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

INDIGENOUS ENVIRONMENTAL
NETWORK and NORTH COAST RIVERS
ALLIANCE,

Plaintiffs,

vs.

PRESIDENT DONALD J. TRUMP,
UNITED STATES DEPARTMENT OF
STATE; MICHAEL R. POMPEO, in his
official capacity as U.S. Secretary of State;
UNITED STATES ARMY CORPS OF
ENGINEERS; LT. GENERAL TODD T.
SEMONITE, Commanding General and
Chief of Engineers; UNITED STATES FISH
AND WILDLIFE SERVICE, a federal
agency; GREG SHEEHAN, in his official
capacity as Acting Director of the U.S. Fish
and Wildlife Service; UNITED STATES
BUREAU OF LAND MANAGEMENT, and
DAVID BERNHARDT, in his official

CV 19-28-GF-BMM

**MEMORANDUM IN
SUPPORT OF
SUPPLEMENTAL MOTION
BY TRANSCANADA
KEYSTONE PIPELINE, LP
AND TC ENERGY
CORPORATION TO
DISMISS PLAINTIFFS'
COMPLAINT PURSUANT
TO FED. R. CIV. P. RULE
12(B)(1) OR 12(B)(6),**

capacity as Acting U.S. Secretary of the Interior,

Defendants,

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

Defendant-Intervenors.

On June 27, 2019, Federal Defendants moved to dismiss Plaintiffs' Complaint. Fed. Defs.' Mot. to Dismiss (Doc. 22). On July 16, 2019, TransCanada Keystone Pipeline, LP and TC Energy Corporation ("TC Energy") also moved to dismiss the Complaint. TC Energy Mot. Dismiss (Doc. 32). In response, Plaintiffs filed the First Amended Complaint (Doc. 37) on July 18, 2019. The new complaint adds a third claim for relief alleging the President violated Executive Order 13337 in issuing TC Energy a border-crossing permit for the Keystone XL Pipeline ("Keystone XL"). Because TC Energy has already addressed this claim in its original motion to dismiss and supporting materials (Doc. 32, 33) as well as its Opposition to Plaintiffs' Motion for a Preliminary Injunction (Doc. 42), TC Energy hereby adopts those arguments as well as those set forth in Federal Defendants' Motion to Dismiss Plaintiffs' Amended Complaint (Doc. 48) in support of this supplement motion.

In its initial motion to dismiss, TC Energy explained that the Court lacks jurisdiction over a claim brought pursuant to Executive Order 13337 and that Plaintiffs lack standing. TC Energy's Mem. in Supp. at 10-13, 15-21 (Doc. 33). Because Plaintiffs' First Amended Complaint does not moot TC Energy's original arguments, TC Energy hereby incorporates that Memorandum in support of this supplemental motion. *See* 6 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1476 (3d ed. West 2005) (Plaintiffs cannot moot a motion to dismiss by filing an amended complaint when "the defects raised in the original motion remain in the new pleading . . . To hold otherwise would be to exalt form over substance."); *Stamey v. Howell*, No. CV 16-23-M-DLC, 2016 WL 7174613, at *1 (D. Mont. Dec. 7, 2016) (court relied on original motion to dismiss when "the Amended Complaint failed to cure the alleged defects in the first Complaint.")

Additionally, in opposing Plaintiffs' motion for a preliminary injunction, TC Energy explained that the President could not violate Executive Order 13337. TC Energy's Mem. in Opp. Mot. Prelim. Injunction at 18-20 (Doc. 42). Executive orders do not bind the President because they can be "withdrawn at any time for any or no reason." *Id.* at 19 (citing *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965)) *see also id.* ("the President is generally free to amend or revoke instructions to his subordinates in a form and manner of his choosing" (citing *Status of Presidential Memorandum Addressing the Use of*

Polygraphs, 2009 WL 153263, at *8 (O.L.C. Jan. 14, 2009)). Additionally, Executive Order 13337 expressly states that it “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.” *Id.* at 20 (citing Executive Order 13337, § 6, 69 Fed. Reg. at 25,301). Thus, Plaintiffs lack a cause of action against the President under Executive Order 13337.

TC Energy also explained that the 2019 Permit was issued “*notwithstanding Executive Order 13337.*” *Id.* at 20 (citing 84 Fed. Reg. at 13,101 (emphasis added)). Consequently, as a matter of law, issuance of the 2019 Permit could not violate that Order or the procedural requirements of that Order.

Finally, TC Energy argued that the President had no duty to provide a reasoned explanation for deviating from the State Department’s previous denial of a Presidential Permit for Keystone XL because such a requirement is imposed by the Administrative Procedure Act, which does not apply to the President. *Id.* at 18-19 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992)). TC Energy hereby adopts the arguments set forth in its Opposition to Plaintiffs’ Motion for a Preliminary Injunction (Doc. 42) in support of this supplemental motion to dismiss.

CONCLUSION

For the foregoing reasons and those set forth in TC Energy's original motion to dismiss, the Court should dismiss the First Amended Complaint because Plaintiffs lack standing and have failed to state any cognizable claims for relief.

DATED this 1st day of August 2019,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this brief is printed in 14-point font, double spaced, and contains 666 words, excluding tables, caption, signatures, and certificates of service and compliance.

/s/ Jeffery J. Owen

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