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

ROSEBUD SIOUX TRIBE *et al.*, Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 4:18-cv-00118-BMM **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

On January 14, 2020, TC Energy Corporation and TransCanada Keystone Pipeline, P.L., (together, "TransCanada") filed a status report indicating that they intend to begin construction of the Keystone XL Pipeline ("KXL") in April 2020. (Dkt. 94). At the time, TransCanada still lacked a critical right-of-way and permit from the Bureau of Land Management ("BLM") that it needed to construct KXL across federal lands in Montana. Without those authorizations, TransCanada could not begin construction. On January 22, 2020, the BLM issued its record of decision ("ROD") granting TransCanada the necessary right-of-way and permit to begin construction. Plaintiffs Rosebud Sioux Tribe ("Rosebud") and Fort Belknap Indian Community ("Fort Belknap") (together, "the Tribes") received no advance notice of the BLM's ROD. For the first time since the inception of this case, TransCanada is now poised to begin construction in a matter of weeks.

Just two days after the BLM issued its ROD, TransCanada moved for summary judgment without answering the Tribes' First Amended Complaint and without any discovery. (Dkt. 96). The Tribes initially requested a status conference to discuss a briefing schedule in light of these facts and the fact that TransCanada intends to begin construction in April

2020. (Dkt. 100). The Court set a summary judgment briefing schedule and a hearing on summary judgment motions for March 25, 2020—seven days before TransCanada intends to being construction. (Dkt. 104). On February 13, 2020, the Court reset the hearing for April 16, 2020 (Dkt. 106)—sixteen days into TransCanada's proposed construction season.

Until now, a preliminary injunction was unnecessary. The schedule had allowed for a ruling on the summary judgment motions before construction would begin. With the hearing moved to April 16, the circumstances changed. A preliminary injunction now is necessary to ensure that the *status quo* is maintained and that the Tribes' lands and water, natural, and cultural resources are not irreparably damaged between April 1 and the Court's ruling on summary judgment. *See Indigenous Envtl. Network v. U.S. Dep't of State*, 369 F. Supp. 3d. 1045, 1050-51 (D. Mont. 2018) ("*IEN II*") ("These preconstruction activities raise the risk of [] 'bureaucratic momentum.'"); *Indigenous Envtl. Network v. U.S. Dep't of State*, CV-17-29-GF-BMM, 2019 WL 652416, at *11 (D. Mont. Feb. 15, 2019) ("*IEN III*") ("Plaintiffs have shown irreparable injury in the form of the actual construction and operation of Keystone and potential 'bureaucratic momentum.' The potential injuries to Plaintiffs would be further threatened by the off-right-

of-way activities that would occur in areas that had not been surveyed for cultural resources."). Construction at the border crossing is a centerpiece of the Tribes' claims that the President had no authority to grant the permit and right-of-way in the first place. Thus, permitting construction in April places the cart before the horse by allowing KXL to be built and then adjudicate its legality later. The damage will have been done. Moreover, construction on access roads and man camps also begins in April and these too affect the Tribes' rights. Dkt. 92 at 11. None of these claims have been adjudicated.

The Tribes are likely to succeed on the merits of their claims and have, at least, raised serious questions going to their merits. The balance of the equities weighs sharply in the Tribes' favor, and an injunction is in the public interest. As such, the Tribes respectfully request that the Court grant their Motion for Preliminary Injunction. The border crossing is a focus of the Tribes' complaint and the key piece of the "bureaucratic momentum" this Court has warned about. Construction should not be permitted until this Court makes a decision on the merits.

STANDARD OF REVIEW

To obtain a preliminary injunction, a movant must establish that: (1) they likely will succeed on the merits; (2) they will suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tip in their favor; and (4) that an injunction serves the public interest. *N. Arapaho Tribe v. LaCounte*, 215 F. Supp. 3d 987, 998 (D. Mont. 2016) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). This Circuit also employs the "sliding scale" standard, in which a movant must only show that there are "serious questions going to the merits" if the balance of hardships "tips sharply in the plaintiff's favor" and the other two factors are satisfied. *All. for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017) (citation omitted). A movant is "not required to prove his case in full" at the preliminary injunction stage. *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395 (1981).

ARGUMENT

I. The Tribes Are Likely to Succeed on the Merits.

A. Tribes are Likely to Succeed on their Summary Judgment Motion.

The Tribes have moved for summary judgment on claims two, five, and six, and are likely to succeed on the merits of these claims. (Dkt. 114). Claim two challenges the constitutionality of the 2019 Permit. Claim five addresses TransCanada's trespass and the United States' obligation to prevent such trespass, the unlawful interference with mineral estates, and mining. Claim six asserts Rosebud's jurisdiction to regulate the construction and operation of KXL where it crosses Rosebud lands and threatens Rosebud resources. The Tribes are not merely likely to succeed on the merits of these claims, they are entitled to summary judgment on them.

1. Claim Two (Constitutional Claim)

The Tribes are likely to succeed on the merits of their claim that the 2019 Permit is unconstitutional because the President lacks the constitutional authority to issue it. This issue has been extensively briefed in the Tribes' Supplemental Brief (Dkt. 99, at 18-49) and Memorandum in Support of Motion for Summary Judgment. (Dkt. 114, at 19-27).

This Court already has held "that the transportation of crude oil through a pipeline constitutes a form of foreign commerce" (Dkt. 92, at 15), and that such transportation "falls within Congress's power to regulate foreign Commerce. *Indigenous Envtl. Network v. Trump*, CV-19-28-GF-BMM,

2019 WL 7421955, at *9 (D. Mont. Dec. 20, 2020) ("*IEN*"). Because Congress's power to regulate foreign commerce is "'exclusive and plenary,'" *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2006) (citation omitted), the President may act in that sphere only when Congress has delegated to him the authority or acquiesced in his particular exercise of authority. As described in greater detail in the Tribes' earlier briefing, Congress has not delegated the President the authority to permit KXL or cross-border crude oil pipelines and Congress has not acquiesced in the President's unilateral issuance of the 2019 Permit. (Dkts. 99, at 34-49; 114, at 23-27). Nor does the President possess independent, inherent, or concurrent constitutional powers to issue the 2019 Permit. (Dkts. 99, at 24-33; 114, at 20-23).

As shown in summary judgment briefing, the Tribes are likely to succeed on the merits of their constitutional claim. (Dkt. 114, at 19-27). At a minimum, the Tribes have raised a significant question going to the merits of this claim. (*C.f.* Dkt. 92, at 16 (The Tribes "have pled a plausible claim that the President exceeded his constitutional authority.")). The 1.2 mile border crossing section to be constructed in April is directly implicated by this claim.

2. Claim Five (Mineral Claim)

As shown in summary judgment briefing (Dkt. 114, at 21-8), the Tribes are likely to succeed on the merits of their mineral claims. TransCanada has admitted it would cross Rosebud Indian lands (mineral estates held in trust for Rosebud), which is dispositive. The United States has an obligation to prevent a trespass into, and unlawful interference with, Rosebud's mineral estate. The United States has failed in its obligation and TransCanada has not sought Rosebud's consent. Further, TransCanada will be "mining" by utilizing the mineral estate as "padding material," "backfill," and for subsidence. As such, the Tribes are likely to succeed on the merits of these claims, and at minimum have raised a significant question going to the merits of these claims.

3. Claim Six (Tribal Jurisdiction)

As shown in summary judgment briefing (Dkt. 114, at 28-33), the Tribes are likely to succeed on the merits of their jurisdiction claim. TransCanada has admitted it would cross Rosebud Indian lands (mineral estates held in trust for Rosebud), which is dispositive. (*See* Dkt. 114, at 28-32). KXL also would have a disastrous effect on Rosebud's members' health and welfare, and thus Rosebud has jurisdiction. (Dkt. 114, at 33).

The construction and inevitable spill of KXL also threatens to destroy the Tribes' cultural resources. Declaration of Mike Black Wolf ¶¶ 8-14.[1] KXL's threats to the Tribes' cultural resources are also sufficient to establish tribal jurisdiction. *See FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935 (9th Cir. 2019) ("Threats to tribal natural resources, including those that affect tribal cultural and religious interests, constitute threats to tribal self-governance, health and welfare." (citations omitted)). And TransCanada has also "agreed to . . . follow all state, local, and tribal laws and regulations with respect to the construction and operation of [KXL]." (Dkt. 115-6, at 31 (the 2017 Decision)). Given TransCanada's express agreement to abide by tribal laws and regulations, the Tribes have jurisdiction over TransCanada and KXL. *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

To date, TransCanada has not followed any tribal nation laws and regulations with respect to the construction and operation of KXL. For instance, Rosebud has Land Use, Environmental Protection, and Utilities

[1] The Tribes are submitting two declarations, but identifying information has been removed due to restrictions on the dissemination of site locations and contents. However, all site information is in the custody and control of Defendants. The court is not able to see these details so *in camera* review or a motion under seal may be warranted for the court to see the impact of the destruction.

codes, and Fort Belknap has a Cultural Property Act, all of which are applicable to KXL. The Tribes are likely to succeed in showing that TransCanada must address these issues in tribal fora. *Window Rock*, 861 F.3d at 906 (holding that, where tribal jurisdiction is at least colorable or plausible, exhaustion in the tribal forum is required); *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1025 (8th Cir. 2014).

B. The Tribes are Likely to Succeed on the Merits of their Treaty Claims.

The Tribes treaty claims fall into two categories: (1), a violation of the "depredation" provisions (claims one, three, and four); and (2), a violation of the "consent" provisions (claim five). While the Tribes have not moved for summary judgment on all of the treaty claims, they are likely to succeed on the merits of each one and have certainly raised serious questions going to the merits of each claim.

1. The Treaties Must Be Interpreted as the Indians Understood Them.

As explained in the Tribes' earlier briefing, (Dkts. 74, at 30-32; 111, at 11-12, 24-27), treaties must be "construed as 'they would naturally be understood by the Indians.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019) (quoting *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*,

443 U.S. 658, 676 (1979)). In interpreting a treaty, "courts must focus upon the historical context in which it was written and signed." *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1012 (2019) (citing *United States v. Winans*, 198 U.S. 371, 381 (1905). When courts determine the tribal "understanding of written words," they "must be careful to avoid reasoning that holds strictly to our later-established understanding of those words." *James v. United States*, 846 F.3d 1343, 1352 (Fed. Cir. 2017) (citing *Worcester v. Georgia*, 31 U.S. 515, 552-53 (1832)). The idea is to determine the intent of the Tribes at the time.

2. The Tribes Meant for the Treaties to Protect their Natural Resources and to Protect Against Crossing their Land Without their Consent.

Article 3 of the 1851 Fort Laramie Treaty, 11 Stat. 749,and Article 7 of the 1855 Lame Bull Treaty, 11 Stat. 657, create binding obligations on the United States to protect the Tribes against depredations. History points to the fact that in entering into the treaty negotiations, the Tribes meant to: (1) protect their natural resources (e.g., water, grasslands, game); and (2) keep people from crossing their lands. KXL would violate both of these terms of the agreements.

a. History, Purpose, and Negotiation of the Treaties

The discovery of gold in California in the late 1840s prompted a massive influx of emigrants through Indian Country. *Crow Tribe of Indians v. United States,* 284 F.2d 361, 364-66 (Ct. Cl. 1960); *Indians of Ft. Berthold Indian Reservation v. United States,* 71 Ct. Cl. 308, 330 (1930). This influx led to the destruction of timber, buffalo, and other natural resources tribes relied on for subsistence. *Crow Tribe,* 284 F.2d at 364-66. "The United States recognized that the serious losses of supplies which were vital to [the Indians'] subsistence gave the Indians cause for dissatisfaction, and the government was anxious to make the way safe for the travelers." *Id.* at 365. The tribes looked "upon the intrusion of the large bodies of emigrants into their country, and particularly the consequent great destruction of buffalo, which is their almost sole reliance for subsistence, with great jealousy and discontent." *Id.*

The 1851 Fort Laramie Treaty "was precipitated by the depletion of game, timber, and forage by the constantly increasing number of settlers who crossed the lands of the Plains Indians on their way to California. Aggrieved by these depredations, the Indians had opposed that passage, sometimes by force." *Montana*, 450 U.S. at 571 (Blackmun, J., dissenting). The

impetus and purpose for the 1851 Fort Laramie Treaty, from the United States' perspective, was to provide for the peace and protection for western bound emigrants by, among other things, compensating the tribes for the "destruction of their game, timber, grass, etc., by the citizens and soldiers of the United States passing through their country without their knowledge or consent." 1850 Commissioner of Indian Affairs Ann. Rep. 16, 24; Burton S. Hill, *The Great Indian Treaty Council of 1851*, 47 Neb. St. Hist. Soc'y 85, 98-99 (1966); Leroy R. Hafen & Francis M. Young, *Fort Laramie and the Pageant of the West*, 1834-1890, 178 (1938) (providing against outbreaks, securing peace, and noting that the emigrants had "desolated and impoverished" the country they traversed); *id*. at 187-88 (noting the destruction of the buffalo and grass, and the need for safe passage for the emigrants).

To the tribes, the protection of their natural resources from destruction was the central issue they wished to address in the 1851 Fort Laramie Treaty. Hill, *supra* at 92; *see also* Declaration of Fred Hoxie (Dkt. 115-3) at 20-21. They were concerned about the vanishing buffalo, deer, and antelope, as well as the forage on which the wild game depended being rapidly depleted by non-Indians' livestock. Hill, *supra* at 92; Hoxie Decl. at 20-21; *see* 1850

Commissioner of Indian Affairs Ann. Rep. at 16, 24. Keeping others from crossing their lands was a major part of this concern.

Several tribal individuals attending the 1851 Fort Laramie Treaty Council spoke of the disastrous impact of the emigrant trails through tribal lands. Big Yankton (Sioux), stated:

> Father, you tell us to behave ourselves on the roads and make peace. I am willing to shake hands and make peace with the whites and all the Indians. Your white people travel the roads and they have destroyed the grass, why do you not give them grass of their own. They have destroyed our grass and timber, and we can't hunt where we used to.

Adam B. Chambers, *Letters from the Editor: Treaty Ground near Ft. Laramie, 1851*, St. Louis Mo. Republican (Oct. 26, 1851). Some tribal representatives specifically mentioned a need to protect their water. For example, Cut Nose, an Arapaho Chief, stated: "We have to live on these streams and in the hills, and I would be glad if the whites would pick out a place for themselves and not come into our grounds; but if they must pass through our country, they should give us game for what they drive off." Hafen & Young, *supra* at 190. In other words, *don't come through here and destroy our natural resources*.

Four years after the signing of the 1851 Fort Laramie Treaty, the United States government entered into the Lame Bull Treaty on October 17, 1855. 11

Stat. 657. The parties promised peaceful relations among the tribes, between the signatory tribes and other tribes, and between the tribes and the United States. *Id.* at art. 1, 2. The Gros Ventre was a signatory to the 1855 Lame Bull Treaty. As with the 1851 Fort Laramie Treaty, Governor Isaac Stevens was charged with negotiating a peace between the tribes to secure safe passage for the railroad and white emigrants. Ensuring peace and safe travel for the railroad, in the view of the government, rested on similar grounds that were solidified in the 1851 Fort Laramie Treaty. *See* William E. Farr, *When We Were First Paid: The Blackfoot Treaty, The Western Tribes, And The Creation of The Common Hunting Ground, 1855*, 21 Great Plains Q. 131, 137 (2001).

The history and purpose of the treaties makes it clear that the Tribes had two goals: (1) to preserve their natural resources; and (2) to keep outsiders off their lands. KXL is a modern-day version of this westward expansion. With its thoughtless trampling through tribal territory, without regard to either Tribes' property rights, treaty rights, and cultural, water, and natural resources, TransCanada set a path through lands they are not entitled to waste and spoil. The Tribes bargained against this very kind of violation over a hundred years ago and the United States' agreement to these terms was critical to the Tribes' agreement.

b. Language of the 1851 Fort Laramie and 1855 Lame Bull Treaties

The Tribes' understanding and intent is borne out by the actual language of the Treaties. Article 3 of the 1851 Fort Laramie Treaty frames the government's affirmative obligation to protect tribal resources:

> In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of *all depredations by the people of the said United States*, after the ratification of this treaty.

2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 594 (1904) (emphasis added). Article 7 of the 1855 Lame Bull Treaty provides:

> And the United States is hereby bound to protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit.

1855 Lame Bull Treaty, *supra* at art. 7.

Two dictionaries contemporaneous to the signing of the treaties define "to protect" in broad terms. *Accord A Dictionary of the English Language* 577 (7th ed. 1850) (meaning "to defend, to cover from evil, shield"); *A Dictionary of the English Language* 328 (1854) (meaning "to cover from danger; to shield"). Interpreting the term's use in the context of the Treaties, the United States bound itself to *shield or defend* the Tribes "against the commission of

all depredations by the people of the said United States" and *cover* the Tribes *from danger* of depredations by whites.

Dictionaries contemporaneous to the signing of the 1851 Fort Laramie Treaty demonstrate that the term "depredation" had various meanings: "a robbing, spoiling; voracity," "waste," and "the act of plundering; consumption; a taking away by any act of violence." *A Dictionary of the English Language* 135 (7th ed. 1850); *accord An American Dictionary of the English Language* 321 (1857) ("the act of plundering; a robbing; a pillaging or waste; consumption; a taking away by any act of violence. The sea often makes depredations on the land.").

Common to the dictionary definitions is the notion of "waste." Interpreting the term depredation in the context of the 1851 Fort Laramie Treaty clarifies its intended meaning and scope. The language in Article 3 is used expansively to include "*all* depredations[.]"Kappler, *supra* at 594 (emphasis added). In incorporating the word "all," the United States expressed a clear intent to take responsibility for the totality of depredations inflicted on the tribes by "the people of the said United States." *Id*. The historical background, purpose, and negotiations of the Treaties support

giving this language a broad reading, obligating the United States to protect the Tribes' natural resources from waste.

Owing to the special relationship between the United States and the Tribes, "Indian treaties are to be interpreted liberally in favor of the Indians," with "any ambiguities . . . resolved in their favor." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999). Interpreting Article 3 of the 1851 Fort Laramie Treaty and Article 7 of the 1855 Lame Bull Treaty in favor of the Tribe imports an obligation on the United States to protect the Tribes natural resources from "waste."

A crude oil pipeline, such as KXL, through Indian lands and resources is a depredation and must be re-routed as more fully explained in the Tribes' Opposition to TransCanada's Motion for Summary Judgment. (Dkt. 111, at 20-25).

II. The Tribes Will Suffer Irreparable Injury Without Preliminary Injunctive Relief

"Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). The harms faced by the Tribes are irreparable. The very real threats to their drinking water cannot

be remedied by money. Perhaps more immediate and certain, their cultural resources and minerals in the direct pathway of KXL's actual easement will be destroyed if an injunction is not granted. Without injunctive relief, the Tribes will suffer "irreparable injury in the form of the actual construction and operation of [KXL]." *IEN III*, 2019 WL 652416, at *11. Once lost, many ancient, sacred, cultural, and historical features will be lost forever. This is the very definition of irreparable.

A. Injury to Cultural Resources

The destruction of cultural resources constitutes irreparable harm. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1120 (S.D. Cal. 2010) ("Damage or destruction of any of the [sites of cultural and religious significance] would constitute irreparable harm in some degree."); *c.f. Battle Mountain Band of the Te-Moak Tribe of W. Shoshone Indians v. U.S. Bureau of Land Mgmt.*, 3:16-CV-0268-LRH-WGC, 2016 WL 4497756, at *10 (D. Nev. Aug. 26, 2016) ("Such injuries have previously been held to be irreparable." (citations omitted)).

The Tribes face irreparable injury to their cultural resources from the construction and operation of KXL. For example, there are known ancient and prehistoric sacred and cultural sites in KXL's direct route that will be

damaged and destroyed without an injunction. Black Wolf Decl. ¶¶ 8-14.; Declaration of Andy Werk ¶¶3-6. Because of National Historic Preservation Act (NHPA) restrictions, *see* 54 U.S.C. § 307103, and due to the unique sacred and spiritual nature of these locations, they cannot be described in detail here. Black Wolf Decl. ¶¶ 12-13; Werk Decl. ¶¶ 6-7 . Attached is a declaration describing their importance in a general way, and more specific facts may be submitted under seal. These, and very likely many more, culturally, spiritually, and historically significant sites will be destroyed by the construction of KXL. Black Wolf Decl. ¶¶ 7,14. Rosebud faces similar threats to its cultural resources. Once gone, these sites are lost forever.

The Tribes also have alleged that the federal government has violated the treaties by failing to adequately identify historic and cultural resources pursuant to Section 106 of the NHPA and consult with them in this identification process. (Dkt. 58 ¶¶ 410-20). Accordingly, both Tribes raise serious concerns that many more cultural resources exist within the path of KXL that have not been identified by the Tribes, the State Department, or the BLM, that could be destroyed by construction.[2] The injury caused by the

[2] *Accord Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1109 (S.D. Cal. 2008) ("The Court finds the various federal statutes aimed at protecting

construction and operation of KXL to the Tribes' known *and unknown* cultural resources within its path are irreparable. *C.f. IEN III*, 2019 WL 652416, at *11.

B. Injury to Minerals

As described in summary judgment briefing, TransCanada would mine, trespass into, and unlawfully interfere with Rosebud's mineral estates. (Dkt 114, at 21-28). They would dig a trench eight feet deep and five feet wide, rock rip (breaking up and temporarily removing rock with an excavator), and then utilize the mineral estate as backfill. TransCanada would also be "blasting." (Dkt. 114 at 27). Sand and gravel (minerals as defined at 25 C.F.R. § 211.3) would then be used as "padding material" to protect the pipeline during backfill. (Dkt. 114 at 27). The backfill would then be compacted by a backhoe to reduce the potential for ditch line subsidence. (Dkt. 114 at 27). If KXL spills, the surface and subsurface soil and minerals could likewise be contaminated. These construction activities threaten immediate and irreparable injuries to the Tribes.

Indian cultural resources, located both on Indian land and public land, demonstrates the government's comprehensive responsibility to protect those resources and[] thereby establishes a fiduciary duty.").

C. Injury to Water Resources

Injury to natural resources are, by their nature, irreparable. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages as it is often permanent or at least of long duration, *i.e.*, irreparable."). Construction of KXL poses immediate and irreparable injuries to the Tribes' drinking water and water resources generally.

KXL crosses the Ogallala Aquifer, Missouri River, Cheyenne River, and White River, and Rosebud has federally reserved rights to these waters. (Dkt. 115 at 12-13, 15); *Winters v. United States,* 207 U.S. 564, 577 (1908); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.,* 849 F.3d 1262, 1268 (9th Cir. 2017). Fort Belknap also has water rights to the Milk River that are currently in the process of quantification. Werk Decl. ¶¶ 10-11. Of the aquifers KXL crosses, the Ogallala is at the highest risk of contamination given the shallow depth of its water tables. (Dkt. 115 at 13). In the inevitable event of a spill (which has happened *three times* since 2016 from the existing Keystone Pipeline (Dkt. 58, at 162-65)), the groundwater would be contaminated, and groundwater wells nearby likewise would be contaminated with chemicals. (Dkt. 115 at 13). In Tripp County, South

Dakota, within one mile of the KXL's proposed route, 2,537 wells are already in existence, with Rosebud retaining federally reserved rights to that groundwater (and the right to drill new wells to obtain that water) on land near the route. (Dkt. 115 at 13).

There will likewise be impacts to surface water from construction and any spill of KXL. (Dkt. 115 at 13-14). Impacts such as sedimentation, changes in stream channel morphology and stability, reduction in stream flow, and contamination are all possible. (Dkt. 115 at 14). Of the 1,073 waterbody crossings, only fourteen will utilize horizontal drilling under the waterbody. (Dkt. 115 at 13-14). The rest will primarily be open cut trenches through the waterbody. (Dkt. 115 at 14). The open cut method typically involves excavating the channel bed and banks of a stream and digging a trench directly in the stream. (Dkt. 115 at 14). If there were to be a spill in surface water, it could travel as far as ten miles downstream, perhaps farther, contaminating the water. (Dkt. 115 at 15).

KXL would cross the Cheyenne River upstream from the Mni Wiconi Project intake plant, meaning a spill in or near the river could disperse into the Mni Wiconi Project and Rosebud Water System through the intake plant. (Dkt. 115 at 15). KXL would also cross the White River in Tripp County just

upstream from Rosebud land held in trust. (Dkt. 115 at 15). The White River is the 1889 Rosebud reservation boundary. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888. Rosebud has federally reserved rights to the water in the White River and any spill into the White would impact these rights and the appurtenant Rosebud land along the river. (Dkt. 115 at 15). Similarly, KXL will cross the Milk River and a spill will impact Fort Belknap's water rights.

D. Injury to Sovereignty

Courts typically grant a preliminary injunction when the movant presents an urgent need for speedy action to protect the movant's rights. *N. Arapaho Tribe*, 215 F. Supp. at 1000. Both Tribes' sovereignty and treaty resources will be irreparably harmed if KXL is built. Harm to a tribe's sovereignty "cannot be remedied by any other relief other than an injunction." *Tohono O'odham Nation v. Schwartz*, 837 F. Supp. 1024, 1034 (D. Ariz. 1993). Likewise, harm to treaty resources is irreparable. *See United States v. Washington*, 20 F. Supp. 3d 777, 789 (W.D. Wash. 2004) (it would be an irreparable injury to permit shellfish harvest before tribe had the chance to determine if it had treaty rights to harvest there); *United States v. Washington*, 853 F.3d 946, 966 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018) (discussing harm to tribe); *United States v. Michigan*, 534

F. Supp. 668 (W.D. Mich. 1982) (denial of treaty right to fish in certain zones of Great Lakes without biological justification was irreparable harm); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 759 F. Supp. 1339 (W.D. Wis. 1991) (citizens' interference with the tribe's treaty right to spearing walleye constituted irreparable harm).

The federal government has ignored tribal law and the federal trust responsibility as set forth in the Treaties and federal laws and regulations applicable to tribal lands and mineral estates. They are bound by the Treaties, federal law, and regulations to protect the Tribes' lands from depredations, and are ignoring this obligation by allowing KXL to proceed. The disregard for tribal authority by the federal government cannot be remedied by the granting of monetary damages. Actions infringing on tribal sovereignty must be enjoined in order to preserve that sovereignty because harm to a tribe's sovereignty "cannot be remedied by any other relief other than an injunction." *Tohono O'odham Nation*, 837 F. Supp. at 1029; *c.f. Bowen v. Doyle*, 880 F. Supp. 99, 136 (W.D.N.Y. 1995) (citing *United States v. Michigan*, 508 F. Supp. 480, 492 (W.D. Mich. 1980)) (right of self-government protected by the Supremacy Clause of the Constitution, deprivation of such rights causes damage "presumed to be irreparable and an injunction should issue

as a matter of course.").

If KXL is built on Rosebud territory without TransCanada obtaining Rosebud's consent, or the United States complying with federal rights-of-way and mineral statutes, Rosebud's right to govern its permanent homeland and its treaty right to the exclusive use of its territory will be irreparably harmed. Likewise, Fort Belknap's right to govern and protect its water and cultural property will be irreparably harmed if KXL is built. Additionally, the 1851 Fort Laramie Treaty and 1855 Lame Bull Treaty will be violated if KXL is built in contravention of the obligation of the United States to protect the Tribes against depredations. At the very least, this Court should grant a preliminary injunction until these weighty matters can be decided on the merits.

III. The Balance of Equities and Public Interest Tip Sharply in Favor of the Tribes.

Courts often consider the last two preliminary injunction factors together. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014); *Drakes Bay Oyster Co. v. Jewell,* 747 F.3d 1073, 1092 (9th Cir. 2014). Courts "must balance the competing claims of injury and must consider the effect on each party of the

granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (quoting *Amoco*, 480 U.S. at 542). Courts must also "pay particular regard for the public consequences" when exercising their discretion to employ injunctive relief. *Id.* Though courts should consider all of the competing interests at stake, the weight courts assign to the particular harms falls within their discretion. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010). When balancing the equities, courts should consider "only the portion of the harm that would occur while the preliminary injunction is in place, and proportionally diminish total harms to reflect only the time when a preliminary injunction would be in place." *Wilderness Defenders*, 752 F.3d at 765.

Balancing the equities for injunctions often involves harm to the environment or historic property on one side and economic harm on the other.[3] When the environmental "injury is sufficiently likely, . . . the balance

[3] *See e.g.*, *Wilderness Defenders*, 752 F.3d at 765 (balancing the equities required comparing "the irreparable environmental harms pled by the [movant], on the one hand, and the economic interests of the intervenors, on the other hand"); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125 (9th Cir. 2005) (concluding that the district's court's weighing of financial harm on one side and likely irreparable environmental harm on the other was "a classic, and quite proper, examination of the relative hardships in an environmental case"); *Quechan Tribe*, 755 F. Supp. 2d at 1121 (balancing the likelihood of

of harms will usually favor the issuance of an injunction to protect the environment." *Id.* (quoting *Amoco*, 480 U.S. at 545). This is especially likely when economic benefit is only delayed and not completely foregone. *See id.* at 765-67. When courts find that the balance of the equities does not favor issuing an injunction to remedy environmental or historic property violations, it is generally because additional factors, other than economic harm, weigh against granting preliminary relief.[4]

Here, the balance of equities tips sharply in favor of the Tribes. On one hand, should construction commence in April 2020, the Tribes will face irreparable injury to their treaty rights, lands, water, cultural, and other natural resources. Sacred, cultural, historic, and prehistoric sites of immeasurable value to the spiritual and cultural practices of the Tribes, will be destroyed. This Court can order a remedy that would alleviate this

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damage to known historic properties and harm arising from inadequate consultation, on one side, and economic harms likely to result from delaying the project, on the other side).

[4] *See e.g.*, *Winter*, 555 U.S. at 24-26 (concluding that the district court erred in issuing an injunction where the balance of the equities tipped strongly against enjoining military training exercises because the ecological, scientific, and recreational interests were outweighed by national security interests).

destruction. The drinking water for tens of thousands of people, including one sixth of the state of South Dakota, is under threat by KXL. (Dkt. 115 at 12). And these are only two of the most imminent and specific types of threats.

One the other hand, TransCanada faces only delay. The injuries to the Tribes far outweigh any delay to TransCanada. *C.f. Neighbors Against Bison Slaughter v. Nat'l Park Serv.*, CV 19-128-BLG-SPW, 2019 WL 6465093, at *5 (D. Mont. Dec. 2, 2019) ("Balancing *the loss of subsistence and cultural preservation* against the unlikely risks to the Plaintiffs or public at large, the Court finds the balance of hardships and public interests tips heavily against Plaintiffs." (emphasis added)). The delay in construction does not counterbalance or outweigh the irreparable injuries the Tribes face. *C.f. All. for the Wild Rockies v. Marten*, 200 F. Supp. 3d 1110, 1112 (D. Mont. 2016) (citing *Wilderness Defenders*, 752 F.3d at 765) ("The balance of equities tips in favor of Alliance because it faces permanent damage if logging activity were to proceed and the Forest Service faces only delay."); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Allowing construction to begin raises the risk of "bureaucratic momentum" that would "skew the Department's future

analysis and decision making regarding the project." *IEN II*, 369 F. Supp. 3d at 1051).

It also is in the public interest to honor the government-to-government promises that were made to the Tribes. "Great nations, like great men, should keep their word." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). Further, Congress has clearly shown that its policy is that of self-determination and self-governance for tribal nations. *See* Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 Am. Indian L. Rev. 1, 16 (2015). Thus, requiring TransCanada to comply with tribal law clearly favors congressional policy and the public interest. The public interest is served by ensuring that the threatened irreparable injuries to the water and cultural resources discussed herein does not occur before this Court can decide the merits of this case. These finite resources are not just vitally important to the Tribes, but all people who live within the path of KXL. Protecting the Tribes' cultural resources also furthers the congressional policy behind the NHPA, and other environmental and cultural resource protection statues. It is clear that

protection of the Tribes' unique, finite, and irreplaceable resources outweighs TransCanada's economic interests.

CONCLUSION

For the foregoing reasons, the Tribes respectfully request that this court enter a preliminary injunction until this Court can reach the merits of the Tribes' claims. The slow roll of the construction of KXL is set to begin in April. The Tribes previously thought that there was time for the Court to issue a ruling before April 1, but now there is a gap between the close of summary judgment briefing and argument and April 1. The status quo must be preserved for this Court to have time to rule on these critical issues.

In order to render this motion ripe for consideration before the end of March, the Tribes will forego their fourteen-day timeline to file a reply and instead file their reply by Monday, March 23, 2020.

RESPECTFULLY SUBMITTED, this 2nd day of March, 2020.

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Certificate of Compliance

I certify, pursuant to Local Rule 1.5 and 7.1(d) that the attached brief:

(1) complies with the type-volume limitation of Local Rule 7.1(d)(2) because it contains 6,316 words, excluding the parts of the brief exempted by Local Rule 7.1(d)(2); and

(2) complies with the typeface requirements of Local Rule 1.5 because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Book Antiqua font.

/s/ Natalie A. Landreth
Natalie Landreth (*pro hac vice*)
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2020, I filed the above **Memorandum in Support of Motion for Preliminary Injunction** with the Court's CM/ECF system, which provided notice of this filing by e-mail to all counsel of record.

/s/ Natalie A. Landreth
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