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

INDIGENOUS ENVIRONMENTAL)
NETWORK and NORTH COAST RIVERS)
ALLIANCE,)

Plaintiffs,)

vs.)

PRESIDENT DONALD J. TRUMP,)
UNITED STATES DEPARTMENT OF)
STATE; MICHAEL R. POMPEO, in his)
official capacity as U.S. Secretary of State;)
UNITED STATES ARMY CORPS OF)
ENGINEERS; LT. GENERAL TODD T.)
SEMONITE, Commanding General and)
Chief of Engineers; UNITED STATES)
FISH AND WILDLIFE SERVICE, a federal)
agency; GREG SHEEHAN, in his official)

Civ. No. CV 19-28-GF-BMM

**PLAINTIFFS' NOTICE OF
RENEWED MOTION AND
RENEWED MOTION FOR
PRELIMINARY
INJUNCTION AND
APPLICATION FOR
TEMPORARY
RESTRAINING ORDER**

**Hearing:
Time:**

Judge: Hon. Brian M. Morris

)
)
)
)
 capacity as Acting Director of the U.S. Fish)
 and Wildlife Service; UNITED STATES)
 BUREAU OF LAND MANAGEMENT,)
 and DAVID BERNHARDT, in his official)
 capacity as Acting U.S. Secretary of the)
 Interior,)
)
 Defendants,)
)
 TRANSCANADA KEYSTONE PIPELINE,)
 LP, a Delaware limited partnership, and TC)
 ENERGY CORPORATION, a Canadian)
 Public Company,)

Defendant-Intervenors.

TO THE ABOVE-ENTITLED COURT AND TO ALL PARTIES HEREIN:

PLEASE TAKE NOTICE that as soon as this matter may be heard, proper notice having been given, in the courtroom of the Honorable Brian M. Morris of the United States District Court for the District of Montana, Great Falls Division, plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance will renew their motion for a preliminary injunction and request this Court’s temporary restraining order (1) staying all approvals issued by the Federal Defendants allowing construction of the Keystone XL Pipeline System (“Keystone”), and (2) enjoining construction of Keystone and preconstruction activities by Defendant-Intervenors TransCanada Keystone Pipeline, LP and TC

Energy Corporation (collectively “TC Energy”) (collectively with the Federal Defendants, “defendants”) pending this Court’s adjudication of the merits of this action. The Federal Defendants and TC Energy have been contacted to ascertain whether they object to the motion and application. Both indicated they oppose the renewed motion and application.

Plaintiffs’ Renewed Motion for a Preliminary Injunction and Application for a Temporary Restraining Order are made on the grounds that (1) plaintiffs are likely to prevail on their claims under Article IV, section 3, clause 2 (the “Property Clause”) and Article 1, section 8, clause 3 (the “Commerce Clause”) of the United States Constitution, and Executive Order 13337 (which remained in effect at the time President Trump issued his Presidential Permit on March 29, 2019); (2) defendants have now made clear, through their Amended Status Report filed January 14, 2020 (Dkt. 75) that they will soon take actions causing immediate and irreparable harm to plaintiffs’ and the public’s interests; (3) the balance of equities tips sharply in plaintiffs’ favor; and (4) an injunction and temporary restraining order are in the public interest.

This Renewed Motion for Preliminary Injunction and Application for Temporary Restraining Order are based on this Notice, Plaintiffs’ Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction filed July 10, 2019 (Dkt. 27-2) and the supporting Declarations of Joye Braun (Dkt. 27-4), Angeline Cheek (Dkt. 27-6), Tom B.K. Goldtooth (Dkt. 27-10), Elizabeth Lone Eagle (Dkt. 27-15), Kathleen Meyer (Dkt. 27-17), LaVae High Elk Red Horse

(Dkt. 27-19), Stephan C. Volker (Dkt. 27-21), Kandi White (Dkt. 27-24), Bill Whitehead (Dkt. 27-26), and Frank Egger (Dkt. 27-27), and all exhibits thereto, filed August 7, 2019, Plaintiffs' Reply Memoranda in support of Motion for Preliminary Injunction filed August 7, 2019 (Dkt. 53, 54), Plaintiffs' Response to Status Report by TC Energy filed September 26, 2019 (Dkt. 63), Plaintiffs' Brief in Response to the Court's December 20, 2019 Order (Dkt. 74) filed January 24, 2020 (Dkt. 80), and Plaintiffs' Response to TC Energy's Amended Status Report filed concurrently herewith on January 31, 2020, along with such oral argument as may be heard by this Court, and any other files or records in this proceeding.

Dated: January 31, 2020

Respectfully submitted,

/s/ Stephan C. Volker
STEPHAN C. VOLKER
Attorney for Plaintiffs
INDIGENOUS ENVIRONMENTAL
NETWORK AND NORTH COAST
RIVERS ALLIANCE

CERTIFICATE OF SERVICE

I, Stephan C. Volker, am a citizen of the United States. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Stephan C. Volker, 1633 University Avenue, Berkeley, California 94703.

On January 31, 2020 I served the following documents by electronic filing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the email addresses registered in the above entitled action:

**PLAINTIFFS' NOTICE OF RENEWED MOTION AND RENEWED
MOTION FOR PRELIMINARY INJUNCTION AND APPLICATION FOR
TEMPORARY RESTRAINING ORDER**

I declare under penalty of perjury that the foregoing is true and correct.

s/ Stephan C. Volker _____

STEPHAN C. VOLKER (Pro Hac Vice)

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INDIGENOUS ENVIRONMENTAL NETWORK
and NORTH COAST RIVERS ALLIANCE

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

INDIGENOUS ENVIRONMENTAL) Civ. No. CV 19-28-GF-BMM
NETWORK and NORTH COAST RIVERS)
ALLIANCE,) **PLAINTIFFS' RESPONSE**
) **TO TC ENERGY'S**
) **AMENDED STATUS**
 Plaintiffs,) **REPORT**
 vs.)
)

PRESIDENT DONALD J. TRUMP,) **Judge: Hon. Brian M. Morris**
UNITED STATES DEPARTMENT OF) **Case Filed: April 5, 2019**
STATE; MICHAEL R. POMPEO, in his)
official capacity as U.S. Secretary of State;)
UNITED STATES ARMY CORPS OF)
ENGINEERS; LT. GENERAL TODD T.)
SEMONITE, Commanding General and)
Chief of Engineers; UNITED STATES)
FISH AND WILDLIFE SERVICE, a federal)
agency; MARGARET EVERSON, in her)

official capacity as Acting Director of the)
U.S. Fish and Wildlife Service; UNITED)
STATES BUREAU OF LAND)
MANAGEMENT, and DAVID)
BERNHARDT, in his official capacity as)
U.S. Secretary of the Interior,)
)
Defendants,)
)
TRANSCANADA KEYSTONE PIPELINE,)
LP, a Delaware limited partnership, and TC)
ENERGY CORPORATION, a Canadian)
Public Company,)
)
Defendant-Intervenors.)
_____)

INTRODUCTION

On January 14, 2020, TransCanada Keystone Pipeline, LP and TC Energy (collectively “TC Energy”) filed an Amended Status Report (Dkt.75) that abruptly and substantially advances its timetable for preconstruction activities by two months, thereby posing an immediate threat of irreparable harm to plaintiffs. It states that TC Energy will resume preconstruction activities on its proposed Keystone XL Pipeline (“Keystone”) in just a few days, in February, 2020. TC Energy fails to disclose, let alone address, the fact that this Court has already ruled that these now-imminent activities would cause irreparable harm, both directly to environmental and cultural resources, and indirectly because they “raised the risk of the ‘bureaucratic momentum’ recognized . . . in *Colorado Wild*, [*Inc. v. U.S.*

Forest Service, 523 F.Supp.2d 1213 (D.Colo. 2017)].” (*Indigenous Environmental Network v. United States Department of State*, 369 F.Supp.3d 1045, 1050-1051 (D. Mont. 2018) (Case No. 4:17-00029-BMM (“*IEN v. State*”), December 7, 2018, Supplemental Order Regarding Permanent Injunction (*IEN v. State*, Dkt. 231) at 10).) As this Court forcefully held, TC Energy’s “proposed preconstruction activities could skew the Department [of State]’s future analysis and decision-making regarding the project.” (*Id.* at 1051.) TC Energy’s Amended Status Report – although provided in the form of unsworn statements from counsel rather than competent evidence – reveals an aggressive agenda to proceed with Keystone before this Court rules on Plaintiffs’ Renewed Motion for Preliminary Injunction and Application for Temporary Restraining Order. This Court should reject TC Energy’s gambit and grant Plaintiffs’ Renewed Motion and Application.

TC ENERGY’S ABRUPT ACCELERATION OF CONSTRUCTION

On October 9, 2019, TC Energy represented in open court “that it would not conduct any further preconstruction activities for the remainder of 2019” and that it “anticipate[d] resuming preconstruction activities during the second quarter of 2020”—i.e., *in April 2020 or later*. (Order filed December 20, 2019 (Dkt. 73) (“Order”) at 40 (2019 WL 7421955 *15).) Now, despite plaintiffs’ previously filed (and now renewed) Motion for Preliminary Injunction, TC Energy has abruptly advanced its planned preconstruction activities by two months. Most significantly, TC Energy now threatens to commence *next month* the felling of

trees within Keystone’s proposed right-of-way in South Dakota. (Amended Status Report (Dkt. 75) at 3.)

In particular, next month “TC Energy intends to begin mobilizing heavy construction equipment to sites designated for worker camps and pipeline storage yards in Montana, South Dakota, and Nebraska,” and to “commence tree felling activity with landowners’ consent in certain areas of South Dakota.” (Amended Status Report (Dkt. 75) at 3.)

In March, “TC Energy intends to begin mobilizing equipment and personnel to the U.S.-Canada border in anticipation of constructing the 1.2 mile border-crossing segment of Keystone XL in April 2020.” (*Id.* at 4.) “If it receives necessary authorizations from BLM and weather conditions permit, TC Energy also intends to conduct mowing in the right-of-way of the 1.2 mile border-crossing segment” and “[a]t sites designated for worker camps, construction yards and pipeline storage yards in Montana, South Dakota and Nebraska” during March. (*Id.*) This “mowing”—a euphemism for removal of vegetation regardless of type, size, slope, proximity to water resources or habitat value— is specifically “intended to deter migratory bird nesting during construction.” (*Id.*) TC Energy also intends to “install water tanks” in Montana and South Dakota for use in construction. (*Id.*)

In April, assuming receipt of necessary authorizations, “TC Energy intends to commence construction of the 1.2 mile border-crossing segment of the pipeline.” (*Id.* at 5.) That month TC Energy also plans to fill the water tanks

constructed in March, prepare its pipe storage yards in Montana, South Dakota and Nebraska for pipe storage, and “transport the pipe that will be used . . . to the pipe storage yards.” (*Id.*) TC Energy also “intends to conduct maintenance and install underground utilities and power beginning in April 2020” at ten worker camp sites in Montana, South Dakota and Nebraska. (*Id.*) At four of these sites, “TC Energy also intends to transport the worker camp modules from remote storage locations to the camp sites and install them.” (*Id.* at 5-6.) Finally, “TC Energy plans to construct construction access roads to pipeline and pump station sites in Montana, South Dakota and potentially in Nebraska,” and also conduct “maintenance on existing unpaved county roads to reduce dust and facilitate traffic” during April. (*Id.* at 6.)

TC ENERGY NOW THREATENS IRREPARABLE HARM

All of these preconstruction activities pose irreparable environmental harm. “Mowing” appears to be TC Energy’s euphemism for clearing. This word is highly misleading. It falsely suggests a flat, uniform expanse of unremarkable grasslands that can be “mowed” like a lawn. To the contrary, the hundreds of miles TC Energy proposes to clear are home to a wide variety of native plants, including trees, shrubs, tall prairie grasses and wetland vegetation, and a rich array of wildlife. (Department of State Administrative Record in *IEN v. State, supra*, (hereinafter “DOS” with “KXLDMT” and leading zeros omitted) at DOS6798-DOS6799.) And, Keystone’s proposed route is also varied topographically, with rivers, streams, ponds, gullies, hills, swamps and cliffs. (DOS6192-DOS6198.)

All of this varied habitat would be harmed, because the purpose of this clearing is to *remove* available habitat for nesting birds. The obvious but unstated impact is that *less* habitat for birds and other wildlife will exist after the clearing. TC Energy intends to commence clearing along “the right-of-way of the 1.2 mile border-crossing segment in March 2010.” (Amended Status Report (Dkt. 75) at 4.)

The Federal Defendants have already admitted these impacts are extensive. According to the Department of State’s Final Supplemental Environmental Impact State issued in 2014 (“SEIS”), Keystone’s construction right-of-way will “cross an estimated 356 miles of native grassland,” much of which has never been tilled, and which may take decades to recover. (DOS6809.) And, this mowing appears to be identical to that which the U.S. Fish and Wildlife Service (“FWS”) determined could *not* be used as an avoidance technique for the American Burying Beetle in South Dakota because it would cause habitat loss for grassland birds.¹

According to that same SEIS, TC Energy plans to clear 11,666 acres of the right-of-way, causing “[p]ermanent loss of wetlands,” “permanent modification of surface and subsurface flow patterns,” “permanent modification of wetland vegetation,” and “[l]oss or alteration of wetland soil integrity,” among other harms. (*IEN v. State* Dkt. 221-1 ¶ 18; DOS5952, 6782-6784, 6809-6811; FWS Administrative Record in *IEN v. State* (hereinafter “FWS” with leading zeros omitted) at FWS2062.) Preconstruction activities will also require clearing of

¹ *IEN v. State* Administrative Record prepared by FWS, at FWS000000002062 (hereinafter “FWS” with leading zeros omitted).

1,916 to 2,316 acres, including 1,037.6 acres for pipe storage yards, 479 acres for contractor yards, and between 400 and 800 acres for construction “man-camps.” (DOS5979-5980.)

For this clearing to achieve its intended purpose, TC Energy will need to *prevent* recovery of this degraded habitat at least until construction is completed, and potentially throughout the 50-year (or longer) Project life as needed for maintenance and access. As noted, it states that it intends to commence clearing in March, but does not provide any specific schedule. (Amended Status Report (Dkt. 75) at 4.) In short, TC Energy intends to disturb and remove thousands of acres of habitat specifically to prevent their suitability for nesting birds, without any binding construction schedule – let alone end date for the ensuing habitat loss – once the clearing is completed.

The importance of bird habitat cannot be overstated. A report published on September 19, 2019, in the respected scientific journal *Science*, revealed a 29% net loss in bird populations in North America since 1970.² Native migratory birds experienced a 28.3% population loss. (*Id.*, at Table 1.) *Birds that rely upon grassland habitats for breeding saw a 53% population loss* over that time period, the biggest loss by habitat type. (*Id.*, at Table 1.) The report cites habitat loss as a

² Rosenberg, K.V., Dockter, A.M., *et al.*, 2019 Decline of the North American avifauna. *Science*, p. eaaaw1313 (available at <https://science.sciencemag.org/content/early/2019/09/18/science.aaw1313>, and <https://birds.cornell.edu/home/wp-content/uploads/2019/09/DECLINE-OF-NORTH-AMERICAN-AVIFAUNA-SCIENCE-2019.pdf>, last visited January 31, 2020)

major contributor to these serious declines in bird populations, especially for native grassland birds.

The SEIS admits that Keystone’s proposed route “falls entirely within the Prairie Avifaunal Biome.” (DOS6368.) The grassland habitats in this biome are used by “breeding landbirds” that are short-distance migrants. (*Id.*) The Project area is also used by migratory birds, for “nesting, migration, and overwintering, with large numbers of species nesting in the northern portion” of the Project area. (*Id.*) In Montana, the route will cross the North Valley Grasslands important bird area (“IBA”), which is “one of the largest blocks of intact grasslands in Montana,” and “supports 73 species of birds,” including “15 species of grassland birds.” (DOS6368-6369.) The SEIS indicates that the Project crosses 42.9 miles of the North Valley Grasslands IBA. (DOS6411.) TC Energy’s plan to disturb and remove habitat in anticipation of construction will directly exacerbate these species’ continuing decline.

TC Energy states that it intends to “commence tree felling activity . . . in certain areas of South Dakota,” but provides no information about the purpose, extent or duration of its intended tree removal. (Amended Status Report (Dkt. 75) at 3.) TC Energy does not disclose the number, species, age, location or acreage of the trees it intends to remove. Nor does it explain how *removal* of trees does not constitute, per se, irreparable harm. Removal is, by definition, a *permanent* loss of *existing* habitat. TC Energy ignores this irreparable loss.

TC Energy has previously claimed that it would remove trees in South Dakota to reduce harm to the Northern Long-Eared Bat during construction. (Status Report by TC Energy filed September 20, 2019 (Dkt. 62) at 4.) But in fact, the permanent removal of trees used for roosting habitat will directly and permanently harm this extremely sensitive species. The SEIS indicates that this bat species “does not migrate, but may travel up to 30 miles from winter hibernation to summer roosts.” (DOS6404.) Summer habitat includes “decaying trees, loose bark, tree snags, and stumps.” (*Id.*) In its March 16, 2017 letter regarding the Reinitiation of [Endangered Species Act] Section 7(a)(2) Consultation, FWS found that the Project would avoid adverse impacts to this listed species *only if* TC Energy implemented conservation measures “designed to protect maternity roost trees and hibernacula for the species” (FWS2748-2749.) The pipeline right-of-way will cross three counties in South Dakota with known Northern Long-Eared Bat populations. (DOS6405.)

The conservation measures referenced in FWS’ March 16, 2017 letter *prohibit* tree felling in South Dakota unless specific processes are followed. As relevant here, no trees may be felled within a 0.25 mile buffer around known hibernacula. (4(d) Rule for the Northern Long-Eared Bat, 81 Fed.Reg 1900, 1909-1910 (January 14, 2016); 17 C.F.R. §17.40(o)(1)(ii) (C)(*I*)). “‘Known hibernacula’ are defined as locations where northern long-eared bats have been detected during hibernation or at the entrance during fall swarming or spring emergency.” (81 Fed.Reg. at 1909-1910.)

TC Energy does not address whether its planned tree-felling is consistent with these applicable limitations. Instead it provides only a statement that landowners have granted permission for this work. (Amended Status Report (Dkt. 75) at 3.) Like its planned mowing's impacts on birds, this "tree felling" plan will *reduce* available habitat, not just for birds, squirrels, and other wildlife that obviously inhabit trees, but especially for the Northern Long-Eared Bat whose existing roosting habitat TC Energy plans to remove. This will cause significant and irreparable environmental harm including impacts on dwindling wildlife populations. (*National Wildlife Federation v. National Marine Fisheries Service*, 235 F.Supp.2d 1143, 1159 (W.D. Wash. 2002) (activity that degrades critical habitat when species are not present still harms those species, because it "mak[es] the species' return less likely"); *Center for Biological Diversity v. Everson*, Case No. 1:15-CV-477, Memorandum Opinion (ECF 81), 2020 WL 437289 (D. D.C. Jan. 28, 2020) (remanding Northern Long-Eared Bat listing decision to FWS to consider endangered status).)

TC Energy also indicates that it will transport pipe to pipe storage locations, "resume grounds-keeping activities" at pipe storage yards, install underground utilities and power, and conduct other undisclosed activities to prepare its man-camps for use. (Amended Status Report (Dkt. 75) at 5.) Although these activities will impact large areas, TC Energy fails to disclose the size and scale of these operations. In December 7, 2018, it stated that it would be preparing approximately 225 acres for its man-camp compounds, and approximately 161

acres for pipe storage yards. (TC Reply (*IEN v. State*, Dkt. 230), p. 3.) As it conceded in 2018, this land would be graded in order to accommodate these uses, thus removing additional available habitat. (*Id.*)

All of these activities will be conducted on the untenable assumption that this Court will not enjoin them. As this Court previously observed, these preconstruction activities “go beyond simply ‘integrating the NEPA process with other planning.’” (*IEN v. State*, 369 F.Supp.3d at 1050 (*IEN v. State*, Dkt. 231, p. 10) (quoting *National Audubon Society v. Dept. of Navy*, 422 F.3d 174, 206 (4th Cir. 2005); 40 C.F.R. § 1501.2).) Instead, these activities “could skew the [agencies’] future analysis and decision-making regarding the project.” (*Id.* at 1051 (citing *Colorado Wild*, 523 F.Supp.2d at 1221).)

Most objectionable of all, TC Energy ignores – and tacitly asks this Court to overlook – the broader impacts of its huge fossil-fuel development project. An article published in the Proceedings of the National Academy of Sciences assigns a 50% probability that global warming will increase between 2.4° and 2.6° Celsius in the near term (2050) and between 4.1° and 5° Celsius by 2100.³ If these levels are reached, the Earth’s climate will be destabilized because self-reinforcing feedback loops would then push the Earth’s climate beyond a temperature regime

³ See Xu, Y., Ramanathan, V., Well below 2 °C: Mitigation strategies for avoiding dangerous to catastrophic climate changes, PNAS v. 114 n. 39 (Sept. 26, 2017) pp. 10315-10323 (available at: <https://www.pnas.org/content/pnas/114/39/10315.full.pdf>, last visited January 31, 2020).

from which it can recover.⁴ The planet would suffer a disastrous series of inexorable increases in temperatures on what they term a “hothouse Earth” pathway, *even if human emissions are then reduced* in belated response. (*Id.*) And in October 2018, the IPCC issued a special report warning of the impacts of global warming of just 1.5° Celsius.⁵ The IPCC report’s stark conclusion is that we must reduce carbon dioxide emissions by at least 45% in the next 12 years compared with 2010 levels, and achieve net zero carbon dioxide production by 2050, in order to stave off potentially calamitous “hothouse” scenarios. The Ninth Circuit has recently ruled that these dire predictions of catastrophic climate change are supported by “compelling evidence.” (*Juliana v. United States*, ___ F.3d ___ (9th Cir. Jan. 17, 2020), 2020 WL 254149*2.)

TC Energy’s push to immediately begin construction of this massive fossil-fuel-project – whose greenhouse gas emissions will indisputably worsen the global warming crisis – must be rejected. TC Energy’s preconstruction activities will cause concrete harms to existing habitat and create impermissible bureaucratic momentum for a project whose necessary gateway permit—the Presidential Permit issued March 29 2019—is plainly unconstitutional.

⁴ See Steffen, W., et al., Trajectories of the Earth System in the Anthropocene, PNAS, v. 115 n. 33 (Aug. 14, 2018), pp. 8252-8259 (available at: <https://www.pnas.org/content/pnas/115/33/8252.full.pdf>, last visited January 31, 2020).

⁵ Special Report: Global Warming of 1.5° C. 2018, IPCC (available at: <https://www.ipcc.ch/sr15/>, last visited January 31, 2020).

Previously this Court ruled that irreparable harm was not yet threatened (and therefore plaintiffs’ Motion for Preliminary Injunction was denied without prejudice) because TC Energy had no definite and immediate plans to resume preconstruction activities. (Order, 2019 WL 7421955 *15.) That is no longer the case. Now, TC Energy has admitted that it intends to begin the felling of trees in just a few days—commencing in February.

There can be no question that the felling of trees poses immediate and irreparable environmental harm sufficient to compel issuance of a preliminary injunction. A similar issue was before the court in *Parker v. U.S.*, 309 F.Supp. 593 (D. Colo. 1970), *aff’d*, 448 F.2d 793 (10th Cir. 1971), *cert. den. sub nom. United States v. Parker*, 405 U.S. 989 (1972). There the district court decided that a preliminary injunction should be continued to preserve the status quo against proposed logging activity. The court noted that:

“[T]he interest of the plaintiffs and the public in maintaining the status quo until the requirements of the Wilderness Act have been fulfilled far outweigh this drive to get the job done now

We are not unmindful of the equities of Kaibab Industries, but here again, we cannot give effect to this interest, for *the cutting of trees is . . . final and conclusive. It must await the process of law.*”

(*Id.*, 309 F.Supp. at 601 (emphasis added).) Likewise in *West Virginia Highland Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971), the court recognized that:

[T]he special interest of Conservancy aligns it with the public interest. It may be true, as [defendants] argue, that a ‘tree cut down does not grow back. But others can be planted.’ The argument overlooks the fact that restoration of what the Wilderness Act of 1964 and other enactments seek to protect may not be achievable for several generations.”

(*Id.*, 441 F.2d at 237.)

Similarly here, TC Energy threatens irreparable environmental harm before this Court has decided the merits of plaintiffs’ compelling constitutional claims. Plaintiffs have demonstrated that a temporary restraining order and preliminary injunction against TC Energy’s threatened tree felling, vegetative clearing and other surface-disturbing activities would enforce (1) the Constitution’s assignment to Congress of the exclusive powers to regulate foreign commerce and dispose of federal lands, and (2) Congress’ clear direction that no Presidential permit for Keystone may issue unless the Department of State has first conducted a national interest review based on full compliance with applicable federal environmental laws. Enforcing the rule of law here—by enjoining TC Energy’s rush to build its Project before this Court has decided the merits—would clearly be in the public interest, as it was in *Parker and Island Creek Coal, supra*.

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CONCLUSION

Accordingly, this Court should grant plaintiffs' Renewed Motion for a Preliminary Injunction and Application for a Temporary Restraining Order.

Dated: January 31, 2020

PATTEN, PETERMAN, BEKKEDAHN &
GREEN, PLLC

s/ James A. Patten
JAMES A. PATTEN

LAW OFFICES OF STEPHAN C. VOLKER

s/ Stephan C. Volker
STEPHAN C. VOLKER (Pro Hac Vice)

Attorneys for Plaintiffs
INDIGENOUS ENVIRONMENTAL NETWORK
and NORTH COAST RIVERS ALLIANCE

CERTIFICATE OF COMPLIANCE

Pursuant to Montana District Court, Civil Rule 7.1(d)(2), I certify that **PLAINTIFFS' RESPONSE TO TC ENERGY'S AMENDED STATUS REPORT** contains 3,026 words, excluding caption and certificate of service, as counted by WordPerfect X7, the word processing software used to prepare this brief.

s/ Stephan C. Volker _____

CERTIFICATE OF SERVICE

I, Stephan C. Volker, am a citizen of the United States. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Stephan C. Volker, 1633 University Avenue, Berkeley, California 94703.

On January 31, 2020 I served the following documents by electronic filing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the email addresses registered in the above entitled action:

**PLAINTIFFS' RESPONSE TO TC ENERGY'S
AMENDED STATUS REPORT**

I declare under penalty of perjury that the foregoing is true and correct.

s/ *Stephan C. Volker*
STEPHAN C. VOLKER (Pro Hac Vice)