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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.

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

**PLAINTIFFS' MEMORANDUM  
IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

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## INTRODUCTION

The 2019 Presidential Permit is unconstitutional because Congress, and not the President, possesses the constitutional power to permit the Keystone XL Pipeline (“Pipeline”). Congress has not acquiesced in the President’s unilateral actions, and the 2019 Permit must be set aside.

TransCanada, for its part, has now admitted that the Pipeline would cross Rosebud mineral estates that are held in trust. This is dispositive. Trenching, rock ripping, blasting, and utilizing the mineral estate as padding and backfill would be a trespass and an unlawful interference with the Rosebud’s dominant estate. And, more than just digging a trench, utilizing the mineral estate as padding, backfill, and to protect against subsidence is “mining” that must be approved by Rosebud.

The United States has a treaty and statutory obligation to protect Rosebud resources, but has failed to fulfill that obligation. And just like any other governmental entity, Rosebud maintains jurisdiction over its minerals, and therefore TransCanada must comply with Rosebud law. For all these reasons, the Tribes are entitled to summary judgment on their second, fifth (with respect to minerals), and sixth (with respect to minerals) claims for relief.

## STATEMENT OF FACTS

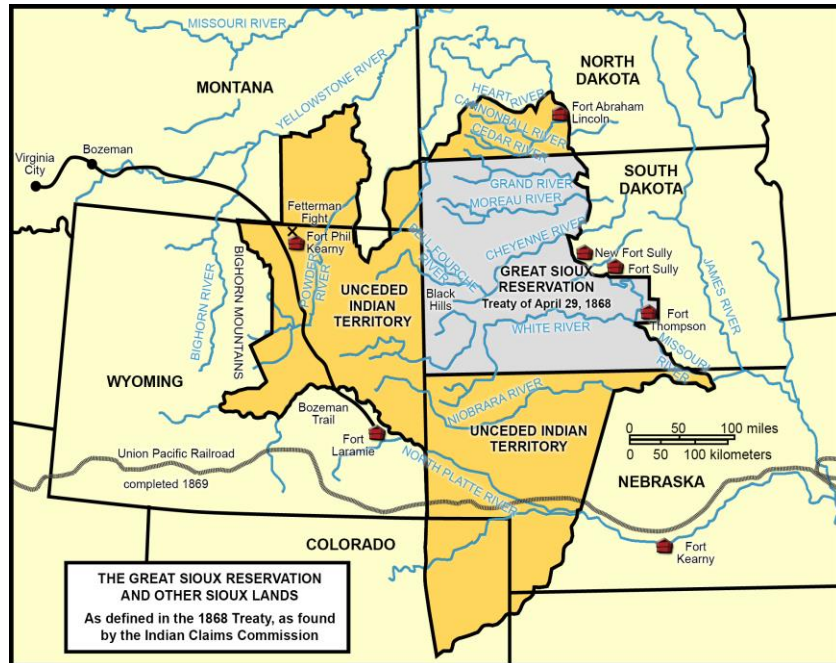
### **I. The Keystone XL Pipeline Would Cross Rosebud and Fort Belknap Territory.**

Native American cultures and histories are intricately intertwined with places and environments. Rosebud and Fort Belknap maintain those historical, cultural, and spiritual ties to the region that the Pipeline would cross. Pls.' Statement of Undisputed Facts ("Pls.' SUF") at 2 ¶ 1. Their connection to these regions was documented, and their governance over these regions was affirmed, over 150 years ago in treaties with the United States. *Id.* But, their connection to the region goes back much further.

For example, a creation story for Rosebud tells of the people emerging from the Black Hills in South Dakota. Craig Howe, *In The Spirit of Mato Tipila: An Honoring, Native Knowledge* 360, <https://americanindian.si.edu/nk360/plains-belonging-homelands/oceti-sakowin.cshtml> (last visited Feb. 25, 2020). Indeed, the Black Hills, which are only a couple hundred miles from Rosebud, were a part of the Great Sioux Reservation. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980). The Oceti Sakowin (Sioux Nation) still fights for the return of the Black Hills. *See, e.g.* Ruth Hopkins, *Reclaiming The Sacred Black Hills*, Indian Country

Today (June 28, 2014),

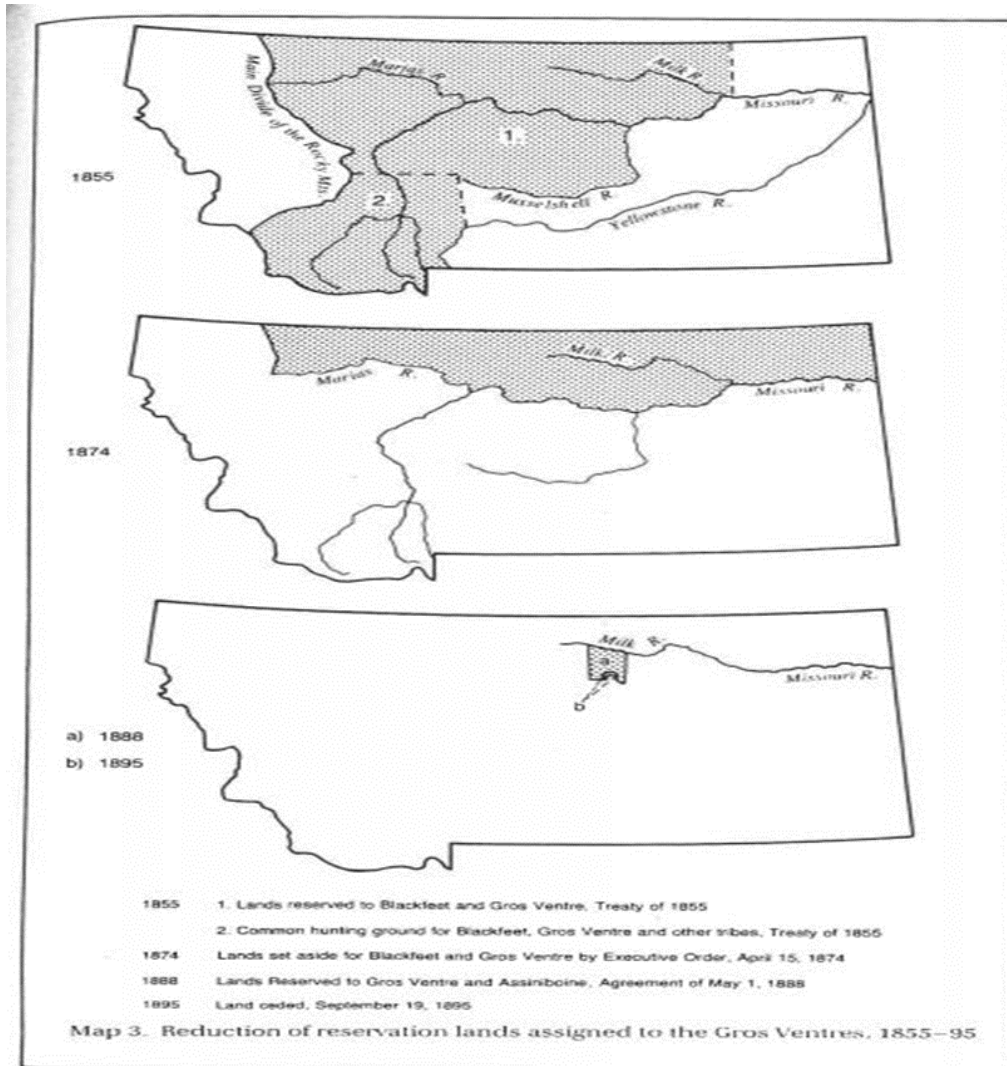
<https://newsmaven.io/indiancountrytoday/archive/reclaiming-the-sacred-black-hills-ueqUBTSDuUK2nq8VzF4Rdg/>. An approximate map<sup>1</sup> of the Great Sioux Reservation can be seen below:



The Gros Ventre have a similar connection to their homeland. They call themselves “AH-AH-NE-NIN,” meaning the White Clay People. *Fort Belknap History*, Fort Belknap Indian Community, <https://ftbelknap.org/history> (last visited Feb. 25, 2020). They believe that they were made from the White Clay that is found along the river bottoms

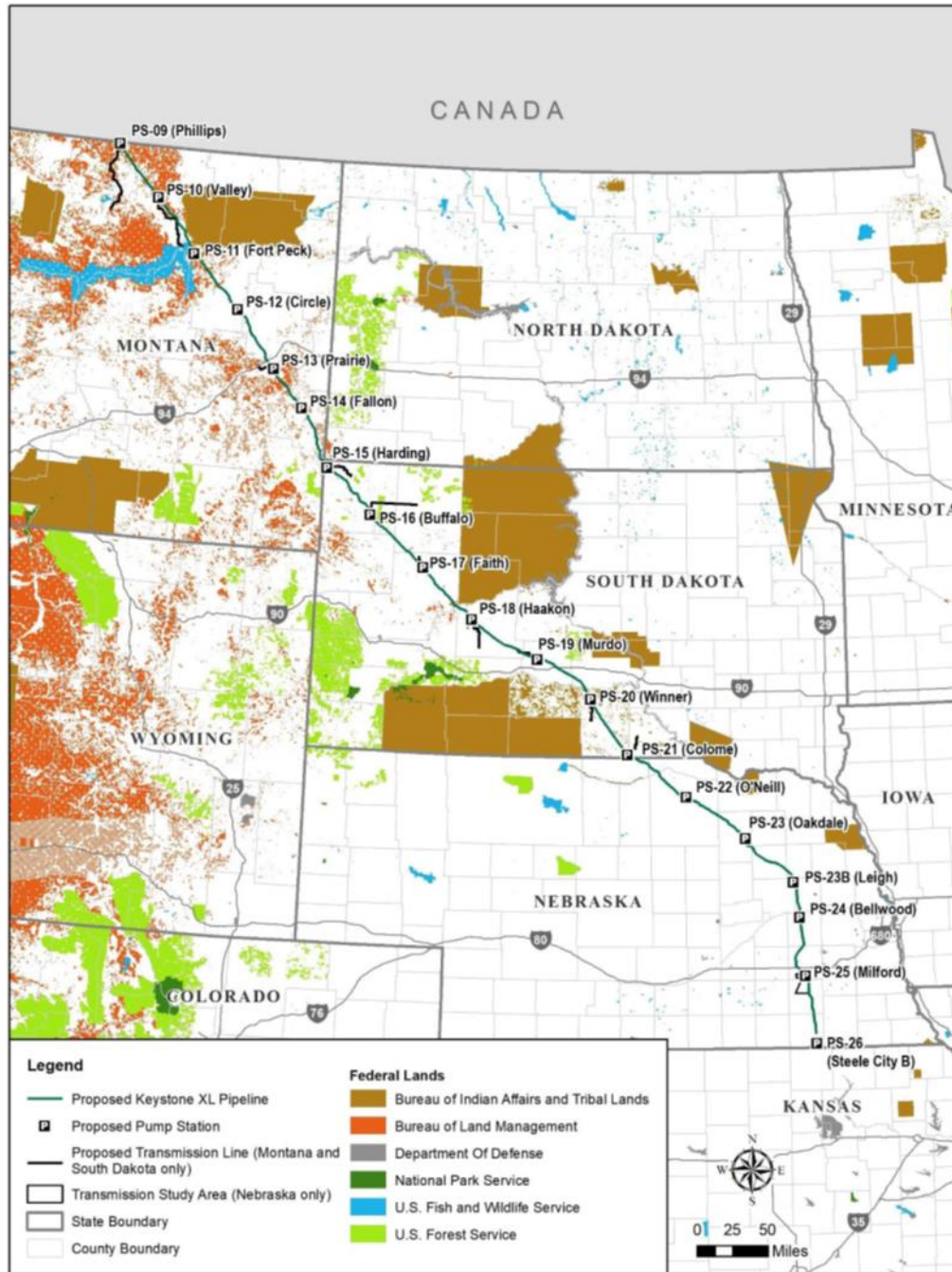
<sup>1</sup> Pls.’ SUF at 2-3 ¶ 2.

in their territory. *Id.* A map of Fort Belknap's territory<sup>2</sup> in Montana is likewise below:



The State Department showing the Pipeline crossing Rosebud and Fort Belknap territories, is below.

<sup>2</sup> Pls.' SUF at 3-4 ¶ 3.



Pls.' SUF at 4-5 ¶ 4.

## II. TransCanada Admits the Pipeline Would Cross Rosebud Mineral Estates Held in Trust



TransCanada admits that the Pipeline easement would cross individual Indian mineral estates held in trust by the United States. TransCanada's Mem. in Supp. of Summ. J., Doc. 98 (TC Br.) at 5, 21-22. They mistakenly assert, however, that Rosebud has no interest in these mineral estates. TC Br. at 21-22. Rosebud owns three of the four mineral estates held in trust by the United States that TransCanada admits would be crossed. Pls.' SUF at 6 ¶ 8. The fourth mineral estate, held in trust, TransCanada admits would be crossed is owned by individual Rosebud members, and Rosebud has an interest in, and authority over, such Indian lands. *Id.* ¶ 9; see *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996) (holding that Cheyenne and Arapaho Tribes could enforce severance tax on non-Indian oil company extractions produced from trust allotted lands); *c.f. HRI, Inc. v. EPA*, 198 F.3d 1224, 1254 (10th Cir. 2000) ("[I]f ownership of mineral rights and the surface estate is split, and either is considered Indian lands, the Federal EPA will regulate the well under the Indian land program." (citation omitted)). Additionally, TransCanada has failed to identify at least two mineral estates held in trust for Rosebud that the Pipeline would cross. Pls.' SUF at 7, ¶ 10.

These trust estates are legally “Indian lands” that Rosebud has authority over and an interest in. 25 C.F.R. § 211.3; *see United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyo.*, 304 U.S. 111, 116-18 (1938); *Mustang Prod.*, 94 F.3d at 1385; *see also HRI*, 198 F.3d at 1254. Indian lands include any lands owned by any individual Indian or Indian tribe “which owns land or interests in the land,” the title to which is held in trust by the United States. 25 C.F.R. § 211.3. The admission that the Pipeline would cross Indian lands that Rosebud has authority over and an interest in is dispositive.

### **III. TransCanada Surveys Are Fundamentally Flawed and the Publicly Available Information Shows the Pipeline Would Impact Rosebud Surface Estates**

TransCanada asserts the Pipeline “land” and “easements” would not cross “Indian lands,” Rosebud’s “Reservation,” or Rosebud surface estates, relying on the declaration of surveyor Brian Fowlds.<sup>3</sup> TC Br. at 4, 13, 20, 26. Mr. Fowlds proclaims to have surveyed tribal lands held in trust. TC SUF Ex. 6. Mr. Fowlds does not claim to have performed a “cadastral survey” or

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<sup>3</sup> TransCanada relies on information entirely within its control for its assertions regarding Rosebud surface estates and failed to provide this information to the Tribes so that they may engage their own surveyor.

inquired with the Bureau of Land Management about performing a survey of Indian lands. Pls.' SUF at 8 ¶ 15.

The publicly available maps the Tribes have seen show that the Pipeline corridor would cross Rosebud surface and mineral estates. *Id.* at 6 ¶ 6. These maps are consistent with the Final Supplemental Environmental Impact Statement for the Keystone XL Project (Dec. 2019) ("2019 EIS") analysis of the impact of construction and operation of the Pipeline. For example, the area of potential effects ("APE")<sup>4</sup> in the 2019 FEIS is 300 feet (150 feet on each side of the Pipeline). Pls.' SUF at 9 ¶ 22. And for areas of the pipeline corridor that were not studied in 2008, the APE is 500 feet (250 feet on each side of the pipeline). *Id.* ¶ 23. Under the 2019 EIS, then, the geographic areas where there would be alterations from the Pipeline are at least 150 feet from the Pipeline corridor (and more properly 250 feet) on each side. And for a spill, the area of effect is between 1,200 feet to 5,000 feet from the release point on the surface and down into the minerals below. *Id.* at 10 ¶ 24. Both the APE and the spill area are larger than the narrow view of the

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<sup>4</sup> The APE is "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist." 36 C.F.R. § 800.16(d).



“easements” that TransCanada analyzed in its SUF at Ex. 5 (showing easement between five feet to roughly 150 feet away from tribal lands). Taking this narrow view is improper when a larger impact area is foreseen.

#### **IV. Impact of the Pipeline on Indian Lands**

The Pipeline would have a major impact on Rosebud spirituality, and Rosebud’s Indian lands held in trust. Pls.’ SUF at 17-18 ¶¶ 74-80. In particular, the geology, soil, water, vegetation, cultural resources and spirituality, air quality and noise, and wildlife on these lands would be directly and indirectly impacted. *Id.* at 18-20 ¶¶ 81-94. With respect to minerals, the 2019 FEIS demonstrates that the Pipeline would impact Rosebud’s geological, paleontological, and mineral resources. *Id.* at 10 ¶ 25.

During construction, topsoil would be removed and the Pipeline route graded. *Id.* ¶¶ 26-27. Vegetation, including crops, trees, logs, brush, and rocks would be cleared. *Id.* Soils would be eroded, contaminated, compacted, and reduced in productivity. *Id.* ¶ 29. In rocky areas like Tripp County, tractor-mounted mechanical rippers or rock trenchers would fracture the rock prior to excavation. *Id.* at 11, ¶ 30. The Pipeline trench then would be excavated to a depth of eight feet, with a width of five feet. *Id.* ¶ 31. TransCanada itself anticipates both rock ripping and “blasting” would

be necessary. *Id.* at 32. The trench then would be cleared of rocks and debris, and sand or gravel utilized in the trench as “padding material.” *Id.* ¶ 33. Any spill would contaminate both soil and minerals. *Id.* ¶ 36. There can be no doubt that the geological, paleontological, and mineral resources of Rosebud are under threat by Pipeline construction and a spill.

### STANDARD OF REVIEW

A court should grant summary judgment 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.” *Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 571 (D. Mont. 2018).

### ARGUMENT

#### **I. Without the 2019 Permit, There Can Be No Pipeline**

Whether the 2019 Permit applies to the entire Pipeline has been extensively briefed. *See* Pls.’ Supp. Br., Doc. 99, at 10-18. It suffices to say that the 2019 Permit is a cause of injury to the Tribes and the entire Pipeline is one enterprise and a connected action. *See WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) (a defendant may be sued if it is one of multiple causes of the plaintiff's injury); *accord* Order, Doc. 92, at 10. The Ninth Circuit has made clear that a defendant may be held liable so long

as he “is at least partially causing the alleged injury.” *WildEarth Guardians*, 795 F.3d at 1157. Without authorization the Pipeline cannot and will not be built, which shows that the 2019 Permit is one cause of the entire Pipeline being built.

## **II. The Tribes are Entitled to Summary Judgment that the 2019 Permit is Unconstitutional**

The Tribes are entitled to summary judgment on their Second Claim for Relief because the President lacks the constitutional power to permit KXL, and the undisputed facts clearly establish that Congress has not acquiesced in the issuance of the 2019 Permit.

### **1. The President Does Not Possess Independent or Inherent Constitutional Powers that Allow Him to Permit KXL**

The 2019 Permit is unconstitutional because Congress, and not the President, possesses constitutional powers to permit Pipeline. This Court definitively held “that the cross-border transportation of crude oil through a pipeline constitutes a form of foreign commerce.” Doc. 92, at 15 (citations omitted). Accordingly, the Court held that such transportation “falls within Congress’s power to regulate foreign commerce.” *Indigenous Env’tl. Network v. Trump*, CV-19-28-GF-BMM, 2019 WL 7421955, at \*9 (D. Mont. Dec. 20, 2019) (*IEN II*) (citation omitted). As noted in the Tribes’ Supplemental Brief,

Doc. 99, at 18-24, because Congress's power to regulate foreign commerce is "exclusive and plenary," *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2006) (citation omitted)), the President possesses no independent, inherent, or concurrent power to regulate foreign commerce, including permitting the Pipeline. *See Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329 (1994) (quoting U.S. Const. art. II, § 8, cl. 3) ("The Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'").

Federal Defendants and TransCanada nevertheless argue that the President's foreign affairs powers and role as Commander-in-Chief provide him with independent, inherent, or concurrent powers to permit the Pipeline. As noted in the Tribes' Supplemental Brief, Doc. 99, at 24-33, neither the President's foreign affairs power, nor his role as Commander-in-Chief provide him authority to permit the Pipeline.

The President's foreign affairs power is diplomatic; it relates to devising and executing the Nation's foreign policy and engaging in diplomatic relations with foreign nations. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086-88 (2015); *see* Doc. 99, at 24-28. In this way, the President's role in foreign affairs must be understood as "discharging [his]

responsibility to maintain the Nation's relationships with other countries."

*Am. Ins. Ass'n. v. Garamendi*, 539 U.S. 396, 420 (2003).

The President's Commander-in-Chief "duty and [] power are purely military." *Flemming v. Page*, 50 U.S. 603, 615 (1850); *see* Doc. 99, at 28-30. This role vests the President with the powers to command and oversee the military, *Loving v. United States*, 517 U.S. 748, 722 (1996), conduct military campaigns, *c.f. Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006) (citation omitted), and ensure the national defense. While the President's Commander-in-Chief role provides him "broad powers," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), "the President is not Commander in Chief of the country, only the military." *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part) (citation omitted).

The power to permit the Pipeline does not flow from either the President's foreign affairs power or his role as Commander-in-Chief. The 2019 Permit regulates foreign commerce. The Pipeline is a commercial enterprise, undertaken by a for-profit corporation seeking to import crude oil from Canada into the United States, where it would be refined and sold on national and global markets. *See* Doc. 99, at 30-33. This is commerce. *Accord* Doc. 92 at 15; *W. Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1342 (9th Cir.

1984) (transportation, refining, and distribution of foreign crude oil are carried out in commerce). The 2019 Permit was neither the result of diplomacy or bilateral negotiations between the United States and Canada, nor required as part of a treaty, related to command and control of the military, nor necessary to repel an attack against the Nation.

While foreign affairs and national security often intersect with foreign commerce, this does not grant the President the power to act in a sphere where he otherwise lacks power. *See Loving*, 517 U.S. at 757 (noting that one branch of government may not intrude upon the central prerogative of another). Had the framers intended for the President to regulate foreign commerce, they would not have explicitly granted that power to Congress. The President cannot usurp Congress's Foreign Commerce Clause power simply by invoking "foreign affairs" or "national security." *Zivotofsky*, 135 S. Ct. at 2090 ("The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue." (citations omitted)); *Hamdan*, 548 U.S. at 591-92 (quoting *Ex parte Milligan*, 71 U.S. at 139) ("But neither can the President, in war more than peace, intrude upon the proper authority of Congress."); *Youngstown*, 343 U.S. at 587-88 (majority). The contention that the President's foreign affairs power and role as

Commander-in-Chief allow him to permit the Pipeline undermines the fundamental constitutional tenet of separation of powers.

The authority to permit the Pipeline falls within Congress's *exclusive and plenary* power to regulate foreign commerce. *C.f. IEN II*, 2019 WL 7421955, at \*9. The President, therefore, possesses no independent, inherent, or concurrent powers that allow him to permit the Pipeline.

## **2. Congress Has Not Acquiesced in the President's Issuance of the 2019 Permit**

When the President exercises a power the Constitution has granted to Congress, he may do so only if Congress has delegated him the authority or it has acquiesced in his exercise of authority. The undisputed facts demonstrate that Congress has not acquiesced in the President's unilateral issuance of the 2019 Permit.<sup>5</sup>

A "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the action has been taken in pursuance of its consent.'" *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (citation, brackets

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<sup>5</sup> Congress has not delegated to the President the authority to permit the Pipeline, and Defendants do not argue that it has.

omitted); *Medellín v. Texas*, 552 U.S. 491, 531 (2008). Yet, “[p]ast practice does not, by itself, create power.” *Dames & Moore*, 453 U.S. at. 686.

Congress has not acquiesced in the President’s unilateral issuance of the 2019 Permit as explained in the Tribes’ Supplemental Brief. *See* Doc. 99, at 37-41, 47. For fifty-one years nine administrations issued permits for cross-border crude oil pipelines pursuant to a process established by Executive Order No. 11,423, 33 Fed. Reg. 11,741 (Aug. 16, 1968) (EO 11423), and Executive Order No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) (EO 13337). This permitting process represents a “‘long-continued practice, known to and acquiesced in by Congress.’” *Dames & Moore*, 453 U.S. at 686 (citation omitted). Congress was well aware of this process and expressed its approval of it. *See Detroit Int’l Bridge Co. v. Gov’t of Can.*, 189 F. Supp. 3d 85, 97 (D.D.C. 2016); Temporary Payroll Tax Cut Continuation Act, Pub. L. No. 112-78, § 501(a), 125 Stat. 1280, 1289 (2011).

The 2019 Permit was not issued pursuant to this, or any other, process. It was radically different and issued unilaterally by the President, in spite of the prior permitting process. *See* 84 Fed. Reg. 13,101 (2019 Permit issued “notwithstanding Executive Order 13337 . . . and the Presidential Memorandum of January 24, 2017”). This “unprecedented action,” *Medellín*,



552 U.S. at 532, was not “‘a systematic, unbroken, executive practice,’” *Dames & Moore*, 453 U.S. at 686 (citation, brackets omitted), and was not “supported by a ‘particularly longstanding practice’ of congressional acquiescence.” *Medellín*, 552 U.S. at 531 (2008) (citation omitted).

Federal Defendants and TransCanada argue that the permitting process established by EOs 11423 and 13337 and used for fifty-one years is irrelevant to the Court’s inquiry. Instead, they argue that Congress has generally acquiesced in the President’s unfettered authority to permit cross-border crude oil pipelines in any manner he sees fit. They argue that prior to the issuance of EO 11423, Presidents unilaterally issued permits for cross-border crude oil pipelines; therefore, the 2019 Permit is constitutional. This argument dangerously misrepresents the doctrine of congressional acquiescence.

Determining whether Congress has acquiesced in the President’s actions must be done on the narrowest of grounds. *Dames & Moore*, 453 U.S. at 660-61. As explained in the Tribes’ Supplemental Brief, Doc. 99, at 46-47, interpreting congressional acquiescence broadly threatens the separation of powers. Accordingly, “Congressional acquiescence can only be inferred when there is ‘overwhelming evidence’ that Congress *explicitly* considered the

'*precise issue*' presented to the court." *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007) (citation omitted, emphasis added); *Medellín*, 552 U.S. at 528 (Congress must have "acquiesced in th[e] *particular exercise* of Presidential authority." (emphasis added)).

The *precise issue*, or *particular exercise* of presidential authority, presented to the Court in this case is the President's *unilateral* issuance of the 2019 Permit. Nine administrations prior to the Trump Administration utilized the permitting process established by EOs 11423 and 13337. The practices of Presidents prior to the issuance of EO 11423 are irrelevant to determining whether Congress has acquiesced in the issuance of the 2019 Permit. EOs 11423 and 13337 established "'a systematic, unbroken, executive practice, long pursued to the knowledge of Congress,'" *Dames & Moore*, 453 U.S. at 686 (citation omitted), by the last nine presidential administrations, over the past fifty-one years. President Trump completely disregarded and unilaterally changed this process when he issued the 2019 Permit.

Taking into "consideration . . . all [of] the circumstances," *Id.* at 668, Congress has not acquiesced in the President's unilateral issuance of the 2019 Permit. The President lacks inherent, independent, or concurrent constitutional powers to regulate foreign commerce, *i.e.*, permit the Pipeline,

and the undisputed facts clearly establish that Congress has not acquiesced in his unilateral issuance of the 2019 Permit. The Tribes are therefore entitled to summary judgment on their Second Claim for Relief that the 2019 Permit is unconstitutional.

### **III. TransCanada Cannot Construct the Pipeline Across the United States-Canada Border without Authorization**

Federal Defendants and TransCanada argue that if the Court holds that the President lacks constitutional authority to permit the Pipeline, then the legality of the 2019 Permit is irrelevant because TransCanada can simply construct the Pipeline across the United States-Canada border without any authorization. This argument is unavailing.

TransCanada is not seeking simply to import crude oil into the United States from Canada through existing infrastructure; instead, it seeks to construct, operate, and maintain a 1,200-mile foreign crude oil Pipeline across the border and then through the heartland of the United States. Unauthorized, these activities would threaten the territorial sovereignty of the Nation. *C.f. Cent. R.R. Co. of N.J. v. Mayor & Alderman of Jersey City*, 209 U.S. 473, 479 (1908) (“We repeat that boundary means sovereignty, since, in modern times, sovereignty is mainly territorial.”). Accordingly, the federal

government has never taken the position that a foreign corporation can simply construct commercial infrastructure across the Nation's borders without authorization. *See, e.g., United States v. La Compagnie Francaise des Cables Telegraphiques*, 77 F. 495, 495 (S.D.N.Y. 1896) (concerning submarine cables, "without the consent of the general government, no one, alien or native, has any right establish a physical connection between the shore of this country and that of any foreign nation"); *accord E. Bay Sanctuary v. Trump*, 932 F.3d 742, 755 (9th Cir. 2018) ("Congress is vested with the principal power to control the nation's borders."); President Ulysses Grant's Seventh Annual Message to Congress, H.R. Doc. No. 1, Pt. 1 (1875), Doc. 67-2 ("The right to control the conditions for the laying of a cable within the jurisdictional waters of the United States to connect our shores with those of any foreign state pertains exclusively to the government of the United States under such limitations and conditions as Congress may impose."); *see* Doc. 99, at 34-37.

Should the Court hold the 2019 Permit unlawful, TransCanada cannot simply construct the Pipeline across the United States-Canada border. Instead, it would be required to seek congressional approval for such foreign commerce. While uncommon today, Congress historically has had to

specifically approve the construction of individual cross-border infrastructure projects. *See Detroit*, 189 F. Supp. 3d at 93-94.

#### **IV. The Tribes are Entitled to Summary Judgment on the Mineral Claims**

TransCanada has admitted the Pipeline would cross Rosebud mineral estates held in trust, and this undisputed fact is dispositive. The Tribes put TransCanada and the United States on notice of several mineral claims<sup>6</sup>— that the United States has an obligation to protect Rosebud minerals, Doc. 58, ¶¶ 115-16; that trenching, rock ripping, and placing the Pipeline in Rosebud mineral estates is an unlawful interference and trespass, *id.* ¶¶ 116, 179, 264, 265; that TransCanada has not obtained Rosebud’s consent, as required, to trespass into its mineral estate, *id.* ¶¶ 265-66, 427; and that TransCanada’s construction activity would constitute mining. *Id.* ¶¶ 426-27. TransCanada merely focuses on the “mining” claim and ignores the rest. The undisputed facts show that the Tribes are entitled to summary judgment.

##### **1. Building a Pipeline Through Rosebud Mineral Estates Held in Trust is a Trespass That the United States Has an Obligation to Prevent**

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<sup>6</sup> TransCanada generally misapprehends the Fifth Claim as merely asserting specific violations of right-of-way and minerals statutes, which is incorrect. It includes treaty violations.

TransCanada admitted it would be trenching and rock ripping (eight feet deep, five feet wide) into Rosebud mineral estates that are held in trust by the United States. TC Br. at 4-5, 25; TC SUF at ¶ 27. And contrary to TransCanada's assertion, Rosebud owns and has an interest in these mineral estates. Pls.' SUF at 7 ¶ 13; *see Mustang Prod.*, 94 F.3d at 1385; *see also HRI*, 198 F.3d at 1254. Given these facts, the President has failed to require Rosebud's consent for such trenching pursuant to the Treaty's consent provisions, and the Agency Defendants have failed to require Rosebud's consent and to require that TransCanada comply with federal regulations. As such, the 2019 Permit is void and TransCanada must be enjoined from trespassing on Rosebud's mineral estates.<sup>7</sup>

First, trespassing into Rosebud's minerals, held in trust, without Rosebud's consent is a violation of the 1851 and 1868 Fort Laramie Treaties. Subsurface minerals have long been considered elements of the land, and are owned by the respective tribal nation. *Shoshone Tribe*, 304 U.S. at 116.

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<sup>7</sup> TransCanada notes that the BLM issued its record of decision granting it a right-of-way, pursuant to the Mineral Leasing Act and NEPA, to build the Pipeline across federal lands. Doc. 97, at 9 n.3. The Tribes intend to amend their Complaint to include the approval as similarly violating the treaties and rights-of-way laws as Tribes have already brought. *See* Doc. 100 at 3.

Rosebud historically would have considered a trespass into their lands (including minerals) as a depredation<sup>8</sup> and trespass, and something that their consent is required for pursuant to the Treaties. The President must comply with the treaties, and his failure to comply with the treaties renders the 2019 Permit void.

Second, the agency defendants have a “responsibility to protect the Tribes’ mineral estate.” *Shoshone Indian Tribe of Wind River Reservation v. United States*, 52 Fed. Cl. 614, 628 (2002) (citing 43 C.F.R. § 3590.2(i)). Included in this responsibility “is the duty to prevent mineral trespass.” *Id.*

Specifically, the Department of the Interior is required to act “on any mineral trespass on Federal or Indian lands in accordance with part 9230 of [Title 43].” 43 C.F.R. § 3590.2(i); *see Shoshone Indian Tribe*, 52 Fed. Cl. at 628. As noted, Indian lands include “any lands owned by any individual Indian . . . [or] Indian tribe . . . which owns land *or interests in the land*, the title to which is held in trust by the United States.” 25 C.F.R. § 211.3 (emphasis added). With regard to the trust mineral estates, Rosebud has an ownership

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<sup>8</sup> The mineral impacts are both a trespass and a depredation. The Tribes, however, are not seeking summary judgment on the depredation claim as that requires further factual development.

and sovereign interest them. Pls.' SUF at 7, ¶ 13; *see Shoshone Tribe*, 304 U.S. at 116-18; *Mustang Prod.*, 94 F.3d at 1385; *see also HRI*, 198 F.3d at 1254.

Federal law defines trespass as the “extraction, severance, injury, or removal” of “mineral materials.” 43 C.F.R. § 9239.0-7. Construction of the Pipeline would extract, sever, injure, or remove Rosebud’s mineral estate, which the United States must prevent. As detailed in the EIS, construction through the mineral estate would follow several steps. TransCanada would remove topsoil, TC SUF Ex. 4, Doc. 98-4 at 2.1-50, dig a trench eight feet deep and five feet wide, rock rip and blast, and then would utilize the mineral estate as padding material and backfill. *Id.* at 2.1-50 to 2.1-52; 2014 EIS 2.1-61. The backfill would then be compacted by a backhoe to reduce the potential for ditch line subsidence. Pls.' SUF at 11 ¶ 35. Finally, crude oil released from the pipeline would absorb into the mineral estate. Pls.' SUF at 11 ¶ 36.

All of these activities show that TransCanada would be extracting, severing, injuring, or removing Rosebud’s mineral estate. As such, the agency defendants are required to enjoin the trespass. *Shoshone Indian Tribe*, 52 Fed. Cl. at 628; 43 C.F.R. § 9239.0-7. Failure of the President and agency defendants to enjoin construction violates the Treaties and federal law, and therefore the Tribes are entitled to summary judgment.



## **2. Building a Pipeline Through Rosebud Mineral Estates Would Unlawfully Interfere with the Tribes' Right to Recover and Use the Minerals**

"When you own property in the West you don't always own everything from the surface to the center of the Earth. Someone else might own the minerals lying underground and the right to access them." *Entek GRB, LLC v. Stull Ranches, LLC*, 763 F.3d 1252, 1253 (10th Cir. 2014). It has long been held that the mineral estate is the "dominant estate and that a homestead patentee with surface estate title holds the servient estate." *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878, 884 (10th Cir. 1974); *Crow Tribe of Indians v. Peters*, 835 F. Supp. 2d 985, 991 (D. Mont. 2011) (surface estate is servient); *Heikkila v. Carver*, 416 N.W.2d 593, 596 (S.D. 1987) (mineral owner has the right to enter upon and make use of the surface).

Construction (and operation) of a crude oil pipeline through Rosebud's dominant trust estate would limit access to the mineral resources (including sand, gravel, clay, rock, oil, gas, etc.) that are located within and near the permanent right-of-way. To be sure, TransCanada would limit access to the permanent ROW using gates, boulders, or other barriers. Pls.' SUF at 11 ¶ 37. But even if gates are not present, the existence of a crude oil pipeline directly across the mineral estate would be an unlawful interference

with the dominant mineral estate. *Transwestern Pipeline*, 492 F.2d at 884; *Amoco Prod. Co. v. Guild Trust*, 461 F. Supp. 279, 283 (D. Wyo. 1978) (granting permanent injunction against any interference with enjoyment of rights in mineral estate). The United States has an obligation to prevent this interference, and Rosebud has authority to bring suit to protect its rights to the dominant estate. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 373–74 (1968) (the power of the United States to sue does not diminish the right of the Indians to maintain an action to protect their interests); *Shoshone Indian Tribe*, 52 Fed. Cl. at 628. As such, the Tribes are entitled to summary judgment that the Pipeline would unlawfully interfere with the Tribes’ right to recover and use the minerals.

### **3. TransCanada is Mining**

With regard to mining, TransCanada ignores the facts and merely asserts that, because it proposes to build a pipeline, it is not engaged in mining or mineral development, and that Rosebud does not own the minerals. TC Br. at 21. As shown, Rosebud does indeed have an interest in the minerals. Pls.’ SUF at 7 ¶ 13. Thus, the questions are whether TransCanada is mining, and whether the Tribes can seek a declaratory judgment and corresponding injunction to that effect.

Courts have held “that the term ‘mineral development’ has a broad meaning,” which may encompass work associated with excavation of minerals to achieve other ends. *United States v. Osage Wind, LLC*, 871 F.3d 1078 (10th Cir. 2017) (excavation of wind turbine footings and reuse of extracted rock constituted mining). In a very detailed opinion, the Tenth Circuit found that a company building wind turbines that sorted and crushed minerals, and used them as backfill for support, was “mining.” *Id.* at 1090-91. It noted that, while merely digging holes in the ground is not mining, the company there went further—it sorted the rocks, crushed them into smaller pieces, and exploited them as support. *Id.* at 1091.

That is precisely what TransCanada would do here. TransCanada would dig a trench eight feet deep and five feet wide, rock rip (breaking up and temporarily removing rock with an excavator), and then would utilize the mineral estate as backfill. TC SUF Ex. 4 at 2.1-50. TransCanada would also be “blasting.” 2014 EIS 2.1-61. Sand and gravel (minerals as defined at 25 C.F.R. § 211.3) would then be used as “padding material” to protect the pipeline during backfill. TC SUF Ex. 4 at 2.1-52. The backfill would then be compacted by a backhoe to reduce the potential for ditch line subsidence. 2014 EIS, Appx. G at 27.

Contrary to what TransCanada asserts, it would do more than simply dig a trench; it would remove and crush minerals to utilize them as backfill for “padding material” and to reduce subsidence. This is mining. *Osage Wind*, 871 F.3d at 1092. Because TransCanada would be mining, it must seek an appropriate permit to do so, and the agency defendants have a “responsibility to protect the Tribes' mineral estate.” *Shoshone Indian Tribe*, 52 Fed. Cl. at 628 (citing 43 C.F.R. § 3590.2(i)). And a “party may be enjoined from committing certain acts without proper authorization from an authorized agency official.” *United States v. Jenks*, 22 F.3d 1513, 1519 (10th Cir. 1994). Here, TransCanada must seek authorization both from the Secretary of the Interior *and* from Rosebud. 25 C.F.R. §§ 211.20(b) (right to decline) and (c) (consent), 212.20(c). TransCanada has not sought or obtained Rosebud’s consent. Pls.’ SUF at 12 ¶ 42. Rosebud is entitled to a declaratory judgment that TransCanada must comply with these federal laws, and to an injunction barring them from engaging in mining without first obtaining the proper authorizations.

#### **4. Jurisdiction Over Indian Land**

TransCanada must comply with Rosebud law. Federal law has long recognized the “inherent sovereign authority” of Indian tribes. *Michigan v.*

*Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (internal quotation marks and citations omitted). Indeed, the Supreme Court held nearly forty years ago that Indian Nations could exercise civil jurisdiction over the activities and conduct of non-Indians on “land belonging to the Tribe or held by the United States in trust for the Tribe.” *Montana v. United States*, 450 U.S. 544, 557 (1981); see *Window Rock Unified Sch. Dist. V. Reeves*, 861 F.3d 894, 899 (9th Cir. 2017); *Takeda Pharms. Am., Inc. v. Connelly*, CV 14-50-GF-BMM, 2015 WL 10985374, at \*5 (D. Mont. Apr. 24, 2015) (where non-Indian conduct allegedly and indisputably occurred on tribal trust land, “[t]his fact, by itself,” presumes tribal jurisdiction); accord *Walker v. Boy*, CV-19-43-GF-JTJ, 2019 WL 5700770, at \*1 (D. Mont. Nov. 4, 2019) (citation omitted) (tribal jurisdiction is presumed if the events that form the basis for it occurred or were commenced on tribal territory).<sup>9</sup>

The presumption of tribal civil jurisdiction over non-Indian activities and conduct on Indian land generally can be defeated only by an express

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<sup>9</sup> Even when conduct occurs off Indian lands, where the effects of that conduct are felt on or directed at Indian lands, tribes possess inherent jurisdiction over those activities. See *Sprint Comm’cs Co. L.P. v. Wynne*, 121 F Supp. 3d 893, 899 (D. S.D. 2015); *Montana v. EPA*, 137 F.3d 1135, 1140-41 (9th Cir. 1998); *Wisconsin v. EPA*, 266 F.3d 741, 749 (7th Cir. 2001).

provision in a Treaty or federal statute. *Window Rock*, 861 F.3d at 899-900. “In interpreting the extent of any such limits, courts do not ‘lightly assume that Congress . . . intend[ed] to undermine Indian self-government.’” *Id.* at 900. The test is whether tribal jurisdiction has been “affirmatively limited by a specific treaty provision or federal statute.” *Id.* TransCanada has pointed to no such statute or treaty that removes Rosebud’s jurisdiction over its mineral estates.

It is undisputed that the Pipeline would cross Rosebud mineral estates held in trust.<sup>10</sup> Indian mineral estates that are held in trust are “Indian lands” that Rosebud has authority over. 25 C.F.R. § 211.3; *see Shoshone Tribe*, 304 U.S. 111, 116-18 (1938); *Mustang Prod.*, 94 F.3d at 1385; *see also HRI*, 198 F.3d at 1254.

TransCanada responds that, pursuant to *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), Rosebud lost jurisdiction over these trust lands. TC at 26. Not so. *Kneip* only dealt with “surplus lands,” *id.* at 590, 609, and not lands that were allotted to Indians and held in trust. “To the extent the members

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<sup>10</sup> Whether the Pipeline, the easements, the work zones, its area of effect, and the spill zone cross tribal surface estates is a disputed fact that Rosebud does not have access to.

of the Rosebud Tribe are living on allotted land outside of the Reservation, they, too, are on ‘Indian country,’ within the definition of 18 U.S.C. s 1151 [sic], and hence subject to federal provisions and protections.” *Id.* at 615, n. 48;<sup>11</sup> see *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1007 (8th Cir. 2010) (allotments are Indian country and fall within the jurisdiction of the resident tribe); *Mustang Prod.*, 94 F.3d at 1385. Indeed, “tribal lands, trust lands, and certain allotted lands generally remain Indian country despite disestablishment.” *HRI*, 198 F.3d at 1251.

It is clear that the mineral estates here are allotments or estates held in trust, and the mineral estates, which Rosebud has an ownership interest in, remain in trust. Pls.’ SUF at 7 ¶ 13. Thus, it is presumed that Rosebud has jurisdiction over these “Indian lands.” See 25 C.F.R. § 211.3; *Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642 F.3d 802, 810 (9th Cir. 2011) (expressly stating that the *Montana* tests “do[] not apply to this case” arising on tribal land); *Grand Canyon Skywalk Dev., LLC v. ‘Sa’ Nyu Wa, Inc.*, 715 F.3d 1196, 1205 (9th Cir. 2013); *Window Rock*, 861 F.3d at 900-01. Moreover, the Tribes, as sovereigns, should not be treated any different than the federal

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<sup>11</sup> While not necessary to address in this case, Rosebud maintains that *Kneip* was wrongly decided.

government, which maintains jurisdiction over federal minerals. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (Court saw “no principled reason” Indian tribes should be treated differently than other governments in upholding tax on minerals); *Entek GRB*, 763 F.3d at 1254 (showing United States maintains jurisdiction over its minerals with Stock-Raising Homestead Act and Mineral Leasing Act); *see also* 43 U.S.C. § 1702 (defining “public lands” as “any land and interest in land owned by the United States”). Given that the Pipeline would cross mineral estates that remain in trust, Rosebud has jurisdiction over it and TransCanada.

TransCanada has also specifically agreed to follow tribal law, which provides the Tribes’ with jurisdiction. *Water Wheel*, 642 F.3d at 818; *accord Grand Canyon*, 715 F.3d at 1206 (under *Montana*, “tribal laws may be fairly imposed on nonmembers if the nonmember consents, either expressly or through his or her actions” (citation omitted)). It was specifically a requirement of the permitting process: “TransCanada Keystone Pipeline, L.P. has agreed to . . . follow all state, local, and tribal laws and regulations with respect to the construction and operation of the proposed Project[.]” 2017 Decision, Pls.’ SUF Ex. 4 at 31.



And the Pipeline would have a disastrous effect on Rosebud's members' health and welfare. Pls.' SUF at 9-21; *Rincon Mushroom Corp. v. Mazzetti*, No. 09cv2330, 2017 WL 3174509, at \*7-8 (S.D. Cal. July 26, 2017) (citations omitted); *Elliot v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 850 (9th Cir. 2009), *cert denied*, 558 U.S. 1024 (2009); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019); *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 905 (9th Cir. 2019); *Water Wheel*, 642 F.3d at 819. Given all of these serious impacts, Rosebud's jurisdiction is certainly plausible and TransCanada must be required to comply with Rosebud law and exhaust its tribal court remedies. *Window Rock*, 861 F.3d at 906 (holding that, where tribal jurisdiction is at least colorable or plausible, exhaustion in the tribal forum is required); *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1025 (8th Cir. 2014).

## CONCLUSION

For the foregoing reasons, the Tribes' Motion for Partial Summary Judgment should be granted.

RESPECTFULLY SUBMITTED this 25th day of February, 2020.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** complies with (1) Local Civil Rule 7.1(d)(2)(A) because it contains 6,470 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 Book Antiqua font.

/s/ Wesley James Furlong

Wesley James Furlong

NATIVE AMERICAN RIGHTS FUND

### CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, 2020, I electronically filed the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** 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

NATIVE AMERICAN RIGHTS FUND