No. 16-5259

In the United States Court of Appeals for the District of Columbia Circuit

Standing Rock Sioux Tribe, Plaintiff-Appellant, and

Cheyenne River Sioux Tribe, Plaintiff-Intervenor,

v.

United States Army Corps of Engineers, Defendant-Appellee, and

Dakota Access LLC, Defendant-Intervenor-Appellee.

On Appeal from the United States District Court for the District of Columbia, Case No. 1:16-cv-01534-JEB (Boasberg, J.)

Federal Defendants' Opposition to Plaintiff-Appellant's Emergency Motion for Injunction Pending Appeal

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Introduction

The Standing Rock Sioux Tribe (the "Tribe") has sued the United States Army Corps of Engineers (the "Corps") to stop the construction of the Dakota Access pipeline ("DAPL"). The Tribe moved the district court for a preliminary injunction, arguing that the Corps's regulatory actions on this pipeline were unlawful and that its construction was likely to cause irreparable harm to historic and cultural sites located all along this 1,168-mile pipeline. The district court exhaustively documented why the Tribe is not likely to succeed on the merits of its claims against the Corps, which has jurisdiction over only roughly 3% of this pipeline. The district court also properly concluded that the Tribe has failed to show that the Corps's limited permitting actions here are likely to cause irreparable harm to the Tribe's historic and cultural sites.

The district court did not abuse its discretion by denying the Tribe's motion for preliminary injunction. The Tribe has now moved this Court for an injunction pending appeal, and that motion should be denied for all the reasons set out in the district court's thorough decision and for the reasons discussed further below.

That said, in a Joint Statement issued last Friday, September 9, 2016, the Department of the Army, the Department of the Interior, and the Department of Justice (the "Departments") recognized that the Tribe has raised important issues regarding this pipeline and the decision-making process that led to its approval. Tribe Att. 2. The Army has announced that it will not authorize construction on the Dakota Access pipeline at Lake Oahe "until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act ('NEPA') or other federal laws." *Id.* at 1. As a

result, construction of the pipeline in the area immediately around Lake Oahe "will not go forward at this time." *Id.* The Departments have also asked Dakota Access LLC to "voluntarily pause all construction activity within 20 miles east or west of Lake Oahe." *Id.* So while the Corps opposes the Tribe's current motion and believes that it should be denied, the Departments believe that the pipeline company should implement the relief that the Tribe is seeking voluntarily. Consistent with the Departments' request, the Corps also would not oppose the entry of an order enjoining all construction activity within 20 miles east or west of Lake Oahe if all parties to this appeal consent to that injunction.

Background

I. The law

A. National Historic Preservation Act ("NHPA")

Section 106 of the National Historic Preservation Act ("NHPA") requires federal agencies to consider the potential effects of federal agency actions on historic properties. 54 U.S.C. § 306108. Among other things, it requires that, before funding or licensing a "[f]ederal or federally assisted undertaking," federal agencies must "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1294 (D.C. Cir. 2007).

B. The Clean Water Act

The Clean Water Act prohibits the discharge of any "pollutant," including dredged or fill material, into "navigable waters" without a permit. *See* 33 U.S.C. §§

1311(a), 1344(a). "[N]avigable waters" means "the waters of the United States," which include, by regulation, certain tributaries and wetlands. *Id.* § 1362(7); 33 C.F.R. § 328.3(a). Under Section 404 of the Clean Water Act, the Corps authorizes discharges of dredged or fill material into waters of the United States through individual and general permits. 33 U.S.C. § 1344(a), (e).

Individual permits require a resource-intensive, case-by-case review. *Id.* § 1344(a); *see* 33 C.F.R. Pts. 323, 325. Concerned that requiring individual permits for routine activities would impose unnecessary delay and administrative burdens on the public and the Corps, Congress in 1977 authorized the Corps to issue general permits for categories of activities. 33 U.S.C. § 1344(e).

C. Rivers and Harbors Act

Section 10 of the Rivers and Harbors Act of 1899 forbids certain activities within the "navigable water of the United States" without permission of the Corps. 33 U.S.C. § 403; *see also* 33 C.F.R. § 322.3(a). The nationwide permit program addressing Clean Water Act Section 404 also authorizes activities under Section 10 of the Rivers and Harbors Act.

D. Nationwide Permit 12 ("NWP 12")

The relevant general permit here is Nationwide Permit 12, which authorizes "[a]ctivities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project." 77 Fed. Reg. at 10,271. A "utility line" is defined to

include oil pipelines. *Id.* at 10,271–72. In general, work that falls within the limitations of Nationwide Permit 12 can begin without any further contact with the Corps. A permittee is required to submit a "pre-construction notification" ("PCN") to the Corps, however, under certain circumstances, as discussed below.

II. The facts

A. The Corps complied with the NHPA before it took action here.

The Dakota Access Pipeline (the "pipeline," "DAPL") is a domestic oil pipeline that will connect oil production regions in North Dakota to Patoka, Illinois. Att. 2 ¶ 4. Congress has not entrusted the regulation of the construction of domestic oil pipelines to the Corps or any other federal agency. *See Sierra Club v. United States Army Corps of Engineers*, 803 F.3d 31, 33 (D.C. Cir. 2015). In and of itself, no Federal permit was required to build or begin operating this pipeline.

The Corps, therefore, does not have jurisdiction over the whole Dakota Access pipeline. Instead, its role is limited. The Corps has authorized construction activities in the waters of the United States at those locations where the pipeline crosses Federally-regulated waters (by the operation of Nationwide Permit 12 issued by the Corps under the Clean Water Act) and on Corps project lands (by operation of Section 408 permissions granted by the Corps under the River and Harbors Act). And the Corps will also have to provide a real estate easement to Dakota Access before it may lay this pipeline beneath Lake Oahe. It has not provided that easement. But even taken together, those regulatory actions affect only a very small part of the pipeline—all told, roughly 97% of the total length of the pipeline lies outside the Corps's jurisdiction. *See* Memorandum Opinion, Docket No. 39 (Sept. 9, 2016) ("Op.") at 13.

The Corps worked diligently to comply with Section 106 of the NHPA and to ensure that the portions of this pipeline that were subject to its jurisdiction would not adversely affect historic sites. Most importantly, the Corps made, and often exceeded, the reasonable, good-faith effort to consult with Indian tribes, including the Standing Rock Sioux Tribe, required by the NHPA. Because this issue of consultation is at the heart of this case, the district court took the time and care to lay out—in 20 pages of fine-grained detail—the entire history of the Corps's efforts to consult with the Tribe. Op. at 11–33. The district court found that the Corps made "dozens of attempts . . . to consult with the [the Tribe]," including "at least three site visits to the Lake Oahe crossing . . . and four meetings with [Corps District Commander] Colonel Henderson." Op. at 33. Those efforts were not "empty gestures"; where tribes consulted with the Corps, the Corps required Dakota Access to make concrete changes to this project. Op. at 49.

But the record also shows that, despite the Corps's efforts, the Standing Rock Sioux Tribe "largely refused to engage in consultations." Op. at 48. As the Tribe acknowledges, it refused to participate fully in these consultations because it believed that the Corps was required to analyze the effects of the entire pipeline, not just the areas under the Corps's jurisdiction. Emergency Motion for Injunction Pending Appeal, Docket No. 1635228 (Sept. 12, 2016) ("Mot.") at 14 ("The Tribe . . . refused to participate."). Undeterred, the Corps used the information that it had—and the information that was provided by other tribes—to avoid adverse effects to historic sites and concluded that the portions of this pipeline under its jurisdiction were not likely to have any adverse effect on historic sites (or that the affected sites were not

eligible for listing on the National Register of Historic Places). Att. 6; Att. 9. The North Dakota State Historic Preservation Officer concurred with the Corps's determination. Att. 3 ¶¶ 26, 34.

B. The current status of construction, the temporary restraining order, and the Joint Statement

Dakota Access has already built most of this pipeline. The company has generally been free to work on the majority of this pipeline because most of it is located on private land and is not subject to Federal permitting. As of August 24, 2016, nearly half of the pipeline had already been completed ("cleared, graded, trenched, piped, backfilled, and reclaimed"). Op. at 34. As a result, most of the harms alleged by the Tribe in its motion for preliminary injunction are now moot. Op. at 55 (noting that "the die is cast").

The significant exception to this is the work around (and under) Lake Oahe. That work is currently subject to a temporary restraining order—on September 6, 2016, the district court, at the Tribe's request, enjoined all "construction activity" on the pipeline "between Highway 1806" (just to the west of Lake Oahe) and "20 miles to the east of Lake Oahe." Minute Order (Sept. 6, 2016); *see* Att. 5, Figure 7 (at ECF page 154) (showing the work at Lake Oahe and Highway 1806). At the Tribe's further request, the district court extended the terms of that temporary restraining order until this Friday, September 16, 2016. Minute Order (Sept. 12, 2016). The Corps did not oppose the Tribe's motion for a temporary restraining order (or its motion to extend that order until this Friday, September 16, 2016) on the grounds that "the public

interest would be served by preserving peace near Lake Oahe." Docket No. 32 (Sept. 5, 2016) at 2.

In addition, the pipeline cannot cross Lake Oahe, a Federally-authorized project under the Corps's jurisdiction, until Dakota Access first obtains a real estate easement from the Corps. The Corps has not granted that easement, and Dakota Access cannot build at Lake Oahe until it does. On September 9, 2016, the Department of the Army, the Department of the Interior, and the Department of Justice announced together, in a joint statement, that construction at Lake Oahe "will not go forward at this time" and will not go forward until the Army "can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under [NEPA] or other federal laws." Tribe Att. 2 at 1. The Army has not yet determined how long that process will take or what the results of the process may be.

This means that Dakota Access cannot install the pipeline under Lake Oahe at this time. Once the temporary restraining order issued by the district court expires on Friday, September 16, 2016, the company will be free to continue work on the pipeline outside the area immediately around Lake Oahe. In their joint statement, however, the Departments of the Army, Interior, and Justice have requested that Dakota Access "voluntarily pause all construction activity within 20 miles east or west of Lake Oahe." Tribe Att. 2 at 1. While the Corps opposes the issuance of the requested injunction pending appeal for the reasons explained below, the Department of the Army nonetheless requested that the pipeline company, given the current circumstances surrounding this project, voluntarily pause construction until the Army

can complete the determination described above. The Corps does not oppose the entry of an injunction if all parties to this appeal consent to it.

III. The standard of review

The district court's "ultimate decision to deny injunctive relief, as well as its weighing of the preliminary injunction factors," is reviewed "for abuse of discretion," and "its findings of fact for clear error." *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012). The district court's legal conclusions are reviewed de novo. *Id.*

Argument

I. The Tribe is not likely to succeed on the merits of its claims.

A. Nationwide Permit 12 does not violate the NHPA.

The Corps has ensured that the activities permitted under Nationwide Permit 12 will comply with the NHPA in two main ways. First, General Condition 20 (which applies to Nationwide Permit 12) requires permittees like Dakota Access to "submit a pre-construction notification . . . if the authorized activity may have the potential to" cause effects to historic properties. 77 Fed. Reg. at 10,284. Once General Condition 20 is triggered, the permitted activity cannot proceed unless one of the Corps's district engineers completes a site-specific analysis and verifies either (1) that the activity will not actually affect any eligible historic site or (2) that the consultations required by the NHPA are complete. *Id.*

Here, Dakota Access submitted pre-construction notifications for this pipeline at just over 200 sites. Op. at 54. The Corps ultimately "verified" all of those

notifications, concluding that the permitted activities were either not likely to affect any historic site or that the affected historic sites were not eligible for listing. Att. 7.

Second, if permittees discover previously-unknown remains or artifacts during construction, General Condition 21 requires them to "immediately notify" the Corps and then to "avoid construction activities that may affect the remains and artifacts" "to the maximum extent practicable" until the Corps has completed "Federal, Tribal, and state coordination." *Id.* at 10,284. This condition has been triggered six times by the pipeline's construction. Op. at 34.

The Tribe challenges Nationwide Permit 12 as the Corps applied it to this pipeline. The district court properly concluded that the Tribe is not likely to succeed on the merits of these claims. Op. at 39–45, 48–50. In its motion, the Tribe again argues that Nationwide Permit 12 is unlawful because it allows the Corps to rely on information submitted by the permittees. The Tribe especially objects to the application of this permit at sites where no pre-construction notification is submitted and thus no formal Corps review is required before construction begins. The Tribe argues that the Corps has "unlawfully abdicated" its NHPA duties. Mot. at 7.

The Corps's use of information submitted by permittees, however, is reasonable and, indeed, expressly allowed by the NHPA's regulations. 36 C.F.R. § 800.2(a)(3). The courts have regularly upheld the practice of requiring permit applicants to supply studies and documentation for agency review both under the NHPA and in the analogous context of NEPA. *See, e.g., Crutchfield v. County of Hanover*, 325 F.3d 211, 223–24 (4th Cir. 2003); *Friends of the Earth v. Hintz*, 800 F.2d 822, 835-36 (9th Cir. 1986).

Here, the Corps reviewed all of Dakota Access's submissions. It verified that the permitted activities at each of the more than 200 sites where pre-construction notification was required would not affect eligible historic sites. *See, e.g.,* Att. 6, 7. And the Corps also took the extra effort to review all of the crossings where pre-construction notification was not required. Att. 2 ¶ 37; Att. 2 Exh. 16 (ECF page 117). The Corps found that permitted activities at those "non-PCN" sites would also not affect eligible historic sites. *Id.*

The Tribe complains that this "short . . . memo" by the Corps's archaeologist was not enough to ensure that Dakota Access's work at "non-PCN" crossings would avoid harming historic sites. Mot. at 9. But even now, the Tribe still has not identified a single specific site that would allegedly be harmed by the activities permitted at "non-PCN" crossings. As the district court noted, "[t]he Tribe has had more than a year to come up with evidence that the Corps acted unreasonably in permitting even a single jurisdictional activity without a PCN, and it has not done so." Op. at 45. The Tribe is not likely to succeed on the merits of its challenges to Nationwide Permit 12.

B. The Corps reasonably restricted the scope of its analysis to the areas under its jurisdiction.

The Corps did not analyze the effects of the entire pipeline on historic sites, but instead restricted the scope of its analysis to those portions of the pipeline that were actually under its jurisdiction. That decision is reasonable and entirely consistent with Section 106 of the NHPA. Section 106 requires the Corps to "take into account the effect of [an] undertaking on any historic property," but only where the Corps has "direct or indirect jurisdiction over the undertaking" (including the "authority to

license [that] undertaking."). 54 U.S.C. § 306108. Here, it is undisputed that the Corps does not have jurisdiction over the pipeline as a whole and does not "license" the pipeline as a whole. And so the Corps reasonably limited its analysis under the NHPA to the matters actually under its jurisdiction.[1]

The Corps's decision here is also consistent with its own regulations, which define the process that the Corps uses to fulfill its obligations under the NHPA as they apply to its regulatory program (including its issuance of permits under the Clean Water Act).[2] *See, generally*, 33 C.F.R. Part 325, App. C. Those regulations explain that the "undertaking" here is not the pipeline as a whole; instead each individual crossing of a Federally-regulated water is its own "undertaking." 33 C.F.R. Part 325, App. C(1)(f). That is because pipelines can "almost always" be undertaken without the Corps's authorization, "if they are designed to avoid affecting the waters of the United States," although it is usually "less expensive" and "more convenient" to get the Corps's authorization. *Id.* App. C(1)(f)(4). But because the Corps's authorization is not strictly necessary to complete these pipelines, the "'but for' test is not met by the entire project right-of-way." *Id.* App. C(1)(f)(4)(i). Thus, consistent with its regulations,

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[1] The Corps's decision here is also consistent with the meaning of the term "undertaking," which both the NHPA and its regulations define to be "a project, activity, or program funded in whole or in part **under the direct or indirect jurisdiction** of a Federal agency, including . . . those requiring a Federal permit, license, or approval." 54 U.S.C. § 300320(3) (emphasis added); *see also* 36 C.F.R. § 800.16(y) (same).

[2] The Tribe objects to the Corps's regulations because they have not been approved by the Advisory Council. Mot. at 11. But these regulations are not formal "counterpart regulations" that require the Advisory Council's approval. Instead, they are stand-alone regulations that merely define the process that the Corps uses to fulfill its obligations under the NHPA and the NHPA's regulations. Att. 8 at 2.

the Corps reasonably interpreted the "undertaking" here (as it relates to the Corps's permitting under the Clean Water Act) to be each of the discrete individual crossings of Federally-regulated waters made by this pipeline, and not the entire 1,168-mile pipeline as a whole. Att. 6 at ECF pages 3–4.

The district court concluded that the Corps reasonably restricted the scope of its analysis to the areas where it had jurisdiction. Op. at 45–48. As the district court noted, Section 106 of the NHPA does not require the Corps to "consider the effects of actions over which it has no control and which are far removed from its permitting activity." Op. at 47–48. That is also consistent with the Supreme Court's decision in *Department of Transportation v. Public Citizen*, where the Court held that when "an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency['s action] cannot be considered a legally relevant 'cause' of the effect." 541 U.S. 752, 770 (2004). The narrow activities permitted by the Corps here are not the legal cause of this entire pipeline, almost all of which is on private land and roughly 97% of which is outside the Corps's jurisdiction, without any need for Federal approval. *See* Op. at 46.

The Corps's decision to limit the scope of its analysis is also consistent with the decisions of this Court, which rejected a similar attempt to "federalize" a pipeline project in *Sierra Club v. United States Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015). In that case, as here, the Corps's regulatory actions—in the form of "easements" and "Clean Water Act verifications"—were limited to "discrete geographic segments of the pipeline comprising less than five percent of its overall length." *Id.* at 34. And the plaintiffs in that case, just like the Tribe, argued that the

Corps's actions made "the entire pipeline" a "foreseeable effect of federal action requiring public environmental scrutiny" (in that case, under NEPA).[3] *Id.* Notably, it was undisputed in *Sierra Club* that the Corps's actions were necessary to complete construction of the pipeline. *Id.* at 35.

But this Court rejected the argument that the Corps's actions had "federalized" the entire pipeline—to the contrary, it found that there is "no persuasive explanation why the portions of the pipeline outside the verification and easement areas constitute 'federal actions' and thus 'should be under consideration.'" *Id.* at 51. Similarly, in *Duncan's Point Lot Owners Association v. FERC*, this Court held that FERC's analysis of a project only had to extend as far as "the license it granted" because the agency did not have jurisdiction over the rest of the project. 522 F.3d 371, 375–77 (D.C. Cir. 2008). The Tribe's arguments here cannot be reconciled with this Court's rulings in *Sierra Club* and *Duncan's Point*.

In the district court, the Tribe argued that this whole pipeline has been "federalized." Docket No. 6 at 27–30. On this motion, however, the Tribe has changed its argument. Mot. at 10–12. It now contends that, even if the Corps was not required to consider the whole pipeline, it was required to look beyond the "water's edge" at some of the pipeline route. Mot. at 10–11. The Tribe did not make this argument to the district court. And because the district court never heard it, it cannot

[3] *Sierra Club* addressed the Corps's obligations under NEPA, not the NHPA. The courts, however, have repeatedly held that the scope of analysis under these two statutes is similar. *See, e.g., Karst Env. Education and Protection, Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007).

support the Tribe's claim that the district court abused its discretion.

In any event, notwithstanding the Tribe's allegations, the Corps did consider the effects of the pipeline beyond the "water's edge"—including parts of the pipeline route—where it concluded that those actions were "connected" to the actions that it had permitted. At Lake Oahe, for example, Dakota Access plans to use "horizontal directional drill" ("HDD") construction to place the pipeline deep under the bed of the lake. *See, generally*, Att. 5 at 76–78; Att. 3, Exh. 3 at ECF pages 33–41. The Corps did not just analyze the effects of that drilling up to the "water's edge," but also considered its broader effects, including the effects from construction at "all bore pit, stringing areas, staging areas and access routes" and on part of the pipeline right-of-way (up to the "bore pit locations" and that part "identified as access routes or staging areas,"). Att. 3, Exh. 3 (ECF page 34). As the maps of the project plainly show, that analysis took the Corps more than 1,500 feet up along the pipeline, past the "water's edge." Att. 5, Fig. 11 (ECF page 159) (showing relevant "workspace" areas in yellow).

The Corps then worked to identify historic sites near this "affected area." It surveyed the literature to identify any previously-recorded sites, not only in the area itself, but also within a mile of the area, and identified 43 such sites. Att. 5 at 78. Dakota Access conducted a Class II/III investigation in the area and discovered one new site. *Id.* The Corps then evaluated the effects of the pipeline on these sites and concluded that they either would not be affected or were not eligible for listing. *Id.* at 78-79.

So the Tribe is wrong when it argues that the Corps ignored the effects of this pipeline beyond the water's edge. It is true that the Corps did not analyze the effects

of the entire pipeline—instead, it limited the scope of its analysis to the areas under its jurisdiction and those areas that it concluded were so connected that they were also part of the "federal undertaking." Att. 3, Exh. 3 at ECF pages 33–34; *see also* Att. 5 at 77. That was a reasonable decision that complies with the NHPA and is consistent with the precedent set by this Court in *Sierra Club* and *Duncan's Point*.

Next, the Tribe contends that the district court wrongly upheld the scope of the Corps's analysis because it "failed to defer to binding regulations issued by" the Advisory Council on Historic Preservation (the "Advisory Council," "ACHP"). Mot. at 4. But the scope of the Corps's analysis here is consistent with the Advisory Council's promulgated regulations, which merely repeat the same statutory definition of "undertaking" that focuses on the agency's "direct or indirect jurisdiction." 36 C.F.R. § 800.16(y). Moreover, as this Court has held, "however broadly . . . the [Advisory Council] define[s] 'undertaking,'" Section 106 of the NHPA still "applies only to: (1) 'any Federal agency having . . . jurisdiction over a proposed Federal or federally assisted undertaking'; and (2) 'any Federal . . . agency having authority to license any undertaking.'" *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 755 (D.C. Cir. 1995). There is no conflict here between the scope of the Corps's analysis and the Advisory Council's regulations.

The Advisory Council did ask the Corps to analyze the entire pipeline, but its letters are not "binding regulations." *See* Tribe Att. 12. To the contrary, the Advisory Council's regulations required the Corps—not the Council—to determine the scope of this undertaking. 36 C.F.R. § 800.3(a). And while the regulations allow the Advisory Council to object, they do not give the Council a "veto" over the Corps. Instead, they

required the Corps to take the Council's opinion "into account" and then expressly allowed the Corps to "affirm [its] initial finding of no adverse effect" over the Council's objections. 36 C.F.R. §§ 800.5(c)(3)(ii)(A), (B). The Corps did just that, Attachment 6, and, by doing so, it fulfilled its Section 106 obligations. 36 C.F.R. § 800.5(c)(3)(ii)(B).

Finally, the Tribe contends that the Corps should have looked at a larger portion of the pipeline based on two Ninth Circuit decisions. Mot. at 13 (citing *Save Our Sonoran v. Flowers*, 408 F.3d 1113 (9th Cir. 2005) and *White Tanks Concerned Citizens v. Strock*, 563 F.3d 1033 (9th Cir. 2009)). These cases are easily distinguished because they both involved large housing developments where Federally-regulated waters were significant to the project as a whole. *See Sonoran*, 408 F.3d at 1118, 1122; *White Tanks*, 563 F.3d at 1041. Here, in contrast, the Tribe is seeking to "federalize" 1,168 miles of pipeline where the Corps has jurisdiction over only roughly 3% of the entire project. This case is not like *Sonoran* or *White Tanks*—it is like *Sierra Club*, where this Court rejected a similar attempt to "federalize" a pipeline under NEPA.

II. The Tribe has not shown irreparable harm.

The Tribe asks the Court to enjoin construction of the pipeline "for 20 miles on both sides of the Missouri River at Lake Oahe" pending the resolution of this appeal. Mot. at 1. To obtain this injunction, the Tribe must show that it is "likely to suffer irreparable harm" without it. *See Winter v. NRDC*, 555 U.S. 7, 20, 22 (2008). The district court properly concluded that the Tribe had not made that showing. Op. at 50–57. The Tribe's most relevant declarations are the two submitted by Tim Mentz,

Sr. Tribe Att. 5, 6. Mr. Mentz alleges that he observed historic sites in the path of the pipeline on private lands several miles from Lake Oahe and that those sites were later destroyed by pipeline construction. Dakota Access disputes Mr. Mentz's allegations.

But in any event, these allegations cannot support the injunction sought by the Tribe because these alleged incidents occurred entirely on private land, outside the jurisdiction of the Corps, which cannot be reached by an injunction against the Corps. *See* Op. at 35; Tribe Att. 6 ¶ 3 (alleging that these sites are "about 1.75 miles from the construction activity that the Corps has actually permitted at Lake Oahe.").

The Tribe has not alleged that any of these sites fell within the Corps's jurisdiction, and the Tribe has not identified any specific sites that are likely to be affected by the construction at Lake Oahe. The Corps's land around Lake Oahe extends only a few hundred feet from the shore (between 350 and 630 feet) and does not reach these sites. *See* Att. 5, Fig. 11 at ECF page 159; Att. 5, Fig. 14 at ECF page 162. The "affected area" around Lake Oahe extends a little further to include the private lands where the borehole drilling and other construction will take place. But the areas identified by Mr. Mentz are "entirely outside the Corps' jurisdiction." Op. at 35. Because the Tribe has sued the Corps, and not Dakota Access, this Court should not enjoin "the construction of [the pipeline] on private lands, which are not subject to any federal law." Op. at 51.

Even at Lake Oahe, the Tribe has failed to show that the construction of the pipeline is likely to cause irreparable harm. Op. at 56. The pipeline will run at least 90 feet below the bed of the lake, and drilling and construction will be completed on only a few acres of neighboring private land. The Corps visited the site with the Tribe

several times earlier this year, in an effort to identify sites that might be affected by the pipeline's construction. Att. 3 ¶ 29. The Tribe identified several previously undiscovered sites during those visits, but they are not located near the construction. *See id.* The Corps ultimately identified 41 archaeological sites within a one-mile radius of the Lake Oahe construction. Mot. at 15. But the Corps concluded that the limited drilling that will be conducted in this small area is too far from these sites to have any effect. Att. 5 at 78–79; Att. 3 ¶ 33. North Dakota's State Historic Preservation Officer ("SHPO") toured the site and concurred with the Corps's "no effect" determination. Att. 3 ¶¶ 26, 34.

For these reasons, the district court properly concluded that the Tribe has failed to make the required showing of irreparable harm. Op. at 57. The Tribe now argues that the district court wrongly concluded that it "lacked authority to enjoin Dakota Access." Mot. at 16. The Tribe, however, "has not sued **Dakota Access** here for any transgressions." Op. at 51 (emphasis in original). The Tribe's complaint does not allege that Dakota Access has violated any law, and Dakota Access's construction on private lands, outside the requirements of Federal permitting, are "not subject to any federal law." Op. at 51.

Beyond Lake Oahe, the district court also correctly concluded that the Tribe has failed to show that construction at any of the crossings under the Corp's jurisdiction is likely to cause irreparable harm. Op. at 50–57. As the district court explained, the Tribe's allegations of harm are plagued by a series of problems. Many of these allegations relate to construction on private lands entirely outside the Corps's jurisdiction. Op. at 51. Much of this construction has already been completed,

rendering the Tribe's claims moot. Op. at 53. And the Tribe failed to carry its burden of demonstrating where its culturally-significant lands lie. Op. at 53–54.

Most importantly, the Tribe has failed to identify specific historic sites or cultural resources that might be affected by construction at these crossings. Op. at 54–56. The Tribe has speculated that such sites must exist somewhere along the length of the pipeline. Op. at 54. But speculation alone is not enough to show irreparable harm. As the Supreme Court has held, "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (citation omitted); *see also Wis. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985) ("[T]he injury must be both certain and great; it must be actual and not theoretical."). It was the Tribe's burden here to show that it is "likely to suffer irreparable harm in the absence of preliminary relief," and the district court properly concluded that it has not carried that burden. Op. at 54–56.

III. The balance of equities and public interest do not support granting an injunction.

The balance of equities and the public interest weigh against granting the requested injunction. The Corps tried to consult with the Tribe over this project, and the Tribe refused because it believed that the Corps should address the entire pipeline. But the consultation process was designed to protect the same kind of resources that the Tribe now says will be harmed without an injunction. It would not serve the public interest to grant an injunction to protect resources that might have been

protected if the Tribe had participated in a meaningful consultation with the Corps. *See Apache Survival Coalition v. United States*, 21 F.3d 895, 908 (9th Cir. 1994) (holding that the tribe could not bring claims for violations of the NHPA where it "removed itself from the NHPA process.").

Conclusion

For these reasons and the reasons set out in the district court's decision, the Tribe's motion for injunction pending appeal should be denied. Nonetheless, as discussed above, pipeline construction at Lake Oahe will not go forward at this time, and the Departments of the Army, the Interior, and Justice call on Dakota Access LLC to pause its construction voluntarily within 20 miles of Lake Oahe until the Corps can determine whether it needs to reconsider any of its previous decisions regarding the Lake Oahe site.

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I hereby certify that on September 14, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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