

No. 20-35412

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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NORTHERN PLAINS RESOURCE COUNCIL, *et al.*,

*Plaintiffs–Appellees,*

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,

*Defendants–Appellants,*

and

TRANSCANADA KEYSTONE PIPELINE, LP, *et al.*,

*Intervenor-Defendants–Appellants.*

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On Appeal from the U.S. District Court for the District of Montana  
No. 4:19-cv-00044-BMM

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**OPPOSITION TO FEDERAL APPELLANTS’ MOTION FOR LEAVE  
TO FILE AN OVER-LENGTH EMERGENCY STAY MOTION,  
REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY, AND  
PROPOSED BRIEFING SCHEDULE**

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## **RULE 26.1 DISCLOSURE STATEMENT**

Plaintiffs-Appellees Northern Plains Resource Council, Bold Alliance, Center for Biological Diversity, Friends of the Earth, Natural Resources Defense Council, and Sierra Club represent that each is a non-profit organization with no parent corporation and no outstanding stock shares or other securities in the hands of the public. No publicly held corporation owns any stock in any of the organizations.

Federal Appellants ask this Court for a stay pending appeal of the district court's well-reasoned and well-supported decisions holding that the U.S. Army Corps of Engineers ("Corps") violated the Endangered Species Act when it failed to conduct programmatic consultation under Section 7 of the Act before issuing Nationwide Permit 12 and ordering appropriate relief. Federal Appellants simultaneously request that this Court (1) rule on their motion within 16 days, (2) issue an immediate administrative stay in the meantime, and (3) accept their overlong brief.

Plaintiffs-Appellees Northern Plains Resource Council, Bold Alliance, Center for Biological Diversity, Friends of the Earth, Natural Resources Defense Council, and Sierra Club (collectively, "Northern Plains") respectfully submit this short opposition to the latter three requests. Northern Plains will file a full opposition to Federal Appellants' motion for a stay pending appeal within the timeframe allowed by the federal rules or by the Court.

*First*, Federal Appellants fail to provide *any* support for their extraordinary request for a ruling by this Court within the 21 days afforded by Circuit Rule 27-3, let alone the 16 days they propose. That Circuit Rule requires applicants for emergency relief to "state the facts showing the existence and nature of the claimed emergency" and makes clear that the applicant must demonstrate the "irreparable harm" that would occur if a ruling

is not made within 21 days. Circuit Rule 27-3 & (c)(ii). The sole example of such harm provided in the Circuit Advisory Committee Notes—imminent removal—underscores that Circuit Rule 27-3 should only be invoked in limited circumstances; it is not intended to afford quick relief to litigants who are merely displeased with the district court’s underlying order.

Federal Appellants do not meet Circuit Rule 27-3’s high bar here. While their stay motion makes general claims that the Corps and the public will be irreparably harmed absent a stay—a premise Northern Plains disputes, as will be detailed in its forthcoming opposition to the motion—Federal Appellants fail to specify any harm that would occur or any pipeline whose construction would be delayed if this Court were not to rule within the next 16, or even 21, days. *See* Fed. Appellants’ Emergency Mot. Stay Pending Appeal 40-43, ECF No. 11. As such, Federal Appellants’ request for an expedited briefing schedule (which would give Northern Plains a week to respond to Federal Appellants’ motion and just five days to respond to the “[r]elated stay motions and amicus briefs” that are likely to come, *id.* at 47), and for this Court to issue a ruling by May 29, should be denied.

*Second*, Federal Appellants similarly fail to justify their request for an immediate administrative stay. Under the already rapid timeline afforded by Federal Rule of Appellate Procedure 27(a)(3), briefing on Federal Appellants’

motion for a stay pending appeal will be completed by June 2 at the latest, depending on when Federal Appellants file their reply.<sup>1</sup> As with their request for an expedited briefing schedule, Federal Appellants offer no justification why an immediate administrative stay is needed during that short interval. They claim only that they would suffer harm if a stay were not granted for the duration of the appeal. But their alleged harm is not irreparable and, in any event, is outweighed by the harm that would flow to Northern Plains, endangered and threatened species and their critical habitat, and the public were a stay to be granted, as Northern Plains will demonstrate in its forthcoming brief. *Cf., e.g., Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015) (“[W]hen evaluating a request for injunctive relief to remedy an [Endangered Species Act] procedural violation, the equities and public interest factors always tip in favor of the protected species.”).

The injuries to Northern Plains, protected species, and the public were a stay to issue are not only irreparable but imminent: Federal Appellants are asking that the Corps be allowed to authorize, and that private companies *immediately* be permitted to proceed with, the construction of oil and gas pipelines through U.S. waters that provide habitat to protected species, despite

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<sup>1</sup> Northern Plains assumes that other intervenors-appellants and parties will file any related stay motions or briefs by May 15, as Federal Appellants have proposed.

the district court’s conclusion that the Corps inadequately analyzed the cumulative impacts of those projects as required by the Endangered Species Act (and before this Court can make even a preliminary assessment of that holding). Such authorizations and construction activities have been barred by the district court’s order for a month. They should remain barred at least until this Court can fully consider the parties’ briefing on the motion for a stay pending appeal.

*Third*, the Court should reject Federal Appellants’ request to accept their overlong stay motion, which is more than twice the length afforded by the federal rules. Federal Appellants complain that Northern Plains submitted “new material” to oppose the stay motions filed in the district court. Fed. Appellants’ Mot. Leave to File Over-Length Mot. 1, ECF No. 13. That material—chiefly, 14 declarations that responded to Federal Appellants’ and Defendants-Intervenors’ arguments and their nine supporting declarations, and which only further underscored why Northern Plains’ proposed remedy was warranted—was properly submitted and, in any event, did not materially factor into the district court’s amended order. *See* Order Am. Summ. J. & Den. Defs.’ Mots. for Stay Pending Appeal 10, *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, No. 19-cv-44 (D. Mont. May 11, 2020).

Federal Appellants otherwise refer to “two orders under review” presenting “serious issues” to justify their request. Over-Length Mot. 1. But parties before this Court regularly brief multiple orders of substantial complexity, and do so in the allotted space. Permitting Federal Appellants to file a brief that is more than twice the length allowed is unwarranted and will prejudice Northern Plains, who will likely need to respond to multiple related stay motions and other briefs, as Federal Appellants recognize. Nevertheless, as Federal Appellants indicate, Northern Plains does not oppose an increase to 8,400 words. Should the Court accept Federal Appellants’ overlong brief as filed, that would serve as yet another reason for denying the expedited briefing schedule Federal Appellants propose.<sup>2</sup>

## **CONCLUSION**

For the foregoing reasons, Northern Plains requests that the Court deny Federal Appellants’ proposed expedited briefing schedule and request for an emergency ruling by May 29. Northern Plains also requests that the Court reject Federal Appellants’ request for an immediate administrative stay. Finally, Northern Plains requests that the Court permit Federal Appellants to

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<sup>2</sup> Northern Plains reserves the right to oppose any intervenors-appellants’ or other parties’ motions for leave to file overlong stay motions and supporting briefs, and to seek leave to file a single, combined (and overlong) opposition to such related stay motions.

file a stay motion of no more than 8,400 words, instead of the 11,198 words they have requested.

Respectfully submitted,

Dated: May 14, 2020

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## **STATEMENT OF RELATED CASES**

Northern Plains is not aware of any related cases pending in this Court other than the two appeals of the same underlying district court orders filed by Intervenor-Appellants TransCanada Keystone Pipeline, LP et al. and American Gas Association et al., listed on the docket as companion case nos. 20-35414 and 20-35415.

/s/ Alexander Tom

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing opposition contains 1,144 words, excluding the material exempted by Federal Rules of Appellate Procedure 27(d)(2) and 32(f). This complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) and Circuit Rules 27-1(1)(d) and 32-3(2).

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

/s/ Alexander Tom

## **CERTIFICATE OF SERVICE**

I certify that I electronically filed the foregoing opposition on May 14, 2020 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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

/s/ Alexander Tom