MARK STEGER SMITH
Assistant U.S. Attorney
U.S. Attorney's Office
2601 Second Avenue North, Suite 3200
Billings, MT 59101
Ph: (406) 247-4667; Fax: (406) 657-6058
mark.smith3@usdoj.gov

JEFFREY H. WOOD, Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division
SETH M. BARSKY, Section Chief
BRIDGET KENNEDY McNEIL (CO Bar 34299)
Wildlife and Marine Resources Section
LUTHER L. HAJEK (CO Bar 44303)
Natural Resources Section
999 18th St., South Terrace, Suite 370
Denver, CO 80202
Ph: 303-844-1484, 303-844-1376; Fax: (303) 844-1350
bridget.mcneil@usdoj.gov
luke.hajek@usdoj.gov

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

INDIGENOUS ENVIRONMENTAL NETWORK, *et al*., Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE, *et al.,* Federal Defendants,	CASE NO. 4:17-CV-00029-BMM **REPLY IN SUPPORT OF MOTION TO DISMISS**

and TRANSCANADA CORPORATION, *et al.*, Intervenor-Defendants.	

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. The Issuance of the Presidential Permit Was a Presidential Action That Is Not Reviewable Under the APA 1

A. The Under Secretary's Decision Was a Presidential Action for Purposes of APA Review 2

B. The President's Memorandum Did Not Relinquish the President's Inherent Constitutional Authority Over Border-Crossings 3

C. NEPA and Other Environmental Statutes Do Not Limit the President's Authority to Issue Presidential Permits for Transboundary Oil Pipelines..5

D. The SEIS Is Not a Final Agency Action Under the APA and Therefore Cannot Be Reviewed in the Absence of Separate Reviewable Action 7

II. The Decision to Issue the Presidential Permit for the Keystone XL Pipeline Was Committed by Law to the Under Secretary.............9

III. Plaintiffs' Alleged Injuries are Not Redressable................................11

IV. The Proposed Amendment Does Not Cure the Standing Defects for the ESA Claim 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Border Power Plant Working Group v. Dep't of Energy,
260 F. Supp. 2d 997 (S.D. Cal. 2003) 9

Dalton v. Specter,
511 U.S. 462 (1994) 2

Detroit Int'l Bridge Co. v. Gov't of Canada,
189 F. Supp. 3d 85 (D.D.C. 2016) 3, 10

Franklin v. Massachusetts,
505 U.S. 788 (1992) 2

Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy,
383 F.3d 1082 (9th Cir. 2004) 6

Jensen v. Nat'l Marine Fisheries Serv.,
512 F.2d 1189 (9th Cir. 1975) 2, 6, 10

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 12, 13

Natural Res. Def. Council, Inc. v. U.S. Dep't of State,
658 F. Supp. 2d 105 (D.D.C. 2009) 2, 3, 4, 5

No Oilport! v. Carter,
520 F. Supp. 334 (W.D. Wash 1981) 10, 11

Ocean Advocates v. U.S. Army Corps of Eng'rs,
402 F.3d 846 (9th Cir. 2005) 11

Olmsted Citizens for A Better Cmty. v. United States,
793 F.2d 201 (8th Cir. 1986) 6

Or. Nat'l Desert Ass'n v. BLM,
625 F.3d 1092 (9th Cir. 2008) 8

Ouachita Watch League v. Jacobs,
463 F.3d 1163 (11th Cir. 2006) 8

Protect Our Communities Found. v. Chu,
Civ. No. 12cv3062 L(BGS), 2014 WL 1289444 (S.D. Cal. Mar. 27, 2014) 9

Raines v. Byrd,
521 U.S. 811 (1997) 14

Rattlesnake Coal. v. EPA,
509 F.3d 1095 (9th Cir. 2007) 8

Salmon Spawning & Recovery All. v. Gutierrez,
545 F.3d 1220 (9th Cir. 2008) 11

Sierra Club v. Clinton,
689 F. Supp. 2d 1147 (D. Minn. 2010) 8, 12, 13

Sierra Club v. U.S. Army Corps of Eng'rs,
446 F.3d 808 (8th Cir. 2006) 9

W. Mining Council v. Watt,
643 F.2d 618 (9th Cir. 1981) 14

Whitmore v. Arkansas,
495 U.S. 149 (1990) 14

Statutes

Administrative Procedure Act,
5 U.S.C. §§ 701-706 ....*passim*

National Environmental Policy Act,
42 U.S.C. § 4321 *et seq.* 5, 6, 7, 8, 9, 10

International Bridge Act of 1972,
33 U.S.C. § 535 *et seq.* 7

Endangered Species Act,
16 U.S.C. § 1531 *et seq.* 1, 12, 13, 14

Regulations

U.S. Department of State, Regulations for Implementation of the National Environmental Policy Act,
22 C.F.R. § 161.1-161.12 7

Federal Register

Exec. Order No. 11,467, 34 Fed. Reg. 7271 (May 1, 1969) 4

Exec. Order No. 13212, 66 Fed. Reg. 28,357 (May 18, 2001) 7

Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) 1, 7

Final Rule, Regulations for Implementation of the National Environmental Policy Act, 45 Fed. Reg. 59,553 (Sept. 10, 1980) 7

INTRODUCTION

Plaintiffs' claims should be dismissed. Under Ninth Circuit law, the issuance of the Presidential Permit for the Keystone XL Pipeline ("Presidential Permit") was a presidential action and, thus, it is unreviewable under the Administrative Procedure Act ("APA"). The decision also was committed to agency discretion by law because no statutes curtail the Under Secretary's discretion or provide meaningful standards of review. In addition, Plaintiffs lack standing to bring Endangered Species Act ("ESA") claim against the U.S. Fish and Wildlife Service ("FWS").

ARGUMENT

I. The Issuance of the Presidential Permit Was a Presidential Action That Is Not Reviewable Under the APA

The issuance of the Presidential Permit was not, as Plaintiffs contend, a run-of-the mill agency action that can be reviewed under established APA principles. *See* Mem. of Pts. and Auths. in Opp. to Fed. Defs' Mot. to Dismiss and TransCanada's Mot. to Dismiss ("Pl. Opp.") at 16-17 (ECF No. 60). Rather, it was an exercise of the President's constitutional authority delegated to the Secretary of State in Executive Order ("E.O.") No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004). As Ninth Circuit law makes clear, the decision was a presidential action and judicial review under the APA is precluded.

A. The Under Secretary's Decision Was a Presidential Action for Purposes of APA Review

Where an agency head acts under the President's duly delegated constitutional authority, the action is considered to be a presidential action for purposes of APA review. *Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189, 1191 (9th Cir. 1975) ("For purpose of this appeal, the Secretary's actions are those of the President, and therefore by the terms of the APA the approval of the regulation at issue here is not reviewable."). While *Jensen* predated the Supreme Court's decisions in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), and *Dalton v. Specter*, 511 U.S. 462 (1994), the holding in those cases that the President's actions are not reviewable under the APA does not affect the Ninth Circuit's holding in *Jensen* that a delegated presidential action is not reviewable under the APA.

Nor does it matter that the President did not personally issue the Presidential Permit. *See* Pl. Opp. at 20, 22-23. The crucial question in *Franklin* was not whether the President took the final action himself, but whether the President's duties were discretionary or "merely ceremonial or ministerial." *Franklin*, 505 U.S. at 800; *see also Natural Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 110-11 (D.D.C. 2009) (hereinafter, "*NRDC*"). As Plaintiffs concede, the relevant inquiry "boils down to how much discretionary authority the President

possesses to take or direct the action." Pl. Opp. at 19. Just as in *NRDC*, the President's discretion in this case with respect to presidential permits for transboundary oil pipelines is plenary. Accordingly, the action remains presidential and it does not matter that the President did not personally take the final permitting action here.

Plaintiffs also argue that the President's discretion is limited here because, unlike the *Detroit International Bridge* case, there is no statutory authority for the President's action. Pl. Opp. at 20-21 (citing *Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85, 96-105 (D.D.C. 2016), *appeal docketed*, no. 16-5270 (D.C. Cir. Sept. 27, 2016). But the fact that no statute governs the issuance of a presidential permit for a transboundary oil pipeline cuts against Plaintiffs' argument here. In the absence of a congressional enactment, the approval of such permits lies solely within the President's discretion and therefore is a presidential action. *See NRDC*, 658 F. Supp. 2d at 111.

B. The President's Memorandum Did Not Relinquish the President's Inherent Constitutional Authority Over Border-Crossings

Plaintiffs argue that the issuance of the Presidential Permit was not a presidential action because the January 24, 2017 Memorandum issued by President Trump relinquished the President's role in the permitting process. *See* Pl. Opp. at 22-23. This assertion is based on the provision in the President's Memorandum

waiving certain procedural requirements in E.O. 13,337, which included a provision directing the Secretary to refer the national interest determination to the President in the event of a disagreement between the Secretary and other agency heads. *See* Jan. 24, 2017 Mem. § 3(a)(iv); E.O. 13,337 § 1(i).

As an initial matter, the fact that the President has chosen to remove himself from the permitting process for the Keystone XL Pipeline does not change the nature of the action for purposes of APA review. The E.O. at issue in the *Jensen* case similarly delegated authority to the Secretary of State "without the approval, ratification, or other action of the President." E.O. No. 11,467 § 1, 34 Fed. Reg. 7,271 (May 1, 1969). Thus, *Jensen* makes clear that whether the President expressly retains authority makes no legal difference. Moreover, the fact that the President opted to waive Section 1(i), along with other procedural requirements in E.O. 13,337, only underscores that the President retains complete control and authority over the process, as well as the ultimate decision, with respect to the Presidential Permit for the Keystone XL Pipeline. *See NRDC*, 658 F. Supp. 2d at 111 ("No permit can issue without, at the very least, the President's acquiescence . . . .").

C. NEPA and Other Environmental Statutes Do Not Limit the President's Authority to Issue Presidential Permits for Transboundary Oil Pipelines

Plaintiffs assert that NEPA and other environmental statutes curtailed the President's authority over the Presidential Permit. Pl. Opp. at 24-26, 27-28. They are mistaken.

First, Plaintiffs argue that the Under Secretary's decision was *not* based solely on the President's delegated authority in E.O. 13,337 and the President's Memorandum. *Id.* at 24. They argue that Congress also has a role in regulating commerce. While it is true that Congress could enact a law regulating the permitting process for border crossings for transboundary oil pipelines, it has not done so. Therefore, no statute applies here.

Second, Plaintiffs argue that the Under Secretary's authority is curtailed by NEPA, but this is simply wrong.[1] *See Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1088 (9th Cir. 2004) (NEPA does not apply

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[1] Plaintiffs also argue that the ESA limited the Under Secretary's authority. *See* Pl. Opp. at 25. But Plaintiffs' original complaint contained no ESA claim against the State Department, *see* Compl. ¶ 87 (ECF No. 1), and therefore any claimed constraint on the Under Secretary's authority by the ESA cannot serve as a basis for jurisdiction over the claims against the State Department. Defendants will address the ESA issues in their supplemental motion to dismiss Plaintiffs' proposed amended complaint, which includes an ESA claim against the State Department. *See* Proposed Am. Compl. ¶¶ 86, 111 (ECF No. 61).

to the President). Because the Under Secretary issued the Presidential Permit solely pursuant to the President's delegated constitutional authority, his action is that of the President and both the APA and NEPA are inapplicable. *See Jensen*, 512 F.2d at 1191.

Plaintiffs suggest that because the State Department prepared an environmental impact statement ("EIS"), it should be reviewable. *See* Pl. Opp. at 25-26. But the Under Secretary was clear that NEPA and other environmental statutes did not apply and that the environmental reviews were prepared solely "as a matter of policy." ROD/NID at 3. The documents the State Department voluntarily prepared are not subject to judicial review merely because State prepared them. *See Olmstead Citizens for a Better Cmty. v. United States*, 793 F.2d 201, 208 n.9 (8th Cir. 1986) ("[T]he government's preparation here of a putative environmental impact statement means that environmental factors were given even greater consideration, and that Olmsted Citizens was given an even greater chance to participate, than required by the NEPA.").

Third, the President's Memorandum does not establish that NEPA applies to the issuance of the Presidential Permit. The memorandum states only that the existing Supplemental Environmental Impact Statement ("SEIS") should be deemed by the Secretary "to the extent permitted by law . . . to satisfy" the requirements of NEPA. Jan. 24, 2017 Mem. § 3(a)(ii). The memorandum did not

state that NEPA applied; rather, it was a direction that the Secretary consider any existing environmental analysis and consultation to be sufficient for purposes of making a decision within 60 days. *Id.* § 3(a)(1).

Finally, the State Department's NEPA regulations do not require a NEPA analysis for the presidential permitting decision at issue here. The regulations state only that an environmental assessment would "normally" be required for permits for "international bridges and pipeline[s]." 22 C.F.R. § 161.7(c). This is not a concession that NEPA applies to the issuance of a permit pursuant to the President's delegated authority. Moreover, the particular types of permits referred to in the regulations – permits issued under "Executive Order 11423 and the International Bridge Act" – are not at issue here. The regulations, *see* 45 Fed. Reg. 59,553 (Sept. 10, 1980), were issued long before the issuance of E.O. 13,337 in 2004, which replaced E.O. 11,423 and was intended to expedite the processing of permits for cross-border pipelines. *See* E.O. 13,337, 69 Fed. Reg. at 25,299; E.O. 13,212, 66 Fed. Reg. 28,357 (May 18, 2001). That presidential objective would be frustrated by the application of inapplicable regulations.

D. The SEIS Is Not a Final Agency Action Under the APA and Therefore Cannot Be Reviewed in the Absence of Separate Reviewable Action

Plaintiffs argue that the Under Secretary's Record of Decision and National Interest Determination ("ROD/NID") constitute final agency action for purposes of

APA review. *See* Pl. Opp. at 17, 26. But the cases they cite for that proposition are all distinguishable because they involved a ROD that would otherwise be reviewable under the APA.[2] *See id.* at 26. Because the national interest determination and Presidential Permit are presidential actions, they are unreviewable regardless of their finality. Plaintiffs do not refute that proposition.

Plaintiffs alternatively argue that the SEIS is itself a final agency action subject to judicial review. Specifically, they argue that Defendants have misconstrued *Rattlesnake Coal. v. EPA*, 509 F.3d 1095 (9th Cir. 1997), but that is not so. As explained in that case, the completion of a NEPA process alone, without an associated decision, is not a sufficient basis for a NEPA claim to lie. *Id.* at 1104. An EIS is merely an analysis – it makes no decision and authorizes no action. Plaintiffs rely on *Sierra Club v. Clinton* for the proposition that an EIS standing alone was final agency action under the APA, but that decision was based on Eighth Circuit law. *See* 689 F. Supp. 2d 1147, 1157 (D. Minn. 2010). In fact, *Sierra Club* went beyond Eighth Circuit because the Eighth Circuit has not held that an EIS, as opposed to a finding of no significant impact ("FONSI")—a decision-making document—could amount to a final agency action. *See Sierra*

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[2] *See Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1118-19 (9th Cir. 2008) (EIS and ROD approving a land use plan); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1173 (11th Cir. 2006) (EIS and ROD for land use plan amendments).

Club v. U.S. Army Corps of Eng'rs, 446 F.3d 808 (8th Cir. 2006). Plaintiffs have pointed to no Ninth Circuit case that so holds, and the district court in *Chu* failed to explain how an EIS alone could serve as the basis for judicial review. *See Protect Our Communities Found. v. Chu*, Civ. No. 12cv3062 L(BGS), 2014 WL 1289444, at *4-6 (S.D. Cal. Mar. 27, 2014);[3] *see also* Defs' Mem. in Supp. of Mot. to Dismiss ("Def. Mem.") at 13-14 (ECF No. 44-1).

Accordingly, the SEIS is not a separately reviewable final agency action.

II. The Decision to Issue the Presidential Permit for the Keystone XL Pipeline Was Committed by Law to the Under Secretary

Plaintiffs argue that the Under Secretary's decision was not committed to agency discretion by law and that meaningful standards to apply can be found in the APA and NEPA. Pl. Opp. at 29-33. But neither of those statutes can provide a meaningful standard of review in this case. As discussed in section I, *supra*, the decision to issue the Presidential Permit was a presidential action that is not subject to the APA; therefore, the APA cannot provide a meaningful standard of review. Likewise, NEPA does not apply to the issuance of the Presidential Permit. *See* section I.C, *supra*. Because no statutory standards apply, the decision is

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[3] The *Border Power Plant* case provides no guidance here because the issue of presidential action versus agency action was not raised in the case. *See Border Power Plant Working Group v. Dep't of Energy*, 260 F. Supp. 2d 997, 1018 (S.D. Cal. 2013).

committed to the Under Secretary's discretion. *See Jensen*, 512 F.2d at 1191; *see also Detroit Int'l Bridge*, 189 F. Supp. 3d at 106 (alternatively holding that the issuance of a presidential permit for an international bridge was "an action 'committed to agency discretion by law'") (quoting 5 U.S.C. § 701(a)(2)).

Jensen is not distinguishable on the grounds argued by Plaintiffs. *See* Pl. Opp. at 32. The fact that *Jensen* involved regulations, whereas this case involves the issuance of a presidential permit, makes no legal difference because both actions were taken pursuant to the constitutional authority of the President delegated in an executive order. *See Jensen*, 512 F.2d at 1191. As to their assertion that the *Jensen* case did not involve "requirements for exemption from judicial review," *id.* at (quoting *Chu*, 2014 WL 128944, at *8), they are simply wrong. The limits of APA review were squarely at issue in *Jensen*. *See* 512 F.2d at 1191.

Plaintiffs misconstrue *No Oilport! v. Carter*, 520 F. Supp. 334 (W.D. Wash. 1981). In that case, the court reviewed two separate government actions: the President's selection of a pipeline route and the U.S. Department of Interior's grant of a right-of-way for the domestic pipeline. *See id.* at 342. While the court reviewed a NEPA claim relating to the right-of-way grant, *id.* at 352-59, the court held that the President's selection of a pipeline route based on the "national interest" standard in the Public Utility Regulatory Policies Act ("PURPA") was

unreviewable. *Id.* at 350, 352. That conclusion was based both on the lack of standards in the statute, as well as the fact that the President's decision was based on considerations of "national security and foreign policy." *Id.* at 352. Both of these factors apply with even greater force here because there is no underlying statutory scheme governing the national interest determination by the President or his delegee.

III. Plaintiffs' Alleged Injuries are Not Redressable

Plaintiffs argue that, even if the Court does not order injunctive relief, the Court can redress their injuries by ordering a procedural remedy in accordance with NEPA. *See* Pl. Opp. at 34 (citing *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005). But the availability of procedural relief alone is not sufficient to establish redressability. As the Ninth Circuit explained in analogous circumstances, "the redressability requirement is not toothless in procedural injury cases." *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008). A plaintiff still must be able to demonstrate that a procedural "right, if exercised, *could* protect their concrete interests." *Id.* at 1226 (quoting *Defs. of Wildlife v. EPA*, 420 F.3d 946, 957 (2005), *overruled on other grounds by Nat'l Ass'n of Home Builders, Inc.*, 551 U.S. 644 (2007)); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 (1992) (explaining that a procedural

injury must be coupled with a "separate concrete interest" in order to establish standing).

Here, Plaintiffs cannot obtain redress of their alleged concrete interests because the Court cannot enjoin the Presidential Permit or direct the President to consider environmental impacts without infringing on the President's inherent constitutional authority over foreign affairs and national security. *See* Def. Mem. at 20. Plaintiffs' reliance on *Sierra Club* is misplaced because in that decision the court did not address how the plaintiffs' concrete interests could be redressed. *See* 689 F. Supp. 2d at 1155.

IV. The Proposed Amendment Does Not Cure the Standing Defects for the ESA Claim

We previously showed that the claim against the biological opinion should be dismissed because Plaintiffs' complaint does not allege that any of Plaintiffs' members have an interest in a particular ESA-listed species or concrete and particularized plans to visit the Project area in order to observe such species. Def. Mem. at 21-24. Plaintiffs now argue that their proposed amended complaint cures any deficiencies by highlighting Paragraphs 11-13 as describing "plaintiffs' interests in affected wildlife and their habitat." Pl. Opp. at 35. This proposed amendment does not get Plaintiffs across the threshold and into the courthouse.

Paragraphs 11 and 12 of the proposed amended complaint contain identical lists of various activities that Plaintiffs' members have engaged in "within" and "adjacent to the proposed route of the Project."[4] Proposed Am. Compl. ¶¶ 11-12. These activities are not specific to ESA-listed species; the closest they come is a vague statement that Plaintiffs' members "observed and photographed wildlife and wild flowers." *Id.* This ambiguous interest in "wildlife" is insufficient to show that Plaintiffs' members have a concrete and particularized interest in any of the ESA-listed species potentially impacted by the Project. *Lujan,* 504 U.S. at 565-66 (rejecting a generalized interest in the "ecosystem" to support standing for ESA claims).

Likewise, the only statement in the proposed amended complaint that arguably speaks to an interest in ESA-listed species is a generalized statement that Plaintiffs' members "highly value" all of the species evaluated in the biological opinion, "have sought to study and observe them in the wild, and will continue to

[4] These vague statements of recreation near the Project are still insufficient to show the requisite geographic nexus, given that only about 4% of the 1,200 mile route crosses public land and the permanent Project corridor is limited to 50 feet. *See Lujan*, 504 U.S. at 565-66 ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it.").

do so in the future." Proposed Am. Compl. ¶ 88.[5] However, this one conclusory sentence cannot carry the weight of Plaintiffs' burden to clearly allege sufficient *facts* showing a concrete and particularized interest in any of the listed species.

Plaintiffs argue that they need "plead only 'enough facts to state a claim to relief that is plausible on its face.'" Pl. Opp. at 35. True enough. But even at the pleading stage, Plaintiffs are still "subject to the requirement that the facts demonstrating standing must be clearly alleged in the complaint." *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981). The proposed amended complaint simply does not contain "enough facts" to support standing for Plaintiffs' claim against the biological opinion. Without sufficient allegations, this Court is "powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155–56 (1990); *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (plaintiffs must satisfy standing requirements "based on the complaint"). Accordingly, Plaintiffs' challenge to the biological opinion should be dismissed.

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[5] This paragraph is included in Plaintiffs' proposed new ESA citizen-suit claim, which will be the subject of the forthcoming supplemental motion to dismiss.

CONCLUSION

For the foregoing reasons and the reasons stated in Defendants' opening memorandum, all of Plaintiffs' claims should be dismissed for lack of jurisdiction or, in the alternative, for failure to state a claim.

Respectfully submitted this 11th day of August, 2017.

JEFFREY H. WOOD
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

SETH M. BARSKY, Section Chief

*/s/ Bridget Kennedy McNeil*___________________
BRIDGET KENNEDY McNEIL (CO Bar 34299)
Senior Trial Attorney
Wildlife and Marine Resources Section
999 18th St., South Terrace, Suite 370
Denver, Colorado 80202
Ph: (303) 844-1484; Fax: (303) 844-1350
bridget.mcneil@usdoj.gov

*/s/ Luther L. Hajek*____________________
LUTHER L. HAJEK (CO Bar 44303)
Natural Resources Section
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Ph: (303) 844-1376; Fax: (303) 844-1350
luke.hajek@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points, and contains 3,248 words, excluding the caption, table of contents, table of authorities, certificate of compliance, and certificate of service.

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2017, a copy of the foregoing Reply in Support of Motion to Dismiss on all counsel of record via the Court's CM/ECF system.

/s/ Luther L. Hajek
LUTHER L. HAJEK
U.S. Department of Justice