

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Plaintiff- Intervenor,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant,

and

DAKOTA ACCESS LLC,

Defendant- Intervenor.

Case No. 1:16-cv-1534-JEB

MOTION FOR AN INJUNCTION PENDING APPEAL UNDER FED. R. CIV. P. 62(C)

Pursuant to Fed. R. Civ. P. 62(c), Plaintiff Standing Rock Sioux Tribe and Plaintiff-Intervenor Cheyenne River Sioux Tribe (collectively, the “Tribes”) respectfully move for an injunction pending appeal of this Court’s denial of the Tribe’s motion for a preliminary

injunction. The Tribes seek an injunction pending appeal in the area within 20 miles of Lake Oahe. In the alternative, if the Court is not inclined to grant an injunction pending appeal, the Tribes seek an injunction until the D.C. Circuit rules on the emergency motion for an injunction pending appeal that the Tribes will file, if needed. This motion is supported by the memorandum appended hereto, today's statement from the Corps and other agencies, and the Declaration of Thomas F. King, Ph.D.

Undersigned counsel conferred with counsel for defendant and defendant-intervenor after the Court issued its ruling today. Counsel for the Army Corps opposes this motion but does not oppose extension of the existing temporary restraining order through Wednesday, September 14, 2016. However, the Tribes note that the defendant has called publicly for a voluntary pause on all construction activity within 20 miles of Lake Oahe while it reconsiders its decisions at the Lake Oahe site. *See* Exhibit 1. Counsel for Dakota Access LLC ("DAPL") opposes this motion but has represented that the company will not engage in any construction in the areas currently covered by the TRO (i.e., lands between Highway 1806) through Friday, September 16, 2016. Under that agreement, construction could start after that date, and there is no agreement on lands west of Highway 1806. To ensure there is no gap in protection for these areas before the D.C. Circuit rules on the Tribe's appeal, we ask the Court to issue the above-requested relief. Also, because of the need to file an emergency motion in the D.C. Circuit immediately if the motion is denied, the Tribes respectfully request that the Court rule on this motion immediately.

Accordingly, Plaintiff and Plaintiff-Intervenor respectfully request that the Court grant their motion for an injunction pending appeal on construction 20 miles west of Lake Oahe.

Dated: September 9, 2016

Respectfully submitted,

/s/ Jan E. Hasselman

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**MEMORANDUM IN SUPPORT OF MOTION FOR AN INJUNCTION PENDING
APPEAL UNDER FED. R. CIV. P. 62(C)**

INTRODUCTION

In this motion, Plaintiff Standing Rock Sioux Tribe and Plaintiff-Intervenor Cheyenne River Sioux Tribe (“Tribes”) seek modest relief to preserve their rights pending resolution of

their interlocutory appeal. As the Court recognized in its preliminary injunction decision issued today, the issues presented in this case are legally and factually complex, and have generated a high level of public interest. A relatively small area of the pipeline corridor remains undisturbed by pipeline construction. One such segment happens to be the area closest to a gathering of people (currently estimated in the thousands) opposed to the pipeline. While an agreement has been reached on a narrow area of construction for the next week, and while the U.S. administration has asked for a voluntary hold to construction activity within 20 miles of Lake Oahe, should construction resume, the last opportunity for the Tribes to vindicate their legal rights and safeguard sacred sites in the pipeline's corridor could be gone. Accordingly, an injunction pending appeal is warranted here.¹

STANDARD OF REVIEW

Federal Rule of Civil Procedure 62(c) authorizes courts to issue an injunction pending appeal. A stay pending appeal “is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit.” *Washington Metro. Area Transit Comm’n v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977). To determine whether to grant the stay, the Court must weigh the same four factors it considers when determining whether to grant an injunction: “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985). In *Washington Metro.*, 559 F.2d at 843, the D.C. Circuit clarified that a moving party need not show a “mathematical probability” of success on the merits, and that interim relief may be granted if the

¹ FRAP 8(a)(1) requires a party seeking an injunction pending appeal before the Circuit Court to seek relief from the District Court.

other factors support it as long as the movant has made a “substantial case” on the merits. *Id.*; *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982) (movant is not required to demonstrate a more than fifty percent chance of prevailing on the merits).

ARGUMENT

I. THE TRIBES RAISE SIGNIFICANT ISSUES THAT MERIT AN OPPORTUNITY FOR MEANINGFUL APPELLATE REVIEW

This Court has previously recognized that in seeking relief under Rule 62(c), a moving party is “placed in the uncomfortable position of ‘asking a district court to determine whether its decision is likely to be overturned.’” *Loving v. I.R.S.*, 920 F. Supp. 2d 108, 110 (D.D.C. 2013). This Court has also recognized that no such showing is needed: “[I]nstead, so long as the other factors strongly favor a stay, such remedy is appropriate if ‘a serious legal question is presented.’” *Id.*, citing *CREW v. Office of Admin.*, 593 F. Supp. 2d 156, 160 (D.D.C. 2009). There, the Court recognized that “the issue is one of first impression and raises serious and difficult legal questions. If the other factors tip in favor of a stay, therefore, this factor will not preclude one.” *Id.*; see also *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 13–14 (D.D.C. 2014) (where decision “presented difficult and substantial legal questions.... and was at times, a close one,” a low likelihood of success is not fatal to a 62(c) motion); *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 988, 990 (D.D.C. 2006) (Rule 62(c) relief appropriate where decision involves legal issues “sufficiently serious, substantial, and difficult, to make [it] ‘a fair ground for litigation and ... more deliberative investigation.’”).

Even after denying a request for preliminary injunction, other district courts have issued an injunction pending appeal to preserve the status quo when the plaintiffs have raised serious legal questions and will suffer irreparable harm without injunctive relief while the matter is pending on appeal. See, e.g., *Conservation Cong. v. U.S. Forest Serv.*, 803 F. Supp. 2d 1126,

1134 (E.D. Cal. 2011) (denying an injunction pending appeal in a case challenging a timber sale, but “because of the potential for irreparable harm,” granting plaintiff a limited injunction of 10 days to seek a stay from the Ninth Circuit). For example, in *Shrader v. Idaho Department of Health and Welfare*, the district court denied the plaintiff’s motion for an injunction based on its ruling on the merits, but stayed the dissolution of a preliminary injunction pending appeal because the legal issues were complex. 590 F. Supp. 554, 556 (D. Idaho 1984). On appeal, the plaintiffs prevailed on the merits. *Shrader v. Idaho Department of Health and Welfare*, 768 F.2d 1107 (9th Cir. 1985). Had the decision not been stayed, the plaintiffs would have been denied the ultimate relief they sought, and, as it turned out, to which they were entitled.

This case satisfied this lenient standard. While the Tribes appreciate the considerable effort the Court has taken in addressing the preliminary injunction motion, there can be no dispute that it involves difficult and weighty legal issues. To the Tribes’ knowledge, the question of the National Historic Preservation Act’s application to the Army Corps’ Nationwide Permit program has never been decided by a court, or even litigated. While the question of whether the Corps’ duties under § 106 extend outside the narrow area of its own jurisdiction has been litigated, the cases have produced conflicting outcomes. The scope of § 106 compliance required for the permits at issue in this case is the subject of a full-blown interagency dispute, with the Advisory Council on Historic Preservation (“ACHP”) – the agency charged with issuing binding regulations implementing the NHPA – taking the Tribe’s side and formally objecting to the Corps’ § 106 determinations. Clearly, serious legal questions are presented over which reasonable jurists, like the agencies involved, may disagree. The federal administration itself has recognized that the Tribes have raised “important issues” and that it will need to “reconsider” some of its decision pertaining to Lake Oahe. Exhibit 1. The Court should enable the Tribes to

seek relief from the D.C. Circuit without risking the loss of the few remaining places where vindication of its legal rights could be meaningful.

II. THE TRIBES WILL BE IRREPARABLY HARMED IF AN INJUNCTION PENDING APPEAL DOES NOT ISSUE

Standing Rock Sioux Tribe's preliminary injunction motion was supported by declarations from the Standing Rock Chairman, Dave Archambault, II, and the current and former Tribal Historic Preservation Officers, Jon Eagle, Sr. and Tim Mentz, Sr. The three declarants described the irreparable harm suffered by the Tribe and its members caused by the loss of cultural and sacred sites. The Tribe supplemented its evidence with a September 2, 2016 supplemental declaration from Mr. Mentz describing newly discovered sacred burial sites in the pipeline corridor. These included a stone depiction of the Big Dipper constellation that indicates a very important leader was buried there, which Mr. Mentz described as "one of the most significant archeological finds in North Dakota in many years," Supplemental Decl. ¶ 10, and a Strong Heart Society Staff that represents a spiritual pledge made by elite warriors and has particular significance to today's members of the Hunkpapa band from which these warriors came. *Id.* ¶ 11. The landowner had offered to allow the Tribe to access these sites, which could fill a void from the Tribe's separation from its ancestral lands. *Id.* Remarkably, DAPL's bulldozers destroyed these sites on September 3, 2016, the day after the Tribe submitted evidence of their existence to the Court and to DAPL. Declaration of Tim Mentz, Sr. in Support of Motion for Temporary Restraining Order (Sept. 4, 2016). While the Court noted that DAPL has presented evidence that the sites were not in the corridor, Mr. Mentz personally returned to the area and resurveyed it the next day and offered an opinion that sites had been destroyed. *Id.*

With this motion, the Tribes submit a declaration from an expert with decades of experience with the NHPA, including as a former senior ACHP official. Declaration of Thomas

F. King, Ph.D. (Sept. 9, 2016). Dr. King attests to Mr. Mentz's professional qualifications to identify and understand the significance of cultural and sacred sites to the Standing Rock Sioux people, as well as to the quality of the survey he conducted last week and documented in his September 2, 2016 supplemental declaration. The Tribes are submitting this motion to counter suggestions made by DAPL in opposing a temporary restraining order that Mr. Mentz lacked qualifications and expertise to conduct the survey and identify and describe the meaning to the Tribe of the sacred burial sites he found.

An injunction pending appeal in the narrow area around Lake Oahe is necessary to prevent additional losses and desecration of grave sites. The Tribes ask the Court to issue such an injunction. There is a high likelihood of additional sites in this area that the Tribes should be given an opportunity to survey for, and seek to protect before they are destroyed. In addition, as Mr. Mentz explained in his declaration supporting the motion for a temporary restraining order (at ¶ 8), the Tribes should be given an opportunity to rebury their ancestors and relatives whose graves were disturbed by DAPL's bulldozing the sacred burial sites less than one day after it received documentation of their existence. DAPL's conduct over Labor Day weekend corroborates the imminence of DAPL's destruction of sites in this area and the need for an injunction pending appeal to preserve what remains of them.

III. THE BALANCE OF HARMS SUPPORTS ISSUANCE OF AN INJUNCTION PENDING APPEAL

As DAPL has emphasized, construction is well underway throughout most of the pipeline route. The Tribes seek only limited relief in a small area. Construction could continue elsewhere as long as it is recognized that DAPL proceeds at its own risk. Furthermore, DAPL is proceeding, even though, as is undisputed, DAPL still lacks an easement that is necessary for it

to drill under Lake Oahe. Now, the government agencies have announced that such easement will not be forthcoming pending a thorough review.

There is little harm to DAPL that could arise from this short-term and narrowly focused relief. Its overblown claims of economic harm made in opposition to the Tribe's preliminary injunction motion pertained to a shut-down of all activity on the pipeline. Here, no such shutdown is requested. The Tribes seek an injunction with respect to a modest portion of the pipeline's route, and only for a few weeks pending resolution of the Tribes' interlocutory appeal of the preliminary injunction ruling. In its brief filed on the Tribes' motions for a temporary restraining order, DAPL made no effort at all to argue that the requested temporary restraining order would cause it any harm. Limited relief will not cause undue economic impact.

The harm from continued bulldozing of a valuable cultural landscape likely eligible for listing on the National Register of Historic Places is enormous. *See King Decl.* DAPL has repeatedly represented to the Court that it cares deeply about the protection of historic and sacred sites and has adapted its pipeline route to avoid destroying them. An injunction pending appeal would be consistent with DAPL's representations and hold DAPL to them.

IV. THE PUBLIC INTEREST SUPPORTS ISSUANCE OF AN INJUNCTION PENDING APPEAL

The requested injunction pending appeal is in the public interest. Courts have repeatedly confirmed that protection of historic sites, and preservation of Tribal culture, is in the public interest. *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1440 (C.D. Cal. 1985) (tribal sites "represent a means by which to better understand the history and culture of the American Indians in the past, and hopefully to provide some insight and understanding of the present day American Indians."). Similarly, in *Quechan Tribe*, the court found an injunction against a major development project to be in the public interest in an NHPA case:

The Tribe itself is a sovereign, and both it and its members have an interest in protecting their cultural patrimony. The culture and history of the Tribe and its members are also part of the culture and history of the United States more generally.... [I]n enacting NHPA Congress has adjudged the preservation of historic properties and the rights of Indian Tribes to consultation in the public interest.... The Court must adopt the same view.

Quechan Tribe, 755 F. Supp.2d at 1121-22.

Moreover, the Court's decision does not arise in a vacuum. While the Tribes have sought to protect their interests through the legal system, many people have gathered near the reservation to share their objections to the pipeline. Last weekend, protests turned violent when recently discovered sacred sites were bulldozed a few hours after evidence of them was submitted to this Court. While the Tribe has repeatedly condemned violence on all sides and worked to promote peaceful and prayerful disagreement to the pipeline, it is not in control of the thousands of people at the site. As the Corps acknowledged in its non-opposition to the motion for a temporary restraining order the public interest would be served by preserving peace near Lake Oahe. Corps Response Br. at 2.

CONCLUSION

For the foregoing reasons, Plaintiff Standing Rock Sioux Tribe and Plaintiff-intervenor Cheyenne River Sioux Tribe respectfully request that this Court grant motion for relief under Rule 62(c).

Dated: September 9, 2016

Respectfully submitted,

/s/ Jan E. Hasselman

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I electronically filed the foregoing *Motion and Memorandum In Support of Motion For An Injunction Pending Appeal Under Fed. R. Civ. P. 62(C)* 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/ Jan E. Hasselman

Jan E. Hasselman