

Natalie A. Landreth (*pro hac vice*)
Wesley James Furlong (MT Bar No. 42771409)
NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466
landreth@narf.org
wfurlong@narf.org

Matthew L. Campbell (*pro hac vice*)
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
Tel. (303) 447-8760
Fax (303) 443-7776
mcampbell@narf.org

Counsel for all Plaintiffs
Additional Counsel Listed on Signature Page

**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.

Case No. 4:18-cv-00118-BMM

**PLAINTIFFS' REPLY IN
SUPPORT OF APPLICATION
FOR TEMPORARY
RESTRAINING ORDER**

Introduction

The spread of COVID-19 within our Nation's communities threatens to strain our Nation's healthcare systems. As of March 12, 2020, 1,645 people from 47 States have been infected with the virus that causes COVID-19. It is incumbent on hospitals and medical facilities throughout the country to assess their preparedness posture and be prepared to surge capacity and capability.

Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020).

Defendants proclaim the Tribes have improperly moved for a TRO. But the new and ever-evolving information about COVID-19 demands swift and appropriate action to protect the Tribes. On the same day the Trump Administration announced that up to 240,000 people may succumb to the virus, *see* Rick Noack et al., *White House Task Force Projects 100,000 to 240,000 Deaths in U.S., Even with Mitigation Efforts*, WASH. POST (Mar. 31, 2020), <https://www.washingtonpost.com/world/2020/03/31/coronavirus-latest-news/>, TransCanada announced it intends to move forward with the Pipeline's construction. *TC Energy to Build Keystone XL Pipeline*, TC Energy Corp. (Mar. 31, 2020), <https://www.tcenergy.com/announcements/2020-03-31tc-energy-to-build-keystone-xl-pipeline/>. This, during the projected peak of the virus. *See COVID-19 Projections*, INST. FOR HEALTH METRICS & EVALUATION, <https://covid19.healthdata.org/projections> (last visited Apr.

2, 2020). And TransCanada has outlined numerous activities for April all along the route of the Pipeline, not just at the border. *See* Doc. 94 (construction of access roads, preparation of man camps and pipe yards, etc.). But even at the border, construction must be undertaken by workers that must be brought in from somewhere. The Fort Belknap Indian Reservation is located an hour and a half away from Morgan, Montana, where construction is slated to begin, and Malta, Montana, the county seat for Philips County, where supplies and the Philips County Hospital are located, is just off the reservation. Defendants fail to recognize the import of the pandemic and only faintly address this impending threat.

Defendants also proclaim the Tribes have improperly moved to amend their First Amended Complaint. But, the Federal Rules of Civil Procedure specifically allow for amendments during and after trial and the Ninth Circuit has sanctioned the exact request the Tribes have made. “[W]hen issues are raised in opposition to a motion for summary judgment that are outside the scope of the complaint, [t]he district court should [construe the matter raised] as a request pursuant to rule 15(b) of the Federal Rules of Civil Procedure to amend the pleadings out of time.” *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014) (citations and quotation marks

omitted). The difference here is the request is not out of time because there is not even a scheduling order in place, and thus leave shall be freely given “with extreme liberality.” *Id.* (quoting Fed. R. Civ. P. 15(a)).

In reality, it is the Tribes that have been prejudiced by Defendants gamesmanship. TransCanada moved for summary judgment just two days after the Bureau of Land Management’s Record of Decision. Doc. 97. They did so without answering the Tribes’ First Amended Complaint, meaning the Tribes were entitled to a default judgment and the facts in the complaint are to be taken as true. *See* Doc. 111, at 11. They also moved without any scheduling order, without any discovery, and without providing the Tribes with the maps that it (and presumably the United States) has in its possession so that the Tribes may conduct their own land surveys. *See* Doc. 111, at 10-16 (pointing to Federal Rule of Civil Procedure 56(d)); Doc. 125; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (describing a premature motion for summary judgment without any discovery as being “railroaded”). TransCanada even boldly asserted, without answering the First Amended Complaint, that the “undisputed evidence establishes that Keystone XL will not cross either tribe’s reservation or any property owned by either tribe.” Doc. 97, at 1. Yet, the First Amended Complaint should be

taken as true without an answer. And in the same document, TransCanada admitted that the Pipeline would indeed cross property owned by Rosebud and Rosebud members. Doc. 97, at 4; Doc. 114, at 5-6.

The United States asserts we are at a late stage in this proceeding, yet they, too, have only just recently asked to file an answer out of time. Doc 116. They made this request *after* filing a motion for summary judgment, meaning the Tribes were likewise entitled to default judgment against the United States, and the facts in the First Amended Complaint should be deemed true. Doc. 109; Doc. 111; Doc. 116. Because there has been no discovery, and not even a scheduling order, it is hardly “very late” in this proceeding. The Tribes wished to bring these issues to the Court, Doc. 100, but the Court, justifiably wanting to be in a position to rule by April, set a briefing schedule on motions for summary judgment. Doc. 104. Defendants proclaim that the Tribes could have easily amended during the successive rounds of briefing ordered by the Court, yet they have previously filed motions to dismiss arguing that the Tribes complaint fails to state a claim. Doc. 67, at 7; Doc. 65. The Tribes’ request to amend should be granted because any alleged prejudice and delay created here was caused by Defendants’ own actions.

The TRO Should Be Granted

“[T]he purpose of a temporary restraining order is to preserve the status quo until a hearing may be held on the appropriateness of a preliminary injunction.” *Native Ecosystems Council v. Marten*, No. CV 18-87-M-DLC, 2018 WL 3148145, at *1 (D. Mont. June 27, 2018) (citation omitted). This Court has already set a hearing on the Tribes’ Motion for Preliminary Injunction for April 16, 2020. The Tribes seek to simply maintain the *status quo* for the next thirteen days, in the face of the rapidly evolving COVID-19 pandemic and the irreparable injuries they will suffer from “the actual construction and operation of [the Pipeline].” *Indigenous Envtl. Network v. U.S. Dep’t of State*, CV-17-29-GF-BMM, 2019 WL 652416, at *11 (D. Mont. Feb. 15, 2019). TransCanada faces no hardship by a thirteen-day delay in construction. Instead, TransCanada wishes to quickly build as much of the Pipeline as possible and use this construction as justification for allowing the project to proceed whether or not it is legal. This is precisely the type of momentum the Tribes are concerned with.

On March 26, 2020, Montana Governor Steve Bullock issued a shelter in place order for the entire State of Montana in response to the expanding COVID-19 crisis. Governor of Mont., *Directive Implementing Executive Orders 2-2020 and 3-2020 Providing Measures to Stay at Home and Designating Certain*

Essential Functions (Mar. 26, 2020) (“Shelter in Place Order”) (Pls.’ Ex. A). The Shelter-in-Place order mandates social distancing, prohibits non-essential activities, and mandates the closure of non-essential businesses, operations, and services.

The Shelter in Place Order does allow individuals to “leave their residence to provide any service or perform any work necessary to offer, provision, operate, maintain and repair Essential Infrastructure.” *Id.* at 5. The Shelter in Place Order goes on to list examples of Essential Infrastructure. *Id.* The construction of *new* crude oil pipelines is not one of them, and such construction does not “offer, provision, operate, maintain [or] repair” existing Essential Infrastructure. Accordingly, the Pipeline is not Essential Infrastructure, and its construction is not an Essential Operation or Activity. *See id.* at 2-3.

At the time of this filing, there are at least 243 confirmed cases of COVID-19 in Montana, including in Cascade, Glacier, Toole, Liberty, Hill, Roosevelt, Musselshell, and Yellowstone Counties. *See Montana Response: COVID-19 – Coronavirus – Global, National, and State Information Resources*, <https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b> (last visited Apr. 2, 2020, 3:12 pm MDT).

It is now beyond imperative that the Court grant the Tribes immediate, temporary relief enjoining all of TransCanada's preconstruction and construction activities for the Pipeline. TransCanada's preconstruction and construction activities, including constructing man-camps and other related facilities and infrastructure, as well as mobilizing workers, immediately threaten the health, safety, and welfare of the Tribes and other tribal and rural communities throughout Montana, South Dakota, and Nebraska, along the Pipeline's route.

TransCanada anticipates hiring over 10,000 workers to construct the Pipeline, only ten percent of whom may be from local communities. 2014 FEIS, at 4.10-2.¹ TransCanada anticipates deploying 900 to 1,300 workers to each "construction spread" along the Pipeline's route. *Id.* TransCanada proposes four construction spreads in Montana and three construction spreads in South Dakota. *Id.* at 3.10-19. Accordingly, in Montana alone, TransCanada anticipates deploying up to 5,200 workers within Montana in the coming weeks and months for the 2020 construction season, ninety percent of whom will not be local.

¹ All 2014 FEIS excerpts are attached as Plaintiffs' Exhibit B.

In order to house these workers, TransCanada must construct man-camps along the Pipeline's route. Indeed, TransCanada's current preconstruction activities include constructing man-camps. *See* Doc. 94. TransCanada intends on constructing at least six man-camps in Montana: one in Philips County (PS-09), near Fort Belknap; two in Valley County (Hinsdale and Fort Peck), near Fort Belknap and the Fort Peck Indian Reservation; one in McCone County (Circle); one in Dawson County (Glendive); and one in Fallon County (Baker). 2019 FEIS, at 2-7 (Pls.' Ex. C). TransCanada also intends on constructing at least four man-camps in South Dakota: one in Harding County (Buffalo); one in Meade County (Opal); one in Haakon County (Philip); and one in Tripp County (Colome). *Id.* at 2-7 to 2-8. A large community of Rosebud tribal members live in Colome. Even after these camps are constructed, TransCanada intends on housing their transient workers in local hotels and motels, RV parks, and rental properties. 2014 FEIS, at 4.10-12. And while these camps are being constructed, transient workers will have to be housed in local, rural, and tribal communities.

TransCanada's preconstruction and construction activities, including the construction and operation of man-camps, and the influx of hundreds or thousands of transient, out-of-state workers pose serious, immediate, and

irreparable health risks to the Tribes during the COVID-19 pandemic. Tribal and rural communities face serious healthcare delivery shortfalls. The healthcare systems in tribal and rural communities are already strained to provide basic healthcare services, much less the critical emergency services necessary to respond to an outbreak of COVID-19. *C.f.* Mary Smith, *Native Americans: A Crisis in Health Equity*, 43:3 AM. BAR. ASS'N HUMAN RIGHTS MAGAZINE (2018), available at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/native-american-crisis-in-health-equity/; Erika Ziller & Andrew Coburn, *Health Equity Challenges in Rural America*, 43:3 AM. BAR. ASS'N HUMAN RIGHTS MAGAZINE (2018), available at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/health-equity-challenges-in-rural-america/. An outbreak of COVID-19 in tribal and rural communities could immediately overwhelm and cripple these already over-leveraged healthcare systems. *C.f.* Cecily Hilleary, *Native American Tribes Face Critical Shortages of COVID-19 Test Kits, Protective Gear*, VOICE OF AM. (Mar. 21, 2020), <https://www.voanews.com/science->

[health/coronavirus-outbreak/native-american-tribes-face-critical-shortages-covid-19-test](#). Should any of TransCanada's thousands of anticipated transient, out-of-state workers contract or bring with them COVID-19, such an outbreak would make it nearly impossible for the Tribes (and other tribes and rural communities) to provide essential and lifesaving healthcare services to those COVID-19 patients, as well as other patients as needed. TransCanada's decision to steamroll the construction of the Pipeline during the COVID-19 pandemic literally threatens the lives of its workers, the Tribes' members, and those living in the tribal and rural communities TransCanada's workforce will live in and travel through.

TransCanada's argument that the Tribes do not face imminent harms from the construction of the Pipeline or man-camps is specious. On March 31, 2020, TransCanada announced publicly that it was moving forward with construction. *See TC Energy to Build Keystone XL Pipeline, supra*. TransCanada has already informed the Court that it intends to construct man-camps in March and April. *See* Doc. 94. These man-camps do not build themselves. The workforce necessary to construct these man-camps must be housed in local communities. Even if TransCanada's activities are only limited to the 1.2-mile border segment, which they are not, *see id.* (detailing activities

throughout Montana and South Dakota in March and April), TransCanada intends on constructing at least one man-camp at milepost one on the Pipeline's route: Camp PS-09 in Philips County. 2019 FEIS at 2-7. Irrespective of the construction of man-camps, TransCanada intends on employing thousands of workers to construct the Pipeline, ninety-percent of whom will not be local. *See* 2014 FEIS, at 4.10-2.

The influx of thousands of out-of-state workers during the COVID-19 pandemic—regardless of what they are constructing and whether they are staying in man-camps or local communities—poses an immediate, irreparable, and unacceptable risk to the Tribes. TransCanada's financial gain from constructing the Pipeline does not outweigh the risk of exposing the Tribes, their members, and their communities to COVID-19 and collapsing their healthcare systems.

Defendants further argue that the Tribes do not face immediate and irreparable harms to their cultural resources. Defendants support this argument by supplying selected documents from the administrative record. Defendants argument rests on shifting the burden of NHPA consultation onto the Tribes, despite the statute's and regulations' clear command that it is the federal government's obligation to engage in good faith consultation.

Accord 54 U.S.C. § 302706(b); 36 C.F.R. §§ 800.2(a) (“It is the statutory obligation of the Federal agency to fulfill the requirements of section 106”), 800.2(c)(2)(ii). The Tribes challenge the adequacy of the United States’ Section 106 processes for the Pipeline and the sufficiency of its consultation efforts. In response, Defendants cite a handful of documents they claim prove the Tribes repeatedly rejected the opportunity to engage in consultation. Yet, the Tribes repeatedly raised objections to the adequacy of the State Department’s Section 106 processes (as well as the Pipeline traversing their land and water) during the permit application reviews. *See, e.g.*, Letter from Cyril Scott, President, Rosebud Sioux Tribe, to Jack C. Jackson, U.S. Dep’t of State (Jan. 31, 2014) (noting that Rosebud, and not Yankton Sioux Tribe, claim the land the State Department was attempting to assess) (Pls.’ Ex D); Letter from Cyril Scott, President, Rosebud Sioux Tribe, to U.S. Dep’t of State, Bureau of Energy Res. (Mar. 5, 2014) (Pls.’ Ex. E). The Tribes’ objections to and concerns with the State Department’s Section 106 processes were ignored.

Consultation requires more than merely providing the Tribes the opportunity to express their concerns. It requires the United States to “seek[], discuss[], and consider[] the views of [the Tribes], and, where feasible, seek[]

agreement with them regarding matters arising in the section 106 process,” 36 C.F.R. § 800.16(f), in recognition of “the government-to-Government relationship between the Federal Government and [the] [T]ribes . . . [and] in a manner sensitive to the concerns and needs of the [Tribes].” *Id.* § 800.2(c)(ii)(C); *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104, 1109 (S.D. Ca. 2010) (“Indian tribes are entitled to *special consideration* in the course of an agency’s fulfillment of its consultation obligations.” (emphasis in original)); *c.f.* U.N. Declaration on the Rights of Indigenous Peoples art. 19 (2007) (free, prior and informed consent). Furthermore, the Treaties, the NHPA, and other “various federal statutes aimed at protecting Indian cultural resources, located both on Indian land and public land, demonstrate the government’s comprehensive responsibility to protect those resources and[] thereby established a fiduciary duty.” *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1109 (S.D. Cal. 2008). Simply citing a list of documents is insufficient to establish that the United States engaged in *meaningful* consultation. *See Quechan Tribe*, 755 F. Supp. 2d at 1108-20.

In spite of the extreme danger posed to the Tribes and their members, the public at large, and their own workers, TransCanada seeks to forge

ahead, undoubtedly hoping to build bureaucratic momentum. The United States makes the disingenuous statement: “Moreover, the Ninth Circuit has not endorsed the bureaucratic momentum theory. *See, e.g., N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (refusing to vacate oil and gas leases).” Doc. 143, at 21. To the contrary, *Norther Cheyenne Tribe* actual states:

Bureaucratic rationalization and bureaucratic momentum are real dangers, to be anticipated and avoided by the Secretary. But the difference between voiding the leases and suspending them does not create any major difference in the process that must now go on. We see no reason to suppose that the Secretary will feel greater commitment to the original project if the leases are not voided but held in abeyance until a new evaluation is made, especially as the injunction will now specifically direct the Secretary not to consider prior investments by the lessees when he reconsiders the lease sale.

851 F.2d at 1157 (emphasis added). The court specifically acknowledged the dangers of bureaucratic momentum, but held that in the unique facts presented in that case, facts not present here, it was not an issue.

Defendants’ arguments that bureaucratic momentum does not apply here because a NEPA analysis has been done, are equally unavailing. No analysis was made of the devastating effects of the current pandemic, either as to the whole Pipeline or the 1.2-mile border section, no adequate

consultation has occurred pursuant to the treaties and Interior policy, and the Tribes' consent has not been obtained.

In light of the rapidly changing circumstances surrounding the COVID-19 pandemic, its dangers not just the Tribes' members, but the public at large, and the other immediate, irreparable injuries the Tribes face, it is imperative that the Court temporarily restrain TransCanada from undertaking any preconstruction and construction activities related to the Pipeline until it can issue more permanent injunctive relief.

RESPECTFULLY SUBMITTED this 3d day of April, 2020.

/s/ Wesley James Furlong

Natalie A. Landreth (*pro hac vice*)

Wesley James Furlong (MT Bar No. 42771409)

NATIVE AMERICAN RIGHTS FUND

/s/ Matthew L. Campbell

Matthew L. Campbell (*pro hac vice*)

NATIVE AMERICAN RIGHTS FUND

Daniel D. Lewerenz (*pro hac vice*)

NATIVE AMERICAN RIGHTS FUND

1514 P Street Northwest (rear), Suite D

Washington, D.C. 20005

Tel. (202) 785-4166

Fax (202) 822-0068

lewerenz@narf.org

Counsel for all Plaintiffs

Daniel D. Belcourt (MT Bar No. 3914)
BELCOURT LAW, P.C.
120 Woodworth Avenue
Missoula, MT 59801
Ph. (406) 265-0934
Fax (406) 926-1041
danelbelcourt@aol.com

Ronnie M. Flannery (MT Bar No. 5890)
LAW OFFICE OF RONNI M. FLANNERY
936 South 2nd Street West
Missoula, MT 59801
Ph. (406) 214-5700
rflannery@bresnan.net

*Counsel for Plaintiff Fort Belknap Indian
Community*

CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing **PLAINTIFFS' REPLY IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER** complies with: (1) Local Civil Rule 7.1(d)(2)(A) because it contains 2,890 words, excluding those parts of the brief exempted by Local Civil Rule 7.1(d)(2)(E); and (2) the typeface requirements of Local Civil Rule 1.5(a) because it has been prepared using proportionally spaced typeface using Microsoft Word 2016, in 14-point Times New Roman font.

/s/ Wesley James Furlong

Wesley James Furlong (MT Bar No. 42771409)
NATIVE AMERICAN RIGHTS FUND

CERTIFICATE OF SERVICE

I hereby certify that on the 3d day of March, 2020, I electronically filed the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER** with the Clerk of the Court for the United States District Court for the District of Montana by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Wesley James Furlong

Wesley James Furlong (MT Bar No. 42771409)
NATIVE AMERICAN RIGHTS FUND