United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5043 **September Term, 2016**

1:16-cv-01534-JEB

Filed On:

Standing Rock Sioux Tribe,

Appellee

Cheyenne River Sioux Tribe,

Appellant

v.

United States Army Corps of Engineers and
Dakota Access LLC,

Appellees

BEFORE: Kavanaugh, Millett*, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the emergency motion for injunction pending appeal, the oppositions thereto, and the reply, it is

ORDERED that the motion for injunction be denied. Appellant has not satisfied the stringent requirements for an injunction pending appeal. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2017).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Michael C. McGrail
Deputy Clerk

* A statement by Judge Millett concurring in the denial of the motion is attached.

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Millett, J., concurring in the denial of the motion for an injunction pending appeal:

I agree that the Cheyenne River Sioux Tribe has not met its heavy burden of proving entitlement to the extraordinary relief of an injunction pending appeal. I reach that conclusion largely because, although the Tribe grounds its claim for injunctive relief solely on the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, the district court was explicit that it has not yet decided whether to allow the Tribe's proposed Second Amended Complaint, which is necessary to add the RFRA claim to the litigation. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, No. 16-1534, 2017 WL 908538, at *3 (D.D.C. March 7, 2017). That means that the Tribe is asking this court to grant an injunction pending appeal on the basis of a legal claim that, at this procedural juncture, has not yet even been accepted as an issue in the litigation. Under those unusual procedural circumstances, to obtain an injunction, the Tribe would not only have to show that (i) the district court likely abused its discretion in denying the preliminary injunction, (ii) the Tribe is likely to suffer irreparable harm in the absence of preliminary relief, (iii) the balance of equities favors the Tribe, and (iv) the public interest supports a stay, *see Winters v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), but also that (v) the district court would *as a matter of law* abuse its discretion were it not to permit the filing of the Second Amended Complaint, *see* Fed. R. Civ. P. 15(a)(2); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1083–1085 (D.C. Cir. 1998) (denial of a second amended complaint reviewed for an abuse of discretion). The Tribe has not made that exceptionally exceptional showing.

Further weighing against a grant of injunctive relief is the Tribe's unexplained untimeliness in raising the RFRA preliminary-injunction claim. While not dispositive by itself—and without endorsing in any way the district court's laches ruling—in my judgment the Tribe's untimeliness weighs against an exercise of this court's equitable authority. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) ("Our conclusion that an injunction should not issue is bolstered by the delay of the appellants in seeking one.").

Because those two grounds together provide a sufficient basis for denying the injunction, I express no opinion on the district court's assessment of the Tribe's likelihood of success on its asserted RFRA claim.