must ask FWS whether any listed species are present in the area of the proposed action (the “action area”). 16 U.S.C. § 1536(c)(1). The “action area” includes all areas that would be “affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. If FWS determines that listed species may be present in the action area, the action agency must prepare a “biological assessment” that must “evaluate the potential effects of the action” on listed species and habitat. *Id.*; 50 C.F.R. § 402.12.

47. If the action agency concludes that the action is “not likely to adversely affect” the species, then FWS must concur in writing with this determination in order to avoid formal consultation. 50 C.F.R. §§ 402.13(a); 402.14(b). If FWS concurs in this determination, then consultation is complete. *Id.* § 402.13(a). If a biological assessment does not adequately support FWS’s concurrence in a “not likely to adversely affect” finding, or if that finding is inconsistent with the best available science, FWS’s concurrence must be set aside. 5 U.S.C. § 706(2).

48. If an action agency concludes in the biological assessment that the action is “likely to adversely affect” listed species or critical habitat, it must then enter into “formal consultation” with FWS. *Id.* at §§ 402.14(a), 402.01(b), 402.12(k). The threshold for triggering the formal consultation requirement is “very low” and “any possible effect ... triggers formal consultation requirements.” 51 Fed. Reg. 19, 949-19,950 (June 3, 1986).

49. In formal consultation, after evaluating all relevant information, FWS prepares a “biological opinion” which, like the biological assessment, considers the “effects of the action” and then concludes “whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” *Id.* at § 402.14(g)(4). The “effects of the action” include consideration of the “direct” and “indirect” effects of the proposed action, the existing environmental conditions or “environmental baseline”, and the effects of actions that are “interrelated or interconnected” with the proposed action. *Id.* § 402.02. “Interrelated actions are those that are part of a larger action and depend on the larger action for their justification” and “[i]nterdependent actions are those that have no independent utility apart from the action under consideration.” *Id.* The “effects of the action” must be considered together with the “[c]umulative effects”, which are “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” *Id.*

50. The biological opinion is the heart of the formal consultation process, and results in either a “likely to jeopardize” or a “no jeopardy” conclusion. 16 U.S.C. § 1536; 50 C.F.R. § 402.14. If “jeopardy” is likely to occur, FWS must prescribe in the biological opinion “reasonable and prudent alternatives” to avoid this result. 50 C.F.R. § 402.14(g).

51. If FWS concludes that the project is “not likely” to jeopardize listed species, under Section 7(b)(4) of the ESA it must provide an “incidental take statement” (“ITS”) with the biological opinion that specifies the amount or extent of incidental take, the “reasonable and prudent measures” necessary or appropriate to minimize such take, and the “terms and conditions” that must be complied with by the action agency or any applicant to implement any

reasonable and prudent measures, as well as other details. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

52. An ITS provides legal authority for covered activities which cause the take of listed species where that take is incidental to the otherwise-lawful activity. The ESA's implementing regulations require the action agencies to report back to the FWS on the action's progress and its impact on the species "[i]n order to monitor the impacts of incidental take." 50 C.F.R. § 402.14(i)(3). The agency must immediately reinstate consultation with the FWS if the authorized amount or extent of incidental taking is exceeded. 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

53. In its discussion of Section 7(b)(4), which sets forth the requirement that an Incidental Take Statement specify the "impact" of incidental takings on listed species, Congress indicated that it preferred the Incidental Take Statement to contain a numerical value, stating that "[w]here possible, the impact should be specified in terms of a numerical limitation on the Federal agency or permittee or licensee." H.R. Rep. No. 97-567, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2827. Congress recognized, however, that a numerical value may not always be available. *Id.* Accordingly, Federal courts have recognized that the permissible level of take ideally should be expressed as a specific number, but that permissible take must be measured in some form. Thus, if FWS does employ some other measure than a specific number, it must establish that no such numerical value could be practically obtained, and must employ some other measure to monitor the amount and extent of take that is actually committed during the action.

B. The National Environmental Policy Act

54. 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.

55. 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).

56. 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. DOS’s own NEPA regulations, which incorporate and supplement the CEQ regulations, are set forth at 22 C.F.R. §§ 161.1-161.12.

57. 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).

58. In addition to considering and disclosing 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.*

59. 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).

60. 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).

61. 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.

62. To accomplish its objectives and procedures and as provided in the regulations promulgated to implement NEPA, agencies must "integrate the NEPA process with other

planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” 40 C.F.R. §§ 1501.2, 1502.5. Federal courts have interpreted these regulations as requiring agencies to prepare NEPA documents, such as an EA or an EIS, “before any irreversible and irretrievable commitment of resources” is made.

63. 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).

64. 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). The CEQ has stated that this means that the action agency “must notify the applicant that the agency will take strong affirmative steps to insure that the objectives and procedures of NEPA are fulfilled.” CEQ, FORTY MOST ASKED QUESTIONS REGARDING CEQ’S NATIONAL ENVIRONMENTAL POLICY ACT REGULATIONS (Mar. 23, 1981) (available at <http://ceq.hss.doe.gov/NEPA/regs/40/40p3.htm>) (last visited Oct. 24, 2011) (Answer 11(A), referring to Section 1506.1(b)). These steps could include “seeking injunctive measures under NEPA” and the “use of sanctions available under either the agency’s permitting authority or statutes setting forth the agency’s statutory mission” –

thus, “[f]or example, the agency might advise an applicant that if it takes such action the agency will not process its application.” *Id.*

C. The Administrative Procedure Act

65. The APA governs judicial review of an agency’s compliance with the ESA and 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), and agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” or “without observance of procedure required by law”. *Id.* § 706(2)(C), (D). The APA also directs a reviewing court to “compel agency action” that has been “unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).

D. Transboundary Permits Under EO 13337

66. 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.”

67. DOS is a Federal agency. As such, its actions, including decisions of whether to issue transboundary permits pursuant to EO 13337, must comply with the ESA, NEPA, and all other applicable Federal laws.

FACTUAL BACKGROUND

A. The Keystone XL Pipeline

68. The Keystone XL Pipeline is a highly-controversial, proposed tar sands pipeline that, if granted a transboundary permit and other Federal authorizations from the Action Agencies, will transport synthetic crude oil mined from the tar sands in northeastern Alberta, Canada to refineries in the United States. Keystone XL would enter the United States in northeastern Montana, cut across South Dakota, through the Sand Hills 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.

69. Several Nebraska elected officials have announced opposition to Keystone XL due to its proposed route traversing the Sand Hills, 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, NASA Scientist Dr. James Hansen, the Dalai Lama, and leaders from national environmental organizations.

70. 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.

71. 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.

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

73. Keystone XL would require the construction of 30 new “pump stations” along its route as well as 112 mainline valves (“MLV”). 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. Most of Keystone I’s leaks have occurred at or near pump stations. New and upgraded electrical transmission lines and substations would be required in order to provide new power for the pump stations and main-line valves.

74. The Keystone XL Pipeline would 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.

75. 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 DOS on September 19, 2008. DOS has not yet issued a Record of Decision regarding whether to grant a transboundary permit for Keystone XL.

76. In addition to obtaining a transboundary permit from DOS, TransCanada must also obtain several additional Federal approvals, including authorizations from each of the Action Agencies. TransCanada must also obtain State and local regulatory permits for other aspects of the Keystone XL project.

B. Listed Species and Critical Habitat Within the Pipeline's Action Area

77. Many endangered and threatened species, including species with critical habitat, occur within the Pipeline's action area. These species include the whooping crane, a critically-endangered bird that has grown from just 15 birds in 1940 to an estimated 338 birds today following decades of recovery efforts. Whooping cranes migrate from Texas to their breeding grounds in northern Canada. Their 5,000-mile, primary annual migratory path, including critical habitat, overlaps with hundreds of miles of the proposed Pipeline route or action area.

78. The Pipeline's new power lines will likely cause collisions with and electrocutions of whooping cranes. The Pipeline will also adversely affect whooping crane habitats, including native grasslands and wetlands, that provide important feeding and resting locations during the cranes' fall migration through the Sand Hills. Potentially disastrous effects to whooping cranes would result from the Pipeline's many spills and leaks – which DOS has characterized as likely and expected to be as frequent as about twice per year over the course of the Pipeline's projected 50-year lifespan – particularly when the spills occur in and/or migrate to rivers, streams, and other drainages or otherwise occur in whooping crane habitat.

79. The Pipeline's new power lines will also increase predation of nesting interior least terns and piping plovers, by providing additional vantage perches for predatory raptors. The Pipeline's many spills and leaks would also adversely affect interior least terns and piping

plovers, particularly when the spills occur in and/or migrate to rivers, streams, and other drainages or otherwise occur in habitat for these birds.

80. The Pipeline's many spills and leaks would also adversely affect endangered and threatened fish species which occur within the Pipeline's action area, including the pallid sturgeon and the Arkansas River shiner, particularly when the spills occur in and/or migrate to rivers, streams, and other drainages or otherwise occur in habitat for these fishes.

81. The Pipeline will also adversely affect the American burying beetle. The American burying beetle is the largest burying beetle in North America and known for its distinctive, shiny black body and red and orange markings and for its mating and rearing habits, which are unusual for an invertebrate. Approximately once a year, a pair of American burying beetles buries a carcass and lays eggs and raises its young near the carcass underground. The carcass must be of suitable size, *i.e.*, about 3.5 to 7 ounces. The parents then feed and raise their young underground for a period of 30 to 45 days, an unusually-long rearing period of rearing for an invertebrate species.

82. The American burying beetle once ranged throughout the Midwest and eastern United States and was associated with the passenger pigeon, a once-abundant bird that was declared extinct in the early 20th century. Passenger pigeons likely provided abundant, suitably-sized carrion for American burying beetles. With the decline of its prey and the rise of species that directly compete for suitable carrion – such as raccoon and skunk – the American burying beetle has declined too, and today survives in a few populations in Rhode Island, Oklahoma and Texas, and the Sand Hills of Nebraska.

83. The Pipeline will fragment two areas where American burying beetles survive in the Sand Hills and in Oklahoma, and will permanently destroy underground habitat. The

Pipeline will also adversely affect endangered beetles through a massive trap-and-relocate effort, by which beetles will be trapped in “pitfall traps” that consist of large, bucket-sized traps that are baited with carrion, and then removed from the Pipeline’s route and put somewhere else at least five miles away. This effort has already begun in the Sand Hills of Nebraska, prior to a Record of Decision for the Pipeline and authorizations of the Pipeline from the Action Agencies, in order to remove American burying beetles from TransCanada’s preferred route for the Pipeline, so that TransCanada will not have to delay construction a year, through another active season for American burying beetles – necessarily assuming that Keystone XL will be Federally authorized.

84. The Pipeline will also adversely affect the western prairie fringed orchid due to mowing and clearing of native vegetation, including in the Sand Hills of Nebraska. Mowing of native grasslands in the Sand Hills has already begun in connection with trapping and relocation of endangered American burying beetles, prior to a Record of Decision for the Pipeline and authorizations of the Pipeline from the Action Agencies.

85. In addition to the whooping crane, the piping plover and Arkansas River shiner have designated critical habitat that falls within the Pipeline’s action area, *e.g.*, because these species’ critical habitat may be in directly or indirectly affecting by the Pipeline’s frequent spills and/or power lines. 50 C.F.R. § 402.02 (definition of “action area”).

C. The Keystone XL DEIS

86. DOS released a draft environmental impact statement (“DEIS”) for Keystone XL pursuant to NEPA in April 2010.

87. 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 Sand Hills of Nebraska, 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.

88. 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.

89. The DOI Secretary's Office submitted comments on the DEIS which also criticized it for lacking analysis of the Pipeline's impacts to wildlife including whooping cranes and migratory birds. The DOI Secretary stated that the Pipeline would be "likely to adversely affect" the whooping crane, interior least tern, and piping plover due to new power lines connected to the Pipeline, and would also be "likely to adversely affect" the western prairie fringed orchid due to mowing and clearing of native vegetation. The DOI also raised concerns about the Pipeline's impacts to the American burying beetle.

D. The Keystone XL SDEIS

90. DOS released a supplemental draft environmental impact statement ("SDEIS") for Keystone XL pursuant to NEPA in April 2011.

91. EPA rated the SDEIS as "Insufficient." EPA expressed continued concerns about the Pipeline's significant environmental impacts that would have to be avoided in order to provide adequate environmental protection. EPA also criticized DOS for failing to consider reasonable alternatives in the SDEIS, including alternatives that would avoid the Ogallala Aquifer and the Sand Hills.

92. The DOI's Office of the Secretary also submitted comments on the SDEIS stating that DOS had failed to respond to its concerns about the Pipeline's effects to endangered and threatened species.

93. Plaintiffs the Center and FoE submitted comments on both the DEIS and the SDEIS, raising concerns about the proposed Pipeline's adverse effects to public health, the global climate, threatened and endangered species, and other problems.

E. The Keystone XL FEIS and National Interest Determination

94. The FEIS was released for comment on August 23, 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.

95. The FEIS stated that spills from Keystone XL are "likely" and estimated their frequency at 1.78 to 2.51 spills per year throughout the Pipeline's lifespan. The FEIS also analyzed that the Pipeline's new power lines as "connected actions" to the Pipeline within the meaning of NEPA's implementing regulation, 40 C.F.R. § 1508.25(a)(1), and stated that they will increase collisions with and electrocutions of whooping cranes, as well as predation of interior least terns and piping plovers.

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

97. DOS is now 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 DOS. If the

permit is approved, decisions the other Federal authorizations for the Pipeline will likely be made by that time.

F. The Biological Assessment

98. When it released the FEIS, DOS and the other Action Agencies also released the Biological Assessment.

99. In stark contrast to the FEIS, which determined that spills from Keystone XL are “likely” and estimated their frequency at about twice per year for the Pipeline’s lifespan, the final Biological Assessment dismissed spills as “unlikely” and for this reason, did not assess the effects of spills to any endangered or threatened species or critical habitat.

100. In the FEIS, DOS and the other Action Agencies stated that new power lines and facilities are “connected actions” to the pipeline, and assessed their environmental effects. Yet, the Action Agencies did not consider the Pipeline’s increased collision hazards to whooping cranes as part of the Pipeline’s effects in the final Biological Assessment.

101. Because it erroneously dismissed spills as “unlikely” and did not consider the effects of increased power line collision hazards to endangered whooping cranes as part of the Pipeline’s effects, DOS and the other Action Agencies did not initiate formal consultation with FWS to consider whether these impacts will jeopardize the continued existence of the whooping crane, interior least tern, piping plover, western prairie fringed orchid, pallid sturgeon, or Arkansas River shiner. Nor did the Action Agencies consider whether these impacts will destroy or adversely modify critical habitat for the whooping crane, piping plover, or Arkansas River shiner.

102. When it released the Biological Opinion for Keystone XL about a month after release of the FEIS and Biological Assessment, FWS stated in the Biological Opinion that it

concurred in the Action Agencies' determination that the Pipeline would not adversely affect the whooping crane, interior least tern, piping plover, western prairie fringed orchid, pallid sturgeon, or Arkansas River shiner.

G. Endangered Species Relocation and Pipeline Construction Activities

103. Following release of the FEIS and Biological Assessment in late August, 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 – *i.e.*, before completion of formal consultation between the Action Agencies and FWS regarding the Pipeline's effects to the American burying beetle, before the NID has been made, before the ROD has been issued, before a transboundary permit has been issued, and before the Action Agencies have provided all necessary Federal authorizations for the Pipeline.

104. Upon information and belief, these relocation activities were conducted in order to clear a 100-mile-long, unvegetated strip along the proposed Keystone XL Pipeline route in the Sand Hills, where endangered beetles are no longer 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.

105. According to the *Omaha World-Herald* article, TransCanada conducted these activities with FWS's authorization, before decisions by the Action Agencies of whether to authorize the Pipeline had been made, because waiting until Federal approval for the Pipeline “might have delayed work a year.”

106. If TransCanada does not get a transboundary permit from DOS for Keystone XL, it will not be required to carry out monitoring and habitat restoration for the American burying beetle. Thus, there will be no requirement that the removal of American burying beetles from

the Pipeline's ROW is remedied – *i.e.*, through reintroduction or restoration of habitat, if necessary, such as to remove noxious weeds.

107. A member of the Center completed a fly-over of the proposed Pipeline route through the Sand Hills on September 20, 2011, and confirmed that mowing of native prairie grasslands has occurred in some areas, but did not document that mowing was at that time completed along the entire 100 miles of the proposed route. A photograph from this fly-over shows the mowing of the Pipeline route:



108. In addition to being conducted in order to relocate endangered beetles away from the proposed Pipeline route, clearing of vegetation also constitutes the initial stage of Pipeline

construction through the Sand Hills. These activities are removing rare, native grasslands and prairies that provide important habitat for a range of wildlife species and migratory birds and which may never be restored.

109. 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 under the purported authority of Section 10(a)(1)(A) of the ESA. 16 U.S.C. § 1539(a)(1)(A).

110. 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. 66 Fed. Reg. 32,636 (June 15, 2001).

111. Upon information and belief, Dr. Hoback currently holds two such research permits: one permit which FWS issued on April 7, 2010 and covering "research" of American burying beetles in South Dakota and Nebraska, and another permit dated July 1, 2010 and covering such activities in Texas.

112. FWS announced in the Federal Register in December 2010 that it was considering renewal of Dr. Hoback's research permit "in conjunction with recovery activities throughout the species' range for the purpose of enhancing [the American burying beetle's] survival and recovery." 75 Fed. Reg. 5101 (Feb. 1, 2010).

113. When it published notice of the application to renew Dr. Hoback's research permit and invited the public to comment on the proposal, FWS did not provide a copy of the application itself or any other underlying reports, data, or information. 75 Fed. Reg. 5101. FWS also did not disclose to the public that the permit could be used to remove American burying beetles from the areas for proposed projects, such as Keystone XL. *Id.*

114. 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 remove them from the Pipeline route. Multiple news outlets have reported that extensive removal of American burying beetles has occurred in the Sand Hills under the authority of Dr. Hoback's research permit.

H. The Biological Opinion

115. On September 23, 2011, following a massive removal of American burying beetles from the Pipeline route, FWS released the final Biological Opinion for Keystone XL. The Biological Opinion considered the effects of the Pipeline in formal consultation to only one listed species, the American burying beetle, and concluded that the Pipeline is not likely to jeopardize the beetle's continued existence. Nevertheless, the Biological Opinion acknowledged that the Pipeline will result in the "take" of beetles in Nebraska and Oklahoma, including from the massive beetle removal activities as well as from permanent habitat losses and habitat fragmentation, as the Pipeline will cause the loss of hundreds of acres of some of the last remaining "prime" beetle habitat in the Sand Hills. In addition, the Biological Opinion based its analysis on the assumption that much of the lands affected by Pipeline construction will experience only "temporary" habitat losses, despite serious doubts about whether the thousands of beetle habitat that would be disturbed during Pipeline construction can ever be restored to their former condition.

116. For those areas that have already been mowed and where beetle removal activities have already occurred, the Biological Opinion stated that only if the Pipeline receives Federal authorization – including a transboundary permit from DOS – will any monitoring or habitat reclamation activities take place to assure that the Biological Opinion's provisions are met.

Thus, under the Biological Opinion TransCanada will only be required to monitor and restore habitat in the proposed Pipeline route if it gains Federal authorization for the Pipeline.

117. Appended to the Biological Opinion is an “Incidental Take Statement” to provide legal authority under the ESA for Keystone XL’s take of American burying beetles. The Incidental Take Statement does not specify the amount or extent of incidental take to American burying beetles, stating that this would be too difficult to specify.

CLAIMS FOR RELIEF

Claim One: Violations of the ESA and APA: FWS’s Concurrence with the “Not Likely to Adversely Affect” Determinations in the Biological Assessment is Arbitrary, Capricious, and Contrary to the ESA

118. Plaintiffs hereby incorporate by reference all preceding paragraphs.

119. The ESA requires federal agencies to consider the effects of their actions on endangered and threatened species and their critical habitat. Section 7(a)(2) of the ESA requires action agencies to ensure that their actions are not likely to jeopardize the continued existence of endangered or threatened species, and that their actions are not likely to destroy or adversely modify critical habitat for listed species. 16 U.S.C. § 1536(a)(2). The only way to satisfy the duties in Section 7(a)(2) of the ESA is to complete the procedural requirements set forth in the ESA’s implementing regulations, and in doing so, to rely on the best scientific information available. 50 C.F.R. Part 400. FWS’s concurrence that a proposed action is not likely to adversely affect listed species, or are not likely to destroy or adversely modify critical habitat, is final agency action that is reviewable under Section 706(2)(A) of the APA.

120. The best scientific data available shows that power lines that are connected with the Keystone XL Pipeline project will cause an increase in the number of collisions with and electrocutions of whooping cranes, which are listed as “endangered” under the ESA with only

338 remaining animals, whose primary migratory flyway overlaps with much of the Keystone XL route in the Midwestern United States. In addition to existing power lines throughout the crane's flyway, there will be an estimated 74 locations where new power lines to Keystone XL pipeline pump stations could cause additional collision hazards for migrating whooping cranes. Power lines will also increase predation of endangered and threatened interior least terns and piping plovers. The final Biological Assessment did not consider the effects of Keystone XL's power lines to any listed species on the basis that they may be considered at a later time by local, non-Federal power providers. Thus, FWS's concurrence in the Biological Assessment's determination regarding these effects is arbitrary, capricious, an abuse of agency discretion, and contrary to the ESA, within the meaning of Section 706(2)(A) of the APA.

121. The best scientific information available shows that spills from Keystone XL are likely to occur, as frequently as 1.78 to 2.51 per year throughout the Pipeline's 50-year lifespan. Larger spills will migrate to rivers and streams that may provide habitat for endangered and threatened species including the whooping crane as well as the interior least tern, piping plover, pallid sturgeon, and Arkansas shiner. Thus, FWS's concurrence in the final Biological Assessment's determination that spills from Keystone XL are unlikely to occur is arbitrary and capricious and should be set aside under Section 706(2)(A) of the APA. 5 U.S.C. § 706(2)(A).

Claim Two: FWS Has Issued a Biological Opinion that Fails to Rely on the Best Scientific Data Available and is Arbitrary, Capricious, and Contrary to the ESA

122. Plaintiffs hereby incorporate by reference all preceding paragraphs.

123. When considering the effects of a proposed action to listed species in a biological opinion, FWS must consider the action's "direct" and "indirect" effects in the "action area." This includes an assessment of how much habitat will be permanently destroyed. This assessment must be based on the best scientific data available.

124. In the Biological Opinion for Keystone XL, FWS failed to adequately consider the Pipeline's permanent effects to the American burying beetle. FWS avoided this analysis in the Biological Opinion by erroneously characterizing habitat loss as "temporary" when it will in fact be permanent, and failing to consider the effects of soil erosion and the potential loss of native grasslands that provide habitat for American burying beetles due to the spread of noxious weeds. Thus, the Biological Opinion fails to rely on the best scientific data available, is arbitrary and capricious and contrary to the ESA and its implementing regulations, and should be set aside under Section 706(2)(A) of the APA. 5 U.S.C. § 706(2)(A).

Claim Three: FWS Has Issued an Incidental Take Statement for the Keystone XL Pipeline that is Arbitrary, Capricious, and Contrary to the ESA

125. Plaintiffs hereby incorporate by reference all preceding paragraphs.

126. When FWS concludes that an action will not jeopardize the existence of a listed species or adversely modify its habitat, but that the project is nevertheless likely to result in incidental takings of listed species, FWS must provide a written statement with the biological opinion that authorizes such takings based on the best scientific data available. 16 U.S.C. § 1536(b)(4), (o). The Incidental Take Statement must: (1) specify the impact of the incidental taking on the species; (2) specify the "reasonable and prudent measures" that the FWS considers necessary or appropriate to minimize such impact; (3) set forth "terms and conditions" with which the action agency must comply to implement the reasonable and prudent measures (including, but not limited to, reporting requirements); and (4) specify the procedures to be used to handle or dispose of any animals actually taken. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The permissible level of take ideally should be expressed as a specific number, but must be measured in some form. If FWS does not employ a specific number, it must establish

that no such numerical value could be practically obtained and must employ some other measure to quantify take.

127. The Incidental Take Statement for Keystone XL does not specify the amount of take that will be incidental to aspects of the Keystone XL project in numerical form, and does not establish that no numerical value could not be practically obtained. The Incidental Take Statement also fails to provide a means to measure aspects of the Pipeline's permissible take in any other form. Accordingly, the Biological Opinion's Incidental Take Statement is arbitrary, capricious, an abuse of discretion, not in accordance with the ESA, and should be set aside under Section 706(2)(A) of the APA. 5 U.S.C. § 706(2)(A).

Claim Four: FWS's Issuance of a Scientific Research Permit for the Incidental Take of American Burying Beetles in Connection with Keystone XL is Arbitrary, Capricious, and Contrary to the ESA

128. Plaintiffs hereby incorporate by reference all preceding paragraphs.

129. Pursuant to Section 10(a)(1)(A) of the ESA, 16 U.S.C. § 1539(a)(1)(A), the Secretary of the Interior "may permit, under such terms and conditions as he shall prescribe, any act otherwise prohibited by [Section 9] of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section."

130. The authorization of take incidental to the Keystone XL Pipeline is beyond the statutory authority conferred by and in direct violation of Section 10(a)(1)(A) of the ESA. FWS's issuance of the research permit to Dr. Wyatt Hoback constitutes FWS action that is not in accordance with the ESA, and agency action that is "in excess of statutory jurisdiction, authority,

or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A), (C). The research permit should be set aside under the APA.

Claim Five: FWS’s Issuance of a Scientific Research Permit for the Incidental Take of American Burying Beetles in Connection with Keystone XL Violates the ESA’s and APA’s Notice and Comment Requirements

131. Plaintiffs hereby incorporate by reference all preceding paragraphs.

132. When FWS considers an application for a research permit pursuant to Section 10(a)(1)(A) of the ESA, 16 U.S.C. § 1539(a)(1)(A), the agency’s implementing regulations require it to “publish notice in the Federal Register” the application and “invite the submission from interested parties, within 30 days after the date of the notice, of written data, views, or arguments with respect to the application.” 50 C.F.R. § 17.22. Fundamental principles of administrative law principles dictate that notice and comment opportunities must be meaningful – *i.e.*, the agency must provide actual notice of the action and invite members of the public to comment on the proposal with all necessary facts and information about what the agency is proposing to do.

133. When FWS published notice in the *Federal Register* that Dr. Wyatt Hoback had applied for a research permit under Section 10(a)(1)(A) of the ESA, the agency did not disclose that the permit would be used for a massive removal of American burying beetles to clear the proposed route for any projects, including Keystone XL. 75 Fed. Reg. 5101 (Feb. 1, 2010). Nor did FWS providing for public review a copy of Dr. Hoback’s application for the research permit or any other documentation reflecting the “take” that his permit would authorize. FWS’s failure to disclose this information to the public and invite a meaningful opportunity to comment on the proposed research permit was arbitrary, capricious, an abuse of FWS’s discretion, not in accordance with the ESA and its implementing regulations, and without the observance of

procedure required by law. 5 U.S.C. §§ 706(2)(A), (D). Accordingly, the research permit should be set aside.

Claim Six: Violation of NEPA and Its Implementing Regulations: Taking Action and Failing to Stop Actions During The NEPA Process

134. Plaintiffs hereby incorporate by reference all preceding paragraphs.

135. 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).

136. To accomplish its objectives and procedures and as provided in the regulations promulgated to implement NEPA, agencies must “integrate the NEPA process with other planning *at the earliest possible time* to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” 40 C.F.R. § 1501.2 (emphasis added); *see also id.* § 1502.5 (“An agency shall commence preparation of an [EIS] as close as possible to the time the agency is developing or is presented with a proposal ...”). Federal courts have interpreted these regulations as requiring agencies to prepare NEPA documents, such as an EA or an EIS, “before any irreversible and irretrievable commitment of resources.”

137. 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).

138. Defendants have authorized construction activities 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 removal of American burying beetles from the Pipeline route and removal of suitable carrion within the proposed Pipeline's ROW pursuant to a ESA Section 10(a)(1)(A) scientific research permit issued to Dr. Wyatt Hoback, a paid consultant for TransCanada.

139. 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).

140. Defendants Secretary of State Clinton and DOS are considering an application from TransCanada, a non-Federal entity, for a transboundary permit, and the other Action Agencies are considering Federal authorizations for Keystone XL, and all of these Defendants are aware that TransCanada is taking or will 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 DOS will take strong affirmative steps 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. 5 U.S.C. § 706(1).

RELIEF REQUESTED

A. Declare that the FWS's concurrence in the final Biological Assessment's determinations that the Keystone XL Pipeline will not adversely affect listed species, or destroy or adversely modify critical habitat, is arbitrary, capricious, an abuse of agency discretion, and contrary to law, in violation of Section 706(2)(A) of the APA.

B. Set aside FWS's concurrence in the Biological Assessment.

C. Declare that FWS's Biological Opinion and Incidental Take Statement for the Keystone XL Pipeline are arbitrary, capricious, an abuse of agency discretion, and contrary to law, in violation of Section 706(2)(A) of the APA.

D. Set aside the Biological Opinion and Incidental Take Statement.

E. Declare that FWS's issuance of a "research permit" under Section 10(a)(1)(A) of the ESA to cover take that is incidental to the Keystone XL Pipeline project is not in accordance with the ESA and its implementing regulations, and constitutes agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" and "without procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D).

F. Set aside Dr. Hoback's research permit for the American burying beetle.

G. Declare that Defendants' authorization of construction activities – including, but not limited to, vegetation clearing and removing an 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;

H. 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;

I. Declare that the Action Agencies 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);

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

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

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

DATED this 25th day of October, 2011.

Respectfully submitted,

s/Amy R. Atwood

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Admitted *pro hac vice*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 25, 2011, she filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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s/ Amy R. Atwood

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