IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Defendant-Intervenor.	Case No. 1:16-cv-01534 (JEB) (consolidated with Cases No. 1:16-cv-01796 & 1:17-cv-00267)

UNITED STATES ARMY CORPS OF ENGINEERS' RESPONSE TO PLAINTIFFS' REQUEST FOR IMPOSITION OF REMAND CONDITIONS

I. INTRODUCTION

Plaintiffs request that this Court order injunctive relief in addition to the remand that has already been ordered. Their request fails to reference or even attempt to meet the legal requirements for injunctive relief, and should be denied on that basis alone. In addition, Plaintiffs' requested temporary alternative measures are unnecessary because the existing easement with its current conditions is already protective of the Tribes, as well as their water, resources, and lands. The alternative measures go beyond the regulatory requirements for pipeline safety, and are not tailored to address any of the issues that led to the Court's order on remand. These facts, coupled with the additional burden and potential for complicating and delaying work on the remand, militate strongly in favor of denying Plaintiffs' request.

II. ARGUMENT

A. Plaintiffs' Request for "Alternative Measures" Should be Denied Because Plaintiffs Failed to Establish Grounds for Injunctive Relief

This Court has already properly held that vacatur of the Corps' easement decision is inappropriate while the Corps addresses issues in its NEPA analysis on remand. Mem. Op., ECF No. 284. Plaintiffs now request that the Court impose injunctive relief through three alternative measures on the operation of the pipeline during the remand: 1) Finalization and implementation of oil spill response plans at Lake Oahe; 2) Completion of a third-party compliance audit; and 3) Public reporting of eleven categories of information regarding pipeline operations. Pls.' Remedy Br. 35-40, ECF No. 272. As a practical matter, such an injunction would essentially force the Corps to amend its easement during the remand process. But Plaintiffs have not argued, much less established, any basis for this Court to go beyond the ordinary relief available in an APA case. Plaintiffs' request for "alternative measures" is therefore nothing more than a request for

additional injunctive relief without even attempting to satisfy any of the elements required for such extraordinary relief.

Where a court has found a NEPA violation, "[a]n injunction should issue only if the traditional four-factor test is satisfied." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010). To show they are entitled to such extraordinary relief, Plaintiffs must show "(1) that [they have] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id*. at 156-57 (citation omitted). Plaintiffs admit that "[v]acatur is *not* the same as an injunction" and recognize that "the U.S. Supreme Court made clear in *Monsanto* that there is no presumption to other injunctive relief . . . ." ECF No. 272 at 3.

Here, Plaintiffs have sought preliminary injunctive relief against the Corps on several occasions between August 4, 2016 and January 18, 2017. Sept. 6, 2016 Minute Order; *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 16-1534); Feb. 13, 2017 Minute Order (Feb. 13, 2017); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77 (D.D.C. 2017) (No. 16-1354). The Court denied each of those requests because Plaintiffs failed to carry their burden to establish their entitlement to injunctive relief. Plaintiffs' latest attempt fares no better.

Plaintiffs are once again asking this Court to impose injunctive relief, but fail to reference the applicable legal standards and provide no evidence to support their entitlement to an injunction. *See* ECF No. 272 at 35-40. Plaintiffs argue that the Court's "general equitable powers to address federal agency wrongdoing" allow the Court to impose "alternative measures"

to amend the Corps' permit. *Id*. at 36. Plaintiffs, however, rely on simple black letter law regarding the scope of the Court's powers in equity generally, not on any legal principle that eliminates the need for Plaintiffs to show that injunctive relief is warranted. *See id.* For example, Plaintiffs cite to *Montana Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1034 (D. Mont. 2006), arguing that "[t]he district court's equitable powers are broad, and it is within the court's authority to fashion a remedy that fits the particular facts of the case before it." ECF No. 272 at 36. In *Montana Wilderness*, however, the district court had already determined that the plaintiffs were entitled to an injunction. 408 F. Supp. 2d at 1034. Here, the Court has expressly concluded that vacatur was not warranted and Plaintiffs have failed to demonstrate that they are entitled to injunctive relief.

Plaintiffs' other citations are similarly inapposite. In *Hecht Co. v. Bowles*, the Supreme Court was addressing the specific scope of the courts' authority to shape injunctive relief when a violation of the Emergency Price Control Act of 1942 mandated an injunction. 321 U.S. 321, 329 (1944). In other words, the agency had already established that Hecht had violated the statute, and injunctive relief was therefore required under the statutory language. *Id.* at 324-25. The question was simply whether the court was required to enter the injunction sought by the agency, or whether it had discretion to shape the injunctive relief once a violation was found. *Id*. at 329. Here, Plaintiffs have failed to establish that they are entitled to any injunctive relief in the first instance. Plaintiffs' arguments about the scope of the Court's equitable powers presuppose (without actually establishing) that they are entitled to injunctive relief at all.

Finally, Plaintiffs also cite to *Sierra Club v. Rural Utilities Service*, 841 F. Supp. 2d 349, 363 (D.D.C. 2012) arguing that the court in that case "issu[ed an] injunction rather than vacatur in light of the facts." ECF No. 272 at 36. However, in that case, the court specifically

recognized that it "must still consider whether plaintiff has satisfied the four-factor test" for an injunction before it could consider the scope of injunctive relief. *Sierra Club*, 841 F. Supp. 2d at 358 (citing *Monsanto*, 561 U.S. at 157). By contrast, here, although Plaintiffs admit that "the U.S. Supreme Court made clear in *Monsanto* that there is no presumption to other injunctive relief" (ECF No. 272 at 3), they nonetheless assume that they are entitled to injunctive relief without even addressing the legal standard applicable to their request.

Plaintiffs have failed to show that they have suffered any irreparable harm, and have failed to show how the equities or public interest weigh in favor of the injunction they have requested. In addition, as discussed in more detail below, Plaintiffs have failed to show how their requested injunctive relief is narrowly tailored to address their alleged harms. As a result, there is no legal basis to support Plaintiffs' request. For that reason alone, Plaintiffs' request that the Court impose "alternative measures" on the Corps' remand should therefore be denied.

B. Plaintiffs' Proposed Injunctive Relief Is Unnecessary, Duplicative, and Burdensome

Even if Plaintiffs could establish that they were entitled to injunctive relief, the alternative measures they seek to impose are unwarranted and are unlikely to address Plaintiffs' stated concerns with the operation of the pipeline. As a result, the proposed alternative measures are not narrowly tailored to address the limited deficiencies identified in the Court's remand order.

Plaintiffs ask the Court to impose three forms of injunctive relief:

1) Finalization and implementation of oil spill response plans at Lake Oahe;
2) Completion of a third-party compliance audit; and
3) Public reporting of eleven categories of information regarding pipeline operations.

ECF No. 272 at 35-40.

Plaintiffs refer to the second and third requests as "Implementation of [Pipeline and Hazardous Materials Safety Administration ("PHMSA")] recommendations." ECF No. 272 at 38. As an initial matter, it is important to note that PHMSA did not recommend that these proposed easement conditions were required for safe operation of the pipeline. Rather, in December 2016, in coordination with PHMSA, the Tribes, and Dakota Access, the Corps reviewed potential easement conditions in an effort to further respond to the Tribe's concerns. The two cited conditions were identified by PHMSA as conditions that are not required by the normal regulatory requirements for pipeline operations, 49 C.F.R. Part 195, but that were occasionally used in other pipeline projects. These were not conditions that PHMSA believed were required for the safe operation of the pipeline, and the Corps did not believe they were necessary to comply with its obligations under the Mineral Leasing Act. They were simply ideas submitted to enhance the existing conditions as part of the Corps' in-depth evaluation process in response to the Tribe's concerns.

More importantly, the Corps' extensive analysis has demonstrated that the existing easement with all of its conditions related to safe operation of the pipeline are sufficient to address the potential safety issues raised by the Tribes in their briefing. The Court has already upheld the Corps' conclusion that the risk of a spill is low. Mem. Op. 27-29, ECF No. 239. The Corps' NEPA analysis properly recognized that "DAPL will be constructed and maintained in accordance with 'industry and governmental requirements and standards,' including those from PHMSA, the American Society of Mechanical Engineers, the National Association for Corrosion Engineers, and the American Petroleum Industry." ECF No. 239 at 28. Simply put, the Tribes' rights, resources, and land are fully protected by the existing easement with its current

conditions, and the Tribes have failed to show any reason why these alternative measures should be imposed during the remand process.

1. The proposal for coordination regarding spill response plans should be rejected because it appears Dakota Access and the Tribe have already begun coordination

With respect to the first request, based on Dakota Access' and the Tribes' representations at the October 18, 2017 status conference, the Corps understands that the Tribes and Dakota Access either have resolved, or are in the process of resolving, the Tribe's request. In addition, the easement also addresses spill response in conditions 7, 24, and 35. *See* Ex. 1 (Easement Exhibit D). Accordingly, the Corps does not believe an injunction relating to spill response planning is necessary because it appears that the parties have already engaged in the requested coordination.

2. The proposal for a Third-Party Auditor should be rejected because it is not required by the regulations governing pipeline operations.

Plaintiffs request that the Corps and Dakota Access jointly select a third-party auditor to audit Dakota Access's compliance with easement conditions and safety standards. ECF No. 272 at 38. Plaintiffs further request that the "Court direct the Corps and DAPL, in consultation with the Tribes, to arrange for the independent audit." *Id.* In addition, Plaintiffs request that "the Corps be directed to involve the Tribes' experts in this audit." *Id.* First, PHMSA is already charged with conducting pipeline inspections and ensuring compliance with all regulatory requirements. 49 C.F.R. Part 195. Plaintiffs have identified no tangible benefits to pipeline safety that would be realized by this redundancy.

Second, the Tribe's request to be involved in arranging an independent audit has the potential to unnecessarily complicate and slow down the process. Moreover, for the Tribe to have its own experts actually participate in the audit would destroy the independent nature of any

audit. Having the Tribes and their experts involved in the audit will impose a risk of improperly influencing the audit process to achieve the Tribe's experts' desired conclusions, and will make it difficult (if not outright impossible) for the auditor to arrive at an independent conclusion. Moreover, the Corps already has an obligation to ensure the pipeline is in compliance with the easement and that its operation will not interfere with the Congressionally authorized purpose. *See* U.S. Army Corps of Engineers, Real Estate Handbook, Engineer Regulation 405-1-12, § 8-99 ch. 1 (1994) (requiring annual compliance inspections).

Finally, the Corps is also not in a position to be involved in Dakota Access's selection of a third party auditor. When the Government is procuring goods and services, it must follow certain rules on how it selects contractors and companies that provide these goods and services to ensure fairness in their selection and other policy goals. *See e.g.* The Competition in Contracting Act, 41 U.S.C. §§ 3301, 3304, 3501 to 3506. Here the Corps is acting in its regulatory role as a land manager and should not be directly involved with selecting a "Third Party Independent Expert Engineering Company."

3. The request for additional public reporting should be rejected because it is unnecessary, duplicative and potentially burdensome.

Plaintiffs' request for monthly public reporting on eleven different operational parameters is unnecessary, and unlikely to lead to any meaningful differences in the safety of the pipeline. First, even on an annual basis, this level of public reporting goes above and beyond what is required by PHMSA in 49 C.F.R. Part 195. Moreover, PHMSA's original proposed condition was for *annual* reports, in addition to the annual reports already required by 49 C.F.R. Part 195 Subpart B, related to the operation of the pipeline. Plaintiffs are now requesting the Court to require monthly reports, but have made no showing that there is any safety benefit to be obtained in requiring monthly reporting of data.

For example, a requirement for monthly reporting of any reportable incidents anywhere on the pipeline during the previous year is potentially burdensome and unlikely to meaningfully address any safety concerns raised by Plaintiffs. Plaintiffs do not limit their request to any specific segment of the pipeline, but request monthly reporting for every mile of the over 1,000 mile-long pipeline. Plaintiffs have made no showing how their concerns about a spill would be informed or mitigated by monthly reports about any vague category of reportable incidents that could be taking place on a segment of the pipeline that is hundreds of miles away from the Lake Oahe crossing. Aside from being unnecessary, these facts further underscore why it is so important for Plaintiffs to make the required showing that they are actually entitled to injunctive relief. Plaintiffs have failed to show that there is any irreparable harm, and have failed to show how the equities or public interest weigh in favor of the injunction they have requested. Plaintiffs have also failed to show how their requested injunctive relief is narrowly tailored to address their alleged harms.

C. Any Alternative Measures Should be Narrowly Tailored to Reflect the Conditions Discussed by PHMSA

For the foregoing reasons, the Corps does not believe that Plaintiffs' requested injunctive relief is necessary. In the event that the Court is inclined to impose the relief requested by Plaintiffs, the Court should impose only the original conditions discussed by PHMSA and the Corps, and should not adopt Plaintiffs' requested amendments to those conditions. With regard to the Third-Party Auditing condition, the Court should deny Plaintiffs' request to have the Tribes or their experts involved in the arrangement of an audit or the audit process itself for the reasons described above. In addition, the Corps would request that the auditing condition be edited to reflect the Corps' concerns regarding their involvement in the procurement process. The Corps' role should be limited to evaluating the criteria used to select the independent third-

party auditor to determine whether Dakota Access designed the criteria such that it would lead to the selection of a truly independent company and whether Dakota Access followed that criteria. The Corps would propose editing the language of the proposed condition as follows:

> Third Party Independent Expert Engineering ~~Annual~~ Audit: Operator ~~and [Army Corp of Engineers District office]~~ must ~~jointly~~ select a Third Party Independent Expert Engineering Company to review these conditions and to report on the implementation of these conditions by Operator and any other integrity threats that need to be implemented to maintain safety on the pipeline segment to the [Army Corp of Engineers District office]. The Operator must design the selection criteria for the Third Party Independent Expert Engineering Company to insure independence. The [Army Corps of Engineers District office] can object to the selection based on either adequacy of the selection criteria to insure independence or how the Operator applied the selection criteria. The ~~Annual~~ Third Party audit~~s~~ must be posted by the Operator by April 1, 2018 ~~of the following year~~ on the operator website.

This change to the condition would help the Corps avoid any issues with procurement requirements and would be limited in duration to the remand period.

With respect to the public reporting condition, if the Court is inclined to require public reporting of the data requested by Plaintiffs, the Corps requests that the language of the original condition be entered, without monthly reporting, and only for the period of the remand. For purposes of remand, the Corps would prefer to receive one report in February 2018.

III. CONCLUSION

Plaintiffs have failed to carry their burden to show they are entitled to injunctive relief, and their request for alternative measures governing the operation of the pipeline during remand should be denied on that basis alone. Moreover, the alternative measures proposed by Plaintiffs are unnecessary, burdensome, and are unlikely to meaningfully address the issues identified in the Court's remand order. Accordingly, Plaintiffs' request should be denied. However, if the Court is inclined to grant additional injunctive relief, the Corps requests that the Court rely on the language of the conditions discussed by PHMSA, with the modifications to the third-party

audit requirement identified in Section II.C., above, and limit the duration of the conditions to the period of the remand.

Dated: November 1, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 1st day of November, 2017, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Reuben S. Schifman
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