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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 capacity as Acting Director of the U.S. Fish and Wildlife Service; UNITED STATES BUREAU	Civ. No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

OF LAND MANAGEMENT, and DAVID BERNHARDT, in his official capacity as Acting U.S. Secretary of the Interior,

Defendants.

INTRODUCTION

1. On March 29, 2019, PRESIDENT DONALD J. TRUMP purported to take three actions to facilitate the proposal by TRANSCANADA KEYSTONE PIPELINE, L.P. ("TransCanada") to construct and operate an 875-mile long pipeline and related facilities known as the Keystone XL Pipeline (the "Project") to transport up to 830,000 barrels per day ("BPD") of tar sands crude oil from Alberta, Canada through the states of Montana, South Dakota and Nebraska to existing pipeline facilities near Steele City, Nebraska. 84 Federal Register 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 Presidential Permit ("2017 Permit") that the Trump Administration had issued to TransCanada on March 23, 2017 (82 Federal Register 16467 (April 4, 2017)), granting permission to "construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada at Morgan, Montana, for the import of crude oil from Canada to the United States." 84 Federal Register at 13101. President Trump had both the authority and the duty to revoke the 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 issue a new Presidential 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 Federal Register at 13101. President Trump did not have authority to take this second action because Mr. Trump lacks authority to regulate use 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)."[1]

4. 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*, ___ F.Supp.3d ___, Case No. 3.17-cv-00101-SLG (D.Ak. March 29, 2019), slip op. at 5, n. 20; *Alabama v. Texas*, 347 U.S. 272, 273

[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.

(1954). Congress has directed BLM to manage this property in accordance with the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. section 1701 *et seq.*, the National Environmental Policy Act ("NEPA"), 42 U.S.C. section 4321 *et seq.*, the Endangered Species Act ("ESA"), 16 U.S.C. section 1531 *et seq.*, the Clean Water Act ("CWA"), 33 U.S.C. section 1251 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. section 706. BLM has not issued any approval of the Project, let alone demonstrated compliance with FLPMA, NEPA, the ESA, the CWA, and the APA. Those portions of the 2019 Permit that purport to authorize construction and operation of the first 1.2 miles of the Project are therefore *ultra vires*.

5. The third action President Trump apparently took – although inartfully worded – was to authorize the balance of the 875-mile-long Project. 84 Federal Register at 13101-13102. The 2019 Permit purports to authorize not just the 1.2 miles closest to the border, but also, indirectly, the Project's other "Facilities," which the 2019 Permit defines to include "the portion in the United States of the international pipeline project" – i.e., the Project's other 875 miles. Assuming by this indirect reference that President Trump intended to authorize the balance of the Project, he lacked authority to do so for three reasons.

6. The first reason is that the Project would also cross approximately 45

miles of other lands administered by BLM.[2] President Trump lacks authority over management of these additional BLM lands. As noted, the Property Clause of the U.S. Constitution gives to Congress – and not the President – the "Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." U.S. Constitution, Article IV, section 3, clause 2; *League of Conservation Voters v. Donald J. Trump*, *supra*, slip op. at 5, n. 20; *Alabama v. Texas*, *supra*, 347 U.S. at 273. Congress has assigned management responsibility over these lands to BLM, which must administer them in accordance with applicable law including FLPMA, NEPA, the ESA, the CWA, and the APA.

7. The second reason that President Trump lacked authority to authorize the balance of the Project is that doing so conflicts with Congress' correlative power to regulate foreign and interstate commerce under Article I, section 8, clause 3 of the United States Constitution. The balance of the Project includes many river crossings including under the Missouri River, Yellowstone River, Cheyenne River, and Platte River, and as well as other waters of the United States and their tributaries. These river crossings and their associated impacts on the environment including species listed under the ESA are regulated by federal agencies pursuant to Congress' broad authority over foreign and interstate commerce under Article I, section 8, clause 3 of the United States Constitution. Congress' comprehensive regulatory scheme pursuant to Article I, section 8,

[2] Department of State Administrative Record at DOSKXLDMT0005954, 6046.

clause 3 of the United States Constitution requires that federal agencies including the UNITED STATES ARMY CORPS OF ENGINEERS ("Corps of Engineers") and the U.S. FISH AND WILDLIFE SERVICE ("FWS") regulate these river crossings and their environmental impacts under the CWA and the ESA, among other laws. Those agencies have not issued any approvals for these river crossings.

8. The third reason President Trump lacked authority to authorize the balance of the Project 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' correlative power to regulate foreign and interstate commerce under Article I, section 8, clause 3 of the United States Constitution, a legislative power that previous Presidents have recognized and respected through issuance of Executive Order 11423 by President Lyndon Johnson in 1968 and Executive Order 13337 by President George W. Bush in 2004.

9. 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 adopted, including FLPMA, NEPA, the CWA, the ESA, and the APA. 33 Federal Register 11741 (August 16, 1968); 69 Federal Register 25299 (May 5, 2004). Executive Order 13337, which currently governs

issuance of Presidential Permits for transboundary oil pipelines such as the Project, 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 Federal Register at 25301, section 5 (emphasis added).

10. 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 13337, President Trump failed to make a National Interest Determination ("NID") finding that the Project would serve the national interest based on a detailed analysis of the appropriate factors, including those regarding climate change.

11. Accordingly, because PRESIDENT DONALD J. TRUMP lacks authority to authorize the Project, 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 the Project complies with applicable environmental statutes including the UNITED STATES DEPARTMENT OF STATE and Secretary of State MICHAEL R. POMPEO (collectively, "Department of State"); the UNITED STATES ARMY CORPS OF ENGINEERS, LT. GENERAL TODD T. SEMONITE, Commanding General and Chief of Engineers of the UNITED STATES ARMY CORPS OF ENGINEERS

(collectively "Corps of Engineers"); the UNITED STATES FISH AND WILDLIFE SERVICE, and Acting Director of the United States Fish and Wildlife Service GREG SHEEHAN (collectively, "FWS"); the UNITED STATES BUREAU OF LAND MANAGEMENT ("BLM"); and DAVID BERNHARDT, the Acting Secretary of the United States Department of the Interior; for violations of Articles I and IV of the United States Constitution, and the federal environmental laws with which the Project must comply, including FLPMA, 43 U.S.C. section 1701 *et seq*., NEPA, 42 U.S.C. section 4321 *et seq*., the ESA, 16 U.S.C. section 1531 *et seq*., the CWA, 33 U.S.C. section 1251 *et seq*., and the APA, 5 U.S.C. section 701 *et seq*., and regulations promulgated thereunder.

12. 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 CWA, the APA, and Executive Order 13337; (2) granting preliminary injunctive relief restraining defendants and, should it intervene, TransCanada, from taking any action that would result in any change to the physical environment in connection with the Project pending a full hearing on the merits; and (3) granting permanent injunctive relief overturning defendants' Project approvals pending their compliance with Articles I and IV of the United States Constitution, FLPMA, NEPA, the ESA, the CWA, the APA, and Executive Order 13337.

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JURISDICTION AND VENUE

13. 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) because (1) the action arises under the United States Constitution, FLPMA, NEPA, the ESA, the CWA, the APA, and Executive Order 13337; (2) President Trump is the chief executive, and the State Department, Corps of Engineers, BLM and FWS are agencies, of the U.S. government, and the individual defendants are sued in their official capacities as officers of the U.S. government; (3) the action seeks a declaratory judgment voiding those portions of President Trump's 2019 Permit that purport to authorize the Project; and (4) the action seeks further injunctive and mandamus relief until the defendants comply with applicable law.

14. 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 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).

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

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

17. Plaintiffs have standing to assert their claims and, to the extent required, have exhausted all applicable remedies.

PARTIES

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

throughout the United States and Canada to mobilize and educate the public regarding the harmful environmental and cultural impacts of the Project. IEN's members include individuals who have hiked, fished, hunted, observed and photographed wildlife and 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, and by the oil spills that would pollute the lands and waters that IEN's members use and enjoy.

19. 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 wild flowers, 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, and by the oil spills that would pollute the lands and waters that NCRA's members use and enjoy.

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

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

22. Defendant UNITED STATES DEPARTMENT OF STATE ("Department of State") is an agency of the United States government. Under Executive Order 13337, the Department of State is responsible for determining whether granting a Presidential permit for the Project would serve the national

interest and comply with applicable law.

23. Defendant MICHAEL R. POMPEO is the U.S. Secretary of State, and is sued herein in his official capacity. In that capacity, he is responsible for issuing Presidential permits for energy facilities that cross the United States-Canada border, including the Presidential Permit at issue here.

24. 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.

25. 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.

26. 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 may harm.

27. Defendant GREG SHEEHAN is the Acting Director of FWS, and is sued herein in his official capacity. He 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 may harm.

28. 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 CWA and the APA.

29. Defendant DAVID BERNHARDT is the Acting Secretary of the U.S. Department of the Interior and is sued herein 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 of those agencies regarding the Project challenged herein.

BACKGROUND

30. 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 that would run from the Canadian border in Phillips County, Montana to connect to an oil pipeline in Steele City, Nebraska.

31. 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.

32. 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.

33. 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.

34. On May 15, 2013, the FWS issued its Biological Opinion for the proposed Keystone XL pipeline Project to the Department of State.

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

36. On November 6, 2015, Secretary of State John Kerry determined pursuant to Executive Order 13337 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.

37. 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).

38. 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 right-of-ways and easement access, ostensibly within the areas previously included by the Department of State in its FSEIS.

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

40. On March 27, 2017, plaintiffs filed suit challenging the Department of State's Record of Decision ("ROD") and NID 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.

41. 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.

42. The Department of State then lodged its Administrative Record. Utilizing that record, the parties filed cross-motions for summary judgment.

43. 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. August 15, 2018). That review is ongoing.

44. On November 8, 2018, this Court decided the remaining claims, ruling for plaintiffs on some and vacating the Department of State's ROD/NID. This Court also 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 ROD/NID. *Indigenous Environmental Network v. United States Department of State*, *supra*, 317 F.Supp.3d at 591.

45. 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.

46. 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.

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

48. 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*.

49. President Trump, however, is not above the law. Under Article III of the United States Constitution, President Trump's unlawful conduct is subject to

this Court's review, as alleged more particularly below.

FIRST CLAIM FOR RELIEF

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

(Against All Defendants)

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

51. On March 29, 2019 President Trump purported to issue a Presidential Permit ("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 Federal Register 13101. The 2019 Permit might be interpreted to also grant permission for TransCanada to construct and operate the balance of the Project within the United States.

52. President Trump did not have authority to authorize 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 lacks authority to regulate 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 because approximately 45 miles of the Project's route elsewhere in Montana are likewise located on lands owned by the United States Government and administered by BLM.

53. Under the Property Clause of the U.S. Constitution, Congress – and not the President – holds the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Constitution, Article IV, section 3, clause 2; *League of Conservation Voters v. Donald J. Trump*, *supra*, slip op. at 5, n. 20; *Alabama v. Texas*, *supra*, 347 U.S. at 273.

54. Congress has directed BLM to manage all of the federal lands within Montana that the Project would cross, including those between Milepost 0.0 and Milepost 0.93 and the balance of the 45 miles of BLM lands, in accordance with FLPMA, 43 U.S.C. section 1701 *et seq*. In managing this property pursuant to FLPMA, BLM must comply with the requirements of NEPA, the ESA, the CWA, and the APA.

55. BLM has 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.

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

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

57. Because the United States Constitution assigns the power to regulate and dispose of all property belonging to the United States to Congress rather than the President, President Trump lacks 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 the 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 CWA, and the APA. Because BLM has done neither, and, 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.

58. Accordingly, President Trump's purported granting 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.

SECOND CLAIM FOR RELIEF

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

(Against All Defendants)

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

60. 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 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' correlative power to regulate foreign and interstate commerce under Article I, section 8, clause 3 of the United States Constitution.

61. Previous presidents have recognized and respected Congress' legislative power over transboundary oil pipelines such as the Project through issuance of Executive Order 11423 by President Lyndon Johnson in 1968 and Executive Order 13337 by President George W. Bush in 2004. 33 Federal Register 11741 (August 16, 1968); 69 Federal Register 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. Executive Order 13337, 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 Federal Register at 25301, section 5 (emphasis added).

62. Executive Order 13337 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 Federal Register 25300 at section 1(g). Contrary to this requirement, President Trump did not make a finding that issuance of the 2019 Permit "would serve the national interest." Nor did he provide a "reasoned explanation" justifying his abrupt reversal of former Secretary of State John Kerry's detailed and factually-based reasons why climate change required rejection of the Project.

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

64. President Trump's 2019 Permit also ignores and violates Executive

Order 13337, which expressly requires "compliance with applicable laws and regulations." 69 Federal Register 25301, section 5. The many requirements 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 crossings including under the Missouri River, Yellowstone River, Cheyenne River, and Platte River, as well as their tributaries. Neither the Corps of Engineers nor FWS has issued any approvals allowing the Project to cross these water bodies. 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 and other waters of the United States.

65. 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 commerce or interstate commerce, including FLPMA, NEPA, the ESA, the CWA, and the APA. As this Court ruled in vacating the 2017 Permit, this Project is subject to the detailed requirements of these environmental and procedural 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.

66. Because the 2019 Permit purports to "grant permission . . . to TransCanada . . . to construct, connect, operate, and maintain pipeline facilities extending 875 miles from the Canadian border to Steele City, Nebraska *without requiring compliance with these applicable federal laws*, it conflicts with Congress' comprehensive regulatory scheme adopted pursuant to Article I, section 8, clause 3 of the United States Constitution. Accordingly, President Trump's 2019 Permit is *ultra vires* and of no lawful force and effect.

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 13337 and is therefore *ultra vires* and of no legal force and effect.

4. Preliminarily and permanently enjoin all defendants including, should it intervene, 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 13337, and to the extent applicable, the requirements of FLPMA, NEPA, the ESA, the CWA and the APA, and their implementing regulations;

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

6. Grant plaintiffs such additional relief as the Court may deem just and proper.

Dated: April 5, 2019

PATTEN, PETERMAN, BEKKEDAHL & GREEN, PLLC

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

Dated: April 5, 2019

LAW OFFICES OF STEPHAN C. VOLKER

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

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