

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STANDING ROCK SIOUX TRIBE,

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant.

Case No. 1:16-cv-1534-JEB

**INTERVENOR-PLAINTIFF CHEYENNE RIVER SIOUX TRIBE'S
EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER**

Pursuant to Local Rule 65.1(a), Intervenor-Plaintiff Cheyenne River Sioux Tribe (“Tribe”) respectfully moves for a temporary restraining order against Intervenor-Defendant Dakota Access, LLC (“Dakota Access”) to prevent further destruction of sacred and culturally significant sites near Lake Oahe, North Dakota and to prevent Dakota Access from harming and antagonizing members of the Tribe who are peacefully protesting at the site, prior to this Court ruling on the Standing Rock Sioux Tribe’s Motion for Preliminary Injunction, which the Court previously indicated is anticipated this week. Specifically, the Tribe seeks: a Temporary Restraining Order (“TRO”) preventing Dakota Access from (1) performing any additional construction pertaining to the Missouri River crossing of the Dakota Access Pipeline (“DAPL”) within 20 miles of Lake Oahe, and (2) engaging with or antagonizing peaceful protestors, including members of the Tribe. This motion is supported by the memorandum appended hereto, and the Declaration of Nicole E. Ducheneaux. A TRO is required because Dakota Access is currently in the process of destroying sites of great historic and cultural significance to the Tribe. A TRO is necessary to prevent additional irreparable harm to the Tribe, further destruction of relevant evidence, and to protect

peacefully protesting Tribal Members, prior to this Court having an opportunity to make a decision on the Standing Rock Sioux Tribe's motion for a preliminary injunction.

Accordingly, Intervenor-Plaintiff, Cheyenne River Sioux Tribe, respectfully requests that the Court grant its motion for a TRO. A proposed order is submitted herewith.

Dated: September 4, 2016

CHEYENNE RIVER SIOUX TRIBE,
Plaintiff,

By: /s/ Conly J. Schulte

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U.S. ARMY CORPS OF ENGINEERS,

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Case No. 1:16-cv-1534-JEB

**INTERVENOR-PLAINTIFF CHEYENNE RIVER SIOUX TRIBE'S
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CHEYENNE
RIVER SIOUX TRIBE'S EMERGENCY MOTION FOR
TEMPORARY RESTRAINING ORDER**

Intervenor-Plaintiff Cheyenne River Sioux Tribe (“Tribe”) respectfully requests that the Court enter a Temporary Restraining Order (“TRO”) enjoining Defendant-Intervenor Dakota Access, LLC (“Dakota Access”) from (1) performing any additional construction work pertaining to the Missouri River crossing of the Dakota Access Pipeline (“DAPL”) within 20 miles of Lake Oahe, (2) engaging with or antagonizing peaceful protestors including members of the Tribe (hereinafter “site protectors”) who work to prevent further demolition of sacred and culturally significant sites near the DAPL construction site in response to Dakota Access’s destructive actions, until this Court issues a ruling on the Standing Rock Sioux Tribe’s Motion for a Preliminary Injunction, which is anticipated this week.

INTRODUCTION

The Standing Rock Sioux Tribe (“SRST”) filed a Motion for Preliminary Injunction that is currently being reviewed by this Court. An opinion is expected during the week of September 5, 2016. In the afternoon of Friday, September 2, 2016, the SRST further submitted recently discovered evidence of an astonishing archeological find. This find concerned historically, culturally, and religiously important stone features and grave markings to the successors of the Great Sioux Nation, including graves of chiefs, warriors, and Bear Medicine healers. These formations and grave sites are adjacent to and in the pipeline’s proposed right-of-way approximately 1 to 2 miles away from the Lake Oahe crossing site. Less than 24 hours after SRST’s filing, Dakota Access desecrated and destroyed the sites described in SRST’s declaration. In obvious retribution for SRST’s recent filing and in a deliberate attempt to destroy evidence, on Saturday, September 3, 2016, Dakota Access ended its voluntary construction hiatus on the DAPL Missouri River crossing, grading the entire sacred site area by removing the top layer of vegetation and soil, destroying all indicated stone features in and next to the pipeline’s 150 foot right-of-way. The intentional destruction and desecration of these sites has caused incalculable harm to the Tribe and to the public at large. As stated in the September 2, 2016 Supplemental Declaration of Tim Mentz Sr., the site he uncovered is “one of the most significant archeological finds in North Dakota in many years” and qualifies for inclusion on the National Register of Historic Places. Supplemental Declaration of Tim Mentz, Sr., ECF No. 29-1 at ¶ 10 (“Supp. Mentz Decl.”).

Site Protectors of all ages, outraged at Dakota Access’s clear intent to engage in construction while knowingly destroying sacred sites identified earlier in the week, attempted to halt construction and preserve evidence. In a calculated response, Dakota Access hired a paramilitary security force to attack the site protectors, including women, children, and the elderly

with vicious and dangerous breed dogs, such a Pit Bulls and German Shepherds, not trained for security service. Dakota Access paramilitary squad used canisters of tear gas, and pepper spray against the site protectors. A number of the site protectors were injured by the pepper spray and gas, and bitten by the vicious attack dogs. For example, news reports discuss that a pregnant woman was bitten on the shoulder and a young girl was bitten and they were treated for injuries. Nadia Purpis, Common Dreams: Breaking News & Views for the Progressive Community, Dakota Access Pipeline Company Attacks Protesters with Dogs & Mace (Sept. 4, 2016), <http://www.commondreams.org/news/2016/09/04/dakota-access-pipeline-company-attacks-protesters-dogs-and-mace>.

In order to prevent further destruction of sacred sites and deter future violence and injury, the Cheyenne River Sioux Tribe seeks a TRO prohibiting Dakota Access from continuing construction on the Missouri River crossing of the DAPL or engaging in any way with site protectors pending a ruling on the preliminary injunction.

STANDARD OF REVIEW

In considering a motion for a temporary restraining order, “the Court must consider whether the movant has met its burden of demonstrating that ‘(1) it has a substantial likelihood of succeeding on the merits; (2) it will suffer irreparable harm if the injunction is not granted; (3) other interested parties will not suffer substantial harm if the injunction is granted; and (4) the public interest would be furthered by the injunction.’” *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 72 (D. D.C.2001) (internal citation omitted). The standards for a temporary restraining order are the same as a motion for a preliminary injunction. *Id.*; *Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D. D.C. 2003) (“The same standards apply for both temporary restraining orders and preliminary injunctions”).

FACTUAL BACKGROUND

The Corps failed to follow federal statutory tribal consultation requirements pursuant to the National Historic Preservation Act, Clean Water Act, and Rivers and Harbors Act. In the course of the litigation's pendency, to show their opposition for the DAPL, site protectors and others began to gather near the site for the Missouri River Lake Oahe crossing. In mid-August 2016, after Complaints were filed in the United States District Court for the District of Columbia, Dakota Access halted its work on the DAPL Missouri River crossing location, seemingly pending the Court's decision on Plaintiff's Preliminary Injunction. On Friday, September 2, 2016, the Standing Rock Sioux Tribe filed a Motion for Leave to File Supplemental Declaration, ECF No. 29. The Supplemental Mentz Declaration identified specific historical and cultural sites that included stone rings, effigies, stone cairns, grave markers, and burial sites of the Cheyenne River Sioux Tribe and the Standing Rock Sioux Tribe. Supp. Mentz Decl. ECF No. 29-1 at ¶ 16.

ARGUMENT

I. Cheyenne River Sioux Tribe Will Likely Prevail on the Merits.

The Cheyenne River Sioux Tribe filed its Complaint and Motion to Intervene in *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, Case No. 16-cv-01534. (ECF No. 11 & 11-12). The Standing Rock Sioux Tribe's Motion for Preliminary Injunction is currently pending in this Court. The parties have extensively briefed the legal issues, and the Cheyenne River Sioux Tribe incorporates by reference the Standing Rock Sioux Tribe's arguments with respect to the merits. SRST's pending motion, like the Tribe's claims set forth in its Complaint, concerns whether the Army Corps of Engineers ("Corps") properly issued permits to Dakota Access to construct a water crossing for the DAPL underneath the Missouri River at Lake Oahe, an area of significant cultural and historical importance to successor tribes of the Great Sioux

Nation, when the Corps failed to properly consult with numerous affected tribes pursuant to the National Historic Preservation Act (“NHPA”). The Advisory Council on Historic Preservation (“ACHP”) regulations and the Corps’ own § 106 regulations require consideration of indirect effects of issuing Corps permits, including impacts of a crude oil pipeline in upland areas outside of direct Corps jurisdiction. The Tribe’s position has been supported by the ACHP repeatedly.

The site that was destroyed by Dakota Access on September 3, 2016, is exactly the kind of site that prompted the Tribe’s lawsuit. The site is located roughly two miles from the Missouri River crossing that is at the center of this dispute, but was not reviewed by the Corps during its truncated and deficient § 106 analysis. Prior to last week, the Tribe never had an opportunity to survey the area until the private landowner extended an invitation to the Standing Rock Sioux Tribe’s former Tribal Historic Preservation Officer and former tribal council member, Tim Mentz, Sr. to survey the route. As a result of the Corps’ inadequate consultation with Indian tribe, construction of the DAPL’s Missouri River crossing is certain to harm additional significant culturally and historically important sites, and has already caused the destruction of the irreplaceable areas described by Mr. Mentz.

Should Cheyenne River Sioux Tribe and other Plaintiffs succeed in this litigation, the Corps would be required to comply with the § 106 process to evaluate and mitigate the impacts of areas like this when issuing permits under its Clean Water Act and Rivers and Harbors Act authorities.

II. Dakota Access Will Cause Irreparable Harm Absent A TRO.

Cheyenne River Sioux Tribe’s Complaint and Motion to Intervene (ECF No. 11 & 11-12) and SRST’s Motion for Preliminary Injunction outline the irreparable harm to cultural and historical sites that will be caused by further construction of the DAPL. The Standing Rock Sioux

Tribe filed the Supplemental Declaration of Tim Mentz, Sr. containing a description of recently discovered evidence of specific cultural and historical sites within the boundaries set out for DAPL construction.

The Supplemental Declaration of Tim Mentz, Sr., filed September 2, 2016, discussed discovery of highly unusual stone features that link the Tribes to their cultural heritage, some of which clearly indicate grave markers. Mr. Mentz was invited onto the private property by the landowner on lands adjacent to the DAPL construction site. There he observed five stone features in a narrow area that “unquestionably” met the criteria for National Register designation. Supp. Mentz Decl. ECF No. 29-1 at ¶ 7. Mr. Mentz also catalogued a significant number of stone features (82) and archeological sites with no fewer than 27 grave sites within a concentrated area in and next to the pipeline’s route. *Id.* at ¶ 6.

The sites described in Mr. Mentz’s declaration, sites that have stood undisturbed for centuries, are now gone. *See* Declaration of Tim Mentz, Sr. in Support of TRO, ECF No. 30-1 (“Mentz TRO Decl.”). The morning after the Standing Rock Sioux Tribe filed Mr. Mentz’s declaration describing the sites and their importance, and providing maps as to their precise location, DAPL construction crews graded the entirety of the two mile stretch surveyed by Mr. Mentz and described in his declaration. Mentz TRO Decl., ECF 30-1 at ¶ 2. Notably, at the time of the surveys just a few days ago, Mr. Mentz saw no evidence of imminent construction in the area. Supp. Mentz Decl., ECF No. 29-1 at ¶ 10.

The stone features were intentionally destroyed, the grading that took place may easily be deep enough to destroy burial sites and certainly disturb any of the Tribes’ ancestors interred there. Mentz TRO Decl., ECF No. 30-1 at ¶ 8. Continuing construction on the DAPL at the site would involve digging more deeply in order to lay the pipeline, and will disturb and destroy burial sites.

Although the stone features are demolished, there are still steps Tribal elders can take to mitigate additional harm to these sacred grave sites. *Id* at ¶ 9. Additionally, there still are areas in and around Mr. Mentz's survey that may still be salvaged but only if a TRO is issued. A TRO preventing additional construction at the Missouri River crossing site and immediately surrounding areas is necessary to prevent additional desecration of known and unknown cultural and historical sites until such time as this Court issues its opinion on the Plaintiffs' pending preliminary injunction.

III. The Balance of Harms Favors Cheyenne River Sioux Tribe and Supports a TRO.

The balance of harms favors Cheyenne River Sioux Tribe and supports a TRO because if the motion is denied, specifically identified sacred sites will be destroyed and Dakota Access will continue inciting violence to detract from the litigation. Furthermore, Defendant's actions have been deliberate and in bad faith. Based on Dakota Access's actions with respect to the destruction of the scared stone cairns and effigies, the Tribe has no faith that any human remains that may surface from further construction will be treated any differently. The Tribe seeks the narrow relief of a TRO pending the outcome of the Court's decision on Plaintiff's preliminary injunction, anticipated this week. Given the short timeline of the Tribe's requested relief, the economic impact of such a TRO on Dakota Access will be negligible. Furthermore, Dakota Access will not be harmed by a TRO because Dakota Access had given every indication that it was going to halt construction until the resolution of this litigation due to the fact that any time and money expended on the DAPL would potentially be a waste of company resources when the results of ligation were unknown. Rather, the TRO will only prevent Dakota Access from continuing to perform construction on the Missouri River DAPL crossing during the pendency of this litigation. Dakota Access shall be spared spending additional capital on a project that may not go forward. However,

the harm to the Tribe from the potential loss of additional unknown sites, the desecration of known grave sites and the treatment of our ancestral human remains, is very significant.

Should construction and further destruction of this area be allowed to continue, the Tribe stands to lose irreplaceable cultural and historic sites, including burial grounds. Although Dakota Access has repeatedly represented to the Court that it has taken extraordinary measures to prevent desecration of culturally important sites, the cold, hard facts prove otherwise. First, Defendants failed to identify any of the sites in its Class II/III archaeological survey. Mentz TRO Decl. at ¶ 17. While Dakota Access claims to have properly surveyed the site for evidence of historic sites, such survey was deficient, through deliberate indifference by not having an individual trained to identify culturally significant tribal sites. Prior to the week of August 29, 2016, the Tribes never had an opportunity to fully survey the site where destruction occurred, never received notification of imminent construction, and never had an opportunity to monitor the site “during and after” construction activity. Next, Dakota Access, not 24 hours after Plaintiff Standing Rock Sioux Tribe identified evidence of specific cultural and historic sites of vital importance to this litigation, knowingly and willfully brought in extensive construction equipment including heavy machinery to an area where no previous work had taken place and destroyed all sites listed in Standing Rock’s filing.

Therefore, the balance of harms weighs in favor Cheyenne River Sioux Tribe and this factor weighs in favor of the Court issuing a temporary restraining order.

IV. The Public Interest Favors a TRO.

Over the past weeks, interactions between Dakota Access and anti-pipeline advocates have escalated. The Cheyenne River Sioux Tribe and Standing Rock Sioux Tribe have staunchly maintained their opposition to the DAPL by promoting nonviolent and prayerful protests. The

Tribes are seeking redress through the proper channels of the legal system. SRST attempted to properly file information regarding recently found and previously unknown significant historic sites that would be beneficial to this Court in its decision on SRST's Motion for Preliminary Injunction. Dakota Access responded to such filing by immediately destroying this evidence. Dakota Access's actions are clear and deliberate, and were aimed at destroying the cultural sites identified by SRST's filing. Within 24 hours of providing detailed evidence of major archaeological discoveries directly in and adjacent the pipeline's route, Dakota Access intentionally destroyed those sites. Moreover, Defendant took extreme measures to ensure this detailed evidence was destroyed, by employing a private paramilitary security team with vicious attack dogs and armed with chemical agents which were used on the site protectors.

The Cheyenne River Sioux Tribe does not blindly insinuate that Dakota Access resumed work with the intention of destroying the Plaintiffs' sacred sites. Site protectors that camp at the construction site have not previously observed Dakota Access's crews working on weekends. Mentz TRO Decl. at ¶ 11. Further, construction crews had not been seen on the identified site prior to Standing Rock Sioux Tribe's filing identifying specific sacred sites. *Id* at ¶ 10. It is clear that in retaliation for filing evidence of present historic and cultural sites, Dakota Access ordered its employees to resume work on the Missouri River crossing project in areas where crews had not previously been present to knowingly and deliberately destroy such sites on a holiday weekend, and when the Court is closed for the Labor Day observance.

Dakota Access's knowing and intentional destruction of cultural sites that had been submitted to this Court, as evidence of irreparable harm also amounts to spoliation of relevant evidence. "Spoliation" is "defined as 'the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable

litigation.’” *Clarke v. Wash. Metro. Area Transit Auth.*, 904 F. Supp. 2d 11, 20 (D. D.C. 2012). A party is obligated to not spoliage evidence “it knew or reasonably should have known were relevant to the . . . litigation if it knew the destruction or alteration of those documents would prejudice the plaintiff[].” *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1481 (D.C. Cir. 1995). Dakota Access had reason to know that the site it intentionally graded on September 3, 2016 included culturally significant sites that were imperative to an ongoing litigation where Dakota Access is an intervening defendant. At this time, any ongoing construction in conjunction to the Missouri River crossing site would spoil other relevant evidence imperative to the Court’s analysis of Plaintiffs’ preliminary injunction and would certainly further frustrate any § 106 consultation that could occur on sites of significance to the Tribe.

Additionally, the public has a vested interest in deescalating tensions surrounding this litigation. In addition to Dakota Access’s retaliatory construction, Dakota Access hired a paramilitary squad under the guise of providing “security.” Media photography indicates that the paramilitary employees were outfitted with military type uniforms including combat boots. True law enforcement officers were nowhere to be found, despite their suspicion that the day’s events would produce potential violence. North Dakota Office of the Governor, *Dalrymple Signs Emergency Declaration to Enhance Public Safety Associated with Cannon Ball-area Protest* (Aug. 19, 2016), available at <http://www.governor.nd.gov/media-center/news/dalrymple-signs-emergency-declaration-enhance-public-safety-associated-cannon-ball>; Counter Current New, *Police Do Nothing While Armed Mercenaries Attack Native American Dakota Pipeline Protesters With Dogs and Pepper Spray* (Sept. 3, 2016), <http://countercurrentnews.com/2016/09/police-do-nothing-mercenaries-protesters-dogs/>. Numerous media interviews indicate that site protectors witnessed paramilitary employees lunge and command large, aggressive dogs to attack nonviolent

protectors. Witness reports even indicate that paramilitary employees were openly laughing as the attack dogs bit women and children. After the incident, six site protectors were bitten by dogs and 30 were treated for side effects of pepper spray. Tom Boggioni, Raw Story, *Oil Company Sics Dogs on Native Americans Protesting Pipeline Through Their Burial Grounds* (Sept. 4, 2016), <https://www.rawstory.com/2016/09/oil-company-sics-dogs-on-native-americans-protesting-pipeline-through-their-burial-grounds/>. The paramilitary personnel also carried large canisters of chemical weapons. A number had tear gas in fire extinguisher type dispensers and pepper sprayed nonviolent protestors, including women and children. Several individuals required treatment for pepper spray. *Id.* Dakota Access intentionally created an unsafe, violent, and retaliatory environment.

The public interest favors a TRO to prevent destruction of significant Tribal cultural and historical sites to examine the area for repatriation of human remains, preserve evidence for the purpose of litigation, and deescalate violence in internationally publicized, high-tension demonstrations.

V. The Court Should Grant This TRO Ex Parte.

Ex parte injunctions are appropriate when the threatened harm is so immediate and so severe that even giving the other party notice of the application for the injunction and an opportunity to be heard in opposition is not practical. Fed. R. Civ. P. 65(b). Although Cheyenne River Sioux Tribe has given notice to all parties in *Standing Rock Sioux Tribe v. Army Corps of Engineers*, Case No. 16-cv-01534 of its filing of this Motion for Temporary Restraining Order, as the facts above indicate, unless this motion is granted, the Cheyenne River Sioux Tribe will suffer immediate and irreparable loss, damage, or injury as a result of the actions of Dakota Access before

Dakota Access can be heard in opposition, and before a hearing can be had on the motion for preliminary injunction.

CONCLUSION

The balance of equities clearly favors Cheyenne River Sioux Tribe and justice requires the Court to intervene. Therefore, for the foregoing reasons, Plaintiff Cheyenne River Sioux Tribe respectfully requests that this Court grant the Motion for a Temporary Restraining Order.

Dated: September 4, 2016

CHEYENNE RIVER SIOUX TRIBE,
Plaintiff,

By: /s/ Conly J. Schulte

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th of September 2016, 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/ Nicole E. Ducheneaux