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Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers

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***Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, ___ F.Supp.3d ___, 2016 U.S. Dist. LEXIS 121997, 2016 WL 4734356 (D.D.C. September 9, 2016).**

Jody Lowenstein

The Standing Rock Sioux's effort to enjoin the U.S. Army Corps of Engineers' permitting of an oil pipeline was stifled by the United States District Court of the District of Columbia. In denying the preliminary injunction, the court held that the Tribe failed to show that the Corps violated the National Historic Preservation Act, and that the Tribe's belated effort to litigate was futile after failing to participate in the consultation process.

I. INTRODUCTION

The court in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* reviewed the Standing Rock Sioux Tribe's ("Tribe") Motion for Preliminary Injunction.[1] The Tribe's motion sought to enjoin the U.S. Army Corps of Engineers' ("Corps") permitting of an oil pipeline's construction across a section of the Missouri River.[2] The Tribe claimed that the Corps violated the National Historic Preservation Act ("NHPA"), and that this violation would inevitably result in irreparable harm to culturally significant sites unless the agency was restrained from permitting the pipeline.[3] The United States District Court for the District of Columbia denied the motion, concluding that the Corps fulfilled its obligations under the NHPA, and that the alleged harms would not be avoided by granting the injunction.[4]

II. LEGAL BACKGROUND

a. The National Historic Preservation Act

The NHPA was enacted in order to productively harmonize modern society and historic properties.[5] Section 106 of the NHPA requires federal agencies "to consider the effect[s]" of their "'undertakings'" on historically significant property, but does not require an agency to "take any particular measures" to mitigate possible negative effects.[6]

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[1] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, ___ F.Supp.3d ___, 2016 U.S. Dist. LEXIS 121997, 2016 WL 4734356 (D.D.C. September 9, 2016).

[2] *Id.*, at *1.

[3] *Id.*

[4] *Id.*

[5] *Id.*, at *2 (citing 54 U.S.C. § 300101(1) (2016)).

[6] *Id.*, at *2 (quoting 54 U.S.C. § 300101(1)); *Id*, at *2 (citing CTIA-Wireless Ass'n v. FCC, 466 F.3d 105, 106-07 (D.C.Cir. 2006)).

In order to satisfy Section 106, an agency must make a threshold determination whether an action constitutes an undertaking, and if so, whether the action "has the potential to [affect] historic properties."[7] An agency satisfies Section 106 if either of these inquiries are resolved in the negative.[8] However, if an agency concludes that an action is an undertaking with the potential to impact historic properties, it must then conduct a series of consultations before permitting the action.[9]

The consultation process begins with an agency inviting the participation of the State Historic Preservation Officer ("SHPO") and other stakeholders.[10] The agency then must determine "the area of potential effects," gather information from consulting parties regarding historic properties within the area, and evaluate the identified properties' historic significance.[11] The eligibility of property to be listed as historically significant depends solely on an agreement between an agency and the SHPO, regardless of any party's "special expertise."[12] Section 106 is satisfied if no historic properties are present, or the undertaking would not affect any existing properties.[13] If no such findings are made, an agency must then assess the undertaking's possible adverse effects.[14] Any adverse effects may be resolved by imposing "modifications or conditions" on the action, or by agreement between the agency and consulting parties.[15] However, if these final consultations become "unproductive," an agency may terminate the process and "permit the undertaking despite [any] effects."[16]

b. The Clean Water Act

Under the Clean Water Act ("CWA"), any discharge of "dredged or fill material into navigable waters" must be specifically or generally permitted by the Corps.[17] General permits "preauthorize" certain activities "within a defined area."[18] A nationwide general permit will impose General Conditions ("GCs"), which may require a generally permitted action to complete a pre-construction notice and verification

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7 *Id.* (citing 36 C.F.R. § 800.3(a)(2016).

8 *Id.* (citing 36 C.F.R. § 800.3(a)(1)).

9 *Id.* (citing 36 C.F.R. § 800.16(f)).

10 *Id.*, at *3 (citing 36 C.F.R. § 800.3(c)); Among those entitled to participate are Indian tribes "'attach[ing] religious and cultural significance to historic properties' that may be affected by the 'undertaking.'" *Id.*, at *2 (quoting 36 C.F.R. § 800.2(a)(4), (c)(2)(ii)).

11 *Id.*, at *2-3 (citing 36 C.F.R. §§ 800.3(f), 800.4(a), (c)).

12 *Id.*, at *2 (citing 36 C.F.R. § 800.4(c)(2)).

13 *Id.* (citing 36 C.F.R. § 800.4(d)(1)).

14 *Id.*, at *4 (citing 36 C.F.R. § 800.5(a)).

15 *Id.* (citing 36 C.F.R. § 800.5(b)).

16 *Id.* (citing 36 C.F.R. § 800.7(a)).

17 *Id.* (citing 33 U.S.C. §§ 1311(a), 1342(a).

18 *Id.* (citing 33 U.S.C. § 1344(e)(1)).

("PCN") previous to permitting.[19] The Corps must satisfy all NHPA requirements before issuing a general permit or PCN authorization.[20]

III. FACTUAL AND PROCEDURAL BACKGROUND

Within the Tribe's historical territory, spanning the plains of North and South Dakota, lies Lake Oahe, a man-made reservoir located in an area of religious and cultural significance to the Tribe.[21] The lake is also a proposed crossing site for the Dakota Access Pipeline ("DAPL"), a 1,172-mile crude-oil pipeline currently under construction.[22]

In the summer of 2014, after Dakota Access planned DAPL's route based on "'comprehensive archaeological survey[ing],'" the Corps tried over ten different occasions to meet with the Tribe's Historic Preservation Officer ("THPO").[23] After the Corps secured consultation participation from other tribes and extended the consultation period, the Tribe remained unresponsive.[24]

In November, Dakota Access requested a permit from the Corps for "soil-bore testing at" Lake Oahe, which triggered Section 106.[25] After implementing extensive cultural surveys throughout and beyond the affected area and conducting consultations with responsive tribes, the Corps determined that no historic properties would be affected by the testing, notified the affected parties of its determination, and granted Dakota Access the permit.[26]

It was not until April, after months of the Corps requesting notification from the Tribe of any DAPL-related "concerns regarding cultural resources,", that the Tribe responded.[27] The THPO expressed concern about the soil-bore testing and claimed that the Tribe was never contacted by the Corps.[28]

In August, the Tribe finally responded to the Corps' invitation to consult on the Lake Oahe Crossing.[29] The Tribal Council Chairman and the THPO voiced frustration in the Tribe's exclusion from the consultation process.[30] Yet, through September and October, the Tribe

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19 *Id.* (citing 33 C.F.R. §§ 330.1(e)(2)-(3), 330.6(a)(3)(i)).

20 *Id.*, at *6.

21 *Id.*

22 *Id.*

23 *Id.*, at *7; In North Dakota, 149 potentially eligible sites were discovered by the cultural surveys, and Dakota Access rerouted to avoid 140 of them. *Id.* In the remaining nine areas, mitigation efforts were put in place. *Id.*

24 *Id.*

25 *Id.*

26 *Id.*, at *7-9. The "Corps granted the PCN authorization" for the soil-bore testing under a nationwide general permit, NWP 12, which authorizes the construction of pipelines that pose limited effects. *Id.*, at *5, 9.

27 *Id.*, at *9-10.

28 *Id.*, at *10.

29 *Id.*, at *11.

30 *Id.*

remained unresponsive to more than "ten different attempts" from the Corps "to speak about the project."[31] Furthermore, in December, five tribes participated in a meeting to discuss the potential impacts of DAPL with the Corps.[32] Although twice invited, the Tribe failed to attend.[33]

In January 2016, after the Corps promulgated its draft Environmental Assessment ("EA") for DAPL, the Tribe "provided timely and extensive comments" asserting that the Tribe was not consulted, the Section 106 process was not satisfied, and the affected area was defined too narrowly.[34] Subsequently, the Corps and the Tribe conducted extensive consultations over several months that resulted in several pipeline modifications.[35] Nevertheless, the Tribe continued to demand that the Corps regulate the entire pipeline despite the agency's lack of jurisdictional authority.[36]

In April, the Corps sent all consulting parties a Determination of Effect regarding the crossing at Lake Oahe.[37] Although the SHPO concurred in the Corps opinion, the Tribe objected.[38] Rather than dismiss the objection, the Corps continued its dialogue with the Tribe.[39]

In July, the Corps issued a "'no significant impact'" finding and "verified all 204 PCN locations."[40] In so doing, the Corps required Dakota Access to allow tribal monitoring at all sites.[41] The Tribe was then notified of "the intent to begin construction."[42]

Two days after the issuance of the PCN authorizations, the Tribe filed suit against the Corps, asserting among other things that the Corps violated the NHPA.[43] The Tribe also filed a "Motion for Preliminary Injunction to mandate a withdrawal of [DAPL] permitting."[44] In response, Dakota Access ceased all construction in the disputed area.[45]

IV. ANALYSIS

The court reviewed the Tribe's Motion for Preliminary Injunction under the test established in *Winter v. Natural Resource Defense Advisory Council*, which grants a court discretion to deny a motion if a plaintiff fails "to show either irreparable injury or a

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31 *Id.*, at *11-12.
32 *Id.*
33 *Id.*
34 *Id.*, at *12-13.
35 *Id.*, at *13.
36 *Id.*, at *14.
37 *Id.*
38 *Id.*
39 *Id.*, at *14-15.
40 *Id.*, at *15.
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*

likelihood of success on the merits."[46] Accordingly, the court limited its inquiry to the merits of the case and the asserted injury.[47]

A. Likelihood of Success on the Merits

The Tribe offered four arguments that it was likely to succeed on the merits.[48] First, the Tribe asserted that the Corps failed to conduct Section 106 consultations before issuing NWP 12.[49] Relatedly, the Tribe also argued that a Section 106 process was required for all non-PCN DAPL crossings permitted by NWP 12.[50] Third, the Tribe maintained that the Corps' Section 106 determinations were too narrowly applied.[51] Lastly, the Tribe contended that the Corps' consultations were inadequate.[52]

The court considered the Tribe's first contention, that "the Corps did not engage in *any* NHPA consultations prior to promulgating NWP 12," to be a clear falsity.[53] From November 2009 to March 2011, the Corps sought participation from the Tribe on six occasions regarding NWP 12.[54] The court further noted the Tribe's concession that it did not participate in NWP 12's notice-and-comment.[55] The court labeled the Tribe's effort to invalidate NWP 12 as "launching a belated facial attack" that was unlikely to succeed.[56] In light of the multiple unavailing attempts to consult with the Tribe, the court held that the Corps "made a reasonable effort" to comply with the NHPA "prior to promulgating NWP 12," and its efforts to speak with concerned parties "[were] sufficient" under Section 106.[57]

The Tribe also argued that permitting under NWP 12 violates the Administrative Procedure Act's ("APA") arbitrary-and-capricious standard by failing to require "site-specific Section 106 determination[s]" previous to permitting non-PCN crossings.[58] The Tribe further asserted that GC 20 of NWP 12 improperly delegated the Corps' authority to assess potential effects at non-PCN sites to the permittee.[59] The court considered the Tribe's "vague assertions" unpersuasive, finding that the

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46 *Id.*, at *17 (citing Winter v. Natural Res. Def. Advisory Council, 555 U.S. 7 (2008)); *Id.*, at *17 (citing Dodd v. Fleming, 223 F.Supp.2d 15, 20 (D.D.C. 2002)).

47 *Id.*

48 *Id.*, at *18.

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*, at *18-19.

55 *Id.*, at *19.

56 *Id.*

57 *Id.*

58 *Id.*, at *20.

59 *Id.*

Corps conducted extensive assessments of the pipeline's route to identify any concerns that would necessitate a PCN verification or trigger GC 20.[60] The court held that the Tribe never pointed "to a specific non-PCN activity . . . where there [was] evidence . . . indicating that cultural resources would be damaged."[61]

The court next addressed the Tribe's claim that the Corps' Section 106 determinations at PCN sites were deficient because the agency was obligated to consider "the entire pipeline" as the indirect effect of permitting DAPL's crossing.[62] The court asserted that the Corps was not "required to consider all the effects of the entire pipeline to be the indirectly or directly foreseeable effects of the narrower permitted [crossing]," and therefore the Corps' reasonably interpreted Section 106.[63]

The court made short shrift of the Tribe's last argument "that the Corps failed to offer it a reasonable opportunity to participate in the Section 106 process."[64] In dismissing this claim, the court again pointed to the Tribe's refusal "to engage in consultations" after "dozens of attempts" by the Corps.[65] In light of the extensive record, the court held that the Corps not only satisfied the NHPA's requirements in making a good faith effort to consult with the Tribe, but actually exceeded these obligations.[66]

In summary, the court concluded that the Tribe had "not shown that it [was] likely to succeed on the merits of its NHPA claim."[67]

B. Irreparable Harm

In reviewing the Tribe's claim that DAPL's construction would likely cause irreparable damage to "sites of great cultural or historical significance," the court clarified that "regardless of how high the stakes or how worthy the cause," the Tribe was required to demonstrate that it was probable that the potential injury asserted would "occur in the absence of the preliminary injunction."[68] This, the court concluded, the Tribe failed to do.[69]

Basing its reasoning on numerous considerations, the court first maintained that DAPL's construction on private land would assuredly

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60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*, at *22.

65 *Id.*

66 *Id.*; The court highlighted that the Corps: 1) was not required by the NHPA to include the Tribe in any cultural surveys; and 2) voluntarily required modification of DAPL's route in response to tribal concerns regarding the location of burial sites. *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

continue undeterred regardless of any enjoinment of the Corps' permitting.[70] Consequently, the court found that "any such harms are destined to ensue whether or not the Court grant[ed] the injunction the Tribe desire[d]."[71]

The court also found that the Tribe failed to show any likely injury that would occur from the permitting of both non-PCN and PCN sites.[72] The court highlighted that the Tribe neglected to point "to any resources that may be affected by" permitting the remaining 11 PCN sites, and that it could not "avoid its responsibility to identify a likely injury" by claiming the Corps' alleged failure to consult with the Tribe prevented it from doing so.[73] Likewise, the court found it unlikely that construction would damage any culturally significant sites due to the PCN authorization restrictions imposed by the Corps, including tribal monitoring, archaeological oversight, and mandatory cessation of construction upon an "unanticipated discovery."[74] Even at the Lake Oahe site, the court reasoned, the only discovered resources were "located away from" DAPL-related activity, and the proposed drilling method "would not cause structural impacts" at these sites.[75]

As a result of the aforementioned reasoning, the court held that the Tribe failed "to demonstrate that the [c]ourt could prevent damage to important cultural resources by enjoining the Corps' DAPL-related permitting."[76]

V. CONCLUSION

The court in *Standing Rock Sioux* confronted a tribe's effort to cure its administrative failures through ineffective litigation. Ultimately, the court's denial of the preliminary injunction was a consequence of the Tribe's irresponsiveness to the Corps' frequent efforts to include it in the agency's consultation process. The ruling exemplifies the inadequacy of pursuing litigation in lieu of adequate administrative procedures in order to protect important tribal interests.

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70 *Id.*
71 *Id.*, at *23-24.
72 *Id.*, at *24.
73 *Id.*
74 *Id.*
75 *Id.*, at *24-26.
76 *Id.*, at *26.