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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 JOSEPH R. BIDEN, JR; UNITED STATES DEPARTMENT OF STATE; ANTONY J. BLINKEN, in his official capacity as U.S. Secretary of State; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GENERAL SCOTT A. SPELLMON, Commanding General and Chief of Engineers; UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency; MARTHA WILLIAMS, in her	Civ. No. CV 19-28-GF-BMM **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO TC ENERGY'S MOTION TO DISMISS** **Judge: Hon. Brian M. Morris**

official capacity as Principal Deputy Director acting as Director of the U.S. Fish and Wildlife Service; UNITED STATES BUREAU OF LAND MANAGEMENT; and DEBRA A. HAALAND, in her official capacity as U.S. Secretary of the Interior,

Defendants,

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

Defendant-Intervenors.

INTRODUCTION

This case is not moot, and TC Energy's Motion to Dismiss (ECF 169-170; "Motion") on that ground should be denied, for three reasons. First, President Joseph Biden's voluntary cessation of unlawful conduct by issuing his Revocation Order could be overturned in *State of Texas v. Joseph R. Biden*, Jr., No. 3:21-cv-65 (S.D. Tex.) ("*Texas v. Biden*"), thereby restoring the Presidential Permit this action seeks to vacate. Or, if that suit fails, either President Biden or a future president – such as a re-elected President Donald Trump – could reinstate that permit anyway.

Second, the harmful effects of TC Energy's uncompleted construction of its Keystone XL Project ("Project" or "Keystone") will linger for decades, if not

indefinitely. TC Energy has refused to commit to its removal and clean up. Under the law of this Circuit, unless and until those long-term impacts are "completely and irrevocably eradicated," this case cannot be moot. *Karuk Tribe of California v. U.S. Forest Service* ("*Karuk Tribe*"), 681 F.3d 1006, 1019 (9th Cir. 2012).

Third, the real reason TC Energy has abruptly declared its Project "terminated" came to light on July 2, when it issued a News Release revealing it had filed a notice of its intent to pursue a $15 billion claim under legacy arbitration provisions of Chapter 11 of the former North American Free Trade Agreement ("NAFTA") against the United States based on economic harm allegedly resulting from President Biden's Revocation Order. If allowed, that claim would be paid by United States taxpayers, including Plaintiffs. See Plaintiffs' accompanying Request for Judicial Notice, Exhibit 2. But if that claim falters, nothing prevents TC Energy from returning to its original plan to build Keystone. Although today TC Energy may be prepared to jettison this Project for a hugely profitable $15 billion payday on its NAFTA claim, it may reverse course should that claim's prospects fade.

In sum, even if TC Energy's new agenda is to trade its Project for money, the fact remains that it has not forsworn construction of the Project if *Texas v. Biden* succeeds, or if Mr. Trump is re-elected. That alternative strategy, indeed, is why TC Energy is now pushing so hard to prevent this Court's ruling on the parties' long-pending motions for summary judgment: it knows that if this Court rules that its Presidential Permit was unconstitutional, reinstatement of that

unlawful permit may not be possible. And if its Presidential Permit is declared *ultra vires*, its NAFTA claim for compensation might be denied on that ground as well. So, far from being a dead letter, the lawfulness of TC Energy's Presidential Permit is anything but a moot question.

Regardless, TC Energy has no intention of restoring the lands, waters and wildlife its Project has harmed. But unless and until it irrevocably commits to permanently removing its Project and rectifying all the environmental damage it has caused, it has not carried its heavy burden to show this case is moot.

For each of these reasons, TC Energy's Motion must be denied.

I. *TEXAS V. BIDEN* COULD OVERTURN PRESIDENT BIDEN'S REVOCATION ORDER, OR FORMER PRESIDENT TRUMP COULD BE RE-ELECTED, THEREBY REINSTATING THE PERMIT THIS ACTION CHALLENGES

TC Energy's Motion never acknowledges the inconvenient truth that if *Texas v. Biden* succeeds, President Biden's Revocation Order will be vacated and TC Energy's Presidential Permit will be reinstated, as that is the sole purpose of that suit. See Plaintiffs' Memorandum in Opposition to TC Energy's Motion to Dismiss filed May 5, 2021(ECF 165) at 8-11 and Plaintiffs' Request for Judicial Notice filed May 5, 2021 (ECF 165-1) at Exhibit 1, page 38, "Prayer for Relief."

Nor does TC Energy acknowledge that since Plaintiffs brought *Texas v. Biden* to this Court's attention, two more states have joined that suit as plaintiffs – bringing the total to 23 states – and more allegations supporting its claims – adding another 13 pages to the length of the Complaint – have been added. See

Plaintiffs' accompanying Request for Judicial Notice at Exhibit 1, the First Amended Complaint filed June 1, 2021 *in Texas v. Biden*. Thus, far from withering on the litigation vine, *Texas v. Biden* is growing and ripening toward its plaintiffs' desired favorable result.

Nor does TC Energy address the equally undisputed and dispositive fact that if former President Trump is re-elected, he will almost certainly reinstate that permit. As long as that permit can be reinstated, this case is not moot.

This Court's Order on Mootness (ECF 166) observed that "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" Order at 10, quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000). This rule disposes of TC Energy's Motion. As this Court noted, "[a]lthough President Biden revoked the 2019 Permit, the possibility remains that he, or a future president, could issue unilaterally another permit." *Id*. Indeed, as this Court pointed out,

> "A president's decision to issue unilaterally a new cross-border permit would require no approval, no process, no examination, and could be performed without warning. See *id*. In fact, President Biden exercised such unilateral and unchecked authority in his revocation of the 2019 Permit. That revocation included no mention of the lawfulness of the underlying 2019 Permit, but instead noted that the 2019 Permit 'disserves the U.S. national interest.' [Citation omitted.] That unilateral revocation now sits at the center of new litigation filed in the Southern District of Texas. See *State of Texas v. Joseph R. Biden, Jr.*, No. 3:21-cv-65 (S.D. Tex.)."

Id. at 11.

TC Energy's Motion does not address this Court's plainly correct ruling that

President Biden's Revocation Order could be vacated by court order or by voluntary action by any president. Nor does it acknowledge the allegations and Prayer for Relief in the *Texas v. Biden* litigation that specifically seek a ruling vacating President Biden's Revocation Order and reinstating TC Energy's Presidential Permit. Nor, as noted, does it acknowledge that if former President Donald Trump is re-elected in 2024, President Trump would likely reinstate his Presidential Permit for Keystone.

Nor does TC Energy's Motion address what action TC Energy would take in response to such a ruling, to such a reelection, and to such a reinstatement. TC Energy advances no competent evidence proving that it – or another pipeline company eager to take over completion of this lucrative Project – would not resume its construction if *Texas v. Biden* succeeds and its Presidential Permit is thereby reinstated. All TC Energy provides this Court is a reference to its unsworn Press Release dated June 9, 2021 abruptly announcing the Project's "termination" and counsel's unsworn argument based on that announcement.

It is apparent that TC Energy wants it both ways. It could end the *Texas v. Biden* lawsuit tomorrow by filing an intervention motion averring that it would not continue with its Project, nor sell it to another pipeline company, if its Presidential Permit were reinstated. It could remove the pipeline segment already built and restore the environment its construction has impacted. But it has chosen not to do either of these things because it wants to keep the Project completion – or sale to another pipeline company – options alive in the event its forthcoming NAFTA

claim to collect $15 billion fails, as discussed in section III of this memorandum.

Having chosen not to take action to preclude completion and operation of the Project in the conclusive manner required to moot this case, TC Energy must bear the consequences of its election to keep its options open.

II. TC ENERGY HAS REFUSED TO REMOVE ITS PIPELINE AND RESTORE THE IMPACTED LANDS AND WATERS.

Even if TC Energy ultimately chooses not to exercise the options of either resuming construction or selling Keystone to another pipeline company if its Presidential Permit is reinstated, this case would still not be moot because in the absence of injunctive relief, the harmful effects of Keystone's uncompleted construction will linger for decades, if not indefinitely. Despite Plaintiffs' request that TC Energy "provide documentation of the specific actions TC Energy is taking to . . . comply with any permit requirements for restoration of resources disturbed by TC Energy" in constructing the Project, TC Energy has refused to commit to its removal and clean up. See Attachment A to TC Energy's Memorandum in Support of Motion to Dismiss Based on Mootness (ECF 170) at 2-3.

This Court observed in its Order on Mootness that "this case presents a live controversy because the Court can provide relief to Plaintiffs by ordering the removal of the constructed border segment." *Id*. at 9. That observation remains controlling on the issue of mootness. TC Energy attempts to sidestep this Court's correct ruling on this dispositive point by claiming that "Plaintiffs have not

requested removal of the pipe, and the Court could not award such relief if they requested it." Motion at 2. TC Energy is doubly mistaken.

TC Energy is wrong on the first point because Plaintiffs have repeatedly requested a preliminary injunction to prevent construction of *all* aspects of the Project – a request that obviously and logically seeks restoration of any lands harmed before construction is halted. Plaintiffs filed their initial motion on July 10, 2019 (ECF 27), and renewed it first on January 31, 2020 (ECF 82), and again on April 14, 2020 (ECF 136). This Court denied these motions by Order filed October 16, 1020 (ECF 147).

Plaintiffs did not abandon or waive their requests for injunctive relief after this Court denied them. Instead, Plaintiffs preserved their requests by timely appealing this Court's Order denying Plaintiffs' motion for a preliminary injunction on December 11, 2020 (ECF 151). To maintain their appeal from this Court's denial of their preliminary injunction motions, Plaintiffs timely filed all briefs necessary to prosecute their appeal, never wavering from their firm and consistent opposition to any construction of the Project to prevent environmental harm. Their appellate briefs included their Appellants' Opening Brief filed January 8, 2021 (Ninth Cir. Dkt. 10), Appellants' Opposition to Appellees' Motions for Extension of Time filed February 3, 2021(Ninth Cir. Dkt. 17), and Plaintiffs-Appellants' Opposition to Defendants-Appellees' Motions to Dismiss Appeal filed April 7, 2021 (Ninth Cir. Dkt. 22). TC Energy does not, and on this record it cannot, contend that Plaintiffs failed to fully prosecute their appeal from

this Court's denial of their motions for preliminary injunctive relief.

Although on July 16, 2021 the Ninth Circuit granted Appellees' motion to dismiss Plaintiffs' appeal on mootness grounds, it rejected their request to also vacate this Court's decisions. (Ninth Dkt. 29; ECF 171.) And, in a ruling that is tantamount to a rejection of TC Energy's pending Motion to Dismiss in this Court, the Ninth Circuit *rejected* its (and the Federal Defendants') request that the Ninth Circuit also order this Court to dismiss this action on mootness grounds. (*Id*.)

TC Energy is wrong on the second point because this Court has ample authority to order removal of the pipeline and restoration of the impacted lands and waters. For the same reason this Court had broad power to enjoin all federal approvals for Keystone in Plaintiffs' previous litigation against the Department of State's approvals of this same Project, so too this Court has authority to enjoin all actions taken by TC Energy in furtherance of the unlawful Presidential Permit challenged in this action. *Indigenous Environmental Network v. U.S. Department of State,* 347 F.Supp.3d 561, 591 (D. Mont. 2018) (initial judgment awarding broad injunctive relief); Indigenous *Environmental Network v. U.S. Department of State*, 369 F.Supp.3d 1045, 1053 (D. Mont. 2019) (order narrowing scope of injunctive relief to exclude surveys and maintaining site security but still preventing Project construction unlawfully permitted by the United States).

The sole basis TC Energy advances for its argument that this Court lacks authority to order removal of the 1.2-mile border segment of the pipeline is its claim that Plaintiffs lack standing to challenge the Federal Defendants' approval

of the 1.2 mile border segment. Motion at 12-13. This argument fails because this Court has already rejected TC Energy's challenge to Plaintiffs' standing as to this 1.2-mile border segment, stating:

> Plaintiffs have demonstrated an injury sufficient to survive Defendants' motions to dismiss even if the Court were to construe the [Presidential] permit as authorizing only the 1.2-mile pipeline segment. Plaintiffs' First Amended Complaint describes their members' interests in the 1.2-mile segment of land. (Doc. 37 at 16.) Plaintiffs assert that the 2019 Permit allows TC Energy to construct an oil pipeline on a 1.2-mile segment of land on which they live, work, recreate, and otherwise enjoy. (*Id*. at 15.) Plaintiffs claim that the pipeline will pass by or otherwise impact waters, habitat, and plant and animal species within the first 1.2-mile segment. (*Id*.) Plaintiffs assert that they would be directly and irreparably harmed by the connection and operation of the first 1.2-mile pipeline segment. (Docs. 37 at 15-17 & 57 at 16.) Plaintiffs assert additional injuries and note that all other pipeline permits flow from the 2019 Permit and that the remainder of the pipeline could not operate without the 2019 Permit. (Doc. 57 at 17 (citing *Backcountry Against Dumps v. Chu*, 215 F.Supp.3d 966, 976 (S.D. Cal. 2015)).) Plaintiffs have alleged sufficiently a concrete and particularized invasion of their legally protected interests. See *Spokeo, Inc*. [*v. Robins*], 136 S.Ct. [1540] at 1548 [2016].

Indigenous Environmental Network v. President Donald J. Trump, 428 F.Supp. 3d 296, 305-306 (D. Mont. 2019).

Accordingly, Plaintiffs have demonstrated their standing to seek injunctive relief to prevent environmental harm due to construction of the 1.2-mile border segment, and to seek injunctive relief to order restoration of the lands, waters and wildlife habitat that TC Energy cleared and dug up when it built the 1.2-mile pipeline segment. As this Court has ruled, Plaintiffs have sufficiently demonstrated their concrete interest in protecting the impacted lands, waters and wildlife habitat from environmental harm. *Id*.

TC Energy's further contention that Plaintiffs have no tangible interest in preventing "speculative" harm that might occur in the future should TC Energy resume construction ignores the fact that Plaintiffs seek relief from the quite tangible environmental harm that has *already* occurred along this border pipeline segment. There is nothing speculative about that existing harm. As the Court noted in its Order on Mootness:

> "Images provided in [TC Energy's] filings [demonstrating its progress in building the 1.2-mile border segment] show the clearing of land, excavation of the pipeline route, and installation of the pipeline on the 1.2-mile border segment. (Docs. 62, 75, 83, 135). The Court relied on TC Energy's representations of the construction activities when the Court determined that a preliminary injunction would not prevent irreparable harm as those construction activities were already complete. (Doc. 147 at 12-13). This case does not involve mere text in the Federal Register. Rather, it involves a physical pipeline that today sits under the ground at the U.S.-Canada border. The Court can provide Plaintiffs with requested injunctive relief by ordering TC Energy to remove that pipeline from the ground. Such relief certainly meets the low bar of providing 'any effectual relief whatever to the prevailing party.' *Chaffin* [*v. Chafin*], 568 U.S. [165] at 172 [(2013)](quoting *Knox* [*v. Service Employees*], 567 U.S. [298] at 307 [(2012)]). That relief demonstrates a live controversy."

Order on Mootness at 9-10.

In sum, TC Energy cannot show mootness because this Court has authority to provide effectual relief to Plaintiffs by ordering removal of the pipeline and restoration of the lands, waters and habitat that TC Energy cleared, excavated and developed with its Project. TC Energy has refused to even acknowledge its responsibility to remedy the environmental harm that construction of the pipeline's border segment caused, let alone actually perform that environmental restoration work. Under the law of this Circuit, unless and until the long-term impacts of the

border pipeline TC Energy has constructed are "completely and irrevocably eradicated," this case cannot be moot. *Karuk Tribe,* 681 F.3d at 1019.

Accordingly, TC Energy has failed to demonstrate any error in this Court's Order on Mootness on this dispositive point. That Order correctly applies the law to the facts of this case and finds, as the law and the facts require, that the availability of effectual relief for Plaintiffs' environmental injuries "demonstrates a live controversy." Order on Mootness at 10. Therefore TC Energy's Motion must be denied.

III. THIS ACTION IS NOT MOOT BECAUSE NOTHING ABOUT TC ENERGY'S NAFTA CLAIM PREVENTS TC ENERGY FROM RESUMING ITS CAMPAIGN TO CONSTRUCT AND OPERATE KEYSTONE IF ITS NAFTA CLAIM FALTERS.

When TC Energy initially notified this Court and the parties of its decision to "terminate" the Project on June 9, 2021 (ECF167), it provided no explanation for this abrupt change in its position – from zealous advocate for prompt completion and operation of the Project to resigned and seemingly vanquished foe. It seemed hard to believe that TC Energy would simply walk away from its multi-billion dollar investment without pushing back – as its allies in over 20 states were doing, seemingly on its behalf, in the District Court for the Southern District of Texas – against President Biden's Revocation Order. Again, at the time it filed its formal "Notice Regarding Termination of Keystone XL Pipeline" two weeks later on June 24, 2021 (ECF 168), TC Energy still did not disclose the reasons for its about-face. Even when, one week later on June 30, it filed its Motion to Dismiss

(ECF 169), TC Energy continued to keep its reasons to itself. Finally, on July 2, 2021, a vital piece of this puzzle emerged when TC Energy publicly announced it was pursuing a $15 billion claim against the United States under NAFTA's legacy arbitration provisions. See Exhibit 2 to Plaintiffs' Request for Judicial Notice.

Two facts about TC Energy's NAFTA claim are indisputable. First, if it fails, there is nothing in it that prevents TC Energy from returning to "Plan A" and resuming its campaign to overturn President Biden's Revocation Order and build Keystone. Second, its prospects for success may depend on this Court's ruling on the constitutionality of TC Energy's Presidential Permit. For if that permit was *ultra vires*, the United States would have a potential defense that TC Energy's permit was never lawfully authorized in the first place. The fact that Plaintiffs have consistently contended in this Court – commencing on April 5, 2019, just seven days after the permit's issuance, and continuing to date – that this permit was *ultra vires* certainly placed TC Energy on notice throughout this permit's life that any reliance on it was problematic.

CONCLUSION

As demonstrated, TC Energy's Motion to Dismiss for Mootness should be denied for three reasons. First, President Biden's voluntary cessation of unlawful conduct by issuing his Revocation Order could be overturned in *Texas v. Biden,* thereby restoring the Presidential Permit this action seeks to vacate. Or, if that suit fails, either President Biden or a future president – such as a re-elected President Donald Trump – could reinstate that permit anyway.

Second, the harmful effects of TC Energy's uncompleted construction of Keystone will linger for decades, if not indefinitely. TC Energy has refused to commit to its removal and clean up. But unless and until those long-term impacts are "completely and irrevocably eradicated," this case cannot be moot. *Karuk Tribe,* 681 F.3d at 1019.

Third, the real reason TC Energy abruptly declared its Project "terminated" was revealed on July 2, when it issued a News Release disclosing it was pursuing a $15 billion claim for damages against the United States under NAFTA. But if that claim falters, TC Energy will likely reverse course again to build Keystone.

For each of these reasons, this matter is not moot and TC Energy's Motion to Dismiss must therefore be denied.

July 21, 2021

Respectfully submitted,

LAW OFFICES OF STEPHAN C. VOLKER

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

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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)(E), I certify that **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO TC ENERGY'S MOTION TO DISMISS** contains 3,301 words, excluding caption, certificate of service, and signature blocks, as counted by WordPerfect X7, the word processing software used to prepare this brief.

Dated: July 21, 2021 /s/ *Stephan C. Volker*
STEPHAN C. VOLKER (Pro Hac Vice)

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 July 21, 2021 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 IN OPPOSITION TO TC ENERGY'S MOTION TO DISMISS

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

Dated: July 21, 2021 s/ *Stephan C. Volker*
STEPHAN C. VOLKER (Pro Hac Vice)