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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,	CV 18-118-GF-BMM **DEFENDANTS TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

Defendant-Intervenors TransCanada Keystone Pipeline, LP and TC Energy Corporation ("TC Energy") submit this opposition to Plaintiffs' extraordinary—and meritless—motion for a preliminary injunction. As TC Energy informed this Court and the parties in January, it plans to start pipeline construction at the U.S./Canadian border on or after April 1st. Mere commencement of construction over fifty miles from their reservations will not cause any injury, much less irreparable harm, to Plaintiffs' lands or resources before this Court can rule on the parties' pending motions for summary judgment. And Plaintiffs have no likelihood of succeeding in their legal challenges to the 2019 Permit that the President issued for the 1.2-mile segment of border-crossing facilities.

As TC Energy has explained, Plaintiffs' treaty claims are precluded by *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), which holds that the United States has no treaty obligation to protect Plaintiffs from alleged harms that originate from activities outside their reservations. Remarkably, Plaintiffs do not even mention this decision, let alone attempt to explain why it is not controlling. Similarly, Plaintiffs' claims that Congress has not acquiesced in the practice of Presidents unilaterally granting permits for oil pipelines is flatly inconsistent with a 50-year historical record during which Presidents from Woodrow Wilson to Lyndon Johnson did precisely that. And the fact that construction of Keystone XL

will require the temporary removal and then replacement of sand and rocks does not demonstrate that TC Energy will engage in unlawful "mining" in a handful of plots in South Dakota, or subject TC Energy to tribal jurisdiction.

Plaintiffs' claims of irreparable harm are equally baseless. Speculative concerns about future oil spills or illegal conduct by workers at camps are not "*immediate* and irreparable harms" from border construction. Moreover, the federal defendants have adequately identified Plaintiffs' historic and cultural resources, and Plaintiffs cannot claim irreparable harms when they have rebuffed the government's attempts at consultation and declined invitations to conduct their own traditional cultural property surveys at Keystone's expense. Similarly, any alleged "injury" to Plaintiffs' interests in mineral estates is not irreparable, because it could be remedied by an award of damages. And a pipeline built on federal, state, and private land cannot injure Plaintiffs' sovereignty. For these and other reasons explained in greater detail below, Plaintiffs' motion for a preliminary injunction should be denied.

STATEMENT OF FACTS

A. Keystone XL Pipeline

Keystone XL will cross the U.S. border near Morgan, Montana, and continue for approximately 882 miles to Steele City, Nebraska, where it will

connect to the existing Keystone pipeline system.[1] To construct the Project, TC Energy has acquired fee simple interests in land for the pumping stations, permanent easements and rights of entry over land where the pipeline will be located, and temporary easements and rights of entry for temporary work spaces needed during construction. Cummings Decl., Dkt. 98-3, ¶ 3; *see also* 2014 FSEIS, Dkt. 98-4, at 2.1-19 (Figure 2.1.2-1) (depicting typical 110-foot-wide temporary construction right-of-way that is later reduced to a 50-foot-wide permanent right-of-way following construction). TC Energy has also acquired rights for temporary access roads or additional temporary work spaces during construction. Cummings Decl. ¶ 6. Some of these easements or agreements are on privately owned land where the landowner granted TC Energy permission to build the pipeline, but Rosebud claims that it holds some interest in the mineral estate that the United States reserved in trust for specific Indian allottees when the tracts were patented decades ago. *See* Antoine Decl., Dkt. 112-4, ¶¶ 17-19, 24-25; Hofer Decl., Dkt. 98-5, ¶ 8; Second Declaration of Amy Hofer ¶¶ 5-6 (Exhibit 1) .

The declarations TC Energy submitted in support of its motion for summary judgment establish that, with the exception of certain federal land, all of TC

[1] U.S. Dep't of State, *Final Supplemental Environmental Impact Statement for the Keystone XL Project*, S-1 (Dec. 2019) ("2019 Final SEIS"), https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/details?eisId=286595

Energy's easements and rights-of-way in Montana and South Dakota are on property that was owned by private landowners or the State at the time TC Energy acquired them. Cummings Decl. ¶¶ 4-5; Hofer Decl. ¶ 7; Fowlds Decl., Dkt. 98-6, ¶ 11; Second Declaration of Brian Fowlds ¶ 4 (Exhibit 2);U.S. Dep't of the Interior, Bureau of Land Mgmt., Record of Decision, Keystone XL Pipeline Project Decision to Grant Right-of-way and Temporary Use Permit on Federally-Administered Land (Jan. 22, 2020), https://eplanning.blm.gov/epl-front-office/projects/nepa/1503435/20011555/250015801/Keystone_ROD_Signed.pdf (granting right-of-way). Although some of TC Energy's property interests may be on land that was part of the Great Sioux Reservation in the 1870s or where the Fort Belknap's ancestors once lived, Dkt. 114 at 2-5, none is within the current boundaries of Plaintiffs' reservations. Cummings Decl. ¶¶ 4-5.

In the summary judgment briefing, Plaintiffs contest TC Energy's proof by claiming that they "have seen" "publicly available maps" that "show" that the Pipeline corridor would cross Rosebud surface estates. Dkt. 111 at 7-8. In support, they cite a declaration submitted by Paula Antoine, the Director of the Sicangu Oyate Land Office for the Rosebud Sioux Tribe. *Id.* But in a recent hearing on TC Energy's application for a permit to draw water from certain South Dakota rivers for the construction of Keystone XL, both Ms. Antoine and the President of the Rosebud Sioux Tribe, testified, under oath, that the pipeline would be *near*, but not

on, tribal land. When asked to describe "the proximity of the pipe itself and the construction of the pipeline right-of-way" in Tripp County to "tribal lands or allotted lands," Ms. Antoine replied: "It gets very close." Exhibit 3 at 12:24-13:5; *see also id*. at 13:15-21 (agreeing that it is "a fair summary" of her testimony that the pipeline is "directly abutting and affecting tribal land"). The President of the Rosebud Sioux Tribe similarly testified that he is "familiar with the route of Keystone" and the pipeline gets "[v]ery close" to tribal land. Exhibit 4 at 17:11-15; *see also id*. at 17:18-20 (pipeline "comes right by tribal lands" southwest of Presho); *id.* at 18: ("very close to some trust acreage" in the Winner Ideal Indian community). He further testified that it is "that proximity" "between the pipeline and [his] tribe's lands" that forms "the basis for [his] testimony that the Keystone XL Pipeline violates the 1868 and 1851 Fort Laramie Treaties." *Id.* at 18:9-14.

B. Tribal Consultation During the NEPA Process

When TC Energy first applied for a Presidential Permit in 2008, the State Department decided to follow the process set forth in section 106 of the National Historic Preservation Act ("NHPA") by consulting with Indian tribes, state historic preservation officers ("SHPOs"), and local governments about the pipeline's effect on historic and cultural properties. As part of that process, State, SHPOs from Montana, South Dakota and Nebraska, numerous other state and federal agencies, and TC Energy signed a Programmatic Agreement ("PA") that establishes a

process for identifying historic properties that might be affected by construction of Keystone XL, and for taking steps to avoid or mitigate any adverse effects when feasible. *See* 2014 FSEIS, Appendix E (Programmatic Agreement); *id.* at Attachment G.

When TC Energy reapplied for a permit in 2012, State contacted tribes with interest in the cultural resources potentially affected by Keystone XL. *See* 2014 FSEIS at ES-26 & PA Attachment I. Sixty-nine tribes replied. Some, like Rosebud, said they would like to become consulting parties; others, like Fort Belknap, said they were undecided. *See* PA Attachment G (Table 1). "In addition to communication by phone, email, and letter, high-level Department officials travelled to the areas near the proposed Project route to hold four face-to-face consultations, to which all Indian tribes were invited and whose participation was funded by Keystone …." 2014 FSEIS at ES-26. Neither Rosebud nor Fort Belknap availed themselves of this opportunity. PA Attachment I. State invited tribes to conduct cultural studies (at Keytsone's expense), but Plaintiffs did not accept the invitation. PA Attachment G (Table 3); *see also* PA, E2 (documenting numerous efforts at consultation with Plaintiffs prior to the 2014 FSEIS).

State renewed the tribal consultation process again in August, 2018. It met with the Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation in Poplar, Montana to provide an update on the cultural resources investigation for Keystone

XL. 2019 Final SEIS at A-1. State scheduled a similar meeting with the Fort Belknap in Montana on August 15, 2018, but "at the last moment the tribe cancelled the meeting with no explanation and shortly thereafter ceased communicating with the Department." *Id.*

State also set up an online cultural resources portal to enable the tribes to more easily review documents concerning the cultural surveys. *Id.* at D-17. "In March 2019, a Geographic Information System (GIS) was added to the portal enabling users to see the location of all recorded cultural resources in relation to the Project pipeline right-of-way, access roads, substations, etc." *Id.*

Based on information obtained from the consultation process, State conducted another cultural resources inventory along the first 77 miles of the pipeline corridor in Montana, and invited tribes to participate in the field work. *Id*. Again, Plaintiffs declined the invitation. *Id*. The new survey in Montana was not the only new survey. "In 2018 and 2019, surveys were conducted in all three states for all parcels with landowner permission." 2019 Final SEIS at 3.9-6; *id*. at 3.9-7 (Table 3.9-2); *id.* at 4-70.

As a result, the entire route has been surveyed in Montana and South Dakota. *Id.* at 3.9-8 (Table 3.9-3); *see also id*. at 3.9-14-3.9-15 (Table 3.9-6). The 2019 Final SEIS contains tables of the cultural properties within the Keystone XL construction footprint or adjacent to the Project in Montana that are eligible, or

potentially eligible, for listing in the National Register of Historic Properties, and the steps taken to prevent or mitigate impact to them. 2019 Final SEIS at 4-71-4-75 (Table 4.9-2, Table 4.9-3).[2] The vast majority will not be affected, *id.* and "[n]o historic properties will be affected by the Project in South Dakota," *id.* at 4-72.

ARGUMENT

A preliminary injunction is an "extraordinary remedy never awarded as of right." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (quoting *Winter v. NRDC*, 555 U.S. 7, 24 (2008)). Plaintiffs must therefore show: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent preliminary relief, (3) that the balance of equities favors that relief, and (4) that an injunction is in the public interest. *Id.* The first factor is the most important; absent a showing of likelihood of success on the merits, the Court "need not consider the remaining three [*Winter* elements]." *Id.* That principle applies *a fortiori* here, where Plaintiffs' claims fail as a matter of law.

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

Plaintiffs claim that they are likely to succeed on their claims that: (1) the President's issuance of the 2019 Permit violated the Commerce Clause; (2)

[2] Work is ongoing to determine whether cultural properties identified in the recent Montana surveys are eligible for placement on the National Register. If so, State will follow the Programmatic Agreement and impose measures to prevent or mitigate impact. 2019 Final SEIS at 3.9-14-3.9-15 (Table 3.9-6); *id.* at 4-70.

construction of the pipeline is unauthorized "mining" and a trespass on Rosebud's interest in reserved mineral estates in several parcels on land in South Dakota; (3) Plaintiffs have jurisdiction over the pipeline and TC Energy must comply with their laws; and (4) issuance of the 2019 Permit violates Plaintiffs' treaty rights. Dkt. 120 at 5. Defendants are entitled to summary judgment on all of these claims, which are addressed in detail in TC Energy's summary judgment filings. TC Energy will address the merits only in abbreviated form here and incorporate by reference its briefing on those motions, as Plaintiffs also have done.[3]

A. Issuance Of The 2019 Permit Does Not Violate The Tribes' Treaty Rights

Plaintiffs' treaty claims are foreclosed by binding Ninth Circuit precedent. Plaintiffs advance the same claims, based on the same treaties, that Fort Belknap and other tribes advanced in *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006). *See* Dkt. 97 at 10-11. Here, as there, Plaintiffs claim that the government violated its treaty obligation to protect the tribes from "depredations" by permitting activities outside reservation boundaries that allegedly will damage their historic and cultural resources and pollute their water supply. The Ninth

[3] TC Energy will file its opposition to Plaintiffs' motion for summary judgment and its reply brief in support of its own summary judgment motion in two days. It is filing its opposition to the motion for preliminary injunction now, because that is the deadline under this Court's rules, and Plaintiffs would not consent to TC Energy's request for a two-day extension.

Circuit rejected the tribes' claim. It held that the United States' obligation under the treaties is "to protect the Tribes from depredations that occurred only on tribal land," and thus did not apply to federal permits authorizing mining activity outside the tribes' reservation. *Gros Ventre*, 469 F.3d at 813

Plaintiffs thus cannot succeed on their treaty claims because it is clear that the 2019 Permit only grants permission "to construct, connect, operate, and maintain pipeline facilities *at the international border* of the United States and Canada at Phillips County, Montana." Presidential Permit of March 29, 2019, 84 Fed. Reg. 13,101, 13,101 (Apr. 3, 2019) (emphasis added)—a 1.2-mile segment far from either tribe's reservation and Rosebud's alleged mineral estates in South Dakota. *See also* Dkt. 97 at 11-12, 19; Dkt. 76 at 2-4. And even if the 2019 Permit authorized the entire Keystone XL route, the Permit still would not authorize activity on tribal land, because Keystone XL will be built on property interests that TC Energy has acquired (or will acquire) from private landowners, the States, or the federal government, *see* Dkt. 97 at 13—a fact that Rosebud officials have acknowledged in sworn testimony in administrative proceedings in South Dakota, *see supra*, pp. 4-5.

Remarkably, Plaintiffs' motion nowhere addresses *Gros Ventre*. Instead, they spend nine pages arguing that their historical expert will probably be able to show that the Indians who signed the treaties would have viewed a "crude oil

pipeline, such as KXL," passing "through Indian lands and resources" as a "depredation" the United States had a duty to prevent. Dkt. 120 at 17. Because the treaties have already been authoritatively construed by the Ninth Circuit, however, Plaintiffs' historical evidence is legally irrelevant.

Moreover, Plaintiffs' own description of that evidence confirms what the Ninth Circuit held: the treaty protected the tribes from "depredations" committed by outsiders *on* tribal land. Plaintiffs emphasize that the 1851 Fort Laramie Treaty "was precipitated by the depletion of game, timber, and forage by the constantly increasing number of settlers *who crossed the lands of the Plains Indians* on their way to California. Aggrieved *by these depredations*, the Indians had opposed that passage, sometimes by force." Dkt. 120 at 11 (quoting *Montana v. United States*, 450 U.S. 544, 571 (1981) (Blackmun, J., dissenting)) (emphasis added). And Plaintiffs summarize the views of the tribal negotiators as expressing the sentiment "don't *come through here* and destroy our natural resources." Dkt. 120 at 13 (emphasis in original). This historical evidence is fully consistent with the Ninth Circuit's view that the treaty obligation was to protect the tribes "from depredations that occurred only *on* tribal land," and thus was not an obligation that lasts "in perpetuity, even after the Tribes later relinquished their ownership in that land." *Gros Ventre*, 469 F.3d at 813 (emphasis added). And because neither tribe

owns the land where there are Keystone XL easements, the pipeline cannot be a "depredation" that violates the treaties.

Assuming the 2019 Permit authorized the entire pipeline, and the pipeline route crosses tribal land (neither of which is true), the treaty claims still fail. "[A]t most, the treaties merely recognize a general or limited trust obligation to protect the Indians against depredations on Reservation lands: an obligation for which we have no way of measuring whether the government is in compliance, unless we look to other generally applicable statute or regulations." *Gros Ventre*, 469 F.3d at 812; *see also* Dkt. 97 at 15-18; Dkt. 109 at 18-19. Plaintiffs cannot show that issuance of the 2019 Permit violated any generally applicable statutory requirements.

Plaintiffs have conceded that NEPA, the NHPA, and the APA do not apply to the President. Dkt. 111 at 24. They claimed, however, that "the President is bound by the Treaties," and it is "the substantive (not technical) requirements" of NEPA and the NHPA that provide the "standards to apply to fulfill the treaty obligations." *Id.* at 24-25. But no such principle can be found in *Gros Ventre*. Measuring the government's treaty compliance by reference to "generally applicable statutes or regulations," 469 F.3d at 812, cannot mean extending substantive requirements to entities not subject to those statutes or regulations.

B. The 2019 Permit Is Not Unconstitutional

The President had the authority to issue the 2019 Permit. Plaintiffs' summary judgment briefs contain a lengthy discussion of Congress's authority over foreign commerce, Dkt. 114 at 11-15, but ultimately acknowledge that the President can issue permits for cross-border oil pipeline facilities if Congress "has acquiesced in his exercise of [that] authority," *id.* at 15. Their claim is that Congress has not acquiesced in Presidents unilaterally issuing such permits; that such actions are "unprecedented," *id.* at 16 (quoting *Medellin v. Texas*, 552 U.S. 491, 532 (2008); and that it would "threaten[] the separation of powers" for this Court to consider historical evidence contradicting that inaccurate claim, *id.* at 17. That argument fails as a matter of law.

Presidents have issued permits for cross-border pipeline facilities since at least 1918 and, for 50 years, they did so unilaterally. President Wilson signed two such permits, which stated that "[t]he President *hereby authorizes*" or "*hereby grants authority for*" construction of an oil pipeline after "*having duly considered the application* …. Exhibit 5A, or & 5B. Similarly, Presidents Kennedy and Johnson signed permits stating that, "[b]y virtue of the authority vested in me as President … permission is *hereby granted*" for oil pipeline construction. Exhibits 5C-5F. None of these permits states that it was issued only after the President consulted with State or any other agency, much less that it was issued *by an agency*

after a multi-agency consultation process. Indeed, the title of E.O. 11423—"Providing for the performance of certain functions *heretofore performed by the President*," E.O. 11423 (emphasis added)—confirms that, in 1968, President Johnson delegated to State tasks that Presidents had previously performed themselves.

The historical record thus demonstrates that the only "systematic unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned." *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (citation omitted), is one in which an executive branch official grants permits for cross-border oil pipeline facilities. The particular officials who granted such permits, and the particular procedures used to do so, have varied since 1918, and thus cannot be considered part of an "unbroken" practice.

Plaintiffs argue that "Congressional acquiescence can only be inferred when there is '*overwhelming evidence*' that Congress *explicitly considered* the '*precise issue*' presented to the court." Dkt. 114 at 17-18 (quoting *Morales-Izquierdo v. Gonzales*, 486 F.3d 484 (9th Cir. 2007), quoting *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 n.5 (2001)) (emphasis Plaintiffs'). Plaintiffs imply that this standard can only be met by Presidential practice since 1968. But the standard they invoke is inapplicable here. It addresses the showing required to establish "congressional acquiescence to *administrative*

interpretations of a statute," *Solid Waste Agency*, 531 U.S. at 169 (emphasis added)—a far more stringent test because it relies on disfavored subsequent legislative history to discern the meaning of a statute passed by a different Congress. *See id.* (discussing the "considerably attenuated" relationship between the enacting Congress and the subsequent Congress acquiescing in agency's interpretation).

The standard for acquiescence in Presidential assertions of power is simply whether Congress has acquiesced "in conduct *of the sort* engaged in by the President." *Dames & Moore*, 453 U.S. at 678-79 (emphasis added). Congress has acquiesced both in Presidents issuing permits for oil pipelines themselves and doing so through the State Department pursuant to an inter-agency process. There is no basis for concluding that, by acquiescing in the latter, more recent Presidential practice, Congress somehow impliedly barred the President from engaging in the *same conduct* that (a) other Presidents previously engaged in and (b) Congress itself previously acquiesced in. This is particularly true where, as in *Dames & Moore* itself, Congress has "not disapproved of the" President's action. *Id.* at 687.

Indeed, other congressional actions also contradict Plaintiffs' claims that Congress has acquiesced only to the process whereby Presidential Permits are issued after an inter-agency consultative process. As Plaintiffs note, Dkt. 114 at 16,

Congress was aware of E.O. 11423—the very source of the process that they now claim is binding—yet, when Congress replaced the part of that Order that addressed international bridges, it did *not* mandate that the President issue permits either through an agency or after any inter-agency process. To the contrary, it provided that the President had to approve such bridges and that, "[i]n the course of determining whether to grant such approval, the President shall secure the advice and recommendations of (1) the United States section of the International Boundary and Water Commission, United States and Mexico [for bridges connecting those countries], and (2) the heads of such departments and agencies of the Federal Government *as he deems appropriate* to determine the necessity for such bridge." 33 U.S.C. § 535b (emphasis added).

Moreover, as TC Energy has explained at length, the Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, 125 Stat. 1280, Title V (the "2011 Temporary Act") is not evidence that Congress acquiesced only in the permitting process set forth in E.O. 11423 or E.O. 13337. *See* Dkt. 95 at 7-23. Indeed, the only provision in that statute that mentioned either of these Executive Orders bluntly directed the President, acting through State, to *grant* a permit for Keystone XL. § 501(a), 125 Stat. at 1289. Yet another provision provided that, if the President failed to act within 60 days, the permit would "be in effect by operation of law." § 501(b)(3), 125 Stat. at 1290-91. This provision did not

mention E.O. 13337 at all, much less make it a precondition of the permit's effectiveness. And the provision requiring the President to notify Congress if he decided that a permit for Keystone XL would not be in the national interest does not mention E.O. 13337. *See* § 501(b)(2), 125 Stat. at 1290.

Collectively, these provisions demonstrate that Congress believed a permit for Keystone XL was in the national interest and it sought to force President Obama to promptly grant a permit or explain why he would not. Far from limiting its acquiescence to permits issued in compliance with E.O. 13337, the 2011 Temporary Act was a temporary measure designed to *override* the E.O. 13337 process with respect to Keystone XL.

And four years later, Congress passed the Keystone XL Pipeline Approval Act of 2015, which, but for the President's veto, would have done precisely that. Thus, the import of Congress's actions is clear. In 2011, it tried to force the President to issue a permit for Keystone XL; in 2015, it passed a law issuing such a permit itself.

In short, there is no basis for Plaintiffs' claim that Congress has, through acquiescence or its direct legislative action, required that Presidential Permits for cross-border oil pipeline facilities be approved only pursuant to a process like E.O. 13337, and thereby barred Presidents from unilaterally granting such permits. Plaintiffs thus have no likelihood of succeeding on their constitutional claims.

C. Pipeline Construction Is Not Mining Or A Trespass On Rosebud's Alleged Interest In Minerals.

Plaintiffs also have no likelihood of success on the merits of the claim under the Indian Mineral Leasing Act. As TC Energy has explained, the Indian Mineral Leasing Act allows land to be "*leased for mining purposes*," 25 U.S.C. § 396 (emphasis added); it does not address rights-of-way for oil pipelines. Rights-of-way for oil pipelines—even ones buried underground like Keystone XL—are not for mining purposes. *See* Dkt. 97 at 21-26. They are for a right-of-way on the surface estate, and thus are governed by the Indian Rights-of-Way Act. *See* 25 U.S.C. § 323 (authorizing "rights-of-way for all purposes").

The BIA regulations make this clear. They state that the Indian Rights-of-Way Act authorizes "rights-of-way over and across Indian or BIA land, for uses including … Oil and gas pipe lines (including pump stations, meter stations, and other appurtenant facilities)." 25 C.F.R. § 169.5(a)(8). They define "Indian land" as land in which "the surface estate" is owned by an Indian tribe or individual Indian in trust or restricted status. 25 C.F.R. §§ 169.2, 169.3(a). And they make clear that the "surface estate includes everything other than the mineral estate, such that any buried lines or other infrastructure affect the surface estate and require a right-of-way." 80 Fed. Reg. 72,492, 72,495 (Nov. 19, 2015).

In the summary judgment briefing, Plaintiffs had no response to that argument. Instead, they claimed that digging the pipeline trench would entail

"mining" because it would "rip" rock and "utilize the mineral estate as backfill," which would be compacted to reduce the potential for subsidence. Dkt. 114 at 27. That is nonsense. What Plaintiffs describe is part of the process of digging a trench, removing soil and rock, installing the pipeline, and *replacing* the soil and rock in the trench to return the land to its pre-construction condition. Dkt. 97 at 25; *see also* Declaration of L.A. "Buster" Gray, III (attached as Exhibit 6). That is not mining. *See* 25 C.F.R. § 211.3 ("[m]ining" is "the science, technique, and business of mineral development, including, but not limited to: opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals"). And even if the digging of a trench were deemed to be "mining," it would fall within the exception that provides that "when sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt is the subject mineral, an enterprise is considered 'mining' only if the extraction of such a mineral exceeds 5,000 cubic yards in any given year." *Id*. As the declaration of the Keystone XL Construction Manager explains, the excavated soil (minus any rocks and cobbles) is returned to the trench following installation of the pipe, and the company will not remove 5,000 or more cubic yards of rocks and cobbles from the properties where Rosebud claims to hold a mineral estate. Gray Decl. ¶ 10.

D. The Tribes Have No Jurisdiction To Prohibit Keystone XL

Finally, Plaintiffs' interest in the reserved mineral estate does not give them tribal jurisdiction over Keystone XL. When a mineral estate is severed from the surface estate, the mineral estate holder acquires only the minerals, not the entire subsurface. *See Paradigm Energy Partners, LLC v. Fox*, No. 1:16-cv-304, 2016 WL 9496588, at *9 (D.N.D. Sept. 13, 2016). The surface estate owner thus controls the use of the subsurface, except with respect to development of the minerals. *Id.* And the surface owner can convey an easement or right of way for a buried pipeline without infringing the rights of an Indian tribe that owns the mineral estate. The pipeline "does not impair, impede, or encumber the mineral estate of the Tribe," because the minerals, if any, remain for the tribe "to explore, develop, and transfer." *Paradigm*, 2016 WL 9496588, at *16. As a result, the tribe cannot prevent the owner of the surface estate from granting a right-of-way for a buried pipeline. *Id.*

II. PLAINTIFFS HAVE FAILED TO SHOW THAT THEY ARE LIKELY TO SUFFER IRREAPABLE HARM

Because Plaintiffs' claims are meritless, the Court need not consider the remaining preliminary injunction factors. *Google*, 786 F.3d at 740. In all events, Plaintiffs have failed to establish that they are likely to suffer irreparable injury.

First, most of the harms Plaintiffs allege cannot support the preliminary injunction they seek. The proper "scope of injunctive relief is dictated by the extent

of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Plaintiffs have made no effort to tailor their requested injunction to the legal violations they allege. For example, virtually all of the harms they allege will occur from activities outside the 1.2-mile border-crossing segment of the pipeline ("the border segment") on land where TC Energy has the legal right to conduct such activities. The 2019 Permit, however, does not authorize any activities outside the border segment. It only allows TC Energy to "construct, connect, operate, and maintain pipeline facilities *at the international border* of the United States and Canada at Phillips County, Montana." 84 Fed. Reg. at 13,101 (emphasis added); *see also* Dkt. 97 at 11-12; Dkt. 95, at 2-6. Thus, even if issuance of the 2019 Permit was unlawful—and it plainly was not—the Court cannot enjoin activities outside the border segment, as any harms resulting from those activities are not attributable to the alleged violation.

Similarly, Plaintiffs' mining and tribal jurisdiction claims are based on allegations that construction of the pipeline will constitute mining or a trespass on Rosebud's interest in the minerals underlying just a few parcels of land in South Dakota. Even if those claims have merit—and they do not—the Court cannot enjoin activities outside those parcels.

Second, and in all events, Plaintiffs' "showing" of irreparable harm consists primarily of unsubstantiated assertions that construction could damage cultural

resources and speculation that an oil spill could occur years from now after the pipeline is in service and pollute their water or minerals. That is not remotely sufficient. Irreparable harm cannot be presumed. *Cottonwood Envtl. Law Ctr. v. USFWS*, 789 F.3d 1075, 1090-91 (9th Cir. 2015). To obtain the extraordinary remedy of a preliminary injunction, Plaintiffs must prove that they are "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter*, 555 U.S. at 22 (citation omitted). They have not remotely met that burden.

1. Cultural Resources

Pipeline construction will not cause irreparable harm to "ancient and prehistoric sacred and cultural sites in Keystone XL's direct route." Dkt. 120 at 18-19. Plaintiffs' declaration claiming that the pipeline will go "directly through rock cairns and stone circles" in Montana and impact "archeological sites that had been recommended for avoidance," Werk Decl., Dkt. 120-1, ¶¶ 6-7, omits critical facts. State identified those cultural resources and historic properties; it has engaged (or is engaging) in consultations about them with the tribes and the Montana SHPO pursuant to section 106 of the NHPA and the Programmatic; and TC Energy is taking steps to avoid or mitigate harm to them. 2019 Final SEIS at 4-71 (Table 4.9-2); *id* at 3.9-14 (Table 3.9-6). In addition, construction will be "monitored by tribal representatives for consistency with Section 106 of the NHPA in areas of tribal concern." 2014 FSEIS at 3.11-44 (discussing Tribal Monitoring Plan).

Under these circumstances, any harm that may occur is not legally cognizable. Plaintiffs have no right to compel the President to protect every resource on private, state or federal land that is of cultural or historical significance to them. The only statutes that govern such issues—NEPA and the NHPA—do not apply to the President. *See* Dkt. 97 at 15-16. And even if they did, they would not authorize a court to issue an injunction merely because "cultural resources might be harmed." *WildEarth Guardians v. Provencio*, 923 F.3d 655, 679 (9th Cir. 2019). The obligations these statutes impose are "procedural in nature," requiring a permitting agency to "conduct[] the required prefield work, consult[] with the appropriate entities, and reach a determination consistent with the evidence before it." *Id.*

Plaintiffs' further claim that the "government" has failed to "adequately identify historic and cultural resources pursuant to Section 106 of the NHPA and consult them in the identification process" is both unsubstantiated, *see* Dkt. 120 at 19 (citing only the allegations their complaint), and untrue. As described above, Plaintiffs rebuffed many of State's attempts at consultation and declined the invitation to conduct their own traditional cultural property surveys at Keystone's expense. *See supra*, pp. 5-8. "Equity is not served" when a "Tribe refuses to consult" with an agency about protecting its "interests and then seeks an injunction to protect those same interests on the ground that the [agency] has failed to

consult." *Grand Canyon Tr. v. Williams*, No. 13-cv-8045, 2015 WL 3385456, at *6 (D. Ariz. May 26, 2015) (denying motion for injunction); *see also Apache Survival Coal. v. United States*, 21 F.3d 895, 907 (9th Cir. 1994) (denying claim when the "Tribe ignored the *very process* its members now contend was inadequate").

2. Water

Construction of the pipeline also poses no irreparable harm to Plaintiffs' water resources. Plaintiffs first note that the pipeline will cross the Missouri, Cheyenne, White and Milk Rivers in which the tribes allegedly have water rights. Dkt. 120 at 21-23. But they ignore that horizontal directional drilling will be used to bury the pipeline below those rivers to avoid impacts to the water resources. 2014 FSEIS at 2.1-66, 4.3-21.

Plaintiffs then make another unfounded claim (again supported only by the allegations of their complaint), saying that an oil spill is an "inevitable event." Dkt. 120 at 21. Such *allegations* do not "satisfy the plaintiff's burden of *demonstrating* immediate threatened injury as a prerequisite to preliminary injunctive relief." *L.A. Mem. Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980) (emphasis in original). In fact, the "Keystone XL pipeline has a lower probability of experiencing a spill" than the average oil pipeline because of its "design standards and the addition of the Special Conditions" that are "over and

above the current regulatory requirements." 2014 FSEIS at 4.13-6. And Plaintiffs' claims that an oil spill would deprive them of water are wrong in any event.

Neither tribe's reservation is "located adjacent to waterways within the 40 mile downstream area included in the [region of impact] for the Project." 2019 Final SEIS 5-57. The possibility that an oil spill in the Cheyenne River would reach the Mni Wiconi Project and Rosebud Water system, Dkt. 120 at 22, is "exceptionally remote" because the intake plant is over 100 miles from the pipeline crossing. 2014 FSEIS at 4.3-19; 2019 Final SEIS at 5-40 (same). And in the unlikely event that a spill were to "contaminate[] water supplies used for industrial, municipal or irrigation purposes, Keystone has committed to provide an alternate water supply for any users of wells or irrigation intakes where water quality is affected by a spill." 2019 Final SEIS 5-58. Keystone would also be liable "for all costs associated with cleanup and restoration, including damages to natural resources for the loss of subsistence use of these natural resources." *Id.* at 5-21.

3. Minerals

Digging the trench and burying the pipeline will not cause irreparable injury to Rosebud's interest in the mineral estate. Dkt. 120 at 20. Pipeline installation is not "mining." *See supra*, pp. 18-19; Dkt. 97 at 23-25. And even if it were, it would not cause any irreparable injury, since any unauthorized "mining" could be remedied by an award of damages equal to the value of the minerals that were

supposedly "mined." *See, e.g., Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1216 (9th Cir. 1984) (no irreparable injury where the "loss is calculable and compensable by an award of damages")

4. Tribal Sovereignty

Finally, construction of Keystone XL poses no irreparable affront to tribal sovereignty, Dkt. 120 at 23-25, because Plaintiffs have no jurisdiction to regulate a pipeline built on federal, state, and private land. *See supra*, pp. 3-5; Dkt. 97 at 25-27. Indeed, Plaintiffs are seeking to *expand* their jurisdiction by asking this Court to grant an injunction based on an expansive interpretation of their treaty rights that the Ninth Circuit has previously rejected. If granted, the injunction would set a precedent that would give the tribes the power to veto economic activity on ancestral lands throughout Montana and South Dakota, even though they do not own that land, and the land has been under the jurisdiction of the states and federal government for the last century. It would also impose substantial and unwarranted costs on TC Energy and numerous state, public, and private interests the Project will serve.

III. THE BALANCE OF HARDSHIPS WEIGHS AGAINST AN INJUNCTION

TC Energy has spent over a decade and approximately $3.14 billion to develop the Project. Declaration of Gary Salsman ¶ 11 (Exhibit 7). Plaintiffs blithely assert that an injunction would cause TC Energy "only delay." Dkt. 120 at

28. That delay will impose substantial economic costs on the company, will threaten hundreds of jobs and significant tax revenue, and could delay the operational date of a service that shippers have already contracted to use. This counsels strongly against an injunction. *See Alaska Survival v. STB*, 704 F.3d 615, 616 (9th Cir. 2012) ("[f]urther delay of this project will prevent the award of construction contracts, postpone the hiring of construction employees, and significantly increase costs).

TC Energy needs to construct worker camps and pipe yards several months before construction of the pipeline itself. Salsman Decl. ¶¶ 7, 12. If it cannot do so, completion of the Project could be delayed past the planned in-service date, and the company could lose earnings of approximately $1.2 billion. *Id.* ¶ 13. The increased workforce and extended construction season entailed in trying to maintain that in-service date following a delay could impose incremental costs of approximately $200 million, with uncertain prospects of success. *Id.* ¶ 12.

A delay in construction and completion of the Project would also harm third parties. It would threaten hundreds of jobs and significant tax revenue. *Id.* ¶ 13; *see also* 2019 Final SEIS at 4-63, 4-65 (describing beneficial impacts to economic base and tax revenue). It would deprive TC Energy's customers of a service they have contracted to use. Salsman Decl. ¶ 16. And it would harm the public interest by

delaying a Project that State found would promote the nation's energy security and bilateral relations with Canada.

CONCLUSION

For the foregoing reasons, TC Energy requests that the Court deny Plaintiffs' motion for a preliminary injunction.

March 16, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this brief contains 6,406 words, excluding the caption, the tables of contents and authorities, and certificates of service and compliance.

/s/ Jeffery J. Oven

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served today via the Court's CM/ECF system on all counsel of record.

/s/ Jeffery J. Oven