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

ROSEBUD SIOUX TRIBE *et al.*, Plaintiffs, v. DONALD J. TRUMP *et al.*, Defendants.	Case No. 4:18-cv-00118-BMM **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

This case, at its heart, is about treaties, solemn contracts between two sovereign nations. There is well-settled law that governs the interpretation of treaties, including that treaties can and do proscribe activities both on and off Indian lands. The Ninth Circuit recently confirmed this long-held understanding. *See United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *aff'd by equally divided court*, 138 S. Ct. 1832 (2018) ("*Culverts*"); *c.f. Herrera v. Wyoming*, 139 S. Ct. 1686 (2019). Treaties are also interpreted according to well-settled Canons of Construction, the first of which requires that a treaty be interpreted not according to the technical meaning of its words to lawyers, but as "they would naturally be understood by the Indians." *Herrera*, 139 S. Ct. at 1701; *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring) ("[W]e must 'give effect to the terms as the Indians themselves would have understood them.'"). Any ambiguities are resolved in favor of the Indians. *Cougar Den*, 139 S. Ct. at 1016; *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 174 (1973). The Tribes have asserted five claims that implicate the Fort Laramie and Lame Bull Treaties. Resolution of these claims requires the Court to analyze the Treaties' provisions as the Native nations would have understood them

at the time they were signed. Critically, this Court needs to understand the bargains that were made, and specifically what the term "depredation" means in the context of these specific Treaties. Only then can the Court analyze the application of the Treaties to the instant case.

TransCanada continues to ignore this body of law, despite Plaintiffs' repeated and detailed citations to the relevant law. Doc. 74 at 6, 18-20; Doc. 58 at 73-5. TransCanada fails to address treaty law, and offers absolutely no evidence on one of the key terms, "depredation," instead citing to one case it believes supports its position: *Gros Ventre v. United States,* 469 F.3d 801 (9th Cir. 2006). As will be shown, that case does not control here. This case is controlled by *Herrera*, 139 S. Ct. at 1701, *Cougar Den,* 139 S. Ct. at 1006 (opinion), and *Culverts*, 853 F.3d 946. As the Tribes have noted on previous occasions, *Gros Ventre* is a common law trust case and does not employ the well-settled treaty Canons of Construction.

TransCanada's second tactic is to ignore the Treaties altogether and treat this case as if it were a case of common trespass. It spends the majority of its motion, and devotes several declarations, to assertions that it is not crossing lands "owned" by the Tribes. In fact, TransCanada has admitted to actions that do involve activity on "Indian lands." 25 C.F.R. § 211.3.

Furthermore, TransCanada's factual assertions are disputed as described herein. Indian landholdings are complex and consist of fee lands, trust lands, on- and off-reservation lands, and surface and subsurface holdings. Moreover, the interests the Tribes have asserted here include "depredations," damages and threats to their land, minerals, water system, their drinking and irrigation water itself, and their natural, historic, and cultural resources. None of these claims *require* land ownership. The fact that the pipeline corridor, area of potential effect ("APE") under the National Historic Preservation Act, 54 U.S.C. § 306108, ("NHPA"), and the spill zone all impact Rosebud mineral and surface holdings is merely one aspect of this case.

TransCanada is not entitled to summary judgment on any of the claims. It failed to answer the Tribes' First Amended Complaint, and then jumped the proverbial gun by hurriedly filing a summary judgment motion based on disputed facts and without any discovery needed to resolve the Tribes' claims. This court should deny this motion or continue it until the relevant facts and discovery have been established.

There are, however, some specific issues in this case that can be determined by summary judgment. The Tribes are filing for partial

summary judgment on the claims that are matters of law, namely their constitutional claim, and the claims for which TransCanada has admitted the relevant facts—namely their claims concerning mineral rights and tribal jurisdiction. The Tribes are dealing with those issues separately in their Motion for Summary Judgment and incorporate those arguments by reference here so as to avoid duplicative briefing.

STATEMENT OF DISPUTED MATERIAL FACTS

I. The Tribes' Claims Are Based on the Treaties and TransCanada Offered No Evidence About the Tribes' Understanding of the Treaties

The Tribes, as sovereign nations, ground their claims on treaty obligations undertaken by the United States in government-to-government negotiations. TransCanada again wrongly asserts that the Tribes' claims are purely statutory. TransCanada's Mem. in Supp. of Summ. J., Doc. 98 (TC Br.) at 15-21 (referring to the statutory provisions without mention of treaties). The independent authority and substantive obligations taken on by the United States through the Treaties, as the "supreme Law of the Land," U.S. Const. art. VI, cl. 2, may be informed by the United States' other statutory obligations. But the Treaties themselves form the bases for those claims.

TransCanada did not present any of the factual background about the Tribes' understanding of the Treaties, and that is fatal in a summary judgment posture. The Supreme Court has made clear that in interpreting a treaty with a tribe, "courts must focus upon the historical context in which it was written and signed." *Cougar Den*, 139 S. Ct. at 1012; *see Jones v. United States*, 846 F.3d 1343, 1351 (Fed. Cir. 2017). While courts should look to the parties' "choice of words," they should also consider the "larger context that frames the Treaty," including its "history, purpose, and negotiations." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 197, 202 (1999); *see Culverts*, 853 F.3d at 963.

Treaties are construed as "they would naturally be understood by the Indians." *Herrera*, 139 S. Ct. at 1701; *Culverts*, 853 F.3d at 963. When courts determine tribes' "understanding of written words," they "must be careful to avoid reasoning that holds strictly to our later-established understanding of those words." *Jones*, 846 F.3d at 1352. By failing to provide any historical facts about the Tribes' understanding of the Treaties, TransCanada has failed to provide any factual support for its treaty arguments. There being no facts to rely on, there can be no summary judgment based on undisputed facts and TransCanada's motion should be denied.

II. TransCanada Admits the Pipeline Crosses Rosebud Mineral Estates Held in Trust

TransCanada admits that the Pipeline easement would cross mineral estates owned by individual Indians held in trust by the United States. TC Br. at 5, 21-22; TransCanada's Statement of Undisputed Facts, Doc. 98 (TC SUF) at Ex. 5, ¶ 8, 9. They mistakenly assert, however, that Rosebud has no interest in these mineral estates. TC Br. at 21-22. Rosebud is the owner of three of the four mineral estates that TransCanada admits would be crossed and they are held in trust by the United States. Pls.' Statement of Disputed Facts ("Pls.' SDF") at 5-6, 9-20, 28-30. The fourth mineral estate that TransCanada admits would be crossed is owned in trust for individual Rosebud members, and Rosebud still has an interest in, and authority over, those Indian lands. *See Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996) (holding that Cheyenne and Arapaho Tribes could enforce severance tax on non-Indian oil company extractions produced from trust allotted lands); *c.f. HRI, Inc. v. EPA*, 198 F.3d 1224, 1254 (10th Cir. 2000) ("[I]f ownership of mineral rights and the surface estate is split, and either is considered Indian lands, the Federal EPA will regulate the well under the Indian land program." (citation omitted)). Additionally, TransCanada has

failed to include at least two mineral estates that the Pipeline would cross that are held in trust for Rosebud. Antoine Decl. at 6; Pls.' SDF (Additional Facts) at 29 ¶ 56.

III. TransCanada Has Failed to Provide Information, and Its Surveys Are Fundamentally Flawed

TransCanada asserts the Pipeline "land" and "easements" would not cross "Indian lands," Rosebud's "Reservation," or Rosebud surface estates. TC Br. at 4; 13, 20, 26. TransCanada provided Mr. Brian Fowlds, a surveyor, with the "digital coordinate file containing the proposed centerline of the Easements, temporary workspace, additional temporary workspace, and certain access roads in Tripp County, South Dakota." Doc. 98-6 at ¶ 5. TransCanada, however, has refused to provide this information to the Tribes so that they may engage their own expert and surveyor. Antoine Decl. at 8; Pls.' SDF (Additional Facts) at 30 ¶ 62; Rhodd Decl. at. 4. Further, Mr. Fowlds claims to have surveyed Indian lands held in trust. *See generally* 98-6. Mr. Fowlds does not, however, claim to have performed a "cadastral survey" or inquired with the Bureau of Land Management ("BLM") about performing a survey of Indian lands. Antoine Decl. at 7; Pls.' SDF (Additional Facts) at 30 ¶ 61; U.S. Dep't of Interior, *Management of Land Boundaries* 6 , *available at*

https://www.blm.gov/sites/blm.gov/files/Management%20of%20Land%20Boundaries.pdf.(BLM surveying standards intended to, *inter alia*: "Protect and preserve Indian trust assets from boundary conflicts, trespass, unauthorized use, and ambiguous land descriptions.").

The publicly available maps the Tribes have seen show that the Pipeline corridor would cross Rosebud surface and mineral estates. Antoine Decl. at 3; Pls.' SDF (Additional Facts) at 28 ¶ 52. These maps are consistent with the Final Supplemental Environmental Impact Statement for the Keystone XL Project (Dec. 2019) ("2019 EIS") analysis of the impact of construction and operation of the Pipeline. For example, the APE[1] in the 2019 EIS is 300 feet (150 feet on each side of the Pipeline). 2019 EIS at 3.9-1; Pls.' SDF at 23 ¶ 48. In the Programmatic Agreement governing NHPA compliance for the Pipeline, for areas of the Pipeline corridor that were not studied in 2008, the APE is 500 feet (250 feet on each side of the Pipeline). *See* Pls.' SDF (Additional Facts) at 27 ¶ 49; Programmatic Agreement, Appx. E at 2, Final Supplemental Environmental Impact Statement for the Keystone

[1] The APE is "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist." 36 C.F.R. § 800.16(d).

XL Project ("2014 EIS"). Under the 2019 EIS, then, the geographic areas where there would be alterations from the Pipeline are at bare minimum 150 feet from the Pipeline corridor (and more properly 250 feet) on both sides. And for a spill, the area of effect would be between 1,200 to 5,000 feet from the release point on the surface and down into the minerals below. 2019 EIS at 5-2. Mr. Fowlds' survey failed to include these areas. Pls.' SDF (Additional Facts) at 27 ¶ 50.

IV. Indian Lands Held in Trust

TransCanada variously argues that the Pipeline "lands" and "easements" would not cross Rosebud or Fort Belknap lands held in trust, reservation lands, or tribal lands, and that the 2019 Permit did not "authorize activity" on tribal lands. TC Br. at 4; 12, 13, 20, 26. The Tribes lack the maps to independently evaluate this assertion with regard to surface estates (trespass claims) at the level of detail required for a motion for summary judgment.

Simply looking at the "easements" and "authorized activity," however, is deeply flawed. The 2019 Permit authorized the construction of the Pipeline consistent with TransCanada's application. As noted, both the APE and the spill area are larger than the narrow view of the "easements"

that TransCanada has provided in its SUF at Ex. 5 (showing easement between five feet to roughly 150 feet away from Rosebud surface estates). Taking this narrow view is improper when a larger impact area is foreseen.

At the same time, however, TransCanada has admitted the Pipeline would cross Rosebud mineral estates held in trust. These trust estates are legally "Indian lands." Indian lands include any lands owned by any individual Indian or Indian tribe "which owns land or interests in the land," the title to which is held in trust by the United States. 25 C.F.R. § 211.3. As will become apparent, this is fatal to TransCanada's motion in several respects.

ARGUMENT

I. TransCanada is Not Entitled to Summary Judgment

A. TransCanada's Motion is Premature and Thus Violates Federal Rule of Civil Procedure 56(d)

With only twenty-four hours' notice, TransCanada notified Plaintiffs that it would move for summary judgment. Doc. 96. TransCanada's Motion to Dismiss had only recently been denied on December 20, 2019, Doc. 92, and the Court had ordered further briefing on specific questions due on January 24, 2020, and February 14, 2020. Doc. 93. In the interim, according to the

federal rules, both federal Defendants and TransCanada were required to file Answers to the Tribes' First Amended Complaint within fourteen days of the Court's order denying their Motions to Dismiss. Fed. R. Civ. P. 12(a)(4)(A). Their Answers were due on January 3, 2020. Because Defendants did not respond in a timely fashion, the Tribes could have applied for an entry of default. Fed. R. Civ. P. 55(b)(2). Nevertheless, because Defendants have failed to deny the allegations in the First Amended Complaint, all facts not denied may be taken as true. *See* William W. Schwarze et al., *California Practice Guide: Federal Civil Procedure Before Trial* § 14:189, at 14-91 (The Rutter Group 2019) ("Rutter Guide"); *see also Lockwood v. Wolf Corp.,* 629 F.2d 603, 611 (9th Cir. 1980) (summarizing factual standard at motion for summary judgment and holding in part that the "failure to deny the allegation in its answer . . . constitutes an admission. Therefore, no evidence on this element was required." (internal citation omitted)). The purpose of the Answer "is to put the case 'at issue' as to all the important matters alleged in the complaint that the defendant does not want to admit" and accordingly narrow the issues the Court must consider for the remainder of the litigation. Rutter Guide, *supra* § 8:8880, at 8-126. Without the Answer, the Tribes do not know

the affirmative defenses to and bases for, opposition to the claims, nor do they have a basis upon which to craft pertinent discovery.

In keeping with its lack of adherence to the rules, TransCanada's motion for summary judgment is also premature because it was filed before the Tribes could access key factual evidence on which the motion is based. TransCanada has based its arguments on digital files depicting route information and land ownership that it has not disclosed in any form, and to which the Tribes have no access. Antoine Decl. at 8; Pls.' SDF (Additional Facts) at 30 ¶ 62; Rhodd Decl. at 4. In other words, the motion for summary judgment is based on material facts that are within the *exclusive knowledge* of the moving party. As this Court is aware, TransCanada has kept its exact route maps so close to the vest that previous litigants have had to move to compel their disclosure in the administrative record. *See* Mot. to Compel Completion of the Admin. Record, *Indigenous Envtl. Network v. U.S. Dep't of State*, Case No. 4:17-cv-00029-BMM (D. Mont. filed Jan. 1, 2018), Doc. 125. Basing a motion for summary judgment on information the moving party alone controls is precisely the kind of situation for which Rule 56(d) is intended.

i. The Standard For Rule 56(d)

If the party opposing the motion shows that, for specified reasons, it cannot present facts essential to its opposition, the court may deny the motion, defer considering it, or allow time to conduct sufficient discovery. FRCP 56(d). The purpose of this rule is to prevent the opposing party from being "railroaded" by a premature motion. *Celotex Corp. v. Catrett,* 477 U.S. 317, 326 (1986) (describing purpose of predecessor to Rule 56(f)); *see also Big Lagoon Rancheria v. California*, 789 F.3d 947, 952 n.3 (9th Cir. 2015) ("The 2010 amendments to the Federal Rules of Civil Procedure moved the language contained at Fed. R. Civ. P. 56(f) to Fed. R. Civ. P. 56(d). As the notes of the Advisory Committee explain, new 'subdivision (d) carries forward without substantial change the provisions of former subdivision (f).'").

The policy behind this rule is straightforward: summary judgment should "be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986). This rule provides a safety valve "against judges swinging the summary judgment axe too easily." *Rivera-Torres v. Rey-Hernandez,* 502 F.3d 7, 10 (1st Cir. 2007) (citation omitted).

There are four factors under 56(d). The nonmoving party must show: (1) that there is a likelihood controverting evidence exists as to a material

fact; (2) reasons why it was not discovered earlier; (3) the steps by which the opposing party proposes to obtain such evidence within a reasonable time; and (4) an explanation of how those facts will help determine the present motion. *Tatum v. City & Cnty. of S.F.*, 441 F.3d 1090, 1101 (9th Cir. 2006). Lesser specificity is required, however, if no discovery has taken place in the case. *See Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation,* 323 F.3d 767, 774 (9th Cir. 2003). That is precisely the case here. TransCanada has moved for summary judgment when absolutely *no discovery* has occurred and based it upon information that only it possesses.

ii. TransCanada's Motion is Premature

First, no Answer has been filed, there is no scheduling order in place that would govern discovery, and absolutely no discovery has taken place. TransCanada and the Federal Defendants are the only parties with knowledge and evidence of the actual Pipeline route with the requisite level of specificity, and it has neither provided this evidence to the Tribes nor made this evidence public such that the Tribes may determine with legal particularity the impacts on lands either owned by or held in trust for the Tribes. There was full briefing on this issue in the companion case. *See Indigenous Envtl. Network*, Case No. 4:17-cv-00029-BMM (Doc. 125). The

Tribes need those files in order to determine the veracity of the claims made in TransCanada's declarations, and therefore TransCanada is not entitled to summary judgment with regard to claims that deal with surface estates (treaty, trespass, right-of-way).

And with regard to the survey conducted by TransCanada, they do not appear to have reached out to, or utilized, the BLM. *Management of Land Boundaries*, *supra*, 4, 6. The Tribes should be permitted to hire their own surveyor, or utilize the BLM, to conduct an independent survey to determine the proper boundary of these Indian lands.

In addition, the Tribes know that evidence exists as to other material facts: The Tribes' understanding that "depredation" in the Treaties includes injuries to tribal resources irrespective of landownership, which is essential to resolve the Treaty claims. The Tribes have identified some of this information in their previous filings, *see* Pls.' Combined Oppo., Doc. 74 at 20-25, but the Tribes have also secured the services of an expert witness who is gathering all the pertinent historical evidence. Given TransCanada's premature motion, the expert had already begun but has not yet finished his full report; however, he has provided the Court with an overview of his findings thus far. Pls.' SDF (Additional Facts) at 33 ¶ 79. Unless TransCanada

is ready to concede these facts, in which case it concedes that the Pipeline is a depredation within the meaning of the Treaties, the expert needs the time to finish his full report and provide the Court with evidence on which to base its decision. That outstanding expert witness reports exist is enough to warrant a denial or continuance. *See Sames v. Gable,* 732 F.2d 49, 52 (3d Cir.1984) (error to grant motion for summary judgment while pertinent discovery requests were outstanding); *Schering Corp. v. Home Ins. Co.,* 712 F.2d 4, 10 (2d Cir.1983) (summary judgment should not be granted while opposing party timely seeks discovery of potentially favorable information).

Second, the facts were not discovered earlier because, as noted above, no discovery has occurred. Neither Defendant has filed an Answer, thus no scheduling order has been issued setting any discovery deadlines.[2] Third, the steps the Tribes propose are simple. They intend to request the digital SHAPE files from TransCanada, and to analyze their veracity through the use of a proper cadastral survey. The Tribes would also have their land offices analyze this data and secure their own expert to test this information.

[2] This was one reason the Tribes asked for a status conference—to note that discovery had not been conducted, and to request guidance on the need to respond to a motion for summary judgment in its absence. *See* Doc. 100.

The Tribes also intend to have their current expert complete his report on the historical evidence surrounding the Treaties and the meaning of the terms therein.

Fourth, those facts will help resolve the present motion because they will help determine land status down to cadastral details and specific metes and bounds and the Pipeline's impacts on "Indian lands." The Tribes dispute TransCanada's assertions based on the evidence they currently have. The facts sought will also help the Court understand the meaning of "depredation" as the Indians would have meant it at the time the Treaties were signed—specifically that a crude oil pipeline crossing Indian lands, water resources, and damaging cultural sites would certainly have been understood as a depredation in the treaties. The Court cannot resolve this case without that information.

B. A Crude Oil Pipeline On Indian Lands is a Depredation

As the Tribes have indicated, they are developing additional historical material concerning their understanding of the Treaty provisions obligating the United States to protect their lands and resources from depredation. Therefore, summary judgment as to the United States' obligations under the Treaties, and the effect of those obligations on the validity of the 2019 Permit

is foreclosed at this time. Nevertheless, if the Court should decide to reach the issue, it should deny TransCanada's request for summary judgment. The 2019 Permit is a cause of injury to the Tribes (as discussed in the Tribes' Memorandum in Support of Motion for Summary Judgment), authorizes the entire Pipeline, and is prohibited by the United States' Treaty obligations to protect the Tribes' lands and resources from depredations.

A treaty between the United States and an Indian tribe is essentially "a contract between two sovereign nations." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). Treaties are not interpreted as ordinary contracts, however, but are interpreted according to Canons of Construction, "rooted in the unique trust relationship between the United States and the Indians." *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985); *accord EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1082 (9th Cir. 2001); *Confederated Tribes of the Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996); *United States v. Washington*, 157 F.3d 630, 643 (9th Cir. 1998). These Canons "have quasi-constitutional status . . . provid[ing] an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation." Cohen's Handbook of

Federal Indian Law § 2.02[2], at 118-19 (Nell Jessup Newton, ed., 2012). Courts interpret treaty language "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899). Ambiguities in the treaty language are resolved in favor of the Indians. *See, e.g., McClanahan*, 411 U.S. at 174. The responsibility to interpret treaties in this manner seeks to ensure that treaty terms "are carried out, so far as possible . . . in a spirit which generously recognizes the full obligation of this nation to protect the interests of [Indian] people." *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Fishing Vessel*, 443 U.S. at 690.

Nor is the United States a normal contracting party when determining its treaty obligations.

> In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); *Nance v. EPA*, 645 F.2d 701, 710-11 (9th Cir. 1981), *cert denied sub nom.*, *Crow Tribe of Indians v.*

EPA, 454 U.S. 1081 (1981) (citing *Seminole*, 315 U.S. at 296-97) (any federal government action is subject to fiduciary responsibilities).

TransCanada relies almost entirely on *Gros Ventre* for its argument that the Treaty obligations are inapplicable here since, as they assert, the activity at issue, a pipeline carrying eight-hundred thousand gallons of crude oil a day, is located off lands held in trust, reservation lands, or tribal lands, and that the Permit did not "authorize activity" on tribal lands. TC Br. at 4; 12, 13, 20, 26.[3] TransCanada has admitted, however, that at a minimum, the Pipeline would cross Rosebud mineral estates held in trust.[4] But, the mineral estates held in trust are "Indian lands." 25 C.F.R. § 211.3; *see United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyo.*, 304 U.S. 111, 116-18 (1938) (concluding that treaty covered minerals and therefore Shoshone had ownership of them). As a result, *Gros Ventre* does not control here (and actually dictates a result in favor of the Tribes) because the Pipeline would indeed cross Indian lands as admitted by TransCanada.

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[3] TransCanada also makes reference to state condemnation power, suggesting that it may be at their disposal, but under federal law, it has no such authority over Indian lands when a tribe is an owner. *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1109-13 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1695 (2018).

[4] The Tribes suspect discovery may yield even more lands crossed.

Given that *Gros Ventre* was a common law trust case, the court did not utilize the Canons of Construction to interpret the treaty provisions favorably for the tribes, the court did not resolve ambiguities in their favor, and did not interpret treaty provisions as the tribes would have understood them. Given the common law nature of that case, it is *Herrera*, 139 S. Ct. at 1701, *Cougar Den,* 139 S. Ct. at 1016, and *Culverts*, 853 F.3d 946 that control this treaty case.

The difference in the context between *Gros Ventre* and the present case also dictates a different result. The court in *Gros Ventre* held that the general trust responsibility did not give rise to a cause of action. *Gros Ventre*, 469 F.3d at 809-10. As to the argument that there was a cause of action based on the specific duty of protection under the treaties, the court characterized it as an attempt "to impose a duty on the government to manage resources that exist off the Reservation. Essentially, this amounts to a duty to regulate the third-party use of non-Indian resources for the benefit of the tribes. We are not aware of any circuit or Supreme Court authority that extends a specific *Mitchell*-like duty, to non-tribal resources." *Id*. at 812-13.

The situation here is quite distinct from *Gros Ventre*. First, the Pipeline would indeed cross "Indian lands." 25 C.F.R. § 211.3; *see Shoshone Tribe*, 304

U.S. at 116-18. Second, there is no management of third party off-reservation resources. Rather, the Tribes seek to prevent depredations in the first instance by requiring a federally approved and federally permitted pipeline to comply with the Treaties' requirements.

The preliminary research shows that the Tribes, in bargaining for the protective treaty provisions, would never have understood that if the source of the federally permitted depredation originated a short distance from the reservation the United States would be released from any treaty obligation—that the United States would have no duty to prevent the creation of the source of the depredation in the first instance. Hoxie Decl. at 20-21; Pls.' SDF (Additional Facts) at 33 ¶ 76; Doc. 74 at 22-3 (statements from Big Yankton and Cut Nose); Doc. 58 at 14-21. Such an interpretation cannot be squared with what the preliminary research shows the Indians' understanding to be, particularly when informed by the Canons of Construction, federal policy, common sense, and even international standards.[5]

[5] *See* the United Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc.A/RES/61/295, arts. 3, 18, 19, 32(2), 43 (Sept. 2007); *accord Pueblo of Jemez v. United States*, 350 F. Supp. 3d 1052, 1094 n.15, 1104 n.28 (D.N.M. 2018) (discussing Declaration's applicability to federal Indian law issue); Advisory Council on Historic Pres., *Section 106 and the U.S. Declaration of Rights of Indigenous Peoples: Intersections and Common Issues: Article 18 and*

TransCanada wants to draw a bright line between protecting on-reservation and off-reservation resources; but courts consistently hold the treaties apply to protect Tribes' off-reservation resources. *See, e.g. Culverts*, 853 F.3d 946. And federal law requires assessing effects of a project wherever they occur. Whether the action is on or off Indian lands, the *minimum* duties still apply. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 772, 788 (9th Cir. 2006) (noting the highlands were "not part of" Indian lands and concluding the minimum duties were violated). A "federal agency's trust obligation to a tribe extends to actions it takes off a reservation which uniquely impact tribal members or property on a reservation." *N. Cheyenne Tribe v. Hodel*, 12 Indian L. Rep. 3065, 3071 (D. Mont. 1985) (review of injunction); *Island Mountain Protectors*, 144 I.B.L.A. 168, 184 (1998). And the government certainly has a duty to protect a tribe's treaty rights. *See N.W. Sea Farms, Inc., v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1519-20 (W.D. Wash. 1996) ("In carrying out its fiduciary duty, it is the government's . . . responsibility

Section 106 (Nov. 22, 2013) (discussing the Declaration's intersection with the Section 106 process).

to ensure that Indian treaty rights are given full effect.").[6] TransCanada's interpretation of the Treaties as having no relevance to their actions because they allegedly occur off Indian lands cannot survive. The case law simply does not support this. This alone is sufficient to defeat TransCanada's motion and find the Pipeline is a depredation, and the Court need go no further.

If the Court were to go further[7], the substantive (not technical) requirements of the National Environmental Policy Act , 42 U.S.C. §§ 4321-4347 ("NEPA"), and the NHPA provide further standards to apply to fulfill the treaty obligations. TransCanada cannot claim that, because NEPA and NHPA do not apply to the President, there are no applicable standards. TransCanada misapprehends the Tribes' citation to *Pit River*. TransCanada

[6] *See also Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999) (federal government had a trust responsibility to the tribes obligating them to protect the tribes' interests); *No Oilport! v. Carter*, 520 F. Supp. 334, 373 (W.D. Wash. 1981) ("Here, unquestionably, the treaties involved place substantive duties upon the United States."); *Klamath Tribes v. United States*, No. 96-381, 1996 WL 924509 (D. Ore. Oct. 2, 1996) (citation omitted) (federal government has a procedural duty to consult and "a substantive duty to protect 'to the fullest extent possible' the tribe's treaty rights and the resources on which those rights depend").

[7] It is the Tribes position that a crude oil pipeline is a depredation—the easy case—and thus the Court need not look to the substantive requirements of NEPA or the NHPA.

argues that these laws do not apply to the President. But, it is clear the President is bound by the Treaties. *Mille Lacs*, 526 U.S. 172. It is through the federal agency defendants that the requirements of the NEPA and the NHPA are carried out. Those requirements constitute the absolute minimum duty to comply with the Treaties. *Pit River Tribe*, 469 F.3d. at 788. The Tribes have detailed their treaty claims and the controlling law in their Combined Opposition to Defendants' Motions to Dismiss and incorporate those pages by reference here. *See* Doc. 74, at 30-40. The Tribes rebutted the exact arguments being made anew here in their Combined Opposition. *See* Doc. 74, at 38-40.

Quite simply, TransCanada is not entitled to summary judgment on the treaty claims for two reasons: (1) the evidence as to surface estates and what constitutes a "depredation" under the Treaties is not yet fully established (although TransCanada may choose to concede the that the Pipeline is a depredation); and (2) the law does not support their repeated arguments that somehow the President is above the law.

C. TransCanada is not Entitled to Summary Judgment on the Tribes' other Claims

TransCanada also argues that it is entitled to summary judgment on the Tribes' constitutional claim, mineral claims, and tribal jurisdiction claim. As explained in greater detail in the Tribes' Memorandum in Support of Plaintiffs' Motion for Summary Judgment, the Tribes, and not TransCanada are entitled to summary judgment on these claims.

CONCLUSION

For the foregoing reasons and the reasons outlined in the Tribal Plaintiffs' Motion for Summary Judgment, which is being filed contemporaneously and incorporated here by reference, TransCanada's Motion for Summary Judgment should be denied. TransCanada has admitted the Pipeline does in fact cross tribally held mineral estates and this is fatal to their motion. These admissions constitute the very minimum of what is known at this time, and discovery will also likely reveal that tribally owned surface estates are also within the APE and the spill zone. This is what the publicly available maps and records show. This is a textbook case of a factual dispute. Furthermore, TransCanada cannot prevail on its motion with respect to the treaty claims either because they have not put forth any evidence as to what the Treaties mean. This too is fatal. The Tribes allege the Pipeline is a depredation of their lands and resources in violation of the

Treaties. Unless TransCanada is prepared to concede that (in which case the Tribes are instead entitled to summary judgment), then these also are disputed facts. Finally, the Tribes, and not TransCanada, are entitled to summary judgment on the Tribes' constitutional, mineral estate, and tribal jurisdiction claims. TransCanada's motion should be denied in its entirety.

RESPECTFULLY SUBMITTED this 25th day of February, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S MOTION FOR SUMMARY JUDGMENT** complies with (1) Local Civil Rule 7.1(d)(2)(A) because it contains 5,741 words, excluding those parts of the brief exempted by Local Civil Rule 7.1(d)(2)(E); and (2) the typeface requirements of Local Civil Rule 1.5(a) because it has been prepared using proportionally spaced typeface using Microsoft Word 2016, in 14-point Book Antiqua font.

/s/ Wesley James Furlong
Wesley James Furlong
NATIVE AMERICAN RIGHTS FUND

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, 2020, I electronically filed the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS TC ENERGY CORPORATION AND TRANSCANADA KEYSTONE PIPELINE, LP'S MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court for the United States District Court for the District of Montana by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Wesley James Furlong
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

ROSEBUD SIOUX TRIBE *et al.*, Plaintiffs, v. DONALD J. TRUMP *et al.*, Defendants.	Case No. 4:18-cv-00118-BMM **DECLARATION OF ATTORNEY WESLEY JAMES FURLONG**

1. My name is Wesley Furlong. I am counsel of record for Plaintiff Tribes Rosebud Sioux ("Rosebud") and Fort Belknap Indian Community ("Plaintiff Tribes") in the above-captioned case.

2. I am over the age of 18 and competent to testify to the matters herein.

3. No discovery has yet occurred in this case.

4. As described in the Plaintiff Tribes' Opposition to TC Energy Corporation's and TransCanada Keystone Pipeline, L.P.'s (collectively, "TransCanada") Motion for Summary Judgment, counsel for Plaintiff Tribes do not have access to some of the information cited in declarations submitted in support of TransCanada's summary judgment motion.

5. Specifically, counsel for Plaintiff Tribes does not know what documents were submitted to the surveyor, nor has counsel for Plaintiff Tribes had the opportunity to test the accuracy and veracity of that information.

6. Plaintiff Tribes do have their own land and estate files and those files do show that the pipeline corridor, area of potential effects ("APE"), and spill zone traverse lands held in trust by the United States for Rosebud.

7. Plaintiff Tribes require the information used by TransCanada's surveyor in order to get a complete picture and accurate picture of land status within the corridor, APE and spill zone.

8. Before the TransCanada's Motion for Summary Judgment was filed, counsel for Tribal Plaintiffs had already hired Professor Frederick E. Hoxie to provide expert opinions on the meaning of the Treaties at issue in this case. He had not yet completed his report when TransCanada's motion was filed. Accordingly, counsel for Plaintiff Tribes has asked him to provide a summary of his conclusions thus far and his complete report is forthcoming.

9. Among his conclusions, counsel for Plaintiff Tribes expect him to address the meaning of a "depredation" in the Treaties. We require this information in order to be able to analyze the Treaties under the proper legal framework.

10. Also missing from this case is the Administrative Record for the BLM's recent Record of Decision and the State Department's 2017 and 2015 Decisions. This information is required to analyze the Tribes' claim for relief that incorporates the standard set forth in the NEPA and NHPA.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: 02/25/20

Wesley Furlong