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

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE, Plaintiffs, vs. PRESIDENT DONALD J. TRUMP, UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GENERAL TODD T. SEMONITE, Commanding General and Chief of Engineers; UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency; GREG SHEEHAN, in his official	Civ. No. CV 19-28-GF-BMM **PLAINTIFFS' SUPPLEMENTAL BRIEF** **Judge: Hon. Brian M. Morris**

capacity as Acting Director of the U.S. Fish and Wildlife Service; UNITED STATES BUREAU OF LAND MANAGEMENT, and DAVID BERNHARDT, in his official capacity as Acting U.S. Secretary of the Interior,

Defendants,

TRANSCANADA KEYSTONE PIPELINE, LP, a Delaware limited partnership, and TC ENERGY CORPORATION, a Canadian Public Company,

Defendant-Intervenors.

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INTRODUCTION

Plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance (collectively "IEN") respectfully submit this Supplemental Brief pursuant to this Court's October 16, 2020 Order (Dkt. 147). This Court sought additional guidance on the tension between Congressional and Presidential authority as it relates specifically to cross-border pipeline permits. As the following discussion makes clear, the context of each Presidential action at issue must be examined carefully, for it is the context that is determinative.

In particular, it is important to bear in mind that Congress has chosen to exercise its constitutional powers under the Commerce Clause and the Property Clause broadly, by adopting statutes that apply comprehensively to all federal agency actions that impact federal lands, waters and wildlife, rather than narrowly through adoption of a specific regulatory scheme for cross-border pipeline permits. Congress clearly intended that Executive Branch actions that impact these federal resources be made by federal agencies rather than the President acting alone, for three reasons.

First, agency actions are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. sections 701-706 ("APA"), which is a reliable, time-tested method of assuring that executive actions comply with and implement Congress's direction. Judicial enforcement of the limitations that Congress placed on federal agency action provides the check on executive power that the Framers intended to protect Congress's exercise of its powers.

Second, agency actions are specifically identified in each of the statutes that comprise the comprehensive scheme for environmental protection that Congress adopted. The National Environmental Policy Act, 42 U.S.C. section 4321 et seq. ("NEPA"), for example, applies broadly to "all *agencies* of the Federal Government," which are charged with enumerated responsibilities to assure that they "utilize a systematic, interdisciplinary approach" to "insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," and to that end, "include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment . . . a detailed statement by the responsible official on . . . the environmental impact of the proposed action." 42 U.S.C. § 4332 (2)(A), (C) (emphasis added). The Endangered Species Act, 16 U.S.C. section 1531, et seq. ("ESA") likewise applies to "[e]ach Federal *agency*." *E.g.*, 16 U.S.C. § 1536(a)(2) (imposing on all federal agencies the duty to consult with the two resource agencies with expertise in protection of threatened and endangered species and their critical habitat). Similarly, the Clean Water Act, 33 U.S.C. section 1251 et seq. ("CWA"), imposes specific duties on federal *agencies* such as the Corps of Engineers to regulate the discharge of dredged or fill material into navigable waters (33 U.S.C. section 1344), and requires all federal agencies to secure water quality certifications from affected states before permitting any discharge of pollutants into those navigable waters (33 U.S.C. section 1341). Congress did not intend that the Executive

Branch be free to evade these emphatic and broadly applicable, yet detailed, statutory protections by taking actions directly through the office of the President rather than through the federal agencies that Congress had created and empowered specifically to implement its comprehensive scheme.

Third, Congress went to great lengths to assure that federal agencies have the specific statutory guidance, funding and expertise to carry out Congress' comprehensive scheme of environmental protection. It did not, by contrast, simply give the Executive Branch a large, untethered check to spend as the President wished.

For each of these reasons, the brilliant, albeit necessarily rough, doctrinal template outlined by Justice Jackson in his celebrated concurrence in *Youngstown Sheet & Tube v. Sawyer* (*"Youngstown"*), 343 U.S. 579, 635 (1952) must be informed by an understanding of the manner in which Congress has chosen to exercise its powers under the Commerce Clause and the Property Clause. The key to understanding why Executive Branch actions taken pursuant to Executive Orders 11,423 and 13,337 are constitutional, while those that sidestep those Executive Orders are not, is that those orders recognized the role of federal agencies – most notably, the Department of State – in assuring that Congress's comprehensive scheme for environmental protection would be carried out, rather than ignored.

ARGUMENT

1. Where on the Youngstown spectrum do each of the following individual executive actions lie:

Overview and Summary

As this Court accurately observed, it has the authority to "determine whether a unilateral presidential action went beyond the bounds of the executive power and infringed on the enumerated powers of Congress." Dkt. 147 at 20. In making that determination, the Court relies on a framework that places presidential actions in (or near) one of three categories identified by Justice Jackson in his concurring opinion in *Youngstown*, 343 U.S. at 635. "Executive actions 'in any particular instance fall[] not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.'" Dkt. 147 at 22 (*quoting Dames & Moore v. Regan* ("*Dames & Moore*"), 453 U.S. 670, 669 (1981)).

Under the first category of that framework, the Supreme Court indulges the strongest presumption to support the President's action when he "acts pursuant to an express or implied authorization of Congress." *Youngstown,* 343 U.S. at 635 (Jackson, J., concurring). President's Trump's 2019 Presidential Permit does not fall within the first prong, because it was not "pursuant to an express or implied authorization of Congress." *Id.*

The second category applies when the President and Congress have "concurrent authority," due to "absence of either a congressional grant or denial of

authority." *Youngstown,* 343 U.S. at 637. In such an instance, the President "can only rely upon his own independent powers," and this Court examines whether "'congressional inertia, indifference or quiescence may' invite the exercise of executive power.'" December 20, 2019, Order Denying Motions to Dismiss ("Dkt. 73") at 27 (*quoting Zivotofsky v. Kerry* (*"Zivotofsky*"), 576 U.S. 1, 11 (2015), in turn *quoting Youngstown*, 343 U.S. at 637 (additional quotes omitted)).

The third category applies "[w]hen the President takes measures incompatible with the expressed or implied will of Congress." *Id.* (quoting *Youngstown*, 343 U.S. at 637). In this context, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.'" *Id*. (*quoting Youngstown*, 343 U.S. at 637). This is the context of the present case, for the President has received no Congressional delegation of power to grant transboundary permits absent compliance with Executive Order 13,337, and his issuance of the 2019 Presidential Permit – in sharp contrast to the 2017 Presidential Permit, which was issued by the Secretary of State *after* preparation of an Environmental Impact Statement ("EIS") as required by NEPA and in recognition of the other environmental laws and procedures that applied – violates all of the environmental review procedures mandated by NEPA, the ESA, the CWA and the APA.

1. Commerce Clause.

The Constitution grants Congress, not the President, exclusive power over

international commerce. U.S. Const., Art. I, § 8, cl. 3; *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2009); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994); *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56 (1933). While the "President has a degree of independent authority to act" in foreign affairs, "Congress holds *express authority* to regulate public and private dealings with other nations in its . . . foreign commerce powers." *American Insurance Association v. Garamendi*, 539 U.S. 396, 414 (2003) (emphasis added).

Authorization of a cross-border pipeline across federal lands falls squarely within Congress' "exclusive and plenary" powers to regulate foreign commerce. *Board of Trustees*, 289 U.S. at 56. The cross-border transport of foreign oil is a quintessential matter of foreign commerce. *United States v. Ohio Oil Co.*, 234 U.S. 548, 560 (1914) (affirming Congress' power under the Foreign Commerce Clause to regulate the transportation of oil); *Alaska v. Brown*, 850 F.Supp. 821, 827 (D.Ak. 1994) (regulating oil exportation is within Congress' "plenary power over foreign commerce"). "There can be no dispute that a connection exists to the United States when a party seeks to build a cross-border pipeline facility that physically connects the United States and Canada." Dkt. 73 at 23. "Even employing a narrow definition of commerce, . . . the transportation of crude oil from Canada to the United States falls within Congress's power to regulate foreign commerce." Dkt. 73 at 23.

The President shares this power only where Congress has delegated it. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign*

Affairs, 111 Yale L.J. 231, 253 (2001) ("the President's executive foreign affairs power is residual, encompassing only those executive foreign affairs powers not allocated elsewhere by the Constitution's text"). Congress has not done so here, for neither President Trump nor TransCanada has identified any statute that delegates this power to the President.

2. Property Clause

Likewise the Property Clause of the U.S. Constitution grants only Congress – and not the President – the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other *Property belonging to the United States*." U.S. Constitution, Article IV, section 3, clause 2 (emphasis added); *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976); *League of Conservation Voters v. Trump* ("*League*"), 363 F.Supp.3d 1013, 1017 n. 20 (2019). Congress has never ceded its Property Clause power to the President. To the contrary, it has directed the Bureau of Land Management ("BLM") and the Corps of Engineers – rather than the President – to manage all of the federal lands and waters that Keystone would cross, in accordance with a comprehensive statutory scheme including the Federal Land Policy Management Act, 43 U.S.C. section 1701 et seq. ("FLPMA") and the Mineral Leasing Act, 30 U.S.C. section 181 et seq. ("MLA"). *See, e.g.*, 43 U.S.C. §§ 1712-1716 (land use planning and disposal, withdrawal, and exchange of public lands under FLPMA), 1732 (land management), 1761-1765 (rights-of-way); 30 U.S.C. §§ 185 (rights-of-way under the MLA).

Far from "congressional inertia, indifference or quiescence . . . invit[ing] the

exercise of executive power," *Zivotofsky*, 576 U.S. at 11, Congress forcefully exercised its powers over commerce and property to establish the laws that would guide the State Department's review of permits for cross-border oil pipelines, including FLPMA, the MLA, NEPA, the ESA, the CWA and the APA.

Conversely, nothing in the President's limited foreign affairs power authorizes him to dispose of property of the United States. "Although the President has the constitutional authority under Article II to provide for national security and conduct foreign affairs, the President's authority to dispose of [federal lands] can arise *only* by delegation from Congress." *League*, 363 F.Supp.3d at 1017, n. 20 (emphasis added); *Beaver v. United States*, 350 F.2d 4, 8 (9th Cir. 1965). No such delegation has ever been made.

Thus, presidential action purporting to issue a cross-border oil pipeline is plainly subject to Congress' exclusive purview within the third category on the *Youngstown* spectrum. Because the issuance of cross-border pipeline permits falls squarely within Congress' power to regulate foreign commerce and manage federal property, if a President goes beyond the scope of the procedure prescribed by Congress, his actions fall well outside his constitutional authority. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637. Particularly where Congress has prescribed a statutory scheme that constrains presidential action, a "Presidential

claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id*. at 637-638. Unless the President has recognized and complied with Congress's statutory scheme, any attempted usurpation of Congress's exclusive power to dispose of federal lands – including the 0.93 mile of BLM land within the 1.2-mile border segment here – exceeds his authority and is therefore *ultra vires*.

3. Application of the TPTCCA and Executive Order 13,337.

This Court has asked where the Temporary Payroll Tax Cut Continuation Act ("TPTCCA") and Executive Order 13,337 fall on the *Youngstown* spectrum. As discussed on pages 34-39 below, the TPTCCA and Executive Order 13,337 can and should be harmonized. Contrary to both, Trump issued the 2019 Permit without consulting the Secretary of State as required by the TPTCCA and Executive Order 13,337. The 2019 Permit simply ignores the TPTCCA, and openly defies Executive Order 13,337's requirement that the permit conform to the laws that govern Department of State permits such as NEPA, the APA, the ESA, FLPMA, the CWA, and the NHPA. Congress enacted those procedures and standards pursuant to the Foreign Commerce Clause and the Property Clause, to protect the environment and ensure proper management of federal lands and waters.

4. Conclusion

Because Congress has exclusive authority to regulate foreign commerce and

dispose of federal lands, and because Congress has not delegated that authority to the President, any Presidential intrusion into that authority necessarily falls within the third category of the *Youngstown* spectrum, as further discussed below.

. **a. Issuance of pre-1968 cross-border pipeline permits**

There is little information available about Presidential permits for cross-border oil pipelines prior to 1968. What we do know is that Congress has exclusive control over matters of foreign commerce, including the cross-border transportation of oil. Congress first regulated cross-border transportation of oil in 1906, when it passed the Hepburn Amendments to the 1887 Interstate Commerce Act, which applied the Interstate Commerce Act to persons or corporations who transported oil through pipelines "from one State . . . to any other State or Territory of the United States, . . . *or from any place in the United States to an adjacent foreign country*, or from any place in the United States through a foreign country to any other place in the United States," among other methods. Pub. L. 59-337, 35 Stat. 584 (1906) (emphasis added); Judith Matlock, *Federal Oil and Gas Pipeline Regulation: An Overview,* Rocky Mountain Mineral Law Foundation Paper No. 4, 4-1 (Feb. 23-24, 2011) ("Congress did not exercise its authority under the Commerce Clause to regulate pipelines transporting crude oil, liquids and refined petroleum products until the Hepburn Amendment in 1906 extended the Interstate Commerce Act ("ICA") to such pipelines.").

This is not surprising, since until the advent of the automobile ignited and propelled demand for petroleum across the United States, there was no interstate,

let alone international, network of oil pipelines to serve that demand. Once Congress signaled its intent to exercise its dormant – but nonetheless exclusive – constitutional authority to regulate the international transport of oil through pipelines, the President had to conform his actions to that paramount authority. Consequently Presidential intrusion into that exclusive authority is subject to the limitations – both explicit and implied – that Congress places on the President. And this Court's analysis of those actions must consider Congressional intent, and whether the President acted consistent with that intent.

The limited information that is available regarding pre-1968 cross-border pipeline permits either provides no insight into the process or shows that the process was not a unilateral action by the President. For example, the *Digest of International Law* indicates that *one* Presidential permit was issued in 1918, but it does not provide any information about the process under which it was issued, or whether the State Department was involved. Whiteman, Marjorie, *Digest of International Law*, Vol. 9, p. 920 (1968) ("Oil pipeline under Saint Clair River issued June 10, 1918"). There is slightly more information about a 1966 cross-border oil pipeline Presidential permit that indicates that the process was not a unilateral action by President Johnson. 31 Fed.Reg. 6204 (April 22, 1966). While the President did sign the permit, the "Department of State transmitted the . . . Presidential permit" to the applicant, and the Secretary of State "grant[ed] permission to construct, operate, and maintain [the] pipeline." *Id*. Furthermore, the permit required that the applicant provide the State Department with

information about certain actions, including notice of when the "connection authorized by [the] permit is made at the international boundary." *Id*. The evidence therefore shows that the State Department was indeed involved in the cross-border oil pipeline permitting process prior to 1968.

While the information available about actions prior to 1968 is limited, what we do know is that those actions were subject to the same constitutional requirements and separation of powers limitations that the branches are subject to today. Because Congress has exclusive authority over foreign commerce and cross-border pipeline permits, any presidential action either in furtherance of, or contrary to, that authority must be considered with Congressional intent in mind. Therefore, these actions fall squarely within the third category of the *Youngstown* framework, and "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 637-638.

b. Issuance of Executive Order 11423, Providing for the Performance of Certain Functions Heretofore Performed by the President with Respect to Certain Facilities Constructed and Maintained on the Borders of the United States, Exec. Order 11423, 33 Fed. Reg. 11741 (Aug. 20, 1968)

Executive Order 11,423 formalized the existing practice of State Department review and permitting of cross-border oil pipelines that thereafter continued smoothly and without incident or exception for over 50 years until President Trump unilaterally purported to approve Keystone through the 2019 Permit, without State Department review or compliance with federal

environmental laws. *See* Dkt. 73 at 3, 6, 27-28, 29. Executive Order 11,423 reflects the Executive Branch's recognition of the need to implement a comprehensive permitting scheme for the issuance of cross-border pipeline permits, with review by all federal agencies with interests, expertise and responsibilities as directed by Congress. 33 Fed.Reg. 11741 (Aug. 20, 1968). And while it is noteworthy that it was a Presidential action that formalized the permitting process, that Presidential action was consistent with, and in furtherance of, Congress's intent. Indeed, as further discussed below, "Congress implicitly approved of the system . . . whereby the Secretary of State reviewed cross-border permits and the Secretary of State made the national interest determination." Dkt. 73 at 28.

Because the President's actions here were limited to formalizing the process that Congress was implicitly approving – the President's issuance of a Presidential permit *after* the State Department reviews and makes a national interest determination – President Johnson was complying with Congress's apex authority over cross-border permits when he issued Executive Order 11,423. As such, that action falls between the second and third category on the *Youngstown* spectrum.

c. Executive Order 13,337, Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States, Exec. Order No. 13,337, 69 Fed. Reg. 25299 (April 30, 2004)

As shown above, Congress acquiesced to the comprehensive permitting

scheme adopted by President Johnson in Executive Order 11,423 (33 Fed.Reg. 11741-11742 (August 20, 1968)), because it was entirely compatible with the foreign commerce authority held by Congress. *See also* IEN Motion for Summary Judgment (Dkt. 101) at 19-20. President Bush merely modified this existing scheme slightly when he issued Executive Order 13,337 in 2004. This Court has already found that those changes were relatively minor. Dkt. 73 at 4. For example, Executive Order 13,337 adds a 15-day timeline for officials to notify the Secretary of State that they disagree with the proposed national interest determination. Executive Order 13,337 § (1)(i) (69 Fed.Reg. 25301). On the whole, Executive Order 13,337 reaffirmed the general review framework under which the Executive Branch had operated since 1968. And it reaffirmed that the State Department's permitting system does not "supersede or replace the requirements established under any other provision of law," such as those established under Congress' comprehensive scheme for regulating environmental protection, including NEPA, the CWA and the ESA. Executive Order 13,337 § 5 (69 Fed.Reg. 25301 (quote)).

Indeed, President Bush intended his amendments to Executive Order 11,423 to "expedite reviews of permits as necessary to accelerate the completion of energy . . . transmission projects . . . , while *maintaining* safety, public health, and environmental protections." 69 Fed.Reg. 25299 (emphasis added). Thus, Executive Order 13,337 expressly incorporated the State Department's existing environmental review procedures, at Title 22, Code of Federal Regulations, part

161. From 1980 until after this lawsuit was filed, these regulations indicated that cross-border pipelines required, at a minimum, the preparation of an environmental assessment as NEPA requires. 40 C.F.R. § 1508.9; 22 C.F.R. § 161.7(c)(1) (2004) ("Actions normally requiring environmental assessments" include "(1) Issuance of permits for construction of international bridges and pipeline (see Executive Order 11423 and the International Bridge Act of 1972 (Pub. L. 92-434, 86 Stat. 23))").

Consequently, Executive Order 13,337 continued the Executive Branch's long-standing comprehensive review of cross-border pipelines. Because that review was compatible with NEPA and the other environmental laws, Congress has no reason to overrule it. Instead, it fully acquiesced in it. Although "[p]ast practice does not, by itself, create power, . . .'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .'" *Dames & Moore*, 453 U.S. at 686 (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474, 1915)). President Bush's issuance of Executive Order 13,337 represents permissible Presidential action that is compatible with implementation of Congress' comprehensive scheme of environmental protection and thus tolerated by Congress.

Had Executive Order 13,337 not allowed for State Department review consistent with that agency's compliance with Congress's comprehensive statutory scheme including NEPA review, it would have violated the separation of powers embodied in the Foreign Commerce and Property Clauses. By contrast, because

President Trump's actions in issuing the 2019 Permit did not recognize and provide for NEPA review by the State Department – nor compliance with any other federal environmental law – before *that* permit was issued, those actions violated both of those clauses.

d. State Department Denial of TC Energy's application following Congress' passage of the Temporary Payroll Tax Cut Continuation Act ("TPTCCA"), Pub. L. No. 112-78, 125 Stat. 1280 (December 23, 2011)

The State Department's denial of TransCanada's 2008 application for a Presidential Permit comported with the direction Congress gave the Executive Branch in the TPTCCA. PL 112-78, § 501, 125 Stat. at 1289-1291. That denial, at President Obama's direction, was done in keeping with the President's duty under the Constitution to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

President Obama consulted with the State Department regarding its consideration of the national interest pursuant to Executive Order 13,337, and relied upon its expertise when the State Department determined that it lacked sufficient information to make such a determination in the time provided by Congress. 77 Fed.Reg. 5679 (Feb. 3, 2012). The State Department informed President Obama that it was seeking additional information, and "in order to consider relevant environmental issues and the consequences of the project on energy security, the economy, and foreign policy, [it] indicated that its review could be complete as early as the first quarter of 2013." *Id*. President Obama

relied upon the State Department's counsel in determining that "the Keystone XL pipeline project, as presented and analyzed at this time, would not serve the national interest." *Id*. And the State Department, acting pursuant to TPTCCA section 501 subdivision (b)(1), and Executive Order 13,337, denied the 2008 application based upon President Obama's direction. 77 Fed.Reg. 5614 (Feb. 3, 2012).

These actions are congruent with Congressional authority, as the President and the State Department exercised their discretionary functions using the framework that Congress prescribed. Under Justice Jackson's *Youngstown* framework, the Executive Branch's compliance with the TPTCCA falls closer to the first category, where Presidential power is at "its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 353 U.S. at 635. This is so because the TPTCCA delegated some of Congress's powers under the Foreign Commerce and Property Clauses to the President and the State Department, to be used in considering whether the 2008 application was in the national interest. Yet, because the President lacks his own authority to regulate federal lands and foreign commerce, it is *Congress* and *not* the President who controlled the manner in which the State Department denied the 2008 permit.

The 2019 Permit attempts to evade compliance with the procedural and substantive requirements imposed by Congress in three salient respects. First, it directs in Article 1, section 1, that "[t]his permit may be . . . amended at any time

at the sole discretion of the President of the United States (the 'President'), with or *without advice provided by any executive department or agency* (agency)." *Id.* (emphasis added). By these words, the 2019 Permit impermissibly arrogated to the President unfettered discretion to amend the 2019 Permit unilaterally, without any review by any federal agency including most notably the State Department, which as seen, is specifically granted authority to conduct such reviews by Executive Order 13,337. And, as noted, Executive Order 13,337's procedures, including State Department review, are specifically mandated by the TPTCCA. Because the 2019 Permit grants to the President exclusively, cross–border permit review authority that Executive Order 13,337 and the TPTCCA instead give to the State Department, it violates Congress's exercise of its power under the Foreign Commerce and Property Clauses to prescribe how that review is to be conducted. Therefore it is *ultra vires*.

Second, the 2019 Permit directs further in Article 1, section 1, that "[t]he permittee shall make no substantial change in the Border facilities, in the location of the Border facilities, or in the operation authorized by this permit until the permittee has notified the President or his designee of such change *and the President has approved the change." Id.* (emphasis added). Again, this language of the 2019 Permit impermissibly grants to the President unilateral authority to approve substantial changes to the "facilities," their "location," and their "operation" without any review by any federal agency, including the State Department whose review is specifically mandated by Executive Order 13,337 and

the TPTCCA. Because the 2019 Permit grants to the President exclusive authority to approve substantial changes to the Border facilities, their location, and their operation – authority that Executive Order 13,337 and the TPTCCA instead give to the State Department – it violates Congress's exercise of its power under the Foreign Commerce and Property Clauses to prescribe how that permit is to be reviewed and approved. Therefore it is *ultra vires*.

Third, the 2019 Permit prescribes in Article 1, section 2, that "construction, operation, and maintenance of the 'Facilities'" – i.e., per the Permit's definition at 84 Fed.Reg. 13101-13102, "the portion in the United States of the international pipeline project associated with the permittee's application for a Presidential permit filed on May 4, 2012 and resubmitted on January 26, 2017" – "*shall be, in all material respects* and as consistent with applicable law, as described in the permittee's application for a Presidential permit." *Id.* (emphasis added). This language requires approval of the permittee's application without material change, regardless of the views of the State Department or any other federal agency with regard to whether, and if so on what terms, the permittee's application should be approved, if at all. Mandating approval of the application and all its material terms without providing for review by the State Department or any other federal agency – and thus without regard for their substantive view of the application's terms – usurps the State Department's review and approval of the permit that is mandated in Executive Order 13,337 and the TPTCCA. Therefore it is *ultra vires*.

While the 2019 Permit does provide that "construction, connection,

operation, and maintenance of the Facilities" be "consistent with applicable law," that general reference does not save the Permit's constitutionality because as noted above, the Permit's exclusion of the State Department – and indeed, all federal agencies – from the permitting process *completely changes the "applicable law*." The "applicable laws" that would otherwise govern State Department review – such as the APA and NEPA – no longer apply. Because the 2019 Permit is specifically intended and written to *circumvent* State Department review "notwithstanding Executive Order 13337," it impermissibly evades the environmental laws and the judicial review available under the APA that would *otherwise* be applicable. 84 Fed.Reg. 13101. The entire purpose of the 2019 Permit was to evade this Court's previous judgment and injunction overturning the 2017 Permit and the APA's requirement that the Secretary of State make a national interest determination based on compliance with our nation's bedrock environmental laws. The intent and effect (save a constitutional challenge) was to render President Trump's issuance of the 2019 Permit unreviewable by this Court.

The latter point bears elaboration, because it is fundamental to this Court's review. The President is empowered to issue a Presidential permit only to the extent that he has received delegated authority to do so from Congress, and only if he complies with the limitations that Congress has prescribed. Because the 2019 Permit failed to comply with Congress' direction, that permit is invalid. As this Court has ruled, the President may issue such permits, but only if he complies with Congress' direction. Dkt. 73 at 21, quoting *Medellin v. Texas*, 552 U.S. 491, 524

(2008) ("'The President's authority to act, as with the exercise of any governmental power, 'must stem from either an act of Congress or from the Constitution itself'").

The authority that Congress has granted the President to issue Presidential permits is not absolute. As this Court observed, "Congress' enactment of the TPTCCA in 2011 evidences its intent to exercise authority over cross-border pipeline permitting." Dkt. 73 at 28. The TPTCCA required that the Department of State review and approve such permits pursuant to the procedures set forth in Executive Order 13,337. Those procedures, in turn, trigger compliance with Congress' environmental mandates including NEPA, the ESA, the MLA, FLPMA, the CWA and the National Historic Preservation Act (54 U.S.C. section 300101 et *seq*. ("NHPA"). If the President fails to comply with these statutory procedures and standards, as here, any permit he purports to issue is *ultra vires*. Dkt. 73 at 19-20 (courts may "enjoin the President . . . where the order 'exceeds the statutory authority delegated by Congress and constitutional boundaries'") (quoting *Hawaii v. Trump*, 859 F.3d 741, 768 (9th Cir. 2017) (*dismissed as moot*, 138 S.Ct. 377 (2017)) and citing *League*, 363 F.Supp.3d at 1031.

Contrary to Congress's direction, President Trump issued the 2019 Permit without consulting the Secretary of State as required by the TPTCCA and Executive Order 13,337. The 2019 Permit simply ignores the TPTCCA, and openly defies Executive Order 13,337's requirement that the permit conform to the laws that govern Department of State permits such as NEPA, the APA, the ESA,

FLPMA, the CWA, and the NHPA. Contrary to those laws, the 2019 Permit attempts to evade compliance with their procedural and substantive requirements by prescribing in Article 1, section 2 that the "Facilities" (i.e., per the Permit's definitions, the entire 875 miles) "*shall* be in *all* material respects and as consistent with applicable law, *as described* in the permittee's application for a Presidential permit filed on May 4, 2012 and resubmitted on January 26, 2017." 84 Fed.Reg. 13101-13102 (April 3, 2019) (emphasis added).

As this Court has explained, Congress directed that issuance of a Presidential permit, in this circumstance, requires: consultation with the Secretary of State, the Secretary's determination that the Project serves the national interest, and compliance with the environmental laws that Congress has prescribed for the Secretary's review as well for the approvals required by other federal agencies. Dkt 73 at 28. Congress enacted those procedures and standards pursuant to the Foreign Commerce Clause and the Property Clause, to protect the environment and ensure proper management of federal lands and waters. The required consultation never took place, the required national interest determination was never made, and there was no compliance with the applicable environmental laws.

As this Court has noted, the President's authority is at its "lowest ebb" because the 2019 Permit contravenes both the expressed and implied will of Congress. It sidesteps Executive Order 13,337, which Congress had specifically directed the President to follow in processing the Keystone permit application.

TPTCCA §§ 501(a)-(b); Dkt. 73 at 27, quoting *Youngstown*, 343 U.S. at 637. And it departs from the long-standing practice – embodied in Executive Order 11,423 and Executive Order 13,337 and consistently followed for 51 years – of State Department review and permitting of cross-border oil pipelines pursuant to Congress' comprehensive statutory scheme of environmental protection.

e. President Barack Obama's veto of the Keystone XL Pipeline Approval Act. Veto Message to the Senate: S. 1, Keystone XL Pipeline Approval Act, 2015 WL 758544 (2015)

Article I section 7, clause 2 of the Constitution grants to the President the power to veto bills that the President finds objectionable. It mandates that, if the President does not approve a bill:

> he shall return it, with his Objections, to that House in which it shall have originated, who shall . . . proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

U.S. Const. art. I, § 7, cl. 2. Thus, President Obama's veto of the Keystone XL Pipeline Approval Act – and his veto message – comported with his duties under the Constitution. In his veto message, President Obama acknowledged that Act's conflict with "longstanding and proven processes for determining whether or not building and operating a cross-border pipeline serves the national interest." Veto Message to the Senate: S. 1, Keystone XL Pipeline Approval Act, 2015 WL 758544, at *1 (2015). Indeed, President Obama acknowledged that the existing process allowed for "thorough consideration of issues that could bear on our

national interest – including our security, safety, and environment" while the vetoed Keystone XL Pipeline Approval Act failed to do so. This decision was well within his power under the Constitution. Art. I, § 7, cl. 2.

f. President Donald Trump's issuance of the 2019 Permit.

Congress has both explicitly and implicitly directed that the President has only one congressionally-sanctioned pathway to process TransCanada's permit application: the procedure set forth in EO 13,337. The President's authority here is limited to the specific action in which Congress acquiesced: namely, the President's issuance of a Presidential permit *after* the State Department has reviewed the permit and made a national interest determination – based on that agency's comprehensive environmental reviews as Congress has prescribed in adopting a series of statues with which the State Department must comply.

Any action by the President that contravenes that Congressional intent necessarily falls in the third classification on the *Youngstown* spectrum. Those actions cannot be upheld where Congress has expressed an alternate intent. Indeed, the President's authority here is strictly limited to "his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637. And here, the President does not have authority to act.

President Trump's approval of the 2019 Permit conflicts with Congress' exclusive power to regulate foreign and interstate commerce. Keystone's express purpose is to transport tar sands crude across both *international* and *interstate*

boundaries for commercial purposes. Therefore it is subject to Congress' regulation of this commerce under the Commerce Clause. *E.g.*, *United States v. Ohio Oil Co.*, 234 U.S. at 560 (affirming Congress' power under the Commerce Clause to regulate the transportation of oil); *Alaska v. Brown*, 850 F.Supp. at 827 (regulating oil exportation is within Congress' "plenary power over foreign commerce"). But President Trump contravened Congressional will and unilaterally issued the 2019 Permit.

The 2019 Permit likewise conflicts with Congress's exclusive power to dispose of federal lands. It violates the Property Clause because it (1) purports to dispose of federal land without Congressional approval, (2) impedes BLM's compliance with Congressional directives for managing federal lands, and (3) circumvents the Congressionally-sanctioned procedure for State Department review of the Keystone application.

Consequently, the 2019 Permit violates both the Commerce Clause and the Property Clause. It directly and deliberately contravenes the will of Congress by sidestepping the long-standing – and Congressionally-sanctioned – practice of requiring State Department review of cross-border permits and ensuring compliance with federal environmental laws. Because President Trump had no authority to independently approve the 2019 Permit outside the process prescribed by Congress, his issuance of that approval was made at the lowest ebb of his authority and "must be scrutinized with caution" in order to protect "the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at

638.

2. Address the following additional questions that will inform the Court's Youngstown analysis:

a. Did TPTCCA endorse the EO 13,337 process generally?

Congress, in passing the TPTCCA, endorsed the process outlined in Executive Order 13,337. It directed the President, "acting *through the Secretary of State*," to either deny or "grant a permit *under* Executive Order No. 13,337" for Keystone within sixty days of its enactment. Pub. L. No. 112-78, §§ 501(a)-(b) 125 Stat. 1280 (2011) (emphasis added). This Court has asked whether this endorsement is only as to Keystone XL or if it also applies to cross-border pipelines in general.

The TPTCCA endorses the Executive Order 13,337 process generally for three reasons. First, it references the existing actions undertaken by the State Department in compliance with Executive Order 13,337 including "the final environmental impact statement issued by the Secretary of State on August 26, 2011" (Pub. L. No. 112-78, § 501(c)(4)(A), 125 Stat. 1290), "the construction, mitigation, and reclamation measures . . . in the Construction Mitigation and Reclamation Plan found in appendix B [of the August 26, 2011 FEIS] . . . ." (Pub. L. No. 112-78, § 501(c)(5)(A), 125 Stat. 1290), and "the special conditions agreed to between the permittee and the Administrator of the Pipeline Hazardous Materials Safety Administration of the Department of Transportation found in appendix U [of the August 26, 2011 FEIS]" (Pub. L. No. 112-78, § 501(c)(5)(B),

124 Stat. 1290-1291). Thus the TPTCCA approved of and endorsed the State Department's existing review process for cross-border pipelines.

Second, the TPTCCA directly endorses Executive Order 13,337's process by directing "the President, acting through the Secretary of State" to grant or deny the permit "*under* Executive Order No. 13337 . . ." Pub. L. No. 112-78, §§ 501(a), 125 Stat. 1289. Had Congress instead intended Executive Order 13,337 to not bind the Executive Branch's consideration of cross-border pipeline permits, it would have omitted reference to this Executive Order in the law, or directed the President to act notwithstanding Executive Order 13337. Congress would not have explicitly demanded action "under Executive Order 13337" had Congress not specifically and unambiguously approved of the same. Congress said what it meant, and meant what it said.

Third, the TPTCCA specifies the manner in which the President and the State Department were to deviate from the process established under Executive Order 13,337 while considering the "application filed on September 19, 2008 (including amendments)." Pub. L. No. 112-78, § 501(a)-(b), 125 Stat. 1289-1290. In particular, the TPTCCA accelerates the deadlines that "the President, acting through the Department of State" must meet in considering TransCanada's application. *Id.* Under Executive Order 13,337, the State Department was required to solicit input from "the Secretary of Defense, the Attorney General, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, the Secretary of Homeland Security, the

Administrator of the Environmental Protection Agency, or the heads of the departments or agencies in which the relevant authorities or responsibilities of the foregoing are subsequently conferred," as well as "such other Federal Government department and agency heads as the Secretary of State deems appropriate," and those officials and agencies were required to provide responses within 90 days. Executive Order 13,337 §§ 1(b)-(c) (69 Fed.Reg. 25299 (May 5, 2004)).

Executive Order 13,337 tolled this 90 day period during any time where the agencies requested additional information but had not yet received that information. *Id.*, at § 1(d) (69 Fed. Reg. 25299-25300). It also permitted the State Department to consult with state, local, tribal and foreign governments while considering applications, in a process that likewise was limited to 90 days. *Id.*, at § 1(e) (69 Fed. Reg. 25300). Once the State Department received responses, Executive Order 13,337 afforded it additional time to deliberate and consider the input it received, and seek additional information from the applicant if necessary, before making a national interest determination. *Id.*, at § (1)(f)-(h) (69 Fed.Reg. 25300). After it had taken the time to appropriately deliberate, it was required to notify the agencies of its proposed determination. *Id.* Then, the agencies were afforded 15 days to notify the State Department of their disagreement with the proposed determination and "request the Secretary of State refer the application to the President." *Id.*, at § 1(i) (69 Fed.Reg. 25300). In contrast, the TPTCCA mandated that the State Department's review of the application be completed "not later than 60 days after the date of [its] enactment . . . " Pub. L. No. 112-78, §

501(a), 125 Stat. 1289.

Executive Order 13,337 also authorized the State Department to "issue further rules and regulations, and prescribe . . . further procedures . . . necessary or desirable" to conduct its review. Executive Order 13,337 §3(b) (69 Fed.Reg. 25301). Through this authorization, the State Department's NEPA regulations also applied to cross-border pipeline permit applications. Under the TPTCCA, Congress directed the President, through the Department of State, to consider the Project based on the environmental review already completed during this accelerated process. Pub. L. No. 112-78, §§ 501(a), (c)(4), 125 Stat. 1290. By truncating the time for the State Department to solicit and consider input from relevant agencies, and by curtailing the normal scope of its review, while continuing to require review "under Executive Order 13337," Congress carved out an exemption that, by its very nature -- the express exception that proves the existence of the rule -- endorses the existing process for applications other than the "application filed on September 19, 2008 (including amendments)." *Id.*

b. Did TPTCCA endorse the EO 13,337 process only for Keystone?

For the reasons discussed above, the TPTCCA endorsed the Executive Order 13,337 process in general, and not only for the "application filed on September 19, 2008 (including amendments)." TPTCCA, PL 112-78, §§ 501(a), 125 Stat. at 1289. If Congress had intended that the Executive Order 13,337 process apply to *only* the 2008 Keystone application, then it would not have required President Obama, acting through the State Department, to deviate from

that process in the particulars regarding the timing and scope of that review that are discussed above.

c. Assuming TPTCCA endorsed the EO 13,337 process for Keystone, how could TC Energy obtain a permit once President Obama denied the permit?

The TPTCCA set forth a clear framework and deadline for President Obama's review of the "application filed on September 19, 2008 (including amendments)," based upon the State Department's 2011 EIS. TPTCCA, PL 112-78, §§ 501(a)-(c), 125 Stat. at 1289-1291. As directed by the TPTCCA, President Obama consulted with the State Department regarding its consideration of the national interest pursuant to Executive Order 13,337, and relied upon the State Department's expertise when it determined that it lacked sufficient information to make such a determination in the time provided by Congress. 77 Fed.Reg. 5679 (Feb. 3, 2012). As discussed above, at the President's direction, the State Department denied the 2008 application following the process laid out by TPTCCA and Executive Order 13,337. 77 Fed.Reg. 5614 (Feb. 3, 2012); TPTCCA, PL 112-78, § 501(b)(1)-(2), 125 Stat. at 1289-1290.

Congress did not, through the TPTCCA, bar any subsequent application for a Presidential Permit. TPTCCA, PL 112-78, § 501, 125 Stat. at 1289-1291. It specified only how the President, acting through the State Department, would address the "application filed on September 19, 2008 (including amendments)." *Id.* Thus, on May 4, 2012, TransCanada was able to submit a new application for

a Presidential Permit. This application, like the one before it, requests the State Department's authorization "[p]ursuant to Executive Order 11432 . . . and Executive Order 13337 . . ." TransCanada Keystone Pipeline, L.P., Application for Presidential Permit for Keystone XL Pipeline Project (Dkt. 97-2), pp. 2, 4.

d. How should the Court interpret the passage of the Keystone XL Pipeline Approval Act?

The Keystone XL Pipeline Approval Act never became law, as Congress was unable to override President Obama's veto. As this Court observed

> President Obama vetoed the Keystone XL Pipeline Approval Act on February 24, 2015. Veto Message to the Senate: S. 1, Keystone XL Pipeline Approval Act, 2015 WL 758544 (2015). President Obama noted that Congress was attempting "to circumvent longstanding and proven processes for determining whether or not building and operating a cross-border pipeline serves the national interest." *Id.* President Obama further stated that the Keystone XL Approval Act conflicted "with established executive branch procedures" and cut short "thorough consideration of issues that could bear on our national interest—including our security, safety, and environment . . . ." *Id.*

Dkt. 73, at 29.

President Obama's successful veto must end this Court's inquiry. "Under the U.S. Constitution, the only actions of Congress that have legally operative effect are those acts that are passed by both the House and Senate and are either signed by the President or repassed by a supermajority vote to break a presidential veto." *Republic of Honduras v. Philip Morris Companies, Inc*., 341 F.3d 1253, 1260 (11th Cir. 2003) (citing U.S. Const. Art. I, § 7; *United States v. Estate of Romani*, 523 U.S. 517, 535–36 (1998) (Scalia, J. concurring)). Indeed,

> failed legislative proposals have no operative effect because they do not satisfy the bicameralism and presidential signature or veto override requirements. To give effect to such proposals would invest Congress with legislative power far beyond what the Constitution provides because Congress could shape the meaning of the law by merely introducing a proposal, removing it and having individual legislators comment on the motivation behind its removal.

Id. Because the Keystone XL Pipeline Act was not enacted into law, it "'has utterly no legal effect'" and should not factor into this Court's analysis of President Trump's overreach in issuing the Presidential Permit for this Project. *Republic of Honduras*, 341 F.3d 1260-1261 (quoting *Romani*, 523 U.S. at 535).

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CONCLUSION

For the reasons stated above, President Trump acted in excess of his authority under the Constitution, and infringed on Congress' powers to regulate foreign commerce and to dispose of federal lands when he issued the 2019 Presidential Permit for Keystone. He did so without complying with Executive Order 13,337's established process. This Court should find that President Trump's issuance of the 2019 Presidential Permit was *ultra vires*, and his overreach must be set aside.

Respectfully submitted,

November 16, 2020

LAW OFFICES OF STEPHAN C. VOLKER

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

November 16, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana District Court, Civil Rule 7.1(d)(2)(E), and this Court's October 16, 2020 Order (Dkt. 147), I certify that **PLAINTIFFS' SUPPLEMENTAL BRIEF** contains 7,776 words, excluding caption, tables, exhibits, and certificate of service, as counted by WordPerfect X7, the word processing software used to prepare this brief.

Dated: November 16, 2020

/s/ Stephan C. Volker

CERTIFICATE OF SERVICE

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

On November 16, 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' SUPPLEMENTAL BRIEF

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

Dated: November 16, 2020 s/ *Stephan C. Volker*

STEPHAN C. VOLKER (Pro Hac Vice)