NO. 16-5259

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STANDING ROCK SIOUX TRIBE,
Plaintiff-Appellant,

and

CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff,

v.

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

and

DAKOTA ACCESS LLP,
Intervenor-Defendant-Appellee.

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# PLAINTIFF-APPELLANT'S REPLY IN SUPPORT OF MOTION FOR EMERGENCY INJUNCTION PENDING APPEAL

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## INTRODUCTION

The injunction sought in this motion does not span the entire pipeline, but only the area around Lake Oahe, an area of sacred and ceremonial importance to the Standing Rock Sioux Tribe. The site was part of the Tribe's land before it was taken by the U.S. government in violation of treaties and later flooded by the Army Corps. Many sacred and culturally important sites have been found here, and no one disputes that destruction of such sites causes irreparable harm to the Tribe. This motion merely seeks to prevent additional loss of such sites pending resolution of this appeal.

Throughout this case, the Corps and Dakota Access have argued strenuously that the Corps need not consider areas outside the Corps' jurisdiction in complying with § 106 of the National Historic Preservation Act ("NHPA"). On this motion, however, both concede that the Corps must do so, at least to some distance. But the Corps has never explained what is inside its scope of review, what is outside, and how it draws the line between the two. The result is an arbitrary, inconsistent, and unlawfully narrow application of the NHPA requirement to consider indirect effects of federally licensed undertakings.

The Tribe's requested injunction coincides with the request made by the agencies for a voluntary halt to construction because of "important issues raised" by the Tribe in this litigation. Tribe's Att. 2. The Corps agrees that construction should stop on the ground to allow the review process to proceed, and will not issue an easement needed to cross Lake Oahe until it completes its review. Accordingly,

whatever harms Dakota Access claims from a temporary cessation of construction in this narrow area are already in play, regardless of any decision here.

## ARGUMENT

### I. THE CORPS UNLAWFULLY ABDICATED ITS § 106 DUTIES UNDER NATIONWIDE PERMIT 12 FOR MOST WATER CROSSINGS

The Corps and Dakota Access ignore the fact that the agency charged with implementing the NHPA—the Advisory Council on Historic Preservation (the "Council")—specifically criticized the nationwide permits for allowing permittees to make their own determinations of impacts to historic properties with no input from the agency and no consultation with tribes. Motion at 7-8. They also ignore the fact that the district court itself recognized that it could well be unlawful for an agency to "rel[y] completely on the unilateral determination" of a permittee as to impacts to historic sites. *Id.* at 9. Instead, the Corps simply points to Council regulations that allow use of private contractors. Corps Opp. at 9. However, those regulations emphasize that even where contractors are used, the agency remains responsible, 36 C.F.R. § 800.2(c), and direct that the agency itself must ensure that impacts to historic sites are considered. Here, however, the Corps had no role at all in "ensuring" that effects to historic properties caused by the "non-PCN" water crossings were considered because a nationwide 12 delegated that duty to the proponent with no standards and no oversight.

The Corps points to a cursory half-page memo prepared in anticipation of this

litigation, but the agency did not have a rational basis for concluding that thousands of "non-PCN" crossings had no effect on historic sites. Corps Opp. at 10. The surveys submitted by Dakota Access are silent on the proximity of cultural resources to jurisdictional waters. Tribe Motion at 9. A cursory one-page validation of these surveys, with zero input from the Tribe, cannot possibly satisfy § 106.[1] Instead of addressing these points, the Corps seeks to shift the burden to the Tribe to provide evidence of sites that weren't considered. Corps Opp. at 10. But the issue here is legal, not evidentiary. The point of § 106 is to give the Tribe an opportunity to participate in these determinations, which includes participation in surveys of parts of their ancestral lands to which they typically no longer have access. Because there was never any § 106 process for the thousands of "non-PCN" water crossings along the pipeline, the Corps violated § 106.

## II. THE CORPS FAILED TO CONSIDER INDIRECT EFFECTS

### A. The Corps Applied § 106 Unlawfully Narrowly

The Corps' position is premised on a false binary choice between expanding § 106 to cover the entire pipeline, and applying it only in the direct areas of its jurisdiction. That was not the question in the district court nor is it the question here. Both the Corps' and the Council's regulations require consideration of indirect effects

[1] The opportunities for the Tribe to consult that were the focus of the district court's opinion were limited to the notification and verification sites only, of which there were two in North Dakota. It is undisputed that the Tribe never had any opportunity to consult under § 106 on the non-PCN sites.

outside areas of direct jurisdiction. The Corps, backtracking from its position before the district court, acknowledges this now. But none of the pipeline route—including areas immediately adjacent to jurisdictional waters—was considered under §106, effectively writing indirect effects out of the statute and regulations. The Corps' late acknowledgement that it must look at indirect effects does not cure its failure to actually have done so at the time it authorized these actions. If it had, the sacred sites found by Mr. Mentz just over a mile and a half away from Lake Oahe could have been found and protected as part of the § 106 process.

The Corps' and Dakota Access's positions with respect to the scope of § 106 review are self-contradictory. On one hand, the Corps repeatedly emphasizes that the Corps "reasonably restricted the scope of its analysis to areas where it had jurisdiction." Corps Opp. at 12. On the other, Dakota Access correctly recognizes that limiting § 106 review to the area where the Corps has jurisdiction—specifically, the water—would be "nonsensical" because only submerged cultural resources would be recognized. Dakota Opp. at 10. Both point to places where the Corps exercised authority on private uplands. The result is an incoherent and arbitrary approach to the Corps' § 106 scope in which some uplands are considered and others are not, with no recognizable dividing line between the two.[2]

[2] The Corps and Dakota Access emphasize that most pipeline activities take place on "private" lands. But it is indisputable that § 106 applies to federal permits on private lands—indeed, land ownership is irrelevant to § 106 consultation. *See* 77 Fed. Reg. 10184, 10251 (Feb. 21, 2012) ("Even though most NWP activities occur on private

For example, the Corps claims to have considered portions of the pipeline route in uplands, pointing to Fig. 11 in the EA. Corps Opp. at 14.[3] But it is mistaken. This map shows that the *access road* leading up to the Oahe bore hole was deemed an "indirect effect" of the crossing, but the pipeline route itself leading away from the bore hole (marked by a dotted red line) was not. Corps Att. 5 (PDF page 161). The Corps document concluding the § 106 process is very explicit that the pipeline route is not in the "area of potential effects," *even though its own map showed known sites directly in the pipeline's path*. Tribe Motion at 11. The Corps provided no coherent explanation for why the access road was an indirect effect of the Corps' authorization but the pipeline itself was not, and the parties do not provide one here.

Similarly, the Corps implicitly acknowledges that it has authority in uplands via the General Condition 21 requirement to address unexpected discoveries. Corps Opp. at 9. But nowhere does it identify how far that authority extends from jurisdictional waters. The Corps does not explain why it has authority to dictate what happens on private uplands outside of its jurisdiction through the unanticipated discoveries plan, but cannot consult with tribes in the first instances in those exact same areas. Mr. Mentz's discoveries highlight the problem. While the Corps considered the access road from the bore hole site to Highway 1806 as an indirect

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land, compliance with applicable Federal laws is necessary.").

[3] With respect to cultural resources, the EA is clear that all that was considered was the bore hole sites on either side of Lake Oahe. Corps Att. 5 at 77-78.

effect of its Lake Oahe authorizations, Mr. Mentz's discoveries in the pipeline route on the other side of that same highway were barely any further away. One was within the scope of § 106, and the other was not, yet no explanation can be found as to why.

The Corps, like the district court, relies on *Sierra Club v. U.S. Army Corps of Engineers,* 803 F.3d 31(D.C. Cir. 2015) to argue that the Corps need not consider impacts outside of its direct jurisdiction. But that case differs in significant respects. First, the plaintiff there had argued for a "pipeline-wide" review, and waived any challenge to anything less. Here, in contrast, the Tribe has expressly preserved the argument that the Corps should have looked more broadly without necessarily tethering it to a "pipeline-wide" § 106 analysis.[4] Second, that case parsed and applied definitions under NEPA, not the definitions of "undertaking" and "area of potential effects" under NHPA, which expressly include indirect jurisdiction and indirect effects on historic properties.[5] Moreover, the *Sierra Club* Court deferred to the Corps'

[4] The Tribe was fully aware of the *Sierra Club* decision, and pled a "whole pipeline" § 106 claim as well as a more limited "indirect effects" claim, and focused its district court briefing on the latter. EFC 1 at 35. Further, the Tribe never argued that the whole pipeline was "federalized," as the Corps claims, but rather that the Corps "unlawfully limited its § 106 consultation review to the direct impacts in the immediate area where the Corps had Clean Water Act jurisdiction, and ignored impacts to sites caused by the pipeline even a few yards away." Preliminary Injunction Brief [ECF 5] at 27 (PDF p. 36); *see also* Reply [ECF24] at 6-7 ("The question presented here is the extent to which the Corps must comply with § 106 for portions of the pipeline outside direct areas of its CWA jurisdiction").

[5] The Corps cites *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291 (D.C. Cir. 2007) for the proposition that NEPA and NHPA are similar, but the case simply states that both require federal actions before a court can review them. The parties do

NEPA regulations, which have been approved by the Council on Environmental Quality, whereas here, the Council has never approved—and continues to dispute the validity—of Appendix C. Finally, the *Sierra Club* Court relied on the fact that the Corps had conducted NEPA analysis on the nationwide permits at the time they were issued, rendering additional NEPA analysis at the verification stage unnecessary. Here, the Corps never engaged in an analogous § 106 consultation at the programmatic level. The Corps' effort to recast this case as the NHPA analogue to *Sierra Club* should be rejected.

B. The District Court Erroneously Deferred to the Corps

The Corps continues to rely on its Appendix C guidance to defend its truncated § 106 consultation but its arguments must fail. First, whatever the merit of the contention that pipelines "almost always" can be undertaken without Corps authorization, it is certainly not true of this one. Corps Opp. at 11. Dakota Access claims to have taken extraordinary pains to avoid Corps jurisdiction but still needed 204 verifications and other Corps permits to build its nearly 1200-mile-long pipeline. Even a theoretical alternative pipeline that tunneled under every single one of the thousands of jurisdictional waters in its path would still need multiple Corps authorizations. 33 C.F.R. § 322.3 (requiring permit to tunnel under navigable waters). There is no way to build a pipeline from North Dakota to Illinois without Corps'

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not point to any case that says that "major federal action" under NEPA and "undertakings" under NHPA are the same thing, and they are not.

permits. *See also* Corps Att. 5 at 15 ("no action" alternative to Lake Oahe crossing is "no pipeline"); *Save our Sonoran v. Flowers*, 408 F.3d 1113, 1122 (9th Cir 2005) (relying on similar admission in NEPA document to find Corps responsible for evaluating parts of project outside Corps jurisdiction).

Second, the district court erred by deferring to the Corps instead of the Council on matters of NHPA interpretation, a point unaddressed by the Corps. Motion at 11-12. In a perplexing footnote, it asserts that its Appendix C guidance does not require Council approval because it is a "stand alone" rule that defines the § 106 process. The distinction is meaningless. Absent Council approval, the Appendix C guidance has no legal relevance, and the Council regulations control. 36 C.F.R. § 800.14.[6] The Corps' insistence that its actions were consistent with those regulations is belied by the letters from the Council saying the exact opposite.

The Council understood that the unlawfully narrow scope infected the entire process of dialogue between the Tribe and the Corps. While the district court points to the volume of communications and blames the Tribe for failing to participate, it ignores the fact that this critical legal problem would remain even if the Tribe had participated. It was error to defer to the Corps, and not the Council, on this point.

[6] Indeed, the Corps includes a document (Att. 8) that reveals that the Corps initiated a proposal in 2004 to overhaul its § 106 rules (which were adopted before the NHPA was significantly amended in 1992), but evidently abandoned that process.

## III. PLAINTIFF'S IRREPARABLE HARM, THE BALANCE OF HARM, AND THE PUBLIC INTEREST SUPPORT AN INJUNCTION

It is undisputed that destruction of sacred ceremonial sites and graves, like those documented by Mr. Mentz, causes irreparable spiritual harm to the Tribe. The findings made by Mr. Mentz belie any assertion that the Tribe has failed to identify sacred sites in harm's way. With the landowner's express permission, Mr. Mentz accessed land adjacent to the pipeline corridor and documented burial and spiritual ceremonial sites unrivaled among recent finds in North Dakota. Tribe Att. 6. Dr. King attested to the credibility of Mr. Mentz' report and his unique expertise in identifying and understanding the meaning of such sites, expertise that no one would claim the construction operators would have. Tribe Att. 7.

Instead, Dakota Access contends that if the stone constellation or effigy extended into the pipeline corridor, they either had already been destroyed or were avoided. It makes this assertion unilaterally with no involvement of the Tribe or the State Historic Preservation Office despite the protocols that require such engagement.[7] Remarkably, Dakota Access was fully aware of Mr. Mentz's findings but did not stop work and complete Tribal, State, and Federal coordination as Corps' General Condition 21 requires it to do. Dakota Att. 13. Instead, it proceeded with

[7] Relying on maps produced on the day of a temporary restraining order hearing and that were never authenticated, Dakota Access asserts that the sites found by Mr. Mentz were outside the path of the pipeline or at the edge of the right-of-way for an older pipeline. Opp. at 13. Without any sworn authentication and context, it was an abuse of discretion for the district court to rely on this map to support its findings.

the bulldozing after surveying the area with a construction crew. Unless an injunction prevents further construction in this area, the Tribe will not have an opportunity to visit the sites to determine what, if anything, is left to re-inter.

For its part, the Corps never disputes the irreparable harm from destruction of these sites, but instead reiterates its merits position that such sites are outside the area of its direct jurisdiction. Corps Opp. at 17-18. It then recites, although does not defend, the district court's erroneous view that it lacked authority to enjoin Dakota Access. This circular reasoning plagues the parties' attempts to pin the blame on the Tribe for not engaging in consultations, when those consultations would have been so narrow that they would not have protected the sites that Mr. Mentz found.

In arguing that it faces economic harm, Dakota Access ignores the fact that it still has no easement to cross Lake Oahe, and will not obtain one until completion of the new federal review. Dakota Access points to maintenance and re-mobilization costs that it will incur until it can drill beneath Lake Oahe. Dakota Att. 12, ¶ 17. But it is incurring such costs independently of any injunction this Court might issue.

In initiating their review, the federal agencies recognized that this case presents "important issues" and indicated their desire that no construction proceed within 20 miles of the lake during that review. It would be a travesty if bulldozing continued right up to the drilling sites at Lake Oahe when the agencies might well decide not to grant the easement, requiring a rerouting. The irreparable harm would then be done for a pipeline that would need to be rerouted away from the Lake.

Dated: September 15, 2016

Respectfully submitted,

*/s/ Jan E. Hasselman*

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation and typeface requirements of FRAP 27(d)(2) and FRAP 32(a) because it is no more than ten (10) pages in length and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size.

Dated: September 15, 2016

*/s/ Jan E. Hasselman*
Jan E. Hasselman

**CERTIFICATE OF SERVICE**

I hereby certify that on September 15, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States District Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

*/s/ Jan E. Hasselman*
Jan E. Hasselman