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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. UNITED STATES DEPARTMENT OF STATE, *et al.*, Defendants, and TC ENERGY CORPORATION, *et al.* Defendant-Intervenors.	CV 18-118-GF-BMM **MEMORANDUM IN SUPPORT OF DEFENDANTS TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs the Rosebud Sioux Tribe ("Rosebud") and the Fort Belknap Indian Community ("Fort Belknap") seek to use their tribal status to obtain judicial review of the Presidential Permit for the Keystone XL Pipeline ("Keystone XL") that is not available to other plaintiffs, and to force the President to comply with laws that do not apply to him. Plaintiffs are not entitled to that relief.

The Presidential Permit authorizes only Keystone XL's border-crossing segment, which is far from either tribe's reservation or tribal property and thus does not implicate any of the treaty rights, fiduciary duties, or Indian property statutes that form the basis of Plaintiffs' claims. And even if the Permit authorized the entire route (which it does not), Plaintiffs' claims still fail as a matter of law. Although the pipeline route does cross land that was once reserved to the tribes by treaties with the United States, subsequent events and acts of Congress diminished the reservation and opened the land to private ownership. As a result, the undisputed evidence establishes that Keystone XL will not cross either tribe's reservation or any property owned by either tribe. The pipeline will be constructed on easements and rights-of-way that TC Energy has acquired (or will acquire) from private landowners, the states, or the federal government. Thus, Defendants are entitled to summary judgment on all claims in the Amended Complaint.

STATEMENT OF FACTS

A. Keystone XL Pipeline

Keystone XL will cross the U.S. border near Morgan, Montana, and continue for approximately 882 miles to Steele City, Nebraska, where it will connect to the existing Keystone pipeline system.[1] In anticipation of being able to construct the Project, TC Energy has acquired fee simple interests in land for the pumping stations. Cummings Decl. ¶ 3. TC Energy has also acquired easements that confer a permanent easement and right of entry over land where the pipeline facilities will be located and a temporary easement and right of entry for temporary work spaces needed during construction. *Id.*; *see also* 2014 FSEIS at 2.1-19 (Figure 2.1.2-1) (depicting typical 110-foot-wide temporary construction right-of-way that is later reduced to a 50-foot-wide permanent right-of-way following construction).[2]

In Montana, TC Energy has acquired land in fee for the pump stations and easements for the pipeline and temporary work spaces to construct all segments of

[1] U.S. Dep't of State, *Final Supplemental Environmental Impact Statement for the Keystone XL Project*, S-1 (Dec. 2019) ("2019 Final SEIS"), https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/details?eisId=286595

[2] After construction, TC Energy is required to restore the right-of-way consistent with TC Energy's permits, the terms of the easement agreements, and the Keystone Construction, Mitigation, and Reclamation Plan. *See* 2014 FSEIS at 2.1-18; 2019 Final SEIS at 2-10-2-11, 3.1-1

the Project in Montana except: (1) 44.4 miles across federal lands managed by the Bureau of Land Management ("BLM"), for which TC Energy has requested a grant of right-of-way and temporary use permit from BLM under the Mineral Leasing Act; (2) a 1.88-mile segment of federal land administered by the Army Corps of Engineers ("Army Corps") for which TC Energy has also requested a grant of right-of-way and temporary use permit from BLM;[3] and (3) a parcel of land held by a private landowner that is currently in condemnation proceedings in Montana state court. Cummings Decl. ¶ 5.[4] None of TC Energy's land, easements or standalone agreements for additional temporary spaces or access roads are within the Fort Belknap Reservation. *Id.* ¶¶ 5-6. With the exception of the federal land that is owned by the United States and covered by the request to the BLM, all of TC Energy's easements and rights-of-way in Montana are on property that was

[3] TC Energy expects to receive the right-of-way and temporary use permit within a matter of weeks because the Secretary of the Interior just issued a Record of Decision granting the company's application. 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/150343520011555/250015801/Keystone_ROD_Signed.pdf . The company should receive the right-of-way and temporary use permit when it posts a bond and submits other documentation to BLM.

[4] Montana, like Nebraska and South Dakota, authorizes pipeline carriers to acquire property by eminent domain. *See* Mont. Code Ann. § 75-20-113; Neb. Rev. Stat. § 57-1101; S.D. Codified Laws §§ 49-2-12, 49-7-11.

owned by private landowners or the State of Montana at the time TC Energy acquired them. *Id*.

In South Dakota, TC Energy has acquired fee land for the pump stations and easements for the pipeline and temporary work spaces to construct all segments of the Project. Cummings Decl. ¶ 4. None of TC Energy's land or easements are within the boundaries of the Rosebud's reservation. *Id.*; *see also* Hofer Decl. ¶ 11. All are on land that was owned in fee by private landowners or the State of South Dakota at the time TC Energy acquired them. Cummings Decl. ¶ 4.

In both states, TC Energy has also entered some standalone agreements with landowners for temporary access roads or additional temporary work spaces during construction. Cummings Decl. ¶ 6. All of these standalone agreements were negotiated with private landowners or the State, and none are within the boundaries of the Rosebud or Fort Belknap Reservations. *Id.*

In response to Plaintiffs' allegations in this case, TC Energy retained title researchers to search the title documents in the Register of Deeds for Tripp County, South Dakota of property encumbered by a Keystone XL pipeline easement ("Easement properties"). Hofer Decl. ¶¶ 3, 6. That examination revealed that none of the Easement properties are owned by Rosebud or owned by the United States in trust for the tribe or an Indian allottee. *Id.* ¶ 7. It also revealed that on three Easement properties, the United States reserved only an interest in the

mineral estate for the benefit of specific individuals and their heirs and assigns at the time the properties were patented and transferred to private ownership in the late 1950s and early 1960s. *Id.* ¶ 8 (listing mineral reservations for Richard Fool Bull and Rosie Everesta Bone Shirt).

TC Energy also retained a South Dakota registered land surveyor to conduct a survey of certain tracts of real property in Tripp County that the Amended Complaint alleges are "Rosebud lands" that will be crossed by Keystone XL. *See* First Am. Compl. ("FAC") ¶¶ 174-76 (Dkt. 58); Fowlds Decl. ¶¶ 3-4, 8. That land survey confirmed that no part of the Keystone XL easements or access roads crosses or encroaches upon any of those tracts. Fowlds Decl. ¶ 11; *see also* Fowlds Decl., Exhibit A (informational drawings of the Keystone XL Easement and adjacent tribal tracts).

B. State and Federal Approvals of Keystone XL

As explained in the briefing on TC Energy's motion to dismiss, the States have the primary authority to approve oil pipeline routes, while federal agency approval is required only for construction of segments that impact a federal civil works project or cross wetlands or navigable waters, federally-owned land, or land held in trust for individual Indians or tribes.[5]

[5] Dkt. 65, at 3-6.

1. State Agency Approvals

The South Dakota Public Utilities Commission ("PUC") issued a permit authorizing construction of Keystone XL in 2010, and certified the permit in 2016 following a lengthy hearing in which Rosebud participated.[6] The PUC also found that "no Indian reservation or trust lands are crossed by the Pipeline route."[7]

The Montana Department of Environmental Quality ("DEQ") issued Keystone a "Certificate of Compliance" necessary to build and operate the pipeline in Montana in 2012.[8] The DEQ approved an amendment to the Certificate in January 2019.[9]

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[6] *See* Pub. Util. Comm'n of S.D., *In the Matter of the Petition of TransCanada Keystone Pipeline, LP for Order Accepting Certification of Permit Issued in Docket HP09-001 to Construct the Keystone XL Pipeline*, No. HP14-001, Final Decision and Order Finding Certification Valid And Accepting Certification, at 1-9 (Jan. 21, 2016) ("2016 PUC Order"); Pub. Util. Comm'n of S.D., *In the Matter of the Application By TransCanada Keystone Pipeline, LP For A Permit Under The South Dakota Energy Conversion And Transmission Facilities Act To Construct The Keystone XL Project*, No. HP09-001, Amended Final Decision and Order at 23, ¶ 4 (June 29, 2010), https://puc.sd.gov/commission/orders/hydrocarbonpipeline/2010/hp09-001c.pdf.

[7] 2016 PUC Order at 19, ¶ 27.

[8] Mont. Dep't of Envtl. Quality, *In the Matter of the Application of TransCanada Keystone Pipeline, LP (Keystone) for a Certificate of Compliance under the Major Facility Siting Act*, Findings Necessary for Certification and Determination, at 57 (Mar. 30, 2012), http://deq.mt.gov/Portals/112/DEQAdmin/MFS/Documents/KXL_Cert_Final_Signed.PDF.

[9] Mont. Dep't of Envtl. Quality, *In the Matter of the Application of TransCanada Keystone Pipeline, LP to Amend their Certificate of Compliance under the Major Facility Siting Act*, at 1 (Jan. 23, 2019), http://deq.mt.gov/Portals/112/DEQAdmin/

In November 2017, the Nebraska Public Service Commission ("PSC") approved a route for Keystone XL in Nebraska.[10] Pipeline opponents appealed to the Nebraska Supreme Court, which affirmed the PSC's decision.[11]

2. Federal Approvals

As this Court is aware, the U.S. Department of State ("State") twice denied Presidential Permit applications for Keystone XL before issuing a Record of Decision and National Interest Determination ("ROD/NID") in March 2017. *See* Order, Dkt. 92, at 4 (Dec. 20, 2019) ("*December Order*"). In litigation brought by other plaintiffs, this Court vacated the 2017 ROD/NID and directed State to supplement its NEPA analysis. *Id.* at 5.

While Defendants' appeal of that ruling was pending, President Trump revoked that Presidential Permit, and personally signed a new Presidential Permit ("2019 Permit"). 84 Fed. Reg. 13,101 (Apr. 3, 2019). The 2019 Permit authorizes the construction, operation and maintenance of Keystone XL pipeline facilities "at the international border of the United States and Canada at Phillips County,

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MFS/Documents/DEQDecision_SBSeedAmendment.pdf?ver=2019-02-01-085504-733.

[10] Neb. Pub. Serv. Comm'n, *In the matter of the Application of TransCanada Keystone Pipeline, L.P.*, Application No. OP-0003, Order (Nov. 20, 2017), https://www.nebraska.gov/psc/orders/natgas/OP-0003.5.pdf.

[11] *In re Application No. OP-0003*, 932 N.W.2d 653 (Neb. 2019).

Montana." *Id.* But it does not relieve TC Energy of responsibility for obtaining the right-of-way grants or easements, permits, and other authorizations required by applicable federal and state laws. *Id.* at 13,101-02 (Art. 1(1) and Art. 6(1)).

Thus, TC Energy has applied to BLM for a right-of-way to cross federal land in Montana, and to the Army Corps for Section 408 permission to construct under the Missouri River.[12] In connection with those applications, the agencies, in cooperation with State, on December 20, 2019, issued a Final SEIS that supplements the prior environmental reviews of Keystone XL and addresses the revised route through Nebraska and the other issues identified by this Court in the prior litigation. *See supra* n.1.

C. The Ruling on Defendants' Motions to Dismiss

This Court dismissed the claims regarding the 2017 Permit as moot, but declined to dismiss Plaintiffs' challenge to the 2019 Permit. *December Order* at 7, 22-23. It found that Plaintiffs met their burden at the motion to dismiss stage to demonstrate standing and allege a cause of action to sue the President, and ordered additional briefing to resolve Plaintiffs' claims and the constitutional challenges

[12] For other water crossings, TC Energy is relying on Nationwide Permit 12, which allows construction of utility lines in U.S. waters subject to many conditions. 82 Fed. Reg.1,860, 1,985-86 (Jan. 6, 2017). Plaintiffs in *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, No. 4:19-cv-00044-BMM (D. Mont.), are challenging Nationwide Permit 12 on its face and as applied to Keystone XL.

raised by different plaintiffs in *Indigenous Environmental Network v. Trump*, No. CV-19-28-GF-BMM (D. Mont.). The Court requested additional briefing on issues related to Plaintiffs' Commerce Clause challenge, and suggested that Plaintiffs' breach-of-fiduciary duty, Indian Rights-of-Way Act and Indian Mineral Leasing Act claims may depend on one of those issues (whether State must issue the Presidential permit). *Id.* at 16, 18-20. The Court declined to dismiss the treaty claims because it thought that the question "[w]hether the 2019 Permit causes depredation on Indian land depends on the scope of the 2019 Permit's approval"—which, too, is the subject of additional briefing. *Id.* at 18.[13] And it declined to dismiss the tribal jurisdiction claims because the complaint alleged "that Keystone will cross and trespass upon Rosebud surface and mineral estates." *Id.* at 21.

ARGUMENT

I. The 2019 Permit Does Not Violate The 1851 Fort Laramie Or 1855 Lame Bull Treaties

Plaintiffs allege that the 2019 Permit violates the 1851 Fort Laramie Treaty and 1855 Lame Bull Treaty, wherein the United States agreed to protect Rosebud and Fort Belknap "from all depredations."[14] Defendants are entitled to summary

[13] The Court also thought that the question whether venue is proper in Montana "depends, in large part, on the scope of the 2019 Permit's approval." *December Order* at 22.

[14] FAC ¶ 381 (Count One); *see also id.* ¶ 57 (quoting Article 3 of the 1851 Fort Laramie Treaty); *id.* ¶ 62 (quoting Article 7 of the 1855 Lame Bull Treaty, which

judgment on this claim because the treaties are limited to protecting the tribes "from depredations that occurred only on tribal land," *Gros Ventre Tribe v. United States*, 469 F.3d 801, 813 (9th Cir. 2006), and the 2019 Permit does not authorize Keystone XL activity on tribal land.[15]

Plaintiffs advance the same legal theory here as Fort Belknap and others argued in *Gros Ventre*, where the tribes alleged that the United States breached the 1851 Fort Laramie Treaty and 1855 Lame Bull Treaty by authorizing "two cyanide heap-leach gold mines located upriver from the Tribes' reservation" that allegedly threatened to harm the water supply and "tribal trust resources" on the reservation. *Id.* at 803, 806. [16] The Ninth Circuit rejected that claim because the mines were not

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protects "said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit").

[15] TC Energy submits that, for the reasons stated in its motion to dismiss, Plaintiffs lack standing. *See* Dkt. 39; Dkt. 64. Because the Court rejected those arguments, and without prejudice to its standing objection, TC Energy will not repeat the arguments here. *See City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009) (lack of Article III standing "cannot be waived" and "court can, and indeed must, resolve any doubts about this constitutional issue sua sponte").

[16] The Ninth Circuit in *Gros Ventre* referred to the 1855 Lame Bull Treaty as the "Treaty with the Blackfeet," but its citation to the Statutes at Large make clear that it is the same treaty. *Compare* FAC ¶¶ 58, 62 (quoting article 7 of "Lame Bull Treaty" signed on October 17, 1855, 11 Stat. 657 (1855)), *with Gros Ventre*, 469 F.3d at 804, 813 (quoting "Treaty with the Blackfeet, art. 7, Oct. 17, 1855, 11 Stat. 657").

on the reservation, and it was "clear" that "the United States agreed to protect the Tribes from depredations that occurred only on tribal land." *Id.* at 813.

Gros Vente compels the entry of summary judgment for Defendants, because the Presidential Permit challenged here, like the BLM mining permit challenged there, does not authorize any activity on tribal land. The 2019 Permit authorizes only the 1.2-mile Keystone XL border-crossing segment that does not cross the Rosebud Reservation, the Fort Belknap Reservation, or any property owned by either tribe. *See* Cummings Decl. ¶ 6; 84 Fed. Reg. at 13,101.

The limited scope of the Permit is clear from the text, which grants permission 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). The Permit defines "Border facilities" as "those parts of the Facilities consisting of a 36-inch diameter pipeline extending from the international border … to and including the first mainline shut-off valve in the United States located approximately 1.2 miles from the international border, and any land, structures, installations, or equipment appurtenant thereto." *Id.* It then imposes conditions and restrictions that are directed only to those "Border facilities." *See id.* 13,101-103 (Articles 1-10). Given the limitations in the terms of the 2019 Permit, it cannot be read to authorize the entirety of Keystone XL.

Assuming the 2019 Permit authorized the entire Keystone XL route—and it does not—it still would not authorize activity on either tribe's reservation or land. Plaintiffs allege that the "Pipeline will run directly through the sacred sites, historic sites, and the *ancestral* lands of the … Tribes of Fort Belknap," FAC ¶ 157 (emphasis added); *id.* ¶ 150 (referring to damage to "ancestral sites"), and "would traverse Rosebud's *1889* reservation boundary," *id.* ¶ 93 (emphasis added), where "there are still many cultural and historical places and sacred sites important to Rosebud," *id.* ¶ 89. But that does not advance their claim because "Congress can alter the terms of an Indian treaty by diminishing a reservation." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

Congress diminished the 1889 reservation boundaries, and land that had been reserved for the tribes was transferred to private landowners. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585 (1977) (statutes passed in 1904, 1907, and 1910 diminished the Rosebud Reservation "so as to exclude … four counties in South Dakota," including Tripp County); FAC ¶ 145 (map illustrating the "original lands reserved" by the Fort Belknap "through treaties, and the subsequent reduction of those lands"). The effect was to alter the scope of the government's treaty obligations. As the Ninth Circuit has held, the treaty obligation to protect the tribes from "depredations" applies only to "tribal land" and not to ancestral lands

"after the Tribes later relinquished their ownership in that land." *Gros Ventre*, 469 F.3d at 813.

Construction of Keystone XL cannot trigger an obligation under the treaties because it will not be built on tribal land. It will be built on fee interests, easements, and rights-of way that TC Energy has acquired (or will acquire) from private landowners, the States, or the federal government. *See* Cummings Decl. ¶ 6; Hofer Decl. ¶ 11. None of this property is on the Rosebud Reservation or the Fort Belknap Reservation. *See* Cummings Decl. ¶ 6; Hofer Decl. ¶ 11. And a recent title examination confirmed that none of the Easement properties in Tripp County, South Dakota are owned by Rosebud or owned by the United States in trust for the Tribe or an Indian allottee. Hofer Decl. ¶ 7.

The land survey did show that some of the Keystone XL easements are on property that is *adjacent* to property owned by Rosebud or owned by the United States in trust for the tribe or an Indian allottee. Fowlds Decl. ¶¶ 4, 11-12 & Exhibit A. And the title examination revealed that three of the easements are on property where the United States holds a reserved mineral interest for specified Indian allottees and their heirs and assigns. Hofer Decl. ¶ 8. But the Indian trust interest in the surface estate (and all other property interests except the mineral interest) was extinguished decades ago when the United States issued patents

transferring the property into private ownership. TC Energy has acquired the Keystone XL easements from the private landowners. Cummings Decl. ¶ 4.

Plaintiffs are thus left with a claim that the government violated the treaties by failing to prohibit Keystone XL activity on *TC Energy's property* because that activity could cause harm to some *adjacent property interests* held by Rosebud or Indian allottees. They allege that a "rupture and spill" could cause oil to leak from the Keystone XL easements onto adjacent property owned by Rosebud, or onto mineral interests held by the United States for Indian allottees under three of those easements, or into water sources for the Mni Wiconi system that provides water to the Rosebud reservation. *See* FAC ¶¶ 107-08, 113, 120-22.[17] Such allegations cannot establish a treaty violation as a matter of law because "the language in these treaties simply cannot be read to impose a specific fiduciary obligation" to regulate activity on private property off the reservation "for the benefit of the Tribes." *Gros Ventre*, 469 F.3d at 813. "Rather, at most, the treaties merely recognize a general or limited trust obligation to protect the Indians against depredations on Reservation lands: an obligation for which we have no way of measuring whether

[17] These allegations are disputed. *See* 2019 Final SEIS at D-78 ("the treatment plant water intake" for the Mni Wiconi project is "approximately 130 miles downstream from the Cheyenne River crossing" and is "considered outside the region of influence from an accidental release"). But the disputes are not material because, the treaties do not obligate the government to regulate activity on TC Energy's property to benefit the Rosebud reservation or tribal property.

the government is in compliance, unless we look to other generally applicable statutes or regulations." *Id.* at 812.

Accordingly, the treaties impose no special obligations that limit the President's authority to issue a presidential permit for Keystone XL. Defendants are entitled to summary judgment on Count One.

II. The President Was Not Required To Comply With NEPA Or NHPA Before Issuing The Presidential Permit.

Defendants are entitled to summary judgment on Counts Three and Four because the President was not required to comply with National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA") before issuing the 2019 Permit.

First, NEPA and the NHPA do not apply to the President or authorize judicial review of his actions. NEPA applies to "agencies of the Federal Government," 42 U.S.C. §§ 4332, 4333, which excludes "the President." 40 C.F.R. § 1508.12. The NHPA likewise applies to "the head of any Federal agency" and the "head of any Federal department or independent agency," 54 U.S.C. § 306108, and it specifies that the term "agency" has the same meaning as it has in the APA, *id.* § 300301. The APA definition of "agency" does not include the President. *See* 5 U.S.C. §§ 701(b)(1), 551(1); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

NEPA and the NHPA also do not provide any rights of action.[18] They can be enforced only through a suit brought under the APA, which also does not apply to the President.[19] Thus, the President had no duty to comply with NEPA or the NHPA when issuing the 2019 Permit, and this Court has no jurisdiction to review any claim to the contrary.

Second, the President has no fiduciary duty to comply with laws that Congress did not make applicable to him. The Ninth Circuit agrees that the United States' general trust responsibility toward tribes does not require agencies to "afford [the tribes] greater rights than they would otherwise have" under laws agencies administer. *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308-09 (9th Cir. 1997).[20] Thus, the court has held in a case involving NEPA and the NHPA that "unless there is a specific duty that has been placed on the government with respect to Indians," the government fulfills any fiduciary duty by complying "with general regulations and statutes not specifically aimed at protecting Indian

[18] *See Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 950 (9th Cir. 2006) (NEPA); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005) (NHPA).

[19] *Dalton v. Specter*, 511 U.S. 462, 470 (1994) (President's actions "are not reviewable under the APA").

[20] *See also, e.g., Klamath Water Users Prot. Ass'n v. U.S. Dep't of Interior*, 189 F.3d 1034, 1038 (9th Cir. 1999) (tribes have no greater right to have communications with an agency withheld under FOIA).

tribes." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998); *see also Gros Ventre*, 469 F.3d at 810 (same). That reasoning forecloses Plaintiffs' NEPA and NHPA claims. No other person could state a claim under the APA, NEPA, or the NHPA challenging the President's action because those laws do not apply to the President.

Plaintiffs previously argued that *Pit River Tribe v U.S. Forest Service*, 469 F.3d 768 (9th Cir. 2006), stands for the proposition that the government has a fiduciary duty to comply with the substantive provisions of NEPA and NHPA, so the President must follow those provisions even though they do not apply to him. *Pit River* said no such thing. It held only that the government's fiduciary duty requires it to "at least show 'compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.'" 469 F.3d at 788. The court concluded that because the "agencies violated both NEPA and NHPA during the leasing and approval process" at issue, "it follows that the agencies violated their minimum fiduciary duty to the Pit River Tribe." *Id*. The court expressly declined to decide whether "the fiduciary obligations of federal agencies to Indian nations might require more" than the statutes themselves require. *Id*.

Moreover, after *Pit River* was decided, the Supreme Court made clear that "[a]lthough the Government's responsibilities with respect to the management of funds belonging to Indian tribes bear some resemblance to those of a private

trustee, this analogy cannot be taken too far." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). "The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id.* at 177. Plaintiffs cite no statute that expressly accepts an Indian trust responsibility to go beyond what NEPA or NHPA require. And those statutes impose no responsibilities on the President.

Plaintiffs do cite the statute establishing the Rosebud Water System, which is "held in trust for the Rosebud Sioux Tribe by the United States."[21] And they allege that potential impacts of Keystone XL on the water system "have not been adequately analyzed pursuant to NEPA." FAC ¶ 133. But nothing in that statute requires an environmental analysis that NEPA itself does not require. And NEPA requires no analysis for Presidential action, because NEPA does not apply to the President. That is fatal to Plaintiffs' trust claim, because a court cannot impose trust duties on the government beyond those in the applicable "specific trust-creating statute and regulations." *Jicarilla Apache Nation*, 564 U.S. at 185.

[21] *Mni Wiconi Act Amendments of 1994*, Pub. L. No. 103-434, § 806, 108 Stat. 4539, 4541 (Oct. 31, 1994) (adding § 3A(e) to Pub. L. No. 100-516).

III. The 2019 Permit Does Not Violate The Indian Rights-Of-Way Act Or The Indian Mineral Leasing Act

Rosebud also alleges that Defendants violated the 1868 Fort Laramie Treaty, the Indian Rights-of-Way Act, 25 U.S.C. § 324, and the Indian Mineral Leasing Act, 25 U.S.C. § 396a, by issuing the 2019 Permit before TC Energy "followed the process to obtain a federal right-of-way across Rosebud surface and mineral estates [or] obtained Rosebud's consent to build the Pipeline across its surface and mineral estates." FAC ¶¶ 424-25 (Count Five). Defendants are entitled to summary judgment on these claims for multiple reasons.

As an initial matter, these allegations state no claim against the President and thus provide no basis for invalidating the 2019 Permit. That Permit does not authorize TC Energy to cross or occupy Rosebud land. It grants permission to construct the border segment hundreds of miles away. *See supra* 11-12. And the Indian Mineral Leasing and the Indian Rights-of-Way Acts do not apply to the President or limit his authority. They simply authorize the Secretary of the Interior to grant rights-of-way to, or to approve mining leases on, certain federal land held in trust for Indians or Indian tribes.[22]

[22] *See* 25 U.S.C. § 323 (empowering the Secretary "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes"); *id.* § 324 (prohibiting grant of rights-of-way across lands belonging to certain tribes "without the consent of the proper tribal officials"); *United States v. Navajo Nation*, 537 U.S. 488, 507 (2003) (Indian Mineral Leasing Act "simply

Furthermore, there are additional reasons why Plaintiffs' claims fail as a matter of law.

A. Indian Rights-of-Way Act.

TC Energy is not required to obtain a right-of-way from the BIA under the Indian Rights-of-Way Act because the undisputed facts show that Keystone XL will not be constructed on any property where the surface estate is owned by Rosebud or by the United States in trust for Rosebud or any Indian allottee. *See supra* 12-14. Although there are a few Keystone XL easements on property where the United States reserved a mineral interest for Indian allottees, this is irrelevant because the Indian Rights-of-Way Act does not apply to mineral estates. It applies to "Indian land," which is land "in which the *surface estate*, or an undivided interest in the surface estate, is owned by one or more tribes" or "in one or more individual Indians," in "trust or restricted status." 25 C.F.R. §§ 169.2, 169.3(a) (emphasis added). Because the Keystone XL easements are not on "Indian land," so defined, there is no requirement that TC Energy obtain a right-of-way under the Indian Rights-of-Way Act.

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requires Secretarial approval" before "mining leases negotiated between Tribes and third parties become effective, 25 U.S.C. § 396a, and authorizes the Secretary generally to promulgate regulations governing mining operations, § 396d").

B. Indian Mineral Leasing Act

There is also no jurisdiction or claim against TC Energy under the Indian Mineral Leasing Act. Plaintiffs allege that construction of Keystone XL will violate a regulation barring "exploration, drilling, or mining operations" on Indian lands "before the Secretary has granted written approval of a mineral lease or permit," 25 C.F.R. § 211.48(a). *See* FAC ¶ 426. But nothing in the statute or regulations provides a private cause of action to enforce that regulation. Instead, the regulations are enforced by the *Secretary,* who may impose civil fines or take other action, subject to specified notice and procedural requirements. *See* 25 C.F.R. §§ 211.54, 211.55, 212.55.

It is not surprising that enforcement lies with the government, because the statute applies to Indian mineral interests over which the United States retains substantial control in the form of restrictions on alienation or the holding of title.[23] And even if private enforcement were allowed in some circumstances, it should not be permitted here, because Plaintiffs do not own the mineral interests that form the basis of their claim. Those mineral interests are owned by the United States in trust

[23] The statute applies to property with an "Indian mineral owner," which is an Indian tribe or an individual Indian who owns a mineral interest "title to which is held in trust by the United States, or is subject to restriction against alienation imposed by the United States." 25 C.F.R. § 211.3 (leases of tribal lands for mineral development); *id.* § 212.3 (leases of allotted lands for mineral development).

for specific individuals and their heirs and assigns, who are not parties to this case. *See supra* 13-14.

"In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). Courts may make exceptions where (1) the plaintiff has a close relationship with the third-party; (2) violation of the third-party's rights harms plaintiff or is "inextricably bound up with the activity the [plaintiff] wishes to pursue;" and (3) there is "some genuine obstacle" to the third-party pursuing its own rights. *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976) (physician may assert rights of patients seeking abortion). But those factors are not present here. Rosebud and Fort Belknap have not alleged that they have a close relationship with the owners of the mineral estates they purportedly seek to protect. They have not explained how any harm to the sand and rocks that allegedly exist in those mineral estates will harm the tribes or interfere with any tribal activities. *Cf. In re Volkwagen "Clean Diesel" Mktg. Sales Practices and Prods. Liab. Litig.*, 894 F.3d 1030, 1045-46 (9th Cir. 2018) (plaintiff may sue about harm to his property, but "cannot rest his claim to relief on the legal rights or interests of other owners or lessees" (citation omitted)). And because the mineral rights are owned by the United States in trust for the Indian allottees, there is no basis for holding

that the tribes must be permitted to sue because the owners cannot protect their own rights.

Furthermore, Defendants are entitled to summary judgment on the merits because TC Energy had no duty to "follow[] the process to obtain a permit" under the Indian Mineral Leasing Act. FAC ¶ 427. That statute allows land to be "*leased for mining purposes*," 25 U.S.C. § 396 (emphasis added); it does not authorize rights-of-way for oil pipelines. Rights-of-way for oil pipelines–even ones buried underground like Keystone XL–are not for mining purposes. They are for a right-of-way on the surface estate, and thus are governed by the Indian Rights-of-Way Act. *See* 25 U.S.C. § 323 (authorizing "rights-of-way for all purposes").

The BIA regulations make this clear. They state that the Indian Rights-of-Way Act authorizes "rights-of-way over and across Indian or BIA land, for uses including … Oil and gas pipe lines (including pump stations, meter stations, and other appurtenant facilities)." 25 C.F.R. § 169.5(a)(8). As noted above, they define "Indian land" as land in which "the surface estate" is owned by an Indian tribe or individual Indian in trust or restricted status. 25 C.F.R. §§ 169.2, 169.3(a). And they make clear that the "surface estate" includes "everything other than the mineral estate, such that any buried lines or other infrastructure affect the surface estate and require a right-of-way." 80 Fed. Reg. 72,492, 72,495 (Nov. 19, 2015).

Plaintiffs nevertheless claim that construction of Keystone XL will entail "mineral development" that requires a permit because excavation of the trench may require "rock ripping" (breaking up and temporarily removing rock with an excavator) in places where the bedrock is near the surface. *See* FAC ¶ 112 (citing 2014 FSEIS). But the case they cited in the earlier briefing makes clear that "merely dig[ging] holes in the ground" or "disrupting the mineral estate" is not "mineral development" or "mining" as defined in BIA's regulations. *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1091-92 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 784 (2019).

The regulations define "[m]ining" as

> "the science, technique, and business of mineral development, including, but not limited to: opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals; Provided, when sand, gravel, pumice, cinders, granite, building stone, limestone, clay or silt is the subject mineral, an enterprise is considered "mining" only if the extraction of such a mineral exceeds 5,000 cubic yards in any given year."

25 C.F.R. § 211.3. The court thought that "each example of 'mineral development' involves some action upon the minerals to take advantage of them for some purpose," which suggests that it involves "action upon the minerals in order to exploit the minerals themselves." *Osage Wind*, 871 F.3d at 1091. Thus, "merely encountering or incidentally disrupting mineral materials" does not trigger the statute. *Id.* The Osage Wind project was held to have engaged in mining because it

"did not merely dig holes in the ground—it went further: It *sorted* the rocks, *crushed* the rocks into smaller pieces, and then *exploited* the crushed rocks as structural support for each wind turbine." *Id.* at 1091. There will not be that type of "sorting and crushing of rocks to provide structural support" for Keystone XL. *Id.* at 1092.

Rather, construction will require excavating a trench 7-8 feet deep and 4-5 feet wide. 2014 FSEIS at 2.1-50. The soil will be removed in layers so it can be placed back in the trench in its original position after the pipeline is installed. *Id.* at 2.1-50, 2.1-52. In rocky areas, "excavated rock [will] be used to backfill the trench to the top of the existing bedrock profile" before the "topsoil [is] returned to its original position over the trench." *Id.* at 2.1-52. Such removal and replacement of soil and rock to replicate its pre-construction position is not "mining" or "mineral development." Accordingly, TC Energy is not required to obtain a mining permit, and Defendants are entitled to summary judgment.

IV. Keystone XL Is Not Subject To Tribal Laws

Defendants are also entitled to summary judgment on Count VI, because Keystone XL is not subject to tribal land use and cultural property laws, and TC Energy is not required to exhaust its remedies in tribal court. This Count is based on the legally erroneous assertion that the "Rosebud and Fort Belknap have jurisdiction over the Pipeline." FAC ¶ 440.

"To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations." *Montana v. United States*, 450 U.S. 544, 565 (1981). But that sovereign power does not extend to Keystone XL, which will not cross either the Rosebud or Fort Belknap Reservation. *See supra* 13-14. The fact that Keystone XL will cross land in South Dakota that was part of the Great Sioux Reservation in 1889, or land in Montana that was previously reserved to Fort Belknap, is irrelevant, because subsequent acts of Congress diminished the reservation boundaries, and with it, the tribes' jurisdiction. *See Rosebud Sioux Tribe*, 430 U.S. at 616 (Marshall, J., dissenting) (the Court's decision precludes Rosebud "from continuing to exercise … jurisdiction" over areas removed from the reservation).

Plaintiffs have also asserted that TC Energy "has consented" to the tribes' jurisdiction by accepting the terms of the Presidential Permit. Dkt. 74 at 49. That is false. The Permit requires the company to comply with "applicable law" as described in the application (Art. 1(2)), and to acquire "necessary" authorizations (Art. 6(1)). 84 Fed. Reg. at 13,101-02. Those conditions do not encompass tribal laws, which do not apply to Keystone XL and thus impose no necessary requirements.

And since it is clear that the Tribes lack jurisdiction over Keystone XL, requiring them to exhaust their remedies in tribal courts "would serve no purpose

other than delay, and is therefore unnecessary." *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). Defendants are entitled to summary judgment on this count as well.

V. Issuance of the Presidential Permit Did Not Violate The Commerce Clause.

Finally, Defendants are entitled to summary judgment on Count Two, which alleges that 2019 Permit violates the Commerce Clause. This count is the subject of the supplemental briefing ordered by this Court. As TC Energy's supplemental brief explains (Dkt. 95 at 7-23), the President had the authority to issue a permit for Keystone XL border facilities. And if the President lacked that power, it would mean that Keystone XL can be built without any presidential permit. *Id.* at 23-26.

CONCLUSION

For the foregoing reasons, the motion for summary judgment should be granted.

January 24, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2)(E) of the United States Local Rules, I certify that this brief contains 6,459 words, excluding caption and certificates of service and compliance, printed in at least 14 point and is double-spaced, including footnotes and indented quotations.

/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