MARK STEGER SMITH
Assistant U.S. Attorney
U.S. Attorney's Office
2601 Second Avenue North, Suite 3200
Billings, MT 59101
Ph: (406) 247-4667; Fax: (406) 657-6058
mark.smith3@usdoj.gov

LAWRENCE J. VANDYKE
Deputy Assistant Attorney General

MARISSA A. PIROPATO (MA BAR 65160)
LUTHER L. HAJEK (CO Bar 44303)
United States Department of Justice
Environment and Natural Resources Division
999 18th St., South Terrace, Suite 370
Denver, CO 80202
Ph: (303) 844-1376; Fax: (303) 844-1350
marissa.piropato@usdoj.gov
luke.hajek@usdoj.gov

Attorneys for Federal Defendants

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' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

I. The Issuance of Presidential Permits 3

II. The 2017 Presidential Permit for the Keystone XL Pipeline and the Ensuing Litigation 4

III. The President's Issuance of the Presidential Permit for the Keystone XL Pipeline in March 2019 5

IV. New Complaint 6

STANDARD FOR OBTAINING A PRELIMINARY INJUNCTION 7

ARGUMENT 8

I. Plaintiffs Are Not Likely to Succeed on the Merits of Their Claims. 8

A. Plaintiffs Have Failed to Demonstrate Standing. 8

B. Plaintiffs Fail to Raise a Viable Constitutional Challenge to the Permit. 13

1. The Issuance of Presidential Permits is Within the Scope of Executive Power. 13

a. The President has broad executive powers. 15

b. For over a century, Congress has never disputed the Executive's assertion of authority over cross-border permits 17

c. A Long Line of Precedent Confirms the Executive's Power to Issue the Permit 18

2. Plaintiffs' Property Clause Claim Lacks Merit 19

3. The Commerce Clause Neither Prohibits nor Conflicts with the Permit 20

4. The Commerce Clause Neither Prohibits nor Conflicts with the Permit 21

II. Plaintiffs Have Failed to Demonstrate Irreparable Harm from the Issuance of the Permit. 25

III. The Balance of the Harms and the Public Interest Weigh Against an Injunction. 30

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Am. Ins. Ass'n v. Garamendi,
539 U.S. 396 (2003) 16, 17

Amoco Prod. Co. v. Village of Gambell,
480 U.S. 531 (1987) 28, 29

Chai v. Carroll,
48 F.3d 1331 (4th Cir. 1995) 23

Chapman v. Pier 1 Imps. (U.S.) Inc.,
631 F.3d 939 (9th Cir. 2011) 12

Cheyenne Tribe v. Hodel,
851 F.2d 1152 (9th Cir. 1988) 29

Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.,
333 U.S. 103 (1948) 15, 25

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 9, 10, 11

Colorado Wild, Inc. v. U.S. Forest Service,
523 F. Supp. 2d 1213 (D. Colo. 2007) 30

Coons v. Lew,
762 F.3d 891 (9th Cir. 2014) 10

Dalton v. Specter,
511 U.S. 462 (1994) 25

Dames & Moore v. Regan,
453 U.S. 654 (1981) 15

Drakes Bay Oyster Co. v. Jewell,
747 F.3d 1073 (9th Cir. 2014) 30

Facchiano Constr. Co. v. U.S. Dep't of Labor,
987 F.2d 206 (3d Cir. 1993) 23

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 24

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
561 U.S. 477 (2010) 22, 23

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 9

Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy,
383 F.3d 1082 (9th Cir. 2004) 24, 30, 31

Haig v. Agee,
453 U.S. 280 (1981) 17

High Sierra Hikers Ass'n v. Blackwell,
390 F.3d 630 (9th Cir. 2004) 27

Indep. Meat Packers Ass'n v. Butz,
526 F.2d 228 (8th Cir. 1975) 23

Kansas v Colorado,
206 U.S. 46 (1907) 19, 20, 21

Kaplan v. Corcoran,
545 F.2d 1073 (1976) 17

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990) 10

Manhattan-Bronx Postal Union v. Gronouski,
350 F.2d 451 (D.C. Cir. 1965) 22

Massachusetts v. Watt,
716 F.2d 946 (1st Cir. 1983) 29

Mazurek v. Armstrong,
520 U.S. 968 (1997) 7

Michigan v. Thomas,
805 F.2d 176 (6th Cir. 1986) 23

Missouri ex rel. Koster v. Harris,
847 F.3d 646 (9th Cir. 2017) 11

Muckleshoot Tribe v. Lummi Indian Tribe,
141 F.3d 1355 (9th Cir. 1998) 10

Munaf v. Geren,
553 U.S. 674 (2008) 7

Newdow v. Bush,
391 F. Supp. 2d 95 (D.D.C. 2005) 12

Pit River Tribe v. U.S. Forest Service,
615 F.3d 1069 (9th Cir. 2010)....................28

Save Our Sonoran, Inc. v. Flowers,
408 F.3d 1113 (9th Cir. 2005)....................28

Sierra Club v. Clinton,
689 F. Supp. 2d 1147 (D. Minn. 2010) 18

Sierra Club v. Marsh,
872 F.2d 497 (1st Cir. 1989) 30

Sisseton-Wahpeton Oyate v. U.S. Dep't of State,
659 F. Supp. 2d 1071 (D.S.D. 2009)....................18

Springer v. Philippine Island,
277 U.S. 189 (1928) 15

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 9, 10

Swan v. Clinton,
100 F.3d 973 (D.C. Cir. 1996) 12

the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011).................... 8, 31

U.S. Dep't of State,
347 F. Supp. 3d 561 (D. Mont. 2018) 5

U.S. Dep't of State,
369 F. Supp. 3d 1045 (D. Mont. 2018) 5

U.S. Dep't of State,
No. 18-36068, 2019 WL 2542756 (9th Cir. June 6, 2019) 6

U.S. Dep't of State,
No. CV-17-29-GF-BMM, 2017 WL 5632435 (D. Mont. Nov. 22, 2017)....................5

U.S. Dep't of State,
No. CV-17-29-GF-BMM, 2019 WL 652416 (D. Mont. Feb. 15, 2019)....................30

U.S. Dep't of State,
658 F. Supp. 2d 105 (D.D.C. 2009) 16, 19

United States v. Curtiss–Wright Export Corp.,
299 U.S. 304 (1936) 15, 16

Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008) 7, 8, 11, 25, 27, 29

Wireless Telegraphy – Int'l Agreement,
24 Op. Att'y Gen. 100 (1902) 3

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 13, 14, 15, 16, 18

Zivotofsky v. Kerry,
135 S. Ct. 2076 (2015) 14

Constitutions

U.S. Const. art. II 22

Statutes

National Environmental Policy Act,
42 U.S.C. § 4332 24

Regulations

40 C.F.R. § 1508.12 24

Executive Orders

Exec Order No. 11,423,
33 Fed. Reg. 11,741 (Aug. 16, 1968) 4

Exec. Order No. 10096,
15 Fed. Reg 389 (Jan. 23,1950)...17

Exec. Order No. 13,337,
69 Fed. Reg. 25,299 (Apr. 30, 2004)....................................... 4, 6, 21, 22, 23, 25

Exec. Order No. 13,687,
80 Fed. Reg. 819 (Jan. 6, 2015)..23

Federal Register

84 Fed. Reg. 13,101, 13101 (Mar. 29, 2019)..5

Opinions of the Attorney General

Cuba – Cables, 22,
Op. Att'y Gen. 514 (1899) 4

Gas Pipeline, 38,
Op. Att'y Gen. 163 (1935) 3

Foreign Cables,
22 Op. Att'y Gen. 13 (1898) 21

Niagara River, 30,
Op. Att'y Gen. 217 (1913) 3

Other Authorities

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)…………………………3

Hackworth, *Digest of International Law*, Vol. IV, § 350 (1942)…………………..3

INTRODUCTION

On March 29, 2019, the President of the United States personally issued a Permit allowing the Keystone XL Pipeline to cross the border from Canada into the United States. Within a week, Plaintiffs challenged it. But they waited over a month after the Ninth Circuit vacated this Court's earlier preliminary injunction to bring this motion for a new one. This new motion seeking extraordinary relief on an exigent basis against the President seeks such relief based on action that is very different than what was at issue in the Plaintiffs' prior motion for injunctive relief against the State Department. Plaintiffs' motion should be denied because the President's authority to issue a border-crossing permit is well-established, as evidenced by multiple Presidents' exercise of such authority over a lengthy span of nearly 150 years. Most fundamentally, Plaintiffs cannot plausibly argue any injury (let alone irreparable injury) from the issuance of a *border-crossing* Permit, which authorizes only facilities at the border of the United States—facilities that cannot be built until additional government permits are secured. In sum, Plaintiffs' new motion fails for three reasons.

First, Plaintiffs have failed to demonstrate standing to challenge the Permit authorizing the construction of border facilities. Instead, Plaintiffs allege harms that would occur along the 875-mile pipeline route after TC Energy obtains all necessary federal authorizations and the pipeline has been constructed. Such

alleged harms are insufficient to show standing because the Permit does not authorize the construction of the entire pipeline. Rather, it authorizes the construction of facilities in a 1.2-mile segment at the border of the United States. And even for that small segment of the pipeline, because most of it is on U.S. Bureau of Land Management ("BLM") land, approval of a right-of-way permit by BLM is still required before the facilities can be built in the 1.2-mile segment. Plaintiffs thus cannot show any injury resulting from the border-crossing Permit.

Second, Plaintiffs are not likely to succeed on the merits of their constitutional claims against the Permit because those claims are baseless. Ever since President Grant authorized the landing of a telegraph cable on the shores of the United States in 1875, Presidents have authorized border crossings for a variety of facilities. For some types of border crossings, Congress has enacted its own requirements, but it has never done so for oil pipelines. Nor has it ever questioned the President's authority to approve a border crossing. Thus, the purported conflict with Congress's authority that Plaintiffs allege simply does not exist. Likewise, there is no conflict with BLM's authority because the construction of facilities at the border is contingent upon BLM issuing a right-of-way to cross federal public land in the border area.

Finally, Plaintiffs fail to demonstrate irreparable harm caused by the border crossing. They seek an injunction for pipeline-related activities along the pipeline

route, but those activities are far from the border segment and were not authorized by the Permit.

The preliminary injunction should be denied.

BACKGROUND

I. The Issuance of Presidential Permits

The authority previously delegated to the Secretary of State to issue permits for various border-crossing facilities, including pipelines, derives wholly from the President's independent constitutional authority over foreign affairs and his authority over national security. For well over a century, Presidents have exercised that inherent authority to authorize border crossing facilities without any Congressional action. *See* Hackworth, *Digest of International Law*, Vol. IV, § 350, at 247-56 (1942) (ECF No. 23-1); 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) (ECF No. 23-2); *see also*, *e.g.*, Granting of License for the Constr. of a Gas Pipeline, 38 Op. Att'y Gen. 163 (1935); Diversion of Water from Niagara River, 30 Op. Att'y Gen. 217 (1913); Wireless Telegraphy – Int'l Agreement, 24 Op. Att'y Gen. 100 (1902); Cuba – Cables, 22 Op. Att'y Gen. 514 (1899). Long before they delegated their permitting authority to executive branch officials, Presidents personally signed and issued permits for border crossing facilities

themselves. *See* Whiteman, *Digest of International Law*, Vol. 9, at 917-21 (1968) (ECF No. 23-3). This practice continued through the 1960s.

In 1968, President Lyndon B. Johnson delegated the President's inherent constitutional authority to issue permits for certain types of border crossing facilities, including oil pipelines, to the Secretary of State. *See* Exec Order No. 11,423 § 1(a), 33 Fed. Reg. 11,741 (Aug. 16, 1968). In 2004, President George W. Bush revised the process for issuing presidential permits for cross-border pipelines for oil or other fuels. Exec. Order No. 13,337 § 1(a), 69 Fed. Reg. 25,299 (Apr. 30, 2004).

Recently, President Trump withdrew the delegation to agency heads to approve the construction, operation, and maintenance of infrastructure projects, including pipeline facilities, at the international border. *See* Exec. Order No. 13,867 §§ 1, 2(k), 84 Fed. Reg. 15,491 (Apr. 10, 2019).

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 then-delegated to the Secretary of State in Executive Order 13,337, the Under-Secretary of State for Political Affairs issued the 2017 Permit, authorizing the construction and operation of pipeline facilities at the United States border with Canada. Defendants moved to dismiss challenges to the permit in this Court on the basis that the issuance of the 2017 Permit was a Presidential action and therefore

not reviewable under the Administrative Procedure Act ("APA"). The Court denied the motion, finding that the issuance of the permit was agency action, not Presidential action. *See IEN v. U.S. Dep't of State*, No. CV-17-29-GF-BMM, 2017 WL 5632435, at *6 (D. Mont. Nov. 22, 2017).

Subsequently, the Court granted summary judgment to Plaintiffs on some of their claims, vacated the Under Secretary's decision to issue the 2017 Permit, and enjoined the government and TC Energy (previously known as TransCanada) from taking any actions in furtherance of the construction of the pipeline. *See IEN v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 590-91 (D. Mont. 2018) (ECF No. 218). The Court later clarified its injunction order to allow TC Energy to undertake certain work in preparation for the construction of the pipeline, but it allowed only activities that would not cause environmental impacts. *See* Suppl. Order Regarding Permanent Inj., *IEN v. U.S. Dep't of State*, 369 F. Supp. 3d 1045, 1052-53 (D. Mont. 2018).

III. The President's Issuance of the Presidential Permit for the Keystone XL Pipeline in March 2019

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* Memorandum, Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 84 Fed. Reg. 13,101, (Mar. 29, 2019) ("Permit").

The President issued the Permit pursuant to the "authority vested in [the President] as President of the United States of America." *Id.* The President issued the permit "notwithstanding Executive Order 13337 of April 30, 2004 . . . and the Presidential Memorandum of January 24, 2017." *Id.* The Permit authorizes the 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.* The Permit specifically requires that the approved "Facilities" be built "consistent with applicable law," *id.* art. 1(2), and that TransCanada is required to acquire "any right-of-way grants or easements, permits, and other authorizations" necessary to build the border-crossing facility, *id.* art. 6(1).

In light of the new Permit, on June 6, 2019, the Ninth Circuit granted the Defendants' and TC Energy's motions and vacated the district court's judgments, dissolved the injunction, and remanded with instructions to dismiss the cases as moot. *See IEN v. U.S. Dep't of State*, No. 18-36068, 2019 WL 2542756 (9th Cir. June 6, 2019).

IV. New Complaint

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[1] 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. Plaintiffs also name the State Department, BLM, U.S. Army Corps of Engineers, and U.S. Fish and Wildlife Service as Defendants, but do not specifically allege any legal violations by those agencies. *See* Compl. ¶ 11.

STANDARD FOR OBTAINING A PRELIMINARY INJUNCTION

A preliminary injunction is "an extraordinary and drastic remedy" that "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). To obtain a preliminary injunction, a plaintiff must demonstrate four elements: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of an injunction, (3) that the balance of equities tips in its favor, and (4) that the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A party *must* demonstrate a "'likelihood of success on the merits'" in order to obtain a preliminary injunction. *Munaf v. Geren*, 553 U.S. 674, 690 (2008). Furthermore, a party seeking preliminary injunctive relief must "demonstrate that irreparable injury is *likely* in the absence of an injunction."

[1] On July 18, 2019, Plaintiffs filed a First Amended Complaint, ECF No. 37.

Winter, 555 U.S. at 22 (rejecting a "possibility" of irreparable harm standard). The Ninth Circuit has held that, notwithstanding the *Winter* decision, a preliminary injunction may issue if the plaintiffs can show "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).[2]

ARGUMENT

I. Plaintiffs Are Not Likely to Succeed on the Merits of Their Claims.

A. Plaintiffs Have Failed to Demonstrate Standing.

Plaintiffs cannot establish a likelihood of success because they lack standing. None of Plaintiffs' 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. The allegations of harm due to the construction of the pipeline as a whole are not caused by the President's action, and any such harms are not imminent in light of the multiple federal approvals, as well as state approvals, that remain before the pipeline can be constructed. Their alleged injuries are also not redressable because enjoining the President would violate the separation of powers doctrine.

---

[2] Given the Supreme Court's rulings in *Winter* and *Munaf*, Defendants do not believe that the "serious questions" test remains viable. They reserve all rights to contest any application of that test here, including by seeking *en banc* review in the Ninth Circuit.

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). "'[T]hreatened 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); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009).

Plaintiffs fail to demonstrate any injury caused by the authorization of border facilities. Instead, they allege injuries to their members that they believe will result—not from the border-crossing Permit itself—but from the construction and operation of other parts of the pipeline, should those parts receive the required authorizations. *See* Mem. of P. & A. in Supp. of Pls.' Mot. for Prelim. Inj. 29-34, ECF No. 27-2 ("Pls.' Mem."); Decl. of Joy Braun ¶¶ 5-7, ECF No. 27-4 (describing potential future injuries from the future construction and operation of workers' camps along the pipeline route); Decl. of Tom B. Goldtooth ¶¶ 10-19, ECF No. 27-10 (alleging future potential injury from construction and operation of the pipeline); Decl. of Elizabeth Lone Eagle ¶¶ 10-11, ECF No. 27-15 ("Lone

Eagle Decl.") (describing harm to "future generations" from future potential oil spill). Such "[a]llegations of possible future injury are not sufficient" to establish standing. *Clapper*, 568 U.S. at 409; *see also Coons v. Lew*, 762 F.3d 891, 898 (9th Cir. 2014).

Plaintiffs do not even attempt to show that there is any concrete and particularized injury from the border-crossing Permit. Rather, Plaintiffs unequivocally state that the complained-of activities will occur near their members' reservations, which this Court can take judicial notice of are not located the small and discrete area subject to the Permit. *See*, *e.g.*, Lone Eagle Decl. ¶ 6; Decl. of LaVae High Elk Red Horse ¶ 5, ECF No. 27-19; *see also Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1358 n.4 (9th Cir. 1998) (court may take judicial notice of undisputed geographical facts). It also 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. *See 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 just over one-mile stretch at the border between the United States and Canada. *Summers v. Earth Island Inst.*, 555 U.S. at 495.

Moreover, TC Energy cannot construct facilities at the border until it receives a right-of-way from BLM authorizing activity on public land in the border area. *See* Permit art. 6(1) (requiring TC Energy to acquire "any right-of-way grants or easements, permits, and other authorizations" necessary to build the border-crossing facility); *see also* Decl. of Diane Friez ¶ 10 ("Friez Decl.") (BLM has "not authorized any surface-disturbing activities on federal lands").

And even if injury alleged to occur from portions of the pipeline far from the border area was relevant to *this* border-crossing Permit, such injury is not "certainly impending." *Clapper*, 568 U.S. at 409. Plaintiffs 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. Pls.' Mem. at 32-33. But TC Energy cannot construct and operate the "balance of the Project," *id.* at 21, until applicable federal agencies have completed their environmental review and permitting processes regarding certain aspects of the pipeline, including BLM's approval of a right-of-way allowing TC Energy to use federal lands for the construction and operation of the pipeline. *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") (citing and quoting *Clapper*, 568 U.S. at 413). Under these circumstances,

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).

Plaintiffs' claims against the President also are not redressable because it would violate the separation of powers for a court to enjoin the President. *See, e.g.*, *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) (noting that an 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).

Here, Plaintiffs seek a declaration that the President's actions are unlawful. Pls.' Mem. at 11; *see also* Compl., Prayer for Relief, ¶¶ 1-3. In so doing, Plaintiffs ask 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.

Accordingly, Plaintiffs fail to show a likelihood of success on the merits because they lack standing.

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

Plaintiffs also fail to demonstrate likelihood of success because their two constitutional claims ignore longstanding historical practice and precedent on the scope of Executive Power. 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 their powers as Chief Executives over foreign affairs and Commanders in Chief. 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, Presidents would not have acted otherwise for more than a century with Congress's acquiescence.

1. The Issuance of Presidential Permits is Within the Scope of Executive Power.

A long line of cases confirms that the President possesses inherent constitutional authority to approve cross-border permits—an authority that Congress has never challenged, in connection with Keystone XL or otherwise. 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: (a) the President was acting pursuant to his independent constitutional authority; (b) Congress has long accepted the presidential authority over border crossing facilities; and (c) a long line of judicial precedent affirms the President's powers.

a. 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").

The President's long-recognized authority to permit international border crossings flows naturally from his inherent foreign affairs powers. 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 supra*, Background section I. 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); *see also id.* at 109 ("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.").

b. 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 Congress had regulated border-crossing permits, the most that could be said is that the President's border crossing authority would fall 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. Plaintiffs' claim the President lacked authority to issue the border crossing Permit challenged in this case cannot be taken seriously.

c. A long line of judicial 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 1147, 1162–63 (D. Minn. 2010). 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*. at 1163. The *Sierra Club* decision followed two district court decisions likewise affirming the President's authority to issue cross-border permit in connection with the Keystone Pipeline, a separate pipeline built in 2010. *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).

2. Plaintiffs' Property Clause Claim Lacks Merit.

Plaintiffs argue that the President lacks authority to issue the Permit because the Property Clause of the Constitution vests only 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. Pls.' Mem. at 20-22. This claim fails for at least two reasons.

First, Plaintiffs' argument that the President "lacked the power to authorize the balance of the Project," Pls.' Mem. at 21, elides what the permit actually authorizes: an international border crossing. The executive action challenged in this case 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 (1907) (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 only BLM exercises authority over federal lands sited at the border crossing and that the Permit improperly supersedes or otherwise overrides BLM's permitting process, that is a claim at once both inaccurate and premature. The Permit is explicit that it does not supplant other necessary authorizations, noting 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." 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 id.* TC Energy still needs to obtain the requisite authorizations from BLM for the parts of the pipeline that traverse federal 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 federal lands, BLM would have to assure itself that the authorization complies with the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act, the Endangered Species Act, and other applicable statutes. Pls.' Mem. at 22. Plaintiffs have no legal or factual basis for contending that the Permit improperly displaces BLM's regulatory authority or otherwise violates any relevant land management statutes.

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

To the extent Plaintiffs contend that the President's authorization of a border

crossing itself infringes on Congress's authority under the Commerce Clause, Pls.' Mem. at 27, this is incorrect because, as discussed above, the President does not need legislation to exercise his foreign affairs power. Plaintiffs seem to 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. Foreign Cables, 22 Op. Att'y Gen. 13, 13 (1898) ("The preservation of our territorial integrity and the protection of our foreign interest is entrusted, in the first instance, to the President.").

Plaintiffs also claim a conflict between the President's border-crossing Permit and Congress's exercise of its Commerce Clause powers to regulate river crossings. Pls.' Mem. at 22-23. But just as with their Property Clause arguments, Plaintiffs incorrectly assume that the Permit somehow eliminates TC Energy's obligation to comply with all of the laws cited by Plaintiffs that regulate river-crossings. *See id.* at 23. The plain text of the Permit itself says just the opposite. *See* Permit, art. 6(1).

4. Executive Order 13,337 Cannot Bind the President.

Plaintiffs also contend that the President lacks authority to issue the Permit

because it violated Executive Order 13,337. Here, President Trump expressly stated that he was issuing this Permit "notwithstanding Executive Order 13,337 of April 30, 2004." Permit at 1. Plaintiffs' arguments about Executive Order 13,337 therefore must be predicated on the notion that once a President issues an Executive Order delegating the President's inherent constitutional authority to an agency, that Executive Order binds successive Presidents in their exercise of their constitutional powers. But any such notion is clearly wrong. Executive orders cannot bind future Presidents.

An executive order cannot 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. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010). "Without such power" to modify or undo past decisions of the Executive Branch, "the President could not be held fully accountable for discharging his own responsibilities; the buck would

stop somewhere else." *Id.* at 514.

Against this legal backdrop, Plaintiffs' attempt to enforce the requirements of Executive Order 13,337 against President Trump is futile. Executive Order 13,337 expressly states that it

> is not intended to, and does not create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

Exec. Order No. 13,337 § 6. In addition, the executive order was issued solely pursuant to the President's inherent constitutional authority—not statutory authority—and therefore the requirements of the executive order cannot be enforced in a private lawsuit. *See Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 336 (8th Cir. 1975); *see also Chai v. Carroll*, 48 F.3d 1331, 1338-40 (4th Cir. 1995); *Facchiano Constr. Co. v. U.S. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993); *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986).

Likewise, Plaintiffs' arguments about the potential retroactive effect of Executive Order 13,687, which revoked Executive Order 13,337, are a red herring. The President did not rely on the later-issued Executive Order 13,687 in issuing the Permit, nor was he required to. Pursuant to his inherent constitutional authority, the President has the authority to issue a permit entirely on his own, as he did here.

Because Executive Order 13,337 only binds the Secretary of State, a

presidential permit issued by the President is not required to contain a "national interest" determination. Pls.' Mem. at 24-25.[3] That does not mean, however, that TC Energy will proceed without federal agency regulation and oversight to ensure compliance with various environmental and other statutes that Congress has made applicable to agency action. 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 segments of or aspects of the 875-mile-long pipeline. Indeed, the Permit is explicit that the permittee must acquire all necessary authorizations. Permit, art. 6(1). Accordingly, Plaintiffs' argument that the Permit allows the President—and, by extension, TC Energy—to sidestep judicial review, Pls.' Mem. at 27, is unfounded.

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 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

[3] Nor would NEPA apply here. 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; *see also Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1088 (9th Cir. 2004) ("NEPA's procedural requirements do not apply to presidential action").

federal agency and, as discussed above, the APA does not apply to his actions. Rather, the Executive's policy choices are "beyond the competence of the courts to adjudicate." *Dalton v. Specter*, 511 U.S. 462, 475-76 (1994); *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 & S. Air Lines*, 333 U.S. at 111.

Plaintiffs' attempts to enforce EO 13,337 against the President are without merit and do not establish a likelihood of success.

II. Plaintiffs Have Failed to Demonstrate Irreparable Harm from the Issuance of the Permit.

Plaintiffs' request for preliminary injunctive relief fails for a second reason: they cannot demonstrate imminent, irreparable harm. *Winter*, 555 U.S. at 22. Indeed, they do not even try to demonstrate any harm from the border crossing itself. Instead, all of their alleged harm results from "the balance of the 875-mile-long … Project," Am. Compl. ¶ 10, which, Plaintiffs' assumption notwithstanding, is simply not "authorized" or otherwise controlled by the President's *border-*

crossing Permit. Allegations of injury caused by activities that are not subject to the Permit or either are not yet authorized by the relevant federal agencies, or are outside of the authority of those agencies, cannot serve as a basis to enjoin some other independent presidential action for which no injury has been alleged.

Plaintiffs cannot demonstrate irreparable injury due to the issuance of the border-crossing Permit because the Permit, by itself, does not authorize any construction (even at the border), and none of Plaintiffs' alleged harms relate to the border crossing. The Permit authorizes the 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. Permit at 1-2. Plaintiffs allege no irreparable harm from construction activities in the 1.2-mile segment at the border and therefore have failed to demonstrate irreparable harm caused by the President's approval of facilities in that area.

Further, the Permit expressly requires that the approved "Facilities" be built "consistent with applicable law," *id.* art. 1(2), and that TransCanada is required to acquire "any right-of-way grants or easements, permits, and other authorizations" necessary to build the border-crossing facility, *id.* art. 6(1). Most of the border segment is on BLM land, and therefore any construction in the border segment is subject to BLM's pending decision regarding a right-of-way. *See* Friez Decl. ¶ 7. BLM is still in the process of considering TC Energy's right-of-way application

and does not plan to make a decision until after the ongoing environmental review is completed. *Id.* ¶ 10. Further, TC Energy cannot undertake any surface-disturbing activities, including clearing or mowing, on BLM land prior to BLM's approval of a right-of-way. *Id.* Accordingly, any construction at the border is not imminent, and Plaintiffs therefore cannot demonstrate imminent irreparable harm from construction in the border area.

To the extent that Plaintiffs are claiming that the Permit approves construction of the pipeline along the entirety of its route, they are simply mistaken. *See* Pls.' Mem. at 30 (arguing that "allowing TC Energy to proceed with construction of the Project would allow it to gain unstoppable momentum"); *see also id.* at 32-33 (alleging harms to environmental and cultural resources along the pipeline route due to construction and potential oil spills). There is no factual basis for the assertion that the actions authorized by this permit will result in environmental harms along the future route of the pipeline. The Permit authorizes only the construction of border facilities. *See* Permit art. 1(1).

Plaintiffs also argue that they will be irreparably harmed due to the failure of federal agencies to conduct environmental analyses. *See* Pls.' Mem. at 30-31 (citing *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004)). Procedural harms alone are insufficient to demonstrate irreparable harm; instead, an injunction may issue only if "environmental injury is sufficiently likely." *High*

Sierra Hikers, 390 F.3d at 642 (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 45 (1987)). In any event, the allegation that the relevant federal agencies have failed, or will fail, to comply with NEPA is entirely unfounded. BLM's NEPA process relating to TC Energy's application for a right-of-way to cross federal lands is still ongoing. *See* Friez Decl. ¶ 10. Plaintiffs will have ample opportunity to participate in that NEPA process, and the court must "presume that [the agency] will follow the law." *Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1069, 1082 (9th Cir. 2010). Moreover, there was no requirement for the President to go through a NEPA process before issuing the Permit. *See* note 3, *supra*.

Plaintiffs also seek to enjoin various activities that the Permit does not authorize and that are outside of the authority of the applicable federal agencies whose actions relating to the pipeline remain pending. This request too should be denied because Plaintiffs have offered no basis for any injunction against pipeline-related activities that are outside of the control of the federal government.

First, the Court cannot enjoin activities that are not subject to the Permit and are outside of the authority of the relevant federal agencies. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1123 (9th Cir. 2005) ("The authority to enjoin development extends only so far as the Corps' permitting authority."). To the extent Plaintiffs claim that an injunction should issue based on the actions of

the federal agencies, they fail to offer any basis for any NEPA violation on the part of those agencies.

Second, Plaintiffs cannot rely on a "bureaucratic momentum" theory to enjoin activities that are outside of federal control. As an initial matter, the bureaucratic momentum theory should not survive the Supreme Court's rulings in *Village of Gambell* and *Winter*. In *Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983), the court enjoined a lease sale reasoning that if the lease sale proceeded, it would engender a "bureaucratic commitment" to the sale, which itself constituted irreparable harm. *Id.* at 952-53. The Supreme Court, however, has refuted the notion that harm to the environment may be presumed. *See Village of Gambell*, 480 U.S. at 544-46 (reversing the preliminary injunction of an offshore oil and gas lease sale); *see also Winter*, 555 U.S. at 22 (emphasizing that a plaintiff "must demonstrate a likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief"). Thus, the bureaucratic momentum theory cannot be squared with the fundamental requirement to show imminent irreparable harm in order to obtain an injunction.[4]

But even if the bureaucratic momentum theory had any continuing validity, it does not apply to the Permit. The theory presumes that if an agency reaches a

---

[4] The Ninth Circuit has also been skeptical of the bureaucratic momentum theory. *See*, *e.g.*, *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (refusing to vacate oil and gas leases based on a bureaucratic momentum theory).

decision prior to a NEPA process and the requisite environmental analysis, it will be less likely to change it later. *See Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). This theory has no application here because NEPA does not even apply to the President. *See Ground Zero Ctr.*, 383 F.3d at 1088.

In the first *IEN* case, the Court enjoined the construction of worker camps and other activities on private land on the basis of a bureaucratic momentum theory. *See IEN v. U.S. Dep't of State*, No. CV-17-29-GF-BMM, 2019 WL 652416, at *10 (D. Mont. Feb. 15, 2019). But the Court did so on the basis that the State Department's 2014 Supplemental Environmental Impact Statement ("SEIS") analyzed the impacts of worker camps. *See id.* That analysis has no bearing now because the President issued the Permit on his own, he was not required to comply with NEPA, and the Permit does not rely on the SEIS in any event. Moreover, the construction of worker camps in various places along the pipeline route are not authorized or governed by the Permit. Likewise, *Colorado Wild, Inc. v. U.S. Forest Service*, 523 F. Supp. 2d 1213 (D. Colo. 2007), does not apply because, in that case, the court found a violation of NEPA. *See id.* at 1219-20, 1224-30.

III. The Balance of the Harms and the Public Interest Weigh Against an Injunction.

The balance of the harms and the public interest weigh against an injunction. "When the Government is a party, these . . . two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Plaintiffs claim that the

public interest will be served based on the interest in avoiding irreparable harm to the environment. Pls.' Mem. at 34 (citing *Cottrell*, 632 F. 3d at 1138). But *Cottrell*, like the other cases Plaintiffs cite, was a NEPA case against a federal agency. *See* 632 F.3d at 1138. There is no public interest in enjoining a presidential action on the basis of an alleged NEPA violation because NEPA does not apply to the President. *See Ground Zero Center*, 383 F.3d at 1088.

Moreover, the public interest in environmental review would not be served by an injunction because an environmental review relating to required approvals for the pipeline is ongoing. An injunction will only serve to enmesh the parties once more in unnecessary and premature litigation over actions that have not yet been approved. The public interest would be best served by allowing the environmental review to continue.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' motion for a preliminary injunction be denied.

Respectfully submitted this 24th day of July, 2019,

LAWRENCE J. VANDYKE
Deputy Assistant Attorney General

/s/ Luther L. Hajek
MARISSA A. PIROPATO
LUTHER L. HAJEK (CO Bar 44303)
United States Department of Justice

Environment and Natural Resources Division
999 18th St., South Terrace, Suite 370
Denver, CO 80202
Ph: (303) 844-1376; Fax: (303) 844-1350
marissa.piropato@usdoj.gov
luke.hajek@usdoj.gov

Attorneys for Federal Defendants

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 7,229 words, excluding the tables, caption, signature, certificate of compliance, and certificate of service.

/s/ Luther L. Hajek
LUTHER L. HAJEK
U.S. Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2019, a copy of the foregoing Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction was served on all counsel of record via the Court's CM/ECF system.

/s/ Luther L. Hajek
LUTHER L. HAJEK
U.S. Department of Justice