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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, and TC ENERGY CORP., *et al.*, Defendant-Intervenors.	CV 18-118-GF-BMM **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

EXHIBIT INDEX

[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, ECF No. 110.

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)

Exhibit 15 – 2019 Final Supplemental Environmental Impact Statement for the Keystone XL Project (December 2019), Excerpts Regarding the Analysis of Impacts to Cultural Resources

Exhibit 16 – 2014 Final Supplemental Environmental Impact Statement for the Keystone XL Project (January 2014), Excerpts Regarding the Analysis of Impacts to Cultural Resources

Exhibit 17 – Amended Programmatic Agreement and Record of Consultation (December 2013)

INTRODUCTION

Plaintiffs' claims challenging the President's issuance of a Presidential Permit for the Keystone XL Pipeline fail as a matter of law. The claims lack merit because the President's authority to issue a border-crossing permit is well-established, as evidenced by multiple Presidents' exercise of such authority over a lengthy span of 150 years. Moreover, Plaintiffs have failed to demonstrate any harm—let alone irreparable harm—caused by the authorization of construction of pipeline facilities at the international border. Plaintiffs' motion for a preliminary injunction fails for the following primary reasons.

First, Plaintiffs cannot show a likelihood of success on the merits because they lack standing to challenge the Permit. Plaintiffs allege no injury flowing from the construction of facilities in the 1.2-mile border segment. They instead allege harms from activities that would occur along the 875-mile pipeline route, but those are subject to separate federal and state approvals.

Second, Plaintiffs' tribal treaty claims lack merit because the authorization of border-crossing facilities does not infringe on their treaty rights. The Permit approves only the border segment and does not approve construction across tribal land. Further, the statutory claims lack merit because none of the statutes Plaintiffs rely on, including the National Environmental Policy Act ("NEPA"), apply to the President. Moreover, they have failed to show any violation of the Indian Right of

Way Act or the Indian Mineral Leasing Act.

Third, 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.

Finally—even assuming Plaintiffs could demonstrate a likelihood of success on the merits—Plaintiffs fail to demonstrate that the authorization of the border crossing is likely to cause them any irreparable. They allege harms from pipeline-related activities along the pipeline route, but those activities were not approved by the Permit. Moreover, Plaintiffs are wrong that construction of the pipeline would cause imminent, irreparable harm to cultural, mineral, and water resources.

Accordingly, Plaintiffs' motion for a preliminary injunction should be denied.

BACKGROUND

The factual background is set forth in Defendants' Statement of Undisputed Facts ("SUF"), ECF No. 110, filed in conjunction with Defendants' Motion for Summary Judgment, ECF No. 108. 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. Both are incorporated by reference.

PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is "an extraordinary and drastic remedy" that "should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted). To obtain a preliminary injunction, a plaintiff must demonstrate four elements: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of an injunction, (3) that the balance of equities tips in its favor, and (4) that the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A party *must* demonstrate a "likelihood of success on the merits" in order to obtain a preliminary injunction. *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (citations omitted). A party must also "demonstrate that irreparable injury is *likely* in the absence of an injunction," as opposed to merely possible. *Winter*, 555 U.S. at 22.[2]

[2] Notwithstanding *Winter* decision, the Ninth Circuit has held that a preliminary injunction may issue if the plaintiffs can show "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Defendants do not believe that the "serious questions" test remains viable following the Supreme Court's rulings in *Winter* and *Munaf* and reserve all rights to contest any application of that test here.

ARGUMENT

I. Plaintiffs Are Not Likely to Succeed on the Merits of Their Claims.

A. The Court Lacks Jurisdiction Over Plaintiffs' Claims.

1. 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.

Plaintiffs have not met their burden to demonstrate standing. *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."). 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, ECF No. 58. 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.[3]

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 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

[3] Plaintiffs' allegations of irreparable harm likewise relate to the construction of the length of the pipeline and pipeline operation, not the construction of the border facilities. *See* section II, *infra*.

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 v. Earth Island Inst.*, 555 U.S. 488, 495 (2009). They have failed to do so.

The only relevant evidence before the Court is TC Energy's application 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.

Finally, out of respect for the separation of powers, the Court cannot enjoin the President's issuance of the Permit. It has been well settled for over a century that a Court cannot issue an injunction against the President himself. 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.

2. 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*, 497 U.S. at 882-83; *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 the amended complaint was filed, none of those actions, including the U.S. Bureau of Land Management's ("BLM") approval of a right-of-way in late January, had been taken and none are identified 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).

3. 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). But Plaintiffs have not identified any such waiver here. Although the 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. Plaintiffs' claims against the President are therefore barred by sovereign immunity.

B. Plaintiffs Have No Likelihood of Success on The Commerce Clause Claim (Claim Two).

In addition to the jurisdictional flaws articulated above, Plaintiffs have no likelihood of success on the Commerce Clause claim because they fail to identify a cognizable cause right of action, and 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.

1. Plaintiffs Identify No Cause of Action that Would Allow Their Claim.

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). Specifically, the APA's cause of action, 5 U.S.C. § 702, 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*.

Moreover, 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). Whether an

equitable cause of action is available depends on whether the relief requested "was traditionally accorded by courts of equity." *See Group Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). 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. Accordingly, Plaintiffs have no viable cause of action for their constitutional claim.

2. Plaintiffs' Commerce Clause Claim Lacks Merit.

Plaintiffs' Commerce Clause claim fails on the merits because the President possesses inherent constitutional authority to approve cross-border permits, and Congress has never enacted legislation attempting to curtail that authority.

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 long 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 the pipeline "would not serve the national interest" and denied the permit, Congress did not challenge the President's determination. *See* Implementing Provisions of the Payroll Taxcut Continuation of 2011 Relating to the Keystone XL Pipeline Permit, 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.

For all of these reasons, Plaintiffs' Commerce Clause claim fails on the merits.

C. Plaintiffs Have No Likelihood of Success on The Mineral Claim (Claim Five).

In addition to the jurisdictional flaws articulated above, *see* section I.A., *supra*, Plaintiffs' mineral claim fails due to threshold pleading deficiencies and because it is devoid of any legal merit. *See* First Am. Compl. ¶¶ 421-31 (Fifth Claim for Relief). The threshold deficiencies in Plaintiffs' statutory and treaty claims are set forth in Defendants' opening brief and therefore are only briefly discussed here. *See* Defs.' Mem. in Supp. of Mot. for Summ. J. ("Defs.' Mem.") at 12-14, ECF No. 109. To summarize, the claim cannot proceed against the President under the APA because such review is foreclosed by Supreme Court precedent. *See Franklin*, 505 U.S. at 801. Nor can such a claim proceed against the President under the theory of non-statutory review because the Plaintiffs

identify no violation of a clear statutory mandate that applies to the President. *See Dalton v. Specter*, 511 U.S. 462, 474-76 (1994).

As for the claim against the agencies, Plaintiffs fail to identify a final agency action, or lack thereof, that would allow their claim to proceed under the judicial review provisions of the APA. *See* 5 U.S.C. § 704; *Lujan*, 497 U.S. at 882-83. Neither the complaint nor Plaintiffs' summary judgment brief is clear as to which agencies are even included in this claim. *See* First Am. Compl. ¶ 425 (alleging that "Agency Defendants have failed to investigate TransCanada's compliance with rights-of-way statutes or require TransCanada to obtain a federal right-of-way"); Pls.' Mem. in Supp. of Mot. for Summ. J. ("Pls.' Mem.") at 22 (arguing that "Agency Defendants have failed to require Rosebud's consent and to require that TransCanada comply with federal regulations"), ECF No. 114. The only action challenged is *the President's* issuance of the Permit. *See* First Am. Compl. ¶¶ 429-30; Pls.' Mem. at 22. Therefore, as to the agencies, this claim fails for lack of final agency action.

The mineral claim also fails because it has no legal merit. Plaintiffs allege and argue three bases for relief in support of that claim, *viz.*, they expressly allege violations of the Indian Right of Way Act, 25 U.S.C. §§ 323-324, and the Indian Mineral Leasing Act, 25 U.S.C. § 396, First Am. Compl. ¶¶ 422, 423, 426, and they (arguably) also allege a claim for mineral trespass. *Id.* ¶ 427. None of these

theories has merit. [4]

First, there has been no violation if the Indian Right of Way Act, 25 U.S.C. §§ 323-324, because the act only applies to rights-of-way across surface estates either owned by the Tribes or held in trust on behalf of the tribes. *See* 25 C.F.R. § 169.2 (defining BIA land as "any tract, or interest therein, in which the *surface estate* is owned and administered by the BIA") (emphasis added); *id.* (defining tribal land as "any tract in which the *surface estate*, or an undivided interest in the *surface estate*, is owned by one or more tribes . . . . The term also includes *surface estate of lands* held in trust for a tribe . . . .") (emphasis added). The only parcels at issue are ones for which the mineral estate—not the surface estate—is held in trust by the United States for the benefit of the Tribes. *See* TC Energy's SUF ¶ 27, ECF No. 98; Declaration of Amy Hofer ¶ 8, ECF No. 98-5. Moreover, neither the President nor the Department of the Interior have approved a right-of-way across tribal land. Therefore, the Indian Right of Way Act does not apply.

Second, the Indian Mineral Leasing Act does not apply because TC Energy's planned digging of a trench in which to place the pipeline does not constitute "mining purposes" within the meaning of the act. 25 U.S.C. § 396a. Mining is defined in the applicable regulations as "the science, technique, and

[4] Defendants response to the substance of the mineral claim will be set forth in more detail in Defendants' opposition to Plaintiffs' Motion for Summary Judgment, ECF No. 113, which is due March 18, 2020.

business of mineral development, including, but not limited to: opencast work, underground work, and in-situ leaching directed to the severance and treatment of minerals." 25 C.F.R. § 2.11.3. The mere digging of a trench for purpose of placing a pipe, without altering the excavated material to make it more suitable for structural support, is not mining within the meaning of the act. *See United States v. Osage Wind, LLC*, 871 F.3d 1078, 1091-92 (10th Cir. 2017).

Here, TC Energy plans to dig a trench for the purpose of placing a pipe in the ground—not for the purpose of extracting minerals that would be altered in size and shape to add structural support for the pipeline. 2014 Supplemental Environmental Impact Statement ("SEIS") at 2.1-50-2.1-54, TC Energy's SUF Ex. 4, ECF No. 98-4. Soil and rock removed from the trench would be placed back in the trench after the placement of the pipe. *Id.* at 2.1-52. But TC Energy's plans do not call for the crushing or altering of the rock to provide support for the pipeline. *See id.* at 2.1-50-2.1-54. Therefore, TC Energy is not engaged in mining and does not require a lease from the Department of the Interior under the Indian Mineral Leasing Act.

Third, Plaintiffs have failed to show that a trespass has actually occurred. As discussed above, the pipeline will cross a handful of parcels for which the mineral rights are held in trust by the United States for the benefit of the tribes. TC Energy's SUF ¶ 27. TC Energy has obtained permission to cross the surface estate

for each of the parcels that the pipeline will cross. *Id.* ¶¶ 20-26. The company, however, was not required to obtain a right-of-way approval to cross mineral estates held in trust for the tribe because that requirement only applies to surface estates. *See* 25 C.F.R. §§ 169.2, 169.5. And the work that TC Energy details would not constitute mining under the Indian Mineral Leasing Act. Therefore, Plaintiffs have failed to demonstrate a mineral trespass. Moreover, the Tribes cannot compel the government to bring a trespass action on their behalf because the decision to bring such an enforcement action is discretionary. *See Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1480-84 (D.C. Cir. 1995).

D. Plaintiffs Have No Likelihood of Success on The Treaty Claims.

The Court lacks jurisdiction over the treaty claims for the reasons already discussed, *i.e.*, the lack of standing, lack of final agency action, lack of waiver of sovereign immunity as to the President, and the inapplicability of non-statutory review. Assuming, however, that 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. It necessarily follows that the Permit 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 neither the President nor the agencies have violated.

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 Tribe v. United States*, 469 F.3d 801, 813 (9th Cir. 2006) ("[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 claims fail.

While Plaintiffs allege that the President violated the Tribes' treaty rights "by approving the Pipeline through Rosebud territory," First Am. Compl. ¶ 382, the Presidential Permit on its face authorizes only 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; *see also* Defs.' SUF ¶¶ 24-27, 32-33. The authorized "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, ECF No. 110-4. In sum, there is no basis for contending that the President has approved the whole pipeline, or that he has authorized the pipeline to cross the Tribes' land.

The Permit, moreover, makes clear that it does not obviate the need for TC

Energy to obtain any necessary approvals for the construction of the pipeline, even within the border segment. 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. at 13,102 (applying to both Border facilities and non-border facilities). Thus, the Permit confirms that all requisite approvals must be obtained 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 or a surface estate owned by the Tribes, then TC Energy would be required to seek a right-of-way, 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. Indeed, 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. As discussed above, however, *see* section I.C.2., the pipeline will not cross any tribal land—instead, it will cross only a handful of parcels in which the mineral estate is held in trust by the United State for the benefit of the Tribes. Therefore, there is no factual basis for the allegation that the President or the

agencies have authorized the pipeline to cross tribal land.

2. The Treaty Obligations Can Only Be Determined in the Context of Generally Applicable Statutes.

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 or the agencies allowed any "depredations" of tribal land. Under Supreme Court and Ninth Circuit precedent, whether such a depredation occurred can only be determined by reference to generally applicable laws and regulations. Plaintiffs have failed to show that such a violation occurred and therefore have failed to demonstrate a violation of the treaties.

The language of the treaties cannot be viewed in a vacuum. The Supreme Court has instructed that "[t]he trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011); *see also id.* at 177 ("The Government assumes Indian trust responsibilities only to the extent that it expressly accepts those responsibilities by statute."). Therefore, the Court must look to the particular statutes that Plaintiffs allege were violated in order to determine, not just whether those statutes were violated, but whether Plaintiffs can claim a violation of a treaty as well. *Id.*

The duty to avoid depredations does not establish a duty to avoid harm to tribal 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 Ass'n AFL-CIO v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006). Nor have Plaintiffs alleged any action taken by any of the

agencies in violation of environmental laws.

Accordingly, Plaintiffs have failed to show that any depredation of tribal land occurred and therefore their treaty claims fail.

II. Plaintiffs Have Failed to Demonstrate Irreparable Harm from the Issuance of the Permit.

To obtain a preliminary injunction, Plaintiffs must show an immediate threat of irreparable injury and that the injunction will alleviate the alleged injury. *See Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022-23 (9th Cir. 2016). The mere "possibility" of harm is not sufficient—Plaintiffs must make a clear showing that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22; *see also All. for the Wild Rockies*, 632 F.3d at 1131, 1135. Potential injury to the environment does not "*automatically* merit[] an injunction." *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008), *overruled on other grounds by Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008). Instead, Plaintiffs must demonstrate imminent, irreparable harm to their interests in the environment. *See All. for the Wild Rockies*, 632 F.3d at 1135. The Plaintiffs have not met this standard.

Plaintiffs allege harms relating to cultural resources, mineral resources, water resources, and to their sovereign interests. Many of these alleged harms relate to the speculative failure of pipeline operations, which are not imminent. The remainder relate to the construction of the pipeline along its route, which was

not authorized by the President, and instead was, or may be, authorized by relevant federal, state, or local approval actions that are not at issue here. Even if the Court finds a likelihood of success on Plaintiffs' claims challenging the Permit, Plaintiffs are not entitled to an injunction of activities that are not approved by the Permit. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1123 (9th Cir. 2005) ("The authority to enjoin development extends only so far as the Corps' permitting authority."); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d, 4, 33 (D.D.C. 2016) (finding that the Corps could not prevent the pipeline across private lands and therefore the alleged harms from such construction could not be used to demonstrate irreparable harm due to the Corps' action). Finally, for the reasons explained below, Plaintiffs cannot demonstrate that any of the alleged harms to their interests from TC Energy's planned construction activities are imminent and irreparable.

A. Alleged Injury to Cultural Resources

Plaintiffs have failed to demonstrate that the construction of the pipeline will cause irreparable harm to cultural resources. They claim that cultural resources will be destroyed if construction is allowed to proceed and that the Tribes have not been sufficiently informed of the location of cultural resources along the pipeline route. *See* Pls.' Mem. in Supp. of Mot. for Prelim. Inj. ("PI Mem.") at 18-20, ECF No. 120. Neither of those things are true.

First, the lands in which the Tribes claim an interest have been surveyed and cultural resources have been identified, and there is a process in place to avoid or mitigate harm to those resources during the construction of the pipeline. Since the 2014 SEIS, several surveys of cultural resource surveys have been conducted. *See* 2019 SEIS at 3.9-6-3.9-16, Ex. 15; *see also* 2014 SEIS at 3.11-11-3.1-35, Ex. 16. With these additional surveys, all of the land along the pipeline route in Montana and South Dakota has now been surveyed. *Id.* at 3.9-8. Further, pursuant to the Programmatic Agreement, the State Department has consulted with the Tribes and other parties to the agreement, including the Montana State Historic Preservation Officer ("SHPO") regarding the impacts of the construction of the pipeline on cultural resources. *See* 2019 SEIS at 4-67-4-68.

Under the Programmatic Agreement, if cultural resources of historic significance are encountered during construction, the State Department must—through consultation with the Tribes, the Montana SHPO, TC Energy, and other parties to the agreement—ensure that such resources are avoided or, if they cannot be avoided, that they are subject to a treatment plan designed to mitigate adverse impacts. *Id.*; *see also* Am. Programmatic Agreement and Record of Consultation ("Programmatic Agreement") at 9-20, Ex. 17; 2014 SEIS at 4.11-4-4.11-6. Indeed, as demonstrated by one of the letters submitted by Plaintiffs, the State Department informed the Tribes in April of 2018 that 95 cultural resources had been identified

along the pipeline route, and that 48 of those resources met the requirement for listing in the National Register of Historic Places. The letter also describes the measures the State Department intended to take to avoid or mitigate harm to those resources. *See* Declaration of Andrew Werk, Jr. ("Werk Decl."), Ex. A (State Department Letter of April 10, 2018), ECF No. 120-1.

Second, over the course of several years of consultation with the Tribes, the State Department has provided the Tribes with all relevant information regarding cultural resources along the pipeline route, and has engaged in good faith consultation, consistent with Section 106 of the NHPA. *See* Declaration of David Cushman ("Cushman Decl.") ¶¶ 4-9; *see also* Programmatic Agreement at Attachments I & J (PDF pages 134-54); 2019 SEIS at 3.9-2-3.9-3; 2014 SEIS at 3.11-35-3.11-43. The State Department also provided the Tribes access to a database identifying all of the cultural resources along the route. *See id.* Cushman Decl. ¶ 6. Therefore, the notion that the State Department has not provided sufficient information to the Tribes is inaccurate.

In sum, Plaintiffs have failed to demonstrate that the construction of the pipeline would cause irreparable harm to cultural resources.

B. Alleged Injury to Mineral Resources and Tribal Sovereignty

Plaintiffs have not demonstrated irreparable harm to tribal mineral resources because, as discussed above, there is no merit to their mineral claim. *See* section

I.C., *supra*. They have no claim for mineral trespass because no right-of-way is required to cross mineral estates held in trust by the United States for the benefit of the Tribes, and they have failed to show that TC Energy plans to engage in mining, such that a lease would be required under the Indian Mineral Leasing Act. Their alleged harm to tribal sovereignty, *see* PI Mem. at 23-25, relies on the same faulty claim that TC Energy intends to engage in a mineral trespass and that the United States has a duty to stop it. Plaintiffs are simply incorrect that the pipeline will be "built on Rosebud territory." *Id.* at 25.

C. Alleged Injury to Water Resources

Most of the alleged injuries to water resources would only occur once the pipeline is fully constructed and in the event of an operational failure. *See, e.g.*, PI Mem. at 21 (alleging harm due to risk of contamination in the event of an oil spill). Defendants understand that it would take at least a year to build the pipeline, and therefore any harm due to an oil spill is not imminent. *See All. for the Wild Rockies*, 632 F.3d at 1135. Plaintiffs also claim, relying on the 2014 SEIS, that harm to water resources will occur from construction. *See* Pls.' SUF at 13-14, ECF No. 115. As explained in the 2014 SEIS, however, TC Energy will utilize required mitigation in order to minimize the impacts of construction on waterbodies. *See* 2014 SEIS at 4.3-4-4.3-5, ECF No. 115-1. Plaintiffs have failed to demonstrate that any harm from construction will be irreparable.

In sum, Plaintiffs have failed to show that the construction of the border facilities authorized by the Permit, or even the construction of the Pipeline in areas not authorized by the Permit, will cause them imminent, irreparable harm.

III. The Balance of the Harms and the Public Interest Weigh Against an Injunction.

There is no public interest in enjoining a Permit issued by the President, when the issuance of such a Permit was well within his constitutional authority as demonstrated by the long history of Presidents issuing similar Permits. Further, the Permit simply does not authorize the construction of the entire pipeline, and therefore it would be improper for the Court to enjoin construction outside of the border segment. The construction of the pipeline is subject to federal and state approvals, and Plaintiffs will have every opportunity to challenge any such approvals, but they are not at issue in this case. The issuance of a preliminary injunction will only serve to continue to entangle the Court and the parties in baseless litigation relating to the Permit.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' motion for a preliminary injunction be denied.

Respectfully submitted this 16th day of March, 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 6,488 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 March 16, 2020, a copy of the foregoing Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction was served on all counsel of record via the Court's CM/ECF system.

/s/ Luther L. Hajek
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