NO. 16-5259

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE,
Plaintiff-Appellant,
and
CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff-Appellant

v.

U.S. ARMY CORPS OF ENGINEERS,
Defendant-Appellee,
and
DAKOTA ACCESS, LLC,
Intervenor-Defendant-Appellee.

OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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Rule 26.1 Corporate Disclosure Statement

Dakota Access, LLC is a nongovernmental entity formed to construct and own the Dakota Access Pipeline. In that capacity it has applied for, received and holds various federal permits, authorizations, and verifications that are needed for the Dakota Access Pipeline project. Pursuant to FRAP 26.1 and Local Rule 26.1, Dakota Access, LLC states that it is owned 75% by Dakota Access Holdings, LLC and 25% by Phillips 66 DAPL Holdings LLC. These companies are in turn owned as follows:

1. Dakota Access Holdings, LLC is wholly owned by Bakken Pipeline Investment LLC which is wholly owned Bakken Holdings Company, LLC, which is in turn owned 60% by LaGrange Acquisition, L.P. and 40% by Sunoco Pipeline, L.P.
2. Phillips 66 DAPL Holdings LLC is owned equally (20% each) by Phillips 66 DE Holdings 20A LLC, Phillips 66 DE Holdings 20B LLC, Phillips 66 DE Holdings 20C LLC, Phillips 66 DE Primary LLC, and Phillips 66 DE Holdings 20D LLC. Each of these companies are wholly owned by Phillips 66 Project Development, Inc.

I, the undersigned, counsel of record for Dakota Access, LLC, certify that to the best of my knowledge and belief, the following are parent companies,

subsidiaries, or affiliates of Dakota Access, LLC which have any outstanding securities in the hands of the public:

1. Phillips 66 Company. Phillips 66 Company holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries.
2. Energy Transfer Partners, L.P. ("ETP"). ETP holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries.
3. Energy Transfer Equity, L.P. ("ETE"). ETE holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries.
4. Sunoco Logistics Partners L.P. ("SLP"). SLP holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries.

These representations are made in order that the judges of this Circuit may determine the need for recusal.

Dated: September 14, 2016

/s/ Jonathan S. Franklin

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INTRODUCTION

Appellant was given ample opportunity to make its case and present the District Court with every piece of evidence that Appellant believed should have compelled the court to issue a preliminary injunction. After two weeks of carefully considering arguments by the parties in voluminous briefings and lengthy oral argument, the District Court properly exercised its discretion and disagreed with Appellant. The District Court then denied Appellant's motion for broad injunctive relief pending appeal.[1] Without any new evidence and no change in circumstances or facts of the case, Appellant now asks this Circuit to change the carefully considered preliminary injunction ruling the District Court just issued.

Appellant gives no reason for this Court to effectively overturn the District Court's decision and issue an injunction that would halt at the eleventh hour the construction of a nearly completed multi-billion dollar pipeline, which is employing eight thousand workers, and which lies on private land where there is no U.S. Army Corps of Engineers ("Corps") or other federal jurisdiction for 99.98% of its route. All construction starting 20 miles east of Lake Oahe is completed. To the west, all but the two miles closes to Lake Oahe (*i.e.*, starting at

[1] In granting more limited injunctive relief, the District Court entered what was acceptable to Defendant and did not have to reach the question of whether contested injunctive relief was warranted; rather, the Court simply acknowledged that Dakota Access, LLC ("Dakota Access") had indicated to Appellant that it was not intending to work in the area at issue before Friday, September 16. Therefore, this Court need not grant any deference to the short-term temporary relief granted by the District Court.

Highway 1806)have been cleared and graded, and the pipeline is strung and nearly installed up to Highway 6, roughly 17 miles west of Lake Oahe. All grading activities at every single location requiring a pre-construction notice and verification ("PCN") by the Corps pursuant to the General Conditions ("GC") of the Nationwide Permit system are complete, with the exception of the PCN area located on land between Highway 1806 and the Horizontal Directional Drill location located west of Lake Oahe. And even the area that is the subject of the Motion—on either side of Lake Oahe except for an area totaling 1,094 feet—is largely private land not subject to federal jurisdiction. The *only* federal land subject to an injunction is approximately 1,094 feet that occurs along the shorelines of the Lake.

An injunction here will only cause harm, not prevent it. Appellant still cannot demonstrate that it will be irreparably harmed if construction continues while an appeal is pending. And Appellant presents no new evidence demonstrating the urgency it claimed existed but that the District Court did not find. To the contrary, rejecting the injunction Appellant seeks would only hold Appellant to the conscious choice it made—time and time again—to reject the chance to consult on the pipeline's path deep beneath Lake Oahe. Granting an injunction, on the other hand, would threaten the viability of the entirety of this multi-billion dollar infrastructure project at a point when construction is nearing completion. Appellant cannot now compel the very consultation it refused to

participate in for two years. At this stage, after an investment of billions of dollars in reliance on an extensive federal permitting process that included tribal consultation, it would be manifestly unfair to Dakota Access to permit Appellant to second-guess decisions it could have participated in, change the pipeline's location after its beginning and end points have been established, interrupt the construction process at an unrecoverable cost of hundreds of millions, or billions, of dollars and otherwise upset the results of a three year long process. And as the District Court's findings show, "on this record, it appears that the Corps **exceeded** its NHPA obligations" to consult with Appellant. Attach. 1 to Appellant's Motion ("Opinion") at 48 (emphasis added).

Additionally, the Court should not lose sight of the prospect that the delay announced by the government on the heels of the District Court's ruling is an effort to defuse violence and other unlawful activities that have resulted from the encouragement of protesters at the construction site. Crowds swelling from hundreds to many thousands of unlawful protesters have required a federally-issued restraining order, and led to hospitalizations and injuries to many including law enforcement and construction personnel, private property damage, road closures, the activation of the National Guard, the destruction and incapacitation of construction equipment, and countless dollars in damages that cannot be recovered to Dakota Access and others reliant on the Dakota Access Pipeline ("DAPL"). An

injunction would merely encourage and reward such last-minute tactics after Appellant consciously elected to sit on the sidelines for the great bulk of the project's duration. Appellant's Motion must therefore be denied

STANDARD OF REVIEW

In determining whether to grant an injunction pending appeal, this Court must consider the same factors considered in denying Plaintiffs' Motion for Preliminary Injunction. *See In re Interested Party 1,* 530 F. Supp. 2d 136, 145 (D.D.C. 2008). Specifically, this Court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent an injunction; (3) the prospect that the defendant will be harmed if the court grants the injunction; and (4) the public interest in granting an injunction. *See id.* The case cited by Appellant in support of its proposition that it does not need to show a "'mathematical probability' of success on the merits," Motion at 3, is no longer good law, as it conflicts with *Winter v. Nat. Res. Def. Advisory Council, Inc.*, 555 U.S. 7 (2008). *Compare id.* at 22 (**requiring** a likelihood of success on the merits) with *Washington Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977) (imposing a lower standard on likelihood of success on the merits in applying the pre-*Winter* sliding scale test).

The District Court has already found that (1) Appellees are likely to prevail

on the merits, and (2) Appellant is unlikely to be irreparably harmed. *See* Opinion at 38. For the reasons that the District Court already found the relevant factors weighed in favor of denying Plaintiffs' Motion for Preliminary Injunction, this Court should deny Appellant's Emergency Motion for Injunction Pending Appeal.

I. APPELLEES ARE LIKELY TO PREVAIL ON THE MERITS

In order to find that Appellant is likely to prevail on the merits of their appeal, this Court must find that the District Court abused its discretion in denying Appellant's Motion for a Preliminary Injunction. *See Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011).

A. The District Court Properly Determined That Appellees Are Likely To Prevail On The Merits Of This Case

The relief requested is based upon a limited challenge to Corps compliance with the consultation requirements under the National Historic Preservation Act, 54 U.S.C.§ 300101 et seq. ("NHPA"). NHPA provides a process for consideration of sites eligible for listing on the National Register of Historic Places. It creates the Advisory Council on Historic Preservation, which plays an advisory role only in a process that mandates no particular result, leaving instead the decision-making functions to the action agency. After reviewing an extensive factual record, the District Court provided a statutory overview and findings located in Opinion pp. 3-50, considering the Corps' and Dakota Access' unrebutted testimony regarding consultations attached in Attachs. 2-6. In summary, it concluded:

- "The Corps made a reasonable effort to discharge its duties under the NHPA prior to promulgating NWP 12, given the nature of the general permit," Opinion at 41;
- Standing Rock Sioux Tribe did not meet its burden to show that the Corps improperly delegated its obligations to NWP permittees, *id.* at 43-45,
- The court "cannot conclude here that a federal agency with limited jurisdiction over specific activities related to a pipeline is required to consider all the effects of the entire pipeline to be the indirectly or directly foreseeable effects of the narrower permitted activity," *id.* at 46 (emphasis in original);
- The Corps offered Appellant a reasonable opportunity to participate in the Section 106 process, and "the Tribe largely refused to engage in consultations. It chose instead to hold out for more – namely, the chance to conduct its own cultural surveys over the entire length of the pipeline," *id.* at 48; and
- Since the court is "powerless to prevent" harms on private lands "given the current posture of the case," it "cannot consider them likely to occur in the absence of the relief sought here," *id.* at 52.

In denying the injunction, the District Court upheld properly promulgated Corps regulations that have governed Corps conduct reviewing "small handle" projects for the past 25 years. The Corps has no basis for exercising jurisdiction over hundreds of miles of pipeline that are nowhere near any "waters of the United

States," and Corps regulations provide that a linear crossing of jurisdictional waters by a pipeline does not make the whole right-of-way part of the permit area or the undertaking for NHPA purposes. 33 C.F.R. pt. 325 App. C § 1(g)(4).

And by affirming the jurisdictional structure of the Corps, the District Court ruling comports with analogous, dispositive U.S. Supreme Court and D.C. Circuit precedent in the NEPA context. *See Dep't of Transportation v. Pub. Citizen*, 541 U.S. 752, 770 (2004; *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. Cir. 2015) (holding that various federal easements and approvals, including verification of numerous NWPs, along 5% of the length of a 593-mile private oil pipeline did not trigger NEPA analysis for the entirety of the pipeline); *see also Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015) and *Winnebago Tribe of Neb. V. Ray*, 621 F.2d 269, 272 (8th Cir. 1980); *Save the Bay, Inc. v. U.S. Army Corps of Eng'rs*, 610 F.2d 322, 326-27 (5th Cir. 1980).[2]

[2] The cases Appellant cites to argue that the scope of the Corps' review was too limited are inapposite, and not just because they conflict with binding D.C. Circuit precedent. In *Save Our Sonoran v. Flowers*, 408 F.3d 1113 (9th Cir. 2005) and in *White Tanks Concerned Citizens v. Strock*, 563 F.3d 1033 (9th Cir. 2009), the Ninth Circuit held that the Corps had to review housing development projects in their entirety before the Corps could issue individual dredging permits under § 404 of the Clean Water Act. These cases, however, do not involve utility lines, for which the Corps has duly promulgated and adopted regulations that determine that the scope of the Corps' is *not* the entire project. Rather, each crossing of waters of the U.S. is a single and complete project for Nationwide Permit purposes. *See* 33 C.F.R. pt. 325 App. C § 1(g)(4). Furthermore, these cases involve *individual* permits to be issued, not multiple verifications of a nationwide permit that has already issued and that has *already* underwent NEPA review. And even if

In addition, Appellant lacks standing to seek the broad relief it requests from this Court. The injunction it seeks affects activities that occur miles from their property over which it asserts no legitimate interest and on private lands to which there is no federal interest or jurisdiction. Appellant lacks standing to complain of any work or injuries affecting only private land to which neither it, the federal government, nor any tribe has any right or interest. *See Gettysburg Battlefield Preservation Ass'n v. Gettysburg College*, 799 F. Supp. 1571, 1580-82 (M.D. Pa. 1992) ("[I]n the absence of ongoing federal involvement and control there is no jurisdiction for a federal court to order a federal agency to undertake NHPA review or to enjoin the project of private actors."), *aff'd*, 989 F. 2d 487 (3d Cir. 1993). This Court therefore lacks jurisdiction to consider the broad relief requested by Appellant because it lacks standing.

B. Appellant's Arguments To This Court Are Meritless

Appellant's arguments to this Court focus on two points: (1) whether the Corps abdicated its § 106 obligations to Dakota Access, and (2) whether the scope of the Corps' consultations was adequate. Neither point has merit.

Appellant's position (like that of the Advisory Council) challenging the adequacy of the Corps' actions here rests on an *erroneous* view of "how the Corps

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Appellant's legal authority was applicable, Appellant "fails to provide any evidence that would call the Corps' technical judgment in this regard into question." Opinion at 47.

interpreted and applied" the Corps' own nationwide permit conditions to DAPL. *Id.* at p. 44. The Court found that the Corps did not, as Appellant argues, "leave[] it to" Dakota Access "to determine for itself the project's impacts on historic properties." Motion at p. 8; *see* Opinion at p. 44 (declining to decide whether "permitting under NWP 12 would be arbitrary and capricious where it relies completely on the unilateral determination of a permittee that there is no potential cultural resource that will be injured by its permitted activity" because "that is not how the Corps interpreted and applied [General Condition] 20 to DAPL"). Rather, "the Corps looked at reports and maps of the pipeline to determine which jurisdictional crossings had the potential to affect historic properties." *Id.*; *see also* Chieply Decl., Attach. 3 at 1; Attach. 7 at 1; Howard Decl., Attach. 5 at ¶¶ 4-10. And despite Appellant having "had more than a year to come up with evidence that the Corps acted unreasonably in permitting even a single jurisdictional activity without a PCN," Appellant "has not done so." Opinion at p. 45

Under the APA's deferential standard, 5 U.S.C. § 706(2)(a), Appellant has failed to meet its burden to demonstrate that the Corps' determinations were unlawful, arbitrary or capricious, or not in accordance with the law. *See* Opinion at 44-45. Appellant's assertion that the Corps' determinations were self-serving and after-the-fact is baseless and has no support in the record.

Appellant also tries to recast the Corps' consultation process as defective by

alleging that the Corps never examined historical resource impacts "beyond the water's edge." *See, e.g.*, Motion at 12. This argument is nonsensical—to accept it, this Court would have to accept that the Corps has only been evaluating impacts to **underwater** cultural resources for over 25 years. The Corps' record and the District Court's findings offer clear rebuttals to Appellant's argument. Perhaps most notably, the Environmental Assessment covering the geographic area at issue in Appellant's Motion details (1) how the Corps both considered significant parts of the pipeline route to be part of the area of potential effects for Lake Oahe, and (2) how the Corps considered significant parts of the route beyond the water's edge. *See* Attach. 8, Final Environmental Assessment at 75-80; *see also* Finding of No Significant Impact, ECF No. 6-52.[3] For these and further reasons set forth in the Opinion, Appellant is not likely to succeed on the merits of its appeal.

II. APPELLANT WILL NOT SUFFER IRREPARABLE HARM IF THE DISTRICT COURT'S RULING REMAINS IN PLACE

Appellant will not suffer any irreparable harm if this Court maintains the status quo pending appeal and allows construction to continue. Appellant's proposed injunction would halt Dakota Access Pipeline DAPL construction even though only 0.02% or 1,094 feet of the proposed route crosses federal land and less than 3% is under federal jurisdiction. Due to Dakota Access' extensive efforts to avoid sensitive lands, DAPL is not and will not be located on any tribal trust lands.

[3] The complete Final Environmental Assessment may be downloaded at http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/2801.

And with respect to the limited amount of construction on federal land (which is strictly limited to crossing beneath such land at depths ranging between 90 to 125 feet below the Lake's mud line, where no surface disturbance or impacts will occur), Dakota Access has gone above and beyond what is required by all applicable laws and regulations in planning and constructing DAPL.

For example, although not required by any federal law, Dakota Access conducted a NEPA-like alternatives analysis to identify and select the route that minimizes impacts. *See, e.g.*, Howard Decl., Attach. 5 at ¶¶ 4-10. Dakota Access engaged in over three years of planning, design, permitting, consultation and environmental survey work for the routing of DAPL. *Id.* Dakota Access also conducted cultural resource surveys along 76.5% of the project route, which includes all waters of the U.S. (inclusive of all PCN areas) and all areas where an agency, regulation or any of the many archaeological consultants identified an area as having the potential to contain cultural resources to supplement pre-existing survey work, yielding a 100% survey in the Dakotas. *See id.* at ¶ 8. Additionally, the entire Lake Oahe area was surveyed. *Id* The cultural survey reports and their findings have been accepted and approved by each of the four State Historic Preservation Offices and the USACE archaeologists. Mahmoud Decl., Attach. 13 at ¶ 4. The agencies then made the determination that the planned route will have no adverse effects to any known sites. *Id.* at ¶ 5.

To assure that the project will not impact any unknown sites, DAPL has developed and deployed a comprehensive Unanticipated Discoveries Plan for each state, which identifies the procedures to stop work, notify the proper authorities, including tribal contacts, and provides implementation guidelines for how to mitigate any unanticipated cultural resource discovery during construction. *Id.* at ¶ 6. The plan was provided to the tribes for comment, and their comments were incorporated. *Id.* The plan has been reviewed and approved by permitting authorities both at the state and federal levels. *Id.*

Finally, with respect to the crossing at Lake Oahe, any eligible or unevaluated sites at the Lake Oahe crossing were avoided by DAPL construction by working around them or by being at depths greater than 90 to 115 feet deep. *Id.* at ¶ 7. Both the Corps and the North Dakota SHPO agreed that there is no effect to cultural resources at the Lake Oahe crossing. *Id.* This determination is based on DAPL's avoidance of sensitive resources by rerouting around such resources and using the Horizontal Directional Drill technique to drill 90-115 feet below the bed of Lake Oahe. *Id.* The method and depth were chosen to avoid any potential cultural resources by being at depths too far below ground to contain cultural or tribal resources as the date of the geology and soil predates human occupation. *Id.*

Appellant's argue that new declarations from Mr. Mentz show a likelihood that important historic sites have been destroyed and therefore will be destroyed in

the absence of emergency relief. The Mentz Declarations justify nothing for numerous reasons. First, the sites Mentz claims to have observed in his Declarations are all outside the path of the pipeline (or in limited instances, in unaffected areas along the right of way edge where another pipeline was installed in 1982, and where no intact cultural features could possibly exist) except for a very small number of exceptions discussed below. *See* Attach. 9. And any purported data from Mentz was obtained by apparently deceiving, and violating the rights of, the landowner, whose declaration, Attach. 10, refutes any suggestion that he invited Appellant onto his property. Second, the fact that the pipeline misses these sites is not an accident. The pipeline was designed and engineered based on the input from qualified archeologists retained by Dakota Access, and based on surveys approved by the State Historic Preservation Officer. Howard Decl., Attach. 5 at ¶¶ 4-16. With their input, the pipeline navigates around important sites; in fact, the route was revised more than 140 times in North Dakota alone to ensure that result. *Id.* Third, in six instances, shown in Attach. 9, Mentz identifies sites that lie on the surface directly above the path of an existing pipeline that was laid 30 years ago. Attach. 9. Therefore, it is extremely unlikely that Mentz has observed or is observing original or authentic sites. Fourth, Dakota Access' project superintendent and equipment operators inspected the path of the intended work on Saturday September 3 (opposed to Mentz who only inspected the vicinity

and not the pipeline path) based upon information Mentz provided to the court, and identified no instances of the claimed sites within the work area. Mahmoud Decl., Attach. 13 at ¶ 9. The construction staff is trained in the Unanticipated Discovery Plan and that plan has been activated 6 times in the past. *Id.* at ¶ 10. Nothing of concern was observed in the construction areas near the sites identified by Mentz. *Id.* Fifth, and perhaps most importantly, regardless of whether Dakota Access was correct or incorrect in its identification of historic sites misses the point of this case. The District Court properly found that extensive processes were employed to obtain timely information from Appellant to ensure that any concerns it had were addressed. Opinion at 29-31. When other tribes took advantage of consultation the pipeline was modified to accommodate their concerns. ***Id.*** The District Court explicitly recognized that Appellant declined and even outright refused the opportunities offered to them to consult. *Id.* Appellant cannot now compel the very consultation it refused to take part in—much less force it to occur on its overly broad terms—by seeking to stop the project as it is nearing completion.

Appellant's claim of intentional destruction of important sites or evidence likewise has no merit. Dakota Access did not intentionally move into any area to destroy sites. *Id.* at ¶ 11. The area was cleared for construction multiple times by the archeologists, the SHPO, and Dakota Access itself, and the area was cleared with heavy equipment before Mentz ever made his observations. *Id.* at ¶ 12.

Dakota Access was not even aware of Mentz's Declaration when the decision was made to remove top soil in the area Mentz now complains about. *Id.* at ¶ 13.[4]

III. DAKOTA ACCESS AND OTHERS WILL BE IRREPARABLY HARMED BY AN INJUNCTION PENDING APPEAL

Dakota Access presented uncontroverted evidence below of the harms it and others will face if an injunction is granted. Dakota Access faces the same harms if the injunction is granted pending Appellant's appeal.

Even a temporary or limited injunction would have devastating long and short term impacts to the DAPL project. Construction is in the final phases and flexibility no longer remains to work around short segments of off-limit portions of the pipeline, and as such, any injunction would jeopardize the project itself by causing deviations and delays to the now-critical path construction schedule. *Id.* at 14. Customer contracts could be permanently lost if Dakota Access' January 1, 2017 delivery schedule is not maintained, and the families of upwards of approximately 8,000 workers will be negatively impacted. Opposition at 22. The costs of even a temporary delay are greater than $430 million, with demobilization costs alone accounting for $200 million. *Id.* at 30. Each additional month of delay would cost interested parties at least $83.3 million. *Id.* Several other individuals, entities, and the public will suffer harm if a stay is not granted, and a summary of

[4] Indeed, Dakota Access' decision was made a week in advance in conjunction with law enforcement, due to the proximity of the protestors. *Id.* Mentz's claims are unrealistic and should not be afforded any weight.

these harms is set forth in Attach. 11.

These harms are irreparable. If Dakota Access is wrongfully enjoined, Appellant will be unable to offset the damages Dakota Access and others would have sustained pending this appeal as required by Federal Rule of Civil Procedure 65(c). As Dakota Access detailed below, Dakota Access faces $1.4 billion dollar losses in its first year of delays, including the cost to renew easements ($70,000,000), remobilization costs ($200,000,000), maintenance of work sites ($1,500,000 per month), capital expense ($36,000,000 annually), loan renewal fees ($15,500,000), 2017 lost revenue ($913,000,000), specialty seed payment ($4,500,000), duck lease penalty ($3,000,000), and completed-by breach payments ($4,300,000). Attach. 12, Mahmoud Decl., ¶¶ 65-66, 68-69, 74. Several of these costs, including the costs of maintaining the work sites, will be incurred **immediately**, and others, such as breach payments, will be inevitable if there is **any** delay in construction, **at any location**. These losses are not delays in payment, but actual losses that Dakota Access can never recover. Since Appellant is unable to give Dakota Access any reasonable amount of security for these losses, an injunction pending Appellant's interlocutory appeal is wholly inappropriate.

In short, Dakota Access' harms, and the harms faced by the contractors, tradesmen, laborers, vendors, and all the tens of thousands of individual Americans dependent on DAPL disfavor an injunction pending appeal. *See, e.g., James River*

Flood Control Assoc. v. Watt, 680 F.2d 543, 544-45 (8th Cir. 1982) (finding irreparable harm would result from an injunction that barred acquisition of land and beginning of construction in a suit challenging the sufficiency of an environmental impact statement because of the damages the defendant would sustain from delays in construction); *see also Mannatech, Inc. v. Wellness Quest, LLC*, No. 3:14-cv-02497, 2015 WL 11120881, at *4 (N.D. Tex. Nov. 5, 2015) (finding irreparable harm would result from an injunction prohibiting sales of a product that would "likely cause [the defendant] to lose most of its existing customer base" and the company would be "unlikely to survive the appeal"). Appellant has presented no new evidence to overcome the showing of irreparable harm that Dakota Access has made, and this Court should not reverse the District Court's prior ruling to inflict these harms.

IV. THE PUBLIC INTEREST WEIGHS IN FAVOR OF DENYING THE INJUNCTION

Issuing an injunction pending appellate review will result in significant harm to the public, and the public interest weighs in favor of denying the Motion. It would be a gross injustice to enter any form of injunction based on Appellant's unsubstantiated claims that it should now be allowed to survey property or consult on historical and cultural sites. As the District Court found in its Order, the Corps and Dakota Access provided numerous opportunities for consultation before approving the project. *See, e.g.*, Opinion at 28-31, 45-50. Appellant cannot be

rewarded for refusing to consult by coming to the table late, when the pipeline is nearly complete, and inflicting hundreds of millions of dollars in irreparable damages on Dakota Access. In addition, there is a broad public interest in this project. First, the primary purpose of DAPL is to provide safe and cost effective shipment of Bakken/Three Forks crude to U.S. markets. DAPL transportation efficiencies will enable Bakken crude to be more cost competitive, creating substantial benefits to Bakken producers, mineral royalty owners, including the United States, shippers and the American consumers, especially in the current market downturn. Without the pipeline, many producers would be forced to further curtail production or stop production entirely until the market conditions improved.

A workforce of approximately 8,000 people will also face layoffs and associated adverse impacts. *Id.* at ¶ 15. These are good construction jobs in a region where such jobs are badly needed. While some workers might be hired to work on other jobs, that is not always possible because the pipeline workforce is specialized and there are few large projects that would absorb this many workers. *Id.* at ¶ 16. Once forgone, income to these families is lost forever. This workforce faces these harms even if the injunction is limited to 20 miles surrounding Lake Oahe due to large costs of remobilization and maintenance. *Id.* at ¶ 17.

DAPL also is generating state and local tax revenues and indirect economic stimulus and support jobs in local communities catering to the construction effort,

such as food, hospitality, and transport, that would be lost if an injunction is issued. Economic models created by economists engaged by DAPL suggest that for every dollar spent on the project roughly $5 is generated across the U.S. and for each $1 million invested in DAPL, there would be 2.6 new direct and indirect jobs created. These jobs and benefits would be lost and could be lost forever if DAPL were suspended and potentially terminated. *Id.* at ¶ 18.

At this point it will take as much work and land disturbance, if not more to temporarily stabilize, continuously maintain, and protect the right-of-way than it would to finish the pipeline. *Id.* at ¶ 19. For the majority of the pipeline length and over 98.5% in North Dakota and South Dakota, the right-of-way has been cleared and graded and less than 10% of the route in North Dakota remains to be trenched and welded for final installation. *Id.* at ¶ 20. All pipe in South Dakota has been installed at this time and only final restoration remains. *Id.* This means that the soils have been disturbed to the depth of the top soil or greater in all places but a few thousand feet sporadically along the right of way, roughly 1 to 3 feet below the surface where any cultural features are likely to occur. *Id.* at ¶ 21. The only remaining digging activities are the actual trenching activities in less than 10% of the project areas in North Dakota that includes roughly a 5 to 8 foot wide trench along the remaining lengths of pipeline to a depth of an additional 4 to 8 feet deep. *Id.* at 22**.** Therefore, to stop construction would cause more harm than

good and would not prevent any harm.

The DAPL project enhances national and energy security and provides direct and substantial economic benefits to local communities in the form of jobs and economic stimulus benefits, but the injunction blocks these benefits. *See Nat. Res. Def. Council v. Kempthorne*, 525 F. Supp. 2d 115, 127 (D.D.C. 2007) ("The development of domestic energy resources is of paramount public interest and will be harmed (at least to some extent) if that development is delayed."); *Sierra Club v. Clinton*, 689 F. Supp. 2d 1123, 1147 (D. Minn. 2010) ("The Court agrees that the public has an interest in developing energy resources, particularly an oil supply from a stable source"); *see also Dine Citizens Against Ruining Our Env't v. Jewell*, CIV 15-0209 JB/SCY, 2015 WL 4997207, at *50 (D.N.M. Aug. 14, 2015) ("The oil-and-gas industry is an enormous job creator and economic engine in New Mexico, and shutting down portions of it based on speculation about unproven environmental harms is against the public interest."). Granting an injunction would deprive the public of these and many other benefits brought by the continued and timely construction of DAPL, and the public interest therefore weighs in favor denying an injunction pending an appeal.

CONCLUSION

For these reasons, and the reasons set forth in the District Court's Opinion, Appellant's Emergency Motion for Injunction Pending Appeal should be denied.

Respectfully submitted,

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September 14, 2016

CERTIFICATE OF COMPLIANCE WITH FRAP 27 AND 32(a)

This *Opposition to Emergency Motion for Injunction Pending Appeal* complies with the type-volume limitation and the typeface requirements of FRAP 27 and 32(a) because it is no more than twenty (20) pages in length and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman type style.

Dated: September 14, 2016

/s/ Jonathan S. Franklin
Jonathan S. Franklin

CERTIFICATE OF SERVICE

I certify that on September 14, 2016, I filed the foregoing *Opposition to Emergency Motion for Injunction Pending Appeal* with the Court and delivered the original and four copies to the Court, and served true and correct copies via e-mail to all parties to this appeal. All parties have agreed to accept electronic service of this Opposition.

Dated: September 14, 2016

/s/ Jonathan S. Franklin
Jonathan S. Franklin