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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

ROSEBUD SIOUX TRIBE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants,	CV 18-118-GF-BMM **DEFENDANTS TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S OPPOSITION TO PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER**

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INTRODUCTION

TransCanada Keystone Pipeline, LP and TC Energy Corporation ("TC Energy") opposes Plaintiffs' untimely, procedurally improper, and meritless motion for a temporary restraining order (TRO). Plaintiffs' latest request for injunctive relief—filed before briefing on its pending motion for a preliminary injunction is even completed—rests on dire claims that construction of the Keystone XL Pipeline ("Keystone XL") will result in the imminent destruction of cultural resources in the 1.2-mile border crossing segment. Yet Plaintiffs' prior actions—and prior inaction—completely belie those claims, which are inaccurate in all events. No cultural resources will be destroyed during construction of the Keystone XL border-crossing segment.

Over two months ago, on January 14, 2020, TC Energy gave notice that, if it obtained the necessary permissions from the Bureau of Land Management (BLM), it would begin building Keystone XL's 1.2 border segment in April 2020, and would commence related pre-construction activities in March. Dkt. 94. BLM issued the necessary authorization on January 22nd.[1] Two days after that, TC Energy moved for summary judgment on all of Plaintiffs' claims. Dkt. 97.

[1] U.S. Dep't of the Interior, Bureau of Land Mgmt, Record of Decision, Keystone XL Pipeline Project Decision to Grant Right-of-way and Temporary Use Permit on Federally-Administered Land (Jan. 22, 2020), https://eplanning.blm.gov/epl-front-office/projects/nepa/1503435/20011555/250015801/Keystone_ROD_Signed.pdf (granting right-of-way).

If, as Plaintiffs now claim, BLM's decision was unlawful and would lead, in just two months, to the destruction of cultural resources in the border segment, they should have promptly moved to amend their complaint to challenge BLM's actions, and just as promptly moved for a preliminary injunction to block TC Energy's clearly stated construction (and pre-construction) plans. Plaintiffs stated in a January 24 status report that they would move to amend their complaint in light of BLM's decision, but they have failed to do so. Dkt. 100 at 3.

Instead, they sought and received an extension of time, until February 25, 2020, *see* Dkt. 107, to respond to TC Energy's summary judgment motion, and cross-moved for partial summary judgment on that same day. Dkt. 114. Through those filings, Plaintiffs indicated that, except for an asserted need for discovery concerning certain claims, the case could properly be resolved, and their right to injunctive relief determined, on the basis of the claims in their first amended complaint.

Plaintiffs waited until March 2nd to move for a preliminary injunction. Dkt. 119. In those filings, Plaintiffs did not argue that BLM's recent decision was unlawful, much less ask the Court to treat their preliminary injunction motion as a *de facto* amendment of their complaint. *See* Dkt. 120. And while Plaintiffs included generalized claims about harms to cultural and historical resources, they did not claim that construction would cause harms to specific resources that they

claimed to have identified *within* the 1.2-mile border segment. It was not until the day *after* TC Energy filed its opposition to the preliminary injunction motion that Plaintiffs unexpectedly (and on very short notice) filed a TRO and claimed, for the first time, that construction would destroy specific cultural resources within the border segment and that BLM's actions were unlawful.

This sand-bagging is plainly improper. Plaintiffs could have amended their complaint weeks ago, and should not be allowed to do so through a last-minute and successive request for injunctive relief. And their legal claims are meritless in all events. Indeed, they failed to exhaust many of the challenges they now seek to assert.

Equally problematic, Plaintiffs' new legal claims and factual assertions bear all the hallmarks of being pretexts. Plaintiffs complain about the adequacy of surveys of their historic and cultural resources, but they declined to participate in those surveys or meet with federal officials about them (even though TC Energy offered to underwrite those activities). In litigation over whether they would be injured by a Presidential Permit that simply authorizes construction within the border segment, Plaintiffs made general references to harms to cultural and historical resources, but did not tie their asserted Article III injury to any claim that specific cultural and historical resources *within* that segment would be destroyed. Nor did they make such claims two weeks ago, in a motion asserting that they will

suffer irreparable harm. These new claims are made by their lawyers, not by any tribal official. And they are wrong.

For all of these reasons, set forth in greater detail below, the Court should deny Plaintiffs' motion for a TRO.

STATEMENT OF FACTS

Because the basic facts about Keystone XL are described in detail in TC Energy's summary judgment briefs and in the opposition to the motion for preliminary injunction, TC Energy will not repeat them again here. But in light of Plaintiffs' erroneous claims about the inadequacy of the survey process and the supposed imminent harm to cultural resources, we provide this discussion of the State Department's extensive efforts to consult with the tribes and the efforts taken to protect cultural and historic properties in order to correct the record.

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

construction of Keystone XL, and for taking steps to avoid or mitigate any adverse effects when feasible. *See* 2014 FSEIS, Appendix E (Programmatic Agreement); *id.* at Attachment G.

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

State renewed the tribal consultation process in August 2018. It met with the Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation to provide an update on the cultural resources investigation for Keystone XL. 2019 Final SEIS at A-1. State scheduled a similar meeting with the Fort Belknap in Montana on August 15, 2018, but "at the last moment the tribe cancelled the meeting with no explanation and shortly thereafter ceased communicating with the Department." *Id.*

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

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

As a result, the entire route has been surveyed in Montana and South Dakota. *Id.* at 3.9-8 (Table 3.9-3); *see also id*. at 3.9-14-3.9-15 (Table 3.9-6). The 2019 Final SEIS contains tables of the cultural properties within the Keystone XL construction footprint or adjacent to the Project in Montana that are eligible, or potentially eligible, for listing in the National Register of Historic Properties, and the steps taken to prevent or mitigate impact to them. 2019 Final SEIS at 4-71-4-75

(Table 4.9-2, Table 4.9-3).[2] The vast majority will not be affected, *id.* and "[n]o historic properties will be affected by the Project in South Dakota," *id.* at 4-72.

ARGUMENT

A preliminary injunction is an "extraordinary remedy never awarded as of right." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (quoting *Winter v. NRDC*, 555 U.S. 7, 24 (2008)). Plaintiffs must therefore show: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent preliminary relief, (3) that the balance of equities favors that relief, and (4) that an injunction is in the public interest. *Id.* The first factor is the most important; absent a showing of likelihood of success on the merits, the Court "need not consider the remaining three [*Winter* elements]." *Id.* In addition, a delay in seeking relief undercuts a claim of irreparable harm and justifies the denial of a preliminary injunction. *Id.; see also Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). Those principles apply *a fortiori* here, where TC Energy is entitled to summary judgment on all claims raised in Plaintiffs' complaint, and Plaintiffs are trying to raise a new claim that they could have brought before but chose not to.

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

I. PLAINTIFFS' LAST-MINUTE REQUEST FOR A TRO BASED ON A CLAIM NOT RAISED IN THE COMPLAINT IS WHOLLY IMPROPER

As noted above, Plaintiffs stated as early as January 24 that they would move to amend their complaint in light of the BLM's decision, Dkt. 100, but never did so. Instead, they engaged in full briefing on summary judgment and, except for an asserted need for discovery on certain of their claims, indicated that the case could properly be resolved, and their right to injunctive relief determined, on the basis of the claims in their first amended complaint. Indeed, Plaintiffs moved for a preliminary injunction on March 2nd, and their motion was based on the summary judgment briefing. Plaintiffs claimed that they were likely to succeed on the merits of each claim in the First Amended Complaint and cited their summary judgment briefs to support that claim. Dkt. 120 at 5-6 (constitutional claim), *id.* at 7 (mineral claim and tribal jurisdiction claim); *id.* at 9 (treaty claims). Plaintiffs further claimed that a preliminary injunction was needed to preserve the status quo "between April 1" (when pipeline construction was scheduled to begin) "and the Court's ruling on summary judgment." *Id.* at 2.

Plaintiffs made no claim that construction would cause harms to identified cultural resources in the 1.2-mile border segment itself. To the contrary, one declarant referred to historical and cultural resources within the entire path of the project, without referring to the border segment. *See* Dkt. 120-1. The other

declarant referred to cultural and historical "features" he saw in 2018 on what he assumed was BLM land in Valley County, Montana, Dkt. 120-2, ¶¶ 8-14; the border segment, however, is in Phillips County. *See* Presidential Permit of March 29, 2019, 84 Fed. Reg. 13,101, 13,101 (Apr. 3, 2019).

TC Energy and the Federal Defendants filed oppositions to the motion for preliminary injunction on March 16, 2020, which was the date responses were due under the local rules. Instead of responding a week later with a reply brief in support of the motion for preliminary injunction as Plaintiffs said they would, *see* Dkt. 120 at 30, Plaintiffs unexpectedly changed course and filed a motion for temporary restraining order the very next day. Dkt. 131. What is even more surprising is that the TRO motion is based largely on the assertion that Plaintiffs are likely to succeed on an Administrative Procedure Act ("APA") challenge to BLM's grant of a right-of-way for Keystone XL—a decision that BLM announced in a Record of Decision ("ROD") nearly two months ago that was not challenged in the First Amended Complaint and thus had not been a subject of any of the summary judgment briefing. *Id.* at 9-11.

This gambit is wholly improper. Plaintiffs could not have raised this new argument in a reply brief in support of their motion for a preliminary injunction, because "issues which are not specifically and distinctly argued … in a party's opening brief are waived." *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d

912, 919 (9th Cir. 2001). Plaintiffs should not be permitted to circumvent that rule by filing a new motion for injunctive relief—and especially not here, where the new argument relates to a claim that is not even alleged in the complaint.

Plaintiffs claim that they should be permitted to raise the new APA claim in the TRO motion because "the timeframe does not allow for a motion to amend [the complaint] to be resolved before construction." Dkt. 131 at 17. If that is so, Plaintiffs have only themselves to blame. BLM issued its decision on January 22, *before* TC Energy filed its motion for summary judgment, *before* Plaintiffs filed their opposition brief or their own cross-motion for summary judgment, and *before* Plaintiffs filed their motion for preliminary injunction. *Id.* at 1-2. Plaintiffs' claim that their "efforts to file a Second Amended Complaint have been delayed by" the briefing on all those motions rings hollow. *Id.* at 16. The new APA claim in the instant motion is that the ROD is arbitrary and capricious because it "allows a depredation and fails to take a 'hard look' at the impacts KXL will have on the Tribes." *Id.* at 9. Under notice pleading, that claim could be described in a few paragraphs of a proposed second amended complaint that could have been drafted in far less time than it took to draft the 22-page brief in support of the TRO motion.

In all events, Plaintiffs make no attempt to explain why they did not raise the APA claim in their brief in opposition to TC Energy's motion for summary judgment and their brief in support of their own cross-motion for summary

judgment as occurred in the case they cite, *Desertrain v. City of Los Angeles*, 754 F.3d 1147 (9th Cir. 2014). Plaintiffs in that case were allowed to amend their complaint with a new claim that they raised "both in their motion for summary judgment and in their opposition to Defendants' motion for summary judgment" and after giving Defendants advance notice of their intent to raise the issue in the summary judgment briefing. *Id.* at 1154. Here, in contrast, Plaintiffs waited to raise the new APA claim with no advance notice to Defendants, and did so in a TRO motion with an abbreviated briefing schedule and in a subsequently filed brief in opposition to the Federal Defendants' motion for summary judgment—a motion that TC Energy is not even party to. As a result, TC Energy does not have an opportunity to fully litigate the new APA claim as it did the claims in the First Amended Complaint. That makes this case entirely unlike *Desertrain*, where there was no prejudice to defendants because "[b]oth parties fully argued the [new] issue in their respective summary judgment briefings." *Id.* at 1155. TC Energy submits that it would be both improper and highly inequitable to enjoin construction of a project that the company has spent 12 years and over $3 billion developing, based on a brand new argument that was raised in a procedurally improper manner and that TC Energy had only 48 hours to address.

II. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

For the reasons stated in TC Energy's brief in opposition to Plaintiffs' motion for preliminary injunction, and the briefs in support of its motion for summary judgment, Plaintiffs have no likelihood of success on the merits of any of the claims raised in their First Amended Complaint. Instead, TC Energy is entitled to summary judgment because: (1) the President's issuance of the 2019 Permit did not violate the Commerce Clause; (2) construction of the pipeline is not unauthorized "mining" or a trespass on Rosebud's interest in reserved mineral estates in several parcels on land in South Dakota; (3) TC Energy does not need to obtain a right-of-way from the Bureau of Indian Affairs ("BIA") because Keystone XL does not cross Indian land; (4) Plaintiffs lack jurisdiction over the pipeline; and (5) issuance of the 2019 Permit does not violate any treaty rights. Dkt. 97, Dkt. 126, Dkt. 134, Dkt. 136.

Because Plaintiffs rested on their previous briefing on these claims, Dkt. 120 at 8, TC Energy will do the same and focus here on the new APA claim. As discussed above, this claim is not properly before the Court. But even if it were, Plaintiffs are not likely to succeed on such a claim.

Plaintiffs' new claim is that BLM "failed to take a hard look at the direct and indirect effects of KXL" on the tribes, in violation of the APA and the National Environmental Policy Act ("NEPA"). Dkt. 131 at 10. NEPA imposes "a set of

'action-forcing' procedures" that require agencies to take "a 'hard look' at environmental consequences" of their proposed actions, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Specifically, and as relevant here, NEPA requires agencies to prepare an EIS for each "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Although preparation of an EIS may "affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson*, 490 U.S. at 350. This means that "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id.* (Forest Service could have "decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd").

Because judicial review of an agency's compliance with NEPA is governed by the APA, a reviewing court must uphold the agency's decision so long as it "conducted a reasoned evaluation of the relevant information and reached a decision that, although perhaps disputable, was not 'arbitrary or capricious.'" *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 385 (1989). That standard is easily met here. The BLM ROD relied on the 2014 Supplemental Environmental Impact

Statement ("SEIS") and the 2019 Final SEIS, *see* Dkt. 138-1 at 1, and Plaintiffs cannot show that this reliance is arbitrary and capricious.

Plaintiffs first claim that the "EISs and ROD failed to analyze a route that avoided the Tribes' treaty lands." Dkt. 131 at 10. They are mistaken. The 2019 Final SEIS expressly acknowledge that some comments "stated the pipeline should be rerouted to avoid impacts to tribal treaty lands and tribal way of life." 2019 Final SEIS at D-19. It said that the "preferred route analyzed within this SEIS avoids tribal lands and tribal trust lands." *Id*. at D-22; *see also id.* at D-23 (map showing pipeline route going near, but not on, tribal land); *see also* 2014 FSEIS at PC-125 ("the proposed Project route itself does not cross any tribal lands"). It noted that TC Energy is required to adhere to numerous "resource protection measures" to "minimize the potential for adverse effects" on nearby tribes, and concluded that "[s]hifting of the pipeline route would be unlikely to eliminate all potential impact to tribes in the event of an accidental release." 2019 Final SEIS at D-22-D-23.

Plaintiffs challenge the conclusion that Keystone XL avoids tribal land, but they cite no evidence in the administrative record of either SEIS that refutes that conclusion. Indeed, the evidence in the summary judgment record makes clear that Keystone XL does avoid tribal land. *See*, *e.g.*, Dkt. 98-3; Dkt. 98-6; Dkt. 126-2; Dkt. 126-3; Dkt. 126-4; Dkt. 136-1; Dkt. 139-2.

Plaintiffs next complain that "the ROD and the 2019 and 2014 EISs 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 in this regard." Dkt. 131 at 11. But, again, they do not cite any contrary evidence in the administrative record (which has not even been compiled and filed with the Court because it is not relevant to any of the claims in the First Amended Complaint). The reason is simple: Plaintiffs did not make the point in their comments to the agency. That is fatal to Plaintiffs' claim. "Parties challenging an agency's compliance with NEPA must ordinarily raise relevant objections during the comment period," unless the flaw in the agency's proposed environmental assessment is "so obvious that there is no need for a commenter to point them out." *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1048-49 (10th Cir. 2015) (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004)). The existence of the tribes' reserved mineral interests is not obvious, and neither is the relevance of the Indian Mineral Leasing Act. That statute authorizes leases of Indian land "for mining purposes," 25 U.S.C. § 396, and construction of a pipeline is not a form of "mining." *See* Dkt. 97 at 23-25, Dkt. 134 at 14-19.

Plaintiffs also claim that the "ROD and the 2019 and 2014 EISs fail to mention that Fort Belknap and Rosebud have federally reserved water rights to the Ogalalla Aquifer, Milk River, and White River, all of which will be crossed by the

Pipeline." Dkt. 131 at 11. That claim ignores Section 3.8.2.4 of the 2019 Final SEIS, which specifically addresses treaty lands and tribal water rights and acknowledges that tribes "have 'reserved' rights in all waters that arise on, border, traverse, or underlie their reservations." 2019 Final SEIS at 3.8-10 (discussing the "Winters Doctrine"). That section admits that the Supreme Court in 1908 held that Fort Belknap has such rights in the Milk River, which at that time was being "diverted upstream by farmers," leaving an "insufficient water supply to support irrigation for agriculture on the reservation." *Id.*; *see also id.* at D-39 (same). Plaintiffs cite no evidence in the administrative record that Keystone XL will affect a similar diversion of water from the Milk River, and they provide no authority to substantiate their claim to "federally reserved water rights" in the Ogalalla Aquifer or White River. Dkt. 131 at 11; *see also* Dkt. 135 at 23-24 (¶ 43); Dkt. 140 at 19-20 (¶ 43).

Plaintiffs also ignore that neither tribe's reservation is "located adjacent to waterways within the 40-river-mile downstream area included in the [region of impact] for the proposed Project." 2019 Final SEIS 5-57. And in the unlikely event that a spill were to "contaminate[] water supplies used for industrial, municipal or irrigation purposes, TC Energy has committed to provide an alternate water supply for any users of wells or irrigation intakes where water quality is affected by a spill." *Id.* at 5-58. TC Energy would also be liable "for all costs associated with

cleanup and restoration, including damages to natural resources for the loss of subsistence use of these natural resources." *Id.* at 5-21. In short, Plaintiffs cannot establish that the EIS failed adequately to consider the effect of Keystone XL on their water resources.

Finally, Plaintiffs complain that the ROD and the 2019 and 2014 EISs fail to take a hard look at the impact of the worker camps, particularly the possibility that construction workers will harm Indian women and children or bring COVID-19 to members of the tribe. Dkt. 131 at 11. No concerns about COVID-19 were raised in the comment periods in either 2014 or 2019, and State has no duty to supplement the EIS to address this issue because COVID-19 is not an adverse *environmental* effect of construction of Keystone XL. "NEPA was designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983). "NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment." *Id.*

NEPA likewise does not require that an EIS assess the impact of criminal activity the tribes fear could be committed by construction workers who reside in the worker camps. *Cf. id.* at 776 (NEPA does not "require agencies to evaluate the risk of crime from the operation of a jail or other public facility in their

neighborhood"). Nevertheless, the 2019 Final SEIS does address the tribes' concerns about the worker camps. It explains that there is a Camp Code of Conduct for construction workers that addresses "disruptive or abusive behavior, alcohol use, and criminal/illegal activities." 2019 Final SEIS at D-36. Anyone who violates the rules will be fired. *Id.* And although it is "out of scope of this project," the 2019 Final SEIS also notes that the Department of Justice is taking steps to address "the unique problem of violence toward Native Americans," and the President has signed an executive order creating an interagency task force to address the crisis of missing women and girls in American Indian communities. *Id.*

III. PLAINTIFFS HAVE FAILED TO SHOW THAT THEY ARE LIKELY TO SUFFER IRREPARABLE HARM

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

First, most of the harms Plaintiffs allege cannot support the temporary restraining order they seek. The proper "scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Plaintiffs have made no effort to tailor their requested injunction to the legal violations they allege. For example, the 2019 Permit only allows TC Energy to "construct, connect, operate, and maintain pipeline facilities *at the international border* of the United States and Canada at Phillips County, Montana." 84 Fed. Reg.

at 13,101 (emphasis added); *see also* Dkt. 97 at 11-12; Dkt. 95 at 2-6. Thus, even if issuance of the 2019 Permit was unlawful—and it plainly was not—the Court cannot enjoin activities outside the border segment, as any harms resulting from those activities are not attributable to the alleged violation.

The same is true for Plaintiffs' new challenge to the BLM ROD. It grants a right-of-way and temporary-use permit "to cross 44.4 miles of federal land managed by BLM and 1.88 miles of federal land managed by the U.S. Army Corps of Engineers (USACE) in Montana, in connection with the larger, proposed Keystone XL pipeline project." Dkt. 138-1 at 1. Thus even if the ROD were arbitrary and capricious (and it is not), the Court cannot enjoin activities on private or state land over which BLM has no control.

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

Second, and in all events, Plaintiffs' new "showing" of irreparable harm in the TRO motion consists primarily of unsubstantiated assertions that construction could damage cultural resources and speculation that construction workers living in the worker camps will harm women and children or spread COVID-19 to

Plaintiffs' members. That is not remotely sufficient. Construction outside the 1.2-mile border segment will not begin for months, *see infra* pp. 21-22 & n.4, and irreparable harm cannot be presumed. *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1090-91 (9th Cir. 2015). To obtain the extraordinary remedy of a preliminary injunction, Plaintiffs must prove that they are "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter*, 555 U.S. at 22 (citation omitted). They have not remotely met that burden.

1. Cultural Resources

Plaintiffs are wrong to claim that "the Tribes' cultural resources are in the direct pathway of KXL's construction easement and will be destroyed if the TRO is not issued." Dkt. 131 at 12. The only pipeline segment scheduled for construction in April is the 1.2-mile segment between the U.S./Canada border and the first shutoff valve in Montana. Dkt. 94 at 5. That construction will cause no irreparable harm to cultural resources because there are none in the pipeline right-of-way or "area of potential effect" for that border segment.[3] Two of the "Previously Recorded" cultural sites that Plaintiffs' counsel saw in the internet portal established for the tribes and SHPOs that consult with State about the

[3] "Area of potential effect" is a regulatory term under the National Historic Preservation Act (NHPA) that 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 were identified in "Class I" or "Level I" surveys based on a review of literature or documentation from surveys and archeological exploration done prior to the development of Keystone XL. Declaration of Erin Salisbury ¶ 9 (Exhibit 1). However, new, "Class III" or "Level III" surveys were done in 2008 and again in 2019 in connection with the development of Keystone XL. *Id.* A Class III survey is a pedestrian survey conducted by professionally trained archaeologists who inventory the area that could be impacted by a project. *Id.* ¶ 8. Because it is done on the ground, a Class III survey is the most accurate way to confirm the accuracy of the Class I/Level I data and determine precisely what cultural resources or historic properties are present. *See generally Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1005-06 (9th Cir. 2013). The Class III surveys done in 2008 and 2019 did not find either of the sites from the Class I survey cited by Plaintiffs' counsel. Salisbury Decl. ¶ 9. The remaining sites that Plaintiffs' counsel saw in the 1.2-mile border segment are outside the pipeline-right-of-way and area of potential effect. *Id.* ¶¶ 10-11.

There is also no threat of immediate irreparable harm to cultural resources outside the 1.2-mile border segment. Construction of other segments of the pipeline in Montana and South Dakota is not scheduled to begin until August, which leaves ample time for a ruling on the pending summary judgment motions.

Dkt. 94 at 3.[4] Moreover, Plaintiffs' allegations of harm to cultural sites beyond the border segment are misleading because they omit the critical fact that State is taking action to address all of the cultural resources and historic properties identified in the declaration of submitted by Plaintiffs' counsel. As described in TC Energy's opposition to Plaintiffs' motion for summary judgment, State has engaged (or is engaging) in consultations about these sites with the tribes and the Montana SHPO pursuant to the NHPA and the PA; and TC Energy is taking steps to avoid or mitigate harm to them. 2019 Final SEIS at 4-71 (Table 4.9-2); *id* at 3.9-14 (Table 3.9-6). In addition, construction will be "monitored by tribal representatives for consistency with Section 106 of the NHPA in areas of tribal concern." 2014 FSEIS at 3.11-44 (discussing Tribal Monitoring Plan).

Under these circumstances, any harm that may occur is not legally cognizable. A court cannot issue an injunction merely because "cultural resources might be harmed." *WildEarth Guardians v. Provencio*, 923 F.3d 655, 679 (9th Cir. 2019). The obligations imposed by NEPA and the NHPA are "procedural in nature," requiring a permitting agency to "conduct[] the required prefield work, consult[] with the appropriate entities, and reach[] a determination consistent with the evidence before it." *Id.*

[4] Construction is scheduled to begin in June 2020 on one segment in Nebraska where no worker camps are required, Dkt. 94 at 2-3, but that will not harm Plaintiffs, whose reservations and tribal lands are in Montana and South Dakota.

Plaintiffs' further claim that there are likely to be "additional, as-of-yet unidentified, cultural sites, cultural resources, and historic properties," because State failed to "engage in adequate consultation and identification efforts pursuant to Section 106 of the NHPA," is unsubstantiated and false. *See* Dkt. 131 at 13 (citing allegations their complaint). As described above and in TC Energy's opposition to the motion for preliminary injunction, Plaintiffs rebuffed many of State's attempts at consultation and declined the invitation to conduct their own traditional cultural property surveys at Keystone's expense. *See supra* pp. 4-7; Dkt. 126 at 5-8. "Equity is not served" when a "Tribe refuses to consult" with an agency about protecting its "interests and then seeks an injunction to protect those same interests on the ground that the [agency] has failed to consult." *Grand Canyon Tr. v. Williams*, No. 13-cv-8045, 2015 WL 3385456, at *6 (D. Ariz. May 26, 2015) (denying motion for injunction); *see also Apache Survival Coal. v. United States*, 21 F.3d 895, 907 (9th Cir. 1994) (denying claim when the "Tribe ignored the *very process* that its members now contend was inadequate").

2. Worker Camps

Plaintiffs claim that tribal members face imminent harm from criminal acts by workers at the temporary camps, Dkt. 131 at 15, is equally unfounded. It takes four to five months to construct a worker camp, *see* Dkt. 126-7 at ¶ 9, so there will not be workers in the camps for months. When the camps are operational, workers

must follow the Camp Code of Conduct. *See supra* p. 18. And a court cannot enter an injunction based on speculation that the plaintiff could be the victim of a crime. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983).

3. Bureaucratic Momentum

Finally, there is no merit to Plaintiffs' bureaucratic momentum argument. The Court previously accepted this argument *after* determining that State's environmental analysis of Keystone XL was legally deficient. No such findings have been made here, however, and Plaintiffs have not demonstrated any likelihood of success on their new (and improper) challenges to BLM's decision. Indeed, given the last-minute nature of Plaintiffs' new challenge, only a particularly strong showing of likely success would justify a decision to enjoin a project that has been the subject of extensive environmental review, including a supplemental review ordered by this Court. And, absent such a showing (which Plaintiffs have not remotely made), there is no basis for concluding that yet another supplemental review must be performed, and construction must be enjoined to prevent any "skewing" of that further review.

In all events, the assumption that construction *outside* the border segment or the federal land covered by the BLM right-of-way would skew a future assessment conflicts with the Court's duty to "presume that agencies will follow the law," *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010). It is also

foreclosed by the Ninth Circuit's decision in the prior appeal. There, the Northern Plains Plaintiffs argued that this Court's injunction should remain in place to prevent construction "outside of the BLM and Corps jurisdictional areas," because it would "skew[] those agencies' decision-making." N. Plains Opp'n to Mots. to Dismiss at 36, *IEN v. U.S. Dep't of State*, No. 18-36068 (9th Cir. Apr. 23, 2019), Dkt. 49-1. The Ninth Circuit necessarily disagreed when it granted the motion to dismiss and dissolved the injunction.

IV. THE BALANCE OF HARDSHIPS WEIGHS AGAINST AN INJUNCTION

TC Energy has spent over a decade and approximately $3.14 billion to develop the Project. Declaration of Gary Salsman ¶ 11 (Dkt. 126-7). Plaintiffs blithely assert that an injunction would cause TC Energy "only delay." Dkt. 120 at 27-28. That delay will impose substantial economic costs on the company, will threaten hundreds of jobs and significant tax revenue, and could delay the operational date of a service that shippers have already contracted to use. This counsels strongly against an injunction. *See Alaska Survival v. STB,* 704 F.3d 615, 616 (9th Cir. 2012) ("[f]urther delay of this project will prevent the award of construction contracts, postpone the hiring of construction employees, and significantly increase costs).

TC Energy needs to construct worker camps and pipe yards several months before construction of the pipeline itself. Dkt. 126-7 ¶¶ 7, 12. If it cannot do so,

completion of the Project could be delayed past the planned in-service date, and the company could lose earnings of approximately $1.2 billion. *Id.* ¶ 13. The increased workforce and extended construction season entailed in trying to maintain that in-service date following a delay could impose incremental costs of approximately $200 million, with uncertain prospects of success. *Id.* ¶ 12.

A delay in construction and completion of the Project would also harm third parties. It would threaten hundreds of jobs and significant tax revenue. *Id.* ¶ 13; *see also* 2019 Final SEIS at 4-63, 4-65 (describing beneficial impacts to economic base and tax revenue). It would deprive TC Energy's customers of a service they have contracted to use. Dkt. 126-7 ¶ 16. And it would harm the public interest by delaying a Project that State found would promote the nation's energy security and bilateral relations with Canada.

CONCLUSION

For the foregoing reasons, TC Energy requests that the Court deny Plaintiffs' motion for a temporary restraining order.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this brief contains 6,294 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