IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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, Intervenor-Plaintiffs, v. DONALD TRUMP, Individually and in His Official Capacity as President; U.S. ARMY CORPS OF ENGINEERS; and DAKOTA ACCESS, LLP, Defendants on Intervenor Complaint.	**REPLY STATEMENT OF PROPOSED INTERVENORS AS TO ADEQUACY OF REPRESENTATION BY THE TRIBES** **Case No. 1:16-cv-1534-JEB**

REPLY STATEMENT OF PROPOSED INTERVENORS SARA JUMPING EAGLE, ET AL.

In their briefs opposing intervention (Doc. 189, Doc. 192) defendants do not dispute that the proposed intervenors (the "Jumping Eagle" intervenors) are registered or enrolled members of the Standing Rock, Cheyenne River, Oglala Sioux and/or Pine Ridge Sioux Nations and own, live on or stand to inherit lands that will be impacted adversely by the Dakota Access pipeline at issue in this matter. In fact, *all* of the Jumping Eagle intervenors are registered or enrolled tribal members and either own or will inherit property on the reservations that will be impacted by any environmental injury arising from the Lake Oahe crossing. On such facts alone, the Jumping

Eagle intervenors are proper parties to an action challenging the easement and the Lake crossing due to environmental and other impacts on adjoining and downstream reservation properties.

While defendants argue that most of the proposed intervenors have not submitted declarations, the Intervenors' complaint on its face is well-suited to filing in the District Court on a notice pleading basis; no authority supports defendants' claim that *all* proposed intervenors *must* submit declarations. In fact, their complaint alone, without declarations, would be sufficient to file as a separate action that would inevitably be consolidated with the present action, so the absence of declarations for some of the intervenors should not be a barrier to their motion.

As to proposed Intervenor Wastewin Young (Wastewin), defendants themselves concede her interest and standing since they identify that she was, in fact, a tribal official of the Standing Rock Sioux Nation, a position that obviously comes about by her membership and residence in the Tribal Nation. While defendants suggest her prior involvement as the historical officer of the tribe now bars her appearing as an Intervenor, such argument must necessarily be limited, if applicable at all, to the NHPA claims in which Wastewin may have had some early role in her capacity as a tribal historian. But the mere fact that Intervenor Wastewin was at one time an official working on historical questions does not and cannot bar her *personal* right to assert claims under the Religious Freedom Restoration Act (RFRA) or her *personal* due process claims arising out of the Army's February 7, 2017 curtailment of the Environmental Impact Statement (EIS) review period in which

she, like any other tribal member, had the right to participate but found such right curtailed by the premature termination of the review period.[1]

Like any other proposed intervenor, Wastewin's interest in challenging the February 7, 2017 decision to abandon the EIS review is a separate and distinct issue from the NHPA issues in which she may have had some involvement as a former tribal official. Moreover, the Army's abandonment of the EIS study and review period, a valid point of administrative challenge by *any* interested tribal resident, did not even arise until February 2017, when the Army terminated the review period. Wastewin's involvement up to January 2016 in *some* of the NHPA issues is thus irrelevant to her due process claims arising out of the government's curtailment of the EIS review that arose more than a year *later*. Even if she were still a tribal official, such would not affect her right as an individual to file due process challenges to the curtailment of the EIS review period since she, as an individual, had an absolute right to comment and participate in that particular administrative review, regardless of any official position. Finally, Wastewin's interest in protecting her own land and drinking water as a resident on the reservation is a *personal* interest, separate and apart from her former work as a tribal historian, as are her personal religious rights under RFRA.

In any event, Wastewin's former tribal position can impact only *her* position as intervenor and cannot reasonably be deemed a bar to intervention of the *other* Jumping Eagle intervenors, none of whom worked for the tribal government or are alleged to have done so. They have *individual* and

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[1] In fact, it is counsel's understanding that Wastewin ceased to be a tribal officer in or about November 2015 and the last reference defendants identify as to her official participation in such matters is a January 2016 tribal document. Since the final NHPA decisions came about substantially after such date, her earlier position as a tribal historical officer should not bar even her NHPA claims.

personal interests under both RFRA and the due process challenge to the Army's curtailment of the EIS review, none of which are impacted by Wastewin's former tribal employment.

Defendants' additional claims that the Jumping Eagle intervenors' complaint is untimely cannot even remotely apply to their administrative challenge to the February 7, 2017 curtailment of the EIS review since that challenge could *not* have been filed prior to February 7, 2017 - up to that date the Army was still considering the EIS study and review. It was only on February 7, 2017, when the Army formally curtailed the review, that such challenge even arose, let alone became ripe. Since the Jumping Eagle Intervenors' complaint was filed on February 20, 2017, a mere 13 days after the February 7 administrative decision, their challenge to the termination of the EIS review cannot be deemed untimely. Indeed, their RFRA claims can also be said not to have arisen until the Army reversed position in February on granting the Lake Oahe easement since up to that date no oil could flow under the Lake crossing. Thus, at minimum, the Jumping Eagle intervenors should be permitted intervention on their due process and RFRA claims even if the Court, arguendo, finds their intervention as to the NHPA claims to be untimely. In any event, since the proposed Intervenors can simply file any claims under a separate Complaint that will be consolidated with this action or heard together, the claim of untimeliness is a mere quibble without substance.

Defendants also provide no answer to the claims by the Jumping Eagle intervenors that their presence in this action is necessary to preserve jurisdiction if the Tribes are ultimately found to lack standing under RFRA as governmental entities. While this point is subject to dispute (and the District Court has thus far not found against the Tribes' standing), neither defendant refutes the logic of intervenors' argument that their personal presence is necessary to maintain jurisdiction, at least on appeal, over the RFRA claims. If the Tribes ultimately are found to lack such standing, the Jumping

Eagle Intervenors are uniquely necessary to assert and preserve such jurisdiction. Moreover, this Court at a later stage could reverse its decision on standing and, in such case, the individual intervenors would be necessary to preserve RFRA jurisdiction.

Similarly, no answer is made by defendants to the plain fact that in all cases asserting religious rights *individuals* are better suited to assert their own religious claims than any governing body, tribal or otherwise. Neither defendant explains just *how* the Tribes can speak for personal religious practices *better* than the individual practitioners. To the contrary, RFRA's presumption against governmental standing demonstrates that the preferred statutory focus is the *individual's* assertion of their *personal* religious rights. As the Seventh Circuit has recognized, "RFRA's general rule prohibits the federal government from placing substantial burdens on '*a person's* exercise of religion'..." *Korte v. Sebelius*, 735 F.3d 654, 673 (7th Cir. 2013).

In enacting RFRA, Congress created a statutory preference for individual, non-governmental standing, demonstrating that Congress presumed individuals are best suited to present RFRA claims. See e.g. *United States v. Antoine*, 318 F.3d 919, n.1 (9th Cir. 2002) (noting that RFRA's application "to any '*person's'* exercise of religion,...arguably suggests coverage of all *individuals* subject to the government's jurisdiction." [emphasis added]; *O Centro Espirita Beneficiente Uniao Do Begetal v. Ashcroft*, 342 F.3d 1170, 1181 (10th Cir. 2003), quoting 42 U.S.C. § 2000bb-1(b) (holding that RFRA"s focus is the burden the government imposes upon the "*individual* claimant" and the "application of the burden to the *person*") [emphasis added]. Looked at from the viewpoint of this statutory preference, individual tribal members *must* be deemed better suited to present their own RFRA claims and not made subject to virtual representation by tribal governments.

As one court has noted, it is "religious *adherents*" that are empowered to seek relief under RFRA. Cf., *United States v. Quaintance*, 2010 U.S. App. LEXIS 10218, *5 (10th Cir. 2010) ("RFRA allows religious *adherents* to challenge government activities that encroach on their beliefs.") [emphasis added]. Regardless of any associational standing the Tribes may have under RFRA, it is the *individual adherent's* religious practice, *Quaintance*, supra, that is the primary subject of Congress's protecting reach and the individual Lakota practitioners cannot and should not be barred from intervening in such action.

Curiously, neither defendant denies that the Tribes themselves have members of multiple faiths, especially Christian faiths, and are by no means better suited to represent Native American religious beliefs than the individual Lakota practitioners. Lacking in defendants' opposition is any substantiation as to just *how* the tribal governments are better able to represent the individual practitioners' religious interests and practices. To the extent the religious rights of Lakota practitioners are at issue, it is self-evident that religious practitioners are the more "effective advocates" and best suited to represent such viewpoints. See e.g. *Singleton v. Wulf*, 428 U.S. 106 114 (1976) ("The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them.") No reason at all has been advanced by the defendants as to why the Tribes are necessarily the better advocate for the religious rights of their individual tribal members.

Since the RFRA rights at stake are *only* those of the actual practitioners of the Lakota faith, only the practitioners themselves can provide adequate representation: "Inadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public." 3B Moore's Federal Practice, Par. 24.07[4] at 24-78 (2d ed.

1995). In this same light, the highly fact-intensive nature of the religious freedom analysis, see e.g. *Brown v. Livingston*, 17 F. Supp. 3d 616, 634 (S.D. Tex. 2014), requires the presence of the actual practitioner who can best inform the Court of the burden to his or her religious practice. In the religious rights field where government ordinarily has no legal say, the court should pay special attention to the standard under which courts "look skeptically on government entities serving as adequate advocates for private parties." Cf., *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 313, 321 (D.C. Cir. 2015), citing *Fund for Animals, supra*; *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912-13, 183 U.S. App. D.C. 11 (D.C. Cir. 1977).[2]

Finally, no defendant disputes that interests of judicial economy strongly favor one single litigation to adjudicate related questions, a point this Court has repeatedly recognized. See e.g., *Natural Resources Defense Council v. Costle*, 561 F.2d at 910, cited with approval in *Crossroads, supra*. It would make little sense for the Court to deny the motion to intervene at this relatively early pre-trial phase only to have the Jumping Eagle intervenors file a separate complaint that would, inevitably, be consolidated with the present action or tracked alongside it before the same judge. And, since the legal issues are the same in substance as those raised by the Tribes, intervention is presumed:

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[2] In *Crossroads*, the Court of Appeals admonished the District Court for disregarding its "minimal" test for intervention:

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

Crossroads, 788 F.3d at 321. In these circumstances, where religious rights are at issue, as well as personal interests in water safety and the interference in due process rights of the individual tribal members caused by the early termination of the EIS review period, the Court should particularly respect the "minimal" standard for intervention.

> "Rule 24(b),...provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact."

Nuesse v. Camp, 385 F.2d 694, 704 (D.C. Cir. 1967).

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2017, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

Respectfully

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