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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; GREG SHEEHAN, in his official

Civ. No. CV 19-28-GF-BMM

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Hearing:
Time:

Judge: Hon. Brian M. Morris

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 Acting 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.

TO THE ABOVE-ENTITLED COURT AND TO ALL PARTIES HEREIN:

PLEASE TAKE NOTICE that as soon as this matter may be heard, proper notice having been given, in the courtroom of the Honorable Brian M. Morris of the United States District Court for the District of Montana, Great Falls Division, Plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance will move will move the Court for leave to file a Second Amended Complaint.

This motion is based on the grounds that Plaintiffs wish to amend their First Amended Complaint to add allegations challenging President Trump's purported revocation of Executive Order 13,337 by issuance of Executive Order 13,867 on April 10, 2019 (84 Fed.Reg. 15491; April 15, 2019). Pursuant to Local Rule 15.1, a copy of plaintiffs' [Proposed] Second Amended Complaint for Declaratory and

Injunctive Relief is attached as Exhibit 1 hereto.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities and Declaration of Counsel, the pleadings and papers on file herein, and upon such other matters as may be presented to the Court at the time of the hearing.

In accordance with Local Rule 7.1(c)(1), the other parties have been contacted and asked whether they oppose the motion. As of the time of filing this motion, the Federal Defendants responded that they would oppose the motion, and TransCanada Keystone Pipeline, LP and TC Energy Corporation have not yet responded.

Respectfully submitted,

Dated: March 2, 2020

LAW OFFICES OF STEPHAN C. VOLKER

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

Dated: March 2, 2020

PATTEN, PETERMAN, BEKKEDAHL & GREEN, PLLC

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

Attorneys for Plaintiffs
INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE

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 March 2, 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' NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

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

Dated: March 2, 2020

s/ *Stephan C. Volker*

STEPHAN C. VOLKER (Pro Hac Vice)

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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 **[PROPOSED] SECOND AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF** **(Filed pursuant to F.R.Civ.P. 15(a)(2))** **Judge: Hon. Brian M. Morris**

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.

INTRODUCTION

1. Through issuance of a Presidential Permit ("2019 Permit") on March 29, 2019, PRESIDENT DONALD J. TRUMP purported to take three actions to approve the proposal by TRANSCANADA KEYSTONE PIPELINE, L.P. and TC Energy Corporation (collectively,"TransCanada") to construct and operate an 875-mile long pipeline and related facilities known as the Keystone XL Pipeline ("Keystone" or "Project") to transport up to 830,000 barrels per day ("BPD") of tar sands crude oil from Alberta, Canada through the states of Montana, South Dakota and Nebraska to existing pipeline facilities near Steele City, Nebraska. 84 Federal Register ("Fed.Reg.") 13101-13103 (April 3, 2019). The Project would pose grave risks to the environment, including the climate, cultural resources, water resources, fish and wildlife, and human health and safety.

2. The first action President Trump took was to revoke the unlawful Presidential Permit ("2017 Permit") that the Trump Administration had issued to

TransCanada on March 23, 2017 (82 Fed.Reg. 16467 (April 4, 2017)), granting permission to "construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada near Morgan, Montana, for the import of crude oil from Canada to the United States." 84 Fed.Reg. at 13101. President Trump had both the authority and the duty to revoke the unlawful 2017 Permit in accordance with this Court's Order on Summary Judgment in *Indigenous Environmental Network v. United States Department of State*, 347 F.Supp.3d 561, 591 (D. Mont. Nov. 8, 2018) ordering that the 2017 Permit be "VACATED."

3. The second action President Trump took was to "grant permission . . . to TransCanada . . . to construct, connect, operate, and maintain pipeline facilities . . . . [extending] approximately 1.2 miles from the international border . . . for the import of oil from Canada to the United States." 84 Fed.Reg. at 13101. This action, however, was not authorized by law. By usurping Congress' exclusive power over management of federal lands, the 2019 Permit violates the United States Constitution's separation and protection of the powers of the United States Congress. Additionally, the 2019 Permit eschews the interagency and intergovernmental procedural protocols and substantive environmental protections mandated by Executive Order 13,337, 69 Fed.Reg. 25299 (May 5, 2004), which was in effect at the time President Trump purported to issue the 2019 Permit.

4. In contravention of both Congressional mandates and Executive Order 13,337, the 2019 Permit: (1) excludes the United States Secretary of State from any participation in the formulation, review, approval and administration of

the 2019 Permit, (2) bypasses all federal agencies and officials, including the Secretaries of the Interior, Commerce, Defense, Energy, Homeland Security, and Transportation, the Attorney General, and the Administrator of the Environmental Protection Agency, thereby precluding their participation in the formulation and review of the 2019 Permit, (3) ignores the requirement that the Secretary of State find that issuance of the 2019 Permit would serve the national interest, (4) omits consultation with state, tribal and local governmental officials as potential sources of invaluable knowledge, wisdom and perspective, (5) excises the requirement that the applicant "obtain authorization from any other department or agency of the United States Government in compliance with applicable laws and regulations," (6) gives no consideration to, let alone provide mitigation for, the environmental and cultural effects of Keystone, and (7) ignores the analyses of those impacts prepared by federal agencies under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA"), the Endangered Species Act, 16 U.S.C. § 1530 et seq. ("ESA"), the National Historic Preservation Act, 54 U.S.C. § 300101 et seq. (formerly 16 U.S.C. § 470 et seq.) ("NHPA") and other environmental statutes. President Trump did not have authority to take this second action for at least four reasons.

5. First, Mr. Trump lacked authority to prescribe the use of this 1.2 mile segment of the Project because the U.S. Constitution grants that power to Congress. According to TransCanada's January 26, 2017 application for the 2017 Permit, "[t]he portion of the border crossing facilities from Milepost 0.0 to

Milepost 0.93" will be located on federally owned lands "administered by the U.S. Bureau of Land Management (BLM)."[1] 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); *League of Conservation Voters v. Donald J. Trump*, 363 F.Supp.3d 1013, 1017-1018, n. 20 (D.Ak. 2019); *Alabama v. Texas*, 347 U.S. 272, 273 (1954). The President lacked authority to usurp this power conferred on Congress by the Property Clause.

6. Second, President Trump lacked authority to approve construction and operation of the first 1.2 miles of Keystone because doing so conflicts with Congress' exclusive power to regulate foreign and interstate commerce under Article I, section 8, clause 3 (the "Commerce Clause") of the United States Constitution. Pursuant to this constitutional authorization, Congress directed BLM and other relevant federal agencies to manage this federal property and the environmental and cultural resources that Keystone would impact, including air and water quality, Native American communities and sacred grounds protected by the NHPA and other laws, and plant and animal species listed under the ESA, in

[1] TransCanada's January 26, 2017 application for its 2017 Permit, at p. 7; Department of State Administrative Record filed in *Indigenous Environmental Network v. United States Department of State*, *supra*, at DOSKXLDMT0001201 ("DOS1201").

accordance with applicable federal environmental and cultural laws, as detailed below. The President lacked authority to usurp this power conferred on Congress by the Commerce Clause.

7. Third, President Trump lacked authority to approve the first 1.2 miles of Keystone because Congress has directed BLM and other relevant federal agencies to manage this federal property and the environmental and cultural resources that Keystone would impact in accordance with the Federal Land Policy Management Act, 43 U.S.C. section 1701 *et seq.* ("FLPMA"), NEPA, the ESA, the NHPA, the Clean Water Act, 33 U.S.C. section 1251 *et seq.* ("CWA"), and the Administrative Procedure Act, 5 U.S.C. section 706 ("APA"). The President lacked authority to override Congress' specific direction to BLM and other relevant federal agencies mandating their management of these lands, waters wildlife and other resources in compliance with each of these statutes.

8. Fourth, President Trump lacked authority to authorize construction and operation of the first 1.2 miles of Keystone because doing so conflicted with the extant Executive Orders that delegated authority to approve this transboundary oil pipeline Project to the Department of State, and required that agency's approval, in turn, to comply with all applicable laws. Both Executive Order 11,423 issued by President Lyndon Johnson in 1968 and Executive Order 13,337 issued by President George W. Bush in 2004 provided that Presidential permits for transboundary oil pipelines be issued by the Department of State, an agency that is subject to Congress' laws protecting the environment and cultural resources, and

governing agency procedure, including FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA. Additionally, Executive Order 13,337 required the Secretary of State, subject to review by President Trump, to make a National Interest Determination finding that Keystone would serve the national interest, based on a detailed analysis of the appropriate factors, including this Project's impacts on environmental and cultural resources, and its emission of greenhouse gases that would massively contribute to climate change. President Trump failed to comply with either of these Executive Orders, notwithstanding the fact that both were in effect on March 29, 2019 when he granted the 2019 Permit.

9. For each of the foregoing reasons, those portions of the 2019 Permit that purport to authorize construction and operation of the first 1.2 miles of Keystone are *ultra vires*.

10. The third action President Trump apparently intended to take – although inartfully worded – was to authorize the balance of the 875-mile-long Keystone XL Pipeline Project. 84 Fed.Reg. at 13101-13102. The first paragraph of the 2019 Permit grants permission to TransCanada "to construct, connect, operate and maintain pipeline facilities at the international border . . . for the import of oil from Canada to the United States." Although this language might, standing alone, limit the authorized "pipeline facilities" to those located "at the international border," other permit language contradicts that interpretation. The third paragraph of the 2019 Permit states that "[t]he term 'Facilities,' as used in this permit, means *the portion in the United States* of the international pipeline

project . . . ." *Id*. (emphasis added). The "portion in the United States" can only mean the 875 miles of the pipeline that are situated "in the United States."

11. The foregoing interpretation is reinforced by Article 1, section 2 of the 2019 Permit, which directs that "[t]he construction, connection, operation, and maintenance of the Facilities" – i.e., the entire 875 miles of 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 and resubmitted on January 26, 2017." *Id.* (emphasis added). This direction reveals an unmistakable intent to approve – and specifically dictate the "material respects" of – the *entire* 875-mile-long Project.

12. This construction is additionally buttressed – rather than contradicted – by the 2019 Permit's further clarification, also in the third paragraph, that "[t]he term 'Border facilities,' as used in this permit, means those parts of the Facilities . . . located approximately 1.2 miles from the international border . . . ." Significantly, the first paragraph of the 2019 Permit – which contains the critical "grant" language – never uses the term "Border facilities." Instead, it uses the term "facilities," which as noted is defined to "mean[] the portion *in the United States* of the international pipeline project," including the balance of Keystone beyond its first 1.2 miles. *Id.* (emphasis added).

13. The 2019 Permit's plain language thus shows that President Trump intended to authorize the "portion in the United States of the . . . project."

President Trump lacked authority to "grant permission" and direct the "material respects" of the Project's 875 miles for three reasons.

14. The first reason is that, aside from the 0.93 miles of BLM land within the Project's first 1.2 miles, the Project would also cross approximately 45 miles of other federal lands administered by BLM.[2] President Trump lacked approval authority over use of these additional BLM lands for the same reason he lacked land use approval authority over the first 1.2 miles. As noted, the Property Clause of the U.S. Constitution gives to Congress – and not the President – the "Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." U.S. Constitution, Article IV, section 3, clause 2; *League of Conservation Voters v. Donald J. Trump*, *supra*, slip op. at 5, n. 20; *Alabama v. Texas*, *supra*, 347 U.S. at 273. Congress has assigned management responsibility over these lands to BLM, which must administer them in accordance with applicable law including FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA.

15. The second reason that President Trump lacked authority to approve the balance of the Project – including the other 45 miles of BLM land – is that doing so conflicts with Congress' exclusive power to regulate foreign and interstate commerce under Article I, section 8, clause 3 of the United States

[2] Department of State Administrative Record at DOS5954, 6046.

Constitution, including the impacts of that commerce on the waters and fish and wildlife (and other species) of the United States.

16. The Project impacts waters of the United States that are protected by the CWA, and fish and wildlife (and other) species of the United States that are protected by the ESA. The Project includes many river crossings including under the Missouri, Yellowstone, Cheyenne, and Platte rivers, and their tributaries. Indeed, within its first 1.2 miles, Keystone crosses at least one unnamed tributary of the East Fork of Whitewater Creek. Whitewater Creek flows into Frenchman Creek, which in turn flows into the Milk River, and thence into the Missouri River. Should Keystone leak oil into a tributary of Whitewater Creek, the resulting contamination would flow downstream to the Missouri River, a water course used by Plaintiffs for drinking and farming among other uses.

17. The Project's impacts on waters of the United States protected by the CWA and on species protected by the ESA and enjoyed by Plaintiffs are regulated by several federal agencies pursuant to Congress' broad authority over foreign and interstate commerce under Article I, section 8, clause 3 of the United States Constitution. For example, Defendant UNITED STATES ARMY CORPS OF ENGINEERS ("Corps of Engineers") regulates these river crossings and their environmental impacts under the CWA, and Defendant FISH AND WILDLIFE SERVICE ("FWS") regulates the Project's impacts on listed species under the ESA, among other laws. Because these agencies had not completed their reviews of – let alone approved – the Project's many river crossings and impacts on listed

species, President Trump was without authority to preempt their ongoing reviews by unilaterally approving the Project.

18. The third reason President Trump lacked authority to authorize the balance of Keystone is that doing so conflicts with the Executive Orders that delegate authority to approve this transboundary oil pipeline Project to the Department of State, and require that agency's approval to comply with all applicable laws. Evading compliance with those laws conflicts with Congress' exclusive power to regulate foreign and interstate commerce under Article I, section 8, clause 3 of the United States Constitution, a legislative power that, as noted, previous Presidents have recognized and respected through issuance of Executive Order 11,423 by President Lyndon Johnson in 1968 and Executive Order 13,337 by President George W. Bush in 2004.

19. Both of those Executive Orders provide that Presidential permits for transboundary oil pipelines shall be issued by the Department of State, an agency that is subject to the laws protecting the environment and governing agency procedure that Congress has chosen to adopt, including FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA. 33 Fed.Reg. 11741 (August 16, 1968); 69 Fed.Reg. 25299 (May 5, 2004). Executive Order 13,337, which governed issuance of Presidential permits for transboundary oil pipelines such as the Project when President Trump purported to approve the 2019 Permit, provides in pertinent part that "[n]othing contained in this order shall be construed to . . . *supersede or replace the requirements established under any other provision of law, or to*

relieve a person from any requirement to obtain authorization from any other department or agency of the United States Government in compliance with applicable laws and regulations . . . ." 69 Fed.Reg. 25301, section 5 (emphasis added).

20. Contrary to these Executive Orders, President Trump purported to authorize construction and operation of the Project *without* "compliance with applicable laws and regulations." Also contrary to Executive Order 13,337, as noted the Secretary of State failed to make a National Interest Determination finding that the Project would serve the national interest based on a detailed analysis of the appropriate factors, including those regarding climate change.

21. Accordingly, because PRESIDENT DONALD J. TRUMP lacked authority to unilaterally approve Keystone, Plaintiffs challenge his approval of the 2019 Permit. Plaintiffs also name as Defendants the federal officials and agencies who have been charged by Congress with responsibility to assure that Keystone complies with applicable environmental statutes including the UNITED STATES DEPARTMENT OF STATE and Secretary of State MICHAEL R. POMPEO (collectively, "Department of State"); the UNITED STATES ARMY CORPS OF ENGINEERS, LT. GENERAL TODD T. SEMONITE, Commanding General and Chief of Engineers of the UNITED STATES ARMY CORPS OF ENGINEERS (collectively "Corps of Engineers"); the UNITED STATES FISH AND WILDLIFE SERVICE, and Acting Director of the United States Fish and Wildlife Service MARGARET EVERSON (collectively, "FWS"); the UNITED STATES

BUREAU OF LAND MANAGEMENT ("BLM"); and DAVID BERNHARDT, the Secretary of the United States Department of the Interior. Plaintiffs sue these federal agencies and officials to assure their compliance with Articles I and IV of the United States Constitution, and the federal environmental and historic protection laws with which the Project must comply, including FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA, and regulations promulgated thereunder, and Executive Order 13,337.

22. On April 10, 2019, President Trump purported to revoke Executive Order 13,337 by issuing Executive Order 13,867 ("2019 Executive Order"). 84 Fed. Reg. 15491 (April 15, 2019). This attempted revocation post-dates the 2019 Presidential Permit, and cannot operate retroactively to excuse the 2019 Permit's violations of Executive Order 13,337, and of the Commerce Clause and the Property Clause of the United States Constitution, or to otherwise render the 2019 Permit lawful despite its direct conflict with Executive Order 13,337. Like the 2019 Presidential Permit, the 2019 Executive Order is *ultra vires* because it impermissibly departs from and attempts to evade and eliminate the Congressionally-sanctioned cross-border permit process approved by Congress pursuant to its exclusive and plenary power over foreign commerce and federal lands and waters. That cross-border permit process had been in effect for over 50 years and requires review by the Secretary of State and other appropriate federal agencies, full compliance with Congress's comprehensive statutory scheme for

environmental and historic resource review, and the Secretary of State's informed determination of whether the permit is in the national interest.

23. To remedy these violations of law, Plaintiffs seek orders from this Court: (1) declaring that Defendants violated Article I, section 8, clause 3 and Article IV, section 3, clause 2 of the United States Constitution, FLPMA, NEPA, the ESA, the NHPA, the CWA, the APA, and Executive Order 13,337; (2) granting preliminary injunctive relief restraining Defendants, including TransCanada, from taking any action that would result in any change to the physical environment in connection with Keystone pending a full hearing on the merits; and (3) granting permanent injunctive relief overturning Defendants' approvals of Keystone pending their compliance with Articles I and IV of the United States Constitution, FLPMA, NEPA, the ESA, the NHPA, the CWA, the APA, and Executive Order 13,337.

JURISDICTION AND VENUE

24. The Court has jurisdiction over this action under 28 U.S.C. sections 1331 (federal question), 1337 (regulation of commerce), 1346 (U.S. as defendant), 1361 (mandamus against an officer of the U.S.), 2201 (declaratory judgment), and 2202 (injunctive relief); under the Administrative Procedure Act ("APA"), 5 U.S.C. sections 701-706 (to compel agency review unlawfully withheld or omitted), and under the ESA, 16 U.S.C. sections 1540(g)(1) (A) and (C) (based on notice given in 2017 and to be renewed as necessary) because (1) the action arises

under the United States Constitution, FLPMA, NEPA, the ESA, the NHPA, the CWA, the APA, and Executive Order 13337; (2) President Trump is the chief executive, and the State Department, Corps of Engineers, BLM and FWS are agencies, of the U.S. government, and the individual Defendants are sued in their official capacities as officers of the U.S. government; (3) the action seeks a declaratory judgment voiding those portions of President Trump's 2019 Permit that purport to authorize Keystone; and (4) the action seeks further injunctive and mandamus relief until the Defendants comply with applicable law.

25. Venue is proper in this judicial district pursuant to 28 U.S.C. section 1391(e)(1)(B) and Montana Local Civil Rules 1.2(c)(3) and 3.2(b)(1)(A) because a substantial part of the events giving rise to this action – namely, construction and operation of the proposed pipeline Project – would cross the international border in, and thence pass through, Phillips County, Montana, which is located within the Great Falls Division of this judicial district. 28 U.S.C. § 1391(e)(1)(B); Mont. Civ.R. 3.2(b)(1)(A).

26. There exists now between the parties hereto an actual, justiciable controversy in which Plaintiffs are entitled to have a declaration of their rights, a declaration of the Defendants' obligations, and further relief because of the facts and circumstances herein set forth.

27. This Complaint is timely filed within the applicable six-year statute of limitations set forth in 28 U.S.C. section 2401(a).

28. Plaintiffs have standing to assert their claims and, to the extent required, have exhausted all applicable remedies. In particular, Plaintiffs' members live, work, recreate in or otherwise use and enjoy the lands, waters and plant and animal species and their habitat through which Keystone would pass or otherwise impact, including both its first 1.2 miles and the balance of the Project's 875 miles.

PARTIES

29. Plaintiff Indigenous Environmental Network ("IEN") is incorporated under the non-profit organizational name of Indigenous Educational Network of Turtle Island. Established in 1990, IEN is a network of Indigenous peoples from throughout North America including the states of Montana, South Dakota and Nebraska and the Province of Alberta through which the Project is proposed to be built, who are empowering their Indigenous Nations and communities toward ecologically sustainable livelihoods, long-denied environmental justice, and full restoration and protection of the Sacred Fire of their traditions. Its members include chiefs, leaders and members of Indigenous Nations and communities who inhabit the states and province through which the Project is proposed to be built and who would be directly and irreparably harmed by its many severe adverse environmental and cultural impacts. IEN has been involved in grassroots efforts throughout the United States and Canada to mobilize and educate the public regarding the harmful environmental and cultural impacts of the Project. IEN's members include individuals who have hiked, fished, hunted, observed and

photographed wildlife and wildflowers, star-gazed, rode their horses, floated, swum, camped and worshipped the Creator on lands and waters within and adjacent to the proposed route of the Project and who intend to continue to do so in the future. Because IEN's members use and enjoy the land and water resources and wildlife within the Project area that the Project would harm, they would be directly and irreparably harmed by the construction and operation of the Project, including its international border crossing and first 1.2 miles, and by the Project's oil spills that would pollute the lands and waters that IEN's members use and enjoy.

30. Plaintiff North Coast Rivers Alliance ("NCRA") is an unincorporated association of conservation leaders from the western and northern United States and Canada. NCRA has participated in public education, advocacy before legislative and administrative tribunals, and litigation in state and federal court to enforce compliance by state and federal agencies with state and federal environmental laws. NCRA's members include individuals who have camped, fished, observed and photographed wildlife and wildflowers, star-gazed, rode their horses, drove their wagon teams, floated, hiked and worshipped the Creator on lands and waters within and adjacent to the proposed route of the Project and who intend to continue to do so in the future. Because NCRA's members use and enjoy the land and water resources and wildlife within the Project area that the Project would harm, they would be directly and irreparably harmed by the construction and operation of the Project including its international border crossing and first 1.2

miles, and by the Project's oil spills that would pollute the lands and waters that NCRA's members use and enjoy.

31. Plaintiffs' injuries are fairly traceable to the Defendants' actions. Construction and operation of the Project, including its international border crossing and first 1.2 miles and connected actions throughout its 875-mile length, will harm Plaintiffs' use of the Project area including ground and surface waters the Project would cross for fishing, hunting, camping and other recreational purposes, and domestic, cultural and spiritual activities including nature study, wildlife and wildflower viewing, scenic enjoyment, photography, hiking, family outings, star gazing and meditation. These injuries are actual, concrete, and imminent. Plaintiffs have no plain, speedy, or adequate remedy at law. Accordingly, Plaintiffs seek injunctive, mandamus, and declaratory relief from this Court to set aside the Defendants' unlawful acts and omissions, and to redress Plaintiffs' injuries.

32. Defendant DONALD J. TRUMP is the President of the United States. On March 29, 2019 he issued the Presidential Permit that this action challenges. His 2019 Permit was published on April 3, 2019 in the Federal Register. 84 Fed.Reg. 13101-13103.

33. Defendant UNITED STATES DEPARTMENT OF STATE ("Department of State") is an agency of the United States government. Under Executive Order 13,337, the Department of State was responsible for determining

whether granting a Presidential permit for the Project would serve the national interest and comply with applicable law.

34. Defendant MICHAEL R. POMPEO is the U.S. Secretary of State, and is sued herein in his official capacity. Under Executive Order 13,337, he was responsible for issuing Presidential permits for energy facilities that cross the United States-Canada border, including the Presidential permit at issue here.

35. Defendant UNITED STATES ARMY CORPS OF ENGINEERS ("Corps of Engineers") is an agency of the federal government. The Corps of Engineers has authority to regulate the Project where it crosses or otherwise impacts waters of the United States.

36. Defendant LT. GENERAL TODD T. SEMONITE is Chief of Engineers and Commanding General of the Corps of Engineers, and is sued herein in his official capacity. He is charged with the supervision and management of all decisions and actions by the Corps of Engineers including those regarding the Project to assure they comply with applicable law.

37. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("FWS") is an agency within the U.S. Department of the Interior. Under the ESA, FWS is charged with the preservation of endangered and threatened species and their habitat, including the species that the Project will harm.

38. Defendant MARGARET EVERSON is the Acting Director of FWS, and is sued herein in her official capacity. She is charged with responsibility for

carrying out and complying with the ESA, and with preserving endangered and threatened species and their habitat that the Project will harm.

39. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT ("BLM") is an agency within the U.S. Department of the Interior. Under FLPMA, BLM is charged with administering lands owned by the United States and assigned to its management, including lands within the proposed route of the Project, consistent with federal environmental laws including FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA.

40. Defendant DAVID BERNHARDT is the Secretary of the U.S. Department of the Interior and is sued in his official capacity. He is the federal official charged with responsibility for the proper management of BLM and FWS in compliance with applicable law, and is responsible for the actions or failure to act of those agencies regarding the Project challenged herein.

BACKGROUND

41. On May 4, 2012, the Department of State received an application from TransCanada Corporation, a Canadian public company organized under the laws of Canada, for a Presidential permit for a proposed oil pipeline widely known as the Keystone XL Pipeline that would run approximately 875 miles from the Canadian border in Phillips County, Montana to connect to an oil pipeline in Steele City, Nebraska.

42. On March 1, 2013, the Department of State released a Draft Supplemental Environmental Impact Statement ("DSEIS") for the new Presidential permit application for the proposed Keystone XL Pipeline Project.

43. On March 8, 2013, the U.S. Environmental Protection Agency ("EPA") announced the availability of the DSEIS on its website, starting the 45-day public comment period.

44. On April 18, 2013, the Department of State held a public meeting in Grand Island, Nebraska, and on April 22, 2013, the comment period on the DSEIS closed.

45. On May 15, 2013, the FWS transmitted its Biological Opinion for the proposed Keystone XL Pipeline Project to the Department of State.

46. The Department of State provided an additional 30-day opportunity for the public to comment during the National Interest Determination comment period that began with the February 5, 2014 notice in the Federal Register announcing the release of the Final SEIS ("FSEIS").

47. On November 6, 2015, Secretary of State John Kerry determined pursuant to Executive Order 13,337 that issuing a Presidential permit for the proposed Keystone XL Pipeline's border facilities would not serve the national interest, and denied the permit application.

48. On January 24, 2017, President Donald Trump issued a Presidential Memorandum Regarding Construction of the Keystone XL Pipeline which, *inter*

alia, invited the permit applicant "to resubmit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline." On January 24, 2017, President Trump also issued an Executive Order on Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects in which he set forth the general policy of the Executive Branch "to streamline and expedite, *in a manner consistent with law, environmental reviews and approvals for all infrastructure projects*, especially projects that are a high priority for the Nation," and cited pipelines as an example of such high priority projects. *Id.* (emphasis added).

49. On January 26, 2017, the Department of State received a re-submitted application from TransCanada for the proposed Project. The re-submitted application included purportedly minor route alterations reflecting agreements with local property owners for specific rights-of-way and easement access, ostensibly within the areas previously included by the Department of State in its FSEIS.

50. On March 23, 2017, the Department of State granted a Presidential Permit to TransCanada, allowing its construction and operation of the Project.

51. On March 27, 2017, Plaintiffs filed suit challenging the Department of State's Record of Decision and National Interest Determination and Presidential Permit allowing TransCanada to construct and operate the Project, and the Department of State's FSEIS for the Project. A second suit challenging these

approvals was filed on March 30, 2017, and on October 4, 2017, both actions were consolidated for briefing and hearing.

52. On November 22, 2017, this Court denied motions to dismiss filed by TransCanada and the Department of State that claimed that Plaintiffs had challenged a Presidential action that was not reviewable under the APA. This Court ruled that the 2017 Presidential Permit was reviewable under the APA.

53. The Department of State and FWS then lodged their portions of the Administrative Record. Utilizing that record, the parties filed cross-motions for summary judgment.

54. On August 15, 2018, this Court granted partial summary judgment to Plaintiffs, and ordered the Department of State to supplement its NEPA review to analyze the Project's revised "Main Line Alternative" route through Nebraska. *Indigenous Environmental Network v. United States Department of State*, 317 F.Supp.3d 1118, 1123 (D. Mont. 2018).

55. On November 8, 2018, this Court decided the remaining claims, ruling for Plaintiffs on some and vacating the Department of State's Record of Decision and National Interest Determination. This Court permanently enjoined the Department of State and TransCanada "from engaging in any activity in furtherance of the construction or operation of Keystone [XL] and associated facilities" until specified supplemental reviews are completed and the Department of State renders a new Record of Decision and National Interest Determination.

Indigenous Environmental Network v. United States Department of State, 347 F.Supp.3d 561, 591 (D. Mont. 2018).

56. On November 15, 2018, TransCanada moved this Court to allow certain "preconstruction activities." On December 7, 2018, this Court issued an Order allowing some of those activities. *Indigenous Environmental Network v. United States Department of State*, 369 F.Supp.3d 1045 (D. Mont. 2018).

57. On December 21, 2018, TransCanada filed its Notice of Appeal and Motion for Stay Pending Appeal with this Court. On February 15, 2019 this Court issued its Supplemental Order Regarding Motion to Stay allowing TransCanada to construct and use pipeline storage yards outside of the Project's right-of-way.

58. On February 21, 2019, TransCanada filed a Motion for Stay Pending Appeal in the Ninth Circuit Court of Appeals. On March 15, 2019, the Ninth Circuit Court of Appeals denied TransCanada's Motion, concluding that "TransCanada has not made the requisite strong showing that they are likely to prevail on the merits."

59. After losing on the merits in this Court, and failing to secure a stay of this Court's injunction in the Ninth Circuit Court of Appeals, President Trump chose to evade the effect of those court orders. Rather than comply with applicable federal environmental laws as directed by these courts pursuant to their authority to interpret and apply the law under Article III of the United States Constitution, on March 29, 2019 President Trump attempted to sidestep those

rulings by issuing, through his Office of the Press Secretary, a new "Presidential Permit" purportedly "grant[ing] permission" for TransCanada "to construct, connect, operate and maintain" its proposed Project *without compliance with the laws of the United States*.

60. President Trump, however, is not above the law. Under Article III of the United States Constitution, President Trump's unlawful conduct is subject to this Court's review, as alleged more particularly below.

FIRST CLAIM FOR RELIEF

(Violation of the United States Constitution, Article IV, Section 3, Clause 2)

(Against All Defendants)

61. The paragraphs set forth above and below are realleged and incorporated herein by reference.

62. On March 29, 2019 President Trump purported to issue the 2019 Permit "grant[ing] permission . . . to TransCanada . . . to construct, connect, operate, and maintain pipeline facilities . . . . [extending] approximately 1.2 miles from the international border . . . for the import of oil from Canada to the United States." 84 Fed.Reg. 13101. The 2019 Permit also grants permission for TransCanada to construct and operate the balance of the Project within the United States.

63. President Trump did not have authority to approve either of these portions of the Project. Mr. Trump lacked the power to "grant permission . . . to

TransCanada . . . to construct . . . pipeline facilities" between the Canadian border and a point 1.2 miles south of that border because Mr. Trump lacked authority to approve the use of the federal lands that comprise the majority of this 1.2 mile segment of the Project. According to TransCanada's January 26, 2017 application for the 2017 Permit, "[t]he portion of the border crossing facilities from Milepost 0.0 to Milepost 0.93 will be located on lands administered by the U.S. Bureau of Land Management (BLM)."[3] Mr. Trump lacked the power to authorize the balance of the Project's 875 miles because approximately 45 miles of the Project's route elsewhere in Montana are likewise located on lands owned by the United States government and administered by BLM.

64. 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; *League of Conservation Voters v. Donald J. Trump*, *supra*, slip op. at 5, n. 20; *Alabama v. Texas*, *supra*, 347 U.S. at 273.

65. Congress has directed BLM to manage all of the federal lands within Montana that the Project would cross, including those between Milepost 0.0 and Milepost 0.93 and the balance of the 45 miles of BLM lands that the Project would

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[3] TransCanada's January 26, 2017 application for its 2017 Permit at p. 7; Department of State Administrative Record filed in *Indigenous Environmental Network v. United States Department of State*, *supra*, at DOS1201.

traverse, in accordance with FLPMA, 43 U.S.C. section 1701 *et seq*. In managing this property pursuant to FLPMA, BLM must comply with the requirements of NEPA, the ESA, the NHPA, the CWA, and the APA.

66. As of the date President Trump issued the 2019 Permit, BLM had not issued any approval of the Project for the BLM lands between Milepost 0.0 and Milepost 0.93, or for any other BLM lands within the proposed route of the Project.

67. BLM has not demonstrated compliance with FLPMA, NEPA, the ESA, the NHPA, the CWA, nor the APA with regard to approval of the Project.

68. Because the United States Constitution assigns the power to regulate and dispose of all property belonging to the United States to Congress rather than to the President, President Trump lacked constitutional authority to grant permission to TransCanada to "construct, connect, operate, and maintain pipeline facilities" on lands owned by the United States, including the lands administered by BLM located between Milepost 0.0 and Milepost 0.93 of the Project, and BLM lands located elsewhere on the Project's proposed route. Before those lands could be used for the Project, BLM would have to first issue an approval allowing that pipeline use and, before issuing such an approval, BLM would have to demonstrate compliance with FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA. Because BLM had done neither, and additionally, moreover, this Court has declared unlawful and vacated the 2017 Permit for the Project, the Project has

not been lawfully approved by President Trump or any department, agency, official or instrumentality of the United States.

69. Accordingly, President Trump's purported grant of "permission . . . to TransCanada . . . to construct, connect, operate, and maintain pipeline facilities . . . . [extending] approximately 1.2 miles from the international border . . . for the import of oil from Canada to the United States" – and elsewhere on BLM lands in the United States – is *ultra vires* and of no lawful force and effect.

70. President Trump's purported revocation of Executive Order 13,337 through issuance on April 10, 2019 of the 2019 Executive Order (Executive Order 13,867, 84 Fed.Reg. 15491 (April 15, 2019)) is likewise *ultra vires* because it impermissibly departs from and attempts to evade and eliminate the Congressionally-sanctioned cross-border permit process approved by Congress pursuant to its exclusive and plenary power over foreign commerce and federal lands and waters. That cross-border permit process had been in effect for over 50 years and requires review by the Secretary of State and other appropriate federal agencies, full compliance with Congress's comprehensive statutory scheme for environmental and historic resource review, and the Secretary of State's informed determination of whether the permit is in the national interest.

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SECOND CLAIM FOR RELIEF

(Violation of the United States Constitution, Article I, Section 8, Clause 3)

(Against All Defendants)

71. The paragraphs set forth above and below are realleged and incorporated herein by reference.

72. President Trump's purported issuance of the 2019 Permit allowing "TransCanada . . . to construct, connect, operate, and maintain pipeline facilities" between the Canadian border and a point roughly 1.2 miles south of that border, and elsewhere throughout the Project's 875-mile length, is *ultra vires* for the further reason that it conflicts with Congress' exclusive power to regulate foreign and interstate commerce under Article I, section 8, clause 3 of the United States Constitution.

73. Previous presidents have recognized and respected Congress' legislative power over transboundary oil pipelines such as the Project through issuance of Executive Order 11,423 by President Lyndon Johnson in 1968 and Executive Order 13,337 by President George W. Bush in 2004. 33 Fed.Reg. 11741 (August 16, 1968); 69 Fed.Reg. 25299 (May 5, 2004). Both Executive Orders provide that Presidential permits for transboundary oil pipelines shall be issued by the Department of State, an agency that is subject to the laws protecting the environment and governing agency procedure that Congress has enacted pursuant to Article I, section 8, clause 3 of the United States Constitution.

74. Executive Order 13,337, for example, provides in pertinent part that "[n]othing contained in this order shall be construed to . . . *supersede or replace the requirements established under any other provision of law, or to relieve a person from any requirement to obtain authorization from any other department or agency of the United States government in compliance with applicable laws and regulations* . . . ." 69 Fed.Reg. 25301, section 5 (emphasis added).

75. The many mandates established by Congress for the construction, connection, operation, and maintenance of oil pipelines such as the Project include the requirements of the CWA and the ESA for review and approval by the Corps of Engineers and FWS of the Project's numerous river and stream crossings and impacts on species listed under the ESA and their habitat. Neither the Corps of Engineers nor FWS has issued any lawful approvals allowing the Project to cross these water bodies or impact these species. Absent their approval, the President is powerless to "grant permission" to TransCanada to construct, connect, operate, and maintain the Project's pipeline and related facilities where they may impact these federally-protected waters and species.

76. The 2019 Permit was issued without compliance with a host of other federal environmental and procedural laws that apply to the construction, connection, operation, and maintenance of oil pipelines that are situated on federal lands, affect waters of the United States, impact threatened and endangered species, pose significant environmental impacts, disturb cultural resources, threaten public health and safety, and otherwise impact foreign or interstate

commerce, including FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA. As this Court ruled in vacating the 2017 Permit, this Project is subject to the detailed requirements of the laws that Congress enacted to protect the environment, cultural resources, and public health and safety. *Indigenous Environmental Network v. United States Department of State*, *supra*, 347 F.Supp.3d at 571, 590-591.

77. Because the 2019 Permit purports to "grant permission . . . to TransCanada . . . to construct, connect, operate, and maintain pipeline facilities extending 875 miles from the Canadian border to Steele City, Nebraska *without requiring compliance with these applicable federal laws*, it conflicts with Congress' comprehensive regulatory scheme adopted pursuant to Article I, section 8, clause 3 of the United States Constitution.

78. Executive Order 13,337 further directs that, "[a]fter consideration of the views and assistance obtained" from other federal agencies and officials, and "any public comments submitted" in response to public notice of the proposed Presidential permit, the "Secretary of State [must find] that issuance of a permit to the applicant would serve the national interest." 69 Fed.Reg. 25300, section 1(g). Contrary to this requirement, the Secretary of State did not make a finding that issuance of the 2019 Permit "would serve the national interest." Nor did he or President Trump provide a "reasoned explanation" justifying President Trump's abrupt reversal of former Secretary of State John Kerry's detailed and factually-based reasons why its impacts on climate change required rejection of the Project.

79. President Trump's and the Secretary of State's failure to provide such a "reasoned explanation" for reversing course violates this Court's previous Order filed November 8, 2018 requiring such an express, factually-based explanation. *Indigenous Environmental Network v. United States Department of State*, *supra*, 347 F.Supp.3d at 584.

80. Because President Trump thus lacked authority to issue the 2019 Permit, it is *ultra vires* and of no lawful force and effect.

81. President Trump's purported revocation of Executive Order 13,337 through issuance on April 10, 2019 of the 2019 Executive Order (Executive Order 13,867, 84 Fed.Reg. 15491 (April 15, 2019)) is likewise *ultra vires* because it impermissibly departs from and attempts to evade and eliminate the Congressionally-sanctioned cross-border permit process approved by Congress pursuant to its exclusive and plenary power over foreign commerce and federal lands and waters. That cross-border permit process had been in effect for over 50 years and requires review by the Secretary of State and other appropriate federal agencies, full compliance with Congress's comprehensive statutory scheme for environmental and historic resource review, and the Secretary of State's informed determination of whether the permit is in the national interest.

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THIRD CLAIM FOR RELIEF

(Violation of Executive Order 13,337)

(Against All Defendants)

82. The paragraphs set forth above and below are realleged and incorporated herein by reference.

83. President Trump's purported issuance of the 2019 Permit allowing "TransCanada . . . to construct, connect, operate, and maintain pipeline facilities" between the Canadian border and a point roughly 1.2 miles south of that border, and pipeline facilities elsewhere throughout the Project's 875-mile length, is *ultra vires* for the additional reason that it conflicts with Executive Order 13,337 in at least seven significant respects.

84. First, the 2019 Permit excludes the United States Secretary of State from any participation in the formulation, review, approval and administration of the 2019 Permit.

85. Second, the 2019 Permit bypasses all federal agencies and officials, including the Secretaries of the Interior, Commerce, Defense, Energy, Homeland Security and Transportation, the Attorney General, and the Administrator of the Environmental Protection Agency, thereby precluding their participation in the formulation and review of the 2019 Permit.

86. Third, the 2019 Permit ignores the requirement that the Secretary of State find that issuance of the 2019 Permit would serve the national interest.

87. Fourth, the 2019 Permit omits consultation with state, tribal and local governmental officials as potential sources of invaluable knowledge, wisdom and perspective.

88. Fifth, the 2019 Permit excises the requirement that the applicant "obtain authorization from any other department or agency of the United States Government in compliance with applicable laws and regulations."

89. Sixth, the 2019 Permit gives no consideration to, let alone provide mitigation for, the environmental and cultural effects of Keystone.

90. Seventh, the 2019 Permit 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.

91. Because the 2019 Permit violates the foregoing material requirements of Executive 13,337, it is *ultra vires* and of no lawful force and effect.

92. President Trump's purported revocation of Executive Order 13,337 through issuance on April 10, 2019 of the 2019 Executive Order (Executive Order 13,867, 84 Fed.Reg. 15491 (April 15, 2019)) is likewise *ultra vires* because it impermissibly departs from and attempts to evade and eliminate the Congressionally-sanctioned cross-border permit process approved by Congress pursuant to its exclusive and plenary power over foreign commerce and federal lands and waters. That cross-border permit process had been in effect for over 50 years and requires review by the Secretary of State and other appropriate federal

agencies, full compliance with Congress's comprehensive statutory scheme for environmental and historic resource review, and the Secretary of State's informed determination of whether the permit is in the national interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Adjudge and declare that President Donald J. Trump's purported issuance of the 2019 Permit violated Article IV, section 3, clause 2 of the United States Constitution and is therefore *ultra vires* and of no legal force and effect;

2. Adjudge and declare that President Donald J. Trump's purported issuance of the 2019 Permit violated Article I, section 8, clause 3 of the United States Constitution and is therefore *ultra vires* and of no legal force and effect;

3. Adjudge and declare that President Donald J. Trump's purported issuance of the 2019 Permit violated Executive Order 13,337 and is therefore *ultra vires* and of no legal force and effect.

4. Adjudge and declare that President Donald J. Trump's purported revocation of Executive Order 13,337 through issuance on April 10, 2019 of the 2019 Executive Order (Executive Order 13,867, 84 Fed.Reg. 15491 (April 15, 2019)) is likewise *ultra vires* because it impermissibly departs from and attempts to evade and eliminate the Congressionally-sanctioned cross-border permit process approved by Congress pursuant to its exclusive and plenary power over foreign commerce and federal lands and waters under the Property Clause (Article IV, section 3, clause 2) and the Commerce Clause (Article I, section 8, clause 3) of

the United States Constitution, and is therefore *ultra vires* and of no legal force and effect.

5. Preliminarily and permanently enjoin all Defendants, including TransCanada, from initiating any activities in furtherance of the Project that could result in any change or alteration of the physical environment unless and until Defendants comply with the requirements of Article IV, section 3, clause 2 and Article I, section 8, clause 3 of the United States Constitution, Executive Order 13,337, and to the extent applicable, the requirements of FLPMA, NEPA, the ESA, the NHPA, the CWA and the APA, and their implementing regulations;

6. Award Plaintiffs their reasonable attorneys' fees and costs and expenses incurred in connection with the litigation of this action;

7. Grant Plaintiffs such additional relief as the Court may deem just and proper.

Respectfully submitted,

Dated: March 2, 2020

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

Dated: March 2, 2020

PATTEN, PETERMAN, BEKKEDAHL & GREEN, PLLC
s/ *James A. Patten*
JAMES A. PATTEN

Attorneys for Plaintiffs
INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE

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 March 2, 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:

[PROPOSED] SECOND AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF

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

Dated: March 2, 2020

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

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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 **[PROPOSED] SECOND AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF** **(Filed pursuant to F.R.Civ.P. 15(a)(2))** **Judge: Hon. Brian M. Morris**

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.

INTRODUCTION

1. Through issuance of a Presidential Permit ("2019 Permit") on March 29, 2019, PRESIDENT DONALD J. TRUMP purported to take three actions to approve the proposal by TRANSCANADA KEYSTONE PIPELINE, L.P. and TC Energy Corporation (collectively,"TransCanada") to construct and operate an 875-mile long pipeline and related facilities known as the Keystone XL Pipeline ("Keystone" or "Project") to transport up to 830,000 barrels per day ("BPD") of tar sands crude oil from Alberta, Canada through the states of Montana, South Dakota and Nebraska to existing pipeline facilities near Steele City, Nebraska. 84 Federal Register ("Fed.Reg.") 13101-13103 (April 3, 2019). The Project would pose grave risks to the environment, including the climate, cultural resources, water resources, fish and wildlife, and human health and safety.

2. The first action President Trump took was to revoke the unlawful Presidential Permit ("2017 Permit") that the Trump Administration had issued to

TransCanada on March 23, 2017 (82 Fed.Reg. 16467 (April 4, 2017)), granting permission to "construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada near Morgan, Montana, for the import of crude oil from Canada to the United States." 84 Fed.Reg. at 13101. President Trump had both the authority and the duty to revoke the unlawful 2017 Permit in accordance with this Court's Order on Summary Judgment in *Indigenous Environmental Network v. United States Department of State*, 347 F.Supp.3d 561, 591 (D. Mont. Nov. 8, 2018) ordering that the 2017 Permit be "VACATED."

3. The second action President Trump took was to "grant permission . . . to TransCanada . . . to construct, connect, operate, and maintain pipeline facilities . . . . [extending] approximately 1.2 miles from the international border . . . for the import of oil from Canada to the United States." 84 Fed.Reg. at 13101. This action, however, was not authorized by law. By usurping Congress' exclusive power over management of federal lands, the 2019 Permit violates the United States Constitution's separation and protection of the powers of the United States Congress. Additionally, the 2019 Permit eschews the interagency and intergovernmental procedural protocols and substantive environmental protections mandated by Executive Order 13,337, 69 Fed.Reg. 25299 (May 5, 2004), which was in effect at the time President Trump purported to issue the 2019 Permit.

4. In contravention of both Congressional mandates and Executive Order 13,337, the 2019 Permit: (1) excludes the United States Secretary of State from any participation in the formulation, review, approval and administration of

the 2019 Permit, (2) bypasses all federal agencies and officials, including the Secretaries of the Interior, Commerce, Defense, Energy, Homeland Security, and Transportation, the Attorney General, and the Administrator of the Environmental Protection Agency, thereby precluding their participation in the formulation and review of the 2019 Permit, (3) ignores the requirement that the Secretary of State find that issuance of the 2019 Permit would serve the national interest, (4) omits consultation with state, tribal and local governmental officials as potential sources of invaluable knowledge, wisdom and perspective, (5) excises the requirement that the applicant "obtain authorization from any other department or agency of the United States Government in compliance with applicable laws and regulations," (6) gives no consideration to, let alone provide mitigation for, the environmental and cultural effects of Keystone, and (7) ignores the analyses of those impacts prepared by federal agencies under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA"), the Endangered Species Act, 16 U.S.C. § 1530 et seq. ("ESA"), the National Historic Preservation Act, 54 U.S.C. § 300101 et seq. (formerly 16 U.S.C. § 470 et seq.) ("NHPA") and other environmental statutes. President Trump did not have authority to take this second action for at least four reasons.

5. First, Mr. Trump lacked authority to prescribe the use of this 1.2 mile segment of the Project because the U.S. Constitution grants that power to Congress. According to TransCanada's January 26, 2017 application for the 2017 Permit, "[t]he portion of the border crossing facilities from Milepost 0.0 to

Milepost 0.93" will be located on federally owned lands "administered by the U.S. Bureau of Land Management (BLM)."[1] 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); *League of Conservation Voters v. Donald J. Trump*, 363 F.Supp.3d 1013, 1017-1018, n. 20 (D.Ak. 2019); *Alabama v. Texas*, 347 U.S. 272, 273 (1954). The President lacked authority to usurp this power conferred on Congress by the Property Clause.

6. Second, President Trump lacked authority to approve construction and operation of the first 1.2 miles of Keystone because doing so conflicts with Congress' exclusive power to regulate foreign and interstate commerce under Article I, section 8, clause 3 (the "Commerce Clause") of the United States Constitution. Pursuant to this constitutional authorization, Congress directed BLM and other relevant federal agencies to manage this federal property and the environmental and cultural resources that Keystone would impact, including air and water quality, Native American communities and sacred grounds protected by the NHPA and other laws, and plant and animal species listed under the ESA, in

[1] TransCanada's January 26, 2017 application for its 2017 Permit, at p. 7; Department of State Administrative Record filed in *Indigenous Environmental Network v. United States Department of State*, *supra*, at DOSKXLDMT0001201 ("DOS1201").

accordance with applicable federal environmental and cultural laws, as detailed below. The President lacked authority to usurp this power conferred on Congress by the Commerce Clause.

7. Third, President Trump lacked authority to approve the first 1.2 miles of Keystone because Congress has directed BLM and other relevant federal agencies to manage this federal property and the environmental and cultural resources that Keystone would impact in accordance with the Federal Land Policy Management Act, 43 U.S.C. section 1701 *et seq.* ("FLPMA"), NEPA, the ESA, the NHPA, the Clean Water Act, 33 U.S.C. section 1251 *et seq.* ("CWA"), and the Administrative Procedure Act, 5 U.S.C. section 706 ("APA"). The President lacked authority to override Congress' specific direction to BLM and other relevant federal agencies mandating their management of these lands, waters wildlife and other resources in compliance with each of these statutes.

8. Fourth, President Trump lacked authority to authorize construction and operation of the first 1.2 miles of Keystone because doing so conflicted with the extant Executive Orders that delegated authority to approve this transboundary oil pipeline Project to the Department of State, and required that agency's approval, in turn, to comply with all applicable laws. Both Executive Order 11,423 issued by President Lyndon Johnson in 1968 and Executive Order 13,337 issued by President George W. Bush in 2004 provided that Presidential permits for transboundary oil pipelines be issued by the Department of State, an agency that is subject to Congress' laws protecting the environment and cultural resources, and

governing agency procedure, including FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA. Additionally, Executive Order 13,337 required the Secretary of State, subject to review by President Trump, to make a National Interest Determination finding that Keystone would serve the national interest, based on a detailed analysis of the appropriate factors, including this Project's impacts on environmental and cultural resources, and its emission of greenhouse gases that would massively contribute to climate change. President Trump failed to comply with either of these Executive Orders, notwithstanding the fact that both were in effect on March 29, 2019 when he granted the 2019 Permit.

9. For each of the foregoing reasons, those portions of the 2019 Permit that purport to authorize construction and operation of the first 1.2 miles of Keystone are *ultra vires*.

10. The third action President Trump apparently intended to take – although inartfully worded – was to authorize the balance of the 875-mile-long Keystone XL Pipeline Project. 84 Fed.Reg. at 13101-13102. The first paragraph of the 2019 Permit grants permission to TransCanada "to construct, connect, operate and maintain pipeline facilities at the international border . . . for the import of oil from Canada to the United States." Although this language might, standing alone, limit the authorized "pipeline facilities" to those located "at the international border," other permit language contradicts that interpretation. The third paragraph of the 2019 Permit states that "[t]he term 'Facilities,' as used in this permit, means *the portion in the United States* of the international pipeline

project . . . ." *Id*. (emphasis added). The "portion in the United States" can only mean the 875 miles of the pipeline that are situated "in the United States."

11. The foregoing interpretation is reinforced by Article 1, section 2 of the 2019 Permit, which directs that "[t]he construction, connection, operation, and maintenance of the Facilities" – i.e., the entire 875 miles of 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 and resubmitted on January 26, 2017." *Id.* (emphasis added). This direction reveals an unmistakable intent to approve – and specifically dictate the "material respects" of – the *entire* 875-mile-long Project.

12. This construction is additionally buttressed – rather than contradicted – by the 2019 Permit's further clarification, also in the third paragraph, that "[t]he term 'Border facilities,' as used in this permit, means those parts of the Facilities . . . located approximately 1.2 miles from the international border . . . ." Significantly, the first paragraph of the 2019 Permit – which contains the critical "grant" language – never uses the term "Border facilities." Instead, it uses the term "facilities," which as noted is defined to "mean[] the portion *in the United States* of the international pipeline project," including the balance of Keystone beyond its first 1.2 miles. *Id.* (emphasis added).

13. The 2019 Permit's plain language thus shows that President Trump intended to authorize the "portion in the United States of the . . . project."

President Trump lacked authority to "grant permission" and direct the "material respects" of the Project's 875 miles for three reasons.

14. The first reason is that, aside from the 0.93 miles of BLM land within the Project's first 1.2 miles, the Project would also cross approximately 45 miles of other federal lands administered by BLM.[2] President Trump lacked approval authority over use of these additional BLM lands for the same reason he lacked land use approval authority over the first 1.2 miles. As noted, the Property Clause of the U.S. Constitution gives to Congress – and not the President – the "Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." U.S. Constitution, Article IV, section 3, clause 2; *League of Conservation Voters v. Donald J. Trump*, *supra*, slip op. at 5, n. 20; *Alabama v. Texas*, *supra*, 347 U.S. at 273. Congress has assigned management responsibility over these lands to BLM, which must administer them in accordance with applicable law including FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA.

15. The second reason that President Trump lacked authority to approve the balance of the Project – including the other 45 miles of BLM land – is that doing so conflicts with Congress' exclusive power to regulate foreign and interstate commerce under Article I, section 8, clause 3 of the United States

[2] Department of State Administrative Record at DOS5954, 6046.

Constitution, including the impacts of that commerce on the waters and fish and wildlife (and other species) of the United States.

16. The Project impacts waters of the United States that are protected by the CWA, and fish and wildlife (and other) species of the United States that are protected by the ESA. The Project includes many river crossings including under the Missouri, Yellowstone, Cheyenne, and Platte rivers, and their tributaries. Indeed, within its first 1.2 miles, Keystone crosses at least one unnamed tributary of the East Fork of Whitewater Creek. Whitewater Creek flows into Frenchman Creek, which in turn flows into the Milk River, and thence into the Missouri River. Should Keystone leak oil into a tributary of Whitewater Creek, the resulting contamination would flow downstream to the Missouri River, a water course used by Plaintiffs for drinking and farming among other uses.

17. The Project's impacts on waters of the United States protected by the CWA and on species protected by the ESA and enjoyed by Plaintiffs are regulated by several federal agencies pursuant to Congress' broad authority over foreign and interstate commerce under Article I, section 8, clause 3 of the United States Constitution. For example, Defendant UNITED STATES ARMY CORPS OF ENGINEERS ("Corps of Engineers") regulates these river crossings and their environmental impacts under the CWA, and Defendant FISH AND WILDLIFE SERVICE ("FWS") regulates the Project's impacts on listed species under the ESA, among other laws. Because these agencies had not completed their reviews of – let alone approved – the Project's many river crossings and impacts on listed

species, President Trump was without authority to preempt their ongoing reviews by unilaterally approving the Project.

18. The third reason President Trump lacked authority to authorize the balance of Keystone is that doing so conflicts with the Executive Orders that delegate authority to approve this transboundary oil pipeline Project to the Department of State, and require that agency's approval to comply with all applicable laws. Evading compliance with those laws conflicts with Congress' exclusive power to regulate foreign and interstate commerce under Article I, section 8, clause 3 of the United States Constitution, a legislative power that, as noted, previous Presidents have recognized and respected through issuance of Executive Order 11,423 by President Lyndon Johnson in 1968 and Executive Order 13,337 by President George W. Bush in 2004.

19. Both of those Executive Orders provide that Presidential permits for transboundary oil pipelines shall be issued by the Department of State, an agency that is subject to the laws protecting the environment and governing agency procedure that Congress has chosen to adopt, including FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA. 33 Fed.Reg. 11741 (August 16, 1968); 69 Fed.Reg. 25299 (May 5, 2004). Executive Order 13,337, which governed issuance of Presidential permits for transboundary oil pipelines such as the Project when President Trump purported to approve the 2019 Permit, provides in pertinent part that "[n]othing contained in this order shall be construed to . . . *supersede or replace the requirements established under any other provision of law, or to*

relieve a person from any requirement to obtain authorization from any other department or agency of the United States Government in compliance with applicable laws and regulations . . . ." 69 Fed.Reg. 25301, section 5 (emphasis added).

20. Contrary to these Executive Orders, President Trump purported to authorize construction and operation of the Project *without* "compliance with applicable laws and regulations." Also contrary to Executive Order 13,337, as noted the Secretary of State failed to make a National Interest Determination finding that the Project would serve the national interest based on a detailed analysis of the appropriate factors, including those regarding climate change.

21. Accordingly, because PRESIDENT DONALD J. TRUMP lacked authority to unilaterally approve Keystone, Plaintiffs challenge his approval of the 2019 Permit. Plaintiffs also name as Defendants the federal officials and agencies who have been charged by Congress with responsibility to assure that Keystone complies with applicable environmental statutes including the UNITED STATES DEPARTMENT OF STATE and Secretary of State MICHAEL R. POMPEO (collectively, "Department of State"); the UNITED STATES ARMY CORPS OF ENGINEERS, LT. GENERAL TODD T. SEMONITE, Commanding General and Chief of Engineers of the UNITED STATES ARMY CORPS OF ENGINEERS (collectively "Corps of Engineers"); the UNITED STATES FISH AND WILDLIFE SERVICE, and Acting Director of the United States Fish and Wildlife Service MARGARET EVERSON (collectively, "FWS"); the UNITED STATES

BUREAU OF LAND MANAGEMENT ("BLM"); and DAVID BERNHARDT, the Secretary of the United States Department of the Interior. Plaintiffs sue these federal agencies and officials to assure their compliance with Articles I and IV of the United States Constitution, and the federal environmental and historic protection laws with which the Project must comply, including FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA, and regulations promulgated thereunder, and Executive Order 13,337.

22. On April 10, 2019, President Trump purported to revoke Executive Order 13,337 by issuing Executive Order 13,867 ("2019 Executive Order"). 84 Fed. Reg. 15491 (April 15, 2019). This attempted revocation post-dates the 2019 Presidential Permit, and cannot operate retroactively to excuse the 2019 Permit's violations of Executive Order 13,337, and of the Commerce Clause and the Property Clause of the United States Constitution, or to otherwise render the 2019 Permit lawful despite its direct conflict with Executive Order 13,337. Like the 2019 Presidential Permit, the 2019 Executive Order is *ultra vires* because it impermissibly departs from and attempts to evade and eliminate the Congressionally-sanctioned cross-border permit process approved by Congress pursuant to its exclusive and plenary power over foreign commerce and federal lands and waters. That cross-border permit process had been in effect for over 50 years and requires review by the Secretary of State and other appropriate federal agencies, full compliance with Congress's comprehensive statutory scheme for

environmental and historic resource review, and the Secretary of State's informed determination of whether the permit is in the national interest.

23. To remedy these violations of law, Plaintiffs seek orders from this Court: (1) declaring that Defendants violated Article I, section 8, clause 3 and Article IV, section 3, clause 2 of the United States Constitution, FLPMA, NEPA, the ESA, the NHPA, the CWA, the APA, and Executive Order 13,337; (2) granting preliminary injunctive relief restraining Defendants, including TransCanada, from taking any action that would result in any change to the physical environment in connection with Keystone pending a full hearing on the merits; and (3) granting permanent injunctive relief overturning Defendants' approvals of Keystone pending their compliance with Articles I and IV of the United States Constitution, FLPMA, NEPA, the ESA, the NHPA, the CWA, the APA, and Executive Order 13,337.

JURISDICTION AND VENUE

24. The Court has jurisdiction over this action under 28 U.S.C. sections 1331 (federal question), 1337 (regulation of commerce), 1346 (U.S. as defendant), 1361 (mandamus against an officer of the U.S.), 2201 (declaratory judgment), and 2202 (injunctive relief); under the Administrative Procedure Act ("APA"), 5 U.S.C. sections 701-706 (to compel agency review unlawfully withheld or omitted), and under the ESA, 16 U.S.C. sections 1540(g)(1) (A) and (C) (based on notice given in 2017 and to be renewed as necessary) because (1) the action arises

under the United States Constitution, FLPMA, NEPA, the ESA, the NHPA, the CWA, the APA, and Executive Order 13337; (2) President Trump is the chief executive, and the State Department, Corps of Engineers, BLM and FWS are agencies, of the U.S. government, and the individual Defendants are sued in their official capacities as officers of the U.S. government; (3) the action seeks a declaratory judgment voiding those portions of President Trump's 2019 Permit that purport to authorize Keystone; and (4) the action seeks further injunctive and mandamus relief until the Defendants comply with applicable law.

25. Venue is proper in this judicial district pursuant to 28 U.S.C. section 1391(e)(1)(B) and Montana Local Civil Rules 1.2(c)(3) and 3.2(b)(1)(A) because a substantial part of the events giving rise to this action – namely, construction and operation of the proposed pipeline Project – would cross the international border in, and thence pass through, Phillips County, Montana, which is located within the Great Falls Division of this judicial district. 28 U.S.C. § 1391(e)(1)(B); Mont. Civ.R. 3.2(b)(1)(A).

26. There exists now between the parties hereto an actual, justiciable controversy in which Plaintiffs are entitled to have a declaration of their rights, a declaration of the Defendants' obligations, and further relief because of the facts and circumstances herein set forth.

27. This Complaint is timely filed within the applicable six-year statute of limitations set forth in 28 U.S.C. section 2401(a).

28. Plaintiffs have standing to assert their claims and, to the extent required, have exhausted all applicable remedies. In particular, Plaintiffs' members live, work, recreate in or otherwise use and enjoy the lands, waters and plant and animal species and their habitat through which Keystone would pass or otherwise impact, including both its first 1.2 miles and the balance of the Project's 875 miles.

PARTIES

29. Plaintiff Indigenous Environmental Network ("IEN") is incorporated under the non-profit organizational name of Indigenous Educational Network of Turtle Island. Established in 1990, IEN is a network of Indigenous peoples from throughout North America including the states of Montana, South Dakota and Nebraska and the Province of Alberta through which the Project is proposed to be built, who are empowering their Indigenous Nations and communities toward ecologically sustainable livelihoods, long-denied environmental justice, and full restoration and protection of the Sacred Fire of their traditions. Its members include chiefs, leaders and members of Indigenous Nations and communities who inhabit the states and province through which the Project is proposed to be built and who would be directly and irreparably harmed by its many severe adverse environmental and cultural impacts. IEN has been involved in grassroots efforts throughout the United States and Canada to mobilize and educate the public regarding the harmful environmental and cultural impacts of the Project. IEN's members include individuals who have hiked, fished, hunted, observed and

photographed wildlife and wildflowers, star-gazed, rode their horses, floated, swum, camped and worshipped the Creator on lands and waters within and adjacent to the proposed route of the Project and who intend to continue to do so in the future. Because IEN's members use and enjoy the land and water resources and wildlife within the Project area that the Project would harm, they would be directly and irreparably harmed by the construction and operation of the Project, including its international border crossing and first 1.2 miles, and by the Project's oil spills that would pollute the lands and waters that IEN's members use and enjoy.

30. Plaintiff North Coast Rivers Alliance ("NCRA") is an unincorporated association of conservation leaders from the western and northern United States and Canada. NCRA has participated in public education, advocacy before legislative and administrative tribunals, and litigation in state and federal court to enforce compliance by state and federal agencies with state and federal environmental laws. NCRA's members include individuals who have camped, fished, observed and photographed wildlife and wildflowers, star-gazed, rode their horses, drove their wagon teams, floated, hiked and worshipped the Creator on lands and waters within and adjacent to the proposed route of the Project and who intend to continue to do so in the future. Because NCRA's members use and enjoy the land and water resources and wildlife within the Project area that the Project would harm, they would be directly and irreparably harmed by the construction and operation of the Project including its international border crossing and first 1.2

miles, and by the Project's oil spills that would pollute the lands and waters that NCRA's members use and enjoy.

31. Plaintiffs' injuries are fairly traceable to the Defendants' actions. Construction and operation of the Project, including its international border crossing and first 1.2 miles and connected actions throughout its 875-mile length, will harm Plaintiffs' use of the Project area including ground and surface waters the Project would cross for fishing, hunting, camping and other recreational purposes, and domestic, cultural and spiritual activities including nature study, wildlife and wildflower viewing, scenic enjoyment, photography, hiking, family outings, star gazing and meditation. These injuries are actual, concrete, and imminent. Plaintiffs have no plain, speedy, or adequate remedy at law. Accordingly, Plaintiffs seek injunctive, mandamus, and declaratory relief from this Court to set aside the Defendants' unlawful acts and omissions, and to redress Plaintiffs' injuries.

32. Defendant DONALD J. TRUMP is the President of the United States. On March 29, 2019 he issued the Presidential Permit that this action challenges. His 2019 Permit was published on April 3, 2019 in the Federal Register. 84 Fed.Reg. 13101-13103.

33. Defendant UNITED STATES DEPARTMENT OF STATE ("Department of State") is an agency of the United States government. Under Executive Order 13,337, the Department of State was responsible for determining

whether granting a Presidential permit for the Project would serve the national interest and comply with applicable law.

34. Defendant MICHAEL R. POMPEO is the U.S. Secretary of State, and is sued herein in his official capacity. Under Executive Order 13,337, he was responsible for issuing Presidential permits for energy facilities that cross the United States-Canada border, including the Presidential permit at issue here.

35. Defendant UNITED STATES ARMY CORPS OF ENGINEERS ("Corps of Engineers") is an agency of the federal government. The Corps of Engineers has authority to regulate the Project where it crosses or otherwise impacts waters of the United States.

36. Defendant LT. GENERAL TODD T. SEMONITE is Chief of Engineers and Commanding General of the Corps of Engineers, and is sued herein in his official capacity. He is charged with the supervision and management of all decisions and actions by the Corps of Engineers including those regarding the Project to assure they comply with applicable law.

37. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("FWS") is an agency within the U.S. Department of the Interior. Under the ESA, FWS is charged with the preservation of endangered and threatened species and their habitat, including the species that the Project will harm.

38. Defendant MARGARET EVERSON is the Acting Director of FWS, and is sued herein in her official capacity. She is charged with responsibility for

carrying out and complying with the ESA, and with preserving endangered and threatened species and their habitat that the Project will harm.

39. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT ("BLM") is an agency within the U.S. Department of the Interior. Under FLPMA, BLM is charged with administering lands owned by the United States and assigned to its management, including lands within the proposed route of the Project, consistent with federal environmental laws including FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA.

40. Defendant DAVID BERNHARDT is the Secretary of the U.S. Department of the Interior and is sued in his official capacity. He is the federal official charged with responsibility for the proper management of BLM and FWS in compliance with applicable law, and is responsible for the actions or failure to act of those agencies regarding the Project challenged herein.

BACKGROUND

41. On May 4, 2012, the Department of State received an application from TransCanada Corporation, a Canadian public company organized under the laws of Canada, for a Presidential permit for a proposed oil pipeline widely known as the Keystone XL Pipeline that would run approximately 875 miles from the Canadian border in Phillips County, Montana to connect to an oil pipeline in Steele City, Nebraska.

42. On March 1, 2013, the Department of State released a Draft Supplemental Environmental Impact Statement ("DSEIS") for the new Presidential permit application for the proposed Keystone XL Pipeline Project.

43. On March 8, 2013, the U.S. Environmental Protection Agency ("EPA") announced the availability of the DSEIS on its website, starting the 45-day public comment period.

44. On April 18, 2013, the Department of State held a public meeting in Grand Island, Nebraska, and on April 22, 2013, the comment period on the DSEIS closed.

45. On May 15, 2013, the FWS transmitted its Biological Opinion for the proposed Keystone XL Pipeline Project to the Department of State.

46. The Department of State provided an additional 30-day opportunity for the public to comment during the National Interest Determination comment period that began with the February 5, 2014 notice in the Federal Register announcing the release of the Final SEIS ("FSEIS").

47. On November 6, 2015, Secretary of State John Kerry determined pursuant to Executive Order 13,337 that issuing a Presidential permit for the proposed Keystone XL Pipeline's border facilities would not serve the national interest, and denied the permit application.

48. On January 24, 2017, President Donald Trump issued a Presidential Memorandum Regarding Construction of the Keystone XL Pipeline which, *inter*

alia, invited the permit applicant "to resubmit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline." On January 24, 2017, President Trump also issued an Executive Order on Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects in which he set forth the general policy of the Executive Branch "to streamline and expedite, *in a manner consistent with law, environmental reviews and approvals for all infrastructure projects*, especially projects that are a high priority for the Nation," and cited pipelines as an example of such high priority projects. *Id.* (emphasis added).

49. On January 26, 2017, the Department of State received a re-submitted application from TransCanada for the proposed Project. The re-submitted application included purportedly minor route alterations reflecting agreements with local property owners for specific rights-of-way and easement access, ostensibly within the areas previously included by the Department of State in its FSEIS.

50. On March 23, 2017, the Department of State granted a Presidential Permit to TransCanada, allowing its construction and operation of the Project.

51. On March 27, 2017, Plaintiffs filed suit challenging the Department of State's Record of Decision and National Interest Determination and Presidential Permit allowing TransCanada to construct and operate the Project, and the Department of State's FSEIS for the Project. A second suit challenging these

approvals was filed on March 30, 2017, and on October 4, 2017, both actions were consolidated for briefing and hearing.

52. On November 22, 2017, this Court denied motions to dismiss filed by TransCanada and the Department of State that claimed that Plaintiffs had challenged a Presidential action that was not reviewable under the APA. This Court ruled that the 2017 Presidential Permit was reviewable under the APA.

53. The Department of State and FWS then lodged their portions of the Administrative Record. Utilizing that record, the parties filed cross-motions for summary judgment.

54. On August 15, 2018, this Court granted partial summary judgment to Plaintiffs, and ordered the Department of State to supplement its NEPA review to analyze the Project's revised "Main Line Alternative" route through Nebraska. *Indigenous Environmental Network v. United States Department of State*, 317 F.Supp.3d 1118, 1123 (D. Mont. 2018).

55. On November 8, 2018, this Court decided the remaining claims, ruling for Plaintiffs on some and vacating the Department of State's Record of Decision and National Interest Determination. This Court permanently enjoined the Department of State and TransCanada "from engaging in any activity in furtherance of the construction or operation of Keystone [XL] and associated facilities" until specified supplemental reviews are completed and the Department of State renders a new Record of Decision and National Interest Determination.

Indigenous Environmental Network v. United States Department of State, 347 F.Supp.3d 561, 591 (D. Mont. 2018).

56. On November 15, 2018, TransCanada moved this Court to allow certain "preconstruction activities." On December 7, 2018, this Court issued an Order allowing some of those activities. *Indigenous Environmental Network v. United States Department of State*, 369 F.Supp.3d 1045 (D. Mont. 2018).

57. On December 21, 2018, TransCanada filed its Notice of Appeal and Motion for Stay Pending Appeal with this Court. On February 15, 2019 this Court issued its Supplemental Order Regarding Motion to Stay allowing TransCanada to construct and use pipeline storage yards outside of the Project's right-of-way.

58. On February 21, 2019, TransCanada filed a Motion for Stay Pending Appeal in the Ninth Circuit Court of Appeals. On March 15, 2019, the Ninth Circuit Court of Appeals denied TransCanada's Motion, concluding that "TransCanada has not made the requisite strong showing that they are likely to prevail on the merits."

59. After losing on the merits in this Court, and failing to secure a stay of this Court's injunction in the Ninth Circuit Court of Appeals, President Trump chose to evade the effect of those court orders. Rather than comply with applicable federal environmental laws as directed by these courts pursuant to their authority to interpret and apply the law under Article III of the United States Constitution, on March 29, 2019 President Trump attempted to sidestep those

rulings by issuing, through his Office of the Press Secretary, a new "Presidential Permit" purportedly "grant[ing] permission" for TransCanada "to construct, connect, operate and maintain" its proposed Project *without compliance with the laws of the United States*.

60. President Trump, however, is not above the law. Under Article III of the United States Constitution, President Trump's unlawful conduct is subject to this Court's review, as alleged more particularly below.

FIRST CLAIM FOR RELIEF

(Violation of the United States Constitution, Article IV, Section 3, Clause 2)

(Against All Defendants)

61. The paragraphs set forth above and below are realleged and incorporated herein by reference.

62. On March 29, 2019 President Trump purported to issue the 2019 Permit "grant[ing] permission . . . to TransCanada . . . to construct, connect, operate, and maintain pipeline facilities . . . . [extending] approximately 1.2 miles from the international border . . . for the import of oil from Canada to the United States." 84 Fed.Reg. 13101. The 2019 Permit also grants permission for TransCanada to construct and operate the balance of the Project within the United States.

63. President Trump did not have authority to approve either of these portions of the Project. Mr. Trump lacked the power to "grant permission . . . to

TransCanada . . . to construct . . . pipeline facilities" between the Canadian border and a point 1.2 miles south of that border because Mr. Trump lacked authority to approve the use of the federal lands that comprise the majority of this 1.2 mile segment of the Project. According to TransCanada's January 26, 2017 application for the 2017 Permit, "[t]he portion of the border crossing facilities from Milepost 0.0 to Milepost 0.93 will be located on lands administered by the U.S. Bureau of Land Management (BLM)."[3] Mr. Trump lacked the power to authorize the balance of the Project's 875 miles because approximately 45 miles of the Project's route elsewhere in Montana are likewise located on lands owned by the United States government and administered by BLM.

64. 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; *League of Conservation Voters v. Donald J. Trump*, *supra*, slip op. at 5, n. 20; *Alabama v. Texas*, *supra*, 347 U.S. at 273.

65. Congress has directed BLM to manage all of the federal lands within Montana that the Project would cross, including those between Milepost 0.0 and Milepost 0.93 and the balance of the 45 miles of BLM lands that the Project would

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[3] TransCanada's January 26, 2017 application for its 2017 Permit at p. 7; Department of State Administrative Record filed in *Indigenous Environmental Network v. United States Department of State*, *supra*, at DOS1201.

traverse, in accordance with FLPMA, 43 U.S.C. section 1701 *et seq*. In managing this property pursuant to FLPMA, BLM must comply with the requirements of NEPA, the ESA, the NHPA, the CWA, and the APA.

66. As of the date President Trump issued the 2019 Permit, BLM had not issued any approval of the Project for the BLM lands between Milepost 0.0 and Milepost 0.93, or for any other BLM lands within the proposed route of the Project.

67. BLM has not demonstrated compliance with FLPMA, NEPA, the ESA, the NHPA, the CWA, nor the APA with regard to approval of the Project.

68. Because the United States Constitution assigns the power to regulate and dispose of all property belonging to the United States to Congress rather than to the President, President Trump lacked constitutional authority to grant permission to TransCanada to "construct, connect, operate, and maintain pipeline facilities" on lands owned by the United States, including the lands administered by BLM located between Milepost 0.0 and Milepost 0.93 of the Project, and BLM lands located elsewhere on the Project's proposed route. Before those lands could be used for the Project, BLM would have to first issue an approval allowing that pipeline use and, before issuing such an approval, BLM would have to demonstrate compliance with FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA. Because BLM had done neither, and additionally, moreover, this Court has declared unlawful and vacated the 2017 Permit for the Project, the Project has

not been lawfully approved by President Trump or any department, agency, official or instrumentality of the United States.

69. Accordingly, President Trump's purported grant of "permission . . . to TransCanada . . . to construct, connect, operate, and maintain pipeline facilities . . . . [extending] approximately 1.2 miles from the international border . . . for the import of oil from Canada to the United States" – and elsewhere on BLM lands in the United States – is *ultra vires* and of no lawful force and effect.

70. President Trump's purported revocation of Executive Order 13,337 through issuance on April 10, 2019 of the 2019 Executive Order (Executive Order 13,867, 84 Fed.Reg. 15491 (April 15, 2019)) is likewise *ultra vires* because it impermissibly departs from and attempts to evade and eliminate the Congressionally-sanctioned cross-border permit process approved by Congress pursuant to its exclusive and plenary power over foreign commerce and federal lands and waters. That cross-border permit process had been in effect for over 50 years and requires review by the Secretary of State and other appropriate federal agencies, full compliance with Congress's comprehensive statutory scheme for environmental and historic resource review, and the Secretary of State's informed determination of whether the permit is in the national interest.

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SECOND CLAIM FOR RELIEF

(Violation of the United States Constitution, Article I, Section 8, Clause 3)

(Against All Defendants)

71. The paragraphs set forth above and below are realleged and incorporated herein by reference.

72. President Trump's purported issuance of the 2019 Permit allowing "TransCanada . . . to construct, connect, operate, and maintain pipeline facilities" between the Canadian border and a point roughly 1.2 miles south of that border, and elsewhere throughout the Project's 875-mile length, is *ultra vires* for the further reason that it conflicts with Congress' exclusive power to regulate foreign and interstate commerce under Article I, section 8, clause 3 of the United States Constitution.

73. Previous presidents have recognized and respected Congress' legislative power over transboundary oil pipelines such as the Project through issuance of Executive Order 11,423 by President Lyndon Johnson in 1968 and Executive Order 13,337 by President George W. Bush in 2004. 33 Fed.Reg. 11741 (August 16, 1968); 69 Fed.Reg. 25299 (May 5, 2004). Both Executive Orders provide that Presidential permits for transboundary oil pipelines shall be issued by the Department of State, an agency that is subject to the laws protecting the environment and governing agency procedure that Congress has enacted pursuant to Article I, section 8, clause 3 of the United States Constitution.

74. Executive Order 13,337, for example, provides in pertinent part that "[n]othing contained in this order shall be construed to . . . *supersede or replace the requirements established under any other provision of law, or to relieve a person from any requirement to obtain authorization from any other department or agency of the United States government in compliance with applicable laws and regulations* . . . ." 69 Fed.Reg. 25301, section 5 (emphasis added).

75. The many mandates established by Congress for the construction, connection, operation, and maintenance of oil pipelines such as the Project include the requirements of the CWA and the ESA for review and approval by the Corps of Engineers and FWS of the Project's numerous river and stream crossings and impacts on species listed under the ESA and their habitat. Neither the Corps of Engineers nor FWS has issued any lawful approvals allowing the Project to cross these water bodies or impact these species. Absent their approval, the President is powerless to "grant permission" to TransCanada to construct, connect, operate, and maintain the Project's pipeline and related facilities where they may impact these federally-protected waters and species.

76. The 2019 Permit was issued without compliance with a host of other federal environmental and procedural laws that apply to the construction, connection, operation, and maintenance of oil pipelines that are situated on federal lands, affect waters of the United States, impact threatened and endangered species, pose significant environmental impacts, disturb cultural resources, threaten public health and safety, and otherwise impact foreign or interstate

commerce, including FLPMA, NEPA, the ESA, the NHPA, the CWA, and the APA. As this Court ruled in vacating the 2017 Permit, this Project is subject to the detailed requirements of the laws that Congress enacted to protect the environment, cultural resources, and public health and safety. *Indigenous Environmental Network v. United States Department of State*, *supra*, 347 F.Supp.3d at 571, 590-591.

77. Because the 2019 Permit purports to "grant permission . . . to TransCanada . . . to construct, connect, operate, and maintain pipeline facilities extending 875 miles from the Canadian border to Steele City, Nebraska *without requiring compliance with these applicable federal laws*, it conflicts with Congress' comprehensive regulatory scheme adopted pursuant to Article I, section 8, clause 3 of the United States Constitution.

78. Executive Order 13,337 further directs that, "[a]fter consideration of the views and assistance obtained" from other federal agencies and officials, and "any public comments submitted" in response to public notice of the proposed Presidential permit, the "Secretary of State [must find] that issuance of a permit to the applicant would serve the national interest." 69 Fed.Reg. 25300, section 1(g). Contrary to this requirement, the Secretary of State did not make a finding that issuance of the 2019 Permit "would serve the national interest." Nor did he or President Trump provide a "reasoned explanation" justifying President Trump's abrupt reversal of former Secretary of State John Kerry's detailed and factually-based reasons why its impacts on climate change required rejection of the Project.

79. President Trump's and the Secretary of State's failure to provide such a "reasoned explanation" for reversing course violates this Court's previous Order filed November 8, 2018 requiring such an express, factually-based explanation. *Indigenous Environmental Network v. United States Department of State*, *supra*, 347 F.Supp.3d at 584.

80. Because President Trump thus lacked authority to issue the 2019 Permit, it is *ultra vires* and of no lawful force and effect.

81. President Trump's purported revocation of Executive Order 13,337 through issuance on April 10, 2019 of the 2019 Executive Order (Executive Order 13,867, 84 Fed.Reg. 15491 (April 15, 2019)) is likewise *ultra vires* because it impermissibly departs from and attempts to evade and eliminate the Congressionally-sanctioned cross-border permit process approved by Congress pursuant to its exclusive and plenary power over foreign commerce and federal lands and waters. That cross-border permit process had been in effect for over 50 years and requires review by the Secretary of State and other appropriate federal agencies, full compliance with Congress's comprehensive statutory scheme for environmental and historic resource review, and the Secretary of State's informed determination of whether the permit is in the national interest.

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THIRD CLAIM FOR RELIEF

(Violation of Executive Order 13,337)

(Against All Defendants)

82. The paragraphs set forth above and below are realleged and incorporated herein by reference.

83. President Trump's purported issuance of the 2019 Permit allowing "TransCanada . . . to construct, connect, operate, and maintain pipeline facilities" between the Canadian border and a point roughly 1.2 miles south of that border, and pipeline facilities elsewhere throughout the Project's 875-mile length, is *ultra vires* for the additional reason that it conflicts with Executive Order 13,337 in at least seven significant respects.

84. First, the 2019 Permit excludes the United States Secretary of State from any participation in the formulation, review, approval and administration of the 2019 Permit.

85. Second, the 2019 Permit bypasses all federal agencies and officials, including the Secretaries of the Interior, Commerce, Defense, Energy, Homeland Security and Transportation, the Attorney General, and the Administrator of the Environmental Protection Agency, thereby precluding their participation in the formulation and review of the 2019 Permit.

86. Third, the 2019 Permit ignores the requirement that the Secretary of State find that issuance of the 2019 Permit would serve the national interest.

87. Fourth, the 2019 Permit omits consultation with state, tribal and local governmental officials as potential sources of invaluable knowledge, wisdom and perspective.

88. Fifth, the 2019 Permit excises the requirement that the applicant "obtain authorization from any other department or agency of the United States Government in compliance with applicable laws and regulations."

89. Sixth, the 2019 Permit gives no consideration to, let alone provide mitigation for, the environmental and cultural effects of Keystone.

90. Seventh, the 2019 Permit 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.

91. Because the 2019 Permit violates the foregoing material requirements of Executive 13,337, it is *ultra vires* and of no lawful force and effect.

92. President Trump's purported revocation of Executive Order 13,337 through issuance on April 10, 2019 of the 2019 Executive Order (Executive Order 13,867, 84 Fed.Reg. 15491 (April 15, 2019)) is likewise *ultra vires* because it impermissibly departs from and attempts to evade and eliminate the Congressionally-sanctioned cross-border permit process approved by Congress pursuant to its exclusive and plenary power over foreign commerce and federal lands and waters. That cross-border permit process had been in effect for over 50 years and requires review by the Secretary of State and other appropriate federal

agencies, full compliance with Congress's comprehensive statutory scheme for environmental and historic resource review, and the Secretary of State's informed determination of whether the permit is in the national interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Adjudge and declare that President Donald J. Trump's purported issuance of the 2019 Permit violated Article IV, section 3, clause 2 of the United States Constitution and is therefore *ultra vires* and of no legal force and effect;

2. Adjudge and declare that President Donald J. Trump's purported issuance of the 2019 Permit violated Article I, section 8, clause 3 of the United States Constitution and is therefore *ultra vires* and of no legal force and effect;

3. Adjudge and declare that President Donald J. Trump's purported issuance of the 2019 Permit violated Executive Order 13,337 and is therefore *ultra vires* and of no legal force and effect.

4. Adjudge and declare that President Donald J. Trump's purported revocation of Executive Order 13,337 through issuance on April 10, 2019 of the 2019 Executive Order (Executive Order 13,867, 84 Fed.Reg. 15491 (April 15, 2019)) is likewise *ultra vires* because it impermissibly departs from and attempts to evade and eliminate the Congressionally-sanctioned cross-border permit process approved by Congress pursuant to its exclusive and plenary power over foreign commerce and federal lands and waters under the Property Clause (Article IV, section 3, clause 2) and the Commerce Clause (Article I, section 8, clause 3) of

the United States Constitution, and is therefore *ultra vires* and of no legal force and effect.

5. Preliminarily and permanently enjoin all Defendants, including TransCanada, from initiating any activities in furtherance of the Project that could result in any change or alteration of the physical environment unless and until Defendants comply with the requirements of Article IV, section 3, clause 2 and Article I, section 8, clause 3 of the United States Constitution, Executive Order 13,337, and to the extent applicable, the requirements of FLPMA, NEPA, the ESA, the NHPA, the CWA and the APA, and their implementing regulations;

6. Award Plaintiffs their reasonable attorneys' fees and costs and expenses incurred in connection with the litigation of this action;

7. Grant Plaintiffs such additional relief as the Court may deem just and proper.

Respectfully submitted,

Dated: March 2, 2020

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

Dated: March 2, 2020

PATTEN, PETERMAN, BEKKEDAHL & GREEN, PLLC
s/ *James A. Patten*
JAMES A. PATTEN

Attorneys for Plaintiffs
INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE

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 March 2, 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:

[PROPOSED] SECOND AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF

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

Dated: March 2, 2020

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