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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' RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The construction of Keystone XL ("Pipeline") is integrally tied to the President's issuance of the 2019 Permit as well as the recent permit issued by the Department of Interior ("Interior"). Indeed, without these permits, there can be no Pipeline. These Permits, then, are causes of the Pipeline being built, and create a substantial risk of injury to the Rosebud Sioux Tribe and the Fort Belknap Indian Community ("the Tribes"). The issuance of the 2019 Permit was *ultra vires* because it violated the separation of powers and the Tribes' treaties with the United States. As such, the agency defendants should be enjoined from enforcing the 2019 Permit.

Interior has now taken final agency action to approve the Pipeline's construction across federal land. This is clearly a cause of injury to the Tribes, and the Tribes put the Defendants on notice through correspondence and pleadings of their intent to amend their First Amended Complaint to challenge this agency action. *See, e.g.*, Docs. 100, at 3; 103, at 3; 114, at 22 n.7. Despite this case being in its early stages with no discovery, and TransCanada only just having requested leave to file an answer, Doc. 125, the United States has indicated it would oppose a motion to amend but has

acknowledged the Tribes can challenge such agency authorizations. Doc. 109, at 7-8. TransCanada has taken no position with regard to such a motion.

As with the President's 2019 Permit, Interior's action violates the Tribes' treaties as well as federal law and is therefore arbitrary, capricious, an abuse of discretion, and not in accordance with the law, and construction should be enjoined until Interior has complied with the law. If Interior's actions were declared unlawful and construction enjoined, there may be no need to rule on the legality of the 2019 Permit at this time. Given that the timeframe does not allow for a motion to amend to be resolved before construction, the Tribes respectfully request that the Court "incorporate" Interior's final agency action into the complaint "by amendment under Fed.R.Civ.P. 15(b)[,]" *Desertrain v. City of L.A.*, 754 F.3d 1147, 1154 (9th Cir. 2014) (citation omitted), and "'construe[] the matter raised [in summary judgment] as a request pursuant to rule 15(b) of the Federal Rules of Civil Procedure to amend the [complaint].'" *Id.* (citation and brackets omitted).

BACKGROUND

On December 20, 2019, this Court denied Defendants' motions to dismiss and ordered the parties to file supplemental briefs addressing certain issues by January 24, 2020. Docs. 92; 93. Shortly before the briefing

deadline, on January 22, 2020, Defendant David L. Berhnardt, Secretary of the Interior, issued his Record of Decision ("ROD") approving a right-of-way for the Pipeline across federally administered lands in Montana. Statement of Disputed Facts to Opp. to Fed. Defs.' Summ. J. Mot. ("SDF") at ¶ 46. The ROD, a final agency action, relies on, and incorporates, the State Department's 2019 Environmental Impact Statement ("EIS") and 2014 EIS for the Pipeline. SDF at ¶ 47. All of these documents are fundamentally flawed as described below.

Prepared for the issuance of the ROD, just two days later and without filing an answer, TransCanada filed its motion for summary judgment creating the current posture of this case. Doc. 97. The Tribes, aware that they intended to amend their complaint, but also having to respond to several briefs and now a motion for summary judgment, requested a status conference. Doc. 100. TransCanada responded, agreeing that a status conference was a wise decision given that the Tribes put the parties on notice of their intent to challenge the final agency action. Doc. 103, at 3. In an effort to achieve the orderly and expeditious disposition this case, the Court ordered a summary judgment schedule be followed as set forth by the Court. Doc. 104. The schedule required the Tribes to respond to TransCanada's

summary judgment motion and file their own affirmative motion within fifteen days, *id.*, which was later extended by one week. Doc. 118. The Court also ordered the United States to file its own motion for summary judgment. The Tribes now submit their response to the United States' motion.

STANDARD OF REVIEW

Summary judgment is appropriate where the movant demonstrates 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). When a plaintiff raises new claims "in their motion for summary judgment, they should [be] allowed to incorporate it by amendment under Fed.R.Civ.P. 15(b)." *Desertrain*, 754 F.3d at 1154 (citation omitted). And "when issues are raised in opposition to a motion to summary judgment that are outside the scope of the complaint," the district court should "'construe[] the matter raised as a request pursuant to rule 15(b) of the Federal Rules of Civil Procedure to amend the pleadings.'" *Id*. (citation and brackets omitted).

ARGUMENT

I. The Tribes Have Standing

For purposes of standing, the Tribes must show "a 'substantial risk' that harm will occur." *Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 658 U.S. 398, 414 n.5 (2013)); *In re Zappos.com, Inc.*, 888 F.3d 1020, 1026 (9th Cir. 2018). By permitting the entire length of the Pipeline without the Tribes' consent and without complying with the treaty obligations to protect the Tribes, the President has caused concrete injuries to the Tribes and created a substantial risk of future additional injuries. Interior, which has now taken final agency action, has likewise failed to comply with the treaties and federal law, creating a substantial risk of future additional injuries. These injuries can be redressed by the Court by declaring the 2019 Permit and Interior's action unlawful, enjoining TransCanada from construction, and enjoining the United States from implementing the agency actions and the 2019 Permit. Thus, the Tribes have standing. *See Indigenous Envtl. Network v. U.S. Dep't of State*, No. CV-17-29-GF-BMM, 2017 WL 5632435, at *9 (D. Mont. Nov. 22, 2017) (setting forth the standing inquiry).

A. President Trump and the Agencies Have Injured the Tribes by Effectively Abrogating the Treaties and Approving the Pipeline Through Tribal Lands.

The Tribes have interests in protecting their treaty rights, in enforcing the United States' obligations to uphold those rights, and in tribal self-government. *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463 (2d Cir. 2013); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510-11, 1516 (W.D. Wash. 1988) (duty to protect Indians' treaty rights); *c.f. N. Arapaho Tribe v. LaCounte*, 215 F. Supp. 3d 987, 1000 (D. Mont. 2016) (harm to sovereignty). The approval of the Pipeline consistent with TransCanada's applications, and ignoring federal law and the treaties in taking agency action, abrogates the treaty duty to protect the Tribes from all depredations, and harms the Tribes' ability to govern their lands and resources. President Trump and the agencies took action without seeking Rosebud's consent to cross Indian lands as required by the Treaties, federal law, and tribal law, and this actual injury to tribal sovereignty has already occurred. These injuries flow from the 2019 Permit and Interior's action, and are not speculative or conjectural.

B. President Trump and the Interior's Actions Endanger Tribal Territory, Sacred Lands, and Objects of Cultural and Historic Importance to the Tribes, and the Tribes Have Suffered Procedural Injury.

For the purposes of standing, the Tribes must show merely "a 'substantial risk' that harm will occur." *Dreihaus*, 573 U.S. at 158 (quoting *Clapper*, 658 U.S. at 414 n.5); *In re Zappos.com*, 888 F.3d at 1026. Defendants do not challenge the existence of harms; rather, they assert that the injuries are not "fairly traceable" to, or are "not caused" by, the 2019 Permit. Doc. 109, at 4-6. As detailed in the Tribes' Motion for Preliminary Injunction, Doc. 120, at 17-25, and Motion for Summary Judgment, Doc. 114, at 21-28, the President's and Interior's actions have created a substantial risk of certain harm to the Tribes' cultural resources, mineral resources, water resources, and sovereignty. And, the Department of State has documented at least four "Previously Recorded" "Cultural Sites" located within KXL's right-of-way and construction corridor along the first 1.3 miles of its route. Doc. 131 at 12. Within the first fifty miles of the route, there are at least eighty cultural sites within KXL's right-of-way and construction corridor. *Id*.

With regard to "procedural injury," the Court must determine whether the Treaties were established to protect the Tribes' concrete interests, and whether the specific procedural violations alleged "actually harm, or present a material risk of harm to, such interests." *W. Org. of Res. Councils v. Bernhardt*, 362 F. Supp. 3d 900, 909 (D. Mont. 2019). Defendants

do not argue the Treaties were not created to protect the Tribes' concrete interests. And, as discussed below, the Treaties require the United States to comply with its minimum fiduciary duties. The procedural violations (failure to prevent depredations and comply with minimum duties, etc.) present a material risk of harm to the Tribes' concrete interests sufficient for standing. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 779 (9th Cir. 2006).

These harms are now certainly impending given that pre-construction has commenced and the Defendants' actions have created a substantial risk that they will occur. *Dreihaus*, 573 U.S. at 158; *In re Zappos.com*, 888 F.3d at 1026.

C. Without the 2019 Permit and the Agency Action There Can Be No Pipeline.

The plain language of the 2019 Permit applies to the entire Pipeline. This argument has been extensively briefed, s*ee* Pls.' Supp. Br., Doc. 99, at 10-18, and to avoid duplication the Tribes will not repeat those arguments here, but rather incorporate them by reference. Even if the 2019 Permit did not explicitly apply to the entire Pipeline, without the 2019 Permit and Interior's ROD, there could be no Pipeline. Indeed, TransCanada did not start any work before it received these permits. Thus, the 2019 Permit and

Interior's actions are a cause of injury to the Tribes. *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). And this Court has already noted that the entire Pipeline is one enterprise and a connected action—meaning that any of the various approvals are all related to, and a cause of, the Pipeline being built and thus the Tribes' injuries. *Indigenous Envtl. Network* 317 F. Supp. 3d at 1123. The Defendants admit as much noting the 2019 Permit is "associated with the" Pipeline. Doc. 109 at 5, 7. Rather than address causation, the Defendants focus merely on the plain language of the 2019 Permit. But that is not how causation works.

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. Thus, the 2019 Permit and Interior's actions are causes of the entire Pipeline being built, and therefore, the Tribes' injuries.

D. Redressability

This Court has already concluded that there is no hesitation to grant declaratory or injunctive relief when the President has no authority to act. Doc. 92 at 12-13; *see Sierra Club v. Trump*, No. 19-16102, 2019 WL 2865491 (9th

Cir. July 3, 2019) (denial of emergency request for stay pending appeal of injunction against federal defendants' reprogramming federal funds to build a wall).[1] Indeed, the Defendants have admitted that the President must comply with the Tribes' treaties. Doc. 123 ¶ 30 (admitting paragraph thirty in the First Amended Complaint); Doc. 58 ¶ 30 ("In his official capacity, President Trump is obligated to act in accordance with all federal treaties, laws, and regulations, and to uphold the United States' duties to the Tribes pursuant to the treaties."). And, the President can be a party where his actions are declared illegal and relief can be directed against other federal officials. *See Sierra Club*, 2019 WL 2865491. That is exactly what the Tribes are seeking here—to enjoin the other federal officials and TransCanada. With regard to the agencies, there is clearly no bar to enjoining their activity when they violate federal law. *IEN*, 317 F. Supp. 3d at 1123 (ordering Federal Defendants to supplement EIS).

[1] *See also Clinton v. NYC*, 524 U.S. 417, 433, n.22 (1998) (President's use of line item veto "would be redressed by declaratory judgment that the cancellations are invalid."); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir 2017), *dismissed as moot*, 138 S. Ct. 337 (2017) (injunction against immigration policy); *U.S. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996); *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996); *c.f. Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

The 2019 Permit is *ultra vires* as a depredation to the Tribes' territories and resources, without their consent, and unconstitutional as a usurpation of Congress's Foreign Commerce Clause power and must be enjoined altogether. But, Interior's agency action likewise violates the Treaties for the same reason and violates the United States' minimum obligations as set forth in the Treaties. *Pit River Tribe*, 469 F.3d at 788 (United States must comply with minimum duties). While the laws that set forth the minimum duty (the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 302706, 306108, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347) do not specifically apply to the President, the 2019 Permit is invalid if those laws are not complied with, and it is only through inferior federal defendants that that may be accomplished. *C.f. Sierra Club v. Clinton*, 689 F. Supp. 2d 1147 (D. Minn. 2010) (allowing NEPA claims to proceed against State Department despite finding the issuance of the permit was presidential action); *accord IEN*, 2017 WL 5632435, at *6. Thus, even when the President cannot be directly named and even where the relevant federal officials are not before the court, they can be enjoined. *Swan v. Clinton,* 100 F.3d 973, 980 (D.C. Cir. 1996); *League of Conservation Voters v. Trump* ("*LCV*"), 303 F. Supp. 3d 985, 995 (D. Alaska 2018). Here, the federal agencies can be enjoined from

enforcing the President's illegal permit, and for separately violating the treaties and federal law through their own actions.

II. Defendants are Not Entitled to Summary Judgment

A. The Tribes Have Non-Statutory Review Causes of Action Against the President and the other Federal Defendants Because Issuance of the 2019 Permit Was Either Unconstitutional, *Ultra Vires*, or Against Federal Law.

Defendants assert that the President cannot be sued and thus there is no waiver of sovereign immunity. Doc. 109, at 10-12. Sovereign immunity does not apply, however, to suits alleging that an officer's actions were unconstitutional or beyond statutory authority. *Swan*, 100 F.3d at 981; *LCV*, 303 F. Supp. 3d at 993. That is because "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Swan,* 100 F.3d at 981 (citation omitted). Where *ultra vires* or unconstitutional action is involved, there is no sovereign immunity to be waived because it never attached in the first place. *Reich*, 74 F.3d at 1329-30 (concluding when a Presidential action violates a statutory right it is *ultra vires* and reviewable); *LCV*, 303 F. Supp. 3d at 993.

Because the President's issuance of the 2019 Permit was *ultra vires* (as violating rights in the Treaties) and unconstitutional as set forth below, no

waiver of sovereign immunity is necessary for the Tribes to bring causes of action against him or the Federal Defendants that act pursuant to the 2019 Permit. *Reich*, 74 F.3d at 1329-30. This is exactly the posture of the case in *Reich*, which concluded that when statutory rights are violated, the claims can move forward. Here, the treaty clearly "binds" the United States to protect against "all depredations[,]" which as described below is violated, and thus the claims can move forward. "It does not follow, then," that the President's authority precludes judicial review of executive action "to determine whether that action violates another statute[,]" or in this case, a treaty. *Id.* at 1331. With regard to the agencies, they can be enjoined from implementing an unconstitutional or *ultra vires* order as discussed above; and in any event, Interior's separate final agency action is arbitrary, capricious, an abuse of discretion, and not in accordance with the law.

B. The Tribes, and not Federal Defendants, are Entitled to Summary Judgment on the Constitutional Claim

The President does not possess inherent, independent, or concurrent constitutional authority to permit cross-border crude oil pipelines, including the Pipeline. Accordingly, because Congress has not delegated to the President this authority and has not acquiesced in his unilateral issuance of

the 2019 Permits in contravention of the past fifty-one years of executive practice, the Tribes are entitled to a judgment as a matter of law that the 2019 Permit is unconstitutional.

Defendants' cannot square their argument that the President possess the constitutional authority to issue the 2019 Permit with this Court's previous holding "that the cross-border transportation of crude oil through a pipeline constitutes a form of foreign commerce," Doc. 92, at 15 (citations omitted), and that such "transportation of crude oil from Canada to the United States falls within Congress's power to regulate foreign commerce." *Indigenous Envtl. Network v. Trump*, No. CV-28-GF-BMM, 2019 WL 7421955, at *9 (D. Mont. Dec. 20, 2019) (citations omitted). As shown in the Tribes' earlier briefing, Doc. 99, at 19-24, a "fundamental principle" of Congress's power to regulate foreign commerce is "'that it is *exclusive and plenary*.'" *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2006) (citation omitted) (emphasis added). Accordingly, unless Congress has specifically delegated its power to the President or acquiesced in his particular exercise of authority, the President does not possess any power to regulate foreign commerce—in this case, permit the Pipeline. *See Barclay's Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994) (quoting U.S. Const. art. I, § 8, cl.

3) ("The Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'").

Defendants argue that the President's foreign affairs powers and role as Commander-in-Chief provide him with constitutional authority to issue the 2019 Permit. In support, Defendants cite a number of cases that simply affirm the President's powers over foreign affairs and as Commander-in-Chief.[2] None of these cases hold that the President's foreign affairs powers or role as Commander-in-Chief allow him to regulate foreign commerce or permit the Pipeline. As shown in the Tribes' earlier briefing, Doc. 99, at 24-33, neither of these powers provide the President with the authority to issue the 2019 Permit.

Defendants further contend that with the passage of the Temporary Payroll Tax Cut Continuation Act ("TPTCCA"), Pub. L. No. 112-78, § 501(a), (b)(1), 125 Stat. 1280, 1289 (2011), Congress acknowledged the President's inherent constitutional authority to permit the Pipeline. Defendants fundamentally mischaracterize the TPTCCA. With the TPTCCA, Congress

[2] As discussed in the Tribes' earlier briefing, Doc. 99, at 25-28, 29-30, Congress possesses significant foreign affairs and war powers, often constraining the President's own powers.

specifically directed the President to issue or deny a permit for the Pipeline pursuant to the procedures established in Executive Order 13337. The TPTCCA's command that the President act in a specific way is not an acknowledgement of inherent power. Indeed, President Obama capitulated to Congress's directive and denied a permit within the timeframe given to him. *See* 77 Fed. Reg. 5,677 (Feb. 3, 2012). Had the President actually possessed inherent, concurrent, or independent authority to act, he could have disregarded Congress's directive. *Accord Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers *minus any constitutional powers of Congress over the matter*." (emphasis added)); *Clark*, 435 F.3d at 1109.

Since the President lacks inherent, concurrent, or independent constitutional powers to permit the Pipeline, he may do so only if Congress has delegated him the authority or "acquiesced in th[e] particular exercise of

Presidential authority." *Medellín v. Texas*, 552 U.S. 491, 528 (2008).[3] As shown in the Tribes' earlier briefing, Doc. 99, at 34-49, Congress has not acquiesced in the President's issuance of the 2019 Permit because it was a new and unprecedented process.

The Tribes are entitled to summary judgment on their constitutional claim because the President lacks independent, inherent, or concurrent constitutional authority to permit the Pipeline and Congress has not delegated him the power or acquiesced in his unilateral issuance of the 2019 Permit.

C. A Crude Oil Pipeline On Indian Lands is a Depredation Under the 1851 and 1855 Treaties and Requires Consent Under the 1868 Treaty.

As the Tribes have indicated in other briefing, Doc. 111, at 17-25, they are developing additional historical material concerning their understanding of the Treaty provisions obligating the United States to protect their lands and resources from depredations. Therefore, summary judgment as to the United States' obligations under the Treaties, and the

[3] Congress has not delegated to the President authority to permit cross-border crude oil pipelines or the Pipeline specifically. Defendants do not argue otherwise.

effect of those obligations on the validity of the 2019 Permit and the agency action, should be foreclosed at this time. *Id*. Nevertheless, should the Court reach the issue, it should deny the United States' request for summary judgment because the 2019 Permit and Interior's action violate the anti-depredation and consent provision of the treaties.

To avoid duplication, the Tribes incorporate here by reference their argument in response to TransCanada's motion for summary judgment, Doc. 111, at 17-25, and their argument in support of preliminary injunction. Doc. 120, at 9-17. To summarize, treaties must be "construed as 'they would naturally be understood by the Indians.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019). The Tribes would have understood that the construction of a crude oil pipeline through their treaty lands, cultural resources, and lands held in trust would have required their consent, and would view it as a depredation. We know this because when the original treaty was negotiated, the Tribes' goals were to prevent non-tribal members from crossing their lands and from harming their natural resources.

Because the Pipeline admittedly crosses Rosebud mineral estates held in trust, which are "Indian lands," *see* Doc. 114, at 6-7, *Gros Ventre v. United States*, 469 F.3d 801 (9th Cir. 2006), does not control. *Gros Ventre* was also a

common law breach of trust case, which does not control this breach of *treaty* case. This case is controlled by *Herrera*, 139 S. Ct. at 1701, *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019), and *United States v. Washington* ("*Culverts*"), 853 F.3d 946 (9th Cir. 2017).

Defendants assert that they can violate the treaties only if they also separately violate "applicable environmental laws." Doc. 109, at 19. In support, Defendants rely on *Gros Ventre*. But as noted, *Gros Ventre* was a common law breach of trust case, and this is a breach of treaty case. This distinction is dispositive. To determine the Defendants' obligations under the Treaties, the Court must look to the history, purpose, and negotiations of the Treaties and must construe the treaties to the Tribes' benefit. *Herrera*, 139 S. Ct. at 1701; *see* Doc. 111, at 17-25. Indeed, in *Culverts*, there was no other statute or law that required the removal of the culverts at issue in that case. 853 F.3d at 962-66. Rather, the court looked to the history of the treaties, and construed them to the benefit of the tribes. *Id*. Similarly, here, the Court should not start and end its analysis with "other applicable environmental laws." Rather, it must first analyze the history, purpose, and negotiations of the Treaties and then construe them to the Tribes' benefit and as the Tribes would have understood. The Tribes, in bargaining for the protective treaty

provisions, would never have understood that if the source of a federally permitted depredation originated a short distance from their reservation the United States would be released from any obligation— that the United States would have no duty to prevent the creation of the source of the depredation in the first instance. Other applicable laws may provide the *bare minimum* obligation, but as the Court will see, the Treaties require more.

Taken to its logical extreme, the Defendants' argument would eviscerate any treaty obligation at all, so long as the United States complies with laws of general applicability. It would equate the United States' "distinctive obligation of trust," *Seminole Nation v. United States,* 316 U.S. 286, 296 (1942), with generally applicable statutory standards. The Tribes bargained for more than to be treated as all citizens are treated—and the United States agreed to unique obligations.

The United States was "anxious to make the way safe for" immigrants seeking gold. *Crow Tribe of Indians v. United States,* 284 F.2d 361, 365 (Ct. CL. 1960); Doc. 74 at 21-4. As Justice Blackmun described, 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." *Montana v. United States*, 450 U.S. 544, 571 (1981) (Blackmun, J., dissenting) (emphasis added).

The Treaties also require the United States to prevent the destruction of their cultural resources. Within just the first fifty miles of the Pipeline's route, at least eighty *documented* cultural sites that will be crossed and subsequently destroyed. Decl. of Furlong, Doc. 131-1. The Treaties require the United States to prevent these depredations. The NHPA, along with other "federal statues aimed at protecting Indian cultural resources, located both on Indian land and public land, *demonstrate the government's comprehensive responsibility to protect those resources* and[] thereby *establishes a fiduciary duty*." *Quechan Indian Tribe v. United States*, 535 F. Supp. 3d 1072, 1109 (S.D. Cal. 2008) (emphasis added). The United States' failure to prevent the destruction of the Tribes' cultural resources violates the treaties, as well as federal law, and the United States' comprehensive responsibility to protect these resources.

The treaties require more than mere compliance with generally applicable statutes, and analyzing the history, purpose, and negotiations shows that. The Tribes seek to prevent depredations in the first instance by

requiring a federally approved and federally permitted pipeline to comply with the Treaties' requirements.

That the Pipeline is a depredation is itself sufficient to defeat Defendant's motion, and the Court need go no further. Should the Court go further, the substantive requirements of the NEPA provide further standards to apply to fulfill the treaty obligations as discussed below.[4]

D. Interior's Final Agency Action Violates the Treaties and Federal Law.

As discussed above, approval of the Pipeline, including Interior's approval, violates the Treaties because a crude oil pipeline is a depredation and requires consent. Interior's actions also are arbitrary, capricious, an abuse of discretion, and not in accordance with the law. In particular, an EIS must include a "full and fair discussion" of the effects of a proposed action, including those on the "affected region, the affected interests, and the locality." 40 C.F.R. §§ 1502.1, 1508.27(a); *Indigenous Envtl. Network*, 347 F. Supp. 3d at 572. NEPA's "full and fair discussion" requirement directs an agency to look at a Project's "direct" and "indirect" effects. 40 C.F.R. §

[4] It is the Tribes' position that a crude oil pipeline is a depredation—the easy case—and thus the Court need not look to the substantive requirements of the NEPA or the NHPA.

1508.8(a)-(b). Indirect effects include those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b); *Indigenous Envtl. Network*, 347 F. Supp. 3d at 575. The Court must ensure that the agency has taken a "hard look" at the environmental consequences of its decision. *Indigenous Envtl. Network*, 347 F. Supp. 3d at 572 (quoting *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001)). Interior failed to take a hard look at the direct and indirect effects of the Pipeline.

1. Interior Failed to Take a Hard Look at a Route that Avoids the Tribes' Treaty Lands.

The "existence of reasonable but unexamined alternatives renders an EIS inadequate." *Id.* at 573. Throughout the process there have consistently been comments that the United States should avoid, or at least evaluate a route that avoids, tribal treaty lands. The Scoping Report for the 2014 EIS states that "[t]he Supplemental EIS should evaluate an alternative route to avoid the sovereign Lakota territory encompassed by the boundaries of the Great Sioux Reservation as identified in the 1851 and 1868 Fort Laramie Treaties." SDF at ¶ 59. Yet, in 2014, no such route was analyzed. *Id.* In 2019, the United States received comments that "the pipeline should be rerouted

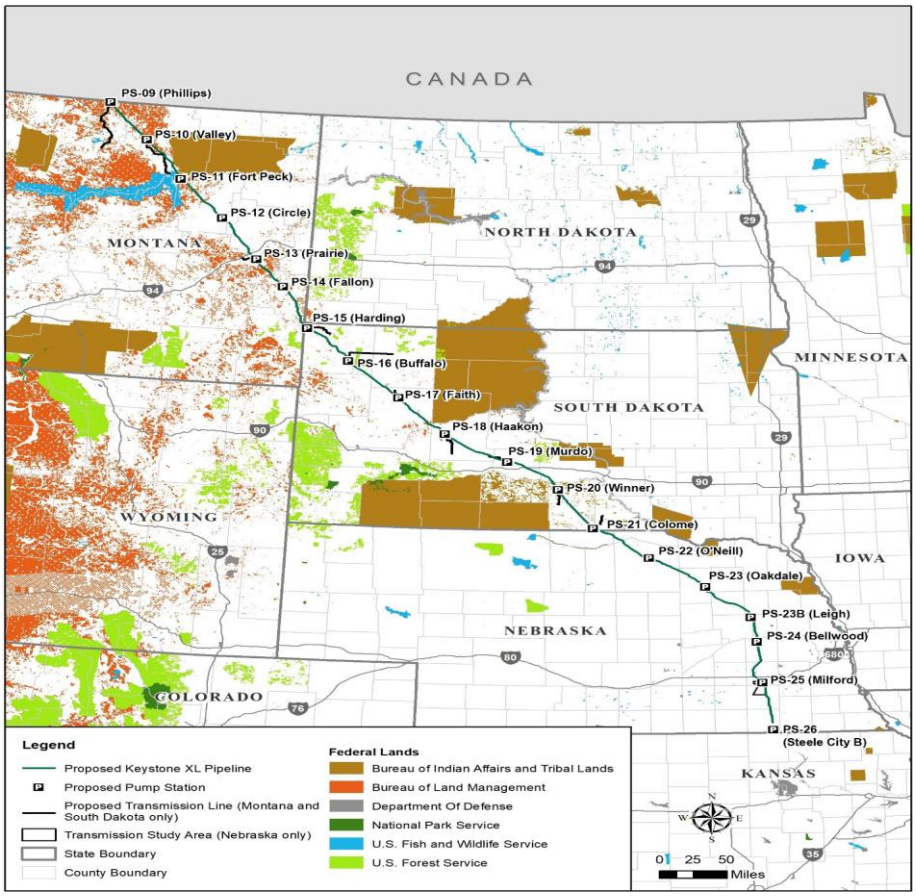
to avoid impacts to tribal treaty lands and tribal way of life," and that the United States failed to consider an alternative that avoided disproportionate impacts to tribes on their ability to hunt, fish, and utilize natural resources as was suggested prior to the 2014 SEIS." SDF at ¶ 61. No such alternative was analyzed, rather the U.S. asserted that the preferred route avoids tribal lands, but not necessarily treaty lands.

Given the treaty obligation to avoid depredations and the "existence of reasonable but unexamined alternatives," Interiors' final agency action should be declared void and construction enjoined until its obligations are upheld and it analyzes a route that avoids the treaty lands.

2. The ROD and EIS Incorrectly Conclude that No Federal Lands Are Crossed Outside of MT and that No Indian Lands Are Crossed or Even Within One Mile of the Pipeline.

The ROD states that "[n]o federal lands are crossed by KXL outside of MT." SDF at ¶ 49. And the 2014 EIS, which is incorporated into both the ROD and 2019 EIS, states that the "proposed Project does not cross any tribal lands, such as Indian reservations[,]" and that "no federal land in South Dakota will be crossed." SDF at ¶ 48. But TransCanada has admitted the Pipeline crosses Rosebud mineral estates that are held in trust by the United States. Docs. 111, at 6-7; 114, at 5-6. The 2019 EIS relies on a generic low-detail

map to assert that "the preferred route analyzed within this SEIS avoids tribal lands and tribal trust lands as demonstrated in the image on the following page." SDF at ¶ 52. The map, which is below, fails to provide sufficient detail to show whether Indian lands are truly impacted and appears to show such lands are impacted.[5] SDF at ¶ 53.



[5] And we know that TransCanada has failed to provide the detailed maps to the Tribes so that they may conduct their own survey with regard to surface estates. Doc. 111, at 7-8.

At its most extreme, the 2014 EIS states that the Pipeline "does not cross *or come within 1 mile* of any tribal lands." SDF at ¶ 54 (emphasis added). This is clearly belied by the map above and the information TransCanada has provided that shows the Pipeline within a couple hundred feet of Indian land. Doc. 97, at 13 (admitting that, at bare minimum, the Pipeline is "*adjacent* to property owned by Rosebud" or the United States in trust); Doc. 98-6, at Ex. A (maps showing the Pipeline would be within roughly 200 feet of Indian land held in trust).

Further, the relevant analysis to determine whether the Pipeline crosses other Indian land is to look at where the effects are to occur. Simply looking at the "easements" and "authorized activity," is deeply flawed. Both the Area of Potential Effect ("APE") and the spill area are larger than the narrow view of the "easements" that TransCanada has provided. *See* Doc. 114 at 8-9 (showing the APE at 300 feet and the spill zone at 1,200-5,000 feet, then showing the "easement" at only 150 feet). Taking this narrow view is improper when a larger impact area is foreseen.

The publicly available maps show that the Pipeline corridor would cross Rosebud surface and mineral estates. Doc. 114, at 8. Under the 2019 EIS the geographic areas where there would be alterations from the Pipeline are

at bare minimum 150 feet from the Pipeline corridor (and more properly 250 feet) on both sides. And for a spill, the area of effect would be between 1,200 to 5,000 feet from the release point on the surface and down into the minerals below. 2019 EIS at 5-2. The EIS fails to take this into consideration as it wrongly concludes the Pipeline will be within even one mile of Indian lands.

Given these faulty conclusions, the United States has failed to prevent depredations or take a hard look at the reasonably foreseeable direct and indirect impacts of the Pipeline on Plaintiffs and their lands. 40 C.F.R. § 1508.8(b); *Indigenous Envtl. Network*, 347 F. Supp. 3d at 575

3. The ROD and EIS Fail to Mention, or Analyze, Rosebud Mineral Estates.

The ROD, 2019 EIS, and 2014 EIS all fail to mention that Rosebud mineral estates held in trust would be crossed, and there is no analysis of the United States' obligation pursuant to the treaties or its Indian mineral regulations. TransCanada has admitted that the Pipeline easement would cross mineral estates owned by individual Indians held in trust by the United States, and Rosebud owns these Indian lands. Docs. 111, at 6-7; 114, at 5-6. These trust estates are legally "Indian lands." 25 C.F.R. § 211.3.

The Tribes extensively briefed the United States' obligation to prevent trespass, prevent an unlawful interference, and prevent mining without a permit in their Motion for Summary Judgment, which they incorporate here. Doc. 114, at 21-8. The Unites States has failed to acknowledge that it has 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*. 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. Doc. 114 at 24. And a Pipeline through the mineral estate certainly interferes with the tribes right to access its mineral estate. Doc. 114 at 25.

The United States failed to take a hard look at these issues or prevent such depredations and that is contrary to federal law.

4. The ROD and EIS Fail to take a hard look at Fort Belknap or Rosebud Water Resources.

The 2019 EIS analyzes the impact the Pipeline would have on the Fort Peck Assiniboine and Sioux Tribes reserved water rights, but not all of Fort

Belknap or Rosebud's. SDF at ¶ 58. Yet, the Pipeline would impact Fort Belknap and Rosebud federally reserved water rights and resources. Doc. 120, at 21-23. The Pipeline would cross the Ogallala aquifer, the White River, and the Milk River, in which the Tribes have reserved rights. *Id*. The failure to acknowledge this, and analyze it, violates the anti-depredation provisions of the treaties, and is not a "hard look."

5. The ROD and EIS Failed to Take a Hard Look at the Effect of Man-Camps on Native Women and Children and COVID-19 Is New Information Requiring Supplementation.

The EISs also fail to take a hard look or provide meaningful analysis at whether and how man camps and the influx of out-of-state workers related to the construction, operation, and maintenance of the Pipeline will affect the health, welfare, and safety of Tribal members, and in particular Native women and children. Both EISs assume that any such impacts are "associated with boom towns and/or longer term operations . . . where a largely male workforce may be residing for months or years." SDF at ¶ 63. But the EISs go on to note the construction camps for the Pipeline would be operational for 6 to 8 months. SDF at ¶ 64. Given this length of time, the United States was required to look at the man-camps' "direct" and "indirect" effects on Native communities and people. 40 C.F.R. § 1508.8(a)-(b). Indirect

effects include those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id*. § 1508.8(b); *Indigenous Envtl. Network*, 347 F. Supp. 3d at 575. There is no meaningful analysis about how the largely male man-camps will impact or effect Native communities, and in particular Native women and children. There is only a discussion about a camp code, but not about the effects that the Tribes will feel. This fails to protect against depredations and is not a "hard look."

Further, "NEPA imposes a continuing duty on federal agencies to supplement new and relevant information." *Indigenous Envtl. Network*, 347 F. Supp. 3d at 576. "A supplement proves necessary if the new information presented is sufficient to show the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Id*. (citations omitted). The new COVID-19 pandemic is new information that affects the quality of the Tribes environment to a significant extent and it has not been considered.

The United States, Montana, South Dakota, and both Tribes have declared a state of emergency. *See e.g.,* Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020) (Presidential Proclamation declaring national emergency related to COVID-19); Gov. of Mont. Exec. Order No. 2-2020

(Mar. 12, 2020) (declaring state of emergency related to COVID-19); Dean Welte, *Gov. Kristi Noem Announces All South Dakota Public School Will Be Closed Starting Next Week*, KTIV (Mar. 13, 2020) https://ktiv.com/2020/03/13/gov-kristi-noem-declares-state-of-emergency-in-south-dakota/; Assoc. Press, *Rosebud Sioux Tribe Announces Travel Ban to Prevent Virus Spread*, newscenter1(Mar. 6, 2020), https://www.newscenter1.tv/rosebud-sioux-tribe-announces-travel-ban-to-prevent-virus-spread/; Fort Belknap Indian Cmty. Council R. 55-2020 (Mar. 16, 2020) (declaring state of emergency related to COVID-19), https://img1.wsimg.com/blobby/go/d94bfdb9-dd85-49bd-94c2-4822ef04bf3b/downloads/55-2020%20-%20Declaration%20of%20Emergency.pdf?ver=1584453493532. Tribes are particularly vulnerable communities given the dire state of their healthcare systems. Salt Lake Tribune, *'We are not ready for this': Native American tribes struggle to deal with coronavirus*, (Mar. 4, 2020), https://www.sltrib.com/news/nation-world/2020/03/04/we-are-not-ready-this/. The influx of out-of-state workers that may have COVID-19 will affect the health, welfare, and safety of Tribal members and their ability to monitor the workers in the man-camps that come to nearby Tribal

communities. Thus, the Defendants should be required to supplement its analysis to take into consideration the COVID19 pandemic. *Indigenous Envtl. Network*, 347 F. Supp. 3d at 576.

CONCLUSION

For the foregoing reasons and the reasons, the United States' Motion for Summary Judgment should be denied.

RESPECTFULLY SUBMITTED this 18th day of March, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** complies with: (1) Local Civil Rule 7.1(d)(2)(A) because it contains 6,494 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 (MT Bar No. 42771409)
NATIVE AMERICAN RIGHTS FUND

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March, 2020, I electronically filed the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS' 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.

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