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

INDIGENOUS ENVIRONMENTAL NETWORK, *et al*., Plaintiffs, v. PRESIDENT DONALD J. TRUMP, *et al.*, Defendants.	CV 19-28-GF-BMM **DEFENDANTS' OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY INJUNCTION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER**

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INTRODUCTION

Plaintiffs' claims challenging the President's issuance of a Presidential Permit for the Keystone XL Pipeline fail as a matter of law. The President's authority to issue a border-crossing permit is well-established, as evidenced by multiple Presidents' exercise of such authority over a lengthy span of nearly 150 years. Moreover, Plaintiffs have failed to demonstrate any harm—let alone irreparable harm—caused by the authorization of construction of pipeline facilities at the international border. In sum, Plaintiffs' new motion fails for three reasons.

First, Plaintiffs have failed to demonstrate standing to challenge the Permit authorizing the construction of border facilities. Instead, Plaintiffs allege harms that would occur along the 875-mile pipeline route *after* TC Energy obtains all necessary federal authorizations and the pipeline has been constructed. Such alleged, future harms are insufficient to show standing, because the Permit authorizes only the construction of facilities in a 1.2-mile segment at the border of the United States.

Second, Plaintiffs are not likely to succeed on the merits of their constitutional claims because they are baseless. Ever since President Grant authorized the landing of a telegraph cable on the shores of the United States in 1875, Presidents have authorized border crossings for a variety of facilities. And while Congress has enacted its own requirements for some types of border

crossings, it has never done so for oil pipelines. Nor has it ever questioned the President's authority to approve a border crossing. Thus, the purported conflict with Congress's authority that Plaintiffs allege simply does not exist.

Finally, Plaintiffs fail to demonstrate any irreparable harm caused by the border crossing. They seek an injunction for pipeline-related activities along the pipeline route, but those activities are far from the border segment and were not authorized by the Permit. For all of these reasons, the preliminary injunction should be denied.

BACKGROUND

I. The Issuance of Presidential Permits

There is a long history of Presidents issuing cross-border permits under their foreign affairs power and authority as Commander-in-Chief. *See* Moore, *Dig. of Int'l Law*, Vol. II, at 454-55 (1906), ECF No. 81-1. In 1869, President Grant authorized the landing of a telegraph cable from France subject to certain conditions. *Id.* at 454-55; *see also* President Ulysses Grant's Seventh Annual Message to Congress, *reprinted in* Papers Relating to the Foreign Relations of the United States, Vol. 1, 44th Cong. 1st Sess., H.R. Doc. No. 1, Pt. 1 (Dec. 6, 1875), ECF No. 81-2.

Continuing this practice, Presidents have exercised the authority to approve or deny various types of border crossings for nearly 150 years. *See* Moore, *Dig.*

Int't Law, Vol. II, at 461 (citing Foreign Cables, 22 Op. Att'y. Gen. 13, 25 (1898)); *see also, e.g.*, Granting of License for the Construction of a Gas Pipeline, 38 Op. Att'y Gen. 163 (1935); Wireless Telegraphy—Int't Agreement, 24 Op. Att'y Gen. 100 (1902); Cuba—Cables, 22 Op. Att'y Gen. 514 (1899); Hackworth, *Dig. Int'l Law*, Vol. IV, at 251 (1942), ECF No. 81-3.

Specifically with respect to oil pipelines, Presidents have exercised their inherent authority to authorize border crossings for over 100 years, and for the first 50 years they did so without action by Congress and without delegating the responsibility for issuing permits to an agency official. *See* Whiteman, *Dig. Int'l Law*, Vol. 9, at 920-22 (1968), ECF No. 81-4. These authorizations include permits issued by Presidents Eisenhower, Kennedy, and Johnson. *See* ECF Nos. 81-5, 81-6 & 81-7.

In 1968, President Lyndon B. Johnson issued Executive Order 11,423, delegating his Constitutional authority to issue permits for border crossing facilities, including oil pipelines, to the Secretary of State. *See* Exec. Order No. ("EO") 11,423 § 1(a), 33 Fed. Reg. 11,741 (Aug. 20, 1968). Pursuant to this limited delegation of authority, various Under Secretaries of State issued Presidential Permits for cross-border oil pipelines between 1968 and 2004. *See* Compilation of Historical Presidential Permits, ECF No. 81-8. In 2004, President George W. Bush issued EO 13,337, which continued the practice of delegating the

responsibility for issuing cross-border permits for oil pipelines to the Secretary of State but with certain revisions. EO 13,337 § 1(a), 69 Fed. Reg. 25,299 (Apr. 30, 2004).

In 2019, President Trump revoked Executive Orders 11,423 and 13,337, thus ending the modern practice of delegating authority for the issuance of cross-border permits to the Secretary of State. *See* EO 13,867 § 2(k), 84 Fed Reg. 15,491, 15,491-92 (Apr. 10, 2019).[1]

II. The Presidential Permit for the Keystone XL Pipeline

On March 29, 2019, the President issued a permit expressly superseding and revoking the prior cross-border permit for the pipeline issued by an Under Secretary of State in 2017. *See* Memorandum, Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 84 Fed. Reg. 13,101 (Mar. 29, 2019) ("Permit"). The President issued the Permit pursuant to the "authority vested in [the President] as President of the United States of America," *id.*, and "notwithstanding Executive Order 13337 of April 30, 2004 . . . and the Presidential Memorandum of January 24, 2017." *Id.* The Permit authorizes the

[1] The history of, and legal basis for, border crossing permits by the President is set for the more fully in Defendants' Responses to the Court's Questions in Its December 20, 2019 Order ("Defs.' Resp."), ECF No. 81, which is incorporated by reference.

construction and operation of pipeline facilities in an approximately 1.2-mile segment from the Canadian border to the first mainline shutoff valve in the United States. *Id.* The Permit requires that the approved "Facilities" be built "consistent with applicable law," *id.* art. 1(2), and that TransCanada is required to acquire "any right-of-way grants or easements, permits, and other authorizations" necessary to build the border-crossing facility, *id.* art. 6(1).

PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is "an extraordinary and drastic remedy" that "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). To obtain a preliminary injunction, a plaintiff must demonstrate four elements: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of an injunction, (3) that the balance of equities tips in its favor, and (4) that the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A party *must* demonstrate a "'likelihood of success on the merits'" in order to obtain a preliminary injunction. *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (citation omitted). A party must also "demonstrate that irreparable injury is *likely* in the absence of an injunction," as opposed to merely possible. *Winter*, 555 U.S. at 22. Notwithstanding the *Winter* decision, the Ninth Circuit has held that a preliminary injunction may issue if the plaintiffs can show "that serious

questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).[2]

ARGUMENT

I. Plaintiffs Are Not Likely to Succeed on the Merits of Their Claims.

A. The Court Lacks Jurisdiction Over Plaintiffs' Claims Because Plaintiffs Lack Standing.

Plaintiffs cannot establish a likelihood of success because they lack standing. None of Plaintiffs' alleged injuries relate to the 1.2-mile segment of the pipeline at the border, which is all that the President's border-crossing Permit authorizes. The allegations of harm due to the construction of the pipeline as a whole are not caused by the Presidential action at issue here. Their alleged injuries are also not redressable because enjoining the President would violate the separation of powers doctrine.

To demonstrate standing to sue, a plaintiff must show: (1) "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v.*

[2] Defendants do not believe that the "serious questions" test remains viable following the Supreme Court's rulings in *Winter* and *Munaf*. We reserve all rights to contest any application of that test here.

Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000). "'[T]hreatened injury must be *certainly impending* to constitute injury in fact,'" and "'[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted).

Plaintiffs fail to demonstrate any injury caused by the authorization of border facilities. Instead, they allege injuries to their members that they believe will result—not from the border-crossing Permit itself—but from the construction and operation of other parts of the pipeline. *See* Mem. of P. & A. in Supp. of Pls.' Mot. for Prelim. Inj. 29-34, ECF No. 27-2 ("Pls.' Mem."); Decl. of Joy Braun ¶¶ 5-7, ECF No. 27-4 (describing potential future injuries from the future construction and operation of workers' camps along the pipeline route); Decl. of Tom B. Goldtooth ¶¶ 10-19, ECF No. 27-10 (alleging future potential injury from construction and operation of the pipeline); Decl. of Elizabeth Lone Eagle ¶¶ 10-11, ECF No. 27-15 ("Lone Eagle Decl.") (describing harm to "future generations" from future potential oil spill). Such "'[a]llegations of possible future injury' are not sufficient" to establish standing. *Clapper*, 568 U.S. at 409.

Even after two rounds of briefing, Plaintiffs still do not attempt to show that there is any concrete and particularized injury from the *border-crossing Permit itself*, which is the only federal action challenged in this suit. Rather, Plaintiffs unequivocally state that the complained-of activities will occur near their

members' reservations, which are not located near the small and discrete area subject to the Permit. *See, e.g.*, Lone Eagle Decl. ¶ 6; Decl. of LaVae High Elk Red Horse ¶ 5, ECF No. 27-19; *see also Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1358 n.4 (9th Cir. 1998) (court may take judicial notice of undisputed geographical facts). It also is not enough that Plaintiffs' members reside somewhere in the states along the "proposed route of the Project," or that they may use resources impacted somewhere by the 875-mile long pipeline. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 887-89 (1990) ("bare allegation of injury" that plaintiff used land "in the vicinity" of the action failed to show standing) (citation omitted). They must allege a concrete and particularized harm for the area covered by the Permit—the just over one-mile stretch at the border between the United States and Canada. *Summers v. Earth Island Inst.*,555 U.S. 488, 495 (2009). Further, even if Plaintiffs could demonstrate injury-in-fact, there are too many links in the "chain of causation" between Plaintiffs' alleged harms at the Missouri River and their fear that the Permit could lead to pollution of an unnamed tributary at the border-crossing. *Allen v. Wright*, 468 U.S. 737, 759 (1984); *Clapper*, 568 U.S. at 410–11. Plaintiffs must establish a genuine nexus between their alleged injury and Defendants' conduct to show that it is fairly traceable to the Permit. *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985,

994–95 (9th Cir. 2000). That causal connection has not been sufficiently alleged here.

Instead, Plaintiffs ask the Court to assume that there will be some future pollution event related to the border crossing that will travel through no fewer than five bodies of water. This "speculative chain of possibilities" does not establish injury fairly traceable to the Permit—indeed, it does not establish injury at all. *Clapper*, 568 U.S. at 414. Nor can Plaintiffs dispense of the causation inquiry by relying on the circular argument that without the "headwaters" border-crossing permit, they would not be injured by the Project. Plaintiffs' theory that a single permit — one issued by the President no less — is linked to every municipal, state, and private action taken on non-federal lands related to the pipeline is without precedent. Unlike *Backcountry Against Dumps v. Chu*, on which they rely, Plaintiffs allege harms that are too many steps removed from the border-crossing Permit itself to establish causation. 215 F. Supp. 3d 966, 976 (S.D. Cal. 2015).[3]

Finally, out of respect for the separation of powers, the Court cannot enjoin the President's issuance of the Permit, and therefore Plaintiffs' claims are not redressable. As this Court has recognized, "[s]eparation of power principles generally counsel against courts granting injunctive and declaratory relief against

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

the President in the performance of his official duties." Dec. 20, 2019 Order at 19, ECF No. 73 ("Order"). And while this Court is correct that courts have, in limited circumstances, "vacated unlawful presidential decisions," *id.*, none of the cases relied upon by the Court address the question of whether an injunction can issue directly against the President himself. *Cf. League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013, 1029–31 (D. Alaska 2019) (finding President's act was inconsistent with "text and context" of statute)[4]; *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017) (finding redressability through relief against defendants other than the President); *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998) (overturning legislation affording President line item veto). The answer to that question is decisively no. *See Franklin v. Massachusetts*, 505 U.S. 788, 802–03, (1992) ("this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 4 Wall. 475, 501, 18 L.Ed. 437 (1897); *id.* at 827 (Scalia, J., concurring in part and concurring in the judgment) ("The apparently unbroken historical tradition supports the view, which I think implicit in the

[4] The United States appealed the district court decision in *League of Conversation Voters* and that appeal is pending before the Ninth Circuit. *See League of Conservation Voters v. Trump*, No. 19-35460 (9th Cir.). The issues on appeal challenge the justiciability of the suit, including the propriety of suing the President and finding invalid an Executive Order untethered to agency action. Any reliance on *League of Conservation Voters* is therefore suspect.

separation of powers established by the Constitution, that the principals in whom the executive and legislative powers are ultimately vested — viz., the President and the Congress (as opposed to their agents) — may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary. For similar reasons, I think we cannot issue a declaratory judgment against the President.").

The Permit was issued solely by the President, *see* Permit 1, and no subordinate officials were involved in its issuance. To enjoin the Permit, the President would have to be enjoined, precluding redress altogether. *Swan v. Clinton*, 100 F.3d 973, 979 (1996). Plaintiffs' request thus raises precisely the separation of powers concerns that have animated courts to insulate the President from equitable relief. *See Swan*, 100 F.3d at 976.

Accordingly, Plaintiffs fail to show a likelihood of success because they lack standing.

B. Plaintiffs Fail to Raise a Valid Challenge to the Permit.

It is well established that the President has the authority to issue border-crossing permits based on his authority under Article II of the Constitution over foreign affairs and his authority as Commander-in-Chief. Congress has enacted no legislation that would undermine the President's authority with respect to the issuance of cross-border permits for oil pipelines. Therefore, Plaintiffs' constitutional claims fail as a matter of law.

1. The Issuance of Presidential Permits is Within the Scope of Executive Power.

The President possesses inherent constitutional authority to approve cross-border permits—an authority that Congress has never challenged, in connection with Keystone XL or otherwise.

Justice Jackson's three-part test from his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* provides the general framework for assessing a challenge to the exercise of presidential power. 343 U.S. 579, 635-38 (1952) (Jackson, J. concurring). *See, e.g.*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015). *First*, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635. *Second*, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. *Third*, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id.* at 637-38. As discussed below, the President's authority over border-crossing permits for oil pipelines falls within the first or second *Youngstown* category.

The President's authority to issue the Permit is rooted in his powers over foreign affairs and as Commander-in-Chief. The President possesses inherent constitutional responsibility for foreign affairs and as Commander-in-Chief. *See, e.g.*, *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"); *Youngstown*, 343 U.S. at 635–636, n. 2 (Jackson, J., concurring) (the President can "act in external affairs without congressional authority") (citing *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304 (1936); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations'") (quoting *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring). Thus, the President's power in the field of international relations "does not require as a basis for its exercise an act of Congress." *Curtiss–Wright Export Corp.*, 299 U.S. at 320; *Youngstown*, 343 U.S. at 635-36, n. 2.

This Court "need not consider whether, as an original question," the President's Article II authority encompasses the power to control border-crossing facilities because the Executive has long exercised such power. *United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915). In separation-of-powers cases, the

Supreme Court "has often 'put significant weight upon historical practice.'" *Zivotofsky*, 135 S. Ct. at 2091 (quoting *NLRB v. Noel Canning*, 134 S. Ct. 2550, 259 (2014)). Although past practice does not, by itself, create constitutional power, a "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that [it] had been made in pursuance of [congressional] consent or of a recognized . . . power of the Executive." *Midwest Oil Co.*, 236 U.S. at 474; *see also Mistretta v. United States*, 488 U.S. 361, 401 (1989).

As discussed above, *see* Background § I, *supra*, several Presidents over a 100-year span have issued cross-border permits for oil pipelines. *See* Whiteman, *Dig. Int'l Law*, Vol. 9, at 920-22. During that time, Congress has acquiesced to this practice by not legislating in this area. *See Kaplan v. Corcoran*, 545 F.2d 1073, 1077 (1976) ("Since the promulgation of Executive Order 10096 on January 23, 1950, there has been Congressional acquiescence in the order by the failure of Congress to modify or disapprove it."). As the Supreme Court has said, "[g]iven the President's independent authority 'in the areas of foreign policy and national security, . . . congressional silence is not to be equated with congressional disapproval.'" *Garamendi*, 539 U.S. at 429 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)); *see also Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981).

A long line of cases recognizes the President's authority over border crossings specifically. In 1896, in a dispute involving the landing of a telegraph

cable, Judge LaCombe explained that the question of whether a physical connection to this country should be allowed "is a political question, which, in the absence of congressional action, would seem to fall within the province of the executive to decide." *United States v. La Compagnie Francaise des Cables Telegraphiques*, 77 F. 495, 496 (S.D.N.Y. 1896); *see also United States v. W. Union Telegraph Co.*, 272 F. 311, 323 (S.D.N.Y. 1921) (recognizing the President's authority to approve or deny a border crossing in the absence of Congressional action), *aff'd*, 272 F. 893 (2d Cir. 1921), *rev'd on other grounds*, 260 U.S. 754 (1922); *Greene Cty. Planning Bd. v. Fed. Power Comm'n*, 528 F.2d 38, 46 (1975) (recognizing that the President's authority over border-crossings is "rooted in the President's power with respect to foreign relations if not as Commander in Chief of the Armed Forces").

More recently, courts have confirmed the President's authority to issue cross-border permits for pipelines based on both his foreign affairs and Commander-in-Chief authority. *See Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1162–63 (D. Minn. 2010) (concluding that it is "well recognized" that "the President's authority to issue" border crossing permits "comes by way of his constitutional authority over foreign affairs and authority as Commander in Chief" and that "Congress has accepted the authority of the President to issue cross-border permits"); *see also Natural Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp.

2d 105, 109 (D.D.C. 2009) ("Defendants have amply documented the long history of Presidents exercising their inherent foreign affairs power to issue cross-border permits, even in the absence of congressional authorization."); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1078 (D.S.D. 2009) (same).

2. Plaintiffs' Commerce Clause Claim Lacks Merit Because Congress Has Enacted No Conflicting Legislation.

Congress has enacted legislation regarding distinctly different types of border-crossings, such as submarine cables, *see* Submarine Cable Landing License Act of 1921, 47 U.S.C. § 35, and international bridges, *see* International Bridge Act of 1972, 33 U.S.C. § 535b.[5] But Congress has never legislated with respect to cross-border oil pipelines, much less in a manner intended to curtail the long-running Presidential practice of authorizing such pipeline crossings. The two instances where Congress sought to intervene concerning the Keystone XL Pipeline reinforce, rather than undermine, the President's role as the appropriate authorizing federal officer.

First, Congress enacted the Temporary Payroll Tax Cut Continuation Act ("TPTCCA") of 2011, Pub. L. No. 112-78, 125 Stat. 1280. Although the TPTCCA

[5] Where Congress has enacted legislation regarding border crossings, it has acknowledged the President's inherent constitutional authority over border-crossings. *See* 47 U.S.C. § 35 (recognizing the President's authority to license the landing of submarine cables); 33 U.S.C. § 535b (recognizing the President's authority to approve the construction of cross-border bridges).

indicated an intent that the pipeline be approved, it left the actual decision to the President to determine whether the border-crossing for the pipeline would "serve the national interest" and therefore should be approved. *See* TPTCCA § 501(b)(1)–(2), 125 Stat. at 1289-90. When President Barack H. Obama nonetheless determined that pipeline "would not serve the national interest" and denied the permit, Congress did not challenge the President's determination. *See* 77 Fed. Reg. 5,679, 5,679 (Jan. 18, 2012). Thus, far from showing that Congress sought to encroach on the President's historic role in deciding whether to authorize border-crossings for oil pipelines, the TPTCCA took that role as a given.

Second, in 2015, Congress passed the Keystone XL Pipeline Approval Act, S. 1, 114th Cong. §§ 1-6 (1st Sess. 2015). *See* S.1., Keystone XL Pipeline Approval Act ("Approval Act") (Jan. 6, 2015), ECF No. 81-9. The bill proposed that the Keystone XL Pipeline be approved without additional analysis under the National Environmental Policy Act. *See id.* § 2(a)-(b). But the bill was never enacted into law because it was vetoed by President Obama. *See* Veto Message to the Senate: S. 1, Keystone XL Pipeline Approval Act, 2015 WL 758544 (White House Feb. 24, 2015). Therefore, Congress never actually exercised its authority. Moreover, the bill did not propose any regulatory scheme for cross-border oil pipelines and did not question the President's authority over such border-crossings. Indeed, the Senate majority report supporting the bill affirmed that "the President

has, for more than a century, asserted authority to approve energy and telecommunication facilities that cross international borders pursuant to the President's constitutional authority over foreign affairs." S. Rep. No. 114-1, at 1 (2015), ECF No. 81-10.

Thus, Plaintiffs are unlikely to succeed on their claim that the President's issuance of a cross-border permit for the Keystone XL Pipeline unconstitutionally infringes on Congress's Commerce Clause authority—an authority Congress has studiously declined to exercise in this arena.

3. Plaintiffs' Property Clause Claim Lacks Merit.

Similarly devoid of merit is Plaintiffs' claim that the Permit infringes on Congress's authority under the Property Clause. Plaintiffs insist that the Permit infringes on Congress's power to regulate and dispose of federal lands because the Permit authorizes construction of pipeline facilities on land that Congress has directed BLM to manage. Pls.' Mem. at 20-22. This claim fails for at least three reasons.

First, Plaintiffs' argument that the President "lacked the power to authorize the balance of the Project," Pls.' Mem. at 21, elides what the permit actually authorizes—an international border crossing. The executive action challenged in this case is a cross-border permit – not a right-of-way on domestic lands. The narrow scope of the Permit is confirmed by TC Energy's application, which

explicitly defines the border facilities as the 1.2 mile border segment. *See* TC Energy's 2012 Application (excerpt) at 6 & Ex. B, attached as Ex. 1; TC Energy's 2017 Application at 6 & Ex. B, attached as Ex. 2.

Second, if Plaintiffs are arguing that only BLM exercises authority over federal lands sited at the border crossing, and that the Permit improperly supersedes or otherwise overrides BLM's permitting process, that is inaccurate. The Permit explicitly does not supplant other necessary authorizations, noting that "[t]he permittee is responsible for acquiring any right-of-way grants or easements, permits, and other authorizations as may become necessary or appropriate." Permit, art. 6(1). The Permit thus does not relieve TC Energy of the duty to acquire "right-of-way grants or easements, permits and other authorizations" required by law. *See id.* In fact, TC Energy applied for, and received, the requisite authorization from BLM for a right-of-way over the federally owned land within the 1.2-mile stretch covered by the border crossing Permit.[6] BLM's grant of a right-of-way to cross lands away from the border, including a portion of the border segment, demonstrates the limited scope of the Permit. Moreover, before issuing the right-of-way grant, BLM was required to complete environmental analyses in compliance with NEPA, the National Historic Preservation Act, the Endangered

[6] BLM issued a right-of-way to TC Energy on January 22, 2020. Plaintiffs have not challenged BLM's right-of-way decision and thus it is not before this Court.

Species Act, and other applicable statutes. Pls.' Mem. at 22. Thus, Plaintiffs have no legal or factual basis for contending that the Permit improperly displaces BLM's regulatory authority or otherwise violates any relevant land management statutes.

Nor does *League of Conservation Voters* provide "instructive reasoning," Order at 32-33, because the district court in that case addressed the legality of an Executive Order that it deemed inconsistent with the *express terms* of Congress's delegation of authority to the President. 363 F. Supp. 3d at 1017 n.20. The Court addressed what authority the President had over Outer-Continental Shelf ("OCS") lands where Congress had issued legislation governing the disposition of OCS lands. *Id.* There is no such legislation here.

Third, even if the Court finds "plausible" an argument that the Permit—contrary to its text—sweeps broader than the 1.2-mile border segment and could thus potentially conflict with the Property Clause, it should nonetheless adopt Defendants' reading of the Permit to avoid an unnecessary constitutional conflict. The constitutional avoidance canon of construction supports a reading of the Permit that would raise no constitutional issues. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see generally Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). The United States and TC Energy have argued persuasively that the

only rational reading of the Permit is that it authorizes the border segment and no more. *See* Reply Mem. in Supp. of Suppl. Mot. 1, ECF No 60; Defs.' Reply Mem. in Supp. of Mot. to Dismiss Pls' Am. Compl. 1, ECF No. 61. And this reading of the Permit—the only reading advanced by the parties bound by it—avoids the constitutional concerns this Court found to be "plausible," including the concern that the Permit may violate the Property Clause or that the President may be acting *ultra vires*. Order at 29-30, 34.

A court's "reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers" of other officers of the government. *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989) (citation omitted). The prospect of this Court declaring unconstitutional an act of the President based on an interpretation of the Permit that is subject to substantial doubt raises the profound separation-of-powers concerns that lie at the core of the principle of constitutional avoidance, *see, e.g.*, *Ashwander*, 297 U.S. at 347, and accordingly weighs heavily in favor of rejecting Plaintiffs' expansive interpretation of the Permit.

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

Plaintiffs also contend that the President lacks authority to issue the Permit because it violated Executive Order 13,337. This claim lacks merit because a president cannot be bound by an executive order issued by a prior president.

Rather, an executive order can be "withdrawn [by the President] at any time for any or no reason." *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965). President Trump explicitly stated that the Permit was not subject to Executive Order 13,337. See 84 Fed. Reg. at 13,101 (issuing the Permit "notwithstanding Executive Order 13,337 of April 30, 2004"). That statement alone is dispositive of Plaintiffs' claim.

While this Court in its December 20, 2019 Order referenced precedent standing for the proposition that an executive order implementing a statute may be enforceable against an agency, *see* Order at 35-36; *see also*, *e.g.*, *City of Carmel-By-The-Sea v. U.S. Department of Transp.*, 123 F.3d 1142, 1165-66 (9th Cir. 1997), that precedent is inapplicable for two simple reasons. First, Executive Order 13,337 did not implement the requirements of any statute—instead, the procedures established by President Bush for issuing cross-border permits for oil pipelines were based solely on the President's inherent constitutional authority and thus cannot be enforced in a private lawsuits. *See* Exec. Order 13,337, 69 Fed. Reg. at 25,299; *see Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975); *Chai v. Carroll*, 48 F.3d 1331, 1338-40 (4th Cir. 1995); *Facchiano Constr. Co. v. U.S. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993); *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986).

And second, the President is not "an agency." Plaintiffs here do not

challenge agency action because it deviates from the requirements of an enforceable executive order; they instead seek to cabin President Trump's exercise of inherent constitutional authority based on the whim of a predecessor. This is plainly improper for the reasons explained in *Gronouski*.[7]

Notwithstanding these two points, Plaintiffs insist that they may enforce Executive Order 13,337 against the President—as if he were an agency—because the TPTCCA provides a statutory basis for enforcing the Order's requirements. This is incorrect for the reasons discussed above, *see* section I.B.2., *supra*. Although the TPTCCA indicated an intent that the pipeline be approved, it left the actual decision to the President to determine whether the border-crossing for the pipeline should be approved. *See* TPTCCA § 501(b)(1)–(2), 125 Stat. at 1289-90. The TPTCCA did not adopt the procedures set forth in Executive Order 13,337 into law. Instead, the instruction in the TPTCCA that the President "act[] thorough

[7] Neither *City of Carmel-By-The-Sea* nor *Legal Aid Society of Alameda City v. Brennan*, 608 F.2d 1319 (9th Cir. 1979), *see* Order at 35-36, stand for the proposition that an executive order itself may be treated as if it were an agency action and reviewed under the Administration Procedure Act ("APA"). Both cases instead stand for the proposition that a court may, in some instances, *enforce* the requirements of an executive order when reviewing an agency action under the judicial review provisions of the APA. While the court in *City of Carmel* confusingly stated that "Executive Orders 11988 and 11990 are subject to judicial review," 608 F.2d at 1166, the case plainly involved only the enforceability of those executive orders, not their legality. *Legal Aid Society* similarly focused on the legality of a Department of Labor regulation, which the court reviewed against standards established in the referenced executive order. 608 F.2d at 1330. The validity of the executive order itself was not at issue in either case.

the Secretary of State," *id.* § 501(a), merely underscores that Congress intended to defer to the procedures established by the Office of the President. Thus, the TPTCCA imposes no procedural restrictions on the President's issuance of cross-border permits under his foreign affairs and Commander in Chief powers. This understanding is bolstered by the subsequent Approval Act, which made no reference to the procedural requirements of Executive Order 13,337. *See* Approval Act § 2(a)-(f).

Thus, Plaintiffs have no likelihood of success on their claim that the President was required to comply with Executive Order 13,337.

II. Plaintiffs Have Failed to Demonstrate Irreparable Harm from the Issuance of the Permit.

Plaintiffs' request for preliminary injunctive relief fails for a second reason: they cannot demonstrate imminent, irreparable harm. *Winter*, 555 U.S. at 22. Indeed, they do not even try to demonstrate any harm from the border crossing itself. Instead, all of their alleged harm results from construction of the entire pipeline. *See* Pls.' Mem. at 29-30. Such allegations fail to demonstrate irreparable harm because the Permit authorizes the construction and operation of pipeline facilities only in an approximately 1.2-mile segment from the Canadian border to the first mainline shutoff valve in the United States. Permit, 84 Fed. Reg. at 13,101; *see also* Background § II, *supra*.

To the extent Plaintiffs claim that the Permit approves construction of the entire pipeline, they are simply mistaken. *See* Pls.' Br. in Resp. to the Court's December 20, 2019 Order at 13-16, ECF No. 80. There is no factual basis for the assertion that the actions authorized by this Permit will result in environmental harms along the future route of the pipeline. The Permit authorizes only the construction of border facilities. *See* Permit art. 1(1); *see also* TC Energy's 2017 Application at 6 & Ex. B.

Further, even if approval of the crossing somehow entailed approval of the entire pipeline—which is demonstrably not the case—the alleged failure of federal agencies to conduct environmental analyses, standing alone, would be insufficient to demonstrate irreparable injury. Procedural harms alone are insufficient to demonstrate irreparable harm; instead, an injunction may issue only if "environmental injury is sufficiently likely." *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 45 (1987)). In any event, there was no requirement for the President to go through a NEPA process before issuing the Permit. *See Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1088 (9th Cir. 2004).

And to the extent Plaintiffs claim irreparable harm from activities that the Permit does not authorize, the Court should deny that request. After all, the Court

cannot enjoin activities that are not subject to the Permit and are outside of the authority of the relevant federal agencies. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1123 (9th Cir. 2005) ("The authority to enjoin development extends only so far as the Corps' permitting authority."). In addition, Plaintiffs cannot rely on a "bureaucratic momentum" theory to enjoin activities that are outside of federal control. The theory presumes that, if an agency reaches a decision prior to a NEPA process and the requisite environmental analysis, it will be less likely to change it later. *See Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). This theory cannot be squared with the Supreme Court's direction that irreparable harm to the environment may not be presumed. *See Village of Gambell*, 480 U.S. at 544-46 (reversing the preliminary injunction of an offshore oil and gas lease sale); *see also Winter*, 555 U.S. at 21 (emphasizing that a plaintiff "must demonstrate a likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief").[8] Moreover, it has no application here because NEPA does not apply to the President or his issuance of the Permit. *See Ground Zero Ctr.*, 383 F.3d at 1088.

The Court previously enjoined the construction of worker camps and other activities on private land based on a bureaucratic momentum theory. *See*

[8] The Ninth Circuit has not endorsed the bureaucratic momentum theory. *See, e.g.*, *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (refusing to vacate oil and gas leases).

Indigenous Envtl. Network v. U.S. Dep't of State, No. CV-17-29-GF-BMM, 2019 WL 652416, at *10 (D. Mont. Feb. 15, 2019). But the Court did so on the basis that the State Department's 2014 Supplemental Environmental Impact Statement ("SEIS") analyzed the impacts of worker camps. *See id.* That analysis has no bearing now because the President issued the Permit on his own, he was not required to comply with NEPA, and the Permit does not rely on the SEIS in any event. Moreover, the construction of worker camps in various places along the pipeline route is not authorized or governed by the Permit.

III. The Balance of the Harms and the Public Interest Weigh Against an Injunction.

The balance of the harms and the public interest weigh against an injunction. "When the Government is a party, these . . . two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Plaintiffs argue that an injunction avoids irreparable harm to the environment, relying on cases imposing injunctions in NEPA cases. *See, e.g., All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011). There is no public interest, however, in enjoining a presidential action on the basis of an alleged NEPA violation, because NEPA does not apply to the President. *See Ground Zero Ctr.*, 383 F.3d at 1088. Further, as the Under Secretary of State found in 2017, the proposed pipeline would serve the national interest by supporting energy security and maintaining strong bilateral relations with Canada.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' motion for a preliminary injunction be denied.

Respectfully submitted this 10th day of February, 2020,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 6,489 words, excluding the tables, caption, signature, certificate of compliance, and certificate of service.

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2020, a copy of the foregoing Defendants' Opposition to Plaintiffs' Renewed Motion for Preliminary Injunction and Application for Temporary Restraining Order was served on all counsel of record via the Court's CM/ECF system.

/s/ Luther L. Hajek
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