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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 **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs argue at length that TC Energy's motion for summary judgment is premature because there has been no discovery. Dkt. 111 at 10-17. But Rule 56 allows a motion for summary judgment to be filed "at any time until 30 days after the close of all discovery." Fed. R. Civ. P. 56(b). TC Energy invoked that rule because the Court had denied the motions to dismiss but ordered supplemental briefing on several dispositive legal issues raised in those motions. Until the Court issued its clarification order (Dkt. 104), it was unclear if the Court would consider dismissing the claims based on the supplemental briefing it ordered. TC Energy's motion for summary judgment was a procedural alternative for obtaining dismissal of Plaintiffs' claims. *See* Dkt. 96. It is, moreover, clear that Plaintiffs' claims rest on questions of law that, properly resolved, render immaterial the factual issues Plaintiffs seek to raise.

First, Plaintiffs admit that their Commerce Clause challenge to the 2019 Permit is a question of law that requires no factual development. Dkt. 111 at 4. They have also moved for summary judgment on their Indian Mineral Leasing Act claim and their tribal jurisdiction claim. As explained in TC Energy's opening brief, summary judgment should be granted to Defendants, not Plaintiffs, on these claims. But because Plaintiffs addressed the claims in their summary judgment motion and incorporated their arguments by reference in their opposition to TC

Energy's motion to avoid duplicative briefing, Dkt. 111 at 4, TC Energy will do the same. The response to those arguments is in TC Energy's opposition to Plaintiffs' summary judgment motion and incorporated by reference here.

Second, Plaintiffs' other challenges to the 2019 Permit fail as a matter of law, because the Permit authorizes only the 1.2-mile border-crossing segment in Montana, *see* Dkt. 97 at 11-12, 19, far from the tribe's reservation and Rosebud's alleged surface and mineral estates.[1] Indeed, this Court has acknowledged that "[w]hether the 2019 Permit causes depredation on Indian land depends on the scope of the 2019 Permit's approval," and it "*assume[d]* at this point in the litigation that the 2019 Permit authorizes the entire Keystone pipeline." Dkt. 92 at 18 (emphasis added). As TC Energy's summary judgment and supplemental briefs demonstrate, that assumption is incorrect. Dkt. 97 at 11; Dkt. 95 at 2-7. The parties' disagreement on that issue can be resolved now as a matter of law based on the language of the Permit and the related documents cited in the supplemental briefing. Plaintiffs do not claim to need discovery or time for additional factual development on this issue.

[1] *See* Tribes' Statement of Disputed Facts, Dkt. 112, at ¶ 8 (admitting location of border crossing); ¶ 16 (admitting that no part of KXL crosses the Fort Belknap Reservation), ¶¶ 17, 19 (claiming that KXL will impact Rosebud surface and mineral estates in *South Dakota*).

Third, even if the 2019 Permit authorized the entire pipeline, Plaintiffs' treaty claims and their related claims that the government's trust relationship with Indian tribes required the President to comply with the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and the Administrative Procedure Act (APA) before issuing the Permit are still foreclosed by *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), and other Ninth Circuit and Supreme Court precedent. Consequently, there is no need for the parties to hire experts to opine on how the tribes would have understood the treaties at the time they were signed. *See* Dkt. 111 at 15-17. The Ninth Circuit has already interpreted the very treaties the tribes invoke here and held that they do not confer the rights the tribes claim.

ARGUMENT

I. The Treaty Claim For Alleged Failure To Protect The Tribes From Depredations Ignores Controlling Ninth Circuit Precedent.

Fort Belknap and Rosebud advance the same type of claim based on the same treaties that Fort Belknap and other tribes advanced in *Gros Ventre*. *See* Dkt. 97 at 10-11. Here, as there, the tribes claim that the government violated its treaty obligation to protect the tribes from "depredations" when it granted a permit to a project (here, an oil pipeline, there, gold mines) that the tribes claim will damage their historic and cultural resources and pollute their water supply. The Ninth Circuit rejected the tribes' claim for two reasons. First, the treaties obligate the

government "to protect the Tribes from depredations that occurred only on tribal land," and thus do not apply to federal permits authorizing mining activity outside the tribes' reservation. *Gros Ventre*, 469 F.3d at 813. Second, the government satisfies its "obligation to protect the Indians against depredations on Reservation lands" if it complies with "applicable statute or regulations." *Id.* at 812. Both reasons are equally dispositive here.

A. The 2019 Permit Only Authorizes Activity At The Border.

The 2019 Permit challenged here, like the mining permits challenged in *Gros Ventre*, does not authorize activity on tribal land. It 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); *see also* Dkt. 97 at 11; Dkt. 95 at 2-7. Plaintiffs' contentions to the contrary are unpersuasive.

Plaintiffs selectively quote the Permit's title, which authorizes "'Pipeline *Facilities* at the International Boundary Between the United States and Canada,'" and argue that "'Facilities'" refers to "the entire pipeline." Dkt. 99 at 1-2 (quoting 84 Fed. Reg. at 13,101 (emphasis added by Plaintiffs)). But Plaintiffs ignore the descriptive phrase that directly follows—"*at the International Boundary* Between

the United States and Canada." Read in its entirety, the title makes clear that the authorized facilities are only those at the international border.

Plaintiffs also assert that the 2019 Permit approves the entire route because "Article 6(3) is the only provision of the 2019 Permit specifically limited to the Border Facilities." Dkt. 99 at 4. They are mistaken. *See* Dkt. 95 at 2-3 (citing provisions in Articles 1-5 and 7-10 that also apply only to "Border Facilities").

Plaintiffs next point to a condition in the 2019 Permit requiring that the construction and operation of the pipeline be "as described in" the Permit application, and assert that this Court previously interpreted a similar condition in the 2017 Permit to authorize the entire pipeline. Dkt. 99 at 1-2. That, too, is incorrect. The Court did not address the scope of the 2017 Permit. Instead, it addressed whether the State Department had a duty under NEPA to supplement its environmental review after Nebraska approved an alternate pipeline following issuance of the 2017 Permit. The Court held that NEPA did impose such a duty because the 2017 Permit gave State "discretion to review any changes to the project that might arise after" the Permit issued. *Indigenous Envtl. Network v. U.S. Dep't of State*, 317 F. Supp. 3d 1118, 1122 (D. Mont. 2018). State had that authority because it made it a *condition* on the permission to build the border segment. Such a condition is not an *authorization* to build outside that segment. Dkt. 95 at 4.

Finally, Plaintiffs cite statements in the 2019 Permit application and by the President recognizing that construction of the entire the Project will enable the transportation of crude oil from Canada to Nebraska and create jobs in the United States. Dkt. 99 at 4-7. Neither statement establishes that the Permit approves the entire Project. The application requested a "Presidential Permit" only "for the specific border crossing facilities associated with the Keystone XL Project." Dkt. 98-1 at 6. More fundamentally, it is absurd to claim that authorization for a single segment of the Project authorizes the entire Project. By that logic, the Nebraska PSC's approval of the route through Nebraska also authorized the entire Project, because the pipeline cannot be built if it cannot connect to the existing Keystone system in Nebraska.

In short, the 2019 Permit approved only the 1.2-mile border segment in Phillips County, Montana, which is not tribal land.

B. Keystone XL Will Not Cross Any Tribal Land.

TC Energy also argued that even if the 2019 Permit authorized the entire Keystone XL route, it still would not authorize activity on tribal land because Keystone XL will be built on fee land, easements, and rights-of-way that TC Energy has acquired (or will acquire) from private landowners, the States, or the federal government. *See* Dkt. 97 at 13. TC Energy's showing in this regard was supported by a declaration from a registered surveyor in South Dakota.

Plaintiffs contest TC Energy's proof, claiming that they "have seen" "publicly available maps" that "show" that the Pipeline corridor would cross Rosebud surface estates, and that they need to hire a surveyor to do a "'cadastral survey'" to verify that claim. 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 hearing just two months ago 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." Dkt. 126-3 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 testified that he is "familiar with the route of Keystone" and the pipeline gets "[v]ery close" to tribal land. Dkt. 126-4 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 Winner). 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.[2]

Plaintiffs' contention that they need discovery and expert analyses to *contradict their own sworn testimony* in a recent state hearing is extraordinary and unfounded. TC Energy's surveyor employed the methods of a cadastral survey, specifically inspection of public records, location and/or reconstruction of corner monuments, and establishment or recreation of boundary lines. Dkt. 163-2 ¶¶ 6-13. And the maps cited in Ms. Antoine's declaration were provided to the South Dakota Public Utilities Commission in 2009. Dkt.112-4 ¶ 10. Plaintiffs do not claim that they just discovered the maps after Ms. Antoine and Mr. Bordeaux testified to at the water board hearing in January.[3] Nor could they; the maps are cited in the First Amended Complaint filed in April, 2019. Dkt. 51-1¶ 170. The Court should not countenance such gamesmanship, particularly where the asserted

[2] Ben Rhodd, the Tribal Historic Preservation Officer for the Rosebud Sioux Tribe who also submitted a declaration in this case, *see* Dkt. 112-6, likewise testified that the "Keystone Pipeline traverses over what we call our homeland," which he admitted is "outside of the Rosebud reservation." Exhibit 1 at 11:9-14.

[3] Plaintiffs have had numerous opportunities, over the course of years, to consult about the pipeline's route during the NEPA review and State Department consultation with Indian tribes about historic properties along the route. *See* 2014 FEIS, Appendix E, Attachments G and I (discussing Government-to-Government Consultation with Indian Tribes Between 2012 and 214);2019 Final SEIS at 4-70-4-75 & Appendix A (discussing federal agency consultations with Indian Tribes in 2018 and 2019); Declaration of David Cushman, Dkt. 127-4, ¶¶ 4-9 (discussing multiple efforts by State to consult with Fort Belknap and other tribes) .

need for such discovery arises only as a result of Plaintiffs' untenable claims concerning the scope of the 2019 Permit. The current record, and the sworn testimony of the Rosebud Tribes' own officials, shows that Keystone XL will not cross tribal land, even if the 2019 Permit is (improperly) read to authorize the project's entire route.

Finally, this conclusion is not undermined by Plaintiffs' contention that Rosebud, rather than a specific Indian allottee, has an interest in a mineral estate beneath private land where TC Energy has obtained an easement for the pipeline. *See* Antoine Decl., Dkt. 112-4, ¶¶ 17-19, 24-25; Hofer Decl., Dkt. 98-5, ¶ 8 Second Declaration of Amy Hofer, Dkt. 126-1, ¶¶ 5-6. The pipeline is on the privately-owned surface estate, not the subsurface mineral estate. *See* TC Br. in Opp'n to Pls' Mot. for Summ. J. at § II.

C. Because The 2019 Permit Does Not Authorize Any Activity On Tribal Land, It Cannot Violate The Treaties.

Because, even under Plaintiffs' overbroad and improper interpretation, the 2019 Permit does not authorize activity on tribal land, Defendants are entitled to summary judgment on Plaintiffs' treaty claims. *Gros Ventre* held that "the language in these treaties simply cannot be read to impose a specific fiduciary obligation" on the government to regulate activity on private land "for the benefit of the Tribes." 469 F.3d at 801. And it did so even though it "recognize[d] that activities occurring off the Reservation may *impact* resources on the Reservation."

Id. (emphasis added). That decision is binding precedent, and it clearly forecloses Plaintiffs' claim that the 2019 Permit violates the treaties because there are tribal land and mineral interests within the "spill zone"[4] or "area of potential effect"[5] that could be "impacted" by the pipeline's construction or operation. The same is true of any impact to a subsurface mineral estate caused by activity on the privately-owned surface estate.

Plaintiffs thus argue that it does not matter whether the 2019 Permit authorized any activity on tribal land, because historical research will show that the tribes "would never have understood that if the source of the federally permitted depredation originated a short distance from the reservation the United States would be released from any treaty obligation." Dkt. 111 at 22. That is simply an oblique claim that *Gros Ventre* is wrong, because the Ninth Circuit did not interpret the treaties as Plaintiffs say it should have. *Id.* at 21. But *Gros Ventre* is not wrong. And even if it were, it is still controlling.

[4] "Spill zone" to refer to the distance that the 2019 Final SEIS estimated that an oil spill could spread over land. *See* 2019 Final SEIS at 5-2.

[5] "Area of potential effect" refers to the area in which pipeline construction could potentially affect historic properties, including traditional cultural properties of tribes. *See* 2019 Final SEIS, at 3.9-1-3.9-8; 36 C.F.R. § 800.16(d). Surveys to identify (and mitigate harm to) such properties within the area of potential effect have been completed in Montana and South Dakota. *See* 2014 FSEIS, Appendix E. The 2019 Final SEIS concluded that "construction impacts to cultural resources would be less than significant." 2019 Final SEIS, at 3.9-8, 4-69.

Gros Ventre held that a treaty protecting "Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit" is limited to protection from depredations by outsiders on tribal land. 469 F.3d at 813 (quoting art. 7 of the 1855 Lame Bull Treaty).[6] That is fully consistent with Supreme Court cases that give effect to such geographic limitations in Indian treaties. *See, e.g.*, *Or. Dep't of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753, 768 (1981) (treating giving tribe the right to take from streams and lakes "included in said reservation" make "manifest that the rights secured … did not exist independent of the reservation itself"). And the Ninth Circuit's conclusion that such rights do not last "in perpetuity, even after the Tribes later relinquished their ownership in that land," *Gros Ventre*, 469 F.3d at 813, is fully consistent with the Supreme Court's holding that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana v. United States*, 450 U.S. 544, 559, 562 (1981) (treaty right to control hunting and fishing "in the territory described in [the treaty]" does not apply to allotted land that was later patented and is now "held in fee by non-Indians").

[6] The Ninth Circuit concluded that the provisions of the Fort Laramie Treaty that allowed the federal government "to establish roads, military and other posts, within their respective territories" in return for protection "against the commission of all depredations by the people of said United States," likewise showed that this treaty protected the tribes from depredations on tribal land. *Gros Ventre*, 469 F.3d at 813.

D. The 2019 Permit Does Not Violate Any Treaty Duty To Protect The Tribes From "Depredations" On Tribal Land Because It Was Issued In Compliance With Generally Applicable Laws.

Even if the 2019 Permit authorized the entire pipeline, and even if the pipeline route crosses tribal land (neither of which is true), the treaty claims still fail as a matter of law. "[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 statutes 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 the President's issuance of the 2019 Permit violated any generally applicable statutory requirements.

Plaintiffs concede that NEPA, the NHPA, and the APA do not apply to the President. Dkt. 111 at 24. They claim 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 other generally applicable statutes or regulations," 469 F.3d at 812, cannot mean extending the substantive requirements of statutes or regulations to entities that are not subject to them.

Plaintiffs also cite *Pit River Tribe v. U.S. Forest Service*, 496 F.3d 768 (9th Cir. 2006). Dkt. 111 at 25. But the Ninth Circuit there expressly declined to decide whether the government's "fiduciary obligations" to Indian tribes "might require more" than the statutes themselves require. *Pit River*, 496 F.3d at 788; *see also* Dkt. 97 at 17. Moreover, Plaintiffs did not respond to TC Energy's further showing that *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011), forecloses any argument that the President has some obligation to comply with laws that do not apply to him. *See* Dkt. 97 at 17-18. That case, which held that the "Government assumes Indian trust responsibilities only to the extent it expressly accepts" such responsibilities, 564 U.S. at 177, is not mentioned in Plaintiffs' opposition brief or the earlier briefing it incorporates by reference. *See* Dkt. 111 at 25 (incorporating Dkt. 74 at 30-40).

CONCLUSION

For the foregoing reasons, and those in TC Energy's opening memorandum and in TC Energy's opposition to Plaintiffs' motion for summary judgment, this Court should grant TC Energy summary judgment.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify this brief contains 3,211 words, excluding the caption, the certificates of service and compliance, and the tables of contents and authorities.

/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