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' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Other Authorities

INTRODUCTION

Plaintiffs base their challenge to the President's decision to issue a cross-border Permit for the Keystone XL Pipeline on transparent fiction. Plaintiffs first mischaracterize what the Permit does by arguing that it authorizes the "balance of" the 875-mile-long Project without compliance with environmental laws. Pls.' Opp'n Br. 32, ECF No. 57 ("Br."). But the Permit clearly states that it only authorizes a 1.2-mile border crossing subject to TC Energy obtaining all requisite approvals for the pipeline. Plaintiffs next argue that Executive Order 13,337 ("EO 13,337") is the only congressionally "sanctioned" pathway for Permit approval, Br. 34, when there is no statute governing Presidential Permits. Plaintiffs lastly offer a skewed view of the balance of power between the President and Congress, seeking to jettison over a century of historical practice for an invented rule that a President may only issue a cross-border permit with Congress' express permission. Br. at 13.

As a threshold matter, this case should be dismissed because Plaintiffs lack standing. The President authorized only a 1.2-mile border crossing and Plaintiffs allege no credible injuries arising from the Permit. Plaintiffs instead ask this Court to assume that some future pollution event would traverse five water bodies to harm them. This is not injury; this is speculation.

Even if the Court could reach the constitutional claims, Plaintiffs' Commerce Clause and Property Clause claims disregard the nearly 150-year history of Presidents exercising their inherent constitutional authority to grant or deny the construction of facilities at the United States' border to protect the Nation's territorial integrity. As between Plaintiffs' novel claims versus over a century of Presidential practice and Congressional acquiescence, this Court should side with the other two branches of government.

For these reasons, as set forth below, this Court should grant the United States' motion to dismiss.

ARGUMENT

I. Plaintiffs Lack Standing to Challenge the Cross-Border Permit.

Plaintiffs lack standing to challenge the Permit because they fail to allege any non-speculative injury fairly traceable to the conduct of Defendants relating to the 1.2-mile border segment. And any such injuries would not be redressable.

A. *No Legally Cognizable Injury-in-Fact is Alleged.*

Plaintiffs argue that they allege injury-in-fact to their members because they include a generic allegation that the "construction and operation" of the Project—including 1.2 miles at the border—would harm them. This hardly satisfies the more exacting pleading standards set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). This is

especially true because the Permit only authorizes a border crossing, yet Plaintiffs only vaguely allege harms from the *entire* Project.

Attempting to bolster their obscure injury claims, Plaintiffs allege that one "unnamed tributary" in the border-crossing area flows into two different creeks that flow into a river that then flows into the Missouri River, which is "used by plaintiffs for drinking and farming. . . ." Br. 16–17. This too fails at the threshold: the Court must assume that "contamination" from construction and operation of the Project will flow into several water bodies. This is not an injury, but a series of speculative future events that are not "particularized enough to establish the first element of standing." *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-15 (2013).

Because the Permit explicitly does not authorize construction and operation of the border segment without securing all necessary permits—including a right-of-way from BLM—Plaintiffs' hazy claims of harm are especially tenuous. Plaintiffs attempt to dodge the Permit's requirement that TC Energy must secure additional federal permits before it can construct and operate the Project, arguing federal agencies are not "independent" of the President. Br. 19. But this inverts the fundamental tenet of administrative law that agency decisions are "entitled to a presumption of regularity." *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1043 (9th Cir. 2015).

Further, even if Plaintiffs could demonstrate injury-in-fact, there are too many links in the "chain of causation" between Plaintiffs' alleged harms at the Missouri River and any alleged pollution at the unnamed tributary at the border-crossing connected to the Permit. *Allen v. Wright*, 468 U.S. 737, 759 (1984); *Clapper*, 568 U.S. at 410–11. Plaintiffs must establish a genuine nexus between their alleged injury and Defendants' conduct to show that it is fairly traceable to the Permit. *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 994–95 (9th Cir. 2000). That causal connection has not been alleged here.

Instead, Plaintiffs ask the Court to assume that there will be some future pollution event that will travel through no fewer than five bodies of water. This "speculative chain of possibilities" does not establish injury fairly traceable to the Permit; it does not establish injury at all. *Clapper*, 568 U.S. at 414. Nor can Plaintiffs dispense of the causation inquiry by relying on the circular argument that without the "headwaters" border-crossing permit, they would not be injured by the Project. Unlike *Backcountry Against Dumps v. Chu*, on which they rely, Plaintiffs allege harms that are too many steps removed from the border-crossing Permit itself to establish causation. 215 F. Supp. 3d 966, 976 (S.D. Cal. 2015).[1]

[1] And because there can be no National Environmental Policy Act ("NEPA") claim here, NEPA's theory of interdependent projects is irrelevant. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006).

B. *The Claims Are Not Redressable Because the Court Cannot Enjoin Presidential Action.*

Out of respect for the separation of powers, the Court cannot enjoin the President's issuance of the Permit, and therefore Plaintiffs' claims are not redressable. Plaintiffs nonetheless argue that redress is available because courts have vacated presidential decisions. Br. 20. But this misses the point. The question is what remedy can attach, not whether courts have found a presidential decision unlawful. None of the cases Plaintiffs cite address whether the Court can enjoin Presidential action. *Cf. League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013, 1029–31 (D. Alaska 2019) (finding President's act was inconsistent with "text and context" of statute); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017) (finding redressability through relief against defendants other than the President); *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998) (overturning legislation affording President line item veto).

Such relief is not available here. This case "represents one of those rare instances where the bypass is closed, and only injunctive relief against the President himself will redress [Plaintiffs'] injury." *Swan v. Clinton*, 100 F.3d 973, 979 (1996). The Permit was issued solely by the President, *see* Permit 1, and no subordinate officials were involved in its issuance. To enjoin the Permit, the President would have to be enjoined, precluding redress altogether.

II. Plaintiffs' Constitutional Claims Are Without Merit.

Plaintiffs' constitutional claims should be dismissed because the President's authority to issue cross-border permits has been exercised for the majority of our Nation's history, and Plaintiffs have made no showing to the contrary.

1. Congress Has Not Regulated Cross-Border Pipelines.

Plaintiffs argue that Congress has the exclusive authority to regulate foreign commerce and that any exercise of authority by the President over border crossings is not merely "suspect," but also in direct contravention of Congressional will. Br. 22–23. This argument gets an "A" for audaciousness, but an "F" for plausibility—for multiple reasons.

First, while there is no dispute that Congress has authority to regulate foreign commerce, it has not passed a law relating to cross-border pipelines permits. Plaintiffs get no help from the Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, 125 Stat. 1280 ("TPTCCA"). In that Act, Congress preserved the President's authority, consistent with EO 13,337, to make the final determination as to whether a permit for the Keystone XL Pipeline would "serve the national interest" and should be granted. *Id.* § 501(b)(1)–(2), 125 Stat. at 1289–90. Congress could have passed a law approving the pipeline regardless of what the President determined, but did not do so.

Second, Plaintiffs argue that the *Digest of International Law* excerpts and President Grant's speech cited by Defendants demonstrate limited Presidential permitting authority. ECF Nos. 48-1, 48-2, Br. 23–24. But President Grant's speech and the digest support the principle that, in the absence of Congressional action, Presidents possess inherent constitutional authority over border-crossing permits to preserve the United States' territorial integrity. *See* ECF No. 48-1 at 247–56. Here, there was no countervailing action by Congress.

Third, Plaintiffs misinterpret Judge Augustus Hand's opinion in *United States v. Western Union Telegraph Company* as placing in doubt the President's authority to issue the Permit. 272 F. 311 (S.D.N.Y. 1921). There, the court accepted the principle that, in the absence of an applicable congressional enactment, the President could grant or deny a physical connection to the United States. *Id.* at 318–19. And while the court questioned the source of the President's authority, it doubted whether this "was a justiciable matter." *Id.* Here, unlike *Western Union*, there is no statute that governs authorization for cross-border pipelines. *That is a critical fact that Plaintiffs simply refuse to acknowledge.*

2. In the Absence of Congressional Action, the President Has Authority to Authorize a Border Crossing.

The President's authority to grant or deny a border-crossing permit for an international pipeline is rooted in his inherent authority as Commander-in-Chief and his foreign affairs power. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S.

396, 414 (2003). Plaintiffs cite no authority finding that the President lacks such authority but rather contend that this case does not involve an issue of foreign affairs historically committed to the President. Br. 25–27.

Plaintiffs' argument that the Permit does not embrace an issue of foreign affairs historically committed to the executive ignores almost 150 years of history. Beginning with President Grant, the power to approve cross-border permits has rested with the President unless Congress acted. *See* ECF No. 48-2; *Nat. Res. Def. Council, Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 112 (D.D.C. 2009). While Plaintiffs attempt to frame cross-border permits as solely involving foreign commerce, this argument takes an exceptionally crabbed view of the international relations and territorial integrity issues raised by such permits. *Foreign Cables*, 22 Op. Att'y Gen. 13, 13 (1898) ("The preservation of our territorial integrity and the protection of our foreign interests is intrusted in the first instance to the President.").

Instead, Plaintiffs unsuccessfully attempt to explain away the cases supporting the President's authority over border-crossing permits. The only instance in which the President's authority to issue a border-crossing permit for a pipeline was squarely addressed was *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147 (D. Minn. 2010). The *Sierra Club* court found that the President's authority in this area was "well recognized" and dismissed the claim. *Id.* at 1163. Plaintiffs argue

that the *Sierra Club* decision is distinguishable, largely relying on TPTCCA and the Permit's "notwithstanding EO 13,337" language. Br. 28–29. But neither TPTCCA nor EO 13,337 trenches upon the President's well-recognized authority to issue the Permit.

3. Congress Has Acquiesced to the President's Authority Over Cross-Border Pipelines.

Congress' acquiescence to Presidential authority to approve cross-border pipelines is a prototypical example of a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned." *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). Plaintiffs nonetheless press that the President's power was at its "lowest ebb," Br. 43, when he issued the permit because it contravened Congress' will and sidestepped the "long-standing" practice of State Department review. As discussed above, TPTCCA does not evidence any Congressional will *against* Presidential authority to approve cross-border pipelines. *See supra* pp. 6–7. To the extent Plaintiffs suggest the Court should look more narrowly at the "longstanding practice of State Department review" utilized by Presidents for fifty years, that highlights Congress' acquiescence to presidential authority over pipeline border-crossings. Presidents have unilaterally changed the process for permit review and Congress has not intervened. Defs.' Mem. 4. The President's more recent

delegation to the Secretary of State for *part* of the 150-year history does not undermine his inherent constitutional authority.

A. Plaintiffs' Property Clause Claim Lacks Merit.

Plaintiffs also argue the President lacks authority to issue the Permit because Congress—not the President—has the power under the Constitution to regulate and dispose of federal lands affected by the Permit. But this mischaracterizes what the Permit does and wrongly assumes that it authorizes TC Energy to construct the "balance" of the Project. Br. 32. This claim fails for at least two reasons.

First, Plaintiffs continue to ignore what the Permit authorizes: an international border crossing, not the "balance of Keystone's 875 miles." *Id.* A cross-border permit squarely falls into the President's inherent constitutional authority because it "implicates foreign affairs and national security concerns." *Sierra Club*, 689 F. Supp. 2d at 1162. Nor can Plaintiffs find any support in *League of Conservation Voters*, where the Court addressed not the Property Clause, but what authority the President had over Outer-Continental Shelf ("OCS") lands where Congress had issued legislation governing the disposition of OCS lands. 363 F. Supp. 3d at 1018 n.20. There is no such legislation here. *Again, this is the key distinction that Plaintiffs simply cannot countenance.*

Second, Plaintiffs contend that the Permit's conditions are "permissive" because TC Energy is responsible for securing authorizations that "may become

necessary or appropriate." Br. 33. This argument again ignores what the Permit actually says. Plaintiffs cite the word "may" shorn of its context; the "may become" language modifies the permits that TC Energy may have to acquire; *it does not modify TC Energy's obligations to obtain all necessary authorizations*. The Permit reinforces this obligation, requiring that construction and operation of the Project be "consistent with applicable law." Permit, Art. 1(2). The required authorizations from the numerous entities involved "may" change. But the requirement that TC Energy secure all necessary authorizations will not.

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

Plaintiffs contend that the Permit violates the Commerce Clause because only Congress may regulate foreign commerce. Here again, Plaintiffs mischaracterize what the Permit does and the authority that the President exercised. Plaintiffs' arguments fail for at least four reasons.

First, Plaintiffs argue that Congress has the exclusive authority to regulate foreign commerce. Br. 30. Defendants do not dispute that Congress has authority to regulate foreign commerce, but the President's shared authority over foreign affairs is just as well-established. *See, e.g.*, *Garamendi*, 539 U.S. at 414. And Congress has passed no laws relating to the permitting of cross-border pipelines, so there is no conflict here.

Second, while Plaintiffs emphasize that the Permit implicates Congress' foreign Commerce Clause authority, the Permit does not merely encompass foreign *commerce*, but also concerns foreign affairs and territorial integrity. The President's authority to grant or deny a border-crossing permit is rooted in his inherent constitutional authority, not the Commerce Clause. *See id.*

Third, Plaintiffs argue that Congress "intended" any environmental review to occur before the issuance of a border-crossing permit. Br. 31. Even indulging the fiction that a multi-member body like Congress can have such singular "intent," Plaintiffs offer no citation evincing such "intent" except for a NEPA case.[2] *Id*. It is strange enough to posit that a *judicial* case would somehow establish *legislative* intent. But it is especially odd in this particular case given that it is blackletter law that NEPA does not apply to the President. *See supra* at n.1.

Finally, there is no merit to Plaintiffs' argument that the Permit undermined the territorial integrity of the United States because the President invited TC Energy to reapply for the Permit. Plaintiffs have it backwards: the absence of a Presidential Permit would threaten territorial integrity. Presidents first permitted border crossings because entities were building cross-border projects without the United States' consent. Against this historical backdrop and in the absence of

[2] *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 897 (9th Cir. 2002).

Congressional action, the President's exercise of permitting authority is necessary to protect territorial integrity. *See supra* p. 8.

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

Plaintiffs' argument that the President has no authority to authorize cross-border pipeline crossings rests uneasily alongside their other argument that Congress "sanctioned" precisely such an exercise of the President's authority in EO 13,337. Putting that aside, their premise that EO 13,337 binds the President because Congress somehow "sanctioned" it ignores the facts and the law. Plaintiffs ignore the facts because Congress has never sanctioned EO 13,337. They ignore the law because, as borne out by almost 150 years of precedent and practice, the President has the power to permit the pipeline. Plaintiffs cannot seriously challenge the President's inherent constitutional authority to revisit, reverse, and undo prior decisions of the Executive Branch. U.S. Const. art. II, § 1, cl. 1; *id.*, § 3. Rather, they try to sidestep the argument altogether by arguing that Congress has "sanctioned" EO 13,337. Br. 35. This strained idea that Congress can take an executive action that, under Plaintiffs' view of the world, would initially be illegal, and then turn it into law *binding on the President* by somehow vaguely "sanctioning" it, is completely unsupported. It is, frankly, grasping at straws.

Plaintiffs' argument that EO 13,337 binds the President because it "implement[s] a congressional mandate" has it backwards. Br. 34. EO 13,337 was issued almost ten years before TPTCCA, and President Bush issued the order pursuant to his constitutional authority, not a delegation from Congress. And Congress, in TPTCCA, ordered the *President*, through the Secretary of State, to approve the pipeline or issue a national interest determination. Congress has thus not mandated a process for cross-border pipelines. And the President can therefore withdraw EO 13,337 at "any time for any or no reason" under his Article II authority. *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965).

Moreover, Plaintiffs' argument that EO 13,337 does not preclude judicial review ignores the threshold question: whether EO 13,337 can provide a basis to sue the President. The answer is no. Not only does EO 13,337 state that it creates no legal rights, § 6, but it was issued under Presidents' inherent constitutional authority, precluding review of the President's actions. *See* Defs.' Mem. 3–4.

Plaintiffs' tortured attempts to enforce EO 13,337 against the President are without merit.

III. There is No Legally Cognizable Basis to Sue Agency Defendants.

Plaintiffs contend that Agency Defendants are properly part of this suit because they "had duties" under EO 13,337 to "review and consult" on the Project. Br. 36–37. This is demonstrably wrong.

First, as discussed above, EO 13,337 does not apply to a permit issued by the President. EO 13,337 delegates Presidential authority to the Secretary; it doesn't relinquish it. The President may therefore exercise his inherent constitutional power to approve border crossings notwithstanding the delegation.

Second, Plaintiffs raise no judicially-cognizable final agency action or failure to act. EO 13,337 expressly creates no rights or trust responsibilities. Agency Defendants have no independent "duties" under EO 13,337 subject to judicial review. Agency Defendants therefore have no "[duty] to review and consult on the Keystone Project." Br. 37.

CONCLUSION

For the reasons stated herein, this Court should dismiss this suit pursuant to Rules 12(b)(1) and 12(b)(6).

Respectfully submitted this 12th day of September, 2019,

LAWRENCE J. VANDYKE
Deputy Assistant Attorney General

/s/ Marissa A. Piropato
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 3,248 words, excluding the tables, caption, signature, certificate of compliance, and certificate of service.

/s/ Marissa A. Piropato
MARISSA A. PIROPATO
U.S. Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2019, a copy of the foregoing reply brief was served on all counsel of record via the Court's CM/ECF system.

/s/ Marissa A. Piropato
MARISSA A. PIROPATO
U.S. Department of Justice