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@jcrowleyfleck.com

Peter R. Steenland, Jr.
Peter R. Whitfield
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 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. DONALD J. TRUMP, *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 **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

Plaintiffs' response to the motions to dismiss makes it clear that Plaintiffs are no longer challenging the 2017 Permit, and all of their remaining claims proceed from the premise that the 2019 Permit authorizes construction and operation of the entire Keystone XL pipeline. Pltfs.Br. 3-4, 7-8. That premise is wrong.

The 2019 Permit only authorizes construction and operation of Keystone XL facilities in the 1.2-mile corridor in Phillips County, Montana where the pipeline crosses the U.S./Canada border. That corridor does not cross any Indian reservation, and it is far from any land where Rosebud or its members are alleged to hold any interest. Consequently, the authorization to construct and operate Keystone XL in that corridor cannot harm Plaintiffs or violate any treaty, fiduciary duty, tribal law, or federal statute regulating Indian mineral interests or surface estates.

Indeed, the lack of harm is further reinforced by the fact that the 2019 Permit does not relieve Keystone XL of the duty to obtain additional authorizations required by federal, state and local law. Thus, TC Energy still must obtain a right-of-way from the Bureau of Land Management (BLM) before it can construct the border-crossing facilities on federal land, and authorizations and permits from the Army Corps of Engineers (Corps) before it can cross waters of the United States

elsewhere along the route. For these reasons and others discussed in more detail below, the Amended Complaint should be dismissed for lack of jurisdiction and failure to state any claim for which relief can be granted.

ARGUMENT

I. Plaintiffs Lack Standing To Challenge The 2019 Presidential Permit

Although Plaintiffs claim that construction and operation of Keystone XL could harm tribal territory and natural resources, destroy cultural sites, and endanger tribal members, they do not claim that these harms will occur in the 1.2-mile corridor where Keystone XL crosses the U.S./Canada border. Pltfs.Br. 14-15. That corridor does not cross Fort Belknap's Reservation or Rosebud's Reservation or alleged historic treaty territory in South Dakota. *See* FAC ¶¶ 156-60. Plaintiffs' claim of standing is thus based on the assertion that the 2019 Permit authorizes construction and operation of "the entire Pipeline." Pltfs.Br. 8; *see also id*. at 14. But the Permit admits of no such reading.

It "grant[s] permission … to construct, connect, operate, and maintain pipeline *facilities at the international border* of the United States and Canada *at Phillips County, Montana*." 84 Fed. Reg. 13,101 (Apr. 3, 2019) (emphases added). Its title reflects this limitation. *See id.* (authorizing pipeline facilities "*at the International Boundary* Between the United States and Canada") (emphasis added). And it defines "Border facilities" as those "appurtenant" to the pipeline

segment "from the international border … to and including the first mainline shut-off valve in the United States located approximately 1.2 miles from the international border." *Id.* This language plainly limits TC Energy's authorization to activities at the border—as both TC Energy and the Government have stated.

In an effort to invalidate this limited authorization, Plaintiffs claim that the definition of "Facilities" operates to authorize the entire pipeline. But that term (as opposed to the term "Border facilities") is not used in the sections of the Permit that actually authorize any activities by TC Energy. Instead, the term "Facilities" is used only in the "Conditions" section, where TC Energy's authorization is conditioned on (1) its compliance with the laws that apply to the rest of the pipeline, and (2) its indemnification of the United States from any liability arising from the construction or operation of the rest of the route. *See* Arts. 1(2) & 6(2), 84 Fed. Reg. at 13,101-02. Neither of these conditions on TC Energy's right to construct facilities at the border authorizes construction or operation of facilities elsewhere.

Moreover, the 2019 Permit is not, in and of itself, sufficient to authorize construction of even the Border facilities. Much of the 1.2 mile border-crossing corridor is on federal land. *See* FAC ¶ 147. The Permit does not exempt TC Energy from complying with any law, and the activity it authorizes is conditioned on TC Energy's acquisition of "any right-of-way grants or easements, permits, and other

authorizations as may become necessary or appropriate," Art. 6(1), 84 Fed. Reg. at 13.102. Thus, TC Energy must obtain a right-of-way from BLM before it can even construct the Border facilities, and permission from the Corps before it can cross waters of the United States elsewhere along the route. Those agencies must comply with the National Environmental Protection Act (NEPA) and the National Historic Preservation Act (NHPA) before taking such action. *See* TC.Br. 4, 13; U.S.Br. 2, 12. The harms Plaintiffs fear are thus too speculative to create standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013).

Finally, even if issuance of the 2019 Permit would cause Plaintiffs imminent harm (and it will not), Plaintiffs have not shown that it is redressable by the court. The APA provides no cause of action to enjoin the President's actions. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). Of course, "the President's actions may still be reviewed for constitutionality," and a court may enter "injunctive relief against executive officials" who implement an unconstitutional presidential directive. *Id*. at 801-02. But here there is no executive official to enjoin, because no agency action is needed to act to make the 2019 Permit effective.

It is no answer for Plaintiffs to say that the Court can enjoin TC Energy "from further proceedings on the pipeline." Pltfs.Br. 47. If the 2019 Permit is "unconstitutional as a usurpation of Congress's foreign commerce power," as Plaintiffs allege, *id*. at 48, that would not justify an injunction against Keystone

XL. It would mean the President has no role to play in the approval process, so Keystone XL can be constructed and operated wherever it obtains the approvals required by *other* laws, whether federal, state, or local. TC.Br. 22.

II. Fort Belknap's Treaty And Tribal Law Claims Must Be Dismissed

Even if the 2019 Permit authorized the entire pipeline (and it does not), and Plaintiffs had standing (which they do not), Fort Belknap's claims must be dismissed. The pipeline will not cross the Fort Belknap Reservation or land owned by the tribe or its members, so the Permit cannot violate any treaty right, fiduciary duty, or tribal law of the Fort Belknap.

A. The Treaty Claim For Alleged Failure To Protect The Tribe From Depredations Ignores Controlling Ninth Circuit Precedent.

The Ninth Circuit's decision in *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), compels dismissal of the claim that the 2019 Permit violated Fort Belknap's treaty rights. Fort Belknap was a plaintiff in *Gros Ventre*, and it raised claims based on the same treaties that Plaintiffs cite here. *See id*. at 803-04; TC.Br. 15, n.39; Pltfs.Br. 2-3. Plaintiffs in *Gros Ventre* claimed that the treaties created "trust responsibilities" that BLM breached by approving the expansion of gold mines that threatened the water supply for the Fort Belknap Reservation and interfered with the tribes' "spiritual, cultural and religious interests." 469 F.3d at 806. The Ninth Circuit rejected that claim because the mines were not on the Reservation, and it was "clear" that "the United States agreed to protect the Tribes

from depredations that occurred only on tribal land." *Id.* at 813. That the mines were on land that had been "part of the Tribes' territory" when the treaty "was ratified" and "may impact resources on the Reservation" was irrelevant because the treaty language does not require the government "to manage that land for the benefit of the Tribes in perpetuity, even after the Tribes later relinquished their ownership in that land." *Id.*

Because Keystone XL concededly will not cross the Fort Belknap Reservation, *Gros Ventre* forecloses Plaintiffs' claim that the 2019 Permit violates the treaty obligation to protect Fort Belknap's natural resources from "depredation" or "waste." Pltfs.Br. 8, n.3 & 25-26. *Gros Ventre* cannot be distinguished on the ground that the tribes there "sought a mandatory injunction to force the United States to manage property off the tribe's reservation," while the tribes here seek "to maintain the status quo." Pltfs.Br. 28. The *Gros Ventre* plaintiffs sought to "compel[] the government to comply" with their treaty obligations and to enjoin "further destruction of tribal trust resources," 469 F.3d at 806, while Plaintiffs here seek a similar injunction "requiring Federal Defendants to fully comply" with their treaty obligations and barring further development of the pipeline, FAC, Requested Relief ¶ 10. And Plaintiffs invoke the same treaty right to protection "against depredations and other unlawful acts which white men

residing in or passing through their country may commit." *See* 469 F.3d at 804, 813; Pltfs.Br. 25.

B. There Is No Cognizable Claim For Breach Of Fiduciary Duty Under NEPA Or The NHPA.

Gros Ventre also compels the conclusion that, in issuing the 2019 Permit, the President had no fiduciary duty to comply with the APA, NEPA, or NHPA. The court explained that the tribes' interest in protecting the quality of their water supply was no different from that of "any other affected landowner, subject to the same statutory restrictions." 469 F.3d at 811. "[U]nless there is a specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by the [government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Id*. at 810 (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998)). That reasoning controls here. No other person could state a claim under the APA, NEPA, or the NHPA challenging the President's action because (as Plaintiffs admit) those laws do not apply to the President. Pltfs.Br. 17, n.6 & 27.

Pit River Tribe v U.S. Forest Service, 469 F.3d 768 (9th Cir. 2006), does not compel a different result. Pltfs.Br. 27-28. The court there held that the government's fiduciary duty requires it to "at least show 'compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.'" *Pit*

River, 469 F.3d at 788. The court concluded that because the "agencies violated both NEPA and NHPA during the leasing and approval process" at issue, "it follows that the agencies violated their minimum fiduciary duty to the Pit River Tribe." *Id*. The opinion nowhere states that the "*substantive* provisions of the generally applicable statutes set forth the 'minimum fiduciary duty,'" and "that the technical requirements of the statutes do not apply." Pltfs.Br. 27. The court expressly declined to decide whether "the fiduciary obligations of federal agencies to Indian nations might require more" than the statutes themselves require. *Pit River*, 469 F.3d at 788. Plaintiffs' ignore that critical language and fail to address *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011), which makes clear that the "Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."

C. The Tribal Law Claim Cannot Apply to Keystone XL.

Fort Belknap's tribal laws do not apply to Keystone XL, which has no contractual relationship with the Tribe and is on private land off the Fort Belknap Reservation. *See* TC.Br. 26-27. Plaintiffs cite no case allowing tribal jurisdiction over such activity.[1] And their assertion that "TransCanda has consented to their

[1] Plaintiffs cite (at 49-52) *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (2017), which involved employment claims against the district that operated schools on tribal land under a lease requiring compliance with tribal law; *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), which involved breach of lease claims against a resort that leased reservation land

jurisdiction," Pltfs.Br. 49, is false. The Permit requires the company to comply with "applicable law" as described in the application (Art. 1(2)), and to acquire "necessary" authorizations (Art. 6(1)). 84 Fed. Reg. at 13,101-02. That does not encompass Fort Belknap laws, which are inapplicable.

III. Rosebud's Treaty, Tribal Law, And Statutory Claims Must Be Dismissed.

Rosebud's claims must be dismissed because they are based on the erroneous premise that the 2019 Permit authorized construction of Keystone XL "within its permanent homeland" in South Dakota without its consent. Pltfs.Br. 9. The Permit only authorized the border-crossing segment in Montana. *Supra* pp.2-3. And even if the 2019 Permit authorized the entire route (which is does not), there are additional defects in Rosebud's claims.

A. Rosebud's Treaty And Tribal Law Assertions Fail To Present Claims That Can Be Adjudicated In Federal Court.

Rosebud claims that Keystone XL will cross its reservation established by the 1868 Fort Laramie Treaty and a statute enacted in 1889. *See* Pltfs.Br. 8-9 & n.4. Although the Treaty described those boundaries as "permanent," *id.* at 8, it is clear that "Congress can alter the terms of an Indian treaty by diminishing a reservation." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

---

from the tribe; and *Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x 11 (9th Cir. 2012), which involved environmental regulation of activity on the reservation.

What is more, the Supreme Court held that Congress did precisely that in statutes passed in 1904, 1907, and 1910, which diminished the Rosebud Reservation "so as to exclude … four counties in South Dakota," including Tripp County, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585 (1977), through which Keystone XL will pass, *see* FAC ¶ 88. As a result, the treaty duty to protect Rosebud from "depredations" no longer exists in these excluded areas, *supra* pp.5-6, and Rosebud has no jurisdiction over the pipeline. *Rosebud Sioux*, 430 U.S. at 616 (Marshall, J., dissenting) (the Court's decision precludes Rosebud "from continuing to exercise … jurisdiction" over areas removed from the reservation).

Accordingly, Rosebud's treaty and tribal law claims must be dismissed for failure to state a claim

B. Rosebud's Breach Of Fiduciary Duty Claims Under NEPA And NHPA Also Fail.

Rosebud's breach of fiduciary duty claim is largely identical to Fort Belknap's claim, so it too fails to state a claim. *Supra* pp.7-8. Rosebud also alleged that the United States holds the Rosebud Water System in trust for the tribe, but Plaintiffs have no response to our argument that the statute establishing the water system does not require the President to comply with NEPA, and courts cannot require compliance with duties that Congress did not impose. *See* TC.Br. 20.

C. Rosebud Cannot Pursue Claims Under The Indian Rights-Of-Way Act And The Indian Mineral Leasing Act.

Rosebud also has no viable response to our argument that the Indian Rights-of-Way Act and Indian Mineral Leasing Act claims in Count Five must be dismissed because there is no final agency action as required for judicial review under the APA, and no private right of action under these statutes against TC Energy. *See* TC.Br. 24-26. Rosebud cites *United States v. Jenks*, 22 F.3d 1513, 1519 (10th Cir. 1994), for the proposition that a party may be enjoined from acting without proper authorization from an agency. Pltfs.Br. 58. But there the *government* sued to enforce the permitting requirement, so the case says nothing about whether a private party can sue without statutory authorization.

Beyond that, Rosebud cannot state a claim under the Indian Mineral Leasing Act because construction of the pipeline does not involve "mining" or "mineral development." Construction will require excavating a trench 7-8 feet deep and 4-5 feet wide,[2] which may involve "rock ripping" (breaking up and temporarily removing rock with an excavator)[3] in segments where bedrock is near the surface. But Rosebud is wrong to say that constitutes "mineral development." Pltfs.Br. 60. The case it cites makes clear that "merely dig[ging] holes in the ground" or

[2] Dep't of State, *Final Supplemental Environmental Impact Statement for Keystone XL Project* ("FEIS") at 2.1-50 (Jan. 2014).

[3] FAC ¶ 112 (quoting FEIS at 4.1-4).

"disrupting the mineral estate" is not "mineral development" or "mining" as defined in Interior's regulations. *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1091-92 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 784 (2019). The Osage Wind project was held to have engaged in mining because it went further: "It *sorted* the rocks, *crushed* the rocks into smaller pieces, and then *exploited* the crushed rocks as structural support for each wind turbine." *Id.* at 1091.

The Amended Complaint does not allege there will be "sorting and crushing of rocks to provide structural support" for Keystone XL. *Id.* at 1092. Instead, the soil will be removed in layers so it can be placed back in the trench in its original position after the pipeline is installed.[4] And in rocky areas, "excavated rock [will] be used to backfill the trench to the top of the existing bedrock profile" before the "topsoil [is] returned to its original position over the trench."[5] Such removal and replacement of soil and rock is not "mining" or "mineral development."

Rosebud says that defendants have misread Count Five because it also seeks to enforce a treaty right to exclude outsiders from Rosebud's land. Pltfs.Br. 57. Even assuming that this treaty right exists (and TC Energy does not concede that it does), Rosebud has identified no statute that provides a cause of action against TC

[4] FEIS at 2.1-50, 2.1-52.

[5] *Id.* at 2.1-52.

Energy. Rosebud cites *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 759 F. Supp. 1339, 1344 (W.D. Wis. 1991), where the court enjoined protesters from interfering with the Indians' exercise of their treaty right to spear walleye. But that case was brought under federal civil rights statutes that are inapplicable here, where there is no claim that Defendants are "driven by racial hostility toward Indians." *Id.* at 1349. Count Five must be dismissed in its entirety.

IV. The Tribes' Commerce Clause Claim Provides No Basis For Enjoining Construction of Keystone XL

Plaintiffs' challenge to the President's constitutional authority to issue the 2019 Permit rests on the theory that Congress acquiesced in the process established by Executive Order 13,337, and that the President impermissibly "upended the established practice" when he "unilaterally" issued the 2019 Permit. Pltfs.Br. 43. Not so.

Presidents personally issued permits for cross-border facilities prior to 1968. *See* TC.Br. 4-5. The 2011 statute directing President Obama to issue a permit for Keystone XL under EO 13,337, Pltfs. Br. 45, did not codify that Executive Order. Instead, the relevant history shows that Congress acquiesced in a practice in which Presidential Permits for cross-border oil pipeline facilities were *routinely granted*,

whether by the President or the State Department, [6] and that Congress objected the only time (to our knowledge) that an oil pipeline was ever denied a Presidential Permit. *See* TC.Br. 22, n.47. Presidential issuance of the 2019 Permit is fully consistent with the historical practice.

Moreover, Plaintiffs have no response to our argument that the Commerce Clause challenge provides no basis for enjoining Keystone XL. *Id*. at 22. If the President has no constitutional authority to issue a permit, then the pipeline and related facilities may be constructed whenever permitted by the laws enacted by Congress and by applicable state and local laws.

CONCLUSION

For the foregoing reasons, and those stated in our Opening Brief, the Amended Complaint should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted.

[6] *See* Adam Vann & Paul W. Parfomak, Cong. Research Serv., R43261, *Presidential Permits for Border Crossing Energy Facilities*, at 12, tbl.3 (Oct. 29, 2013) (Ex. 1) (listing 19 cross-border oil pipelines).

DATED this 15th day of August 2019,

CROWLEY FLECK PLLP

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

SIDLEY AUSTIN LLP

/s/ Peter R. Steenland, Jr.
Peter R. Steenland, Jr.
Peter R. Whitfield
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: 202-736-8000
Email: psteenland@sidley.com
pwhitfield@sidley.com

Counsel for TransCanada Keystone Pipeline, LP and TC Energy Corporation

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 3,230 words, excluding tables, caption, signatures, and certificates of service and compliance.

/s/ Jeffery J. Oven

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