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

<p>BOLD ALLIANCE, <i>et al.</i>,</p> <p>Plaintiffs,</p> <p>v.</p> <p>THE U.S. DEPARTMENT OF THE INTERIOR, <i>et al.</i>,</p> <p>Defendants,</p> <p>and</p> <p>TRANSCANADA KEYSTONE PIPELINE, LP, <i>et al.</i>,</p> <p>Defendant-Intervenors.</p>	<p>CV 20-59-BMM</p> <p><b>JOINT THIRD MOTION FOR AN EXTENSION OF THE SUMMARY JUDGMENT BRIEFING SCHEDULE</b></p>
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Pursuant to Federal Rule of Civil Procedure 6(b) and District of Montana Local Civil Rule 7.1, Defendants U.S. Department of the Interior *et al.* (“Defendants”), Plaintiffs Bold Alliance *et al.*, and Defendant-Intervenors TC Energy *et al.* jointly move for a third extension of the summary judgment briefing schedule. Plaintiffs filed their opening summary judgment brief on January 20, 2021. The Court previously granted two extensions of the schedule, and Defendants’ opening summary judgment brief is currently due May 7, 2021. *See* Order, ECF No. 63. The parties request that this deadline and the remaining briefing deadlines be extended by an additional thirty days, with a hearing held at the Court’s earliest convenience following the close of briefing. The parties request this extension in light of the President’s revocation of the Presidential permit for the Keystone XL Pipeline on January 20, 2021, and the agencies’ ongoing efforts to evaluate their existing authorizations for the pipeline.

This case involves the U.S. Bureau of Land Management’s (“BLM”) approval of a right-of-way for the Keystone XL Pipeline and actions taken by the U.S. Fish and Wildlife Service (“FWS”) regarding the pipeline. On January 20, 2021, President Joseph R. Biden revoked the March 29, 2019 Presidential Permit granted to TransCanada Keystone Pipeline, L.P., for the construction, connection, operation, and maintenance of pipeline facilities at the international border of the United States and Canada. *See* Protecting Public Health and the Environment and

Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7,037, 7,041 (Jan. 20, 2021).

The requested extension will allow incoming officials within the U.S. Department of the Interior and other applicable agencies to become familiar with the litigation and to evaluate the previously issued authorizations for the pipeline in light of the President's action revoking the cross-border permit. BLM and FWS will evaluate whether the authorizations should be rescinded or suspended in light of the President's action or for other reasons. It likely will take new officials several more weeks to evaluate the agencies' prior authorizations and the litigation surrounding the Keystone XL Pipeline and to make decisions regarding the authorizations.

Plaintiffs agree that the requested extension is reasonable given both these developments and the following representations from Defendants and Defendant-Intervenors. TC Energy does not intend to conduct any further construction of the pipeline or construct new pump stations over the next sixty days. TC Energy intends to consider the impact of the President's decision on the project and does not intend to move forward with pipeline construction while it conducts that evaluation. If that changes and TC Energy opts to move forward with pipeline construction or construction of new pump stations, it will notify the parties and the Court of those plans sixty days in advance of moving ahead with construction. The

notice provision does not apply to actions taken by TC Energy in response to an order from the government, dismantling facilities or movement of equipment, required environmental protection measures, or the maintenance of existing infrastructure.

In addition, in order for any construction activity to occur on federal lands under the authority of BLM and the U.S. Army Corp of Engineers (“Corps”), TC Energy must request a notice to proceed from BLM. *See* U.S. Bureau of Land Management, Record of Decision, Keystone XL Pipeline Project, Decision to Grant Right-of-Way and Temporary Use Permit on Federal Land at 7 (Jan. 20, 2020). *See* BLM-00149.<sup>1</sup> If such a request were submitted, BLM would need to evaluate it to ensure that TC Energy will comply with the required terms of the right-of-way grant, and that evaluation would likely take at least several weeks. To date, no such application has been submitted, and if an application is submitted, Defendants will notify the parties and the Court.

Further, in order for BLM to approve a notice to proceed, TC Energy needs to have in place all permits that are necessary for the construction of the particular segment of the pipeline. The Corps 2017 Nationwide Permit (“NWP”) 12 is enjoined for use for the Keystone XL Pipeline. *See U.S. Army Corps of Engineers*

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<sup>1</sup> Citations to “BLM-xxxxx” refer to the documents in BLM’s administrative record. *See* ECF No. 48.

*v. N. Plains Res. Council*, 141 S. Ct. 190 (2020). Given that relief, Plaintiffs do not concede that the Keystone XL pipeline can be authorized under the new NWP 12, which took effect on March 15, 2021. Nonetheless, TC Energy agrees that if it attempts to rely on the new NWP 12, TC Energy will provide thirty days advance notice to the parties and the Court prior to the submission of a preconstruction notification to the Corps. Submission of a preconstruction notification alone does not mean that the Corps will verify that the proposed activities qualify for NWP 12.

Otherwise, in order for portions of the pipeline to be constructed, TC Energy would need to obtain approval from the Corps for an individual permit under the Clean Water Act section 404, 33 U.S.C. § 1344(a), and Rivers and Harbors Act section 10, 33 U.S.C. § 403. An application for an individual permit is pending, but the Corps expects that it will not make a decision on whether to approve the permit for several months. Without section 404 authorization, TC Energy currently does not have all of the permits that it needs to construct the segments of pipeline that cross federal land in Montana. Until TC Energy has all of the requisite permits for the applicable pipeline segments, BLM will not approve a notice to proceed across federal land.

In addition, TC Energy is required to schedule a preconstruction conference with BLM prior to commencing any construction or ground-disturbing activities on

federal land and must notify BLM at least thirty days in advance of such preconstruction conference. *See* U.S. Bureau of Land Management, Right-of-Way Grant MTM-98191, Temporary Use Permit MTM-98191-01, at Exhibit B, stipulation 4. *See* BLM-00022-23. To date, TC Energy has not provided BLM notice of a preconstruction conference, but if TC Energy does provide notice, Defendants will inform the parties and the Court.

Based on similar filings in other cases involving the Keystone XL Pipeline, the Court has granted continued stays in two of those cases. *See* Order Continuing Stay, *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. U.S. Department of the Interior*, No. 4:20-cv-44-BMM, ECF No. 79; Order Continuing Stay, *Rosebud Sioux Tribe v. U.S. Department of the Interior*, No. 4:20-cv-109-BMM, ECF No. 14. And in a third case, the Court recently granted an additional thirty-day extension of the deadline to respond to the complaint. *See* Order Granting Defs.’ Third Mot. for an Extension of Time to File a Response to Pls.’ Compl., *Indigenous Environmental Network*, No. 4:20-cv-115-BMM, ECF No. 11.

Therefore, the parties request that the Court grant an approximately thirty-day extension of the summary judgment briefing schedule and hearing date, as set forth in the attached proposed order. The parties reserve the right to seek further modifications to this schedule as necessary and appropriate, given the circumstances described above.

DATED: May 4, 2021

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2)(E), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 1,167 words, excluding the tables, caption, signature, certificate of compliance, and certificate of service.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 4, 2021, a copy of the foregoing was served on all counsel of record via the Court's CM/ECF system.

*/s/ Luther L. Hajek* \_\_\_\_\_  
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