IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Defendant-Intervenor and Cross-Claimant	Case No. 1:16-cv-01534 (JEB) (consolidated with Cases No. 1:16-cv-1796 & 1:17-cv-00267)

UNITED STATES ARMY CORPS OF ENGINEERS' OPPOSITION TO SARA JUMPING EAGLE et al.'s MOTION TO INTERVENE AND RESPONSE TO STATEMENT OF PROPOSED INTERVENORS AS TO ADEQUACY OF REPRESENTATION BY THE TRIBES

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I. INTRODUCTION

Sara Jumping Eagle and twelve other individuals ("Movant-Intervenors") seek to intervene, bringing claims identical to those currently being litigated by the Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe. Movant-Intervenors' proposed Complaint also includes claims against President Donald Trump, in his individual and official capacity. The Court should deny Movant-Intervenors' motion for two reasons. First, it is untimely and therefore unduly prejudicial to existing parties. Movant-Intervenors brought this motion after substantial legal proceedings have already occurred. Moreover, Movant-Intervenors' individual-capacity claims for damages against President Trump create an additional layer of complexity that is likely to cause undue delay and therefore prejudice the existing parties. Second, Movant-Intervenors' asserted interests are already adequately represented by the Tribes, who have brought equivalent claims under the National Environmental Policy Act, Administrative Procedure Act, treaties, Religious Freedom Restoration Act, and First Amendment claims.[1] Movant-Intervenors have failed to show they are entitled to intervention, and this Court should deny their motion to intervene.

II. BACKGROUND

A. Nature of Existing Claims

In this case, four Tribes challenge the U.S. Army Corps of Engineers' permissions and real estate grants related to the Dakota Access Pipeline ("Pipeline"). Standing Rock filed this

[1] Cheyenne River and Standing Rock make RFRA and First Amendment claims in their respective pending February 2017 proposed amendments to their complaints. *See* Standing Rock First Am. Compl. (Feb. 10, 2017), ECF No. 106-1 ¶¶ 286-97; Cheyenne River Second Am. Compl. (Feb. 9, 2017), ECF No. 97-1 ¶¶ 348-58. For purposes of this brief the Corps assumes that the motions for leave to amend are granted, but does not waive any arguments regarding the Tribes' motions for leave to amend.

lawsuit on July 27, 2016 and Cheyenne River intervened on August 10, 2016. ECF No. 11. Cheyenne River and Standing Rock advance similar claims under NEPA, the NHPA, RFRA, CWA, RHA, MLA, and Flood Control Act. *See* Standing Rock Amend. Compl. (Feb. 10, 2017), ECF No. 106-1; Cheyenne River Amend. Compl. (Feb. 9, 2017), ECF No. 97-1. Both Standing Rock and Cheyenne River filed proposed amended complaints this past February to add claims under RFRA and to challenges the Corps' grant of an easement. *Id.*

The Oglala Sioux Tribe filed its Complaint on February 11, 2017. *Oglala Sioux Tribe*, No. 1:17-cv-00267-JEB, ECF No. 1. Like the other Tribes, Oglala Sioux's Complaint alleges violations of NEPA, treaties, and trust duties against the Corps.[2] *Id.* at 27-32. Oglala Sioux's NEPA and APA claims focus on the Corps' environmental assessment ("EA"), *id.* at 29, and the Army's withdrawal of its Notice of Intent to prepare an Environmental Impact Statement ("EIS") and breach of trust obligations. *Id.* at 30-31.

On March 16, 2017 this Court consolidated two cases, *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, No. 1:16-cv-01796 (D.D.C. filed Sept. 8, 2016), and *Oglala Sioux Tribe v. U.S. Army Corps of Engineers*, No. 1:17-cv-00267 (D.D.C. filed Feb. 11, 2017) with this matter.[3] Min. Order, *Standing Rock Sioux Tribe*, No. 16-cv-01534 (D.D.C. Mar. 16, 2017).

B. Movant-Intervenors' Proposed Complaint

On February 27, 2017 the instant Movant-Intervenors sought intervention. Mot. ECF No.

[2] Oglala Sioux's Complaint also alleges violations of the Mineral Leasing Act and Mni Wiconi Project Act. Compl. *Oglala Sioux Tribe*, No. 1:17-cv-00267-JEB, ECF No. 1 at 27-32.

[3] The Yankton Sioux Complaint also alleges claims against the Corps for its various decisions, approvals, and verifications of the Pipeline. Compl., *Yankton Sioux Tribe*, No. 1:16-cv-01796-JEB, ECF No. 1. Yankton Sioux also brings claims against the U.S. Fish and Wildlife Service ("FWS") for issuing special use permits in connection with certain portions of the pipeline that cross conservation easements administered by FWS.

145. All are Sioux Indians and practice the Lakota Faith. *Id.* at 1. Six are members of Cheyenne River, four are members of Standing Rock, two are members of Oglala Sioux, and one, Russell Vasquez, is not a tribal member but claims he is impacted by risks to Oglala Sioux's aquifers. Compl., ECF No. 145-1 ¶¶ 2 – 14. Movant-Intervenors seek to bring seven claims against the Corps that are largely duplicative of the Tribes' claims. These claims include: (1) challenges to the adequacy of the EA, *id.* at 7-16; (2) treaty claims, *id*. at 31-33; (3) environmental justice claims, *id.* at 28-31; (4) claims alleging inadequate public comment under NEPA, *id.* at 18-22; (5) claims alleging an EIS is required, *id.* at 7-15; (6) a claim that the decision to grant the Lake Oahe easement is arbitrary and capricious, *id.* at 18; and (7) RFRA and First Amendment claims. *Id.* at 24.

Additionally, Movant-Intervenors bring claims against President Trump in his official and personal capacity. Movant-Intervenors claim President Trump went beyond his authority by allegedly intervening in the Corps' decisionmaking process. *Id.* at 16-18. They also allege that, by doing so, President Trump is personally liable for money damages. *Id.* at 23-24.

On March 20, 2017 Movant-Intervenors filed a statement arguing that the Tribes cannot adequately represent them for several reasons. First, they argue that Tribes, as governments, may lack standing under RFRA. ECF No. 180 at 2. Second, they also argue that, because Tribes "embrace citizens of a wide variety of faiths," they cannot "be fairly said to represent the Lakota faith." *Id.* at 5. Third, Movant-Intervenors argue that the Tribes, as a governmental entity, would be deficient in representing their NEPA claims. *Id.* at 8-9. Lastly, Movant-Intervenors note that they bring claims not raised by the Tribes – their claims against President Trump. *Id.* at 9-10.

C. Proceedings Held to Date

There have already been a series of substantive proceedings on many of the claims that Movant-Intervenors seek to advance. First, the RFRA claims were briefed on a preliminary injunction and the Court issued an in-depth 38-page decision denying that injunction. Mem. Op., ECF No. 158. Cheyenne River appealed that decision and sought an injunction pending appeal. Mem. Op., ECF No. 167. The injunction pending appeal was denied. ECF No. 171. The appeal is pending. *See* Case No. 17-5043 (D.C. Cir.).

Separately, the parties are engaged in ongoing summary judgment briefing with both Standing Rock and Cheyenne River. Standing Rock moved for summary judgment on: (1) claims related to the adequacy of the EA, ECF No. 117-1 at 26-32; (2) treaty right claims, *id.* at 33-35; (3) environmental justice claims, *id* at 36-40; (4) claims about the need for an EIS and post-EA review deficiencies, *id* at 42-43; and (5) a claim that the decision to grant the Lake Oahe easement is arbitrary and capricious. *Id.* at 44-45. Both the Corps and Dakota Access have opposed this motion, ECF Nos. 159, 172, and Dakota Access joined the Corps in cross-moving for partial summary judgment. ECF Nos. 173, 186. Standing Rock's motion will be fully briefed by April 4, 2017.

Cheyenne River's motion joined Standing Rock's motion on its NEPA claims. ECF No. 131 at 8. In addition, Cheyenne River moved for summary judgment on: (1) claims that the Corps did not adequately consult, *id.* at 22-30; (2) trust duty claims, *id.* at 40-47; and (3) a claim that the decision to grant the Lake Oahe easement is arbitrary and capricious, *id.* at 47.[4] The Corps and Dakota Access also opposed this motion and cross-moved for partial summary

[4] Cheyenne River also brought claims under RHA section 408 and MLA. Mot. for Partial Summ. J., ECF No. 131 at 11-22, 37-44.

judgment. ECF Nos. 183, 185. Cheyenne River's motion will be fully briefed by April 13, 2017.

III. ARGUMENT

A. Movant-Intervenors Are Not Entitled to Intervene as a Matter of Right

Under Federal Rule of Civil Procedure 24(a), intervention as a matter of right should be granted only when the movant:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).

Four prerequisites must be established in order to intervene of right: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)).[5] Failure to satisfy ***any*** of these elements is grounds for denial of intervention as of right. *SEC*, 136 F.3d at 156. Movant-Intervenor's motion fails to satisfy at least two of these elements: timeliness and adequate representation.[6]

[5] In addition, "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit," applicants also must establish standing to participate in the action. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003) (quoting *City of Cleveland v. NRC*, 17 F.3d 1515, 1517 (D.C. Cir. 1994)). Although not directly argued here, the Corps does not concede that Movant-Intervenors have standing to participate in the original litigation.

[6] The Corps does not concede that Movant-Intervenors have demonstrated a legally protected interest or that the Corps' actions threaten to impair any alleged legally protected interest. But the Court need not reach those issues because the first and fourth elements are plainly deficient.

1. Movant – Intervenors' Motion Is Untimely and Granting the Motion Would Unduly Prejudice the Parties and Delay the Matter

Timeliness must be evaluated against the totality of the circumstances. *NAACP v. New York*, 413 U.S. 345, 366 (1973). Thus, when considering timeliness "courts are instructed to determine timeliness not only by evaluating the point to which the case has progressed, but by evaluating all of the circumstances of the case." *Seminole Nation of Okla. v. Norton*, 206 F.R.D. 1, 8 (D.D.C. 2001) (citation omitted). This Circuit considers all circumstances, and "especially weigh[s] the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (quoting *United States v. AT&T Co.*, 642 F.2d 1285, 1295 (D.D.C. 1980). A delay caused by a potential intervenor is sufficient to constitute prejudice where a decision on the merits is pending. *Amador Cty. v. U.S. Dep't of Interior*, 772 F.3d 901, 905 (D.C. Cir. 2014). Indeed, "the requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Id.* (quoting *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014)).

Movant-Intervenors' motion is prejudicially untimely because of the significant potential to cause undue delay to this matter. Movant-Intervenors sought to intervene after a years-long administrative process and six months of active litigation. Standing Rock and Cheyenne River have both moved for partial summary judgment and both Dakota Access and the Corps have opposed those motions, and cross-moved for summary judgment. Allowing intervention at this stage could delay a ruling on the pending motions for summary judgment and cause the parties to engage in unnecessary additional proceedings, and unnecessarily expend time and resources.

Moreover, the new legal arguments, theories of liability, and request for relief in damages presented by Movant-Intervenors against President Trump present an entire new set of unique issues that could prejudice existing parties. Individual capacity claims are wholly distinct from claims asserted against the government. A defendant sued in his individual capacity must be served personally and is permitted sixty days to respond to the complaint following service. Fed. R. Civ. P. 4(i)(3), 12(a)(3). Because Movant-Intervenors are asserting individual capacity claims, and seek to recover money damages from the personal assets of a government official, an official sued in his personal capacity (and the President in particular) has unique personal defenses available to him. Indeed, the Court would have to evaluate defenses such as the applicability of absolute or qualified immunity. *See Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (absolute immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) (qualified immunity). Additionally, the Court would have to assess whether an implied damages remedy is available. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Because the defendant that Movant-Intervenors seek to sue in this private suit for damages is the President of the United States, absolute presidential immunity—a doctrine rooted in the constitutional tradition of the separation of powers—undoubtedly will be at the forefront of the defenses that this court will need to evaluate separate and apart from those defenses already at issue in the lawsuit.

Relatedly, the individual-capacity claims against the President also present other challenges to litigation proceedings. Absolute or qualified immunity is an immunity from suit rather than a mere defense to liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Because the "basic thrust" of immunity is to free officials from the concerns of litigation, the Supreme Court has recognized that, until the threshold immunity question is resolved, a stay is justified. *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009); *Harlow*, 457 U.S. at 818. Similarly, the

President would be entitled to take an immediate, interlocutory appeal for any denial of immunity as well as to seek a concomitant stay while that appeal is pending. *See id.* at 672-73 (qualified immunity); *Nixon*, 457 U.S. at 741-43 (absolute immunity).

Movant-Intervenor's motion is untimely because it is brought after the litigation has significantly progressed. Moreover, allowing intervention would unduly prejudice all parties and impose additional delay. The uniqueness and complexity related to making claims against the President could insert a host of new issues to this already complex litigation. Accordingly, the motion should be denied.

2. The Tribes Adequately Represent Movant-Intervenors' Interests

If it is clear that a party to the litigation will provide adequate representation to the absentee, then intervention is not warranted. *Fund for Animals*, 322 F.3d at 735 (citing *AT&T*, at 1293). Representation is adequate "when the objective of the applicant for intervention is identical to that of one of the parties." *City of Stilwell v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996) (quoting *Bottoms v. Dresser Indus.*, 797 F.2d 869, 872 (10th Cir. 1986)). And courts require applicants for intervention to overcome the presumption of adequate representation when they share the same ultimate objective as a party to the suit. *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841-42 (9th Cir. 2011); *Haspel & Davis Milling & Planting Co. v. Bd. of Levee Comm'rs of the Orleans Levee Dist.*, 493 F.3d 570, 578-79 (5th Cir. 2007); *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005); *Stone v. First Union Corp.*, 371 F.3d 1305, 1311 (11th Cir. 2004); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999).

Because existing parties clearly provide adequate representation, intervention is not warranted. Twelve of the thirteen individuals are members of Standing Rock, Cheyenne River or

Oglala Sioux.[7] Like these Tribes, Movant-Intervenors' Complaint brings claims under NEPA, the APA, and treaties. Specifically, Movant-Intervenors allege that the Corps prepared an inadequate EA, should have prepared an EIS, did not provide an adequate opportunity to comment, and arbitrarily granted the Lake Oahe easement. Jumping Eagle Compl. ¶¶21-41, ECF No. 145-1. These are the same claims alleged by Standing Rock and Cheyenne River in their motions for partial summary judgment and Oglala Sioux in its Complaint. ECF No. 117-1 at 17-31, 42-48; ECF No. 131 at 8, 21-30, 37-44.

Movant-Intervenors cite *Crossroads Grassroots Policy Strategies v. FEC* for the proposition that the Tribes' representation of intervenors, like the U.S. government, must be looked at skeptically. 788 F.3d 312, 321 (D.C. Cir. 2015) (citing to *Fund for Animals,* 322 F.3d at 736); ECF No. 180 at 9. However *Crossroads,* and its predecessor *Fund for Animals*, suggest that courts look skeptically on the government because of the vast array of interests it must consider compared to the narrow interests of an intervening private party. *Fund for Animals,* 322 F.3d at 736-37. Here, the Tribes and Movant-Intervenors have the same concerns and narrow interest - enjoining Pipeline operations. *See* Standing Rock First Am. Compl., Prayer for Relief, ¶¶ 6, 12-13, ECF No. 106-1; Cheyenne River Second Am. Compl., Prayer for Relief, ¶¶16-18, ECF No. 97-1; Jumping Eagle Compl. ¶ 143, ECF No. 145-1. Thus, it is clear that Movant-Intervenors' NEPA and APA claims are adequately represented – and already being vigorously litigated– by the Tribes.

It is also clear that Movant-Intervenors share the same ultimate objective as the Tribes – to halt construction and the flow of oil through the Pipeline. *Id.* As noted above, *supra* p. 8,

[7] The thirteenth member, Russell Vasquez, stands to inherit land on the Pine Ridge Sioux Reservation and claims this land may be impacted by the Pipeline's impact on the Oglala aquifer. ECF No. 145-1 ¶ 10. Therefore, his interests are also adequately represented by Oglala Sioux.

where potential intervenors share the same ultimate objective as parties in the suit, adequate representation is presumed. *Freedom from Religion Found.*, 644 F.3d at 841. Here, Movant-Intervenors have not provided an argument to overcome this presumption.

Likewise, Movant-Intervenors allege parallel RFRA and First Amendment claims to those found in the Tribes' Amended Complaints. *See* Jumping Eagle Compl. at 24, ECF No. 145-1; Standing Rock First Am. Compl. ¶¶ 286-97, ECF No. 106-1; Cheyenne River Second Am. Compl. ¶ 348-58, ECF No. 97-1. Indeed, the Movant-Intervenors literally "repeat and reallege" the relevant portion of Cheyenne River's Complaint and state "these concerns expressed by the tribal government are equally, if not in greater degree, expressed and felt by the plaintiffs herein." Jumping Eagle Compl., ¶¶ 114-15, ECF No. 145-1. Accordingly, Movant-Intervenors' interests are clearly adequately represented by the Tribes.

B. Movant-Intervenors Do Not Meet the Criteria for Permissive Intervention

Although not specifically requested, this Court should also deny Movant-Intervenors permissive intervention under Federal Rule of Civil Procedure 24(b)(1). Permissive intervention may be granted if the applicant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Generally, courts look to three factors to determine whether permissive intervention is appropriate: (1) whether independent grounds for subject matter jurisdiction exist; (2) whether the motion is timely; and (3) whether the applicant shares a claim or defense that has a question of law or fact in common with the main action. *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 66 (D.D.C. 2004). Additionally, a court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed R. Civ. P 24(b)(3). Above all these factors is the simple fact that

permissive intervention is discretionary and a court may deny intervention even if all the criteria are met. *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1048 (D.C. Cir. 1998).

Here, the Court should exercise its discretion to deny Movant-Intervenors' motion because it will unduly delay and prejudice the original parties. At this critical stage in litigation – with the administrative process complete and summary judgment briefing well under way – permissive intervention is unduly prejudicial to the existing parties in this suit. Moreover, as outlined above, adding President Trump in his personal capacity, could bring a host of undue delays, complications, and unique procedural steps to this already complex suit. In comparison, Movant-Intervenors will not be prejudiced if their motion is denied because their interests are already represented by Standing Rock, Cheyenne River, and Oglala Sioux. Accordingly, the Court should exercise its discretion and deny Movant-Intervenors' motion to intervene under Rule 24(b)(1).

C. If Intervention Is Granted, the Court Should Impose Conditions on Intervention

If Movant-Intervenors are allowed to intervene, the Court should impose conditions on the parameters of their intervention. It is an established principle that reasonable conditions may be imposed on an intervenor – even upon one who intervenes of right. *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 20 (D.D.C. 2010). Here, intervention, should be conditioned on Movant-Intervenors removing President Trump in both his official and individual capacity, as a listed defendant and party in their Complaint. Additionally, the Court should require Movant-Intervenors to schedule and coordinate future briefing with Plaintiffs, to avoid any duplication of arguments.

IV. CONCLUSION

For the reasons stated above, this Court should deny Sara Jumping Eagle et al.'s motion to intervene.

Respectfully submitted,

Dated March 27, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, on the 27th day of March, 2017, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

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