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Standing Rock Legal Team at Columbia Law School Challenges Delaying Trial For Qualified Immunity Appeal

Thunderhawk v. County of Morton, North Dakota

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New York, October 26, 2020 — Counsel for Standing Rock civil rights plaintiffs are challenging any additional trial delay, arguing that neither the doctrine of qualified immunity nor its underlying policy goals support staying discovery in *Thunderhawk v. County of Morton, North Dakota*. Trial has been set for August 16, 2021.

“Qualified immunity has recently come under enormous amounts of criticism from judges, academics, and policymakers from the political left, right, and center,” counsel state in their brief. “This Court should not further extend the doctrine of qualified immunity by halting discovery for the parties in this case—leading to another delay of potentially a year or more.”

“Now is the time for this case to move forward,” lead attorney Noah Smith-Drelich said.



The *Thunderhawk* case arises out of the NoDAPL movement at Standing Rock in 2016-2017, in which tens of thousands of Water Protectors gathered on the northern border of the Standing Rock Reservation to support the Standing Rock Sioux Tribe’s resistance to the Dakota Access Pipeline. The lawsuit centers around law enforcement’s discriminatory closure of a nine-mile stretch of the region’s primary public right of way, which effectively severed the Tribe and its supporters from Bismarck, the state capital and the location of the nearest airport, shopping, and major population center, as well as from the nearest major hospital.

In their latest filing, plaintiffs' counsel argue that the state and county defendants' interlocutory appeal to the U.S. Court of Appeals for the Eighth Circuit on the denial of qualified immunity is clearly "for purposes of delay" and "frivolous."

Plaintiffs' counsel highlight that the purported policy goals justifying the doctrine of qualified immunity do not support staying discovery in the present case. Qualified immunity is intended to protect officers who act unconstitutionally in the heat of the moment (but not unreasonably under the circumstances) from personal financial liability.

This case involves neither heat-of-the-moment decision making nor personal liability. The official decision to close the public highway spanned the length of five months and involved multiple public and private parties, all of whom had ample opportunity to consider the unconstitutionality of their actions before proceeding. Moreover, the officers in question will not face personal liability for their wrongs: North Dakota state law requires indemnification of public officials in these circumstances.

Plaintiffs also assert that as a private party not entitled to qualified immunity, the private security firm TigerSwan LLC is not entitled to a stay of discovery. Granting TigerSwan a stay of discovery can accomplish nothing beyond delaying justice; if qualified immunity applied to all government defendants, the lawsuit would still move forward against TigerSwan.



The *Thunderhawk* plaintiffs are represented by [Professor Noah Smith-Drelich](#) (Assistant Professor of Law at Chicago-Kent) and [Professor Bernard E. Harcourt](#) of Columbia Law School. Prior to joining Chicago-Kent, Professor Smith-Drelich was a Lecturer in Law at Columbia Law School, and before that the ACLU's Staff Attorney for their North Dakota, South Dakota, and Wyoming affiliates. Professor Harcourt is the founding director of the [Columbia Center for](#)

[Contemporary Critical Thought](#), which actively engages in pro bono public-interest representation.

The plaintiffs in this case, Cissy Thunderhawk, Wašté Win Young, the Reverend John Floberg, and José Zhagñay are, respectively, a small-business owner, a former Historic Preservation Officer of the Standing Rock Sioux Tribe, Standing Rock's Episcopalian Minister, and a school volunteer. The plaintiffs, and the class they seek to represent, allege violations of their constitutional rights. Through the suit, the plaintiffs hope to recover damages for the substantial harms inflicted on the community and movement by this unnecessary and overbroad road closure.

The litigation forms part of the [Practical Engagements](#) initiative of the [Columbia Center for Contemporary Critical Thought](#). In 2018, the Center organized [a seminar on Standing Rock](#) that explored many of the legal issues and civil rights violations associated with the Standing Rock protest movement.

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More information and documents here:

<https://cccct.law.columbia.edu/content/standing-rock-litigation>

Most recent brief challenging qualified immunity:

<https://cccct.law.columbia.edu/sites/default/files/content/Document%2016%20-%20Memo%20in%20Opposition%20to%20Discovery%20Stay%20FILE%20STAMPED.pdf>

Amended Complaint, *Thunderhawk v. County of Morton*, filed February 1, 2019, here:

<https://cccct.law.columbia.edu/sites/default/files/content/Pleading%2044%20-%20Amended%20Complaint.pdf>

Horn, Steve. "[TigerSwan, County Sheriff Sued Over Road Blockade During Dakota Access Pipeline Protests](#)," DeSmog, October 26, 2018.

Gosztola, Kevin. "[Counterinsurgency on Steroids: Interview with Bernard Harcourt on Trump, Cesar Sayoc, and the Counterrevolution](#)," Shadowproof, October 29, 2018.

"[Standing Rock defendants move to dismiss on basis of factual disputes](#)," Indian Country Today, February 17, 2019.