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,

and

TC ENERGY CORPORATION, *et al.*,

Defendant-Intervenors.

CV-18-118-GF-BMM

ORDER

Rosebud Sioux Tribe ("Rosebud") and Fort Belknap Indian Community ("Fort Belknap") (collectively "the Tribes") bring this action against President Donald J. Trump and various governmental agencies and agents in their official capacities ("Agency Defendants") (President Trump and Agency Defendants collectively "Federal Defendants"). Plaintiffs allege that Federal Defendants violated the 1851 Fort Laramie Treaty, the 1855 Lame Bull Treaty, the 1868 Treaty of Fort Laramie, the Foreign Commerce Clause of the United States Constitution, the Tribes' inherent sovereign powers, and various federal statutes and regulations when President Trump issued a Presidential Permit in 2019 ("2019 Permit") to defendant-intervenors TransCanada Keystone Pipeline, LP and TC

Energy Corporation (collectively "TC Energy") related to the oil pipeline known at Keystone XL ("Keystone"). (Doc. 58 at 105-118.) The parties dispute the scope of the permit. Federal Defendants and TC Energy move to dismiss Plaintiffs' claims. (Docs. 64 & 66.)

BACKGROUND

This Court in *Indigenous Environmental Network v. Trump* discussed in lengthy detail the factual background that gave rise to both that litigation and this litigation. *Indigenous Environmental Network v. Trump*, No. CV-19-28-GF-BMM (D. Mont. Dec. 20, 2019) (hereinafter "*IEN December 2019 Order*"); *see* Issuance of Permits with Respect to Facilities and Land Transportation Crossings at the International Boundaries of the United States, Exec. Order 13867, 84 Fed. Reg. 15491 (April 10, 2019) (hereinafter, "2019 Executive Order"); Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States, Exec. Order No. 13337, 69 Fed. Reg. 25299 (April 30, 2004) (hereinafter, "2004 Executive Order"); Providing for the Performance of Certain Functions Heretofore Performed by the President with Respect to Certain Facilities Constructed and Maintained on the Borders of the United States, Exec. Order 11423, 33 Fed. Reg. 11741 (Aug. 20, 1968) (hereinafter, "1968 Executive Order"). The Court directs the parties to its *IEN December 2019 Order* for a more complete factual background. *IEN*

December 2019 Order, No. CV-19-28-GF-BMM. The Court offers a brief refresher on this factual background below.

The 1968 Executive Order and the 2004 Executive Order provided that the President, acting through the Secretary of State, could issue a cross-border pipeline permit after requesting the views of various federal agencies and departments and finding that issuance of the permit would "serve the national interest." 33 Fed. Reg. at 11741; 69 Fed. Reg. at 25300. The 2019 Executive Order revokes the 1968 Executive Order and the 2004 Executive Order. 84 Fed. Reg. at 15492. The 2019 Executive Order provides that permitting decisions "shall be made solely by the President." *Id.* The 2019 Executive Order instructs the Secretary of State to collect information that "the President may deem necessary" and then advise the President regarding whether issuance of the permit would "serve the foreign policy interests of the United States." *Id.* The 2019 Executive Order does not require the President to consult with federal agencies and departments and it does not require the Secretary of State to determine whether issuance of the permit would serve the national interest. *Id.* at 15491-93.

TC Energy first applied for a permit to build Keystone in 2008 ("2008 Application"). *Indigenous Envtl. Network v. U.S. Dep't of State*, No. CV-17-29-GF-BMM, 2017 WL 5632435, at *1 (D. Mont. Nov. 22, 2017) (hereinafter "*IEN November 2017 Order*"). The State Department recognized that its consideration of

TC Energy's 2008 Permit required a detailed environmental analysis and prepared an environmental impact statement ("EIS"). *See* Notice of Intent to Prepare an EIS, 74 Fed. Reg. 5019-02 (Jan. 28, 2009). Congress passed the Temporary Payroll Tax Cut Continuation Act ("TPTCCA"). Pub. L. No. 112-78, 125 Stat. 1280 (December 23, 2011). The TPTCCA directed the President, acting through the State Department, to render a final decision on TC Energy's 2008 Application within sixty days. *Id.* The State Department denied the 2008 Application in early 2012. *IEN November 2017 Order*, 2017 WL 5632435, at *2.

TC Energy applied for another permit to build Keystone in 2012 ("2012 Application"). *IEN November 2017 Order*, 2017 WL 5632435, at *2. The Secretary of State denied the 2012 Application after determining that issuing TC Energy a permit to build Keystone would not serve the national interest as required by the 2004 Executive Order. *Id.*

President Trump issued a memorandum on January 24, 2017, in which he invited TC Energy to reapply for a permit to build Keystone. Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8663 (Jan. 24, 2017). TC Energy filed a renewed application to the State Department on January 26, 2017 ("2017 Application"). *IEN November 2017 Order*, 2017 WL 5632435, at *2. Under Secretary of State Thomas A. Shannon published a Record of Decision ("ROD") and a National Interest Determination ("NID") on March 23, 2017. *IEN November*

2017 Order, 2017 WL 5632435, at *1. The State Department issued an accompanying Presidential Permit on April 4, 2017 ("2017 Permit"). *See* Notice of Issuance of a Presidential Permit to TransCanada Keystone Pipeline, L.P., 82 Fed. Reg. 16467-02 (Apr. 4, 2017).

The Court eventually vacated the State Department's ROD and NID. *Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 591 (D. Mont. 2018). The Court remanded the matter to the State Department for further consideration. *Id.* The parties appealed the Court's decisions to the United States Court of Appeals for the Ninth Circuit. TransCanada Notice of Appeal, *Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 591 (D. Mont. 2018) (No. CV-17-29-GF-BMM); Indigenous Environmental Network Notice of Appeal, *Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. 2018) (No. CV-17-29-GF-BMM); United States Notice of Appeal, *Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. 2018) (No. CV-17-29-GF-BMM).

President Trump subsequently issued the 2019 Permit on March 29, 2019. Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 84 Fed. Reg. 13101 (March 29, 2019). The President issued the 2019 Permit pursuant to the "authority vested in [him] as

President of the United States of America." *Id.* at 13101. The 2019 Permit grants TC Energy permission, subject to certain conditions, "to construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada . . . for the import of oil from Canada to the United States." The 2019 Permit expressly supersedes and revokes the 2017 Permit. *Id.* The 2019 Permit grants TC Energy permission to construct the cross-border pipeline facilities "notwithstanding" the 2004 Executive Order. *Id.*

President Trump's issuance of the 2019 Permit resulted in the Ninth Circuit dismissing the appeal regarding the 2017 Permit and remanding the action to the Court with instructions to vacate the injunction and dismiss the matter as moot. *See Indigenous Envtl. Network v. U.S. Dep't of State*, 2019 WL 2542756, at *1 (9th Cir. June 6, 2019). The Ninth Circuit never addressed the merits of any claims raised by the parties on appeal.

President Trump issued the 2019 Executive Order a few weeks after he issued the 2019 Permit. 84 Fed. Reg. at 15491. The 2019 Executive Order provides the President with complete authority to approve or deny cross-border pipeline permits. *Id.* at 15492. In this regard, the 2019 Executive Order clarifies that applicants do not need State Department or agency permission to obtain a cross-border pipeline permit. *Id.*

The Tribes brought this action to challenge the 2017 Permit and the 2019 Permit. (Doc. 58.) The Tribes have conceded that their Eighth through Eleventh Claims for relief (Doc. 58 at 118-124), which challenged the 2017 Permit, are now moot. (Doc. 74 at 15.) The Tribes consent to the Court's dismissal of those claims. (*Id.*)

The Tribes challenge the 2019 Permit on numerous grounds. The Tribes allege that President Trump's issuance of the 2019 Permit violates the 1851 Fort Laramie Treaty, the 1855 Lame Bull Treaty, the 1868 Treaty of Fort Laramie (collectively "the Treaties"), the Foreign Commerce Clause of the United States Constitution, the Tribes' inherent sovereign powers, and various federal statutes and regulations. (*Id.* at 105-118.) The Tribes seek the following relief:

- The Tribes seek a declaration that Federal Defendants violated the 1851 Treaty of Fort Laramie and the 1855 Lame Bull Treaty. (*Id.* at 125.) Stemming from those violations, the Tribes seek a declaration that TC Energy must re-route Keystone to avoid a depredation to the Tribes' permanent homelands. (*Id.*)

- The Tribes seek a declaration that Federal Defendants violated the 1851 Treaty of Fort Laramie and the 1855 Lame Bull Treaty by failing to fulfill their minimum fiduciary duty to the Tribes by complying with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 ("NEPA") and the National Historic Preservation Act, 54 U.S.C. § 306108 ("NHPA"). (*Id.*)

- The Tribes seek a declaration that Federal Defendants violated NEPA, the 1851 Treaty of Fort Laramie, the 1855 Lame Bull Treaty, and the Administrative Procedure Act, 5 U.S.C. §§ 701-06 ("APA"), by failing to take a hard look in the 2014 Final Supplemental EIS at Keystone's impacts on the Tribes' treaty, environmental, spiritual, and other rights; failing to take a hard look at the impacts from potential oil spills; failing to analyze

reasonable alternatives; failing to supplement its climate analysis; and failing to comply with tribal law. (*Id.* at 125-26.)

- The Tribes also seek a declaration that Federal Defendants violated NHPA, the 1851 Treaty of Fort Laramie, the 1855 Lame Bull Treaty, and the APA when President Trump issued the 2019 Permit without determining whether the construction, operation, and maintenance of Keystone would be an "undertaking" that mandated tribal consultation under Section 106 of NHPA. (*Id.* at 126.)

- The Tribes seek a declaration that Defendants State Department, Secretary Pompeo, and Under Secretary Hale (collectively "State Department Defendants") and President Trump violated Article I, sections 1 and 8 of the United States Constitution, when President Trump issued the 2019 Permit. (*Id.*)

- The Tribes seek a declaration that all Defendants violated the 1868 Treaty of Fort Laramie, the Indian Rights-of-Way Act, 25 U.S.C. § 324, and the Indian Mineral Leasing Act, 25 C.F.R. § 211.48(a). (*Id.*)

- The Tribes seek a declaration that Rosebud and Fort Belknap have jurisdiction over their reservation territory; that Rosebud and Fort Belknap have jurisdiction over Keystone; that Rosebud and Fort Belknap have jurisdiction over TC Energy; that TC Energy must comply with the Tribes' laws; and that TC Energy has failed to comply with the Tribes' laws. (*Id.*)

- The Tribes seek an injunction that rescinds, sets aside, and holds unlawful the 2019 Permit; requires Federal Defendants to comply fully with the 1851 Fort Laramie Treaty, the 1855 Lame Bull Treaty, the 1868 Fort Laramie Treaty, tribal law, the Indian Rights-of-Way Act, the Indian Mineral Leasing Act, NEPA, and NHPA; and prohibits any activity in furtherance of the construction, connection, operation, and maintenance of Keystone and related facilities. (*Id.*)

- The Tribes seek an injunction requiring TC Energy and Federal Defendants to comply with the requirements of Rosebud tribal law and Fort Belknap tribal law, and prohibiting any activity in furtherance of the construction, connection, operation, and maintenance of Keystone and related facilities until TC Energy complies. (*Id.* at 127.)

DISCUSSION

I. Standing

To invoke this Court's jurisdiction, the Tribes must establish that they possess standing to sue. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-60 (1992). The Tribes must demonstrate an injury-in-fact fairly traceable to the challenged action and that likely would be redressed by a favorable court decision in order to establish standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). TC Energy and Federal Defendants assert that the Tribes lack standing to bring this lawsuit. (Docs. 65 at 19 and 67 at 18.)

Standing represents an "indispensable part of [a] plaintiff's case." *Lujan*, 504 U.S. at 561. A plaintiff must support each element of standing in successive stages of the litigation "with the same manner and degree of evidence required" for any other matter at that stage. *Id.* "General factual allegations" prove sufficient to satisfy standing requirements at the pleading stage. *Id.* Courts "presume[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990); *accord Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009).

A. An Injury-In-Fact Fairly Traceable to the 2019 Permit

To demonstrate injury-in-fact, the Tribes must show that they suffered "an invasion of a legally protected interest" that is "concrete and particularized" and

"actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). If an alleged injury is threatened, not actual, the threatened injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Allegations of possible future injury are not sufficient. *Id.*

The parties dispute the scope of the 2019 Permit. The Tribes claim that the permit authorizes the entire Keystone pipeline. (Doc. 74 at 12, 19-20.) On the other side, both TC Energy and the Federal Defendants claim that the 2019 Permit authorizes only the 1.2-mile cross-border segment. (Docs. 81 at 2 & 82 at 4.) All parties rely on the language of the 2019 Permit.

At the motion to dismiss stage, the Court will assume that the 2019 Permit authorizes the entire Keystone pipeline. 84 Fed. Reg. 13101-03. TC Energy's application asked to build the entire Keystone pipeline, not the 1.2-mile cross-border pipeline facility. And historically, Presidents have issued permits for entire pipelines, not segments of those pipelines. Further, the 2019 Permit references TC Energy's past permit applications to the State Department when it defines the term "Facilities" and when it provides that the construction "of the Facilities (*not including the route*) shall be" as described in TC Energy's 2012 Application and 2017 Application. 84 Fed. Reg. at 13101-02 (emphasis added).

The Tribes' First Amended Complaint describes their interests in the land that Keystone would cross. (Doc. 58 at 45-56.) Plaintiffs assert a number of injuries. (Doc. 74 at 26-27.) The Tribes have demonstrated an injury sufficient to survive Defendants' motions to dismiss. The Tribes' general allegations that construction of Keystone would violate the Tribes' rights to their tribal land prove sufficient to satisfy standing requirements at the current stage of the proceedings. *See Lujan*, 504 U.S. at 561. The Tribes have alleged sufficiently a concrete and particularized invasion of their legally protected interests. *See Spokeo, Inc.*, 136 S. Ct. at 1548.

The Tribes also have alleged sufficiently that the injury is certainly impending and fairly traceable to the 2019 Permit. *See Clapper*, 568 U.S. at 409. As the Tribes note, their injuries stem in part from pre-construction activities, including preparation of man camps and road projects necessary to complete construction of the pipeline. (Doc. 74 at 15.) These injuries, according to the Tribes' allegations, already have begun. The Tribes have pled facts sufficient to allege a certainly impending injury-in-fact that is fairly traceable to the 2019 Permit at this stage of the proceeding. *See Clapper*, 568 U.S. at 409.

B. Redressability

The Tribes must demonstrate that a favorable decision likely would redress their alleged injuries. *Summers*, 555 U.S. at 493. The Tribes seek various

declarations and injunctive relief from this Court. (Doc. 58 at 120-23.) For example, they ask that the Court issue "injunctive relief rescinding, setting aside, and holding unlawful the 2019 Permit." (*Id.* at 122.)

Federal Defendants and TC Energy argue that any alleged injury would not be redressable. They claim that this Court cannot enjoin the President without violating the separation of powers. (Doc. 67 at 21.) Federal Defendants assert that the Tribes' requested relief invades the President's power over foreign affairs and power as Commander-in-Chief. (*Id.* (citing *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996).) Without the power to enjoin the President, they contend, this Court cannot redress the Tribes' injuries.

The Court first must address whether it possesses the authority to enter an injunction against the President. Separation-of-power principles generally counsel against courts granting injunctive and declaratory relief against the President in the performance of his official duties. *See Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality). Courts have not hesitated, however, to grant injunctive and declaratory relief when the Court determines that the President has no authority to act in the first place. *See id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)). Various courts have vacated unlawful presidential decisions. *See, e.g.*, *League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013, 1031 (D. Alaska

2019); *Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998). A court's power to enjoin the President extends to enjoining portions of an executive order where the order "exceeds the statutory authority delegated by Congress and constitutional boundaries." *Hawaii v. Trump*, 859 F.3d 741, 768 (9th Cir. 2017), *dismissed as moot*, 138 S. Ct. 377 (2017); *League of Conservation Voters*, 363 F. Supp. 3d at 1031.

Courts retain the ability to enjoin the President in these situations because even where the President has broad discretion over an issue, "that discretion is not boundless" and "may not transgress constitutional limitations." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986). Further, it remains firmly "the duty of the courts, in cases properly before them, to say where th[e] . . . constitutional boundaries lie." *Id.*

This Court can review President Trump's actions for lawfulness and enjoin his actions if it were to determine that President Trump acted unlawfully when he issued the 2019 Permit. In other words, if the Tribes prevail on their merits arguments, this Court possesses the ability to redress the harm that the Tribes allege that the 2019 Permit caused. The Tribes have demonstrated redressability. *See Summers*, 555 U.S. at 493.

II. Defendants' Motions to Dismiss

Federal Defendants and TC Energy move to dismiss the Tribes' First Amended Complaint pursuant to Rule 12(b)(1), Rule 12(b)(3), and Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Docs. 64 & 66.) A party may bring a motion to dismiss challenging the Court's jurisdiction pursuant to Rule 12(b)(1), as either a facial attack on the sufficiency of the pleadings, or as a factual attack contesting the complaint's allegations. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Federal Defendants and TC Energy bring a facial attack—they question whether the Tribes have presented a cause of action.

In resolving a facial attack, the Court must accept as true factual allegations as it would in resolving a Rule 12(b)(6) motion. *Id.* The Court assumes that a plaintiff's factual allegations are true in deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff must state "a claim to relief that is plausible on its face." *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Dismissals based on a lack of jurisdiction in federal-question cases are exceptional and must satisfy *Bell v. Hood*, 327 U.S. 678 (1946). *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Dismissal would be proper under *Hood* only "where the alleged claim under the Constitution or federal statutes . . . is wholly insubstantial and frivolous." *Hood*, 327 U.S. at 682-83.

1. The Tribes' Foreign Commerce Clause Claim

The United States Constitution vests Congress with the exclusive power to "regulate Commerce with foreign Nations." U.S. Const. art I, § 8, cl. 3. The Court agrees that the cross-border transportation of crude oil through a pipeline constitutes a form of foreign commerce. *See United States v. Ohio Oil Co.*, 234 U.S. 548, 560 (1914); *Bd. of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48, 57 (1933) ("The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted."); *State v. Brown*, 850 F. Supp. 821, 827 (D. Alaska 1994).

The President's power is limited to that granted to him by the Constitution or by Congress. *See Youngstown*, 343 U.S. at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or the Constitution itself."). President Trump purported to issue the 2019 Permit pursuant to the authority vested in him "as President by the Constitution," "including Article II . . . which gives the President authority over foreign affairs." 84 Fed. Reg. 15491.

The Tribes allege that President Trump's issuance of the 2019 Permit violates the Foreign Commerce Clause. (Doc. 58 at 108.) TC Energy and Federal Defendants assert that the Tribes failed to state a claim for relief under the Foreign Commerce Clause. (Doc. 65 at 29; Doc. 67 at 31.) The Court in its *IEN December 2019 Order* questioned the President's authority to issue the 2019 Permit and

discussed Congress's and the President's past efforts to regulate cross-border pipeline permitting. *IEN December 2019 Order*, No. CV-19-28-GF-BMM, at 21-30. The Court directs the parties to its *IEN December 2019 Order* for a complete discussion of the Foreign Commerce Clause considerations that the 2019 Permit invokes. *Id.*

Based on the Court's discussion in the *IEN December 2019 Order*, and the need for further argument on the issue, the Court concludes that the Tribes have pled a plausible claim that the President exceeded his constitutional authority and usurped Congress's authority to regulate foreign commerce when he issued the 2019 Permit. The Court will deny Federal Defendants' and TC Energy's motions to dismiss the Tribes' Foreign Commerce Clause claim.

2. The Tribes' Treaty Claims

Treaties are "the supreme law of the land." U.S. Const. art. VI, cl. 2. A treaty with an Indian tribe represents a contract between the Indian tribe and the United States. *Elk v. United States*, 87 Fed. Cl. 70, 78 (2009) (citing *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("A treaty . . . is essentially a contract between two sovereign nations.")). Courts should interpret treaties to give effect to the intent of the signatories. *Elk*, 87 Fed. Cl. at 78.

Courts focus their interpretation of treaties "upon the historical context in which it was written and signed." *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1012 (2019); *Tulee v. Washington*, 315 U.S. 681, 684 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council.") Courts must construe treaties "to give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).

The Tribes allege that Article 3 of the 1851 Fort Laramie Treaty and Article 7 of the 1855 Lame Bull Treaty create binding obligations on the United States to protect the Tribes' natural resources from waste. (Doc. 58 at 79.) The Tribes further allege that Articles 2 and 16 of the 1868 Fort Laramie Treaty require TC Energy to obtain Rosebud's consent before crossing its territory, which includes it surface and mineral rights. (Doc. 58 at 79.)

TC Energy and Federal Defendants argue that the Tribes have failed to state treaty claims against the President. (Doc. 65 at 22; Doc. 67 at 23.) TC Energy and Federal Defendants reason that the President stands immune from suit for alleged treaty violations. (Doc. 65 at 22-23; Doc. 67 at 23.) Sovereign immunity does not apply, however, to claims alleging that an officer acted in an unconstitutional manner or beyond the officer's statutory authority. *Swan*, 100 F.3d at 981; *League*

of Conservation Voters v. Trump, 303 F. Supp. 3d 985, 993 (D. Alaska 2018). The Court may review the President's actions for constitutionality and lawfulness. *See Franklin*, 505 U.S. at 801.

TC Energy and Federal Defendants further argue that the 2019 Permit does not violate the Treaties because the 2019 Permit does not cause depredation on Indian land. (Doc. 65 at 23 (citing *Gros Ventre Tribe v. United States*, 469 F.3d 801, 813 (9th Cir. 2006) (concluding that the government is only required to protect against "depredations that occur on Indian land")); Doc. 67 at 29.) Whether the 2019 Permit causes depredation on Indian land depends on the scope of the 2019 Permit's approval. As discussed above, the Court assumes at this point in the litigation that the 2019 Permit authorizes the entire Keystone pipeline. *See* 84 Fed. Reg. at 13101-03. The Tribes have alleged sufficiently that depredations will or have occurred already on their land if the 2019 Permit authorizes the entire Keystone pipeline. (*See* Doc. 58 at 33, 48-50.)

TC Energy and Federal Defendants also seek to dismiss the Tribes' NEPA, NHPA, and APA claims, and Rosebud's Indian Rights-of-Way Act and Indian Mineral Leasing Act claims. (Doc. 65 at 25, 31; Doc. 67 at 16, 22, 25). The trust relationship between the United States and the Indian people imposes a fiduciary duty on the government when it conducts "any Federal government action which

relates to Indian Tribes." *See Nw. Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515, 1519–20 (W.D. Wash. 1996) (quotations omitted).

The Tribes oppose the motions to dismiss their statutory claims and assert that the statutory obligations inform the United States's duties to the Tribes under the Treaties. (Doc. 74 at 39, 69.) The Tribes allege that NEPA, NHPA, APA, the Indian Rights-of-Way Act, and the Indian Mineral Leasing Act establish the minimum fiduciary duty that the United States owes to the Tribes. (Doc. 74 at 39 (citing *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006)).)

Treaties represent an integral part of the "the supreme law of the land." *See* U.S. Const. art. VI, cl. 2. The Tribes have asserted that the 2019 Permit proves unconstitutional because the 2019 Permit did not satisfy the fiduciary duties that the United States owes to the Tribes under the Treaties. The 1968 Executive Order and the 2004 Executive Order required the Secretary of State to perform a comprehensive review of cross-border pipeline permits. 69 Fed. Reg. at 25299; 33 Fed. Reg. at 11741. The Secretary of State would request the views of various departments and agencies when it received an application for a cross-border pipeline permit. 69 Fed. Reg. at 25300; 33 Fed. Reg. at 11741. The Secretary of State would consider these views to determine whether the issuance of a permit "would serve the national interest." 69 Fed. Reg. at 25300; 33 Fed. Reg. at 11741. The State Department previously recognized that Keystone needed to comply with

other applicable law. *IEN November 2017 Order*, 2017 WL 5632435, at *3. President Trump ignored these historical practices when he issued the 2019 Permit. *See* 84 Fed. Reg. at 13101.

The Court concludes that the Tribes have alleged sufficiently their treaty and statutory claims at this point in the litigation. The Tribes' claims are not "wholly insubstantial and frivolous." *See Bell*, 327 U.S. at 682-83. The Court will deny TC Energy's and Federal Defendants' motions to dismiss the Tribes' treaty and statutory claims.

3. The Tribes' Jurisdiction

The Tribes allege that they have jurisdiction over Keystone. The Tribes contend that their jurisdiction over Keystone requires TC Energy to comply with Rosebud tribal law and, to the extent it applies, Fort Belknap tribal law. The Tribes possess inherent sovereign powers, including the authority to exclude. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011). "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). A tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66.

The Tribes allege that they have civil authority over Keystone. The Tribes contend that their jurisdiction over Keystone requires TC Energy to comply with Rosebud tribal law and, to the extent it applies, Fort Belknap tribal law. (Doc. 58 at 116 (citing *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 897–98 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 648 (2018) (requiring exhaustion in tribal forum when tribal jurisdiction is at least colorable or plausible)); Doc. 74 at 61.) TC Energy asserts that the Tribes lack any power over Keystone because Keystone will not cross the current boundaries of either the Rosebud Reservation or the Fort Belknap Reservation. (Doc. 65 at 35.)

Rosebud has alleged, however, that Keystone will cross and trespass upon Rosebud surface and mineral estates. (Doc. 58 at 52-59.) Rosebud asserts that, therefore, TC Energy must comply with Rosebud law. (Doc. 58 115-16; Doc. 74 at 62-63.) At this point in the litigation, Rosebud has alleged sufficiently that TC Energy is required to comply with tribal laws as it seeks to construct and operate Keystone.

4. Venue

TC Energy argues that venue in this Court is improper. (Doc. 65 at 33.) Courts look to the place of injury in assessing venue when addressing constitutional claims. *See Serv. Women's Action Network v. Mattis*, 320 F. Supp. 3d 1082, 1088 (N.D. Cal. 2018). When one or more claims are closely related, in

that they arise out of a common nucleus of operative facts, venue proves proper as to all claims so long as venue is established for just one claim. *Id.*

The Court recognizes that whether venue is proper in this Court depends, in large part, on the scope of the 2019 Permit's approval. The Tribes' claims all arise out of a common nucleus of operative facts if the 2019 Permit approves the entire Keystone pipeline. *See Serv. Women's Action Network*, 320 F. Supp. 3d at 1088. Venue is proper, therefore, in this Court at this point in the litigation based on the assumption that 2019 Permit approves the entire Keystone project.

CONCLUSION

The Tribes have conceded that the revocation of the 2017 Permit renders moot their Eighth through Eleventh Claims for Relief. (Doc. 74 at 15.) The Tribes have alleged otherwise plausible claims for relief regarding the 2019 Permit. The Tribes' First through Seventh Claims for Relief remain.

The Court recognizes that the strength of each of the Tribes' remaining claims and each claim's relation to each Defendant will likely shift as the litigation proceeds. TC Energy and Federal Defendants remain free to raise issues as the landscape of the case becomes clearer as the litigation proceeds.

ORDER

Accordingly, it is **HEREBY ORDERED** that TC Energy's Motion to Dismiss (Doc. 64) is **GRANTED, IN PART,** and **DENIED, IN PART**.

It is **FURTHER ORDERED** that Federal Defendants' Motion to Dismiss (Doc. 66) is **GRANTED, IN PART,** and **DENIED, IN PART**.

The Tribes' Eighth through Eleventh Claims for Relief (Doc. 58 at 118-124) are **DISMISSED AS MOOT** pursuant to the Tribes' concession (Doc. 74 at 15).

DATED this 20th day of December, 2019.

Brian Morris
United States District Court Judge