MARK STEGER SMITH
Assistant U.S. Attorney
U.S. Attorney's Office
2601 Second Avenue North, Suite 3200
Billings, MT 59101
Ph: (406) 247-4667; Fax: (406) 657-6058
mark.smith3@usdoj.gov

PRERAK SHAH
Deputy Assistant Attorney General

LUTHER L. HAJEK (CO Bar 44303)
United States Department of Justice
Environment and Natural Resources Division
999 18th St., South Terrace, Suite 370
Denver, CO 80202
Ph: (303) 844-1376; Fax: (303) 844-1350
luke.hajek@usdoj.gov

Attorneys for Federal Defendants

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, and TC ENERGY CORP., *et al.*, Defendant-Intervenors.	CV 18-118-GF-BMM **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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Exhibit 3 – Hackworth, *Digest of International Law*, Vol. IV, § 350 (1942) (excerpt)

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Exhibit 5 – Presidential Permit Authorizing the Lakehead Pipe Line Company Inc. ("Lakehead") to Construct, Operate, Maintain, and Connect Facilities for the Transportation and Exportation to Canada of Oil, President Dwight D. Eisenhower (April 28, 1953)

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Exhibit 8 – Compilation of Historical Presidential Permits

Exhibit 9 –S.1, Keystone XL Pipeline Approval Act (Jan. 6, 2015)

Exhibit 10 – S. Rep. No. 114-1, Keystone XL Pipeline (Jan. 12, 2015)

[1] Exhibits 1 through 10 are attached to Defendants' Responses to the Court's Questions in Its December 20, 2019 Order, ECF No. 101. Exhibits 11 through 14 are attached to Defendants' Statement of Undisputed Facts, ECF No. 110. Exhibits 15-17 are attached to Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction, ECF No. 127. Exhibit 18 is attached hereto.

Exhibit 11 – Department of State Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, L.P. Application for a Presidential Permit (November 3, 2015)

Exhibit 12 – TransCanada Keystone Pipeline, L.P. Application for Presidential Permit for Keystone XL Pipeline Project (May 4, 2012)

Exhibit 13 – Memorandum of January 24, 2017, Construction of Keystone XL Pipeline

Exhibit 14 – TransCanada Keystone Pipeline, L.P. Application for Presidential Permit for Keystone XL Pipeline Project (January 26, 2017)

Exhibit 15 – 2019 Final Supplemental Environmental Impact Statement for the Keystone XL Project (December 2019), Excerpts Regarding the Analysis of Impacts to Cultural Resources

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Exhibit 17 – Amended Programmatic Agreement and Record of Consultation (December 2013)

Exhibit 18 – 2014 Final Supplemental Environmental Impact Statement for the Keystone XL Pipeline Project (January 2014), Excerpts Regarding Federal, State, and Local Approvals for the Pipeline.

INTRODUCTION

Plaintiffs challenge the decision of the President of the United States to issue a Permit allowing the Keystone XL Pipeline to cross the border from Canada into the United States. Plaintiffs' challenge continues to be based on a mischaracterization of what the Permit actually authorizes. Moreover, they fail to demonstrate that authorization of the border crossing has violated the U.S. Constitution, treaties, or statutes.

First, Plaintiffs' claims must be dismissed because they suffer from fatal threshold deficiencies. Most significantly, Plaintiffs lack standing to challenge the Permit authorizing the construction of border facilities. Plaintiffs allege harms that would occur along the 875-mile pipeline route, which are subject to separate federal and state approvals. They have failed, however, to demonstrate any injury to their interests caused by the approval of the 1.2-mile border segment. Plaintiffs' claims are also not justiciable because they fail to challenge any final agency action under the Administrative Procedure Act and they fail to identify a waiver of sovereign immunity that would allow their claims to proceed against the President.

Second, the mineral claim fails on the merits because neither the President nor the Defendant agencies have authorized the pipeline to cross tribal land. No right-of-way would be required in any event because the pipeline will not cross either reservation land or surface estates held in trust on behalf of the Tribes. In

addition, no mineral lease was required because TC Energy does not intend to conduct mining activities on mineral estates held in trust for the Tribes.

Third, Plaintiffs' tribal treaty claims lack merit because the authorization of border-crossing facilities does not infringe on their treaty rights. They erroneously claim that the Permit authorizes the whole pipeline and that the pipeline will cross parcels held in trust for the Tribes. But the Permit approves only the border segment and does not approve construction across tribal land. Further, the treaty claims, to be viable, must be grounded in violations of generally applicable statutes and regulations. But none of the statutes Plaintiffs rely on, including the National Environmental Policy Act ("NEPA"), apply to the President, and they have demonstrated no statutory violations by the agency Defendants.

Finally, Plaintiffs' constitutional claims are baseless. Ever since President Grant authorized the landing of a telegraph cable on the shores of the United States in 1869, Presidents have authorized border crossings for a variety of facilities. And while Congress has enacted its own requirements for some types of border crossings, it has never done so for oil pipelines. Thus, the purported conflict with Congress's authority that Plaintiffs allege simply does not exist.

Accordingly, summary judgment should be granted to Defendants on all claims.

BACKGROUND

The factual background is set forth in Defendants' Statement of Undisputed Facts ("SUF"), ECF No. 110, filed in conjunction with Defendants' Motion for Summary Judgment, ECF No. 108. The history of, and the legal basis for, the issuance of border crossing permits by the President is also set forth in Defendants' Responses to the Court's Questions in Its December 20, 2019 Order ("Defs.' Resp."), ECF No. 101. Both are incorporated by reference.

ARGUMENT

I. The Court Lacks Jurisdiction Over Plaintiffs' Claims.

Plaintiffs lack standing to challenge the Permit. As already demonstrated, the Permit approves only the construction of the 1.2-mile border segment, and Plaintiffs have failed to demonstrate harm that is fairly traceable to the approval of that segment. *See* Defs.' Mem. in Supp. of Mot. for Summ. J. ("Defs.' Mem.") at 3-8, ECF No. 109. Plaintiffs offer no new argument on that point and instead argue that the Permit is one of several actions that has or will cause harm to the Tribes. *See* Pls.' Mem. in Supp. of Mot. for Summ. J. ("Pls.' Mem.") at 10-11. That is legally and factually inaccurate.

As a legal matter, while it is true that Plaintiffs could demonstrate injury in fact by showing that the challenged action is one of multiple causes of harm, *see WildEarth Guardians v. U.S. Dep't. of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015),

they must at least be able to show that the action they are challenging caused them some harm. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (an injury must be "fairly traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court") (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)) (brackets omitted).

And as a factual matter, Plaintiffs are incorrect that the approval of the Permit will cause, or has caused, other approvals for the pipeline to be issued. There are myriad federal, state, and local approvals that are required for the pipeline to be built. 2014 Supplemental Environmental Impact Statement ("SEIS") at 1.9-1-1.9-9, Ex. 18. The mere authorization of the border crossing did not cause those other approvals to occur, and the issuance of the Permit does not guarantee that the pipeline will be built at all. Accordingly, because Plaintiffs have failed to demonstrate harm from the issuance of the Permit, they lack standing.

In addition, the Court lacks jurisdiction over Plaintiffs' claims because the claims are not redressable, they fail to challenge final agency action (which is necessary to bring claims against the agencies), and the claims against the President are barred by sovereign immunity. *See* Defs.' Mem. at 8-11. Defendants incorporate these arguments by reference. Plaintiffs do not address these issues in their opening brief; accordingly, Defendants will address those issues, as

necessary, in their reply.

II. The Constitutional Claim Fails on the Merits.

The constitutional claim fails on the merits because the President possesses the inherent constitutional authority to approve or deny a physical connection to the United States and Congress has acquiesced to that practice with respect to oil pipelines for over one hundred years. Plaintiffs' arguments to the contrary fail to address the relevant case law and also fail to identify any act of Congress that curtails the President's authority with respect to cross-border pipelines.

A. Plaintiffs Lack a Viable Cause of Action for their Constitutional Claim.

As an initial matter, the constitutional claim fails for lack of a viable cause of action, and Defendants incorporate by reference their previous briefing on this point. *See* Defs.' Mem. at 20-22. Plaintiffs do not address this point in their opening brief, and Defendants will address it in reply, as necessary.

B. The President Possesses the Inherent Constitutional Authority to Approve or Deny a Physical Connection to the United States.

President Trump made a decision regarding whether to grant permission for a pipeline to cross the border into the United States, as Presidents have done for over a hundred years, and as the prior administration did. This authority is rooted in the President's inherent constitutional authority.

The President's authority to issue a permit allowing a pipeline to cross the border into the United States, or to deny such a permit, is rooted in his inherent

constitutional responsibility for foreign affairs and as Commander-in-Chief. *See, e.g.*, *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–636 & n.2 (1952) (Jackson, J., concurring) (the President can "act in external affairs without congressional authority") (citing *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304 (1936)); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations'") (quoting *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring)). The President's power in the field of international relations "does not require as a basis for its exercise an act of Congress." *Curtiss–Wright Export Corp.*, 299 U.S. at 320; *Youngstown*, 343 U.S. at 635-36 & n.2.

As previously demonstrated, since President Ulysses Grant's authorization of the landing of a submarine cable in 1869, Presidents have exercised authority over border crossings. *See* Defs.' Resp. at 8-13. Courts have long recognized the President's authority to act regarding a potential border-crossing, particularly where Congress has not done so:

> It is thought that the main proposition advanced by complainant's counsel is a sound one, and that, without the consent of the general

> government, no one, alien or native, has any right to establish a physical connection between the shores of this country and that of any foreign nation. Such consent may be implied as well as expressed, and whether it shall be granted or refused is a political question, which, in the absence of congressional action, would seem to fall within the province of the executive to decide.

United States v. La Compagnie Francaise Des Cables Telegraphiques, 77 F. 495, 496 (S.D.N.Y. 1896); *see also* Hackworth, *Dig. Int'l Law*, Vol. IV, at 251 (1942), Ex. 3.

More recent court decisions similarly affirm the President's authority to issue cross-border permits for pipelines based on both his foreign affairs authority and his authority as Commander-in-Chief. *See Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1162–63 (D. Minn. 2010) (concluding that it is "well recognized" that "the President's authority to issue" border crossing permits "comes by way of his constitutional authority over foreign affairs and authority as Commander in Chief"); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1078 (D.S.D. 2009) (noting that, even if the permit were set aside, "the President would still be free to issue the permit again under his inherent Constitutional authority to conduct foreign policy on behalf of the nation"); *Natural Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009) ("Defendants have amply documented the long history of Presidents exercising their inherent foreign affairs power to issue cross-border permits, even in the absence of any congressional authorization.").

Plaintiffs do not even address the above cases and instead argue that a decision to approve or deny a border crossing for a pipeline is a simple act of commerce. *See* Pls.' Mem. at 13-14. But for over a hundred years, the act of approving a physical connection to the United States has not been viewed as merely commerce.

In 1898, in the context of the potential landing of a telegraph cable on United States shores, Acting Attorney General Richards explained that "[t]he preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President." Foreign Cables, 22 U.S. Op. Atty Gen. 13, 25 (1898). That role is bestowed upon the President by the Constitution based on his authority as "commander in chief of the Army and Navy" and his constitutional role in foreign affairs "to make treaties, and to appoint ambassadors, public ministers, and consuls." *Id.* at 25-26. Further, the President's role in protecting the territorial integrity of the United States "is not limited to the enforcement of specific acts of Congress." *Id.* at 26. Thus, Acting Attorney General Richards concluded, "the President has the power, in the absence of legislative enactment, to control the landing of foreign submarine cables." *Id.* at 27. This reasoning remains as sound today as it was over a hundred years ago.

Moreover, this reasoning has been adopted by subsequent administrations up

to and including the prior administration. In then-Secretary of State John Kerry's decision denying TC Energy a presidential permit in 2015, he stated that the decision regarding the permit was based on the President's delegated "Constitutional powers." 2015 Record of Decision at 3, Defs.' SUF Ex. 11, ECF No. 110-1. The Secretary's decision to deny the permit was based not solely on commercial concerns, but on a broad array of factors bearing on national security and foreign affairs. *Id.* at 29-31. Plaintiffs have never taken the position that Secretary Kerry's decision was invalid because it exceeded his delegated constitutional authority. Their position in this case that the President, nevertheless, exceeded his authority when he relied on the very same constitutional power as Secretary Kerry is refuted by multiple court decisions finding the opposite and the consistent position of the United States over a one-hundred year period.

C. Congress Has Acquiesced to the President's Role in Approving Border-Crossings for Pipelines for Over One Hundred Years.

Congress has acquiesced to the President's authority to approve or deny border crossings for oil and gas pipelines for over one hundred years. *See* Defs.' Resp. at 14-26. Plaintiffs' argument that there has been no acquiescence is based on the faulty premise that the Court's analysis of the issues should be limited to only the past 51 years. But even if the Court were to examine only the last 51 years, Plaintiffs' argument still fails because Congress has not curtailed the President's authority in this area.

First, the Court's analysis is not limited to only the past 51 years and instead must include the entire one-hundred year history of Presidents authorizing cross-border oil pipelines. Plaintiffs argue that, in order for there to be acquiescence, Congress must have acquiesced in the "particular exercise of Presidential authority" at issue. *Medellin v. Texas*, 552 U.S. 491, 528 (2008). But that is exactly what Congress has done with respect to cross-border permits authorized unilaterally by past Presidents. There are records of such permit going back to 1918, Defs.' Resp. at 14-15, and when Presidents Eisenhower, Kennedy, and Johnson issued permits for cross-border pipelines, *id.* at 15, Congress took no action. Thus, Congress has acquiesced to precisely the action challenged here—the unilateral issuance by the President of a cross-border permit for an oil and gas pipeline.

Moreover, the suggestion that Congress was unaware of the President's exercise of authority over border crossings prior to 1968 is untenable. Over that same period, Congress enacted the Submarine Cable Landing Licensing Act of 1921, 47 U.S.C. § 35, and only a short time later it enacted the International Bridge Act of 1972, 33 U.S.C. § 535b. Congress simply chose to take no similar action with respect to cross-border pipelines.

In addition, Plaintiffs' argument that it is the Defendants' burden to demonstrate "explicit" evidence that Congress was aware of the President's actions

during this time period is incorrect. Pls.' Mem. at 17-18 (citing *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007)). *Gonzales* is distinguishable because, in that case, the government was arguing that Congress had acquiesced in the agency's interpretation of a *statute*. *See id.* at 492-93. Thus, the issue was whether the agency's interpretation—which differed from language in the statute—was nevertheless entitled to deference because the agency had administrated the statute in a certain way. No such issue is present in this case because Congress has enacted no applicable legislation with respect to cross-border pipelines.

Second, even looking at just the previous 51 years, Congress has still acquiesced to Presidential control over border-crossing permits for oil and gas pipelines. As Plaintiffs note, past Presidents first delegated the authority to approve or deny such permits to particular agency heads and then changed the procedures for the issuance of such permits through the issuance of multiple executive orders. *See* Pls.' Mem. at 16; *see also* Defs.' Resp. at 15-16. Thus, Congress has acquiesced, not only in the President's exercise of authority over permits for cross-border oil pipelines, but also in the President's authority to do so using whatever procedures he sees fit.

Congress's enactment of the Temporary Payroll Tax Cut Continuation Act ("TPTCCA") of 2011, Pub. L. No. 112-78, 125 Stat. 1280, supports the conclusion that Congress has acquiesced in the President's authority with respect to oil

pipelines. In the TPTCCA, Congress left it to the President to decide whether to approve the pipeline in accordance with procedures that had already been established by President George W. Bush in Executive Order No 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004). And when President Barack H. Obama nonetheless determined that the pipeline "would not serve the national interest" and denied the permit, Congress took no action. *See* 77 Fed. Reg. 5,679, 5,679 (Jan. 18, 2012). Thus, the TPTCCA affirms the President's primary role in deciding whether to authorize border-crossings for oil pipelines.[2] Further, the TPTCCA has no application going forward because it applied only to President Obama's decision regarding a prior application by TC Energy in early 2012.

The circumstances of this case are analogous to those in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In that case, the Court upheld the President's decision to suspend claims brought by foreign nationals, despite the lack of express statutory authority to do so. *Id.* at 686. The Court found that "the history of [congressional] acquiescence in executive claims settlement" supported a

[2] The circumstances in *Detroit International Bridge* case were different because Congress has acted to regulate international bridges with the enactment of the International Bridge Act, 33 U.S.C. § 535. *See Detroit Int'l Bridge Co. v. Gov't of Canada*, 883 F.3d 895, 899 (D.C. Cir. 2018), *as amended on denial of reh'g* (Mar. 6, 2018), *cert. dismissed sub nom. Detroit Int'l Bridge Co. v. Dep't of State*, 139 S. Ct. 378 (2018). And even the International Bridge Act preserves the President's role to determine whether an international bridge should be approved. 33 U.S.C. 535b.

presumption that the President's action was within his authority. *Id.* Significant to the Court's conclusion was the fact that two prior statutes—the International Emergency Economic Power Act and the Iran Hostage Act—while not authorizing the President's action, indicated "congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case." *Id.* at 677; *see also id.* at 686.

The same is true here. In the TPTCCA, Congress affirmed the President's role in approving cross-border pipelines. *See* Pub. L. No. 112-78, § 501(b). Likewise, in proposing the Keystone XL Approval Act, which was never enacted, Congress recognized that the "President has, for more than a century, asserted authority to approve energy and telecommunication facilities that cross international borders pursuant to the President's constitutional authority over foreign affairs." S. Rep. No. 114-1, at 1 (2015), ECF No. 101-10. The fact that Congress has considered the President's long history of exercising authority over cross-border permits for oil pipelines and has not enacted legislation to curtail that authority confirms that Congress has acquiesced to the President's authority in this area.

In sum, Plaintiffs' claim that the President's issuance of a cross-border permit for the Keystone XL Pipeline unconstitutionally infringes on Congress's Commerce Clause authority fails on the merits.

III. The Tribes' Mineral Claim Fails for Lack of Jurisdiction and On the Merits.

Plaintiffs argue that Defendants have violated treaties and Indian right-of-way and mineral laws by not preventing TC Energy from constructing the pipeline across tribal land. *See* First Am. Compl. ¶¶ 421-30 (Fifth Claim for Relief). As an initial matter, the claim is nonjusticiable because it cannot be asserted against the President under any theory, and because Plaintiffs fail to identify the agency action or lack of agency action they purport to challenge under the APA. But even assuming such a claim were justiciable, it fails on the merits because the statutes at issue do not apply to the President and the U.S. Department of the Interior has not violated the applicable statutes.

A. The Mineral Claim is Not Justiciable and Has Threshold Pleading Deficiencies.

The mineral claim cannot be brought against the President or the agency Defendants. The jurisdictional and threshold pleading shortcomings of Plaintiffs' treaty and statutory claims are set forth in Defendants' opening brief and therefore are only briefly discussed here. *See* Defs.' Mem. at 12-14. To summarize, the claims cannot proceed against the President under the APA because such review is foreclosed by Supreme Court precedent. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). Nor can such a claim proceed against the President under the theory of non-statutory review because Plaintiffs identify no violation of a clear

statutory mandate that applies to the President. *See Dalton v. Specter*, 511 U.S. 462, 474-76 (1994). Thus, the mineral claim, to the extent it is brought against the President, is not justiciable.

As for the claim against the agencies, Plaintiffs fail to identify a final agency action, or lack thereof, that would allow their claim to proceed under the judicial review provisions of the APA. *See* 5 U.S.C. § 704; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990). Neither the complaint nor Plaintiffs' brief is clear as to which agencies are even included in this claim. *See* First Am. Compl. ¶ 425 (alleging that "Agency Defendants have failed to investigate TransCanada's compliance with the rights-of-way statutes or require TransCanada to obtain a federal right-of-way"); Pls.' Mem. at 22 (arguing that "Agency Defendants have failed to require Rosebud's consent and to require that TransCanada comply with federal regulations"). The only action challenged is the issuance of the Permit. *See* First Am. Compl. ¶¶ 429-30; Pls.' Mem. at 22. Therefore, as to the agencies, this claim fails for lack of final agency action.

Accordingly, the purported mineral claim is not properly before the Court.

B. The Mineral Claim Fails on the Merits.

The mineral claim also fails because it has no legal merit. In addition to the alleged violations of treaty obligations, Plaintiffs allege and argue three statutory bases for relief in support of the mineral claim, *viz.*, they expressly allege

violations of the Indian Right of Way Act, 25 U.S.C. §§ 323-24, and the Indian Mineral Leasing Act, 5 U.S.C. § 396, First Am. Compl. ¶¶ 422, 423, 426, and they (arguably) also allege a claim for mineral trespass. *Id.* ¶ 427. None of these theories has merit.

As pled against the President, as already discussed, the claim lacks merit because the statutes at issue do not apply to the President and the President did not approve the pipeline to cross tribal land and did not approve any mining activities on tribal land. *See* Defs.' Mem. at 14-15.

Insofar as this claim is brought against the agency Defendants, it also fails. To begin with, the treaty language cannot be viewed in a vacuum. The Supreme Court has instructed that "[t]he trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011); *see also id.* at 177 ("The Government assumes Indian trust responsibilities only to the extent that it expressly accepts those responsibilities by statute."). Therefore, the Court must look to the particular statutes that Plaintiffs allege were violated in order to determine, not just whether those statutes were violated, but whether Plaintiffs can claim a violation of a treaty as well. *Id.*

Consistent with *Jicarilla*, the Ninth Circuit has held on multiple occasions that the government's trust obligation to the Indian tribes is satisfied through its

compliance with generally applicable laws. *See Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) ("[U]nless there is a specific duty that has been placed on the government with respect to the Indians," the United States' trust obligation "is discharged by the agency's compliance with general regulations and statutes . . . ."); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 815 (9th Cir. 2006) (stating that treaty obligations could only be measured by looking to "other generally applicable statutes or regulations"); *Okanogan Highlands All. v. Williams*, 236 F.3d 468, 479-80 (9th Cir. 2000) (holding that BLM satisfied its trust obligations through compliance with NEPA).

As discussed below, Plaintiffs fail to demonstrate that any statutory violation, or any other violation of a legal duty owed to the Tribes, occurred.

1. The Indian Right of Way Statute Does Not Apply.

The Indian Right of Way statute does not apply because the pipeline will not cross surface estates owned by the Tribes. Rights-of-way across tribal land may be granted by the Secretary of the Interior, and the consent of the tribes is required, with certain exceptions. *See* 25 U.S.C. §§ 323-24. The statute applies to "Indian or BIA land" and includes rights-of-way for "[o]il and gas pipelines." 25 C.F.R. § 169.5. BIA land is defined in the regulations as "any tract, or interest therein, in which the *surface estate* is owned and administered by the BIA." 25 C.F.R. § 169.2 (emphasis added). Indian land includes "individually owned Indian land

and/or tribal land," which in turn is defined as "any tract in which the *surface estate*, or an undivided interest in the *surface estate*, is owned by one or more tribes . . . . The term also includes *surface estate of lands* held in trust for a tribe . . . .") (emphasis added). The final rule removes any doubt as to the applicability of the statutes and regulations only to surface estates. *See* 80 Fed. Reg. 72,492, 72,495 (Nov. 19, 2015) ("The definitions refer to the surface estate only because these regulations address only the surface estate and the [Bureau of Indian Affairs ("BIA")] distinguishes only between the surface estate and the mineral estate.").

Here, the only parcels at issue are ones for which the mineral estate—not the surface estate—is held in trust by the United States for the benefit of the Tribes. *See* TC Energy's Statement of Undisputed Facts ("SUF") ¶ 27, ECF No. 98; Declaration of Amy Hofer ("Hofer Decl.") ¶ 8, ECF No. 98-5; Declaration of Joshua Alexander ("Alexander Decl.") ¶¶ 5-8, 13-18, 20. Plaintiffs claim that some of the parcels in which the Tribes have an interest may also include surface estates. *See* Pls.' SUF ¶ 7, ECF No. 115; Declaration of Paula Antoine ("Antoine Decl.") ¶ 12, ECF No. 115-4. But none of the parcels the surface estates they identify are crossed by the pipeline right-of-way. Alexander Decl. ¶¶ 9-12, 19. Moreover, neither the President nor the Department of the Interior have approved a right-of-way across tribal land. Accordingly, the Indian Right of Way Statute does not apply.

2. The Indian Mineral Leasing Act Does Not Apply.

The Indian Mineral Leasing Act does not apply because TC Energy's planned digging of a trench in which to place the pipeline does not constitute "mining purposes" within the meaning of the act. 25 U.S.C. § 396a. Mining is defined in the applicable regulations as "the science, technique, and business of mineral development including, but not limited to: opencast work, underground work, and in-situ leaching directed to the severance and treatment of minerals." 25 C.F.R. § 2.11.3. The digging of a trench for a pipeline is not mining.

The definition of mining under the Indian Mineral Leasing Act was addressed in detail by the Tenth Circuit in *United States v. Osage Wind, LLC*, 871 F.3d 1078 (10th Cir. 2017). In that case, the court considered whether the removal of minerals to lay wind turbine foundations constituted mining. *See id.* at 1089-90. In light of the canon of construction favoring Indian tribes, the court adopted a broad interpretation of the term "mineral development" to include "acting upon the minerals to exploit the minerals themselves." *Id.* at 1091. Crucial to the court's conclusion that the wind developer's actions constituted mining was the fact that it had not "merely [dug] holes in the ground," but instead has "*sorted* the rocks, *crushed* the rocks into smaller pieces, and then *exploited* the crushed rocks as structural support for each wind turbine." *Id.* The court held that acting "upon the minerals by altering their natural size and shape in order to take advantage of them

for a structural purpose" constituted mining. *Id.* at 1091-92.

In contrast, TC Energy plans to dig a trench for the purpose of placing a pipe in the ground—not for the purpose of extracting minerals that would be altered in size and shape to add structural support for the pipeline. 2014 SEIS at 2.1-50-2.1-54, TC Energy SUF Ex. 4, ECF No. 98-4. Soil and rock removed from the trench would be placed back in the trench after the placement of the pipe. *Id.* at 2.1-52. But TC Energy's plans do not call for the crushing or altering of the rock to provide support for the pipeline. *See id.* at 2.1-50-2.1-54. Therefore, TC Energy is not engaged in mining and does not require a lease from the Department of the Interior under the Indian Mineral Leasing Act.

In an effort to make the installation of the pipeline appear similar to the installation of the wind turbines in *Osage Wind*, Plaintiffs argue that TC Energy will use soil and rock excavated from the trench for backfill. Pls.' Mem. at 27. But merely using excavated material as backfill is not mining. The crucial distinction is that TC Energy does not plan to alter the rocks' "size and shape" in order to create support material for the pipeline. *Osage Wind*, 871 F.3d at 1091-92. As the Tenth Circuit explained, "[t]here is simply no sense in which the word 'mineral development' means only the removal of dirt without some further manipulation, commercialization, or offsite relocation of it." *Id.* at 1091. There is also no basis for Plaintiffs' assertion that excavated material would be used as

"padding material." Pls.' Mem. at 27. Instead, in rocky areas the pipe would be padded with "borrow material," which "would be obtained from existing, previously permitted commercial sources." 2014 SEIS at 2.1-18, 2.1-52.

Accordingly, given TC Energy's planned activities, the Indian Mineral Leasing Act does not apply.

3. Plaintiffs Have No Claim for Mineral Trespass.

Plaintiffs argue that the construction of the pipeline across parcels in which the Tribes own the mineral estate would be a mineral trespass. *See* Pls.' Mem. at 22-24. This claim fails because no trespass has occurred, and Plaintiffs cannot compel the government to bring a trespass action on their behalf. Moreover, if a mineral trespass occurs in the future, Plaintiffs would have remedies available to them.

Plaintiffs have failed to show that a trespass has actually occurred. As discussed above, the pipeline will cross a handful of parcels for which the mineral rights are held in trust by the United States for the benefit of the tribes. TC Energy's SUF ¶ 27.[3] TC Energy has obtained permission to cross the surface

[3] Plaintiffs rely on *United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyoming*, 304 U.S. 111 (1938). The case involved whether land granted to the Shoshone Tribe under a treaty included mineral rights. *See id.* at 117-18. The case has no relevance here because the only parcels that are at issue are parcels in which the mineral rights are held in trust by the United States for the benefit of the Tribes.

estate for each of the parcels that the pipeline will cross. *Id.* ¶¶ 20-26. The company, however, was not required to obtain right-of-way approval to cross mineral estates held in trust for the tribe because that requirement only applies to surface estates. *See* 25 C.F.R. §§ 169.2, 169.5. And the work that TC Energy details would not constitute mining under the Indian Mineral Leasing Act.

The United States, for its part, has not approved any use or development of Tribe's mineral estate. And, because TC Energy has no plans to engage in mining under the Indian Mineral Leasing Act, there is no basis for the Department of the Interior to initiate an action against TC Energy for the unauthorized extraction of mineral resources pursuant to 43 C.F.R. § 9239.0-7. In any event, the Tribes cannot compel the government to bring a trespass action on their behalf because the decision to bring such an enforcement action is discretionary. *See Shoshone Bannock Tribes. v. Reno*, 56 F.3d 1476, 1480-84 (D.C. Cir. 1995) (tribes could not compel the United States to bring an action to protect their federal reserved water rights); *see also Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985) (an agency's decision not to take an enforcement action is presumptively unreviewable as an action that is committed to agency discretion by law under 5 U.S.C. § 701(a)(2)).[4]

[4] Note as well the irony of the Plaintiffs opposing the mere transport of energy resources across their land by invoking a statute designed to allow them to exploit energy resources or other minerals on their land. The Plaintiffs' opposition to development and infrastructure is thus highly selective.

Plaintiffs certainly fear that, in trenching, TC Energy will trespass against the Tribe's mineral interests. Should that actually come to pass, however, Plaintiffs could, at that time, bring a potential claim against TC Energy for trespass. *See, e.g.*, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, No. 18-35704, 2020 WL 1038679, at *8, 11-13 (9th Cir. Mar. 4, 2020) (analyzing a trespass claim in the context of the Indian Right of Way Act). Assuming the Tribes could demonstrate mineral trespass and that the United States breached some fiduciary duty in allowing or failing to prevent that trespass, the Tribe would have a potential claim against the United States in the Court of Federal Claims. *See Shoshone Indian Tribe of Wind River Reservation, Wyoming v. United States*, 52 Fed. Cl. 614, 628-29 (2002). But to this point, Plaintiffs have not demonstrated that a mineral trespass has occurred. And any claim to the contrary is speculative, meaning the Plaintiffs lack standing to pursue it. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("'[T]hreatened injury must be *certainly impending* to constitute injury in fact,'" and "'[a]llegations of *possible* future injury' are not sufficient.") (citation omitted). Such a claim would also be unripe. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

Accordingly, Plaintiffs have no viable claim for mineral trespass.

4. Plaintiffs Have No Claim for Interference With Mineral Rights.

Plaintiffs did not plead a claim for interference with mineral rights or allege

sufficient facts to support such a claim, and therefore it should be dismissed. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009). In any event, the claim lacks merit because, as with trespass, Plaintiffs have not shown any actual interference with the development of the mineral estates held in trust for their benefit. Any claim that the pipeline will interfere with such development is mere speculation.

The cases on which Plaintiffs rely do not support their argument that interference with their mineral rights either has occurred or will occur. *Crow Tribe of Indians v. Peters*, 835 F. Supp. 2d 985 (D. Mont. 2011), involved a dispute over a parcel held by the United States in trust for the tribe. The tribe and the developer asserted the right to develop the mineral estate over the objection of the surface estate owner. *Id.* at 988. The court sided with the tribe, holding that the developer was not required to obtain the consent of the surface estate owner before exercising lease rights granted under the Indian Mineral Leasing Act. *Id.* at 992. Thus, far from demonstrating any interference with the Tribes' interest in the mineral estate here, the case stands for the proposition that the Tribes should be able to obtain the development of the mineral estate in the future.

The other cases cited by Plaintiffs similarly show, not that the surface estate owner may prohibit the development of the mineral estate, but that the mineral estate owner generally *cannot* be precluded from developing the mineral estate. *See Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878, 884 (10th Cir.

1974) (mining company was not required to provide structural support for a pipeline); *Heikkila v. Carver*, 416 N.W.2d 593, 596 (S.D. 1987) (finding that "an oil and gas lease also carries with it the incidental or implied right of the lessee to use as much of the land's surface and in such manner as is reasonably necessary for him to effectuate the purposes of the lease and perform the obligations imposed by the lease").

In sum, even if Plaintiff had pleaded a claim for interference with mineral rights, they have failed to demonstrate that the installation of the pipeline would interfere with the development of the mineral estate.

IV. If the Court Finds That the President Lacks the Authority to Approve the Border Crossing for the Pipeline, Then No Permit Is Required.

There is no basis for Plaintiffs' assertion, that if the Court holds the approval or denial of a cross-border permit exceeds the President's authority, then some other unspecified approval to cross the border is required. *See* Pls.' Mem. at 19-20. Plaintiffs' citation to *United States v. La Compagnie Francaise Des Cables Telegraphiques*, 77 F. 495 (S.D.N.Y. 1896), and President Ulysses Grant's Seventh Annual Address to Congress, H.R. Doc. No. 1, Pt. 1 (1875), ECF No. 67-2, proves the government's point. *La Compagnie* stands for the proposition that, in the absence of congressional action, the decision to approve or deny a border-crossing is "within the province of the executive to decide." 77 F. at 496. Likewise, President Grant felt obligated to act regarding the landing of a telegraph cable

because Congress had not done so. Plaintiffs would have this Court declare that the President lacks this important power to protect the territorial integrity of the United States, meaning that in the absence of action by Congress, no approval to cross the border would be required.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that summary judgment be granted in their favor on all claims.

Respectfully submitted this 18th day of March, 2020,

MARK STEGER SMITH
Assistant U.S. Attorney
U.S. Attorney's Office
2601 Second Avenue North, Suite 3200
Billings, MT 59101
Ph: (406) 247-4667; Fax: (406) 657-6058
mark.smith3@usdoj.gov

PRERAK SHAH
Deputy Assistant Attorney General

/s/ Luther L. Hajek
LUTHER L. HAJEK (CO Bar 44303)
United States Department of Justice
Environment and Natural Resources Division
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Ph: (303) 844-1376; Fax: (303) 844-1350
luke.hajek@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 6,245 words, excluding the tables, caption, signature, certificate of compliance, and certificate of service.

/s/ Luther L. Hajek
LUTHER L. HAJEK
U.S. Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2020, a copy of the foregoing Defendants' Opposition to Plaintiffs' Motion for Summary Judgment was served on all counsel of record via the Court's CM/ECF system.

/s/ Luther L. Hajek
LUTHER L. HAJEK
U.S. Department of Justice