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

ROSEBUD SIOUX TRIBE *et al.*, Plaintiffs, v. DONALD J. TRUMP *et al.*, Defendants.	Case No. 4:18-cv-00118-BMM **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The 1868 Fort Laramie Treaty ("1868 Treaty") provides that, before crossing Rosebud's lands, the United States and anyone else must secure Rosebud's consent. TransCanada has admitted the Keystone XL Pipeline ("Pipeline") would cross Rosebud's mineral estates, which are "Indian lands" and subject to the 1868 Treaty requirements. The Pipeline would also impact Rosebud's surface estates and reserved water rights. TransCanada, however, has not obtained Rosebud's consent.

Tribes have jurisdiction over their lands, including mineral estates. Therefore, Rosebud has jurisdiction over the Pipeline that Defendants now admit crosses its mineral estates. Further, the direct effects on Rosebud and its lands, water, cultural resources, fish and game, and its community, provide Rosebud another basis for jurisdiction over the Pipeline. Finally, TransCanada specifically agreed to abide by the Tribes' laws.

Defendants ignore the Treaty's consent requirements, but because the Pipeline's area of potential effect ("APE") and spill zone cross Rosebud's surface estates, the right-of-way statutes likewise apply. TransCanada will also remove Rosebud's mineral estate, running it through machines to sort out rock and cobble, and then utilizing it as backfill and structural support

to prevent the Pipeline from subsiding. This is mining. And by placing a crude oil pipeline through Rosebud's minerals, TransCanada will trespass and interfere with Rosebud's mineral rights. The Tribes are entitled to seek a declaration of unlawfulness and to prevent such harm.

Finally, Congress, and not the President, possesses the constitutional authority to regulate foreign commerce. The previous permitting process, utilized for over fifty-one years, established a systematic and unbroken practice that Congress was aware of. Congress's acquiescence in that particular exercise of Presidential authority, which otherwise does not exist, is not *carte blanche* to act however the President chooses. The President's explicit flouting of this practice violates the separation of powers because Congress did not acquiesce in the issuance of the 2019 Permit.

The Court, therefore, should grant the Tribes' Motion for Summary Judgment.

I. Tribal Jurisdiction

The presumption of tribal jurisdiction over Indian land can generally be defeated only by express Treaty or statutory provisions. *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 899-900 (9th Cir. 2017). TransCanada

has identified no such provision that removes Rosebud's jurisdiction over its mineral and surface estates.

Indeed, TransCanada completely ignores its admission that the Pipeline would cross Rosebud "Indian lands." Docs. 111, at 6-7; 114, at 5-6. This is dispositive because Rosebud maintains jurisdiction over its lands, *see* Docs. 114, at 28-32; 139-2 (Pipeline crosses mineral estates), including allotments and minerals. *See Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996) (tribes could enforce severance tax on non-Indian oil production from trust allotments); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1007 (8th Cir. 2010) (allotments are Indian country and fall within the jurisdiction of the tribe); *c.f. HRI, Inc. v. EPA*, 198 F.3d 1224, 1250-54 (10th Cir. 2000) (split-estate lands set aside for Indians and under federal control are Indian Country).[1] Furthermore, Rosebud possesses jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981), because the Pipeline would have a disastrous effect on Rosebud's health and welfare and TransCanada has agreed to tribal jurisdiction. Doc. 114 at 32-33; 2017 Record of Decision

[1] Allotments and other trust lands within Rosebud's original reservation are still reservation lands, and lands over which Rosebud has jurisdiction. *See Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 615, n. 48 (1977) (allotted lands are Indian Country); *Yankton Sioux Tribe*, 606 F.3d at 1006, 1011.

("ROD"), Doc. 115-6, at 30 (TransCanada agreed "to follow all state, local, and tribal laws and regulations with respect to the construction and operation of the [Pipeline].").

To minimize the Pipeline's effects, Defendants focus on its footprint. But, as explained, this is flawed. Doc. 114, at 8. Its APE is 300 feet. *Id*. And its potential spill zone is 1,200 to 5,000 feet from the release point on the surface and down into the minerals, which encompasses tribal surface and mineral estates. *Id.* at 10; Docs. 137, at 26 (Pipeline within 200 feet of Indian land); 139-2, at 5 (Pipeline is 140 feet from trust land).[2] The Tribes have maintained the surveys are flawed because they do not consider the spill zone and APE. Doc. 111, at 7-9. Thus, they misrepresent the Pipeline's impacts and harms. Further, TransCanada has not provided the maps to the Tribes so they can conduct their own survey. *Id*. at 9-10. Yet, TransCanada's own maps show the Pipeline corridor crossing Rosebud lands. Docs. 58 ¶¶

[2] President Bordeaux and Paula Antione's statements are not to the contrary. *See* Docs. 126-3, at 13 (noting she could put her hand on the Pipeline if on tribal land and it would directly "affect" tribal land), at 15 (construction would affect tribal land); 126-4, at 13 (crosses treaty territory), at 18-19 (construction would impact tribal land), at 40 (pipeline will cross mineral estates).

172-76; 112 ¶ 52; 112-4 ¶¶ 10-12. TransCanada has not disputed the accuracy of its maps. Docs. 135 ¶ 5; 129 ¶¶ 172-76.

The Pipeline would harm water resources to which the Tribes have reserved rights, Docs. 120 at 21-22; 115-1, at 12-14; cultural resources and minerals, Doc. 120 at 18-20, and the Tribes' communities, women, and children from the man-camps and the pandemic. Doc. 137, at 2-31. Given the impacts aimed at the Tribes, and that TransCanada has explicitly agreed to follow tribal law, the Tribes have jurisdiction. *Elliot v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 850 (9th Cir. 2009); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019); *Rincon Mushroom Corp. v. Mazzetti*, No. 09cv2330, 2017 WL 3174509, at *7-8 (S.D. Cal. July 26, 2017). TransCanada asserts the 2017 ROD was withdrawn by the State Department. Yet, the State Department still lists the 2017 ROD as part of the 2019 Permit's record,[3] and the United States does not dispute TransCanada agreed to the Tribes' jurisdiction. Doc. 140, at ¶ 19. In any event, whether the 2017 ROD was vacated is irrelevant; it is specific evidence that TransCanada did agree to follow all tribal laws and regulations. Nevertheless, to the extent

[3] *Keystone XL Pipeline*, U.S. DEP'T OF STATE (n.d.) https://www.state.gov/keystone-pipeline-xl/ (last visited Mar. 30, 2020).

TransCanada's conduct occurs off tribal lands, the effects of which are directed onto tribal lands, the Tribes have jurisdiction. *Accord Wisconsin v. EPA*, 266 F.3d 741, 749 (7th Cir. 2001); *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998); *Sprint Commc'ns Co. L.P. v. Wynne*, 121 F. Supp. 3d 893, 899-902 (D. S.D. 2015).

II. Mineral Claims

Defendants rely on the Indian Right of Way Act to assert there is no claim, but they fail to recognize that the 1868 Treaty also requires consent to cross treaty lands. Rosebud's mineral estates are within the Treaty boundary, Doc. 140 ¶¶ 1-4, and are still held in trust as "Indian lands." Doc. 114, at 6-7. Therefore, pursuant to the 1868 Treaty, TransCanada and the United States must obtain Rosebud's consent to cross these mineral estates. *Id.* at 21-23 (failure to obtain consent pursuant to treaty); Doc. 58, at 18-22 (history and language of the 1868 Treaty requires consent). Defendants again assert they can violate the treaties only if they violate "applicable laws." Doc. 139, at 16-17. But to determine their obligations, the Court must look to the history of the Treaties and interpret them to the Tribes' benefit. Defendants offer no case law saying the 1868 Treaty does not require consent, and rather focus on cases analyzing *common law trust principles* and the 1851 Fort

Laramie Treaty. *Id*. The 1868 Treaty requires consent, and the common law trust cases do not say otherwise.

With regard to the right-of-way requirements, the Tribes agree they apply to surface estates. 25 C.F.R. § 169.2. TransCanada, however, has not provided the Tribes with the maps to conduct their own survey, Doc. 111, at 9, and the United States did not review the "corner evidence and methods utilized" by TransCanada in performing its survey. Doc. 139-2, at 10. The APE and spill zone cross Rosebud's surface estates; thus, a right-of-way is required. 25 C.F.R. § 169.2 (right-of-way is the "legal right to go *over or across* tribal land" (emphasis added)). *Paradigm Energy Partners v. Fox* is inapplicable because the tribe there gave permission to cross the surface estate and there was no treaty consent requirement at issue. No. 1:16-CV-304, 2016 WL 9496588, at *4 (D.N.D. Sept. 13, 2016). Likewise, *Pardigm* did not deal with mining, trespass under the mineral regulations, or unlawful interference.

Here, TransCanada will trench, remove, and then utilize the mineral estate as backfill and padding, which is mining. Doc. 114, at 27. TransCanada argues that the surface estate owner retains control of the subsurface, except with regard to the minerals. Doc. 134, at 19. But, the mineral estate is

dominant, *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878, 884 (10th Cir. 1974), and that only prompts the question: what are the minerals?

Defendants admit that sand and gravel are the major mineral resource in South Dakota and that a gravel pit is within a half a mile of the Pipeline in Tripp County, where Rosebud's mineral estates lie. Docs. 58 ¶ 111; 123 ¶ 111; 129 ¶ 111. TransCanada also admits there is "shale" where Rosebud mineral estates are and they have to dig through "clayey soils." Doc. 126-6 ¶¶ 4-5. Shale "is a fine-grained sedimentary rock that forms from the compaction of *silty* and *clay*-sized mineral particles[.]" *Id.* (emphasis added). Minerals include sand and gravel, as well as "clay" and "silt." 25 C.F.R. § 211.3. Rosebud has the dominant right to remove the shale, clay, silt, sand, and gravel "even though the surface ground may be wholly destroyed as a result thereof." *MacDonnell v. Capital Co.*, 130 F.2d 311, 320 (9th Cir. 1942). *Paradigm* is not to the contrary. 2016 WL 9496588, at *8. And the United States has a "responsibility to protect the Tribes' mineral estate[,]" which includes "the duty to prevent mineral trespass." *Shoshone Indian Tribe of Wind River Reservation v. United States*, 52 Fed. Cl. 614, 628 (2002) (citation omitted).

Defendants assert mining will not occur because the minerals will be replaced. TransCanada is not merely digging a hole. It is digging a hole and

separating the rock from clay and silt, putting a pipeline in the hole, and then utilizing the minerals to support that pipeline. After the minerals are trenched and removed, they run "through large machines that screen out cobble and rock" to "prevent damage to the pipe," Doc. 126-6 ¶ 8, and then are utilized as backfill and padding and to prevent subsidence. Doc. 114, at 27. TransCanada will remove the minerals, run them through machines to sort, and then utilize them as backfill for structural support, to prevent the Pipeline from subsiding. This is mining. *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1090-91 (10th Cir. 2017) ("Osage Wind sorted and then crushed the minerals and used them as backfill to support its wind turbine structures."). *Koniag, Inc. v. Koncor Forest Resource* is inapplicable because it analyzed the Alaska Native Claims Settlement Act ("ANCSA"), which established the rights of estate holders, and the court could not interpret the statute inconsistent with Congress's intent. 39 F.3d 991, 996 (9th Cir. 1994). ANCSA is inapplicable here.

TransCanada argues it would not "remove" 5,000 cubic yards. Doc. 134, at 19. But, this is specious given the Pipeline crosses at least 5,100 feet of mineral estate. Doc. 139-2 ¶¶ 7 (crosses 2,100 feet of mineral estate), ¶ 19 (crosses 3,000 feet). At eight feet deep and five feet wide, TransCanada

would excavate roughly 7,555 cubic yards of material. Mining does not require "removal." *Osage Wind, LLC*, 871 F.3d at 1091-92. Given that 7,555 cubic yards of material would be utilized, TransCanada is mining.

Federal Defendants assert Rosebud cannot seek a declaratory judgment that the Pipeline crossing its minerals is a trespass as defined in 43 C.F.R. § 9239.0-7. Doc. 127, at 16. Defendants would prefer to wait for the trespass to occur, rather than Rosebud seeking to prevent the foreseeable harm and obtain a declaratory judgment in the first place. Utilizing the mineral estate through trenching, as padding, and backfill would extract, sever, injure, or remove Rosebud's minerals, which is a trespass. Rosebud seeks such a declaration and the Unites States' protection. *Shoshone Indian Tribe*, 52 Fed. Cl. at 628; *c.f. Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 495, 505 (1928).

Further, placing the Pipeline through Rosebud's mineral estate would unlawfully interfere with and limit access to the minerals. Doc. 114, at 25-26. Defendants argue the Tribes did not put them on fair notice of such a claim. Doc. 139, at 23-24. Not so. There are more than sufficient facts in the First Amended Complaint that this claim was clearly plausible. Doc. 58 ¶¶ 114-16, 171-82, 260-66, 421-27; *see Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009). The

Pipeline will be in place for at least fifty years. Should Rosebud need to utilize those minerals, it could not just dig under a crude oil pipeline, making it unsafe.

Defendants argue there can be no trespass or interference. Yet, in *Kinney-Coastal*, the Supreme Court held that the potential construction of a neighborhood on the surface estate would unlawfully interfere with the mineral rights. 277 U.S. at 495, 505. There, the Supreme Court held that the oil company was seeking "to protect from wrongful obstruction and impairment the right [to the minerals,]" and "prevent the *threatened* occupancy and use of the surface for purposes incompatible with their right[.]" *Id.* at 505-06 (emphasis added). Here, Rosebud has the dominant right to remove minerals "even though the surface ground may be wholly destroyed as a result thereof." *MacDonnell,* 130 F.2d at 320; *Occidental Geothermal, Inc. v. Simmons*, 543 F. Supp. 870, 876–77 (N.D. Cal. 1982) ("Even if the preclusion of the patentees' surface use is severe, the dominance of the mineral estate's joint interest in the surface supports it."); *Union Producing Co. v. Pittman*, 146 So. 2d 553, 555 (Miss. 1962). The Pipeline is incompatible with Rosebud's rights to recover their clay, silt, shale, sand, gravel, and other minerals.

III. Commerce Clause

The Tribes have briefed why the President lacks authority to issue the 2019 Permit and will not repeat that here. *See, e.g.*, Doc. 99, at 18-49. Nonetheless, Defendants argue that Congress has acquiesced in the President's issuance of cross-border permits because Presidents, dating back over 100 years, have unilaterally issued such permits. Defendants' argument fundamentally misunderstands the law of congressional acquiescence and the Supreme Court's instruction that "[p]ast practice does not, by itself, create power." *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

Defendants continue to ignore this Court's holding that the regulation of cross-border crude oil pipelines "falls within Congress's power to regulate foreign commerce." *Indigenous Envtl. Network v. Trump* (*IEN*), No. CV-19-28-GF-BMM, 2019 WL 7421955, at *9 (D. Mont. Dec. 20, 2019) (citation omitted); Doc. 92, at 15. Because the President's permitting of the Pipeline requires him to exercise a constitutional power he does not possess, his powers are at an absolute minimum. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J. concurring) ("[H]e can rely only upon his own constitutional powers minus any constitutional powers of Congress over the

matter."). The President, therefore, cannot act however he deems fit in this matter.

The practices of Presidents prior to 1968 and the issuance of Executive Order No. 11,423, 33 Fed. Reg. 11,741 (Aug. 16, 1968) ("EO 11423"), are irrelevant in determining whether Congress acquiesced in the issuance of the 2019 Permit. Whether Congress has acquiesced in the issuance of the 2019 Permit must be viewed in the context of the President's inherent lack of constitutional powers in this matter, as well as in the context of past executive practice. EO 11423, as updated by Executive Order No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) ("EO 13337"), established a permitting process utilized for over fifty-one years. This established "[a] systematic, unbroken, executive practice, long pursued to the knowledge of Congress[.]" *Dames & Moore*, 453 U.S. at 686 (citation omitted). This process, the past nine administrations' adherence to it, and Congress's tacit approval of it, committed the Executive to a specific course of action regarding the exercise of a constitutional power it does not actually possess.

Congress's acquiescence in a "*particular exercise* of Presidential authority," *Medellín v. Texas*, 552 U.S. 491, 528 (2008) (emphasis added)—one he otherwise does not possess—is not *carte blanche* for the President to act

however he chooses. Such a result imperils the separation of powers. *C.f. Dames & Moore*, 435 U.S. at 660-61; Doc. 99, at 37. Congress has not acquiesced in this particular exercise of authority—the unilateral issuance of the 2019 Permit in total disregard of the previous permitting process.

IV. Standing, Ultra Vires, Agency Action

The Tribes have extensively briefed why they have standing. Doc. 137 at 4-12. Without the 2019 Permit and Agency Action,[4] there can be no Pipeline. *Id*. Thus, the 2019 Permit and Interior's actions are a cause of the Tribes' injury. *See WildEarth Guardians v. U.S. Dep't of Agric*., 795 F.3d 1148, 1157 (9th Cir. 2015). Defendants argue there is no causation because there are still other permits required. That is no barrier when the government has already granted the permits. *League of Conservation Voters v. Trump*, 303 F. Supp. 3d 985, 997 (D. Alaska 2018) (although permits still required, there is no indication that the government will not grant such permits).

Defendants assert the Tribes cannot sue the President. This Court has rejected these arguments, denying Defendants' motions to dismiss and holding that the Tribes' claims can proceed. Doc. 92, at 22-23. Indeed,

[4] Defendants argue there is no "agency action"; but, there was final agency action. Doc. 137, at 22.

sovereign immunity does not apply to suits alleging an officer's actions were unconstitutional. *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996).

Defendants argue there is no express cause of action. Yet, the lack of an express "cause of action is [not] *per se* a bar to judicial review." *U.S. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (citation omitted); Doc. 142, at 12-13. The Tribes' Foreign Commerce Clause and treaty claims raise fundamental separation of powers questions. These are the very types of claims for which the Tribes do not need to rely upon an independent cause of action, other than the Constitution itself. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 81 (D.D.C. 2006).

Defendants further argue the Tribes lack a cause of action because they seek a remedy courts at equity could not have provided. This Court has already held that it "can review President Trump's action for lawfulness and enjoin his action if it were determined that President Trump acted unlawfully when he issued the 2019 permit." Doc. 92, at 13. Where the President exceeds his authority, it is the Court's constitutional responsibility to resolve the dispute and enjoin the President or the officials enforcing the President's action. *IEN*, 2019 WL 7421955, at *8 (citation omitted). The Tribes

do not need to identify and independent cause of action, other than the Constitution itself, to pursue their claims.

For the forgoing reasons, the Tribes respectfully request that the Court grant their Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 30rd day of March, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT** complies with (1) Local Civil Rule 7.1(d)(2)(B) because it contains 3,244 words, excluding those parts of the brief exempted by Local Civil Rule 7.1(d)(2)(E); and (2) the typeface requirements of Local Civil Rule 1.5(a) because it has been prepared using proportionally spaced typeface using Microsoft Word 2016, in 14-point Book Antiqua font.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30rd day of March, 2020, I electronically filed the foregoing **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court for the United States District Court for the District of Montana by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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