

JAMES A. PATTEN  
PATTEN, PETERMAN,  
BEKKEDAHL & GREEN,  
PLLC  
Suite 300, The Fratt Building  
2817 Second Avenue North  
Billings, MT 59101-2041  
Telephone: (406) 252-8500  
Facsimile: (406) 294-9500  
email: apatten@ppbglaw.com

STEPHAN C. VOLKER (Pro hac vice)  
ALEXIS E. KRIEG (Pro hac vice)  
STEPHANIE L. CLARKE (Pro hac vice)  
JAMEY M.B. VOLKER (Pro hac vice)  
LAW OFFICES OF STEPHAN C. VOLKER  
1633 University Avenue  
Berkeley, California 94703-1424  
Telephone: (510) 496-0600  
Facsimile: (510) 845-1255  
email: svolker@volkerlaw.com  
akrieg@volkerlaw.com  
sclarke@volkerlaw.com  
jvolker@volkerlaw.com

Attorneys for Plaintiffs  
INDIGENOUS ENVIRONMENTAL NETWORK  
and NORTH COAST RIVERS ALLIANCE

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

INDIGENOUS ENVIRONMENTAL )  
NETWORK and NORTH COAST RIVERS )  
ALLIANCE,

Plaintiffs,

vs.

PRESIDENT DONALD J. TRUMP, )  
UNITED STATES DEPARTMENT OF )  
STATE; MICHAEL R. POMPEO, in his )  
official capacity as U.S. Secretary of State; )  
UNITED STATES ARMY CORPS OF )  
ENGINEERS; LT. GENERAL TODD T. )  
SEMONITE, Commanding General and )  
Chief of Engineers; UNITED STATES )  
FISH AND WILDLIFE SERVICE, a federal )  
agency; MARGARET EVERSON, in her )

Civ. No. CV 19-28-GF-BMM  
)  
) **PLAINTIFFS' REPLY TO**  
) **FEDERAL DEFENDANTS'**  
) **OPPOSITION TO**  
) **PLAINTIFFS' MOTION FOR**  
) **PRELIMINARY**  
) **INJUNCTION**

) **Judge: Hon. Brian M. Morris**  
) **Case Filed: April 5, 2019**

official capacity as Acting Director of the )  
U.S. Fish and Wildlife Service; UNITED )  
STATES BUREAU OF LAND )  
MANAGEMENT, and DAVID )  
BERNHARDT, in his official capacity as )  
U.S. Secretary of the Interior, )

Defendants, )

TRANSCANADA KEYSTONE PIPELINE,) )  
LP, a Delaware limited partnership, and TC )  
ENERGY CORPORATION, a Canadian )  
Public Company, )

Defendant-Intervenors. )

---

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES. . . . . 4**

**I. SUMMARY OF ARGUMENT. . . . . 8**

**II. BACKGROUND. . . . . 12**

**A. Presidents Lack Authority to Issue Border-Crossing Permits Without Congressional Delegation.. . . . 12**

**B. Congress Has Not Acquiesced in the 2019 Permit.. . . . 13**

**III. LEGAL STANDARD. . . . . 14**

**IV. PLAINTIFFS HAVE ESTABLISHED THEIR LIKELIHOOD OF SUCCESS. . . . . 14**

**A. Plaintiffs Have Standing.. . . . 14**

**B. The 2019 Permit Violated the Property Clause.. . . . 16**

**C. The 2019 Permit Violated the Commerce Clause. . . . . 18**

**D. The 2019 Permit Violated EO 13,337. . . . . 19**

**V. PLAINTIFFS WILL SUFFER IRREPARABLE HARM. . . . . 21**

**VI. THE BALANCE OF HARM AND THE PUBLIC INTEREST FAVOR PLAINTIFFS.. . . . 22**

**VII. CONCLUSION.. . . . 22**

**CERTIFICATE OF COMPLIANCE. . . . . 24**

**CERTIFICATE OF SERVICE. . . . . 25**

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Animal Legal Def. Fund v. U.S. Dep’t of Agric.*  
789 F.3d 1206 (11th Cir. 2015)..... 21

*Backcountry Against Dumps v. Chu*  
215 F.Supp.3d 966 (S.D. Cal. 2015)..... 11, 15

*Barclays Bank PLC v. Franchise Tax Bd.*  
512 U.S. 298 (1994)..... 9, 12, 19

*Beaver v. United States*  
350 F.2d 4 (9th Cir. 1965)..... 18

*Board of Trustees of Univ. of Ill. v. United States*  
289 U.S. 48 (1933)..... 8, 17

*Chen v. Carroll*  
48 F.3d 1331 (4th Cir. 1995)..... 20

*Citizens for Smart Growth v. Secretary of Dept. of Transp.*  
669 F.3d 1203 (11th Cir. 2012)..... 20

*City of Carmel-by-the-Sea v. U.S. Department of Transportation*  
123 F.3d 1142 (9th Cir. 1997)..... 10, 19

*City of Dania Beach v. F.A.A.*  
628 F.3d 581 (D.C. Cir. 2010)..... 19

*Clinton v. City of New York*  
524 U.S. 417 (1998)..... 16

*Colorado Wild, Inc. v. U.S. Forest Service*  
523 F.Supp.2d 1213 (2007)..... 21, 22

*Comet Enterprises Ltd. v. Air-A-Plane Corp.*  
128 F.3d 855 (4th Cir. 1997)..... 10

*Dames & Moore v. Regan*  
453 U.S. 654 (1981)..... 12, 18

*E. Bay Sanctuary Covenant v. Trump*  
 909 F.3d 1219 (9th Cir. 2018)  
 withdrawn and reissued with dissent, 2018 WL 8807133. . . . . 12

*Ex parte Mitsuye Endo*  
 323 U.S. 283 (1944).. . . . . 21

*Facchiano Constr. Co. v. U.S. Dep’t of Labor*  
 987 F.2d 206 (3d Cir. 1993). . . . . 20

*Great Basin Mine Watch v. Hankins*  
 456 F.3d 955 (9th Cir. 2006).. . . . . 15

*Hawaii v. Trump*  
 859 F.3d 741 (2017), dismissed as moot, 138 S.Ct. 337 (2017).. . . . . 16

*Haynes v. United States*  
 891 F.2d 235 (9th Cir. 1989).. . . . . 17, 19

*IEN v. State*  
 2017 WL 5632435 (11/22/2017).. . . . . 16

*IEN v. State*  
 347 F.Supp.3d 561 (D.Mont. 2018).. . . . . 16

*IEN v. State*  
 2019 WL 652416 (2/15/19).. . . . . 22

*Independent Meat Packers Ass’n v. Butz*  
 526 F.2d 228 (8th Cir. 1975).. . . . . 20

*Kleppe v. New Mexico*  
 426 U.S. 529 (1976).. . . . . 9, 17

*League of Conservation Voters v. Trump*  
 363 F.Supp.3d 1013 (D.Ak. 2019). . . . . 14, 16, 18

*Legal Aid Society of Alameda County v. Brennan*  
 608 F.2d 1319 (9th Cir. 1979).. . . . . 10, 19

*Manhattan-Bronx Postal Union v. Gronouski*  
 350 F.2d 451 (D.C. Cir. 1965).. . . . . 19

*Medellin v. Texas*  
 552 U.S. 491 (2008)..... 14

*Michigan v. Thomas*  
 805 F.2d 176 (6th Cir. 1986)..... 20

*Sierra Club v. Marsh*  
 872 F.2d 497 (1st Cir. 1989)..... 21-22

*Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*  
 255 F.Supp.3d 101 (D.D.C. 2017)..... 10

*Swan v. Clinton*  
 100 F.3d 973 (D.C. Cir. 1996)..... 16

*United States v. Clark*  
 435 F.3d 1100 (9th Cir. 2009)..... 9, 12, 19

*Youngstown Sheet & Tube Co. v. Sawyer*  
 343 U.S. 579 (1952)..... 12, 19

*Winter v. NRDC*  
 555 U.S. 7 (2008)..... 14

*Wyoming Wildlife Federation v. United States*  
 792 F.2d 981 (10th Cir. 1986)..... 19

*Zivotofsky v. Kerry*  
 135 S.Ct. 2076 (2015)..... 12, 18

**CONSTITUTION**

United States Constitution, Article I  
 § 8, cl. 3. .... 12

**FEDERAL STATUTES**

United States Code, Title 16  
 §§ 1531 *et seq.* (Endangered Species Act). .... 9, 18

United States Code, Title 42  
 §§ 4321 *et seq.* (National Environmental Policy Act)..... 9, 17, 18

**OTHER AUTHORITIES**

33 Federal Register 11,741 (8/20/1968)..... 13

59 Federal Register 7,629 (2/11/1994)..... 10

69 Federal Register 25,299 (5/5/2004)..... 13

84 Fed.Reg. 13,101 (4/3/2019)..... 13, 16, 21

84 Fed.Reg. 15,491 (4/10/2019) . . . . . 13

Public Law No. 112-78, 125 Stat. 1280 (2011)

    § 501 . . . . . 13, 18, 20

## I. SUMMARY OF ARGUMENT

Plaintiffs' Opening Memorandum demonstrates their entitlement to a preliminary injunction because (1) Plaintiffs are likely to prevail on their claims under the Property and Commerce Clauses of the U.S. Constitution and Executive Order ("EO") 13,337, (2) Plaintiffs would suffer irreparable harm absent injunctive relief, (3) the balance of equities favors Plaintiffs, and (4) injunctive relief would serve the public interest. The Federal Defendants (collectively, "Trump") fail to show otherwise. Trump's attempted end-run around the rule of law must be rejected.

First, Trump claims Plaintiffs lack standing because "[n]one of [their] alleged injuries relate to the 1.2-mile segment of the pipeline, at the border, which is all that the President's border-crossing Permit authorized." Opp. 8. Not so. Plaintiffs' First Amended Complaint ("FAC") alleges their members "use and enjoy the land and water resources and wildlife . . . [that] would be directly and irreparably harmed by . . . the Project, *including its . . . first 1.2 miles . . .*" FAC ¶¶ 28-30 (emphasis added).

Second, Trump contends Plaintiffs' "two constitutional claims ignore longstanding historical practice and precedent on the scope of Executive Power." Opp. 13. Incorrect. The Commerce and Property Clauses grant exclusive and plenary power over foreign commerce and federal lands, respectively, to Congress. *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56 (1933) ("*Board*



*of Trustees*"); *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) ("*Kleppe*"). The President shares this power only where Congress has delegated it. It has not done so here.

Third, Trump claims the 2019 Permit does not violate the Property Clause because it does not "allow the proposed pipeline to cross federal lands." Opp. 19. Trump cites the Permit's Article 6, but it merely provides "[t]he permittee is responsible for acquiring any right-of-way grants or easements, permits, and other authorizations as *may* become necessary or appropriate." Opp. 20 (emphasis added). "May" is permissive, not mandatory. It does not require compliance with anything, let alone specific laws or regulations. The 2019 Permit's clear contrary purpose was to *bypass* the Department of State's review "notwithstanding Executive Order 13,337" in order to *avoid* compliance with NEPA, the Endangered Species Act ("ESA"), the National Historic Preservation Act ("NHPA"), and other environmental laws Congress adopted to govern federal lands.

Fourth, Trump argues Plaintiffs' Commerce Clause claim fails because "the President does not need legislation to exercise his foreign affairs power." Opp. 20-21. Wrong again. The Constitution grants Congress, not the President, exclusive power over international commerce. *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2009) ("*Clark*"); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994) ("*Barclays*").

Fifth, Trump claims “[e]xecutive orders cannot bind future Presidents.” Opp. 22. Wrong. Numerous cases enforce Executive Orders that – like EO 13,337 – implement statutory mandates. *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1329-1331 (9th Cir. 1979) (“*Legal Aid*”); *City of Carmel-by-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1166 (9th Cir. 1997) (“*Carmel*”). Although Trump could have withdrawn EO 13,337, he did not. Therefore he was bound by it.

Relatedly, Trump argues that section 6 of EO 13,337 expressly bars judicial enforcement. Opp. 23. Wrong again. Section 6 never refers to judicial review, and omits the key sentence commonly used in executive orders to preclude such review. *E.g.* EO 12,898 (59 Fed.Reg 7,629 (2/11/1994) § 6-609 (“Judicial Review”); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F.Supp.3d 101, 136 (D.D.C. 2017) (noting that EO 12,898 “expressly states it does not create a private right to judicial review”). Absent clear language of preclusion, EO 13,337 should be construed narrowly – consistent with its actual terms – to sustain its constitutionality, since Presidents may not “insulate executive bodies from judicial oversight . . . without congressional ratification.” *Legal Aid* at 1330 n. 15; *Comet Enterprises Ltd. v. Air-A-Plane Corp.*, 128 F.3d 855, 859 (4th Cir. 1997).

Sixth, Trump claims Plaintiffs “cannot demonstrate imminent, irreparable harm” because “they do not even try to demonstrate any harm from the border

crossing itself.” Opp. 25. Wrong. The FAC explains Plaintiffs’ members “would be directly and irreparably harmed by . . . the Project[’s] . . . first 1.2 miles” because it crosses a tributary of Whitewater Creek that ultimately flows into the Missouri River, and thus a pipeline spill there would harm Plaintiffs’ uses downstream. FAC ¶¶ 16, 28-30; *see* Administrative Record in *IEN v. State*, CV 17-29-GF-BMM (*see* ECF 111-112, 158, 167) DOSKXLDMT0009652 (“DOS9652”) (FSEIS Appendix D, Table 1 – “Waterbodies Crossed by the Project in Montana” at Milepost 1.11); Declaration of Bill Whitehead (ECF 27-26) ¶ 6 and Exhibit 1 (Missouri River use). Regardless, the 2019 Permit harms Plaintiffs because without it, the Project (and its impacts on Plaintiffs throughout its length) could not occur. *Backcountry Against Dumps v. Chu*, 215 F.Supp.3d 966, 976 (S.D. Cal. 2015) (“*Backcountry*”).

Seventh, Trump claims “[t]he balance of harms and the public interest weigh against an injunction” because “[t]he public interest” favors “allowing the environmental review to continue.” Opp. 31. Nonsense. Plaintiffs seek to enjoin Keystone’s construction, not its environmental review.

Because Trump fails to overcome Plaintiffs’ showing that the four preliminary injunction criteria are met, Plaintiffs’ motion should be granted.

///

///

## II. BACKGROUND

### A. Presidents Lack Authority to Issue Border-Crossing Permits Without Congressional Delegation.

Trump contends “[f]or well over a century, Presidents have exercised . . . inherent authority to authorize border crossing facilities without any Congressional action.” Opp. 3-4. But mere “[p]ast practice does not, by itself, create power.” *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (“*Dames & Moore*”). Beyond that, Trump cites only obsolete secondary authorities that are superseded by *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-638 (1952) (“*Youngstown*”) (Jackson, concurring). *Id.* Under *Youngstown*, “the President’s asserted power must be *both* ‘exclusive’ *and* ‘conclusive’ on the issue” where the “President takes measures incompatible with the express or implied will of Congress.” *Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2084 (2015) (“*Zivotofsky*”) (emphasis added).

Here, Trump’s claimed power is neither. The Constitution grants Congress the “exclusive and plenary” power “[t]o regulate Commerce with foreign Nations.” *Clark*, 435 F.3d at 1109; U.S. Const. art. I, § 8, cl. 3. Consequently, “Congress is vested with the principal power to control the nation’s borders.” *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1231 (9th Cir. 2018), withdrawn and reissued with dissent, 2018 WL 8807133. The President, by contrast, has no inherent constitutional power to regulate foreign commerce. *Barclays*, 512 U.S. at 329.

**B. Congress Has Not Acquiesced in the 2019 Permit**

Trump argues “Congress has acquiesced to this long-standing practice [of presidential cross-border permits] by not legislating in this area.” Opp. 17. Not so. The 2019 Permit eschews the fifty-one-year-old practice of requiring State Department review of cross-boundary permits that commenced with EO 11,423 by President Johnson in 1968 (33 Fed.Reg. 11,741) and continued with EO 13,337 by President Bush in 2004 (69 Fed.Reg. 25,299).

Contrary to Trump’s claim, Congress has specifically *required* State Department review under EO 13,337 for Keystone approval. In 2011, Congress enacted the Temporary Payroll Tax Cut Continuation Act (“TPTCCA”), which directed the President, through the State Department, to either deny or “grant a permit *under* Executive Order No. 13,337” for Keystone within sixty days. Pub. L. No. 112-78, §§ 501(a)-(b) 125 Stat. 1280 (2011) (emphasis added).

But rather than follow this half-century practice required by Congress, on March 29, 2019 Trump changed the process by issuing the 2019 Permit without State Department review, “notwithstanding [EO] 13,337.” 84 Fed.Reg. 13,101. And, just 12 days later, Trump changed the process a second time by issuing EO 13,867, which revoked EOs 11,423 and 13,337. 84 Fed.Reg. 15,491 (4/10/19). Rather than adhering to “long-standing practice,” Trump has repeatedly *departed* from the congressionally-required practice of State Department review.

Thus, far from surmounting “the high bar required to [demonstrate

Congressional] acquiescence” “in th[e] particular exercise of Presidential authority” at issue, Trump has shown *disdain* for both “long-standing practice” and Congress’ explicit direction. *League of Conservation Voters v. Trump*, 363 F.Supp.3d 1013, 1030 (D.Ak. 2019) (“*LCV*” (first quote)); *Medellin v. Texas*, 552 U.S. 491, 528 (2008) (second quote).

### **III. LEGAL STANDARD**

Trump agrees with Plaintiffs’ four-part test for a preliminary injunction. *Opp.* 7, citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

#### **IV. PLAINTIFFS HAVE ESTABLISHED THEIR LIKELIHOOD OF SUCCESS**

##### **A. Plaintiffs Have Standing**

Trump attacks Plaintiffs’ standing on four grounds. All fail. First, Trump claims “[n]one of Plaintiffs’ alleged injuries relate to the 1.2-mile segment of the pipeline . . . that the President’s border-crossing Permit authorized.” *Opp.* 8. Not so. Plaintiffs’ FAC alleges “the Project, including its . . . first 1.2 miles,” would harm Plaintiffs’ use and enjoyment of “land and water resources and wildlife,” explaining that the “border” segment crosses a tributary of Whitewater Creek that ultimately flows into the Missouri River, and thus a pipeline spill into that creek would harm Plaintiffs. FAC ¶¶ 16, 28-30; Whitehead Dec. (ECF 27-26) ¶ 6 and Exh. 1.

In any event, Plaintiffs’ standing is not dependent on harms arising from the

border segment. The border crossing permit is the headwaters permit from which flow all other pipeline permits; pipeline operation *anywhere* could not occur without it. *Backcountry*, 215 F.Supp.3d at 976 (presidential permit for transboundary transmission line permit caused plaintiffs' injuries even though project required additional approvals from other agencies); *cf.*, *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006) (interdependent projects must be analyzed together).

Second, Trump contends "TC Energy cannot construct facilities at the border until it receives a right-of-way from BLM." Opp. 11. Wrong again. Between Mileposts 0.92 and 1.2, Keystone is located on Montana State Land. Declaration of Diane M. Friez ¶ 9 and Exh. 2. TC Energy's Opposition admits approval from Montana. *Id.* 7 n. 15. Its Montana approvals allow Keystone's construction upon issuance of Trump's 2019 Permit. Reply Volker Dec. ¶ 2, Exh. 1.

Third, Trump asserts "TC Energy cannot construct . . . the 'balance of the project' . . . until . . . federal agencies have completed their . . . permitting processes," and this Court should not indulge "guesswork as to how independent decisionmakers will exercise their judgment." Opp. 11. But these agencies are not "independent." They report to Trump, who has already approved Keystone.

Fourth, Trump contends "Plaintiffs' claims against the President . . . are not redressable because it would violate the separation of powers . . . to enjoin the

President.” Opp. 12, citing *Swan v. Clinton*, 100 F.3d 973, 976 n. 1 (D.C. Cir. 1996). Incorrect. Numerous courts have vacated unlawful presidential decisions. *LCV*, 363 F.Supp.3d at 1031 (“vacat[ing] Section 5 of [EO] 13,795”); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) (enjoining federal defendants despite presidential involvement), dismissed as moot, 138 S.Ct. 337 (2017); *Clinton v. City of New York*, 524 U.S. 417, 433, n. 22 (1998) (voiding president’s line-item veto); *IEN v. State*, 2017 WL 5632435 \*6 (11/22/17) (allowing claims against State Department despite presidential involvement); *IEN v. State*, 347 F.Supp.3d 561, 591 (D.Mont. 2018) (vacating 2017 Permit despite Trump’s involvement) (vacated as moot, 9th Cir. 18-36068, June 6, 2019 Order).

Accordingly, Trump’s challenges to Plaintiffs’ standing are meritless.

**B. The 2019 Permit Violated the Property Clause**

Trump attacks Plaintiffs’ Property Clause claim on the grounds “[t]he executive action challenged . . . is a cross-border permit[,] not . . . authorization to . . . cross federal lands,” and “the Property Clause does not . . . nullify the President’s . . . foreign affairs power.” Opp. 19. Wrong. Among other approvals, the 2019 Permit grants “permission . . . to construct ‘a 36-inch diameter pipeline extending from the international border . . . to . . . approximately 1.2 miles from [that] border, and any land, structures, installations or equipment appurtenant thereto.’” 84 Fed.Reg. 13,101. It allows construction not just on BLM land, but also on Montana State Land between Mileposts 0.92 and 1.2. And, it does so



without State Department review and compliance with NEPA and other environmental laws. Although BLM “do[es] not anticipate making a decision . . . until the environmental review is completed,” it never states that environmental review *must* precede BLM approval. Friez Dec. ¶ 10.

Trump’s invocation of his “foreign affairs power” fails because the Permit is not the product of intergovernmental negotiation, let alone a treaty. Its authorization of a trans-boundary pipeline across federal lands falls squarely within Congress’ “exclusive and plenary” powers to regulate foreign commerce and manage federal land. *Board of Trustees*, 289 U.S. at 56; *Kleppe*, 426 U.S. at 539.

Trump also argues the Permit “does not supplant other necessary authorizations because it states “[t]he permittee is responsible for acquiring any . . . authorizations as *may* become necessary or appropriate.” Opp. 20, quoting Permit, art. 6(1) (emphasis added). “May” is permissive, not mandatory. *Haynes v. United States*, 891 F.2d 235, 239-240 (9th Cir. 1989). This passive language does not *require* compliance with anything. The Permit’s purpose was to *bypass* State Department review “notwithstanding Executive Order 13,337” in order to *avoid* compliance with NEPA and other environmental laws that should govern federal lands management. *Id.*

Even accepting Trump’s narrow construction of the Permit to restrict its authorization to Keystone’s first 1.2 miles, by approving that “border” segment

without complying with EO 13,337's process – which required reviews by the State Department and other agencies under NEPA, the ESA and the NHPA – Trump usurped Congress' "exclusive and plenary" power to manage federal lands within this segment. *LCV*, 303 F.Supp.3d at 1017-1018 n. 20, 1030-1031; *Beaver v. United States*, 350 F.2d 4, 8 (9th Cir. 1965). By enacting the TPTCCA, Congress directed the President to either "grant" or "deny" Keystone "under Executive Order 13,337." Pub. L. No. 112-78, §§ 501(a), 501(b), 125 Stat. 1280 (2011) (emphasis added).

Accordingly, the 2019 Permit impermissibly encroached upon Congress' exclusive and plenary power to manage federal lands under the Property Clause.

### **C. The 2019 Permit Violated the Commerce Clause**

Trump contends the 2019 Permit did not usurp Congress' Commerce Clause power because "the President does not need legislation to exercise his foreign affairs power," citing Presidential actions taken long before Congress began exercising its foreign commerce authority. Opp. 21. But "[p]ast practice does not, by itself, create power." *Dames & Moore*, 453 U.S. at 686.

Where – as here – a President does not act "pursuant to an express or implied authorization of Congress," nor in the "absence" of Congressional direction, and moreover, "takes measures incompatible with the express or implied will of Congress," then "[t]o succeed . . . the President's asserted power must be both 'exclusive' and 'conclusive' on the issue." *Zivotofsky*, 135 S.Ct. at 2084,

quoting *Youngstown*, 343 U.S. at 635-638. It is neither here. The Constitution grants Congress, not the President, exclusive power over international commerce. *Clark*, 435 F.3d at 1109; *Barclays*, 512 U.S. at 329.

Trump likewise denies usurping Congress’ power to regulate river crossings. Opp. 21, citing Permit art. 6(1). But Article 6 merely provides “[t]he permittee is responsible for acquiring any right-of-way grants or easements, permits, and other authorizations as *may* become necessary or appropriate.” *Id.* (emphasis added). “May” is merely permissive. *Haynes*, 891 F.2d at 239-240. This passive language requires compliance with nothing. Its contrary purpose was to *bypass* State’s otherwise *mandatory* review – “notwithstanding Executive Order 13,337” – to *avoid* compliance with environmental laws Congress enacted to regulate commerce. 2017 Permit ¶ 1 (DOS2485).

**D. The 2019 Permit Violated EO 13,337**

Trump claims “[a]n executive order cannot constrain the President because it can be ‘withdrawn at any time for any or no reason.’” Opp. 22, quoting *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965). Not so. Where an executive order implements a statutory mandate – as here – it is enforceable. *Legal Aid*, 608 F.2d at 1329-1331; *Carmel*, 123 F.3d at 1166; *Wyoming Wildlife Federation v. United States*, 792 F.2d 981, 985 (10th Cir. 1986) (fees to plaintiffs for enforcing Executive Order protecting wetlands); *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 591 (D.C. Cir. 2010) (agency violated

Executive Order protecting wetlands); *Citizens for Smart Growth v. Secretary of Dept. of Transp.*, 669 F.3d 1203, 1214 (11th Cir. 2012) (same).

Trump's cases are inapposite. *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975) held Executive Order 11,821 unenforceable because it was "a managerial tool for implementing the President's personal economic policies," rather than rooted in a grant of congressional authority. EO 13,337, by contrast, was selected by Congress to govern Presidential permits for Keystone. Pub. L. No. 112-78, §§ 501(a)-(b) 125 Stat. 1280 (2011). *Chen v. Carroll*, 48 F.3d 1331, 1338-40 (4th Cir. 1995) disallowed an asylum claim under Executive Order 12,711 because "it was an internal directive from the President to his Attorney General," and the Court declined "to force managerial discipline on the President's cabinet." *Id. Facchiano Constr. Co. v. U.S. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993) did not enforce Executive Order 12,549 because it was merely "an internal housekeeping measure" not for "plaintiffs' benefit." EO 13,337, by contrast, requires environmental reviews that benefit Plaintiffs. *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986) declined to enforce Executive Order 12,291 because it only concerned internal management.

Finally, Trump contends EO 13,337 section 6 precludes judicial enforcement. Not so. Section 6 never mentions "judicial review." *Cf.*, EO 12,898 §6-609, entitled "Judicial Review," which (unlike EO 13,337) directs that EO 12,898 "shall not be construed to create any right to judicial review . . . ."

Presidents know how to draft executive orders to preclude judicial review. Here Trump chose not to do so. *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206, 1217 (11th Cir. 2015) (“Where Congress knows how to say something but chooses not to, its silence is controlling”); *Ex parte Mitsuye Endo*, 323 U.S. 283, 298 (1944) (executive orders are construed like legislation).

Accordingly, since EO 13,337 was enforceable and Trump failed to comply with it, his 2019 Permit was *ultra vires*.

#### **V. PLAINTIFFS WILL SUFFER IRREPARABLE HARM**

Trump contends Plaintiffs will suffer no irreparable harm because the Permit only “authorizes . . . pipeline facilities in an approximately 1.2-mile segment” and requires that the “Facilities” be built “consistent with applicable law,” and “bureaucratic momentum” is inapplicable to construction “outside of federal control.” Opp. 26-29. Not so. The 2019 Permit authorizes Keystone’s crossing of a tributary of the Missouri River, posing harm to downstream users including Plaintiffs; no “applicable law” is specified; and no further permit process is required. 84 Fed.Reg. 13,101-13,103. Trump’s Friez Declaration does not state what – if any – further environmental review would precede ROW approval, let alone require its completion. *Id.* ¶ 10.

Bureaucratic, financial and construction commitments and ongoing staging activities all create unstoppable momentum. *Colorado Wild, Inc. v. U.S. Forest Service*, 523 F.Supp.2d 1213, 1224-1231 (2007); *Sierra Club v. Marsh*, 872 F.2d

497, 500 (1st Cir. 1989); Volker Reply Dec. Exhs. 1-5. The need for this Court’s injunctive relief to prevent construction of worker camps and other Keystone-related facilities is just as great now as when this Court properly enjoined Keystone’s construction last February. *IEN v. State*, 2019 WL 652416 \*10 (2/15/19), citing *Colorado Wild*.

**VI. THE BALANCE OF HARM AND THE PUBLIC INTEREST FAVOR PLAINTIFFS**

Trump ignores the balance of harm – which clearly favors Plaintiffs – and claims an injunction would not serve the public interest because “ongoing” environmental review should “continue.” Opp. 30-31. Nonsense. Plaintiffs seek an injunction to prevent construction until environmental review is completed.

**VII. CONCLUSION**

President Trump’s Opposition lacks merit, and Plaintiffs’ motion should be granted.

Dated: August 7, 2019

Respectfully submitted,

PATTEN, PETERMAN, BEKKEDAHL &  
GREEN, PLLC

s/ James A. Patten  
JAMES A. PATTEN

Dated: August 7, 2019

LAW OFFICES OF STEPHAN C. VOLKER

*s/ Stephan C. Volker*

STEPHAN C. VOLKER (Pro Hac Vice)

Attorneys for Plaintiffs  
INDIGENOUS ENVIRONMENTAL NETWORK  
and NORTH COAST RIVERS ALLIANCE

**CERTIFICATE OF COMPLIANCE**

Pursuant to Montana District Court, Civil Rule 7.1(d)(2)(B), I certify that **PLAINTIFFS' REPLY TO FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** contains 3,249 words, excluding caption and certificate of service, as counted by WordPerfect X7, the word processing software used to prepare this brief.

*s/ Stephan C. Volker* \_\_\_\_\_



**CERTIFICATE OF SERVICE**

I, Stephan C. Volker, am a citizen of the United States. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Stephan C. Volker, 1633 University Avenue, Berkeley, California 94703.

On August 7, 2019 I served the following documents by electronic filing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the email addresses registered in the above entitled action:

**PLAINTIFFS' REPLY TO FEDERAL DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I declare under penalty of perjury that the foregoing is true and correct.

s/ Stephan C. Volker  
STEPHAN C. VOLKER (Pro Hac Vice)