IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE; ROBERT FLYING HAWK; OGLALA SIOUX TRIBE, Plaintiffs, and CHEYENNE RIVER SIOUX TRIBE, Intervenor Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Intervenor Defendant.	Case No. 1:16-cv-01534-JEB

BRIEF OF DAKOTA ACCESS, LLC REGARDING REMAND CONDITIONS

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INTRODUCTION

Plaintiffs Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe ask this Court to impose two sets of conditions on the operation of the Dakota Access Pipeline ("DAPL") during the Corps's remand process. First, plaintiffs want an order including them in review and modification of emergency response planning at Lake Oahe. Second, plaintiffs want the Court to require hiring of a third-party auditor to assess whether DAPL is in compliance with easement conditions and federal safety standards for the segment of the pipeline crossing Lake Oahe. Neither request meets the legal requirements for injunctive relief, in part because measures are already in place to achieve the objectives behind each proposed set of conditions.

With regard to the first set of conditions, Dakota Access has already taken—and will continue to take—the steps that plaintiffs request. As for the second set, the Corps and the Pipeline and Hazardous Materials Safety Administration ("PHMSA") have the tools and authority to ensure that the pipeline operates in compliance with applicable safety standards and conditions, and they are *already* conducting that oversight. Dakota Access is subject to extensive reporting requirements to PHMSA on the pipeline's operations, and those requirements are largely redundant with what plaintiffs request.

Nevertheless, if those PHMSA requirements are deemed insufficient, Dakota Access is willing to coordinate with the Corps to obtain third-party verification of the pipeline's compliance with applicable standards and conditions. Dakota Access is also willing to publicly report on the subjects plaintiffs request, subject to certain modifications needed for safety and security concerns. Allowing Dakota Access to take these measures voluntarily, in coordination with the Corps, will avoid costly and wasteful duplication of efforts and prevent the risk of harm. Finally, consistent with the purpose of the requested injunctive relief, any conditions under consideration should automatically expire when the Corps notifies the Court that it has completed the remand process.

BACKGROUND

In June 2017, this Court held that the Corps's NEPA analysis for the Lake Oahe crossing fell short in three discrete ways. The ruling left open whether to vacate the Corps's authorizations, thus halting pipeline operations during remand. On that question plaintiffs argued that—in the absence of vacatur—the Court "should provide alternative relief" by requiring Dakota Access and the Corps to take certain steps regarding pipeline operations during remand. D.E. 272 at 35.

In its October 11, 2017 memorandum opinion (D.E. 284, "Op."), this Court ruled against vacatur, reasoning that the problems with the Corps's NEPA analysis "are not fundamental or incurable" and that the Corps "has a significant possibility of justifying its prior determinations on remand." Op. 2. With regard to the alternative relief that plaintiffs requested, the Court recognized its authority to "craft relief as equity requires." Op. 27. The Court then ordered "further briefing" on those proposed conditions. Op. 28.

ARGUMENT

When a court carries out its authority to "craft relief as equity requires," Op. 27, it operates "within the bounds of the statute and without intruding upon the administrative province"; that is, "it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ind. & Mich. Elec. Co. v. Fed. Power Comm'n*, 502 F.2d 336, 346 (D.C. Cir. 1974). In addition, where (as here) a party seeks to alter the status quo, it must satisfy the threshold requirement for injunctive relief, which "has always been irreparable harm." *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). The question here is whether operation of the pipeline during the remand period without the added conditions would likely cause plaintiffs irreparable harm. The very low likelihood of *any* release of oil into Lake Oahe—a finding this Court upheld in its June opinion—is enough to defeat such a showing.

The specifics of the requested conditions also show that plaintiffs cannot meet the standard for adding court-imposed conditions. Plaintiffs ask this Court to: (i) order Dakota Access to finalize and implement spill response plans with mandated coordination with plaintiffs, and (ii) order the Corps to impose pipeline-operation conditions that PHMSA recommended, but that the Corps elected not to impose as part of its decision to deliver the easement. *See* D.E. 272 at 36-39; *see also id.* at 38 ("[T]he Corps adopted some of them, but not others."). And for both requests, plaintiffs want the Court to mandate inserting plaintiffs into the process. Plaintiffs cannot meet their burden of showing irreparable harm on the first request, because Dakota Access has already taken steps to include the tribes in response planning, including upcoming revisions to the existing response plans for the Lake Oahe crossing. Ex. 1 ¶¶ 2-7 (Borkland Decl.). Plaintiffs' second request would intrude on the regulatory authority of the Corps and PHMSA, and it cannot be justified given the lack of any showing of irreparable harm in the absence of injunctive relief. If either condition has a lawful basis in light of the limited remand, the proper forum for considering them is the Corps itself through its application of agency expertise. Thus, this Court should deny plaintiffs' requests.

I. Injunctive Relief For Spill Response Planning Is Unwarranted.

No injunctive relief is needed to implement spill response planning for the Lake Oahe crossing because Dakota Access has already taken—and will continue to take—the steps that plaintiffs request. In particular, plaintiffs ask this Court to require Dakota Access, in coordination with the Corps, to finalize a geographic response plan ("GRP") and put emergency response equipment in place sooner than called for under the easement conditions. D.E. 272 at 36-37. As Dakota Access has confirmed in its earlier briefing, PHMSA approved the facility response plan (which has since been updated) for the Lake Oahe crossing; a completed GRP is in place; and the company has already staged emergency equipment and personnel near the Lake Oahe crossing. D.E. 277 at

10; *see also* D.E. 277-1, Ex. 13. These parts of plaintiffs' requests are therefore moot. *See A&S Council Oil Co. v. Saiki*, 799 F. Supp. 1221, 1234 (D.D.C. 1992) ("If an injunction is sought for a specific action, the occurrence or performance of that act will usually moot the case."), *rev'd on other grounds*, 56 F.3d 234 (D.C. Cir. 1995).

Plaintiffs also want an order requiring Dakota Access to coordinate further response planning with plaintiffs' emergency management personnel. That request is moot, too, because Dakota Access is already coordinating with those persons. In particular, Dakota Access has spoken with Elliott Ward, Standing Rock's Emergency Response Manager, about coordination of response planning and has shared with him the operative versions of the facility response plan and the GRP. Mr. Ward has advised Dakota Access's head of response planning that further dialogue will follow an early-November Tribal Council meeting. Ex. 1 ¶ 5 (Borkland Decl.). Dakota Access has also reached out to the Cheyenne River Sioux Tribe offering similar coordination and is waiting for that tribe's response planning personnel to make initial contact with the company. These voluntary efforts negate the possibility of irreparable harm—an essential ingredient to the grant of injunctive relief. *Veitch v. England*, No. 00-cv-2982, 2005 WL 762099, at *16 (D.D.C. Apr. 4, 2005) (voluntary action can "eliminat[e] the possibility of future harm and the utility of the injunction.").

II. Injunctive Relief Is Unwarranted As To PHMSA's Recommended Conditions.

Plaintiffs' next request is for a court order mandating conditions that PHMSA recommended but the Corps elected not to impose. In particular, plaintiffs want to compel an independent third-party audit of DAPL's compliance with the easement. They also want the Court to order DAPL to "provide public reports on a number of safety and operational parameters." D.E. 272 at 38. These injunctive measures would interfere with the existing regulatory scheme governing both pipeline operations and public reporting. PHMSA's regulatory scheme is more than adequate to

defeat a showing of likely irreparable harm during the remand and beyond. Thus, granting plaintiffs' requested relief would "intrud[e] upon the administrative province" and serve only to create needless costs and inefficiencies, without any gain to the operational safety already secured by the existing framework. *Ind. & Mich. Elec. Co.*, 502 F.2d at 346. If PHMSA does not take the steps it is expected and required to take to assess compliance with safety and operational requirements, Dakota Access is prepared to work with the Corps on filling the gap. Allowing Dakota Access to do so voluntarily avoids needless duplication of effort and a tailoring of conditions to avoid harm.

A. Plaintiffs first request a third-party auditor to ensure DAPL's compliance with the easement and applicable standards. But the Corps and PHMSA have the tools for overseeing and enforcing the relevant requirements. The easement gives the Corps the power to oversee Dakota Access's compliance with the easement conditions, including inspection rights. AR ESMT 4 (Ex. 3) (¶ 10 reserving right of entry for inspection); AR ESMT 6 (Ex. 3) (¶ 16 allowing suspension for noncompliance). And PHMSA has the power and responsibility to verify that the pipeline was designed and built, and that it is now being operated, in compliance with applicable requirements.

In the ordinary course, PHMSA utilizes its expert inspectors, investigators, and engineers to audit DAPL's compliance with federal laws and regulations. Ex. 2 ¶ 8 (McCown Decl.). These audits are similar to—and thus redundant with—the third-party audit that plaintiffs would require. *Id*. PHMSA also works closely with other government agencies, such as the Corps. Indeed, PHMSA was actively involved in overseeing the design and construction phases of this pipeline. AR ESMT 895 (Ex. 4) (discussing input from PHMSA); AR ESMT 1173 (Ex. 5) (input from PHMSA on easement conditions). Hence PHMSA's existing authority over the pipeline is more than sufficient to oversee DAPL's compliance with applicable requirements. And there is every reason to believe that PHMSA will inspect and require DAPL's operational compliance during the

remand period. Adding a judicially mandated third-party audit of the sort plaintiffs request would undermine PHMSA's congressionally mandated regulatory mission. Ex. 2 ¶ 14 (McCown Decl.).

Only if PHMSA does not follow through on its regulatory role would there be occasion to consider additional efforts. In that event, Dakota Access is willing to work voluntarily with the Corps on engaging a third party to confirm compliance with those easement conditions that PHMSA is not expected to have already addressed by February 28, 2018. Allowing Dakota Access to do so voluntarily, in coordination with the Corps and consistent with the limitations suggested in the Corps's brief, D.E. 287 at 8-9, will avoid duplication of effort while fully achieving the purposes of the proposed injunctive relief.

Plaintiffs' request for more should be rejected. They ask the Court for an order inserting their consultants into the selection of a third-party auditor and the verification process itself. There is no reason to grant this request—and no lawful basis for doing so either. The premise of plaintiffs' argument for adding these conditions is that PHMSA recommended them. But that recommendation *did not* include inserting a tribe's consultants (or anyone else for that matter) into an outside audit. And PHMSA's recommendations were, in part, based upon the previous administration's attempts to unlawfully burden the easement and pipeline. Ex. 2 ¶ 12 (McCown Decl.). Moreover, the use of third-party audits in the past has been at the request—and on behalf—of government agencies such as PHMSA, without outsider involvement. *Id.* ¶ 13. Inserting plaintiffs in this process would undermine governmental regulatory authority. Also, given the many sharp disagreements to date between plaintiffs' consultants and both the Corps and Dakota Access over issues related to DAPL, it would be burdensome and counter-productive, ultimately bogging down the verification process, to require the inclusion of these outside persons. The last thing needed here is for any audit or verification process to turn into a contested and adversarial proceeding.

B. As part of the second set of conditions, plaintiffs also want the Court to require public reporting of eleven different items related to "safety and operational parameters." D.E. 272 at 38. To the extent these items are not redundant with existing requirements, they create burdens that are not offset by any conceivable benefit. And because Dakota Access is prepared to report voluntarily the information that does not create those burdens, injunctive relief is unwarranted.

To start, much of what plaintiffs request is redundant with applicable PHMSA regulations, which require annual reporting on the same or similar topics. *See* 49 C.F.R. § 195.49. Plaintiffs request reporting of inline inspection results and corrosion testing, but PHMSA already requires annual reporting of "[g]eneral corrosion that has reduced the wall thickness to less than that required for the maximum operating pressure, and localized corrosion pitting to a degree where leakage might result." 49 C.F.R. § 195.55(a)(1).[1] Plaintiffs further request reports of encroachments in the right-of-way, or changes in high consequence areas, but PHMSA already requires reports of environmental or physical conditions that endanger pipeline integrity. 49 C.F.R. § 195.55(a)(2), (3), (6). Plaintiffs request disclosure of "reportable incidents," but these incidents are already required to be reported to PHMSA and publicly disclosed within ten days of discovery. 49 C.F.R. § 195.56; *see also* 49 C.F.R. §§ 195.50 (reporting accidents), 195.52 (immediate notice of certain events), 195.54 (accident reports), 195.55 (reporting safety-related conditions). Plaintiffs request reports on integrity threats, but PHMSA already requires Dakota Access to conduct extensive assessment, testing, and written analysis of pipeline integrity—including through the use of inline testing. 49 C.F.R. § 195.452. Plaintiffs request reporting of corporate changes such as

[1] Certain PHMSA reporting requirements do not apply at remote locations, but that will not be an issue here because a report is required for any pipeline whose rupture could affect a stream, river, lake, or reservoir. 49 C.F.R. § 195.55(b)(1).

mergers, acquisitions, or transfers of assets, but federal regulations already require public disclosure of that information. *See, e.g.*, 17 C.F.R. § 240.13d-1 (requiring reporting of acquisition or merger activity); 17 C.F.R. § 229.303 (requiring annual reporting of financial status and prompt disclosure of potential merger or major asset transfer activity).

At bottom, the comprehensive federal regulatory scheme already provides for extensive reporting that largely overlaps with plaintiffs' requests. Dakota Access is required to submit this report by June 15, 2018. 49 C.F.R. § 195.49. Requiring Dakota Access to make additional reports before that date would be needlessly duplicative and costly. If the Court disagrees, Dakota Access is willing to report voluntarily on most of these items during the remand period, with certain modifications, but the Court should not order that it go beyond Dakota Access' proposed list. The modifications and limits are shaped by two concerns:

First, public reporting of ongoing damage prevention efforts (item (i)) would be self-defeating when it comes to security measures aimed at thwarting intentional damage. The danger here is real given the attacks that already occurred on this pipeline, including those detailed in a sealed filing. *See* D.E. 178. Allowing wrongdoers access to changes in pipeline security procedures would educate them on how to circumvent those procedures. Dakota Access's voluntary reporting would thus protect from disclosure changes relating to security measures.

Second, other proposed reporting requirements are vague or poorly defined, such as "all repairs" made on the pipeline without language limiting the scope to repairs implicating the risk of a leak or spill. The pipeline is a complex project that inevitably undergoes numerous repairs in the ordinary course. Reporting on all repairs to the relevant pipeline segment—regardless of whether they relate to the safety of the pipeline—would be more than burdensome, because it could obscure work that actually bears on the purpose of such a reporting condition during remand.

With these concerns in mind, if the Court deems additional reporting to be necessary, Dakota Access is prepared to voluntarily issue a report of the following by February 28, 2018, for the pipeline segment at issue here (*i.e.*, between the valves closest to each shore of Lake Oahe) covering the period through the end of 2017:

a) Inline inspection run results or direct assessment results performed on the pipeline during the previous year will be reported to the same extent required by PHMSA for annual reports. (Because these procedures are not required during 2017, there may be no reporting for this item.)

b) The results of all internal corrosion management programs will be reported. That is, Dakota Access will report actions taken in response to findings of internal corrosion, if any.

c) Any new integrity threats identified during the previous year will be reported.

d) Any encroachment in the right-of-way will be reported.

e) Any high consequence area changes during the previous year will be reported.

f) Any reportable incidents that occurred during the previous year will be reported.

g) Any leaks or ruptures on the pipeline that occurred during the previous year will be reported.

h) A list of repairs on the pipeline made during the previous year that relate to leaks, ruptures, or the ability to respond to leaks or ruptures, will be reported. (The proposed condition of reporting all repairs is vague and unnecessarily broad.)

i) On-going damage prevention initiatives on the pipeline and an evaluation of their success or failure will be reported, with the exception of security-related measures or other disclosures that could be helpful to persons seeking to damage the pipeline.

j) Any changes in procedures used to assess and monitor the pipeline, to the extent they relate to the risk of a leak or rupture will be reported. The security-related exceptions listed in (i) will apply.

k) Any company mergers, acquisitions, transfers of assets, or other events affecting the management of the pipeline segment will be reported through SEC-required public filings.

C. The final issue is the duration of each requested condition. Plaintiffs' stated purpose for the proposed conditions is as "an alternative lesser remedy if this Court remands without vacatur." D.E. 280 at 18. Similarly, the Court's authority to impose conditions is grounded in its

equitable power to fashion the appropriate remedy during the remand. Op. 27-28. Once the remand process has run its course, the remedy will have finished serving its purpose. Thus, the auditing and reporting conditions, if any are imposed, should be triggered only once. As noted above, Dakota Access is willing to voluntarily complete an auditing of its compliance with easement conditions and report various items by the end of February 2018. If an injunction is entered, it should likewise be limited in duration.

CONCLUSION

Dakota Access will voluntarily work with plaintiffs on emergency response planning for the Lake Oahe crossing. If PHMSA does not conduct an audit or inspection for compliance with each easement condition by February 28, 2018, Dakota Access will voluntarily coordinate with the Corps on selecting a qualified third party to address what PHMSA does not. And Dakota Access will voluntarily report on each of the items requested by plaintiffs, in the manner described above, by February 28, 2018 if the Court determines that reporting in the ordinary course is insufficient. This Court should therefore deny plaintiffs' request for alternative relief.

Dated: November 1, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2017, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

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