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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.	Case No. 4:18-cv-00118-BMM **PLAINTIFFS' SUPPLEMENTAL BRIEF**

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INTRODUCTION

Pursuant to the Court's December 20, 2019, order (Dkt. 93), Plaintiffs Rosebud Sioux Tribe and Fort Belknap Indian Community ("the Tribes") respectfully submit this Supplemental Brief. The 2019 Permit issued by Defendant Donald J. Trump to Defendants TC Energy Corporation and TransCanada Keystone Pipeline, L.P., (collectively "TransCanada") for the Keystone XL Pipeline ("KXL") extends to the entire pipeline. The authority to permit KXL flows from Congress's exclusive and plenary foreign commerce powers. TransCanada cannot simply construct KXL across the United States-Canada border if the Court finds the 2019 Permit unconstitutional.

DISCUSSION

I. Without the 2019 Permit, There Can Be No Pipeline

The 2019 Permit extends to the entire KXL project and is a cause of injury to the Tribes. *See WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) (defendant may be sued if it is one of multiple causes of plaintiff's injury). The 2019 Permit is not limited to the 1.2-mile border facility, as demonstrated by its plain language and the overall context surrounding its issuance.

The plain language of the 2019 Permit shows that it permits the entire KXL. The title of the 2019 Permit is: "Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Connect, Operate, and Maintain Pipeline *Facilities* at the International

Boundary Between the United States and Canada." 84 Fed. Reg. 13,101, 13,101 (Apr. 3, 2019) (emphasis added). "The term 'Facilities' as used in this permit, means the portion in the United States of the international pipeline project associated with the permittee's application for a Presidential permit filed on May 4, 2012, and resubmitted on January 26, 2017, and any land, structures, installations, or equipment appurtenant thereto." *Id.* In other words, the entire pipeline. The 2019 Permit provides that "construction, connection, operation, and maintenance of the Facilities (not including the route) shall be, in all material respects and as consistent with applicable law, as described in the permittee's application for a Presidential permit filed on May 4, 2012, and resubmitted on January 26, 2017." *Id.* art. 1(2). The language is broad—"any land . . . appurtenant"—and nowhere includes the restrictions that Defendants now argue it contains.

This Court has already held that this language refutes the argument that the 2019 Permit applies only to the 1.2-mile segment. *See Indigenous Envtl. Network v. U.S. Dep't of State*, No. CV-17-29-GF-BMM, 2017 WL. 5632435, at *1 (D. Mont. Nov. 22, 2017) (*IEN I*); *Indigenous Envtl. Network v. U.S. Dep't of State*, 317 F. Supp. 3d 1118, 1122 (D. Mont. 2018) (*IEN II*) (quoting 82 Fed. Reg. 16,467 (Apr. 4, 2017)) ("Federal Defendants argument that the [2017] Permit applies only to the segment of the pipeline at the border proves unpersuasive as the [2017] Permit states that [KXL] 'must be constructed and operated as described in the 2012 and 2017

permit applications[and] the 2014 EIS.'"). Critically, this holding binds Defendants. *See Collins v. D.R. Horton, Inc*., 505 F.3d 874, 880 (9th Cir. 2007). This Court also referenced the importance of this language in *Rosebud Sioux Tribe v. Trump*, No. CV-18-118-GF-BMM, ___ F. Supp. 3d ___, 2019 WL 7421956, at *5 (D. Mont. Dec. 20, 2019) ("And historically, Presidents have issued permits for entire pipelines, not segments of those pipelines."). It does not matter that the Court originally discussed the 2017 Permit, as the President incorporated the identical language into the 2019 Permit, with full knowledge of this Court's interpretation of that language.

This interpretation is further supported by the fact that "Border Facilities" are separately defined. "Border Facilities" are a small part of what is contained in the broad term "Facilities" as used in the title of the 2019 Permit: "The term 'Border Facilities' as used in this permit means those *parts of the Facilities* . . . extending from the international border between the United States and Canada . . . to and including the first mainline shut-off valve in the United States located approximately 1.2 miles from the international border." 84 Fed. Reg. at 13,101 (emphasis added). Thus, the term Border Facilities refers to a part of KXL's overall Facilities.

The 2019 Permit contains additional pertinent language. For example, it requires TransCanada to acquire all relevant permits, without limitation to the Border Facilities, *see id*. at 13,102, art. 6(1), and holds the United States harmless

for any liability arising out of the "construction, operation, or maintenance of the Facilities, including environmental contamination from the release, threatened release, or discharge of hazardous substances or hazardous waste." *Id*. art. 6(2). Tellingly, Article 6(3) is the only provision of the 2019 Permit specifically limited to the Border Facilities. *Id*. at 13,102. Finally, Articles 9 and 11, concerning notice of the timetable for construction and restriction of the rights granted by the 2019 Permit, are not limited to the Border Facilities. *Id*. at 13,103. Looking at the language used in both the 2017 and 2019 Permits, including how they define "Facilities" and "Border Facilities," it cannot be clearer that the 2019 Permit authorizes the entire pipeline.

The context around the 2017 and 2019 Permits shows the federal government and TransCanada have always viewed KXL as a single enterprise. The President himself affirmed this understanding, stating that he was permitting "the Pipeline," never just a piece of it. On January 24, 2017, President Trump issued a memorandum inviting TransCanada to resubmit its application for the "*Construction of the Keystone XL Pipeline*." 82 Fed. Reg. 8,663, 8,663 (Jan. 24, 2017) (emphasis added). During the signing ceremony for the memorandum, President Trump stated: "[W]e'll see if we can get that pipeline built. Lot of jobs. 28,000 jobs. . . . Okay, Keystone Pipeline." *Trump Signs Executive Orders on Keystone and Dakota Pipelines*, at 0:25-0:46 (CNBC Jan. 24, 2017), *video available at*

https://www.cnbc.com/2017/01/24/trump-to-advance-keystone-dakota-pipelines-with-executive-order-on-tuesday-nbc.html. The President did not say, for example, "We'll see if we can get that 1.2-mile border facility built." In line with the understanding that he was approving the entire KXL, Section 2 of the memorandum invites TransCanada "to promptly re-submit its application to the Department of State for a Presidential *permit for the construction and operation of the Keystone XL Pipeline, a major pipeline for the importation of petroleum from Canada to the United States*." 82 Fed. Reg. at 8,663, § 2 (emphasis added).

TransCanada resubmitted its application promptly, stating: "Authorization is being requested, pursuant to Executive Order 13337, in connection with Keystone's proposed international pipeline project – the Keystone XL Pipeline Project (Project). This application is also submitted *consistent with the Presidential Memorandum* to the Secretaries of State, the Army, and the Interior regarding Construction of the Keystone XL Pipeline, signed by the President on January 24, 2017." Letter from Kristine L. Delkus, Exec. Vice President, TransCanada Corp., to Richard W. Westerdale, Dir., Policy Analysis & Pub. Diplomacy, Bureau of Energy Res., U.S. Dep't of State, *TransCanada Keystone Pipeline, L.P.: Application for Presidential Permit for Keystone XL Pipeline Project* (Jan. 26, 2017), *available at* https://www.state.gov/wp-content/uploads/2019/02/Application-for-Presidential-Permit-for-Keystone-XL-Pipeline-Project.pdf (emphasis added).

TransCanada's 2017 permit application states: "*If* this application is approved, the Project will allow transportation of crude oil production from [Canada] . . . and the Bakken . . . to a point located on the existing Keystone Pipeline system at Steele City, Nebraska." TransCanada Keystone Pipeline, L.P., *Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border* ("2017 Application"), at 1 (Jan. 26, 2017), *available at* https://www.state.gov/wp-content/uploads/2019/02/Application-for-Presidential-Permit-for-Keystone-XL-Pipeline-Project.pdf (emphasis added). The application further states: "The border crossing facilities are intended to transport crude oil as an *integral part of the proposed Project* -- an international project designed to transport Canadian crude oil from . . . to refinery markets in the U.S. Gulf Coast region." *Id.* at 7-8 (emphasis added).

There is simply no doubt that the entire pipeline is one enterprise and a connected action. *Rosebud*, 2019 WL 7421956, at *5. Activities must be viewed together when they have a cumulative impact and where the matters are so interrelated that "[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken." *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985), *abrogated on other grounds*

by Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075 (9th Cir. 2015); *Save the Yaak Comm. v. Block*, 840 F.3d 714, 719 (9th Cir.1988).

After the 2017 Permit was issued, President Trump tweeted: "Today, I was pleased to announce the official approval of the presidential permit for the #KeystonePipeline." https://twitter.com/realDonaldTrump/status/845320243614547968?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed&ref_url=https%3A%2F%2Fwww.latimes.com%2Fpolitics%2Fla-pol-updates-everything-president-trump-announces-permit-for-keystone-xl-1490395305-htmlstory.html. The President later tweeted that he approved the "Keystone XL and Dakota Access pipelines." https://twitter.com/realdonaldtrump/status/919560102725738498?lang=en.

In litigation over the 2017 Permit, this Court rejected the federal government's and TransCanada's argument that the 2017 Permit applied only to the 1.2-mile segment of KXL. *See IEN II*, 317 F. Supp. 3d at 1122. As a result of this Court holding the issuance of the 2017 Permit unlawful, *Indigenous Envtl. Network v. U.S. Dep't of State*, 347 S. Supp. 3d 561 (D. Mont. 2018) (*IEN III*), the President revoked the 2017 Permit and issued the 2019 Permit, which is in all respects consistent in scope with the 2017 Permit, and uses the same key language as the 2017 Permit. *See* 84 Fed. Reg. 13,101. At no point—whether the plain language of the 2017 or 2019 Permits, legal precedent, the President's public statements, or TransCanada's

application—has any party suggested these permits were only for a 1.2-mile section of the overall KXL. This assertion appears only now, before this Court, invented out of whole cloth in an attempt to undermine this and the companion cases.

There is also no doubt that the 2019 Permit is one cause of KXL and the Tribes' injuries.[1] KXL must be treated as one whole in light of the treaty obligations owed to the Tribes. As the Tribes have explained in detail in prior briefing, the President cannot violate the federal government's treaty obligations to protect the Tribes from depredations. Defendants attempt to minimize the impact of KXL by advancing this crabbed interpretation that the 2019 Permit only applies to a 1.2-mile segment. This is not how causation works, and it is unworkable in the context of treaty rights, because KXL's *impacts* reach beyond the 1.2-mile section.

The Ninth Circuit has made clear that a defendant may be held liable so long as he "is at least partially causing the alleged injury." *WildEarth Guardians*, 795 F.3d at 1157. "The relevant inquiry is instead whether a favorable ruling could redress the challenged cause of the injury." *Id.* There is no doubt here that holding

[1] Defendants' argument that federal approvals for KXL do not cause the Tribes' injuries and do not authorize the construction of the entire KXL is belied by the Bureau of Land Management's granting of a right-of-way to TransCanada on January 22, 2020, to construct 46.28 miles of KXL in Montana. Announcing the right-of-way, Secretary Barnhart stated: "Today's decision is an important milestone in constructing the [KXL]." https://www.blm.gov/press-release/interior-approves-record-decision-keystone-xl-pipeline.

the 2019 Permit unlawful will prevent KXL from being built and harming the Tribes. Without the 2019 Permit, there can be no KXL.

The history, purpose, and negotiations of the Treaties show that in treating with the federal government, the Tribes meant to protect their natural resources and keep people from crossing their lands. (*See* Dkts. 58, at 14-22; 74, at 32-38). The approval of KXL violates the Treaty provisions that enshrine both of these goals. (*See, e.g.*, Dkt. 74, at 38-40). The President cannot evade compliance with the Treaties by creating a legal fiction that his actions are restricted to a 1.2-mile area, distant from the Tribes' modern day lands, when, without the 2019 Permit, KXL cannot be built and harm the Tribes.

The plain language of the 2019 Permit, its precedent, its context, and the application itself all indicate that it approved the entire KXL and is one cause of its construction.

II. Congress, not the President, Possesses the Inherent Constitutional Power to Permit KXL

Congress has the exclusive and plenary power to regulate foreign commerce, which includes the power to permit KXL and other cross-border crude oil pipelines. The President's foreign affairs and Commander-in-Chief powers do not grant him concurrent, independent, or inherent authority to permit KXL or other cross-border crude oil pipelines.

A. The Authority to Permit KXL Flows from Congress's Exclusive and Plenary Power to Regulate Foreign Commerce.

The Constitution grants Congress the power "To regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. A "fundamental principle" of Congress's Foreign Commerce Clause power is "'that it is exclusive and plenary.'" *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2006) (quoting *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56 (1933)) (emphasis added). The President, therefore, possesses no concurrent, independent, or inherent authority to regulate foreign commerce. *See Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994) (quoting U.S. Const. art. I, § 8, cl. 3) ("The Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'"). Congress's Commerce Clause "'power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.'" *United States v. Lopez*, 514 U.S. 549, 553 (1995) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824))

Congress's Commerce Clause power "'is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.'" *Id*. (quoting *Gibbons*, 22 U.S. at 196). Regarding interstate commerce, the Supreme Court has identified three broad categories Congress may regulate: "(1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in

interstate commerce; and (3) activities that substantially affect interstate commerce." *Clark*, 435 F.3d at 1102. While "[n]o analogous framework exists for foreign commerce," these categories are instructive when considering Congress's foreign commerce powers in specific contexts. *Id.* at 1103.

Courts have consistently interpreted "'the scope of the foreign commerce power to be greater' as compared with interstate commerce." *Id*. (quoting *Jap. Line, Ltd. v. L.A. Cnty.*, 441 U.S. 434, 448 (1979)) (ellipsis omitted). Indeed, courts have characterized "the Foreign Commerce Clause as granting Congress sweeping powers." *Id*. at 1113 (citing *Bd. of Trustees*, 289 U.S. at 59). The Supreme Court "has been unwavering in reading Congress's power over foreign commerce broadly." *Id*. (citing *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 46 (1974) ("The plenary authority of Congress over both interstate and foreign commerce is not open to dispute."); *Butterfield v. Stranahan*, 192 U.S. 470, 492 (1904) ("The power to regulate commerce with foreign nations is expressly conferred upon Congress, and, being an enumerated power, is complete in itself, acknowledging no limitations other than those prescribed in the Constitution.")).

Congress's complete, exclusive, and plenary power to regulate foreign commerce is most quintessentially exercised by regulating the importation of goods into the country. *C.f. Gibbons*, 22 U.S. at 189-90 ("Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial

intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."). Congress's authority to regulate imports is absolute. *See, e.g.*, *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 126 (1973) (quoting *Webber v. Freed*, 239 U.S. 325, 329 (1915)) ("The plenary power of Congress to regulate imports is illustrated in a holding by this Court which sustained the validity of an Act of Congress prohibiting the importation of 'any film or other pictorial representation of any prize fight . . .' in view of 'the complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles.'" (internal citations and footnote omitted)); *Bd. of Trustees*, 289 U.S. at 57; *Butterfield*, 192 U.S. at 492; *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 660 (4th Cir. 1953).

Additionally, "Congress is vested with the principal power to control the nation's borders." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 755 (9th Cir. 2018). "This power flows naturally" from Congress's power to regulate foreign commerce, as well as its powers to declare war and regulate immigration. *Id.* (quoting U.S. Const. art. I, § 8, cls. 3, 4, 11).

The authority to permit cross-border crude oil pipelines, such as KXL, flows from Congress's exclusive and plenary power to regulate foreign commerce. The power to regulate foreign commerce "comprehend[s] every species of commercial intercourse between the United States and foreign nations. No sort of trade can be

carried on between this country and any other, to which this power does not extend." *Gibbons*, 22 U.S. at 193. As this Court correctly held, the "cross-border transportation of crude oil through a pipeline constitutes a form of foreign commerce." *Rosebud*, 2019 WL 7421956, at *6 (citations omitted); *Indigenous Envtl. Network v. Trump*, No. CV-19-28-GF-BMM, ___ F. Supp. 3d ___, 2019 WL 7421955, at *9 (D. Mont. Dec. 20, 2020) (*IEN IV*) ("[T]he transportation of crude oil from Canada to the United States falls within Congress's power to regulate foreign commerce." (citation omitted)).

Courts have consistently recognized that transporting crude oil (as well as refined petroleum products and natural gas) through pipelines is commerce within the meaning of the Commerce Clause. *See, e.g., W. Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1342 (9th Cir. 1984) ("It is undisputed that up to 95% of the petroleum substances entering the oil companies' facilities are of foreign origin and that between 46-98% of the products leaving the refineries are channeled onto interstate and foreign commerce. There is, therefore, no question that plaintiff's activities are carried out in interstate commerce."); *Maryland v. Louisiana*, 451 U.S. 725, 754-55 (1981) ("Initially, it is clear to us that the flow of [natural] gas from the [Outer Continental Shelf] wells, through processing plants in Louisiana, and through interstate pipelines to the ultimate consumers in over 30 States constitutes interstate commerce."); *Mich.-Wis. Pipe Line Co. v. Calvert*, 347 U.S. 157, 167-68 (1954)

("The 'taking' into appellants' pipelines is solely for interstate transmission and the [natural] gas at the time is not only actually committed to but is moving in interstate commerce."); *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965) ("The result of our decisions is to make the sale of [natural] gas which crosses a state line at any stage of its movement from wellhead to ultimate consumption 'in interstate commerce.'"); *United States v. Ohio Oil Co.*, 234 U.S. 548, 560 (1914); *c.f. Alaska v. Brown*, 850 F. Supp. 821, 827 (D. Alaska 1994).

That KXL transports crude oil across the United States-Canada border "is quite relevant to [the Court's] inquiry," as the scope of Congress's Foreign Commerce Clause power *far exceeds* the scope of its Interstate Commerce Clause power. *United States v. Cummings*, 281 F.3d 1046, 1049 n.1 (9th Cir. 2002) (quoting *Jap. Line*, 441 U.S. at 448). Congress's authority to regulate cross-border crude oil pipelines under its Foreign Commerce Clause powers is consistent with its authority to regulate other cross-border commercial infrastructure. *See, e.g., United States v. W. Union Tel. Co.*, 272 F. 893, 894 (2d Cir. 1921) (*W. Union II*), *vac'd as moot pursuant to stipulation* 260 U.S. 754 (1922) (affirming Congress's power to permit the landing of foreign submarine telegraph cables); *Detroit Int'l Bridge Co. v. Gov't of Can.*, 189 F. Supp. 3d 85, 93 (D.D.C. 2016) (acknowledging Congress's authority to permit international bridges).

It is unquestionable that the authority to permit cross-border crude oil pipelines, including KXL, flows from Congress's exclusive and plenary power to regulate foreign commerce.

B. The Authority to Permit KXL Does Not Flow from the President's Foreign Affairs or Commander-in-Chief Powers.

1. The President's Foreign Affairs Powers are Principally Diplomatic in Nature

The source of the President's foreign affairs power "does not enjoy any textual detail" in the Constitution and, instead, must be implied from the Executive powers conferred in Article II. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003). The Constitution grants the President the *power* "to make Treaties . . . [and] appoint Ambassadors," U.S. Const. art. II, § 2, cl. 2, and assigns him the *duties* of serving as the "Commander in Chief of the Army and Navy of the United States," *id*. § 2, cl. 1, and "receiv[ing] Ambassadors and other public Ministers." *Id*. § 3; *accord Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2113 (2016) (Roberts, C.J., dissenting) (emphasizing the distinction between "*duties* imposed on" and "*powers* granted to" the President (emphasis in original)).

Historically, the Supreme Court understood the President's foreign affairs powers to be immense. In *United States v. Curtiss-Wright Export Corp.*, for example, the Court described "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international

relations." 229 U.S. 304, 320 (1936). Since *Curtiss-Wright*, the Supreme Court has repudiated this understanding of the President's power. *Zivotofsky*, 135 S. Ct. at 2089 (majority) ("This Court declines to acknowledge that unbounded power."); *id.* at 2115 (Roberts, C.J., dissenting) ("But our precedents have never accepted such a sweeping understanding of executive power." (citations omitted)). Instead, *Zivotofsky* acknowledged Congress's concurrent foreign affairs powers often constrain the President's own powers. *Id*. at 2087 (majority) ("It remains true, of course, that many decisions affecting foreign relations . . . require congressional action.").

Indeed, the Constitution grants Congress power to "regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, "establish an uniform Rule of Naturalization," *id.* cl. 4, "define and punish Pirates and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* cl. 10, "declare war, grant Letters or Marque and Reprisal," *id.* cl. 11, and "makes Rules for the Government and Regulation of land and naval Forces." *Id.* cl. 14.

Additionally, the few actual foreign affairs *powers* granted to the President are circumscribed by reciprocal powers granted to Congress. While the Constitution grants the President the power "to make Treaties . . . [and] appoint Ambassadors," he may do so only "by and with the Advice and Consent of the Senate." *Id*. art. II, § 2, cl. 2. Furthermore, the Appropriations and the Necessary and Proper Clauses grant

Congress further powers that can constrain the President's foreign affairs powers. *See Zivotofsky*, 135 S. Ct. at 2087 (discussing U.S. Const. art. I, § 8, cls. 1, 18).

When weighed against the foreign affairs powers granted to Congress, it is clear the extent of the President's foreign affairs powers is diplomatic in nature. Article II confers upon the President the authority "'to speak for the Nation with one voice in dealing with other governments.'" *Garamendi*, 539 U.S. at 424 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000)). The President's foreign affairs powers include devising and executing foreign policy and establishing and maintaining diplomatic relations with foreign nations. *See id.* at 420 (describing the President's role in foreign affairs as "discharging [his] responsibility to maintain the Nation's relationships with other countries.").

In *Zivotofsky*, the Supreme Court catalogued the President's foreign affairs powers as principally diplomatic. 135 S. Ct. at 2086. The Court noted that beyond his express powers to negotiate treaties, as he did with the Tribes here, and nominate ambassadors, "the President himself has the power to open diplomatic channels by engaging in direct diplomacy with foreign heads of state and their minsters." *Id.* (internal citation omitted)); *id*. at 2088 (quoting *United States v. Belmont*, 301 U.S. 324, 330 (1937)) ("'[R]ecognition, establishment of diplomatic relations, and agreements with respect thereto' are 'within the competence of the President.'" (alterations omitted)). "In these matters," which relate to the government-to-

government relationships between the United States and foreign nations, "'the Executive has authority to speak as the sole organ of the government.'" *Id*. (quoting *United States v. Pink*, 315 U.S. 203, 223 (1942)).

The nature of the President's foreign affairs powers is also informed by the foreign affairs powers granted to and withheld from Congress. Congress's constitutionally enumerated foreign affairs powers far exceed the President's and often constrain the powers granted to him. *Compare* U.S. Const. art. I, § 8, cls. 1, 3-4, 10-11, 14, 18, *with id*. art II, § 2, cl. 1-2, *and id*. § 3. The few powers Congress lacks are those relating to direct diplomacy. *C.f. Zivotofsky*, 135 S. Ct. at 2086 ("Congress . . . has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation.").

To be sure, "historical gloss . . . has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Garamendi*, 539 U.S. at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)). But this power pertains to the President's role as the Nation's "chief diplomat," *Zivotofsky*, 135 S. Ct. at 2099 (Thomas, J., concurring); that is, representing "the United States among the world's nations." *Crosby*, 530 U.S. at 380. In this way, the Constitution provides the President with the "unique role in communicating with foreign governments." *Zivotofsky*, 135 S. Ct. at 2090 (majority). Nonetheless, Congress's commensurate foreign affairs powers mean that

"[i]t is not for the President alone to determine the whole content of the Nation's foreign policy." *Id*. at 2090. Indeed, as *Zivotofsky* recognized: "In a world that is even more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected." *Id*.

2. The President's Commander-in-Chief Duties and Powers are Purely Military

Much like foreign affairs, the Constitution grants war powers to both Congress and the President. To Congress, the Constitution grants the powers to "declare war . . . and make Rules concerning Capture on Land and Water," U.S. Const. art. I, § 8, cl. 11, to "raise and support Armies," *id*. cl. 12, to "define and punish . . . offenses against the Law of Nations," *id.* cl. 10, and "To make Rules for the Government and Regulation of the land and naval forces." *Id.* cl. 14. To the President, the Constitution simply assigns him the duty of serving as the "Commander in Chief of the Army and Navy of the United States." *Id*. art. II, § 2, cl. 1; *Lane v. Halliburton*, 529 F.3d 548, 559 (5th Cir. 2008) (the Constitution grants "the Executive the responsibility of commanding th[e] armed forces.").

The President's "duty and power are purely military." *Flemming v. Page*, 50 U.S. 603, 615 (1850). In commanding the military, the President enjoys "broad powers." *Youngstown*, 343 U.S. at 587 (majority) (recognizing the "broad powers in military commanders engaged in day-to-day fighting in a theater of war"); *Flemming*, 50 U.S. at 615 ("As commander-in-chief, he is authorized to direct

movements of the naval and military forces placed by law in his command."); *c.f. Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006) (quoting *Ex parte Milligan*, 71 U.S. 2, 139 (1866)) ("'Congress cannot direct the conduct of campaigns.'"). Additionally, the President's duties as Commander-in-Chief "require him to take responsible and continuing action to superintend the military." *Loving v. United States*, 517 U.S. 748, 722 (1996).

The President's duty as Commander-in-Chief also empowers him with ensuring the national defense. *See Mottola v. Nixon*, 318 F. Supp. 538, 541 (N.D. Cal. 1970), *vac'd on other grounds* 464 F.2d 178 (9th Cir. 1972) ("[T]he President has power under Article II, acting in his role as Chief Executive and as Commander in Chief of the armed forces, to repel on his own initiative any attack upon the United States."); *The Amy Warwick*, 67 U.S. 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force."). But, the President's Commander-in-Chief powers are necessarily constrained by Congress and the Constitution. *Ex parte Quirin*, 317 U.S. 1, 26 (1942); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (President's exercise of war powers cannot exceed the constraints of due process and *habeas corpus*).

The President's duties and powers as Commander-in-Chief pertain to the command and control of the military and ensuring the national defense. As Justice Souter emphasized in *Hamdi*, "it is instructive to recall Justice Jackson's observation

that the President is not Commander in Chief of the country, only the military." *Hamdi*, 542 U.S. at 552 (Souter, J., concurring in part, dissenting in part, concurring in judgment) (citing *Youngstown*, 343 U.S. at 643-33 (Jackson, J., concurring)).

3. The President's Foreign Affairs and Commander-in-Chief Powers do not Provide Him Authority to Permit KXL

The authority to permit cross-border crude oil pipelines, including KXL, does not flow from the President's foreign affairs powers and role as Commander-in-Chief because the "transportation of crude oil through a pipeline constitutes a form of foreign commerce." *Rosebud*, 2019 WL 7421956, at *6.

To be sure, "the President's independent authority 'in the areas of foreign policy and national security,'" *Garamendi*, 539 U.S. at 429 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)), are sources of broad Executive power. Nevertheless, they do not serve as independent sources of authority to regulate foreign commerce, *i.e.*, permit cross-border crude oil pipelines, such as KXL. *IEN IV*, 2019 WL 7421955, at *9 ("[T]he transportation of crude oil from Canada to the United States falls within Congress's power to regulate foreign commerce.").

The fundamental tenet of the separation of powers is that the President cannot exercise powers explicitly granted to Congress. *See Loving*, 517 U.S. at 757 ("[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." (citations omitted)); *Lopez*, 514, U.S. at 552 (quoting *Gregory v. Ashcroft*, 510 U.S. 452, 458

(1991)) ("'[T]he separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch.'").

Here, "[t]he Constitution expressly grants Congress, *not the President*, the power to 'regulate Commerce with foreign Nations.'" *Barclays*, 512 U.S. at 329 (quoting U.S. Const. art. I, § 8, cl. 3) (emphasis added). Courts have consistently recognized that Congress's power to regulate foreign commerce is "'exclusive and plenary.'" *Clark*, 435 F.3d at 1109 (quoting *Bd. of Trustees*, 289 U.S. at 56)). Therefore, the Constitution places the regulation of cross-border crude oil pipelines squarely in the hands of Congress, divesting the President of any concurrent, independent, or inherent authority to regulate them.

The 2019 Permit was not issued as the result of diplomacy between the governments of the United States and Canada, nor was it issued as part of the command and control of the military or to repel an attack on the Nation. TransCanada is not a foreign government; it is a for-profit, publicly traded corporation. (Dkt. 59). In 2018, TransCanada saw $13.679 billion Canadian in revenue and held assets totaling $98.920 billion Canadian. TransCanada, *Annual Report 2018*, at 21 (2018), *available at* https://www.tcenergy.com/siteassets/pdfs/investors/reports-and-filings/annual-and-quarterly-reports/2018/transcanada-2018-annual-report.pdf. Unlike the Trans

Mountain Pipeline, the Canadian federal government does not own and operate the proposed KXL. *See* Kathleen Harris, *Liberals to Buy Trans Mountain Pipeline for $4.5B to Ensure Expansion is Built*, CBC NEWS (May 29, 2018), *available at* https://www.cbc.ca/news/politics/liberals-trans-mountain-pipeline-kinder-morgan-1.4681911 (discussing Canada's purchase of the Trans Mountain Pipeline and its infrastructure from Kinder Morgan, Inc., to ensure expansion pipeline built).

Indeed, in inviting TransCanada to reapply for a permit in 2017, President Trump described KXL as "a major pipeline for *the importation of petroleum from Canada into the United States*." 82 Fed. Reg. at 8,663, § 2 (emphasis added). And TransCanada's 2017 permit application explicitly describes KXL as "an international project designed to transport Canadian crude oil . . . , and, *subject to commercial demand*, domestic U.S. crude oil production from the Bakken . . . , to refinery markets in the U.S. Gulf Coast region." 2017 Application at 7-8 (emphasis added). This is foreign commerce. *Accord IEN IV*, 2019 WL 7421955, at *9; *W. Oil & Gas*, 726 F.2d at 1342.

The assertion that foreign affairs and national security concerns may somehow be implicated by the construction of KXL does not invest the President with the power to issue the 2019 Permit. The President cannot usurp the powers expressly committed by the Constitution to Congress simply by raising the specter of foreign affairs or national security. *See Zivotofsky*, 135 S. Ct. at 2090 ("The

Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue." (citations omitted)); *Barclays* 512 U.S. at 329 (quoting *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 81 (1993) (Scalia, J., concurring in part and concurring in judgment) ("'The President is better able to decide . . . our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only Congress.'"); *Hamdan*, 548 U.S. at 591-92 (quoting *Ex parte Milligan*, 71 U.S. at 139) ("'But neither can the President, in war more than in peace, intrude upon the proper authority of Congress.'"); *Youngstown*, 343 U.S. at 587-88 (majority) ("Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property . . . . In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). The 2019 Permit was issued to TransCanada—a foreign, for-profit corporation—to import crude oil from Canada into the United States. The KXL is a market-driven enterprise intended to do nothing more than make money for TransCanada and its shareholders. Permitting KXL had nothing to do with diplomacy or national security.

C. Historical Practices Affirm that the Authority to Permit Cross-Border Crude Oil Pipelines Falls under Congress's Foreign Commerce Clause Powers.[2]

Questions over which branch of government exercises constitutional authority to regulate cross-border commercial infrastructure first arose in the Ninetieth Century as telegraph companies began laying submarine telegraph cables connecting the United State with foreign nations. In 1875, President Ulysses S. Grant addressed Congress on the subject: "The right to control the conditions for the laying of a cable within the jurisdictional waters of the United States to connect our shores with those of any foreign state pertains exclusively to the government of the United States *under such limitations and conditions as Congress may impose*." *Papers Relating to the Foreign Relations of the United States, Transmitted to Congress, with the Annual Message of the President*, H.R. Doc. 1, pt. 1, 44th Cong. vol. 1, at XIV (1st Sess. 1875) (emphasis added) (Dkt. 67-2). In the absence of congressional action, President Grant set forth conditions under which his administration would approve the landing of submarine telegraph cables, stating: "'I present this subject to the earnest consideration of Congress. In the meantime, *and unless Congress otherwise directs*, I shall not oppose the landing of telegraphic cables which complies with and assents to the points above enumerated.'" *Id*. at XVI (emphasis added).

[2] This Section addresses both question 2.c and 2.d (Dkt. 93).

Despite establishing conditions under which the Executive Branch would permit the landing of submarine telegraph cables, President Grant acknowledged that the plenary and inherent authority to license these cables lay with Congress. This view was affirmed by a series of contemporary Attorney General opinions. *See, e.g.*, 22 U.S. Op. Atty. Gen. 13, 27 (1898) ("*The executive permission to land a cable is, of course, subject to subsequent Congressional action*. . . . I am of the opinion, therefore, that the President has the power, *in the absence of legislative enactment*, to control the landing of foreign submarine cables." (emphasis added)); 22 U.S. Op. Atty. Gen. 514, 515 (1899) (same); 22 U.S. Op. Atty. Gen 408, 408-09 (1899) (same).[3]

Contemporary court decisions further affirm the understanding that the authority to license the landing of foreign submarine telegraph cables lay with Congress. For example, in *United States v. La Compagnie Francaise des Cables Telegraphiques*, the court held that "it is certainly indisputable that congress has absolute authority over the subject." 77 F. 495, 495 (S.D.N.Y. 1896).

[3] This view was reiterated in Attorney General opinions concerning other forms of cross-border infrastructure. *See, e.g.*, 25 U.S. Op. Atty. Gen. 100, 100-01 (1902) (concerning "conditions upon the operation of wireless telegraphy systems which convey[] messages to or from the United States," finding that "[s]uch transmission is commerce"); 30 U.S. Op. Atty. Gen. 217, 222 (1913) (concluding that the President may regulate the importation and exportation of electricity from and to Canada "in the absence of legislation by Congress").

This issue also was central in *United States v. Western Union Telegraph Co.*, 272 F. 311 (W.D.N.Y. 1921) (*W. Union I*). Examining the President's foreign affairs and Commander-in-Chief powers, *id*. at 313-16, the court found "it most questionable whether the power of the President to regulate cable connection is expressed or implied in the Constitution," *id*. at 319, because "the Constitution gives only to Congress the power 'to regulate commerce with foreign nations.'" *Id*. at 316. The court ultimately held that Congress had acquiesced in the President's practice of licensing such cables, *id*. at 318, but found in this particular case that Congress had authorized the cable. *Id*. at 323.

On appeal, the Second Circuit did not equivocate: "Concededly the right to permit the landing of cables between foreign countries and the American coast is in Congress, under its power to regulate commerce between the states and between the states and foreign countries." *W. Union II*, 272 F. at 894. The Second Circuit affirmed the district court's finding that Congress has expressly authorized the landing of the cable at issue, but overturned its holding that Congress had acquiesced to the President's practice of licensing the cables. *Id.*

Following the Second Circuit's decision, Congress exercised its Foreign Commerce Clause power to license the landing of foreign submarine telegraph cables by enacting the Kellogg Act. *See* Pub. L. No. 67-8, 42 Stat. 8 (1921) (codified as amended at 47 U.S.C. §§ 34-39). The Kellogg Act delegated to the President

Congress's authority to license the landing of submarine cables, 47 U.S.C. § 34, withhold or revoke such licenses and establish the terms and conditions of the licenses, *id.* § 35, and "empowered" the President "to prevent the landing of any cable about to be landed in violation of" the act. *Id.* § 36.

Congress has similarly exercised its Foreign Commerce Clause powers over other cross-border infrastructure. *See, e.g.*, Natural Gas Act, Pub. L. No. 75-688, §§ 1(a), 3, 52 Stat. 821, 821-22 (1938) (declaring "that Federal regulation in matter relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest" and delegating to the Executive the power to authorize the import or export of natural gas); Public Utility Act, Pub. L. No. 74-333, § 213, 49 Stat. 803, 849 (1935) (codified as amended at 16 U.S.C. § 824a(e)) (delegating to the Executive the power to authorize the transmission of electricity across the Nation's borders); International Bridge Act ("IBA"), Pub. L. No. 92-434, §§ 2, 4, 89 Stat. 731, 731 (1972) (codified as amended at 33 U.S.C. §§ 535, 535b) ("grant[ing]" "[t]he consent of Congress . . . to the construction, maintenance, and operation of any bridge and approaches thereto, which will connect the United States with any foreign country" and delegating to the President the authority to approve transboundary bridges).

Despite Congress's exclusive and plenary power to regulate foreign commerce, the President has asserted he alone has the constitutional power to permit

cross-border crude oil pipelines. This, of course, is incorrect. Nevertheless, from 1968 until 2019, without congressional approval, the Executive issued permits for cross-border crude oil pipelines pursuant to procedures established by a series of executive orders acquiesced in by Congress. In 1968, President Lyndon B. Johnson issued an executive order designating and empowering the Secretary of State ("the Secretary") "to receive all applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of . . . pipelines to or from a foreign country." Exec. Order No. 11,423, § 1(a), 33 Fed. Reg. 11,741, 11,741 (Aug. 20, 1968) (EO 11423). EO 11423 also set forth the process by which the Secretary would receive and review such applications. *Id*. § 1(b)-(f). This process required the Secretary to consult with the heads of other specific federal agencies regarding whether issuing the permit would serve the national interest. *Id*. § 1(b). After considering these views, the Secretary was required to determine whether issuing the permit would serve the national interest and inform the agency officials of that determination prior to a permitting decision. *Id*. § 1(d)-(e).

If any officials disagreed with the Secretary's national interest determination, they could request that the Secretary refer the application to the President. *Id.* § 1(f). If such a request was made, the Secretary was required to "refer the application . . . to the President for his consideration and final decision." *Id*.

In 2004, President George W. Bush issued a new executive order slightly modifying this process. Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) (EO 13337). Specifically, EO 13337 updated the list of agency officials the Secretary was required to consult about its national interest determination. *Id*. § 1(b)(ii). EO 13337 also included a new requirement that if the Secretary and the head of another agency disagree on the national interest determination, they must consult prior to referring the application to the President. *Id*. § 1(f), 69 Fed. Reg. at 25,300. Despite these minor changes, EO 13337 largely left in place the process established by EO 11423.

From 1968 to 2019, the State Department followed the process established by these executive orders to permit cross-border crude oil pipelines.[4] In following this process, the State Department also complied with other generally applicable environmental laws. *See, e.g.*, *IEN I*, 2017 WL 5632435, at *1-2 (describing the State Department's National Environmental Policy Act ("NEPA") and Endangered Species Act ("ESA") reviews for the first two KXL application reviews); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1075-75 (D.S.D. 2009) (describing the State Department's NEPA and National Historic Preservation Act

[4] In 2019, President Trump issued Executive Order No. 13,867, 84 Fed. Reg. 15,491 (Apr. 10, 2019) (EO 13867), rescinding EOs 11423 and 13336 and replaced them with a new permitting process that removes the obligation to consult with other federal agencies, and attempts to deny judicial review of permitting decisions under the Administrative Procedures Act.

("NHPA") reviews for the original Keystone Pipeline); *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1152 (D. Min. 2010) (describing the State Department's NEPA review for the Alberta Clipper Pipeline).

Congress was well aware of the process established by EO 11423 when it was issued in 1968. When Congress passed the IBA in 1972, it did so knowing that the President would exercise his delegated authority to permit international bridges pursuant to the procedures established by EO 11423 because both were developed in concert with each other. *See Detroit Int'l*, 189 F. Supp. 3d at 97 (quoting *Presidio Bridge Co. v. Sec'y of State*, 486 F. Supp. 228, 295-96 (W.D. Tex. 1978)) ("'[A]fter four years of working on the [IBA], the President issued [EO 11423] anticipating its final passage . . . [and] the bill that was ultimately produced was the product of the arm of the government that issued [EO 11423], and was passed by a Congress that was well aware of both the provisions in [EO 11423] and the reason for its existence.'").

In 2011, Congress reaffirmed its Foreign Commerce Clause authority over cross-border crude oil pipelines, and KXL specifically. In December 2011, while the State Department was reviewing TransCanada's first permit application, Congress passed, and President Barack H. Obama signed into law, the Temporary Payroll Tax Cut Continuation Act ("TPTCCA"). Pub. L. No. 112-78, 125 Stat. 1280 (2011). The TPTCCA provided, *inter alia*, "for the construction of KXL." *Id*. The TPTCCA

specifically directed the President to permit KXL within sixty days of the TPTCCA's enactment. *Id*. § 501(a), 125 Stat. at 1289 ("[N]ot later than 60 days after the date of enactment of this Act, the President, acting through the Secretary of State, shall grant a permit under Executive Order No. 13337 . . . for the [KXL] project."). The TPTCCA allowed the President to deny a permit if he found that KXL was not in the national interest. *Id*. § 501(b)(1). The TPTCCA further prescribed a number of conditions on the construction and operation of KXL, including compliance with all applicable federal law. *Id*. § 501(c), 125 Stat. at 1290-91.

On January 18, 2012, President Obama, citing Congress's directive in the TPTCCA, directed the Secretary to deny a permit for KXL. 77 Fed. Reg. 5,677, 5,677 (Feb. 3, 2012) ("The [TPTCCA] requires a determination, within 60 days of enactment, of whether the [KXL] project . . . would serve the national interest."). The President noted that the sixty-day timeline in the TPTCCA was "insufficient" to make a positive permitting decision and therefore required him to deny the permit. *Id*. On February 3, 2012, the State Department denied the permit. 77 Fed. Reg. 5,614 (Feb. 3, 2012). The President's compliance with the conditions set forth in the TPTCCA affirm Congress's plenary authority over the permitting of KXL.

Additionally, in 2015, during the State Department's review of TransCanada's second permit application, Congress passed the Keystone XL Pipeline Approval Act. S. 1, 114th Cong. (1st Sess. 2015); *see* 161 Cong. Rec. S620-45 (daily ed. Jan. 29,

2015) (Senate passage); 161 Cong. Rec. H947-60 (daily ed. Feb. 11, 2015) (House passage). The act would have authorized TransCanada to "construct, connect, operate, and maintain the pipeline and cross-border facilities" without obtaining a permit from the State Department. S. 1, 114th Cong. § 2(a). President Obama vetoed the legislation. 161 Cong. Rec. 31073 (daily ed. Feb. 24, 2015). Congress failed to override the veto.

The power to permit cross-border crude oil pipelines "falls under Congress's power to regulate foreign commerce." *IEN IV*, 2019 WL 7421955, at *9. The historical practices discussed above do not change this. While the President historically has asserted authority to permit cross-border infrastructure, including crude oil pipelines, "[p]ast practice does not, by itself, create power." *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

"The Constitution expressly grants Congress, *not the President*," *Barclays*, 512 U.S. at 329 (citation omitted, emphasis added), the "'exclusive and plenary'" power to regulate foreign commerce. *Clark*, 435 F.3d at 1109 (quoting *Bd. of Trustees*, 289 U.S. at 56). When the Constitution explicitly grants an enumerated power, such as this, to Congress, the President cannot exercise that power under his own prerogative. *Loving*, 517 U.S. at 757 ("[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another."). The separation of powers "'serve[s] to prevent the

accumulation of excessive power in any one branch.'" *Lopez*, 514 U.S. at 552 (quoting *Gregory*, 510 U.S. at 458); *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring) ("Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

When Congress specifically exercised its Foreign Commerce Clause power over KXL, *see* Pub. L. No. 112-78, § 501(a), 125 Stat. at 1289, the President accepted Congress's plenary authority and complied with its directives. *See* 77 Fed. Reg. at 5,677. More generally, while the President historically has asserted authority to permit a broad range of cross-border infrastructure, he has done so in recognition of Congress's plenary power to permit such infrastructure. *See* H.R. Doc. 1, pt. 1, 44th Cong. vol. 1, at XIV, XVI (submarine telegraph cables); 22 U.S. Op. Atty. Gen at 27 (same); 22 U.S. Op. Atty. Gen. at 515 (same); 22 U.S. Op. Atty. Gen at 408-09 (same); 30 U.S. Op. Atty. Gen. at 222 (transmission lines); 25 U.S. Op. Atty. Gen. 100-01 (wireless telegraphy). Courts have also recognized Congress's plenary power over permitting cross-border infrastructure. *W. Union II*, 272 F. at 894 (submarine telegraph cables); *La Compagnie*, 77 F. at 495 (same); *Detroit Int'l*, 189 F. Supp. 3d at 93 (bridges). And Congress repeatedly has exercised that power by delegating to the President the authority to permit cross-border infrastructure. *See* Pub. L. No. 67-8, 42 Stat. 8 (submarine telegraph cables); Pub. L. No. 75-688, § 3,

52 Stat. at 822 (natural gas pipelines); Pub. L. No. 74-333, § 213, 49 Stat. at 849 (transmission lines); Pub. L. No. 92-434, 89 Stat. 731 (bridges).

The President's historical practices neither invest in him the power to regulate foreign commerce, nor divest Congress of its constitutional power to regulate foreign commerce. Had the Framers intended for the President to exercise the power to regulate foreign commerce, they would not have explicitly granted that power to Congress. These historical practices, along with the structure and nature of the Constitution and the Foreign Commerce Clause, affirm that the power to permit cross-border crude oil pipelines, including KXL, lies with Congress.

D. The President May Permit Cross-Border Crude Oil Pipelines only if Congress Has Delegated to Him the Authority or Acquiesced in His Exercise of Authority

"The President's power, if any, to [permit KXL] must stem from either an act of Congress or from the Constitution itself." *Youngstown*, 343 U.S. at 585 (majority). Since the Foreign Commerce Clause grants Congress possesses exclusive and plenary authority to permit KXL, the President may do so only if Congress has delegated to him the authority or has acquiesced in his exercise of authority.

Congress could delegate to the President the authority to permit cross-border crude oil pipelines. Congress's authority "to delegate significant portions of its Foreign Commerce Clause power to the Executive is well established." *Cal. Bankers*, 416 U.S. at 59 (citing *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S.

103, 109 (1948); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933)) (brackets omitted). If Congress were to delegate to the President the authority to permit cross-border crude oil pipelines, "his authority [would be] at a maximum." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Congress, however, has not delegated to the President the authority to permit cross-border crude oil pipelines generally, or KXL specifically.

In the absence of congressional delegation, the President could permit cross-border crude oil pipelines only if Congress has acquiesced in his exercise of authority. "'[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by [the Constitution].'" *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown*, 343 U.S. 610-11 (Frankfurter, J., concurring)).

Yet, "[p]ast practice does not, by itself, create power." *Id.* Instead, a "'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the action had been taken in pursuance of its consent.'" *Id*. (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)) (brackets omitted); *Medellín v. Texas*, 552 U.S. 491, 531 (2008) (quoting *Garamendi*, 539 U.S. at 415) (The President's action must be "supported by a 'particularly longstanding practice' of congressional acquiescence.").

Courts must consider congressional acquiescence on the narrowest possible grounds, as interpreting acquiescence broadly threatens to upset the constitutional balance of powers by implying to the President powers expressly granted to Congress. *Accord Dames & Moore*, 453 U.S. at 660-61 ("[W]e stress that the expeditious treatment of the issues involved by all of the courts which have considered the President's actions makes us acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case . . . and attempt to confine the opinion only to the very questions necessary to decide the case." (citation omitted)); *Garamendi*, 539 U.S. at 438 (Ginsburg, J., dissenting) ("Notably, the Court in *Dames & Moore* was emphatic about the 'narrowness' of its decision." (citation omitted)); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1338 (2016) (Roberts, J., dissenting) (quoting *Medellín*, 552 U.S. at 531) (noting that the Court "refus[ed] to extend the President's . . . authority beyond 'the narrow set of circumstances' defined by the 'systematic, unbroken, executive practice'" (citation omitted)).

Accordingly, Congress must have "acquiesced in th[e] *particular exercise* of Presidential authority" in question. *Medellín*, 552 U.S. at 528 (emphasis added). As the Ninth Circuit has stated: "Congressional acquiescence can only be inferred when there is 'overwhelming evidence' that Congress explicitly considered the '*precise issue*' presented to the court." *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493

(9th Cir. 2007) (quoting *Rapanos v. United States*, 547 U.S. 715, 750 (2006)) (emphasis added). Determining whether Congress has acquiesced in the President's action "hinges on a consideration of all the circumstances which might shed light on the view of the Legislative Branch towards such action." *Dames & Moore*, 453 U.S. at 668-69.

Congress has not acquiesced in the particular exercise of presidential authority presented to the Court in this case: the *unilateral* issuance of the 2019 Permit for a crude oil pipeline. Since 1968, permits for cross-border crude oil pipelines were permitted pursuant to the different process established by EOs 11423 and 13337, a process that involved consultation among various federal agencies and the State Department's compliance with environmental statutes such as the NEPA, the NHPA, and the ESA. Indeed, the State Department utilized this established process to evaluate and deny TransCanada's first two permit applications for KXL.

Congress was well aware of this process when it was first developed, *see Detroit Int'l*, 189 F. Supp. 3d at 96-97, and more recently, Congress expressed its approval of this process when it directed President Obama to permit (or not) KXL *pursuant to* EO 13337. *See* Pub. L. No. 112-78, § 501(a), 125 Stat. at 1289.

Over the span of forty-nine years, nine Presidents utilized this process (one that Congress has expressed approval of) to permit cross-border crude oil pipelines. This "systematic, unbroken, executive practice," *Dames & Moore*, 453 U.S. at 686

(citation and quotation marks omitted), was upended in 2017 when President Trump altered the permitting process for KXL. President Trump's 2017 memorandum inviting TransCanada to reapply for a permit significantly changed the permitting process by removing the Secretary's obligation to consult with other federal agencies and those agencies' ability to object to the Secretary's national interest determination. *See* 82 Fed. Reg. at 8,663, § 3(iv). This fundamentally changed the entire permitting process. *See IEN I*, 2017 WL 5632435, at *5.

After this Court held the 2017 Permit unlawful, *see IEN III*, 347 F. Supp. 3d 561, President Trump again changed the permitting process for KXL by revoking the 2017 Permit and unilaterally issuing the 2019 Permit without any process whatsoever. *See* 84 Fed. Reg. at 13,101.[5] The 2019 Permit specifically states that it is issued in spite of all previous processes. *Id*. at 13,101 (revoking the 2017 Permit and permitting KXL "notwithstanding Executive Order 13337 . . . and the Presidential Memorandum of January 24, 2017").

The unilateral issuance of the 2019 Permit was an "'unprecedented action,'" *Medellín*, 552 U.S. at 532, not supported by the "particularly longstanding," *Garamendi*, 539 U.S. at 415, "systematic, unbroken, executive practice," *Dames & Moore*, 453 U.S. at 686 (citation and quotation marks omitted), established by EOs

[5] Weeks later, President Trump revoked EOs 11423 and 13337, establishing an entirely new permitting process. Exec. Order No. 13,867, 84 Fed. Reg. at 15,491.

11423 and 13337, utilized for fifty-one years, and "'known to and acquiesced in by Congress.'" *Id.* (quoting *Midwest Oil*, 236 U.S. at 474). It was supported by no practice whatsoever.

Accordingly, because the President lacks the inherent constitutional authority to regulate foreign commerce, the 2019 Permit is unconstitutional because Congress has neither delegated him the power to issue it nor acquiesced in the unilateral issuance of a permit, unchecked by any process and not in compliance with EOs 11423 and 13337.

III. TransCanada Cannot Construct KXL Across the United States-Canada Border without Appropriate Authorization

As the entirety of Section II makes clear, only Congress has authority to permit cross-border crude oil pipelines. It logically follows, then, that without Congress's approval—either directly or through an Executive process approved of or acquiesced in by Congress—TransCanada cannot simply construct KXL across the United States-Canada border if the Court finds the 2019 Permit unconstitutional. TransCanada has two options: either secure Congress's approval; or utilize a congressionally-approved permitting process.

TransCanada could seek approval to construct KXL from Congress itself. This is not unprecedented. Prior to the enactment of the IBA, explicit congressional approval was required to construct any bridge connecting the United States with a foreign nation. *Detroit Int'l*, 189 F. Supp. 3d at 93-94. Congress enacted the IBA

because it found "that approval of each international bridge had become too burdensome" for the legislative body. *Id*. at 94. Congressional approval would assuage any concerns related to the constitutionality of permitting KXL.

TransCanada could also secure approval to construct KXL from the Executive pursuant to the processes established by EOs 13337 and 11423, or EO 13867. *See IEN IV*, 2019 WL 7421955, at *14 ("[TransCanada] and Federal Defendants would still be responsible for complying with either the permitting process set forth in [EO 13337], or the permitting process set forth in [EO 13867], depending on its applicability and constitutionality."). Of course, if the Court finds that the 2019 Permit is unconstitutional, EO 13867 would be similarly unconstitutional. Just like with the unilateral issuance of the 2019 Permit, EO 13867 has not established a process "supported by a 'particularly longstanding practice' of congressional acquiescence." *Medellín*, 552 U.S. at 531 (quoting *Garamendi*, 539 U.S. at 415); *accord IEN IV*, 2019 WL 7421955, at *14 ("If the 2019 Permit proves *ultra vires* because President Trump lacked the inherent constitutional authority to issue the permit, [EO 13867] likely would be unlawful for similar reasons."). Accordingly, the Executive could permit KXL only if the President revoked EO 13867 and re-established the process established by EOs 13337 and 11423.[6]

[6] This, of course, would not cure the other issues the Tribes have raised regarding the permitting of KXL, including Treaty violations.

Regardless of the President's lack of authority to permit or regulate cross-border crude oil pipelines as a function of foreign commerce, the President possesses the implied constitutional authority to prevent the unauthorized entry into the United States. *See E. Bay Sanctuary*, 932 F.3d at 755 (quoting *United States ex rel. Knaff v. Shaughnessy*, 338 U.S. 537, 542 (1950)) ("The exclusion of aliens . . . is inherent in the executive power to control the foreign affairs of the nation." (ellipses in original)). Finally, the President would be obligated to prevent the unauthorized construction of KXL across the border as part of his treaty obligations to protect the Tribes from depredations.

If the 2019 Permit is held unconstitutional, TransCanada cannot simply construct KXL across the United States-Canada border absent approval from Congress directly or the Executive pursuant to EOs 13337 and 11423.

CONCLUSION

As detailed herein, the 2019 Permit is not limited to the 1.2-mile border facilities. The context surrounding its issuance, the Executive's understanding, and TransCanada's application affirm that the 2019 Permit extends to the entire KXL. Regardless, the 2019 Permit is a cause of the Tribes' harms because without it, KXL cannot be built. Additionally, the authority to permit KXL falls under Congress's exclusive and plenary power to regulate foreign commerce, not the President's foreign affairs and Commander-in-Chief powers. Finally, TransCanada cannot

simply construct KXL across the United States-Canada border without authorization if the Court holds the 2019 Permit unconstitutional.

RESPECTFULLY SUBMITTED this 24th day of January, 2020.

/s/ Natalie A. Landreth
/s/ Wesley James Furlong
Natalie A. Landreth (*pro hac vice*)
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **PLAINTIFFS' SUPPLEMENTAL BRIEF** complies with: (1) the Court's order dated December 20, 2020, (Dkt. 93) because it contains 9,986 words, excluding those parts of the brief exempted by Local Civil Rule 7.1(d)(2)(E); and (2) the typeface requirements of Local Civil Rule 1.5(a) because it has been prepared using proportionally spaced typeface using Microsoft Word 2016, in 14-point Times New Roman font.

/s/ Wesley James Furlong
Wesley James Furlong
NATIVE AMERICAN RIGHTS FUND

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2020, I electronically filed the foregoing **PLAINTIFFS' SUPPLEMENTAL BRIEF** with the Clerk of the Court for the United States District Court for the District of Montana by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Wesley James Furlong
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