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 and Cross-Claimant	Case No. 1:16-cv-01534 (JEB)

UNITED STATES ARMY CORPS OF ENGINEERS' OPPOSITION TO CHEYENNE RIVER SIOUX TRIBE'S MOTION FOR INJUNCTION PENDING APPEAL

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I. INTRODUCTION

Cheyenne River Sioux Tribe ("Cheyenne River") moves for an injunction pending appeal to prevent the flow of oil through the Dakota Access Pipeline ("Pipeline") until the D.C. Circuit completes review of this Court's March 7, 2017 decision rejecting Cheyenne River's motion for preliminary injunction. Mot. for an Inj. Pending Appeal under Fed. R. Civ. P. 62(c), ECF No. 165 ("CRST's Mot."). Cheyenne River fails to establish any of the elements necessary for the extraordinary remedy of an interim injunction. Instead, Cheyenne River seeks to re-litigate legal arguments expressly rejected by this Court.

The balance of factors does not favor injunctive relief. Cheyenne River is not likely to succeed on the merits of its Religious Freedom Restoration Act ("RFRA"), claim and its irreparable harm argument fails because it is tied to that RFRA claim. Additionally, Cheyenne River cannot demonstrate that public interest would favor such extraordinary relief. Accordingly, the Court should deny Cheyenne River's motion for injunction pending appeal.

II. STANDARD OF REVIEW

Rule 62(c) of the Federal Rules of Civil Procedure provides that, when "an appeal is pending from an interlocutory or final judgment that . . . denies an injunction," a court, in its discretion, "may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c).

In deciding whether to grant an injunction pending appeal, courts look to four factors:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a[n] [injunction]; (3) the prospect that others will be harmed if the court grants the [injunction]; and (4) the public interest in granting the [injunction].

Loving v. IRS, 920 F. Supp. 2d 108, 110 (D.D.C. 2013) (citations omitted).

A party who moves for an injunction has the burden to show the balance of the four factors weigh in favor of an injunction. *McCammon v. United States*, 588 F. Supp. 2d 43, 47 (D.D.C. 2008) (internal quotation marks and citations omitted). Granting an injunction pending appeal is "always an extraordinary remedy." *Id.* The moving party "carries a heavy burden to demonstrate that the [injunction] is warranted." *Id.* (citation omitted).

III. ARGUMENT

A. Cheyenne River Is Unlikely to Succeed on the Merits of Its Appeal

In reviewing and denying the Cheyenne River's motion for preliminary injunction, this Court has already evaluated the factors that apply to this renewed injunction request under Rule 62. The Court denied the request for preliminary injunction because the Tribe failed to demonstrate it was likely to succeed on the merits of its claim. *See* Memorandum Opinion, ECF No. 158. Cheyenne River has not raised any new arguments that call that decision into question. Instead, Cheyenne River falls back on arguments that have already been rejected regarding laches and whether *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), is still good law.[1] CRST's Mot. 3-5. These rehashed arguments fail.

1. The Court Properly Applied Laches

Cheyenne River challenges the applicability of the doctrine of laches by alleging the Court applied an unfair standard of specificity and also conflated the laches notice standard with Administrative Procedure Act ("APA") notice requirements. CRST's Mot. 4. These allegations are misguided and confuse the issues. Laches applies here because Cheyenne River waited to

[1] To the extent that the Court may revisit these arguments, Defendant incorporates, by reference, its arguments from its Opposition to Cheyenne River's Motion for Preliminary Injunction. ECF No. 127.

come forward with its RFRA concerns after a two year period during which it commented repeatedly on the Pipeline.

To begin, the U.S. Army Corps of Engineers ("Corps") did not argue that Cheyenne River should use "legalese" or "magic words" to allege its RFRA claim. *See* CRST's Mot. 4. Rather, the Corps argued that Cheyenne River could have brought its specific RFRA concerns at any time during a two year administrative process but inexplicably chose not to. Defs.' Opp'n to Prelim. Inj. 22, ECF No. 127. Indeed, the Corps' laches argument centers around Cheyenne River's silence regarding the specific religious concerns that form the foundation for the Tribe's RFRA claim. Before moving for a temporary restraining order and preliminary injunction, Cheyenne River had only raised generalized concerns regarding spill risks. *Id.* It was only during this litigation that Cheyenne River—for the very first time—told the Corps that the existence of a pipeline anywhere under Lake Oahe symbolized the fulfillment of a religious prophecy that would impact the Tribe's ability to practice its religion. This was not mere wordplay, but a fundamentally different concern that had never been raised during the two year administrative process. Put differently, Cheyenne River confuses the Court's application of laches to a supposed choice of words, when in reality, laches applies to Cheyenne River's failure to articulate any specific concerns it had until it prejudiced the other parties.

In a similar vein, Cheyenne River confuses the application of laches to the administrative process with the Court's application of inexcusable delay. As Cheyenne River notes, mere delay is not sufficient to warrant the application of laches. *Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 531 (D.C. Cir. 2010); *see also* CRST's Mot. 4. Indeed, the delay must be inexcusable or unreasonable. *Id.* Here, laches applies not because of mere delay, but because Cheyenne River's two year delay in bringing its RFRA claim is inexcusable and unreasonable.

The Tribe cannot provide a valid reason for why it did not bring its specific religious claims during a lengthy consultation process in which it managed to articulate several other environmental and cultural concerns.

2. There Is No Substantial Question as to Whether *Lyng* Applies

Cheyenne River is incorrect in asserting that "[a]s a result of Supreme Court decisions in *Hobby Lobby* and *Holt*, *Lyng* is neither controlling nor reliable authority in this RFRA analysis." CRST's Mot. 5. Cheyenne River's mistake is to take a discrete sentence and issue from *Hobby Lobby* and apply in an extremely overbroad way that is not consistent with the opinion or RFRA itself.

The Tribe states in its brief: "[t]he Supreme Court in Hobby Lobby explained that even the original text of RFRA, enacted in 1993, was clear on its face that it was not 'meant to be tied to th[e] Court's pre-Smith interpretation of [First Amendment free exercise]' to the extent that pre-Smith authorities are not consistent with the expansive protections provided by RFRA." CRST's Mot. 5 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014)). Cheyenne River distorts the relevant quotation by truncating it. The Court stated in full: "nothing in the text of RFRA as originally enacted suggested that **the statutory phrase "exercise of religion under the First Amendment"** was meant to be tied to this Court's pre-*Smith* interpretation of that Amendment." *Hobby Lobby*, 134 S. Ct. at 2772 (emphasis added); *cf.* CRST's Mot. 5. Cheyenne River reads the "exercise of religion" phrase out of the Court's opinion. The *Hobby Lobby* Court reasoned that the phrase "exercise of religion" in RFRA was not meant to be tied only to first amendment caselaw, but regardless, "[I]f the original text of RFRA was not clear enough on this point—and we think it was—the amendment of RFRA through RLUIPA surely dispels any doubt" as "[RLUIPA] . . . deleted the prior reference to the

First Amendment, *see* 42 U.S.C. § 2000bb–2(4) (2000 ed.) (incorporating § 2000cc–5)[.]" *Hobby Lobby*, 134 S. Ct. at 2772.

Nothing about the *Hobby Lobby* decision, or about the RLUIPA amendments affect the relevant portions of *Lyng*, which are not about what constitutes an "exercise of religion." Both the instant case and *Lyng* assume that plaintiffs are "exercise[ing] religion." However the issues in *Lyng* as here is whether government activities on federal land can be a "substantial burden" to such exercise. Neither *Hobby Lobby* nor RLUIPA addressed this question, and certainly *Hobby Lobby* did not expressly overturn *Lyng's* conclusion on this issue.

The legislative history of RLUIPA confirms that this section merely clarifies "the definition of 'religious exercise.'" 146 CONG. REC. S7774-01, S7776 (daily ed. July 27, 2000), 2000 WL 1079346. It also notes that:

> The Act does not include a definition of the term "substantial burden" because it is not the intent of this Act to create a new standard for the definition of "substantial burden" on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. The term "substantial burden" as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.

Id. Therefore, there is no substantial question as to whether *Lyng* applies. And under *Lyng*, Cheyenne River cannot demonstrate that the government's actions substantially burden the Tribe's religious practices. As a result, Cheyenne River is unlikely to succeed on the merits, and cannot show that it is entitled to any injunction pending appeal.

B. Cheyenne River Sioux Has Not Shown Irreparable Harm

Without a likelihood of success on the merits, Cheyenne River's irreparable harm argument is defeated. Put simply, Cheyenne River cannot show likelihood of success on the merits and therefore cannot show irreparable harm. Because a violation of religious exercise

rights under RFRA represent irreparable injuries, *O Centro Espirita Beneficiant Uniao Do Vegetal v. Ashcroft*, 282 F. Supp.2d 1236, 1269-70 (D.N.M. 2002), *aff'd*, 342 F.3d 1170 (10th Cir. 2003), the irreparable injury prong partially converges with the likelihood of success on the merits. And because Cheyenne River has not demonstrated that its religion will be substantially burdened by the Lake Oahe easement, it also has not demonstrated that it will be irreparably harmed by that easement.

C. Denying the Injunction Is in the Public Interest

Finally, public interest weighs in favor of denying injunctive relief. Where the federal government is a party, the equities and public interest inquiries tend to merge. *Colo. Wild Horse & Burro Coal., Inc. v. Jewell*, 130 F. Supp. 3d 205, 220-21 (D.D.C. 2015) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009). Granting equitable relief in the form of an injunction now would only reward the Tribe's unwillingness to engage meaningfully in the consultation process. Contrary to Cheyenne River's assertion, such relief would cause harm to the Corps' future administrative processes. Moreover, the President has expressly determined that the Pipeline is "in the national interest." Resp. of Dakota Access, LLC in Opp. to Pl. Cheyenne River Sioux Tribe's Mot. for a Prelim. Inj. 36, ECF No. 124-1. The public interest would not be served by an injunction pending appeal because it would delay operation of the Pipeline by a third-party, and would encourage parties in the future to decline consultation and comment in favor of bringing last minute challenges to halt activities after the administrative process is concluded and a project is well underway.

IV. CONCLUSION

For the foregoing reasons Cheyenne River's Motion for Injunction Pending Appeal should be denied.

Dated: March 14, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 14th day of March, 2017, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

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