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## Indigenous Environmental Network and North Coast Rivers Alliance v. President Donald J. Trump, et al. and TC Energy Corporation, et al.

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***Indigenous Environmental Network and North Coast Rivers Alliance  
v. President Donald J. Trump, et al. and TC Energy Corporation, et al.,  
428 F. Supp. 3d 296 (D. Mont. 2019)***

**Kirsten D. Gerbatsch**

A single cross-border pipeline project has been the epicenter of environmental litigation for the last decade—and it is not over yet. For years, TransCanada Keystone Pipeline, LP and TC Energy have sought to construct and maintain a segment of the Keystone pipeline between the United States and Canada to connect existing pipeline infrastructure and transport crude oil. To do so, the company must first apply and be approved for a permit. Between 2008 and 2012, President Obama twice denied TransCanada Keystone Pipeline and TC Energy’s applications. Then, in 2017 and again in 2019, President Trump unilaterally invited TC Energy’s application and approved the permit. Plaintiffs challenged the 2017 permit in a separate case. This case centers upon President Trump’s issuance of the 2019 permit. In response, Plaintiffs sought a preliminary injunction to stay all federally-issued permits that allowed TC Energy to construct the pipeline, and to prohibit its construction and preconstruction activities during litigation.

**I. INTRODUCTION**

In 2019, a coalition of environmental organizations filed suit against the federal government challenging the approval of the Keystone XL pipeline.<sup>1</sup> The Indigenous Environmental Network and North Coast Rivers Alliance (“Plaintiffs”) brought the action in the United States District Court for the District of Montana against President Trump and various government agencies and agents (“Agency Defendants”). President Trump authorized Defendant-intervenors TransCanada Keystone Pipeline, LP and TC Energy Corporation (collectively “TC Energy”) to construct the United States and Canada cross-border Keystone XL oil pipeline (“Keystone”).

Plaintiffs claimed President Trump violated the Commerce and Property Clauses of the United States Constitution and violated a 2004 Executive Order when, in 2019, he approved and issued TC Energy a Presidential Permit (“2019 Permit”) to begin constructing Keystone.<sup>2</sup> Plaintiffs requested a preliminary injunction to halt all federally-issued permits for Keystone and enjoin TC Energy from further construction and preconstruction activities until the court had ruled on the merits of their action.<sup>3</sup>

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1. *Indigenous Environmental Network and North Coast Rivers Alliance v. President Donald J. Trump, et al. and TC Energy Corporation, et al* 428 F. Supp. 3d 296, 300 (D. Mont. 2019).

2. *Id.*

3. *Id.*

The court held that (1) Plaintiffs had standing to invoke federal jurisdiction; (2) Plaintiffs sufficiently pled their claims that President Trump violated the Commerce Clause, the Property Clause, and the 2004 Executive Order; and (3) Plaintiffs' requested preliminary injunction was not warranted.<sup>4</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

In 1968, President Johnson issued the first executive order regulating the construction and maintenance of pipelines along the United States' foreign borders. The order required applicants to obtain permission from the Secretary of State, who would review all permit applications, consult with various departments and agencies, and determine whether a permit served the national interest before it could be approved.<sup>5</sup> In 2004, President Bush signed a new executive order. The order sought to streamline the approval process for domestic energy and transmission projects, but the process for cross-border projects, remained the same. Notably, the order still required a party seeking a cross-border permit to obtain authorization from any departments or agencies with jurisdiction over the project, and to comply with their applicable laws and regulations.<sup>6</sup>

In 2008, TC Energy applied to the State Department for a presidential permit to create the Keystone pipeline, capable of transporting 830,000 barrels of crude oil per day from Canada and Montana to existing pipeline facilities in Nebraska.<sup>7</sup> The State Department determined the construction of the Keystone pipeline triggered the National Environmental Protection Act ("NEPA") and issued a final Environmental Impact Statement in August of 2011.<sup>8</sup> Several months later, Congress directed the President, acting through the State Department, to swiftly make a decision on TC Energy's 2008 application when it passed the Temporary Payroll Tax Continuation Act ("TPCCA").<sup>9</sup> The State Department denied TC Energy's application in early 2012, stating it did not have sufficient time to adequately assess Keystone's potential environmental impacts.<sup>10</sup>

TC Energy submitted a second application in May 2012. The State Department conducted a supplemental EIS of the second application in January 2014 and denied it in 2015 because the Keystone pipeline would not serve the national interest, as required by the 2004 Executive Order.<sup>11</sup>

In 2017, President Trump invited TC Energy to reapply for a permit and instructed the State Department to issue the permit within 60 days upon determining that permit issuance would serve the national

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4. *Id.* at 306–07, 312–14, 316.

5. *Id.* at 300–01.

6. *Id.* at 301.

7. *Id.* at 302.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 302–03.

interest under the 1968 and 2004 Executive Orders.<sup>12</sup> TC Energy filed an application and the Under Secretary of State recommended approval. The 2017 Permit was approved in April, granting TC Energy the authority to construct and operate 875 miles of pipeline.<sup>13</sup> Plaintiffs challenged the State Department's decision, and in 2018, the United States District Court of Montana enjoined TC Energy from further construction until the State Department completed a supplemental EIS in accordance with NEPA.<sup>14</sup> All parties appealed to the United States Court of Appeals for the Ninth Circuit.<sup>15</sup>

In 2019, President Trump issued a permit to TC Energy, which “expressly supersede[d] and revoke[d] the 2017 Permit,” based on his authority as President.<sup>16</sup> The 2019 Permit granted TC Energy permission to construct the cross-border pipeline facilities notwithstanding the 2004 Executive Order.<sup>17</sup> TC Energy and Federal Defendants moved to dismiss their pending appeals in the Ninth Circuit regarding the 2017 Permit.<sup>18</sup>

Then, only a few weeks after President Trump issued the 2019 Permit, he issued an Executive Order, which replaced and eliminated the 1968 and 2004 Executive Orders.<sup>19</sup> The 2019 Executive Order granted President Trump complete authority over the cross-border pipeline permitting process, thus removing the State Department from its role in approving or denying permits.<sup>20</sup>

Plaintiffs filed suit, alleging that President Trump violated the Property Clause, the Commerce Clause, and the 2004 Executive Order by issuing the 2019 Presidential Permit.<sup>21</sup> Plaintiffs requested a preliminary injunction to stay all permits issued by Federal Defendants for the pipeline construction. Additionally, Plaintiffs sought to enjoin TC Energy's construction and preconstruction activities. In response, Federal Defendants and TC Energy moved to dismiss this action for lack of subject matter jurisdiction and for failure to state a claim and moved to dismiss Federal Agency Defendants.<sup>22</sup>

### III. ANALYSIS

In making its decision, the court first examined whether Plaintiffs had standing.<sup>23</sup> Next, the court examined Plaintiffs' claims that the 2019

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12. *Id.* at 303.

13. *Id.*

14. *Id.* at 303–04 (citing *Indigenous Env'tl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 591 (D. Mont 2018)).

15. *Id.* at 304.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 304–05.

20. *Id.* at 305.

21. *Id.* at 300.

22. *Id.*

23. *Id.* at 305.

Permit issuance violated the Commerce Clause, Property Clause, and the 2004 Executive Order.<sup>24</sup> The court determined that Plaintiffs pled plausible claims and denied Federal Defendants' and TC Energy's motions to dismiss.<sup>25</sup> The court then considered and denied Federal Defendants' request to dismiss Agency Defendants.<sup>26</sup> Finally, the court denied Plaintiffs' request for a preliminary injunction.<sup>27</sup>

#### A. *Plaintiffs Had Standing*

The court held Plaintiffs had standing because they were able to show they suffered a concrete and particularized injury-in-fact which was "certainly impending,"<sup>28</sup> traceable to the Keystone construction, and redressable by a favorable court decision.<sup>29</sup> The parties do not dispute that the 2019 Permit allegedly authorizes TC Energy to build and maintain a segment of pipeline, 1.2 miles long, which extends from the US-Canada border to, and including, the first mainline shut off valve.<sup>30</sup> Plaintiffs argued the 2019 Permit granted TC Energy permission to construct an additional 875 miles of pipeline in the United States because the 2019 Permit makes reference to the 2012 and 2017 Applications.<sup>31</sup> However, the court found that even if it assumed the permit authorized only a 1.2-mile cross-border pipeline segment, Plaintiffs demonstrated that Keystone would still cause direct and irreparable harm to the environment and the area where they live, work, and recreate.<sup>32</sup>

The court held that if Plaintiffs prevail on the merits of the case, the harm caused by the 2019 Permit is redressable.<sup>33</sup> Defendants argued Plaintiffs' alleged injuries were not redressable because the requested relief violated the separation of powers between the Executive and Judicial Branches.<sup>34</sup> The court disagreed. It determined that while the separation of powers doctrine generally steers courts away from granting injunctive relief against the President when performing official duties, courts can enter an injunction against the President when the President has acted without the necessary authority.<sup>35</sup> The court held that the Judicial Branch may properly review whether the President has acted with the necessary authority, then determine if those actions are lawful, and enjoin actions deemed unlawful.<sup>36</sup>

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24. *Id.* at 312–14, 316.

25. *Id.* at 307, 312–315.

26. *Id.* at 315.

27. *Id.* at 316.

28. *Id.* at 305 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)).

29. *Id.* at 305.

30. *Id.*

31. *Id.* at 306.

32. *Id.*

33. *Id.* at 307.

34. *Id.*

35. *Id.*

36. *Id.*

## B. *Plaintiffs Stated Plausible Claims*

The court denied Defendants' motions to dismiss Plaintiffs' claims. Plaintiffs claimed that the issuance of the 2019 Permit violated the Foreign and Interstate Commerce Clause and Property Clause of the United States Constitution, and the 2004 Executive Order.<sup>37</sup> The court held that Plaintiffs pled plausible claims on all three accounts.<sup>38</sup>

### 1. *Commerce Clause*

Plaintiffs alleged that President Trump's unilateral issuance of the 2019 Permit violated the Commerce Clause of the United States Constitution.<sup>39</sup> Plaintiffs argued the import of oil and the requisite pipeline construction to transport oil is a matter of foreign and interstate commerce, which is Congress's exclusive power to regulate.<sup>40</sup> Defendants argued President Trump used his presidential constitutional powers to issue the cross-border pipeline permit.<sup>41</sup>

The court found that the cross-border transportation of oil is a form of foreign commerce under the Constitution's Commerce Clause.<sup>42</sup> The court identified that the Constitution provides explicit textual authority regarding the allocation of powers between the President and Congress "when the Constitution wanted both branches to be involved in an area of foreign affairs."<sup>43</sup> However, because President Trump and Congress both exercised authority over cross-border pipeline permits prior to President Trump issuing the 2019 Permit in the absence of explicit Constitutional designations of power, the court applied the Supreme Court's approach.<sup>44</sup>

This analytical approach places "significant weight upon historical practice[s]" of separation of powers cases.<sup>45</sup> The court examined the Secretary of State's long-standing authority granted by the 1968 and 2004 Executive Orders, Congress' passage of the Keystone XL Pipeline Approval Act, President Obama's subsequent veto, Congress's passage of the TPTCCA in 2011, and the failed Keystone XL Pipeline Approval Act of 2015 as all examples of the "presidential-congressional interplay."<sup>46</sup> The court acknowledged that President Trump unilaterally issued the 2019

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37. *Id.* at 312, 314–315.

38. *Id.*

39. *Id.* at 308.

40. *Id.*

41. *Id.* at 309.

42. *Id.*

43. *Id.* at 309–10.

44. *Id.*

45. *Id.* at 311.

46. *Id.* at 311.

Permit and held that Plaintiffs' claim alleging the 2019 Permit was outside the bounds of President Trump's legal authority was plausible.<sup>47</sup>

## 2. Property Clause

Plaintiffs alleged that President Trump's issuance of the 2019 Permit violated the Property Clause because President Trump lacked the authority to grant TC Energy permission to occupy federal land, over which Congress has complete power, for the Keystone pipeline.<sup>48</sup> Plaintiffs contended that only Congress can make federal land rules and regulations through the Property Clause.<sup>49</sup> Therefore, the 2019 Permit for Keystone on federal land, without State Department review or compliance with Congressional environmental laws, violated the United States Constitution.<sup>50</sup>

The court found that the Property Clause provides Congress power over public lands "to prescribe the conditions upon which others may obtain rights in them."<sup>51</sup> Further, the court found that the Bureau of Land Management ("BLM") must manage federal land in compliance with federal environmental regulations and is not excused from this work under the 2019 Permit.<sup>52</sup> Additionally, the court found that the 2019 Permit "affirmatively acknowledges" that TC Energy must obtain BLM right-of-way permits or authorizations for constructing the pipeline across federal land.<sup>53</sup>

Looking to persuasive precedent from the District of Alaska in *League of Conservation Voters v. Trump*,<sup>54</sup> the court drew upon similar implications of congressional authority over federal lands under the Property Clause.<sup>55</sup> In *League of Conservation Voters*, the court held that President Trump had unlawfully revoked President Obama's withdrawals of Outer Continental Shelf lands because President Trump acted beyond the definitive statutory framework granting Congress sole authority to revoke prior presidential withdrawals.<sup>56</sup>

In the case at hand, the same statutory framework does not exist.<sup>57</sup> However, the court applied this precedent and determined that Congress previously exercised its authority on the specific issue of Keystone cross-border pipeline permitting. The court found Congress clearly ensured that the permitting process incorporate federal agencies' views and the State

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47. *Id.* at 311–12.

48. *Id.* at 312.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 313 (citing *League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013, 1031 (D. Alaska 2019)).

55. *Id.*

56. *Id.* at 313.

57. *Id.*

Department identify a “national interest” served by the permit in its application review. The State Department review process was a congressionally-approved process set forth in the 2004 Executive Order and was still in effect at the time the permit was issued.<sup>58</sup> The court found that Congress demonstrated its control over the pipeline permitting process and has sole authority over federal lands under the Property Clause.<sup>59</sup> Therefore, the court held that Plaintiffs presented a plausible claim that President Trump violated the Property Clause in issuing the 2019 Permit.<sup>60</sup>

### 3. 2004 Executive Order

Plaintiffs alleged that President Trump violated numerous provisions of the 2004 Executive Order by issuing the 2019 Permit, and the permit itself violated the 2004 Executive Order.<sup>61</sup> Defendants countered that the “President cannot violate an executive order as a matter of law.”<sup>62</sup>

The court examined the President’s constitutional authority to issue and revoke executive orders.<sup>63</sup> The court determined that President Trump does not possess the “same liberty over a prior executive order that implemented certain statutory foundations” such as agency action.<sup>64</sup> Thus, the court held that it may review the executive order and whether President Trump acted beyond constitutional or statutory authority.<sup>65</sup>

#### C. Motion to Dismiss Agency Defendants Denied

The Federal Defendants requested the court dismiss the Agency Defendants, arguing that Plaintiffs did not allege that Agency Defendants violated applicable law.<sup>66</sup> The court denied the motion without prejudice, holding that Agency Defendants were appropriately included because Plaintiffs have argued that at least one of the Agency Defendants, the BLM, did not demonstrate compliance with federal law. Additionally, the court held it would be “premature” to dismiss the Agency Defendants because Plaintiffs made a plausible claim for relief that the 2019 Permit issuance violated the 2004 Executive Order. Therefore, if the court were to hold that President Trump acted beyond his authority in issuing the 2019 Permit, then the Agency Defendants would be implicated in further

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58. *Id.*  
59. *Id.*  
60. *Id.* at 313–14.  
61. *Id.* at 314.  
62. *Id.*  
63. *Id.*  
64. *Id.*  
65. *Id.*  
66. *Id.* at 315.



litigation because they participate in the cross-border pipeline permitting process.<sup>67</sup>

*D. Preliminary Injunction Request Denied*

The Plaintiffs sought a preliminary injunction.<sup>68</sup> The court denied Plaintiffs' request because they did not demonstrate that the injunction would be needed to "preserve the status quo" at that point in the litigation since TC Energy stated it would not conduct further preconstruction activities for the remainder of 2019.<sup>69</sup> However, the court ruled that Plaintiffs could renew their request for injunctive relief if TC Energy's pipeline activities altered the status quo.<sup>70</sup>

IV. CONCLUSION

The court's decision allowed the challenge to Keystone to continue on its merits among the ranks of other pending litigation. In a separate order, the court directed the parties to file supplemental briefs on additional issues.<sup>71</sup> Litigation has continued since January 2020 with Plaintiffs filing a renewed motion for a preliminary injunction and all parties filing summary judgment motions.<sup>72</sup>

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67. *Id.*

68. *Id.* at 316.

69. *Id.*

70. *Id.*

71. Order Requesting Additional Briefing Indigenous Environmental Network and North Coast Rivers Alliance v. President Donald J. Trump, et al. and TC Energy Corp., et al., Dec. 20, 2019, CV-19-28-GF-BMM.

72. Tiffany Challe, *February 2020 Updates to the Climate Case Charts: Montana Federal Court Agreed to Consider Keystone XL-Specific Documents and 2012 Biological Opinion in Challenge to Authorization Under Nationwide Permit*, CLIMATE LAW BLOG, <http://blogs.law.columbia.edu/climatechange/2020/02/10/february-2020-updates-to-the-climate-case-charts/> (last visited Aug. 11, 2020).