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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; AURELIA SKIPWITH, in her	Civ. No. CV 19-28-GF-BMM **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT** **Hearing:** **Time:** **Judge: Hon. Brian M. Morris**

official capacity as 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 the Court for leave to file a Third Amended and Supplemental Complaint.[1]

This Motion is based on the grounds that Plaintiffs wish to file their Third

[1] The proposed Third Amended and Supplemental Complaint and related Motion will, if allowed by this Court, supersede and subsume the proposed Second Amended Complaint and related motion for leave to file it currently pending before this Court.

Amended and Supplemental Complaint to address Defendants' subsequent conduct, including Defendant Bureau of Land Management's January 22, 2020 Record of Decision which relies on Defendant Department of State's Final Supplemental Environmental Impact Statement for the Keystone XL Project dated December 2019. Pursuant to Local Rule 15.1, a copy of Plaintiffs' [Proposed] Third Amended and Supplemental 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. On August 20, 2020 and August 21, 2020, respectively, the Federal Defendants President Donald J. Trump et al., and the Intervenor-Defendants TransCanada Keystone Pipeline LP and TC

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Energy Corporation, responded that they would oppose the Motion.

Respectfully submitted,

Dated: August 21, 2020

LAW OFFICES OF STEPHAN C. VOLKER

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

Dated: August 21, 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 August 21, 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 THIRD AMENDED AND SUPPLEMENTAL COMPLAINT

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

Dated: August 21, 2020 s/ *Stephan C. Volker*

STEPHAN C. VOLKER (Pro Hac Vice)

EXHIBIT
1

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Attorneys for Plaintiffs
INDIGENOUS ENVIRONMENTAL NETWORK
and NORTH COAST RIVERS ALLIANCE

IN THE UNITED STATES DISTRICT COURT
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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; AURELIA SKIPWITH, in her	Civ. No. CV 19-28-GF-BMM **[PROPOSED] THIRD AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF** **(Filed pursuant to F.R.Civ.P. 15(a)(2), (d))** **Judge: Hon. Brian M. Morris**

capacity as 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.

By this Third Amended and Supplemental Complaint, Plaintiffs Indigenous Environmental Network ("IEN") and North Coast Rivers Alliance ("NCRA") update their previous Complaint to challenge Defendant UNITED STATES DEPARTMENT OF STATE'S ("STATE'S") approval of a Final Supplemental Environmental Impact Statement ("FSEIS") for the Keystone XL Pipeline Project "("Keystone" or "Project") under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA") on or about December 20, 2019, Defendant UNITED STATES FISH AND WILDLIFE SERVICE'S ("FWS'S") decision to decline to prepare a biological opinion analyzing the Project's impacts on endangered and threatened species (with the sole exception of the American burying beetle) under the Endangered Species Act, 16 U.S.C. section 1531 et seq. ("ESA") on or about December 23, 2019, and Defendant UNITED STATES BUREAU OF LAND MANAGEMENT'S ("BLM's") issuance of a Record of Decision ("ROD") under the Federal Land Policy Management Act, 43 U.S.C. §

1701 et seq. ("FLPMA") and the Mineral Leasing Act, 30 U.S.C. § 181 et seq. ("MLA") on or about January 22, 2020 approving Defendant-Intervenors TRANSCANADA KEYSTONE PIPELINE LP'S and TC ENERGY CORPORATION'S (collectively, "TRANSCANADA'S") proposed Keystone XL Pipeline Project, and reiterate their existing challenges to Keystone, as follows:

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 the province of Alberta, Canada through the province of Saskatchewan and 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 that must be prepared by federal agencies as directed by Congress under NEPA, the ESA, FLPMA, the MLA, the National Historic Preservation Act, 54 U.S.C. § 300101 et seq. (formerly 16 U.S.C. § 470 et seq.) ("NHPA"), the Clean Water Act, 33 U.S.C. § 1251 et seq. ("CWA") and other environmental statutes and their implementing regulations. 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, Indigenous communities and sacred grounds protected by the NHPA and other laws, and plant and animal species listed under the ESA, in accordance with applicable federal environmental and cultural laws, as detailed

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[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").

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 FLPMA, NEPA, the ESA, the NHPA, the MLA, the 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's laws protecting the environment and cultural resources, and governing agency procedure, including FLPMA, NEPA, the ESA, the MLA, 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*, 363 F.Supp.3d at 1017-1018, 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 MLA, 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 Constitution, including the impacts of that commerce on the waters and fish and wildlife (and other species) of the United States.

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[2] Department of State Administrative Record filed in *Indigenous Environmental Network v. United States Department of State, supra*, at DOS5954, 6046.

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 UNITED STATES 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, the MLA 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 Director of the United States Fish and Wildlife Service AURELIA SKIPWITH (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, the MLA, 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 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. Defendant Department of State issued a Final Supplemental Environmental Impact Statement for Keystone in December 2019 ("2019 FSEIS"). Notice of the 2019 FSEIS was published in the Federal Register on December 20, 2019. 84 Fed.Reg. 70,187-70,188 (Dec. 20, 2019). The 2019 FSEIS, like the deficient EISs before it, fails to take a hard look at the impacts of Keystone, and therefore violates NEPA.

24. On or about January 22, 2020, Defendant BLM, in reliance upon this insufficient 2019 FSEIS, improperly issued a Record of Decision ("ROD") for the Keystone XL Pipeline Project, Decision to Grant Right-of-Way and Temporary Use Permit on Federally-Administered Land. BLM's ROD grants a right-of-way ("ROW") and temporary use permit ("TUP") pursuant to the MLA. The ROW and TUP allow the Project to cross 46.28 miles of federal land in Montana – 44.4 miles managed by BLM, and 1.88 miles managed by the Corps of Engineers. The Federal Register published notice of the ROD on January 29, 2020. 85 Federal Register ("Fed.Reg") 5232-5233 (Jan. 29, 2020).

25. Neither the 2019 FSEIS nor the ROD makes any determination that the Project is in the national interest.

26. 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 MLA, 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 MLA, the APA, and Executive Order 13,337.

JURISDICTION AND VENUE

27. 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 MLA, 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, 2019 FSEIS, and January 2020 ROD, ROW and TUP that purport to authorize Keystone; and

(4) the action seeks further injunctive and mandamus relief until the Defendants comply with applicable law.

28. 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).

29. 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 Defendants' obligations, and further relief because of the facts and circumstances herein set forth.

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

31. 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

32. 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 provinces 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 wild flowers, 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.

33. 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.

34. Plaintiffs' injuries are fairly traceable to 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 Defendants' unlawful acts and omissions, and to redress Plaintiffs' injuries.

35. Defendant DONALD J. TRUMP ("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.

36. Defendant UNITED STATES DEPARTMENT OF STATE ("Department of State" or "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.

37. 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.

38. 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.

39. 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.

40. 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.

41. Defendant AURELIA SKIPWITH is the 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.

42. 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, the MLA, and the APA.

43. 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

44. 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.

45. 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.

46. 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.

47. 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.

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

49. 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").

50. 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.

51. 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).

52. 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.

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

54. 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.

55. 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.

56. 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.

57. 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). Although not then completed, in December 2019 Defendants terminated that review, and the following month, in January 2020, defendants purported to reapprove Keystone throughout its length.

58. 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).

59. 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).

60. 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, but otherwise denying TransCanada's Motion for Stay.

61. On February 21, 2019, TransCanada filed in the Ninth Circuit Court of Appeals a Motion for Stay Pending Appeal of this Court's orders filed November 8, 2018, December 7, 2018, and February 15, 2019, vacating Defendants' approvals, and enjoining TransCanada's construction, of the Project. 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."

62. 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*. 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.

63. On October 4, 2019, the Federal Register published a notice that Defendant Department of State's Draft Supplemental Environmental Impact Statement was available for public review and comment.

64. On November 18, 2019, Plaintiffs submitted timely comments on the Draft Supplemental Environmental Impact Statement to the Department of State via Regulations.gov, and U.S. Mail.

65. On December 23, 2019, FWS issued a concurrence letter to BLM, concluding that Keystone is, with the exception of the American Burying Beetle, not likely to adversely affect listed species. FWS prepared a Biological Opinion addressing Keystone's impacts on the American Burying Beetle, but uncritically accepted and relied upon the deficient analysis and conclusions in BLM's 2019 Biological Assessment in deciding not to prepare a biological opinion that would fully analyze the Project's adverse effects on other listed species.

66. Notice that Defendant Department of State had issued the 2019 FSEIS was published in the Federal Register on December 20, 2019. 84 Fed.Reg.

70,187-70,188. The 2019 FSEIS, like the deficient EISs that had preceded it, fails to take a hard look at the impacts of Keystone, and therefore violates NEPA.

67. On January 22, 2020, Defendant BLM, in reliance upon this insufficient 2019 FSEIS, improperly issued the ROD approving the Project by granting the ROW under FLPMA and the TUP under the MLA. The ROW and TUP allow the Project to cross 46.28 miles of federal land in Montana – 44.4 miles managed by BLM, and 1.88 miles managed by the Corps of Engineers. The Federal Register published notice of the ROD on January 29, 2020. 85 Fed.Reg. 5232-5233 (Jan. 29, 2020).

68. Neither the 2019 FSEIS nor the ROD makes any determination that the Project is in the national interest, and thus both, along with the ROW and TUP that the ROD purportedly authorized, violate the U.S. Constitution and other laws as alleged more particularly hereinbelow.

FIRST CLAIM FOR RELIEF

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

(Against All Defendants)

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

70. 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.

71. 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 43.5 miles of the Project's route elsewhere in Montana are likewise located on lands owned by the United States government and administered by BLM, and because applicable law vests exclusive authority in federal agencies, including Defendants BLM, the Corps of Engineers and FWS, to issue permits for the Project's use and occupancy

[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.

of these and other lands and waters, under standards and pursuant to procedures adopted by Congress, and by those agencies.

72. 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*, 363 F.Supp.3d at 1017-1018, n. 20; *Alabama v. Texas*, *supra*, 347 U.S. at 273.

73. Congress has directed BLM to manage all 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 44.4 miles of BLM lands that the Project would 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 not just of FLPMA, but also of NEPA, the ESA, the CWA, the MLA, the NHPA, and the APA.

74. 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.

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

76. 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, the MLA 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.

77. 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.

78. 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.

SECOND CLAIM FOR RELIEF

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

(Against All Defendants)

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

80. 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's exclusive power to regulate foreign

and interstate commerce under Article I, section 8, clause 3 of the United States Constitution.

81. Previous presidents have recognized and respected Congress's 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.

82. 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).

83. 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.

84. 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, the MLA 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.

85. 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's comprehensive regulatory scheme adopted pursuant to Article I, section 8, clause 3 of the United States Constitution.

86. 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 the Project's impacts on climate change required its rejection.

87. 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.

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

89. 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.

THIRD CLAIM FOR RELIEF

(Violation of Executive Order 13,337)

(Against All Defendants)

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

91. 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.

92. 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.

93. 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.

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

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

96. 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."

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

98. 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.

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

100. 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.

FOURTH CLAIM FOR RELIEF

(Violation of the National Environmental Policy Act)

(Against All Defendants)

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

102. By issuing the ROD on January 22, 2020, based on the Department of State's inadequate 2019 FSEIS, BLM violated NEPA, 42 U.S.C. section 4321 *et seq*., and its implementing regulations, 40 C.F.R. section 1500 *et seq*. By

approving the Project without complying with NEPA, BLM failed to proceed in accordance with law in violation of the APA, 5 U.S.C. section 706(2)(A) and (D).

ENVIRONMENTAL IMPACTS

103. An EIS must take a "hard look" at the environmental impacts of proposed major federal actions and provide a "full and fair discussion" of those impacts. 40 C.F.R. § 1502.1; *National Parks & Conservation Association v. Babbitt* ("*NPCA v. Babbitt*"), 241 F.3d 772, 733 (9th Cir. 2001). Here, however, the 2019 FSEIS's discussion of many environmental and cultural impacts remains absent or inadequate, as explained below.

Cultural Resources

104. NEPA mandates that agencies analyze cultural resource impacts in environmental impact statements. 40 C.F.R. §§ 1502.16(g), 1508.8. Defendants failed to complete cultural resource surveys for the Project prior to publication of the 2014 SEIS, or approval of the 2017 ROD. Thus, "[t]he 2014 SEIS fail[ed] to provide a 'full and fair discussion of the potential effects of the project to cultural resources' in the absence of further information on the 1,038 unsurveyed acres." *IEN v. State*, 347 F.Supp.3d at 580, quoting *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 965 (9th Cir. 2005).

105. Despite this Court's orders directing, and Plaintiffs' comments asking, Defendants to remedy their failure to complete essential surveys of threatened cultural resources as NEPA requires, the 2019 FSEIS does not correct

this informational gap. It fails to provide vital information essential for decision makers and the public to understand the Project's impacts on traditional cultural and historic resources in several respects. First, at the time the 2019 FSEIS was published, Defendants had still failed to survey more than 500 acres of threatened cultural resources previously identified as requiring surveys. 2019 FSEIS 3.9-16.

106. Second, the 2019 FSEIS fails to address the Project's impacts on recently discovered Indigenous cultural resources. It reveals that for newly discovered traditional cultural sites along the Project's right-of-way in Montana, "eligibility determinations and management recommendations have not been established at this time." 2019 FSEIS 4-70 to 4-71. The 2019 FSEIS admits that additional cultural resource evaluation and analysis are still required, stating that "[a]s of the date of this document a report on the historic properties re-inspection is being prepared and will be sent to all applicable federal and state agencies and all tribal consulting parties for review and comment . . . ." 2019 FSEIS 3.9-16; 4-70 to 4-71.

107. Because Defendants have failed to gather the foregoing essential information addressing the Project's impacts on cultural resources, they have failed to take the required hard look at the Project's impacts on the human environment as NEPA requires. By approving the Project without first completing these additional, essential cultural resource surveys and analysis, and instead relying upon an admittedly deficient 2019 FSEIS, Defendants have failed to cure

the deficiencies identified by the Court and Plaintiffs whose correction was and remains needed to comply with NEPA.

108. Defendants' violations of their NEPA duties to identify and mitigate the Project's harm to cultural resources threaten profound harm to Indigenous communities including Plaintiffs' members. The Keystone Pipeline is proposed to pass near "vulnerable unmarked graves of [Cheyenne River Sioux Tribe and Rosebud Sioux Tribe] ancestors and other cultural sites such as the camp of Chief Bigfoot before he led [their] people south, only to be massacred by the United States Army at Wounded Knee." Declaration of Joye Braun in Support of Plaintiffs' Motion for Preliminary Injunction filed July 10, 2019 (Dkt. 27-4) ¶ 8.

109. Ms. Braun has attested to the significance of Defendants' failure to survey cultural resources as required by NEPA and how this omission threatens severe harm to these deeply sacred cultural resources:

> "Every year [the descendants of the survivors of this massacre] hold a horse ride with prayers along this route of sadness and tragedy. For our people, this is a memorial horse ride to build strength, courage and fortitude among our youth. It is done in quiet, respectful prayer. After the ride is completed, descendants of the survivors of the massacre run back in the freezing cold to my homeland. We fear what will happen to our unmarked graves and other cultural sites if the Keystone XL Pipeline is constructed and man-camps are

> installed as is now proposed within a few miles of the border of our Reservation."

Id. ¶ 9. Allowing Keystone to be built in a manner that literally tramples on and obliterates this irreplaceable cultural legacy would cause unimaginable pain and unconscionable humiliation to the Indigenous communities that still grieve for those lost to this genocide.

110. Defendants' continuing failure to survey and protect cultural resources that are sacred to Indigenous communities is a daily reminder to them of the centuries of discrimination and violence against their members they have endured. The tiny Indigenous community of Bridger, South Dakota, for example,

> "was founded by survivors of the Wounded Knee massacre perpetrated by the U.S. Army. Because Bridger is a descendant community of survivors from that horrendous slaughter, the historical trauma remains prevalent in those who live here. . . . [T]he simple possibility of the Keystone XL pipeline [being constructed] has already significantly increased the stress level and anxiety in the Bridger Community."

Declaration of Elizabeth Lone Eagle filed July 10, 2019 (Dkt. 27-15) ¶ 9.

111. Unless this Court orders Defendants to comply with NEPA by fully and comprehensively identifying and mitigating the Project's potential adverse impacts on the Indigenous communities' cultural and religious resources and practices, including the sacred sites of birth rituals and death memorials, those

communities will suffer grievous harm. Braun Declaration ¶¶ 8-9; Lone Eagle Declaration ¶ 9; Declaration of Kandi White in Support of Plaintiffs' Motion for Preliminary Injunction filed July 10, 2019 (Dkt. 27-24) ¶ 12.

112. The construction and operation of the KXL Pipeline in proximity to Native American reservations and rural settlements poses a direct threat to the historic and cultural sites important to those communities. The 2019 FSEIS' failure to adequately address these impacts violates NEPA.

Accidental Spills

113. The 2019 FSEIS fails to take a hard look at the Project's potential impacts from oil spills in the following ways, among others.

114. First, the 2019 FSEIS presents a distorted picture of the potential for the Project's oil spills to impair waterways, groundwater, wetlands and soil, downplaying the likelihood and severity of those spills. It relies upon several flawed assumptions in its discussion and modeling of oil spill impacts.

115. The 2019 FSEIS reveals that a pinhole leak – a leak from a 1/32-inch diameter hole – would allow up to 28 barrels of oil to spill each day from Keystone's pressurized pipeline. 2019 FSEIS 5-17. It admits that such a leak "could continue unnoticed until the released volume is observed at the ground or water surface or is identified during a pipeline integrity inspection." 2019 FSEIS 5-17. But Keystone's automatic leak detection system would miss more that just those pinhole leaks.

116. The 2019 FSEIS reveals that TransCanada's automatic leak detection systems are only able to sense leaks when they exceed approximately 1.5 to 2 percent of the pipeline's flow rate. 2019 FSEIS, D-70; *see also* TransCanada's January 17, 2020, Keystone XL Pipeline Project Final Plan of Development ("POD")139.[4] The Project is designed "to transport up to 830,000 barrels per day (bpd)," which equates to 34,583 barrels per hour. 2019 FSEIS, 1-8. Thus, a spill of up to two percent of the flow of the pipeline, which can be expressed as approximately 692 barrels per hour or 16,600 barrels per day, would not be detected "in real time" by the automatic leak detection systems. 2019 FSEIS D-70; POD 139. The 2019 FSEIS relies upon direct observations – although there is no provision for posting of trained observers – and non-real time computer-based pipeline volume trend analysis to detect these leaks. *Id.*

117. Neither proposal would work. First, as the 2019 FSEIS concedes, visual observation would not detect leaks "until the spill volume is expressed on the surface." 2019 FSEIS D-70. But it assumes that leaking oil would be visible. During the winter, ice forms on the surface, directly blocking detection of spills from surface observation. Ice formation on the Missouri River below the Fort Peck Dam where Keystone would cross under the water begins in late November and lasts until late March or longer. During this time snow accumulates on top of the ice. Thus, for at least four months of the year, oil spills into the Missouri River

[4] Defendant BLM's ROD incorporates and relies upon the POD as one basis for its approval of the Project. ROD 5.

would not be visible on the surface. U.S. Army Corps of Engineers, Missouri River Mainstem Reservoir System Water Control Manual Volume 2, Fort Peck Dam – Fort Peck Lake (2018), III-11. The initial ice formation usually begins 204 miles downstream at the headwaters of the Garrison reservoir, and continues upstream – past the intake for the Assiniboine and Sioux Rural Water Supply System near Wolf Point, and then all the way to the reach immediately below Fort Peck Dam. *Id.*, at VII-8. During this approximately four-month period each year, it is unlikely that lower-volume oil spills in the river would be visible due to the iced-over condition.

118. Second, the 2019 FSEIS provides no information on the amount of time required for a computer-based volume trend analysis to detect such leaks, leaving the public completely in the dark on this critical issue. Worse, as noted, a leak of up to 16,600 barrels per day would not be detected "in real time" by the automatic leak detection systems. 2019 FSEIS D-70; POD 139.

119. This omission cripples public evaluation of the magnitude of the oil spills that could occur before detection – let alone before the exact source is located and the leakage is halted.

120. The inadequacy of this leak detection system became evident with the operation of TransCanada's original Keystone pipeline. In May 2011, that Keystone pipeline spilled between 17,000 and 22,000 gallons of crude oil. "That spill was discovered by a North Dakota rancher, Bob Banderet, on May 7, 2011,

when he saw oil gushing from the Keystone Pipeline's Ludden pumping station near his land. He reportedly called the emergency phone number that TransCanada Corporation (now TC Energy) had provided him as a volunteer firefighter to alert TransCanada's emergency response dispatcher to the spill." White Declaration (Dkt. 27-24) ¶ 6. To cover up the fact that its detection system had failed, "TransCanada asked the Pipeline and Hazardous Materials Safety Administration to amend its shutdown order to state that TransCanada's internal sensors – rather than Mr. Banderet – had first discovered the leak. TransCanada subsequently referred to this spill as proof that 'the system worked as it was designed to do.'" *Id*. But the leak detection system had, to the contrary, failed, even with this extremely large leak. And TransCanada has not provided any reason why the same failure should not be expected here.

121. The 2019 FSEIS's analysis of oil released in waterways is limited to "the distance the released crude oil might travel within 6 hours." 2019 FSEIS 5-3. This limitation is derived from the flawed assumption that TransCanada will prevent additional oil from spilling within six hours of when a spill starts. *Id.* The 2019 FSEIS states that "the 6-hour response time was used as it represents the maximum response time along the Missouri River stipulated by federal pipeline safety regulations." 2019 FSEIS D-60. But these regulations merely require that TransCanada begin to *respond* within six hours "after *discovery* of a worst case discharge" – not that the discovery occur within six hours. 49 C.F.R. § 194.115 (emphasis added). As seen, TransCanada's discovery might be delayed for

months. And, of course, even after the leak is discovered, these regulations do not require that TransCanada complete its response within six hours of every spill's occurrence. *Id.*

122. In sum, the 2019 FSEIS' entire analysis of Keystone's impacts due to oil spills is a house of cards. None of the premises on which it is based withstand scrutiny. And for releases of less than 2 percent of the pipeline's flow rate, both in ice-covered waterways and those pooling under ground, the 2019 FSEIS's assumption that leaks will be contained within six hours is demonstrably unsupported, and unsupportable. The 2019 FSEIS sweeps the real – and potentially severe – oil spill impacts of Keystone under the rug.

123. While the 2019 FSEIS addresses additional action that would need to be taken when leaks under ice-covered waterways occur, of course this analysis assumes – again, incorrectly – that such leaks would be promptly detected in the first place. But as we have seen, if not visible from the surface, the leaks would never be detected unless their volume excceds up to 2 percent of Keystone's entire flow. As noted, the 2 percent threshold is a whopping 16,600 barrels of oil per day. At 44 gallons per barrel, that equals 730,000 gallons per day. The 2019 FSEIS' failure to account for lags in detection and response in its impact modeling and analysis misleads the public by ignoring significant oil spill impacts. 2019 FSEIS 5-38, D-63 to D-64. Defendants' failure to take a "hard look" at Keystone's impacts violates NEPA.

124. In addition to unreasonably assuming rapid detection of spills, the 2019 FSEIS's impact modeling unreasonably assumes that oil spills in waterways will be *always* be contained before oil can travel more than 40 river miles. 2019 FSEIS 5-2, D-58. This is demonstrably unsupported and unsupportable. As noted, during winter, leaking oil may flow hundreds of miles down river, hidden by ice and snow, before detection. Tacitly conceding this fact, the 2019 FSEIS states that even if the sheen and globules from an oil spill might travel beyond the 40-mile distance assumed in the impact analysis, this contamination would not pose a significant impact. 2019 FSEIS 5-2. But instead of providing facts and analysis to support this claim, the FSEIS just assumes the impact would be insignificant because the quantity of contamination would be small compared to the river's total volume. *Id*. In other words, the 2019 FSEIS assumes that dilution is the solution to toxic pollution. But modern science laid that notorious premise to rest decades ago. Using it to dismiss an impact does not satisfy NEPA's unflinching demand for a fact-based "hard look."

125. Attempting to pass off speculation as learned analysis, the 2019 FSEIS claims that oil globules "*typically* accumulate in depositional areas," and that they would do so here "at concentrations that would not *typically* result in significant impacts to aquatic biota." 2019 FSEIS 5-2 (emphasis added). But the 2019 FSEIS makes no attempt to buttress this wishful thinking with actual facts and analysis, much less any assessment of the likelihood and effects of "atypical" impacts.

126. The 2019 FSEIS likewise downplays the risk to groundwater resources, again relying upon an inapplicable model. 2019 FSEIS 5-37. The "dissolved phase distance in groundwater" distances presented in the 2019 FSEIS are – not surprisingly – identical to the Hydrocarbon Spill Screening Model ("HSSM") output distances used in the discredited 2014 SEIS that this Court has already found inadequate. 2019 FSEIS 5-37; DOS12314 (2014 SEIS Appendix T). As Plaintiffs demonstrated in the previous litigation, the HSSM model is not designed for use with pressurized oil pipelines like Keystone. Therefore it has no application to this pipeline, let alone prediction of groundwater plumes of pollution when it spills.

127. Indeed, as Defendants have previously admitted, the HSSM "is intended to provide order of magnitude estimates of contamination levels only" and "not designed to address dynamic conditions." DOS7852-7853. The "dynamic conditions" for which "the model is not designed" include "fluctuating groundwater, changing gradient, or . . . *pressurized leaks* from a pipeline." DOS7853 (italics added). As Plaintiffs explained in the previous litigation, *all three* of these "dynamic conditions" would be present should the pipeline develop a leak in or over groundwater (whose level fluctuates), rivers or streams (whose gradient is necessarily "changing" since the water is flowing down gradient), and "pressurized leaks from a pipeline," which would always be the source of a leak from this pressurized pipeline. Further, the HSSM is not designed to address dilbit, the heavy tar sands crude (mixed with a diluent) that Keystone would pump.

Rather, HSSM is used to evaluate "light non-aqueous phase liquid" – liquid that normally *floats* on water, rather than sinking as dilbit does. DOS7853.

128. Defendant Department of State was aware that these limitations render HSSM inapplicable and therefore unusable for estimating the Project's groundwater contamination plume, but utilized HSSM for the 2019 FSEIS anyway. Instead of discussing whether more accurate modeling is available as NEPA requires (per 40 C.F.R. § 1502.22), or addressing the defects in the existing modeling, Defendants deceptively removed any reference to the HSSM from the 2019 FSEIS while continuing to rely upon its same, inapplicable, output data. 2019 FSEIS 5-37; DOS7853. Thus, the 2019 FSEIS's analysis and conclusions regarding the Project's impacts to groundwater are as fundamentally and fatally flawed as were those of the 2014 SEIS that this Court has already ruled inadequate.

129. The 2019 FSEIS' analysis of oil spill impacts to wetlands likewise fails to satisfy NEPA's "hard look" requirement. 40 C.F.R. § 1502.1; *NPCA v. Babbitt*, 241 F.3d at 733. It admits that "[d]ilbit is more likely than lighter crude oils to persist within wetlands because of the higher amount of residual oil left behind after weathering, increased adhesion and resistance of dilbit to biodegradation," but then disregards its own disclosure by persisting in analyzing lighter crude oils anyway. 2019 FSEIS 5-42. This is particularly concerning given one of the major spills that the Keystone I pipeline has experienced since 2017 spilled an estimated 383,000 gallons into a sensitive wetland in South

Dakota. Yet even as the 2019 FSEIS concedes that "the rate for large spills from TransCanada pipelines . . . is 1.7 times higher than the industry average" (2019 FSEIS 5-12), it nonetheless downplays the risk that such spills will occur on this Project near wetlands (2019 FSEIS 5-43).

130. In view of these additional oil spill risks and unknowns, the 2019 FSEIS should have examined whether additional mitigation measures are possible and advisable to identify and reduce the Project's oil spill impacts. For example, while the 2019 FSEIS acknowledges that "a large spill could affect soil productivity adversely," and "[i]n some cases . . . soil productivity would not likely return to prior levels," it does not address whether any new mitigation measures to prevent and respond to the Project's inevitable oil spills should be examined to address their grave impacts. 2019 FSEIS 5-30.

131. But new mitigation measures are necessary if this Project were to proceed, because the impacts of a spill on waterways would be devastating. For example, the Keystone XL Pipeline would cross the Missouri River upstream of all three intakes for the Fort Peck Reservation's water supply. A spill from Keystone into the Milk or Missouri rivers upstream of the Reservation would destroy the only source of clean water available to the 30,000 people dependent on these intakes. Declaration of Bill Whitehead in Support of Plaintiffs' Motion for Preliminary Injunction filed July 10, 2019 (Dkt. 27-26) ¶¶ 4-13. Since Keystone would cross or pass near other rivers that provide potable water to other Indigenous communities, it would threaten their water supplies as well. For

example, it would cross the Cheyenne River less than 100 yards upstream from the southwest boundary of the Cheyenne River Reservation, threatening that Indigenous community and its water supply. Declaration of LaVae High Elk Red Horse in Support of Plaintiffs' Motion for Preliminary Injunction filed July 10, 2019 (Dkt. 27-19) ¶¶ 3-7; Lone Eagle Dec. ¶¶ 3-6.

132. Many of the waterways directly impacted by the Project are of great importance to the Indigenous communities because they depend on these waters for drinking, irrigation, livestock, and their cultural and religious practices. A spill from the pipeline – which is certain to occur – would significantly impact and potentially poison drinking and irrigation water for tens of thousands of people and their farmland. As noted above:

> "The Keystone XL Pipeline would cross under the Milk River and the Missouri River just 10 and 14 miles upstream of [the] Wyota and Frazer irrigation intakes on the Missouri River, which supply the Fort Peck Reservation's extensive irrigation system, providing water to about 19,000 acres of highly productive farmland. Downstream of the Wyota and Frazer irrigation intakes is the intake for the Wambdi Wahachanka "Eagle Shield" Water Treatment Plant that pumps water from the Missouri River, for potable use, to the inhabitants of the Fort Peck Reservation as well as other communities within Montana's four northeastern counties."

Whitehead Dec. ¶ 6. A pipeline spill upstream of these intakes would be devastating to the Fort Peck Reservation for two reasons. First, that Reservation is wholly dependent on these three intakes for its potable water supply, as noted. Second, an upstream oil spill would disable its water treatment plant. The Fort Peck Reservation's water treatment plant "is not designed nor equipped to remove hydrocarbon contaminants . . . that are present in crude oil and the diluent that is used to facilitate its passage through pipelines. Were there to be a tar sands crude oil leak contaminating the Missouri River, [the] water treatment plant would have to close, resulting in the loss of the sole water supply for over 30,000 residents of the Fort Peck Reservation and surrounding communities . . . , including four hospitals and thirteen public schools. *Id.* ¶ 7.

133. Water supply contamination would have serious health impacts on Indigenous communities that cannot be ignored. There are many vulnerable families and individuals residing in the affected Indigenous communities who have "cancer and other diseases attributed to contamination of their water supply." Declaration of Angeline Cheek in Support of Plaintiffs' Motion for Preliminary Injunction filed July 10, 2019 (Dkt. 27-6) ¶ 11. These ongoing health risks and illnesses would be made worse should an oil spill from Keystone prevent use of surface waters and force these communities to resume reliance on the contaminated groundwater supplies that caused their ill health in the first place.

134. The impacted Indigenous communities rely on these rivers not only for drinking water, but also for native medicines and edible plants that grow along

their riverbanks. Because of their unique dependence upon and interdependence with the natural world, these communities would be profoundly and disproportionately harmed if Keystone spilled oil into their rivers. As Indigenous community resident and spokesperson Joye Braun has testified to this Court,

> "[i]f the Keystone XL Pipeline should leak into any of these rivers, our people, our water supply, and our health and safety would be immediately impacted. I frequently harvest native medicines and berries along the Cheyenne River downstream from where the KXL Pipeline would be constructed. My family and I rely on these foods and medicines for our sustenance and health."

Braun Declaration (Dkt. 27-4) ¶ 3.

135. A spill would destroy more than just native foods and medicines. It would also harm the spiritual, religious, cultural, and personal connections that many members of the Impacted Indigenous communities have with these waters. As Indigenous community member Elizabeth Lone Eagle has testified in this proceeding,

> "[f]or us, life begins and ends with water. We are born from and nourished by water. It is our first medicine. It enables our food to grow, our fish to live, and our game to thrive. Our horses use the river to water, swim, frolic, and to clean themselves. . . .Should the KXL Pipeline rupture– as appears to us inevitable and has been predicted by the Final Environmental Impact

> Statement for the project – and leak into the Cheyenne River, White River or their tributaries, the resulting contamination of our water supply would be devastating to my family, our community, and the entire way of life on which our Tribes depend for survival."

Lone Eagle Declaration (Dkt. 27-15) ¶¶ 3, 6.

136. Kandi White has similarly attested to the fact that if Keystone should spill into their rivers, the Indigenous communities would suffer a profoundly deep sense of loss:

> "[c]ontamination of a river in this way is particularly painful for me and my people. As Mandan, Hidatsa, Arikara people, we always lived along waterways and farmed along the fertile floodplains. Consequently, it is very important to us that we remain close to and make frequent use of our rivers."

White Declaration (Dkt. 27-24) ¶ 10. LaVae High Elk Red Horse has summed up the totality of this impact on the Indigenous communities as follows:

> "[b]ecause we . . . depend on the great Cheyenne River and its tributaries for our sustenance, the Keystone XL Pipeline would threaten all that we live for and our cultural and religious legacy as we live it every day."

Declaration of Lavae High Elk Red Horse in Support of Plaintiffs' Motion for Preliminary Injunction filed July 10, 2019 (Dkt. 27-19) ¶ 4.

137. The 2019 FSEIS also understates Keystone's risks to and impacts on imperiled species should the pipeline leak. By improperly downplaying the frequency, duration, and extent of oil spills, Defendants obfuscate the Project's foreseeable impacts on listed species. With the sole exception of the American Burying Beetle, the 2019 FSEIS – and BLM's 2019 Biological Assessment on which it is based – assume that the Project would not adversely affect listed species, including the interior least tern, whooping crane, pallid sturgeon, piping plover, Topeka shiner, northern long-eared bat, western-fringed prairie orchid, and others. 2019 FSEIS 4-53 to 4-55; *see also* 2019 Biological Assessment. But this assumption is based on the false premise that the Project will not spill oil into their habitat.

138. This assumption is baseless, for the FSEIS elsewhere admits, as it must, that Keystone could spill oil anywhere along its 875-mile route. And, the 2019 FSEIS concedes that the potential biological impacts of a spill include "direct and acute mortality; sub-acute interference with feeding and reproductive capacity; disorientation and confusion; reduced resistance to disease; tumors; reduced or lost sensory perceptions; interference with metabolic, biochemical and genetic processes; and many other acute or chronic effects," as well as "consequences on local flora and fauna." 2019 FSEIS 5-44 to 5-45. Yet neither the 2019 FSEIS nor the 2019 Biological Assessment tie these observations to the potential population-level impacts of oil spills from Keystone on listed species. This omission violates NEPA's "hard look" standard.

Greenhouse Gas and Climate Change

139. The 2019 FSEIS likewise fails to take the requisite hard look at the Project's greenhouse gas ("GHG") impacts, as NEPA requires. It does not correct the deficiencies that this Court previously identified in the 2014 SEIS. That SEIS failed to address the cumulative GHG emissions associated with the Project and related and connected pipelines. It also failed to use updated modeling information in presenting the Project's impacts. For these reasons, this Court ruled that the State Department had "failed to paint a full picture of emissions for these connected actions, and, therefore, ignored its duty to take a 'hard look.'" *IEN v. State*, 347 F.Supp.3d at 578.

140. Just like the 2014 SEIS, the 2019 FSEIS does not take a hard look at the Project's GHG and climate change impacts. Although the 2019 FSEIS reveals that the Project could increase *annual* emissions by between 174.7 and 178.3 million metric tons of CO_2-equivalent emissions (2019 FSEIS 4-81), it fails to analyze the *compounding* effect of these emissions. GHGs do not dissipate. Instead, they remain in the atmosphere for decades, causing warming to cumulatively increase over time as each year's increased emissions add to this growing impact. The FSEIS fails to acknowledge and analyze this cumulative worsening of Keystone's annual GHG impacts. 2019 FSEIS 7-20.

141. In 2018, the Intergovernmental Panel on Climate Change ("IPCC") issued a special report warning of the impacts of global warming of just 1.5° Celsius.[5] Its stark conclusion is that the entire planet – particularly major contributors such as the United States – must reduce CO_2 emissions by at least 45% in the next 12 years compared with 2010 levels and achieve net zero CO_2 production by 2050, in order to stave off potentially calamitous hothouse scenarios, ocean acidification, and other catastrophic and irreversible changes to the planet. *See*, *e.g.*, 2018 IPCC 1.5° Report, Summary for Policy Makers, pp. 5, 12.

142. Yet, the 2019 FSEIS fails to recognize and address the fact that approval of Keystone XL would make it more likely that the planet will experience a temperature rise of 3° Celsius by 2100. This level of warming will cause calamitous permafrost melting, accelerated sea level rise, ocean acidification, and widespread and irreversible destruction of what were once carefully-balanced natural climatic control systems. The 2019 FSEIS unreasonably disregards these increasingly likely significant climate impacts, and the Project's contribution thereto. While it admits that the Project's GHG effects will be significant, it downplays those potentially disastrous impacts, stating that

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[5] The 2018 IPCC Special Report on Global Warming of 1.5°C ("2018 1.5° Report") is available in full at: https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf.

"the proposed Project would not by itself significantly alter the trajectory of global climate change." 2019 FSEIS 4-76, D-53. But this argument fails to see the forest for the trees. An individual tree does not itself make a forest, but the addition of just one tree could be the increment that makes a group of a trees a forest. So too here, no one individual energy project will create enough GHG emissions by itself to cause the earth to enter a "hothouse" state from which escape becomes impossible, but any one project – particularly this massive oil development Project – could be the incremental addition that pushes the planet over that precipice.

143. The 2019 FSEIS also impermissibly downplays the likely impacts that climate change will have on the Project, should it be built. 2019 FSEIS 4-101 to 4-102. It fails to take the requisite hard look at how climate change could alter Project operations, and instead relies upon sheer speculation that periodic pipeline inspection will "mitigate risk of damage from severe weather" caused by climate change. 2019 FSEIS 4-102. It also fails to address the likelihood – which recent oil market contractions have shown to be increasingly inevitable as renewable energy rapidly expands – that the Project will become a stranded asset as climate change undermines and ultimately eliminates the market for Canadian tar sands altogether. *Id.*

Market Analysis of the Impact of Oil Prices on Tar Sands Production

144. The 2014 SEIS incorrectly "conditioned much of its analysis . . . on the price of oil remaining high." *IEN v. State*, 347 F.Supp.3d at 576. However,

"significant changes in oil prices . . . have occurred since 2014." *Id.* The 2014 SEIS admits that "lower-than-expected oil prices could affect the outlook for oil sand production," but the State Department still failed to address important updated information regarding the price of oil. *Id*., citing DOSKXLDMT0005895.

145. The 2019 FSEIS attempts to justify the 2014 SEIS' failure to analyze falling oil prices by presenting numerous, widely divergent projections about oil prices. 2019 FSEIS 1-12 to 1-23. It claims that "crude oil prices [for the Western Canadian Crude Oil Market] are likely to increase over the medium to long terms such that the recent low price of crude oil globally . . . would not be a driving factor in the crude oil industry's decision regarding development of future [Western Canadian Sedimentary Basin ("WCSB")] production facilities." 2019 FSEIS 1-22. But this conclusion does not follow from the evidence. As the 2019 FSEIS reveals, subsequent to the 2014 SEIS, "global crude oil prices declined more than 50 percent from peak prices." 2019 FSEIS 1-18. The 2019 FSEIS, however, wrongly assumed that this decline was merely a temporary setback, based on the erroneous premise that since 2016 oil prices had "partially recovered to [an] average price 25 percent lower than 2014 prices." 2019 FSEIS 1-18. But like the 2014 SEIS, the 2019 FSEIS' sanguine premise has been refuted rather than supported by subsequent events which, as explained below, have pushed oil prices down and kept them there. *IEN v. State*, 347 F.Supp.3d at 576.

146. Despite a brief period of recovery, the price of WCSB oil has plummeted once again. "Prices for Canadian oil continue[d] to sink" after the

most recent Keystone pipeline spill,[6] and continued to fall in the first half of 2020 partially as a result of the Covid-19 pandemic, to as low as $3.50 per barrel in April 2020. At the time of this Third Amended and Supplemental Complaint, WCSB prices have recently risen to around $30 per barrel. However, that price is less than half the average price in 2014, which generally ranged between the low $60's and the low $80s per barrel. Therefore, the 2019 FSEIS' assumption that oil prices would at least partially recover "over the medium . . . term[]" has been proven to be incorrect, as has been the 2019 FSEIS' associated market analysis.

Environmental Justice

147. The 2019 FSEIS likewise fails to take the necessary "hard look" at the Project's disproportionate impact on Indigenous communities, including the severe human health and safety impacts they are likely to face should Keystone be built and begin operation. As Plaintiffs' members have testified,

> "construction of man-camps . . . would unleash severe social impacts within nearby rural communities, particularly the Indigenous communities. . . . The direct effects [of man camps] include violence against Native American women and children, including murders, abductions, rape and other forms of physical violence, exposure to drugs including methamphetamines and heroin, and sex trafficking. The indirect effects include displacement of

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[6] Cunningham, Nick, *Canadian Oil Prices Crash After Keystone Spill*, oilprice.com, November 7, 2019, attached as Exhibit 9 to Plaintiffs' November 18, 2019 comments on the draft 2019 SEIS. *See* 2019 FSEIS E-127.

> local residents from housing due to doubling and tripling of rental costs, inflation in other necessities of life including food, clothing and services, the breakdown of public safety and family and community support networks, and the overall degradation in quality of life due to exposure to alcohol and drug abuse and resulting addiction, and increased domestic and sexual violence."

Cheek Declaration (Dkt. 27-6) ¶¶ 8, 29; *see also* Cheek Declaration ¶¶ 4, 12, 14, 15; Braun Declaration (Dkt. 27-4) ¶¶ 5, 7; High Elk Red Horse Declaration (Dkt. 27-7) ¶¶ 5, 7, 8; Lone Eagle Declaration (Dkt. 27-15) ¶ 5.

148. The FSEIS completely fails to consider the impacts of the Project's man-camps on the surrounding Indigenous communities. FSEIS 2-6 to 2-8. "The impact of the man-camps is not limited to the acreage that would be developed. Their effects would extend far beyond the directly disturbed acreage, with far-reaching consequences for the local residents of surrounding rural communities." Corrected Declaration of Kathleen Meyer in Support of Plaintiffs' Motion for Preliminary Injunction filed October 7, 2019 (Dkt. 65-2) ¶ 14. Of particular concern, the "man-camps would have substantial adverse impacts on the adjacent Indigenous communities . . . . includ[ing] violence against Native American women in the vicinity of these camps, and increased drug use and alcohol abuse within the nearby Native American communities." Braun Declaration (Dkt. 27-4) ¶ 7.

149. "[R]eservation communities are the closest towns and thus likely to be used by the oil workers for 'entertainment.'" Braun Declaration (Dkt. 27-4) ¶ 6. In the past, when man-camps were constructed for other oil development projects in the area, the Indigenous communities were disproportionately, and severely impacted. For example, "[t]he surge of oil field and pipeline workers [from development of the Bakken oil and gas fields] resulted in much higher crime rates, including murders, abductions, rapes and other forms of sexual violence, drug and alcohol abuse, addiction and sex trafficking." Cheek Declaration (Dkt. 27-6) ¶ 12. That "surge in violence against Native Americans, particularly women and children, then moved north into the Fort Peck Reservation, resulting in widespread criminal activity," including attempts to abduct juvenile females. *Id.* ¶ 14. This criminal activity prompted the "Fort Peck tribal courts [to] add[] a human trafficking code to [the] Fort Peck Tribes' Comprehensive Code of Justice." *Id*. "At the same time, [the Fort Peck] Reservation experienced a tremendous increase in sexually-transmitted diseases . . . [and i]ncidents of drug and alcohol abuse and addiction." *Id.* ¶ 15.

150. Man-camps near other Indigenous communities have likewise disproportionately impacted those communities, exposing them to increased rates of drug use and violence, and consequent erosion of public safety and loss of quality of life. "The placement of oil and gas pipeline-related man-camps near Indigenous communities elsewhere in South Dakota and North Dakota has been associated with physical assaults against and murders of Native American women,

as well as drug and alcohol abuse within Native American communities." High Elk Red Horse Declaration (Dkt. 27-7) ¶ 5; *see also* Lone Eagle Declaration (Dkt. 27-15) ¶ 7; Braun Declaration (Dkt. 27-4) ¶¶ 5, 7; Meyer Declaration (Dkt. 65-2) ¶ 14; Cheek Declaration (Dkt. 27-6) ¶ 4. These horrific effects are impacts on the human environment, cognizable under NEPA. 40 C.F.R. § 1508.14 ("[w]hen . . . social and . . . physical environmental effects are interrelated, then the [EIS] will discuss all of these effects on the human environment"). Yet the 2019 FSEIS fails to disclose these impacts and explain how they will disproportionately harm the impacted Indigenous communities. This omission violates NEPA.

151. While the 2019 FSEIS claims that "[w]orkers who violate [TransCanada's] camp Code of Conduct would be dismissed," it does not disclose, let alone discuss, any of the requirements of that purported "camp Code of Conduct," depriving the public of any opportunity to evaluate its claimed efficacy as a mitigation measure. 2019 FSEIS 2-8. Nor does it explain how – or who – will determine if a violation has occurred. Nor does it reveal if this measure has ever been used. Without evidence documenting and comparing its actual use in response to the many documented acts of man-camp-related violence against Indigenous women and children, it is just empty words on a piece of paper.

152. Furthermore, dismissal is only one of the many mitigation measures that the FSEIS should have considered and evaluated to halt these horrendous depredations by man-camp-housed transients against Indigenous communities. Other measures that should have been examined include more thorough

background checks on employees, employee education and supervision, restrictions on employee travel to nearby Indigenous communities, curfews, enforceable prohibitions against alcohol and drugs, enhanced communication with local – including tribal – law enforcement agencies to develop coordinated responses to criminal activity, and financial and logistical support to local and tribal law enforcement agencies to facilitate their investigation and criminal prosecution of crimes against Indigenous community members. The FSEIS should have evaluated whether TransCanada should be required to undertake these other measures to cooperate and coordinate with law enforcement agencies both locally and regionally to facilitate questioning, investigation, and apprehension when appropriate.

153. Yet the FSEIS is silent on these critically needed measures to address and mitigate these violent acts against Indigenous women and children. By limiting its consideration of the potential responses to man-camp-related violence against Indigenous women and children to quiet, private dismissal of employees who violated TransCanada's undisclosed "camp Code of Conduct," the 2019 FSEIS downplays the severity of these impacts and their disproportionate effects on Indigenous communities. At the same time, it fails to identify and evaluate a reasonable range of potentially effective mitigation measures. Consequently, it ignores NEPA's command that federal agencies take a hard look at Keystone's impacts on the human environment, and at measures that would reduce those impacts.

DEFENDANTS' APPROVAL VIOLATES NEPA BECAUSE IT EXCEEDS THE SCOPE OF THE PROJECT CONSIDERED IN THE FSEIS

154. Defendant BLM's Record of Decision ("ROD") incorporates and references the Project's Plan of Development ("POD"). The POD indicates that the Project includes the construction of seven man camps in Montana, four in South Dakota, and one in Nebraska – a total of 12 camps. POD 13-14. This contradicts the 2019 FSEIS, which states that "a total of 11 camps are currently being considered, 6 in Montana, 4 in South Dakota and 1 in Nebraska." 2019 FSEIS, 2-6. Indeed, the 2019 FSEIS states that the Proposed Whitewater Camp in Montana "has been removed" from the Project. *Id.* Yet despite this purported removal, the Whitewater Camp is included in the maps that provide the Project overview included within BLM's ROD (Appendix B, Map A). Thus, BLM's approval appears to improperly exceed the scope of the Project it studied and disclosed to the public.

FIFTH CLAIM FOR RELIEF

(Violation of the Mineral Leasing Act)

(Against All Defendants)

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

156. The Mineral Leasing Act, 30 U.S.C. sections 181, et seq. ("MLA"), governs the grant of rights-of-way for oil pipelines through federal land. 30 U.S.C. § 185.

157. The MLA specifies that the approval of all rights-of-way must comply with any applicable NEPA requirements. 30 U.S.C. § 185(h)(1). In furtherance of this mandate, it calls for any applicant "to submit a plan of construction, operation, and rehabilitation for such right-of-way or permit which shall comply with this section," including the command that rights-of-way comply with NEPA. 30 U.S.C. § 185(h)(2).

158. BLM's regulations likewise direct that the applicant must, "[t]o the extent practicable, comply with all existing and subsequently enacted, issued, or amended Federal laws and regulations," including NEPA. 43 C.F.R. § 2885.11(b)(1). They command that the applicant must "[c]omply with project-specific terms, conditions, and stipulations, including requirements to: . . . Control or prevent damage to scenic, aesthetic, cultural, and environmental values, including fish and wildlife habitat, and to public and private property and public health and safety." 43 C.F.R. § 2885.11(b)(9)(iii).

159. Because BLM issued the right-of-way grant for the Project notwithstanding Defendants' numerous and egregious NEPA violations discussed above, Defendants violated the MLA mandate that any right-of-way authorization must comply with all applicable federal laws, including NEPA.

SIXTH CLAIM FOR RELIEF

(Violation of the Federal Land Policy and Management Act)

(Against All Defendants)

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

161. The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. section 1701 *et seq*., directs that

> public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8).

162. In furtherance of that mandate, FLPMA requires BLM to limit to the extent feasible the natural resource damage that Keystone would cause along its right-of-way. 43 U.S.C. § 1765. FLPMA commands that BLM "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b); 43 C.F.R. § 2801.2(b). It further requires that "[e]ach right-of-way shall be limited to the ground which the Secretary concerned determines . . . will do no unnecessary damage to the environment." 43 U.S.C. § 1764(a).

163. FLPMA also commands that "[e]ach right-of-way shall contain . . . terms and conditions which will . . . minimize damage to scenic and esthetic

values and fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. § 1765(a). These requirements are strictly enforced and cannot be easily counterbalanced, and can never be displaced, by project proponents' claims of inconvenience or cost. *Trout Unlimited v. U.S. Dept. of Agriculture,* 320 F.Supp.2d 1090, 1108 (D. Colo. 2004). "FLPMA itself does not authorize [a federal agency's] consideration of the interests of private facility owners as weighed against environmental interest such as protection of fish and wildlife habitat." *Id*. Indeed, FLPMA "simply does not allow [a federal agency] to ignore options that would minimize environmental degradation because of the costs to private parties and difficulty in implementation." *Id*.

164. Contrary to these environmental mandates, BLM approved the right-of-way grant for Keystone, despite its significant impacts that will cause unnecessary and undue degradation of the environment. Notably, spills are expected along the pipeline every year and a leak of up to 16,600 barrels per day would go undetected "in real time" by the automatic leak detection systems. A single significant spill, like those that have occurred along the original Keystone Pipeline, would unnecessarily and unduly degrade the environment. Furthermore, the Project poses a direct threat to the historic and cultural sites important to Indigenous communities, and will disproportionately impact those communities. Because Keystone as approved will unduly degrade the human environment, BLM's approvals violate FLPMA.

165. BLM also failed to consider terms and conditions that would avoid or reduce the Project's impacts because BLM has not adequately disclosed and examined those impacts, and mitigation measures that would reduce them. As noted, FLPMA "simply does not allow [a federal agency] to ignore options that would minimize environmental degradation." *Trout Unlimited v. U.S. Dept. of Agriculture,* 320 F.Supp.2d at 1108. Because BLM has not been fully informed of the Project's potential impacts, it cannot properly evaluate and guard against the Project's environmental harms as required by FLPMA.

166. Because Keystone will cause unnecessary and undue degradation to the environment, and BLM failed to explore, evaluate and adopt terms and conditions that would avoid or reduce the Project's foreseeable impacts, BLM's ROD violates FLPMA and must be set aside.

SEVENTH CLAIM FOR RELIEF

(Violation of the Endangered Species Act)

(Against Defendants Fish and Wildlife Service, its Director Skipwith, and Interior Secretary Bernhardt)

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

168. Any action "authorize[d], fund[ed], or carr[ied] out" by a federal agency which may affect listed species or their critical habitat is subject to inter-agency consultation under section 7 of the ESA, 33 U.S.C. section 1536. "A

federal agency must initiate formal consultation if its proposed action 'may affect' listed species or critical habitat, and any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement." *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011) (internal quotes omitted).

169. The consultation process under section 7 of the ESA requires BLM as the "action agency" to consult with the Secretary of Interior to ensure that BLM's actions are "not likely to jeopardize the continued existence of any endangered species . . . ." 16 U.S.C. §1536(a)(2). In order to fulfill this statutory mandate, both BLM and FWS must use the "best scientific and commercial data available." *Id.* Except for listed species that inhabit the ocean, by statute and regulation FWS is the agency within the Department of the Interior with specific expertise in the habitat requirements, population trends and ecological health of endangered and threatened species. Therefore, when conducting this required consultation it must apply that expertise to independently evaluate claims by action agencies that their proposed actions will not harm listed species.

170. The consultation process often begins with informal consultation, an "optional process that includes all discussions, correspondence, etc., between the Service and the Federal [action] agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required." 50 C.F.R. § 402.13(a). If, during informal consultation, both the action agency *and* the Department of the Interior's

consulting agency with expertise in listed species – in this case FWS – determine that "the action is not likely to adversely affect listed species," then the consultation process is terminated. *Id.* This termination requires specific, written concurrence by FWS. *Id.*

171. In the event either of the agencies determines that the proposed action may adversely affect listed species, they must initiate formal consultation. 50 C.F.R. § 402.14. Formal consultation requires a detailed inquiry into the scope and extent of adverse effects upon listed species which may result from the proposed action. *Id.* The formal consultation process must result in a biological opinion reaching one of two conclusions: that the project will, or will not, jeopardize listed species. 50 C.F.R. § 402.14(e).

172. If the project will jeopardize the continued existence of a listed species, harming or killing ("taking") that species creates civil and criminal liability under section 9 of the ESA. If, however, the biological opinion concludes that the project will not jeopardize the continued existence of the listed species, but will cause the "incidental take" of members of that species, FWS will provide an incidental take statement authorizing a certain number or extent of takings allowed, and specifying "reasonable and prudent measures" required to minimize the impact. 50 C.F.R. § 402.14(i).

173. While BLM's 2019 Biological Assessment acknowledges that exposure to oil spills could harm listed species, it dismisses the likelihood of harm

as insignificant "due to the low probability" that a spill would impact species' habitat. *E.g.* 2019 Biological Assessment 47-48, 51 (interior least tern), 65-67 (whooping crane), 82-83 (pallid sturgeon), 89 (Topeka shiner), 130-131 (northern long-eared bat), 165-166 (western-fringed prairie orchid), 146-147 (piping plover). It does so even though it acknowledges that spills are *likely* to occur, within the "known range" that may be occupied by these species, at a frequency of *nearly twice per year* (0.6 years between spills) for the whooping crane and at lower, but still significant, frequencies for the other listed species, down to the lowest frequency, once every 33.3 years, for the Topeka shiner. *Id.* Because FWS failed to require formal consultation even though, as the agency with expertise in protection of listed species, it knew that formal consultation was needed to address these substantial, admitted risks, FWS failed to perform its consultation duties under section 7 of the ESA.

174. On December 23, 2019, FWS improperly concluded informal consultation as to these species by concurring in the 2019 Biological Assessment's conclusions.[7] Yet as noted, the 2019 Biological Assessment fails to provide an adequate basis for FWS's determination that Keystone is "not likely to adversely affect" these species. In its concurrence letter, FWS failed to disclose, analyze and address Keystone's adverse oil spill impacts on the listed species it purportedly determined were not likely to be "adversely affect[ed]" by Keystone.

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[7] On December 23, 2019, FWS also issued a Biological Opinion specific to Keystone's impacts to the American Burying Beetle.

175. FWS's December 23, 2019 concurrence letter constitutes final agency action under the APA.

176. By issuing its December 23, 2019 concurrence letter based upon, and without independently and critically evaluating, BLM's inadequate 2019 Biological Assessment, FWS violated the ESA, 16 U.S.C. section 1531 *et seq*., and its implementing regulations, 50 C.F.R. part 402. Because FWS issued its concurrence without requiring formal consultation, despite the deficient Biological Assessment, FWS failed to proceed in accordance with law in violation of the APA, 5 U.S.C. section 706(2)(A) and (D). By issuing its concurrence without an adequate factual and scientific basis, and without reliance upon the best scientific and commercial data available, FWS violated the ESA and the APA. 16 U.S.C. § 1536(a)(2); 5 U.S.C. § 706(2). Accordingly, its concurrence must be set aside.

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. Adjudge and declare that the Department of State's 2019 Final SEIS violates NEPA.

6. Adjudge and declare that in issuing the ROD, BLM failed to proceed in the manner required by NEPA, the MLA, FLPMA, the ESA, and the APA, BLM's approval of the Project must accordingly be vacated and set aside.

7. Adjudge and declare that by issuing its December 2019 concurrence letter and not requiring formal consultation with BLM, FWS failed to proceed in the manner required by the ESA, and therefore FWS's concurrence letter must accordingly be vacated and set aside under the APA.

8. Preliminarily and permanently enjoin all Defendants, including Intervenor 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 NEPA, the MLA, FLPMA, the ESA, and the APA, and their implementing regulations;

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

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

Respectfully submitted,

Dated: August 18, 2020

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

Dated: August 18, 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 August 21, 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] THIRD AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF

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

Dated: August 21, 2020

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

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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; AURELIA SKIPWITH, in her	Civ. No. CV 19-28-GF-BMM **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT UNDER F.R. CIV. PRO. 15** **Hearing:** **Time:** **Judge: Hon. Brian M. Morris**

official capacity as 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.

I. INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 15(a)(2) and (d), Plaintiffs respectfully submit this Motion for Leave to File their Third Amended and Supplemental Complaint.[1] In December 2019, the Department of State issued its Final Supplemental Environmental Impact Statement for the Keystone XL Project ("2019 FSEIS") in response to this Court's November 8, 2018 Order in *Indigenous Environmental Network, et al. v. United States Department of State, et al.*, 347 F.Supp.3d 561 (D.Mont. 2018). On January 22, 2020, relying on the 2019 FSEIS,

[1] The proposed Third Amended and Supplemental Complaint and related Motion will, if allowed by this Court, supersede and subsume the proposed Second Amended Complaint and related motion to file it currently pending before this Court.

the Bureau of Land Management ("BLM") issued its Record of Decision for the Keystone XL Pipeline Project Decision to Grant Right-of-Way and Temporary Use Permit on Federally-Administered Land ("ROD"). But the 2019 FSEIS, and subsequently the ROD, fail to comply with the National Environmental Policy Act, 42 U.S.C. sections 4321, et seq. ("NEPA"). The ROD and related approvals of the Project by the Federal Defendants also violate other environmental laws, as explained in Plaintiffs' [Proposed] Third Amended and Supplemental Complaint.

Pursuant to Local Rule 15.1, a copy of Plaintiffs' [Proposed] Third Amended and Supplemental Complaint for Declaratory and Injunctive Relief is attached as Exhibit 1 to the concurrently filed Notice of Motion and Motion.

II. BACKGROUND

On April 5, 2019, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief (Dkt. 1) against the Federal Defendants challenging Trump's issuance of a Presidential Permit for the Keystone XL Pipeline on March 29, 2019 ("2019 Permit"). Plaintiffs sought judicial review pursuant to this Court's federal question jurisdiction under 28 U.S.C. section 1331 raising two Claims for Relief alleging violations of Article 1, section 8, clause 3 ("Commerce Clause") and Article IV, section 3, clause 2 ("Property Clause") of the United States Constitution.

In response to the motions to dismiss filed by Trump on June 27, 2019 (Dkt. 22) and Defendant-Intervenors TransCanada Keystone Pipeline LP and TC Energy Corporation (collectively, "TC Energy") on July 16, 2019 (Dkt. 32), on July 18,

2019 Plaintiffs filed their First Amended Complaint (Dkt. 37) clarifying certain allegations and separately stating a Third Claim for Relief alleging violations of Executive Order 13,337 (69 Fed.Reg. 25299; May 5, 2004).

On August 1, 2019 Trump and TC Energy again filed motions to dismiss (Dkt. 51, 49). By Order filed December 20, 2019 (Dkt. 73), this Court denied Defendants' motions to dismiss. However, this Court noted that "Plaintiffs' claims currently before the Court do not directly present the question of whether the 2019 Executive Order proves lawful." Order 37. Therefore, Plaintiffs filed a Motion for Leave to File Second Amended Complaint on March 2, 2020 (Dkt. 108) to address Trump's unlawful 2019 Executive Order. This Court heard the matter on April 16, 2020, but has not yet ruled on the motion.

Plaintiffs filed a motion for a preliminary injunction to prevent any surface disturbing activities by Trump or TC Energy on July 10, 2019, which the Court denied without prejudice because irreparable harm was not then imminent by Order filed December 20, 2019 (Dkt. 73). After TC Energy changed its plans and announced its intent to commence ground-disturbing activities in February 2020 (Dkt. 75), on January 31 Plaintiffs renewed their preliminary injunction motion (Dkt. 82). Briefing on that motion was completed on February 18, 2020, and the court held a hearing on the motion on April 16, 2020.

The parties also filed cross-motions for summary judgment. TC Energy filed its motion on January 24, 2020 (Dkt. 77), and Plaintiffs and the Federal Defendants both filed their motions on February 25, 2020 (Dkts. 100, 95,

respectively). Briefing on the cross-motions for summary judgment was completed on April 1, 2020. This Court held a hearing on the cross-motions on April 16, 2020. The Court has not yet ruled on those motions.

III. THE GROUNDS FOR AMENDMENT COMPLY WITH RULE 15

Plaintiffs move for leave to file their Third Amended and Supplemental Complaint pursuant to Federal Rule of Civil Procedure 15, which governs the amendment and supplementation of complaints. This rule supports Plaintiffs' Motion and gives the Court broad authority to approve the amendment. Rule 15(a) permits a party to amend a pleading "with the opposing party's written consent or the court's leave," and directs that "[t]he court should freely give leave when justice so requires." As explained in the accompanying declaration of counsel, Defendants have not consented to the proposed amendment. Rule 15(d) provides that a party may, with leave of the court, "serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." *Id.* "While some relationship must exist between the newly alleged matters and the subject of the original action, they need not all arise out the same transaction or occurrence." *Keith v. Volpe*, 858 F.2d 467, 474 (9th Cir. 1988).

Plaintiffs' proposed amendment is fully consistent with Rules 15(a)(2) and (d). Rule 15 is construed with "extreme liberality" in favor of amendment. *Eminence Capital, L.L.C., v. Aspeon, Inc*., 316 F.3d 1048, 1051 (9th Cir. 2003); *see also AmerisourceBergen Corp. v. Dialysis West, Inc.*, 445 F.3d 1132, 1136

(9th Cir. 2006). "Federal policy strongly favors determination of cases on their merits. Therefore . . . leave to amend the pleadings is freely given unless the opposing party makes a showing of undue prejudice, or bad faith or dilatory motive on the part of the moving party." California Practice Guide (The Rutter Group 2020), Federal Civil Procedure Before Trial § 8:1461, *citing Foman v. Davis* (1962) 371 U.S. 178, 182, *Sonoma County Association of Retired Employees v. Sonoma County*, 708 F.3d 1109, 1117 (9th Cir. 2013). Likewise, "supplemental pleadings are favored because they enable the court to award complete relief in the same action, avoiding the costs and delays of separate suits. Therefore, absent a clear showing of prejudice to the opposing parties, they are liberally allowed." *Id.* at § 8:1750, *citing Keith v. Volpe,* 858 F2d at 473. The "standards for granting or denying motion[s] to supplement under Rule 15(d) are [the] same as [the] standards for leave to amend under Rule 15(a)." California Practice Guide, *supra*, § 8:1750.

Accordingly, "the circumstances under which Rule 15(a) 'permits denial of leave to amend are limited.'" *Id.*, citing *Ynclan v. Department of Air Force* (5th Cir. 1991) 943 F.2d 1388, 1391. While courts need not grant leave to amend or supplement where defendants can prove that the amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in the litigation; or (4) is futile, Defendants cannot show that these factors prevent amendment or supplementation here.

First, Defendants cannot show prejudice. Defendants are familiar with the

relevant law, as well as the content of the 2019 FSEIS and ROD. Defendants are likewise aware that Plaintiffs have serious concerns regarding the adequacy of the 2019 FSEIS, including its failure to comply with NEPA and address this Court's November 8, 2018 Order. Plaintiffs submitted comments to the Department of State on the Draft SEIS on November 18, 2019, but the FSEIS failed to remedy the inadequacies Plaintiffs raised. Furthermore, Defendants were party to Plaintiffs' original lawsuit that resulted in this Court's November 8, 2018 Order triggering the drafting of the 2019 FSEIS. Because Defendants are aware and have been aware of Plaintiffs' concerns and intention to ensure compliance with important environmental laws, and because Defendants have ample time to respond to Plaintiffs' arguments, Defendants cannot show prejudice.

Second, Defendants cannot show bad faith. Plaintiffs seek to amend in good faith to address Defendants' subsequent unlawful actions, which continue Defendants' failure to comply with applicable law.

Third, the proposed amendment will not unduly delay litigation. Federal Defendant's failure to conduct adequate environmental review before granting permits to construct and operate the Keystone XL Pipeline, including BLM's right-of-way grant, presents a question of law based on its own administrative record of proceedings, for this Court to resolve under the Administrative Procedure Act, 5 U.S.C. section 706. All of the claims in this Third Amended and Supplemental Complaint address the legality of the Project approvals, and Defendants' failure to comply with the law. The additional briefing required to

resolve Plaintiffs' new allegations will not significantly delay resolution of this litigation. In fact, amendment and supplementation will "enable the court to award complete relief in the same action, avoiding the . . . delays of separate suits." *Id.,* at § 8:1750, *citing Keith v. Volpe,* 858 F2d at 473.

Fourth, Defendants cannot show that this amendment is futile. Plaintiffs' proposed Third Amended and Supplemental Complaint properly raises claims arising from Defendants' subsequent conduct that continues Defendants' previous and ongoing failures to comply with environmental laws while authorizing the Keystone XL Project. As Plaintiffs' claims are timely, cognizable, and not barred by prior orders of this Court, Plaintiffs' amendment is not futile.

Particularly where the amendment is proffered in a good faith effort to consolidate and focus this Court's review to avoid potential duplication of effort by the parties and this Court, leave to amend should be granted. Plaintiffs seek to add new allegations that update the Court on the current factual context and thereby avoid the need to file a separate lawsuit to adjudicate these new claims. Plaintiffs strive to minimize the burden on court and counsel. Doing so clearly serves the interests of justice.

For each of these reasons, Plaintiffs should be granted leave to file their Third Amended and Supplemental Complaint for Declaratory, Injunctive, and Mandamus Relief as requested.

IV. PLAINTIFFS' REASONS FOR AMENDMENT ARE COMPELLING

Plaintiffs present compelling reasons for their motion for leave to amend

and supplement the complaint. BLM's ROD is predicated on an inadequate environmental review, and unless set aside by this Court, will authorize substantial yet avoidable environmental harms. Because the 2019 FSEIS fails to adequately disclose and analyze the Project's greenhouse gas impacts, oil spill risks and harms, and cultural resource impacts, among others, BLM's ROD will allow the Project to proceed without first providing the public and decision makers with the environmental review that NEPA requires. By relying on the inadequate 2019 FSEIS to approve its right-of-way grant, temporary use permit, and plan of development, BLM violated its duty as a cooperating agency under NEPA.

Further, Plaintiffs' proposed amendments will allow this Court to address the full range of constitutional and statutory infirmities that plague the Project and its approvals. Those amendments bring to this Court's attention and resolution Plaintiffs' new allegations that BLM's January 2020 ROD is unlawful because it relies on an inadequate 2019 FSEIS. Plaintiffs' proposed Third Amended and Supplemental Complaint provides the Court with an updated and complete understanding of Defendants' extant approvals of the Project and Plaintiffs' allegations challenging those approvals so that the Court may in one action and based on one record rule on all of Plaintiffs' challenges to Defendants' Project approvals. Doing so will conserve the resources of the parties and the Court.

V. PLAINTIFFS HAVE REQUESTED CONSENT

Rule 15(a)(2) states that after the passage of 21 days following the filing of a motion to dismiss, "a party may amend its pleading only with the opposing

party's written consent or the court's leave." *Id.* However, this Rule also directs that "[t]he court should freely give leave [to amend] when justice so requires." *Id.* As explained in the accompanying Declaration of Counsel, the Federal Defendants and the Defendant-Intervenors have declined to consent to the proposed amendments. However, even though consent has not been given, leave to amend should be granted for the reasons stated above.

VI. CONCLUSION

Plaintiffs' Motion should be granted because it advances the policy of the federal courts to serve justice, conserve resources, and resolve matters on their merits where possible. Plaintiffs seek leave to amend their Complaint to bring all related claims together in a single proceeding.

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs leave to file their Third Amended and Supplemental Complaint.

Respectfully submitted,

Dated: August 21, 2020

LAW OFFICES OF STEPHAN C. VOLKER

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

Dated: August 21, 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 COMPLIANCE

Pursuant to Montana District Court, Civil Rule 7.1(d)(2)(B), I certify that **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT UNDER F.R. CIV. PRO. 15** contains 2023 words, excluding caption and certificate of service, as counted by WordPerfect X7, the word processing software used to prepare this brief.

s/ *Stephan C. Volker*

CERTIFICATE OF SERVICE

I, Stephan C. Volker, am a citizen of the United States. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Stephan C. Volker, 1633 University Avenue, Berkeley, California 94703.

On August 21, 2020 I served the following documents by electronic filing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the email addresses registered in the above entitled action:

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT UNDER F.R. CIV. PRO. 15

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

Dated: August 21, 2020

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

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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; AURELIA SKIPWITH, in her	Civ. No. CV 19-28-GF-BMM **DECLARATION OF STEPHAN C. VOLKER IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT UNDER F.R. CIV. PRO. 15** **Hearing:** **Time:** **Judge: Hon. Brian M. Morris**

official capacity as 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.

I, Stephan C. Volker, hereby declare:

1. I am lead counsel to Plaintiffs Indigenous Environmental Network, et al. and make this Declaration in support of their Motion for Leave to File Third Amended and Supplemental Complaint for Declaratory, Injunctive and Mandamus Relief. I have personal knowledge of the facts stated below, and if called as a witness, would so testify.

2. On August 19, 2020, at approximately 2:36 pm PDT, I emailed a copy of Plaintiffs' proposed Third Amended and Supplemental Complaint to counsel for the Federal Defendants Donald J. Trump, et al., and Defendant-Intervenors TransCanada Keystone Pipeline LP and TC Energy Corporation along with a redline version showing the changes from Plaintiffs' operative First Amended Complaint, and requested their consent to Plaintiffs' Motion for Leave to File

Third Amended and Supplemental Complaint. On August 20, 2020, counsel for the Federal Defendants responded that they would oppose the motion. On August 21, counsel for Defendant-Intervenors responded that they would likewise oppose the motion.

I declare under penalty of perjury that the foregoing facts are true and correct of my personal knowledge, that I am competent to and if called would so testify, and that this Declaration was executed on August 21, 2020 in Berkeley, California.

Dated: August 21, 2020

s/ *Stephan C. Volker*
STEPHAN C. VOLKER

CERTIFICATE OF SERVICE

I, Stephan C. Volker, am a citizen of the United States. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Stephan C. Volker, 1633 University Avenue, Berkeley, California 94703.

On August 21, 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:

DECLARATION OF STEPHAN C. VOLKER IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT UNDER F.R. CIV. PRO. 15

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed in Berkeley, California on August 21, 2020.

s/ *Stephan C. Volker*

STEPHAN C. VOLKER (Pro Hac Vice)