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

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EXHIBIT INDEX

[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 to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment, ECF No. 139.

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

Exhibit 16 – 2014 Final Supplemental Environmental Impact Statement for the Keystone XL Project (January 2014), Excerpts Regarding the Analysis of Impacts to Cultural Resources

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

There is no emergency necessitating the extraordinary remedy of a temporary restraining order, because no credible irreparable harm to cultural resources—or the Tribes' interests more generally—is likely to occur before the April 16, 2020 hearing that this Court has set. In addition, Plaintiffs have failed to demonstrate a likelihood of success on their existing claims, and the attempted addition of new claims at this late juncture—when such claims have not even been pled—is plainly improper. The Federal Rules of Civil Procedure apply to all litigants, and Plaintiffs are not entitled to bend those rules in order to obtain the relief that they seek—relief that is unwarranted in any event.

First, the claim that irreparable harm to the Tribes' interests will occur over the next two weeks unless the Court orders a temporary restraining order is unfounded. The only construction that is currently authorized to occur on federal land is the construction of the border facilities within the first 1.2 miles of the pipeline and there are no cultural resources sites within that segment to be harmed by any construction. Plaintiffs are simply mistaken as a factual matter that such sites exist within the pipeline route in the border segment. The remaining alleged harms, such as harms from worker camps on private and state lands, would not occur within the next two weeks or in the immediate future. Accordingly, the motion should be denied on that basis alone.

Second, Plaintiffs have not demonstrated a likelihood of success on the merits of their claims. There has been extensive briefing on Plaintiffs' likelihood of success on the merits of Plaintiffs' challenge to the Presidential Permit. That Permit authorizes only the border crossing and does not authorize the construction of the pipeline across tribal land o*r even near tribal land*. And the notion that the President lacks constitutional authority to issue such a permit is belied by 150 years of history. The challenges to the Permit simply lack merit.

Finally, at this very late stage in the proceedings, it is improper for Plaintiffs to attempt to assert claims challenging the U.S. Bureau of Land Management's ("BLM") decision to authorize a right-of-way for the pipeline to cross approximately 46 miles of federal land in Montana. BLM issued its decision two months ago and Plaintiffs have opted not to challenge it: they have not moved for leave to amend the complaint in this case, nor have they initiated a separate civil action. Therefore, Plaintiffs have no basis for challenging the right-of-way under NEPA or any other statute in their TRO motion, or in opposition to Defendants' summary judgment brief. BLM's decision is a separate action supported by its own record. It would be entirely improper, as well as prejudicial to BLM, to allow Plaintiffs to obtain a ruling on such claims without first moving to amend their complaint.

BACKGROUND

The factual background is set forth in Defendants' Statement of Undisputed Facts, 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, ECF No. 101. Both are incorporated by reference.

STANDARD FOR OBTAINING A TEMPORARY RESTRAINING ORDER

A temporary restraining order is "an extraordinary and drastic remedy" that "should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted) (setting forth standard for preliminary injunctive relief); *see Stuhlbarg Int'l. Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001) (analyses for temporary restraining order and preliminary injunction "substantially identical"); *see Native Ecosystems Council v. Marten*, No. CV 18-87-M-DLC, 2018 WL 3178145, at *2 (D. Mont. June 27, 2018) (same). A temporary restraining order is restricted to its "underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers,* 415 U.S. 423, 439 (1974) (footnote omitted). A temporary restraining order may only

last 14 days. *See* Fed. R. Civ. P. 65(b)(2).

As with a preliminary injunction, to obtain a temporary restraining order a plaintiff must demonstrate four elements: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of an injunction, (3) that the balance of equities tips in its favor, and (4) that the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A party *must* demonstrate a "likelihood of success on the merits" in order to obtain a preliminary injunction. *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (citations omitted). A party must also "demonstrate that irreparable injury is *likely* in the absence of an injunction," as opposed to merely possible. *Winter*, 555 U.S. at 22.[2]

ARGUMENT

I. Plaintiffs Have Failed to Demonstrate that Their Interests Will Be Irreparably Harmed Over the Next Fourteen Days if a Temporary Restraining Order Is Not Granted

Plaintiffs have not met their burden of demonstrating imminent, irreparable harm to their interests in the two weeks prior to the hearing scheduled on April 16, 2020. Plaintiffs argue that, in the absence of emergency relief, the Tribes' cultural

[2] Notwithstanding *Winter* decision, the Ninth Circuit has held that a preliminary injunction may issue if the plaintiffs can show "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Defendants do not believe that the "serious questions" test remains viable following the Supreme Court's rulings in *Winter* and *Munaf* and reserve all rights to contest any application of that test here.

resources will be irreparably injured. *See* Pls.' Mem. in Supp. of Appl. for Temp. Restraining Order ("TRO Mem.") at 12, ECF No. 131. That is not the case, because the only construction on federal land that is scheduled and authorized prior to August is the construction of the border segment, and there are no cultural resources within the border segment of the pipeline right-of-way.

TC Energy has now received all necessary federal approvals for the construction of pipeline facilities in the border segment. Last March, the President issued the Permit for the border crossing, and in January of this year, BLM issued a decision approving a right-of-way across federal lands in Montana. *See* ECF No. 138-1. But that does not mean TC Energy can immediately construct the pipeline all the way across Montana or in other states, or that it has plans to do so. Before construction can begin, TC Energy must receive a notice to proceed from BLM. So far, BLM has issued a notice to proceed only with respect to BLM land within the 1.2-mile border segment. *See* Declaration of James Stobaugh ("Stobaugh Decl.") ¶ 8 & Ex. 2 (BLM Notice to Proceed).

BLM has not yet issued any other authorization allowing TC Energy to construct other segments of the pipeline. *See* Stobaugh Decl. ¶ 9. BLM expects to hold a pre-construction meeting with TC Energy in July to discuss the construction of the next segment of the pipeline. *Id.* Following that meeting, BLM may issue a notice to proceed with additional construction, which could occur in August. *Id.*

And TC Energy has indicated that it does not plan to begin construction on sections of the pipeline outside of the border segment until August. *See* Defs. TC Energy Corp. and TransCanada Keystone Pipeline, LP's Opposition to Pls.' App. for Temp. Restraining Order ("TC TRO Opp.") at 21-22 & n.4, ECF No. 141. Thus, the only section of the pipeline relevant to the motion for a temporary restraining order is the 1.2-mile border segment.

No cultural resources in the 1.2-mile border segment will be harmed by the construction of the pipeline. Two sites in that segment were previously identified in a Class I survey (a literature survey) conducted in 1980. *See* Declaration of Joshua Chase ("Chase Decl.") ¶ 4. The sites were recorded prior to the use of GPS and higher resolution maps. *Id.* Detailed Class III surveys—during which a team of archaeologists personally walked the pipeline route looking for signs of cultural resource sites—were conducted in 2008, 2012, 2013, and 2019, and did not identify the two previously recorded sites within the pipeline right-of-way. *Id.* ¶¶ 3, 4. No other sites were identified in the first 2.4 miles of the pipeline route. *Id.* ¶ 4; *see also* Declaration of Erin Salisbury ¶¶ 5-14, ECF No. 141-1. Thus, there is no basis for Plaintiffs' assertion that cultural resource sites in the 1.2-mile border segment will be harmed by construction, which is all the Court need consider for purposes of Plaintiffs' motion for a temporary restraining order.

Further, as already demonstrated, the accusation that there are unidentified

cultural resource sites in Montana is baseless. *See* Defs.' Opp. to Pls.' Mot. for a Prelim. Inj. ("Defs.' PI Opp.") at 24-25, ECF No. 127. The agencies have provided the Tribes with full access to information about cultural resources that have been identified within the pipeline right-of-way and sought the Tribes' input regarding the identification and protection of those resources. Declaration of David Cushman ¶¶ 6-7, ECF No. 127-4. The Tribes, however, have rebuffed those overtures and have refused to meet to discuss the identification and protection of cultural resources sites. *Id.* ¶¶ 8-9. Moreover, detailed Class III cultural resources surveys have been conducted on all of the miles of the pipeline right-of-way in Montana and South Dakota. *See* 2019 Supplemental Environmental Impact Statement at 3.9-8, ECF No. 127-1. Thus, there is no basis for the claim that there are unidentified cultural resources sites in the border segment.

Plaintiffs' other claims of imminent, irreparable injury likewise have no merit, but in any event are not the basis for the issuance of a temporary restraining order—because such alleged harms could not occur, at the earliest, until months from now.

Plaintiffs have not demonstrated that irreparable harm to their mineral interests or their sovereignty will occur because, among other reasons, TC Energy has no plans to conduct mining activities on mineral estates held for the benefit of the Tribes. *See* Defs.' PI Opp. at 13-17. In any event, the mineral estates held in

trust for the benefit of the Tribes are in Tripp County, South Dakota. *See* Declaration of Joshua F. Alexander ¶¶ 5-8, ECF No. 139-2. TC Energy has no immediate plans for the construction of the pipeline in South Dakota, *see* TC TRO Opp. at 21-22 & n.4, and therefore any alleged harms to the mineral estates are not imminent.

Likewise, Plaintiffs' alleged harm flowing from the establishment of worker camps and the consequent alleged spread of COVID-19 are not imminent. TC Energy has indicated that it will take several months to set up worker camps. *See id.* at 23. In contrast, Plaintiffs seek the extraordinary remedy of a temporary restraining order based on speculation about the camps from articles in the media. Therefore, alleged harms from such camps is not a basis for issuing a temporary restraining order. Finally, other alleged harms to the environment, including the potential harm due to an oil spill once the pipeline is operational, are even farther removed in time. *See* Defs.' PI Opp. at 26-27.

In sum, Plaintiffs have failed to demonstrate that imminent, irreparable harm to their interests would occur from pipeline construction in the immediate future, and therefore their motion for a temporary restraining order should be denied.

II. Plaintiffs Are Not Likely to Succeed on the Merits of Their Claims.

Plaintiffs are not likely to succeed on the merits of their claims challenging the Permit for reasons that have already been briefed at length and thus are only

briefly summarized here. Further, Plaintiffs may not introduce new claims challenging BLM's right-of-way at this late juncture and without following the Federal Rules of Civil Procedure. Their attempt to do so in the context of a motion for a temporary restraining order when summary judgment is nearly fully briefed should be rejected.

A. Plaintiffs Are Not Likely to Succeed on Their Claims Challenging the Issuance of the Presidential Permit.

Plaintiffs are not likely to succeed on the only claims that have been pled in this case, which challenge the cross-border permit issued by the President. Plaintiffs' claims have no merit for the reasons discussed in Defendants' prior briefing. *See* Defs.' Mem. in Supp. of Mot. for Summ. J. ("Defs.' SJ Mem."), ECF No. 109; Defs.' PI Opp.; Defs.' Opp. to Pls.' Mot. for Summ. J. ("Defs.' SJ Opp."), ECF No. 139. The notion that the President was not entitled to exercise the same constitutional authority that Presidents have exercised for 150 year is entirely unfounded. Plaintiffs' remaining claims flow largely from the misguided notion that the Permit authorized the construction of the entire pipeline without any requirement to obtain necessary federal, state, and local approvals. That is simply false, as has been demonstrated several times. Thus, Plaintiffs' claims challenging the Permit are not likely to succeed.

B. Plaintiffs Have Not Pled Claims Challenging BLM's Right-of-Way Decision, And Therefore Arguments About BLM's Decision Cannot Serve as a Basis for a Temporary Restraining Order.

Plaintiffs' attempt to interject new claims not pled in the Complaint—after preliminary injunction briefing is complete and summary judgment briefing is substantially compete—is not only procedurally improper but also is highly prejudicial. "Federal Rule of Civil Procedure 8(a)(2) requires that the allegations in the complaint 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)). "[S]ummary judgment is not a procedural second chance to flesh out inadequate pleadings." *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (citation omitted); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) ("[W]here, as here, the complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court."); *see also, e.g., Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 435 (9th Cir. 2011) (claim raised for the first time on summary judgment "was not properly before the district court").

Plaintiffs' proposed backdoor amendment under Rule 15(b) comes after sitting on their hands for almost two months, and through several rounds of

briefing. This delay in inexcusable. On January 24, 2020, Plaintiffs stated in their status report that they would move to amend their complaint to add BLM's right-of-way decision, *see* Pls.' Request for Status Conference, ECF No. 100, but no motion was forthcoming. Rather, Plaintiffs briefed summary judgment and raised no claims related to the right-of-way decision. On March 2, 2020, Plaintiffs moved for preliminary injunction, relying on the First Amended Complaint and their summary judgment briefs—and again did not raise BLM's decision. *See* Pls.' Mem. in Supp. of Mot. for Prelim. Inj., ECF. 120. Two weeks later, Defendants opposed Plaintiffs' motion for preliminary injunction. Before filing a reply brief, Plaintiffs moved for a temporary restraining order, raising for the first time an Administrative Procedure Act challenge to BLM's January 22, 2020, decision approving TC Energy's application for a pipeline right-of-way.

Plaintiffs give two reasons for their delay, both of which actually underscore that it is not justified. First, they state that the Court should excuse their delay because the timeframe before construction requires action from the Court now rather than waiting for the adjudication of a motion to amend. *See* TRO Mem. at 17. But it was Plaintiffs that waited sixty days to seek amendment and even then have not followed the proper procedure: a proposed Second Amended Complaint and a supporting motion that would allow the court and the parties to evaluate the proposed amendment. To the extent there is exigency now, Plaintiffs created it.

Second, Plaintiffs claim their delay is excusable because they have been busy with other briefing in this case. *Id.* at 16. But this too does not withstand scrutiny. Plaintiffs point to no aspect of their proposed claim that is so complex that it would have required a significant time commitment to plead. Moreover, the plaintiffs in the companion case, *Indigenous Environmental Network* v. *Trump*, No. 4:19-cv-00028-BMM (D. Mont. filed Apr. 5, 2019), ECF No. 108, had similar briefing burdens and were able to follow the appropriate procedures under the Federal Rules of Civil Procedure. Finally, Plaintiffs' decision to file a motion for a temporary restraining order shortly after seeking preliminary injunctive relief also undercuts their assertion that they simply did not have time.

Plaintiffs' attempt to press new claims at this late stage is prejudicial because any challenge to BLM's right-of-way decision should be adjudicated only after BLM has lodged the administrative record. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (holding that a court must review "the administrative record already in existence, not some new record made initially in the reviewing court"). And while it may sometimes be appropriate for a court to decide motions for emergency relief before a record is lodged, this two-year old case is different. Plaintiffs' likelihood of success arguments here are based on an entirely new agency action, and explicitly rely on a new "claim" they assert for the first time in their opposition to Defendants' summary judgment motion. *See* Pls.' Resp. in Opp. to Fed. Defs.'

Mot. for Summ. J. at 22-32, ECF No. 137. The law is clear that Plaintiffs may not use summary judgment briefs to "flesh out inadequate pleadings." *Wasco Prods., Inc.*, 435 F.3d at 992 (9th Cir. 2006).

Allowing amendment at this late stage, and by first presenting their new claim in a summary judgment brief, could also prejudice Federal Defendants by delaying the disposition of this case. *See Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (finding that the need for additional fact-finding would delay the resolution of the case, supporting a finding of prejudice). For this reason, Plaintiffs' reliance on *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014), is misplaced. There, plaintiffs challenged the constitutionality of a city ordinance and raised in their opening summary judgment brief a vagueness theory of liability, a theory that had not been pled in the Complaint. The court found no prejudice in allowing plaintiffs to amend through briefing because, although the vagueness challenge raised a new legal theory, it required no new evidence and had been raised during discovery. *Id.* at 1155 ("By the summary judgment stage, Defendants had ample notice of Plaintiffs' vagueness challenge, and the issue did not require further discovery."). Here, in contrast, Plaintiffs purport to add not just a new legal theory but also a new agency action that will require new evidence, *viz.*, an administrative record.

Therefore, *Desertrain* provides no support for Plaintiffs' request to amend the complaint at this late stage. The proposed amendment is procedurally improper and prejudicial and cannot serve as a basis for Plaintiffs' motion for temporary injunctive relief.

III. The Balance of the Harms and the Public Interest Weigh Against an Injunction.

The balance of the harms and the public interest do not weigh in favor of the Court taking the extraordinary step of enjoining the President's authorization of a border crossing. Putting the weighty constitutional issues raised by this motion aside, *see* Defs.' SJ Mem. at 8-11, 20-25; Defs.' SJ Opp. at 5-13, Plaintiffs have not demonstrated that a temporary restraining order is necessary to protect their interests or the public interest. There are no cultural resource sites in the border segment, let alone sites that will be harmed from the construction of the border facilities. As discussed above, all of Plaintiffs' allegations of imminent, irreparable injury are unfounded, and the Court need not consider alleged harms that would occur months from now, if at all, in the context of a motion for temporary restraining order.

In addition, Plaintiffs cannot rely on alleged "bureaucratic momentum" to support a temporary restraining order. The theory presumes that, if an agency reaches a decision prior to a NEPA process and the requisite environmental analysis, it will be less likely to change it later. *See Sierra Club v. Marsh*, 872

F.2d 497, 500 (1st Cir. 1989). This theory cannot be squared with the Supreme Court's direction that irreparable harm to the environment may not be presumed. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 544-46 (1987) (reversing the preliminary injunction of an offshore oil and gas lease sale); *see also Winter*, 555 U.S. at 21 (emphasizing that a plaintiff "must demonstrate a likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief"). Moreover, the Ninth Circuit has not endorsed the bureaucratic momentum theory. *See, e.g., N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (refusing to vacate oil and gas leases). In any event, Plaintiffs have failed to show how the bureaucratic momentum theory would even apply, as BLM issued a right-of-way decision only after the preparation of a NEPA analysis and other environmental reviews.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' motion for a temporary restraining order be denied.

Respectfully submitted this 26th day of March, 2020,

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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 3,597 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 26, 2020, a copy of the foregoing Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order was served on all counsel of record via the Court's CM/ECF system.

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