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, and DAKOTA ACCESS LLC, Defendant-Intervenor-Cross Claimant.	Case No. 1:16-cv-01534-JEB

RESPONSE OF DAKOTA ACCESS, LLC TO MOTION FOR AN INJUNCTION PENDING APPEAL UNDER FED. R. CIV. P. 62(c)

Cheyenne River Sioux Tribe once again proclaims an emergency that is purely of the Tribe's own making. This Court denied injunctive relief last Tuesday morning. Yet the Tribe waited until after Court closed on Friday to appeal that order, along with an urgent request for this Court to "immediately" (*i.e.,* before Defendants can respond) give it a stay anyway that would last until the Tribe's new appeal or another yet-to-be-filed stay request is decided. As with the new Religious Freedom Restoration Act (RFRA) claim on which the Tribe based its request for extraordinary relief, there is no basis for the Court to make Defendants bear the brunt of a delay that Plaintiffs created. The motion should be denied in its entirety. Anything less would unfairly prejudice Dakota Access.

I. The Court Correctly Applied Laches To Bar Equitable Relief.

Cheyenne River says it is "unfair" to apply the doctrine of laches just because the Tribe was not "specific enough" or failed to converse in "the legalese of RFRA" when articulating its religious objections. D.E. 165 (Stay Mot.) 4. But the Court did not require the Tribe to speak in a way that "lawyers" or even persons with "extensive educational backgrounds" would. *Id.* These are the Tribe members' own religious beliefs, and they never told the Corps that the *mere presence* of an oil pipeline would fulfil one of their religion's prophecies. Whatever leeway might be warranted when lay persons need to speak on technical issues for which they lack special knowledge—such as the ins and outs of horizontal directional drilling methods—there is nothing unfair in expecting at least one mention of how a prophecy from their own religion supposedly requires a different pipeline route.

The Tribe also misses the point when it argues that it filed its RFRA claim only a few months after this litigation began and as soon as it became "ripe for injunctive relief." Stay Mot. 4. Wholly separate from the Tribe's tardiness in filing its claim, at no time in the two years *before* litigation began did it alert the Corps to a religious objection based on the mere presence of oil in the pipeline. Op. at 10-14 (recounting the Tribe's many opportunities to raise *this* concern when it communicated raising a host of other concerns); D.E. 124 at 8-9 (same). Had the Tribe raised a *valid* religious-exercise concern two years ago—in time for evaluation and possible implementation of a different pipeline route—a significant waste of everyone's time and effort on consultation over cultural sites or environmental risks peculiar to the current route would have been avoided.

The Tribe's failure to speak up sooner—before the pipeline was more than 99.9% completed—makes this very much like a case the Supreme Court discussed with approval in

Petrella v. MGM, Inc., 134 S. Ct. 1962 (2014). In that case—*Chirco v. Crosswinds Communities, Inc.*, 474 F.3d 227 (6th Cir. 2007)—laches barred equitable relief against a defendant who allegedly used the plaintiffs' architectural designs without their permission in building a housing development. *Petrella*, 134 S. Ct. at 1978 (discussing *Chirco*). Although laches did not bar the copyright suit itself, it did foreclose injunctive relief. The Court explained that an order requiring destruction of the project "would be inequitable" because, "[l]ong aware of the defendants' project, the plaintiffs took no steps to halt the housing development until more than 168 units were built, 109 of which were occupied." 134 S. Ct. at 1978. For those same reasons, laches bars the Tribe's efforts to enjoin completion of the pipeline at this late date.

II. This Court Correctly Found A Low Likelihood Of Success On The Merits.

Cheyenne River repeats its doubts that *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), "remains reliable authority" in light of *Hobby Lobby* and *Holt*. *See Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751 (2014); *Holt v. Hobbs*, 135 S. Ct. 853 (2015). But here the Tribe repeats the error it made in its motion without any effort to address this Court's explanation for why *Lyng* remains good law. The Tribe again fails to acknowledge the difference between the "free exercise of religion" and a "substantial burden" on that free exercise. In *Lyng*, as here, the Court did not question the existence of the former when holding that the plaintiff had failed to establish the latter. The Tribe also ignores Congress's express statement that RFRA retains the test used in *Lyng* as well as in other important pre-RFRA cases for establishing a substantial burden.

The Tribe does not even address three other insurmountable obstacles to success: (1) the government does not burden religion when, rather than take the challenged action, it merely uses criteria unrelated to religion to approve a third-party's request to use federal land; (2) the Tribe is

not a person entitled to sue under RFRA; and (3) refraining from taking away Dakota Access's easement is the least restrictive way of promoting the government's compelling interest in respecting property rights. Any one of these is enough to foreclose success on the merits.

III. No Other Factors Support A Stay Either.

The Tribe faults this Court for writing an incomplete opinion, arguing that the Court's "failure to address the remaining prongs" of the 4-prong test for preliminary injunctive relief "requires an injunction pending appeal." Stay Mot. 6. Not only is the Tribe's position at odds with how it argued its motion, *see* D.E. 98 at 22 (arguing that in RFRA cases "the likelihood of success on the merits will often be the determinative factor" for interim injunctive relief), it fails to account for the significance of intervening Supreme Court precedent. Under *Winter v. Natural Resources Defense Council, Inc*., the "extraordinary remedy" of "injunctive relief" "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." 555 U.S. 7, 22 (2008). And this Court's opinion properly explained that "[w]hether a sliding-scale analysis still exists or not" after *Winter*, "courts in our Circuit have held that a failure to show a likelihood of success on the merits alone is sufficient to defeat the motion." Op. at 7. The Tribe does not even mention this part of the Court's reasoning, much less explain how it could be wrong.

In any event, for all of the reasons Dakota Access and the Corps previously argued, the Tribe cannot meet any of the other three requirements either. On irreparable harm, the Tribe fails to explain how the added "burden" of a pipeline that crosses this part of the Missouri River could itself produce irreparable harm to the purity of Lake Oahe's waters when so many other oil pipelines, gas pipelines, refineries, power lines, railroad tracks, and other man-made intrusions have burdened the same waters for so long. The Tribe's extreme and unjustified tardiness also prevents it from satisfying the third prong—the balance of the equities. Dakota Access has already

suffered substantial loss from inordinate delay in the completion of the pipeline—delay that the Tribe fostered so that it could consult with the government even further about its concerns. Others should not bear the burden of further delay just because Cheyenne River elected not to use more than two years of comment and consultation opportunities to mention the Black Snake prophecy. Far from seeking to hold things in place, moreover, the Tribe asks the Court to directly alter the legal rights and obligations of Defendants by nullifying performance of a contract. And the Tribe identifies no lawful basis for binding Dakota Access, a private party that is not—nor could it ever be—subject to RFRA's prohibitions. See Fed. R. Civ. P. 65(d).

Finally, on the question of public interest, the Tribe again ignores Defendants' earlier points. Dakota Access's Response established that "[t]he development of domestic energy resources is of paramount public interest" and that the interest is harmed "if that development is delayed." *Nat. Res. Def. Council v. Kempthorne*, 525 F. Supp. 2d 115, 127 (D.D.C. 2007). And the President has concluded that "construction and operation of the" Dakota Access pipeline will "serve the national interest." D.E. 124-1, Ex. G. Instead of addressing any of this, the Tribe returns to its point that the pipeline "has generated opposition." Stay Mot. 9. But apart from failing to prove in any concrete sense that the numbers are one-sided in the Tribe's favor, "the public interest"—like the protection of religious exercise—"is not a popularity contest." *Comm. in Solidarity with the People of El Salvador v. Sessions*, 705 F. Supp. 25, 30 (D.D.C. 1989).

Conclusion

The free exercise of religion is indisputably important to the functioning of a free society. Like all important rights, however, it should not be held back only for use as part of a last-gasp litigation tactic. For the reasons stated above and in the earlier briefing, the motion for a stay

pending appeal should be denied, and the Court should reject the alternative request for an injunction until the D.C. Circuit rules on a yet-to-be-filed motion in *that* Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2017, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

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