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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 OF LAND MANAGEMENT, and DAVID BERNHARDT, in his official

CV 19-28-GF-BMM

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR A PRELIMINARY INJUNCTION AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER

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,

Intervenor-Defendant-Intervenors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 1

ARGUMENT 2

I. PLAINTIFFS CANNOT ESTABLISH THAT THEY ARE LIKELY TO SUCCEED ON THE THEIR CLAIMS. 3

A. Plaintiffs' Constitutional Claims Are Meritless. 3

1. Congress Has Not Explicitly Required The President To Comply With Executive Order No. 13337 3

2. Congress Has Not Impliedly Required The President To Comply With Executive Order 13337. 11

B. Issuance Of The 2019 Permit Did Not Violate E.O. 13337 15

II. PLAINTIFFS HAVE FAILED TO SHOW THAT THEY ARE LIKELY TO SUFFER IRREPARABLE HARM 18

III. THE BALANCE OF HARDSHIPS WEIGHS AGAINST AN INJUNCTION 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases

Alaska Survival v. STB,
704 F.3d 615 (9th Cir. 2012) 27

Califano v. Yamasaki,
442 U.S. 682 (1979).....19

Citizens for Smart Growth v. Sec'y of Dep't of Transp.,
669 F.3d 1203 (11th Cir. 2012) 17

City of Carmel-by-the-Sea v. U.S. Dep't of Transp.,
123 F.3d 1142 (9th Cir. 1997) 17

City of Dania Beach v. FAA,
628 F.3d 581 (D.C. Cir. 2010).....17

City of Los Angeles v. Lyons,
461 U.S. 95 (1983).....24, 25

Cottonwood Envtl. Law Ctr. v. USFWS,
789 F.3d 1075 (9th Cir. 2015) 21

Dames & Moore v. Regan,
453 U.S. 654 (1981).....12, 14

Davis v. Mineta,
302 F.3d 1104 (10th Cir. 2002) 26

Detroit Int'l Bridge Co. v. Canada,
189 F. Supp. 3d 85 (D.D.C. 2016), *aff'd*, 883 F.3d 895 (D.C. Cir. 2018) 15

Franklin v. Massachusetts,
505 U.S. 788 (1992).....10, 13

Garcia v. Google, Inc.,
786 F.3d 733 (9th Cir. 2015) 2, 3, 18

Indigenous Envtl. Network v. U.S. Dep't of State,
No. 4:17-cv-00029-BMM (D. Mont. Nov. 22, 2017) 13

League of Conservation Voters v. Trump,
363 F. Supp. 3d 1013 (D. Alaska 2019), *appeal docketed*, No. 19-35460 (9th Cir. May 29, 2019) 17

Legal Aid Soc'y of Alameda Cty. v. Brennan,
608 F.2d 1319 (9th Cir. 1979) 17

Manhattan-Bronx Postal Union v. Gronouski,
350 F.2d 451 (D.C. Cir. 1965).....16

Parker v. United States,
309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971) 24

Pit River Tribe v. U.S. Forest Serv.,
615 F.3d 1069 (9th Cir. 2010) 25

Winter v. NRDC,
555 U.S. 7 (2008).....22

Wyo. Wildlife Fed'n v. United States,
792 F.2d 981 (10th Cir. 1986) 17

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952).....10

Statutes and Regulations

Act of May 27, 1921, ch. 12, 42 Stat. 8 .....4, 5, 6, 7

Iran Freedom Support Act of 2006, Pub. L. No. 109-293, 120 Stat. 1344.....4, 6, 8

Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, 125 Stat. 1280 .....*passim*

16 U.S.C. § 1540.....13

33 U.S.C. § 535b..... *passim*

33 U.S.C. § 1365.....13

42 U.S.C. § 4332 13

42 U.S.C. § 4333 13

40 C.F.R. § 1508.12 13

Executive Order 11423,
33 Fed. Reg. 11,741 (Aug. 20, 1968) 5

Presidential Permit of March 29, 2019,
84 Fed. Reg. 13,101 (Apr. 3, 2019) 19, 20

Legislative History

S. 1, 114th Cong. (2015) 10

Advisory Opinions

Proposals Regarding an Independent Attorney General,
1 Op. O.L.C. 75 (1977) 16

Status of Presidential Memorandum Addressing the Use of Polygraphs, 2009 WL 153263 (O.L.C. Jan. 14, 2009) 16

Other Authority

Whiteman, *Digest of International Law*, Vol. 9 (1968) 14

INTRODUCTION

Plaintiffs have not remotely satisfied the standards for the extraordinary relief they seek. Plaintiffs are unlikely to prevail on their claims; their claims are so devoid of merit that TC Energy is entitled to summary judgment. There is thus no need to even consider Plaintiffs' claims of harm. In all events, those claims are meritless. Few, if any, relate to the legal violation Plaintiffs assert. Many mischaracterize environmental *mitigation* efforts (such as mowing) as irreparable harms. Still others rest on legally impermissible speculation. As TransCanada Keystone Pipeline, LP and TC Energy Corporation ("TC Energy") explain in detail below, Plaintiffs' renewed motion for injunctive relief should be denied.

BACKGROUND

Plaintiffs seek to invalidate the permit that the President issued on March 29, 2019 authorizing construction, operation, and maintenance of oil pipeline facilities for the Keystone XL Pipeline ("Keystone XL") at the U.S.-Canadian border (the "2019 Permit"). Plaintiffs contend that, in issuing the 2019 Permit, the President (and certain agencies) violated the Foreign Commerce and Property Clauses of the Constitution, and Executive Order No. 13337 ("E.O. 13337").

On December 20, 2019, the Court denied motions to dismiss those claims, concluding they were "plausible." Dkt. 73 at 21-38. The Court indicated, however, that "further argument and analysis" was warranted, *id.* at 30, and directed the

parties to file supplemental briefs addressing specific questions. Dkt. 74. The Court also denied Plaintiffs' motion for a preliminary injunction. Dkt. 73 at 40-41.

On January 14, 2020, TC Energy notified the parties and the Court that it planned to begin certain preconstruction activities in February and March 2020, and construction in April 2020. Dkt. 75. On January 24, 2020, TC Energy filed a supplemental brief responding to the Court's questions, Dkt. 74, and separately moved for summary judgment on all claims, Dkts. 77, 78.

One week later, Plaintiffs renewed their motion for preliminary injunction, and incorporated by reference their prior motion (and related filings) and their response to the Court's Order. Dkts. 82, 82-1. None of these materials demonstrates that they are entitled to injunctive relief.

ARGUMENT

A preliminary injunction is an "extraordinary remedy never awarded as of right." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (quoting *Winter v. NRDC*, 555 U.S. 7, 24 (2008)). Plaintiffs must therefore show: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent preliminary relief, (3) that the balance of equities favors that relief, and (4) that an injunction is in the public interest. *Id.* The first factor is the most important; absent a showing of likelihood of success on the merits, the Court "need not consider the remaining

three [*Winter* elements]." *Id.* That principle applies *a fortiori* here, where Plaintiffs' claims fail as a matter of law.

I. PLAINTIFFS CANNOT ESTABLISH THAT THEY ARE LIKELY TO SUCCEED ON THE THEIR CLAIMS.

A. Plaintiffs' Constitutional Claims Are Meritless.

Plaintiffs' constitutional claims depend on the theory that Congress either has explicitly or impliedly prohibited the President from issuing permits for cross-border oil pipeline facilities except in accordance with E.O. 13337. *See* Dkt. 80 at 11 ("there is only one congressionally sanctioned pathway to process TC Energy's permit application: the procedure set forth in [E.O.] 13,337"); *id.* at 23 (nearly verbatim assertion); *id.* at 25 (Congress "*explicitly* expressed its will that Keystone be permitted pursuant to [E.O.] 13,337"); *id.* at 29 ("the President may *only* issue cross-border pipeline permits *pursuant to the [E.O.] 13,337* review procedure"). This claim is demonstrably wrong.

1. Congress Has Not Explicitly Required The President To Comply With Executive Order No. 13337

Plaintiffs claim that, by enacting the Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, 125 Stat. 1280, Title V (the "2011 Temporary Act"), Congress explicitly mandated compliance with E.O. 13337 for cross-border oil pipeline permits. *See* Dkt. 80 at 32. Plaintiffs effectively claim that the Act codified E.O. 13337 (either for all oil pipelines or just for Keystone XL).

But the Act did no such thing. It imposed a one-time deadline to force President Obama to act on the Keystone XL application. There is no plausible basis for adopting Plaintiffs' contrary reading.

To begin with, when Congress codifies Executive Orders, it does so expressly. For example, the Iran Freedom Support Act of 2006 provides that, "[e]xcept as otherwise provided in this section, United States sanctions with respect to Iran imposed pursuant to sections 1 and 3 of Executive Order No. 12957, sections 1(e), (1)(g), and (3) of Executive Order No. 12959, and sections 2, 3, and 5 of Executive Order No. 13059 (relating to exports and certain other transactions with Iran) as in effect on January 1, 2006, shall remain in effect." Pub. L. No. 109-293, § 101(a), 120 Stat. 1344-45 ("Iran Sanctions Codification").

Similarly, Congress has codified Executive Branch permitting practice by providing the President with authority to issue permits under explicit statutory standards and processes. The Kellogg Act prohibited foreign cable landings "unless a written license to land or operate such cable has been issued by the President," "after due notice and hearing," and based on a finding that the license would "assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States." May 27, 1921, ch. 12 §§ 1, 2, 42 Stat. 8, 8 ("Kellogg Act"). Congress further

empowered the President to impose rate-related conditions, but prohibited the granting of "exclusive rights of landing or of operation in the United States," and preserved the Interstate Commerce Commission's authority over rates. *Id.* § 2, 42 Stat. at 8.

Finally, the International Bridge Act of 1972 ("IBA") modified aspects of E.O. 11423, the precursor to E.O. 13337. Specifically, E.O. 11423 required the State Department to accept applications for permits to build bridges at the U.S. border (when congressional authorization for the bridge was not required); to request the views of the Attorney General and the Secretaries of Treasury, Defense, and Transportation; and to approve or deny such permits based on a national interest standard. E.O. 11423 § 1(a)(iv), 1(b), 1(d)-(e), 33 Fed. Reg. 11,741, 11,741-42 (Aug. 20, 1968). In 1972, Congress provided that no international bridge can be constructed "unless the President has given his approval thereto." 33 U.S.C. § 535b. The IBA requires the President to "secure the advice and recommendations of the United States section of the International Boundary and Water Commission, United States and Mexico, in the case of a bridge connecting" those countries, but it does not mention, much less codify, the inter-agency consultation process. Instead, it provides the President "shall secure the advice and recommendations of … the heads of such departments and agencies …

as he deems appropriate to determine the necessity for such bridge," *id.* (emphasis added)—thereby rendering the process set forth in E.O. 11423 optional.

The 2011 Temporary Act does not bear the slightest resemblance to a codification of an Executive Order or Executive Branch practice. Its first provision was a blunt directive to the President to grant TC Energy's application for Keystone XL within 60 days. *See* § 501(a), 125 Stat. at 1289. The Act allowed the President to decline to grant the application if he determined that it "would not serve the national interest," but required him to explain any such determination. *See* § 501(b)(1)-(2), 125 Stat. at 1289-90. It further provided that, if the President failed to act within the 60-day period, a permit for Keystone XL "shall be in effect by operation of law," provided it satisfied various other conditions. § 501(b)(3), 125 Stat. at 1290-91.

The 2011 Temporary Act has no hallmarks of a codification. It does not provide that "the interagency process and national interest standard in section 1 of Executive Order No. 13337 shall remain in place." *Cf.* Iran Sanctions Codification, § 101(a), 120 Stat. at 1344-45. It does not even institutionalize the President's role in permitting cross-border pipeline facilities, by prohibiting construction of cross-border oil pipeline facilities "unless a written license … has been issued by the President," Kellogg Act, § 1, 42 Stat. at 8, or the "President has given his approval thereto," IBA, 33 U.S.C. § 535b. It does not require that the President engage in

any process in order to grant a permit, *see* Kellogg Act (authorizing issuance of license "after due notice and hearing"); IBA, 33 U.S.C. § 535b (requiring advice from the United States section of the International Boundary and Water Commission, United States and Mexico); forbid issuance of a license in any circumstances, *cf.* Kellogg Act, § 2, 42 Stat. at 8 (no "exclusive rights of landing or of operation in the United States"); or empower the President to impose conditions on a permit, *cf. id.*(authorizing conditions "to assure just and reasonable rates"). Simply put, the 2011 Temporary Act does not remotely codify, or mandate compliance with, E.O. 13337. It was simply a mechanism for Congress to direct the President to act on a single project.

In nevertheless claiming that the Act "specifically directed the President to comply with EO 13,337 in permitting Keystone," Dkt. 57 at 28, Plaintiffs rely on the fact that the Act directed the President to "grant a permit *under* Executive Order No. 13,337." *Id.* at 25 (emphasis added). But this phrase cannot possibly bear the weight Plaintiffs ascribe to it.

The sentence from which Plaintiffs selectively quote states, in material part:

> Except as provided in subsection (b), not later than 60 days after the date of enactment of this Act, the President, acting through the Secretary of State, *shall grant* a permit under Executive Order No. 13337 … for the Keystone XL pipeline project *application filed on September 19, 2008 (including amendments)*.

§ 501(a), 125 Stat. at 1289 (emphases added). The highlighted language makes clear that Congress was directing the President to issue a permit "under" E.O. 13337 because that was the process being used to evaluate the pending "application." The fact that subsection (a) directed the President to "*grant* a permit"—not simply to "make a decision about the Keystone XL pipeline project application"—demonstrates that, in this provision, Congress was *commandeering* the E.O. 13337 process and *dictating* the outcome Congress desired. It was not binding President Obama (and all future Presidents) to adhere to that process for all transboundary pipelines, by specifying that section 1 of E.O. 13337 "shall remain in place," *cf.* Iran Sanctions Codification, § 101(a), 120 Stat. at 1344-45, or stating that the President "shall secure the advice and recommendations of the" State Department, IBA, 33 U.S.C. § 535b.[1]

The rest of the Act provides further confirmation, if any were needed, that it did not mandate compliance with E.O. 13337. First, the action-forcing mechanism Congress chose is the antithesis of a codification of that Executive Order. If President Obama failed to make any decision within 60 days, the permit for

[1] Similarly, because the phrase on which Plaintiffs rely directs the President, acting through State, to "*grant* a permit under Executive Order No. 13337," § 501(a), 125 Stat. at 1289 (emphases added), it is plainly not an "instruction that the Secretary of State *evaluate the Keystone permit*," much less do so "based on the procedures set forth in the 2004 Executive Order." December 2019 Order at 33 (emphasis added).

Keystone XL would "be in effect by operation of law." § 501(b)(3), 125 Stat. at 1290. Thus, Congress dictated that, if the President did nothing, the permit would become operative *without regard to* E.O. 13337's substantive "national interest" standard or its procedural requirements.

Indeed, the Act did *not* state that a permit issued under subsection (b)(3) "satisfies the national interest requirement of E.O. 13337"—language it would have included if it were codifying this standard. Instead, it refers to the "national interest" standard only when requiring the President to justify a decision *not* to grant the permit. § 501(b)(2), 125 Stat. at 1289. Thus, far from demonstrating that Congress wanted "the State Department to ensure that … the pipeline would serve the national interest," December 2019 Order at 34, the structure of the 2011 Temporary Act presumed that Keystone XL was in the national interest and required to the President to explain why he disagreed.

Similarly, the Act does not provide that a (b)(3) permit should be deemed to have satisfied the E.O. 13337's interagency consultation process. In fact, the Act never mentions the inter-agency process that Plaintiffs claim Congress codified. Instead, it set forth an entirely different process that would have required the President to coordinate review with Nebraska concerning the pipeline's route through that state. *See* § 501(d)(3), 125 Stat. at 1291.

Section 501(b)(2)'s reporting requirement likewise confirms the Act's time-limited purpose. This provision required the President to explain a decision not to grant a permit so Congress could decide what to do next. And Congress later responded to President Obama's decision to deny the permit by passing a statute directly approving the Project. Keystone XL Pipeline Approval Act, S. 1, 114th Cong. §§ 1-6 (2015). Significantly, if the 2011 Temporary Act had mandated that any permit for Keystone XL be issued in compliance with E.O. 13337, the 2015 Approval Act should and would have stated that, "[N]otwithstanding the requirements of the Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. 112-78, 125 Stat. 1280, Title V, and the requirements of Executive Order No. 13337, the application filed on May 4, 2012 by TransCanada Keystone Pipeline, L.P. is hereby approved." The 2015 legislation included no such language because the 2011 Temporary Act had no continuing legal effect.[2]

Finally, *Franklin v. Massachusetts*, 505 U.S. 788 (1992), forecloses Plaintiffs' reading of the 2011 Temporary Act. There, the Supreme Court explained that "[w]e would require an express statement by Congress before

[2] Contrary to Plaintiffs' claim, Dkt. 80 at 26, the fact that the Keystone XL Approval Act was vetoed does not mean that it sheds no light on Congress's intent. Indeed, the Supreme Court has inferred congressional intent from Congress's failure to enact laws. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952) (relying on fact that "Congress had refused to adopt" proposals as evidence of its intent).

assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Id.* at 800-01. That principle applies with even greater force here, where Plaintiffs do not merely claim that a statute authorizes judicial review of the President's performance of statutory duties, but that a statute dictates how the President performs a function that Congress had left unregulated for decades. Thus, even if the language of the 2011 Temporary Act was ambiguous and could plausibly be read to mandate compliance with E.O. 13337—neither or which is true—Plaintiffs' reading would still have to be rejected. Language directing President Obama to "*grant* a permit under Executive Order No. 13337 … for the Keystone XL pipeline project application," § 501(a), 125 Stat. at 1289 (emphasis added), is manifestly *not* a clear statement *prohibiting* Presidents from granting a permit for Keystone XL (or any other oil pipeline) *unless* they comply with the requirements of E.O. 13337. There is simply no plausible basis for claiming that the 2011 Temporary Act includes the express statement necessary to convert the requirements of E.O. 13337 into binding statutory commands to the President.

2. Congress Has Not Impliedly Required The President To Comply With Executive Order 13337.

Plaintiffs' alternative theory is that Congress has somehow mandated compliance with E.O. 13337 simply by acquiescing in its use. This theory is even more untenable.

Plaintiffs' "implied restriction" theory reflects a fundamental misunderstanding of congressional acquiescence, which operates to *permit* presidential action, not to *regulate* it. Congressional acquiescence in a long-continued and well-known practice raises "a presumption that the [action] had been [taken] in pursuance of [Congress'] consent." *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). Congress can always override that presumption, by passing legislation to stop a presidential practice or to modify it. But Plaintiffs cite no authority for the proposition that Congress' *silence* in the face of an assertion of presidential authority somehow *requires* the President to continue to exercise that purported presidential authority for all times in precisely the same manner. Indeed, under Plaintiffs' theory, E.O. 11423 was itself illegal—prior to 1968, Congress had consented for 50 years to the President directly issuing permits for cross-border oil pipeline facilities, *see infra* at 14, thereby (on Plaintiffs' view) barring him from delegating that task to State.

Nor does it matter that Congress enacted the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), and the Endangered Species Act (ESA) in the years after President Johnson adopted E.O. 11423. *See* Dkt. 57 at 25. None of these statutes includes the "express statement" necessary to show that Congress intended to subject the President himself to the requirements of these laws.

Franklin, 505 U.S. at 800-01.[3] The most that can be said about them, therefore, is that they effectively require the President to make a choice. He can exercise an inherent constitutional power himself, free of the constraints of these statutes (and of judicial review under the Administrative Procedure Act (APA)). Alternatively, he can delegate that power to an agency. This Court has held that, when the President makes the latter choice, the delegate/agency is subject to the requirements of NEPA, the CWA, ESA, and the APA even when it is exercising inherent presidential authority. Order, *Indigenous Envtl. Network v. U.S. Dep't of State*, No. 4:17-cv-00029-BMM (D. Mont. Nov. 22, 2017).[4] Even assuming *arguendo* the correctness of that holding, it necessarily means that the President can choose to avoid the burdens imposed by these statutes by exercising his constitutional authority directly, which is what President Trump did when he issued the 2019 Permit. There is no conceivable basis for claiming that, simply by

[3] NEPA applies to "agencies of the Federal Government," 42 U.S.C. §§ 4332, 4333, and NEPA regulations define "Federal agency" to exclude "the President." 40 C.F.R. § 1508.12. The CWA and ESA, like the APA, do not expressly authorize suits against the President. *See* 16 U.S.C. § 1540(g)(1)(A) (ESA: authorizing suit against "any person, including the United States and any other governmental instrumentality or agency"); 33 U.S.C. § 1365(a)(1) (CWA: authorizing suit against "any person (including (i) the United States, and (ii) any other governmental instrumentality or agency").

[4] As the Court is aware, TC Energy does not agree with the Court's ruling in this regard. Because issuance of the 2019 Permit mooted the litigation in which the Court rendered that ruling, the Ninth Circuit did not have an opportunity to address the issue. TC Energy reserves its right to contest the Court's ruling, should the need arise in the future.

enacting NEPA, the CWA, or the ESA—none of which expressly applies to the President—Congress somehow (1) barred the President from revoking E.O. 11423 or any similar subsequent Executive Order, (2) barred the President himself from ever issuing a presidential permit for cross-border oil pipeline facilities, and (3) required that such permits only be issued by the State Department (or another agency subject to the foregoing laws).

Plaintiffs' "implied restriction" theory fails for the additional reason that it rests on an impermissibly myopic view of the historical record. Congressional acquiescence can be inferred from "a systematic unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned." *Dames & Moore*, 453 U.S. at 686. Plaintiffs attempt to limit the relevant practice to actions taken since 1968, when E.O. 11423 first delegated authority to the State Department to issue permits for transboundary oil pipelines following consultation with other agencies. But presidential permits for cross-border oil pipelines have been granted since at least as early as 1918. *See* Whiteman, *Digest of International Law*, Vol. 9, p. 920 (1968). And for 50 years thereafter, until 1968, the President himself granted such permits. *Id.* at 920-21. Thus, the relevant "*unbroken*" executive practice is simply one in which some executive branch official grants permits for cross-border oil pipeline facilities. The particular officials who granted such permits, and the particular means by which they did so, have varied since

1918, and thus cannot be considered part of an "unbroken" practice. There is simply no basis for concluding that, from 1918 until 2019, Congress acquiesced in a process in which the President always delegated issuance of permits for cross-border oil pipeline facilities to the State Department, and that Congress expected and wanted that agency to evaluate such permits based on a multifactor analysis of the "national interest."

Finally, Plaintiffs' theory ignores the import of the IBA, where Congress legislated with full awareness of E.O. 11423. *See Detroit Int'l Bridge Co. v. Canada*, 189 F. Supp. 3d 85, 96-99 (D.D.C. 2016), *aff'd*, 883 F.3d 895 (D.C. Cir. 2018). Far from providing that the President could issue permits for international bridges only in compliance with E.O. 11423's interagency review process and national interest standard, Congress dispensed with both, and provided that the President could consult with such department and agency heads "as he deems appropriate," 33 U.S.C. § 535b—which obviously allows the President to deem no consultation necessary. In light of that concrete *action* by Congress rendering the procedures of E.O. 11423 *optional*, it is completely untenable to claim that, *by doing nothing*, Congress *mandated* compliance with all aspects of E.O. 13337.

B. Issuance Of The 2019 Permit Did Not Violate E.O. 13337

Plaintiffs also argue that E.O. 13337 itself bound President Trump. Dkt. 57 at 34-36. This theory also fails as a matter of law.

Plaintiffs do not dispute that an Executive Order that is not grounded in any statutory duties can be "withdrawn at any time for any or no reason." *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965); *see also Proposals Regarding an Independent Attorney General*, 1 Op. O.L.C. 75, 77 (1977) (President "legally could revoke or supersede [an] Executive order at will"). Nor have they challenged TC Energy's showing that, where the President has plenary power to withdraw, revoke, or supersede an Executive Order, he can do so in any manner he chooses—including by simply authorizing action notwithstanding an existing Executive Order. *See Status of Presidential Memorandum Addressing the Use of Polygraphs*, 2009 WL 153263, at *8 (O.L.C. Jan. 14, 2009) ("the President is generally free to amend or revoke instructions to his subordinates in a form and manner of his choosing").

Plaintiffs claim only that "Executive orders that, as here, implement a congressional mandate can and do bind the President." Dkt. 57 at 34. E.O. 13337, however, does *not* implement any statutory mandate. It cites only the President's inherent constitutional power and 3 U.S.C. § 301. The latter statute imposes no duties on the President; it authorizes the President to delegate duties to agencies and states that such delegations can be revoked at will.

For this reason, the various cases Plaintiffs cite are irrelevant. All but one simply concluded that an Executive Order that imposed sufficiently specific, non-

discretionary duties on federal officials could be judicially enforced against those officials.[5] None held that an Executive Order bound the President, and that the President cannot withdraw or supersede an Executive Order.

The decision in *League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013 (D. Alaska 2019), *appeal docketed*, No. 19-35460 (9th Cir. May 29, 2019), demonstrates only that a *statute* can limit the President's ability to revoke prior Executive Orders issued to implement that statute. That case involved the Outer Continental Shelf Lands Act (OCSLA), which authorized the leasing of offshore lands for certain purposes, but empowered the President to withdraw unleased lands from that authorization. *Id.* at 1016. The court held that the statute did not grant the President the power to revoke a prior withdrawal. *Id.* at 1020-29. Thus, it found that Congress had enabled a President who wished to permanently withdraw lands from leasing to tie the hands of future Presidents.

It is indisputable, however, that E.O. 11423 and E.O. 13337 were not issued to implement any statute, much less a statute that precluded revocation of any Executive Orders issued to implement its commands. Like the other cases they

[5] *Legal Aid Soc'y of Alameda Cty. v. Brennan*, 608 F.2d 1319, 1329-1332 (9th Cir. 1979); *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997); *Wyo. Wildlife Fed'n v. United States*, 792 F.2d 981, 985 (10th Cir. 1986); *City of Dania Beach v. FAA*, 628 F.3d 581, 591 (D.C. Cir. 2010); *Citizens for Smart Growth v. Sec'y of Dep't of Transp.*, 669 F.3d 1203, 1214 (11th Cir. 2012).

cite, therefore, *League of Conservation Voters* has no relevance to whether President Trump could supersede E.O. 13337.

In the end, Plaintiffs' claim that the President violated E.O. 13337 appears to be yet another version of its argument that Congress explicitly or impliedly codified that Executive Order and required future Presidents to comply with its substantive standard and procedures. But for the reasons discussed above, there is no merit to those theories. And because Plaintiffs' claims against the agency Defendants are entirely derivative of Plaintiffs' legally untenable claims against the President, Dkt. 57 at 37, those claims fail as well.[6]

II. PLAINTIFFS HAVE FAILED TO SHOW THAT THEY ARE LIKELY TO SUFFER IRREPARABLE HARM

Because Plaintiffs' claims are meritless, the Court need not consider the remaining preliminary injunction factors. *Google*, 786 F.3d at 740. In all events, Plaintiffs have failed to establish that they are likely to suffer irreparable injury.

First, virtually all of the harms they allege will occur from activities outside the 1.2-mile border-crossing segment of the pipeline ("the border segment") on land where TC Energy has the legal right to conduct such activities. These alleged harms are thus legally irrelevant. The proper "scope of injunctive relief is dictated

[6] The Court noted Plaintiffs' assertion, in their amended complaint, that BLM had "not demonstrated compliance with applicable federal law." Dkt. 73 at 35. Merely alleging that an agency has failed to comply with a federal statute is not a basis for finding a constitutional violation.

by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The 2019 Permit, however, does not authorize any activities outside the border segment—indeed, those activities could occur without that Permit. Thus, even if issuance of the 2019 Permit was unlawful—and it plainly was not—the Court cannot enjoin activities outside the border segment, as any harms resulting from those activities are not attributable to the alleged violation.

The 2019 Permit only allows TC Energy to "construct, connect, operate, and maintain pipeline facilities *at the international border* of the United States and Canada at Phillips County, Montana." Presidential Permit of March 29, 2019, 84 Fed. Reg. 13,101 (Apr. 3, 2019) (emphasis added). In addition to that clear limitation, the Permit defines "Border facilities" as the part of the pipeline "extending from the international border … to and including the first mainline shut-off valve in the United States located approximately 1.2 miles from the international border, and any land, structures, installations, or equipment appurtenant thereto." *Id.* It then imposes numerous conditions and restrictions only on those "Border facilities." *See id*. at 13,101-03 (Articles 1, 2, 3, 4, 5, 7, 8, 9 and 10).

Ignoring the foregoing dispositive textual evidence, Plaintiffs focus (Dkt. 80 at 14) on Article 1(2), which states that the "construction, connection, operation, and maintenance of the Facilities (not including the route) 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. at 13,101-02. But language in the application "describ[ing] the whole of the pipeline," Dkt. 80 at 14, does not control the scope of the Permit itself. TC Energy's application "requests a Presidential Permit" *only* for "the specific border crossing facilities associated with the proposed Keystone XL Project"—which "extend[] downstream from the United States border, in Phillips County, Montana up to and including the first pipeline isolation valve, located at Milepost 1.2." Application at 6; *see also id.* at Exhibit B (depicting border crossing facilities).

Furthermore, even if Article 1(2) were read to address facilities beyond the border segment, it is at most a *condition* on the permission to build and operate within the border segment, *i.e.*, TC Energy may build and operate the border segment as long as it constructs and operates facilities outside that segment in accordance with the description in its application. It is not an *authorization* to build and operate facilities outside the border segment.

Plaintiffs also offer an absurd causation-based reading of the Permit, arguing that it "*effectively* authorizes the entire pipeline because the remainder of the Project would not be built but for the 2019 Permit." Dkt. 80 at 15 (emphasis added). By that logic, the Nebraska's approval of the route through Nebraska also

authorizes the entire Project, because the pipeline cannot be built if it cannot connect to the existing Keystone system in Nebraska. That is nonsense. The 2019 Permit is not a "headwaters permit from which flow all other pipeline permits." *Id.* It is a permit for a specific portion of Keystone XL, separate and distinct from the permits and approvals issued by the federal and state agencies that regulate different aspects of the Project under a variety of federal and state laws. *See* Dkt. 42 at 4-7 (discussing relevant laws).

Accordingly, even if Plaintiffs could establish that issuance of the 2019 Permit was unlawful (and they cannot), that would provide, at most, a basis for an injunction against activities within the border segment. It provides no basis for enjoining activities outside that segment, which TC Energy may otherwise conduct in accordance with state and federal laws.

Second, and in all events, Plaintiffs' "showing" of irreparable harm consists of assertions that TC Energy's planned activities will change the status quo and unsubstantiated conclusions that this constitutes irreparable harm to various species and habitats. That is not remotely sufficient. Irreparable harm cannot be presumed. *Cottonwood Envtl. Law Ctr. v. USFWS*, 789 F.3d 1075, 1090-91 (9th Cir. 2015). To obtain the extraordinary remedy of a preliminary injunction, Plaintiffs must prove that *they* are "likely to suffer irreparable harm before a decision on the

merits can be rendered." *Winter*, 555 U.S. at 22 (citation omitted). They have not remotely met that burden.

1. Mowing

Plaintiffs allege that TC Energy will clear "hundreds of miles" of land that are home to "a wide variety of native plants," which will leave "*less* habitat for birds and other wildlife" and "directly exacerbate" the "continuing decline" of various species of birds. Dkt. 82-1 at 5-6 & 8. But they do not explain how that will harm their members, and the allegations are unsubstantiated and inaccurate in any event. The allegations are not based on declarations from any expert, but on isolated quotes from the 2014 FSEIS and an article about the decline in North American bird populations since 1970 that does not mention Keystone XL or any other major oil pipeline. *Id.*at 5-8. Plaintiffs claim that these impacts "are extensive" (Dkt. 82-1 at 6), but both the 2014 FSEIS and the 2019 Final SEIS concluded that the impacts of construction and operation of Keystone XL on land use, water resources, and biological resources will be "less than significant." *See* 2019 Final SEIS, Table 4.1-1 at 4-2 (comparing Impact Findings from 2014 FSEIS and 2019 Final SEIS). Most importantly, Plaintiffs ignore the extensive and well-documented steps that TC Energy will take to minimize and redress the effects of construction. *See* 2019 Final SEIS, Table S-4 at S-19-S-23 (describing resource protection measures).

Indeed, the mowing is done pursuant to a Conservation Plan, developed under current FWS guidance, to *protect* birds from harm that could occur if they nested in the construction right-of-way. *See* 2019 Final SEIS at 4-39; U.S. Fish & Wildlife Service, Nationwide Standard Conservation Measures at 2, https://www.fws.gov/migratorybirds/pdf/management/nationwidestandardconservationmeasures.pdf. And "[t]otal habitat loss due to pipeline construction" is "likely be small in the context of available habitat, both because of the linear nature of the proposed Project and because restoration would follow construction." 2019 Final SEIS at 4-39.

Plaintiffs also say construction could harm the American Burying Beetle and cause loss of wetlands. Dkt. 82-1 at 6. But they ignore that TC Energy has committed to special measures to minimize harms to both. *See* 2019 Final SEIS, Table 8-2 at 8-4-8-5 (wetlands); *id.* Table 8-3 at 8-13-8-14 (American Burying Beetle). And these harms cause no legally cognizable injury, because any loss of wetlands or beetles will be authorized by permits issued under Section 404 of the CWA and by an incidental take permit issued under Section 10 of the ESA. *See, e.g.*, 2019 Final SEIS at 4-28 (discussing CWA), 2020 Keystone XL Plan of Development, Appx. U-2 at 3 (Biological Opinion).[7]

[7] available at https://eplanning.blm.gov/epl-front-office/projects/nepa/1503435/20011541/250015783/POD_Appendix_U-2__Biological_Opinion_508.pdf

2. Tree Felling

Plaintiffs' claims concerning tree cutting are equally baseless. In the recently-completed Biological Opinion, FWS found no records of northern long-eared bat maternity roosts or hibernacula within the action area of Keystone XL. Biological Opinion at 3-4. In addition, TC Energy must comply with the law and is subject to liability if it violates the ESA or implementing regulations. A preliminary injunction cannot be based on speculation that the company will violate the law. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983).

Nor is tree-felling *per se* irreparable harm. Plaintiffs cite cases (Dkt. 82-1 at 13) where injunctions were issued to protect trees under the Wilderness Act, where "wilderness" areas must remain "undeveloped" and in their "natural condition[]," and "untrammeled by man." *Parker v. United States*, 309 F. Supp. 593, 597-98 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971). But the land at issue here is mostly private, and none of it is protected by any law barring all development.

3. Global Warming Impacts

Plaintiffs assert without any supporting evidence that the pipeline "will indisputably worsen the global warming crisis." Dkt. 82-1 at 11-12. But any impact is attributable to *operation* of the pipeline, not its construction, and so it is neither imminent nor a basis to enjoin *construction or preconstruction*. Moreover, the 2019 Final SEIS addresses this issue (as the Court directed) and concludes that

greenhouse gas emissions from Keystone XL would contribute only "incrementally to global climate change in combination with all other global sources of greenhouse gas emissions." 2019 Final SEIS at 7-20. And here, too, any harm is not legally cognizable, for Plaintiffs have no legal right to stop activities that generate greenhouse gas emissions.

4. Criminal Activity By Construction Workers

Plaintiffs previously claimed that tribal members would be harmed by criminal acts by workers at the temporary camps. Again, however, courts cannot enter injunctions based on speculation that the plaintiff could be the victim of a crime. *Lyons*, 461 U.S. at 105-110.

5. Bureaucratic Momentum

Finally, Plaintiffs reprise their bureaucratic momentum argument. But, because the 2019 Permit was lawfully issued, *supra* § I, no further assessment of Keystone XL is required, and thus no such assessment can be "skewed" by commencement of construction. And even if the Court were to vacate the 2019 Permit and require compliance with E.O. 13337, Plaintiffs' bureaucratic momentum argument still fails.

First, the assumption that construction *outside* the border segment would skew a future assessment conflicts with the Court's duty to "presume that agencies will follow the law," *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th

Cir. 2010), and is foreclosed by the Ninth Circuit's decision in the prior appeal. There, the Northern Plains Plaintiffs argued that this Court's injunction should remain in place to prevent construction "outside of the BLM and Corps jurisdictional areas," because it would "skew[] those agencies' decision-making." Northern Plains Opp'n to Mots. To Dismiss, No. 18-36068, Dkt. 49-1 at 36 (9th Cir. Apr. 23, 2019). The Ninth Circuit necessarily disagreed when it granted the motion to dismiss and dissolved the injunction.

Second, even with respect to construction of the border segment itself, the rationale of the "bureaucratic momentum" theory no longer applies. Courts have applied that theory where (1) an agency has failed to adequately study the environmental impact of a project; (2) there is an alternative that, if chosen, would eliminate or obviate that potential impact; and (3) there is a danger that allowing a project to move forward while the issue is studied will foreclose selection of the harm-reducing alternative. *See, e.g.*, *Davis v. Mineta*, 302 F.3d 1104, 1115 & n.6 (10th Cir. 2002). Here, however, the deficient environmental assessment has been remedied, BLM considered that analysis before granting a right-of-way, and Plaintiffs have not challenged either the new assessment or BLM's decision. Thus, their bureaucratic momentum theory rests on impermissible speculation that the State Department would look at the same Final SEIS and decide to prohibit construction of the same facilities, in the same place, that BLM authorized.

III. THE BALANCE OF HARDSHIPS WEIGHS AGAINST AN INJUNCTION

The balance of hardships also favors TC Energy, which has spent over a decade and approximately $3.14 billion to develop the Project. Declaration of Gary Salsman ¶ 11 (attached as Exhibit 1). Further delay will impose substantial economic costs on the company, will threaten hundreds of jobs and significant tax revenue that the Project would provide, and could delay the operational date of a service that shippers have already contracted to use. This counsels strongly against an injunction. *See Alaska Survival v. STB*, 704 F.3d 615, 616 (9th Cir. 2012) ("[f]urther delay of this project will prevent the award of construction contracts, postpone the hiring of construction employees, and significantly increase costs).

TC Energy needs to construct worker camps and pipe yards several months before construction of the pipeline itself. Salsman Decl. ¶¶ 7, 12. If it cannot do so, completion of the Project could be delayed past the planned in-service date, and the company could lose earnings of approximately $1.2 billion. *Id.* ¶ 13. The increased workforce and extended construction season entailed in trying to maintain that in-service date following a delay could impose incremental costs of approximately $200 million, with uncertain prospects of success. *Id.* ¶ 12.

A delay in construction and completion of the Project would also harm third parties. It would threaten hundreds of jobs and significant tax revenue that the Project would provide. *Id.* ¶ 13; *see also* 2019 Final SEIS at 4-63, 4-65 (describing

beneficial impacts to economic base and tax revenue). It would deprive TC Energy's customers of a service they have contracted to use. *Id.* ¶ 16. And it would harm the public interest by delaying a Project that State found would promote the nation's energy security and bilateral relations with Canada.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be denied.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2) of the United States Local Rules, I certify that this Brief contains 6489 words, excluding caption and certificates of service and compliance, printed in at least 14- point font and is double-spaced, including for footnotes and indented quotations.

DATED this 10th day of February, 2020.

By: */s/ Jeffery J. Oven*

CERTIFICATE OF SERVICE

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

/s/ Jeffery J. Oven