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

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| ROSEBUD SIOUX TRIBE, *et al.*,<br><br>Plaintiffs,<br>v.<br><br>DONALD J. TRUMP, *et al.*,<br><br>Defendants,<br>and<br><br>TC ENERGY CORP., *et al.*,<br><br>Defendant-Intervenors. | CV 18-118-GF-BMM<br><br>**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** |

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[1] Exhibits 1 through 10 are attached to Defendants' Responses to the Court's Questions in Its December 20, 2019 Order, ECF No. 101. Exhibits 11 through 14 are attached to Defendants' Statement of Undisputed Facts, accompanying this memorandum.

Exhibit 11 – Department of State Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, L.P. Application for a Presidential Permit (November 3, 2015)

Exhibit 12 – TransCanada Keystone Pipeline, L.P. Application for Presidential Permit for Keystone XL Pipeline Project (May 4, 2012)

Exhibit 13 – Memorandum of January 24, 2017, Construction of Keystone XL Pipeline

Exhibit 14 – TransCanada Keystone Pipeline, L.P. Application for Presidential Permit for Keystone XL Pipeline Project (January 26, 2017)

## INTRODUCTION

Plaintiffs challenge the decision of the President of the United States to issue a Permit allowing the Keystone XL Pipeline to cross the border from Canada into the United States. Plaintiffs' challenge is based on a mischaracterization of what the Permit actually authorizes and an unsupported view of the Constitution's allocation of authority between the President and Congress.

First, Plaintiffs have failed to demonstrate standing to challenge the Permit authorizing the construction of border facilities. Instead, Plaintiffs allege harms that would occur along the 875-mile pipeline route *after* TC Energy obtains all necessary federal authorizations and the pipeline has been constructed. Such alleged, future harms are insufficient to show standing, because the Permit authorizes only the construction of facilities in a 1.2-mile segment at the border of the United States. Likewise, Plaintiffs cannot assert a proper cause of action under which to seek relief against the President, nor can they articulate a personal interest protected by the Commerce Clause. The Court should dismiss this case outright and decline to resolve the treaty and constitutional issues raised by Plaintiffs.

Second, Plaintiffs' tribal treaty claims lack merit because the authorization of border-crossing facilities does not infringe on their treaty rights. They depict the border-crossing Permit as "authoriz[ing] the entire Pipeline." First Am. Compl. ¶ 15, ECF No. 58. But the Permit does no such thing. By its own terms, as

well as the terms of TC Energy's application for a presidential permit, the Permit only applies to a 1.2-mile stretch of the pipeline at the Border. Plaintiffs' attempt to characterize the Permit as authorizing portions of the pipeline that could pass on or near their territory is a clear mischaracterization of the Permit. Further, the statutory claims lack merit because the statutes Plaintiffs cite, such as the National Environmental Policy Act ("NEPA"), do not apply to the President.

Finally, Plaintiffs' constitutional claims are baseless. Ever since President Grant authorized the landing of a telegraph cable on the shores of the United States in 1875, Presidents have authorized border crossings for a variety of facilities. And while Congress has enacted its own requirements for some types of border crossings, it has never done so for oil pipelines. Thus, the purported conflict with Congress's authority that Plaintiffs allege simply does not exist.

Accordingly, summary judgment should be granted to Defendants on all claims.

## BACKGROUND

The factual background is set forth in Defendants' separately filed Statement of Undisputed Facts. The history of, and the legal basis for, the issuance of border crossing permits by the President is also set forth in Defendants' Responses to the Court's Questions in Its December 20, 2019 Order ("Defs.' Resp."), ECF No. 101, which is incorporated by reference.

## STANDARD OF REVIEW

"Summary Judgment is appropriate where the movant demonstrates that no genuine dispute exists 'as to any material fact' and the movant is 'entitled to judgment as a matter of law.'" *Tarpey v. United States*, No. CV-17-94-B-BMM, 2019 WL 1255098, at *2 (D. Mont. Mar. 19, 2019) (quoting Fed. R. Civ. P. 56(a)); *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011). The moving party "bears the initial responsibility of informing the district court of the basis for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "If the moving party satisfies that burden, summary judgment shall be granted unless the non-moving party demonstrates 'specific facts showing that there is a genuine issue for trial.'" *Tarpey*, 2019 WL 1255098, at *2 (quoting *Celotex*, 477 U.S. at 324). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party. *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008).

## ARGUMENT

### I. The Court Lacks Jurisdiction Over Plaintiffs' Claims.

#### A. Plaintiffs Have Failed to Demonstrate Standing.

Plaintiffs have failed to demonstrate standing for their claims against the President and the agencies. None of Plaintiffs' alleged injuries relate to the 1.2-mile segment of the pipeline at the border, which is all that the President's border-

crossing Permit authorized. *See* Authorizing TransCanada Keystone Pipeline, L.P., to Construct, Connect, Operate, & Maintain Pipeline Facilities at the International Boundary Between the United States & Canada, 84 Fed. Reg. 13,101 (Mar. 29, 2019) ("Permit"). The allegations of harm due to the construction of the pipeline as a whole are not caused by the President's action in issuing the cross-border permit, and no action by the agencies is challenged. Their alleged injuries are also not redressable because enjoining the President would violate the separation of powers doctrine.

To demonstrate standing to sue, a plaintiff must show: (1) "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). "'[T]hreatened injury must be *certainly impending* to constitute injury in fact,'" and "'[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009).

Although a federal court must always assure itself of jurisdiction, the specific nature of Plaintiffs' suit—challenging presidential action in the arena of

foreign affairs and national security—demands heightened scrutiny of their standing assertions. *See Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) (observing that the Court's standing inquiry "has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."); *Clapper*, 568 U.S. at 408-09 (observing that the Court has "often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs").

Plaintiffs have not met their burden. They fail to demonstrate any injury caused by the authorization of border facilities. Instead, they allege injuries to their members that they believe will result from the construction and operation of other segments of the pipeline the Permit will allegedly encourage. They allege that members of the Rosebud Sioux Tribe will be harmed if the pipeline is constructed on or near Rosebud territory in South Dakota. *See, e.g.*, First Am. Compl. ¶¶ 98-99, 107-119, 120-141. The Fort Belknap Indian Community similarly alleges harm due to the potential construction and operation of the pipeline near their reservation in Montana. *See id.* ¶¶ 142-154. But none of these allegations can be traced to the construction, operation, and maintenance of a 1.2-mile segment of pipeline at the United States border, *see* Permit, 84 Fed. Reg. at 13,101, and therefore are not caused by the issuance of the Permit.

Plaintiffs have not alleged (or shown) any actual or imminent, concrete and particularized injury that is fairly traceable to the border-crossing Permit itself. Rather, Plaintiffs allege that the complained-of activities will occur near their reservations, which are not located in the vicinity of the small and discrete area subject to the Permit. *See* First Am. Compl. ¶¶ 98-154. It is not enough that there are tribal lands that would be near the pipeline somewhere along the 875 miles of pipe or that resources along the length of the pipeline may be impacted. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 887-89 (1990) ("bare allegation of injury" that plaintiff used land "in the vicinity" of the action failed to show standing) (citation omitted). Instead, they must allege a concrete and particularized harm traceable to the issuance of the Permit—and not merely an injury traceable to the entire pipeline project. *See Summers*, 555 U.S. at 495. They have failed to do so.

Indeed, in their opposition to Defendants' motion to dismiss, Plaintiffs made no effort to attempt to demonstrate harm that is fairly traceable to the construction of border facilities. *See* Combined Resp. to Defs.' Motions to Dismiss, at 12-15 ("Pls.' Resp."), ECF No. 74. Instead, their standing arguments were based on the erroneous contention that the President "permit[ed] the entire length of the Pipeline." *Id.* at 12. Under the lenient standard applicable at the pleading stage, the Court found this contention to be "plausible" and therefore "assume[d] that the 2019 Permit authorizes the entire Keystone pipeline." Dec. 20, 2019 Order

("Order") at 10, ECF No. 92. Under the more probing standard applicable at the summary judgment stage, this finding cannot stand.

The only evidence before the Court is that TC Energy applied for permission "to construct, connect, operate, and maintain the specific border crossing facilities associated with Keystone XL Project." TransCanada Keystone Pipeline, L.P., Application for Keystone XL Pipeline Project (Jan. 26, 2017) at 6, Ex. 14. A diagram depicting the border-crossing facilities that TC Energy seeks to construct are shown in Exhibit B to the application. With the issuance of the Permit, the President gave TC Energy permission "to construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada at Phillips County, Montana, for the import of oil from Canada to the United States." Permit, 84 Fed. Reg. at 13,101. Thus, the contention that the Permit authorizes the entire pipeline is simply belied by the facts.

In an effort to establish standing, Plaintiffs also rely on alleged procedural injuries. *See* Pls.' Resp. at 16. Such alleged injuries, however, are insufficient to establish standing. Plaintiffs do not allege that the President has failed to follow any procedures relating to the issuance of cross-border permits. Instead, the procedural requirements of NEPA and the National Historic Preservation Act ("NHPA") relate only to the federal agencies who are responsible for authorizing certain aspects of the pipeline. *See* section II.B., *infra*. Plaintiffs will have ample

opportunity to challenge such authorizations separately. Moreover, alleged procedural injuries alone are insufficient to establish standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("a procedural right *in vacuo*—is insufficient to create Article III standing").

Finally, out of respect for the separation of powers, the Court cannot enjoin the President's issuance of the Permit. As this Court has recognized, "[s]eparation-of-power principles generally counsel against courts granting injunctive and declaratory relief against the President in the performance of his official duties." Order at 19. And while this Court is correct that courts have, in limited circumstances, "vacated unlawful presidential decisions," *id.*, none of the cases relied upon by the Court address the question of whether an injunction can issue directly against the President himself. *Cf. League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013, 1029–31 (D. Alaska 2019) (finding President's act was inconsistent with "text and context" of statute), *appeal docketed*, Nos. 19-35460, 19-35461, 19-35462 (9th Cir. May 29, 2019)[2]; *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) (finding redressability through relief against defendants

[2] The United States appealed the district court decision in *League of Conversation Voters* and that appeal is pending before the Ninth Circuit. *See League of Conservation Voters v. Trump*, No. 19-35460 (9th Cir. *docketed* May 29, 2019). The issues on appeal relate to the justiciability of the suit, including the propriety of suing the President and finding invalid an Executive Order untethered to agency action.

other than the President), *vacated and remanded*, 138 S. Ct. 377 (2017); *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998) (overturning legislation affording President line item veto). It has been settled for more than a century that the answer to that question is no. Federal courts "ha[ve] no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1897); *see Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (plurality opinion); *id.* at 827 (Scalia, J., concurring in part and concurring in the judgment) ("The apparently unbroken historical tradition supports the view, which I think implicit in the separation of powers established by the Constitution, that the principals in whom the executive and legislative powers are ultimately vested — viz., the President and the Congress (as opposed to their agents) — may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary. For similar reasons, I think we cannot issue a declaratory judgment against the President.").

The Permit was issued solely by the President. *See* Permit, 84 Fed. Reg. at 13,101. Plaintiffs' request thus raises precisely the separation of powers concerns that have animated courts to insulate the President from equitable relief. *See Swan v. Clinton*, 100 F.3d 973, 976 (D.C. Cir. 1996).

Accordingly, all of Plaintiffs' claims fail for lack standing.

### B. The Claims Against the Agencies Fail for Lack of Final Agency Action.

The claims against the U.S. Department of State and the U.S. Department of the Interior, *see* First Am. Compl. ¶¶ 31-35, fail because Plaintiffs do not challenge final agency action. 5 U.S.C. § 704; *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1171-72 (9th Cir. 2017). Plaintiffs allege that the agencies have various responsibilities associated with the approval of the pipeline, but they fail to challenge any final agency actions by the agencies. At the time amended complaint was filed, none of those actions, including BLM's approval of a right-of-way in late January, had been taken and none are identified in the lawsuit. Further, the claims challenging the 2017 Presidential Permit issued by an official within the State Department have been dismissed as moot, *see* Order at 22, and no other action by the State Department is alleged in the lawsuit. Therefore, the claims against the agencies fail for lack of a challenged final agency action. *See Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1104 (9th Cir. 2007) (declining to review a NEPA claim absent a final agency action).

### C. Plaintiffs' Claims Against the President Are Barred by Sovereign Immunity.

Sovereign immunity bars suits against the United States and its officials sued in their official capacity unless Congress expressly waives that immunity. *Lane v.*

*Pena*, 518 U.S. 187, 192 (1996). A plaintiff suing the United States must establish that its suit "falls within an unequivocally expressed waiver of sovereign immunity by Congress." *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007). An "official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Thus, absent a congressional waiver, sovereign immunity extends to any suit against a federal official in an official capacity.

Plaintiffs have sued the President for an official action—issuing a Presidential permit. But Plaintiffs have not identified any waiver of sovereign immunity because Congress has not enacted one. Although the Administrative Procedure Act ("APA") waives sovereign immunity for non-monetary relief against the United States, 5 U.S.C. § 702, that waiver does not apply to suits against the President. *Franklin*, 505 U.S. at 800–01. The Court should dismiss Plaintiffs' suit on sovereign immunity grounds. Dismissal does not necessarily insulate the challenged presidential action from review: "Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Id.* at 828 (Scalia, J., concurring in part). Plaintiffs have not done so here.

Accordingly, the Court lacks jurisdiction over Plaintiffs' claims.

## II. The Court Lacks Jurisdiction over the Statutory and Treaty Claims and the Claims Fail on the Merits.

The Court lacks jurisdiction over the Plaintiffs' statutory and treaty claims for additional reasons. Plaintiffs allege that the claims may be brought under the doctrine of non-statutory review, but such review is unavailable because the Plaintiffs fail to identify a clear violation of a statutory mandate or a constitutional provision. Further, the statutory claims fail on the merits because the statutes that Plaintiffs cite do not apply to the President. Likewise, the treaty claims fail because they rely on the same alleged statutory violations as the statutory claims and because the President simply did not approve any activity on tribal lands.

### A. The Statutory and Treaty Claims Cannot Be Brought Against the President Under the Doctrine of Non-Statutory Review.

Judicial review under the APA of Plaintiffs' statutory claims against the President is foreclosed by Supreme Court precedent. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (holding that, because "the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements"); *Dalton v. Specter*, 511 U.S. 462, 470 (1994) ("actions of the President . . . are not reviewable under the APA"). Nevertheless, Plaintiffs allege that their claims may proceed under the doctrine of non-statutory review. Such review, however, is unavailable for Plaintiffs' statutory and treaty claims for the reasons explained below.

In order to proceed under a non-statutory review theory, Plaintiffs must demonstrate either a violation of a clear statutory mandate or the Constitution. *See id.* at 474-76 (1994); *see also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)). Non-statutory review is "extremely limited [in] scope." *Int'l Ass'n of Machinists & Aerospace Workers, Dist. Lodge 166 v. Griffin*, 590 F. Supp. 2d 171, 175 (D.D.C. 2008) (quoting *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988)). In order to bring such a claim, Plaintiffs must show that the official acted "in excess of its delegated powers and contrary to a specific prohibition which is clear and mandatory." *Nat'l Air Traffic Controllers Ass'n AFL-CIO v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006) (internal quotation marks and citation omitted).

Plaintiffs have failed to show that non-statutory review is applicable at all. The Supreme Court stated in *Dalton*, that it "assume[d] for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA." 511 U.S. at 474. In light of the fact that non-statutory review effectively allows a plaintiff to avoid the requirements of the APA, the availability of such review is limited. *See id.* ("[I]f every claim alleging that the President exceeded his statutory authority were considered a constitutional claim, the exception identified in *Franklin* [for review of constitutional claims] would be broadened beyond recognition."); *see also id.* at

472 ("Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution."). Plaintiff have failed to offer any authority for the proposition that the statutory and treaty claims brought in this case fall within the limited class of statutory claims that may be brought outside of the APA context. Further, as discussed below, they have failed to allege a violation of a statute that even applies to the President.

Therefore, non-statutory or *ultra vires* review is unavailable and the Court lacks jurisdiction over Plaintiffs' statutory and treaty claims.[3]

**B. The Statutory Claims Fail on the Merits.**

Assuming that the Court finds that non-statutory review of Plaintiffs' statutory claims is not foreclosed, Plaintiffs' statutory claims fail on the merits under non-statutory review because Plaintiffs fail to allege any clear and mandatory directive that the President violated by issuing the Permit. Plaintiffs allege that, in issuing the Permit, the President violated NEPA, the National Historic Preservation Act ("NHPA"), and federal right-of-way and mineral statutes. *See, e.g.*, First Am. Compl. ¶¶ 399-407, 411-417, 422-426. These

[3] Nor can the treaty claims proceed as an alleged common law action for breach of trust. *See Gros Ventre Tribe v. United States*, 469 F.3d 801, 813-14 (9th Cir. 2006).

statutes do not even apply to the President. NEPA applies only to "agencies of the Federal Government," 42 U.S.C. § 4332, 4333, and NEPA's regulations explicitly define the term "Federal agency" to exclude "the President." 40 C.F.R. § 1508.12. Similarly, NHPA applies to "the head of any Federal agency" and the "head of any Federal department or independent agency," 54 U.S.C. § 306108, and uses the same definition of "agency" as in the APA. *Id.* § 300301.

The President also did not authorize the pipeline to cross tribal land. *See* First Am. Compl. ¶ 423 (citing 25 U.S.C. § 324). Nor did the President approve any exploration, drilling, or mining operations on tribal lands. *See* First Am. Compl. ¶ 426 (citing 25 C.F.R. § 211.20, 212.20, 211.48(a)). Given that these statutes do not even apply to the President or to the 1.2 miles of land at the border, the claims fail on the merits.

**C. The Treaty Claims Fail on the Merits.**

Assuming the Court has jurisdiction over the treaty claims, they fail for two primary reasons. First, the Permit only authorizes construction of the border facilities and therefore did not authorize any action on tribal land and therefore did not violate the treaty obligation to avoid depredations on tribal land. Second, the obligations under the treaty can only be measured in conjunction with generally applicable statutes, which the President has not violated. Therefore, the claims fail on the merits.

**1. The Permit Authorizes Only the Border Crossing Facilities.**

The duty to avoid depredations under the 1851 Fort Laramie Treaty and the 1855 Lame Bull Treaty extend only to tribal land. *Gros Ventre*, 469 F.3d at 813 ("[T]he United States agreed to protect the Tribes from depredations that occurred only on tribal land."). Because the Permit does not authorize any pipeline construction across tribal land, the treaty claim fails.

The President has authorized only a border crossing. *See* section I, *supra*. The President has not approved the whole pipeline and has not authorized the pipeline to cross the Tribes' land. The Plaintiffs allege that the President violated the Tribes' treaty rights "by approving the Pipeline through Rosebud territory." First Am. Compl. ¶ 382. That is simply not the case. The Permit authorizes the construction and operation of pipeline facilities "at the international border of the United States and Canada at Phillips County." Permit, 84 Fed. Reg. at 13,101. The border facilities are expressly defined to include only the section of the pipeline from the border to "the first mainline shutoff valve in the United States approximately 1.2 miles from the international border." *Id.* The same facilities are described in TC Energy's Application. *See* TC Energy's 2017 Application at 6 & Exhibit B, Ex. 14.

The Permit does not authorize anything other than the Border facilities of the Keystone XL Pipeline project. Insofar as the Permit refers to facilities other than

the Border facilities, none of the provisions include any affirmative *grant* of authority. Rather, they reinforce the fact that the Permit does not give TC Energy carte blanche to construct the pipeline and that TC Energy will be still subject to the limitations enumerated in its application for the border crossing. The Permit explicitly requires TC Energy to secure all requisite approvals from local, state and federal entities, specifying that "[t]he permittee is responsible for acquiring any right-of-way grants or easements, permits, and other authorizations as may become necessary or appropriate." Permit art. 6(1), 84 Fed. Reg. 13,102 (applying to both Border facilities and non-border facilities). Thus, far from authorizing the entire Keystone XL pipeline, the Permit merely confirms that TC Energy must obtain all requisite approvals before constructing and operating the project.

Finally, there has simply been no federal authorization allowing the pipeline to cross tribal land. Defendants agree that, if the pipeline were to cross the Tribes' reservation land, then TC Energy would be required to seek a right-of-way to cross tribal land and the right-of-way would have to be approved by the Bureau of Indian Affairs before the construction of the pipeline could proceed. *See* 25 U.S.C. § 323, 324. Further, the permit expressly requires TC Energy to obtain "any right-of-way grants or easements, permits, or other authorizations as may become necessary or appropriate." Permit art. 6(1), 84 Fed. Reg. at 13,102. No application for a right-of-way to cross tribal lands has been submitted or approved. Therefore, there is

simply no factual basis for the allegation that the President, or anyone else, has authorized the pipeline to cross tribal land.

**2. The Treaty Obligations Can Only Be Determined in the Context of Generally Applicable Statutes, and the President Did Not Violate Any Statutory Requirements.**

Even if the Permit authorized construction of facilities across tribal land (which it does not), Plaintiffs' claims would still fail because the Plaintiffs have not shown that the President violated any generally applicable statutory requirements. Plaintiffs allege that the President allowed "depredations" of tribal lands in violation of the government's obligations under the 1851 Fort Laramie Treaty and the 1855 Lame Bull Treaty by failing to avoid depredations to tribal land. *See* First Am. Compl. ¶¶ 381, 443. The duty under the treaties to avoid depredation, however, are satisfied by the government's compliance with applicable statutory and regulatory requirements. The President violated no statutory requirements, as there were none that applied to his issuance of the Permit.

The duty to avoid depredations does not establish a duty to avoid harm to reservation lands beyond complying with applicable environmental laws. *See Okanogan Highlands All. v. Williams*, 236 F.3d 468, 479-80 (9th Cir. 2000) (in approving a gold mine, BLM satisfied its trust obligations through compliance with NEPA); *Gros Ventre Tribe*, 469 F.3d at 815 ("Nothing within any of the

statutes [including FLPMA] or treaties cited by the Tribes imposes a specific duty on the government to manage non-tribal resources for the benefit of the Tribes."); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (holding that the United States' general trust relationship is discharged by compliance with NEPA and the NHPA).

Indeed, in *Gros Ventre Tribe*, the plaintiffs cited the very same depredation provisions in the 1851 Fort Laramie Treaty and the 1855 Lame Bull Treaty (referred to as "the Treaty with the Blackfeet"), yet the court concluded that those treaties did not impose a duty on the government beyond complying with applicable environmental laws. 469 F.3d at 812. Thus, the duty to avoid "depredations" must be viewed in terms of the government's obligations to comply with applicable environmental laws. The environmental laws that the Tribes allege to have been violated, *e.g.*, NEPA and the NHPA, do not apply to the President. Therefore, those laws cannot provide the basis for any violation of law by the President, let alone one that is "clear and mandatory." *Nat'l Air Traffic Controllers*, 437 F.3d at 1263.

Accordingly, because the treaty claims rely on the same statutory standards as Plaintiffs' statutory claims, they fail for the same reason—namely, the President has violated no statutory requirement.

## III. The Constitutional Claims Fail on Jurisdictional Grounds and On the Merits.

The constitutional claims fail for reasons in addition to the one identified above, *see* section I., *supra*, and the also fail on the merits. Plaintiffs fail to identify a cause of action that would allow them to bring their constitutional claims. Their constitutional claims fail on the merits because the President's authority to issue permits for border-crossing facilities, in the absence of Congressional action, is well-established; Presidents have issued such permits for nearly 150 years.

### A. Plaintiffs Identify No Cause of Action that Would Allow Their Claims.

Even if Plaintiffs could satisfy the requirements for Article III jurisdiction—which they cannot—they have failed to articulate a proper cause of action to support the Court's jurisdiction. This is also fatal to their constitutional claims. Neither the Constitution nor any statute provides an express cause of action for the alleged violations of the Commerce Clause. *See, e.g.*, *Alexander v. Trump*, 753 F. App'x 201, 206 (5th Cir. 2018) ("Although there have been a few notable exceptions, the federal courts . . . have been hesitant to find causes of action arising directly from the Constitution."), *cert. denied*, 139 S. Ct. 1200 (2019). And this is not "a proper case" for courts to provide the "judge-made remedy" of an implied cause of action in equity to enjoin unconstitutional action by public officials.

*Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *cf. Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). The APA's cause of action, 5 U.S.C. § 704, is unavailable here because APA review of action by the President or the agencies is unavailable for the reasons explained above. *See* section I.C., *supra*. And this is not "a proper case" for courts to provide the "judge-made remedy" of an implied cause of action in equity to enjoin unconstitutional action by public officials. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *cf. Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017).

"[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . . depend on traditional principles of equity jurisdiction," which depends on whether the relief request "was traditionally accord by courts of equity." *Group Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999) (citations omitted). Equitable suits against the government traditionally have been recognized where a party seeks *preemptively to assert a defense* that would otherwise be available to it in an anticipated enforcement action by the government. *See Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014); *see, e.g., Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 487, 491 n.2 (2010). There are no circumstances here that would fall within the sweep of traditional equity jurisdiction.

Plaintiffs' failure to identify a viable cause of action to support their constitutional claims also mandates entry of summary judgment in Defendants' favor.

**B. Plaintiffs' Commerce Clause Claim Lacks Merit.**

Plaintiffs' Commerce Clause claims fail on the merits because the President possesses inherent constitutional authority to approve cross-border permits. Congress has never enacted legislation attempting to curtail that authority, in connection with Keystone XL or otherwise.

The President's authority to issue the Permit is rooted in his inherent constitutional responsibility for foreign affairs and as Commander-in-Chief. *See, e.g.*, *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–636 & n.2 (1952) (Jackson, J., concurring) (the President can "act in external affairs without congressional authority") (citing *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304 (1936)); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations'") (quoting *Youngstown*, 343 U.S. at 610-11

(Frankfurter, J., concurring)). Thus, the President's power in the field of international relations "does not require as a basis for its exercise an act of Congress." *Curtiss–Wright Export Corp.*, 299 U.S. at 320; *Youngstown*, 343 U.S. at 635-36 & n.2.

As previously demonstrated, Presidents have long exercised authority over border crossings and Congress has acquiesced to the President's exercise of that authority. *See* Defs.' Resp. at 6-26. Congress has never legislated with respect to cross-border oil pipelines, much less in a manner intended to curtail the long-running Presidential practice of authorizing such pipeline crossings. The two instances where Congress sought to intervene concerning the Keystone XL Pipeline reinforce, rather than undermine, the President's role as the appropriate authorizing federal officer.

First, Congress enacted the Temporary Payroll Tax Cut Continuation Act ("TPTCCA") of 2011, Pub. L. No. 112-78, 125 Stat. 1280. Although the TPTCCA indicated an intent that the pipeline be approved, it left the actual decision to the President to determine whether the border-crossing for the pipeline would "serve the national interest" and therefore should be approved. *See id.* § 501(b)(1)–(2), 125 Stat. at 1289-90. When President Barack H. Obama nonetheless determined that pipeline "would not serve the national interest" and denied the permit, Congress did not challenge the President's determination. *See* 77 Fed. Reg. 5,679,

5,679 (Jan. 18, 2012). Thus, far from showing that Congress sought to encroach on the President's historic role in deciding whether to authorize border-crossings for oil pipelines, the TPTCCA took that role as a given.

Second, in 2015, Congress passed the Keystone XL Pipeline Approval Act, S. 1, 114th Cong. §§ 1-6 (1st Sess. 2015). *See* S.1., Keystone XL Pipeline Approval Act ("Approval Act") (Jan. 6, 2015), ECF No. 101-9. The bill proposed that the Keystone XL Pipeline be approved without additional analysis under the National Environmental Policy Act. *See id.* § 2(a)-(b). But the bill was never enacted into law because it was vetoed by President Obama. *See* Veto Message to the Senate: S. 1, Keystone XL Pipeline Approval Act, 2015 WL 758544 (White House Feb. 24, 2015). Therefore, Congress never actually exercised its authority. Moreover, the bill did not propose any regulatory scheme for cross-border oil pipelines and did not question the President's authority over such border-crossings. Indeed, the Senate majority report supporting the bill affirmed that "the President has, for more than a century, asserted authority to approve energy and telecommunication facilities that cross international borders pursuant to the President's constitutional authority over foreign affairs." S. Rep. No. 114-1, at 1 (2015), ECF No. 101-10.

In sum, Plaintiffs' claim that the President's issuance of a cross-border permit for the Keystone XL Pipeline unconstitutionally infringes on Congress's

Commerce Clause authority—an authority Congress has studiously declined to exercise in this arena—lacks merit.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that summary judgment be granted in their favor on all claims.

Respectfully submitted this 25th day of February, 2020,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 5,665 words, excluding the tables, caption, signature, certificate of compliance, and certificate of service.

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 25, 2020, a copy of the foregoing Defendants' Memorandum in Support of Motion for Summary Judgment was served on all counsel of record via the Court's CM/ECF system.

*/s/ Luther L. Hajek*
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