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INTRODUCTION

Steve Vance, the Tribal Historic Preservation Officer (“THPO”) for the Cheyenne River Sioux Tribe should be denied both intervention of right and permissive intervention. On March 13, 2017, this Court requested a notice from Mr. Vance indicating: 1) whether he still wished to intervene given the Court had denied Cheyenne River’s Motion for Preliminary Injunction on grounds unrelated to standing; and 2) why he is not sufficiently represented by the current Plaintiffs. Mr. Vance’s notice claims that his Religious Freedom Restoration Act (“RFRA”) and First Amendment claims may not be adequately represented because Cheyenne River’s religious claims may fail on standing grounds or Laches. ECF No. 177 at 1-2. However, this argument does not alter any of the reasons why Mr. Vance’s intervention should be denied. *See* Corps’ Opp’n to Vance’s Mot. to Intervene, ECF No. 139 at 4-9. Indeed, Mr. Vance’s notice does not overcome the fact that his motion to intervene is untimely, nor does it show that his claims are not adequately represented by Cheyenne River.

ARGUMENT

Mr. Vance concedes that his RFRA claims are identical to Cheyenne River’s claims in substance and relief sought. Vance’s Reply to Opp’ns to Mot. to Intervene, ECF No. 155 at 7. However, Mr. Vance argues that Cheyenne River may not be able to adequately represent his interests because its RFRA claims may be disposed of under Laches and standing grounds. ECF No. 177 at 3. Mr. Vance’s notice does not address the fact that his motion is deficient on Laches grounds as well. Corps’ Opp’n to Vance’s Mot. to Intervene, ECF No. 139 at 5-7. Indeed, the Court’s Laches analysis equally applies to Mr. Vance’s motion as a timeliness argument. *Id.* at 1-7; Mem. Opinion, ECF No. 158 at 8-9.

I. Mr. Vance’s Motion Is Untimely

Regardless of whether Mr. Vance's interests are adequately represented by Cheyenne River, his motion to intervene is untimely. As Cheyenne River's THPO, Mr. Vance has been intimately involved in the administrative process and litigation surrounding the Pipeline, and was well aware that his rights would be directly affected by the litigation. This Court's opinion denying Cheyenne River's motion for preliminary injunction in part on laches grounds, applies equally to Mr. Vance's eleventh hour motion to intervene. ECF No. 158 at 8-9. Mr. Vance's motion is untimely and should be denied.

Contrary to Mr. Vance's claims, timeliness is not determined by whether Mr. Vance was required to participate in the administrative process. ECF No. 155 at 1. Instead, timeliness is measured from the point where the "potential inadequacy of representation comes into existence" and considers when "the prospective intervenor knew or should have known that any of its rights would be directly affected by the litigation" *Amador Cty. v. U.S. Dep't of Interior*, 772 F.3d 901, 904 (D.C. Cir. 2014) (internal quotation marks and citations omitted). As Cheyenne River's THPO, Mr. Vance has been acutely aware of the Pipeline and served in an active role in this matter's administrative process, beginning in October 2014. Corps' Opp'n to Vance's Mot. to Intervene, ECF No. 139, 2-4. Mr. Vance was also aware of the litigation and the Tribe's claims at the latest in August 2016, when he provided a declaration for the Tribe, which at the time, was not asserting any RFRA or First Amendment claims. Mr. Vance had an adequate opportunity to advance his claims if he believed the Tribe was not representing his interests but did not act until well after it was clear that the litigation would affect his interests.

Additionally, Mr. Vance's untimeliness would unduly prejudice the parties. Mr. Vance advanced his claims for the first time, only after the easement had been conveyed, after a years-long administrative process (that he participated in) and during a complex legal process where summary judgment briefing is underway. Allowing intervention at this stage would force the

parties to address potentially new legal arguments and new theories of liability while simultaneously responding to current claims. Failure to meet any single required element of intervention is grounds for denial of intervention as of right. *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). Timeliness is one of those elements. *Id.* Accordingly, Mr. Vance's untimeliness alone is grounds for denial.

II. Mr. Vance is Adequately Represented

The Court's disposition of Cheyenne River's RFRA claim, without reference to the Tribe's standing, is fatal to Mr. Vance's inadequate representation argument. The Court held that Cheyenne River's RFRA claim is unlikely to succeed on the merits at least in part because binding Supreme Court precedent bars the claim. Mem. Opinion, ECF No. 158 at 16-17, 23-27 (citing to *Vill. of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006) and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)). The Court did not hold that Cheyenne River lacks standing, and did not directly address the Tribe's standing under RFRA. Mr. Vance's arguments regarding the Tribe's standing have no bearing on the adequacy of representation because there are threshold legal barriers unrelated to standing that bar the claim. Mr. Vance has not shown that the Tribe inadequately represents his interests with regard to these legal issues. The Court has made clear that the RFRA claims are barred for reasons unrelated to standing, and Mr. Vance's status as a "person" for RFRA purposes does not impact the Tribe's ability to represent Mr. Vance's interests. Additionally, Mr. Vance concedes that his RFRA claims are identical to Cheyenne River's claims in substance and relief sought. ECF No. 155 at 7. As a result, Cheyenne River adequately represents Mr. Vance's interests.

III. Conditional Intervention

If allowed, Mr. Vance's intervention should be conditional. This court can reasonably impose conditions on an intervenor. *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 20 (D.D.C. 2010). Here, in the event Mr. Vance is permitted to intervene, Cheyenne River and Mr. Vance should be required to coordinate and consolidate their filings into a single document. Requiring this condition will avoid duplicative filings and help foster judicial economy and conserve the resources of the parties.

CONCLUSION

For the reasons stated above, this Court should deny Mr. Vance's Motion to Intervene.

Respectfully submitted,

Dated March 27, 2017

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources Division

By: /s/ Amarveer S. Brar
AMARVEER S. BRAR, CA Bar 309615
REUBEN S. SCHIFMAN, NY Bar
BRIAN M. COLLINS, TX Bar 24038827
U.S. Department of Justice
Natural Resources Section
P.O. Box 7611
Benjamin Franklin Station
Washington, DC 20044
Phone: (202) 305-0479 (Brar)
Phone: (202) 305-4224 (Schifman)
Phone: (202) 305-0428 (Collins)
Fax: (202) 305-0506
amarveer.brar@usdoj.gov
reuben.schifman@usdoj.gov
brian.collins@usdoj.gov

ERICA M. ZILIOLI, D.C. Bar 488073
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044

Phone: (202) 514-6390
Fax: (202) 514-8865
erica.zilioli@usdoj.gov

*Attorneys for the United States Army Corps
of Engineers*

OF COUNSEL:

MILTON BOYD
MELANIE CASNER
U.S. Army Corps of Engineers
Office of Chief Counsel
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that, on the 27th 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.

/s/ Amarveer S. Brar

Amarveer S. Brar