

EXHIBIT J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE,)
et al.,)
) Civil No. 16-01534
Plaintiffs)
)
v.)
) Washington, D.C.
UNITED STATES ARMY CORPS)
OF ENGINEERS, et al.,)
) Friday, September 16, 2016
) 2:05 p.m.
Defendants.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 P R O C E E D I N G S

2 (In open court)

3 THE DEPUTY CLERK: Civil Action 16-1534, Standing
4 Rock Sioux Tribe versus United States Army Corps of Engineers.

5 Counsel, please announce yourself for the record,
6 starting with counsel on the telephone.

7 MR. HASSELMAN: Good afternoon, Your Honor. This is
8 Jan Hasselman and Stephanie Tsosie for plaintiff, Standing
9 Rock Sioux Tribe.

10 THE COURT: Good afternoon.

11 Sometimes the phone connection is not so great, so
12 please make sure you're near your microphone and speak loudly
13 and clearly, if you can. Thanks.

14 MS. DUCHENAU: Good afternoon. This is Nicole
15 Ducheneaux on behalf of the Cheyenne River Sioux Tribe, and I
16 also have Conly Schulte on the line with me.

17 THE COURT: Thank you. Welcome.

18 Same proviso to you folks.

19 THE COURT: For the government?

20 MS. ZILIOLI: Good afternoon, Your Honor. Erica
21 Zilioli, representing the United States Army Corps of
22 Engineers. With me at counsel table is Michael Thorp,
23 Assistant Section Chief in the National Resources Section
24 also at DOJ. He will be standing in for Mr. Marinelli today.

25 THE COURT: Good afternoon to both of you folks.

1 MS. ZILIOLO: Also, at counsel table is James Gette,
2 who is the Principal Deputy Section Chief of the Natural
3 Resources Section of DOJ.

4 THE COURT: Thank you both for being here.

5 MS. ZILIOLO: And Melanie Casner of the Army Corps of
6 Engineers.

7 THE COURT: Thank you.

8 And then for the defendant intervenor?

9 MR. LEONE: Good afternoon, Your Honor. Bill Leone
10 on behalf of intervenor, Dakota Access. My partner, Bob
11 Comer, is with us at counsel table, and Joey Mahmoud, who is
12 the vice president for the company, is also with us at the
13 table. Mr. Pieper, our associate general counsel at Dakota
14 Access is on the phone listening in.

15 THE COURT: Thank you all, as well.

16 I want to start with the government, and I'm not sure
17 who wants to answer these questions, so I will let you
18 choose.

19 I will start by saying some of my, shall we say, less
20 restrained colleagues would likely have had you and your
21 supervisors all the way up to, I'm sure, the assistant
22 attorney general here last Friday to explain what happened in
23 connection with the press release you issued immediately
24 after I filed my injunction opinion. I have not done that.
25 I retained our regularly scheduled date, but that doesn't

1 mean I'm not quite troubled by what happened here. Let me
2 explain why.

3 If we review the bidding, that on July 27th Standing
4 Rock filed its complaint and then on August 4th, the
5 preliminary injunction motion. The government's opposition
6 was filed on August 18th, and among other things you said,
7 "Granting the equitable remedy of a preliminary injunction
8 now, after both the Corps and Dakota Access have invested
9 significant time and resources and accommodated timely raised
10 tribal concerns would only reward plaintiffs' unwillingness
11 to engage meaningfully in the consultation process, and it
12 would not serve the public interest to encourage parties in
13 the future to decline to consult and comment and then bring
14 last minute challenges as construction is underway, utilizing
15 judicial resources in the process, rather than taking the
16 proper steps to engage in the planning stages, when their
17 concerns can be addressed without resorting to such a drastic
18 step as an injunction."

19 So you maintain your strong opposition and cite,
20 among other things, the preservation of judicial resources.

21 Then the plaintiff files a TRO on September 4th. And
22 your filing the next day, September 5th, said you didn't
23 oppose "a short and discrete TRO" until this Court rules on
24 plaintiff's pending motion for a preliminary injunction.
25 Even in that court hearing, you don't tell me that you're

1 reconsidering your position. So I continue to expend
2 reasonably significant effort to issue in an expedited
3 fashion a lengthy opinion. And within minutes, you issue a
4 press release from "The Department of Justice, The Department
5 of the Army, and The Department of Interior" indicating the
6 Corps will not authorize construction under Lake Oahe.

7 So my first question is: How did this happen? And
8 how is this complying with your duty of candor to the
9 tribunal when you knew, and apparently had known for some
10 time, since the press release talks about coordination among
11 several departments, that you would reverse your opinion, but
12 waited until after my opinion issued? How can this happen?

13 MR. THORP: Good afternoon, Your Honor. Michael
14 Thorp for the government. If I may, may I rely on Mr. Gette,
15 as well.

16 I think there are is some clarity in order here,
17 Judge.

18 THE COURT: Please. I would love some.

19 MR. THORP: Your Honor, the government has not
20 reversed its position in any way. I think the press release
21 is intended to be read quite literally here.

22 THE COURT: So if you had issued the press release
23 before I had issued my opinion, that wouldn't have mooted out
24 the issue about Lake Oahe?

25 MR. THORP: No, not at all, Your Honor. The press

1 release should be meant quite literally. There has been no
2 agency action or any change whatsoever in the agent's
3 position.

4 THE COURT: In other words, when the press release
5 says, "The Army will not authorize constructing the pipeline
6 under Lake Oahe," is what you're saying that you're not
7 withdrawing the permit, it is just that you're not granting
8 the easement, or both?

9 MR. THORP: It is really neither, Your Honor. There
10 has been no suspension or revocation of any authorization,
11 verification, or permit that's already been granted, none
12 whatsoever.

13 THE COURT: They still have the permit to go ahead
14 and construct?

15 MR. THORP: That's correct.

16 THE COURT: What is blocking them?

17 MR. THORP: With respect to the easement, that has
18 never been granted, and it is still under consideration.
19 That also has not changed.

20 THE COURT: When you say you won't authorize it, that
21 means you won't issue the easement?

22 MR. THORP: No. If you read the statement, what we
23 are really saying is that remains under consideration.

24 THE COURT: But you're not authorizing it now?

25 MR. THORP: Right. That was not a final agency

1 action, Your Honor. What we were saying is that it won't be
2 authorized today or tomorrow, it will be authorized once the
3 Court completes its review --

4 THE COURT: When you say "authorized," I want this to
5 be clear. You tell me to read this literally, but it doesn't
6 mention the easement or the permit, and I'm sure Dakota
7 Access would like to know, I'm sure the plaintiff would like
8 to know, I'm sure the public would like to know what you do
9 mean by that.

10 Does it mean at the moment you're not granting the
11 easement, or you're saying there is something beyond the
12 easement?

13 MR. THORP: No. It is at the moment. The easement
14 has only been under consideration and has not been granted.
15 That easement issue, actually, is not before the Court right
16 now, nor was it ever.

17 THE COURT: When you say you won't authorize, it
18 means that for now you're not granting the easement?

19 MR. THORP: What it means is the easement application
20 remains under consideration.

21 THE COURT: Everyone knows the easement consideration
22 is under consideration. You're saying you're not going to
23 authorize until it can determine whether it will need to
24 reconsider any of its previous decisions. Again, you're
25 talking about the easement and not the permit?

1 MR. THORP: Right. The easement remains under
2 consideration. That has never changed. With respect to all
3 authorizations that have already been approved, the Corps is
4 looking at its prior approvals for the purposes of good
5 governance and due diligence, to make sure that it is in
6 compliance with the law. That is not unusual. That is
7 exactly what we did with respect to the NHPA issues.

8 THE COURT: If you're saying that we're not for the
9 time being going to issue the easement, and Dakota Access
10 can't proceed obviously without that easement, that's the
11 blocking of the pipeline that is occurring now; correct?

12 MR. THORP: Right, but that has never changed. That
13 easement application has been pending.

14 THE COURT: There wouldn't be irreparable harm in
15 regard to Lake Oahe if there is no easement because they
16 couldn't dig.

17 MR. THORP: Right. We made that clear.

18 THE COURT: Did you ever say that in any of your
19 papers, that we're not granting the easement or there is no
20 irreparable harm because we haven't authorized this? Of
21 course not.

22 MR. THORP: That's not what we're doing, Your Honor.

23 THE COURT: You just told me you're doing that.

24 MR. THORP: What I said was the easement has always
25 been under consideration by the Court. That hasn't changed.

1 THE COURT: What's changed is you're now publicly
2 saying, we're not issuing it anytime soon.

3 MR. THORP: Because the consideration process is
4 ongoing.

5 THE COURT: If nothing has changed, what is the point
6 of the press release?

7 MR. THORP: We're making sure the public is aware of
8 what we are doing.

9 THE COURT: Why did you wait until minutes after my
10 order? In other words, you could have issued this at any
11 time and say, public, by the way --

12 MR. THORP: Your Honor, the litigation was an
13 evolving situation throughout this entire process as was
14 public safety issues on the ground. That continues to be a
15 paramount concern, public safety, as well. There is nothing
16 that has changed about agency action here, not one thing.
17 What we're saying is we're looking at all our decision making
18 to confirm compliance. There is really nothing unusual about
19 that.

20 THE COURT: So why do you wait until -- you're not
21 going to tell me it is coincidental that the press release
22 issues after my ruling; right? I mean, you waited for my
23 ruling to issue it; right?

24 MR. THORP: We certainly needed to know what Your
25 Honor was going to rule to determine what our approach would

1 be, sure.

2 MR. GETTE: Your Honor, if I might?

3 THE COURT: Please.

4 MR. GETTE: I think it would be helpful to put into
5 context the situation that our client agencies and the
6 Department of Justice found themselves in last week.

7 THE COURT: Delighted to hear it.

8 MR. GETTE: As you know from the taxing week that I'm
9 sure you had, it was a very challenging and fluid situation,
10 both on the ground and legally, as well, as we presented our
11 arguments to you.

12 During that process, our client agencies were
13 grappling with some very heady and important issues,
14 including issues of public safety and public concern, issues
15 that addressed important sovereign-to-sovereign relationships
16 and conversations, all of which was going on minute by minute
17 in the context of us responding to the Court and
18 appropriately litigating on behalf of our agency clients.

19 In that context, the agencies were looking at the
20 statement that they ultimately issued, but their
21 conversations and consideration regarding that statement, I
22 can tell you, and the status of that statement continued up
23 until moments before it was issued. And we didn't feel like
24 it was driven by the Court's decision. The issue before the
25 Court --

1 THE COURT: You would agree it is not coincidental
2 that this issues minutes after my decision? In other words,
3 you weren't ready to issue it before I ruled; right?

4 MR. GETTE: We were not. And I will tell you
5 honestly that while I was not personally involved in those
6 conversations, they were happening at a level higher than I
7 was involved, those conversations were literally on an
8 ongoing basis, including the content, what would be said,
9 conversations from agency to agency about what we could and
10 could not do appropriately given the situation and the
11 ongoing litigation.

12 THE COURT: How about saying to me at some point,
13 look, Judge, we know you're in trial in another case and yet
14 you're still trying to get this out by the deadline and we're
15 actually reconsidering our position, and if we decide to
16 actually hold the easement, there wouldn't be irreparable
17 harm and maybe you can hold off on doing this work and
18 issuing this opinion because there may be nothing to enjoin?

19 MR. GETTE: So, Your Honor, I think we felt -- you
20 keep using the term "reconsideration." As we stand here now,
21 we still do not believe that this is in a situation of
22 reconsideration.

23 THE COURT: Let me ask you this, just talking about
24 Lake Oahe, because there are other permitted waterways, and
25 we will talk about those in a little bit: But if the

1 easement was not going to be granted anytime soon, don't you
2 agree that that is a strong argument why there would be no
3 irreparable harm at Lake Oahe?

4 MR. GETTE: That comes back to "won't be issued
5 anytime soon." Even in this public release, we have not said
6 that there is a deadline by which we will or won't grant the
7 easement. That is under consideration. It was under
8 consideration when we were before the Court. That
9 consideration is ongoing.

10 I can tell you that there is a sense within the
11 government right now, between the conversations with
12 easements, that that consideration is at this point likely to
13 take weeks but not days. Also, Your Honor this has only been
14 determined within the last week literally. And that it is
15 not likely to take months. We're talking weeks. There is
16 still an exigency that is hanging over this project. And so
17 we have tried to address that. We, of course, are trying to
18 take into consideration the interests of both the plaintiffs
19 in this case, as well as the intervenor defendants, in trying
20 to find a route forward that addresses the concerns of
21 everyone. We worked very hard at doing that. Why we felt it
22 was appropriate to issue the statement is that from the
23 client agency's standpoint, nothing in the statement changed
24 anything that the Court was considering at that time. The
25 NHPA issue was ripe for the Court's consideration.

1 THE COURT: If that is true, why wouldn't you have
2 said in any of your pleadings, we don't know what is going to
3 happen with the easement? In fact, the easement issue was
4 raised in oral argument, and Mr. Leone, as I recall, was
5 rather surprised about where that even stood, to learn that
6 it hadn't yet been approved. It was certainly never raised
7 in the papers as this is an issue, of course Dakota Access
8 has to get the easement, and who knows when that is going to
9 happen. So it was never raised; right?

10 MR. GETTE: Your Honor, if we failed to raise that,
11 and it sounds as if we did, in a way that really put you, the
12 Court, on appropriate notice, I apologize, if we failed to
13 raise that and failed to share the specifics of the easement
14 and how it plays into the permitting process. We did have a
15 permit that had issued, and that was what was being
16 challenged. So if we didn't share with you sufficient
17 information to fully inform the Court about other issues that
18 played into the context of the overall project, I certainly
19 apologize for that. That was certainly not our intention.

20 THE COURT: Again, just so we are completely
21 clear -- this is probably more for the public than the
22 litigants, who I'm sure know -- I have no political position
23 on whether the pipeline is a good idea, bad idea, should be
24 built, shouldn't be built. That is not what judges are to
25 decide. I also realize that the executive does make

1 political decisions and decisions where they weigh the
2 interests -- I don't say "political" in any negative
3 fashion -- but decisions where they have to weigh the
4 interests of competing groups. That's what government does.

5 And for you at any point to say, we decided we're
6 going to hold this easement because there are considerations
7 that we think merit it, that's completely your right, that's
8 your business, I have no opinion on it because it has nothing
9 to do with me.

10 What I do have an opinion on is the way it has been
11 handled and the way that I believe I have -- I won't say been
12 misled -- but that I don't believe the filings have been
13 fully truthful. I think there have been omissions, material
14 omissions, that would have, had I been informed of them,
15 caused different timetables or this to proceed on a different
16 track. That's my concern.

17 MR. GETTE: Your Honor, to the extent that we have
18 not shared with you sufficient information in the way this
19 rolled out, I certainly apologize, if we didn't fully inform
20 the Court in a way that we could have. As I said, we were
21 literally moving hour by hour throughout the week last week,
22 and if there was more information that we could have provided
23 or that we thought would have been more helpful to the Court,
24 we would have done so. And I apologize that we didn't.

25 In the end, it seemed to us that regardless of what

1 we did -- and I think this has been borne out by the
2 continued desire by the plaintiffs in both this court and the
3 Court of Appeals -- that they are still seeking the
4 injunctive relief that they sought from this Court as of
5 today. Despite having made our statement --

6 THE COURT: I'm going to talk to Mr. Hasselman, but
7 one driver of that could well be non-Lake Oahe sites. Again,
8 it wasn't clear to me, and I don't know if it was clear to
9 the plaintiffs or Dakota Access whether the language of the
10 press release referred to the permitting or the easement,
11 because it doesn't say, and I didn't know until I had been
12 told today.

13 MR. GETTE: In fact, our understanding at the time
14 and our belief at the time is the plaintiffs were asking for
15 substantially more than our statement in terms of the Lake
16 Oahe piece and the permitting that was being addressed by our
17 statement. So we fully thought that as we issued the
18 statement it was not going to, in fact, diminish the
19 plaintiff's desire for the Court to move forward with this
20 adjudication. And in fact, that was our understanding and
21 one of the reasons that we did not think that it would
22 somehow change the role the Court had to play in this. If we
23 had for a minute thought that it would negate the requirement
24 that the Court be involved given that we were in an emergency
25 relief situation, we certainly would have informed the Court

1 immediately. And that definitely went into our calculus in
2 terms of determining what it was that we were doing in
3 issuing the statement and whether it would have an impact on
4 the Court's role in this.

5 THE COURT: Thank you. I appreciate both of your
6 coming down here and addressing these issues and not avoiding
7 them and being forthright with me. I appreciate that. We
8 will now move on to some other issues. Thank you.

9 Let me start with Mr. Leone, and I'm going to ask a
10 few technical issues, because we have to talk about where do
11 we go from here.

12 Mr. Leone, let me go back to the issue I just raised,
13 which is non-Lake Oahe sites. So my question to you as you
14 stand here: Are there any other PCN waterways where
15 construction has not been completed aside from Lake Oahe?

16 MR. LEONE: Not to my knowledge, Your Honor. Every
17 PCN site other than Lake Oahe site has been fully graded at
18 this point.

19 Wait just a minute.

20 (Pause)

21 MR. LEONE: I think the right answer, Your Honor, is
22 every PCN site that we intend to work on in the foreseeable
23 months has been graded already

24 THE COURT: Aside from Lake Oahe?

25 MR. LEONE: Correct.

1 THE COURT: Second question: How about non-PCN
2 permitted sites, again waterways? We talked to Mr. Marinelli
3 last time, hard to pin down a number. I know this is
4 somewhat amorphous. But do you have any estimate of that?

5 MR. LEONE: Yes, I think I can answer your question.
6 I'm going to limit it to the area 20 miles east of Lake Oahe
7 and then go to the west. So 20 miles east of Lake Oahe, the
8 pipe is in the ground. There's only dribs and drabs of work
9 to be done, reclamation. I think there are some landowners
10 that want to fill in a ditch or two. The work is done. We
11 shouldn't even be talking about restraint there. West of
12 Lake Oahe, everything has been graded now to Highway 1806. I
13 always transpose the numbers. Let me get into a little more
14 detail on that.

15 (Pause)

16 MR. LEONE: Let me correct it, Your Honor.
17 Everything up to 1806 is cleared, and the topsoil has been
18 removed, and it is in the process of being subgraded.

19 THE COURT: I'm not asking about private land
20 grading. What I want to know is about waterways grading; in
21 other words, permit 12 waterways. You're saying it has been
22 graded to Highway 1806 over any waterways?

23 MR. LEONE: Mr. Mahmoud has the answer to this
24 question. I can ferry it back and forth or we can have --

25 THE COURT: Well, you are still the lawyer.

1 MR. LEONE: All right. Let me ask him then.

2 (Pause)

3 MR. LEONE: Your Honor, I don't know we have a
4 specific number for how many of those non-PCN sites. You
5 kind of have to look at them case by case. Every one has
6 been disturbed in some way, either with a bridge or access or
7 some kind of grading.

8 THE COURT: I'm asking in terms of potential
9 injunction. I'm going to Mr. Hasselman and Ms. Ducheneaux
10 next.

11 Are there other waterways that the plaintiffs, aside
12 from Lake Oahe, that the plaintiffs could still seek to
13 enjoin your work on because they haven't been completed? You
14 tell me no PCN sites. But let's talk about the non-PCN
15 permit sites.

16 MR. LEONE: Stated another way, is there any work
17 ongoing at non-PCN sites?

18 THE COURT: Just in the vicinity of waterways, not
19 private land.

20 MR. LEONE: Right. When I say non-PCN site, what I
21 mean is a waterway --

22 THE COURT: You need permit 12 coverage but not PCN.

23 MR. LEONE: Right. And I'm limiting this to North
24 Dakota west of Lake Oahe.

25 THE COURT: Yes.

1 MR. LEONE: The closest I can give you, Your Honor,
2 is that the pipeline is 60 percent done in that area, which
3 means completely installed, which means there must be some
4 kind of work ongoing on the other 40 percent. To what extent
5 that includes these non-PCN waterways, I'm not sure.

6 THE COURT: Okay. Thank you.

7 Mr. Hasselman, let me move to you and Ms. Ducheneaux.
8 This in some way relates to the appeal.

9 Mr. Hasselman, it seems that your appeal is not moot,
10 I guess, for a few reasons. And if I am missing something,
11 please tell me. So the first would be as to Lake Oahe,
12 according to the government, they could change their
13 mind -- I guess I shouldn't say that -- they could grant the
14 easement at any point in the coming weeks. The PCN
15 waterways, it seems, is moot because they have all been
16 graded and cleared. But then there are also the non-PCN
17 waterways that would be covered by your motion and that
18 aren't covered by the government's position now.

19 So am I right that then the two issues that remain
20 live for you are Lake Oahe, because you fear the government
21 issuing the easement in the non-PCN waterways?

22 MR. HASSELMAN: Thank you, Your Honor.

23 I think that's right, but I do want to observe that
24 the fact that there has been a bulldozer that has gone
25 through does not moot out any possible relief that the tribe

1 could seek. In Mr. Mentz's declaration that we submitted in
2 support of the TRO, he talks about the important need to find
3 and reinter any remains that were disturbed when the graves
4 that he identified were disturbed.

5 So, you know, the fact that a bulldozer has been
6 through doesn't mean that we now have no interest in that
7 area.

8 THE COURT: But that's not injunctive relief you have
9 been seeking. That might be subsequent relief. Right?

10 MR. HASSELMAN: Well, the injunction relief, in the
11 Court of Appeals, our request for relief is sort of getting
12 smaller and smaller as the construction proceeds. But what
13 we did with the injunction to the Court of Appeals was to
14 mirror what the government has asked for in terms of a
15 voluntary stand-down, which is the 20 miles on either side.
16 As I think we now understand, 20 miles on the east side
17 really is probably irrelevant. And then on the other side,
18 we just don't know because it changes every day.

19 THE COURT: Right. I haven't seen anything else. I
20 get notice of certain things from the Court of Appeals but
21 not everything. Do you have a hearing scheduled on your
22 injunction pending appeal, Mr. Hasselman? The latest I saw
23 was a briefing schedule.

24 MR. HASSELMAN: Right, Your Honor. The briefing is
25 complete as of Wednesday. We have asked the circuit for a

1 decision by the end of the day today, because that's when the
2 agreement or the TRO or however we characterize it ends, but
3 there is no hearing scheduled.

4 THE COURT: Okay. All right. Thank you.

5 Ms. Ducheneaux, you're certainly a party, although I
6 didn't let you participate in the motion, but I will ask you:
7 Is there anything you want to add on the harm issue?

8 MS. DUCHENAUX: No, I don't think so. I think that
9 Jan, on behalf of Standing Rock, represented it well.

10 THE COURT: Okay. So the next question then is what
11 the folks want to do here. Whether you got an injunction
12 pending appeal or not, you have still appealed the
13 preliminary injunction. So, Mr. Hasselman, is your belief
14 then that that ousts me of jurisdiction to proceed further in
15 the case and we should wait and see what happens in the Court
16 of Appeals? Or do you want to go forward on any other issues
17 in this case? Because there certainly are some, I think,
18 separate issues.

19 MR. HASSELMAN: Yeah, thank you. Our
20 understanding -- and I believe it is shared by the
21 government -- is that the filing of the interlocutory appeal
22 doesn't divest you of jurisdiction over the other issues in
23 the case. And I think while you have recognized that we are
24 in a somewhat fluid situation, you know, our expectation is
25 that this case will proceed under the normal course of

1 events. The next step in a case like this would be the
2 production of the administrative record -- well, the filing
3 of an answer and production of record. We have been
4 discussing with Ms. Zilioli those dates and have reached, I
5 think, a preliminary understanding around some dates that
6 would work for us and for them.

7 THE COURT: Okay. Why don't you tell me those, and
8 then I will hear from the defendants.

9 MR. HASSELMAN: The e-mail that we received from
10 Ms. Zilioli was that the Corps's response to the complaint
11 would be due November 10th and that the administrative record
12 would be due on December 19th. And these are extensions of
13 the normal schedule that is provided for under the local
14 rule, but we would not oppose those extensions.

15 THE COURT: All right. And that would include Dakota
16 Access, as well, Mr. Hasselman? Obviously, not in the
17 administrative record but in terms of responding to the
18 complaint as a defendant.

19 MR. HASSELMAN: I believe Dakota Access has already
20 filed an answer.

21 THE COURT: I don't remember from the docket.
22 Mr. Leone, is that right?

23 MR. LEONE: That is right, Your Honor.

24 THE COURT: I'm sorry. I see August 24th, I do see
25 that.

1 So the government's response, November 10th;
2 administrative record, December 19th. Well, we can sort of
3 see if the government or Dakota Access moves to dismiss on
4 the NHPA issue. I may feel that I shouldn't be ruling on
5 that given the success-on-the-merits question is in front of
6 the Court of Appeals. But certainly if there are NEPA
7 issues, I could rule on those.

8 And I guess the last issue then is: Are plaintiffs
9 also seeking that the TRO that I issued remain in effect
10 until further order of the Court, although it seems moot
11 because in the sense the TRO terms that I reimposed are not
12 any broader than the government's voluntary position on the
13 easement issue combined with the mootness of construction
14 east of the lake? But are you seeking me to retain those TRO
15 conditions?

16 MR. HASSELMAN: Your Honor, I think retention of the
17 TRO makes a lot of sense in light of the dynamic and the
18 things in motion. My understanding is that, to date, you
19 have been willing only to issue relief where there is
20 agreement of the parties.

21 THE COURT: Okay. Let me hear first from the
22 government; and then, Mr. Leone, I will hear from you.

23 So Ms. Zilioli, you agree with the dates that
24 Mr. Hasselman pointed out?

25 MS. ZILIOLOI: Yes, Your Honor.

1 THE COURT: I trust that you don't object to the TRO
2 conditions until further order since they are no broader than
3 what you are already voluntarily doing?

4 MS. ZILIOLI: Your Honor, I think if there is an
5 agreement between the parties, then we would certainly not
6 oppose the extension of a TRO along the lines of the terms of
7 that agreement.

8 THE COURT: When you say agreement of the parties,
9 you are a principal party.

10 MS. ZILIOLI: If Dakota Access is willing to agree to
11 the terms, we would not oppose --

12 THE COURT: Why would you oppose it if it is no
13 broader -- at least west of Lake Oahe -- it is no broader
14 than what you're doing anyway? Right?

15 MS. ZILIOLI: Yes, I think our original position on
16 the TRO that we would not oppose that as well as the
17 extension, initially that was premised on concern for public
18 safety. Since then, those concerns should be addressed by
19 other events. Again, we would not oppose the extension if
20 Dakota Access is willing to agree to the terms. We don't
21 think that the urgency of a TRO is necessary if there's not
22 an agreement.

23 THE COURT: There isn't an application for one, and I
24 wouldn't issue one. I'm just saying, for clarity, if
25 everybody agrees, I'm happy to make it an order, just so it

1 is clear.

2 THE COURT: Okay. Thank you.

3 Mr. Leone, the question to you is what is your
4 position on -- I'm calling them TRO conditions because they
5 first appeared in my TRO by consent by all parties, so that
6 is my shorthand for them. I would just be imposing a
7 continuing order that was reached by agreement of the
8 parties. If people don't agree, I won't do it. Again, it
9 seems that you're not prejudiced because there is nothing to
10 do east of the lake, and without the government's easement,
11 you can't do anything west of the lake in that small area
12 anyway.

13 MR. LEONE: Your Honor, I exercise great restraint
14 here because we are as confused and befuddled about some of
15 this as you are because I'm not sure what exactly we're
16 hearing either from the plaintiff or the government, to be
17 honest with you.

18 When we walked into the court for that preliminary
19 injunction hearing, we had been told by the Corps that the
20 easement was issued and the 14-day notice was going to
21 Congress 10 days before we showed up here to argue that
22 motion. The first time we -- and the permits were issued,
23 signed off by the Corps, as high as they need to be signed
24 off on. That decision was made. And we were surprised as
25 anyone when I stood here at the podium and the government

1 interrupted in the middle of the argument to say, not so
2 fast, the easement is still sitting on somebody's desk. We
3 are as shocked as anyone.

4 This company has lost \$5 billion in market value in
5 the last two weeks, because the market, the public, were
6 waiting to see what Your Honor would do with respect to the
7 motion for preliminary injunction. Was the Corps right or
8 was the Corps wrong? Did they follow a process or not? The
9 decision came out, and 30 minutes later the government for
10 reasons that are still not clear to us interrupted that
11 process. And so we are against any form of restraint, even
12 though Your Honor was very careful to say it was based on
13 simply the concessions and accommodations of the parties.
14 The media and the plaintiffs presented that to the world as a
15 victory, that there had been some kind of restraint put on
16 the pipeline. We will never make that mistake again. We are
17 opposed to any form of restraint, temporary or otherwise. We
18 ask you not extend the existing temporary restraining order.
19 We ask that you not grant any form of injunction pending
20 appeal.

21 The specifics of what is and is not moot on the left
22 side of Lake Oahe get a little confusing, but it is not true
23 that the easement is necessary for us to work in the areas
24 east of Highway 1806. That is still private land. Most of
25 that from 1806 to the lake is private land. We don't need an

1 easement for that. We have all the permits that we need.
2 The company has been deferring from construction for reasons
3 of public safety. The governor of the state of North Dakota
4 is dealing with the public safety, and that's who should be
5 dealing with that.

6 We would ask that this case go forward on the main
7 case on the normal schedule. We weren't consulted about the
8 extensions. Well, we were consulted. We were asked if we
9 agree. We don't agree with the extensions of time.

10 THE COURT: How are you prejudiced by an extension of
11 time? It would seem that what has prejudiced you is the
12 government's decision on the easement. But absent that, it
13 would seem that you're happy to take your time here because
14 it is the plaintiffs who are the ones attempting to have
15 Court interference as quickly as possible.

16 MR. LEONE: Your Honor, let me run at it from this
17 direction for a minute. I think you put the finger on it a
18 minute ago. You pointed out it is not your role to make a
19 judgment about whether it is good or bad politics or good or
20 bad decision making to approve this pipeline or not.
21 Obviously, you're right about that. And we understand that,
22 and we are participating in whatever this process is that
23 exists outside of this courtroom, both the process of
24 negotiation with the tribes, negotiation with the government
25 in our attempts to get our pipeline built. It does nothing

1 but complicate that process to inject restraining orders or
2 injunctions into the process.

3 THE COURT: Right.

4 MR. LEONE: And it does prejudice in that context.

5 THE COURT: I'm not talking about that. I'm not
6 going to issue any, because as I said, the only issuance of a
7 restraining order was by agreement. And I made that explicit
8 in my orders. But if there is not agreement, I won't issue
9 it because as I said I don't see a basis for it. So I won't
10 issue that. But my question had nothing to do with
11 restraining orders or injunctions. It was simply about the
12 scheduling of the case. I understand you may not want a
13 lawsuit hanging over your head, but if it doesn't interfere
14 with your proceeding with the pipeline, my question is: How
15 are you prejudiced by it?

16 MR. LEONE: Your Honor, as long as it doesn't
17 interfere with our building of the pipeline, then it is hard
18 for me to say what the prejudice is. But my life experience
19 tells me that with the case hanging over the pipeline, it
20 will interfere with the pipeline.

21 Let me try to put this in a bigger context. Our hope
22 had been that we could get through the preliminary injunction
23 issues successfully; and that there might be a remaining
24 issue, because a lot of the concerns expressed by the
25 plaintiffs had to do with what happens when somebody puts oil

1 in the pipeline and what does that mean for the river. And
2 we felt we would have three or four months here before the
3 pipeline has to go into operation to satisfy you, according
4 to a normal good briefing schedule, that any environmental
5 issues associated with the pipeline had been properly
6 addressed by the Corps, and we could do that something other
7 than a file-the-motions-on-Saturday-and-Sunday basis.

8 We would still hope that at some point we can get
9 back on that trajectory and that we can get to the merits of
10 the main case as quickly as possible, which if it was done
11 under the ordinary scheduling, the answer from the government
12 would be due on October 10th, the administrative record would
13 be due on November 10th, and there's at least a fighting
14 chance of getting this case briefed by the end of the year to
15 a point where you can make a decision within that kind of a
16 time frame.

17 Our concern from a scheduling standpoint is we start
18 slipping schedule now and we put off the government's answer
19 for 30 days -- which as I say we have already answered, so we
20 don't know why that should be put off for 30 days -- and if
21 everybody works hard and under the same constraints that we
22 have already been working under to get this case decided, it
23 is beneficial to us.

24 It is for all the reasons we set forth in our papers,
25 Your Honor, about the irreparable harm, the harm that we're

1 incurring.

2 THE COURT: Let me go back to Mr. Hasselman then.
3 What if I move those deadlines up by a few weeks, the two you
4 just mentioned, the defense response and the administrative
5 record?

6 MR. HASSELMAN: That may be a rare point of agreement
7 between Mr. Leone and myself. Our non-opposition to the
8 government's proposed deadline reflects the fact that, in my
9 experience, it's sort of fruitless to oppose them. I would
10 certainly like a few things moved as fast as possible, and
11 also had originally envisioned this case would be briefed up
12 by the end of the year. So I would enthusiastically support
13 a faster deadline.

14 THE COURT: Okay.

15 MR. HASSELMAN: There is one thing --

16 THE COURT: Yes.

17 MR. HASSELMAN: -- that needs to be addressed, is the
18 likelihood that we will need to file an amended complaint.
19 Some of the actions here occurred subsequent to our filing of
20 the complaint at the end of July. And if an easement is
21 issued, I think we will need to clean up the complaint by
22 including those. I don't see that it would affect anything
23 about the record in a way that would cause a delay.

24 THE COURT: You can, obviously, if you talk to
25 defense about consent to filing an amended complaint. I'm

1 happy to entertain it; if they disagree, I'm happy to look at
2 it.

3 Ms. Zilioli, why can't we say that your response is
4 due October 7th, the administrative record filed by
5 November 7th?

6 MS. ZILIOLOI: Thank you, Your Honor.

7 I believe, based on when the U.S. Attorney's Office
8 was served, our response date would be October 11th. We can
9 confirm that. And the record would be due 30 days later,
10 November 10th.

11 THE COURT: So what is wrong with those dates?

12 MS. ZILIOLOI: Several things, Your Honor. As you
13 know, the parties have been deeply invested, most of their
14 time and resources in responding to various motions for TRO,
15 preliminary injunction, and injunction pending appeal.
16 Unfortunately, many of the same key Corps personnel who have
17 been investing all of their time in those proceedings have
18 not been able to spend the time they need in continuing to
19 compile the record.

20 The Corps is working diligently in compiling the
21 administrative record, but we are talking about over 200
22 different Corps authorizations across the pipeline that are
23 being challenged. And the record, as you can imagine, is
24 quite extensive and requires coordination amongst multiple
25 different Corps offices, as well as headquarters.

1 And a minor point, but this particular time of year
2 it is particularly challenging given all the
3 end-of-the-fiscal-year obligations that are simultaneously
4 taking up folks' time.

5 I think for those reasons, we really believe the
6 additional time would be necessary for both the answer and
7 the administrative record.

8 THE COURT: I will issue the dates as I proposed.
9 The defense response will be due October the 11th, and the
10 administrative record will be due November the 10th.

11 Let's return to discuss a briefing schedule because
12 we may know more from the Court of Appeals thereafter. Let
13 me just check my schedule.

14 Mr. Hasselman, 10:30, November 14th, although I guess
15 if you're on the West Coast, you might like something later,
16 right?

17 MR. HASSELMAN: I'm in trial on another matter that
18 week, Your Honor.

19 THE COURT: Then how about the 10th?

20 MR. HASSELMAN: The 10th I can do, yeah.

21 THE COURT: You prefer later in the day, or are you
22 an early morning person and you're happy to do it in the
23 morning here?

24 MR. HASSELMAN: I don't mind. Thank you for asking.

25 THE COURT: Mr. Hasselman, 2:00 on the 10th of

1 November for a status. What that status would be would be
2 largely to decide a briefing schedule unless there are other
3 developments from the Court of Appeals or other developments
4 on the ground. Is that a convenient time and date?

5 MR. HASSELMAN: Yes, it is. Thank you for asking.

6 THE COURT: Ms. Ducheneaux?

7 MS. DUCHENAU: Yes, Your Honor, it is. Thank you.

8 THE COURT: Ms. Zilioli?

9 MS. ZILIOI: Yes, Your Honor.

10 THE COURT: Mr. Leone?

11 MR. LEONE: Your Honor, I have a trial starting the
12 following Monday, and I know I'm going to be out of town at
13 that time. If it is just a status conference for a briefing
14 schedule, if I can participate by phone.

15 THE COURT: You can do that.

16 Ms. Zilioli, if there are issues regarding the
17 administrative record and you want to seek an extension for
18 good cause, I will hear you, but you should make sure you
19 consult with the other parties before you do that.

20 THE COURT: Okay. Any other issues, Mr. Hasselman
21 that, you want to raise today?

22 MR. HASSELMAN: Not on my end. Thank you.

23 THE COURT: Ms. Ducheneaux?

24 MS. DUCHENAU: Not today. Thank you.

25 THE COURT: Ms. Zilioli?

1 MS. ZILIOLO: No, Your Honor.

2 THE COURT: And Mr. Leone?

3 MR. LEONE: Your Honor, not in this specific
4 proceeding. I think you're aware that a very similar case
5 was filed recently by a different plaintiff. It adds a
6 federal defendant. I think probably the right thing for us
7 to do is to file a very short intervention motion, and we're
8 considering whether we want to consolidate that case.

9 THE COURT: I'm aware of that. That has certainly
10 been something in my mind, as well. If you do intervene, I
11 will hear you, I will hear the government on consolidation.
12 I haven't looked at the specifics of that complaint. I
13 assume it is fairly similar. If consolidation makes sense,
14 I'm happy to do that.

15 Mr. Hasselman, are you involved in the other case, or
16 is different counsel?

17 MR. HASSELMAN: I'm not involved. Ms. Ducheneaux and
18 I did have a chance to meet with the counsel for Yankton
19 Sioux Tribe. I believe that they authorized me to represent
20 that they would not oppose consolidation. And yes, it is a
21 very parallel transaction.

22 THE COURT: Thank you for doing that legwork for me.

23 Again, if everyone agrees, people can just file a
24 consent motion for consolidation at some point, and I'm happy
25 to consolidate, and we'll go from there.

All right. Thank you all.

Have a pleasant weekend.

(Proceedings adjourned)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Patricia A. Kaneshiro-Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

PATRICIA A. KANESHIRO-MILLER

DATE