IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS Defendant.	§ § § § § § § § § § §	**Case No. 1:16-CV-01534-JEB**

COMBINED RESPONSE TO STANDING ROCK SIOUX TRIBE'S MOTION TO SUPPLEMENT AND MOTIONS FOR TEMPORARY RESTRAINING ORDER BY STANDING ROCK SIOUX TRIBE AND CHEYENNE RIVER SIOUX TRIBE

Intervenor Dakota Access, LLC ("Intervenor" or "DA") is not destroying and has not destroyed any evidence or important historical sites. Intervenor absolutely did not move its construction spread in order to retaliate against Mentz or cause harm to any historic sites. Intervenor has not violated any laws. Intervenor has taken and continues to take every reasonable precaution (and more), well above any reasonable standard and greatly exceeding any regulatory requirement, to ensure that no sites will be or have been impacted. Intervenor did not provoke or start any violent confrontation. It is undisputed that Plaintiffs were the aggressors and violated numerous laws in their efforts to stop the pipeline.

Beginning Friday afternoon September 2, Plaintiffs began filing a flurry of supplemental motions in connection with this case. In every case, before filing their papers, and more importantly, before undertaking their purported "investigations" on private property, Plaintiffs repeatedly failed to confer or consult in a reasonable manner, at a reasonable time, and following reasonable procedures. Plaintiffs now seek to exploit their predicament for preliminary and

temporary relief. The Court should not sanction Plaintiffs' actions, and their Motions, like the Standing Rock Sioux Tribe's Motion for Preliminary Injunctive Relief, should be denied.

In this case, Plaintiffs also failed to make an effort to reasonably confer with counsel for Intervenor prior to their 11th hour filings despite having been provided cell phone contact numbers for counsel several weeks ago. In addition, Plaintiffs continue to violate an existing federal restraining order, continue to make false and unsupported allegations causing emotional outbursts and violence at the construction site, and physically attacked and assaulted private workers on private land. After failing at every turn to follow the process prescribed by law and declining repeated invitations to consult, Plaintiffs cannot now stop or delay this project by violating the law, engaging in guerilla legal tactics, and/or attempting to do what they should have done two years ago.[1]

I. The area of construction is all on private land as to which there is no federal jurisdiction.

As a preliminary matter, Plaintiffs fail to advise the Court that 100% of the construction activities which are referenced in the Motions occur on private land and are not subject to any Federal regulatory nexus that would trigger an action under Section 106 of the National Historic Preservation Act. None of this construction occurs on what has been referred to as PCN areas (areas subject to preconstruction notification requirements of Nationwide Permit 12). DA has proper and lawful easements from the private property owners, has the required permits from the other state agencies, inclusive of the State Historic Preservation office and the North Dakota

[1] Plaintiffs have made multiple public statements regarding their willingness to do anything to stop the pipeline as well as to heighten the awareness of the plight of the Native American people. The Chairman of the Standing Rock Sioux Tribe has been quoted in major media outlets making those exact statements, and was on CNN just this past weekend.

Public Service Commission, permission from the Meyer Family allowing DA to be on their property, to build roads, to clear and grade, and to build the pipeline and associated access roads.

Plaintiffs cite no legal authority whatsoever that would authorize any kind of order, much less a temporary restraining order, that would extend 20 miles from the banks of the Missouri River and would prevent private use of private land. The land in question, and everything on it and under it belongs to the landowner. Plaintiffs cite no authority because there is no authority that allows them to assert a claim over these private lands or to prevent their use or development. DA has a surface lease and easement over the land which gives it the right to control the surface.

II. Intervenor did not accelerate its construction schedule to work on areas described in Plaintiff's 11th hour Friday afternoon filing, or to destroy evidence or to destroy historical sites.

A. Intervenor followed its normal construction schedule that has been in place for months.

There was no change to the starting time or days of work. Dakota Access' normal construction schedule has been in place for months, and Dakota Access' construction plan was established over a year ago. **According to the plan, construction staff works 6 days a week, with a normal day of construction commencing at 6:30 a.m.** Construction was *always* planned for Saturday, September 3, 2016. And as was previously planned, crews did not work on Sunday September 4 or Monday September 5.

B. The schedule of work was not changed as a result of any Declaration filed by Plaintiff SRST on Friday September 3.

Contrary to Plaintiffs' allegation, Intervenor did not intentionally do anything to provoke the outbursts at the site, much less intentionally change a construction schedule to destroy evidence or take advantage of Plaintiffs' Friday afternoon legal filing. The events of the past weekend require context. For the past three weeks, since the Standing Rock Sioux Tribe filed its Motions for Preliminary Injunction, Plaintiffs and their supporters have, with the active

encouragement of Plaintiffs' leadership, engaged in a pattern of illegal conduct aimed at stopping the pipeline. This conduct includes violating a federal restraining order ordering them not to interfere with construction, breaking down fences, trespassing onto private property, physically assaulting construction workers, damaging and destroying equipment and property, chaining themselves to equipment, impeding access to the construction site, and making horrible threats of physical violence directed against DA, its employees and construction workers.

As a result of Plaintiffs' campaign to take the law into their own hands, local law enforcement expressed concerns to DA about the best means of ensuring their continued access to the work site and specifically expressed concern about a large Native American gathering scheduled for this week (September 6th or 7th through the 12th) in North Dakota, generally referred to as the "Pow Wow." Local law enforcement anticipated as many as 10,000 to 15,000 persons attending the Pow Wow and expressed concern about construction activities occurring in the proximity of the Missouri River crossing during the Pow Wow. As a result of (1) those concerns, (2) to help ensure the safety of the workers in light of Plaintiffs' complete disregard for the law, (3) intelligence from the field that the number of protesters seemed to have abated, and (4) to ensure that all work that can be done in advance of the Pow Wow, DA altered its construction schedule **weeks ago** to complete the grading on portions of the right-of-way in close proximity to Lake Oahe. Indeed, due to the logistical coordination required, it would be nearly (if not outright) impossible to reschedule construction and reroute construction locations on a Friday evening for construction that is to take place the next morning. Plaintiffs' allegations regarding any purported retaliation to the Mentz declaration are not plausible.

All work on the west side of Lake Oahe has been complete for multiple weeks at this time and no activities have been occurring. Work on the immediate west side of Lake Oahe up

to Highway 1806 have been temporarily suspended while DA waits for the court ruling. However, work further west of Highway 1806 continues as planned with certain modifications to account for the large gathering east and south of the pipeline crossing at Highway 1806.

By deciding to alter its construction plan to avoid working within the view shed of the large gathering, DA attempted to reduce the risk of antagonizing the Pow Wow gathering. DA believed that by completing the grading on the west side of Highway 1806, approximately 2 miles west of Lake Oahe, it would avoid alarming the gathering while in session. The area of construction will be referred to as the West Meyer's Ranch in this Response.

The discussions and coordination with local law enforcement started well before DA was aware of Mentz's declaration, and the decision to work on the West Meyers' Ranch was made before DA received any information about any of Plaintiffs' purported surveys. Intervenor did not even know of any activities by Plaintiffs because, although they could have attempted to coordinate their activities and reach some kind of common factual basis for the Court, they chose to proceed unilaterally, without notice.

The motivation and timing behind the Mentz declaration remains unclear. However, Mentz appears to be the principal purveyor of false rumors at the site that have led to multiple altercations and Mentz himself suggested to DA long ago that he should have been hired by DA. A full investigation of his purpose and whether he and the Plaintiffs are being used by those opposed to any pipeline, or to the development of oil resources generally remains outside the scope of this proceeding. What is clear is that the veracity of his declaration is suspect. Far from "being invited" onto the construction site by the owner, Mentz trespassed on it and then notified the owner of his presence and asked forgiveness rather than consent. That forgiveness was

granted until the owner understood Mentz's agenda and it was withdrawn. As shown below, the substance of Mentz's declaration is false, untimely, and incomplete.

III. Although work was scheduled on the West Meyers' Ranch before receiving the September 3 Mentz Declaration, Intervenor took special steps to make sure its work would not impact any sites identified by Mentz.

First, the Mentz Declaration, again, does not actually say that any sites are threatened or were in imminent danger from this pipeline. To the contrary, every example given is outside the area of work for the pipeline. In the short time since Plaintiffs filed, DA has prepared a detailed map showing the location of every site identified by Mentz and showing that they are (a) located outside the area affected by DAPL or (b) in 6 instances are directly over the existing Northern Border Natural Gas Pipeline center line and could not possibly be original artifacts. See Exhibit A. A careful reading of the Mentz declaration reveals that even he only alleges that important sites are "adjacent to or just within a right of way." DA has always been aware that there are sites of alleged historical significance in the vicinity of the pipeline. As noted at the PI hearing, extensive efforts were made to avoid such sites. Historical sites, including many of those noted by Mentz were identified by DA's archeologists during their surveys and the pipeline route and work areas were modified to avoid and reroute around them. The map and inset enlargement below depict DA's routing to miss the sites and are consistent with the Mentz Declaration.

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TM-14F
TM-15F
KM-10F
KM-9F-2
TM-13F
TM-12F
TM-11F
LA-5F-2
LA-6F-2
LA-4F-2
TM-5F
LA-3F
KM-6F
KM-3F
TM-3F
LA-2F
LA-1F
TM-2F
KM-2F
TM-1F
32MOX0178- Isolated Find - NE
TM-1F
32MOX0148 - Isolated Find - NE
TM-5F
TM-2F
LA-1F
KM-1F
LA-4F
LA-12F
LA-11F
LA-13F
LA-10F
1806
32MO00257 - Avoided
32MO00258 - Avoided
32MO00256 - Not Eligible
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1997
Imagery Date: 5/4/2016 46°27'15.59" N 100°38'15.35" W elev 1818 ft

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TM-3F
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TM-6F
TM-2F
TM-5F
TM-1F
Google earth

Second, after receiving the September 2 Mentz Declaration, DA's construction manager and security team went on site to re-walk the property, locate sites and ensure that no identified site would be harmed by the scheduled work. They found none. Plaintiffs purport to provide photographs of some stones in grass near the pipeline, and drawings in which some of the stones are connected into shapes. However, as noted above some of those sites are located in an area directly above (on-top of) the Northern Border Natural Gas pipeline that was constructed more than 30 years ago and cannot possibly be the stone arrangements of a historic culture. Exhibit A shows the relative proximity of the two pipelines and the location at which the Northern Border Pipeline bisects the six alleged historic sites. Rather, the "evidence" at these sites more likely helps demonstrate the hazard of basing historic identification processes on subjective or religious assessments by an interested party rather than a rigorous study by qualified archeologists. Intervenor has also taken photographs of the site for the Court's benefit. An example appears below:

During the walk through and during grading, nothing was found. Bones were not unearthed. Graves were not found. No structure of historical significance was noted. The area in question was mowed and cleared well before the Mentz Declaration was filed, and nothing during or after grading has been unearthed to suggest the presence of any grave or cultural site.

Third, the lack of any findings during work is not surprising. The path within which work is occurring has already been surveyed by qualified archeologists and approved for work by the State Historic Preservation Officer. The path also overlaps the workspace used by the Northern Border Natural Gas pipeline. The process followed to locate the pipeline should not be discarded lightly because of the Declaration of one interested person whose observations contain such an obvious error and are both subjective and over broad. The time for raising these concerns has passed as set forth below.

IV. <u>This kind of "consultation" comes too late.</u>

Plaintiffs seek to force, through their request for emergency relief, that which they should have provided long ago when invited to consult. As Plaintiffs have been emphatic in pointing out, consultation works best when it happens early. Here, the undisputed record is that Plaintiffs were repeatedly invited to help identify sensitive sites months and years ago during the long planning stage for this project– based upon court records there have been hundreds of attempts (389 by one count) to consult or communicate with the Native American Community, 11 directly with the SRST and the USACE., The SRST declined seven formal invitations from Intervenor to individually meet and consult.. Those early invitations, accepted by other tribes, were genuine and effective. As pointed out at the hearing, for every tribe that took advantage of consultation, either an agreement was reached for access to fee land, or the pipeline route, design or work area was modified to eliminate or avoid any disturbance. 80% of the private landowners consented to inspections. But, that was not good enough for Plaintiffs. Rather, they waited until the pipeline was 80% graded in North Dakota and 100% graded in South Dakota, and now 100% graded at PCN sites to complain.

Having refused to consult before the project began, Plaintiffs now seek to invoke the Court's assistance to stop the pipeline after billions have been spent. Even then, the September 2 Mentz Declaration was over a week in the making and undermines Plaintiffs' request for emergency relief. Prior to any grading activity, the right of way was mowed and mats were placed down to allow access by heavy construction equipment. The Mentz Declaration alludes to that fact when it attempts to explain the reason why there have never before been any significant observed historic sites within the ROW prior to last week. Plaintiffs knew that construction was about to commence for over a week but waited until Friday afternoon at 4:20 p.m. on a holiday weekend to file its supplemental declaration, and until after its supporters had

stormed, trespassed and assaulted DA workers at the site on Saturday to seek a TRO. Again, rather than seek a way to raise their concerns timely, they were raised in a Friday afternoon legal filing with a request for an emergency TRO and without affording DA a reasonable opportunity to confront the incendiary allegations made in the filing.

As set forth above, there is no merit to the allegations that DA has done anything intentional to destroy artifacts or evidence, or that it is acting outside its legal rights. Nor is there any truth to the allegation that DA refused or failed to consult with Plaintiffs before commencing construction. And, as set forth below, there is no truth to the allegation that DA is harming or antagonizing "peaceful protesters." To the extent there has been any effort to confer, it has consisted of Plaintiffs' counsel threatening that people will be hurt unless DA stops doing what it is legally entitled to do. It would be a complete corruption of the rule of law to hold that a TRO should issue to enjoin a law abiding activity in order to prevent and further encourage the commission of a criminal act by the party seeking the TRO.

V. Plaintiffs are correct that the situation on the ground needs intervention. However, the intervention that is needed is to make clear that plaintiffs are not allowed to take physical possession of large parts of North Dakota where there are no tribal lands.

Intervenor has not antagonized or harmed any legally protectable interests with its pipeline. However, Plaintiffs have run roughshod over DA's legal rights and those of its employees and the rights of the private landowners. The North Dakota Governor has declared a state of emergency and the Plaintiffs' protest illegal. In addition to violating a federal restraining order against the Chairman of the SRST and other protestors, the protestors' actions on Saturday are chronicled by the report of the Morton County Sheriff's Department, attached hereto as Exhibit B. Among other things the report finds that:

1. The protesters launched a march that illegally blocked traffic in both lanes of the roadway (Highway 1806).

2. The protesters broke down fences around the construction site by jumping and stepping on the fence.
3. Within five minutes, the crowd of protesters became violent.
4. The protesters stampeded the construction area with horses, dogs and vehicles.
5. The protesters assaulted private security officers hired by DA to protect its workers.
6. The officers were hit and jabbed with fence posts and flag poles, threatened with knives and screamed at by protesters who threatened to stomp them, and kick them, and threatened that they would "not leave."
7. The protesters attempted to stab the guard dogs that were with the security officers.
8. Dogs and guards received medical treatment.

As stated by the Sheriff, "any suggestion that today's event was a peaceful protest is false. This was more like a riot than a protest. Individuals crossed onto private property and accosted private security officers with wooden posts and flag poles. The aggression and violence displayed here today is unlawful…."

VI. <u>Intervenor must continue to build wherever it is permitted to do so.</u>

As noted at the hearing on the Preliminary Injunction, this lawsuit comes at the end, not the beginning, of an elaborate process that included consultation, modification, planning and permits. In order to meet its obligations to deliver oil via this pipeline, DA must complete the project far enough in advance of year end to properly test the pipeline and commence operations. The lead time for the Lake Oahe crossing requires months not days. The access roads, pads, approaches and the rest of the pipeline that are being constructed now must be complete before the bore begins. That is why time is of the essence and DA has proceeded with construction in

locations where it has permission. DA has no desire to antagonize or inflame any legitimate fears or interests. But, the solution to the case before the Court is to strongly reaffirm the rule of law, not condone people to take the law into their own hands. It is imperative that the laws of the country be upheld so that both sides will know with certainty and predictability what they can/must do. Otherwise, if one side believes that it can achieve negotiating leverage through ignoring the consultative process in the hopes of improving its legal position, or achieve a legal objective by threatening and executing violence and law breaking, episodes like last Saturday will become the norm and dueling political interests will be encouraged to settle their disputes in the field with violence rather than pursuant of the law.

CONCLUSION

For the foregoing reasons, DA respectfully requests that this Court deny Plaintiffs' motions for a TRO.

Respectfully submitted this 6th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2016, I electronically filed the foregoing *Combined Response to Standing Rock Sioux Tribe's Motion to Supplement and Motions for Temporary Restraining Order by Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe* with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Kimberly H. Caine
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