IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE; ROBERT FLYING HAWK; OGLALA SIOUX TRIBE, Plaintiffs, and CHEYENNE RIVER SIOUX TRIBE, Intervenor Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Intervenor Defendant.	Case No. 1:16-cv-01534-JEB

RESPONSE OF DAKOTA ACCESS, LLC IN OPPOSITION TO 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'S MOTION TO INTERVENE

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INTRODUCTION

A month ago, Dakota Access opposed a motion by Steven Vance to intervene in this case. Dakota Access argued that Vance had waited too long to raise his religious-freedom claims. Among other things, this Court was already well on its way to deciding a motion by Plaintiff-Intervenor Cheyenne River Sioux Tribe ("Cheyenne River") to preliminarily enjoin Dakota Access from completing construction and operating the Dakota Access Pipeline ("DAPL") during the pendency of dispositive motions. We are well past that now. This Court's order denying Cheyenne River's preliminary-injunction motion has already been the subject of an emergency appeal to the D.C. Circuit. Also, briefing on motions for partial summary judgment is nearly complete.

Nevertheless, Movants persist. They are 13 individuals who ostensibly belong to one of the Sioux tribes in North or South Dakota and who purport to practice the Lakota religion and have property interests within one of the reservations. We say "ostensibly" because for 9 of the 13 the record is utterly barren of any documentation or sworn statements supporting any relevant fact—including whether they own land on the reservation, or whether they practice the Lakota faith using waters of the Missouri River or Lake Oahe. Movants acknowledged as much in their

[1] "D.E." refers to docket entries in this action; "Motion" or "Mot." refers to the Motion to Intervene, D.E. 145, and "Statement" refers to the Statement of Proposed Intervenors As To Adequacy of Representation By The Tribes, D.E. 180.

Motion—"[n]ot all [Movants] could submit declarations in time for this submission," Mot. 1-2—but made no effort whatsoever to correct this severe deficiency when they submitted their Statement three weeks later.

These Movants have proposed an array of claims that they would like to introduce into this already complex litigation—three counts challenging the U.S. Army Corps of Engineers' ("Corps") decision-making process after the new administration took power (Counts I-III), one count alleging religious freedom violations (Count IV), one count asserting environmental harms (Count V), and one count complaining of treaty violations (Count VI). This Court should deny their motion to intervene, either under mandatory or permissive intervention.

Indeed, what little the record contains about Movants shows that their motions are untimely—timeliness being, of course, a prerequisite to both mandatory and permissive intervention. Two of the Movants participated in the two-year-plus administrative process involving DAPL as part of the Standing Rock Sioux Tribe's Historical Preservation Office, and were in frequent contact with Corps personnel about DAPL. Two others are on record as early opponents of DAPL. Movants certainly could have filed Counts IV, V, or VI far earlier in the process, and, by failing to provide declarations containing even basic facts, have left the Court without the minimum evidentiary support needed to grant intervention. Untimeliness is reason alone to deny intervention. The absence of sufficient evidentiary support for their allegations that they will be harmed by the pipeline is another.

Permissive intervention also fails. This Court must consider any delay or prejudice caused by permissive intervention, including the addition of overlapping claims and legal theories that might distract from the primary dispute between the parties. Rather than try to refute this possibility, one of Movants' principal arguments in *favor* of intervention is their desire

to do what the rule cautions against: add new arguments to this litigation. The Court should not allow tardy intervention to further delay a proceeding—one that is finally approaching conclusion—with side issues that will distract the parties from the only disputes that are properly before the Court.

BACKGROUND

Available information about the 13 Movants varies considerably—in large part because only two proposed Movants actually submitted sworn declarations to the Court in support of the motion to intervene.

What is known is this. Two of the Movants have already appeared and participated in the Corps's regulatory approval process. LaDonna Brave Bull Allard is a member of the Standing Rock Sioux Tribe ("Standing Rock"). Allard has been involved in the DAPL regulatory approval process for more than a year. In her capacity as Standing Rock's Section 106 coordinator for the Tribal Historic Preservation Office, AR 66314 (Ex. A), she participated in a January 22, 2016 meeting attended by that Office and the Corps, AR 66740 (Ex. B), and a March 7, 2016 on-site visit, AR 66314 (Ex. A). She also founded the "Sacred Stone Camp," one of the first camps formed to protest DAPL, which has been in operation since at least April 1, 2016. Camp of the Sacred Stones, http://sacredstonecamp.org/about/. She did not submit a sworn affidavit.

Wastewin Young also is no stranger to the DAPL regulatory process. Indeed, she was a leading cause of Standing Rock's failure to timely raise religious concerns during the tribal consultation process. As the tribe's historic preservation officer, she was one of the key points of contact for Standing Rock's involvement in the DAPL regulatory approval process. To that end, she corresponded with the Corps about DAPL as early as September 16, 2014, AR 67150 (Ex. C), and again on February 18, 2015, AR 67087 (Ex. D), February 25, 2015, AR 67074 (Ex. E),

April 8, 2015, AR 67021 (Ex. F), August 21, 2015, AR 66988 (Ex. G), and September 28, 2015, AR 66929 (Ex. H). Throughout this correspondence she consistently rebuffed or ignored attempts by Dakota Access and the Corps to discuss concerns or even schedule meetings. *See* D.E. 39, at 15-18 (noting, for example, that when a Corps archeologist emailed Young to solicit comments regarding soil-bore testing there was "[a]gain, no reply"). Young also did not submit a sworn declaration. The proposed complaint asserts that she "will inherit that will be impacted adversely" [sic] by DAPL, without identifying what she will inherit. D.E. 145-1 ¶ 14.

The two Movants who provided declarations—Chani Phillips and Maxine Brings Him Back-Janis—are also short on relevant details. Phillips, according to his declaration, is a member of Cheyenne River and will inherit his mother's land, though he does not say where that land is located. D.E. 145-2 ¶ 3. He also asserts that he "practice[s] our traditional Lakota Spirituality," but does not say if that is in the vicinity of Lake Oahe, or elsewhere, *id.* ¶¶ 4-6; indeed, the only address information he provides is in Yakima, Washington, more than a thousand miles from the Cheyenne River reservation.

Janis asserts that she is a member of the Oglala Lakota (Sioux) tribe. In her declaration—more accurately, a completed form questionnaire—she responded "Yes" to a question asking whether "you own, reside upon, or stand to inherit land impacted by the Dakota Access Pipeline." D.E. 145-3 ¶ 3. The declaration does not say where the land is located—a matter of some importance in that the Pine Ridge reservation does not border the Missouri River. In fact, it is near the southwest corner of South Dakota,[2] raising the question as to how she would be harmed by a pipeline that runs from the northwest corner of the State to its southeast corner.

[2] *See* http://www.sdtribalrelations.com/images/ost.jpg (map of Pine Ridge reservation on which the Oglala tribe lives).

She also does not assert that she practices the Lakota faith anywhere near the Missouri River or Lake Oahe, but rather that she "practice[s] to keep in harmony and balance" and that the frequency of that "practice" "is not dictated by me, but more so, by a higher calling from my Creator." *Id.* ¶ 4. And like Phillips, Janis's home address is in Washington State (in the town of Selah), which is also more than a thousand miles from the Pine Ridge reservation.

The remaining Movants provide no declarations, although public records shed light on certain relevant facts:

- Sara Jumping Eagle asserts that she owns land on the Cheyenne River and Pine Ridge reservations and that she practices the traditional Lakota faith on these reservations. D.E. 145-1 ¶ 2. According to her twitter account, @drjumpingeagle, she appears to be a member of the Oglala Lakota (Sioux) tribe. In a video interview, she acknowledges participating in the DAPL protests since at least August 12, 2016. *See* Democracy Now!, *Standing Rock Sioux Pediatrician: Threat from Fracking Chemicals is "Environmental Genocide"* (Oct. 18, 2016), https://www.democracynow.org/2016/10/18/standing_rock_sioux_pediatrician_threat_from.

- Virgil Taken Alive, a member of the Standing Rock Sioux Tribe, asserts that he owns land on that reservation, and says that he practices the Lakota faith on the reservation. D.E. 145-1 ¶ 4. He, too, appears to have been an early activist against the DAPL, having provided a comment regarding the pipeline that was included in an April 1, 2016 Standing Rock press release that the Tribe posted on its Facebook page. Standing Rock Sioux Tribe April 1, 2016 Press Release, https://www.facebook.com/402298239798452/photos/a.422881167740159.110630.402298239798452/1234729763221958. Several articles also suggest that he is a Standing Rock "elder" and former member of the tribal council. Fen Montaigne, *Standing Rock: America's Indians are Still Losing, Only the Reasons Have Changed, Citizens Equal Rights Alliance*, http://citizensalliance.org/standing-rock-americas-indians-still-losing-reasons-changed/; Doualy Xaykaothao, *Standing Rock Called a "Spiritual War" for Native American Protestors* (Nov. 28, 2016), http://insideenergy.org/2016/11/28/standing-rock-called-a-spiritual-war-for-native-american-protestors/.

- Cheyenne Garcia asserts that she is a member of Cheyenne River, but does *not* assert that she lives on the reservation or that she "practices the traditional Lakota or Sioux faith" on the reservation or in connection with the Missouri River. D.E. 145-1 ¶ 5.

- William Wild Bill Left Hand asserts that he is a member of Standing Rock, "lives on the reservation" and "practices the traditional Lakota or Sioux faith on the Standing Rock reservation." D.E. 145-1 ¶ 6.

- Kathy Willcuts asserts that she owns land "on the Cheyenne River, Standing Rock and Rosebud reservations that will be impacted" by the DAPL and that she practices the Lakota faith on the Cheyenne River reservation. D.E. 145-1 ¶ 8. Her son, Tateolowan Garcia, asserts that he, too, will be harmed because he "will inherit land and mineral rights from" Ms. Willcuts. *Id.* ¶ 12.

- Crystal Cole asserts that she owns land adversely affected by DAPL and that she practices the traditional Lakota faith on the Cheyenne River reservation. D.E. 145-1 ¶ 9.

- Russell Vazquez asserts that he will inherit land—where, he does not say—that will be impacted by DAPL. He also asserts that he practices the Lakota faith "on the Pine Ridge Reservation," *id.* ¶ 10, although that reservation does not border the Missouri river.

- Thomas Barber, Sr. asserts that he "owns land on which the pipeline will cross on which he owns five capped wells" that will be "adversely impacted by" DAPL, and that he practices the Lakota faith, although he does not say where that takes place. D.E. 145-1 ¶ 11.

None of the Movants filed anything in this Court before moving to intervene on February 27, 2017. D.E. 145. Their proposed complaint would allege three counts tied to the Corps's recent decision not to perform an environmental impact statement, *see* D.E. 145-1 ¶¶ 21-96, and three counts alleging RFRA, environmental, and treaty claims, *see id.* ¶¶ 97-143. On March 21, 2017, they filed a supplemental statement regarding their intent to proceed for intervention. D.E. 180.

ARGUMENT

I. Movants Do Not Meet The Requirements For Intervention As Of Right.

An individual seeking to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2) must satisfy a four-part test: (1) her motion must be timely; (2) she must "clai[m] an interest relating to the property or transaction that is the subject of the action"; (3) she must be "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) her "interest [cannot be] adequately represented by existing parties." *See Fund for Animals, Inc. v. Norton,* 322 F.3d 728, 731 (D.C. Cir. 2003) (internal quotation marks and citation omitted); *see also Jones v. Prince*

George's Cty., Md., 348 F.3d 1014, 1017 (D.C. Cir. 2003). Movants do not address how they propose to meet these requirements, and for good reason: They cannot satisfy these elements.

A. Movants' Motion Is Untimely As To Counts IV, V And VI.

Timeliness of a motion to intervene is a "threshold question" that the court must answer before addressing the other elements of Rule 24(a). *United States v. British Am. Tobacco Australia Servs., Ltd.*, 437 F.3d 1235, 1239 (D.C. Cir. 2006). Whether a motion to intervene is timely is not governed by bright-line rules. Rather, the timeliness inquiry requires "consideration of all the circumstances, especially weighing 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." *Id.* at 1238 (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). In particular, "[w]hen the applicant appears to have been aware of the litigation but has delayed unduly seeking to intervene, courts generally have been reluctant to allow intervention." Charles A. Wright & Arthur R. Miller, *et al.*, 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed.). The Court should deny Movants' motion on timeliness grounds for two reasons.

First, the information in the record about Movants, as well as that available from public sources, demonstrates that they were aware of both the administrative process at the Corps and this lawsuit, and that they have unduly delayed in seeking to intervene on their RFRA claims (Count IV), environmental claims (Count V) and treaty claims (Count VI). In fact, at least four of the Movants—LaDonna Brave Bull Allard, Wastewin Young, Sara Jumping Eagle, and Virgil Taken Alive—were more than just aware of this litigation and the pipeline. Brave Bull and Young were involved in the permitting process as representatives of Standing Rock, while Sara Jumping Eagle and Virgil Taken Alive both were involved in activism starting in Summer 2016 at the latest. The remaining Movants offer the Court nary a hint regarding when they first

learned about the litigation and DAPL's purported effects on their property and religious practices. They have thus deprived the Court of the ability to consider "all the relevant circumstances" necessary to make the "threshold" determination: that Movants moved to intervene in a timely fashion. *See supra* at 7. As such, Movants' motion is untimely as to counts IV, V, and VI. Indeed, Movants make no argument whatsoever to suggest that intervention as to these counts is timely, and this Court should deny their motion for that reason alone.

Second, these intervention motions—launched on the eve of accelerated dispositive briefing on Standing Rock's and Cheyenne River's motions for summary judgement, and on Cheyenne River's (now denied) motion for injunctive relief—will be disruptive to the orderly process of the litigation. They should therefore be rejected for the same reasons intervention was rejected in *British American Tobacco*. In that case, the applicant had already successfully intervened for the limited purpose of asserting documentary privileges, but sought "on the eve of trial" to expand its intervention when one of its employees was named on the government's witness list. 437 F.3d at 1239. The district court denied intervention, and the court of appeals affirmed, explaining that the applicant "allowed nearly six months to pass after receiving the government's witness list," "received multiple early warnings" that it might need to expand its intervention, and "could have requested a broader intervention initially," but instead moved "on the eve of trial." *Id.* at 1238-39. The disruption is comparable here given that this case will likely be resolved at the summary judgment stage, and briefing on such a disposition is well underway.

B. Movants Have Not Presented Any Evidence To Show That Any Of Them Has A Legally Protected Interest In The Outcome Of This Suit.

In support of the second and third elements of Rule 24(a)—that they have interests in this litigation that they cannot protect absent intervention—Movants proffer various different

wordings of the same claims: that they "own, live on or stand to inherit lands that will be impacted" by DAPL and they "practice the Lakota faith that will be substantially burdened by the pipeline at issue in this litigation." Mot. 1-2. The allegations in the proposed complaint adopt a similar construction, alleging (only for some Movants) where the Movant's land is located, that the water appurtenant to the land will also be impacted, and that each Movant practices the Lakota faith. *Supra* at 3-6. But the declarations submitted contradict even these assertions. Neither declarant claims to practice the Lakota faith on any lands that could possibly be affected by DAPL. Indeed, both declarants provided addresses in Washington State. *See* D.E. 145-2, 145-3. These failings are vital because, as Movants' own supplemental memorandum makes clear in arguing that they cannot rely on the tribes to represent their interests, "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." Statement 4. Without competent evidence that any of the Movants actually uses the waters of Lake Oahe, or that they practice the Lakota faith in a manner that could be substantially burdened by the government's action here, Movants impliedly concede that the complaint's RFRA allegations are not sufficient.

Moreover, Movants' own allegations defeat standing. Their proposed complaint alleges that, under their religious beliefs, the waters in Lake Oahe "will be unfit for … sacred use if [DAPL] is completed with or without the flow of oil; the pipeline itself is a desecration." That position—which differs from the allegation by Cheyenne River that it is the oil in the pipeline that would desecrate the water—defeats a showing that Movants face an injury that this Court could redress. There is already a natural gas pipeline below Lake Oahe at the very location DAPL now crosses. AR 71294 (Ex. I). In addition, upstream from the DAPL site is an oil

refinery and numerous other oil facilities and pipeline crossings of the Missouri River of which Lake Oahe is a part. *See* Map of North Dakota Crude Oil Pipelines, https://www.dmr.nd.gov/pipeline/assets/maps/ND%20Crude%20Oil%20Map.pdf. No facts alleged by Movants address how adding one man-made structure to the many others already in place could make the difference between water that is or is not sufficiently pure or natural for use in their religious ceremonies.

Movants have not shown, nor can they show, that denying intervention would impair their rights in any way, and thus cannot intervene as of right.

C. The Tribes Adequately Represent Movants' Interests.

Movants' attempt to intervene as of right also fails with respect to Counts I-III and V-VI because the four separate tribes acting as plaintiffs in this case can adequately represent their interests. Case law from this Circuit and elsewhere clearly prohibits intervention where an existing party's interests in the litigation are "identical" to those of the proposed intervenor. *See Burka v. Aetna Life Ins. Co.*, 917 F. Supp. 8, 12 (D.D.C. 1996) (landlord adequately represented tenants in suit that would affect the landlord and tenants' access to parking spaces associated with the property); *Envtl. Def. Fund, Inc. v. Costle*, 79 F.R.D. 235, 242 (D.D.C. 1978) ("[T]he interests advanced by these proposed intervenors in upholding the validity of these previously promulgated regulations would appear to be identical with those interests advanced by the states."); *see also Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regulation Comm'n*, 787 F.3d 1068, 1073 (10th Cir. 2015); Wright & Miller, *supra*, § 1909 ("[I]f the absentee's interest is identical to that of one of the present parties, or if there is a party charged by law with representing the absentee's interest, then a compelling showing should be required to demonstrate why this representation is not adequate.").

Here, save the RFRA claim in Count IV (which is untimely and futile), Movants will be adequately represented by the parties currently pressing the same claims. The "adequate representation" element of Rule 24(a) is designed to protect against situations in which there is "a divergence of interests" between a party and the represented absentee. *See Am. Tel. & Tel.*, 642 F.2d at 1293. The four tribes pressing claims before this Court—Standing Rock, Cheyenne River, Yankton, and Oglala—cover the claims that Movants seek to press (putting aside the curious claim for personal liability against the President). D.E. 145-1 ¶¶ 90-96. Counts I-III challenge the new administration's decision to reconsider its prior decision to initiate an EIS and to grant the necessary real estate easement to Dakota Access, which several of the tribes directly address. *See* D.E. 97-1 ¶¶ 271-77, 338-47 (Cheyenne River Proposed Second Amended Complaint); D.E. 106-1 ¶¶ 273-85 (Standing Rock Proposed Amended Complaint); Oglala Compl. ¶¶ 84-89 No. 17-cv-267-JEB (D.D.C. Feb. 11, 2017), D.E. 1. Count V's "environmental discrimination rights" claim is a repackaging of challenges to the Corps's approved location for DAPL rather than a location further from tribal interests. *See* D.E. 106-1 ¶¶ 266-272; Oglala Compl. ¶¶ 53-54; Yankton Compl. ¶¶ 160-178, No. 16-cv-1796 (D.D.C. Sept. 8, 2016), D.E. 1. And Count VI alleges breach of treaty rights, which is also covered by other parties' complaints. *See* D.E. 97-1 ¶¶ 297-310 ; Oglala Compl. ¶¶ 95-102; Yankton Compl. ¶¶ 81-90.

Movants do not seriously contend that the tribes provide inadequate representation because they have divergent or different interests. Rather, they point only to this Court's September 2016 decision denying Standing Rock's motion for a preliminary injunction, and assert that the Court held that "the tribes failed to make a timely response to the Army Corps' inquiries and may have waived [National Historic Preservation Act] rights." Statement 6. This shortcoming, Movants contend, means that "the Court itself has made a finding that the Tribes

are not adequately able to protect the tribal members' interests." *Id.* Nonsense. That portion of this Court's ruling addressed whether the Corps complied with its consultation responsibilities under the NHPA. D.E. 39, at 48. But that ruling does not mean that the tribes are inadequate representatives. Put another way, the fact that the claims are unlikely to succeed is no reason to doubt that the tribes' interests are in line with those of Movants.

Movants thus cannot intervene as of right.

II. The Court Should Not Grant Discretionary Intervention.

Movants also fail to qualify for permissive intervention under Rule 24(b). That provision gives courts the discretion, "on timely motion," to allow intervention by someone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(2).[3] Even if the proposed intervenor satisfies those elements, "the court must [still] consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* 24(b)(3). Such "delay or prejudice" "captures all the possible drawbacks of piling on parties" including "the concomitant issue proliferation and confusion." *Mass. School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 782 (D.C. Cir. 1997).

Movants' attempt at permissive intervention fails on two fronts: Their motion is untimely as to Counts IV, V and VI, *see supra* at 7-8; and adding them to this case would unduly delay and prejudice the current parties by adding new issues and parties.

Movants assert that "all parties will benefit from the explication of issues that uniquely apply to the individual Tribal Members but arise from the common factual nucleus found in the pending actions." Mot. 2-3. This argument falls short on three fronts. *First*, the Court has not

[3] Intervenors do not contend that they have been "given a conditional right to intervene by a federal statute." Fed. R. Civ. P. 24(b)(1).

granted either tribe's motion to amend their complaints to include any of the religion-based claims presented in Count IV or the additional claims regarding the Corps' post-July 25, 2016 decision-making process. If the Court declines to do so, Movants' motion to intervene unquestionably would add new and quite distinct issues to the case. *Second*, and relatedly, this argument conflicts with Movants' claim for intervention-as-of-right. In particular, Movants make clear that they have raised "separate and distinct claim[s]" regarding the "illegal intervention of President Trump" in connection with the decision to grant Dakota Access an easement and due process violations in connection with the decision to cut short the Environmental Impact Statement process. Statement 9-10. *Third*, many of these claims have been briefed in Standing Rock's and Cheyenne River's motions for summary judgment and the Corps's cross-claims for summary judgment (in which Dakota Access has joined). Adding new parties (and new counsel) now would only delay action on these issues after the parties have expended considerable effort to brief them in an expedited fashion. The Court should not add to the confusion in this already complex matter by allowing Movants to participate.

CONCLUSION

This Court should deny Movants' motion to intervene.

Dated: March 27, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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