NO. 16-5259

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE,
Plaintiff-Appellant,

and

CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff-Appellant,

v.

U.S. ARMY CORPS OF ENGINEERS,
Defendant-Appellee,

and

DAKOTA ACCESS LLP,
Intervenor-Defendant-Appellee.

EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

PATTI A. GOLDMAN (DCBA #398565)
JAN E. HASSELMAN (WSBA #29107)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Telephone: (206) 343-7340
Fax: (206) 343-1526
pgoldman@earthjustice.org
jhasselman@earthjustice.org
Attorneys for Appellant Standing Rock Sioux Tribe

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INTRODUCTION AND RELIEF SOUGHT

Pursuant to Fed. R. App. P. 8(a)(2)(A)(ii) and D.C. Cir. R. 8, Plaintiff-Appellant Standing Rock Sioux Tribe ("Tribe") seeks an emergency injunction pending appeal of the district court's order denying the Tribe's motion for a preliminary injunction (Attachment 1; hereinafter, "Opinion"). The Tribe asks this Court to enjoin construction of the Dakota Access Pipeline (the "pipeline") for 20 miles on both sides of the Missouri River at Lake Oahe. An injunction is necessary to prevent additional destruction of sacred sites, as occurred over Labor Day weekend when a remarkable cultural landscape of graves and stone features was bulldozed within hours of evidence of these sites being filed with the district court. The Tribe requests an injunction by the end of Friday, September 16, 2016, as an agreement reached by the parties limiting construction near Lake Oahe expires at that time.[1]

This motion meets this Circuit's standards for an injunction pending appeal. The Tribe sought a preliminary injunction because defendant U.S. Army Corps of Engineers ("Corps") authorized the pipeline in violation of the National Historic Protection Act ("NHPA"). This lawsuit and the appeal raise important legal

[1] As required by Fed. R. App. P. 8(a)(1)(c), the Tribes moved for an injunction pending appeal in the district court on September 9, 2016. The district court granted the motion only as to a smaller area, and only through a status conference on September 16, 2016. The district court denied the Tribes' request for the full 20-mile area on either side pending resolution of the appeal.

questions under the NHPA that have been subject to high-level interagency disputes for years. Without an injunction pending appeal, construction could render moot any relief that this Court could grant. The majority of the pipeline's right-of-way already has been cleared and graded. The Tribe seeks an injunction only on a small amount of right-of-way that is of utmost importance to the Tribe. The Tribe seeks to ensure that the pipeline will not complete construction in this narrow area pending resolution of this appeal.[2]

RELIEF REQUESTED

The Tribe's request for relief is narrow. It seeks an injunction prohibiting construction for 20 miles on either side of Lake Oahe, a place of tremendous religious and cultural significance to the Tribe, and a place that was part of the Tribe's treaty land but later taken away by unilateral acts of Congress. It is located just north of the reservation at the confluence of the Cannon Ball and Missouri Rivers, where the force of the rivers coming together formed perfectly round stones considered sacred by the Tribe. Attachment 4, ¶¶ 11-12. Despite loss of extensive land when the Corps dammed the Missouri in the 1950s, it remains a cultural landscape rich in sacred sites and living culture, including the Sundance ceremony, one of the Tribe's most sacred rituals, performed on the banks of the river. *Id*., ¶12; Attachment 3, ¶ 12. It is also the source of the Tribe's drinking and

[2] Undersigned counsel has conferred via telephone with counsel for other parties. D.C. Cir. R. 8(a)(a)(2). Defendant and Defendant-intervenor oppose the motion.

irrigation water. *Id*. It is why the Tribe and its supporters at Lake Oahe say *Mni Wiconi*—water is life. *See also* Opinion at 56 ("Lake Oahe is of undeniable importance to the Tribe, and the general area is demonstrably home to important cultural resources."). It is this sacred area that the Tribe asks the Court to protect during the pendency of this appeal.

Shortly after the district court issued its ruling, three federal agencies announced a suspension on additional permitting for the pipeline at Lake Oahe, and asked for a pause on construction within 20 miles of the crossing. Attachment 2. Because Dakota Access has not yet signaled its position on this request, this motion seeks to formalize this voluntary pause pending resolution of this appeal.

STANDARD OF REVIEW

A party seeking an injunction pending appeal must show that it is likely to prevail on the merits of its appeal; it must show that it will be irreparably harmed in the absence of an injunction; and the Court must assess the impact of an injunction on other parties, as well as the public interest. *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). A moving party need not show a "mathematical probability" of success on the merits, and relief may be granted as long the movant has made a "substantial case" on the merits. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977).

ARGUMENT

I. THE TRIBE IS LIKELY TO PREVAIL ON THE MERITS

This appeal raises two important merits issues. First, the vast majority of the pipeline's impacts on federally protected waters went forward under a Clean Water Act ("CWA") nationwide permit issued in 2012, which pre-approved construction without any consultation on the pipeline's impacts on the Tribe's sacred sites. That permit authorized Dakota Access to make a unilateral determination of impacts, and hence the Tribe never had an opportunity to participate in the NHPA process except in a handful of areas. Second, in those few places where the Corps claims to have conducted NHPA consultation, it focused only on the narrow area of the Corps' direct CWA jurisdiction, ignoring the pipeline route outside these jurisdictional areas. In approving this approach, the district court failed to defer to binding regulations issued by the Advisory Council on Historic Preservation ("Council"), the agency charged by Congress with interpreting the NHPA. While the district court focused in detail on the minutiae of contacts between the Tribe and the Corps, those discussions were fundamentally impaired by the Corps' rigid approach to the scope of its review. The court also created a false choice under which consultation must either stop at the water's edge or cover the entire pipeline. Even if NHPA consultation need not span the whole pipeline under a "but for" causation theory, the Corps must look to uplands impacted by its authorizations if

the Council's mandate to consider "indirect effects" means anything.

A. Statutory Overview

This case grows out of the confluence of the NHPA and CWA. Section 106 of the NHPA requires that prior to issuance of any federal funding, permit, or license, agencies must take into consideration the effects of the underlying "undertaking" on historic properties. 54 U.S.C. § 306108; 36 C.F.R. §§ 800.1, § 800.2(c)(2). Consultation must occur regarding sites with "religious and cultural significance" to Indian Tribes, even if they occur on private land. *Id*. § 800.2(c)(2)(ii)(D). Consultation must consider impacts on the "area of potential effects," defined as the area "within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties." 36 C.F.R. § 800.16(d). The Council's regulations prescribe steps for identifying, evaluating, and determining the undertaking's effects on potentially affected sites, and at every one of these steps, the agency *must* consult with Indian tribes. *Id*. § 800.3(f); § 800.4(a); § 800.5(c)(2); § 800.6; *id*. § 800.2(c)(ii)(D).

The NHPA consultation process applies to actions taken by the Corps authorizing discharges into waters of the United States under the CWA, 33 U.S.C. § 1344(a)–(e), or permitting modifications in navigable waters under the Rivers and Harbors Act, 33 U.S.C. §§ 403, 408. The Corps can issue "individual" permits where the impacts are evaluated case-by-case, or, alternatively, "general" permits

for categories of activities that "will cause only minimal adverse environmental effects" on the environment. 33 U.S.C. § 1344(a), (e). The Corps issued the current set of general nationwide permits in 2012, which pre-authorize various categories of discharges into regulated waters without any additional approval from the Corps. 33 C.F.R. § 330.1(e)(1). In some instances, discharges cannot occur until the proponent of the action files a "pre-construction notification" and receives "verification" from the Corps that the proposed action is consistent with the terms of the nationwide permit. *Id*. § 330.6(a). Under Nationwide 12, which authorizes utility lines (including oil pipelines), verification from the Corps is required only if various criteria are met. 77 Fed. Reg. 10184 (Feb. 21, 2012) at 10272. The permit is also subject to General Condition 20, which requires the proponent to submit a notification to the Corps "if the authorized activity may have the potential to cause effects to any historic priorities." *Id*. at 10284. If a notification is provided, the Corps acknowledges its duty to comply with § 106 prior to verification. 33 C.F.R. § 330.5(g)(2). If no notification is provided, no § 106 process occurs.

B. The Tribe is Likely to Prevail on Its Claim that Use of Nationwide 12 for this Pipeline Violates the NHPA

Issuance of an individual or general § 404 permit is an "undertaking" as defined in the NHPA. 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y). Federal agencies must consult under § 106 consultation to determine the effect of

undertakings on historic properties. 54 U.S.C. § 306108 (federal agencies "*shall* take into account" the effect of actions on historic properties); 36 C.F.R. § 800.1(c). Under ACHP regulations, "it is the statutory obligation *of the Federal agency* to fulfill the requirements of section 106 and to *ensure* that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance…." 36 C.F.R. § 800.2(a) (emphasis added).

At the time the Corps issued Nationwide 12, it did not consider—nor could it consider—the impacts of any specific project, like the pipeline, on sacred sites of importance to the Tribe. Opinion at 41. The permit nonetheless delegates to Dakota Access and any other private project proponent the Corps' statutory duty to evaluate the project's potential impact to such sites. Under Nationwide 12, if the proponent determines for itself that its project will not affect historic sites, the Corps is never even notified and plays no role. In such circumstances, the Corps does not give the Council or impacted Tribes any opportunity to comment on the potential impacts to historic sites. In adopting this approach, the Corps unlawfully abdicated its duty to consider the impacts of authorized undertakings on historic sites and its obligation to bring Tribes into this evaluation, as NHPA requires.

The Council made exactly that complaint when commenting on the Corps' 2011 nationwide permit proposal (Attachment 14):

> [The Corps] appears to grant permittees the authority to make 'effect determinations' and determinations of eligibility, based on the permittees' belief that the permitted activity may have an effect on historic properties. … [Permit applicants] cannot be responsible for making determinations and findings, which remain the legal responsibility of the agency.

When the Corps proposed to reissue Nationwide 12 and General Condition 20 largely unchanged, the Council said it again. Attachment 13 at 1-2 ("[R]eliance on GC 20, 21, and 32 is not a substitute for compliance with Section 106.").

As the Council recognized, the Corps' system of outsourcing this threshold determination of impact is completely inconsistent with the structure of § 106, which requires it to be made *by* the agency *in consultation with* Tribes. The Council's regulations direct that agencies "shall ensure" that the § 106 process provides Tribes a reasonable opportunity to participate in each of the § 106 steps of identifying, evaluating, and determining effects. 36 C.F.R. § 800.2(c)(2)(ii)(A). It is the "responsibility *of the agency official* to make a reasonable and good faith effort to identify Indian Tribes" to be consulted in the § 106 process. *Id*. § 800.2(c)(4) (emphasis added). None of these requirements is satisfied where the Corps pre-authorizes action that may destroy historic sites, and leaves it to the proponent (who has a vested interested in moving forward with the project) to determine for itself the project's impacts on historic properties.

The district court recognized that the Tribe and Council "make a good argument" that agency action would be unlawful where it "relies completely on the

unilateral determination of a permittee that there is no potential cultural resource that will be injured…" Opinion at 44. However, the court sidestepped the legal question by relying on a short, half-page memo by a Corps staffer, obviously prepared in anticipation of this litigation, that he had performed a "quick review" of the private cultural surveys and did not have any "concerns" about jurisdictional crossings that weren't already subject to verification. Attachment 15. The district court ignored the fact that the pipeline's surveys are silent about the proximity of identified sites to regulated waters. More importantly, whatever the content of this cursory review, the Corps never conducted any "consultation" with the Tribe about the areas outside the 204 verification sites, when the NHPA gives the Tribes that right and when it is the Tribes who are best positioned to determine what is culturally significant to them.

The Corps' superficial, after-the-fact review of private surveys, without consultation with the Tribe, does not meet the requirements of § 106. Although the record showed that there were thousands of places where the pipeline crossed waters along its 1,168 mile length, General Condition 20 triggered not a single notification. Outside the 204 verification sites, there was no consultation process at all. The Tribe is likely to prevail on its claim that the Corps illegally abdicated its § 106 responsibilities by letting Dakota Access unilaterally evaluate the impact on historic sites without standards, oversight, or accountability.

C. The Tribe is Likely to Prevail on Its Claim that the Corps Violated § 106 by Failing to Consider Indirect Effects

While no § 106 consultation at all occurred for the vast majority of the pipeline, the Corps verified nationwide permit compliance and claims to have complied with § 106 at 204 places, including the controversial crossing at Lake Oahe (which also requires a Rivers and Harbors Act § 408 permit and a real estate easement). However, that consultation was fundamentally flawed, triggering a major interagency dispute between the Corps and the Council. Specifically, the Corps considered only direct impacts to historic properties from activities actually impacting jurisdictional waters, omitting anything beyond the "waters' edge." Opinion at 52. The district court decision upholding the Corps' review fails to give appropriate deference to the Council and unfairly relies on a false choice between *only* direct impacts, on one hand, and the "entire pipeline" on the other.

The NHPA makes it clear that "undertaking" includes projects "in *whole or in part* under the *direct or indirect* jurisdiction of a Federal agency." 54 U.S.C. § 300320 (emphasis added); 36 C.F.R. § 800.16(y). Similarly, the area of potential effects is defined to include the area "within which an undertaking may *directly or indirectly* cause alterations in the character or use of historic properties…." 36 C.F.R. § 800.16(d) (emphasis added). Plainly, Congress and the Council envisioned that § 106 would apply not just to the components of private projects directly giving rise to federal permitting jurisdiction, but also to indirect impacts,

including areas outside the direct jurisdiction that are affected by permits.

The Corps did not adhere to these definitions. For example, the area of potential effects for the Lake Oahe crossing includes the bore holes, stringing and staging areas, and access routes, but *none* of the pipeline route. Attachment 11 at 2. The bore hole is simply a hole in the ground where a tunnel for the pipeline will go, and, within this confined area, the Corps did not find any eligible sites. *Id*. However, there were sites directly in the pipeline route just outside of the bore hole site, sites that the Tribe was never given the opportunity to evaluate despite many requests. *Id*. at Figures 3 and 4. The Corps applied this same narrow approach to each of the 204 separate waterbody crossings subject to verification.

The district court deferred to the Corps' expertise in determining the scope of review, but, in doing so, it deferred to the wrong agency. The Council, not the Corps, is the expert on interpretation of the NHPA. The Council is tasked with adopting binding NHPA regulations, and its regulations mandate consideration of indirect effects on historic sites. The Corps can adopt alternative procedures, but only if they are approved by the Council. 36 C.F.R. § 800.14. Not only has the Council never approved the Corps' approach, but it has repeatedly criticized the Corps for ignoring indirect effects, and insisted that the Corps consider areas of the pipeline route in uplands outside of Corps jurisdiction in the § 106 process as indirect effects of its exercise of its authority. Attachment 9 at 1; Attachment 10 at

1. The inadequate scope of the Corps' review was at the heart of the ACHP's decision to formally object to the Corps' § 106 conclusions. Attachment 12.

This Circuit requires deference to the Council's interpretations of the NHPA. *McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1287-88 (D.C. Cir. 1992) (Council regulations "commands substantial judicial deference"); *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 117 (D.C. Cir. 2006) ("Congress has entrusted one agency with interpreting and administering section 106 of the NHPA: the Council."). The Court should defer to the Council on the legal question of the scope of §106, not the Corps.

Moreover, the issue is not, as the district court portrayed, a stark choice between analyzing either the "entire pipeline" or only impacts in the jurisdictional areas. The NHPA direction to consider "indirect effects" of federal permits has to mean something. Here, it means impacts beyond the water's edge. The graves and sacred sites identified near Lake Oahe (and subsequently bulldozed by Dakota Access) are a perfect illustration of the problem. While they were in uplands, they are less than two miles away from jurisdictional areas. Attachment 5 at ¶ 3. Without Corps authorization, there would be no pipeline there. It is undisputed that the Corps viewed this area to be outside the scope of its § 106 duty and the Tribe was never given an opportunity to survey this area. Attachment 11. Given the importance of this area to the Tribe, and the evidence in this case that discovery

of historic sites has led to rerouting segments of the pipeline, a § 106 consultation that looked at these areas was required by the NHPA.[3]

Courts have routinely held that the Corps' obligations under an analogous statute, the National Environmental Policy Act ("NEPA"), extend outside the direct area of CWA jurisdiction. In *Save Our Sonoran v. Flowers*, 408 F.3d 1113 (9th Cir. 2005), the Ninth Circuit held that the Corps must perform environmental review of an entire private development project, even though only 5% of the total area was subject to CWA jurisdiction. *Accord White Tanks Concerned Citizens v. Strock*, 563 F.3d 1033, 1039-41 (9th Cir. 2009) (NEPA review required of entire project even though CWA jurisdiction extended to a "very small number of acres in a very large development"). The courts in both cases gave significant weight to comments from other regulatory agencies, like the Environmental Protection Agency, that sought a more expansive review. Here, too, the Council disagreed sharply with the Corps' approach to limiting § 106 review to the immediate areas of its jurisdiction, and sought a more expansive review.[4]

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[3] The district court concluded that the law does not require Tribal participation in cultural surveys. But the issue here is not whether all Tribes have an absolute right in all places at all times. The issue here is whether a decision to deny the Tribe the right to participate in *this particular area* can be upheld under an arbitrary and capricious standard in light of its importance and the Tribe's repeated requests.

[4] *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015) is not to the contrary. There, this Circuit rejected Sierra Club's claim seeking a "pipeline-wide" NEPA analysis on Nationwide 12 verifications because the Corps

While the district court scrutinized the communications between the Corps and the Tribe, the Corps limited what was on the table for consultation to jurisdictional waters only. The Tribe, supported by the Council, expressed deeply felt objections to such a truncated consultation, and refused to participate in what it felt were unlawfully narrow surveys. While there were many communications between the Tribe and Corps, they mostly reflected this dispute. Thus, while the district court believed the Corps made sufficient efforts to engage in consultation with the Tribe, it glosses over the Tribe's reluctance to participate in such a flawed process. If the Tribe and the Council are right on the law, the consultation the Corps offered fell far short, even if the Tribe had fully participated in it.

II. THE TRIBE WILL BE IRREPARABLY HARMED IN THE ABSENCE OF AN INJUNCTION PENDING APPEAL

Continued construction in the 20 miles around Lake Oahe is likely to irreparably harm the Tribe because this is a landscape filled with irreplaceable sacred sites, graves, and cultural features. Indeed, the precise harm that the Tribe has long feared came to pass on September 3, 2016, when Dakota Access bulldozers destroyed graves, prayer sites, and stone features the day after the Tribe filed evidence describing them to the district court. The site included an "*Iyokaptan Tanka*," a stone representation of the Big Dipper constellation, where

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had prepared an environmental review on the nationwide permits when they were issued. *Id*. at 48. Here, in contrast, the Corps conducted no full § 106 analysis on the nationwide permits, but left § 106 for site-specific determinations.

only the highest level of Tribal chiefs could pray and fast, described as "one of the most significant archaeological finds in North Dakota in many years." Attachment 6 at ¶ 10. It also included "*Mato Wapiya*," a stone effigy of a bear, described by Mr. Mentz as only the second location of this type that he had seen in 35 years of study, as well as 27 graves. *Id*. at ¶ 12. Mr. Mentz's opinion that the sites were deserving of protection were supported by a historic preservation expert who served as a high-level Council official for many years. Attachment 7, ¶ 12. Tribal experts found this site in a small area where a private landowner provided access: it has never had the opportunity to formally survey other portions of the route.

No one disputes that the loss of sacred sites and destruction of the cultural heritage of an Indian Tribe is an irreparable injury. Attachment 3, ¶ 14-15; Attachment 4, ¶22, 40-42. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Department of the Interior*, 755 F. Supp. 2d 1104, 1108-9 (S.D. Cal. 2010). Opinion at 45 (without Corps' involvement, court "might well find unreasonable the Corps' determination that construction at the site would have no potential to cause negative effects" to historic and cultural resources at Lake Oahe). Rather, the district court held that the Tribe provided insufficient evidence that such harm is likely. But the Corps' own April 22 "no effect" determination lists 41 archaeological sites within a one-mile radius of the Lake Oahe bore hole sites, most listed as "unevaluated" or "ineligible" for listing—designations made without

the participation of the Tribe. Attachment 11 at 4-5. Some sites lie directly in the pipeline's construction path, but since they are outside the immediate area of the Corps' jurisdiction, they are not addressed. *See id*., Figure 3; Figure 4. That is why it is critical to bring in Tribal cultural experts, like Mr. Mentz, and why the scope of the Corps' responsibilities is so important here. Several tribal experts offered opinions that additional harm was likely or even certain, opinions that were later borne out by the destruction of the recently discovered sites. Attachments 3-5.[5]

The district court also believed that the Tribe could not be irreparably harmed because the court lacked authority to enjoin Dakota Access. That is simply not the law, as courts have "wide discretion" to fashion appropriate injunctive relief unless limited by statute. *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973); *Schneider v. Dumbarton Developers*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) ("When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party."); *District of Columbia v. Merit Systems Prot. Bd.*, 762 F.2d 129, 132 (D.C. Cir. 1985) (court can enjoin intervenor even if

[5] The district court also gave weight to the fact that an older pipeline in some places follows a similar route as Dakota Access. But the only clear evidence in the record about the location of the pipeline was that it could be as much as 300 feet away. Opinion at 56. As Mr. Mentz found, there were many important graves and sacred sites that had not been destroyed by the prior pipeline construction. Attachment 6.

original defendant no longer in suit).

Moreover, the district court's logic is circular, as it is dependent on the erroneous conclusion that § 106 is limited to jurisdictional waters. If the district court got the law wrong, and the Corps must consider indirect effects outside of its jurisdiction, then the Corps has authority to deny or condition a permit in order to protect such sites. Indeed, the Corps' regulations give it broad discretion to require an applicant to proceed under an individual permit, or add conditions to ensure protection of the "public interest." 33 C.F.R. § 330.6. Such discretionary authority is available specifically where there are impacts to historic properties. *Id*. § 330.4(g)(2)(ii). The district court implicitly recognized that such authority existed when it pointed to Corps "stop work" requirements in the event of unanticipated discoveries. Opinion at 56. If the Corps has authority to deny or condition a permit based on impacts to historic properties outside the immediate area of the Corps' jurisdiction, or issue a "stop work" order on private uplands if discoveries are made, then a federal court has jurisdiction to enjoin the same construction to preserve the *status quo* until an adequate § 106 consultation can inform the Corps' exercise of its permitting authority. *Crutchfield v. U.S. Army Corps*, 192 F. Supp. 2d 444, 457 (E.D. Va. 2001) (construction outside a federal agency's jurisdiction may be enjoined "where it has a direct and substantial probability of influencing [the agency's] decision"); *Sayler Park Village Counc. v. U.S. Army Corps*, 2003

WL 22423202 (S.D. Ohio 2003) (enjoining private intervenor from uplands work pending NHPA compliance where continued construction "would frustrate the Corps' involvement").

III. THE BALANCE OF HARMS FAVORS AN INJUNCTION

The Tribe's requested relief here is narrow, affecting only 20 miles around Lake Oahe. When the Tribe sought a TRO in this area, Dakota Access did not argue that it would be financially harmed by a modest delay in this narrow area. Even if it did, to the extent Dakota Access claims harm from not being able to meet its accelerated timetable for completing the pipeline, that timetable is now changed. The Corps and other government agencies announced last week they will not authorize construction at the Lake Oahe crossing until they decide whether they need to reconsider their prior decisions in light of the important issues raised by the Tribe. Attachment 2. The agencies have asked Dakota Access to stop construction activities within 20 miles of the crossing while this review proceeds. The injunction sought here parallels the agencies' modest request.

Moreover, any claimed financial harm to Dakota Access from a small delay is self-inflicted, and cannot be used to tip the balance of equities. *Jones v. SEC*, 298 U.S. 1, 18 (1936) ("It is well established that "where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo."); *Sierra Club v. Army Corps of*

Engineers, 645 F.3d 978 (8th Cir. 2011) (when defendants "jump the gun" or "anticipate[ ] a pro forma result" in permitting applications, they become "largely responsible for their own harm."); *F.T.C. v. Weyerhaeuser Co*., 648 F.2d 739, 741 (D.C. Cir. 1981) ("The defendants acted at their peril in completing the act that the FTC sought to enjoin."). Dakota Access began construction before it received a single authorization from the Corps to cross federal waters. The Corps still has not issued a required easement at Lake Oahe and will not do so until it completes its review. Dakota Access should not be permitted to use the financial impacts of its own risky choices to defeat an injunction. *Quechan Tribe*, 755 F. Supp.2d at 1121 (intervenor's urgency "is a problem of their own making").

IV. THE PUBLIC INTEREST FAVORS AN INJUNCTION

The requested injunction pending appeal is also in the public interest. Courts have repeatedly confirmed that protection of historic sites and preservation of Tribal culture are in the public interest. *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1440 (C.D. Cal. 1985) (tribal sites "represent a means by which to better understand the history and culture of the American Indians in the past, and hopefully to provide some insight and understanding of the present day American Indians."). Similarly, in *Quechan Tribe*, the court found an injunction against a major development project to be in the public interest in an NHPA case:

> The Tribe itself is a sovereign, and both it and its members have an interest in protecting their cultural patrimony. The culture and history

> of the Tribe and its members are also part of the culture and history of the United States more generally…. [I]n enacting NHPA Congress has adjudged the preservation of historic properties and the rights of Indian Tribes to consultation in the public interest… The Court must adopt the same view.

Quechan Tribe, 755 F. Supp.2d at 1121-22.

Moreover, these legal proceedings do not arise in a vacuum. While the Tribe has sought to protect its interests through the legal system and has promoted peaceful and prayerful objections to the pipeline, many people have gathered near the Lake Oahe site. The situation became heated over Labor Day weekend when Dakota Access bulldozed graves and sacred stone features of spiritual importance to the Tribe. The federal government has recognized that a pause on further construction near Lake Oahe is in the public interest pending additional review. The Tribe seeks an injunction that mirrors the voluntary pause sought by the federal agencies. A short-term injunction on construction pending resolution of this interlocutory appeal is in the public interest.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests this Court grant its motion for an injunction pending appeal.

Dated: September 12, 2016

Respectfully submitted,

/s/ Patti A. Goldman
Patti A. Goldman, DCBA # 398565
Jan E. Hasselman, WSBA # 29107

Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Telephone: (206) 343-7340
pgoldman@earthjustice.org
jhasselman@earthjustice.org

Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

This *Emergency Motion for Injunction Pending Appeal* complies with the type-volume limitation and typeface requirements of FRAP 32(a) because it is no more than twenty (20) pages in length and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman type style.

Dated: September 12, 2016

/s/ Patti A. Goldman
Patti A. Goldman

CERTIFICATE OF SERVICE

I certify that on September 12, 2016, I filed the foregoing *Emergency Motion for Injunction Pending Appeal* with the Court and delivered the original and four copies to the Court, and served true and correct copies via e-mail (defendant and intervenor-defendant have agreed to accept electronic service of the Motion), and, as a courtesy, sent copies via Federal Express to the following:

Counsel for Defendant-Appellee U.S. Army Corps of Engineers

James A. Maysonett
Appellate Section, Environment and Natural Resources Section
U.S. Department of Justice
PHB Mailroom 2121
601 D Street, NW
Washington, DC 20004
james.maysonett@usdoj.gov

Erica M. Zilioli
U.S. Department of Justice
Environmental Defense Section
601 D Street, NW, Suite 8000
Washington, DC 20004
erica.zilioli@usdoj.gov

Counsel for Intervenor-Defendant-Appellee Dakota Access, LLC

Kimberly H. Caine
Robert D. Comer
Norton Rose Fullbright US LLP
799 9th Street NW, Suite 1000
Washington, DC 20001-4501
kim.caine@nortonrosefullbright.com
william.leone@nortonrosefullbright.com
bob.comer@nortonrosefullbright.com

William J. Leone
Norton Rose Fulbright US LLP
666 Fifth Avenue
New York, New York 10103-3198
william.leone@nortonrosefulbright.com

Edward V.A. Kussy
Alan M. Glen
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
ekussy@nossaman.com
aglen@nossaman.com

Counsel for Intervenor-Plaintiff
Cheyenne River Sioux Tribe

Nicole E. Ducheneaux
Fredericks Peebles & Morgan LLP
3610 North 163rd Plaza
Omaha, NE 68116
nducheneaux@ndnlaw.com

/s/ Patti A. Goldman
Patti A. Goldman