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-Cross Defendant, and DAKOTA ACCESS, LLP Defendant-Intervenor-Cross-Claimant	)	Case No. 1:16-cv-1534-JEB

MEMORANDUM OF *AMICUS CURIAE* LAKOTA PEOPLE'S LAW OFFICE IN SUPPORT OF PLAINTIFF STANDING ROCK SIOUX TRIBE'S OPPOSITION TO REMAND WITHOUT VACATUR

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I. INTRODUCTION

This Honorable Court has already found that the Corps acted illegally in granting the pipeline easement. ECF No. 238 (Hereinafter "Order"). Based on the findings of illegality, the Court remanded this case to the agency for further consideration. Id.

The Court's rulings, however, did not address an element of the decision-making process that is critical to Defendants' compliance on remand.

The President's issuance of his January 24th, 2017 order (hereinafter "President's Memorandum" or "PM") intruded into the agency's process and led the agency to abdicate its statutory responsibility and to abandon its discretion. The agency considers itself bound to follow the President's Memorandum to issue the easement. It follows that the agency likely views itself as unwilling to acknowledge any wrongdoing that might result in vacating the easement on remand, even if ordered to do so by this Court. Such a position would preclude the Plaintiffs from receiving any relief from the remand or from an order to vacate. If the Court does order vacatur, we ask that the Court specifically instruct the agency that its refusal to vacate the easement on the basis of the President's Order would be unlawful.

II. ARGUMENT

A. The Court did not fully address the ramifications of the agency's capitulation to the President's intrusion into the agency's process.

The Court noted that the President intruded into the agency's process and identified some of the impacts of that intrusion. Order at 16-17. The Court did not, however, directly analyze the agency's abandonment of its statutory responsibilities

in order to comply with the President's dictates. Such analysis may have resulted in immediate vacatur of the easement.

At this stage, the vacatur analysis should include a clear determination by this Court as to whether the agency abandoned its statutory responsibility to make a truly independent determination. If so, this deficiency is serious enough to weigh the scales heavily in favor of vacatur.

(1). The President clearly intruded into the agency process.

On December 4, 2016, Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) sent a Memorandum to Commander, U.S. Army Corps of Engineers stating:

> Accordingly, **the Army will not grant an easement to cross Lake Oahe at the proposed location based on the current record. The robust consideration of reasonable alternatives that I am directing, together with analysis of potential spill risk and impacts, and treaty rights, is best accomplished, in my judgment, by preparing an Environmental Impact Statement (EIS)** that satisfies the accompanying procedures for broad public input and analysis. See, for example, 40 C.F.R. §1502 *et seq*.

ECF-172-8. (emphasis added). The agency then published a Notice of Intent to Prepare an EIS. 82 Fed. Reg. 5543 dated January 18, 2017.

After the agency initiated the EIS process, President Trump issued his January 24th, 2017 Presidential Memorandum directing the agency to:

> (1) review and approve in an expedited manner the issuance of an easement permitting Dakota Access LLC to construct and operate the Dakota Access Pipeline (DAPL) on federally-managed lands;
>
> (2) withdraw the agency's Notice of Intent to Prepare an EIS;
>
> (3) accept prior reviews and determinations as satisfying all legal requirements for the issuance of the easement;
>
> (4) waive notice periods in the Corps policies and regulations; and
>
> (5) issue the easement immediately after notice to Congress.

82 Fed. Reg. 8661 (January 24, 2017), § 2.

The agency complied with the President's directives, rather than with the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., and the Administrative Procedures Act, 5 U.S.C. § 701 - 706, and consequently, arbitrarily and capriciously reversed the decisions made prior to the President's intrusion.[1]

Responding directly to this Presidential directive, the agency took various actions altering previous decisions, including the termination of the then-on-going EIS process. ECF No. 172-9 ("Semonite Memorandum").

(2). The agency reversed its position solely to comply with the President's Memorandum, and abused its discretion by substituting the President's order for its previous factual and legal analysis.

The Semonite Memorandum stated "[t]he purpose of this memorandum is **to comply with the Presidential Memorandum** …." Ibid. at 1 (emphasis added).

Other than the President's Memorandum, the agency had no reason to review its earlier determination that the record did not support the issuance of the easement. ECF 172-8 ¶12.

The Corps described the reversed EIS decision as an exercise of discretion:

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[1] The President's intrusion raises numerous questions regarding the legality of the President's actions and whether those actions violated the separation of powers. See e.g. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). (Under the United States constitutional system, the President is an executive charged with faithfully executing the laws; the laws are passed by Congress). Can the President order an agency to issue a permit that the agency has already decided not to issue? Finding such a direct Presidential intrusion into an administrative proceeding to be legal would open the floodgates for such Executive Branch abuse.

This Court need not, however, reach this questions in order to find that **the agency** improperly abandoned its congressionally-delegated, statutory function upon receipt of the President's orders.

> Because the determinations made in the December 4, 2016 Memorandum reflect the exercise of the former ASA(CW)'s policy discretion, and that Memorandum was not a final agency action, **the Army** has the authority to make a different decision based on an evaluation of the record before it and the requirements of NEPA and any other applicable laws.

Ibid. at 14/16 (emphasis added).

The decision was not an exercise of the agency's discretion based on an objective and independent review of the record. In reversing the Corps' decision as to the adequacy of the record to support issuing the easement, the Corps did not identify a single new piece of evidence relevant to that decision which would have supported changing its earlier decision.

To the contrary, the Semonite Memorandum states that, based on a review of the **existing record**, including the input received since September 2016, the agency concluded that the Final EA did not require further supplementation, as there were **no** "substantial changes in the proposed action" or "**new significant circumstances or information relevant to environmental concerns**." Ibid. at 11/16 *citing* 40 C.F.R. §§ 1502.9(c)(1)(i)-(ii) (emphasis added).

If there was no new information and no need to supplement the record, then the agency offers no legitimate basis for changing the earlier legal determination that the record was insufficient to support the issuance of the easement. This change in the decision is as arbitrary and capricious as can be imagined.

(3). The President provided no factual or legal basis for the reversal of the agency's decision to prepare an EIS.

The President did not cite "new significant circumstances or information relevant to environmental concerns" as required by the agency's own regulations. PM; 40 C.F.R. §§ 1502.9(c)(1)(i)-(ii).

The **only** reason the President provided to support his usurpation of the agency's function was:

> I believe the construction and operation of lawfully permitted pipeline infrastructure serves the national interest.

PM at 1. This bald statement would normally be utterly insufficient to support an agency decision that could survive judicial review.[2] The agency personnel went through a thinly-veiled performance of process but ultimately gave the President exactly what he had ordered within two weeks of the issuance of the PM. The agency made quite clear that they were acting under orders from the President:

> Based on the foregoing determinations and findings, the Corps recommends that the Army, acting through the office of the ASA(CW), find that all of the prior reviews and determinations by the Corps, including the EA and FONSI issued in July 2016, satisfy all the requirements of NEPA, and any other applicable provisions of law. ***See*** **Presidential Document, Memorandum of January 24, 2017, Construction of the Dakota Access Pipeline, Sec. 2(a)(iii), 82 Fed. Reg. 8,661 (January 30, 2017).**

Semonite Memorandum at 13/16 (emphasis added).[3]

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[2] Assuming *ad arguendo* that the President had the legal authority to issue the dictate he directed to the agency and that in so doing the President took it upon himself to make the final decision, then the President's orders are themselves subject to review under the Administrative Procedures Act. 5 U.S.C. § 706(1)(A); See "How the Courts Review Executive Orders" by Steven Gordon, Law 360, February 28, 2017 https://www.law360.com/articles/896003/how-the-courts-review-executive-orders ("When authority is delegated to an agency head, but the exercise of that authority is directed by the president, then the president effectively has stepped into the shoes of the agency head and the action is subject to review under the APA.") The Court does not have to reach this issue to find the agency should have preserved its independence and objectivity.

[3] Each of the President's dictates has the qualifying phrase "to the extent permitted by law and as warranted." PM §2. The Secretary, however, clearly acted to specifically reach conclusions dictated by the President's orders, whether or not any of the Secretary's decisions were permitted by law or warranted. The Secretary approved the construction and operation of the DAPL, §2(i); rescinded the Notice of Intent to Prepare an Environmental Impact Statement, §2(ii); accepted past work as satisfying all legal requirements for issuing the easement, 2(iii); granted waivers of notice periods, §2(iv); and approved the easement, §2(v).

(4). The Secretary of the Army had no lawful or factual reason for terminating the EIS process, other than the order from the President.

Section 2(a)(i) of President Trump's Memorandum directed the Secretary of the Army to "**approve**[4] ... the DAPL." PM at 1 (emphasis added).

To the extent that the Secretary of the Army directed the "approval" of the easement based solely on the President's order, the Secretary's action was "arbitrary", "capricious", an "abuse of discretion", and otherwise "not in accordance with law." 5 U.S.C. § 706(1)(A).

Section 2(a)(ii) of President Trump's Memorandum, then directs the U.S. Army Corps of Engineers personnel to consider whether to withdraw the Notice of Intent to Prepare an EIS. PM at 1. This *directive* challenged the previous official determination *already made* by the Army to prepare an EIS.

To the extent the Secretary "rescinded" the previously-ordered "Notice of Intent" explicitly "to comply with the President's order," the Secretary's decision was "arbitrary", "capricious", and an "abuse of discretion," and otherwise "not in accordance with law." 5 U.S.C. §706(1)(A).

President Trump offered no evidence or any analysis whatsoever as to why the previously-made decision to prepare an EIS should be "reconsidered." The absence of any basis for the reconsideration ordered by in the Memorandum makes the Secretary's "reconsideration" "arbitrary and capricious." 5 U.S.C. §706(1)(A). Cf. *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29 (1983).

> An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when

[4] Not "consider approving."

an agency does not act in the first instance.

Ibid. at 31.

Section 2(a)(iii) of the President's Memorandum is a directive to the Secretary to "consider ...prior reviews and determinations ... **as satisfying**[5] all applicable requirements ...." PM 1 at 1 (emphasis added). The President thus orders the Secretary to accept past actions as *satisfying* all legal requirements, **whether they do or not**.

Determining the adequacy of the record to support a decision is a matter delegated exclusively to the agency by Congress. To the extent that the Secretary "complied" with this section of the Memorandum and "accepted" or "considered" the *prior* investigation and analysis of data as "satisfying" all legal requirements, the Secretary's actions were "arbitrary", "capricious", an "abuse of discretion", and otherwise "not in accordance with law." 5 U.S.C. §706(1)(A).

Section 2(a)(iv) of President Trump's Memorandum, *directs* the Secretary of the Army to "review **and grant**[6] … waivers of notice periods arising from or related to USACE real estate policies and regulations." PM at 1 (emphasis added).

To the extent to which the Secretary waived the agency-required notice periods "to comply with the President's directive," those waivers were "arbitrary", "capricious", an "abuse of discretion", and otherwise "not in accordance with law." 5 U.S.C. §706(1)(A).

Section 2(a)(v) of President Trump's Memorandum *directed* the Secretary of the Army to "**issue** … any approved easements or rights-of-way **immediately** after

[5] Not "possibly satisfying."
[6] Not "possibly grant."

notice is provided to Congress ...." PM at 1-2 (emphasis added). But the ultimate determination as to *whether* to grant the easement sought was the very *purpose* of undertaking preparation of the EIS itself.[7]

Taken as a whole, the President's Memorandum is a directive to the agency to ignore federal law, *i.e.* NEPA and the APA, and to make the decision that the President ordered. The obligation of the Secretary of the Army was to stand up for the rule of law and to refuse to simply "comply with" the President's orders. The Secretary's capitulation and failure to comply with the law rendered his action "arbitrary", "capricious", an "abuse of discretion", and otherwise "not in accordance with law." 5 U.S.C. §706(1)(A).

Because the Secretary of the Army improperly terminated the EIS process and improperly granted the easement sought by DAPL solely in capitulation to the PM and in derogation of NEPA, vacatur is the only appropriate remedy.

B. The U.S. Army Corps of Engineers' previous capitulation and failure to exercise independent review requires instructions that review on remand must be conducted without regard to the Presidents' order.

The remand requires the agency to conduct additional research and analysis regarding numerous issues and to objectively determine whether the record supports the issuance of the easement. That determination should be an exercise of the agency's actual discretion, and not the President's whim.

However, the agency is under direct orders from President Trump to find all of the previous data to be legally sufficient to support issuance of a certificate of

[7] 82 Fed. Reg. 5543 at 5544 ("The Army intends to prepare an EIS to consider any potential impacts to the human environment that the grant of an easement may cause.")

easement. The agency is, therefore, caught between compliance with this Court's order to conduct a genuinely independent review of the relevant data and the President's order to approve the easement. There is enormous pressure from President Trump on the agency to minimize any of the concerns expressed by the Court in order to avoid a record that in any way gives the appearance of disobeying the President's dictates.

Most importantly in this case, the agency has a choice of whether to follow the Court's direction and seriously consider the potential catastrophic impacts of an actual oil spill into the Plaintiffs sole supply of fresh drinking water and on fishing, hunting, other cultural and spiritual practices and environmental justice considerations not even identified in the Court's remand **OR** the agency can bow to the will of the President and make its conclusions conform to the presidential dictates, even though the evidence supports a contrary decision.

This impossible situation for the agency raises serious due process issues for the Plaintiffs. The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 363 P.3d 224, 237 (2015) (permit vacated based on agency's single due process error).

> In an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decisionmakers from being biased, and more specifically, prohibits decisionmakers from prejudging matters and the appearance of having prejudged matters. *[citation omitted].*

Mauna Kea Anaina Hou, supra. at 237.

The remand process could be rendered constitutionally meaningless, if conducted under the sword of the President's edicts.

> "Indeed, if there exists any reasonable doubt about the adjudicator's impartiality at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create [an] appearance of justice." *Sussel [v. City County],* 71 Haw [101] at 108, 784 P.2d [867] at 870 (*quoting* M. Redish & L. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process,* 95 Yale L.J. 455, 483-84 (1986)).

Mauna Kea Anaina Hou, supra at 238.

Due process requires an objective and impartial decision-maker. If the decision-maker is bound to a given outcome, there is no objectivity or impartiality.

III. CONCLUSION

The decision by the Secretary of the Army to cancel the EIS process and grant the easement in response to directives from President Trump is a direct challenge to the rule of law.

The illegality of the decision-making process and a full consideration of the harms an oil spill would cause are both compelling bases on which to grant the Plaintiffs the vacatur they seek.

The agency proceeding was unalterably tainted by the President's intrusion. If the results of the remand are pre-determined by the President's orders, the remand is meaningless and violates Plaintiffs' due process right to a fair hearing.

Dated: August 7, 2017

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of August, 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/ Patrick Sullivan