

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

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Intervenor-Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS,

**Defendant – Cross-
Defendant.**

and

DAKOTA ACCESS, LLP,

**Intervenor-Defendant
Cross-Claimant.**

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

**PLAINTIFF-INTERVENOR STEVE VANCE'S RESPONSE TO THE COURT'S
MARCH 13, 2017 MINUTE ORDER**

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

 I. “Person” under RFRA 1

 II. The Court’s Laches Analysis Does Not Address Vance..... 2

 III. Adequacy of Representation Continues Through Appeals 2

CONCLUSION..... 3

TABLE OF AUTHORITIES

Cases

Fund for Animals, Inc. v. Norton, 322 F.3d 728 (D.C.Cir. 2003) 1, 2

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)..... 2, 3

Melton v. Carolina Power & Light Co., 283 F.R.D. 280 (U.S. Dist. S.C. 2012) 2

Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967) 2

Statutes

Religious Freedom Restoration Act, 42 U.S.C. 2000bb-4..... 1, 2, 3

INTRODUCTION

COMES NOW Plaintiff-Intervenor Steve Vance in response to this Court's Minute Order dated March 13, 2017 directing the Plaintiff-Intervenors to inform the Court whether they still desire to intervene and, if so, why the Plaintiff-Intervenors are not sufficiently represented by the current Plaintiffs given the Court's decision on the Cheyenne River Sioux Tribe's ("Tribe") Motion for Preliminary Injunction that did not implicate the Tribe's standing. Plaintiff-Intervenor Vance still desires to intervene in this matter to vindicate his rights under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-4 ("RFRA") and the First Amendment. He must be allowed to do so as, notwithstanding this Court's Order on the Tribe's Motion for Preliminary Injunction, the Tribe still does not adequately represent his interests in light of the fact that the Tribe's RFRA and First Amendment claims still may fail or be subject to dismissal for reasons that do not implicate Mr. Vance's standing or posture in this matter. This includes the Tribe's ability to fully appeal issues that affect Mr. Vance's rights under RFRA. The standard for allowing intervention is "not onerous," *Fund for Animals, Inc. v. Norton*, 322 F.3d 728,735 (D.C. Cir. 2003), and for numerous reasons, Mr. Vance still seeks to intervene.

ARGUMENT

I. "Person" under RFRA

While this Court's Order denying the Tribe's Motion for Preliminary Injunction (ECF Nos. 157 & 158) does not address the Tribe's status as a "person" able to bring causes of action under RFRA, Dakota Access, LLC nevertheless has signaled that it intends to continue to challenge on appeal the Tribe's status as a "person" under RFRA in its arguments to the District of Columbia Circuit Court of Appeals opposing the Tribe's appeal of that Order. No. 17-5043, Doc. 1666523 at pp. 18-20 (March 17, 2017). Standing implicates the Court's jurisdiction and hence can be

considered on appeal. *Fund for Animals, Inc.*, 322 F.3d at 732. As Dakota Access continues to press this issue, it could still well be determined against the Tribe. Mr. Vance must be allowed to intervene as if the Tribe is ultimately found to not be a “person” under RFRA and is dismissed for lack of standing, there would be no party in the action to press his rights under RFRA.

II. The Court’s Laches Analysis Does Not Address Vance

The Court’s determination on laches did not address whether Mr. Vance had inexcusably delayed in bringing his claims, “Defendants have shown that the Tribe inexcusably delayed.” ECF No. 158 at 14. Whether laches applies “is highly fact-specific.” *Melton v. Carolina Power & Light Co.*, 283 F.R.D. 280, 293 (U.S. Dist. S.C. 2012). Thus, should the Tribe not prevail on appeal on this issue, Mr. Vance might still be able to prevail on a laches challenge as a function of his very different factual position than that of the Tribe—for example, the Tribe is a federally-recognized Tribe; Mr. Vance is a person. This fact and others place Mr. Vance in a fundamentally different position than the Tribe. Should the Tribe not prevail on laches or its RFRA claims and be subject to dismissal later in the action, Mr. Vance must be allowed to proceed to have his claims evaluated independently of the Tribe’s.

III. Adequacy of Representation Continues Through Appeals

This Court’s decision on the proper application of *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) has a wide ranging impact on all RFRA claims brought in this matter. Adequacy of representation encompasses a party’s ability and willingness to appeal issues that affect the intervenor. *Nuesse v. Camp*, 385 F.2d 694,704, n.10 (D.C. Cir. 1967). The Tribe has appealed this Court’s decision on *Lyng* in ECF No. 158 to the D.C. Circuit Court of Appeals, where it has yet to be either briefed or argued. A substantive ruling by the Circuit Court on *Lyng*, unlike laches, and possibly standing, would govern all RFRA claims in this

action, including Mr. Vance's. However, as set forth above, the Tribe's RFRA claims still might fail or be dismissed in light of the laches question and Dakota Access's continued challenge to the Tribe's status as a "person" under RFRA—issues that do not implicate Mr. Vance or, at least, have not been determined yet as to him. The Court of Appeals could determine these issues and dispose of the Tribe's claims without making a decision as to whether this Court properly applied *Lyng*. Should this occur and Mr. Vance not be allowed to intervene, the RFRA claims at issue in this matter would die on questions that do not implicate Mr. Vance (whether the Tribe is a "person" and, potentially, laches) and without any decision on the legal issue that does implicate Mr. Vance (whether *Lyng* forecloses the instant RFRA claim).

CONCLUSION

Mr. Vance's intervention in this matter is still required for the reasons set forth in his original motion. In particular opposing parties still maintain that the Tribe's RFRA claims are subject to dismissal from this action for reasons that do not implicate Mr. Vance and thus, the Tribe does not adequately represent Mr. Vance. Mr. Vance still desires to intervene, and his intervention is still required.

Dated: March 20, 2017

CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff,

By: /s/ Joseph V. Messineo

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