IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| SARA JUMPING EAGLE; LADONNA BRAVE BULL ALLARD; VIRGIL TAKEN ALIVE; CHEYENNE GARCIA; WILLIAM WILD BILL LEFT HAND; MAXINE BRINGS HIM BACK-JANIS, KATHY WILLCUTS, CRYSTAL COLE, RUSSELL VAZQUEZ, THOMAS E. BARBER, SR., TATEOLOWAN GARCIA, CHANI PHILLIPS, WASTEWIN YOUNG,<br>Intervenor-Plaintiffs,<br>v.<br>DONALD TRUMP, Individually and in His Official Capacity as President; U.S. ARMY CORPS OF ENGINEERS; and DAKOTA ACCESS, LLP,<br>Defendants on Intervenor Complaint. | **STATEMENT OF PROPOSED INTERVENORS AS TO ADEQUACY OF REPRESENTATION BY THE TRIBES**<br><br>**Case No. 1:16-cv-1534-JEB** |

INTERVENORS Sara Jumping Eagle, Ladonna Brave Bull Allard, Virgil Taken Alive, Cheyenne Garcia, William Wild Bill Left Hand, Maxine Brings Him Back-Janis, Kathy Willcuts, Crystal Cole, Russell Vazquez, Thomas E. Barber, Sr., Tateolowan Garcia, Chani Phillips, Wastewin Young propound this Statement in response to the Court's request that they explain why their interests are not adequately represented by the Tribes.

As has been set forth in the Complaint, Proposed Intervenors are registered Tribal Members of the Standing Rock, Cheyenne River, Oglala Sioux and/or Pine Ridge Sioux Nations and own, live on or stand to inherit lands that will be impacted adversely by the Dakota Access pipeline at issue in this matter. In particular, the Court has inquired as to why their interests are not

adequately represented by the Standing Rock Sioux Nation and the Cheyenne River Sioux Nation in light of the Court's decision to find that the Tribes have standing under the Religious Freedom Restoration Act (RFRA). The Court appears to have rejected the argument by Dakota Access that under RFRA the Tribes cannot propound the religious interests of tribal members since governmental entities lack standing under the statute. But, though the Court has thus far accepted the Tribes' standing, it cannot be assumed that such position will continue to be maintained by the Court of Appeals once this matter is appealed and briefed on the merits.

Facially, the statute could be said to bar any governmental entity from having standing under RFRA and such bar may reasonably be said to include tribes that have traditionally been recognized as comprising a government. See e.g., *Cal. Valley Miwok Tribe v. Jewell,* 5 F.Supp.3d 86 (D.D.C. 2013)(holding that tribes can comprise "governments" based upon the legitimacy of the elected tribal representatives.); accord *Oliphant v. Suquamish Indian Tribe,* 435 U.S. at 208, 98 S. Ct. at 1020-21 (recognizing a tribe's sovereign character that arises as to the rights retained by a tribe in a treaty with the United States.) As such authorities recognize, tribes are, where recognized by the United States, both governmental and sovereign and a reasonable argument, while debatable, can certainly be made that the Tribes will fall afoul of RFRA's bar on governmental standing in religious rights cases.

Looked at from the reasonably colorable claim that the Tribes may lack standing under RFRA, see 42 U.S.C. §2000bb-2, et seq., any intervention of the individual tribal members will imbue the RFRA claims with *individual* plaintiffs that undeniably have standing. Such individual standing will be necessary in the event that the Court of Appeals ultimately reverses this Court on the question of the Tribes' governmental standing. Since a fair (though debatable) interpretation of

RFRA could be said to mitigate against the Tribes' standing under the statute, the presence of the individual tribal members is essential to protect on appeal the RFRA claims that they share in common with the Tribes. Absent the presence of the individual intervenors, no jurisdictional means will exist for the Court of Appeals to adjudicate the merits of the RFRA claims if the appellate court reverses this Court's holding on the Tribes' standing. From this point of view, the proposed individual intervenors are not only properly brought into the action, but can be said to be essential since it will ultimately be their presence that will secure jurisdiction on the merits of the RFRA claims.

While defendants may argue that if the Court of Appeals reverses on standing and fails to reach the merits, the individual tribal members' RFRA claims can still be adjudicated in a *new* action, such piecemeal litigation is disfavored and must yield to the benefit of intervention so as to include all parties in a single action to avoid more burdensome litigation later, as the D.C. Circuit has made clear:

> "[I]t is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation."

*Natural Resources Defense Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977), cited with approval in *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 313 (D.C. Cir. 2015).

*Costle* plainly endorses expansive intervention: "In the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id*. at 910-911. Viewed from the point of view of this Circuit precedent, it would make little sense to exclude plaintiffs from the right of intervention where the RFRA issues have already been briefed only to later force the individual intervenors to commence a new action in the event that the Court of Appeals should determine to

reverse this Court's holding on standing and avoid ruling on the merits. In such case, the rule of convenience, as the Circuit has noted, would require their intervention now to avoid a completely new proceeding on the RFRA issues at a future and more remote date. It would also fail to serve the interests of Dakota Access to close the present litigation on standing grounds only to face renewed trial proceedings and possibly later appellate proceedings dragging on for many years from the very individual tribal members who seek to be part of a single, unitary action.

Moreover, the individual plaintiffs' right of religious exercise is primarily a *personal* right, not one that is inherently collective, thereby giving rise to a presumption of the need for individuals to intervene:

> "Inadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public."

3B Moore's Federal Practice, Par. 24.07[4] at 24-78 (2d ed. 1995). Governmental burdens upon religious exercise are typically fact specific, highly focused on the *individual* adherent's religious practice and not particularly suited to litigation by collective plaintiffs such as tribal entities. See e.g. *Brown v. Livingston*, 17 F. Supp. 3d 616, 634 (S.D. Tex. 2014)("A Free Exercise Claim requires "a case-by-case, fact-specific inquiry to determine whether government action or regulation imposes a substantial burden on an adherent's religious exercise.")

Finally, it must be considered that by no means can the Tribes as governments be best suited to represent the individual intervenors' religious rights. No evidence in the record documents that the Tribes themselves are comprised of universal Lakota practitioners or that the officers in the tribal governments are all of the Lakota faith. Moreover, nothing in the record documents that the tribal members as a whole are Lakota practitioners; indeed, it is a matter of common knowledge that many, if not a majority of Native Americans practice western faiths,

particularly Christian faiths. While the undersigned is not intending to demean such western-based religious practice by Native Americans, there is simply no basis to presume that the Tribes as governments that undoubtedly embrace citizens of a wide variety of faiths can be fairly said to represent the Lakota faith more effectively than the individual tribal members who are all Lakota practitioners. Such presumption is not only invalid but fundamentally illogical. No principle of law allows any governmental body to represent exclusively the religious views of individual religious practitioners.

The very identity of the individual claims with the Tribes' RFRA claims mandates intervention.

In fact, it has been long recognized that individual litigants must be permitted to intervene under R. 24(b) where their complaint asserts interests that are shared in common with the existing plaintiffs. Here, the Tribes purport to represent the religious rights of practitioners of the Lakota faith and advance the claim that such rights are substantially burdened by the threat to the purity of the waters of Lake Oahe, a claim that is within the same common nucleus of operative fact as the individual Lakota practitioners who form the body of the proposed intervenors. As has been long recognized in this Circuit, "Rule 24(b),...provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact. In the present case the legal issues are the same." *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967).

As in *Nuesse*, the same presumptions apply here where the religious rights interests raised by the individual plaintiffs are the same as those of the Tribes and, as in Nuesse, intervention should be permitted. *Nuesse*, supra. In fact, proposed intervenors as *individuals* have an even

closer nexus to the facts underlying the RFRA claims since it is the intrusion by government into personal religious practice that is the primary target of Congress's RFRA protection.[1]

In other areas, this Court itself has demonstrated the insufficiency of the Tribes as exclusive representatives of their members.

Among the primary arguments raised by Dakota Access and the Army has been that the Tribes failed to timely respond to the Army Corps' original requests for comment by the Tribes under NHPA provisions that require consultation with the Tribal entities. This Court agreed in its September 2016 decision on application for restraints that the Tribes failed to make a timely response to the Army Corps's inquiries and may have waived NHPA rights. Since this Court has *already* found that the Tribes failed to provide timely responses to protect the interests of the Tribes and their members under NEPA and NHPA, it is clear that the Court itself has made a finding that the Tribes are not adequately able to protect the tribal members' interests. It cannot be both ways: Dakota Access and the Army cannot argue that the Tribes failed to timely implement their right to comment under the governing statutes and, at the same time, argue that the Tribes are able to adequately represent the interests of Tribal members.

Dakota Access has also argued in its opposition (Doc 113) to Cheyenne River's motion for preliminary injunction that the Tribes failed to timely raise the question of intrusion of the

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[1]The personal nature of RFRA's scope of protection is emphasized in *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751 (2014), that extended RFRA protection to a closely-held corporation whose small group of family shareholders maintained that their *personal* religious practices were burdened by certain mandates under the Health Care Affordability Act. While *Hobby Lobby* extended protection of the free exercise clause to closely-held corporations, the focus of the decision was on the controlling family's *personal* religious beliefs that dominated their privately-held business. Though it allowed Norman and Elizabeth Hahn's privately-owned business to have RFRA standing, *Hobby Lobby's* focus was still on the *private* religious practices of its small group of family shareholders, emphasizing that, ultimately, RFRA is intended to vindicate the rights of *individual* religious practitioners.

easement into the religious rights of their members during the administrative process and have, thereby, waived the claim. Dakota Access further argued that Cheyenne River waived the RFRA claim in a second way by failing to include it in its complaint when it first sought leave to intervene. (Doc 113 at p. 14) Specifically, Dakota Access argued:

> "[T]he equities weigh heavily in favor of denying Cheyenne River's TRO request. Cheyenne River or its members should have invoked RFRA during the administrative process. The purpose of that statute, after all, is for the government to accommodate the free exercise of religion by not imposing substantial burdens unless the interests are compelling and the least restrictive means are employed. But Cheyenne River never notified the Corps that it believed an accommodation was necessary. And it failed to assert this claim when it first sought leave to file its own complaint—a complaint that accuses the Corps of failing to take into account a number of concerns, including the need to protect cultural and religious sites."

*Id.* It would be anomalous for Dakota Access to argue on the one hand that the Tribes failed to act reasonably to preserve claims that touch directly upon the rights of the individual tribal members and, conversely, contend that the Tribes can *still* "adequately represent" the interests of such members.

It has been well-recognized in this Circuit that the burden to support intervention is "minimal" at best and arises where the record shows the governmental entity "may" not be able to adequately represent the members' interests:

> "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal. See 3B J. Moore, Federal Practice para. 24.09-1 [4] (1969)."

*Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n.10, 30 L. Ed. 2d 686, 92 S. Ct. 630 (1972), cited in *Forest Conservation Council v. United States Forest Sev.*, 66 F.3d 1489, 1498 (9th Cir. 1995)[emphasis in original].

Where this Court has *already* concluded that the Tribes likely have failed to preserve their interests in a major area of public policy under NHPA and NEPA that touch directly upon the individual plaintiffs' interests, it is clear that the "minimal" burden to support intervention, *Trbovich*, supra, is satisfied. It follows that if the Court itself was forced to conclude that the Tribes may well have failed to protect and preserve their own rights under NHPA and NEPA, the record certainly shows that their representation of the individual plaintiffs' interests "*may* be inadequate". *Trvbovich,* supra. Under such circumstances the "minimal" intervention standard is plainly satisfied.

This "minimal" intervention standard has been well-stated by the D.C. Circuit that has held the burden to be "not onerous" and that the presumption lies *against* excluding the intervenor. In *Crossroads Grassroots Policy Strategies v. FEC*, supra, the Court of Appeals admonished the District Court for disregarding the "minimal" test for intervention:

> "To begin with, the district court never acknowledged that we have described this last requirement for intervention as 'not onerous'..., or 'low',..."

*Crossroads*, 788 F.3d at 321, citing *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003).

Thus, the standard for determining that the Tribes do not adequately represent the intervenors is "minimal", "not onerous" or "low", *id.*, a standard easily met here where the Court has *already* found it likely that the Tribes failed to adequately represent their own interests under NHPA and NEPA, let alone those of their members.

Under this Circuit's holdings the presumption lies *in favor* of intervention, as the Court of Appeals has made clear:

> "[A] movant "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation," *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293, 206 U.S. App. D.C. 317 (D.C. Cir. 1980).

Thus, the presumption lies in *favor* of intervention unless it is "clear" that the existing party "*will* provide adequate representation." *Id.* Here, where the Court has already concluded that the Tribes have failed to timely respond to the Army Corps under NHPA and NEPA, the record cannot show that the Tribes "*will* provide adequate representation." *Id*. Indeed, proposed intervenors are already harmed by the Court's finding that the Tribes' failure to timely address the Army Corps's inquiries may have caused a waiver of the Tribes' NHPA and NEPA claims, a waiver that may well impact the rights of the individual tribal members, and it follows that the presumption favoring intervention is satisfied.[2]

As the Circuit has also made clear, where the existing party is a governmental entity the Court must look "skeptically" on claims that the existing party adequately represents the intervenors:

> Nor did the [district] court acknowledge that we look skeptically on government entities serving as adequate advocates for private parties."

*Crossroads* at 321, citing *Fund for Animals, supra*; *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912-13, 183 U.S. App. D.C. 11 (D.C. Cir. 1977). The Tribes, being governmental entities, are certainly within the ambit of such skepticism as to their ability to adequately represent individual plaintiffs.

In addition, the individual plaintiffs raise claims not raised by the Tribes, such as the direct challenge to the grant of the easement based on illegal intervention of President Trump

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[2] Plaintiffs do not necessarily agree that the Tribes failed to adequately communicate with the Army Corps but the Court's holding to such effect merely reinforces the presumption in favor of the individual tribal members' intervention.

who ordered the Army to mandate expedited review over the EIS and easement study. The individual plaintiffs complaint alleges that such order is beyond the President's authority as he cannot order an expert agency, charged with independent review responsibility based on its expertise, to expedite its study. While this issue has not yet been briefed, it is a separate and distinct claim raised by the individual tribal members and is not a matter of mere disagreement in "litigation strategy", cf. *City of Los Angeles*, 288 F.3d at 402.("Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention."), but, rather, is a claim offering a separate basis for challenge to the agency decision.

Proposed intervenors also raise violations to their due process rights in the form of the premature cancellation or termination of the comment period that was to run through February 20, 2017, but was cut off by the Army through its February 3, 2017 and February 7, 2017 pronouncements. While the Tribes last year submitted their expert report from Steve Martin to the Army Corps, the individual plaintiffs - upon the re-opening by the Corps of the Environmental Impact Statement and easement reviews on December 4, 2016 - understood that they, as members of the public, had the right to offer comment in opposition to the easement and in support of the EIS study through the designated date of February 20, 2017. Individual plaintiffs began the process of preparing their statements and experts reports as alleged in their complaint to submit by the February 20, 2017 deadline and will testify to such effect at trial. By ending the comment period without notice and announcing the grant of the easement and termination of the EIS review before the comments were in, the Corps and the government prevented members of the public - including the individual proposed intervenors - from exercising the right they were led to believe they possessed to comment through the February 20,

2017 end of the comment period. And because the individual intervenors did not have the opportunity to file their comments prior to the premature termination of the comment period, they may suffer the loss of *other* due process rights including the right to challenge the agency finding. See e.g., *DOT v. Public Citizen*, 541 U.S. 752, 764-765 (2004)(noting that individuals who fail to present objections during the comment period waive the right to do so later in a judicial proceeding).

Individual intervenors undeniably have suffered a *personal* due process right by the government's premature termination of the comment period.

Such claims represent a violation of basic due process rights: an arbitrary termination of a stated comment period on which the public was intended to rely. Such violation touches directly the interests of *individual* members of the public, the intended beneficiaries of the comment period. See e.g. *Connecticut Light & Power Co. v. Nuclear Regulatory Com*., 673 F.2d 525,530 (D.C. Cir. 1982); ("The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process."); see also *Am. Farm Bureau Fed'n v. United States EPA*, 984 F. Supp. 2d 289, 333 (M.D. Pa 2013)(noting that "The purpose of the public comment period is to allow interested *individuals* the opportunity to communicate information, concerns, and criticisms to EPA during the rule-making process.")[emphasis added].

Plainly such comment periods are uniquely tailored to give *individuals*, as well as governmental bodies, the right to participate in the administrative process, a right that is arguably curtailed illegally when the agency prematurely terminates the comment period while individuals are still reviewing and preparing their comments and expert reports, as is alleged in proposed

intervenors' complaint. Due process rights are violated when there is a failure by the agency to allow such individual participation. Cf. *Singh v. Joshi*, 152 F. Supp. 3d 112,124 (E.D. N.Y. 2016) ("'A party's due process rights are not violated when it may participate fully in an administrative agency proceeding and later seek state-court review.'...Although the record does not reflect that the individual plaintiffs personally participated, there is no claim that they were denied the opportunity to be heard during the notice-and-comment period.")

In contrast to *Singh*, supra, here the complaint alleges a distinct claim that the comment period was terminated, a claim that goes directly to the due process rights of the individual proposed intervenors who were denied their right to participate in the administrative process by the curtailment of the comment period. Intervenors cannot be required to accept that the Tribes shall be the *only* bodies to vindicate intervenor's *personal* rights to offer public comment and expert reports to the Corps, rights that were curtailed without notice two weeks prior to the published termination date. Since such claims impact the proposed intervenors' *personal* rights, it cannot be "clear", *Crossroads*, supra, that the Tribes "will" adequately represent these claims of individual rights violations.

In fact, such claims could not even be filed until the Army's February 3, 2017 and February 7, 2017 pronouncements and individual plaintiffs should not be deprived of the right to litigate such issues under the guise of intervention standards where they could not possibly have brought the claims any earlier. Finally, plaintiffs' other administrative claims, while similar to those of the Tribes, also could not have been filed until the Army's decision to abandon the EIS and easement study in early February. As with their claims as to the comment period, individual intervenors' other administrative challenge could not have been brought earlier and should not be

prejudiced through the use of intervention standards to block a complaint that was promptly and timely filed upon the occurrence of the Army Corps curtailment of the administrative review process. Indeed, individual intervenors filed such new claims at virtually the same time as the Tribes and no considerations of timeliness should bar the individual plaintiffs' claims from being heard.

Accordingly, it is respectfully requested that the Motion to Intervene be granted.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of February, 2017, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

Respectfully

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