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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 DONAL J. TRUMP *et al.*, Defendants, and	CV 19-28-GF-BMM **DEFENDANTS' STATEMENT REGARDING CONSOLIDATION**

TRANSCANADA KEYSTONE PIPELINE, LP *et al.*, Defendant-Intervenors.	

Defendants President Donald J. Trump *et al*. hereby submit this statement regarding consolidation of *Rosebud Sioux Tribe v. Trump*, No. 4:18-cv-00118-BMM, with *Indigenous Environmental Network v. Trump ("IEN")*, No. 4:19-cv-00028-BMM. Although both cases challenge the President's issuance of a Permit allowing the Keystone XL Pipeline to cross the border into the United States, the claims in the cases are sufficiently different, such that there are likely to be no real efficiency gains from consolidation. If the cases are consolidated, Defendants agree with the Rosebud Sioux Tribe that the cases should remain separate and be consolidated for administrative purposes only.

Consolidation is appropriate when the cases involve common factual and legal issues. *See* Fed. R. Civ. P. 42(a). The governing rule states:

> (a) Consolidation. If actions before the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trial any or all matters at issue in the actions;
>
> (2) consolidate the actions; or
>
> (3) issue any other orders to avoid unnecessary cost or delay.

Id. A court has broad discretion to consolidate cases involving similar facts and legal claims. *Thomas Inv. Partners, Ltd. v. United States*, 444 Fed. Appx. 190, 193 (9th Cir. 2011).

There is, unquestionably, a certain amount of factual overlap between the *Rosebud Sioux* and *IEN* cases as both cases challenge the President's issuance of a cross-border Permit for the Keystone XL Pipeline. Nevertheless, the legal claims in the cases are different enough that Defendants do not believe that consolidation at this time would lead to a more efficient resolution of the cases. Instead, given the disparate legal claims raised, it could make the resolution of each of the separate cases more difficult for the reasons discussed below.

First, the named Defendants are not all the same. In addition to the President, both complaints name the U.S. Department of State and the U.S. Department of the Interior, as well as officials within those agencies. *See* First Am. Compl. for Decl. and Inj. Relief ¶¶ 31-35, *Rosebud Sioux Tribe v. Trump*, No. 4:18-cv-00118-BMM (ECF No. 58) ("Rosebud Compl."); First Am. Compl. for Decl. and Inj. Relief ¶¶ 32-33, 38-39, *Indigenous Environmental Network*, No. 4:19-cv-00028-BMM (ECF No. 37) ("IEN Compl."). But IEN also names the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service as Defendants, *see* IEN Compl. ¶¶ 34-37, whereas the Rosebud Sioux Tribe does not.

Second, there is minimal overlap between the claims in the two cases. IEN alleges that, in issuing the Permit, the President violated the Commerce Clause and the Property Clause of the U.S. Constitution, and also violated a prior executive order. *See* IEN Compl. ¶¶ 60-88. The Rosebud Sioux Tribe contains similar claims alleging violations of the Commerce Clause, *see* Rosebud Comp. ¶¶ 392-397, 453-459, but does not allege violations of the Property Clause or past executive orders. The Rosebud Sioux Tribe brings several claims focusing on alleged violations of duties owed to the Tribes under various treaties, *see*, *e.g.*, Rosebud Compl. ¶¶ 381-390, which are not part of IEN's case. The Rosebud Sioux Tribe also alleges claims under the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"), *see id.* ¶¶ 461-486, which IEN does not. The Rosebud Sioux Tribe also bring a separate claim against TC Energy, alleging that TC Energy has not obtained a right-of-way from the Tribes to cross tribal land. *See id.* ¶¶ 432-441. Thus, the circumstances are markedly different from the prior round of litigation involving IEN and the Northern Plains Resource Council, where both sets of plaintiffs brought similar claims under NEPA and the Endangered Species Act. *See IEN v. U.S. Dep't of State*, No. 4:17-cv-29-BMM (filed Mar. 27, 2017); *N. Plains Resource Council v. Shannon*, No. 4:17-31-BMM (filed Mar. 30, 2017).

Third, there are claims remaining in the *Rosebud Sioux* case challenging the 2017 Permit issued by the Under Secretary of State for Political Affairs. *See*, *e.g.*, Rosebud Compl. ¶¶ 445, 463, 478, 483. Similar claims brought by IEN challenging the 2017 Permit were dismissed as moot by the Ninth Circuit. *See IEN v. U.S. Dep't of State*, No. 18-36068, 2019 WL 2542756 (9th Cir. June 6, 2019). Consolidating the cases prior to the dismissal of the claims challenging the 2017 Permit in the *Rosebud Sioux* case could lead to unnecessary confusion.

For all these reasons, Defendants believe that it would not serve judicial efficiency to consolidate the cases, at least until the cases are beyond the pleading stage and the pending motions to dismiss and motion for a preliminary injunction in the *IEN* case have been resolved. Nevertheless, hearings in the two cases could be scheduled at similar times so as to conserve the Court's resources.

Respectfully submitted this 29th day of July, 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 875 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 29, 2019, a copy of the foregoing Defendants' Statement Regarding Consolidation 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