

Jeffery J. Oven
Mark L. Stermitz
Jeffrey M. Roth
CROWLEY FLECK PLLP
490 North 31st Street, Ste. 500
Billings, MT 59103-2529
Telephone: 406-252-3441
Email: joven@crowleyfleck.com
mstermitz@crowleyfleck.com
jroth@crowleyfleck.com

Peter R. Steenland
Peter C. Whitfield
Lauren C. Freeman
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
Telephone: 202-736-8000
Email: psteenland@sidley.com
pwhitfield@sidley.com
lfreeman@sidley.com

Counsel for TransCanada Keystone Pipeline, LP and TransCanada Corporation

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

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'
REPLY TO NORTHERN PLAINS
PLAINTIFFS' RESPONSE TO
THE PROPOSED SCHEDULE
FOR COMPLETING A
SUPPLEMENTAL EIS**

FACTUAL STATEMENT

On August 15, 2018, this Court issued a Partial Order on Summary Judgment Regarding NEPA Compliance (Doc. 210). The Order directed “that Federal Defendants must supplement the 2014 final supplemental EIS to consider the Mainline Alternative route as approved by the Nebraska PSC.” (*Id.* at 12.) Further, the Court directed “Federal Defendants to file a proposed schedule to supplement the EIS in a manner that allows appropriate review before TransCanada’s planned construction activities.” (*Id.*)

On September 4, 2018, the federal defendants responded to this Order by submitting a schedule for preparation of the Supplemental Environmental Impact Statement (SEIS) ordered by the Court. (Doc. 211). Consistent with their proposed schedule, federal defendants issued a draft SEIS on September 21, 2018. In their schedule, the federal defendants estimated that the supplemental National Environmental Policy Act (NEPA) process could be completed by December of this year, and that the Bureau of Land Management (BLM) and the U.S. Army Corps of Engineers (Corps) likely would issue decisions regarding their respective permitting activities soon thereafter, in January or early February, 2019. The federal defendants also suggested that the parties could agree to a briefing schedule, “[a]s the process moves farther along,” so that the goal of appropriate review before construction begins can be achieved. (*Id.* at 4).

In response to this filing, Plaintiffs Northern Plains et al. submitted a pleading attacking the federal defendants' submission with allegations that are rife with speculation and unfounded concern. (Doc. 212.) Northern Plains describes the proposed schedule as unrealistic and vague; it also asserts that this schedule will not allow for judicial review before TransCanada plans to begin construction of the Keystone XL Pipeline in 2019. These assertions are misplaced because the government's schedule can achieve the goals and requirements of the Court's Partial Order on Summary Judgment.

ARGUMENT

TransCanada's goal throughout this litigation has been to keep the Court and the parties fully up to date with respect to the complicated arrangements that are involved in constructing a project as large as the Keystone XL Pipeline. Thus, at the May 24, 2018 hearing, counsel for TransCanada informed the Court that earlier statements regarding the possibility that construction might begin in September 2018 were "wishful thinking," and that as of May 2018, TransCanada was planning to begin pipeline construction in the second quarter of 2019. Transcript of Hearing on Motions 137:9-12 (May 24, 2018). Several months later, TransCanada filed a notice reaffirming those earlier plans, adding additional information, and stating "TransCanada is now considering a proposed schedule for Horizontal Directional Drilling (HDD) under the Missouri and Cheyenne Rivers

that would call for that activity to occur in January, 2019.” Notice of Status Update at 2 (Doc. 204).

Subsequently, TransCanada has refined its plans for pipeline construction. Should BLM and the Corps issue permits and approvals authorizing construction, TransCanada is now considering plans to initiate some construction on the Keystone XL Pipeline during the latter half of the first quarter of 2019. However, the initiation of this construction would not include the proposed HDD work that until recently was scheduled for January 2019, or construction occurring within the BLM right-of-way.

Further, should TransCanada make a final determination to go forward with some initial construction activities during the second half of the first quarter of 2019, this work would occur only in a portion of the pipeline’s route where the parties have fully briefed the legal issues and are awaiting a merits decision from the Court. In other words, in light of the Court’s order directing the State Department to prepare a SEIS on the Mainline Alternative Route in Nebraska, and the expected attendant litigation that document may provoke, TransCanada has no plans to begin pipeline construction in Nebraska during the first half of 2019. As a result, this Court should have ample time to conduct “appropriate review before TransCanada’s planned construction activities” will occur. *See* Partial Order on Summ. J. Regarding NEPA Compliance at 12 (Aug. 15, 2018) (Doc. 210).

Northern Plains' other concerns regarding the NEPA process raised in its pleading should be directed to the federal defendants as comments to the NEPA process ordered by the Court. Although we have no doubt the plaintiffs will challenge the adequacy of this SEIS if they are unsatisfied with the outcome, their current focus should be on the agencies conducting the review and making the underlying decisions rather than the Court. When the plaintiffs in their complaint challenged the validity of the BLM right-of-way process, this Court declined to address those issues because they were not part of a final agency action. Accordingly, the Court held the BLM count in abeyance. We respectfully submit that is exactly the appropriate response here as well.

Finally, the parties have worked diligently to ensure that the Court can resolve the merits of all pending claims before construction is scheduled to begin. We believe this goal can still be accomplished. From the outset of this litigation, the plaintiffs, federal defendants and intervenor-defendants have negotiated schedules for briefing and arguing Motions to Dismiss, Motions to Supplement the Record, and Motions for Summary Judgment. We believe that the federal defendants' good-faith schedule for this SEIS addresses all the concerns expressed in the Court's August 15, 2018 Partial Order on Summary Judgment. All pending claims are fully briefed and ripe for resolution. The briefing of any additional claims involving actions by BLM and the Corps surely can be resolved during the

early months of 2019 before construction occurs on BLM land or HDD activities begins. And, should this schedule prove overly optimistic, we trust the parties can confer and propose a revised schedule for the Court's consideration, mindful of the fact that once armed with its full array of federal permits, TransCanada would have the legal authority to commence construction anywhere along its proposed route.

TransCanada hopes that this notification, including the schedule outlined above, achieves a balance between the Court's interest in achieving appropriate review of the issues and TransCanada's interest to commence construction as soon as possible.

Respectfully submitted this 21st day of September, 2018,

/s/ Jeffery Oven
Jeffery J. Oven
Mark L. Stermitz
Jeffrey M. Roth
CROWLEY FLECK PLLP
490 North 31st Street, Ste. 500
P.O. Box 2529
Billings, MT 59103-2529
Telephone: 406-252-3441
Email: joven@crowleyfleck.com
mstermitz@crowleyfleck.com
jroth@crowleyfleck.com

/s/ Peter Steenland
Peter R. Steenland
Peter C. Whitfield
Lauren C. Freeman
Sidley Austin LLP
1501 K Street, NW

Washington, DC 20005
Telephone: 202-736-8000
Email: psteenland@sidley.com
pwhitfield@sidley.com
lfreeman@sidley.com

*Counsel for TransCanada Keystone
Pipeline, LP and TransCanada Corporation*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2) of the United States Local Rules, I certify that this Brief contains 1,011 words, excluding caption and certificates of service and compliance, printed in at least 14 points and is double spaced, including footnotes and indented quotations.

DATED this 21st day of September, 2018.

/s/ Jeffery Oven
Jeffery J. Oven

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, a copy of the foregoing motion was served on all counsel of record via the Court's CM/ECF system.

/s/ Jeffery Oven

Jeffery J. Oven