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

INDIGENOUS ENVIRONMENTAL NETWORK, *et al*., Plaintiffs, v. PRESIDENT DONALD J. TRUMP, *et al.*, Defendants.	CV 19-28-GF-BMM **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance challenge the decision of the President of the United States to issue a Permit allowing the Keystone XL Pipeline to cross the border from Canada into the United States. Plaintiffs' challenge is based on a blatant mischaracterization of what the Permit actually does (and what it does not do), joined with a grossly lopsided view of the Constitution's allocation of authority between the President and Congress (essentially, that Congress has it all and the President has none). Putting aside Plaintiffs' overstatement, and acknowledging the President's inherent authority as evinced by both precedent and history, this is not a hard case. The President's authority to issue a border-crossing Permit is well-established, that authority is not subject to judicial second-guessing, and Plaintiffs cannot plausibly argue any injury from the issuance of this Permit in any event.

First, in order to help with their standing problem and create a supposed constitutional conflict between the President and Congress, Plaintiffs characterize the Permit as somehow "authoriz[ing] the balance of the 875-mile-long Project." Compl. ¶ 5.[1] It doesn't. The *border crossing* Permit on its own terms applies only to the "facilities *at the international border*"; it does not purport to somehow

[1] *But see id*. (acknowledging that Plaintiffs are just "[a]ssuming" this based on some "indirect reference" in the Permit).

eliminate any requirements of federal or state law for what Plaintiffs aptly label "the Project's *other* 875 miles." *Id.* (emphasis added). This false assumption by Plaintiffs is fatal to their standing, since they don't even attempt to allege injury from the border crossing itself, but rather from construction of the "the balance of the 875-mile long" pipeline far from the border crossing. Compl. ¶ 5.

Plaintiffs make a second false assumption that is similarly fatal to their constitutional claims: they assume that the border crossing Permit somehow eliminates TC Energy's requirement to comply with other federal laws passed by Congress. Again, this is wishful thinking. The Permit itself certainly does not purport to eliminate any additional federal or state requirements; quite the opposite, it affirmatively acknowledges that TC Energy remains "responsible for acquiring any right-of-way grants or easements, permits, and other authorizations as may become necessary or appropriate." Permit, art. 6(1); *see also id.* art. 1(2) (noting that the construction of the "Facilities" must be "consistent with applicable law"). This is true even for the 1.2 mile portion of the pipeline actually covered by the Permit. *Id.* The idea that BLM, for example, is simply going to ignore applicable laws at some point in the future is baseless speculation.

Plaintiffs' Complaint thus sets up a false conflict between Congress's enumerated powers and the President's independent authority. And notwithstanding the absence of any regulatory involvement in the issuance of the

challenged Permit, Plaintiffs also name a host of executive branch agencies and officials as additional defendants, further evincing their erroneous view of executive branch authority, as well as their misconception of what the challenged border-crossing Permit actually does.

Plaintiffs' challenge to the Permit should be dismissed because this Court lacks jurisdiction and Plaintiffs' claims are without merit. The law is clear that injunctive relief against the President is unavailable. And all claims against the Agency Defendants must independently be dismissed for lack of final agency action and ripeness. None of the Agency Defendants have yet taken the actions that Plaintiffs claim would actually injure them.

The President appropriately exercised his Article II authority in issuing the border-crossing Permit. Plaintiffs' argument to the contrary has no basis in law, is inconsistent with historical practice, and is contrary to the Constitution's shared allocation of authority between the two political branches. For these reasons, as set further below, this Court should grant the United States' motion to dismiss.

BACKGROUND

I. The Issuance of Border Crossing Permits

The President's authority to issue a permit for border crossing facilities, including pipelines, derives from his independent constitutional authority over foreign affairs and national security. For over a century, Presidents have exercised

that inherent authority to authorize border crossing facilities without Congressional action. *See* Hackworth, *Digest of International Law*, Vol. IV, § 350 (1942) at 247-56, Ex. 1; President Ulysses Grant's Seventh Annual Message to Congress, *reprinted in* Papers Relating to the Foreign Relations of the United States, Vol. 1, 44th Cong. 1st Sess., H.R. Doc. No. 1, Pt. 1 (Dec. 6, 1875), Ex. 2; *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1163 (D. Minn. 2010). Long before they delegated their permitting authority to executive branch agencies, Presidents personally signed and issued permits for border crossing facilities. *See* Whiteman, *Digest of International Law*, Vol. 9 (1968) at 17-21, Ex. 3. This practice continued through the 1960s. *Id.* Plaintiffs' contentions that the President's permitting authority is somehow either dependent on congressional authority or requires agency participation runs headlong into over a century of practice.

In 1968, President Lyndon B. Johnson issued Executive Order 11,423, which delegated to the Secretary of State the President's constitutional authority to issue permits for border crossing facilities, including oil pipelines. *See* Exec Order No. ("EO") 11,423 § 1(a), 33 Fed. Reg. 11,741 (Aug. 16, 1968). In 2004, President George W. Bush issued EO 13,337, which revised this delegation of authority with respect to oil pipelines. E.O. 13,337 § 1(a), 69 Fed. Reg. 25,299 (Apr. 30, 2004).

II. The 2017 Presidential Permit for the Keystone XL Pipeline and the Ensuing Litigation.

In March 2017, acting under the Constitutional authority of the President delegated to the Secretary of State in EO 13,337, the Under Secretary for Political Affairs issued the 2017 Keystone XL Permit. Two sets of Plaintiffs challenged the issuance of the 2017 Permit in actions before this Court, alleging that the State Department violated NEPA, the APA, and the ESA. *See Indigenous Envtl. Network v. U.S. Dep't of State*, No. 4:17-cv-29-BMM (filed Mar. 27, 2017); *N. Plains Res. Council v. Shannon*, No. 4:17-cv-31-BMM (filed Mar. 30, 2017). After motion to dismiss and summary judgment briefing, the Court vacated the Under Secretary's decision to issue the 2017 Permit, and enjoined the government and TC Energy from taking any actions in furtherance of the construction of the pipeline but later clarified that injunction to allow TC Energy to undertake limited preparatory work. *See* Order, *Indigenous Envtl. Network v. U.S. Dep't of State*, No. 4:17-cv-29-BMM (November 8 and December 7, 2018) (ECF Nos. 218 and 231).

III. The President's Issuance of the March 2019 Permit.

On March 29, 2019, the President himself issued a new Permit expressly superseding and revoking the permit issued by the Under Secretary in 2017. *See* Permit at 1. The President issued the Permit pursuant to the "authority vested in [the President] as President of the United States of America." *Id.* The Permit

authorizes TC Energy to cross the international border for the purposes of construction and operation of pipeline facilities in an approximately 1.2-mile segment from the Canadian border to the first mainline shutoff valve in the United States. *Id.* at 1. The Permit also specifies that "[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.* at 2 (Article 6).

IV. New Complaint

Just one week after the President issued the Permit, Plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance filed this new suit challenging the Permit. Implicitly conceding that the President is not subject to the statutory requirements raised in their prior lawsuit, Plaintiffs do not attempt to directly raise those claims anew. Instead, their new Complaint raises two constitutional claims, alleging that the President's issuance of the Permit infringes on Congress's authority pursuant to the Property Clause and Commerce Clause of the United States Constitution. *See* Compl. ¶¶ 53-58, 60-66. The Prayer for Relief seeks a declaration that the actions of the President in issuing the Permit violated the Property Clause, the Commerce Clause, and EO 13,337. Prayer for Relief, ¶¶ 1-5.

Although Plaintiffs do not challenge any actions taken by the Department of State, the Army Corps of Engineers, the United States Fish and Wildlife Service,

or the United States Bureau of Land Management, Plaintiffs have named as defendants those agencies and certain of their officials. *See* Compl. ¶ 11. And Plaintiffs asks this Court to enjoin *all* defendants from initiating any activities in furtherance of the pipeline that could result in any change the physical environment. *Id.* at 25-26.

MOTION TO DISMISS STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a complaint may be dismissed for lack of subject matter jurisdiction. The plaintiff bears the burden of proving the existence of the court's subject matter jurisdiction. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). When considering jurisdictional challenges, no presumption of truthfulness attaches to the plaintiff's allegations. *Id.* The district court "has authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings." *Land v. Dollar*, 330 U.S. 731, 735 (1947).

In contrast, "[d]ismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (citation omitted)). A court evaluates Rule 12(b)(6) motions to dismiss under the familiar standards articulated in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

ARGUMENT

I. Plaintiffs' Failure to Demonstrate Standing Deprives this Court of Jurisdiction.

Plaintiffs' Complaint should be dismissed for lack of standing. It is particularly telling that in order for Plaintiffs to allege any injury in this case, they are forced to exaggerate what the challenged Permit actually does—assuming that the Permit authorizes "construction and operation of the Project" over its entire 875-mile length without any additional agency approvals. *See* Compl. ¶¶ 5-10. That is because Plaintiffs cannot allege any plausible injury from the part of the pipeline actually covered by the Permit—the 1.2 mile section of pipeline at the border crossing. Instead, they vaguely assert that they have members who have and intend to engage in activities on lands and waters "within and adjacent to the proposed route of the Project," Compl. ¶ 18; *see id.* ¶ 19, which they have defined as "an 875-mile long pipeline and related facilities," *id.* ¶ 1. But the Permit does not authorize an 875-mile long pipeline. It authorizes a border crossing within the first 1.2 miles of the pipeline. The injuries Plaintiffs allege relate entirely to other areas along the pipeline route—not the border segment. And even for those injuries that they do allege—injuries that may arise from a future federal right-of-way approval, which may someday allow the pipeline to be built in areas that may affect their interests—they fail to demonstrate that such injury is imminent. Nor could they, because multiple federal approvals, as well as state approvals, remain

before the pipeline can be constructed. They have also failed to show that any alleged injury could be redressed by an order of this Court because injunctive relief is unavailable against the President.

To demonstrate standing to sue, a plaintiff must show: (1) "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). Where, as here, standing is addressed at the pleading stage, "the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (alteration in original) (citation omitted). Plaintiffs failed to do so here and the complaint should be dismissed.

A. *Plaintiffs fail to demonstrate injury in fact.*

Plaintiffs' standing analysis fails at the threshold: they do not allege imminent, concrete, and particularized harm to their members. Rather, in three barebones paragraphs, they vaguely sketch out broad categories of potential future injuries to their members that they believe will result—not from the Permit itself—but should the entire pipeline be built and become operational. *See* Compl. ¶¶ 18-20. Plaintiffs' "'threatened injury must be certainly impending to constitute injury

in fact,'" and "[a]llegations of possible future injury are not sufficient.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted); *Coons v. Lew*, 762 F.3d 891, 898 (9th Cir. 2014).

Plaintiffs do not attempt to show that there is any concrete and particularized injury from the Permit. Plaintiffs fail to tether any of their alleged harms to the portion of the proposed pipeline at the border crossing, which is the only area of the proposed route the Permit authorizes. *See* Compl. ¶ ¶ 18, 19 (alleging only that Plaintiffs' members have engaged in activities "within and adjacent to the proposed route of the Project").[2] It is not enough that Plaintiffs' members reside somewhere in the states along the "proposed route of the Project," or that they may use resources impacted somewhere by the 875-mile long pipeline. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 887-89 (1990) ("bare allegation of injury" that plaintiff used land "in the vicinity" of the action failed to show standing) (citation omitted). They must allege a concrete and particularized harm for the area covered by the Permit—the one-mile stretch at the border between the United States and Canada. *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009). And it is not enough to complain about harms from the entire pipeline route when it is neither

[2] Even for the 1.2 mile section of the pipeline actually addressed by the border crossing permit, TC Energy must apply for a right-of-way from BLM for the "portion of the border crossing facilities," Compl. ¶ 3, on BLM-managed lands. So even for that 1.2 mile portion, any supposed injury to Plaintiffs would result from the BLM's later right-of-way grant, not the issuance of the Permit challenged here.

authorized by the Permit nor by any of the Agency Defendants. *See id.* Vague allegations about hypothetical harms arising from the possible "construction and operation" of "the balance of the 875-mile-long" pipeline sometime down the road after additional approvals do not demonstrate a legally-cognizable injury.

Moreover, none of the complained of proposed activities—let alone any injuries that might result—meet *Clapper*'s "certainly impending" requirement. Citing general concerns about pollution and oil spills, Plaintiffs fail to allege that any of their injuries are "certainly impending," but rather allege that the Project—in the future, after later approvals of other parts of the pipeline—might impair their enjoyment of the lands adjacent to the 875-mile pipeline route. Compl. ¶¶ 19-29. The Permit itself authorizes barely over 1/10th of 1% of that route. There are several predicate steps that must occur before "the Project's other 875 miles," Compl. ¶ 5, could become operational. TC Energy cannot construct and operate the "balance of the 875-mile-long project" until applicable federal agencies have completed their environmental review and permitting processes regarding certain aspects of the pipeline, which could result either in the pipeline not being built or in the modification of the pipeline in ways that might conceivably *avoid or decrease the likelihood of* any injuries alleged in the complaint. Among the predicate steps is BLM's approval of TC Energy's application for a right-of-way grant—in compliance with the National Environmental Policy Act ("NEPA") and

other applicable statutes—where the pipeline traverses federal lands (including most of the 1.2 mile portion covered by the Permit). *See, e.g., Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 654 (9th Cir. 2017) (noting that the Supreme Court has been "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment") (quoting and citing *Clapper*, 568 U.S. at 413). Under these circumstances, the Plaintiffs cannot plausibly allege an *imminent* injury in fact. *Chapman v. Pier 1 Imps. (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011).

B. *Plaintiffs' claims against the President are not redressable.*

Plaintiffs' requested equitable relief against the President fails because they have not—and cannot—establish that declaratory and injunctive relief would redress their injuries, or that the Court is likely to award such relief in violation of governing separation of powers principles. It would be improper to grant equitable relief against the President here. *See, e.g., See Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) (noting that injunction against the President would present separation of powers problems, and that "similar considerations regarding a court's power to issue relief against the President himself apply to [the plaintiff's] request for a declaratory judgment"); *Newdow v. Bush*, 391 F. Supp. 2d 95, 106-07 (D.D.C. 2005) (dismissing suit to enjoin President because court was "without the authority" to enter declaratory or injunctive relief against the President). By

seeking a declaration that the President's actions have "no legal force and effect," Prayer for Relief, ¶¶ 1-3, Plaintiffs are asking the Court to render ineffective the President's exercise of his foreign affairs and Commander-in-Chief powers. Plaintiffs' request thus raises precisely the separation of powers concerns that animated courts to insulate the President from equitable relief. *See Swan*, 100 F.3d at 976. Even if Plaintiffs could point to some injury in fact from the border Permit, their injuries could not be redressable by the injunctive or declaratory remedies they seek against the President. Plaintiffs' claims against the President are thus doubly defective and should be dismissed.

II. The Challenges to Actions by the Agency Defendants Should Be Dismissed For Lack of Final Agency Action and Ripeness.

Neither of Plaintiffs' claims actually challenge any action taken by the Agency Defendants. That alone is reason enough to dismiss them from this case. While Plaintiffs' reasons for including the Agency Defendants in this suit are not entirely clear, they seem to be implying that the Agency Defendants should have taken some action *before* the President issued the permit. But as discussed, any such claims against the agencies are premature. Nothing in the border crossing Permit purports to relieve the Agency Defendants of any legal obligation. To the contrary, the Permit expressly requires TC Energy and federal agencies to act "consistent with applicable law." Permit, art. 1(2); *see also id.* at art. 6(1). Plaintiffs' inclusion of the Agency Defendants should therefore be dismissed for

lack of final agency action and ripeness.

The statutes that Plaintiffs claim have been violated do not provide a private right of action. *See, e.g.*, *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 950 (9th Cir. 2006) (NEPA provides no right of action); *see also Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015) (the Supremacy Clause does not provide a right of action). Therefore, Plaintiffs' claims against the agencies may proceed only in accordance with the APA, 5 U.S.C. §§ 701-706. *See Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017). Section 702 of the APA provides a right of action for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute[.]" 5 U.S.C. § 702. It also provides a waiver of sovereign immunity for such actions. *Id.* In order to bring suit under the APA, however, a person must challenge an "[a]gency action made reviewable by statute and final agency action for which there [otherwise] is no adequate remedy in a court[.]" 5 U.S.C. § 704. Thus, in order to assert claims arising from a statute against an agency under the APA, a party must challenge "agency action" within the meaning of the APA and that action must be a "final agency action." *Lujan*, at 882-83 (1990); *Navajo Nation*, 876 F.3d at 1170-72.

Plaintiffs' complaint refers to State, the Corps, FWS, and BLM, but it makes

no specific factual claims about final agency action taken by any Agency Defendant. *See* Compl. at ¶¶ 4, 54-57. The Complaint acknowledges that the Agency Defendants have taken no final action regarding the Keystone XL Pipeline. Compl. ¶¶ 64-66. Because no final action has been made and no Agency Defendant has authorized any action related to the Project, the claims against the Agency Defendants should be dismissed for lack of a final agency action. *See Rattlesnake Coal.*, 509 F.3d 1095, 1104 (9th Cir. 2007) (finding no jurisdiction to review NEPA claim absent a final agency action).

Further, because no Agency Defendant has taken final action related to the Project, the claims against them are not ripe. A case is not "'ripe' for judicial review under the APA until some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan*, 497 U.S. at 891. Here, because no Agency Defendant has issued a permit, right-of-way, or approval for the Project, Plaintiffs' claims against those agencies are not ripe.

In a case brought by these Plaintiffs, *Indigenous Environmental Network*, the Court found that the claim against BLM was not ripe because BLM had not yet acted regarding the right-of-way and therefore dismissed the claim without prejudice. *See* Order at 2, *Indigenous Envtl. Network v. U.S. Dept. of State*, CV-17-29-GF-BMM (Nov. 15, 2018) (ECF NO. 219). The same is true here, and the

claims against the Agency Defendants should be dismissed without prejudice.

III. Plaintiffs Fail to Raise a Viable Constitutional Challenge to the Permit.

To the extent the Court determines it has Article III jurisdiction over Plaintiffs' constitutional claims, it should dismiss those claims pursuant to Rule 12(b)(6). Plaintiffs' two constitutional claims fail at the threshold because they depend on a cramped view of Executive power that is contrary to historical practice and precedent. It is well established that the President's Article II power encompasses the authority to control border crossings into the United States. For close to 150 years, Presidents have exercised authority over a wide range of physical connections between the United States and foreign countries pursuant to the President's powers over foreign affairs and as Commander in Chief. Unlike in other areas where the Executive Branch receives its authority from laws enacted by Congress, the President has never required a grant of authority from Congress to control border crossings. And Congress has not disputed this.

Plaintiffs' constitutional claims also fail because neither the Property Clause nor the Commerce Clause explicitly constrain Presidential authority in the manner advanced by Plaintiffs. If they did, the President would not have acted otherwise for more than a century with Congress's acquiesce. Even assuming that Congress *could* use its Property or Commerce Clause powers to constrain the President's independent authority over foreign affairs, it has not done so. There is

no evidence that Congress intended any of the statutes cited by Plaintiffs, *see, e.g.* Compl. ¶ 65, to constrain the *President's* foreign affairs power, which is why courts have routinely held that the APA, for example, doesn't apply to the President. Lastly, Plaintiffs' argument that President is bound by previous EOs is legally baseless.

A. *The Issuance of a Presidential Permit is Within the Scope of Executive Power.*

Plaintiffs' challenge to the Permit turns on their view of Presidential power—and it is an exceedingly crabbed view unrecognizable in either historical practice or legal precedent. A long line of cases confirms that the President possesses inherent constitutional authority to approve cross-border permits—an authority that Congress has not challenged in connection with Keystone XL. Justice Jackson's three-part test from his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, provides the general framework for assessing a challenge to the exercise of Presidential power. 343 U.S. 579, 635-38 (1952) (Jackson, J. concurring). *See, e.g., Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015). First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635. Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is

a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id*. at 637. In this area, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." *Id*. And, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id*. Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." *Id*. at 637-38.

The Supreme Court has cautioned that while the *Youngstown* categories provide a useful analytical framework for evaluating executive action, "it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981); *see also id*. ("'[t]he great ordinances of the Constitution do not establish and divide fields of black and white'") (quoting *Springer v. Philippine Island*, 277 U.S. 189, 209 (1928) (Holmes, J. dissenting))

Along this spectrum, this case falls safely within the first or second *Youngstown* categories for several reasons. First, the President was acting pursuant to his independent constitutional authority. Second, Congress has long accepted the Presidential authority over border crossing facilities. And third, a long line of precedent affirms the President's powers.

i. The President Has Broad Executive Powers.

The President's authority to issue the permit is rooted in his powers over foreign affairs and as Commander-in-Chief. The President possesses inherent constitutional responsibility for foreign affairs. *See, e.g., Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander–in–Chief and as the Nation's organ in foreign affairs"); *Youngstown*, 343 U.S. at 635–636, n. 2 (Jackson, J., concurring) (the President can "act in external affairs without congressional authority") (citing *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304 (1936); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations,'") (quoting *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring). Thus, the "President's power in the field of international relations "does not require as a basis for its exercise an act of

Congress." *Curtiss–Wright Export Corp.*, 299 U.S. at 320; *Youngstown*, 343 U.S. at 635-36, n. 2 (the President can "act in external affairs without congressional authority").

A natural corollary of the President's foreign affairs powers is the authority to permit international border crossings. Formal opinions by the Attorney General for more than one hundred years have recognized the President's independent permitting authority at the international border. *See infra* at 26. And "there is no statute that curtails or otherwise governs the President's discretion to issue presidential permits." *Nat. Res. Def. Council, Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 112 (D.D.C. 2009) ("Defendants have amply documented the long history of Presidents exercising their inherent foreign affairs power to issue cross-border permits, even in the absence of any congressional authorization.").

ii. For Over a Century, Congress Has Never Disputed the Executive's Assertion of Authority Over Cross-Border Permits.

Congress has acquiesced to this long-standing practice by not legislating in this area. In the nearly one and a half centuries of executive exercise of authority over a wide range of cross-border facilities, Congress has never questioned or sought to cabin the President's authority. Instead, it has either explicitly affirmed the Executive's authority over specific types of border crossing facilities or has remained silent and thereby accepted that authority. *Kaplan v. Corcoran*, 545 F.2d

1073, 1077 (1976) ("Since the promulgation of Executive Order 10096 on January 23, 1950, there has been Congressional acquiescence in the order by the failure of Congress to modify or disapprove it."). As the Supreme Court has said, "[g]iven the President's independent authority 'in the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval.'" *Garamendi*, 539 U.S. at 429 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)).)

The President's claim of authority over border crossing facilities thus falls within the first *Youngstown* category, where the President has acted pursuant to his own independent powers *and* with the express or implied authorization of Congress. Even if it did not, the most that could be said is that the President's border crossing authority falls within the second *Youngstown* "zone of twilight" category, where the concurrent and unspecified distribution of powers between the Executive and Congress has been ratified in favor of the President's exercise through longstanding practice and congressional acquiescence. *See Youngstown*, 343 U.S. at 635, 637. Either way, Plaintiffs' claim the President lacked authority to issue the border crossing Permit challenged in this case cannot be taken seriously.

iii. A Long Line of Precedent Confirms the Executive's Power to Issue the Permit.

Courts have universally recognized the President's powers to issue cross-border permits. In *Sierra Club v. Clinton*, plaintiffs challenged a pipeline border crossing permit and the district court concluded that it is "well recognized" that "the President's authority to issue" border crossing permits "comes by way of his constitutional authority over foreign affairs and authority as Commander in Chief." 689 F. Supp. 2d at 1162–63. The court also emphasized that "Congress has not attempted to exercise any exclusive authority over the permitting process" despite the many permits issued by past Presidents—that "inaction suggests that Congress has accepted the authority of the President to issue cross-border permits." *Id*. The *Sierra Club* decision followed two district court decisions likewise affirming the President's authority to issue cross-border permit in connection with earlier iterations of the Keystone Pipeline. *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1078 (D.S.D. 2009) (noting that, even if the permit were set aside, "the President would still be free to issue the permit again under his inherent Constitutional authority to conduct foreign policy on behalf of the nation."); *Natural Res. Def. Council*, 658 F. Supp. 2d at 109 (same). Plaintiffs' allegations that the President lacked authority to issue the Permit is squarely at odds with this established precedent recognizing the President's inherent constitutional authority to do so.

B. Plaintiffs' Property Clause Claim Lacks Merit.

Plaintiffs assert that the President lacks authority to issue the permit because the Property Clause of the Constitution only vests Congress with the power to regulate and dispose of federal lands, and the Permit authorizes construction of pipeline facilities on land that Congress has directed BLM to manage, but without BLM approval. Compl. ¶¶ 52-58. This claim fails for at least two reasons.

First, as a threshold legal matter, the Complaint's focus on the Property Clause and BLM-managed lands elides what the permit actually authorizes: an international border crossing, not the "balance of the 875-mile-long Project." Compl. ¶ 4. The executive action before this Court is a cross border permit, not a right-of-way on domestic lands or other agency authorization to allow the proposed pipeline to cross federal lands. And the Property Clause does not somehow nullify the President's well-established foreign affairs power. *Kansas v Colorado*, 206 U.S. 46, 89 (1906) (addressing *Article IV Section 3*: "Primarily . . . it is a grant of power to the United States of control over its property.).

Second, if Plaintiffs' argument is that the Permit improperly supersedes or otherwise overrides BLM's permitting process, Compl. ¶¶ 55-57, that is simply inaccurate. The Permit is explicit that it does not supplant other necessary authorizations, noting that "the permittee is responsible for acquiring any right-of-way grants or easements, permits, and other authorizations as may become

necessary or appropriate." Permit, Art. 6(1). The permit thus does not relieve TC Energy of the duty to acquire "right-of-way grants or easements, permits and other authorizations" required by law. *See* Permit, Art. 6(1). TC Energy would still need to obtain the requisite authorizations from BLM for the parts of the pipeline that traverse BLM-managed lands, including a right-of-way over the federally owned land within the 1.2 mile stretch covered by the border crossing Permit. And before it authorizes any activities on the land it manages, BLM would have to assure itself that it complies with the Federal Land Policy and Management Act ("FLPMA"), NEPA and the Endangered Species Act ("ESA"), among other statutes, where applicable. Compl. ¶ 54. Plaintiffs have no basis for contending that the Permit improperly displaces BLM's regulatory authority or otherwise violates any relevant land management statutes.

C. The Commerce Clause Neither Prohibits nor Conflicts with the Permit.

Plaintiffs also contend that the President lacks authority to issue the Permit, and that doing so infringed on Congress's authority under the Commerce Clause, because it was issued without compliance with various environmental and other statutes that Congress has made applicable to agency action. Here again, Plaintiffs are forced to grossly exaggerate what the Permit actually does in order to attack it. The Permit is an authorization to cross the international border; it does not exempt TC Energy or federal agencies from complying with federal statutes relevant to

other parts of the 875-mile-long pipeline. The Permit is explicit that the permittee must acquire all necessary authorizations. Permit, Art. 6(1). Therefore, the Permit neither conflicts with any laws enacted by Congress" pursuant to its Commerce Clause authority nor otherwise arrogates that authority. *See* Compl. ¶ 61.

To the extent Plaintiffs contend that the President's authorization of a border crossing itself infringes on Congress's authority under the Commerce Clause, this too is incorrect because, as discussed above, the President does not need legislation to act in this area. Indeed, Plaintiffs assume that Presidents did not previously secure border crossings. *Id.* This is historically inaccurate. The President first authorized border crossings because foreign countries and entities were undertaking cross-border projects without securing permission from the United States. The President's exercise of independent authority, in the absence of Congressional action, is not only allowed but required to protect our territorial integrity. 22 Op. Att'y Gen. at 514-15 ("The preservation of our territorial integrity and the protection of our foreign interest is entrusted, in the first instance, to the President.").

Plaintiffs' argument that the President's issuance of the Permit runs afoul of "federal environmental and procedural laws . . . including FLPMA, NEPA, the ESA, the CWA and the APA" is also baseless because these laws explicitly do not

apply to the President[3] and there is no viable waiver of sovereign immunity that would allow judicial review of the President's issuance of the Permit. Compl. ¶ 65. While the APA provides a general right of action that enables aggrieved persons to seek judicial review of agency action under NEPA and FLPMA, the President's actions are not subject to review under the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (holding that, because "the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements"); *Dalton v. Specter*, 511 U.S. 462, 470 (1994) ("actions of the President . . . are not reviewable under the APA").

Similarly, although the ESA and CWA citizen suits provisions provide a waiver of sovereign immunity for persons seeking to enforce the terms of those acts, 16 U.S.C. § 1540(g)(1)(A), 33 U.S.C. §§ 1365(a), (g), those waivers must be narrowly construed, *see Department of Army v. Blue Fox Inc.*, 525 U.S. 255, 261 (1988), and in this case neither statute explicitly waives sovereign immunity for suits against the President. *See Franklin*, 505 U.S. at 800 ("textual silence is not enough to subject the President").

Nor can Plaintiffs leverage the APA to require the President to provide a "reasoned explanation" for "his abrupt reversal of former Secretary of State John

[3] NEPA applies to "agencies of the Federal Government," 42 U.S.C. §§ 4332, 4333, and NEPA's regulations define the term "Federal agency" to exclude "the President." 40 C.F.R. § 1508.12.

Kerry's" denial of a border crossing permit. Compl. ¶ 62. The APA requires that *federal agencies* provide a reasoned explanation when they reverse position, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), but the President is not a federal agency and, as discussed above, the APA does not apply to his actions. *See supra*. Rather, the Executive's policy choices are "beyond the competence of the courts to adjudicate." *Dalton*, 511 U.S. at 475-76; *cf id.* at 476 ("How the President chooses to exercise the discretion Congress has granted him is not a matter for our review"). Presidents routinely reverse the policies of their predecessors without having to provide a "reasoned explanation." "[T]he very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Air Lines v. Waterman S.S. Corp*., 333 U.S. 103, 111 (1948).

Finally, there are also no credible grounds for Plaintiffs' contention that EO 13,337 binds the President's discretion. An EO cannot plausibly constrain the President because it can be "withdrawn [by the President] at any time for any or no reason." *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965). The President's broad authority to revisit, reverse, and undo prior decisions of the Executive Branch is inherent in the powers of the office vested by

the Constitution. U.S. Const. art. II, § 1, cl. 1; *id.*, § 3 (the President "shall take Care that the Laws be faithfully executed."). The President's authority to undo or modify prior Executive decisions is intrinsic in the executive power because the President is politically accountable for executing the laws. *Free Enter. Fund v. Public Co. Accounting Bd.*, 561 U.S. 477, 513 (2010). Thus Plaintiffs' attempts to enforce provisions of EO 13,337 against the President are without merit.

CONCLUSION

For the reasons stated herein, this Court should dismiss this suit pursuant to Rules 12(b)(1) and 12(b)(6).

Respectfully submitted this 27th day of June, 2019,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 6,481 words, excluding the tables, caption, signature, certificate of compliance, and certificate of service.

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019, a copy of the foregoing Defendants' Unopposed Motion for an Extension of Time to Respond to Plaintiffs' Complaint was served on all counsel of record via the Court's CM/ECF system.

/s/ Marissa A. Piropato
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