

# EXHIBIT A

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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STANDING ROCK SIOUX TRIBE,

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

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.

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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.,

TATELOWAN GARCIA, CHANI PHILLIPS,

WASTEWIN YOUNG,

Intervenor-Plaintiffs,

**COMPLAINT OF  
PROPOSED  
INTERVENORS**

v.

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

DONALD TRUMP, Individually and in His Official

Capacity as President; U.S. ARMY CORPS OF ENGINEERS;

and DAKOTA ACCESS, LLP,

Defendants on Intervenor Complaint.

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Intervenor-Plaintiffs as and for their Complaint against Defendant and Intervenor-Defendant, assert as follows:

### **PARTIES**

1. Intervenor-Plaintiffs (“Plaintiffs”) are registered tribal members of the Standing Rock Sioux, Cheyenne River Sioux, Oglala Sioux and/or Pine Ridge nations (the “tribes” or the “Sioux Nations”), each a sovereign entity recognized by the United States, each part of the “Great Sioux Nation”; Plaintiffs additionally follow their traditional faith known as Lakota, also known as “Sioux” or “Dakota”. Each tribe is a signatory to the 1851 Treaty of Fort Laramie that promised continued sovereignty and ownership over the land the pipeline is being built through, as well as the later Fort Laramie Treaty of 1868 that, against the tribes’ wishes and without their consent, diminished the size of the reservation but did not include subsurface and/or mineral rights in the diminishment.

2. Plaintiff SARA JUMPING EAGLE is a registered member of the Oglala Lakota Tribe and owns land on the Cheyenne River and Pine Ridge reservations that will be impacted adversely by the Dakota Access pipeline and whose water supply will be impacted by the Dakota Access Pipeline. Plaintiff Jumping Eagle practices the traditional Lakota or Sioux faith on these reservations.

3. Plaintiff LADONNA BRAVE BULL ALLARD is a registered member of the Standing Rock Sioux tribe and owns land right at Standing Rock that will be impacted adversely by the pipeline along with its water supply, and her son, father and other relations are buried in a family cemetery near to the DAPL pipeline. Plaintiff Allard practices the the traditional Lakota or Sioux faith on the Standing Rock reservation.

4. Plaintiff VIRGIL TAKEN ALIVE is a registered member of the Standing Rock Sioux Tribe and owns land on the Standing Rock reservation that is exclusively supplied with water from Lake Oahe and its downstream flow and that will be impacted adversely by the pipeline and who practices the traditional Lakota or Sioux faith on the Standing Rock reservation.

5. Plaintiff CHEYENNE GARCIA is a registered member of the Cheyenne River Sioux Tribe and will inherit lands on the reservation whose water supply is served by Lake Oahe system and is downstream flow and that will be impacted adversely by the pipeline. Plaintiff Cheyenne Garcia was raised in and practices the traditional Lakota or Sioux faith.

6. Plaintiff WILLIAM WILD BILL LEFT HAND is a registered member of the Standing Rock Sioux Tribe and lives on the reservation and his water is exclusively from Lake Oahe and its downstream flow and will be impacted adversely by the pipeline. Plaintiff Left Hand practices the traditional Lakota or Sioux faith on the Standing Rock reservation.

7. Plaintiff MAXINE BRINGS HIM BACK-JANIS is a registered member of the Oglala Lakota (Sioux) tribe, owns or stands to inherit lands that will be impacted adversely by the Dakota Access pipeline and practices the traditional Lakota or Sioux faith. Prof. Janis is also an Associate Professor and President's Liaison for Native American Affairs at Heritage University in Toppenish, Washington.

8. Plaintiff KATHY WILLCUTS is a registered member of the Cheyenne River Sioux Tribe and owns land on the Cheyenne River, Standing Rock and Rosebud reservations that will be impacted by the Dakota Access pipeline and whose water supply will be impacted adversely by the pipeline. Plaintiff Willcuts practices the traditional Lakota or Sioux faith on the Cheyenne River reservation.

9. Plaintiff CRYSTAL COLE is a registered member of the Cheyenne River Sioux Tribe and owns land that will be impacted adversely by the Dakota Access pipeline and whose water supply will be impacted by the pipeline. Plaintiff Cole practices the traditional Lakota or Sioux faith on the Cheyenne River reservation.

10. Plaintiff RUSSELL VAZQUEZ will inherit land that will be impacted adversely by the Dakota Access pipeline and whose water supply will be impacted by the pipeline, in particular such water will be impacted by harm to the Oglala aquifer on which his family's lands depend for water that flows from Lake Oahe. Plaintiff Vazquez practices the traditional Lakota or Sioux faith on the Pine Ridge reservation.

11. Plaintiff THOMAS E. BARBER, SR., is a registered member of the Cheyenne River Sioux Tribe and owns land on which the pipeline will cross on which he owns five capped wells and such land and water supply will be impacted adversely by the Dakota Access pipeline. Plaintiff Barber practices the traditional Lakota or Sioux faith.

12. Plaintiff TATELOWAN GARCIA is a registered member of the Cheyenne River Sioux Tribe and will inherit lands and mineral rights from his mother, plaintiff Kathy Willcuts, on the Standing Rock, Cheyenne River and Rosebud reservations that will be impacted adversely and whose water supplies will be impacted adversely by the Dakota Access pipeline. Plaintiff Garcia practices the traditional Lakota or Sioux faith on the Cheyenne River reservation.

13. Plaintiff CHANI PHILLIPS, Ph.D., is a registered member of the Cheyenne River Sioux Tribe and will inherit that will be impacted adversely by the Dakota Access pipeline and whose water supply will be impacted by the pipeline. Plaintiff Phillips practices the traditional Lakota or Sioux faith on the Cheyenne River reservation.

14. Plaintiff WASTEWIN YOUNG is a registered member of the Standing Rock Sioux Tribe and will inherit that will be impacted adversely by the Dakota Access pipeline and whose water supply will be impacted by the pipeline. Plaintiff Young practices the traditional Lakota or Sioux faith on the Standing Rock reservation.

15. The U.S. ARMY CORPS OF ENGINEERS (the “Corps”) is an expert agency charged with neutral and professional review and permitting of certain civilian projects arising on land that is presently in government title or that affects certain waterways of the United States particularly, but not limited to, the Lake Oahe easement and crossing for the pipeline.

16. The DEPARTMENT OF THE ARMY (“Department” or “the Army”) is the parent agency that houses the Army Corps of Engineers and that confirmed the Corps’s approval of the easement and related permitting on or about February 8, 2017.

17. DONALD TRUMP is named in his personal capacity and in his official capacity as President of the United States in that he issued the Presidential Memorandum directing expedited review of the Dakota Access Pipeline easement and/or environmental analysis that is at issue in this litigation and the rescinding of the notice and/or comment periods, such directive being without legal authority or right and, in addition to his official capacity, is liable personally for illegal coercion and interference in the administrative process.

18. DAKOTA ACCESS LLP (“Dakota Access”) is the partnership and/or consortium or joint venture that is constructing the Dakota Access pipeline and that sought the easement and permitting at issue in this litigation.

## **JURISDICTION AND VENUE**

19. Jurisdiction is premised upon federal questions arising under the First, Fifth and Fourteenth Amendments to the United States Constitution; a federal question arising under the National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321–4370f, and cognate statutes; a federal question arising under the Administrative Procedure Act, 5 U.S. C. §701, et seq. and related statutes.

20. Venue is properly in the District of Columbia in that the Headquarters of the Army Corps of Engineers is in this District and the determination to grant the easement and other permitting at issue here was made in substantial part by the Department of the Army in this District, and that the actions of President Trump in connection with said administrative decision took place in substantial part in this District .

### **Count I**

#### **(Illegal Approval of the Easement and Lake Oahe Crossing and Abandonment of the EIS Without Adequate or Substantiated Findings of Fact in Violation of the Administrative Procedure Act, 5 U.S.C. §701, et seq., and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370f.)**

21. The foregoing assertions are repeated below as if more fully set forth herein.

22. Pursuant to the Administrative Procedure Act and cognate acts, the Army Corps of Engineers (the “Corps”) is charged with environmental review and analysis of the easement sought by Dakota Access for the pipeline planned to run under Lake Oahe and other permitting matters in relation to the Dakota Access Pipeline; this Congressional mandate for comprehensive environmental review and analysis reflects a compelling and significant public policy imperative since, for example, in 2013 alone, the US suffered 7,662 spills, blowouts and leaks across 15 states with pipelines.

23. On December 4, 2016 the Assistant Secretary of the Army directed via memorandum of same date that the Corps conduct an environmental review and prepare an environmental impact statement as to the Lake Oahe easement and pipeline crossing.

24. Such determination was made by the Department of the Army because of its specific finding that further study and analysis was necessary, inter alia, as to: 1) alternative sites for the pipeline other than the Lake Oahe crossing; 2) environmental issues and impacts caused by the pipeline crossing under Lake Oahe, namely the threat to the water supply of the Standing Rock, Cheyenne River, and other nearby residents; and 3) related cultural and religious impacts.

25. On January 18, 2017 the Department issued a Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe". See Notice of Intent, 82 FR 5543 (January 18, 2017).

26. In part, the Notice of Intent set forth a public comment period up to and including February 20, 2017 in which the interested public, tribes, tribal members and interested experts could set forth and promulgate their opposition to the proposed easement and pipeline crossing and offer guidance to the Department and the Corps of Engineers. Specifically, the Notice of Intent stated:

To ensure consideration during the development of an EIS, written comments on the scope of an EIS should be sent no later than February 20, 2017. The date of all public scoping meetings will be announced at least 15 days in advance through a notice to be published in the local North Dakota newspaper (The Bismarck Tribune) and online at <https://www.army.mil/asacw>.

See Notice of Intent, <https://www.federalregister.gov/documents/2017/01/18/2017-00937/notice-of-intent-to-prepare-an-environmental-impact-statement-in-connection-with-dakota-access-llcs>.

27. The Notice of Intent also set forth multiple findings of relevance to the Army's determination to conduct an EIS including: 1) that the proposed Lake Oahe easement would

cross the site of the Standing Rock Sioux Tribe's water sources; 2) that the reservation is downstream of the crossing; and 3) that the Tribe retained "water, treaty fishing, and hunting rights in the Lake." Id.

28. The Notice of Intent set forth the following specific questions designated as "scoping questions" to be addressed and resolved administratively as part of the EIS and prior to the issuance of any easement:

"(1) Alternative locations for the pipeline crossing the Missouri River;

(2) Potential risks and impacts of an oil spill, and potential impacts to Lake Oahe, the Standing Rock Sioux Tribe's water intakes, and the Tribe's water, treaty fishing, and hunting rights; and

(3) Information on the extent and location of the Tribe's treaty rights in Lake Oahe."

Id.

29. Without lawful authority and without advance notice to the public, the Corps terminated and cut short the comment period, did not hold the "public scoping meetings" and ended its review prior to the close of the comment period, as set forth in the Corps memorandum dated February 3, 2017 (Doc. 114-1 at 2) in which the Corps stated that it would not continue its review of the easement and pipeline crossing and would not be conducting an EIS; the Corps and/or the Department also determined to dispense with the 14-day notification period to Congress.

30. The Corps closed its administrative review without the benefit of the public comment period and public scoping meetings that the agency had declared to be a required part of its administrative review.

31. Upon information and belief, the Corps termination of its review in the February 3, 2017 memorandum failed to include findings of fact that substantiated the basis for reversing the

Corps's prior determination of December 4, 2016 (Doc. 115-9) to conduct an environmental review, failed to conduct the comparison or review of alternative places for the pipeline in lieu of the Lake Oahe crossing as directed by the Department of the Army on December 4, 2016, failed to allow for the "greater public and tribal participation" anticipated in the December 4 finding and failed to set forth any substantiation for the decision to abandon any study of alternative sites.

32. On February 7, 2017 the Department of the Army approved the easement permit and accepted the Corps termination of the environmental review without any substantiation for such findings except conclusory reference to the existing administrative record and the February 3, 2017 Corps memorandum and the Presidential instruction to expedite the review.

33. In its February 7, 2017 determination the Corps relied upon a Presidential Memorandum (the "PM") issued by President Trump dated January 24, 2017 that directed, without lawful authority and in excess of any lawful authority, that the Army Corps of Engineers, an expert agency charged by Congress with environmental review of pipeline crossings, expedite its review of the Lake Oahe easement and crossing.

34. The Army's February 7, 2017 determination premised its abandonment of the environmental review and easement study on the Presidential Memorandum's directive that: 1) the Secretary of the Army "instruct" the Corps to expedite its review and approval of the easement and pipeline crossing; 2) that the Secretary of the Army instruct the Corps to consider whether to modify or rescind the December 4, 2016 memorandum; 3) that the Secretary of the Army instruct the Corps to consider rescinding the Notice of Intent; and 4) that the Secretary of

the Army instruct the Corps to waive the Congressional notice period for entry of an easement permit.

35. The Secretary of the Army by memorandum dated January 31, 2017 instructed and directed the Corps to comply with the foregoing Presidential demands.

36. On February 7, 2017 the Acting Assistant Secretary of the Army for Civil Works stated that he was bound to and obligated by the instructions of the Presidential Memorandum, a conclusion that is not legally valid in that the Corps as an expert agency is not subject to Presidential orders in the manner or method of its review.

37. As a result of the Presidential Memorandum, the Corps of Engineers and the Department of the Army improperly expedited and abandoned any review of the Lake Oahe crossing and the pipeline easement at the Lake without any consideration of alternative locations or the environmental needs set forth in the Corps's December 4, 2016 findings and without making or setting forth a substantive basis for departing from the December 4, 2016 findings.

38. The only substantive basis for the approval of the easement and pipeline crossing in the February 7, 2017 memorandum is the instruction and directive of President Trump that such review be expedited and that the Notice of Intent be rescinded.

39. Although the Department's February 7, 2017 memorandum states that it relies in part upon the February 3, 2017 Corps memorandum, the February 3, 2017 memorandum contains no substantiated findings as to the issues set forth for scoping in the December 4, 2016 findings and the January 17, 2017 Notice of Intent.

40. As its basis for terminating the Notice of Intent and the December 4, 2016 Corps requirement for the EIS inquiry and scoping, the February 3, 2017 memorandum in substance

sets forth only that the Corps earlier had approved an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI) and that the earlier record was sufficient for the grant of the easement as its basis for terminating the EIS inquiry and the scoping. No actual or specific statement, explanation, finding or documentation was presented as to why the Corps had reversed its position that the EIS and the particular scoping questions that had been deemed necessary on December 4, 2016 finding and the January 17, 2017 Notice of Intent were no longer necessary. *See* Corps of Engineers Memorandum, February 3, 2017, Ex. A to Opposition of Dakota Access to Application of Cheyenne River Tribe for Preliminary Restraints (Doc. 114-1) at 5-6, 10-15.

41. Such factors set forth in the February 3, 2017 memorandum as the basis for terminating the EIS review and its scoping were all known to the Corps and the Department at the time of the December 4, 2016 finding and the January 17, 2017 Notice of Intent but the Corps's February 3 memorandum and the February 7 Department decision do not set forth the basis for why the Corps and the Department now believe the record - that had been previously seen as insufficient to support the easement - now provided a basis for terminating the administrative inquiry.

42. In its December 3, 2016 memorandum, the Department found expressly that the conclusions based on the existing record to support the crossing were "general", were not substantiated and did not take into account the Tribes' reserved water, fishing and hunting rights, as well as the mineral rights still arguably reserved by treaty, among other issues. Specifically, the Department on December 3, 2016 rejected the following conclusions as being "general" and without substantive support in the record:

"No impacts to treaty fishing and hunting rights are anticipated due to construction within the Project Area or Connected Actions."

"Direct and Indirect impacts from the Proposed and Connected Actions will not affect members of the Standing Rock Sioux Tribe or the Tribal reservation."

"[T]here will be no direct or indirect effects to the Standing Rock Sioux tribe. This includes a lack of impact to its lands, cultural artifacts, water quality or quantity, treaty hunting and fishing rights, environmental quality, or socio- economic status."

"Although the history of the [Standing Rock Sioux Tribe] and treaty rights is beyond the scope of the EA, no impact to tribal treaty rights are anticipated due to construction or operation of the pipeline within the Project Area or Connected Actions."

"No treaty rights have been identified that would be adversely affected by project permitting, construction or operation."

*See* December 3, 2016 memorandum, (Doc. 117-6) at pp. 19-20 of 38.

43. The Department concluded that these “general” conclusions did not address the substantive issues of the impact of the pipeline crossing on the acknowledged reserved rights of the Tribes and environmental and religio-cultural issues and that these “general” conclusions were not supported by the existing administrative record and “require a more robust analysis...”:

These general statements about treaty rights require a more robust analysis in light of the settled, geographically relevant nature of the Tribes' rights with regard to Lake Oahe. For example, the existing record does not: identify on-reservation lands where the Tribes may retain hunting and fishing rights or where reservation boundaries exist within Lake Oahe; analyze whether tribal members consume a higher amount of treaty-guaranteed fish or game that might be affected by pipeline construction or a potential spill; identify relevant statutes, treaties, or court cases; discuss proactive mitigation efforts that could protect tribal lands (specifically, and as opposed to any relevant non-treaty protected lands); compare the Tribes' on and off- reservation rights, etc. Similarly, the current record consists of a physical description of the Standing Rock Sioux Reservation and the general assurances quotes above that the DAPL project will not affect tribal rights. In fact, the Tribes and their members use Corps lands, tribal lands, and allotted lands abutting Lake Oahe for hunting, fishing and gathering. The Tribes rely on the waters of Lake Oahe to provide habitat for fish, wildlife and plants that the Tribe depends on for

subsistence and cultural and religious practices. And as the Standing Rock Sioux further explained, "[t]he entire Reservation shoreline along the Missouri is a vital habitat for fish and wildlife - upon which Tribal members rely for subsistence as well as cultural and religious practices."

Nor does anything in the current record recognize that the Standing Rock Oahe Act reserved the Tribe's "title to the ... interest in oil, gas, and all other minerals of any nature whatsoever" in the taken territory. Given the *Bourland* Court's emphasis on the fact that the Cheyenne River Oahe Act's explicit reservation of tribal hunting and fishing rights preserved such rights on the taken territory, this language in the Standing Rock Oahe Act should equally preserve Standing Rock Sioux treaty mineral rights in Lake Oahe. Instead, the EA generally concludes that the pipeline will include technology designed to prevent leaks, notes that the DAPL route "expressly and intentionally does not cross the Standing Rock Sioux Reservation," and says that the pipeline is co-located with existing infrastructure.

These circumstances warrant a more searching consideration of the effect of a federal project on tribal treaty rights.

*See* December 3, 2016 Memorandum, (Doc. 117-6) at pp 20-21 of 38.

44. By this finding, the Department provided a substantive analysis and decision that the "general" conclusions that were entered to support the Lake Oahe crossing in July 2016 were insufficient to address the actual legal and equitable interests of the Tribes and their registered members.

45. Such conclusions by the Department represented an analysis of substantive deficiencies in the existing administrative record that required further examination and administrative review as to the easement, the crossing and the question of whether an EIS was required.

46. In its February 7, 2017 decision the Department, as well as the Corps in its February 3, 2017 determination, failed to provide any substantiated reasons or findings for departing from

the Department's detailed and substantive December 2016 conclusion that more study and analysis was required before an easement could be granted.

47. The February 3 and February 7 Corps and Department decisions merely repeated, as their basis for granting the easement and abandoning the EIS, the substance of the original July 2016 conclusions that the Department had *already* concluded in the December 3, 2016 memorandum and December 4 findings were insufficient and not adequately supported by the record.

48. In addition to the foregoing, the Army and the Corps have violated their mandate under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370f, that requires agencies to fully investigate and disclose the potential adverse environmental impacts of permitting decisions before deciding to proceed.

49. NEPA also requires agencies to use independent, professional, neutral and accurate scientific information and to ensure the scientific integrity of the analysis, see e.g. 40 C.F.R. §§ 1500.1(b), 1502.24, a process that was abandoned by the agency under the pressure and coercion of President Trump's directive to the Army to expedite the inquiry and end the comment period.

50. The Army Corps acted arbitrarily, capriciously and/or unreasonably in its failure to make findings in any degree of substance to support its decision to set aside the Army's December 3, and 4, 2017 determinations that 1) alternate sites must be investigated; 2) that the environmental impact has not been adequately investigated; 3) that public engagement is required before any final determination; and 4) that the prior record did not reflect substantive analysis of the legislated, treaty and traditional rights of the Tribes in Lake Oahe and related

lands, as well as the impact of the pipeline on the Tribe's retained water, mineral and hunting right, along with other issues, including religio-cultural issues for which the Army had determined more robust engagement, analysis and public inquiry was required.

51. Based upon the foregoing, the Acting Assistant Secretary's decision in the February 7, 2017 memorandum is illegal and is without legal authority in that it is not based on actual substantiated independent expert findings but is based, in substance on the President's directive and instruction in the Presidential Memorandum; accordingly, plaintiffs request judgment vacating the easement and any related permits and directing that the Department and Corps be ordered to resume the environmental review and analysis and re-open the public comment period.

### **Count II**

**(Termination of the EIS Review and the Scoping is Illegal in that it is the Result of President Trump's Ultra Vires Directive and Instruction that the EIS and Easement Review Be Expedited and/or that the Notice of Intent and Comment Period and Congressional Notice Periods Be Rescinded)**

52. The foregoing assertions are repeated below as if more fully set forth herein.

53. President Trump had no legal authority to direct or instruct expedited review of the environmental determination of an expert engineering and environmental agency that is required by law to render neutral and objective findings based upon its expertise and professional judgment pursuant to the Flood Control Act, 16 U.S.C. §§ 460d, 825s (1946 Ed.); 33 U.S.C. §§ 708, 709 (1946 Ed.), that expressly delegated authority to the Army Corps of Engineers over Lake Oahe, including authority over water use, leases, construction, recreation, storage, flood control and navigation, other cognate statutes and regulations related to the same.

54. Pursuant to the Flood Control Act and other enactments, the Army Corps is an independent expert agency with delegated factfinding and decisionmaking powers over civilian projects such as the Lake Oahe crossing, easement and the pipeline construction in such vicinity.

55. The APA requires that expert agencies, including the Corps, render independent professional judgments in a quasi-judicial capacity, subject to public participation and inquiry and guided solely by professional expert determination free of overt or hidden political influence or pressure from the President or other officers of government.

56. Pursuant to 33 C.F.R. § 322.3(a) and other regulations and cognate enactments, the Corps has jurisdiction over applications to run pipeline under navigable U.S. waterways and such construction is considered to “have an impact on the navigable capacity of the waterbody.” 33 C.F.R. § 322.3(a).

57. President Trump had no legal authority to direct or instruct that the Corps make any substantive decision as all such decision making powers lie in and within the Corps’s independent expert decision making as mandated by Congress.

58. In reviewing the easement and the Dakota Access Pipeline project the Corps acts as a civilian agency under a mandate by Congress and is outside the President’s authority as Commander in Chief.

59. President Trump had no lawful authority via Presidential Memorandum or otherwise to intervene in the Corps’s decision making function and had no lawful authority to direct or instruct that the Corps consider rescinding the Notice of Intent, to direct or instruct that the corps expedite its environmental review and analysis or that the Corps cut off or suspend any notice or comment periods.

60. Due process considerations under both the APA and the Fifth Amendment bar such interference by a political officer of government including the President, the Secretary of the Army and others.

61. By coercing and/or forcing the Secretary of the Army to instruct the Corps to engage in expedited review of the Lake Oahe crossing, the easement and the EIS, President Trump illegally interfered with the judgment and decision making process of an expert agency in violation of the Corps's Congressional mandate and in violation of the notice and comment requirements and the adjudicatory and factfinding provisions of the APA.

62. Based upon the foregoing, the Department of the Army and the Corps have illegally granted the easement and pipeline permit in substantive reliance on President Trump's memorandum; said easement and permit should be vacated and the Department and the Corps be directed to continue their study and review under the December 4, 2017 memorandum, re-open the comment period, restore the Congressional notice period and render substantive findings under such authority.

### **Count III**

#### **(Approval of the Easement and Lake Oahe Crossing Is In Violation of the Comment and Review Provisions of the Administrative Procedure Act, 5 U.S.C. §701, et seq.)**

63. The foregoing assertions are repeated below as if more fully set forth herein.

64. President Trump and the Department of the Army and the Corps had no legal authority to terminate the declared comment period set under the Notice of Intent.

65. Plaintiff tribal members and others had acted in reliance on the comment period ending February 20, 2017 that had been set by the Corps under the Notice of Intent.

66. Plaintiff tribal members had been preparing and reviewing experts for submission of reports to the Corps concerning the EIS review and analysis and the easement but were deprived of the opportunity to submit such comment by the premature termination of the comment period.

67. The Corps has made no finding as to why comment from the public would not be of value in the EIS review and analysis and the easement determination or as to why premature termination of the comment period was appropriate.

68. The Corps had made no finding of compelling circumstances or other extreme exigency so as to substantiate a premature termination of the comment period.

69. Earlier the December 3, 2017 memorandum of the Department (Doc. 117-6) makes the finding that additional analysis “beyond what was considered in the existing EA for the Section 408 decision” was necessary prior to the grant of the easement. (Doc, 117-6 at p. 4)

70. Consequently, the additional comment from the public was material and relevant to the further inquiry the Department deemed necessary under the December 4, 2017 findings and the Notice of Intent.

71. The December 3 memorandum from the Department noted that the following material was “relevant to the Corps' ongoing analysis of the DAPL project”:

(1) the statutes that created Lake Oahe did not diminish either the Cheyenne River or Standing Rock Sioux Reservations;

(2) portions of the land taken to create Lake Oahe are within the boundaries of both reservations; and

(3) Congress explicitly recognized and preserved Sioux treaty hunting and fishing rights in the Lake Oahe statutes.

(4) In addition, the Department found that “the Tribes retain reserved water rights under federal law.”

Id.

72. Because of these rights and interests retained in and to the waters of Lake Oahe, the Department concluded that

“Since the Tribes retain rights associated with Lake Oahe, the Corps must consider the possible impacts of its DAPL permitting decisions on these reserved hunting, fishing, and water rights.”

Id.

73. Such findings require comment and participation by the tribes and tribal members as to matters that reflect inherently tribal interests and the interests of individual tribal members but who have been prevented from doing so by the premature termination of the comment period.

74. In fact, the Department itself concluded in the December 3 memorandum that such tribal and public participation was necessary to any adequate conclusion of the EIS review and analysis and easement determination. Specifically, the Department concluded that there must be “additional NEPA analysis that adequately evaluates the existence of and potential impacts to tribal rights and interests.” Id. The department concluded that “This should be done through an Environmental Impact Statement (EIS) that will allow for *robust tribal and public engagement.*” Id. [emphasis added].

75. The public and the Tribes were illegally deprived of the opportunity for such “robust...public engagement” by the premature termination of the comment period prior to the designated February 20 cutoff.

76. The Corps was delegated by Congress with the power to set comment periods so as to allow the public, including the plaintiff tribal members, to inform the Corps of relevant

scientific, environmental, engineering and social and religio-cultural information pertaining to the grant of the easement and the EIS.

77. Such comment periods are an inherent part of the administrative factfinding process under the APA.

78. Administrative factfinding or decisionmaking by the Corps is not legally valid in the absence of the mandated comment period.

79. Plaintiff tribal members relied upon the February 20 comment period end date and were in the process of preparing expert and lay comment for the Department's benefit but have been deprived of the right to do so by the Corps termination of the comment period.

80. The Corps had no authority to terminate prematurely the comment period and failed to make findings to support and substantiate such termination or to explain why the "robust...public engagement" the Department had deemed necessary on December 3, 2016 was no longer needed on February 7, 2017.

81. President Trump had no authority or lawful power to direct or instruct that the comment period be terminated or expedited.

82. In addition to other defects arising from his intervention, President Trump is not an engineer, an environmental scientist nor does he have any specialized training or knowledge that would permit him to act as an executive branch official rendering a determination as to the speed or progress of the Corps's expert environmental, cultural and engineering analysis; President Trump holds no appointment to act in any expert administrative proceeding.

83. Such termination materially and absolutely interfered with the due process rights of plaintiffs and their substantive rights under the APA.

84. In addition, plaintiffs did not have access to the technical and engineering documents and findings by the Army Corps until such materials were released, in part, by the Army on or about February 3, 2017 by which time the Army had closed and terminated the comment period.

85. Because such material documents were not released until February 3, 2017, by which date the Army had determined to close the comment period, plaintiffs were further impaired in their ability to materially participate in the public comment process and the decision to close the EIS review and analysis was made in an environment in which both the Tribes and tribal members, as well as other members of the public, could not have commented earlier based on actual documentation in the possession of the Army Corps.

86. Termination of the comment period coincident with the release of material evidence on which the public could comment thereby aggregated the due process violation caused by the close of the comment period.

87. The termination of the comment period violated the APA and the public's right, including but not limited to that of plaintiff tribal members, to comment on and participate in the factfinding and decisionmaking process concerning the EIS and the easement.

88. The Corps determination to abandon the EIS review and analysis and to approve the easement is illegal in that it was accomplished by the improper termination of the comment period set under the Notice of Intent.

89. Based upon the foregoing, the approval of the easement and the determination to abandon the EIS review and analysis is illegal and should be vacated and the Department and Corps be directed to resume the environmental review and analysis and re-open the public comment period.

**COUNT IV**

**(President Trump is Liable Personally Due to His Illegal Intervention in Directing and Instructing the Department to Force Expedited Review of the EIS and Easement and to Terminate the Comment Period, thereby Violating the Rights of the Plaintiff Tribal Members)**

90. The foregoing assertions are repeated below as if more fully set forth herein.

91. As set forth in detail above, on or about December 4, 2016 the Army and/or the Corps made a finding and mandated that further environmental review and analysis of the pipeline easement and crossing was necessary on the ground that the existing Environmental Assessment (EA) for the Dakota Access Pipeline suffers from fatal flaws and deficits, including, inter alia, inadequate consideration of tribal treaty rights and uneven treatment of the project's impacts on native and non-native populations.

92. President Trump acted without lawful power or authority to direct or instruct the Department to expedite its review of the EIS and the easement or to direct or instruct a termination of the notice and comment periods; the Corps made substantial reliance on the Presidential Memorandum in determining the EIS review and comment period and in granting the easement and permitting.

89. Such act by the President through the "Presidential Memorandum" was beyond the lawful authority and power of President Trump who acted in an ultra vires capacity.

93. Such act by the President represented a personal act that illegally interfered in the administrative process violating the rights of the Sioux Nations and the plaintiff tribal members as well as other members of the public.

94. Upon information and belief, President Trump acted personally in seeking to force a policy preference by coercing the administrative process outside of any personal expertise or legal right.

95. Additionally, and upon information and belief, President Trumps owns or recently owned stock in Energy Transfer Partners, the corporate parent and/or primary equity owner of Dakota Access and sought to protect such investment or to further his present or former business affiliation by such interference.

96. Based upon the foregoing, Donald Trump individually and in his personal capacity has damaged the rights of plaintiff tribal members and is liable to compensatory and punitive damages, along with attorneys fees and cost of suit, and injunctive relief barring such future interference in the EIS and easement process of the Department and the Corps.

#### **COUNT IV**

#### **(First Amendment Right to Free Exercise of Religion and the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et. seq.* (“RFRA”))**

97. The foregoing assertions are repeated below as if more fully set forth herein.

98. The waters of Lake Oahe and their flow into the downstream waters, and their relation to the Missouri River complex and ecosystem are sacred to the Lakota or traditional Sioux faith practitioners.

99. Placement of pipeline at such location as well as the flow of oil along with the risk of leakage and pollution into such waters desecrates the waters and substantially burdens the plaintiffs’ free exercise of religion that is heavily dependent upon the purity of the sacred water.

100. Such faith cannot be practiced if the purity of the waters is impugned or subject to continued threat.

101. The proposed pipeline at this location that crosses the Lake and its outflow waters is a substantial burden on the exercise of their religion.

102. In addition to the purity of the waters, the Lake Oahe crossing and related pipeline placement will impugn other sacred elements of both Sioux and Lakota practices and lifestyles, along with damage to their cultural inheritance. The pipeline will cross or has been allowed to cross areas of prior burials and deposition of culturally significant artifacts and will impact adversely lands on which took place events of material importance to the Sioux and Lakota heritage. The land itself on which the pipeline is to run and operate is of immense religious, cultural and spiritual significance to these Tribes and their tribal members.

103. In the Standing Rock area, at least two dozen burial sites have been bulldozed by the pipeline as well as over 82 prayer sites including ancient cairns and stone prayer rings. The loss was felt not only by tribal members, as 1,200 Archaeologists and Museums throughout the country officially denounced the destruction as a loss of American cultural heritage.

104. It is a tenet of Sioux spirituality that what happens to the body after death directly affects the spirit. For example, it is believed that if a body is turned face down after death, they are unable to come back to the people. Therefore bulldozing of bodies or burial sites, which can damage and reposition both the buried and their sacred objects, is of great concern to the Sioux people. After the burials began to be bulldozed, the elders in camp directed everyone from then on to not only pray for the water, but also for the spirits of their ancestors “who are now unable to be at peace,” a demonstration of the intense and compelling religious faith that has been impacted and will continue to be impacted by the pipeline at such locations.

105. The waters of the Missouri river system and Lake Oahe, as they flow near, through or adjacent to tribal lands, both treaty and traditional, are sacred to the plaintiff Lakota practitioners.

106. The area of the pipeline crossing is now called Cannonball due to the natural whirlpools which form perfectly round stones, some of large size. These stones are known by the Sioux as “Tunkan” and are extremely sacred. Finding one is in itself seen as a sign that one is supposed to follow a spiritual path. In ceremony they are often placed in a center point as they represent the entire earth, cosmos, or center of the universe and therefore creation and Creator. By imperfect analogy to Christian faiths, the sacredness of this area and water source would be akin to an area that naturally formed perfectly shaped stone crosses, and its sanctity cannot be overstated. Chief Crazy Horse himself wore a small Tunkan on a necklace when in battle and stated that it protected him from harm.

107. The area the pipeline is being drilled through is the only place on earth the Sioux can gather Tunkan for their ceremonies.

108. Such waters are fundamental and substantively important to the practice of the Lakota faith and cannot be replaced by any substituted or artificially purified waters and are material to the sweat lodge ceremony, among others, that is uniquely dependent upon the use of sacred waters to create an atmospheric merger of the body with the waters.

109. The waters, and additionally the stones within, will be unfit for such sacred use if the pipeline is completed with or without the flow of oil; the pipeline itself is a desecration.

110. The flow of oil in itself taints the purity of the waters because of the known risk and practice of leakage and contamination and because of the use of the sacred waterway for profane purposes.

111. Such usage of the waters will make them unfit for religious use and the religious practice will be prevented and materially impugned.

112. The pipeline itself and its construction taints and disturbs the sanctity of these waters and the lands.

113. Individual plaintiffs each practice the Lakota or traditional Sioux faith in the manner that makes use of the sacred waters and attend ceremonies with sacred Tunkan stones.

114. Individual Plaintiffs repeat and reallege that allegation by the Cheyenne Nation in its Complaint at ¶123, as follows:

“The confluence of the Cannonball and Missouri Rivers, where the crossing would take place, is a sacred place to the Tribe. It is a place of great historical significance, serving as a place of peace, prayer, and trade where traditional enemies could meet without risk of violence. There are numerous sacred stones and historically important sites in the immediate landscape of the Lake Oahe Crossing, few of which have been fully evaluated by Tribal archaeologists.”

115. These concerns expressed by the tribal government are equally, if not in greater degree, expressed and felt by the plaintiffs herein.

116. Individual plaintiffs have an interest in such matters separate and apart from the tribal government as its the individual who practices the Lakota or Sioux faith and requires access to the unimpugned sacred lands and waters for the free exercise of that faith.

117. The pipeline can be completed and operated without crossing the Missouri or by placement at locations other than the Lake Oahe crossing but such other locations have not been

considered in substance and substantive findings have not been made by the Corps as to why these alternative sites are not feasible.

118. The record does not support any conclusion that the Lake Oahe crossing is the least restrictive means of completing and/or operating the pipeline and no such conclusion appears to have been made; to the extent such conclusion may be inferred from the record it is not the product of substantive consideration of such alternate sites; substantive findings as to such alternative sites have not made by the Corps.

119. Based upon the foregoing, the approval of the easement and permit for the Lake Oahe crossing violates the plaintiffs' rights under the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et. seq.*, and First Amendment free exercise rights, and the easement and any related permit should be preliminarily and permanently vacated and enjoined.

#### COUNT V

**(Environmental Discrimination by Virtue of the Corps's Placement of the Pipeline on Traditional Sioux Lands and at the Lake Oahe Crossing Without Substantive Consideration of Alternate Sites at White-Majority Sites and Without Consideration of the Disparate Impact of the Crossing and Pipeline Locations on this Ethnic and National Minority.)**

120. The foregoing assertions are repeated below as if more fully set forth herein.

121. Individual plaintiffs own land, live on lands or stand to inherit lands that are watered and obtain their water supply exclusively by the waters of Lake Oahe and the outflow from the Lake.

122. The individual plaintiffs are registered Tribal Members of the treaty signatory Sioux Nations and/or their direct successors that are endowed with reserved water, fishing and hunting rights and ownership of such resources, along with subsurface and/or mineralogical rights, by

treaty and statutory law for which the individual Tribal Members are ultimate intended beneficiaries.

123. Such ownership and beneficial use is intended uniquely for the Sioux Nations and the benefit of their Tribal Members.

124. Among the Sioux Nations, the Cheyenne and Standing Rock Nations possess sovereign lands adjacent to or near to the Lake that will be impacted by adverse leakage and environmental events from the pipeline crossing at Lake Oahe or elsewhere on tribal lands, such lands being reserved to the Tribes for the benefit of their registered members; the Pine Ridge and Oglala Sioux Nations possess and claim traditional sovereign lands diminished unilaterally by Congress that will face such adverse impact by the pipeline. Cheyenne and Standing Rock Nations also claim traditional sovereign lands diminished unilaterally by Congress that will face such adverse impact. All such lands are for the benefit of the Tribal Members.

125. Alternative sources of water are not available on these lands but are at real and undisputed risk by the leaks and breakage, blowouts and spills associated with such pipelines.

126. In its December 4, 2016 memorandum the Corps made express and substantive findings as to such reserved rights and such findings were fundamental to the Corps's determination that further study and analysis were required as to alternate sites, the environmental and religio-cultural impact of the proposed placement of the pipeline and related factors. Among other findings, the memorandum acknowledges that portions of Lake Oahe are considered to be part of the Standing Rock and Cheyenne River Sioux reservations and include water, hunting and fishing rights that subject to adverse impact by the pipeline crossing.

127. The memorandum also questions the EA's reference to the close proximity of the Standing Rock reservation to the Lake Oahe crossing while finding, at the same time, that "there will be no direct or indirect effects" to the tribe, its lands or treaty rights. In this context, the memorandum states: "The EA does not explain why, if existing safeguards are inadequate to mitigate spill risk from a pipeline running ten miles from a city, they nevertheless protect federally reserved tribal waters less than one mile from an Indian reservation." It concludes by finding that the Corps must engage in a further consultation process with tribes and the public and undertake an Environmental Impact Statement to consider a "broader range" of alternative pipeline routs and additional spill risk analysis. Such "broader" review "should be done through an Environmental Impact Statement *that will allow for robust tribal and public engagement.*" Id. [emphasis added].

128. The Corps and the Army itself have failed to set forth substantive findings as to why the agency now believes such factors do not require further study and analysis whereas in December 2016 and in the January 17, 2017 Notice of Intent the agency made substantive findings as to its rationale for such further study and analysis.

129. Leakage and environmental degradation of land and water resources downstream from oil pipelines, and in the vicinity of oil pipelines, are commonly known hazards that have occurred thousands of times in the U.S. and in North Dakota.

130. No substantive findings or analysis have been made as to: 1) alternative sites for the pipeline; 2) the effects of leakage and discharge upon the Sioux Nations and/or their members whose lands are adjacent to and downstream of the site; and 3) why such known risk of leakage

does not pose a material risk to the water supply and religious rights and practices of the Tribal Members.

131. Any environmental discrimination/environmental justice analysis was not conducted by the Corps or the Army but by Dakota Access, a private party with a direct and personal interest in the matter contrary to law that requires the analysis to be of the delegated agency, in this case the Army Corps.

132. Upon information and belief, such private analysis was never made available to the public for public comment and input contrary to the APA and other relevant statutes and laws.

133. The agency in substance failed to meet its statutory and regulatory duty to consider environmental justice claims as to a minority community or a largely minority community.

134. The proposed pipeline at the Lake Oahe crossing and associated land areas impacts exclusively the Tribes and their Tribal Members: the Corps and Army determination to avoid the alternate route through largely white communities such as Bismarck is without substantive analysis.

135. Accordingly, the easement and related permits, the determination to end the EIS review and analysis, the determination to end the public comment period and the Congressional notification period are illegal, arbitrary, capricious or unreasonable and comprise environmental discrimination and should be vacated.

#### **COUNT VI**

**(The Pipeline Will Run Through Treaty Lands Belonging to the Several Sioux Nations that were Taken Without Tribal Government Consent and the Permits for the Pipeline Across Said Lands Were Entered Contrary to the Sovereign Rights of the Tribes)**

136. The foregoing assertions are repeated below as if more fully set forth herein.

137. Because the pipeline has been placed on lands that were had been Treaty Lands of the several Sioux Nations but were taken and diminished without consent of the Tribes, the pipeline easement and permit approvals is illegal and should be vacated.

138. The particular and unique analysis the government must undertake for projects on tribal land did not take place because the government conducted its review based on a project on lands considered to be in government or private title by virtue of prior Congressional diminishment that was without Tribal government consent.

139. Even assuming, arguendo, that a new or subsequent treaty diminishing the old was valid, subsurface rights were not included in any diminishment. As the pipeline is disturbing those subsurface rights, tribal authority still applies over the pipeline, an authority the Corps and the Army have disregarded.

140. Moreover, the immediate downstream and/or riparian effects of placing a pipeline adjacent to the territory of a separate and sovereign entity gives rise to a direct interest of the tribes and their members so as to have required the consultation appropriate to and consistent with construction of a pipeline on Treaty Lands, consistent with the Supremacy Clause that holds treaties, including Indian treaties, to be the supreme law of the land.

141. Treaties with the Sioux Nation providing for Tribal ownership of the lands on which the pipeline is slated to run are required to be recognized by the United States and such treaties, including the Sioux treaties, should be construed liberally in favor of the Sioux Nation, along with statutory law mandating sovereign participation of the tribes in any pipeline determination, consistent with canons of construction that require all statutes recognizing Native American rights to be construed in favor of Tribal rights.

143. Based upon the foregoing, approval of the easement, associated permits, other permits for the pipeline and other approvals at the Lake Oahe crossing and elsewhere on lands that had been designated tribal Treaty Lands are invalid ab initio and should be vacated and preliminarily and permanently enjoined and the Department of the Army and the Corps be directed to conduct the review appropriate and suited to a site(s) where such pipeline is to be situated on Native American sovereign land.

CONCLUSION

Plaintiffs individual Tribal Members respectfully request the relief set forth above, along with attorneys fees and cost of suit; and damages as to President Trump in his individual capacity, along with such other relief as to the Court may seem just and fair.

Respectfully

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