IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, **Plaintiff,** **and** **CHEYENNE RIVER SIOUX TRIBE,** **Intervenor-Plaintiff,** **v.** **U.S. ARMY CORPS OF ENGINEERS,** **Defendant.** **and** **DAKOTA ACCESS, LLP,** **Intervenor-Defendant.**	**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-Intervenor Cheyenne River Sioux Tribe ("Tribe") respectfully moves for an injunction pending appeal of this Court's denial of the Tribe's motion for a preliminary injunction. The Tribe seeks an injunction pending appeal requesting that this Court prevent the flow of oil through the Dakota Access Pipeline, which would result in the ultimate harm to Tribal members' free exercise of religion. In the alternative, if the Court is not inclined to grant an injunction pending appeal, the Tribe seeks an injunction until the D.C. Circuit rules on the emergency motion for an injunction pending appeal that the Tribe will file, if needed. This motion is supported by the memorandum appended hereto.

To ensure protection 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 Tribe respectfully requests that the Court rule on this motion immediately.

Dated: March 10, 2017

CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff,

By: /s/ Nicole E. Ducheneaux

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of March, 2017, a copy of the foregoing was filed electronically with the Clerk of the Court. The electronic filing prompted automatic service of the filing to all counsel of record in this case who have obtained CM/ECF passwords.

/s/ Nicole E. Ducheneaux

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

On March 7, 2017, the United States District Court for the District of Columbia issued its Order and Memorandum Opinion denying Plaintiff-Intervenor, the Cheyenne River Sioux Tribe's ("Tribe") Motion for Preliminary Injunction. On March 10, 2017, the Tribe filed its Notice of Appeal on this ruling. In this motion, the Cheyenne River Sioux Tribe seeks relief to preserve its rights pending the outcome of its interlocutory appeal. The issues presented in this case are significant, legally and factually complex, and have generated a high level of government and public interest. The Tribe seeks to preserve its and its members' right to free exercise of religion, which is being threatened by the United States Army Corps of Engineers' ("Corps") easement that allows the placement of the Dakota Access Pipeline ("DAPL") and the flow of oil under the sacred waters of Lake Oahe.

The Tribe requests that this Court grant an injunction pending appeal preventing the flow of oil through the pipeline, which would result in the ultimate harm to Tribal members' free exercise of religion. The DAPL's construction rapidly continues simultaneously with this litigation. The DAPL construction is nearly complete under Lake Oahe where oil will soon flow endangering the Tribe's religious practice. While Dakota Access is required to provide weekly updates as to the pipeline's progress, should construction continue during the appeals process, the last opportunity for Cheyenne River Sioux Tribe to defend its Tribal members' free exercise of religion will be lost. Accordingly, an injunction pending appeal is warranted here.

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 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 TRIBE RAISES SIGNIFICANT LEGAL ISSUES THAT MERIT APPELLATE REVIEW AND IS LIKELY TO PREVAIL ON APPEAL

Cheyenne River Sioux Tribe raises significant legal claims regarding the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 ("RFRA"), which provides that the "Government shall not substantially burden a person's exercise of religion" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

Seeking relief under Rule 62(c), creates "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). However, court does not have to reach such a high standard in order to grant a motion for injunction pending appeal. *Id.* (citing *CREW v. Office of Admin.*, 593 F. Supp.

2d 156, 160 (D. D.C. 2009)). Instead, district courts have issued injunctions pending appeal even after denying a request for preliminary injunction in order to preserve the status quo while the courts deliberated serious legal questions and the movant stands to suffer irreparable harm without injunctive relief during such deliberations. *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); *Shrader v. Idaho Dep't of Health & Welfare*, 590 F. Supp. 554, 556 (D. Idaho 1984) (denying plaintiff's motion for an injunction, but staying the dissolution of a preliminary injunction pending appeal because of complex legal issues). This case meets that far lesser standard.

Even though this Court believes that the Tribe is seemingly less likely to prevail, this Court has recognized that where serious legal questions are presented, if the other factors tip in favor of a stay, then this first factor will not preclude one. *Loving*, 920 F. Supp. 2d at 110 (citing *CREW*, 593 F. Supp. 2d at 160); *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 Rule 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.'").

A. The Court Misapplied Laches

The Tribe has presented a substantial case that the doctrine of laches does not bar the injunctive relief that it seeks. As an initial matter, there is a substantial question about the sustainability of this Court's finding that the religious concerns voiced by the Tribe in the Section

106 National Historic Preservation Act ("NHPA") process were not specific enough to alert the government that the presence of the pipeline would impact the Tribes' religious exercise rights under RFRA. This Court seems to be holding tribal representatives (who are not lawyers and many of whom do not have extensive educational backgrounds) to an unfair standard, requiring that they use the legalese of RFRA, or "magic words" in order to put the government on notice of its concerns that the pipeline will impact its religious exercise rights. "[T]he law does not hold [a plaintiff] to the use of magic words" in order to give notice of a claim. *Whorton v. Washington Metro. Area Transit Auth.*, 924 F. Supp. 2d 334, 348 (D. D.C. 2013). Holding the Tribe to such an unfair standard is particularly inappropriate in applying the equitable doctrine of laches.

There is also a substantial question regarding whether it was appropriate for this Court to equate the laches notice standard with the notice requirements applicable to a challenge under the Administrative Procedures Act ("APA") or NHPA process. The Court relied on *Menominee Indian Tribe of Wisc. v. United States* to find that the Tribe failed to address claims during the administrative process. 614 F.3d 519 (D.C. Cir. 2010); ECF No. 158 at 8-10. In *Menominee*, the court addressed delay and found that mere delay is not the standard, but instead unreasonable delay for failing to file suit. *Menominee*, 614 F.3d at 531; *see also Perry v. Judd*, 840 F. Supp. 2d 945 (E.D. Va. 2012) (finding delay where a party failed to file a suit that was ripe to file). The Tribe's RFRA claims are not tied to the APA or consultation process, rather they are independent statutory claims, which were unable to be raised until the Corps issued a decision that made the matter ripe for legal evaluation. *See Menominee*, 614 F.3d at 531 (overturning the district court decision for failing to properly calculate delay time tied to failure to file suit). The threat to the Tribes' religious exercise rights was not imminently threatened—and thus not ripe for injunctive relief—until the Corps approved the easement on February 8, 2017. *See Appalachian Voices v. Chu*, 725 F. Supp.

2d 101, 105 (D. D.C. 2010) (denying injunctive relief "[b]ecause the plaintiffs' asserted injury is not imminent"). Thus it would not have mattered if the Tribe raised the RFRA claim in its initial complaint in August of 2016 – this Court would not have entertained a motion for injunctive relief prior to the grant of the easement because up until that point, the government had been telling the world that it was undertaking further review, and was even going to require and environmental impact statement ("EIS") under NEPA, so there was no imminent threat to the Tribes' RFRA-based rights.

In sum, the Tribe raises significant legal questions regarding the misapplication of the laches doctrine, which merit an injunction pending appeal for reviewable error.

B. There is a Substantial Question Regarding whether *Lyng v. Northwest Indian Cemetery Protective Association* is Applicable to this Case.

The Court relies upon *Lyng v. Northwest Indian Cemetery Protective Association* to find that the Corps' action does not impose a substantial burden on the Cheyenne River Sioux Tribe's members' free exercise of religion. 485 U.S. 439 (1988); ECF No. 158 at 22-27. However, there is a substantial question about whether *Lyng* remains reliable authority to guide this instant analysis in light of the Supreme Court's rulings in *Hobby Lobby* (*Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014)) and *Holt* (*Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015)).

The Supreme Court in *Hobby Lobby* explained that even the original text of RFRA, enacted in 1993, was clear on its face that it was not "meant to be tied to th[e] Court's pre-*Smith* interpretation of [First Amendment free exercise]" to the extent that pre-*Smith* authorities are not consistent with the expansive protections provided by RFRA. *Hobby Lobby*, 134 S. Ct. at 2772 (addressing *Employment Division v. Smith*, 494 U.S. 872 (1990)). As a result of Supreme Court decisions in *Hobby Lobby* and *Holt*, *Lyng* is neither controlling nor reliable authority in this RFRA analysis. The Tribe raises significant legal questions regarding the application of *Lyng*, which

merit an injunction pending the Circuit Court's review of this Court's ruling on the Tribe's motion for preliminary injunction.

While the Tribe acknowledges the Court's time and effort in addressing the preliminary injunction motion, it is unquestionable that the Tribe's Motion involves difficult and weighty legal issues that hinges on the particular facts of the case. Free exercise of religion is a highly protected right under RFRA and the Constitution, and any government action, such as the Corps' easement, that curtails religious practice must be reviewed with the utmost scrutiny. In its analysis contained in its Memorandum Opinion to its Order Denying Preliminary Injunction, the Court misapplied laches and *Lyng* and failed to reach the remaining prongs, as case law has shown to be an important overall determining factor. The Court's failure to address the remaining prongs requires an injunction pending appeal, and the Court should enable the Tribes to seek relief from the D.C. Circuit without risking mootness of its legal rights during the process.

II. CHEYENNE RIVER SIOUX TRIBE WILL BE IRREPARABLY HARMED ABSENT AN INJUNCTION

The Corps is the Tribe's trustee, bound by an obligation of the highest responsibility to protect the Tribe's interest in the waters of Lake Oahe, and yet it has authorized Dakota Access to construct and operate an oil pipeline under its sacred waters that will render those waters unsuitable for use in their holy sacraments. Through such action, the Federal Government directly causes the Tribe irreparable harm.

In this Circuit it is clear that "the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills v. Dist. of Columbia*, 517 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 372 (1976)); *see also Rigdon v. Perry*, 962 F. Supp. 150 (D. D.C. 1997) (violation of First Amendment religious expression rights constituted irreparable injury); *Simms v. Dist. of Columbia*, 872 F. Supp. 2d 90, 104 (D. D.C. 2012)

(violation of Fifth Amendment rights constitutes irreparable harm); *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) (the loss of RFRA-protected freedoms "constitutes irreparable harm"); *cf. Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006) ("[W]here a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination.").

Not only has the United States initiated repetitive and progressive attacks against the Lakota religion, there is no question here that the Corps' issuance of the easement for the DAPL to cross under Lake Oahe amounts to irreparable harm to the Tribe's religious practices and a loss of constitutional freedom. Over the past 40 years, the Tribe and its members have attempted to reintroduce their religious practices, but the Corps' easement and policies have operated again in a manner to desecrate the Tribe's sacred waters. Standing alone, the easement's effect on tribal religion constitutes plain irreparable harm. But also, this injury to the Tribe and its members violates their constitutional and civil rights as codified in RFRA. Irreparable harm under RFRA may be found upon the mere threat of a harmful action. In *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, the Supreme Court upheld a grant of preliminary injunction against the government to prevent enforcement of a drug law that would have the effect of violating a small sect's religious exercise. 546 U.S. 418 (2006) (finding the mere threat of prosecution to amount to irreparable harm). The trial court found that "[a]lthough the United States has not filed any criminal charges . . . the government has threatened prosecution." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1240 (D. N.M. 2002). As in *O Centro*, the Corps easement granting Dakota Access permission to place the pipeline matter before the Court poses a clear threat to the Tribe's and its members' free exercise of religion. *Id.*

The government has granted the easement to place the pipeline under Lake Oahe, and its placement and oil flow is imminent. In Dakota Access's own Status Report, it indicated that oil will assuredly be ready to flow through the pipeline under Lake Oahe by the week of March 13, 2017, well before the Tribe's appeal is heard. ECF No. 156. The Tribe's free exercise of religion is at stake, a right paramount in the United States' Constitution, and it would be egregious for this Court to wait until the harm occurs to provide equitable relief.

III. THE BALANCE OF HARMS SUPPORTS AN INJUNCTION PENDING APPEAL

The United States District Court for the District of the District of Columbia failed to consider the balance of harms in its initial analysis. The balance of harms falls to Cheyenne River Sioux Tribe's favor as loss of freedom of religious exercise is paramount to non-First Amendment claims. The Corps will suffer no injury from a temporary restraining order or a preliminary injunction. Indeed, between September 9, 2016 and January 24, 2017, the Corps affirmatively supported the indefinite suspension of the granting of the easement and even committed itself on December 4, 2016 to preparing an Environmental Impact Statement, a process that takes an agency at least 360 days. *E.g.*, *Jamul Action Committee v. Chaudhuri*, 837 F.3d 958, 965 (9th Cir. 2016).

Dakota Access alleges economic harm resulting from delay; however, the Cheyenne River Sioux Tribe has demonstrated that it will suffer irreparable harm to its religious if Dakota Access constructs and operates its crude oil pipeline under the waters of Lake Oahe. It is well settled that mere economic harm is not itself an irreparable harm, and thus plainly cannot outweigh an irreparable harm in this calculus. *See, e.g.*, *Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

The Tribe and its members request limited relief when seeking the suspension of the Corps' easement while this appeal is pursued. The Corps' December 4, 2016 Memorandum and its Notice

of Intent to prepare an Environmental Impact Statement recommended alternate locations that would reroute the pipeline away from the Tribe's sacred waters. ECF No. 65-1 at ¶ 12; 82 Fed. Reg. 5544 (Jan. 18, 2017). Likewise, the Tribe and its members do not request that all pipelines be prohibited from crossing through its territories or its sacred waters. Indeed the Tribe has tolerated the construction and operation of natural gas pipelines under Lake Oahe because these natural gas pipelines are not the Black Snake of Lakota prophecy and do not burden the Tribe's religious practice. Additionally, other examples of manmade activities along the river discussed by Dakota Access and this Court, such as bridges and power lines above the river fail to have the same destructive impact as the DAPL. ECF No. 158 at 19; ECF No. 124 at 34.

As in the facts supporting the Tribe's arguments in this matter, where there is a strong likelihood of success on the merits, "the balance of harms 'normally favors granting preliminary injunctive relief' because 'injunctions protecting First Amendment freedoms are always in the public interest.'" *Korte*, 735 F.3d at 666 (quoting *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012)).

IV. THE PUBLIC INTEREST SUPPORTS AN INJUNCTION PENDING APPEAL

The DAPL has generated opposition from people representing all walks of life. Many people have gathered over the past several months near the reservation to share their objections to the pipeline. As demonstrated by the overwhelming support that the Cheyenne River Sioux Tribe and the Standing Rock Sioux Tribe have received from every day private citizens across the world, there can be no doubt that the public interest favors granting the instant injunction.

Moreover, "there is undoubtedly also a public interest in ensuring that the rights secured under . . . RFRA are protected." *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 130 (D. D.C. 2012). Indeed, "it is always in the public interest to prevent the violation of a party's

constitutional rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1147 (10th Cir. 2013); *O Centro Espiriat Benficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) (en banc), *aff'd* 546 U.S. 418 (2006) ("There is a strong public interest in the free exercise of religion.").

In addition, as tensions run high, there has been a history of violent interactions between tribal members, protesters, and police/private militia forces, which are likely to arise should an injunction not be issued to preserve the status quo pending the appeals process. For the aforementioned reasons, the public interest favors an injunction pending appeal.

CONCLUSION

For the foregoing reasons, Plaintiff-Intervenor Cheyenne River Sioux Tribe respectfully requests that this Court grant its motion for injunction pending appeal under Rule 62(c).

Dated: March 10, 2017

CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff,

By: /s/ Nicole E. Ducheneaux

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