

Jeffery J. Oven
Jeffrey M. Roth
CROWLEY FLECK PLLP
490 North 31st Street, Ste. 500
Billings, MT 59103-2529
Telephone: 406-252-3441
Email: joven@crowleyfleck.com
jroth@crowleyfleck.com

Peter R. Steenland, Jr.
Peter R. Whitfield
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
Telephone: 202-736-8000
Email: psteenland@sidley.com
pwhitfield@sidley.com

Counsel for TransCanada Keystone Pipeline, LP and TC Energy Corporation

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

ROSEBUD SIOUX TRIBE, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
STATE, *et al.*,

Defendants,

and

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

Defendant-Intervenors.

CV 18-118-GF-BMM

**STATEMENT BY TC ENERGY
IN OPPOSITION TO
CONSOLIDATION**

Pursuant to the Court's Order of July 16, 2019, TC Energy hereby respectfully submits this response opposing consolidation of the matter filed by

Plaintiffs Rosebud Sioux Tribe and Fort Belknap Indian Community (Rosebud Plaintiffs) and the matter filed by Indigenous Environmental Network and North Coast Rivers Alliance (IEN Plaintiffs).

1. Consolidation resulting in parties losing their separate identities would be inappropriate. TC Energy joins Rosebud Plaintiffs in opposing any consolidation that would prevent each plaintiff and each defendant from submitting their own briefs, delivering their own arguments, receiving their own judgments, retaining their own separate rights of appeal and generally receiving the same rights as any party in any case. As to Rosebud Plaintiffs, it would be inappropriate to have sovereign nation tribal parties merge their pleadings with the non-governmental environmental entities who are Plaintiffs in the other matter. Similarly, it would be inappropriate to have TC Energy merge its pleadings with the Federal Defendants for all the reasons given in the successful motions by TC Energy to intervene in these matters.

2. Administrative Consolidation is not warranted because there is little similarity in the two Plaintiffs' claims. In adjudicating earlier challenges to the Keystone XL Pipeline, *Indigenous Environmental Network et al.*, 4:17-cv-00029-BMM, and *Northern Plains Resource Council*, 4:17-cv-00031-BMM (the 2017 cases), this Court directed that those matters be consolidated for purposes of common briefing schedules, oral argument and decision. *See Order*, 4:17-cv-

00029-BMM (Oct. 4, 2017) (Doc. 82). In those two cases, the pleadings demonstrated substantial overlap. The 2017 cases presented a common challenge to the 2017 Presidential Permit, to a Supplemental Environmental Impact Statement prepared by the Department of State, and to a Biological Opinion prepared by the Fish & Wildlife Service. As a result, administrative consolidation was economical and efficient, enabling the Court to issue a series of rulings that were applicable in both cases.

However, there is no similar overlap in the legal challenges brought by the Rosebud Plaintiffs and the IEN Plaintiffs in the two matters under consideration for consolidation. IEN claims that the President's issuance of the 2019 Presidential Permit to TC Energy violates several provisions of the United States Constitution. In contrast, the Rosebud Plaintiffs raise claims including allegations of treaty violations, tribal laws, the Indian Mineral Leasing Act and the National Environmental Policy Act. Clearly, the overlapping merits issues, presaging similar outcomes that were presented in the 2017 cases, are not present here. Thus, there is no efficiency for the Court in adjudicating the merits of these two very different cases, if Plaintiffs were inexplicitly able to defeat the Motions to Dismiss.

There is another reason the efficiencies obtained in the 2017 cases through common briefing schedules, hearings and rulings may not be realized by consolidating these two matters, even for administrative purposes. Notably, the

2017 cases proceeded pursuant to the Administrative Procedure Act (APA) on cross-motions for summary judgment, based upon common administrative records compiled by the Department of State and the Fish & Wildlife Service. In contrast, because the President is not an agency subject to the APA, neither case has an administrative record, much less a common record shared by the parties, and thus there would be no common set of agreed-upon facts that could facilitate efficient disposition of cross-motions for summary judgment.

3. Although the jurisdictional defects in both cases present a set of common legal issues susceptible to a common resolution, the IEN case will not be ready for hearing until September while the Rosebud case has already been set for hearing on August 7. The federal defendants and TC Energy each have filed motions to dismiss in both the Rosebud case and in the IEN case. Although there is some overlap in the jurisdictional arguments defendants raised in both cases, there are substantial differences in the merits arguments because the Rosebud Plaintiffs and the IEN Plaintiffs raised substantively different claims. The motions in the Rosebud case will be fully briefed on August 5, 2019, and oral argument is scheduled for August 7, 2019. The briefing in the IEN matter, however, will take longer to complete because the IEN Plaintiffs have filed an amended complaint. TC Energy will supplement its motion to dismiss with a timely additional pleading to address IEN's amended complaint. We expect the federal defendants to do the

same. As a result, the briefing schedule on motions to dismiss the IEN matter will not be completed until the end of August, well after the August 7 hearing set in the Rosebud case.

CONCLUSION

For the foregoing reasons, TC Energy opposes consolidation of the Rosebud case with the IEN case, seeing no judicial economy or benefit to the parties.

DATED this 29th day of July 2019,

CROWLEY FLECK PLLP

SIDLEY AUSTIN LLP

/s/ Jeffery J. Oven

/s/ Peter R. Steenland, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served today via the Court's CM/ECF system on all counsel of record.

/s/ Jeffery J. Oven