IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE, Plaintiff–Appellee, CHEYENNE RIVER SIOUX TRIBE, Intervenor for Plaintiff–Appellant, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant–Appellee, DAKOTA ACCESS LLC, Intervenor for Defendant–Appellee.	Case No. 17-5043

RESPONSE OF DAKOTA ACCESS, LLC TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Dakota Access, LLC is a nongovernmental entity formed to construct and own the Dakota Access Pipeline. Dakota Access, LLC is owned 75% by Dakota Access Holdings, LLC and 25% by Phillips 66 DAPL Holdings LLC. These companies are in turn owned as follows:

1. Dakota Access Holdings, LLC is wholly owned by Bakken Pipeline Investment LLC, which is wholly owned by Bakken Holdings Company, LLC, which is in turn owned 60% by LaGrange Acquisition, L.P. and 40% by Sunoco Pipeline, L.P.
2. Phillips 66 DAPL Holdings LLC is owned equally (20% each) by Phillips 66 DE Holdings 20A LLC, Phillips 66 DE Holdings 20B LLC, Phillips 66 DE Holdings 20C LLC, Phillips 66 DE Primary LLC, and Phillips 66 DE Holdings 20D LLC. Each of these companies is wholly owned by Phillips 66 Project Development, Inc.

I, the undersigned, counsel of record for Dakota Access, LLC, certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries or affiliates of Dakota Access, LLC, which have outstanding securities in the hands of the public.

1. Phillips 66 Company. Phillips 66 Company holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries.

2. Energy Transfer Partners, L.P. ("ETP"). ETP holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries.
3. Energy Transfer Equity, L.P. ("ETE"). ETE holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries.
4. Sunoco Logistics Partners, L.P. ("SLP"). SLP holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries.

These representations are made in order that the judges of this Circuit may determine the need for recusal.

Dated: March 17, 2017

/s/ Miguel A. Estrada
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INTRODUCTION

Cheyenne River Sioux Tribe seeks extraordinary relief—an injunction pending appeal—based on religious objections it first raised to the path of a 1,170-mile oil pipeline only *after* construction was more than 99.9% completed, following years of public comment. The district court correctly invoked laches to bar equitable relief and found a low likelihood of success on the merits. Controlling precedent holds that the use of federal land does not substantially burden any person's religious exercise. The court also concluded that an injunction would alter (not preserve) the status quo, and the balance of equities and public interest warrant denial. For these and other reasons the court had no need to reach, an injunction is unwarranted.

On the eve of Dakota Access, LLC completing its pipeline, Cheyenne River newly objects, for the first time in a two-year-plus approval process, that the route violates the Religious Freedom Restoration Act (RFRA). The Tribe asserts that oil flowing through a pipeline 90 feet below the bed of Lake Oahe in North Dakota—at a point more than 70 miles north of the Tribe's reservation—would fulfill a "Black Snake prophecy," rendering Lake Oahe's waters unsuitable for tribal religious ceremonies. The Tribe does not object to a crossing of the Missouri River north of this 230-mile-long man-made lake. Ex. 1 at 3, Ex. 2 at 11-12.

Dakota Access first sought U.S. Army Corps of Engineers approval for the Lake Oahe crossing in October 2014. (After the Corps created the lake in the 1950s

by damming the Missouri River, it retained ownership of narrow land strips on each shore.) In July 2016, after extensive public comment, consultation, and review of the crossing's many potential effects, the Corps gave its approval, to be followed by an easement.

Cheyenne River objected to pipeline *safety* and alleged harm to religious sites on land. But in all of its comments before and after approval, *not once* did it say that the mere presence of oil in a pipeline far beneath the lake (as distinct from oil potentially leaking *into* the lake) would interfere with religious ceremonies. The district court correctly concluded that because Cheyenne River waited to raise that objection until *after* Dakota Access began installing this last mile of pipeline, the laches doctrine barred the extraordinary remedy of a preliminary injunction.

The court also correctly applied controlling precedent to find a low likelihood of success on the merits because federal land-use decisions do not qualify under RFRA as substantial burdens on religious exercise. In denying an injunction pending appeal, the court further found that the balance of equities and public interest count against an injunction.

Three other grounds raised below also support that ruling: government approval of private conduct is not a government-imposed burden; the Tribe is not a "person" under RFRA; and the Tribe fails to establish irreparable harm. This Court should deny the motion.

BACKGROUND

1. Dakota Access began seeking Corps approval of its pipeline in 2014. This included federal consultation with tribes about possible cultural-site effects under the National Historic Preservation Act (NHPA), analysis under the National Environmental Policy Act (NEPA); permits under the Rivers and Harbors Act (RHA) and Clean Water Act (CWA); and a Mineral Leasing Act right-of-way.

Cheyenne River raised concerns starting in 2015 that pipeline construction might harm religious sites in its path—on land leading to Lake Oahe—and that the pipeline might leak oil into the lake. *E.g.*, Ex. 3, AR 64139.

On July 25, 2016, the Corps concluded that the pipeline would not significantly impact the environment. Ex. 4, AR 71225-26. Two days later, the Standing Rock Sioux Tribe sued the Corps. D.E. 1. Dakota Access intervened. D.E. 7. Cheyenne River did too, filing claims under NHPA, CWA, RHA, and NEPA. Ex. 5 at 10. Cheyenne River also joined Standing Rock's preliminary-injunction motion, limited to NHPA, which the court denied. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No 16-1534, 2016 WL 4734356 (Sept. 9, 2016).[1]

2. That same afternoon, the government announced that Dakota Access's

[1] After briefing and oral argument, this Court also denied a stay pending appeal of that order and later dismissed the appeal as moot. No. 16-5259, Doc. ## 1640062 (Oct. 9, 2016) & 1656316 (Jan. 18, 2017).

right-of-way to cross Lake Oahe was being delayed to "determine whether" the Corps "will need to reconsider any of its previous decisions." Ex. 6. After the Army confirmed the lawfulness of all prior decisions in November, it still delayed for further tribal consultation. Ex. 7 & 8.

On January 24, 2017, the President directed the Army "to review and approve . . . to the extent permitted by law and as warranted . . . requests for approval to construct and operate the" pipeline. Ex. 9, § 2. At a February 6, 2017, hearing, Cheyenne River stated it would challenge a decision to issue the right-of-way "under tribal treaties, under NEPA, [and] under the Clean Water Act." Ex. 10 at 8-9, 15. It did not mention RFRA.

The next day, the Army announced it would grant the right-of-way, Ex. 11, and the Corps and Dakota Access executed an easement.

3. On February 9, 2017, Cheyenne River moved to temporarily restrain construction, D.E. 99, and sought a preliminary injunction withdrawing the easement, Ex. 1. Rather than invoke any of the statutes it had mentioned just three days earlier, the Tribe asserted—for the first time ever—a purported RFRA violation. *Id.* at 12. (The Tribe's request to amend its complaint to add this RFRA claim remains pending. D.E. 97.)

This new claim is based on a prophecy: "Long ago [Lakota] prophets told of the coming of a Black Snake that would be coiled in" the Tribe's "homeland and

which would harm" its people. Ex. 12, ¶ 18. The Tribe now contends that Dakota Access's pipeline is the Black Snake. Ex. 1 at 19. A single declaration connects the prophecy to this pipeline. Ex. 12, ¶ 18.

4. Judge Boasberg denied a preliminary injunction on March 7, 2017, reaching only two issues. Ex. 13 (Op.). He found the claim unlikely to succeed on the merits, which "alone is sufficient to defeat the motion." Op. 7 (citing D.C. Circuit caselaw). Regardless, laches barred preliminary injunctive relief, because "the Tribe inexcusably delayed in voicing its RFRA objection," thus imposing "significant costs on" Dakota Access that the Tribe could have avoided had it raised its religious objections before "Dakota Access had built up to the water's edge and the Corps had granted the easement to proceed." Op. 15.

a. As to laches, in the two-plus years before Cheyenne River sought emergency relief, it "never asserted that the pipeline's operation itself under Lake Oahe — absent any spill or rupture — would somehow compromise the purity of the water and pose a religious-exercise problem." Op. 10. Even its legal claims "focus on the risk posed by spills or leaks and the possible harm to sacred sites from clearing, grading, and construction activities." Op. 11. "For more than two years" the Tribe "remained silent as to the Black Snake prophecy and its concerns about the presence of oil in the pipeline under Lake Oahe absent any issue of rupture, as well as about

the possible applicability of RFRA." Op. 13. Judge Boasberg found the delay "inexcusable." Op. 14; *id.* at 15 (the request for the "extraordinary and drastic remedy" of a preliminary injunction "comes long after Cheyenne River learned of the pipeline's proposed route, was invited to offer feedback, articulated *other* specific environmental and cultural issues, and filed suit on other claims").

Judge Boasberg found this "unjustified delay" prejudicial. Op. 14-15. "[H]ad [the Corps] known of the Tribe's beliefs during the permitting process," "one possibility" was "rerouting the pipeline north of Lake Oahe." Op. 14. In fact, "prior to any litigation," "Defendants previously modified the pipeline workspace and route more than a hundred times in response to cultural surveys and Tribes' concerns regarding historic and cultural resources." *Id.*

An injunction would "undercut the purpose behind the consultation obligations built into the Corps' permitting processes, which aim to surface tribal concerns in a timely manner." Op. 14. And it would "impose significant costs on a private third party, Dakota Access," by "delaying the flow of oil." *Id.* Also, any remedy "would be more costly and complicated than it would have been months or years ago, as doing so now requires not simply changing plans but abandoning part of a near-complete project and redoing the construction elsewhere." Op. 14-15.

b. Judge Boasberg independently held that "the Tribe has failed to demonstrate a likelihood of success on the merits." Op. 15. The government action here

was not a "substantial burden" on religious exercise, he concluded, because "granting the easement to Dakota Access and thereby enabling the flow of oil beneath Lake Oahe" "does not impose a sanction on the Tribe's members for exercising their religious beliefs, nor does it pressure them to choose between religious exercise and the receipt of government benefits." Op. 22. Cheyenne River's contrary position was "directly at odds with Supreme Court precedent," particularly *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). Op. 16, 22.

Lyng held that even though building a road and allowing timber harvesting on federal land would "'diminish the sacredness of the area in question' and interfere with tribal members' use of sites there for religious practice," "the government's actions did not cause the kind of harm cognizable" for a Free-Exercise-Clause First Amendment claim. Op. 23 (quoting *Lyng*). Those actions "did not 'coerce[]' the affected individuals 'into violating their religious beliefs' or 'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Id*. (quoting *Lyng*).

"Just as the government's tree cutting and road building in *Lyng* did not give rise to an actionable Free Exercise claim, neither does its easement granting here likely violate RFRA." Op. 24. *Lyng* applies, because "[w]hen drafting and debating RFRA, Congress expressly noted that RFRA did not undermine *Lyng*." Op. 25 (Senate Report cited *Lyng* as part of "clear" case law to which courts would look for

substantial burden determinations under RFRA). And this Court and others have "cited *Lyng* approvingly when resolving" RFRA claims. Op. 26.

Judge Boasberg found the facts here indistinguishable; other circuits have applied *Lyng* to federal land uses that "would virtually destroy the . . . Indians' ability to practice their religion." Op. 28 (citations omitted). He also rejected the Tribe's view that *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), or *Holt v. Hobbs*, 135 S. Ct. 853 (2015), somehow render *Lyng* "no longer good law." Op. 30. Neither case changed the definition of "substantial burden." Op. 31 (noting that the *Hobby Lobby* plaintiffs "had to choose between violating their religious beliefs and paying financial penalties," and that Holt was put to a "'choice' between growing a beard and 'serious disciplinary action'").

c. Judge Boasberg did not need to "consider the remaining three factors of the preliminary-injunction analysis — irreparable harm, balance of equities, and public interest — or Defendants' other contentions." Op. 8.

5. On March 10, the Tribe moved for an injunction pending this appeal. Judge Boasberg denied it, concluding the Tribe "does not have a strong case on appeal"; an injunction here "would not preserve the status quo"; "Dakota Access would also be substantially harmed by an injunction," offsetting harms to the Tribe; and the public interest "likely sides with denial," especially given the laches ruling. Ex. 14 at 2-3.

Cheyenne River now asks this Court for an injunction.

LEGAL STANDARD

Cheyenne River concedes that to obtain an injunction pending appeal it must establish four requirements: likely success on the merits, likely irreparable harm absent preliminary relief, a favorable balance of equities, and preliminary relief is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The "ultimate decision to deny injunctive relief, as well as [the] weighing of the preliminary injunction factors," is reviewed "for abuse of discretion," and "findings of fact for clear error." *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012). Legal conclusions are reviewed de novo. *Id.*

ARGUMENT

I. The District Court Properly Applied Laches To Bar An Injunction.

Laches is an equitable defense "designed to promote diligence" and avoid rewarding those who "slumber on their rights." *Menominee Indian Tribe of Wisc. v. United States*, 614 F.3d 519, 531 (D.C. Cir. 2010). It turns on "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Id.* Judge Boasberg correctly held that laches renders "inappropriate" the "'extraordinary remedy' of preliminary injunctive relief," *even if* the RFRA claim survives. Op. 9. The Tribe inexcusably delayed any mention that the

mere presence of oil in a pipeline would interfere with the Tribe's" religious practices. Op. 15. This prejudiced Defendants because Cheyenne River's gross untimeliness prevented the Corps from addressing the concern with a possible re-route *before* construction was nearly complete, and the tardy request introduces further project delays.

Cheyenne River objects that it had no duty to "incant" "magic words to give notice of its claim." Mot. 9. Judge Boasberg required no magic words. Instead, he concluded that if the *mere presence* of an oil pipeline deep beneath the lake's bed would fulfill a religion's prophecy, its members simply needed to say so at some point during the lengthy approval process, when the information seasonably could have informed the choice of route, rather than waiting until after the pipeline was all but completed. Yet never during that process did *any* tribe tell the Corps or Dakota Access that a Black Snake prophecy was relevant here, although tribes have been quick to see the fulfillment of this prophecy in the context of other infrastructure projects—not just pipelines, and not just at particular water crossings. APTN News, "Keystone XL 'Black Snake' Pipeline to Face 'Epic' Opposition from Native American Alliance," (Jan. 31, 2014) (noting that Black Snake prophecies also "have been linked to construction of highways and railways"),[2] New Brunswick Media, "The

[2] http://aptnnews.ca/2014/01/31/keystone-xl-black-snake-pipeline-face-epic-opposition-native-american-alliance/.

Energy East Pipeline and the Black Snake Prophecy," (Nov. 14, 2014) (eastern Canada pipeline),[3] The Circle News, "Black Snake-Enbridge Returns, Tribes Take Action," (Feb. 8, 2017) (Minnesota pipeline).[4] Despite these other uses of this prophecy to object to all manner of infrastructure projects, during more than two years of consultation Cheyenne River never told the Corps that Dakota Access's pipeline might *also* be the prophesized Black Snake if allowed to cross at Lake Oahe.

The Tribe also says it "did not sit on its hands" but rather "objected to the pipeline throughout the process." *Id.* That, in fact, was the judge's point. Cheyenne River raised concerns *other than* fulfillment of the Black Snake prophecy: *e.g.*, an oil leak or spill would harm its waters, or construction methods would harm burial sites or contaminate water. *See, e.g.*, Ex. 15 (August 17, 2015 letter); Ex. 16, ¶¶ 5-6 & 9 (August 16, 2016 declaration). Those concerns called for different Corps determinations. Thus, the Tribe inexcusably passed up numerous opportunities during a two-year-plus period to alert the Corps to the very religious-exercise burden that it newly alleges. Even as recently as January 18, 2017, in a 227-page submission to the Army opposing the crossing, not once did the Tribe mention a Black Snake prophecy. D.E. 131-5.

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[3] http://nbmediacoop.org/2014/11/14/the-energy-east-pipeline-and-the-black-snake-prophecy/.

[4] http://thecirclenews.org/index.php?Itemid=1&id=1433&option=com_content&task=view.

This is a textbook case for applying laches to bar equitable relief. Had the Tribe raised valid religious-exercise concerns two years ago—in time for evaluation and possible pipeline-route changes—a significant waste of time and effort on consultation and litigation over cultural sites or environmental risks peculiar to the current route would have been avoided. And because Dakota Access knew it was capable of addressing each environmental and other concern that *was* raised, it was fully justified in building on private land starting in May 2016 while it awaited approval for the small segments under Corps jurisdiction.

The Tribe's failure to speak up before the pipeline was more than 99.9% completed makes this very much like *Chirco v. Crosswinds Communities, Inc*., 474 F.3d 227 (6th Cir. 2007), the case cited in *Petrella v. MGM, Inc*., 134 S. Ct. 1962 (2014). Cheyenne River misreads both *Chirco* and *Petrella*. The appellate court in *Chirco*, with the Supreme Court's endorsement, did what the district court did here. Rather than hold that "laches barred plaintiffs' suit" challenging use of plaintiffs' building designs without permission, *see* Mot. 8, laches foreclosed a particular remedy—injunctive relief. 134 S. Ct. at 1978; *cf*. Op. 9 (holding that laches renders an injunction inappropriate *without* barring Cheyenne River's claim "in its entirety"). The Supreme Court explained that an order requiring destruction of the project in *Chirco* "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." *Id.* The inequity here would also be substantial. This is not "only" about 6,500 feet of pipe. Mot. 9. The "different route" that the Tribe advocates, Mot. 10, would scrap 100 pipeline miles (99 of them completed) for a 111-mile re-route to the north to avoid Lake Oahe. That would significantly expand the project's footprint by producing an abandoned segment and its replacement. Ex 4, AR 71235 (table comparing two routes for this part of the State). The added delay would also "impose significant costs" on Dakota Access, Op. 14, on top of tens of millions of dollars the company has already lost from delay to date. Ex. 17, ¶ 54 *et seq.* The district court correctly applied laches; this Court should too.

II. The Tribe Cannot Show Likely Success On The Merits.

Judge Boasberg correctly determined that the government's use of its land does not trigger a substantial burden on religious exercise under RFRA. Cheyenne River's claim also fails because federal approval of third-party conduct is not a "government" burden, and the Tribe is not a person entitled to sue under RFRA. Any one of these grounds renders the claim unlikely to succeed.

A. The District Court Correctly Held There Can Be No Substantial Burden On Religious Free Exercise Here.

RFRA was Congress's response to *Employment Division v. Smith*, 494 U.S. 872 (1990), which rejected a Free Exercise Clause claim because the challenged law was one of general application. RFRA "restore[d] the compelling interest test as set forth in" two First Amendment cases and "guarantee[d] its application in all cases where free exercise of religion is substantially burdened," 42 U.S.C. § 2000bb(b)(1), "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a).

Under RFRA, the Tribe needs to prove that (1) the Corps's action implicates religious exercise, (2) the exercise is grounded in a sincerely held religious belief, and (3) the action substantially burdens that exercise. Op. 16. Judge Boasberg correctly held that the Tribe failed at least the third requirement, because the Corps's pipeline approval does not "substantially burde[n]" Cheyenne River's religious exercise. Controlling Circuit precedent requires a plaintiff to prove that government actions "'pressure [him] to modify his behavior and to violate his beliefs' or require him to choose 'between criminal sanction and personally violating his own religious beliefs.'" Op. 22 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008)). One is not pressured to modify behavior and violate beliefs unless the government forces her, *e.g.*, "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her

religion in order to accept work, on the other hand." 553 F.3d at 678 (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

Judge Boasberg properly declined Cheyenne River's proposal to invent a different meaning of substantial burden, under which it would be "sufficient" to show "that the effect of the government's action is to prevent the Tribe's members from performing required religious sacraments at Lake Oahe." Op. 22. That argument "is directly at odds with Supreme Court precedent." *Id.* *Lyng* held that building a road across public land and allowing harvesting of trees did not substantially burden the religious exercise of Native Americans even though the road would "virtually destroy" their "ability to practice their religion" through "a wide variety of specific rituals." 485 U.S. at 451. The action did not "coerc[e]" them "into violating their religious beliefs" or "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens," *id.* at 449. Other courts have properly applied *Lyng* to reject claims like the one here. *See, e.g., Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc) (no RFRA violation in allowing ski resort operations on federal land even if those operations would "spiritually contaminate the entire mountain and devalue" the tribe's "religious exercises").

Cheyenne River claims *Lyng* was "overruled by" *Hobby Lobby* and *Holt*. Mot. 16. But the Tribe once again fails to address Judge Boasberg's explanation for

why *Lyng* remains good law. The "free exercise of religion" and a "substantial burden" on that free exercise are two different things. In *Lyng*, as here, the Court did not question the former when holding that the plaintiff had failed to establish the latter. Neither *Hobby Lobby* nor *Holt* changed settled law on substantial burden. In each, plaintiffs were legally compelled to take an action that violated their religious beliefs or face sanctions. The Tribe also ignores Congress's express statement that RFRA retains the test used in *Lyng* and other important pre-RFRA cases for establishing a substantial burden. *See* Op. 25 (citing legislative materials).

Finally, Judge Boasberg correctly rejected Cheyenne River's effort to "distinguish *Lyng* on the ground that" the Tribe "has an *ownership* interest in the land under Lake Oahe." Op. 35. The Tribe has no more than "rights of *access and use* to the land," which "*Lyng* directly spoke to" as legally insufficient. *Id.* "[W]ater rights reserved to Indians" also do not require "the federal government to refrain from permitting infrastructure projects on its own land when doing otherwise would render water reserved for the reservation's use *spiritually* impure." Op. 36.

There is no substantial burden.

B. The Government Is Not Responsible For An Alleged Burden.

Judge Boasberg did not need to decide whether the private actions of Dakota Access can even qualify as a "government" burden on religious exercise. Under controlling case law the Tribe fails to meet this requirement too. This Court held in

Village of Bensenville v. FAA, 457 F.3d 52 (D.C. Cir. 2006), that the FAA's approval of an airport's plan to relocate a cemetery was not a government-imposed burden because "[m]ere approval of or acquiescence in the initiatives of a private party" is "not sufficient." 457 F.3d at 63 (citation omitted). The principle on which *Bensenville* was decided applies here too.

In *Bensenville*, as here, plaintiffs complained that action approved by a federal agency substantially burdened religious exercise. There, as here, the agencies applied NEPA to a "major federal action." *Id.* at 61. The Court deemed the FAA's required approval of the airport's action (moving the cemetery) to be only a "peripheral role" by the government in the action complained of. *Id.* at 64-65. Under RFRA, the "cause of any burden on religious exercise" was the airport owner because it "submitted the plan," "fought for approval of the plan," and, "at the end of the day," was the entity that carried out the" plan. *Id.* at 65.

The FAA's involvement in *Bensenville* was greater than the Corps's role here. Unlike the FAA's "broad regulatory power to approve" airport layout plans, 457 F.3d at 66, oil pipelines "require no general approval from the federal government," *SRST*, 2016 WL 4734356 at 1. And the FAA's power stems from its need to find the project eligible for federal funding, 457 F.3d at 66, while the pipeline here is only privately funded.

Judge Boasberg noted one possible distinction that he did not need to resolve and is not dispositive: here, it is the government's "own land" rather than "the third party's land." Op. 17 (quoting *Bensenville*). Federal land or not, the Tribe is complaining of "conduct by third parties in which the federal government merely acquiesces." 457 F.3d at 57. The Corps has not "submitted the plan" to install the pipeline; it has not "fought for approval of the plan," and "at the end of the day," it will not build the pipeline, nor will it then put oil in the pipeline. *Cf.* 457 F.3d at 65. The Corps's approval to build less than 0.1% of a privately-owned, privately-funded pipeline deep beneath federal land is thus no more a burden "fairly attributable to" the government than was the government's permission for an airport layout that needed federal approval because it relied on federal funding. *See id.* at 57 (burden not "fairly attributable to" government, even though "federal government plays some role," if the government "merely acquiesces").

C. Cheyenne River Is Not A Person Eligible To Bring A Religious Freedom Restoration Act Claim.

RFRA protects a "person's" exercise of religion. 42 U.S.C. § 2000bb-1(a). Cheyenne River is something else: a semi-sovereign government entity. D.E. 11-12 ¶ 1 (identifying itself as a "federally-recognized Indian Tribe"); *Mich. v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014).

The definition of "person" in 1 U.S.C. § 1 applies because the Supreme Court in *Hobby Lobby* found "nothing in RFRA that suggests a congressional intent to

depart from the Dictionary Act definition." 134 S. Ct. at 2768. "Person," under that Act, includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Sovereign entities like the Tribe are not included. In fact, the Supreme Court applies a "longstanding interpretive presumption that 'person' does not include" sovereign entities; only an "affirmative showing of statutory intent to the contrary" can rebut that presumption. *See Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780-81 (2000); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989). This presumption applies equally where, as here, the statute gives the "person" rights rather than imposing liability. *See Virginia Office for Protection & Advocacy v. Reinhard*, 405 F.3d 185, 190 (4th Cir. 2005) (applying the presumption to hold that a state agency is not a "person" entitled to sue under 42 U.S.C. § 1983).

The Tribe has not even tried to overcome this presumption. Instead, it relied below on a pre-*Hobby Lobby*, out-of-circuit district court case that does not even mention the Dictionary Act or the presumption. D.E. 141 at 5-6. The presumption applies because the exercise of religion is fundamentally a personal right, and the nature, strength, and sincerity of beliefs vary even within the same religion, as Cheyenne River admits. Ex. 1 at 4 ("Lakota religion has no dogma or uniform theology" and "the nuances of belief may be disparate or mutable") & 5 ("there may be more

than one version of a religious teaching or belief" given the Lakota religion's oral tradition). The Tribe cannot bring a RFRA claim.

III. The Tribe Has Not Shown Irreparable Harm.

The district court correctly held that failure to show a likelihood of success on the merits alone defeats the Tribe's motion. *Ark. Dairy Co-op Ass'n, Inc. v. USDA*, 573 F.3d 815, 832 (D.C. Cir. 2009). Thus, it denied a stay despite finding "likely" irreparable harm to Tribe members' religious exercise. But the Tribe falls short here too; irreparable harm cannot be squared with the religious beliefs on which the Tribe relies. Lake Oahe is man-made with power lines and natural gas pipelines running above and below. Ex. 4, AR 71294. A major rail line carries large daily shipments of oil across Lake Oahe just north of the Cheyenne River reservation and 70 miles *closer* than the Dakota Access crossing; just upstream from the lake several oil pipelines cross the Missouri River; and a huge oil refinery sits on the River's edge. Ex. 18.[5]

[5] Judge Boasberg also noted it "is not clear" in the record how far back the Black Snake prophecy dates. This is an important unresolved issue because "[p]resumably" the prophecy must have originated only *after* Lake Oahe "was created nearly 60 years ago"; "otherwise, the presence of pipelines upstream of the lake, including one that crosses 7.5 miles to its north, would be hard to reconcile with the Tribe's belief that DAPL alone is the Black Snake." Op. 20.

If the waters used by Cheyenne River are pure and natural in this state, Ex. 12, ¶¶ 16 & 20, under the Tribe's own beliefs another pipeline deep beneath the lake's bed cannot create a new kind of injury, much less irreparably so.

IV. The Balance Of Equities And The Public Interest Also Favor Denial.

"The development of domestic energy resources is of paramount public interest"; this interest is harmed "if that development is delayed." *Natural Res. Def. Council v. Kempthorne*, 525 F. Supp. 2d 115, 127 (D.D.C. 2007). The President has concluded that "construction and operation" of *this* pipeline will "serve the national interest." Ex. 9. The Corps further recognizes "tremendous secondary and sustainable economic benefits to the United States" that the pipeline would bring. Ex. 4, AR 71305. Further delay would also disserve the public interest by rewarding gamesmanship.

Cheyenne River invokes "overwhelming support" from "around the globe" for its cause. Mot. 20. But apart from failing to prove that the majority of Americans oppose this pipeline, "the public interest"—just like 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).[6]

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[6] Not one of the various amici briefs supports the Tribe's *RFRA* claim. Mot. 20, n.9. Those briefs instead support claims Standing Rock is pursuing under NEPA and *other* statutes.

The balance of the equities also counts against an injunction. Dakota Access has undeniably suffered economic harm from previous delay, and additional delay will only add to that harm. Ex. 17, ¶ 54. An injunction would additionally deprive Dakota Access and the government of the benefits of their contract (the easement) and deny Dakota Access its property interest. The Tribe also 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, granting an injunction after Cheyenne River passed up numerous opportunities to raise its religious-exercise concerns would be the definition of inequitable.

CONCLUSION

The motion should be denied.

Dated: March 17, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the type-volume limitation of Fed. R. App. 27(d)(2)(A) because it contains 5109 words, excluding the portions exempted by Fed. R. App. P. 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: March 17, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2017, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the D.C. Circuit using the CM/ECF system. Service was accomplished by the CM/ECF system on the following counsel:

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