NO. 16-5259

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE,
Plaintiff-Appellant,

and

CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS,
Defendant-Appellee,

and

DAKOTA ACCESS LLP,
Intervenor-Defendant-Appellee.

APPELLANT STANDING ROCK SIOUX TRIBE'S RESPONSE TO DAKOTA ACCESS LLC'S MOTION TO DISMISS

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INTRODUCTION

This appeal concerns defendant U.S. Army Corps of Engineers' compliance with the National Historic Preservation Act ("NHPA") in its permits and approvals for the Dakota Access Pipeline. It involves issues of first impression not just in this Circuit, but in any Circuit. The legal questions at the heart of this appeal triggered an unresolved dispute between the Corps and the Advisory Council on Historic Preservation, the agency that administers the NHPA, and represent a critical component of one of the most high-profile conflicts in the nation.

Appellant Standing Rock Sioux Tribe ("Tribe") understands that appellee Dakota Access Pipeline, LLC ("DAPL") appears to have completed all of the construction that the Tribe sought to enjoin in the underlying preliminary injunction motion that forms the basis for this interlocutory appeal. In doing so, DAPL rejected a formal request from three federal agencies that it voluntarily cease construction within 20 miles of Lake Oahe. Now that DAPL has completed the construction that the injunction sought to prevent, it has mooted the Tribe's appeal from the denial of preliminary injunctive relief under the standards of this Circuit. However, because DAPL's unilateral actions have deprived the Tribe of the opportunity to test the district court's legal findings with respect to NHPA § 106, the underlying preliminary injunction must be vacated. Doing so will ensure that the district court's unappealable decision does not collaterally estop the Tribe or serve as an adverse precedent against

other parties.

ARGUMENT

I. THE DISTRICT COURT'S DECISION MUST BE VACATED

The U.S. Supreme Court addressed the question of mootness pending appeal in *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950). In *Munsingwear*, the Court identified the "established practice" of vacating a lower court decision that became moot pending an appeals court decision. *Id.* at 39. The "prime reason" for vacatur, according to this Circuit, is "to protect the losing party from the collateral effects of a judgment that it might have been able to have overturned but for the mooting event." *Clarke v. U.S.*, 915 F.2d 699, 707 (D.C. Cir. 1990). Indeed, the "standard practice" for both the Supreme Court and the D.C. Circuit in these situations is "automatic vacatur." This Circuit has applied this rule in countless situations. *See, e.g., Akiachak Native Cmty. v. United States Dep't of Interior*, 827 F.3d 100, 115 (D.C. Cir. 2016) ("Because Alaska is the party seeking relief from the judgment below, and has been prevented from appealing the district court's decision for reasons outside its control, vacatur is appropriate to clear the path for future relitigation of the issues ... and eliminate a judgment, review of which was prevented through happenstance.") (internal quotations omitted); *National Kidney Patients Ass'n v. Sullivan*, 902 F.2d 51 (D.C. Cir. 1990) ("The only issue before us—the correctness of the decision to grant a preliminary injunction—is no longer justiciable. Accordingly, the appeal is dismissed, the judgment of the district

court is vacated, and the case is remanded to the trial court for further proceedings.")

There is a limited exception to the default rule of automatic vacatur where "review is prevented, not by happenstance, but by the deliberate action of the losing party before the district court." *Center for Science in the Public Interest v. Regan*, 727 F.2d 1161, 1165-66 (D.C. Cir. 1984). "The distinction between litigants who are and are not responsible for the circumstances that render the case moot is important." *U.S. v. Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988). As explained in *U.S. v. Garde*, courts should not allow a losing party to wipe an adverse decision "from the books" by filing an appeal and then mooting it through their own compliance. *Id.*

The directive in *Munsingwear* to vacate moot decisions applies squarely here. DAPL, having prevailed in the district court on the Tribe's injunction request, took action to moot the appeal by completing all of the clearing and grading activity that the preliminary injunction sought to enjoin. *See, e.g., Monzillo v. Biller*, 735 F.2d 1456, 1459 (D.C. Cir. 1984) ("In general, a case becomes moot where the activities for which an injunction is sought have already occurred and cannot be undone."). DAPL's decision to complete construction of the pipeline route to the water's edge when it still lacks a permit to cross Lake Oahe, and despite a formal request from the federal government to halt construction, is deeply disappointing. Its conduct should not be rewarded by depriving the Tribe of the ability to continue to litigate the NHPA decision in the district court.

Notably, the Tribe does not concede in any way that its underlying NHPA claims are moot. Even in the absence of a preliminary injunction, it may be possible to fashion appropriate declaratory or injunctive relief should the Army Corps be found to have violated § 106 of the NHPA. Such relief can include other measures to help mitigate the damage in the area or elsewhere. *See, e.g., Slockish v. U.S. Fed. Highway Admin.*, 682 F. Supp. 2d 1178, 1184 (D. Or. 2010) (NHPA claims not moot as the defendants might still be required "to carry out additional review of the alleged cultural and historical resources in the project area in compliance with the NHPA . . . or mitigate the harm to cultural resources through the establishment of monuments or markers."); s*ee also Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1066 (9th Cir. 2002); *Tyler v. Cuomo*, 236 F.3d 1124, 1137 (9th Cir. 2000). That said, however, the question of whether the Tribe's underlying NHPA claims are moot—not just the denial of the preliminary injunction—is not before this Court. This Circuit has cautioned that the appeals court "may consider only the *issue* raised before it," and the question of mootness of the underlying claim should be resolved by the district court in the first instance. *National Kidney Patients Ass'n*, 902 F.2d at 54 (emphasis in original).

With that qualification, the Tribe does not oppose dismissal as long as the underlying district court decision is vacated at the same time. This appeal falls squarely within the *Munsingwear* doctrine: because the Tribe will lose the opportunity

to test the district court's findings as to the defendant Army Corps' compliance with the NHPA, that decision should not now serve as a binding precedent against which the Tribe could be collaterally estopped from relitigating, or against other parties who wish to litigate similar issues. Moreover, the limited exception to the doctrine—where mootness arises due to the losing party's voluntary actions—is plainly inapplicable here. Indeed, the Tribe tried every avenue within its power to prevent construction from proceeding pending the resolution of this case, and DAPL even ignored an explicit formal request from three federal agencies to cease construction in a limited area until the Lake Oahe easement decision was finalized. The Tribe is not responsible for the completion of construction which moots its preliminary injunction motion.

II. DAPL'S ALTERNATIVE REQUEST FOR SUMMARY AFFIRMANCE SHOULD BE DENIED

In the alternative, DAPL asks that the district court's preliminary injunction be summarily affirmed. A party seeking summary affirmance has the "heavy burden of establishing that the merits of his case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987). In considering a motion for summary affirmance, the court must "view the record and the inferences to be drawn therefrom in the light most favorable to [the nonmoving party]" and only grant the motion if "no benefit will be gained from further briefing and argument of the issues presented." *Id.* at 298 (quotation omitted). Legal issues of first impression

are generally inappropriate for summary disposition. *See, e.g.*, *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 582 (D.C. Cir. 2002) (court partially denied summary affirmance because it had not yet addressed the precise question); *see also D.C. Circuit Handbook of Practice & Internal Procedures* 36 (2015) ("Parties should avoid requesting summary disposition of issues of first impression for the Court.").

This appeal is a particularly poor candidate for summary affirmance. As observed above, it involves issues of first impression on the interpretation of the NHPA, issues that triggered a major interagency dispute between the Corps and ACHP. This Court heard nearly two hours of oral argument on the motion for an emergency stay pending appeal; hardly a hallmark of a case that is "so clear" that summary action is warranted. And while it is true that this Court denied the motion for emergency stay, it does not automatically follow that there would be no point in considering the underlying preliminary injunction motion. This Court provided no specifics as the reasons for denying the emergency motion: it could be possible, for example, that the Court believed that the Tribe was likely to prevail on the merits but had not adequately proven a likelihood of irreparable harm. Summary affirmance would validate all of the district court's opinion, leaving the Tribe without an opportunity to continue to litigate the merits of its § 106 claims. Dismissal and vacatur so that the Tribe can pursue the merits of its NHPA claim below on cross-motions for summary judgment is the appropriate posture for this appeal.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that its appeal of the district court's preliminary injunction ruling be dismissed, the ruling vacated, and the case remanded to the district court for further proceedings.

Dated this 2nd day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States District Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

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