IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, **Plaintiff,** **and** **CHEYENNE RIVER SIOUX TRIBE,** **Intervenor-Plaintiff,** **v.** **U.S. ARMY CORPS OF ENGINEERS,** **Defendant – Cross-Defendant.** **and** **DAKOTA ACCESS, LLP,** **Intervenor-Defendant Cross-Claimant.**	**Case No. 1:16-cv-1534-JEB**

INTERVENOR STEVE VANCE'S REPLY TO DAKOTA ACCESS' AND THE ARMY CORPS OF ENGINEERS' OPPOSITIONS TO MOTION TO INTERVENE

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INTRODUCTION

Steve Vance's Motion to Intervene must be granted to ensure that his rights under the Religious Freedom Restoration Act, 42 U.S.C.§ 2000bb, *et seq.* ("RFRA") are protected. Contrary to Dakota Access, LLC's ("Dakota Access") and the Army Corps of Engineers' ("Corps") oppositions to Mr. Vance's motion, this motion is timely and his intervention in this action is necessary to protect his rights.

I. Mr. Vance's Motion Is Timely

The Defendants state the correct standard for determining "timeliness" under Fed. R. Civ P. 24. There is no bright line rule; the Court must make its decision based on the totality of the circumstances. *Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008). In the present case, Mr. Vance acted with all required promptness given the circumstances, and he intervened at a time that any reasonable person would have understood to be the effective fruition of the threat to his rights.

At the outset, it is must be stated that Mr. Vance was not required to participate in any administrative process to preserve his rights. His RFRA claim is not an Administrative Procedures Act claim. Instead, it is an independent claim brought under RFRA's specific cause of action set forth in the statute's plain text. 42 U.S.C. § 2000bb-1(c) (providing that a person aggrieved under RFRA "may assert that violation as a claim . . . in a judicial proceeding . . . against the government"). Consequently, Mr. Vance's involvement or lack of involvement at the agency level simply is not relevant to his RFRA claim generally, or to the question of timeliness specifically. Importantly, moreover, Mr. Vance could not have brought any RFRA claim in this Court until the Corps had, at least ostensibly, reached a decision on the pipeline. This would not

have been until the initial authorization and Environmental Assessment ("EA") issued on July 25, 2016 at the earliest. The case history after this date tells the rest of the story.

The Standing Rock Sioux Tribe filed its lawsuit against the Corps on July 27, 2016, challenging approvals granted to Dakota Access under the Rivers and Harbors Act, 33 U.S.C. § 408. However, that start date for this litigation does not come close to being the operative date for determining the timeliness of Mr. Vance's RFRA-based intervention. On September 9, 2016, the Corps announced its intent to review the authorizations it already had issued on July 25, 2016, and its intent to withhold authorization of an easement under the Mineral Leasing Act ("MLA"), 30 U.S.C. § 185, pending additional research into the Standing Rock Sioux Tribe's Treaty rights, the impact of an oil spill on tribal resources and rights, and further review. ECF No. 131-1 ¶ 107. Without the MLA easement, Dakota Access lacked the permission that it required to enter onto federal land in order to actually drill the proposed pipeline under the waters of Lake Oahe. On September 9, 2016, therefore, any reasonable person would have understood that the posture of this litigation had changed; the Corps' previous decisions had been thrown into doubt and the Corps had stated that the final authorization of the project—the easement—may not be granted without a comprehensive review that could encompass a broad range of concerns. It now was apparent that this entire process was moving in a completely opposite direction outside of the litigation.

The Corps continued to foster this environment through the end of 2016 and into the beginning of 2017. On November 14, 2016, Chairman Frazier received a letter from Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works stating that the Corps wanted to discuss conditions of the proposed easement for crossing Lake Oahe. ECF No. 131-1 ¶ 108. While the Corps never actually commenced this consultation with the Cheyenne River Sioux Tribe on

easement conditions, it did issue a Memorandum on December 4, 2017 that determined that the Corps had not released key documents to the tribes, including the Environmental Justice Considerations Memorandum, the Lake Oahe Spill Model Discussion Report, and the HDD Risk Analysis Report for Lake Oahe. ECF No. 131-1 ¶ 112. Significantly, the December 4, 2016 Memorandum further determined that the Corps would conduct an Environmental Impact Statement ("EIS"). *Id.* On December 9, 2016, Chairman Frazier, along with officials from other tribes, met with the Corps, the Department of the Interior, and the Department of Justice in Washington, D.C. At this meeting tribal officials requested information concerning the proposed EIS process, and Corps informed them that further action to be taken by the Corps would be published in the Federal Register by the end of the year. ECF No. 131-1 ¶ 113. The Corps published a Notice of Intent to Conduct an EIS in the Federal Register on January 18, 2017. 82 Fed. Reg. 5543 (Jan. 18, 2017).

What reasonable person, given these facts, would have thought they needed to rush to the courthouse to protect their rights? The very agency that had earlier threatened Mr. Vance's rights was now publicly, repeatedly, and in writing assuring persons concerned that it was reconsidering its threatening decision and would take no action to permit the pipeline to be constructed under Lake Oahe until it completed this process. Moreover, in light of the Corps' announcement of a full review of the proposed easement, Mr. Vance's RFRA claim was not ripe—there was no present threat to his religious exercise.

Even after January 24, 2017, when President Donald Trump issued an Executive Memorandum to the Secretary of the Army directing the Army to issue the easement for Dakota Access Pipeline ("DAPL") without conducting an EIS, the Corps' attorney could not say with any degree of certainty when the easement would issue. See e.g. January 30, 2017 Minute Order

ordering Corps attorney to provide update on easement by February 6, 2017. Then, on February 7, 2017, the Corps and Secretary of the Army issued a Notice of Termination of the EIS Process, a Memorandum providing Congress with only 24 hours' notice of issuance of an easement to Dakota Access, and a Memorandum of Decision to Issue an Easement to Dakota Access to issue on February 8, 2017. ECF No. 131-1 ¶ 125. Mr. Vance filed his Motion to Intervene three days later, on February 11, 2017.

This Court has not made any substantive decisions in this matter other than one decision on a preliminary injunction motion. Further, this matter was effectively on hold for five months while the Corps undertook its review. *Karsner,* 532 F.3d at 886. (holding intervention proper four weeks after filing original complaint and where court had not made any major decisions in case).

Dakota Access' claim that the pending motions for partial summary judgement by the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe (collectively "MSJ") render this matter nearly complete is simply wrong, as is its claim that Mr. Vance's intervention came at the "eleventh hour." Contrary to Dakota Access's assertions, the pending partial MSJ motions do not address all of the Plaintiffs' claims. Thus, regardless of the result of the MSJ, there are still claims to be determined by the Court, and the matter will continue to be litigated.

II. Mr. Vance's Intervention And RFRA Claims Are in Regard to This Pipeline; Dakota Access Cannot Challenge The Reasonableness Of His Claimed Beliefs and Mr. Vance Must Be Allowed to Intervene to Protect His Rights

Defendants argue two additional points against Mr. Vance's intervention: (1) his participation in this case is not necessary to protect his rights; and (2) his claims of religious belief are not reasonable based on *Dakota Access'* belief that the waters of the Missouri River are

already rendered unsuitable by other pipelines. Taking the second point first, Defendants' argument fails both factually and legally.

Dakota Access argues that Mr. Vance's beliefs regarding the effect of the DAPL should be rejected because Lake Oahe is a manmade lake and there are already pipelines running in the vicinity of Lake Oahe, thus the waters are already sullied. ECF No. 139 at 8. As the Cheyenne River Sioux Tribe's ("the Tribe") counsel pointed out at the February 28th hearing, no other crude oil pipelines exist within the Lake Oahe project area—the area of concern for Mr. Vance's religious beliefs. See attached hereto as **Exhibit 1** Declaration of Nicole Ducheneaux ("Ducheneaux Decl.") at paragraph 2, Attachment A (February 28, 2017 Hearing Transcript) 10:17-22; 54:3-23. Additionally, the attempt to denigrate his belief based on the fact that Lake Oahe is manmade neatly sidesteps that fact that it was the Corps that forced Mr. Vance and other members of the Cheyenne River Sioux Tribe into its present situation, and the religious adherents have struggled mightily over the years to maintain their beliefs even the face of affirmative attempts to wipe them out. ECF No. 98-1 at ¶ 13. More importantly, it is simply not the belief of the Lakota people that the creation of Lake Oahe rendered those waters impure. Dakota Access' manmade argument is a red herring, and it has nothing to do with the claim brought by Mr. Vance. Despite this distraction, there is no question that the burden on Mr. Vance's religious exercise derives from the construction under the waters of Lake Oahe of a crude oil pipeline that relates to the Black Snake prophesy.

More importantly, courts must tread very lightly in determining whether a religious adherent's beliefs are reasonable. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014) ("Federal courts have no business addressing" the reasonableness of religious beliefs.) Dakota Access' argument that Mr. Vance's beliefs are not reasonable are based solely upon

Dakota Access' belief that the water is already sullied. That is not what Mr. Vance believes, as set forth in his declarations filed in this Court. His beliefs are clearly that the waters *today* are sacred and the pipeline with oil as placed by Dakota Access *will* sully the currently sacred waters. ECF No. 98-1 at ¶ 19. This Court must not pass judgment on these beliefs; Dakota Access's position is legally unsupportable.[1]

Dakota Access' first point defies comprehension. The oil company argues that Mr. Vance's objection to construction of the pipeline does not relate to his claim because it is his belief that the presence of oil in the pipeline will burden his religious exercise. Dakota Access' claim that the nature of Mr. Vance's belief thus is diminished is not correct, but this is beside the point. Construction of the pipeline is moving quickly, more quickly than any estimate provided by Dakota Access. Ducheneaux Decl., Attachment A, 59:8-25. This Court has recognized that this action is about Dakota Access flowing oil through the pipeline. It has ordered Dakota Access to provide weekly updates on when Dakota Access thinks oil will flow through the pipeline and forty-eight hours' notice before flowing any oil in the pipeline. Ducheneaux Decl., Attachment A, 60:7-9. Is Dakota Access building this pipeline to *not* have oil flow through it? Oil flowing through the pipeline will be the end result of pipeline construction should the Tribe not prevail. Thus, contrary to what Dakota Access asserts, should Mr. Vance not be allowed to intervene, he would be facing a status quo of oil flowing through the pipeline. His intervention must be allowed for him to protect his rights. In any event, Mr. Vance concedes that an order

[1] Dakota Access' attorney also suggested at the February 28th hearing that the tribes (and thus Mr. Vance's) beliefs are not sincere due to the fact that Lake Oahe was constructed in the 1950s, and the Lakota religion and Black Snake prophesy pre-date such construction. This argument is untenable. Surely the contraceptives at issue in *Hobby Lobby* were invented long after the Christian religion/beliefs of the owners of Hobby Lobby, yet no one would suggest that such fact renders their beliefs insincere.

enjoining Dakota Access from flowing oil through the pipeline (as opposed to enjoining construction) would be a sufficient remedy to protect his rights.

The Corps' Opposition takes the position that Mr. Vance cannot be allowed to intervene as his RFRA claims are identical to the Tribe's RFRA claims in substance and relief sought. ECF No. 139 at 8. While this is true, the Corps' position on this issue is disingenuous and seeks to deprive Mr. Vance, or any other person, from vindicating their rights guaranteed by RFRA.

The Tribe's Motion to Amend its complaint to add claims under RFRA has been opposed by both the Corps and Dakota Access. For the Corps Opposition to argue that the Tribe adequately represents Mr. Vance on the cases current posture simply ignores the fact that the Tribe has not yet been granted permission to even bring RFRA claims, and Defendants in this action have sought to categorically prevent it from doing so. If the Corps has its way, the Tribe will not be allowed to bring its RFRA claims. The Corps' position on "adequate representation" only works if it concedes that the Tribe can bring such claims. Otherwise, Mr. Vance is not adequately represented on these issues.

III. Permissive Intervention Is Appropriate

For the reasons set forth in Section I, *supra*, Dakota Access' position on timeliness in regard to permissive intervention should be rejected. As to its claims of prejudice, Mr. Vance did raise these issues in the administrative process, even though he was not required to do so to preserve his rights. Section I, *supra*. In any event, for the Defendants to now claim that the sacred religious nature of these waters is somehow a prejudicial surprise is belied by the record.

CONCLUSION

Mr. Vance's Motion to Intervene is not untimely. To the contrary, given the history of this matter, it is right on time. Mr. Vance must be allowed to intervene or he will be facing an uphill battle to vindicate his rights in a separate litigation to stop an already operational oil pipeline. The Defendants are not prejudiced, as this matter is not in the "eleventh hour", and they had notice of the sacred religious nature of these waters early in this matter. The Motion to Intervene should be granted.

Dated: March 6, 2017

STEVE VANCE, Intervenor,

By: /s/ Joseph V. Messineo

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of March, 2017, a copy of the foregoing was filed electronically with the Clerk of the Court. The electronic filing prompted automatic service of the filing to all counsel of record in this case who have obtained CM/ECF passwords.

/s/ Joseph V. Messineo