

**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 CORPORATION, *et al.*,

Defendant-Intervenors.

CV-18-118-GF-BMM

ORDER

The Court requests additional briefing on each of the following eight issues:

1. As related to the scope of President Trump’s March 29, 2019 Memorandum “Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada,” *see* 84 Fed. Reg. 13101-03:
 - a. Address whether the permit authorizes only the 1.2 mile border facility and provide supporting authority; and
 - b. Address separately whether the permit authorizes the entire Keystone XL Pipeline project and provide supporting authority.
2. As related to the separation of powers,
 - a. Address whether the power to issue permits for cross-border pipeline facilities falls under the President’s foreign affairs or Commander-in-Chief powers;

- b. Address separately whether the power to regulate cross-border pipelines falls under Congress' foreign commerce clause powers;
 - c. How the political branches historically have addressed the question of authority over cross-border pipeline facilities;
 - d. Whether those historical practices weigh in favor of ruling that the power to deal with cross-border pipeline facilities falls under the President's or Congress' powers; and
 - e. Whether the President may issue cross-border pipeline permits even if Congress has the power to regulate cross-border pipelines under the Foreign Commerce Clause.
3. The question of TC Energy's assertion that Plaintiffs' theory of constitutional invalidity would be self-defeating because TC Energy could construct the pipeline without a permit if the President lacks the authority to grant a cross-border pipeline facility permitting, as long as TC Energy obtains the requisite permits and authorizations under other federal laws. (See Doc. 33 at 23.)

The Court encourages the parties to address separately each question presented.

It is hereby **ORDERED** that the Tribes, Federal Defendants, and TC Energy shall submit simultaneous briefing, not to exceed 10,000 words/pages, on the above-listed issues on or before January 24, 2020. The parties may file simultaneous response briefs, not to exceed 5,000 words/pages, on or before February 14, 2020.

DATED this 20th day of December, 2019.



Brian Morris
United States District Court Judge