

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

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DAKOTA ACCESS, LLC,

Plaintiff,

v.

IOWA CITIZENS FOR COMMUNITY  
IMPROVEMENT; ADAM MASON,  
individually and in his official capacity as  
State Policy Director for Iowa Citizens for  
Community Improvement; BOLD IOWA;  
ED FALLON, individually and in his  
official capacity as Director of Bold Iowa;  
and UNKNOWN PARTIES,

Defendants.

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No. 4:16-cv-00482-RGE-CFB

**ORDER RE: PLAINTIFF'S MOTION FOR  
AN EX PARTE TEMPORARY  
RESTRAINING ORDER**

**I. INTRODUCTION**

Now before the Court is a Motion for an Ex Parte Temporary Restraining Order filed by Plaintiff Dakota Access, LLC (Dakota Access) on August 29, 2016. Pl.'s Mot. TRO, ECF No. 2. Named Defendants are Iowa Citizens for Community Improvement; Adam Mason, the State Policy Director for Iowa Citizens for Community Improvement; Bold Iowa; and Ed Fallon, the Director of Bold Iowa. Dakota Access also lists "Unknown Parties" as Defendants. Plaintiff asks the Court to issue an ex parte order immediately restraining and enjoining Defendants prior to a publicized protest against Plaintiff's Bakken Pipeline construction activities in Pilot Mound, Boone County, Iowa, planned for Wednesday, August 31, 2016. For the reasons set forth below, the Court denies Plaintiff's Motion for an Ex Parte Temporary Restraining Order.

**II. SUMMARY OF RELEVANT FACTS**

Dakota Access is a Delaware limited liability company engaged in the business of constructing the Bakken Pipeline in Iowa. Pl.'s Compl. ¶¶ 1, 10, ECF No. 1. The Bakken Pipeline

is an approximately 1,172-mile-long crude oil pipeline stretching across Iowa from western North Dakota to Patoka, Illinois. *Id.* ¶ 10. Dakota Access estimates the cost for construction is \$3.8 billion. *Id.* ¶ 8. The company has obtained a series of permanent easements, temporary leases, and government permits and authorizations for the Bakken Pipeline’s construction and maintenance. *Id.* ¶¶ 12–15. The permit from the United States Army Corps of Engineers is time limited. *Id.* ¶ 15. Construction on the Bakken Pipeline commenced in June 2016 in Boone County and Story County, Iowa. *Id.* ¶ 17, 19. It is scheduled to be completed in “late fall 2016.” *Id.* ¶ 30.

The named Defendants are a group of non-profit organizations, protest groups, and private individuals. Iowa Citizens for Community Improvement (CCI) is a non-profit organization based in Des Moines. *Id.* ¶ 2. Bold Iowa is an “activist group” with an office in Des Moines. *Id.* ¶ 4. Adam Mason and Ed Fallon are both private citizens of Iowa. *Id.* ¶¶ 3, 5. Mason is the State Policy Director for CCI, and Fallon is the Director of Bold Iowa. *Id.* at 1.

On August 26, 2016, Dakota Access became aware of email correspondence indicating CCI and Bold Iowa plan to hold a protest against the Bakken Pipeline’s construction on August 31, 2016. *Id.* ¶¶ 20–21. The CCI email lists Adam Mason as its author. Pl.’s Ex. 1 at 5, ECF No. 2-2. The email states that “[f]or only the second time in our 41 year history, we are encouraging the use of civil disobedience and mass arrest as a key tactic in our pipeline fight.” *Id.* It references the success of “our native sisters and brothers of the Lakota/Dakota Standing Rock Sioux” in using arrest as a tactic to block the construction of the North Dakota portion of the Bakken Pipeline. *Id.* The email asks the recipient “to join me in a non-violent civil disobedience blockade and demonstration next Wednesday.” *Id.* It lists a time and meeting place of Wednesday, August 31, 2016, at the Community Hall in Pilot Mound, Iowa, for “Non-violent Civil Disobedience Training” followed by “Rally & Blockade action” at an undisclosed location. *Id.* The email asks if the

recipient is “willing to take an arrest to stop the Bakken Pipeline,” and states “[w]e are 100% committed to a powerful show of peaceful resistance.” *Id.* The email remarks “[w]e are in this together with our allies at Bold Iowa.” *Id.*

Dakota Access also received a copy of an email authored by Bold Iowa. ECF No. 1 ¶¶ 20, 21. The Bold Iowa email lists Ed Fallon as its author. Pl.’s Ex. 2 at 7, 8, ECF No. 2-2. It states “we are at the point in this struggle where non-violent direct action is essential. Our first action will be Wednesday, August 31 near Pilot Mound.” *Id.* The email lists the same meeting place and time as the CCI email and states “it’s important for people risking arrest to attend the [nonviolence] training.” *Id.* at 8. Bold Iowa also has a RSVP form on its website where users can sign up for “Aug. 31 Bakken Pledge Direct Action + Training.” Pl.’s Ex. 3 at 11, ECF No. 2-2. Another page on the website asks users to “Sign the Bakken Pipeline Pledge of Resistance.” Pl.’s Ex. 4 at 13–16, ECF No. 2-2. Users can input their contact information under the following statement: “I pledge, if necessary, to join others somewhere along the route of the Bakken Pipeline to engage in acts of dignified, peaceful civil disobedience that could result in my arrest in order to send the message to stop construction of the pipeline.” *Id.* at 13. As of August 29, 2016, the pledge had 1,182 signatures. *Id.* at 16.

Dakota Access filed a lawsuit against Defendants on August 29, 2016, seeking declaratory and injunctive relief. ECF No. 1 ¶ 7. The company asks for a declaratory judgment pursuant to 28 U.S.C. § 2201 that “it has the right to construct the Pipeline without physical interference and/or actual obstruction of construction by Defendants.” *Id.* ¶ 33. It asks for “an injunction barring Defendants from interfering with [its] right to construct the Pipeline.” *Id.* ¶ 36. Dakota Access argues “Defendants and other protesters will continue to disrupt [its] construction activities; threaten the safety of [its] employees and contractors and others; and interfere with [its] lawful

exercise of its right under the easements and permits it has obtained to construct the Pipeline.” *Id.*

¶ 25. The company contends Defendants’ threatened actions will also “prevent [it] from operating its business and will cause [it] to [lose] goodwill among its customers.” *Id.* ¶ 27. It claims one day of lost construction will result in damages that “exceed the hundreds of thousands of dollars.” *Id.*

¶ 28. Dakota Access also alleges “[the Defendants’] threat of criminal action is of particular concern as construction equipment utilized on the construction of the Pipeline has been subject to vandalism and arson resulting in approximately \$3,000,000.00 in property damages.” *Id.* ¶ 22. In support of this contention, the company attached photographs of a large construction vehicle with fire damage. Pl.’s Ex. 5 at 18–22, ECF No. 2-2.

Simultaneously with its complaint, Dakota Access filed a motion for an immediate ex parte temporary restraining order (TRO) pursuant to Federal Rule of Civil Procedure 65 and Local Rules 7(j) and 65. ECF No. 2. Dakota Access requests the Court issue the TRO before August 31, 2016, in order to forestall Defendants’ planned protest. *Id.* at 5–6. It argues the “defendants’ threatened illegal actions would cause irreparable harm and [it] does not have an adequate remedy at law to offset that harm.” *Id.* ¶ 9. Dakota Access contends the construction equipment it uses and “[t]he planned acts of civil disobedience represent a risk to the physical safety of the protesters.” *Id.* ¶ 8. The company expresses concern about the safety of its employees and agents “because of past property damage suffered.” *Id.* ¶ 11. Dakota Access requests a hearing following the issuance of a TRO to “provide arguments regarding whether the injunction should remain in place.” *Id.* ¶ 13.

Plaintiff Dakota Access has filed no proof of service for either the Complaint or the TRO.<sup>1</sup>

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<sup>1</sup> Defendants Iowa Citizens for Community Improvement and Adam Mason learned of the Motion for a TRO through news reports. Defs.’ Resist. Mot. ¶ 1, ECF No 4. These Defendants filed a Resistance to the Motion as the Court was preparing to file this Order.

### III. DISCUSSION

Dakota Access asks the Court to issue a TRO without prior notice to Defendants preventing Defendants: 1) “from physical presence within twenty-five . . . feet of [its] easement property”; 2) “from physical contact, abuse, threats or harassment of Dakota Access’s or its contractors’ employees, agents or representatives”; and 3) from “interfering, impeding, or attempting to prevent Dakota Access from constructing its Pipeline on [its] Easement Property.” ECF No. 2 at 5–6.

Federal Rule of Civil Procedure 65(b) sets forth the standards for a TRO:

#### **(b) Temporary Restraining Order.**

**(1) Issuing Without Notice.** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

An ex parte TRO “is an emergency procedure and is appropriate only when the applicant is in need of immediate relief.” 11A Charles Alan Wright, Arthur Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 2951 (3d ed. 2013) (hereinafter Wright & Miller) (footnotes and citations omitted); *see also* Fed. R. Civ. P. 65(b) advisory committee’s note to 1966 amendment (“In view of the possibly drastic consequences of a [TRO], the opposition should be heard, if feasible, before the order is granted.”). Ex parte orders are “limited to preserving the status quo only for so long as is necessary to hold a hearing.” *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 650 (6th Cir. 1993) (citing *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 439 (1974)). If the statutory prerequisites are met, the Court’s

decision whether to grant a TRO is guided by the same four *Dataphase* factors as considered with a preliminary injunction: “(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.” *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc); accord *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008) (setting forth four factors similar to the *Dataphase* factors). But the moving party must meet the statutory requirements for an ex parte TRO before the Court reaches consideration of the *Dataphase* factors. See *Zidon v. Pickrell*, 338 F. Supp. 2d 1093, 1095 (D.N.D. 2004) (holding a movant for an ex parte TRO did not meet the statutory requirements where he failed to demonstrate an immediate, irreparable harm would result if the TRO was not granted); cf. *North Dakota v. U.S. Army Corps of Engr’s*, 264 F. Supp. 2d 871, 878–80 (D.N.D. 2003) (holding movant failed to demonstrate an immediate and irreparable harm would result if the state TRO was not extended and instructing the parties to address the *Dataphase* factors at the subsequent hearing on a preliminary injunction).

The issue before the Court in considering Dakota Access’s request for an ex parte TRO is whether Dakota Access has demonstrated it will suffer “immediate and irreparable injury, loss, or damage” between now and a hearing on its motion for a preliminary injunction. See *U.S. Army Corp. of Engr’s*, 264 F. Supp. 2d at 879 (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). Dakota Access has failed to make such a showing.

Dakota Access contends it will suffer irreparable injury without an adequate remedy at law if Defendants interfere with its construction of the Bakken Pipeline. ECF No. 2 ¶ 9. Dakota Access believes “hundreds of individuals will disrupt construction of the Bakken Pipeline on Wednesday, August 31, 2016, by committing criminal trespass.” ECF No. 2-2 ¶ 8. Dakota Access expresses

concern for the “personal safety of Dakota Access employees, agents, and representatives . . . because of the threatened actions and because of past property damage[ ] suffered in the Easement Property.” ECF No. 2 ¶ 11. Additionally, Dakota Access cites costs of hundreds of thousands of dollars for each day construction is delayed. ECF No. 2-1 at 9; ECF No. 2-2 ¶ 6.

The harm alleged by Dakota Access is not irreparable. There is no indication the protest will be violent or cause harm to Dakota Access employees. Defendants’ publications regarding the protest event and language used in the emails emphasize the nonviolent nature of their planned effort. Pl.’s Exs. 1 & 2 at 5, 7, ECF No. 2-2. The Bold Iowa “Pledge of Resistance” contemplates “dignified, peaceful civil disobedience.” Pl.’s Ex. 4 at 13, ECF No. 2-2. Defendants require protestors attend “Nonviolence Training” prior to the protest itself. Pl.’s Exs. 1 & 2 at 5, 7, ECF No. 2-2. Defendants have not made threats of any harm to Dakota Access’s equipment or employees. In addition, Dakota Access provides no information in their supporting affidavits connecting Defendants to the July 31, 2016 arson of its equipment in Mahaska County. ECF No. 2-2 ¶ 7; Pl.’s Ex. 5 at 18–22, ECF No. 2-2. The harm from trespass or Defendants’ other proposed acts of “peaceful civil disobedience” is not irreparable. Money damages could adequately address any harm caused by any delay in construction pending an adversarial hearing on the preliminary injunction. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *see also* 11A Wright & Miller § 2948.1 (stating injunctive relief “usually will be denied if it appears that the applicant has an adequate alternate remedy in the form of money damages or other relief”) (footnotes omitted).

In the Motion, Dakota Access references a District of North Dakota case in which the court issued an ex parte TRO against a different group of Bakken Pipeline protestors. Order Granting

Pl.’s Mot. TRO, *Dakota Access, L.L.C. v. Archmabault et al.*, 1:16-cv-00296 (D.N.D. Aug. 16, 2016). The facts justifying the issuance of the North Dakota TRO are distinguishable. Before the TRO request in North Dakota, the North Dakota defendant–protestors’ behavior escalated over three days of protest. *Id.* at \*2–4. One of the protestors held a knife in his hand as he confronted law enforcement. *Id.* at \*3. The protestors “threw bottles and rocks at the exiting vehicles and surrounded and blocked the last vehicle, which belonged to a Dakota Access contractor . . . and [left the vehicle] dented.” *Id.* at \*4. Dakota Access employees received a message from an unknown individual that read, “Hope you end up killing[ ] yourself,” signed “Concerned Citizen.” *Id.*

Unlike the defendants in the North Dakota case, Dakota Access presents no history of violence as to any Defendants. There have been no threats of physical harm, no acts of violence, and no criminal activity tied to Defendants. This is the second protest of its type for CCI and the first for Bold Iowa. Pl.’s Exs. 1 & 2 at 5, 7, ECF No. 2-2. No information has been presented to the Court to suggest CCI’s past protest was violent or caused property damage. Dakota Access has not shown the “immediate, irreparable injury” necessary for the Court to issue the extraordinary remedy of a TRO without notice to the opposing party.

In addition to the requirement of demonstrating “immediate and irreparable injury,” the attorney moving for the ex parte TRO must also certify “in writing any efforts made to give notice and the reasons why it should not be required.” Fed. R. Civ. P. 65(b)(1)(B). Dakota Access presents an affidavit from their attorney stating he retained a process server “to attempt to locate the above-named Defendants.” ECF No. 2-3 ¶ 2. Dakota Access cites the short timeframe and Defendants’ threats as reasons for seeking an ex parte order. *Id.* ¶ 6. These assertions do not inform the Court



of “the efforts made to give notice and the reasons why it should not be required.” Fed. R. Civ. P. 65(b)(1)(B).

The Court recognizes ex parte temporary restraining orders are necessary in certain circumstances. However, ex parte orders should be restricted to serving their underlying purpose of preserving the status quo and preventing “immediate and irreparable injury, loss, or damage” so long as is necessary to hold a hearing. *U.S. Army Corp. of Engr’s*, 264 F. Supp. 2d at 879. This is particularly true when the injunction sought pertains to a planned demonstration and the exercise of First Amendment rights. *See, e.g., Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175 (1968). Without participation by Defendants, “[t]he Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate.” *Id.* at 183. If both parties are not present, “[t]he facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate.” *Id.*

#### IV. CONCLUSION

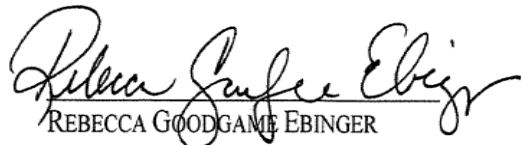
An ex parte TRO is an extraordinary and drastic remedy to be issued only in exceptional circumstances. Based on the limited record before the Court, the Court concludes Dakota Access has failed to make a clear showing that “immediate and irreparable injury, loss, or damage will result” prior to an adversarial hearing on Dakota Access’s motion for preliminary injunction. This ruling does not foreclose the issuance of a preliminary injunction based upon the *Dataphase* factors upon full consideration of the merits. The Court has set an expedited hearing to address the alleged harms and hear arguments from both parties. However, at this time, Dakota Access has not met the high standard for issuance of an ex parte temporary restraining order.

The Court **DENIES** Plaintiff’s Motion for an Ex Parte Temporary Restraining Order, ECF No. 2. In addition, the Court **ORDERS** the following:

- 1) Dakota Access shall immediately serve upon all named Defendants this order, its complaint and motion for a temporary restraining order, which the Court will construe as a Motion for Preliminary Injunction, and any supporting pleadings, exhibits, and affidavits. Dakota Access shall promptly file proof of such service with the Court.
- 2) The Court hereby schedules a hearing in Courtroom 160 of the United States District Court for the Southern District of Iowa, in Des Moines, Iowa, on **Friday, September 2, 2016, at 1:30 p.m.** to determine whether a preliminary injunction should be issued.

**IT IS SO ORDERED.**

Dated this 30th day of August, 2016.

  
REBECCA GOODGAME EBINGER  
UNITED STATES DISTRICT JUDGE