UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, *et al.*,

Plaintiffs,

and

CHEYENNE RIVER SIOUX TRIBE, *et al.*,

Plaintiff-Intervenors,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant,

and

DAKOTA ACCESS, LLC,

Defendant-Intervenor.

Civil Action No. 16-1534 (JEB)

MEMORANDUM OPINION

Just like the Dakota Access Pipeline, which meanders over hill and dale before carrying its crude oil underneath Lake Oahe — a large reservoir on the Missouri River between North and South Dakota — the current litigation has wound its way through myriad twists and turns. Last year, in a hard-earned victory for the American Indian Tribe Plaintiffs whose reservations lie nearby, this Court found that Defendant U.S. Army Corps of Engineers had violated federal law by failing to produce an Environmental Impact Statement before granting Defendant-Intervenor Dakota Access, LLP an easement to run the pipeline under Lake Oahe. The Court subsequently vacated that easement and ordered the pipeline emptied of oil until the Corps could complete the federally mandated EIS.

Wasting no time, both Dakota Access and the Government promptly appealed to the D.C. Circuit. In a partial win for the Tribes, the Court of Appeals affirmed the two central elements of this Court's rulings — specifically, that the Corps should have prepared an EIS and that the easement was properly vacated in the interim. The Circuit thus confirmed that the pipeline was, in legal speak, an unlawful encroachment on federal land.

It was there, however, that the Tribes ran out of luck. Prior to the cessation of any oil flow, the Circuit stayed and eventually reversed the aspect of this Court's order shutting down the pipeline, reasoning that it had not made the necessary findings for what was essentially injunctive relief. In other words, although vacatur of the easement rendered the pipeline an encroachment on federal property, vacatur could not itself bring about the stoppage of oil. For that to occur, the Court of Appeals clarified, this Court needed to conduct an additional, distinct inquiry, a component of which requires the Tribes to demonstrate that — among other things — they will likely suffer irreparable harm in the absence of an order closing the pipeline.

As a result, for all of the headlines and controversy that this litigation has spawned, its tangible consequences for the pipeline itself have been few. Even though this Court vacated the easement for DAPL to cross beneath Lake Oahe, and even though the D.C. Circuit affirmed such vacatur, the pipeline has maintained operations as if none of these developments had occurred. Those seeking an explanation for the persistence of this surprising state of affairs over the past ten-odd months need look no further than the Defendant in this case: the Corps.

Ever since this Court's vacatur order in July 2020, and across two presidential administrations, the Corps has conspicuously declined to adopt a conclusive position regarding the pipeline's continued operation, despite repeated prodding from this Court and the Court of Appeals to do so. On the one hand, the agency has refrained from exercising its enforcement

powers to halt Dakota Access's use of the pipeline, notwithstanding its status as an unlawful encroachment. At the same time, however, neither has the Corps affirmatively authorized the pipeline's occupation of the area underneath Lake Oahe per the process contemplated in its internal procedures. Its chosen course has instead been — and continues to be — one of inaction. Such indecision, it is important to note, does not stem from a lack of time. Nor from a lack of attention. Whatever the reason, the practical consequences of the Corps' stasis on this question of heightened political controversy are manifest: the continued flow of oil through a pipeline that lacks the necessary federal authorization to cross a key waterway of agricultural, industrial, and religious importance to several Indian Tribes.

Those Tribes thus find themselves forced to return to this Court to seek what they have so far been unable to obtain from the Government: an order halting pipeline operations until the Corps completes its new EIS. Before the Court may grant them such relief, however, binding caselaw requires that the Tribes make an evidentiary showing far beyond anything the Corps needs to itself shut down DAPL. As previously mentioned, they must demonstrate a likelihood of irreparable injury from the action they seek to enjoin — to wit, the pipeline's operation. For the reasons articulated in this Opinion, Plaintiffs have not cleared that daunting hurdle.

The Court acknowledges the Tribes' plight, as well as their understandable frustration with a political process in which they all too often seem to come up just short. If they are to win their desired relief, however, it must come from that process, as judges may travel only as far as the law takes them and no further. Here, the law is clear, and it instructs that the Court deny Plaintiffs' request for an injunction.

I. Background

The Court has recounted the factual and procedural history underlying this litigation on numerous occasions since it commenced in the summer of 2016. Eleven Opinions later, the Court need relate only information necessary to set the stage for the present Motion; it refers readers hungry for more to its prior writings. See, e.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock III), 255 F. Supp. 3d 101, 114–16 (D.D.C. 2017); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock VII), 471 F. Supp. 3d 71, 77–78 (D.D.C. 2020).

A. Pre-Vacatur

This case began as an effort by several Tribes to halt the construction — and eventually the operation — of DAPL. The pipeline carries crude oil from North Dakota to Illinois along a 1,200-mile path, a small segment of which runs deep beneath Lake Oahe. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock VI), 440 F. Supp. 3d 1, 9 (D.D.C. 2020). An artificial reservoir created in 1958 following a congressional taking of land from the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe, the "lake" supplies the Tribes with drinking water and supports myriad other critical functions. Id. at 9–10.

Given that no permit is generally required for oil pipelines traversing private land, the legal dispute here has largely fixated on that relatively small segment buried under Lake Oahe. After an initial pair of failed bids to enjoin the pipeline's construction and operation under two federal statutes irrelevant to the present Motion, the Tribes finally pinned their hopes on the National Environmental Policy Act. Id. at 10–11. Under NEPA, agencies must "consider every significant aspect of the environmental impact of a proposed action," Balt. Gas & Elec. Co. v. NRDC, 462 U.S. 87, 97 (1983) (quoting Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S.

519, 553 (1978)), so as to "inform the public that it has indeed considered environmental concerns in its decisionmaking process." Id. (citing Weinberger v. Catholic Action of Haw., 454 U.S. 139, 143 (1981)). Agencies must draft an Environmental Assessment, see 40 C.F.R. § 1501.4(b), that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement [EIS] or a finding of no significant impact [FONSI]." Id. § 1508.9(a). "If any 'significant environmental impacts might result from the proposed agency action[,] then an EIS must be prepared before agency action is taken." Grand Canyon Trust v. FAA, 290 F.3d 339, 340 (D.C. Cir. 2002) (quoting Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983)); see also 42 U.S.C. § 4332(2)(C). In order to determine whether an action may have "significant" environmental impacts, an agency must consider — among other criteria — "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4).

In its EA, the Corps concluded that no EIS was necessary before issuing Dakota Access a couple of necessary authorizations — a permit for DAPL's placement at Lake Oahe under the Rivers and Harbors Act, 33 U.S.C. § 408, and an easement to cross beneath the lake under the Mineral Leasing Act, 30 U.S.C. § 185 — on July 25, 2016, and February 8, 2017, respectively. Standing Rock VI, 440 F. Supp. 3d at 10; Standing Rock III, 255 F. Supp. 3d at 114, 116; ECF No. 183-9 (Section 408 Decision Package) at ECF pp. 3–4, 6–7; ECF No. 172-11 (Easement). The Tribes argued that the Corps' failure to require an EIS before granting those approvals violated NEPA. Standing Rock VI, 440 F. Supp. 3d at 11. Following a 2017 decision in which this Court remanded the matter to the agency for additional evaluation, see Standing Rock III, 255 F. Supp. 3d at 112, the Court in March 2020 finally agreed that the Corps should have prepared an EIS before conferring the easement. Standing Rock VI, 440 F. Supp. 3d at 8, 17

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