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

INDIGENOUS ENVIRONMENTAL NETWORK, *et al.*, and NORTHERN PLAINS RESOURCE COUNCIL, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE, *et al.*, Federal Defendants, and TRANSCANADA CORPORATION, *et al.*, Defendant-Intervenors.	CV 17-29-GF-BMM CV 17-31-GF-BMM **DEFENDANT-INTERVENORS' MEMORANDUM IN SUPPORT OF MOTION TO AMEND THE COURT'S ORDER ON SUMMARY JUDGMENT**

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Defendant-Intervenors TransCanada Corporation and TransCanada Keystone Pipeline LP (collectively, "TransCanada") respectfully submit this Memorandum in support of TransCanada's Motion pursuant to Rule 59(e) and Rule 60(b) to Amend the Court's Order of November 8, 2018 (Doc. 218) and its Order of November 15, 2018 (Doc. 219). Final judgment was granted on November 15, 2018. TransCanada is filing this Motion for the purpose of ensuring that the Court's orders, which enjoined "any activity in furtherance of the construction or operation" of the Keystone XL Pipeline, do not preclude TransCanada from continuing preconstruction activities. These activities are known to the Court and to the parties, and have been underway for some time. As more fully described herein, these activities include, for example, construction planning, project development, permit application, permit compliance, landowner contacts and surveying. None of these activities has the potential to cause injury, much less irreparable injury. None of these activities has the potential to affect ongoing federal decision-making or to taint pending permitting for the project. None of these activities implicate the purported deficiencies that the Court identified in the State Department's environmental review. Nevertheless, TransCanada is concerned that because of the broad language of the injunction, some may see these actions as "in furtherance" of the construction and operation of the project. Accordingly, this Motion seeks clarification or, if necessary,

modification of the Court's orders to ensure that preconstruction activities of this nature may proceed while TransCanada considers a possible appeal of the Court's ruling to the Ninth Circuit.

In its orders, the Court issued a broad permanent injunction against the Federal Defendants and TransCanada. The parties, however, had no opportunity to submit legal arguments or factual evidence regarding appropriate relief. *See, e.g.*, Transcript of Hearing on Motions at 136:16-17 (May 24, 2018) ("If the Court ultimately finds any violation, we request an opportunity for remedy briefing."). And, the Court did not conduct the four-factor analysis required to support an injunction. *See Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139 (2010). Accordingly, in the absence of a stay pending appeal, TransCanada requests the Court to amend its orders to permit TransCanada to engage in activities unrelated to the purported deficiencies the Court identified in the National Environmental Policy Act (NEPA) and Endangered Species Act (ESA).[1]

FACTUAL BACKGROUND

In March 2017, the U.S. Department of State ("State") on behalf of the President issued a Record of Decision/National Interest Determination

[1] The narrow relief sought by TransCanada in this motion should not be viewed as precluding the company from subsequently seeking a stay of the Court's orders in their entirety pending appeal to the Ninth Circuit.

("ROD/NID") and Presidential Permit that authorized TransCanada to construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada at Morgan, Montana. (Doc. 171, p. 15). This lawsuit, filed by Plaintiffs Northern Plains Resource Council ("Northern Plains") and Indigenous Environmental Network ("IEN"), ensued. Full procedural and factual backgrounds are set forth in the Court's November 22, 2017 Order on Federal Defendants' and TransCanada's Motion to Dismiss for Lack of Jurisdiction (Doc. 99), August 15, 2018 Partial Order on Summary Judgment Regarding NEPA Compliance (Doc. 210), and November 8, 2018 Order on Summary Judgment (Doc. 218).

In this Court's August 15, 2018 Partial Order on Summary Judgment Regarding NEPA Compliance (Doc. 210), State was ordered to engage in a supplemental NEPA process. That supplemental NEPA process is ongoing.

In its November 8, 2018 Order (Doc. 218), this Court then enjoined both the Federal Defendants and TransCanada "from engaging in any activity in furtherance of the construction or operation of Keystone and associate facilities" until further supplements to the NEPA process are completed.

TransCanada has continually informed the Court of its plans and schedule to begin construction of Keystone XL. In its August 7, 2018 Notice of Status Update (Doc. 204, p. 2), TransCanada reported that the construction of the pipeline "itself

will not begin until the second quarter of 2019." In a September 25, 2018 judicial telephonic status conference (Doc. 216), TransCanada updated the Court and stated that it does not plan to commence construction until the second half of the first quarter of 2019. In the meantime, as TransCanada has informed the Court, it has been conducting preparatory activities related to the Keystone XL Pipeline. These activities include, among others, engaging with parties on shipper contracts, acquiring and transporting pipe, purchasing materials and equipment, and engaging with communities, including indigenous communities. In addition, TransCanada has been and needs to continue with limited field activities such as cultural, biological, civil and other surveys, and preparation of off-right-of-way pipe storage and contractor yards. Other examples of these activities are described in paragraphs 17-19 of the Declaration of Dr. Ramsay, which is attached hereto as Exhibit 1.

What is more, as this Court noted in its August 15, 2018 Order, Federal Defendants and TransCanada are engaging in reinitiated consultation under Section 7(a)(2) of the Endangered Species Act. TransCanada is continuing discussions with both the Bureau of Land Management regarding its right-of-way application and with the U.S. Army Corps of Engineers with respect to federal permits required by the Clean Water Act. As ordered by this Court, Federal Defendants and TransCanada are, of course, engaging in supplemental NEPA processes as well.

None of these pre-construction activities impacts any of the six subject-matter areas the Court found inadequate in the Federal Defendants' approval of Keystone XL.

LEGAL STANDARD

Rule 59(e) authorizes a party to "alter or amend a judgment" by filing a motion within 28 days after entry of the judgment. Amendment is appropriate under Rule 59(e) if, among other things, "the district court committed clear error or made an initial decision that was manifestly unjust." *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001). District courts have broad discretion in evaluating Rule 59(e) motions. *McDowell v. Calderon*, 197 F.3d 1253, 1256 (9th Cir. 1999). Rule 60(b) authorizes a party to seek relief from "a final judgment, order, or proceeding" on a variety of grounds, including any "reason that justifies relief." Final judgment was entered November 15, 2018.

ARGUMENT

In its order adjudicating the parties' motions for summary judgment, the Court also permanently enjoined "Federal Defendants and TransCanada from engaging in any activity in furtherance of the construction or operation of Keystone and associated facilities until the Department has completed a supplement to the 2014 SEIS that complies with the requirements of NEPA and the APA." Nov. 8 Order at 54 (Doc. 218). The Court entered the permanent injunction

without any evaluation of the mandatory factors that must be addressed prior to granting such relief. Additionally, the relief the Court provided effectively enjoined activities beyond those authorized by the Presidential Permit. Instead, the Court should narrowly tailor relief to address Plaintiffs' purported injury. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (it is well established than an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs"); *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) ("an injunction must be narrowly tailored . . . to remedy only the specific harms shown by the plaintiffs, rather than 'to enjoin all possible breaches of law'"). Given these legal errors, the Court should amend its judgment and preserve the *status quo ex ante*. The Court should clarify that TransCanada may continue to engage in preconstruction activities of the type described in the Ramsay Declaration, as the broad relief the Court ordered will irreparably harm TransCanada.

I. A Court Must Weigh Equitable Factors Prior to Granting an Injunction

Amendment of the Court's orders is appropriate here because the Court granted a permanent injunction without weighing the four requisite injunction factors. In *Monsanto*, the Supreme Court clarified that an "injunction should issue only if the traditional four-factor test is satisfied." 561 U.S. at 157. The Court stressed that an injunction is not an automatic or proper remedy in a NEPA case,

and that "[n]o such thumb on the scales is warranted." *Id.*; *see also id.* at 158 ("It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test set . . . ."). Instead, a "plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *Id*. at 156.

Recently, Judge Molloy responded to a Rule 59(e) motion by recognizing that a district court must first perform this analysis before it can issue an injunction. *Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, No. CV 15-106-M-DWM, 2017 WL 5047901, at *2 (D. Mont. Nov. 3, 2017). In that case, Judge Molloy granted the plaintiffs partial summary judgment after finding a NEPA violation and entered an injunction without addressing the injunction factors. There, too, the scope of the injunction was very broad. Judge Molloy not only enjoined all federal coal mining, but also effectively precluded the defendant-intervenor from accessing private coal. *Id.* at *2-3. The defendant-intervenor moved to amend the court's order on the basis that the court granted the injunction without analyzing the injunction factors. In response, the court acknowledged that a plaintiff must satisfy four factors "[b]efore a[n] … injunction may issue" and that an "injunction must be tailored to remedy the *specific harm alleged*." *Id.* at *2 (citations and internal quotation marks omitted). Given the circumstances, Judge

Molloy made the requisite findings and then permitted the private mining activity to go forward while the federal government addressed the NEPA deficiencies. *Id.* at *3-6.

Here, the Court is faced with a situation similar to that before Judge Molloy in *Montana Environmental Information Center* because it entered a broad injunction without analyzing the four requisite factors. Controlling precedent requires the Court to conduct a full analysis of equitable factors prior to issuing injunctive relief. As demonstrated below, a broad permanent injunction is not warranted.

II. TransCanada's Preconstruction Activities Will Not Harm Plaintiffs

The permanent injunction issued here is not warranted because the preconstruction activities TransCanada would continue to undertake during the completion of the NEPA review and/or appeal of the summary judgment decision will not irreparably harm Plaintiffs. In order for an injunction to issue, a plaintiff must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto*, 561 U.S. at 156–57

(citation omitted). Plaintiffs must show that they satisfy all four criteria in order to obtain an injunction.

The Plaintiffs have not satisfied that burden here. Plaintiffs cannot satisfy the first injunction factor because they have not suffered and cannot suffer an irreparable injury as a result of the limited activity TransCanada has been conducting to prepare for the construction of Keystone XL. In their submissions to the Court, Plaintiffs have alleged potential injuries from the building of the actual pipeline and operation of Keystone XL. *See, e.g.*, Decl. of T. Goldtooth ¶¶ 10-11 (Doc. 148); Decl. of K. Mossett ¶¶ 9-10 (Doc. 149). Preconstruction activities, of the type described in the Ramsay Declaration, will not cause harm or impact federal decision-making. *See* 40 C.F.R. §1506.1(a) (prohibition on activities that have "an adverse environmental impact" or would "[l]imit the choice of reasonable alternatives"). Indeed, the Council on Environmental Quality has declared that an applicant is entitled to conduct planning and perform other preparatory work while the NEPA study is ongoing. *See* 40 C.F.R. §1506.1(d).

As to the second criterion, because the Plaintiffs would suffer no irreparable injury if TransCanada continues with preconstruction activities, there is no need to assess whether remedies otherwise available at law are inadequate to compensate for a non-existent injury.

Third, the balance of hardships does not weigh in favor of Plaintiffs. As noted above, Plaintiffs have identified no injury, much less irreparable harm from continued preconstruction activities. TransCanada and others, however, will suffer significant irreparable harm if it is precluded from taking actions such as surveying, negotiating contracts, purchasing supplies, and the like. Ramsay Decl. ¶¶ 21-29. Currently, preconstruction activities represents almost 700 American jobs. TransCanada is employing approximately:

- 400 workers for pipeline refurbishment work (inspector, drivers, equipment operators),
- 135 workers for work force camp refurbishment and preparation,
- 30 workers conducting equipment pre-commissioning and refurbishment work,
- 40 workers performing material fabrication, and
- 40 workers to perform civil survey routing and environmental surveys.

Ramsay Decl. ¶ 23. The scope of such a sweeping injunction would be a direct and immediate threat to maintaining these jobs and other positions created to support the project. Ramsay Decl. ¶¶ 23-24, 28.

Moreover, such an interpretation of the Court's ruling is likely to result in TransCanada missing the 2019 construction season, even if Federal Defendants resolve the purported NEPA and ESA deficiencies. Ramsay Decl. ¶ 24. By

barring TransCanada from continuing with its preconstruction activities, TransCanada is unable to take the preconstruction steps that are necessary if it is to be able to begin construction in 2019. *Id*. If TransCanada loses the ability to begin construction next year, it will suffer significant financial injury. *See* Ramsay Decl. ¶26; *see also Protect Our Cmtys. Found. v. U.S. Dep't of Agric.*, 845 F.Supp.2d 1102, 1118 (S.D. Cal. 2012), *aff'd*, 473 F. App'x 790 (9th Cir. 2012) ("courts may consider economic harm when determining whether to grant injunctive relief"); *Comm. of 100 on Fed. City v. Foxx*, 87 F. Supp. 3d 191, 220 (D.D.C. 2015) (balance of hardships tips in favor of railroad that would "suffer economically if the project is further delayed"); *James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982) (finding irreparable injury unless the court granted a stay because of lost "opportunity to begin the project [construction] this season"). As the Ninth Circuit has previously found, "[f]urther delay of this project will prevent the award of construction contracts, postpone the hiring of construction employees, and significantly increase costs" – all factors that tip the scales of hardship in TransCanada's favor. *See Alaska Survival v. STB*, 704 F.3d 615, 616 (9th Cir. 2012).

Fourth, an injunction so broad also results in hardship to the public interest and to Federal Defendants. The State Department determined that Keystone XL served the national interest and was important to national energy security.

ROD/NID at 27 ("The Department finds that the proposed Project will meaningfully support U.S. energy security by providing additional infrastructure for the dependable supply of crude oil. Global energy security is a vital part of U.S. national security."). Keystone XL also plays an important role in maintaining strong bilateral relations with Canada. ROD/NID at 29. Additionally, the State Department concluded that Keystone XL would support more than 40,000 jobs and benefit the domestic economy by adding approximately $3.4 billion to the gross domestic product. *Id*. at 18, 30. Delay of the project would harm these federal interests. *See W. Watersheds Project v. BLM*, 774 F. Supp. 2d 1089, 1103 (D. Nev. 2011), *aff'd*, 443 F. App'x 278 (9th Cir. 2011).

In an analogous case, the Fourth Circuit narrowed the scope of a broad injunction in the same manner TransCanada seeks here. *See Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 201 (4th Cir. 2005) (A "NEPA injunction should be tailored to restrain no more than what is reasonably required to accomplish its ends." (citation and internal quotation marks omitted)). In *National Audubon*, the district court found the Navy's analysis of the potential impacts of project on birds to be inadequate and "issued a sweeping injunction, prohibiting the Navy from taking *any* further activity associated with the planning, development, or construction of [the project] in Washington and Beaufort Counties without first complying with its obligations under NEPA." *Id.* at 202. The Navy appealed,

arguing that the injunction was broader than necessary, and not warranted in light of the NEPA defects found.

On appeal, the Fourth Circuit limited the scope of the injunction, noting that "a NEPA injunction predicated on preventing environmental harm can be overbroad if it restricts nonharmful actions—even ones that are precursors to other actions that are potentially harmful." *Id.* at 201; *see also id.* at 202 (A court "should take care not to craft a remedy that extends beyond what NEPA itself and its implementing regulations require."). The court held that "[r]ather than treat development of the [project] as a single indivisible activity, the district court should have subdivided it to determine which of its component steps (either in isolation or in combination) would cause these harms and which would not." *Id.* at 203. The Fourth Circuit reduced the scope of the injunction to allow the Navy to conduct activities, such as purchasing land, conducting surveys, performing architectural and engineering work, and apply for permits. *Id.* at 204.

TransCanada seeks the type of relief the Fourth Circuit provided in *National Audubon*. Its preconstruction activities, like those in *National Audubon*, will not impact the NEPA analysis the Court required, and "[a]ny environmental harm that the above activities might cause would be negligible." *Id.* at 204. Additionally, these activities will not bias the State's NEPA analysis.

CONCLUSION

For the reasons stated above, TransCanada requests that the Court amend its November 8 Order and November 15 judgment to make clear that TransCanada is permitted to continue with preconstruction activities of the type described in the Ramsay Declaration.

Dated this 15th day of November, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2) of the United States Local Rules, I certify that this brief contains 2,941 words, excluding caption and certificates of service and compliance, printed in at least 14 points and is double spaced, including for footnotes and indented quotations.

DATED this 15th day of November, 2018.

By /s/ Jeffery J. Oven

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2018, a copy of the foregoing memorandum was served on all counsel of record via the Court's CM/ECF system.

/s/ Jeffery Oven

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

INDIGENOUS ENVIRONMENTAL NETWORK, et al.,	**CV-17-29-GF-BMM**
and	**CV-17-31-GF-BMM**
NORTHERN PLAINS RESOURCE COUNCIL, et al.	
Plaintiffs	
-vs.-	
UNITED STATES DEPARTMENT OF STATE, et al,	
Defendants,	
and	
TRANSCANADA KEYSTONE PIPELINE, et al.	
Defendant-Intervenors.	

DECLARATION OF NORRIE RAMSAY

I. INTRODUCTION

1. My name is Dr. Norrie Ramsay and I am the Senior Vice-President, Technical Centre and Liquid Projects at TransCanada Pipelines Limited. My business address is 700 Louisiana Street, Houston, Texas, 77002.

2. In my role as Senior Vice-President for liquids projects, I am responsible for the overall planning and construction of the Keystone XL Pipeline Project (the "Project"). My responsibilities for the Project include general oversight of all development and implementation to bring this project into operation. This includes acquiring the necessary property rights and securing all necessary permits to construct and operate the Project. I am also responsible for the Project's engineering, procurement, construction, testing, commissioning and start-up.

3. I have a BSc degree in Biological Sciences from Heriot-Watts University in Edinburgh, Scotland, which I received in 1985, and a PhD in Industrial Toxicology, which I received from Aberdeen University in Scotland in 1990.

4. I have worked at TransCanada for over four years. Prior to my current role, I was accountable for execution of energy infrastructure projects in the United States, Canada, and Mexico. I also have led a number of TransCanada's major business development initiatives. I have worked in the energy industry for 30 years.

5. I am offering this Declaration in support of TransCanada Keystone Pipeline, LP and TransCanada's motion to amend the injunctive relief imposed by the Court in its November 8, 2018 Order. The facts I provide are within my personal knowledge.

6. TransCanada Keystone Pipeline, LP is a Delaware limited partnership owned by TransCanada Keystone Pipeline LLC and TransCanada Keystone Pipeline GP, LLC, which are wholly owned subsidiaries of TransCanada Corporation, a Canadian public company organized under the laws of Canada. TransCanada Keystone Pipeline,

LP was created for the purpose of developing, constructing and operating pipelines to transport crude oil. TransCanada Keystone Pipeline, LP is the sponsor of the Keystone XL Pipeline and will construct the Project. Another wholly owned TransCanada Corporation subsidiary, TC Oil Pipeline Operations, Inc., operates and maintains the Keystone Pipeline System, described below, and will also operate and maintain the Keystone XL Pipeline. For the remainder of this declaration, references to "Keystone" and "Keystone XL" include both TransCanada Keystone Pipeline, LP and TC Oil Pipeline Operations, Inc., and references to "TransCanada" include both those subsidiaries and their parent TransCanada Corporation. TransCanada Corporation is a publicly traded company on the New York and Toronto Stock Exchanges.

7. TransCanada originally proposed the Keystone XL Project in 2008 as an expansion to its Keystone Pipeline System. As originally proposed, the Keystone XL Project included a 329-mile Canadian pipeline segment from Hardisty, Alberta to the U.S.-Canada border, as well as three principal segments in the United States. They were: (i) a segment from the U.S.-Canadian border to Steele City, Nebraska, connecting with the existing Keystone Pipeline (approximately 850 miles); (ii) the Gulf Coast segment (approximately 478 miles, extending from Cushing, Oklahoma to Nederland, Texas); and (iii) the "Houston Lateral" pipeline segment (approximately 47 miles long, extending from Liberty, Texas to Houston, Texas).

7. In September 2008, TransCanada first applied to the U.S. Department of State ("State Department") for a Presidential border-crossing permit for the Keystone XL Pipeline segment that would cross the U.S.-Canada border in Montana. The State

Department coordinated an extensive, multi-year review of the environmental impacts of the entire Keystone XL Project, resulting in its release of a Final Environmental Impact Statement ("FEIS") in August 2011.

8. In November 2011, after controversy arose over the proposed pipeline route within Nebraska, the State Department decided that it needed to prepare a supplement to the FEIS prior to making the national interest determination on the Keystone XL application.

9. On December 23, 2011, President Obama signed tax legislation that included a provision requiring him to grant a permit for the Keystone XL Project within 60 days, unless he determined that the Project would not serve the national interest. Pub. L. No. 112-78, title V, subtitle A. On January 18, 2012, President Obama denied the Keystone XL Project application, explaining that the 60-day statutory window did not provide enough time to assess the then-unresolved issues concerning an alternative route in the Nebraska.

10. Shortly after President Obama's denial of the Keystone XL application, TransCanada decided that it would go forward with the Gulf Coast segment as a separate, stand-alone project because that segment had immediate utility, independent of the Hardisty, Alberta to Steele City segment. The Gulf Coast Pipeline was completed and placed in service in January 2014. The Houston Lateral was placed in service in 2016.

11. In addition, in May 2012, TransCanada submitted a renewed application to the State Department for a cross-border Presidential Permit for the proposed facility that

would cross the border in Phillips County, Montana and interconnect with the Keystone Pipeline at Steele City, Nebraska as originally proposed in 2008.

12. As the State Department was considering TransCanada's 2012 application, the Nebraska Department of Environmental Quality ("NDEQ") conducted a year-long public process to consider proposed alternative routes through Nebraska. In December 2012, the NDEQ submitted a report to the Governor of Nebraska evaluating a route that would avoid the Sandhills areas. The Governor of Nebraska approved that route and advised the President and the Secretary of State of his approval by letter dated January 22, 2013.

13. In March 2013, the State Department released a Draft Supplemental EIS ("DSEIS"), reflecting the new route through Nebraska. The State Department completed its Final Supplemental Environmental Impact Statement ("SEIS") in January 2014. On November 6, 2015, the Obama Administration announced that it had denied the border crossing permit for the Keystone XL Pipeline, based on the premise that approval would be perceived to undermine U.S. climate leadership in the international arena.

14. On January 24, 2017, President Trump invited TransCanada to re-submit its application for a Presidential Permit. On January 26, 2017, TransCanada re-submitted an application for a border crossing permit for the Keystone XL Pipeline. The re-submitted application included minor route refinements, but the route remained entirely within the surveyed areas reviewed by the Department of State in its 2014 SEIS.

15. On March 23, 2017, pursuant to E.O. 13337 and the January 24, 2017 Presidential Memorandum, the State Department determined that the issuance of a permit

to TransCanada would serve the national interest and granted the Presidential Permit as applied for on January 26, 2017. The Presidential Permit issued to TransCanada includes authorizations to construct, connect, operate and maintain facilities at the border of the United States for the transport of crude oil from Canada to the United States as described in TransCanada's Presidential Permit application.

16. Certain parties commenced litigation in this court in 2017 challenging the issuance of the Presidential Permit. During the course of the ongoing litigation, TransCanada has continued to conduct numerous pre-construction preparatory activities that are necessary well in advance of constructing a project of the magnitude of Keystone XL. These activities include a multitude of activities internal to the project team focused on detailed project engineering and conducting the extensive planning and related office work required for the prudent, safe, and environmentally sound construction of the project. These activities also include submitting reports and other administrative actions required to remain in compliance with valid state and local permits.

17. The activities also include engaging with numerous external parties in areas such as confirming the shipper contracts that form the commercial underpinning for the project; pursuing remaining outstanding permits; interfacing with landowners and acquiring necessary land rights; acquiring pipe, materials and equipment, and other long lead time items; inspecting and refurbishing work force camp modules, pipe and associated materials and equipment previously purchased; engaging with communities -- including indigenous communities – as well as federal, state, and local governmental entities, agencies, and other stakeholders; hiring additional project staff; soliciting,

engaging, and contracting with potential construction contractors, specialty service providers and suppliers; and other non-construction, non-destructive planning activities critical maintaining the ability to execute the project in a prudent, safe, and timely manner.

18. Further, the activities include limited field activities including cultural, biological, civil and other surveys; preparation of off-right-of-way pipe storage and contractor yards; transportation, receipt and off-loading of pipe at off-right-of-way storage yards; preparation of sites for off-right-of-way worker camps; and mowing and patrolling areas of the right-of-way to discourage migratory bird nesting. These activities also include maintaining security at project sites to ensure public safety and maintaining environmental protections as required by permits and best practices.

19. As TransCanada has informed the court, it does not plan to commence construction of the pipeline until at least the second half of the first quarter of 2019. Significant mainline construction is not planned to commence until the second quarter of 2019. Construction of the pipeline is planned to occur over two construction seasons in 2019 and 2020. Construction seasons are weather constrained to spring through fall in the area of the project. Construction is planned to be complete in late 2020, with the pipeline commissioned and tested and placed in service in early 2021. Maintaining the current pre-construction and construction schedule is critical to TransCanada's ability to meet this in-service date and its commercial undertakings with respect to its customers.

20. I understand that the court issued an order on November 8, 2018 requiring the Department of State to again supplement the environmental review of the project. I

further understand that the court's order enjoins TransCanada from "engaging in any activity in furtherance of the construction or operation" of the project until the State Department has completed that supplement. While the State Department has not yet provided a schedule for this additional supplemental review, it is my understanding based on previous supplemental reviews, that it is likely to take at least well into the first quarter of 2019 for that work to be completed, if not longer.

21. If TransCanada is prevented from continuing the type of preparatory activities described above for several weeks, it will not be able to commence construction in the 2019 construction season. As a result, it will not be able to meet the planned 2021 in-service date.

22. A one-year delay in construction of the pipeline would result in substantial harm to TransCanada, as well as to United States workers, and to TransCanada's customers relying on the current in-service date of the project.

23. Currently, preconstruction activities represent almost 700 American jobs. TransCanada is employing approximately:

- 400 workers for pipeline refurbishment work (inspector, drivers, equipment operators),
- 135 workers for work force camp refurbishment and preparation,
- 30 workers conducting equipment pre-commissioning and refurbishment work,
- 40 workers performing material fabrication, and
- 40 workers to perform civil survey routing and environmental surveys.

TransCanada also employs approximately 100 individuals in its Houston, Texas office that support the workers identified above. Additionally, the project supports hundreds of indirect jobs at suppliers, manufacturers, and vendors.

24. If, as a result of the injunction, TransCanada were to suspend the work that these individuals are performing for a matter of several weeks, the construction season would be lost and these jobs would be lost.

25. Further, a delay of one year in the construction schedule would have very significant financial impacts. It would prevent TransCanada from employing the approximately 6,600 workers who would otherwise go to work constructing the project in 2019. The 2019 capital expenditure of approximately $2.08 billion for construction contractor awards and wages in the United States would not occur in that year.

26. Additionally, TransCanada estimates that a one-year delay would result in lost earnings before interest, taxes, depreciation, and amortization (EBITDA) of approximately $949 million between March 2021 and March 2022. Even if these revenues were earned back at the end of the current 20-year shipper contract terms, the net EBITDA loss would be approximately $708 million, assuming an 8% discount rate.

27. Further, in the first year of operations, the Company plans to spend approximately $488 million in payments for services and wages, power utilities, and taxes to State, county and municipal governments in the United States. A one-year delay would mean that these operating expenditures would not occur in that year.

28. A delay in the construction schedule will impact more than just financial investments, it will also prevent the Company from entering into contracts with

construction firms to build the project. Currently, the market for pipeline construction contractors is very competitive and it likely to become more competitive next year based on the projected increase in construction projects. Several major oil and gas pipeline projects will be competing for a limited set of experienced and capable contractors. If the Company is not able to secure this work according to our proposed schedule, we face higher costs to hire skilled contractors to do the work.

29. Moreover, a delay of one year in the construction schedule and in-service date would delay the ability of TransCanada's customers to make use of the services for which they have contracted. The Project would connect one of the world's largest sources of heavy crude oil production with the world's largest refining complex capable of refining heavy crude oil. TransCanada has a significant interest in being able to satisfy market demand for transportation service on the Keystone XL Pipeline.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 15th day of November, 2018.

Dr. Norrie Ramsay
Senior Vice President,
Technical Centre and Liquid Projects
TransCanada Corporation

[NOTARY]

David M. Kohlenberg
Notary Public
Province of Alberta