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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 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; MARGARET EVERSON, in her	Civil. No. CV 19-28-GF-BMM **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY INJUNCTION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER** **Judge: Hon. Brian M. Morris** **Case Filed: April 5, 2019** **Hearing:**

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.

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I. SUMMARY OF ARGUMENT

Plaintiffs' Opening Memorandum demonstrates their entitlement to a preliminary injunction because (1) Plaintiffs are likely to prevail under the Commerce and Property Clauses of the U.S. Constitution and Executive Order ("EO") 13,337, (2) Plaintiffs would suffer irreparable harm, (3) the balance of harm favors Plaintiffs, and (4) injunctive relief would serve the public interest. The Federal Defendants (collectively, "Trump") fail to show otherwise.

First, Trump claims Plaintiffs lack standing because "[n]one of [their] 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 authorized." Opp. 6. Not so. Plaintiffs' supporting declarations show TC Energy's ("TCE's") intended construction threatens pollution of the Missouri River and other water bodies that Plaintiffs use and enjoy. *E.g.*, Declaration of Bill Whitehead filed July 10, 2019 (Dkt. 27-26) ¶¶4-9).

Second, Trump argues Plaintiffs' Commerce Clause claim fails because "the President possesses inherent constitutional responsibility for foreign affairs and as Commander-in-Chief." Opp. 13. Wrong. The Constitution grants Congress, not the President, exclusive power over international commerce. *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2009) ("*Clark*"); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994) ("*Barclays*"); *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56 (1933) ("*Board of Trustees*"). The

President shares this power only where Congress has delegated it. It has not done so here.

Third, Trump claims the 2019 Permit does not violate the Property Clause because it does not "relieve [TCE] of the duty to acquire . . . . a right-of-way over the federally owned land within the 1.2-mile stretch covered by the border-crossing Permit." Opp. 19. But this Court has already ruled that "[t]he 2019 Permit ignores . . . the 2004 Executive Order's national interest determination by the Secretary of State and excuses [TCE's] Keystone project from comprehensive State Department review," and that under *League of Conservation Voters v. Trump* ("*LCV*"), 363 F.Supp.3d 1013, 1016 (D. Alaska 2019) and *Kleppe v. New Mexico* ("*Kleppe*"), 426 U.S. 529, 540 (1976), Trump may not usurp Congress's "complete control" over federal lands. Order filed December 20, 2019 (Dkt. 73; "Order") 31-34.

Fourth, Trump claims that "a president cannot be bound by an executive order issued by a prior president." Opp. 21. Wrong. This Court has ruled that Executive Orders that – like EO 13,337 – implement statutory mandates are enforceable. Order 35-36; *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1329-1331 (9th Cir. 1979) ("*Legal Aid*"); *City of Carmel-by-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1166 (9th Cir. 1997) ("*Carmel*"). Even assuming Trump could have withdrawn EO 13,337 before issuing the 2019 Permit, he did not. Therefore it remained binding.

Fifth, Trump claims Plaintiffs "cannot demonstrate imminent, irreparable harm" because "they do not even try to demonstrate any harm from the border crossing itself." Opp. 24. Wrong. The FAC explains Plaintiffs' members "would be directly and irreparably harmed by . . . the Project['s] . . . first 1.2 miles" because it crosses a tributary of Whitewater Creek that ultimately flows into the Missouri River, and thus a pipeline spill there would harm Plaintiffs' uses downstream. FAC ¶¶ 16, 28-30; *see* Administrative Record in *IEN v. State*, CV 17-29-GF-BMM (*see* ECF 111-112, 158, 167) DOSKXLDMT0009652 ("DOS9652") (FSEIS Appendix D, Table 1 – "Waterbodies Crossed by the Project in Montana" at Milepost 1.11); Whitehead Declaration (Dkt. 27-26) ¶¶4-9. Regardless, the 2019 Permit harms Plaintiffs because without it, the Project (and its impacts on Plaintiffs throughout its length) could not occur. *Backcountry Against Dumps v. Chu*, 215 F.Supp.3d 966, 976 (S.D. Cal. 2015) ("*Backcountry*").

Sixth, Trump claims "[t]he balance of harms and the public interest weigh against an injunction" because Plaintiffs rely on "injunctions in NEPA cases" and "NEPA does not apply to the President." Opp. 27. Wrong. Plaintiffs rely on cases enforcing the U.S. Constitution, which Trump must obey.

Because Trump fails to overcome Plaintiffs' showing that the four preliminary injunction criteria are met, Plaintiffs' motion should be granted.

II. BACKGROUND

Plaintiffs have already refuted Trump's claim (Opp. 2-5) that cross-border permits fall under his foreign affairs and Commander-in-Chief authority. *See* Plaintiffs' Brief in Response to the Court's December 20, 2019 Order filed January 24, 2020 (Dkt. 80) at 16-30.

III. LEGAL STANDARD

Trump agrees with Plaintiffs' four-part test for a preliminary injunction. Opp. 5-6, citing *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008).

IV. PLAINTIFFS HAVE ESTABLISHED THEIR LIKELIHOOD OF SUCCESS

A. PLAINTIFFS HAVE STANDING

Trump attacks Plaintiffs' standing on two grounds, injury and redressability. Both fail. First, Trump claims "Plaintiffs fail to demonstrate any injury caused by the authorization of border facilities" and that "[n]one of Plaintiffs' alleged injuries relate to the 1.2-mile segment of the pipeline . . . that the President's border-crossing Permit authorized." Opp. 6(second quote), 7(first quote). Not so. As this Court found, Plaintiffs' First Amended Complaint (Dkt. 37; "FAC") "describes their members interest in the 1.2-mile segment of land," and "Plaintiffs have alleged sufficiently a concrete and particularized invasion of their legally protected interests." Order 15-17. The FAC alleges the "border" segment crosses a tributary of Whitewater Creek that ultimately flows into the Missouri River, and

thus a pipeline spill into that creek would harm Plaintiffs. FAC ¶¶ 16, 28-30. Plaintiffs' declarations prove these allegations. *E.g.,* Whitehead Dec. ¶¶4-9; Declaration of LaVae High Elk Red Horse (Dkt. 27-19) ¶¶3-6. Trump's contrary argument therefore fails. Opp. 8.

As Trump concedes, Plaintiffs' evidence shows that construction and operation of the 875-mile pipeline threatens specific harm to lands, waters and wildlife Plaintiffs use. Opp. 7-8. Trump's claim that these harms are "too many links in the 'chain of causation'" is baseless. Opp. 8. The 2019 Permit is the headwaters permit without which Keystone's construction and operation *anywhere* could not occur . *Backcountry*, 215 F.Supp.3d at 976 (presidential cross-border permit caused plaintiffs' injuries even though additional agency approvals required); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006) (interdependent projects' impacts are intertwined*); Named Individual Members of San Antonio Conservation Soc. v. Texas Hwy. Dept*., 446 F.2d 1013, 1022-1023 (5th Cir. 1971) (same).

Trump asserts that, since Plaintiffs raise no claims under the National Environmental Policy Act, 42 U.S.C. section 4321 et seq. ("NEPA"), *Great Basin* is "irrelevant." Opp. 9 n.3. Wrong. The underlying concept–that interdependent projects must be examined together–is identical. Neither the cross-border segment, nor the larger Project, has any independent utility separate from the other. Both require a Presidential permit to operate. The 2019 Permit controls the manner in which both are built, as it directs that the "Facilities" (as defined,

Keystone's entire 875 miles) "*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. . . ." 84 Fed.Reg. 13101-13102 (4/3/2019) (emphasis added). The 2019 Permit is the gateway for the entire Project and its associated impacts.

Allen v. Wright, 468 U.S. 737, 759 (1984) (*overruled by Lexmark International, Inc v. Static Control Components, Inc.,* 572 U.S. 118, 126 (2014)), is inapplicable. There, plaintiffs challenged the Internal Revenue Service's uneven assignment of tax-exempt status to discriminatory private schools in hopes public schools would benefit. The Court found the connection too speculative, since decisions of third party actors in response to changed tax-status served to break the causal chain. *Id.* Unlike *Allen*, here Plaintiffs' injuries are caused by the 2019 Permit, not unrelated third parties.

As this Court already determined, "Plaintiffs . . . have alleged sufficiently that the injury is certainly impending and fairly traceable to the 2019 Permit." Order 17 (*citing Clapper v. Amnesty International USA*, 568 U.S. 398, 409). TCE has announced it intends to "commence construction-related activities" as early as February 24, and the following month it will "begin mobilizing equipment and personnel to the U.S.-Canada border [for construction of] the 1.2 mile border-crossing segment in April 2020 . . . ." TCE Supplemental Status Report filed

January 31, 2020 (Dkt. 83) at 1; TCE Amended Status Report filed January 14, 2020 (Dkt .75). As shown, this imminent construction threatens harm to Plaintiffs.

Second, Trump contends "Plaintiffs' claims are not redressable," because "the Court cannot enjoin the President." Opp. 9, 10. Wrong. This Court already ruled it:

> can review President Trump's actions for lawfulness and enjoin his actions. . . . Plaintiffs have demonstrated redressability.

Order 20.

Despite this Court's resolution of this issue, Trump persists in claiming this Court is powerless to stop him, so long as "no subordinate officials were involved." Opp. 10-11. But Trump is not above the law. Both *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and *Panama Refining Co. v. Ryan*, 293 U.S. 338 (1935) ruled that, where the President exceeded his constitutional authority, permanent injunctions should issue to prevent unlawful implementation of unauthorized executive action, and vacated the unlawful executive action. Likewise in *LCV,* 363 F.Supp.3d at 1030-1031, the court vacated the unlawful portion of Trump's executive order. This Court must do likewise.

B. THE 2019 PERMIT VIOLATED THE COMMERCE CLAUSE

Trump contends Plaintiffs' Commerce Clause claim fails because "the President possesses inherent constitutional responsibility for foreign affairs and as Commander-in-Chief." Opp. 13. Wrong. The Constitution grants Congress, not

the President, exclusive power over international commerce. *Clark,* 435 F.3d at 1109; *Barclays,* 512 U.S. at 329; *Board of Trustees,* 289 U.S. at 56. The President shares this power only where Congress has delegated it. It has not done so here, as this Court has already ruled. Order 25-30. Trump's invocation of his "foreign affairs power" fails because the 2019 Permit is not the product of intergovernmental negotiation, let alone a treaty. Its authorization of a cross-border pipeline across federal lands falls squarely within Congress' "exclusive and plenary" powers to regulate foreign commerce and manage federal land. *Board of Trustees*, 289 U.S. at 56; *Kleppe*, 426 U.S. at 539

Ignoring this Court's ruling, Trump argues that Congress has adopted legislation that delegates its authority over Keystone to Trump. Opp. 16-18. Wrong again. This Court rejected that contention, ruling that in adopting the Temporary Payroll Tax Cut Continuation Act of 2011 (Pub. L. No. 112-78, §§ 501(a)-(b) 125 Stat. 1280 (2011); "TPTCCA"), Congress "required the State Department to review [TCE's] 2008 Application and make a national interest determination" before Keystone could be approved. Order 33. The vetoed Keystone XL Pipeline Approval Act never became law because Congress refused to disturb the Secretary of State's vital review that Congress mandated in the TPTCCA. Order 28-29.

C. THE 2019 PERMIT VIOLATED THE PROPERTY CLAUSE

Trump attacks Plaintiffs' Property Clause claim, arguing "[t]he executive action challenged . . . is a cross-border permit[,] not a right-of-way." Opp. 18. Wrong. Among other approvals, the 2019 Permit grants "permission . . . to construct 'a 36-inch diameter pipeline extending from the international border . . . to . . . approximately 1.2 miles from [that] border, and any land, structures, installations or equipment appurtenant thereto." 84 Fed. Reg. 13101. It allows construction not just on BLM land, but also on Montana State Land between Mileposts 0.92 and 1.2. And, it does so without the State Department review that Congress had impliedly approved for 51 years, and mandated in the TPTCCA. "Congress's enactment of the TPTCCA . . . evidences its intent to exercise authority over cross-border pipeline permitting," and direction that any Keystone approval be "through the Secretary of State" and "under Executive Order No. 13339." Order 28; Pub. L. No. 112-78, §§ 501(a), 501(b).

The 2019 Permit further usurps Congress's Property Clause authority over federal lands by requiring that "[t]he construction, connection, operation, and maintenance of the [Keystone] Facilities . . .*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, 2017. . . ." 84 Fed. Reg. 13101-13102 (4/3/2019) (emphasis added). By specifically disallowing – "notwithstanding Executive Order 13337" – the State Department review otherwise required, the 2019 Permit evaded the "applicable law" that Congress had prescribed as part of

that State Department oversight. Trump thereby usurped Congress' "exclusive and plenary" power to manage federal lands within this segment. *LCV*, 303 F.Supp.3d at 1017-1018 n. 20, 1030-1031; *Beaver v. United States*, 350 F.2d 4, 8 (9th Cir. 1965).

Accordingly, the 2019 Permit violated the Property Clause.

D. THE 2019 PERMIT VIOLATED EO 13,337

Trump claims "a president cannot be bound by an executive order issued by a prior president." Opp. 21. Wrong. This Court ruled that executive orders that implement statutory mandates – like EO 13,337 – are enforceable. Order 35-36; *Legal Aid*, 608 F.2d at 1329-1331; *Carmel*, 123 F.3d at 1166; *Wyoming Wildlife Federation v. United States*, 792 F.2d 981, 985 (10th Cir. 1986) (enforcing EO protecting wetlands); *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 591 (D.C. Cir. 2010) (same); *Citizens for Smart Growth v. Secretary of Dept. of Transp.*, 669 F.3d 1203, 1214 (11th Cir. 2012) (same). Even assuming Trump could have withdrawn EO 13,337 before issuing the 2019 Permit, he did not. Therefore it remained binding.

Trump's cases (Opp. 22) are inapposite. *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975) held EO 11,821 unenforceable because it was "a managerial tool for . . . the President's personal economic policies," rather than rooted in congressional authority. EO 13,337, by contrast, was selected by Congress to govern Keystone permitting. *Chen v. Carroll*, 48 F.3d 1331, 1338-40

(4th Cir. 1995) disallowed an asylum claim under EO 12,711 because "it was an internal directive from the President to his Attorney General," and the Court declined "to force managerial discipline on the President's cabinet." *Id.* *Facchiano Constr. Co. v. U.S. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993) did not enforce EO 12,549 because it was "an internal housekeeping measure" not for "plaintiffs' benefit." EO 13,337, by contrast, requires environmental reviews that benefit Plaintiffs. *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986) declined to enforce EO 12,291 because it only concerned internal management.

Since EO 13,337 was enforceable and Trump failed to comply with it, his 2019 Permit was *ultra vires*.

V. PLAINTIFFS WILL SUFFER IRREPARABLE HARM

Trump contends Plaintiffs will suffer no irreparable harm because (1) the Permit "authorizes . . . pipeline facilities only in an approximately 1.2-mile segment," and (2) "bureaucratic momentum" is inapplicable to construction "outside of federal control." Opp. 24-27. Both arguments fail.

First, Trump asserts Plaintiffs fail "to demonstrate any harm from" the first 1.2 miles of the pipeline. Opp. 24. Wrong. As shown, the 2019 Permit authorizes Keystone's crossing of an "Unnamed Tributary to East Fork Whitewater Creek" at approximately the 1.11 mile mark. DOS9652. That tributary ultimately "flows into . . . the Missouri River . . . ., a watercourse used by Plaintiffs for drinking and farming among other uses;" and "[s]hould Keystone leak oil into a tributary of

Whitewater Creek, the resulting contamination would flow downstream to the Missouri River," irreparably harming Plaintiffs and the environment. FAC ¶16.

Trump's claim that the balance of the 875-mile Project is not authorized by this Permit likewise fails. Opp. 25. Keystone could not operate *anywhere* without the Permit. *Backcountry*, 215 F.Supp.3d at 976 (that a project "would not have been built absent approval of [a cross-border Presidential] permit . . . . demonstrate[s] that the Defendants' action [was] causal of the injury" to Plaintiffs despite the need for other agency approvals). Plaintiffs' declarations–and TCE's Amended Status Report (Dkt. 75)– show that environmental injury is not only likely, it is certain. As Trump admits, an injunction is appropriate where "'environmental injury is sufficiently likely.'" Opp. 25, quoting *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004).

Trump contends this Court now lacks authority to enjoin construction on a "bureaucratic momentum" theory 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" this Court ordered. Opp. 27. But as shown above, the President's unilateral issuance of the Permit violated the United States Constitution, and Presidential permits must be reviewed by the State Department before approval. Because the State Department must comply with NEPA, as this Court previously held, Presidential permits are subject to NEPA.

As Trump admits, this "Court previously enjoined the construction of worker camps and other activities on private land based on a bureaucratic momentum theory." Opp. 26. The need for injunctive relief to prevent construction of worker camps and other Keystone-related facilities is just as great now as when this Court properly enjoined Keystone's construction last February. *IEN v. State*, 2019 WL 652416 *10 (2/15/19), citing *Colorado Wild, Inc. v. U.S. Forest Service*, 523 F.Supp.2d 1213, 1221 (2007).

VI. THE BALANCE OF HARM AND THE PUBLIC INTEREST FAVOR PLAINTIFFS

Trump ignores the balance of harm – which clearly favors Plaintiffs. Opp. 27. The public and Plaintiffs will suffer irreparable injury if Keystone proceeds, but TCE will suffer no irreparable harm if construction is stayed. Indeed, TCE will not even commit to move forward with Keystone until after this case is resolved. Volker Declaration, Exhibit 1, p. 16 ("there is outstanding litigation in Federal Court in Montana . . . [that] we need to get behind us[b]efore we move forward.").

It is settled law that "when environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Save the Yaak Committee v. Block*, 840 F.2d 714, 722 (9th Cir. 1988); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988); *Bob Marshall Alliance v. Lujan*, 804 F.Supp. 1292, 1295-1298 (D. Mont. 1992). Irreparable injury to the environment and Indigenous communities is not only

"likely," but a certainty if Keystone is built. Yet, TCE admits that if it cannot get "comfort that the risk-reward proposition is attractive . . . then the project will [not proceed and will] stay where it is right now." Volker Declaration, Exhibit 1, p. 16.

Trump claims an injunction would not serve the public interest because "NEPA does not apply to the President" and "the proposed pipeline would serve the national interest." Opp. 27. But NEPA does apply to State Department review of Presidential permits. And Trump has not explained why the Project would serve the national interest now, when it did not in 2015, as this Court required in its previous rulings. *IEN v. State*, 347 F.Supp.3d 561, 591 (2018) (vacating ROD and remanding "with instructions to provide a reasoned explanation for the . . . change in course").

Plaintiffs seek an injunction to prevent construction until applicable laws are met. The Ninth Circuit has recognized "the well-established 'public interest in preserving nature and avoiding irreparable environmental injury'" and "in careful consideration of environmental impacts before major federal projects go forward, and [has] held that suspending such projects until that consideration occurs 'comports with the public interest.'" *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011), *citing South Fork Band Council v. U.S. Dept. of Interior*, 588 F.3d 718, 728 (9th Cir. 2009). Therefore this Court should enjoin construction of Keystone until this Court decides the merits.

VII. CONCLUSION

President Trump's Opposition lacks merit, and Plaintiffs' motion should be granted.

Dated: February 18, 2020

Respectfully submitted,

PATTEN, PETERMAN, BEKKEDAHL & GREEN, PLLC

s/ *James A. Patten*
JAMES A. PATTEN

Dated: February 18, 2020

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

CERTIFICATE OF COMPLIANCE

Pursuant to Montana District Court, Civil Rule 7.1(d)(2)(B), I certify that **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY INJUNCTION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER** contains 3,197 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 February 18, 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' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' 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)