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 Defendant's Response to Motion by Dakota Access LLC to Dismiss Appeal as Moot or for Summary Affirmance in the Alternative

JOHN C. CRUDEN
Assistant Attorney General

JAMES A. MAYSONETT
Attorney, U.S. Department of Justice
Environment & Nat. Res. Division
P.O. Box 7415
Washington, D.C. 20044
202-305-0216
james.a.maysonett@usdoj.gov

This is an appeal by the Standing Rock Sioux Tribe (the "Tribe") of the district court's September 9, 2016 order denying the Tribe's motion for a preliminary injunction. Dakota Access LLC ("Dakota Access") has now moved to dismiss this appeal on the ground that it is moot because the construction that the Tribe sought to enjoin has been completed. Motion by Dakota Access LLC to Dismiss Appeal as Moot or for Summary Affirmance in the Alternative (Nov. 25, 2016) ("Mot.") at 14–16.

The United States agrees. The Tribe sought to enjoin the clearing and grading of the pipeline right-of-way. *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, No. 1:16-cv-1534, Docket No. 6 ("PI Mot.") at 34–39 (alleging that clearing and grading work for the pipeline would cause irreparable harm to the Tribe's historic sites). That work, according to Dakota Access, is now complete. Add. 135. There is, therefore, no relief left for the Court to grant, and the Tribe's motion and this appeal are moot.[1] *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52, 55 (D.C. Cir. 2001).

The Tribe agrees that the appeal is moot and should be dismissed. Appellant Standing Rock Sioux Tribe's Response to Dakota Access LLC's

[1] On December 4, 2016, the United States Army decided not to grant the easement that would allow this pipeline to cross Lake Oahe at the proposed location based on the current record. Instead, the Army has directed the United States Army Corps of Engineers to engage in additional review and analysis. That decision has no bearing on this appeal because the Tribe sought to enjoin construction that is now complete and thus cannot be affected by the Army's decision.

Motion to Dismiss (Dec. 5, 2016) ("Tribe Resp.") at 4. The Tribe, however, also argues that the district court's underlying decision must be vacated. *Id*. at 2–5.

The United States opposes the Tribe's request to vacate the district court's decision. The Tribe has not shown that it is entitled to the "extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). It is true that the Courts of Appeal often vacate district court decisions that become moot while an appeal is pending, but that general rule does not apply to decisions on motions for preliminary injunction.

As the Supreme Court has explained, the general rule is meant to prevent "a judgment, unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear*, 340 U.S. 36, 41 (1950). But a district court's ruling on a motion for preliminary injunction—because it is preliminary—does not have the legal consequences of a final decision. *See, e.g.*, *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Cmty. Nutrition Inst. v. Block*, 749 F.2d 50, 56 (D.C. Cir. 1984). Because there is no "danger of unfair preclusive effect" in this situation, this Court has concluded that there is also no basis to vacate the district court's decision. *See, e.g.*, *Mahoney v. Babbitt*, 113 F.3d 219, 224 (D.C. Cir. 1997) (dismissing appeal as moot but denying motion for vacatur of decision on preliminary injunction because there was no "danger of unfair preclusive effect"); *Chau v. Dep't of State*, No. 95-5205, 1995 WL 686332, at *1 (D.C. Cir. Oct. 19, 1995) (dismissing appeal as moot but denying motion for vacatur "because the judgment from which they appeal is a

preliminary injunction that lacks preclusive effect."). Other Courts of Appeals and commentators have reached the same conclusion. *Gjertsen v. Bd. of Election Comm'rs*, 751 F.2d 199, 203 (7th Cir. 1984) (holding that district court decision on preliminary injunction should not be vacated because it "cannot have any res judicata or collateral estoppel effect, given that the case is continuing in the district court."); *see also* 13C Wright & Miller, Fed. Prac. & Proc. Juris. § 3533.10.3 (3d ed. 2016) ("[I]f the case remains alive in the district court, it is sufficient to dismiss the appeal without directing that the injunction order be vacated.").

The decisions cited by the Tribe do not show otherwise. Most of those cases did not involve appeals from orders on preliminary injunctions, and thus do not address the issue presented here. *See, e.g.*, *Akiachak Native Cmty. v. United States Dep't of Interior*, 827 F.3d 100, 115 (D.C. Cir. 2016). The Tribe cites a single case that granted vacatur when a preliminary-injunction appeal became moot, but the Court did so without discussion (and vacatur may have been unopposed in that case). *See Nat'l Kidney Patients Ass'n v. Sullivan*, 902 F.2d 51, 55 (D.C. Cir. 1990).

The Tribe complains that it will "lose the opportunity to test the district court's findings" if the underlying decision is not vacated, but those findings were preliminary and not binding on the district court. Vacatur is unnecessary and inappropriate here because the Tribe can continue to litigate all of its claims in the district court without prejudice from the preliminary-injunction decision.

Dakota Access has also moved, in the alternative, for summary affirmance. Mot. at 16–19. The Court should not reach that issue because the appeal is moot and must be dismissed.

/s/ James A. Maysonett

James A. Maysonett
Attorney, U.S. Department of Justice
Environment & Nat. Res. Division
P.O. Box 7415
Washington, D.C. 20044
202-305-0216
james.a.maysonett@usdoj.gov

Certificate of Compliance

This brief complies with the limits set by the Fed. Rules of App. Procedure 27(d)(2) because it is 871 words long.

/s/ James A. Maysonett

James A. Maysonett
Attorney, U.S. Department of Justice
Environment & Nat. Res. Division
P.O. Box 7415
Washington, D.C. 20044
202-305-0216
james.a.maysonett@usdoj.gov

Certificate of Service

I hereby certify that on December 8, 2016, I electronically filed the foregoing response 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.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ James A. Maysonett

James A. Maysonett
Attorney, U.S. Department of Justice
Environment & Nat. Res. Division
P.O. Box 7415
Washington, D.C. 20044
202-305-0216
james.a.maysonett@usdoj.gov