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

ROSEBUD SIOUX TRIBE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants,	CV 18-118-GF-BMM **MEMORANDUM IN SUPPORT OF DEFENDANTS TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

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INTRODUCTION

This case arises from the President's March 29, 2019 decisions to (1) issue a Presidential Permit authorizing construction of Keystone XL oil pipeline facilities at the U.S./Canada border in Montana, and (2) revoke a prior Presidential Permit, issued by the State Department ("State") in 2017, that authorized construction of the same facilities. First Amended Complaint ("FAC") ¶¶ 1, 9. In earlier litigation, this Court vacated State's justification for the 2017 Permit, ruling that State had violated the Administrative Procedure Act ("APA"), the National Environmental Protection Act ("NEPA"), and the Endangered Species Act ("ESA"). Central to those holdings was the Court's conclusion that State had engaged in "agency," not "presidential," action when it issued the 2017 Permit, and that State's justification for that permit was therefore subject to judicial review under the foregoing statutes.

By dismissing the appeals (and cross-appeal) of this Court's prior rulings, the Ninth Circuit has made clear that the President's March 29 revocation decision mooted all claims concerning the validity of the 2017 Permit. And Plaintiffs' challenges to the 2019 Permit face a series of insurmountable obstacles, most of which flow from the fact that the Permit was issued by the President himself, not by an agency.

Plaintiffs predicate many of their challenges on treaties between the Tribes and the United States. But Plaintiffs identify no waiver of sovereign immunity that

permits suits against the President for treaty violations. Even if they could, the 2019 Permit does not violate any treaty obligations to protect Rosebud and Fort Belknap from "depredations": the 2019 Permit authorizes construction of facilities only at the U.S./Canada border, far from their reservations or any land held in trust for them.

Moreover, these treaties afford tribes no rights beyond those they have under NEPA and the National Historic Preservation Act ("NHPA"). Those statutes do not apply to the President or authorize judicial review of the President's actions, and the United States has no trust obligation that requires the President to comply with statutes that do not govern his actions.

Plaintiffs also claim that issuance of the 2019 Permit violated the Indian Mineral Leasing Act and the Indian Rights-of-Way Act. But these statutes likewise do not apply to the President, and in all events the 2019 Permit does not grant any right-of-way over Indian land or any mineral lease.

Plaintiffs' constitutional challenge to the 2019 Permit also fails to state a claim. Congress has not regulated issuance of cross-border permits for oil pipelines, and the President does not usurp Congress's authority under the Commerce Clause by granting a permit for the Keystone XL border crossing that Congress previously passed bills to approve.

Finally, because Keystone XL will not cross the current boundaries of the Rosebud or Fort Belknap Reservations, the project is not subject to tribal laws. To the extent that Rosebud alleges that the pipeline corridor might cross a few parcels of land where the United States holds surface or mineral estates in trust for the tribe or its individual members, those claims are not ripe, because no unauthorized crossing has occurred, and venue is improper in this Court, because those parcels are located in South Dakota.

For these reasons and others explained in greater detail below, defendants TC Energy[1] and TransCanada Keystone Pipeline LP move for dismissal of the First Amended Complaint in its entirety.

STATEMENT OF FACTS

A. Regulatory Background

Many of Plaintiffs' claims proceed from the premise that a Presidential Permit authorizes construction of a cross-border oil pipeline throughout its entire U.S. route. In fact, such a permit authorizes only facilities at the border. Other federal permitting requirements govern discrete segments of the pipeline, and approval of the rest of the route is left to the States.

[1] Since Plaintiffs amended their Complaint, defendant TransCanada Corporation changed its name to TC Energy Corporation. For simplicity, this brief uses "TC Energy" to refer to both defendants.

1. Federal Regulation of Oil Pipeline Construction

Natural gas pipelines cannot be built without approval from the Federal Energy Regulatory Commission ("FERC"), but there is no such requirement for oil pipelines.[2] Instead, while federal law establishes oil pipeline design and construction standards,[3] and regulates rates and access to pipeline transportation,[4] it requires federal agency approval only for the construction of those discrete segments of an oil pipeline (if any) that cross wetlands or navigable waters,[5] federally-owned land,[6] or land held in trust for individual Indians or tribes.[7]

In addition, an oil pipeline that crosses the Nation's border must obtain a Presidential permit—a requirement Presidents have imposed on various types of

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[2] *Compare* 15 U.S.C. § 717f(c)(1)(A) (FERC approval needed to construct a natural gas pipeline), *with* 49 U.S.C. § 60502 (no requirement for oil pipeline).

[3] 49 U.S.C. § 60102(a); 49 C.F.R. pt. 195.

[4] *See* 49 U.S.C. § 60502; 49 U.S.C. app. § 1 (1988).

[5] *See* 33 U.S.C. §§ 404, 408, 1344. TC Energy is applying for a Section 408 permit for construction under the Missouri River. For other water crossings, it is relying on Nationwide Permit 12, which allows construction of utility lines in U.S. waters "provided the activity does not result in the loss of greater and 1/2 acre of [U.S. waters] for each single and complete project." 77 Fed. Reg. 10,184, 10,271 (Feb. 21, 2012).

[6] *See* 30 U.S.C. § 185; 43 U.S.C. § 1761 (authorizing Interior Department to grant rights-of-way). TC Energy is applying for a right-of-way to cross federal land in Montana.

[7] *See* 25 U.S.C. §§ 323, 324 (authorizing Interior to grant rights-of-way across land held in trust for Indian tribes or individual Indians).

cross-border facilities for nearly 150 years.[8] Until 1968, Presidents personally issued permits for certain cross-border facilities.[9] That year, the President delegated his authority to issue such permits to State.[10] But on April 10, 2019, the President revoked that delegation and established a new process in which the President will personally issue or deny permits after considering recommendations from State.[11] Notably, Presidential permits do not authorize construction of the entire pipeline. They permit "the construction, connection, operation, or maintenance" of facilities "*at the international boundaries of the United States.*"[12]

2. State Regulation of Oil Pipeline Construction

Montana, South Dakota, and Nebraska—the three States that Keystone XL will cross—require the approval of a state agency or official before an oil pipeline can be built in the State.[13] In addition, a pipeline carrier must acquire any

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[8] *See* President Ulysses Grant's Seventh Annual Message to Congress, *reprinted in* Papers Relating to the Foreign Relations of the United States, Vol. 1, 44th Cong. 1st Sess., H.R. Doc. No. 1, pt. 1 (Dec. 6, 1875).

[9] *See* Whiteman, *Digest of International Law*, Vol. 9 (1968).

[10] *See* Executive Order 11,423, § 1(a), 33 Fed. Reg. 11,741 (Aug. 20, 1968); *see also* Executive Order 13,337, 69 Fed. Reg. 25,299 (May 5, 2004) (refining the Presidential permitting process).

[11] *See* Executive Order 13,867, 84 Fed. Reg. 15,491, 15,492 (Apr. 15, 2019).

[12] *Id.* at 15,491 (emphasis added).

[13] *See* Mont. Code Ann. § 75-20-201; Neb. Rev. Stat. §§ 57-1405(1), 57-1503 ; S.D. Codified Laws §§ 49-41B-2, 49-41B-2.1, 49-41B-4

necessary land or easements by negotiating agreements with landowners or invoking state eminent domain procedures.[14]

B. Keystone XL Obtains Approvals from Montana, Nebraska and South Dakota, and a Presidential Permit

1. State Agency Approvals

The South Dakota Public Utilities Commission ("PUC") issued a permit authorizing construction and operation of Keystone XL on June 29, 2010, subject to certain terms and conditions.[15] State law required a subsequent certification that Keystone continued to meet those terms and conditions,[16] and that certification was challenged by pipeline opponents, including the Rosebud Sioux Tribe, who were allowed to intervene in the certification proceeding.[17] Following a lengthy

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[14] Montana, Nebraska and South Dakota authorize pipeline carriers to acquire property by eminent domain. *See* Mont. Code Ann. § 75-20-113; Neb. Rev. Stat. § 57-1101; S.D. Codified Laws §§ 49-2-12, 49-7-11.

[15] Pub. Util. Comm'n of S.D., *In the Matter of the Application By TransCanada Keystone Pipeline, LP For A Permit Under The South Dakota Energy Conversion And Transmission Facilities Act To Construct The Keystone XL Project*, No. HP09-001, Amended Final Decision and Order at 23, ¶ 4 (June 29, 2010), https://puc.sd.gov/commission/orders/hydrocarbonpipeline/2010/hp09-001c.pdf. The First Amended Complaint (¶¶ 168-69) cites portions of the decisions of the South Dakota PUC, and the Court can consider the rest on a motion to dismiss under "the incorporation-by-reference doctrine" or through judicial notice. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018).

[16] S.D. Codified Laws § 49-41B-27.

[17] Pub. Util. Comm'n of S.D., *In the Matter of the Petition of TransCanada Keystone Pipeline, LP for Order Accepting Certification of Permit Issued in Docket HP09-001 to Construct the Keystone XL Pipeline*, No. HP14-001, Final

evidentiary hearing, the PUC accepted Keystone's certification and authorized construction "subject to the provisions" in the initial permit.[18] The PUC also found that "no Indian reservation or trust lands are crossed by the Pipeline route."[19]

The Montana Department of Environmental Quality ("DEQ") completed its review in March 2012 and approved "the design, location, construction, operation, maintenance, and decommissioning of the Keystone XL pipeline," in conformance with certain conditions it imposed.[20] The DEQ therefore issued the "Certificate of Compliance" necessary to build and operate the Montana portion of the Keystone XL Pipeline.[21]

Decision and Order Finding Certification Valid And Accepting Certification, at 1-9 (Jan. 21, 2016) ("2016 PUC Order").

[18] *Id*. at 26.

[19] FAC ¶ 169, citing 2016 PUC Order at 19, ¶ 27.

[20] Mont. Dep't of Envtl. Quality, *In the Matter of the Application of TransCanada Keystone Pipeline, LP (Keystone) for a Certificate of Compliance under the Major Facility Siting Act*, Findings Necessary for Certification and Determination, at 57 (Mar. 30, 2012), http://deq.mt.gov/Portals/112/DEQAdmin/MFS/Documents/KXL_Cert_Final_Signed.PDF.

[21] Mont. Dep't of Envtl. Quality, *In the Matter of the Application of TransCanada Keystone Pipeline, LP to Amend their Certificate of Compliance under the Major Facility Siting Act*, at 1 (Jan. 23, 2019), http://deq.mt.gov/Portals/112/DEQAdmin/MFS/Documents/DEQDecision_SBSeedAmendment.pdf?ver=2019-02-01-085504-733. The FAC does not refer to this document, but the "court may take judicial notice of matters of public record." *Khoja*, 899 F.3d at 999.

In November 2017, the Nebraska Public Service Commission ("PSC") approved construction of the Keystone XL project, albeit on an alternative route.[22] Pipeline opponents have appealed the PSC order, but that appeal will not affect the Rosebud Sioux or the Fort Belknap, whose reservations and property are in South Dakota and Montana, respectively.[23]

2. The Presidential Permits

As this Court is aware, State twice denied applications for a Presidential Permit for Keystone XL, before issuing a Record of Decision and National Interest Determination ("ROD/NID") in March 2017 that found that issuance of the Presidential Permit would serve the national interest of the United States.[24] In litigation brought by other plaintiffs, this Court vacated the 2017 ROD/NID, and directed State to supplement its NEPA analysis and better explain some of the reasoning in the ROD/NID. [25] The Court also enjoined construction and certain pre-construction activities for Keystone XL.[26] Defendants appealed those rulings.

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[22] FAC ¶ 219.

[23] FAC ¶¶ 27-28.

[24] FAC ¶¶ 183-85, 188; FAC Ex. B.

[25] FAC ¶ 191; *see also Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 590-91 (D. Mont. 2018), *rev'd as moot*, No. 18-36068, Order (9th Cir. June 6, 2019).

[26] FAC ¶¶ 225, 227; *see also Indigenous Envtl. Network*, 347 F. Supp. 3d at 590-91; *Indigenous Envtl. Network v. U.S. Dep't of State*, 369 F.Supp.3d 1045, 1052

While that appeal was pending, President Trump formally revoked the permit issued by State in 2017, and personally signed a new Presidential Permit.[27] This new Permit authorizes the construction, operation and maintenance of Keystone XL pipeline facilities "at the international border of the United States and Canada at Phillips County, Montana."[28]

C. Plaintiffs' Complaint and First Amended Complaint

Plaintiffs' initial Complaint challenged the 2017 Presidential permit.[29] The federal defendants filed a motion to dismiss as moot or for a stay in light of this Court's orders and injunction in *IEN*—a motion TC Energy joined.[30] After President Trump revoked the 2017 permit and issued the 2019 Permit, all defendants filed additional motions to dismiss the Complaint on grounds of

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(D. Mont. 2018), *rev'd as moot*, No. 18-36068, Order (9th Cir. June 6, 2019); *Indigenous Envtl. Network v. U.S. Dep't of State*, No. CV-17-29-GF-BMM, 2019 WL 652416, at *11 (D. Mont. Feb. 15, 2019), *rev'd as moot*, No. 18-36068, Order (9th Cir. June 6, 2019).

[27] FAC ¶¶ 229-30.

[28] The President granted this new permit "notwithstanding Executive Order 13337" and his "Memorandum of January 24, 2017," which had directed State to act under that Executive Order. 84 Fed. Reg. 13,101, 13,101 (Apr. 3, 2019). The President later revoked Executive Order 13337 and replaced it with a new one. *See supra* n.11.

[29] Dkt. 1, ¶¶ 315-33.

[30] Dkts. 38-1, 39.

mootness.[31] This Court allowed plaintiffs to amend the Complaint to challenge the new Presidential Permit. TC Energy now moves to dismiss the Amended Complaint.

ARGUMENT

As discussed below, every count in the Amended Complaint should be dismissed for lack of jurisdiction, improper venue, and/or failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(1), (b)(3), (b)(6).

I. The Challenges To The 2017 Permit Are Moot

Several counts of the Amended Complaint continue to challenge the 2017 permit.[32] These counts must be dismissed for lack of jurisdiction. In the Ninth Circuit, TC Energy moved to dismiss the *IEN* appeal as moot in light of the revocation of the 2017 Permit, and to dissolve the injunction, vacate this Court's judgments, and order the dismissal of the complaints in light of that mootness. *IEN*, No. 18-36068, Dkt. 35-1 (9th Cir. Apr. 8, 2019). The Rosebud plaintiffs, as intervenors, opposed that motion in its entirety, claiming a remand was necessary to determine whether the President's revocation of the 2017 permit was effective

[31] Dkts. 47, 49.

[32] *See* FAC Counts Seven - Eleven, ¶¶ 442-51; ¶¶ 452-59; ¶¶ 460-64; ¶¶ 465-79; ¶¶ 480-86.

and whether challenges to that permit were moot.[33] By granting that motion in full, the Ninth Circuit necessarily held that challenges to the 2017 Permit were moot.[34]

II. Plaintiffs Lack Standing To Challenge The 2019 Presidential Permit

To invoke this Court's jurisdiction, plaintiffs must establish that they have Article III "standing." *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-60 (1992). This requires that they suffer an "injury in fact" that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). If the injury is only "threatened," it "must be *certainly impending* to constitute injury in fact." *Id.* (emphasis in original). "[A]llegations of *possible* future injury are not sufficient." *Id.* (emphasis in original). The Amended Complaint does not satisfy that test.

Plaintiffs allege that construction and operation of the pipeline *could* harm them. *E.g.*, FAC ¶¶ 141, 154 (historical, cultural or religious harms); FAC ¶¶ 98-99 (harms by third-parties to tribal members); FAC ¶ 96 (trespass on parcels with mineral or surface estates held in trust); FAC ¶¶ 108, 122, 144, 154 (potential harms from oil spills). These threatened harms, however, are insufficient to confer

[33] *See IEN*, No. 18-36068, Dkt. 50-1 at 3 (9th Cir. Apr. 23, 2019).

[34] *See IEN*, No. 18-36068, Dkt. 56 (9th Cir. June 6, 2019).

standing to challenge the 2019 Permit because they are speculative, "*possible*," but not "*certainly impending*." *Clapper*, 133 S. Ct. at 1147.

In *IEN*, this Court concluded that similar allegations justified injunctive relief, but it did so based on reasoning dependent upon claims under NEPA. Specifically, the Court agreed that (1) State's issuance of a Presidential Permit to construct 1.2 miles of cross-border facilities was a major federal action triggering NEPA analysis; (2) because the 1.2 mile segment and the remainder of the pipeline were interconnected, State had to evaluate potential impacts (of the same sort alleged here) from the entire pipeline; (3) State had failed adequately to assess those potential harms; (4) plaintiffs would therefore be injured if pipeline construction began before those potential harms were fully evaluated, because the "bureaucratic momentum" from construction would skew State's analysis.[35] The validity of that conclusion (which TC Energy disputed) necessarily depends on the fact that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)), and on the assumption that Congress did so in NEPA. Here, however, plaintiffs cannot challenge the 2019 Permit under NEPA,

[35] *See IEN*, 2019 WL 652416, at *2-11; *IEN*, 369 F. Supp. 3d at 1049-51.

because it was issued by the President, and he is not subject to NEPA. *Infra* § IV. Without that cause of action, plaintiffs' alleged harms are too speculative.

These threatened harms also do not give plaintiffs standing to challenge the 2019 Permit because they are not caused by the 2019 Permit. The harms allegedly will result from the construction or operation of the pipeline along the route through Montana and in South Dakota. But the 2019 Permit only authorizes the construction of 1.2 miles of pipeline facilities at the U.S./Canada border.[36] It does not authorize construction or operation along the route through Montana and South Dakota that allegedly impacts plaintiffs' interest in historical, cultural and religious sites. Those authorizations have come (or will come) from the other federal and state agencies with jurisdiction over different parts of the Keystone XL project. And, because plaintiffs have no valid NEPA claim, they cannot rely on NEPA's theories of "interconnectedness" to tie those harms to a Presidential permit that authorizes only the construction of border-crossing facilities. Accordingly, all counts of the Amended Complaint that challenge the 2019 Permit must be dismissed for lack of standing.[37]

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[36] It covers "Border facilities," defined as those "appurtenant" to the pipeline segment "from the international border … to and including the first mainline shut-off valve in the United States located approximately 1.2 miles from the international border." 84 Fed. Reg. at 13,101.

[37] *See* FAC Counts One – Five, ¶¶ 380-431.

III. Count One Fails To State A Claim For Relief Under The 1851 Fort Laramie Treaty Or The 1855 Lame Bull Treaty

Count One of the Amended Complaint alleges that the 2019 Permit violates the 1851 Fort Laramie Treaty and 1855 Lame Bull Treaty, in which the United States agreed to protect the Rosebud and Fort Belknap "from all depredations."[38] This count must be dismissed for lack of jurisdiction, because it fails to allege an actionable treaty violation, and because there is no venue in this Court.

First, the Amended Complaint identifies no waiver of sovereign immunity for an action against the President for alleged treaty violations. "The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The APA waives sovereign immunity for violations of an Indian treaty or breaches of trust with an Indian tribe by an "agency or an officer or employee thereof." 5 U.S.C. § 702; *see also, e.g., Navajo Nation v. Dep't of Interior*, 876 F.3d 1144, 1173 (9th Cir. 2017) (§ 702 applies to "breach of trust claim" against the Department of Interior). The President, however, is not an "agency," or an officer or employee of an agency, under the APA. *See* 5 U.S.C. §§ 701(b)(1), 551(1); *Franklin v. Massachusetts*, 505 U.S. 788,

[38] FAC ¶ 381; *see also id.* ¶ 57 (quoting Article 3 of the 1851 Fort Laramie Treaty); *id.* ¶ 62 (quoting Article 7 of the 1855 Lame Bull Treaty, which protects "said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit").

801 (1992). Plaintiffs allege failures to prevent depredations by the President "and the Agency Defendants" in "issuing the 2019 Permit." FAC ¶ 382. But the 2019 Permit itself, incorporated by reference in the Amended Complaint, indisputably shows that the President alone issued it, and no agency action is necessary to give it effect. *See* 84 Fed. Reg. at 13,103. Thus, the APA's waiver does not apply.

Second, even if it did, the 2019 Permit does not violate the 1851 Fort Laramie Treaty and 1855 Lame Bull Treaty, because those treaties obligate "the government to protect only against those depredations that occur on Indian land." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 813 (9th Cir. 2006).[39] But as discussed above, the 2019 Permit authorizes only the Keystone XL border-crossing, a 1.2-mile segment that does not cross the Rosebud or Fort Belknap Reservations, or any plot of land in South Dakota where Plaintiffs allege there may be Rosebud surface or mineral estates held in trust by the federal government. *See* FAC ¶¶ 88, 96, 107-18, 166-82, 147.

In fact, even if the Permit authorized the entire Keystone route—and it does not—Plaintiffs do not allege that any portion of Keystone XL will cross the *current*

[39] The Ninth Circuit called the 1855 treaty the "Treaty with the Blackfeet," while the Amended Complaint calls it the "1855 Lame Bull Treaty." But it is clear from the citation to the Statutes at Large that both refer to the same treaty. *Compare* FAC ¶¶ 58, 62 (quoting article 7 of "Lame Bull Treaty" signed on October 17, 1885, 11 Stat. 657 (1855)), *with Gros Ventre Tribe*, 469 F.3d at 804, 813 (quoting "Treaty with the Blackfeet, art. 7, Oct. 17, 1855, 11 Stat. 657").

boundaries of either reservation. *See* FAC ¶ 88 (Rosebud), ¶ 145 (Ft. Belknap). They allege instead that the "Pipeline will run directly through the sacred sites, historic sites, and the *ancestral* lands of the … Tribes of Fort Belknap," FAC ¶ 157 (emphasis added); *id.* ¶ 150 (referring to damage to "ancestral sites"), and "would traverse Rosebud's *1889* reservation boundary," *id.* ¶ 93 (emphasis added), where "there are still many cultural and historical places and sacred sites important to Rosebud," *id.* ¶ 89. The treaty obligations plaintiffs invoke, however, do not extend to ancestral lands "after the Tribes later relinquished their ownership in that land." *Gros Ventre Tribe*, 469 F.3d at 813.

Plaintiffs' allegations that construction or operation of the pipeline outside the reservations could have adverse effects on the reservations[40] are irrelevant. The "United States agreed to protect the Tribes from depredations that occurred only on tribal land." *Gros Ventre Tribe*, 469 F.3d at 813. Although "activities occurring off of the Reservation may impact resources on the Reservation, the language in these treaties simply cannot be read to impose a specific fiduciary obligation" to regulate activity off the reservation "for the benefit of the Tribes." *Id.*; *see also id.* at 803 (rejecting argument that government violated treaties by authorizing "two cyanide

[40] *See, e.g.*, FAC ¶¶ 98-106 (alleged threat to public safety from construction workers); ¶ 108 (alleged threat from oil spill).

heap-leach gold mines located upriver from the Tribes' reservation" that allegedly threatened "tribal trust resources").

Third, to the extent Rosebud claims that treaty rights might still attach to a few parcels of land along the Keystone XL right-of-way where there might be "Rosebud surface and mineral estates held in trust," FAC ¶ 160, this Court lacks venue because these properties are in South Dakota. *See id.* Thus, even if the Permit authorized pipeline construction in South Dakota (and again, it does not), venue over such claims would lie only in Washington, DC (where the President issued the Permit), or in South Dakota.[41]

IV. Counts Three And Four Fail To State Claims For Relief For Breach Of Fiduciary Duty Or Violations Of NEPA Or NHPA.

Counts Three and Four of the Amended Complaint also fail to state claims that the 2019 Permit was issued in violation of NEPA or the NHPA, or of any fiduciary duty to comply with those statutes.

First, NEPA and the NHPA do not apply to the President or authorize judicial review of his actions. NEPA applies to "agencies of the Federal Government," 42 U.S.C. §§ 4332, 4333, and NEPA regulations define "Federal agency" to exclude "the President." 40 C.F.R. § 1508.12. The NHPA likewise

[41] *See* 28 U.S.C. § 1391(e)(1); *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2017 WL 374705, at *4 (D. Mont. Jan. 24, 2017).

applies to "the head of any Federal agency" and the "head of any Federal department or independent agency," 54 U.S.C § 306108, and it specifies that the term "agency" has the same meaning as it has in the APA, *id.* § 300301. But as discussed *supra* p.14, the APA definition of "agency" does not include the President.

NEPA and the NHPA also do not provide any rights of action.[42] They can be enforced only through a suit brought under the APA, which also does not apply to the President.[43] Thus, the President had no duty to comply with NEPA or the NHPA when issuing the 2019 Permit, and this Court has no jurisdiction to review any claim to the contrary.

Second, the President has no fiduciary duty to plaintiffs to comply with laws that Congress did not make applicable to him. The Ninth Circuit has agreed that the United States' general trust responsibility toward Indian tribes does not require agencies to "afford [the tribes] greater rights than they would otherwise have" under laws agencies administer. *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303,

[42] *See Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 950 (9th Cir. 2006) (NEPA); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005) (NHPA).

[43] *Dalton v. Specter*, 511 U.S. 462, 470 (1994) (President's actions "are not reviewable under the APA").

1308-09 (9th Cir. 1997).[44] Thus, the Ninth Circuit has held in a case involving NEPA and the NHPA that "unless there is a specific duty that has been placed on the government with respect to Indians," the government fulfills any fiduciary duty by complying "with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998).

Plaintiffs' reliance (FAC ¶¶ 17, 402, 414), on *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768 (9th Cir. 2006), is misplaced. That case held only that agency violations of NEPA and the NHPA also violated a general fiduciary duty to "protect the Tribe's interests." *Id.* at 788. The court expressly declined to decide, however, whether the "fiduciary obligations of federal agencies to Indian nations might require more." *Id.*

Moreover, after *Pit Tribe* was decided, the Supreme Court made clear that "[a]lthough the Government's responsibilities with respect to the management of funds belonging to Indian tribes bear some resemblance to those of a private trustee, this analogy cannot be taken too far." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). "The Government assumes Indian trust

[44] *See also, e.g., Klamath Water Users Prot. Ass'n v. U.S. Dep't of Interior*, 189 F.3d 1034, 1038 (9th Cir. 1999) (tribes have no greater right to have communications with an agency withheld under FOIA).

responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id.* at 177. Plaintiffs cite no statute that expressly accepts an Indian trust responsibility to go beyond what NEPA or the NHPA requires. And those statutes impose no responsibilities on the President.

Plaintiffs allege that the federal defendants have not conducted a NEPA analysis that adequately analyzes the impact of Keystone XL on the Rosebud Water System, which was established by federal statute and is "held in trust for the Rosebud Sioux Tribe by the United States."[45] *See* FAC ¶¶ 125-26, 133. But they cite nothing in that statute that requires an environmental analysis that NEPA itself does not require. And NEPA requires no analysis when the President issues a Presidential Permit, because NEPA does not apply to the President. That is fatal to plaintiffs' trust claim, because a court cannot impose trust duties on the government beyond those in the applicable "specific trust-creating statute and regulations." *Jicarilla Apache Nation*, 564 U.S. at 185.

The Amended Complaint also cites the 1851 Treaty of Fort Laramie and the 1855 Lame Bull Treaty. But as the Ninth Circuit has explained, there is "no way" to measure compliance with the government's obligation to protect the Indians against depredations on Reservation lands, except by "look[ing] to other generally

[45] *Mni Wiconi Act Amendments of 1994*, Pub. L. No. 103-434, § 806, 108 Stat. 4539, 4541 (Oct. 31, 1994) (adding § 3A(e) to Pub. L. No. 100-516).

applicable statutes or regulations." *Gros Ventre Tribe*, 469 F.3d at 812. Issuance of the 2019 Permit did not violate that limited trust obligation because the President is not subject to, and thus cannot violate, NEPA or the NHPA. In addition, as noted earlier, the permit authorizes no activity on reservation lands, and the treaty imposes no duty to regulate off-reservation activities "for the benefit of the Tribes." *Id.* at 813.

Plaintiffs' NEPA, NHPA and related trust claims must be dismissed for lack of jurisdiction and for failure to state a claim for relief.[46]

V. Count Two Fails To State A Claim For Relief Under The Commerce Clause

Plaintiffs' constitutional challenge to the 2019 Permit (FAC Count Two, ¶¶ 391-97) also fails to state a claim.

First, issuance of the 2019 Permit does not usurp Congress's authority to regulate interstate commerce. The 2019 Permit does not relieve TC Energy of the duty to acquire "right-of-way grants or easements, permits and other authorizations" required by law. *See* 84 Fed. Reg. at 13,102, art. 6(1). It simply

[46] Any claim that the Agency Defendants independently violated NEPA and NHPA (*see* FAC ¶¶ 404-05, 416), must also be dismissed for lack of jurisdiction and failure to state a claim. Because the Agencies did not issue the 2019 Permit, they made no permitting decisions that triggered duties under NEPA or the NHPA, and took no final agency action under either statute that is reviewable under the APA, 5 U.S.C. § 704. *See supra* pp.17-18.

grants an *additional* authorization to construct and operate cross-border facilities that Presidents dating back to President Grant have given when Congress has not delegated that authority to a federal agency. *See supra* pp.4-5. Whatever the limits of the President's assertion of such inherent authority, they are not contravened where, as here, "the views of the Legislative Branch toward such action," *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981), are plainly *supportive* of that action.[47]

Second, if the President did lack authority to grant a Presidential permit, that would not give the court the power to "enjoin the construction of the Pipeline." FAC ¶ 397. It would mean that the President would have no role to play in the permitting process, so Keystone XL could be constructed wherever permitted by the federal laws enacted by Congress and by applicable state and local laws.

[47] *See* Pub. L. No. 112-78, § 501, 125 Stat. 1280, 1289-90 (Dec. 23, 2011) (directing State to "grant a permit" for Keystone XL within 60 days, unless the President determines it "would not serve the national interest," and mandating that if the President failed to act within 60 days, a permit "shall be in effect by operation of law"). Congress later passed an act authorizing construction and operation of cross-border facilities for Keystone XL, but President Obama vetoed it. *See* S. 1, 114th Cong. (2015); 161 Cong. Rec. S620, 637-41 (daily ed. Jan. 29, 2015) (Senate passage); 161 Cong. Rec. H947, 947-60 (daily ed. Feb. 11, 2015) (House passage); 161 Cong. Rec. S1073 (daily ed. Feb. 24, 2015) (veto).

VI. Count Five Fails To State Any Claim For Relief Under The Indian Rights-Of-Way Act And Indian Mineral Leasing Act

Rosebud also alleges that the defendants violated the 1868 Fort Laramie Treaty, the Indian Rights-of-Way Act, 25 U.S.C. § 324, and the Indian Mineral Leasing Act, 25 U.S.C. § 396a, by issuing the 2019 Permit before TC Energy "followed the process to obtain a federal rights-of-way across Rosebud surface and mineral estates [or] obtained Rosebud's consent to build the Pipeline across its surface and mineral estates." FAC ¶¶ 424-25 (Count Five). These allegations fail to state valid claims for relief, and the Court lacks jurisdiction or venue over such claims.

First, these allegations state no claim against the President and thus provide no basis for invalidating the 2019 Permit he issued. That Permit does not authorize TC Energy to cross, settle upon, or occupy Rosebud land. It grants permission to construct 1.2 miles of oil pipeline facilities hundreds of miles from any such land. And the Indian Mineral Leasing and the Indian Rights-of-Way Acts do not apply to the President or purport to limit his authority in any way. They simply authorize the Secretary of Interior to grant rights-of-way to, or to approve mining leases on, certain land held by the United States in trust for Indians or Indian tribes.[48]

[48] *See* 25 U.S.C. § 323 (empowering the Secretary "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes"); *id.* § 324 (prohibiting grant of rights-of-way across lands belonging to

Second, any claims against the other federal defendants fail because the Secretary of Interior has granted no rights-of-way, and approved no mining lease, for Keystone XL. *See* FAC ¶ 427. Thus, the Secretary has done nothing to violate the statutes, and in all events has not taken any "final agency action" subject to judicial review under the APA. 5 U.S.C. § 704.

Third, there is no jurisdiction, venue, or claim against TC Energy under the Indian Mineral Leasing Act. The Amended Complaint alleges that TC Energy violated a regulation prohibiting "exploration, drilling, or mining operations" on Indian lands "before the Secretary has granted written approval of a mineral lease or permit," 25 C.F.R. § 211.48(a). *See* FAC ¶ 426. But nothing in the statute or regulations provides a private cause of action to enforce that regulation. Instead, the regulations are enforced by the *Secretary*, who may impose civil fines or take other action, subject to specified notice and procedural requirements. *See* 25 C.F.R. §§ 211.54, 211.55.

Furthermore, if the Indian Mineral Leasing Act did provide a cause of action, it would have to be dismissed for lack of venue or failure to state a claim.

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certain tribes "without the consent of the proper tribal officials"); *United States v. Navajo Nation*, 537 U.S. 488, 507 (2003) (Indian Mineral Leasing Act "simply requires Secretarial approval" before "mining leases negotiated between Tribes and third parties become effective, 25 U.S.C. § 396a, and authorizes the Secretary generally to promulgate regulations governing mining operations, § 396d").

There is no venue in Montana because the property that allegedly contains Rosebud mineral estates is in South Dakota. *See supra* p.17. And TC Energy had no duty to "follow[] the process to obtain a permit" under the Indian Mineral Leasing Act, FAC ¶ 427, because that statute allows land to be "*leased for mining purposes*," 25 U.S.C. § 396 (emphasis added); it does not authorize easements for oil pipelines, which are governed by the Indian Rights-of-Way Act.[49]

Fourth, there is no jurisdiction, venue, or a valid claim against TC Energy under the Indian Rights-of-Way Act. The Amended Complaint cites no provision of the statute that TC Energy allegedly violated. Instead, the allegation is that TC Energy may construct Keystone XL facilities on property where the United States holds a mineral estate or surface estate in trust for Rosebud. But the Indian Rights-of-Way Act does not apply to mineral estates. It applies to "Indian land," which is defined as land "in which the *surface estate*, or an undivided interest in the surface estate, is owned by one or more tribes" or "in one or more individual Indians," in "trust or restricted status."[50] The Indian Rights-of-Way Act is therefore

[49] 25 U.S.C. § 323 (authorizing "rights-of-way for all purposes"); 25 C.F.R. § 169.5(a)(8) (statute covers "rights-of-way over and across Indian or BIA land, for uses including … Oil and gas pipe lines (including pump stations, meter stations, and other appurtenant facilities)").

[50] 25 C.F.R. §§ 169.2, 169.3(a) (emphasis added); *see also* 80 Fed. Reg. 72,492, 72,495 (Nov. 19, 2015) ("these regulations address only the surface estate," which "includes everything other than the mineral estate, such that any buried lines or other infrastructure affect the surface estate and require a right-of-way").

inapplicable to some of the Rosebud land identified in the Amended Complaint. FAC ¶¶ 176, 178.

Furthermore, if TC Energy were to build Keystone XL on a Rosebud surface estate without obtaining a right-of-way, that would not violate the Indian Rights-of-Way Act. It would be a trespass for which the United States "may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law," and for which the "Indian landowners may pursue any available remedies under applicable law." 25 C.F.R. §169.413. But there is no allegation that any such trespass has occurred, and even if there were, venue would lie in South Dakota, where the property is located. *Supra* n.41.

VII. Keystone XL Is Not Subject To Tribal Laws

There is no merit to the claim that Keystone XL is subject to tribal land use and cultural property laws and must exhaust its remedies in tribal court. FAC Count Six, ¶¶ 432-441. This Count is based on the fundamental misconception that the "Rosebud and Fort Belknap have jurisdiction over the Pipeline." FAC ¶ 440. They do not.

"To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations." *Montana v. United States*, 450 U.S. 544, 565 (1981). But that sovereign power does not extend

to Keystone XL, which will not cross within the current boundaries of either the Rosebud or Fort Belknap Reservation. *See supra* pp.15-16. The fact that Keystone XL will cross land in South Dakota that was within the 1889 boundaries of the Great Sioux Reservation (FAC ¶¶ 86-87, 93), or may cross land in Montana that was previously reserved to the tribes that now form the government of Fort Belknap (FAC ¶¶ 28, 144-49), is irrelevant, because subsequent acts of Congress diminished the reservation boundaries. *See generally, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585 (1977) (rejecting Rosebud's claim of continued jurisdiction over the "original boundaries of their reservation").

And since it is clear that the Tribes lack jurisdiction over Keystone XL, requiring them to exhaust their remedies in tribal courts "would serve no purpose other than delay, and is therefore unnecessary." *Nevada v. Hicks*, 533 U.S. 353, 369 (2001).

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed for lack of jurisdiction, lack of venue, and failure to state a claim upon which relief can be granted.

DATED this 27th day of June, 2019,

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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 6,474 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 27th day of June, 2019.

By: */s/ Jeffery J. Oven*

CERTIFICATE OF SERVICE

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

/s/ Jeffery J. Oven