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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' OPPOSITION TO TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S MOTION FOR SUMMARY JUDGMENT** **Judge: Hon. Brian M. Morris** **Case Filed: April 5, 2019** **Hearing: April 16, 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

After the Court rejected the Trump Administration's first Presidential permit for the Keystone XL Pipeline ("Keystone" or "Project"), issued March 2017 ("2017 Permit"), President Donald Trump ("the President" or "Trump") attempted to circumvent this Court's Judgment setting the 2017 Permit aside–and thereby evade the core environmental laws that Judgment enforced–by unlawfully approving the Project a second time.

This Court had correctly ruled that the Trump Administration's 2017 Permit violated (1) the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, et seq., by failing to address Keystone's Main Line Alternative Route through Nebraska,[1] and (2) NEPA, the APA, and the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, et seq., by ignoring 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.[2]

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[1] *Indigenous Environmental Network v. United States Department of State,* CV 17-29-GF-BMM ("*IEN v. State*"), 317 F.Supp.3d 1118, 1123 (D.Mont. 2018).

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

This Court's Judgment and injunction against Keystone became final and were never overturned. Far from it, when the Ninth Circuit reviewed TC Energy's motion to stay this Court's Judgment and injunction on the grounds both were flawed, the Court unhesitatingly denied the motion, holding squarely that TC Energy "has not made the requisite strong showing that they are likely to prevail on the merits," and pointing out, moreover, that "[t]he record shows that the district court carefully considered all applicable factors in denying the stay of its injunction." Order filed March 15, 2019 in *Indigenous Environmental Network v. United States Department of State,* Ninth Circuit No. 18-36068, at 4.

But rather than comply with this Court's Judgment and injunction and the bedrock environmental laws they enforce, Trump sought to sidestep both by purporting to issue a new Presidential permit on March 29, 2019 ("2019 Permit"). 84 Fed.Reg 13101-13103 (April 3, 2019). But the 2019 Permit ignored and defied constitutional limits on the President's power and departed from half a century of settled historical practice. The 2019 Permit usurped Congress' sole authority over foreign commerce and federal lands. Under the Commerce Clause and Property Clause, Congress has the exclusive power to regulate foreign commerce and to dispose of federal lands.

There is only one Congressionally-sanctioned pathway to process TC Energy's permit application: the procedure set forth in Executive Order ("EO") 13,337. That Congressionally-prescribed process requires the Secretary of State to determine whether the Project serves the national interest. And, in doing so, the

Secretary must first consult with pertinent federal agencies and comply with applicable environmental laws including NEPA.

To remedy the President's violation of the Constitution, on April 5, 2019 Plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance ("Plaintiffs'") filed this action to ensure compliance both with the Constitution and these important environmental laws. Complaint for Declaratory and Injunctive Relief, April 5, 2019 (Dkt. 1).

Continuing their effort to ignore – rather than comply with – these environmental laws, Trump, the Army Corps of Engineers, the Fish and Wildlife Service, and the Bureau of Land Management ("BLM") (collectively, "Trump") and TC Energy Corporation ("TC Energy," and together with Trump, "Defendants") moved to dismiss Plaintiffs' litigation challenging the 2019 Permit. This Court denied those Motions to Dismiss in a well-reasoned Order 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) ("Order") 14-39.

TC Energy now files a Motion for Summary Judgment in order resurrect its failed attempts to sidestep our nation's core environmental laws. Defendants TC

Energy Corporation and TransCanada Keystone Pipeline, LP's Motion for Summary Judgment (Dkt. 77); Memorandum in Support of Defendants TC Energy Corporation and TransCanada Keystone Pipeline, LP's Motion for Summary Judgment (Dkt. 78) ("TCE"). But that motion must likewise fail, as discussed below.

STANDARD OF REVIEW

This Court must decide the significant constitutional questions presented by the President's improper approval of the 2019 Permit. These issues are ripe for summary judgment, as they present no genuine disputes as to any material fact. Rule 56(a).

ARGUMENT

I. DEFENDANTS VIOLATED THE UNITED STATES CONSTITUTION

TC Energy's Motion asks this Court to ignore the indisputable and dispositive point of law that under the Constitution, President Trump lacked authority to unilaterally authorize any portion of Keystone. In issuing the 2019 Permit, Trump unconstitutionally defied Congress' direction, pursuant to its Foreign Commerce Clause power, that any approval of Keystone must adhere to the long-standing practice of previous administrations to require State Department review of cross-border permits, and that such review, in turn, must comply with Congress' comprehensive scheme of environmental protection. TC Energy asks this Court to rule, in effect, that President Trump is not bound by the Constitution.

But this Court has already ruled, in its December 20, 2019 Order (Dkt. 73; "Order"), that Congress's "broad authority to regulate commerce with foreign nations" is ""'exclusive and plenary.'" *Id*. at 22, quoting *Board of Trustees of Univ. of Ill. v. United States*, 298 U.S. 48, 56-57 (1933). And, this Court agreed with Plaintiffs that "[t]here are strong arguments that the President cannot exercise a foreign affairs power granted to Congress." *Id*. at 23. This Court therefore concluded that "Plaintiffs have pled a plausible claim that the President's issuance of the 2019 Permit was *ultra vires*." *Id.* at 29.

This Court has likewise ruled that the President must abide by the Property Clause's assignment of exclusive power over disposition of federal lands to Congress, *id*. at 34, and that "President Trump arguably interfered with Congress' constitutional power to manage federal lands by issuing the 2019 Permit without requiring the congressionally-approved comprehensive State Department review process set forth in the 2004 Executive Order." *Id*.

In summary, this Court has confirmed that Plaintiffs have presented "plausible" grounds for overturning the 2019 Permit as unconstitutional in two respects. First, it violates the Commerce Clause because it is "incompatible with the expressed [*and*] implied will of Congress," which has ultimate authority to regulate cross-border facilities. *Youngstown Sheet & Tube Co. v. Sawyer* ("*Youngstown*"), 343 U.S. 579, 635-638 (1952) (Jackson, J. concurring). Second, it violates the Property Clause because it usurps Congress's exclusive authority to dispose of federal land.

TC Energy glosses over the 2019 Permit's usurpation of Congress's exclusive authority to manage foreign commerce and federal lands. But Congress's well-settled constitutional authority, and the unbroken 51-year history of its exercise and implementation through this established, Congressionally-prescribed permitting process, requires rejection of TC Energy's motion.

A. The 2019 Permit Violates the Commerce Clause

Trump's approval of the 2019 Permit conflicts with Congress' exclusive power to regulate foreign and interstate commerce under Article I, section 8, clause 3 of the U.S. Constitution. Keystone's express purpose is to transport tar sands crude across both *international* and *interstate* boundaries for commercial purposes – and is thus subject to Congress' regulation of this commerce under the Commerce Clause. Congress possesses exclusive authority under the Commerce Clause to regulate foreign commerce, including the cross-border transportation of foreign oil. *United States v. Ohio Oil Co.*, 234 U.S. 548, 560 (1914); *Alaska v. Brown*, 850 F.Supp. 821, 827 (D.Ak. 1994).

The 2019 Permit violates the Commerce Clause because it 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.

TC Energy does not deny that the President failed to obtain State Department review or ensure compliance with federal environmental laws prior to approving the 2019 Permit. TCE 7-21. Rather, it contends the President is not

bound by Congressional direction, because the idea "that Congress has explicitly or impliedly restricted the President's ability to grant permits for cross-border oil pipeline facilities [is] untenable." TCE 7. But the President is not above the law, and his power is not limitless. As this Court noted, "'[t]he 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." Order at 21, citing *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 585). Contrary to what TC Energy would have this Court believe, Congress has *not* acquiesced to unbridled presidential permitting of border crossings. And as shown below, Congress has both explicitly and impliedly directed that the President had only one congressionally sanctioned pathway to process TC Energy's permit application - the procedure set forth in EO 13,337.

"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). Indeed, ""[t]he United States Constitution expressly grants Congress the power to 'regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.'" Order at 22, quoting U.S. Const. art. I, § 8, cl. 3. By contrast with Congress's broad and express authority, "the President's executive foreign affairs power is residual, encompassing only those executive foreign affairs powers not allocated elsewhere by the Constitution's text." Saikrishna B.

Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs* ("*Prakash*"), 111 Yale L.J. 231, 253 (2001).

TC Energy does not dispute, and therefore admits, that cross-border transport of foreign oil is a matter of foreign commerce. TCE 7-21. As this Court acknowledged, "[e]ven 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 at 23. Because any authority the President retains in dealing with foreign commerce is residual and cross-border oil pipelines are undoubtedly a matter of foreign commerce, the President is bound by Congressional direction in considering the Keystone XL Pipeline for approval.

"Congress has demonstrated its intent to regulate cross-border pipelines" – including the Keystone Project – "pursuant to its powers under the Foreign Commerce Clause." Order at 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 51 years.

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. Executive Order 11,423 instituted 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 at 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 at 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 at 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 at 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"). TC Energy contends that this history is too limited, and that "prior to [Executive Order 11,423], the President himself granted such permits." TCE 16-18, 17 (quote). But the evidence on which TC Energy relies does not support its broad conclusion. The *Digest of International Law* does indicate that *one* Presidential permit was issued in 1918, but it does not provide any information about the process under which it was issued, or whether the State Department was involved. Whiteman, Marjorie, *Digest of International Law*, Vol. 9, p. 920 (1968) ("Oil pipeline under Saint Clair River issued June 10, 1918"). And the 1966 cross-border oil pipeline Presidential permit cited by TC Energy, was not a unilateral action by President Johnson. 31 Fed.Reg. 6204 (April 22, 1966). While the President did sign the permit, the

"Department of State transmitted the . . . Presidential permit" to the applicant, and the Secretary of State "grant[ed] permission to construct, operate, and maintain [the] pipeline." *Id*. Furthermore, the permit required that the applicant provide the State Department with information about certain actions, including notice of when the "connection authorized by [the] permit is made at the international boundary." *Id*. The evidence therefore shows that the State Department was indeed involved in the cross-border oil pipeline permitting process prior to issuance of EO 11,423, contrary to TC Energy's mistaken assertion that all Presidential permits were unilateral decisions by the President before 1968.

Thus, 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 at 28. TC Energy's attempt to paint this system as an attempt by Congress to "regulate" rather than "permit" presidential action misconstrues the purpose of this practice. TCE 18. Congressional acquiescence operates to authorize specific presidential actions that have "been [taken] in pursuance of [Congress'] consent." *Dames & Moore*, 453 U.S. at 686. It does not grant the President broad authority to take action in any matter in which he simply

wishes to do so. *Id*. The President's authority here is limited to the specific action in which Congress acquiesced: namely, the President's issuance of a Presidential permit *after* the State Department has reviewed the permit and made a national interest determination–based on that agency's comprehensive environmental reviews as Congress has prescribed in adopting a series of statues with which the State Department must comply. Those laws include NEPA, the APA (5 U.S.C. section 706), the Endangered Species Act (16 U.S.C. section 1531 et seq.; "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"), and the Clean Water Act (33 U.S.C. section 1251 et seq.; "CWA").

In any event, this Court need not rely only on the fact that Congress acquiesced to that specific "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). In 2011 Congress enacted the Temporary Payroll Tax Cut Continuation Act ("TPTCCA"), 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 st 28. 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 at 33. "Congress's enactment of the TPTCCA in 2011 evidences its intent to exercise authority over cross-border pipeline permitting." Order at 28.

Congress' intent to exclusively regulate cross-border pipeline permits is thus clear. Yet TC Energy erroneously contends that the TPTCCA does not bind President Trump's actions in any way. TCE 7-16. It argues that the TPTCCA "imposed a one-time deadline," and did not codify Executive Order 13,337. TCE 7 (quote), 7-10. But Plaintiffs never claimed that the TPTCCA "codified" Executive Order 13,337. Rather, Plaintiffs demonstrate that Congress has expressed its will that in considering Keystone for approval, the President must follow the procedure set forth in Executive Order 13,337. Indeed, TC Energy admits that Executive Order 13,337 "was the process being used to evaluate the Keystone XL pipeline's 'application'" – a process that the State Department and President attempted to follow in issuing the 2017 Permit. TCE 11. TC Energy's post hoc rationalization for the President's unilateral action here conflicts directly with Congress' express intent that Keystone's application be reviewed by the State Department pursuant to Executive Order 13,337.

In summary, Congress' authority to regulate foreign commerce necessarily includes the exclusive authority to regulate cross-border transportation of foreign oil. *United States v. Ohio Oil Co.*, 234 U.S. at 560; *Alaska v. Brown*, 850 F.Supp. at 827. Accordingly, this Court has already ruled "that cross-border transportation

of crude oil through a pipeline constitutes a form of foreign commerce." Order at 23. And, in the exercise of that power, "Congress has approved of the permitting process set forth in the 2004 Executive Order." Order at 36. Defendants' failure to abide by this permitting process contravenes Congressional will and violates the Constitution's Foreign Commerce Clause. Therefore, the 2019 Permit is *ultra vires* and TC Energy's summary judgment motion must be denied.

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; *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 such as 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 United States property. "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.

Here, 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, 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.

TC Energy argues that the 2019 Permit does not excuse compliance with other federal permit requirements, and that the President need not abide by EO 13,337. TCE 6-7. These arguments fail for three reasons.

First, counsel cannot rewrite the 2019 Permit to pass constitutional muster. *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 49-50 (1983). The 2019 Permit violates the Property Clause because it purports to dispose of U.S. territory. The Permit does not stop at authorizing TC Energy to cross the international border with its pipeline facilities. The Permit 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 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 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 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 encroaching on BLM's authority to impose and enforce the conditions prescribed by Congress for private entry upon federal land.

Second, while the 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'[] 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. TC Energy's summary judgment motion must accordingly be denied.

C. The Project Cannot Proceed Without a Legally Issued Presidential Permit

That the 2019 Permit is constitutionally invalid does not negate the need for TC Energy to obtain a Presidential permit prior to construction and operation of

the Project. Order 37 (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"). TC Energy's assertion that the invalidity of the 2019 Permit "is self-defeating" because TC Energy could construct the pipeline without a permit in "[t]he absence of any presidential authority" to permit cross-border pipelines, misapprehends Plaintiffs' argument and misstates applicable law. TCE 21-24. The President is empowered to issue a Presidential permit only to the extent that he has received delegated authority to do so from Congress, and only if he complies with the limitations that Congress has prescribed. That Trump's 2019 Permit failed to comply with Congress' direction does not excuse his duty to comply. Congress clearly intends that approval of Keystone requires State Department review and compliance with EO 13,337.

First, contrary to TC Energy's premise, Plaintiffs do not "suggest that the President has no authority to issue cross-border permits for oil pipelines at all." TCE 21. Rather, Plaintiffs contend that 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. First Amended Complaint (Doc. 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. As this Court has ruled, the President may issue such permits, but only if he complies with

Congress' direction. 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'").

The authority that Congress has granted the President to issue Presidential permits is not absolute. As the Court noted, "Congress's enactment of the TPTCCA in 2011 evidences its intent to exercise authority over cross-border pipeline permitting." Order 28. The TPTCCA required that the Department of State review and approve such permits pursuant to the procedures set forth in Executive Order 13,337. Those procedures, in turn, trigger compliance with Congress's environmental mandates including NEPA, the APA, ESA, FLPMA, the CWA, and the NHPA. If the President fails to comply with these statutory procedures and standards, as here, any permit he purports to issue is *ultra vires*. 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 of Conservation Voters v. Trump*, 363 F.Supp.3d 1013, 1031 (D.Ak. 2019).

Second, contrary to Congress' direction, Trump issued the 2019 Permit without consulting the Secretary of State as required by the TPTCCA and Executive Order 13,337. The 2019 Permit simply ignores the TPTCCA, and openly defies Executive Order 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. In an attempt to justify Defendants' failure to comply with those laws, TC Energy claims that "cross-border facilities are permitted unless barred," and that "Congress deems oil pipelines built and operated in compliance with [design, safety, and rate] standards to be beneficial to the nation." TCE 23, citing *Walling v. Michigan*, 116 U.S. 446, 455 (1886). But the general axiom that "commerce shall be free and untrammeled," does not negate Congress' authority, rooted in the United States Constitution, to regulate foreign commerce. *Walling*, 116 U.S. at 455; U.S. Const. Art. I, § 8, cl. 3. Where as here, Congress has directed that issuance of a Presidential permit requires review by the Secretary of State, the Secretary's determination that the Project serves the national interest, and compliance with the environmental laws that Congress has prescribed for the Secretary's review as well for the approvals required by other federal agencies, the President cannot unilaterally take action to issue a permit. Order 20-39.

The 2019 Permit's defiance of the Constitution is not subtle. It attempts to evade compliance with the procedural and substantive requirements mandated by Congress 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 (April 3, 2019) (emphasis added). 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 required consultation never took place, the required national interest determination was never made, and there was no compliance with the applicable environmental laws.

As discussed, the entire purpose of the 2019 Permit was to evade the Court's previous judgment and injunction, the APA's requirement that any Keystone approval address the grounds for the Secretary of State's previous rejection of Keystone as contrary to the national interest, and compliance with Congress's bedrock environmental laws. The 2019 Permit is thus deliberately, specifically, and patently contrary to Congress' mandate. It is this defiance – in contrast to (and departure from) constitutionally compliant issuance of Presidential permits – that renders the 2019 Permit unconstitutional.

As this Court has noted, Trump's authority is at its "lowest ebb" because the 2019 Permit contravenes both the expressed and implied will of Congress. It sidesteps EO 13,337, which Congress had specifically directed the President to follow in processing the Keystone permit application. Pub. L. No. 112-78, §§ 501(a)-(b), 125 Stat. 1280 (2011); Order 27, quoting *Youngstown*, 343 U.S. at 637. And it departs from the long-standing practice – embodied in EO 11,423 and EO 13,337 and consistently followed for 51 years – of State Department review and permitting of cross-border oil pipelines pursuant to Congress' comprehensive statutory scheme of environmental protection. In summary, a Presidential permit

is required for the Project to proceed, but it must be one issued in compliance with Congressional direction as the Constitution has prescribed.

II. THE 2019 PERMIT VIOLATES EO 13,337

TC Energy argues that Executive Order 13,337 does not bind President Trump in the slightest. TCE 24-25. Indeed, it claims that the 2019 Permit cannot be found to violate Executive Order 13,337 because the 2019 Permit was issued "notwithstanding" that order. TC Energy 24. But Executive Order 13,337 implements statutory obligations and thus the 2019 Permit's notwithstanding clause is unlawful. Further, there is no dispute that the 2019 Permit fails to comply with the explicit requirements of Executive Order 13,337.

First, despite TC Energy's contrary claim (TC Energy 25), Executive Order 13,337 implements statutory duties, directing agency action that provides for public notice and informed agency review. TC Energy's myopic approach – examining solely the authority cited in the Executive Order in vacuum – ignores the overwhelming contextual and historic evidence that Executive Order 13,337 implements Congressional directives.

TC Energy has already conceded that Congress has "plenary and exclusive power over cross-border trade." TC Energy's Response to the Court's Order of December 20, 2019 (Doc. 76), p.6 (citing the Domestic and Foreign Commerce Clauses of the Constitution). Indeed, 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).

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 an 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.

League of Conservation Voters v. Trump, 363 F.Supp.3d 1013 (D.Ak. 2019) (“*LCV*”) further supports Plaintiffs’ position. As TC Energy concedes, *LCV* demonstrates “that a statute can limit the authority of Presidents to revoke prior Executive Orders to implement that statute.” TC Energy 25. TC Energy’s attempt to distinguish *LCV* fails. TC Energy argues that because Executive Order 13,337 does not explicitly discuss Congressional directives, it does not implement a statutory duty. Thus, TC Energy disputes this Court’s ruling that Congress has made clear its intention that Executive Order 13,337 apply to Presidential permits. TCE 24-25.

Under *Youngstown*, this Court must give effect to 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 TPTCCA, as noted in Section I.A, *supra*. Because Executive Order 13,337 implements Congress's statutory directives, the 2019 Permit's notwithstanding clause is unconstitutional and does not excuse compliance with Executive Order 13,337.

Second, as discussed above, the 2019 Permit was issued without State Department review, without the required determination that the Project serves the national interest, and without compliance with applicable environmental laws. For these reasons, it plainly fails to satisfy the requirements of the Executive Order. TC Energy's contrary position ignores these facts and law. TCE 24-26.

III. THE FEDERAL AGENCY DEFENDANTS FAILED TO COMPLY WITH EXECUTIVE ORDER 13,337

TC Energy asserts that Plaintiffs' claims against the Federal Defendants "fail because those claims are entirely derivative of Plaintiffs' . . . claims against the President." TCE 26. TC Energy erroneously contends that "the President had the power and legal right to supersede E.O. 13337 and issue the 2019 permit." TCE 27. But as shown above, that is not true. The President acted beyond the scope of his authority, and contravened Congress' explicit and implied direction that the Secretary of State, and other relevant agencies, review applications for a presidential permit "for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of

petroleum, petroleum products, coal, or other fuels to or from a foreign country." 69 Fed.Reg. 25299 (May 5, 2004).

Because EO 13,337 was in effect when Trump issued the 2019 Permit, each of these federal agencies had 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 Executive Order 13,337. Therefore, this Court should deny TC Energy's motion for summary judgment.

CONCLUSION

Rather than "protect our territorial integrity," Trump has actively undermined it. He first *invited* TC Energy to reapply for – and then approved – a permit that the federal government had already determined was *not* in the national interest. 82 Fed.Reg. 8663-8665 (January 24, 2017). And now – after this Court vacated the 2017 Permit because the State Department failed to explain its changed position and comply with the laws Congress enacted to protect the environment – Trump has attempted through the 2019 Permit to evade our congressionally-enacted bulwarks against environmental harm. TC Energy's attempt to defend Trump's invalid 2019 Permit ignores the simple truth that the Constitution assigns to Congress–and not the President–plenary and exclusive power over foreign commerce and federal lands. Congress has not relinquished that authority, and nothing TC Energy argues in its motion changes that controlling fact.

Accordingly, TC Energy's motion for summary judgment must be denied.

Dated: February 25, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana District Court, Civil Rule 7.1(d)(2) I certify that **PLAINTIFFS' OPPOSITION TO TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S MOTION FOR SUMMARY JUDGMENT** contains 6,491 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' OPPOSITION TO TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S 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)