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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	Civ. No. CV 19-28-GF-BMM **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** **Judge: Hon. Brian M. Morris** **Case Filed: April 5, 2019** **Hearing: March 25, 2020**

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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INTRODUCTION

Plaintiffs respectfully request that this Court set aside President Donald Trump's ("Trump's) improper attempt to usurp Congress's exclusive and plenary power over foreign commerce and federal lands by unilaterally issuing the March 29, 2019 Presidential permit ("2019 Permit") for the Keystone XL Pipeline ("Keystone" or "Project"). 84 Fed.Reg 13101-13103 (April 3, 2019). Granting the 2019 Permit without review by the Secretary of State as directed by Congress also impermissibly bypassed compliance with this nation's bedrock environmental laws. And, it was wrongly intended to evade compliance with this Court's previous Judgment and injunction ("Judgment") issued November 8, 2018 setting aside Trump's 2017 Permit.

As this Court carefully explained in the orders on which that Judgment was based, the 2017 Permit violated Congress' intent that cross-border permits be reviewed by the Secretary of State and comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, et seq., the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, et seq., and the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, et seq. This Court ruled that the 2017 Permit violated those laws because its approval documents including its Final Supplemental Environmental Impact Statement ("FSEIS") ignored the effects of current oil prices, the cumulative effects of greenhouse gas emissions, impacts on unsurveyed cultural resources, potential oil spills and recommended mitigation for them in light of updated modeling, impacts to endangered species in light of updated oil

spill data, and former Secretary of State John Kerry's detailed findings that Keystone would not serve the national interest.[1]

In issuing the 2019 Permit, Trump ignored Congress's express and implied approval of a half-century of established practice and historical precedent requiring that cross-border oil pipeline permits follow review by the Secretary of State pursuant to the procedures set forth in Executive Orders 11,423 and 13,337. Issuing the 2019 Permit in this manner usurped Congress's authority over foreign commerce and federal lands under the Commerce Clause and Property Clause. Congress has the exclusive power to regulate foreign commerce and dispose of federal lands, and there is only one congressionally sanctioned pathway to process TC Energy's permit application: the procedure set forth in Executive Order ("EO") 13,337, which requires the Secretary of State's determination – following his consultation with prescribed federal agencies and full compliance with applicable environmental laws including NEPA – whether the Project serves the national interest. Plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance's ("Plaintiffs'") therefore move for summary judgment to ensure compliance with the Constitution and these important environmental statutes.

Persisting in their collective effort to sidestep – rather than comply with – core environmental laws, Trump, the Army Corps of Engineers, the Fish and Wildlife Service, and the Bureau of Land Management (collectively, "Trump")

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[1] *IEN v. State*, 347 F.Supp.3d 561, 590-591 (D.Mont. 2018).

and TC Energy Corporation ("TC Energy," and together with Trump, "Defendants'") previously moved to dismiss Plaintiffs' litigation challenging the 2019 Permit. On December 20, 2019, this Court issued a well-reasoned Order denying those Motions to Dismiss, holding that (1) Plaintiffs have standing to bring this action, (2) Plaintiffs raised plausible claims for relief under the U.S. Constitution's Commerce Clause (Article I, section 8, clause 3) and Property Clause (Article IV, section 3, clause 2), as well as EO 13,337, and (3) the Army Corps of Engineers, Fish and Wildlife Service, and the Bureau of Land Management ("BLM") (collectively, "Agency Defendants") "remain appropriately included at this stage in the litigation." Order Denying Motions to Dismiss (Dkt. 73) (2019 WL 7421955) ("Order") 14-39.

Consistent with this Court's Order, and as more fully demonstrated below, this Court should grant Plaintiffs' motion for summary judgment.

STANDARD OF REVIEW

There are no genuine disputes as to any material fact, and thus the significant constitutional questions presented by the President's improper approval of the 2019 Permit are properly resolved by summary judgment. Fed.R.Civ.Pro Rule 56(a).

As this Court recognized in its December 20, 2019 Order denying Defendants' motions to dismiss, it "must review the President's actions and determine where lie the constitutional boundaries between the President and Congress." Order 26. "The President's authority to act, as with the exercise of

any governmental power, 'must stem either from an act of Congress or from the Constitution itself[,]'" or from a combination of the two. *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)).

In its Order, this Court properly relied upon the concurring opinion of Justice Jackson in *Youngstown* to provide the framework for its review. Order 26-27 (citing *Youngstown*, 343 U.S. at 635-637). The Supreme Court indulges the strongest presumption to support the President's action when he "'acts pursuant to an express or implied authorization of Congress.'" *Id*. (*quoting Youngstown*, 343 U.S. at 635). When the President and Congress "have concurrent authority," due to "absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers." *Id*. (*quoting Youngstown*, 343 U.S. at 637). In such an instance, this Court examines whether "'congressional inertia, indifference or quiescence may' invite the exercise of executive power.'" *Id.* 27 (*quoting Zivotofsky v. Kerry*, _U.S._ 135 S.Ct. 2076, 2084 (2015), in turn *quoting Youngstown*, 343 U.S. at 637 (additional quotes omitted)). And "[f]inally, '[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.'" *Id*. (*quoting Youngstown*, 343 U.S. at 637).

Here, as shown below, the President acted unilaterally to contravene Congress' express and implied will. Therefore, the President's power was at its

lowest ebb, and he could only rely on his own constitutional powers, minus those prescribed to Congress. Consequently, his approval of the 2019 Permit conflicted with–and must give way to– the Constitution's assignment of exclusive and plenary powers over foreign commerce and federal lands to Congress.

STANDING

Plaintiffs have standing to bring this action because (1) they will suffer an injury-in-fact that (2) is fairly traceable to the challenged actions and (3) is likely to be redressed by a favorable court decision. *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

To demonstrate injury-in-fact, a plaintiff must show "an invasion of a legally protected interest" that is both "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "The relevant showing 'is not injury to the environment, but injury to the plaintiff.'" *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000)).

The 2019 Permit would harm Plaintiffs' legally-protected interests in "concrete and particularized" respects, both at the 1.2-mile border-crossing and from the construction and operation of the "Facilities" described in the 2019 Permit – all 875 miles. *See* 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), LaVae High Elk Red Horse (Dkt. 27-19), Kandi White (Dkt. 27-24), Bill Whitehead (Dkt. 27-26), and Frank Egger (Dkt. 27-29), filed July 10, 2019, and Kathleen Meyer (Dkt. 65-2), filed October 10, 2019.

Plaintiffs have demonstrated that construction at the 1.2-mile border crossing will cause injury. First, this 1.2-mile segment "crosses at least one unknown tributary of the East Fork of Whitewater Creek," which 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. Plaintiffs' First Amended Complaint (Dkt. 37; "FAC") ¶ 16 (explaining the hydrological context); Administrative Record in *IEN v. State*, CV 17-29-GF-BMM (see Dkt. 111-112, 158, 169) at DOSKXLDMT0009652 ("DOS9652") (FSEIS Appendix D, Table 1–"Waterbodies Crossed by the Project in Montana" at Milepost 1.11) (documenting Keystone's crossing of this tributary of the Missouri River); Whitehead Declaration (Dkt. 27-26) ¶¶ 4-9 and Exhibit 1 (documenting resulting threat to the water supply for the Fort Peck Indian Reservation).

Second, construction of Keystone's border segment requires the use of at least one man-camp (DOS5952, 5982, 5986), which plaintiffs have shown will harm their interests. *E.g.,* Cheek Declaration (Dkt. 27-6) ¶¶ 1-29, Exhibits 1-2. Thus, the construction and operation of the 1.2-mile border facilities described in the 2019 Permit will cause "concrete and particularized" harms to Plaintiffs.

The 2019 Permit also approves and requires construction and operation of the remainder of the Project, which likewise harm Plaintiffs. First, as with the 1.2-mile border segment, the remainder of the Project poses significant oil spill risks

that threaten the water supply for the Fort Peck Reservation. Whitehead Declaration (Dkt.27-26), ¶¶ 4-13. Indeed, this risk of spill threatens downstream waterways throughout its route, harming plaintiffs' spiritual, recreational, and subsistence uses of these watersheds. *E.g.* Red Horse Declaration (Dkt. 27-19) ¶ 4; Lone Eagle Declaration (Dkt. 27-15) ¶ 6; Braun Declaration (Dkt. 27-4) ¶ 3; White Declaration (Dkt. 27-24) ¶¶ 10-13; Meyer Declaration (Dkt. 65-2) ¶¶ 9-17).

Second, Keystone would lead to habitat destruction, harming Plaintiffs' use and enjoyment of nature along the pipeline route. *E.g.* Meyer Declaration (Dkt. 65-2) ¶¶ 9-17; Red Horse Declaration (Dkt. 27-19) ¶ 4; Lone Eagle Declaration (Dkt. 27-15) ¶ 6; White Declaration (Dkt. 27-24) ¶¶ 5-13. And it threatens to harm Plaintiffs' members' deep connections to the land, water, and wildlife throughout its route. Braun Declaration (Dkt. 27-4) ¶¶ 2-11; White Declaration (Dkt. 27-24) 5-13; Lone Eagle Declaration (Dkt. 27-15) ¶¶ 2-12; Red Horse Declaration (Dkt. 27-19) ¶¶ 2-7.

These harms – both at the 1.2-mile border crossing, and outside it – are fairly traceable to the 2019 Permit, as each flows from its issuance. Put another way, absent the 2019 Permit these harms could not occur, as it is the headwaters permit for the entire Project. *Backcountry Against Dumps v. Chu*, 215 F.Supp.3d 966, 976 (S.D. Cal. 2015); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006).

Finally, Plaintiffs' injury is redressable. This Court already ruled that it:

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

Order 20. Where, as here, the President exceeded his constitutional authority, this Court may issue a permanent injunction to prevent unlawful implementation of unauthorized executive action, and vacate the unlawful executive action. *Id.*

ARGUMENT

I. DEFENDANTS VIOLATED THE UNITED STATES CONSTITUTION

President Trump violated the Constitution and "ignored . . . historical practices [when he] unilaterally issued the 2019 Permit." Order 29. Congress has the exclusive authority–unless delegated to the President– to regulate both foreign commerce and federal property. Congress did not delegate that authority here. In issuing the 2019 Permit, President Trump ignored Congress's authority and failed to heed its express direction. Therefore Trump usurped Congress's authority when he purported to approve the Keystone XL pipeline.

The 2019 Permit is unconstitutional for two reasons, as discussed in detail below. First, it is "incompatible with the expressed [*and*] implied will of Congress," which has ultimate authority to regulate cross-border facilities under the Commerce Clause. *Youngstown*, 343 U.S. at 635-638 (Jackson, J. concurring). Second, the 2019 Permit violates the Property Clause by usurping Congress' exclusive authority and purporting to dispose of federal land. Therefore, this Court should grant summary judgment in favor of Plaintiffs and set aside the invalid Permit.

A. The 2019 Permit Violates the Commerce Clause

The Constitution grants Congress, not the President, exclusive power over international commerce. U.S. Const., Art. I, § 8, cl. 3; *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2009); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994); *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56 (1933). While the "President has a degree of independent authority to act" in foreign affairs, "Congress holds *express authority* to regulate public and private dealings with other nations in its . . . foreign commerce powers." *American Insurance Association v. Garamendi* ("*Garamendi*"), 539 U.S. 396, 414 (2003) (emphasis added). The President shares this power only where Congress has delegated it. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs* ("*Prakash*"), 111 Yale L.J. 231, 253 (2001) ("the President's executive foreign affairs power is residual, encompassing only those executive foreign affairs powers not allocated elsewhere by the Constitution's text"). It has not done so here, as this Court has already ruled. Order 25-30.

Authorization of a cross-border pipeline across federal lands falls squarely within Congress' "exclusive and plenary" powers to regulate foreign commerce. *Board of Trustees*, 289 U.S. at 56. The cross-border transport of foreign oil is a quintessential matter of foreign commerce. *United States v. Ohio Oil Co.*, 234 U.S. 548, 560 (1914) (affirming Congress' power under the Commerce Clause to regulate the transportation of oil); *Alaska v. Brown*, 850 F.Supp. 821, 827 (D.Ak. 1994) (regulating oil exportation is within Congress' "plenary power over foreign

commerce"). "There can be no dispute that a connection exists to the United States when a party seeks to build a cross-border pipeline facility that physically connects the United States and Canada." Order 23. "Even employing a narrow definition of commerce, . . . the transportation of crude oil from Canada to the United States falls within Congress's power to regulate foreign commerce." Order 23.

"Congress has demonstrated its intent to regulate cross-border pipelines" – including the Keystone Project – "pursuant to its powers under the Foreign Commerce Clause." Order 29-30 (quote), 34. Despite the fact that Congress has not enacted a comprehensive permitting scheme for every type of cross-border facility, the political branches have historically agreed over the past 150 years that (1) Congress retains the ultimate authority to do so, and (2) any regulatory process promulgated by the President is subject to that authority and must not contravene the "express or implied will of Congress." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Therefore, Congress retains the authority to dictate a permitting scheme for cross-border oil pipelines – as it has done for the last fifty years. And Congress has both explicitly and implicitly directed that the President has only one congressionally-sanctioned pathway to process TC Energy's permit application: the procedure set forth in EO 13,337.

The first attempt by either Congress or the President to implement a comprehensive permitting scheme was President Johnson's issuance of Executive Order 11,423 (33 Fed.Reg. 11741 (August 20, 1968)) in 1968. Prior to that time,

there is little information available about Presidential permits for cross-border oil pipelines, and the information that is available shows that the process was not a unilateral action by the President. Whiteman, Marjorie, *Digest of International Law*, Vol. 9, p. 920 (1968) (providing no information except that an "Oil pipeline under Saint Clair River issued June 10, 1918"); 81 Fed.Reg. 4081 (January 25, 2016) (notice of reconsideration by the Department of State of permits for change in ownership of existing 1918 oil pipeline, consistent with EO 13,337); 31 Fed.Reg. 6204 (April 22, 1966) (President signed permit but Secretary of State "grant[ed] permission to construct, operate, and maintain [the] pipeline," and permit required applicant to provide information to State Department).

Executive Order 11,423 formalized the system of State Department review and permitting of cross-border oil pipelines that continued unabated for over 50 years until Trump unilaterally purported to approve Keystone through the 2019 Permit, without State Department review or compliance with federal environmental laws. *See* Order 3, 6, 27-28, 29. The only changes to that permitting scheme during that 51-year span were introduced by President Bush in 2004 via Executive Order 13,337 (69 Fed.Reg. 25299 (May 5, 2004)). *See* Order 4. But those changes were relatively minor (e.g. adding a 15-day timeline for officials to notify the Secretary of State that they disagree with the proposed national interest determination). Executive Order 13,337 reaffirmed the general State Department review framework. Order 4 (Executive Order 13,337 "maintained the same general approval procedure for cross-border pipeline

facilities"). And it also reaffirmed that the State Department permitting system does not "supersede or replace the requirements established under any other provision of law," such as those established under Congress' comprehensive scheme for regulating environmental protection, including NEPA and the ESA. 69 Fed.Reg. 25301 (quote), 25299 (amendments to Executive Order 11,423 intended to "expedite reviews of permits as necessary to accelerate the completion of energy . . . transmission projects . . . , while maintaining safety, public health, and environmental protections") (May 5, 2004); *see also* 22 C.F.R. § 161.7(c)(1) ("Issuance of permits for construction of . . . pipeline[s]" are actions "normally requiring [at least] environmental assessments," citing Executive Order 11,423); *Sierra Club v. Clinton* ("*Sierra Club*"), 689 F.Supp.2d 1147 (D.Minn. 2010) (State Department had conducted NEPA review for both cross-border oil pipelines at issue).

The fact that the practice of State Department review continued unabated for over 50 years without congressional override indicates that the system effectively accommodated congressional mandates and priorities. Order 28 ("Congress implicitly approved of the system"), 34 (Trump interfered with the "congressionally-approved comprehensive State Department review process"), 36 ("Congress has approved of the permitting process").

The "systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned," is one in which the executive branch consults with the State Department before issuing a Presidential

permit. *Dames & Moore v. Regan* ("*Dames & Moore*"), 453 U.S. 654, 686 (1981). Since that process has been identified, it has been consistent and "Congress implicitly approved of the system . . . whereby the Secretary of State reviewed cross-border permits and the Secretary of State made the national interest determination." Order 28. Congressional acquiescence operates to authorize specific presidential actions that have "been [taken] in pursuance of [Congress'] consent." *Dames & Moore*, 453 U.S. at 686. The President's authority here is limited to the specific action in which Congress acquiesced: In this case, the President's issuance of a Presidential permit *after* the State Department reviews and makes a national interest determination, based on that agency's comprehensive environmental reviews as Congress has prescribed in adopting a series of statutes with which the State Department must comply, including NEPA, the APA, the ESA, the Federal Land Policy Management Act (43 U.S.C. section 1701 et seq.; "FLPMA")), the National Historic Preservation Act (54 U.S.C. section 300101 et seq.; "NHPA"), the Clean Water Act (33 U.S.C. section 1251 et seq.; "CWA") and other environmental laws.

In any event, this Court need not rely only on the indisputable fact that Congress acquiesced to that "long-continued practice," because Congress also *explicitly* expressed its will that Keystone be permitted by the State Department, and that that permitting process be governed by Executive Order 13,337. *Dames & Moore*, 453 U.S. at 686 (internal quotations and citation omitted). Congress enacted the Temporary Payroll Tax Cut Continuation Act ("TPTCCA") in 2011,

which requires that "the President[] act[] through the Secretary of State" in determining if Keystone would serve the national interest. 125 Stat. at 1289; Order 28. This Court ruled that in adopting the 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 TPTCCA "expressly conditioned its instruction that the Secretary of State evaluate the Keystone permit based on the procedures set forth in [Executive Order 13,337]," including State Department review in order to make a national interest determination, to "ensur[e] that the pipeline permitting review incorporated the views and expertise of various federal agencies and departments." Order 33. "Congress's enactment of the TPTCCA in 2011 evidences its intent to exercise authority over cross-border pipeline permitting." Order 28. 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.

Trump's approval of the 2019 Permit conflicts with Congress' exclusive power to regulate foreign and interstate commerce. Keystone's express purpose is to transport tar sands crude across both *international* and *interstate* boundaries for commercial purposes. Therefore it is subject to Congress' regulation of this commerce under the Commerce Clause. *E.g.*, *United States v. Ohio Oil Co.*, 234 U.S. at 560 (affirming Congress' power under the Commerce Clause to regulate the transportation of oil); *Alaska v. Brown*, 850 F.Supp. at 827 (regulating oil

exportation is within Congress' "plenary power over foreign commerce"). But Trump contravened Congressional will and unilaterally issued the 2019 Permit.

Because Congress' authority to regulate foreign commerce necessarily includes the exclusive authority to regulate cross-border transportation of foreign oil (per *United States v. Ohio Oil Co.*, 234 U.S. at 560; *Alaska v. Brown*, 850 F.Supp. at 827), this Court has already ruled "that cross-border transportation of crude oil through a pipeline constitutes a form of foreign commerce." Order 23. Furthermore, this Court has confirmed that "Congress has approved of the permitting process set forth in the 2004 Executive Order." Order 36. Yet the 2019 Permit intentionally and specifically contravenes that process, "notwithstanding Executive Order 13,337." 84 Fed.Reg. 13101.

Consequently, the 2019 Permit violates the Commerce Clause. It directly and deliberately contravenes the will of Congress by sidestepping the long-standing – and congressionally-sanctioned – practice of requiring State Department review of cross-border permits and ensuring compliance with federal environmental laws. Therefore, the 2019 Permit is *ultra vires* and this Court should grant summary judgment in favor of Plaintiffs.

B. The 2019 Permit Violates the Property Clause

Under the Property Clause of the U.S. Constitution, Congress – and not the President – holds the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other *Property belonging to the United States*." U.S. Constitution, Article IV, section 3, clause 2 (emphasis added);

Kleppe v. New Mexico, 426 U.S. 529, 540 (1976); *League of Conservation Voters v. Trump*, 363 F.Supp.3d 1013, 1017 n. 20 (2019). Congress has not ceded its Property Clause power to the President. To the contrary, it has directed BLM – rather than the President – to manage all of the federal lands that Keystone would cross, in accordance with statutes like FLPMA and the Mineral Leasing Act ("MLA"). 43 U.S.C. §§ 1712-1716 (land use planning and disposal, withdrawal, and exchange of public lands under FLPMA), 1732 (land management), 1761-1765 (rights-of-way); 30 U.S.C. §§ 185 (rights-of-way under the MLA). Nothing in the President's foreign affairs power authorizes him to dispose of property of the United States. "Although the President has the constitutional authority under Article II to provide for national security and conduct foreign affairs, the President's authority to dispose of [federal lands] can arise only by delegation from Congress." *League*, 363 F.Supp.3d at 1017, n. 20; *Beaver v. United States*, 350 F.2d 4, 8 (9th Cir. 1965). . No such delegation was made.

Trump usurped Congress's plenary power over federal lands in violation of the Property Clause. Trump purported to (1) "grant permission" to TC Energy to "construct, connect, operate, and maintain" a "36-inch diameter [oil] pipeline" within the first "1.2 miles from the international border," and (2) control the manner in which the entirety of the pipeline "Facilities" (as defined, Keystone's entire 875 miles) are built (directing that Keystone "*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

(first quotes), 1301-1302 (last quote; emphasis added). Yet Keystone's first 1.2 miles in the U.S. include nearly one mile on federal land, and the entire pipeline includes approximately 45 miles on BLM-managed federal land. DOS1201 (the "portion of the border crossing facilities from Milepost 0.0 to Milepost 0.93 will be located on lands administered by [BLM]"), 5954, 6046. By purporting to both dispose of some federal lands and control the disposition of all federal lands along Keystone's route without congressional authorization, the 2019 Permit violates the Property Clause in three ways.

First, the 2019 Permit violates the Property Clause because it purports to dispose of federal lands. Defendants have argued that the 2019 Permit "is a cross-border permit – not a right-of-way on domestic lands." Dkt. 87, 18. But counsel cannot rewrite the 2019 Permit to pass constitutional muster. *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 49-50 (1983). The 2019 Permit does not merely authorize TC Energy to cross the international border with its pipeline facilities. It goes much further. It clearly "grant[s] permission" to TC Energy to "construct, connect, operate, and maintain" the Keystone oil pipeline facilities within at least the first "1.2 miles from the international border," which includes 0.93 miles of federal land. DOS1201.

The 2019 Permit does not purport to *require* anything more for TC Energy to start pipeline construction, let alone specify any additional authorizations required. Article 6 of the permit merely states 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." 84 Fed. Reg. 13102 (emphasis added). "May" is permissive, not mandatory. *Haynes v. United States*, 891 F.2d 235, 239-240 (9th Cir. 1989). And while TC Energy has represented to the Court that it "views the 2019 Permit as requiring, not excusing, compliance with applicable federal laws," TC Energy could easily change its position if it hit a snag with BLM or other federal permitting of Keystone facilities in the U.S. Order at 32.

Thus, regardless of the 2019 Permit's caveat about potential additional authorizations, the fact remains that it purports to authorize Keystone's construction and operation across at least the first "1.2 miles from the international border." 84 Fed. Reg. 13101. That authorization, no matter how heavily conditioned, violates the Property Clause's assignment of exclusive and plenary power over the disposition of federal lands to Congress. The Property Clause "provides Congress the power over the public lands 'to control their occupancy and use, to protect them from trespass and injury, and to *prescribe the conditions upon which others may obtain rights to them*.'" *Kleppe*, 426 U.S. at 540 (emphasis added; quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917)). Here, Trump usurped Congress's constitutional authority to "prescribe the conditions" for TC Energy's use of BLM-managed federal land.

The 2019 Permit also impermissibly constrains BLM's congressionally conferred authority to manage the approximately 45 miles of federal land

Keystone would cross by commanding that the "construction, connection, operation, and maintenance of the Facilities (not including the route) *shall be* . . . as described in [TC Energy's] application for a Presidential Permit." 84 Fed. Reg. 13101-13102 (emphasis added); Order at 12-13. Those strictures impede BLM's ability to control the terms of any right-of-way grants for the Keystone facilities and ensure that they achieve the environmental protection and other congressional directives codified in FLPMA and the MLA. 43 U.S.C. §§ 1761 (authority to grant rights-of-way under FLPMA), 1765 (mandate to include "terms and conditions" in the each right-of-way to, among other purposes, "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment"); 30 U.S.C. §§ 185(a) (authority to grant rights-of-way under the MLA), 185(h) (requiring rights-of-way to comply with environmentally protective regulations). These constraints also impede BLM's ability to comply with NEPA by meaningfully considering alternatives to Keystone that depart from the Project "as described in [TC Energy's] application for a Presidential Permit." 84 Fed. Reg. 13101-13102 (quote); 40 C.F.R. § 1502.14 (regulation prescribing the consideration of alternatives under NEPA). The 2019 Permit therefore violates the Property Clause by usurping BLM's authority to impose and enforce the conditions prescribed by Congress for private entry upon federal land.

Second, while the 2019 Permit does provide that "construction, connection, operation, and maintenance of the Facilities" be "consistent with applicable law," that general reference does not save the Permit's constitutionality because the

Permit's exclusion of the State Department from the permitting process *completely changes the "applicable law*." The laws that would otherwise govern State Department reviews – such as NEPA, the APA, the ESA and the CWA– no longer apply. Because the 2019 Permit is specifically intended and written to *circumvent* State Department review "notwithstanding Executive Order 13337," it impermissibly evades the environmental laws that would *otherwise* be applicable. 84 Fed.Reg. 13101 (April 3, 2019).

Third, Trump violated the Property Clause when he unilaterally issued the 2019 Permit without following the congressionally-sanctioned procedure set forth in EO 13,337. Border crossing permits for oil pipelines necessarily implicate "Congress's constitutional power to manage federal lands" because they are the gateway permits without which pipeline construction and operation could not occur on federal land (or anywhere else) in the U.S. Order at 34 (quote); *cf. Backcountry Against Dumps v. Chu*, 215 F.Supp.3d 966, 976 (S.D. Cal. 2015) (transmission line project "would not have been built absent . . . approval of [a cross-border Presidential] permit"). They are the first permits required for use of federal lands by cross-border facilities. Therefore, the power to regulate cross-border pipelines also falls under Congress's Property Clause powers. Trump thus violated both the Commerce Clause and the Property Clause by failing to follow the sole congressionally-sanctioned procedure for permitting cross-border oil pipelines. As discussed in detail in section I.A above, Congress has expressly and

impliedly conveyed its will that the President follow the procedure set forth in EO 13,337.

In sum, the 2019 Permit violates the Property Clause because it (1) purports to dispose of federal land without congressional approval, (2) impedes BLM's compliance with Congressional directives for managing federal lands, and (3) circumvents the congressionally-sanctioned procedure for State Department review of the Keystone application. Accordingly, this Court should grant Plaintiffs' summary judgment motion.

II. THE 2019 PERMIT VIOLATES EO 13,337

Executive Order 13,337 implements Congress's intent that essential interagency consultations be conducted and bedrock environmental laws be applied before Keystone may be approved, and thus Trump's attempt to evade those requirements through the 2019 Permit's "notwithstanding" clause is unconstitutional. As discussed, Congress has directed that any permit authorizing Keystone must be reviewed by the Secretary of State and issued pursuant to the procedure set forth in Executive Order 13,337. That procedure assures that appropriate agencies will receive notice and an opportunity to comment, and that applicable environmental laws will be observed. Order 28-30, 33-37.

This half-century-long procedure respects the unassailable principle that Congress has exclusive authority over cross-border commerce. Indeed, long before this procedure was put into place, in 1935, the Supreme Court found that Congress could *not* delegate to the President the power to prohibit the transport of

petroleum in interstate or foreign commerce without providing the President with an "intelligible principle" to carry out the mandates. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

Once Congress had explicitly and impliedly approved this procedure, the President did not have independent authority to determine whether and how to permit Keystone. As discussed, Congress has exclusive authority in the foreign commerce arena. Executive Order 13,337 established the procedure for discretionary agency review required before the issuance of cross-border permits, including like here, those that cross over federal lands. Since enacting its comprehensive statutory scheme for environmental protection beginning in 1968, Congress has sanctioned the permitting of cross-border oil pipelines through this established process involving State Department review and consultation, as set forth in Executive Order 11,423 and Executive Order 13,337. Through its actions, Congress has sanctioned the procedures adopted by the Department of State for implementing Executive Order 13,337.

Under the framework of *Youngstown*, this Court properly considers indications of Congressional intention. *Youngstown*, 343 U.S. at 585, 635-637; *Zivotofsky v. Kerry*, _U.S._ 135 S.Ct. 2076, 2084, 2090 (2015). Congress clearly endorsed the review process established by Executive Order 13,337 when it passed the TPTCCA in 2011. *See* Section I.A.

Executive orders that, as here, implement a congressional mandate can and do bind the President. *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d

1319, 1329-1331 (9th Cir. 1979); *City of Carmel-by-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1166 (9th Cir. 1997); *Wyoming Wildlife Federation v. United States*, 792 F.2d 981, 985 (10th Cir. 1986) (upholding fee award for lawsuit enforcing EO 11,990, which protects wetlands); *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 591 (D.C. Cir. 2010) (reaching merits of claims that agency violated EO 11,990); *Citizens for Smart Growth v. Secretary of the Department of Transportation*, 669 F.3d 1203, 1214 (11th Cir. 2012) (reaching merits of agency's compliance with EO 11,988 and 11,990). As this Court held, executive orders that implement statutory mandates – like EO 13,337 – are enforceable. Order 35-36. Because Executive Order 13,337 implements statutory directives endorsed by Congress, the 2019 Permit's "notwithstanding" clause cannot be used to excuse compliance with Executive Order 13,337.

Even assuming Trump could have withdrawn EO 13,337 before issuing the 2019 Permit, he did not. The President issued the March 29, 2019 Permit *before* purporting to withdraw EO 13,337. 84 Fed. Reg. 15491-15493 (April 15, 2019). Therefore EO 13,337 remained binding.

Finally, there can be no dispute that the 2019 Permit fails to comply with the explicit requirements of Executive Order 13,337. Trump unilaterally issued the 2019 Permit, excluding the Secretary of State from any participation in the formulation, review, approval and administration of the Permit, including the required national interest determination. The 2019 Permit also bypasses all federal agencies and officials, thereby precluding their participation in the permitting

process. It likewise ignores the analyses of the Project's environmental and cultural impacts that have been or will be prepared by federal agencies under NEPA, the ESA, the NHPA, and other environmental statutes, and mitigation measures that will be needed to lessen those impacts. The 2019 Permit was issued without the required determination that the Project is in the national interest, and without compliance with applicable environmental laws. For these reasons, it simply fails to satisfy the requirements of the Executive Order.

For the same reason, because EO 13,337 was in effect when Trump issued the 2019 Permit, each of the federal agencies had corresponding duties to review and consult on the Keystone Project before it could be permitted. The Federal Defendants' failure to fulfill those duties before Trump issued the 2019 Permit violates EO 13,337.

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

III. THE PROJECT CANNOT PROCEED WITHOUT A LEGALLY ISSUED PRESIDENTIAL PERMIT

TC Energy is required to obtain a constitutionally valid Presidential permit prior to construction and operation of the Project. As this Court acknowledged, TC Energy is "responsible for complying with either the permitting process set forth in [Executive Order 13,337], or . . . Executive Order [13,867], depending on its applicability and constitutionality." Order 37. But under either process, the Project cannot proceed without a Presidential permit.

The President has authority to issue such a permit only to the extent he has received delegated authority to do so from Congress, and complies with Congress' limitations on that authority. See, First Amended Complaint (Dkt. 37) 3-4, 24-32; Plaintiffs' Memorandum of Points and Authorities in Opposition to Motions to Dismiss (Dkt. 57) 12, 21-36; Plaintiffs' Response to Court's December 20, 2019 Order (Dkt. 80) 31-35; Order 21, quoting *Medellin v. Texas*, 552 U.S. at 524 ("'The President's authority to act, as with the exercise of any governmental power, 'must stem from either an act of Congress or from the Constitution itself'"). As the Court noted in its Order, "Congress' enactment of the TPTCCA in 2011 evidences its intent to exercise authority over cross-border pipeline permitting." Order 28. And the TPTCCA required that the Department of State review and approve such permits pursuant to the procedures set forth in EO 13,337. Those procedures, in turn, trigger compliance with Congress' environmental mandates including NEPA, the ESA, FLPMA, the CWA, and the NHPA.

Contrary to Congress' direction, Trump issued the 2019 Permit without consulting the Secretary of State as required by the TPTCCA and EO 13,337. The 2019 Permit simply ignores the TPTCCA, and openly defies EO 13,337's requirement that the permit conform to the laws that govern Department of State permits such as NEPA, the APA, the ESA, FLPMA, the CWA, and the NHPA. Congress enacted those procedures and standards pursuant to the Commerce

Clause and the Property Clause, to protect the environment and ensure proper management of federal lands and waters.

The 2019 Permit attempts to evade compliance with procedural and substantive requirements by prescribing in Article 1, section 2 that the "Facilities" (i.e., per the Permit's definitions, the 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 and resubmitted on January 26, 2017." 84 Fed.Reg. 13101-13102 (emphasis added). But that language does not excuse Trump's undisputed evasion of Congress' intent: the required consultation never took place, the required national interest determination was never made, and there was no compliance with the applicable environmental laws. Where, as here, the President fails to comply with these statutory procedures and standards, any permit he purports to issue is *ultra vires*, and the Project cannot proceed. Order 19-20 (courts may "enjoin the President . . . where the order 'exceeds the statutory authority delegated by Congress and constitutional boundaries'") (quoting *Hawaii v. Trump*, 859 F.3d 741, 768 (9th Cir. 2017) (*dismissed as moot*, 138 S.Ct. 377 (2017)) and citing *League,* 363 F.Supp.3d at 1031.

While the 2019 Permit does provide that "construction, connection, operation, and maintenance of the Facilities" be "consistent with applicable law," that general reference does not save the Permit's constitutionality because as noted above, the Permit's exclusion of the State Department from the permitting process

completely changes the "applicable law." The laws that would otherwise govern State Department reviews – such as NEPA – no longer apply. Because the 2019 Permit is specifically intended and written to *circumvent* State Department review "notwithstanding Executive Order 13337," it impermissibly evades the environmental laws that would *otherwise* be applicable. 84 Fed.Reg. 13101. As discussed above, the entire purpose of the 2019 Permit was to evade the Court's previous judgment and injunction overturning the 2017 Permit and the Administrative Procedure Act's requirement that the Secretary of State make a national interest determination based on compliance with our nation's bedrock environmental laws.

The 2019 Permit is thus contrary to Congress' mandate, rendering it unconstitutional and invalid. And without a valid, constitutional permit, the Project cannot proceed.

CONCLUSION

After this Court vacated the 2017 Permit because the State Department had failed to explain its changed position and comply with the laws Congress enacted to protect the environment, Trump attempted to evade those laws a second time by unilaterally issuing the 2019 Permit. In doing so, Trump undermined the very foundation of our nation's governance: the separation of powers.

The 2019 Permit violated the United States Constitution's Commerce Clause and Property Clause, as well as Executive Order 13,337, which laid out the procedure by with any Keystone Presidential permit must be issued. Because the

State Department did not review TC Energy's application and make a national interest determination prior to issuance of the 2019 Permit as required by Executive Order 13,337 and intended by Congress, the Permit is *ultra vires* and this Court should grant Plaintiffs' summary judgment motion.

Dated: February 25, 2020

PATTEN, PETERMAN, BEKKEDAHL & 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)

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana District Court, Civil Rule 7.1(d)(2) I certify that **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** contains 6,489 words, excluding caption and certificate of service, as counted by WordPerfect X7, the word processing software used to prepare this brief.

Dated: February 25, 2020 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 25, 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' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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

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