ORAL ARGUMENT SCHEDULED FOR NOVEMBER 4, 2020

Nos. 20-5197, 20-5201

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE, et al.,
Plaintiffs / Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Defendant / Appellant.

Appeal from the United States District Court for the District of Columbia
No. 1:16-cv-01534 (Hon. James E. Boasberg)

FEDERAL APPELLANT'S REPLY BRIEF
***** PUBLIC COPY – SEALED MATERIAL DELETED *****

JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
ANDREW C. MERGEN
REUBEN SCHIFMAN
MATTHEW MARINELLI
JAMES A. MAYSONETT
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 305-0216
james.a.maysonett@usdoj.gov

Of Counsel:

MILTON BOYD
MELANIE CASNER
Attorneys
Office of Chief Counsel
U.S. Army Corps of Engineers

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

---

* Authorities upon which we chiefly rely are marked with asterisks.

Statute

Other Authorities

GLOSSARY

APA	Administrative Procedure Act
Corps	United States Army Corps of Engineers
Council	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
HDD	Horizontal Directional Drilling
NEPA	National Environmental Policy Act
PHMSA	Pipeline and Hazardous Materials Safety Administration
Tribes	Plaintiffs Standing Rock, Cheyenne River, Yankton, and Oglala Sioux Tribes

SUMMARY OF ARGUMENT

1. The Tribes have not shown that the United States Army Corps of Engineers (the "Corps") violated the National Environmental Policy Act ("NEPA").

a. They argue that the district court applied the correct legal standard, but that claim is refuted by the court's own opinion.

b. They argue that the pipeline is unsafe, but the record confirms that the risk of a serious spill is very low.

c. They invite the Court to reach its own conclusions about a long list of technical issues, but have failed to show that any of the Corps' findings were "arbitrary and capricious."

2. The Tribes cannot justify vacatur on the ground that it is necessary to compel the completion of an environmental impact statement ("EIS") when the Corps' actions in this case have always been timely.

3. The Tribes cannot save the district court's injunction. Vacatur does not implicitly enjoin the operation of this pipeline, and the court simply did not make the findings necessary to sustain an injunction.

ARGUMENT

I. The Corps complied with NEPA.

A. The district court applied the wrong legal standard.

Based on its misreading of *National Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019), the district court concluded that the mere

"existence of 'consistent and strenuous opposition'" by the Tribes rendered the effects of the Corps' action "highly controversial." 1 J.A. 112–13. The court held that the Corps' reasoning was irrelevant because all that mattered was whether the agency had "succeeded" in convincing the Tribes to drop their opposition. *Id.* The court made the effort to review the Corps' findings only because it found such review "prudent." 1 J.A. 112.

No part of this is consistent with the law. Federal Appellant's Opening Brief ("Corps Brief") at 18. Recognizing the district court's error, the Tribes make no attempt to defend its reading of the law. Instead, they agree with the Corps that the agency was not required "to 'convince' outside technical experts," but only to "reach a rational conclusion on whether a controversy existed." Brief of Appellees Standing Rock Sioux Tribe, et al. ("Tribes Brief") at 23.

But the Tribes also argue that the district court applied the correct standard. *Id.* That argument is flatly refuted by the court's explicit discussion of the issue: it held that *Semonite* provided "clear instruction" that judicial review of the Corps' NEPA compliance is *not* based on whether the Corp reached a rational conclusion. 1 J.A. 109, 110, 112. "The question is not whether the Corps *attempted* to resolve the controversy, but whether it *succeeded*." 1 J.A. 110. And the court explicitly held that the mere existence of opposition could compel an EIS. 1 J.A. 112.

The district court applied that erroneous legal standard. 1 J.A. 113. Its ultimate conclusion was not that the Corps' findings were "arbitrary and

capricious," but rather that "the Corps had not 'succeeded' in 'resolv[ing] the controversy' created by 'consistent and strenuous opposition.'" 1 J.A. 130. In so doing, the court elevated the Tribes' opposition over the Corps' reasoned analysis.

B. The Corps rationally concluded that this pipeline is safe.

The Corps found that the risk of an oil spill is low and that, even if a spill were to occur, its effects would be temporary and limited. Corps Brief at 6–13. The Tribes concede that the "likelihood of an oil spill . . . may be low in absolute terms," Tribes Brief at 2, but go on to claim that the pipeline presents an "unacceptable risk" due to a "lack of surge relief systems," *id.* at 62. That is, they claim that the accidental closing of a valve could cause "overpressure" great enough to rupture the pipeline. *Id.* at 24, 62; *see also* 3 J.A. 545.

The Corps understood the design of the pipeline's surge relief valves, 8 J.A. 1940–41, and directly responded to the Tribes' concerns, 8 J.A. 2053. The agency explained that the operator had a "surge analysis" prepared before the pipeline began operation and "implemented the measures recommended in the report." *Id.*; *see also* 1 R.S.A. 5–50. A third-party audit of the pipeline confirmed that the necessary changes were made. ECF No. 349-2 at 14, 16.

The Tribes argue that the surge report itself "found an 'unacceptable' deficiency." Tribes Brief at 62–63. But the report actually concluded that the pipeline is "protected against excessive surge pressures" as long as its safety systems are in place. 1 R.S.A. 7.

***** Material Under Seal Deleted *****

The rest of the record confirms the Corps' conclusions. The segment of the pipeline under Lake Oahe is designed to withstand nearly double the maximum allowable operating pressure. 3 J.A. 545. PHMSA's historical data shows that for all the pipelines of 16" diameter or greater in the United States, only one pipeline spill was caused by incorrect operations between 2002 and 2012. 8 J.A. 1969–70. After three years of operations, there have been no spills at the Lake Oahe crossing or anywhere on the pipeline's mainline. And even if the Corps had somehow underestimated the risk of such spills, it nevertheless fulfilled its NEPA obligations by closely analyzing the potential consequences of a catastrophic spill.

The risks and consequences of a spill are further reduced by the fact that the pipeline is buried deep below the lakebed. 8 J.A. 1830. The Tribes claim to have refuted the "notion" that "the pipeline's depth . . . eliminates the risk of an incident." Tribes Brief at 34–35. But the Corps did not conclude that a catastrophic spill could never affect the waters of Lake Oahe: to the contrary, the Corps analyzed those scenarios at length. Nonetheless, the physical barrier between the lake and the pipeline sharply limits how a leak would affect the lake. Corps Brief at 8. The Tribes observe that a nearby buried pipeline failed in 2016, spilling the equivalent of 4,200 barrels of oil. Tribes Brief at 35. But unlike the Dakota Access pipeline, that pipeline "lacked accurate or timely leak-detection systems." 3 S.A. 712. Moreover, that spill is [redacted] the size of the catastrophic spill that the Corps modeled; thus, even if such an event were not impossible, the Corps did consider its potential effects.

***** Material Under Seal Deleted *****

The Corps rationally concluded that the risk of an oil spill is low. This is simply a case where the "combination of probability and harm is sufficiently minimal" that the Corps could rationally conclude that an EIS is not required. *New York v. NRC*, 681 F.3d 471, 478–79 (D.C. Cir. 2012).

C. The Tribes have not shown that the effects of this action are "significant" or "highly controversial."

The Tribes ask the Court to resolve a long list of technical issues about the safety of this pipeline. But while the pipeline is complex, this Court does not sit as a pipeline regulator or a de novo trial court. Rather, it conducts its review in accord with the APA, under which the Corps is entitled to "rely on the reasonable opinions of its own qualified experts even if . . . a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). The Tribes had to show that the Corps' conclusions were "arbitrary and capricious," not just that they are open to debate, and they failed to make that showing.

1. Leak detection

This pipeline was built to prevent leaks. Corps Brief at 21–25. If there were to be a leak, the pipeline has a series of systems to detect it, including the "computational pipeline monitoring" ("CPM") system, which can detect the shock wave from a catastrophic rupture within seconds. 3 J.A. 494–95. Still, the Corps did not assume that the pipeline is leakproof or that its systems are infallible: it modeled a series of different hypothetical oil spills, ranging in size from [redacted] up to a catastrophic spill of [redacted]. 9 J.A. 2231.

***** Material Under Seal Deleted *****

The Tribes argue that the Corps' "reliance on DAPL's leak detection system was arbitrary and capricious." Tribes Brief at 27. First, they make the same mistake that the district court made: they argue that the CPM system is wildly unreliable because it detects only 20% of all leaks. *Id.* at 26. But the cited PHMSA report shows that CPM was the *first* system to identify a leak in 20% of cases, not that CPM systems miss 80% of leaks. Corps Brief at 22 (citing 11 J.A. 2800). Because most leaks are small and CPM systems take longer to identify small leaks, this report mostly shows that small leaks are often first found using other methods.

The Tribes claim that "numerous examples" show "pipelines that leaked for hours or days after similar detection systems failed." Tribes Brief at 27. The Corps never denied that a leak is possible, which is why it analyzed different hypothetical leak scenarios, and the "numerous examples" cited by the Tribes confirm that the Corps' analysis was rational. All but two of those incidents were much smaller than the spills modeled by the Corps (the spills reported by the Tribes were, on average, about 2,000 barrels of oil). 6 S.A. 1401–06; *cf.* 6 S.A. 1186 (reporting Belle Fourche leak as 12,615 barrels, [redacted]). Even the two larger spills do not show that CPM systems are inaccurate: The segment of the pipeline that caused the Tesoro Logistics spill (20,600 barrels) lacked a leak monitoring system or pressure sensors. *See* https://www.nytimes.com/2013/10/24/us/oil-spill-in-north-dakota-raises-detection-concerns.html?_r=0. The CPM system promptly detected the leak in the Enbridge spill (20,000 barrels), but its alarms were

mistakenly disregarded by its operators. National Transportation Safety Board, *Accident Report* 8–10 (July 10, 2012), https://www.ntsb.gov/investigations/AccidentReports/Reports/PAR1201.pdf. None of these incidents supports the Tribes' claims that CPM systems are inaccurate.

The Tribes also claim the Corps never "grappled" with the risk that a "pinhole" leak could cause a significant spill over time. Tribes Brief at 26. But the risk of a pinhole leak is low, and while the pipeline's systems might take longer to detect it, it will eventually be found. Corps Brief at 23–24; *see also* 8 J.A. 1948, 2023. And again, the example given by the Tribes—that "a brand-new pipeline . . . leaked 8,600 barrels over 12 days before being detected," Tribes Brief at 26—is still much smaller than the leaks actually modeled by the Corps. That leak, moreover, was actually detected in less than an hour by the pipeline's systems (though it took days to pinpoint the location of the leak). 6 J.A. 1170.

The Corps did not assume that the pipeline's leak detection systems are perfect. It recognized the risk that this pipeline could leak and carefully modeled different oil spills that accurately reflect the kinds of leaks that have occurred historically. That satisfied the requirements of NEPA.

2. "Worst case discharge"

Even though it is very unlikely that this pipeline will suffer a catastrophic rupture, the Corps nonetheless carefully weighed the potential consequences of such an event. Corps Brief at 25–29. To determine how much oil might be released by a catastrophic rupture, the Corps used the volume of oil defined

under PHMSA's regulations as the "worst case discharge." *Id.* That volume of oil—[redacted]—is much larger than the majority of spills seen in actual pipeline incidents. 8 J.A. 1835–36, 1928–29.[1]

The Tribes, however, claim that the Corps' estimate is "over four times lower than the [EPA's] estimate." Tribes Brief at 12. That is simply untrue. In its comments, EPA did not calculate its own estimate and never recommended that the Corps use an estimate "four times" larger. *See* 1 R.S.A. 1–4; 1 R.S.A. 51–55. Instead, the Tribes cite a generic EPA document about oil spill response planning that has nothing to do with this pipeline. That document does give a general "worst-case discharge" for a pipeline of this diameter of 50,800 barrels. U.S. EPA, *Mid-Missouri River Sub-Area Contingency Plan* 10 (Apr. 16, 2015), https://www.nrt.org/sites/32/files/Final%20MO%20with%20Appendices%204.17.15.pdf.

But that is more than twice the size of any onshore pipeline spill reported in decades in the United States. And it is much larger than the Corps' estimate because it assumes that a rupture will spill *all* of the oil in a ten-mile "line section" of the pipeline. *Id*. But the Dakota Access pipeline has valves on either side of Lake Oahe that ensure that only a much smaller segment of the pipeline would release its oil even in the event of a catastrophic rupture. The

[1] PHMSA approved this calculation of the "worst case discharge" when it approved the operator's response plan in 2017. The Tribes speculate that PHMSA approved the plan without actually understanding the math behind the calculation. Tribes Brief at 36 n.10. Nothing in the record supports that speculation, and this case does not involve a challenge to PHMSA's previous decision to approve the plan.

***** Material Under Seal Deleted *****

Corps rationally relied on the specific physical configuration of this pipeline, instead of a generic value. *See* 8 J.A. 1972–73; 9 J.A. 2274; 3 J.A. 647 [redacted].

Next, the Tribes argue that the Corps' estimate fails "to include any time to actually detect a spill or leak." Tribes Brief at 19, 33–34. In fact, the Corps estimated that it would take a total of 12.9 minutes to detect a catastrophic rupture and shut the pipeline down, including less than a minute to detect the rupture (as the resulting pressure waves travel through the pipeline at the speed of sound). Corps Brief at 26–27. The Tribes counter that it could take "hours" or "weeks." *See* 1 J.A. 123–24. Nothing in the record supports that claim. In particular, there are no reported incidents in the PHMSA data where a pipeline suffered a catastrophic rupture that went undetected for "hours" or "weeks." Whatever the limitations of the CPM system, there is no evidence that it would take more than a minute to detect the dramatic pressure changes caused by a catastrophic rupture. *See* 8 J.A. 1943, 1991–92, 2022–23; 2 J.A. 377.

Next, the Tribes argue that the pipeline's safety valves might fail. Tribes Brief at 34. There is no evidence supporting this claim. The valves were tested before the pipeline began operations. 8 J.A. 1974. They are motor-operated, but if there is a power failure, they can also be closed manually. 8 J.A. 1974. The valves have been specifically designed to meet industry standards and to withstand North Dakota's harsh winters. 8 J.A. 1973–74. In any event, the Corps disclosed the additional amount of oil that might be released in the unlikely event that these valves failed. 8 J.A. 1973. NEPA required no more.

Finally, the district court applied the wrong standard of review to this issue. The court was bound to decide whether the Corps had reached rational conclusions about the potential consequences of a catastrophic spill. Instead, the court decided that the Corps had violated NEPA by failing to model the "worst case scenario." 1 J.A. 128. NEPA, however, does not require agencies to consider "worst case scenarios." Corps Brief at 27–28.

The Tribes counter that, "once the Corps chose this methodology . . . , it could not do so arbitrarily." Tribes Brief 35. Doubtless that is correct. But the Corps' analysis was not arbitrary: the Corps carefully evaluated the potential consequences of a catastrophic pipeline rupture. It is irrelevant that the Tribes can conjure up an even larger—and even less likely—oil spill by piling a series of improbable malfunctions and errors on top of each other. The district court erred by holding the Corps to a standard—the "worst case scenario" standard—not found in the law.

3. Winter conditions

The Corps recognized that North Dakota's harsh winters could complicate clean-up efforts in the unlikely event of a spill, and it required the operator to perform winter training exercises to ensure that it would be prepared. Corps Brief at 29–31. The Tribes argue that the Corps' exercise of foresight violated NEPA because the Corps failed to quantify "how exactly winter conditions would delay response efforts." Tribes Brief at 31. The district court held that this disagreement rendered the effects of the Corps' action "highly controversial." 1 J.A. 119–21.

There is no controversy here. Everyone agrees that a clean-up will be more difficult in the winter, and no one has identified any way to calculate exactly *how much more* difficult. The Corps acknowledged, for example, that "ice could impede the deployment of traditional containment booms," 3 J.A. 491, and it examined how winter conditions would change the consequences of a spill, 3 J.A. 499–500. The Tribes and their experts raised these issues in their comments, and the Corps responded to them. 8 J.A. 1967–68, 2064–65. But nowhere did the Tribes explain how the Corps could more fully assess how winter conditions would delay response efforts. NEPA did not require the Corps to prepare a quantitative analysis of winter response times when there is no data or science to support that analysis.

Finally, as the Tribes note, one of their experts asked whether the pipeline's valves were designed for "arctic conditions." Tribes Brief at 30 (citing 1 S.A. 85). The Corps responded directly, explaining that the valves were designed to work in temperatures ranging from "-20 degrees to +150 degree Fahrenheit, even though the product in the pipeline and thus the pipe itself is not anticipated to drop below [+]60 degrees Fahrenheit in the coldest North Dakota winters." 8 J.A. 2054. NEPA required nothing more.

4. Operator safety record

The Corps found the risk of an oil spill low in part based on its review of the historical record of pipeline leaks maintained by PHMSA. Corps Brief at 31–32. The Tribes argue that the Corps failed to consider the operator's "broken safety culture." Tribes Brief at 28. That argument fails for many reasons.

First, the Corps *did* consider the operator's safety record because it is necessarily included in the overall incident record. The agency's decision on which data set to use is entitled to deference. *New York v. NRC*, 824 F.3d 1012, 1022 (D.C. Cir. 2016).

Second, the Tribes' analysis fails to show that this operator's safety record is significantly worse than any other operator: although it has reported a large number of incidents, that reflects the scope of its operations. 7 J.A. 1611–12.

Third, the Corps' analysis *did* include review of an objective survey of the operator's safety practices. 8 J.A. 2056, 10 J.A. 2581, 2591–601, 2631.

Fourth, the Corps did not "fail to acknowledge" the issue, but responded to the Tribes' criticisms. 8 J.A. 1831, 1953–54, 2052–53, 2056.

Fifth, the catastrophic spill analyzed by the Corps is still larger than the largest spill reported for this operator. Tribes Brief at 28–29 (citing 4 S.A. 838). Therefore, even if the Tribes were right, the Corps has still fully considered the potential effects of its action.

5. Other alleged deficiencies

The Tribes raise several other arguments that were not reached by the district court:

Bakken crude. The Tribes argue that this type of crude oil is "uniquely dangerous." Tribes Brief at 37. But the Corps took careful note of the chemical composition of Bakken crude oil, and its spill modeling was based on that oil's specific chemical composition. 8 J.A. 2018–19; 3 J.A. 497–500. The Corps also responded to the Tribes' comments on this issue. 8 J.A. 2054–55, 2064.

Tribal consultation. The Tribes claim that the Corps broke "its own Tribal consultation policies." Tribes Brief at 38. To the contrary, the record shows that the Corps consulted with the Tribes and that those extensive consultations vastly exceeded its narrow legal obligations. *See, e.g.*, ECF No. 183 at 33–42 (Mar. 23, 2017).

Environmental justice. The Tribes contend that the Corps refused to acknowledge the pipeline's "environmental justice implications." Tribes Brief at 38. The pipeline does not cross reservation lands, but the Corps recognized that the Standing Rock Sioux Tribe's reservation is just downstream of the Lake Oahe crossing, 3 J.A. 537, and the agency addressed environmental justice in its original EA, 1 J.A. 84–87. On remand, the Corps prepared a lengthy additional analysis of environmental justice. 8 J.A. 1862–918. It again concluded that—because a significant oil spill is unlikely and would not affect the Tribes' drinking water—this easement does not result in disproportionately high effects on minority and low-income populations. 8 J.A. 1917–18.

Operation and management plans. Finally, the Tribes argue that the pipeline is unsafe and that the operator has violated its easement because it is using "comprehensive" operations and maintenance plans and integrity management plans, instead of "location-specific" plans. Tribes Brief at 37, 62. The easement does not require "location-specific" plans, and the operator submitted the plans required by the easement. *See* 3 J.A. 600; *see also* 7 J.A. 1615–17. The Tribes, moreover, raised this issue only after both the EA and the remand had been completed, and it is not properly part of the claims at issue in this case.

In sum, the Corps complied with NEPA.

II. The district court abused its discretion in vacating the easement.

The district court should not have vacated the easement granted by the Corps. Corps Brief at 33–34. The Tribes now argue that vacatur was necessary because otherwise the Corps will "never finish the EIS." Tribes Brief at 56.

That claim is baseless. The Corps completed the detailed and complex remand required by the district court in a timely way. Moreover, the Corps has already begun the EIS process, *see* 85 Fed. Reg. 55,843 (Sept. 10, 2020), and it has already given the district court its current good-faith estimate that this EIS would take about 13 months to complete. If the court has legitimate concerns about the timing of this EIS, it has at its disposal other tools that would avoid the profound disruptions that could result from vacatur.[2]

III. The district court erred in enjoining operation of the pipeline.

The district court enjoined the operator to "shut down the pipeline and empty it of oil." 1 J.A. 139. That was error because the court entered its injunction without making the findings required by the traditional four-factor test for injunctive relief. Corps Brief at 34–35. Most importantly, the court failed to find that this injunction was necessary to prevent "likely irreparable harm." That is contrary to Supreme Court precedent. *See, e.g., Monsanto Co. v.*

---

[2] The Tribes argue that the Corps "effectively" waived its arguments regarding vacatur because it addressed the issue only briefly. Tribes Brief at 43. Not so. The Court warned the appellants that this case presented "potential problems of duplicative briefing." Order (Aug. 5, 2020). To avoid duplicative briefing, the Corps and the operator coordinated, and the Corps left the bulk of the argument on vacatur to be addressed by the operators. That is not waiver.

Geertson Seed Farms, 561 U.S. 139, 165 (2010); *Winter v. NRDC*, 555 U.S. 7, 22 (2008); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

In response, the Tribes claim that a series of cases have held that vacatur "assumes that the action authorized by a vacated government authorization would cease." Tribes Brief at 13, 69. But in each case cited by the Tribes, the activity at issue—such as the construction of a uranium mine or the operation of a natural gas pipeline—was *regulated* by the defendant federal agency and could be undertaken only with a permit or license from that agency. Thus, if the permit or license was vacated, it necessarily followed that the project could not continue.[3]

Here, however, the operators do not need a permit or license from the Corps to operate this pipeline because the Corps does not regulate the operation of oil pipelines. Instead, what the operator needed was an *easement* to authorize the project to cross federal land. And that is what the Corps authorized—the

---

[3] *City of Oberlin v. FERC*, 937 F.3d 599, 601–02, 611 (D.C. Cir. 2019) (declining to vacate FERC order authorizing operation of natural gas pipeline); *Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019) (concluding that there was no need to enjoin drilling operations because they could not lawfully be conducted once required permits were vacated); *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 535–36 (D.C. Cir. 2018) (holding, in case where vacatur of the required NRC license was sufficient to stop the construction of uranium mine, that plaintiff was not required to show "irreparable injury" to obtain vacatur); *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (vacating permit for construction and operation of gas pipeline); *Apache Corp. v. FERC*, 627 F.3d 1220, 1223 (D.C. Cir. 2010) (declining to vacate FERC order that authorized leasing agreement).

Note that the operation of a natural gas pipeline, unlike an oil pipeline, *does* require a federal permit. *See, e.g.,* 15 U.S.C. § 717f(c).

crossing of federal land and Lake Oahe—not the pipeline's operation. Because the easement is not a permit for the pipeline's operation, its vacatur does not stop its operation, in contrast to the situations in the cases cited by the Tribes. Instead, vacatur merely rendered the pipeline an encroachment on federal land —whether it is operating or not.

None of the cases cited by the Tribes held that vacatur somehow enjoined activities beyond the scope of the federal licenses and permits at issue. And if vacatur *implicitly* meant that the operator had to "shut down the pipeline and empty it of oil," then the district court would not have needed to include that injunction in its order.

The Tribes argue that the Corps forfeited this argument. Tribes Brief at 66–67. But the Corps cannot have forfeited an argument that it was never given an opportunity to make in the first place. *The Tribes never moved for injunctive relief*, and the district court never directed the parties to brief that issue. 1 J.A. 137 (directing the parties instead to brief "whether the easement should be vacated during remand"). Federal Rule 65(d) imposes strict requirements on the issuance of every injunction to ensure that parties are not exposed to the threat of contempt without fair notice. To preclude the Corps and the operators from appealing this injunction, even though it was never briefed or argued, and the Tribes never moved for it, would make a mockery of those requirements.

The parties did brief the potential consequences of shutting down the pipeline as part of the "disruptive consequences" of vacatur. But the Corps briefed those issues only because it recognized that vacatur could set in motion

a chain of events that could ultimately lead to the pipeline's being shut down. *See* ECF No. 507 at 15 (noting that vacatur would raise "[s]erious questions" about "potential remedies" because it would "likely place Dakota Access in violation of the [Mineral Leasing Act] and trigger the Corps' policies regarding curing an encroachment of Federal Property"). The district court made the leap from vacatur to an injunction without any motion before it, and both the operator and the Corps objected as soon as the court made that error. *See, e.g.,* ECF No. 552, at 38–39 (July 8, 2020) (raising these issues two days after the injunction was entered). That is not forfeiture.[4]

Finally, the Tribes argue that the Court should uphold this injunction because the district court "made all of the requisite findings for an injunction." Tribes Brief at 74. But the court never addressed "likely irreparable harm." The Tribes weakly suggest that the district court "considered . . . evidence that the pipeline was not safe," *id.* at 75, but "considering" is not the same as "making the finding required by the law."

Moreover, the Tribes' claim that the pipeline is "not safe" is not true, as Part I of this brief has made clear. *See also* Corps Brief at 1–13. The standard for an injunction is not whether the Tribes believe that the pipeline is "safe"; it is whether the Tribes can show that they are likely to suffer irreparable harm without an injunction. Because the risk of an oil spill is low and not "likely"—

[4] The Court may entertain these arguments, in any event, because the Court "is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991).

as even the Tribes admit—and because the effects of a spill are limited, they cannot make that showing on the existing record (though the district court has recently given them an opportunity to make a sufficient record). The district court's existing injunction is not lawful and should be reversed.

CONCLUSION

The district court's judgment on the Tribes' NEPA claims—and its orders vacating the easement, remanding these matters to the Corps for the preparation of an EIS, and enjoining the operation of the pipeline—should be reversed.

Respectfully submitted,

/s/ James A. Maysonett
JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
ANDREW C. MERGEN
REUBEN SCHIFMAN
MATTHEW MARINELLI
JAMES A. MAYSONETT
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

Of Counsel:

MILTON BOYD
MELANIE CASNER
Attorneys
Office of Chief Counsel
U.S. Army Corps of Engineers

September 30, 2020
90-2-4-14750

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirements of Federal Rule of Appellate Procedure 27(d)(2) because the motion contains 4,865 words.

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Calisto MT font.

/s/ James A. Maysonett
JAMES A. MAYSONETT

Counsel for Federal Appellant