

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STANDING ROCK SIOUX TRIBE,
Plaintiff–Appellee,
CHEYENNE RIVER SIOUX TRIBE,
Intervenor for Plaintiff–Appellant,
v.
UNITED STATES ARMY CORPS
OF ENGINEERS,
Defendant–Appellee,
DAKOTA ACCESS LLC,
Intervenor for Defendant–Appellee.

Case No. 17-5043

**EXHIBITS TO RESPONSE OF DAKOTA ACCESS, LLC TO
EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL**

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**EXHIBITS TO RESPONSE OF DAKOTA ACCESS, LLC TO
EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL**

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EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Intervenor-Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS,

**Defendant – Cross-
Defendant.**

and

DAKOTA ACCESS, LLP,

**– Intervenor-Defendant
Cross-Claimant.**

Case No. 1:16-cv-1534-JEB

**INTERVENOR-PLAINTIFF CHEYENNE RIVER SIOUX TRIBE’S
MOTION FOR PRELIMINARY INJUNCTION
(Oral Argument Requested)**

Pursuant to Federal Rule of Civil Procedure 65 and Local Rule 65.1, Intervenor-Plaintiff Cheyenne River Sioux Tribe hereby moves for a preliminary injunction directing Defendant United States Army Corps of Engineers to withdraw the easement/right-of-way issued on February 8, 2017 that permits Dakota Access, LLC to drill an oil pipeline under federally-owned lands under and on either side of Lake Oahe as the easement/right-of-way constitutes a substantial burden on the free exercise of Cheyenne River Sioux tribal members’ religion, no compelling interest justifies

the burden, and the pipeline does not represent the least restrictive means of achieving the government's interest for the reasons set forth in the accompanying memorandum of law.

The Tribe requests that a Preliminary Injunction preventing drilling under Lake Oahe be issued immediately with a hearing to be held on this matter at the Court's earliest convenience.

Dated: February 9, 2017

CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2017, a copy of the foregoing was filed electronically with the Clerk of the Court. The electronic filing prompted automatic service of the filing to all counsel of record in this case who have obtained CM/ECF passwords.

/s/ Nicole E. Ducheneaux

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

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**Defendant – Cross-
Defendant.**

and

DAKOTA ACCESS, LLP,

**– Intervenor-Defendant
Cross-Claimant.**

Case No. 1:16-cv-1534-JEB

**INTERVENOR-PLAINTIFF CHEYENNE RIVER SIOUX TRIBE’S COMBINED
MEMORANDUM IN SUPPORT OF EX-PARTE APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND APPLICATION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

At the status conference on this matter on Monday, February 6, 2017, counsel for Defendant U.S. Army Corps of Engineers represented to the Court that it would not issue an easement permitting Defendant Dakota Access, LLP to construct a pipeline under Lake Oahe before the end of this week, saying that the easement could issue “as *early as* the end of this week.” Notwithstanding such representations, the very next day, the Corps issued a notice that it would issue the easement, and on February 8, the Corps issued the easement. Dakota Access has now begun construction to place the pipeline under Lake Oahe. Declaration of Harold Frazier dated Feb. 8, 2017 at ¶ 18 (hereinafter “Frazier Decl.”). Intervenor-Plaintiff the Cheyenne River Sioux Tribe (“Tribe”) now moves this Court for an ex-parte temporary restraining order and a preliminary injunction to preserve the status quo, enjoining the effect of the easement purported granted pursuant to 30 U.S.C. § 185 on February 8, 2017, allowing private Defendant Dakota Access, LLC (“Dakota Access”) and those acting concert to begin constructing the Dakota Access Pipeline under Lake Oahe. The Tribe further requests an order enjoining Dakota Access and those acting in concert with Dakota Access from any construction related to the pipeline in the area described in the easement pending further order of this Court. The granting of the easement and resulting construction activity violates the Tribe’s and its members’ Constitutional rights, and will result in immediate and irreparable harm to the Tribe and its members (Frazier Decl. at ¶¶ 8-21) before this Court will be able to rule on the merits of this claim. Fed R. Civ. P 65(b)(1)(A). The Tribe also requests an injunction to maintain the status quo in order to preserve the peace at and near the construction site, to avoid injury to the health and safety of tribal members and others in the vicinity of the construction site, which is imminent and very real, considering the history of violence perpetrated by police and private security forces upon such persons during the past several months.

In its motions, the Tribe requests very limited relief: that this Court suspend the effect of the easement¹ until the parties have resolved the merits of the claims set forth in the Plaintiffs' Complaint. The ex-parte temporary injunctive relief the Tribe requests will not cause any harm to the Federal Defendant. The Corps itself affirmatively supported the indefinite suspension of the subject easement between September 9, 2016 and January 24, 2017 and even committed itself on December 4, 2016 to preparing a full Environmental Impact Statement ("EIS") a process that generally takes an agency at least 360 days.²

This request for relief is based upon the fact that the easement granted is entirely unlawful as a violation of the Tribe's rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 ("RFRA"), which provides that the "Government shall not substantially burden a person's exercise of religion" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

The Lakota people believe that the mere existence of a crude oil pipeline under the waters of Lake Oahe will desecrate those waters and render them unsuitable for use in their religious sacraments. Declaration of Steve Vance dated Jan. 30, 2017 at ¶ 18 (hereinafter "Vance Decl."). The Lakota people believe that the pipeline correlates with a terrible Black Snake prophesied to

¹ Although both the Notice to Congress and the "Term" section of the easement at issue (both of which were filed with this Court) state that it is for a term of 30 years, Exhibit B to the easement (at page 13 of [ECF No. 96]), which is incorporated into the easement itself, provides that the easement is a "PERMANENT EASEMENT" in both its title and its legal description, calling into question whether the easement exceeds the scope of the approved project, the Environmental Assessment, and also whether the Corps' official that signed the easement exceeded his own authority. Whether such contradiction is sloppy drafting or something more nefarious, this inconsistency further supports the need for a preservation of the status quo pending a hearing and this Court's review and decision on the instant motion.

² *E.g., Jamul Action Comm. v. Chaudhuri*, 837 F.3d 958, 965 (9th Cir. 2016).

come into the Lakota homeland and cause destruction. *Id. at* ¶ 18. The Lakota believe that the very existence of the Black Snake under their sacred waters in Lake Oahe will unbalance and desecrate the water and render it impossible for the Lakota to use that water in their Inipi ceremony. *Id. at* ¶¶ 18-20. Without access to natural, unadulterated, and ritually pure water, the Lakota people cannot practice their religion. As Lake Oahe is the only natural, unadulterated, and ritually pure water available to the Tribe—a trust resource for which the United States owes the Tribe a fiduciary duty—desecration of these waters represents a substantial burden on the Tribe’s religious exercise. The United States cannot meet its burden of demonstrating that a compelling governmental interest justifies siting this pipeline under these sacred waters owned by the Tribe. And as the Corps has considered a litany of alternatives to placing the pipeline at this location under Lake Oahe, it cannot meet its burden of demonstrating that the crossing of the pipeline under Lake Oahe is the least restrictive means of furthering any governmental interest.

As this violation of the Tribe’s and its members’ religious exercise implicates their constitutional freedoms, the mere issuance of the easement that threatens the violation is sufficient to establish irreparable harm. And in view of the threat to the Tribe’s and its members’ constitutional right, this Court may not wait until the oil is slithering under the Tribe’s sacred waters. The law entitles the Tribe to relief as soon as the government acts to threaten their rights.

Although the Tribe requires immediate relief, the nature of relief requested is specific and limited. The Tribe does not argue that Dakota Access may not have its oil pipeline elsewhere, or that infrastructure projects in Lakota territory must be barred forever; only that **this pipeline**, sited through **these sacred waters**, owned in trust by the United States for **this Tribe**, violate the Cheyenne River Sioux Tribe’s and its members’ right to exercise their religion. For these reasons, the Tribe respectfully requests that this Court immediately restrain the effect of the subject

easement and the construction and operation of the Dakota Access Pipeline under the waters of Lake Oahe.

FACTUAL BACKGROUND

I. The Religious Exercise of the Cheyenne River Sioux Tribe and Its Members

A. General principles of Cheyenne River Lakota religious exercise

The Cheyenne River Sioux Tribe is a member of the *Oceti Sakowin* (Seven Council Fires) also known as the Great Sioux Nation, which includes the Lakota, Dakota, and Nakota people. The Cheyenne River Sioux Tribe is comprised of four of the seven bands of the Lakota: *Itazipco*, *Minnicoujou*, *Oohenumpa*, and *Siha Sapa*. Before the United States confined the Lakota people to Reservations in the late 19th century, the people lived a nomadic lifestyle following the buffalo in their aboriginal territory, which spanned the Dakotas, Montana, Wyoming, Nebraska, and beyond. ECF No. 11-7.

Non-Indian anthropologists have long been interested in the religion of the Lakota people and produced many early studies of the same based upon the writings and first-hand accounts of Lakota people. Raymond J. DeMallie, *Lakota Belief & Ritual in the Nineteenth Century*, in *SIOUX INDIAN RELIGION: TRADITION AND INNOVATION* 25 (Raymond J. DeMallie & Douglas R. Parks eds., 1987). Scholars have agreed on basic principles concerning traditional Lakota religious practices. The traditional Lakota religious perspective is based upon a concept of oneness, balance, and unity with nature. *See id.* at 27-28. Lakota people believe as a part of their religious worldview that human beings are a part of nature, not separate from it. *Id.* at 28. Lakota religious practice, like Catholicism or Judaism, requires an adherent to participate in a number of sacred rites or sacraments, including among others the Inipi or sweatlodge ceremony, sundance, hanbleceya or

vision questing, and coming of age ceremonies. Anthropologists view Lakota religious beliefs as being powerfully dependent upon the practice of these rituals and sacraments. *Id* at 33.

Like many other religions, Lakota belief provides the system of knowledge that represents man and the universe, and ritual is the means for putting that belief into action. But in the Lakota religion ritual takes on more profound meaning because it is “not merely a reflection of belief; it [is] also a means to further belief; for through ritual a person [comes] to expand his knowledge.” *Id.* at 33-34. In the Lakota religion, therefore, belief itself is fluid and may change subject to new revelations or developments in the world. Lakota religion has no dogma or uniform theology; instead it is Lakota rituals and sacraments that are standardized. Though the nuances of belief may be disparate or mutable, the rites themselves are static and have incredible and potentially dangerous power. The Lakota people believe that their sacraments were dictated to them by holy beings and must be performed as such. *Id* at 33. Anthropologists understand that the Lakota believe that failure to perform rituals in the proper way could result in grave harm. *Id.* at 34.

These non-Indian anthropological views of Lakota religious exercise are consistent with the Tribe’s and its members’ conception of their own beliefs. Tribal members describe a unity of their religious belief with the understanding and respect of the natural world, in addition to broader religious focus on the need for balance and oneness in the intersection between religious practice and the natural world. Vance Decl. at ¶17. Lakota religious adherents describe the necessity of balance in their sacraments as being similar to the eastern concept of the yin and the yang, which is signified by an hourglass shape. *Id* at ¶12. The Cheyenne River Sioux people also echo difficulty in describing a static religious dogma owing in part to the limitations of the English language in capturing the religious meaning inherent in Lakota principles, but also to the general variation inherent in a religion that operates in the context of an oral tradition and individualized

experience. *Id* at ¶ 7. Cheyenne River Sioux adherents likewise stress the primacy of ritual and rite over belief. Sacred rites are standardized and must be practiced according to strict custom. The Cheyenne River Sioux adherents believe that their sacred rights cannot be practiced at all if they are not practiced properly—deviation from proper conduct is strictly prohibited. *See id.* at ¶¶ 14-17, 20.

B. Specific beliefs and sacraments of the Cheyenne River Lakota and their relationship to *mni* or water

1. The Tribe's relationship with sacred water

The Lakota people acknowledge, as discussed above, that because theirs is an oral tradition, there may be more than one version of a religious teaching or belief. *Id* at ¶ 7. One important Lakota religious tradition accepted by the Cheyenne River Sioux teaches that in the beginning there was only water—*mni*. Water was the world's life source, which is echoed in human birth from the water in our mother's womb. *Id.* Along with the water that comprised the beginnings of creation, was a single energy called Inyan. *Id* at ¶ 8. Inyan gave everything of itself to bring forth the earth from the water and was left completely depleted. Inyan means “rock” in Lakota, and the people believe that the rock is Inyan, who gave everything of itself until it was devoid of energy and hard and unyielding. *Id* at ¶¶ 8, 14.

The original people were the last creation. The Lakota believe they first lived below the present world and ultimately emerged from a site in the Black Hills and suffered greatly as they had nothing, including no sustenance; but Creator or God caused the sacred buffalo to lead the people to food and to water, which saved them. *Id* at ¶ 9. Because of this, the Lakota believe that “water is our first medicine” (*mni kinpejuta tokaheya*). To the Lakota, medicine or *pejuta* is something that heals, both natural and supernatural. William K. Powers, *OGLALA RELIGION* 56 (1977). As a corollary of these beliefs and the Lakota notion of unity and wholeness of the world

and nature, the Lakota believe generally that water is sacred and that clean, pure water is an essential part of the Lakota way of life. Declaration of Ron Black Bird dated Feb. 1, 2017 at ¶ 9. (hereinafter “Black Bird Decl.”). Water moreover holds a special significance for the people of the Cheyenne River Sioux Reservation. Minnecoujou, one of the four bands of the Cheyenne River Sioux Tribe, means “plants by the water.” Oohenumpa, one of the four bands of the Cheyenne River Sioux Tribe, means “two kettle” or “boils twice.” Vance Decl. at ¶ 10. The Cheyenne River people consider water to be a central part of their religious and tribal identity. Frazier Decl. at ¶ 17; *see also*, Declaration of Marcella Gilbert dated Feb. 1, 2017 at ¶¶ 5-6 (hereinafter “Gilbert Decl.”).

2. The role of water in Lakota sacraments

Significantly, water does not just have a generalized sanctity in the Lakota religion, but it has a very specific, critical role in the practice of the Lakota sacred rites. The Lakota religion is characterized by several essential ceremonies. Vance Decl at ¶ 11a; *see also*, Black Bird Decl at ¶ 5. Although there are numerous sacred rites of the Lakota, some of which may not be discussed in public, the Lakota consider the following sacraments to be among their most important:

- ***Hanbleceya***: A ceremony where participants fast and pray for a vision in a solitary place. Some refer to Hanbleceya as vision-questing;
- ***Wiwanyan Wacipi***: The Sundance ceremony of renewal and rebirth where Lakota adherents gather and dance, pray, and sacrifice to enhance the welfare of relatives and loved ones in the next year;
- ***Isnati Awiciliwanpi***: A coming of age ceremony for young women;
- ***Wiping of the tears***: A ceremony that is held one year after a loved one has passed way, which signifies the end of a mourning period; and

- **Inipi:** A ceremony of prayer and purification inside a sweat lodge.

Vance Decl. at ¶ 11a. The Cheyenne River people cannot practice their religion without their ceremonies. *Id.*; *see also*, Declaration of Russ Cournoyer dated Feb. 1, 2017 at ¶ 4 (hereinafter “Cournoyer Decl.”). Sacred water figures prominently in all of these ceremonies, including Hanbleceya and Wiwanyan Wacipi where participants purposely deprive themselves of life-giving water, a deprivation intended to remind Lakota people why water is essential to life and to instill a deep respect for it. Vance Decl at ¶ 12; *see also*, Cournoyer Decl. at ¶ 18.

Water figures most centrally and explicitly in the Inipi or sweat lodge ceremony. Inipi is understood to be the oldest sacrament known to the Lakota people. Stephen E. Feraca, WAKINYAN: LAKOTA RELIGION IN THE TWENTIETH CENTURY 32 (1998). Inipi is, moreover, arguably the most important of all Lakota sacraments because Lakota people cannot perform other sacraments without first performing Inipi, a purification rite intended to cleanse one’s spirit. DeMallie, 33. To the Lakota, Inipi is essential to remain in sacred balance. It takes away the negative energy, isolation, and separation that interferes with balance. To perform Inipi, religious adherents heat a number of rocks (Inyan) in a fire and gather in an enclosed dome-shaped lodge. Inside the lodge, sacred water (Mni) is poured on the hot stones in a ritualistic fashion creating burning hot steam. The participants offer prayers, make offerings, and observe various rituals associated with Inipi. *Id.* at 33-34. At the conclusion of the ceremony, which is long, difficult and involved, the adherent is purified in spirit and body. *Id.*

The sacrament itself mirrors the Lakota creation story. Sacred, yielding water (Mni) and selfless, rigid rock (Inyan) act together to provide man with healing energy and purification. The water of the Inipi ceremony is known as *mni wiconi* or the *water of life*. Lakota people believe that “[t]he steam that issues when the water touches the hot rocks is the ‘breath of life’ that pierces

you to your spirit.” Vance Decl. at ¶ 14. The sacrament exemplifies the Lakota’s sacred balance: hard and soft; hot rocks and cold water.

Significantly, Lakota adherents are taught that anything that they use for their sacred ceremonies, especially water, must be ritually pure. Such purity is of special importance in the cleansing Inipi ceremony. Inipi practitioners cannot wear jewelry or manmade items. *Id* at ¶ 20. If practitioners are using sage, they cannot gather sage from the roadside where it is growing near trash; they have to go into the country and find clean, fresh, unadulterated plants. *Id* at ¶ 16. This is a critical consideration for the mni wiconi—the water of life—used in the sweat lodge. Cheyenne River adherents have been taught that the water used in the Inipi ceremony must be clean and ritually pure. *Id*. It must be collected from nature. Adherents cannot use bottled water, which is surrounded by plastic and hence contaminated. *Id*. Adherents cannot use impure water of any kind. Carrying ceremony water in a metal bucket is not permitted, as that is a manmade material. *Id* at 20. Adherents must use a wooden bucket because wood is from nature. The use of unnatural waters is not a substitute that practitioners of the Lakota religion can accept. Vance Decl at ¶ 20; Cournoyer Decl. at ¶ 8; Black Bird Decl at ¶ 9; Gilbert Decl. at ¶6.

C. The Tribe’s Sacred Connection to the Missouri River—*Mni Sose*

The Cheyenne River people consider the Missouri River to be sacred and vital to the practice of their religion, both for religious and cultural reasons and for the concrete, unavoidable legal reasons discussed at length herein. In the Lakota language, the Missouri River is called Mni Sose. The Missouri River is squarely in the heart of both lands that the Lakota have occupied since time immemorial,¹ and the lands that comprise their permanent reservation homeland today. The Lakota understand that the waters of the Missouri River have always been necessary for their existence as Lakota people and for their spiritual practices. The Missouri River was here before

the human beings were here, and the Lakota people chose to live along its banks from time immemorial. It has always been an important source for Lakota foods, medicines, and of course water. The Lakota consider it to be their “bloodline and the lifeline of the people . . . , and [they] cannot live without it.” As discussed below, the Missouri River has taken on paramount importance to the people of the Cheyenne River Sioux Tribe because the United States has systematically deprived the Tribe of other sources of water. Lake Oahe is the reservoir formed by the Missouri River and through which flows all waters that sustain the Cheyenne River Sioux Tribe.

II. The United States’ Systematic Restriction of the Tribe’s and Its Members’ Access to Sacred Waters

Prior to the 19th century, the Lakota people had the ability to access waters for their sacred rites in the clean, natural bodies of water throughout their vast aboriginal homeland, which included lands in what is now the states of North and South Dakota, Montana, Wyoming, and Nebraska. ECF No. 11-7. In 1851, the United States sent out treaty delegations to Indian country to enter into peace time treaties with the various tribes, including the four bands of the Cheyenne River Sioux Tribe. The Great Sioux Nation consequently negotiated and entered into a treaty with the United States and reserved a large portion of these aboriginal lands as the exclusive territory of the Great Sioux Nation. *Treaty of Fort Laramie with Sioux, Etc., Sept. 17, 1851*, art. 5, 11 Stat. 749 (hereinafter the “1851 Fort Laramie Treaty”). The United States bound itself in this treaty to “protect” the Great Sioux Nation “against the commission of all depredations by the people of the said United States, after ratification of this treaty.” *Id.* at art. 4. The Tribe and its members retained the right to access clean, pure water in numerous bodies of water throughout this territory reserved for their exclusive use, including streams and creeks in the Black Hills and the sacred Missouri River, which was included within the eastern external boundary of the territory. *Id.* at art. 5.

In 1868, the Great Sioux Nation entered into treaty negotiations with the United States to end ongoing conflicts arising from the American invasion of their treaty lands, which resulted in the 1868 Sioux Nation Treaty. *Treaty with the Sioux – Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee – And Arapahoe*, April 29, 1868, 15 Stat. 635 (hereinafter “1868 Fort Laramie Treaty”). This Treaty “set apart for the absolute and undisturbed use and occupation of the [Great Sioux Nation]” all lands west of the low water mark of the Missouri River between the forty-sixth parallel north and the northern boundary of the state of Nebraska for “the undisturbed absolute use and occupation” by the Sioux Nation, including the Missouri River which was fully within this territory. *Id.* at art. 2. The United States “solemnly agree[d]” to prohibit settlers and unauthorized persons from settling in or crossing through this territory. *Id.* Again, the Tribe and its members retained the right to access clean, pure water in numerous bodies of water throughout this newly defined territory, including streams and creeks in the Black Hills and the sacred Missouri River, which was still within the eastern boundary of the territory. *Id.*

In 1874, however, gold was discovered in the Black Hills. The United States responded by repeatedly violating the “solemn” promises it had made in the Sioux Nation Treaty just six years earlier, until finally, the United States unlawfully enacted the Act of February 28, 1877, which purported to remove the Black Hills from the absolute and exclusive occupation of the Sioux Nation. 19 Stat. 254 (1877). Many years later, the United States Supreme Court held that the taking of the Black Hills in the Act of February 28, 1877, which was obtained in violation of the Treaty, constituted an unlawful taking. *See United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). The Supreme Court famously observed that “a more ripe and rank case of dishonorable dealings will never, in all probability be found in our history.” *Id.* at 388. When the United States

denied the Sioux Nation access and undisturbed use of the Black Hills in this ignoble Act, they also lost access to the streams and creeks in the sacred Black Hills for use in their sacred rites. But, the Great Sioux Reservation continued to include the sacred Missouri River within its boundaries, which was confirmed in Article 2 of the Act of February 28, 1877. 19 Stat. 254 at art. 2.

In 1889, the United States acted unilaterally again to “set aside as a permanent reservation” nine smaller reservations within the Great Sioux Reservation, including the present-day Cheyenne River Sioux Reservation. Act of March 2, 1889, ch. 206, 25 Stat. 88, § 2. Although the Act of March 2, 1889 dispossessed the Lakota people of the exclusive use and occupation of much of the Great Sioux Reservation, the Act promised the Cheyenne River Sioux Reservation to the Cheyenne River Sioux Tribe as a permanent home for the four Lakota bands that comprise the Tribe today. *Id.* The Act reserved to the tribe its present Reservation, with its eastern boundary at the center point of the main channel of the Missouri River. 25 Stat. 888, § 4.

The Cheyenne River Reservation included the rich river bottomlands along the Missouri River. Here, the people had camped, hunted, gathered foods and medicines, performed religious ceremonies, convened for social and political occasions, buried their dead, and made use of the waters of the Missouri River for religious and consumptive purposes from time immemorial. *See* Michael L. Lawson, DAMMED INDIANS 56-58 (1982). In 1944, unbeknownst to the Tribe and without either their consent or consultation, the United States enacted the Flood Control Act of 1944 (“Flood Control Act”) that authorized the Army Corps of Engineers to construct dams on the Missouri River and to operate projects for the purposes of navigation and flood control, so long as such uses did not conflict with present and future beneficial consumptive uses of waters for “domestic, municipal, stock water, irrigation, mining, or industrial purposes.” 33 U.S.C. § 701-

1(b); *Flood Control Act of 1944*, Pub. L. 78-54, ch. 665, 58 Stat. 887 (Dec. 22, 1944) (codified at 16 U.S.C. § 460d, and various sections of Titles 33 & 43 of the United States Code).

The Cheyenne River Sioux Tribe lost 104,120 acres to the creation of Lake Oahe, including three small towns, the most valuable rangeland, most of the gardens and cultivated farm tracts, and nearly all of the Tribe's timber, wild fruit, and wildlife resources. Lawson, 56-58. Significantly, burial grounds, traditional sacred medicines, and sacred stone cairns were destroyed. The people were forced to dig up the bodies of their parents and grandparents. They lost their livelihoods, their homes, their birthplaces, important cultural sites, and culture itself. *Id.* Ironically, in 1968, Congress renamed the reservoir Lake Oahe “in honor of the Indian people who inhabited the great Missouri River Basin.” Act of March 21, 1968, Pub. L. 90-270, 82 Stat. 51.

Although the Tribe lost much to the dishonest and dishonorable dealings of the United States, it retained property rights in the waters of Lake Oahe, which is still located within the external boundaries of the Cheyenne River Sioux Reservation. Those rights that pre-existed any contact with the United States were first recognized by the United States in the 1851 and 1868 Fort Laramie Treaties. The Tribe to this day retains its rights to access and use the clean, pure waters of the Missouri River, now Lake Oahe—a reservoir that spans from Bismarck, North Dakota to the Oahe Dam at Fort Pierre, South Dakota. Those rights are explicitly recognized in the Oahe Taking Act. 68 Stat. 1191, 1192-1193, § VI, § 10. In light of these serial dispossessions, the members of the Cheyenne River Sioux Tribe must rely on Lake Oahe exclusively, not just for their drinking water, but for the water they use in their religious ceremonies because Lake Oahe is the only source of natural, pure, uncontaminated water available to the people of the Cheyenne River Sioux Reservation. The ground water is full of heavy metals and minerals that render it unsuitable for consumption, and the aquifers are too deep to make access feasible. *United States Army Corps*

of Engineers, Omaha District, P.L. 84-99 Project Information Report Emergency Water Assistance Due to Drought, Cheyenne River Sioux Tribe – Mni Waste’ Water System Fox Ridge Intake, §5.4 (April 19, 2005) (Declaration of Nicole Ducheneaux (hereinafter “Ducheneaux Decl.”)) Exhibit A. The Cheyenne River that forms the southern boundary of the Reservation is severely contaminated with mining tailings from the operation of the Homestake Gold Mine in the Black Hills. *Id.* at A-9.

The Tribe’s exclusive reliance upon Lake Oahe for both drinking water and water required for their religious practice is significant not just because it is the only water available to them, but also because those waters are a tribal trust resource managed by the United States on behalf of the Cheyenne River Sioux Tribe. Under federal law, the Tribe has reserved sufficient water to fulfill the purposes of the Reservation and the United States as fiduciary is bound to protect the waters from upstream contamination.

III. The Tribe’s Ownership of the Waters of Lake Oahe

The reservation of territories including land and water in the 1851 and 1868 Fort Laramie Treaties and in the Act of March 2, 1889 was accompanied by a reservation of water rights in the Missouri River to fulfill the purpose of the Reservation to provide for self-sufficiency. *Winters v. United States*, 207 U.S. 564 (1908); *Cappaert v. United States*, 426 U.S. 128, 141 (1976). The Tribe owns a clear property right in the waters of Lake Oahe and the Missouri River, and has held that interest for as long as the Sioux Nation has existed on this earth. Those rights were reserved to it by the United States when the entire Missouri River to the low water mark of the east bank of the River was included within the reserved territories of the 1851 and 1868 Fort Laramie Treaties. *1851 Fort Laramie Treaty*, art. 5, *1868 Fort Laramie Treaty*. The Tribe’s reserved ownership of the Missouri River was again recognized in Article 2 of the Act of February 28, 1877. 19 Stat. 254

at art. 2. The Tribe's water rights were not abrogated in the Act of March 2, 1889, which continued to recognize the territorial rights of the—four bands of the present day Cheyenne River Sioux Tribe—in the Missouri River to the center of the main channel. 25 Stat. 888, § 4. The Tribe's water rights in Lake Oahe are unquantified.

The reserved water right recognized in the *Winters* doctrine include the right to clean, safe water. *See, e.g., United States v. Gila River Irrigation Dist.*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996). Likewise, the Tribe has retained its right to hunt, fish, and gather on the Reservation. *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993) (noting that Congress explicitly has reserved the Cheyenne River Sioux Tribe's original treaty rights, including the right to hunt and fish, on Lake Oahe); *see also United States v. Dion*, 476 U.S. 734, 738 (1986) ("Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them . . ."). The United States Supreme Court has long held that these treaty rights to hunting, fishing, and gathering are "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). The Tribe's water rights include a right to water that is sufficient in amount and quality to support hunting and fishing rights. *United States v. Adair*, 723 F.2d 1394, 1409, 1411 (9th Cir. 1983).

The Court has long recognized the "existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The courts are clear that "any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes." *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (emphasis in original) (citing *Seminole Nation v. United States*, 316 U.S. 268, 297 (1942)). The trust duty specifically applies to the actions of the United States Army Corps of Engineers. *See, e.g., Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1519-20 (W.D.

Wash. 1996). The federal government has directed the Corps to exercise its trust responsibility to protect tribes and tribal trust resources by government-to-government consultation with tribes on any action under its authority that could impair tribal trust resources or tribal rights. Dep't of Def. Instruction 4710.02 (Sept. 14, 2006); *see also* Sec'y of Def. Policy on "Dep't of Def. Am. Indian & Alaska Native Policy," Oct. 20, 1998; EO 13175, *Consultation & Coordination with Indian Tribal Govts.* (Nov. 6, 2000); *Presidential Memorandum on Tribal Consultation* (Nov. 6, 2009). The Corps exercises this trust responsibility by denying authorization to activities under its jurisdiction that have more than a *de minimis* impact on tribal treaty rights. Army Corps of Eng'rs., Memorandum for Record, Gateway Pacific Terminal Project & Lummi Nation's Usual & Accustomed Treaty Fishing Rights at Cherry Point, Whatcom Cnty., (May 9, 2016), <http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/160509MFRUADeMinimisDetermination.pdf> (last accessed Feb. 8, 2017).

The United States' trust duty applies specifically to protection of tribal reserved water rights from upstream contamination resulting. Indian reserved water rights are "vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians." 55 Fed. Reg. 9223 (Mar. 12, 1990). Under the federal trust responsibility, the United States has a duty to conserve Indian lands, waters, and natural resources, and appropriately manage tribal natural resources. It is also "the policy of the United States[] that all Indian communities . . . be provided with safe and adequate water supply. . . ." 25 U.S.C. § 1632. Among the United States' core obligations is its duty to prevent upstream users from impairing a tribe's reserved right. *See Winters*, 207 U.S. at 577-78. This obligation includes the obligation to prevent upstream users from engaging in practices that reduce the quality of water that feeds the reservation. *Hopi Tribe v. United States*, 782 F.3d 662, 669

(Fed. Cir. 2015) (citing *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1454-55 (D. Ariz. 1996)).

The U.S. Army Corps of Engineers owes the Cheyenne River Sioux Tribe more than a general duty to protect the waters of Lake Oahe and ensure that the waters are safe, adequate, and not impaired in quality by uses that are not authorized in the Flood Control Act of 1944. 33 U.S.C. § 701-1(b), Pub. L. 78-54, ch. 665, 58 Stat. 887 (Dec. 22, 1944). Significantly, the Flood Control Act of 1944 granted the Corps comprehensive power over Lake Oahe, including authority over water use, leases, construction, recreation, storage, flood control, and navigation, and regulations related to the same. *See* 16 U.S.C. §§ 460d, 825s (1946 ed.); 33 U.S.C. §§ 708, 709 (1946 ed.). The Supreme Court has held that the Corps' control over Lake Oahe is pervasive, excluding even its sister agencies. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 505 (1988). The Supreme Court has further held that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). Indeed, "where the Federal Government takes on or has control or supervision over tribal . . . properties, the fiduciary relationship normally exists with respect to such . . . properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about . . . a trust or fiduciary connection." *Id.* (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183 (1980)); *see also Cobell v. Babbitt*, 91 F. Supp. 2d 1, 24 (D. D.C. 1999). The Corps' duty to the Tribe to protect the trust property from upstream contamination by third-parties is a moral obligation of the highest responsibility and trust that should be judged by the most exacting fiduciary standards. *United States v. Jicarilla Apache Nation*, 465 U.S. 162, 207 (2011).

IV. The Impact of the Easement on Lakota Religious Practice

As soon as the Lakota people encountered the United States, the government in its insatiable greed for the resources of the Lakota people began restricting Lakota access to the waters necessary for the practice of their religion, confining the Tribe to ever smaller reservations and depriving them of access to their sacred Black Hills. But Lakota religion was not merely collateral damage of westward expansion. Indeed, beginning in the 19th century, the United States embarked on an explicit 200-year-long campaign to destroy the Lakota religion based on the belief that their religion was paganistic and immoral—actively encouraging the replacement of the Lakota religion with Christianity,³ forcing Lakota children to attend boarding school where their language and religious practice were strictly forbidden,⁴ and even criminalizing Lakota sacraments like the Sundance.⁵ Despite these efforts, and risking their safety and liberty, the Lakota people of the Cheyenne River Sioux Reservation nurtured the spark of their faith, practicing their religion in secret and away from the prying eyes of government agents. Hence, when the United States finally decriminalized the practice of the Lakota religion in 1978⁶ and the faithful could come out of the shadows, the Lakota religion flourished again. Today, the Tribe's members practice widely their native religion, some in conjunction with other western faiths. Frazier Decl. at ¶¶ 7-15; *see also* Robert Hilbert, S.J., *Contemporary Catholic Mission Work Among the Sioux*, in SIOUX INDIAN RELIGION: TRADITION AND INNOVATION 145.

Like their ancestors, modern Lakota people understand that the central precept of the Lakota religion is the notion of balance. Lakota believers are taught that they must walk in balance

³ *See, e.g.*, 25 U.S.C. § 280 (1922) (issuing patents to Indian Lands to religious societies).

⁴ Michael J. Simpson, *Accommodating Indian Religions: the Proposed 1993 Amendment to the American Indian Religious Freedom Act* 54 Mont. L. Rev. 19, 28.

⁵ Office of Indian Affairs, Circular No. 1665 (1921) (stating that “the sundance, and all other similar dances and so-called religious ceremonies are considered ‘Indian Offenses’ under existing regulations, and corrective penalties are provided.”)

⁶ American Indian Religious Freedom Act, 42 U.S.C. § 1996.

in their thinking and walk in balance with every step that they take. Significantly, the Lakota are taught that in order for their water to be natural and ritually pure, it must be in balance and in a state of nature. As further discussed above, although Lakota ritual, such as Inipi and the Sundance are static and governed by strict rules that dictate how and in what manner one must practice, belief itself is fluid and may change subject to new revelations or developments in the world. DeMallie, 33.

Long ago, Lakota prophets told of the coming of a Black Snake that would be coiled in the Tribe's homeland and which would harm the people. In the prophecy, the snake was black, slippery, in motion, and would devour the people. Although there can be no way of knowing when this prophesy emerged into the Lakota worldview, Lakota religious adherents now in their 50s and 60s were warned of the Black Snake by their elders as children. The Black Snake prophecy is a source of terror and existential threat in the Lakota worldview.

Lakota religious adherents today believe that the Black Snake has been made real. Lakota religious practitioners believe that the Dakota Access pipeline, a crude oil pipeline proposed to cross under their homeland is the black, slippery terror described in the Black Snake prophecy. And the coming of the Black Snake is not without consequence in the Lakota religious worldview. Lakota adherents believe that the Black Snake poses an existential threat because it will cause critical imbalance in an essential resource of the Cheyenne River Sioux Tribe: the natural, ritually pure waters of Lake Oahe. The Lakota believe that the presence of the black crude oil under Mni Sose will so severely imbalance the waters as to render them unnatural and impure such that they will be desecrated. The Lakota believe that such desecration will make the waters of Lake Oahe unsuitable for use in their religious practices, especially Inipi or the sweat lodge ceremony, which is such a key component of the Lakota religious practice that most other religious rites cannot

proceed. *See* Feraca 32; DeMallie 33. If the waters of Lake Oahe are so desecrated, the Tribe and its members will be unable to exercise their religion as their Reservation lacks any other pure, natural water source.

V. The Present Dispute

The Dakota Access Pipeline is a domestic oil pipeline designed to move over a half-billion gallons of crude oil daily from North Dakota to Illinois. ECF No. 39 at p. 2. On July 25, 2017, the Corps granted authorization to Dakota Access under various federal statutes, including *inter alia*, Section 408 of the Rivers and Harbors Act, 33 U.S.C. § 403. In conjunction with that permit, the Corps issued a final Environmental Assessment, rather than a full Environmental Impact Statement pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., and a Finding of No Significant Impact. ECF Nos. 6-51, 6-52. Although the EA discussed numerous alternatives to siting of the pipeline under Lake Oahe at the site of the present easement, including rail, truck, and an alternate pipeline route, it selected this Lake Oahe site under the waters owned by the Cheyenne River Sioux Tribe. ECF NO. 6-51 at pp. 6-9. The EA also did not contain any consideration of any potential impacts of the pipeline on the Cheyenne River Sioux Tribe. *See generally, id.*

On July 27, 2016, the Standing Rock Sioux Tribe sued to challenge the Corps' authorization of the pipeline. ECF No. 1. The Standing Rock Sioux Tribe moved for Preliminary Injunction on August 4, 2016 on the narrow issue of whether the authorization violated the National Historic Preservation Act. ECF No. 6. Dakota Access intervened as Defendant and the Cheyenne River Sioux Tribe intervened as a Plaintiff, although Cheyenne River did not participate in the Preliminary Injunction Motion. *See* ECF No. 39 at pp. 33-34. During oral argument on the motion, Dakota Access and the Corps revealed that the oil company lacked the easement required

under the Mineral Leasing Act, 30 U.S.C. § 185 for it to complete drilling across Corps-owned lands. Hence, Dakota Access had no right and no ability to drill under the Tribe's sacred waters. ECF No. 74-3

Immediately following this Court's order on September 9, 2016 denying Standing Rock's motion for preliminary injunction the United States Departments of Justice, Interior, and the Corps issued a joint statement noting that the government would not grant the easement until it had conducted further review. Between September 9, 2016 and January 24, 2017, the United States led the parties in this matter, the Court, and the public to believe that the government had determined that it was legally obligated to closely review impacts of the easement on tribal rights and the treaties that govern the United States' relationship with the Plaintiff Tribe's in this matter, even ordering the preparation of a full Environmental Impact Statement. *See* ECF No. 65-1; 82 Fed. Reg. 5544 (Jan. 18, 2017). The government had neutralized the threat of the Black Snake to the Tribe's sacred waters, indefinitely suspended the threat, and even committed itself to defeating the harm.

On January 24, 2017, however, the Corps filed its notice of issuance of a Presidential Memorandum Regarding Construction of the Dakota Access Pipeline, in which President Trump directed expedited review and approval of the easement and withdrawal of Notice of Intent to prepare an EIS. ECF No. 89-1. Despite representations of counsel for the Corps that the easement would not be granted until the end of this week, the Corps notified Congress of its decision to grant the easement on February 7, 2017 pursuant to 30 U.S.C. § 185, waiving its own 14-day waiting period, and granted the easement on February 8, 2017. According to media reports and statements made by a representative of the Corps of Engineers to Tribal Chairman Harold Frazier, drilling began immediately. Frazier Decl. at ¶ 18. The government has now issued every authorization

that Dakota Access requires to build its Black Snake under the sacred waters of Lake Oahe. And construction has begun.

STANDARD FOR GRANTING TEMPORARY INJUNCTIVE RELIEF

The Cheyenne River Sioux Tribe is entitled to a temporary restraining order and preliminary injunctive relief protecting its members' free exercise of religion while this Court considers the merits of its claims under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-4. Under Federal Rule of Civil Procedure 65, a plaintiff seeking interim injunctive relief must show (1) likelihood of success on the merits; (2) a likelihood of irreparable harm if injunctive relief is not granted; (3) that the balance of interests among the parties favors injunctive relief; and (4) that injunctive relief would be in the best interest of the public generally. *Shereley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)). At the preliminary injunction stage, the burdens of proof "track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). The Supreme Court has held that in a RFRA case it is the plaintiff's burden to show "more likely than not" that the sincere religious exercise had been substantially burdened—a burden of proof "which does not even rise to the level of a preponderance of the evidence." *Id.* at 428 (internal citation and quotation marks omitted). The Supreme Court has explained that this initial burden of proof is satisfied by a showing that the government action "implicates [plaintiff's] religious exercise." *See Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). The burden then shifts to the government to show a compelling interest justifies the burden on religious exercise that cannot be satisfied through less restrictive means. *O Centro*, 546 U.S. at 429. Moreover, where RFRA is alleged in a motion for temporary injunctive relief, "the likelihood of success on the merits will often be the determinative factor." *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) "This is because the "loss of First

Amendment freedoms . . . unquestionably constitutes irreparable injury. . . .” *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

“The purpose of a temporary restraining order is to preserve the status quo for a limited period of time until the Court has the opportunity to pass on the merits of the demand for a preliminary injunction.” *Barrow v. Graham*, 124 F. Supp. 2d 714, 715-16 (D .D.C. 2000). The same test that applies to injunctive relief applies to a motion for temporary restraining order, but with the more modest goal of preserving the status quo. *Id.*

ARGUMENT

I. The Cheyenne River Sioux Tribe is Likely to Succeed on Its RFRA Claim

RFRA provides that “Government shall not substantially burden a person’s exercise of religion” unless the Government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-4(a), (b). Under RFRA, “the term ‘government’ includes [any] branch, department, agency, instrumentality, and official . . . of the United States. . . ,” including the United States Army Corps of Engineers. *See Singh v. McHugh*, 185 F. Supp. 3d 201, 217 (D. D.C. 2016) (noting that the Army concedes that it “is a government actor to which RFRA applies”); *see also Rigdon v. Perry*, 962 F. Supp. 150 (D. D.C.) (applying RFRA against the Secretary of Defense and *inter alia* the Secretary of the Army); *United States v. Sterling*, 75 M.J. 407, 415 (C.A.A.F. 2016) (“RFRA applies to the military.”); *see also* Dep’t of Def. Instruction 130017 (military regulation adopting RFRA standard).

In the present case, the Corps cannot reasonably dispute that the Cheyenne River Sioux Tribal members’ beliefs are sincere and substantially burdened by the construction and operation of a crude oil pipeline under waters owned by the Cheyenne River Sioux Tribe, considered sacred by them and used in their religious ceremonies. Further, in light of the fact that both the Corps and the oil pipeline company actually considered alternate routes for this pipeline, the Corps cannot demonstrate that the proposed pipeline route constitutes the least restrictive means of further a compelling government interest.

A. Practitioners of the Lakota Religion Are Sincerely Compelled to Observe and Practice the Rites of Lakota Spirituality, Especially Inipi

The sincere belief of the members of the Cheyenne River Sioux Tribe that the construction and operation of a pipeline under waters owned by the Tribe, considered sacred by them, and used

in their religious ceremonies will harm their exercise of their sacred rites cannot reasonably be questioned. The sincerity inquiry is an important aspect of a RFRA claim, but it is an inquiry that requires courts to tread lightly. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16 (1981); *see also Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 792 (5th Cir. 2013) (“Though the sincerity inquiry is important, it must be handled with a light touch or judicial shyness.”) (Internal citation and punctuation omitted). Indeed, “the inquiry into the sincerity of a . . . plaintiff’s religious beliefs is almost exclusively a creditability assessment . . .” *Kay v. Bemis*, 500 F.3d 1214, 1219 (10th Cir. 2007) (internal quotation omitted). The Supreme Court long has held that “courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.” *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2779 (2014) (internal quotation omitted). Further, “it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.” *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 699 (1989). As the Supreme Court long has held, “[m]en may believe what they cannot prove[, hence,] [t]hey may not be put to the proof of their religious doctrines or belief.” *United States v. Ballard*, 322 U.S. 78, 86 (1944).

The law protects religious exercise even though it may not arise from any organized denomination, be mainstream, subject to a written doctrine, have a single leader, or even comprehensible to others. *See Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834 (1989); *Ballard*, 322 U.S. at 86. And although this has not always been the case, the law today protects Native religions just as it does mainstream Western religions. *E.g.*, *O Centro*, 546 U.S. at 439 (holding that a federal law criminalizing use of a hallucinogenic tea in Native religious ceremonies violated RFRA); *A.A. ex. rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 263-64 (5th Cir. 2010) (holding that Native American belief in wearing visibly long hair was sincerely held);

United States v. Hardman, 297 F.3d 1116, 1127 (10th Cir. 2002) (concluding that Native American belief in sacredness of eagle feather was sincerely held); *see also* 42 U.S.C. § 1996 (“It shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . and the freedom to worship through ceremonials and traditional rites.”)

The members of the Cheyenne River Sioux are sincere in their belief that construction and operation of this crude oil pipeline under Lake Oahe will substantially burden and impair the practice of their religion. As set forth in detail herein, the specific belief of the Lakota people, including members of the Cheyenne River Sioux Tribe, is that the construction and operation of the oil pipeline will desecrate and deconsecrate the waters that they must use for their sacred religious ceremonies such that the water will be rendered unsuitable for such use. *See generally* Vance Decl.; Frazier Decl.; Gilbert Decl.; Cournoyer Decl.; Black Bird Decl. This belief is not merely sincerely held, but it is reflected in the broader movement surrounding Lakota opposition to the Dakota Access Pipeline.

The Lakota people, including members of the Cheyenne River Sioux Tribe, began a peaceful demonstration against the construction of the oil pipeline by participation in a protest encampment on the Cannonball River near the DAPL construction as early as April 2016. From its first days, the movement has been centered upon a number of intertwined legal, moral, and spiritual beliefs of the Lakota people: (1) that the proposed crude oil pipeline poses an existential threat to the Tribes’ physical existence because of its very real potential to pollute waters that the Tribes physically rely upon and which are owned in trust for them by the United States; (2) that the pipeline would destroy sites of historical, cultural, and spiritual significance to the Lakota people, including ancient stone cairns and burial sites; and (3) that the pipeline would desecrate

the waters that Tribal members require for the practice of their religion. *See generally*, Vance Decl.; Frazier Decl.; Gilbert Decl.; Cournoyer Decl.; Black Bird Decl.

Although the legal fight has, until now concerned primarily water safety and cultural sites, the Lakota opposition to the pipeline has always been focused upon the pipeline's impact upon Lakota religious practice. Tribal religious concerns have pervaded the broader Lakota water protector movement against the DAPL since the beginning.⁷ The movement has always been centered on the concept of *mni wiconi*, a phrase that has been called the rallying cry of the movement. *Mni wiconi*, however, is not just a slogan; the Lakota people consider it to be the heart of their opposition to the pipeline.⁸ While this Lakota phrase can be translated to mean "water is life," as widely reported in the media, the phrase and the concept more precisely refers to *mni wiconi*, the water *of* life that is so critical to the Lakota's sacred Inipi ceremony. Hence, although *mni wiconi* as understood in the public eye has taken on an environmental character, its significance is in the religious meaning of the phrase and concept. This religious-environmental connection in the concept of *mni wiconi* is a microcosm of the Lakota worldview. Elements of the natural world in their pure, balanced, unpolluted state are at the center Lakota religious beliefs and religious sacraments. Fire, rock, and sacred water are essential elements of the Inipi ceremony. Lakota people, including the water protectors, feel a special obligation to protect the environment

⁷ E.g., Jenni Monet, *For Native "Water Protectors," Standing Rock Protest Has Become Fight for Religious Freedom, Human Rights*, PBS NEWSHOUR (Nov. 3, 2016, 5:19 PM) <http://www.pbs.org/newshour/rundown/military-force-criticized-dakota-access-pipeline-protests/> (last visited Feb. 8, 2017); Jessica Ravitz, *The Sacred Land at the Center of the Dakota Pipeline Dispute*, CNN, (Nov. 1, 2016, 2:01 PM) <http://www.cnn.com/2016/11/01/us/standing-rock-sioux-sacred-land-dakota-pipeline/index.html> (last accessed Feb. 8, 2017); Sydney Brownstone, *The New Protectors: How the Standing Rock Sioux Tribe Stood Up to Big Oil and Built a New Activist Movement*, THE STRANGER (Sep. 27, 2016) <http://www.thestranger.com/features/2016/09/27/24585851/the-new-protectors> (last accessed Feb. 8, 2017).

⁸ See Monet, *supra*, note 9.

because they cannot practice their religion, as described herein, when certain elements used in their religion have been desecrated. In short, to the extent that there is an intersection between Lakota environmental concerns and Lakota religious concerns, it is the religious belief that drives the environmental concern; not the other way around.

The prophecy of the Black Snake has also been a central image of Lakota opposition to oil pipelines dating back to the fight against the Keystone XL pipeline, another oil pipeline, but one that is not proposed to cross Lake Oahe.⁹ The prophecy itself, however, is much older than that, although it is impossible to know the precise age or origins of the prophecy in light of the fact that the Lakota religion is based on oral tradition rather than written doctrine. Lakota religious adherents in their 60s recall learning of the Black Snake as children. Today, Lakota religious adherents, including the declarants herein, believe that crude oil pipelines proposed to cross under lands and resources sacred to Lakota people are the Black Snake. This belief is widespread among the Lakota people involved in the water protector movement.¹⁰

Lakota religious adherents, including the Cheyenne River declarants believe that the crude oil pipeline known as the Dakota Access pipeline is the Black Snake and that its proposed route under the waters of Lake Oahe will desecrate the waters that are available to Tribal members and render them unsuitable for use in Lakota religious sacraments, including the Inipi, which is a

⁹ Winona LaDuke, *The Black Snake Hears a Song: Declaring War on the Keystone Pipeline*, INDIAN COUNTRY MEDIA NETWORK (Nov. 21, 2014) <https://indiancountrymedianetwork.com/news/opinions/the-black-snake-hears-a-song-declaring-war-on-the-keystone-pipeline/> (last accessed Feb. 8, 2017).

¹⁰ Louise Erdrich, *How to Stop a Black Snake*, N.Y. TIMES (Dec. 10, 2016) https://www.nytimes.com/2016/12/10/opinion/sunday/how-to-stop-a-black-snake.html?_r=0 (last accessed Feb. 8, 2017); Mike Anderson, *Dakota Access Pipeline Fight Unites the Seven Sioux Nations*, RAPID CITY JOURNAL (Sep. 11, 2016) http://rapidcityjournal.com/news/local/dakota-access-pipeline-fight-unites-the-seven-sioux-nations/article_9a746b78-f1d-5f30-b5d5-cfde26c0642a.html (last accessed Feb. 8, 2017).

central rite of the Lakota religious practice. This belief is one that has been widely reflected in the broader Lakota movement opposing the Dakota Access Pipeline. Challenges to the Cheyenne River declarants' sincerity based upon the unfamiliarity of this belief to mainstream Americans, the lack of a written doctrine setting forth this belief in the Lakota religion, the validity of the belief, or even disparity among Lakota adherents regarding the substance of the belief are inappropriate considerations. *See Smith*, 494 U.S. at 887; *Ballard*, 322 U.S. at 86; *Frazee*, 489 U.S. at 834. The Cheyenne River Sioux Tribe is likely to prevail in any challenge to the sincerity of its belief concerning the effect of the Dakota Access Pipeline on their sacred rites.

B. The Corps' Granting of Permission for Dakota Access to Construct and Operate a Crude Oil Pipeline Under the Tribe's Sacred Waters Substantially Burden the Tribal Members' Religious Exercise

A regulation that substantially burdens plaintiff's exercise of religion "forces them to engage in conduct that their religion forbids or . . . prevents them from engaging in conduct their religion requires." *Henderson v. Kennedy*, 256 F.3d 12, 16 (D.C. Cir. 2001) (collecting cases). A burden rises to the level of being substantial "when (at the very least) the government (1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief." including presenting the plaintiff with "an illusory or Hobson's choice where the only realistically possibly course of action available to the plaintiff trenches on sincere religious exercise." *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014); *see also, Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005) (prison policy that coerced inmates to abandon their beliefs by cutting their hair was a substantial burden); *Love v. Reed*, 216 F.3d 682, 689-690 (8th Cir. 2000) (recognizing that prison's failure to accommodate prisoner's religious diet was substantially burdensome); *Jackson*

v. Mann, 196 F.3d 316, 320 (2d Cir. 1999) (same); *Hunafa v. Murphy*, 907 F.2d 46, 47 (7th Cir. 1990) (same); *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987) (same); *Hudson v. Dennehy*, 538 F. Supp. 2d 400, 411 (D. Mass. 2008). And because RFRA and its companion statute RLUIPA provide greater protection than the Constitution, the test for showing a substantial burden under RFRA is less than that needed to show a violation of the First Amendment. *Holt*, 135 S. Ct. at 862;¹¹ *see also Yellowbear*, 741 F.3d at 55-56 (prison's complete prohibition against an inmate's access to a sweat lodge was a substantial burden on his exercise of religion); *Haight v. Thompson*, 763 F.3d 554, 561 (6th Cir. 2014) (prison's refusal to provide Native American inmates with certain traditional foods in connection with ceremonies substantially burdened their exercise of religion, rejecting the notion that the provision of some but not all of the traditional foods, was sufficient); *Native Am. Council of Tribes v. Weber*, 750 F.3d 742 (8th Cir. 2014) (prison's wholesale ban on tobacco use by Native Americans substantially burdened their exercise of religion, rejecting the prison's claims that the inmate's religious exercise might be satisfied by a substitute for tobacco).

Allowing construction and operation of a crude oil pipeline under Lake Oahe that renders that water unsuitable for use in Lakota religious rites unquestionably imposes a substantial burden on the Cheyenne River Sioux Tribe and its members. The Tribe and its members are in a unique position as to their ability to exercise their religion. The Lakota religion requires natural, undesecrated water that is ritually pure for use in essential Lakota sacraments. Yet, as set forth in

¹¹ In *Holt*, the Court found that the district court erred in concluding that prison's ban on beards did not substantially burden a Muslim's religion because the inmate was allowed to engage in other practices important to his religion allowed to have a prayer rug and Islamic materials, to maintain his required diet, and to observe holidays. The Supreme Court explained that although the availability of alternative means for practicing religion is a relevant consideration in cases arising under the First Amendment, the statute provided greater protection than the Constitution. *See Holt*, 135 S. Ct. 862.

detail herein, beginning at least with the unlawful taking of the Black Hills in 1877, the United States systematically has been depriving the Cheyenne River Sioux Tribe of access to the critical resource that the Tribe requires for its religious practice by confining the Tribe onto ever-smaller tracts of land. Where once the Lakota had reserved under federal law millions of acres and all of the bodies of water contained in them, today the Cheyenne River Sioux Tribe and its members have just one pure, natural, un-desecrated source of water within their Tribal territory: Lake Oahe.

Consequently, if the United States acts to permit Dakota Access to construct and operate a crude oil pipeline that would desecrate the only suitable waters available to the Cheyenne River Sioux Tribe for its religious sacraments, then it will have presented the Tribe and its members with a Hobson's choice of either violating their religious beliefs by using desecrated waters that are unsuitable for religious use or abandoning their religious sacraments. Such coercion constitutes a clear substantial burden that arises frequently in prisoner cases proceeding under RLUIPA: the government has near complete control over the religious adherent's ability to exercise his religion and, by depriving the adherent of a choice, coerces them into either violating their beliefs or abandoning their religious practice. *See Warsoldier*, 418 F.3d at 996; *Love*, 216 F.3d at 689-90; *Jackson*, 196 F.3d at 320; *Hunafa*, 907 F.2d at 47; *McElyea*, 883 F.2d at 196; *Hudson*, 538 F. Supp. 2d at 411.

These prisoner cases provide a fitting comparison not only as to the kind of coercion that is at issue here, but as to nature of the burden imposed. In these cases the burden imposed on the religious adherent often relates to their belief that they will violate their religion by consuming food that it is not prepared in a manner consistent with their religious beliefs—this includes kosher meal preparation for Jews and halal meal preparation for Muslims. *See Jackson*, 196 F.3d at 320; *Hunafa*, 907 F.2d at 47; *McElyea*, 833 F.2d at 198; *Hudson*, 537 F. Supp. 2d at 411. Like the

desecration posed by the Dakota Access Black Snake to the waters of Lake Oahe, the unsuitability of non-kosher or non-halal food to a Jew or a Muslim is simply a matter of the adherent's belief or faith. The preparations that render food kosher or halal have no actual effect on non-adherents, but mean the difference between following or violating a key principle of religious belief for the adherent. Likewise, only a person adhering to Lakota religious beliefs would perceive that the existence of a crude oil pipeline under Lake Oahe had resulted in a desecration of the waters.

While the instant case is similar to the prisoner cases above, the facts here involve a much more substantial burden to religious exercise. In the prisoner cases, the government coerces the plaintiff into a Hobson's choice because, like the Cheyenne River Sioux Tribe, the prisoner has been deprived of any choice by the government in light of his circumstances. But prisoners lack choice because they have been convicted of a crime and, as a consequence, have forfeited some of their rights. *See Crawford-El v. Britton*, 951 F.2d 1314, 1318 (D.C. Cir. 1991) (noting that prisons may infringe on fundamental rights provided it is in service of a penological objective). The Cheyenne River Sioux Tribe and its members, on the other hand, lack choice because of a series of government actions, some already deemed illegal, intended to restrict the Tribe and its members for the government's purposes, not as a punishment to the Cheyenne River Sioux Tribe or its people. Further, in the process of restricting the Tribe and its members, the United States established a relationship with the Tribe like "a ward to his guardian" (*Cherokee Nation v. Georgia*, 5 Pet. 1 (1831)), promised to protect the Tribe against depredations by outsiders in duly negotiated treaties (11 Stat. 749), and assumed a specific trust duty to protect waters owned by the Tribe in Lake Oahe (*see* P.L. 83-77; *Mitchell*, 463 U.S. at 225). The Corps' authorization of the Dakota Access Pipeline under Lake Oahe not only would coerce the Tribe and its members into an improper Hobson's choice that would constitute a substantial burden on their religious exercise,

but it would do so notwithstanding the Tribe's property right in the water and the Corps' fiduciary duty to protect it.

These facts also distinguish the present case from other cases concerning RFRA challenges to federal land regulations that burdened Indian religious exercise. *See Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207 (9th Cir. 2008). In those cases, although a kind of spiritual contamination was alleged, the regulations at issue did not foreclose religious adherents' ability to practice any part of their religion. Rather, the courts were clear that government action was limited in scope and plaintiffs were left other options to practice the rites at issue, hence their religious exercise was not substantially burdened. *Navajo Nation*, 545 F.3d at 1071 (reasoning that a Forest Service plan to use wastewater on a portion of on off-Reservation mountain considered sacred by tribes and where tribes collected plants and performed ceremonies was not a substantial burden); *Snoqualmie Indian Tribe*, 545 F.3d at 1215 (reasoning a federally licensed hydroelectric plant at an off-Reservation water fall did not substantially burden plaintiffs' religious exercise because the regulation did not prohibit adherents from accessing their sacred site). Those cases, moreover, also concerned sacred sites located on lands owned solely by the federal government and in which in none of the plaintiffs could claim any cognizable property interest. *Navajo Nation*, 535 F.3d at 1064; *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d at 1210. This issue figured critically in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), where the Supreme Court held that it could not vindicate Indian religious adherents' challenge to a government-sanctioned project on the government's own land because to do so would imply in the Indian religious believer "*de facto* beneficial ownership of some rather spacious public property." *Id.* at 453.

Here, the Court does not risk implying in the Tribe or its members an improper *de facto* beneficial ownership of Lake Oahe by the finding that the proposed oil pipeline constitutes a substantial burden on their religious exercise because the Tribe and its members enjoy an *actual* legal ownership interest in the waters of Lake Oahe. And not only that, the water is a trust property for which the United States is bound to act as a fiduciary in the protection of those waters for the Tribe's benefit. *Id.* Further, unlike the plaintiffs in *Navajo Nation*, *Snoqualmie*, and *Lyng*, the resource that the Corps' action is proposed to burden is the only one available to the Cheyenne River Sioux Tribe to practice its religion as the United States has systematically deprived the Tribe of access to other water sources as a function of its more than 200-yearlong campaign to dispossess the Lakota people of their aboriginal lands and resources. Sadly, in light of these facts, the Tribe and its members here are more closely analogous to the prisoners whose only options in the exercise of their religion are closely controlled by the government. *See Warsoldier*, 418 F.3d at 996; *Love*, 216 F.3d at 689-90; *Jackson*, 196 F.3d at 320; *Hunafa*, 907 F.2d at 47; *McElyea*, 883 F.2d at 196; *Hudson*, 538 F. Supp. 2d at 411.

Finally, *Navajo Nation* and the court decisions that followed it, including *Snoqualmie*, are no longer good law. A divided panel of the court in *Navajo Nation* rejected tribal claims that the use of wastewater to create snow for skiers on a mountain held sacred to the Tribe violated RFRA based on an incorrect interpretation of RFRA that cannot be reconciled with the Supreme Court's recent decisions in *Hobby Lobby* and *Holt*. In *Navajo Nation*, the Ninth Circuit majority construed RFRA to do nothing more than reinstate the compelling interest tests for First Amendment claims and took the position that the Tribe's religious beliefs were not burdened by the application of wastewater on the mountains. The majority reasoned that the only effect of the project "is on the Plaintiff's subjective emotional religious experience," and applied the Supreme Court's First

Amendment precedent to conclude that the “diminishment of spiritual fulfillment – serious though it may be – is not a substantial burden on the free exercise of religion.” *Navajo Nation*, 535 F.3d at 1070.

Such reasoning is contrary to the analysis and holdings in *Hobby Lobby* and *Holt*. As the Court there made clear, RFRA provides considerably broader protection to the exercise of religion than the First Amendment’s Free Exercise clause. *Hobby Lobby*, 134 S. Ct. at 2671; *Holt*, 135 S. Ct. at 859. The Court relied on First Amendment cases only to define the minimum required by RFRA and RLUIPA (*Hobby Lobby*, 134 S. Ct. at 2671; *Holt*, 135 S. Ct. at 859) but then undertook to give effect to RFRA’s and RLUIPA’s considerably more expansive protections. *Hobby Lobby*, 134 S. Ct. at 2778; *Holt*, 135 S. Ct. at 862 (noting lower court erred when it “improperly imported” reasoning on substantial burden from First Amendment religious freedom cases as RLUIPA provides “greater protection”).

In so doing, the Court rejected the kind of substantial burden critique relied upon by the Ninth Circuit in *Navajo Nation*. *Navajo Nation* held in relevant part that the desecration of the Navajo Tribe’s sacred mountain, which it relied upon for its essential religious practices, could not constitute a substantial burden because “[t]he only effect of the proposed [government action] is on the Plaintiffs’ subjective, emotional religious experience.” *Navajo Nation*, 535 F.3d at 1070. In short, the court held that the burden imposed upon the Indian’s religious practice was too weakly connected to the government regulation. In *Hobby Lobby* the Court rejected the premise that courts can determine the existence of a substantial burden under RFRA based upon whether it is *reasonable* in light of the government regulation. The Supreme Court emphasized that the real question that RFRA presents is “whether the [government regulation] imposes a substantial burden on the ability of the plaintiff to [act] in accordance ***their religious beliefs***,” not “whether the

religious belief asserted in a RFRA case is reasonable.” *Hobby Lobby*, 134 S. Ct. at 2778 (emphasis in original). Such reasonableness determinations tread too closely to a plausibility inquiry, which is not a judicial function. *Id.* (citing *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969)).

Further, the Ninth Circuit’s notion that a substantial burden cannot arise out of an Indian’s subjective, emotional religious experience is nonsensical. All religious experiences are subjective, emotional experiences. The prisoner diet cases bear this out. Unless one is an observant Jew, the burden of being forced to eat food that is not prepared in a kosher kitchen must seem subjective and emotional, rather than objective and rational. Yet the courts that heard the prisoner diet cases did not apply a test of whether the belief was objective and rational to determine whether it substantially burdened prisoners forced to choose between eating non-kosher food or violating their religious beliefs. *See Jackson*, 196 F.3d at 320; *Hunafa*, 907 F.2d at 47; *McElyea*, 833 F.2d at 198; *Hudson*, 537 F. Supp. 2d at 411. To apply such a test would be to question the validity of keeping kosher or observing halal practices, which the law does not permit. *See Smith*, 494 U.S. at 887; *Hernandez*, 490 U.S. at 699. If the law does not permit such an inquiry into religious beliefs arising from the Abramhamic traditions, then it also cannot permit an inquiry into the validity Native American religious beliefs, even though they may be unfamiliar and foreign to the court. *See, e.g., Ballard*, 322 U.S. at 87 (“The religious views espoused by respondents might seem incredible, if not preposterous, to most people[, b]ut if those doctrines are subject to trial . . . , then the same can be done with the beliefs of any sect.”) Like the Jewish and Muslim prisoners who will violate their religion if forced to eat food that is not prepared consistent with their religious beliefs, the members of their Cheyenne River Sioux Tribe will violate their religion if

they are forced to use ritually impure water for their religious sacraments. These beliefs are neither objective nor rational, but this cannot weigh against them in the RFRA analysis.

Allowing construction and operation of a crude oil pipeline under Lake Oahe renders that water unsuitable for use in Lakota religious rites and hence imposes a substantial burden on the Cheyenne River Sioux Tribe and its members. Consequently, the Army Corps of Engineers must demonstrate that a compelling governmental interest justifies construction and operation of the pipeline.¹² It cannot make this showing.

C. The Corps has no Compelling Interest in the Construction of the Dakota Access Pipeline

The Corps' grant of permission to Dakota Access to construct and operate an oil pipeline under Lake Oahe constitutes a substantial burden on the Tribe's and its members' religious exercise, therefore, "the burden [of strict scrutiny] is placed squarely on the [United States Army Corps of Engineers]." *O Centro*, 546 U.S. at 429. As a result, the Corps must prove that placing the crude oil pipeline under Lake Oahe "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(b). "Requiring a [government] to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

The compelling governmental interest inquiry in the RFRA context is a "focused" one that requires courts to "look beyond broadly formulated interests justifying the general applicability of government [regulations]." *O Centro*, 546 U.S. at 431-32. The test "requires the Government to

¹² When a plaintiff moves for preliminary injunction alleging a RFRA violation, the burden shifts to the government once the movant has established a substantial burden on their sincerely held religious beliefs, notwithstanding plaintiffs general burden of demonstrating likelihood of success on the merits. *O Centro*, 546 U.S. at 428

demonstrate that the compelling interest test is satisfied through application of challenged law ‘to the person’ – the particular claimant whose sincere exercise of religion is being substantially burdened.” *Id.* at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)). Therefore, the inquiry here requires the Corps to prove, not just that it has a compelling governmental interest in authorizing the construction and operation of a crude oil pipeline to carry oil from North Dakota to Illinois, but that it has a compelling governmental interest in authorizing the pipeline under the waters of Lake Oahe that affect the religious practice of the Cheyenne River Sioux Tribe and its members.

The Corps cannot meet this heavy burden. The Corps and Dakota Access have already advised this Court of the interests that they believe the pipeline serves, including the general policies promoted by the various statutory schemes that govern the pipeline (ECF No. 21 at p. 43 (citing *Sierra Club v. U.S. Army Corps of Eng’rs*, 990 F. Supp. 3d 9, 43 (D. D.C. 2013))), general transportation safety concerns, and general economic benefits (ECF No. 22 at p. 36-37). Such generalized interests do not satisfy a focused inquiry explaining why crude oil must be carried underground, crossing under the waters of Lake Oahe. Less general reasons for siting the Dakota Access Pipeline under the waters of Lake Oahe exist in the July 25, 2016 Environmental Assessment (“EA”) that accompanied the Corps’ granting of permits to Dakota Access under Section 408 of the Rivers and Harbors Act, 33 U.S.C. § 408, but all these demonstrate is that this particular method for transporting oil cross country was marginally more efficient, marginally less expensive, or marginally safer than truck transport or rail transport; and marginally shorter and marginally less impactful to wildlife, the environment, and human populations.¹³ Governmental

¹³ The EA demonstrates that it rejected a crossing upstream of the non-Indian community of Bismarck, North Dakota in light of “close proximity to several wellhead source water protection areas that were identified and avoided in order to protect areas that contribute water to municipal water supply wells,” while it ignored any impact upon Indian waters. ECF 6-51 at pp. 8-11.

interests that operate on the margins are not sufficient to meet the test. *See Holt*, 135 S. Ct. at 862 (noting that courts considering the government’s claim of a compelling governmental interest must “scrutinize” harm alleged by the government and “‘look to the marginal interest in enforcing’ the challenged government action in that particular context”) (quoting *Hobby Lobby*, 134 S. Ct. at 2779); *see also O Centro*, 546 U.S. at 431. These generalized, marginal governmental interests simply do not meet the government’s high burden.

D. Even if the Corps Had a Compelling Interest Here, Construction of the Pipeline Under Sacred Waters Owned by the Cheyenne River Sioux Tribe is Not the Least Restrictive Means of Furthering That Interest

As the Corps cannot show a compelling governmental interest as applied specifically to siting of the Dakota Access Pipeline under Lake Oahe, the Court may end its analysis here. However, even if the Corps had met its burden, it could not show that constructing and operating the oil pipeline under Lake Oahe represents the least restrictive means of furthering that interest. The burden of proving that the government action at issue represented the least restrictive means is an “exceptionally demanding” standard that “requires the government to ‘show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.’” *Holt*, 135 S. Ct. at 864 (quoting *Hobby Lobby*, 134 S. Ct. at 2780). If a less restrictive means exists, “the Government must use it.” *Id.* (internal citation omitted).

Significantly, where the government has at its disposal actual less restrictive alternatives, it cannot meet its burden. *See Hobby Lobby*, 134 S. Ct. at 2781-82; *O Centro*, 546 U.S. at 433; *see also McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 476 (5th Cir. 2014) (“The very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could

exist.”) In the present case, the Corps has set forth a litany of alternatives in its July 25, 2016 EA that would not burden the Tribe’s religious exercise. Dakota Access could transport its oil by truck or by rail instead of an oil pipeline. Dakota Access could have routed its pipeline to avoid Lake Oahe altogether. *See* ECF No. 6-51 at pp. 5-8. Significantly, the government planned to explore these alternatives in detail as set forth in its December 4, 2017 Memorandum stating its intention to prepare an Environmental Impact Statement and its subsequent Notice of Intent to Prepare an EIS. ECF No. 65-1 at ¶ 12; 82 Fed. Reg. 5544 (Jan. 18, 2017) (noting Army’s determination “that a decision on whether to authorize the pipeline to cross Lake Oahe at the proposed location merits additional analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation . . .”). The government however abandoned that process in favor of the present easement that violates the Tribe’s religious exercise.

Because the Corps had at its disposal actual less restrictive alternatives, it cannot prove the Lake Oahe alternative that would burden the Tribe’s and its members’ religious exercise is the least restrictive alternative. Consequently, there is no question that the Tribe has proven that it is likely to succeed on the merits of its RFRA claim.

II. The Remaining Factors All Weigh In Favor of Granting Temporary and Preliminary Injunctive Relief

Proving likelihood of success on the merits is sufficient standing alone to justify a preliminary injunction and restraining order on behalf of the Tribe and its members. *See Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) (stating that in RFRA cases “the likelihood of success on the merits will often be the determinative factor”); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (same). Nevertheless, the remaining factors governing temporary and preliminary relief fall in the Tribe’s favor.

A. The Cheyenne River Sioux Tribe will suffer irreparable harm absent injunctive relief

The Corps is the Tribe's trustee, bound by an obligation of the highest responsibility to protect the Tribe's interest in the waters of Lake Oahe, and yet it has authorized Dakota Access to construct and operate an oil pipeline under its sacred waters that will render those waters unsuitable for use in their holy sacraments. In its more than 200 yearlong history of interaction with the Lakota people, the United States has acted over and over again to snuff out the spark of the Lakota religion. In its insatiable greed for the Lakota land, the United States has stolen Lakota sacred sites like the Black Hills and restricted the Tribe's access to natural resources. The United States has implemented explicit policies intended to destroy Lakota religion, stealing Lakota children and giving them to Christian missionaries and criminalizing religious practice. Over the past 40 years the Tribe and its members have begun to revitalize their religion and practice it proudly in the light of day. After all this, the Lakota people are once again facing an existential threat to their religion—the Dakota Access Pipeline, which, if allowed to desecrate the Tribe's sacred waters, will steal from them once and for all the sacred faith that war, genocide, theft, and poverty has not been able to extinguish throughout this centuries-long struggle. Standing alone, this constitutes plain irreparable harm.

But also, this injury to the Tribe and its members violates their constitutional and civil rights as codified in RFRA. In this Circuit it is clear that “the loss of constitutional freedoms, **‘for even minimal periods of time, unquestionably constitutes irreparable injury.’**” *Mills v. Dist. of Columbia*, 517 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 372 (1976)) (emphasis added); see also *Rigdon v. Perry*, 962 F. Supp. 150 (D. D.C. 1997) (violation of First Amendment religious expression rights constituted irreparable injury); *Simms v. Dist. of Columbia*, 872 F. Supp. 2d 90, 104 D. D.C. 2012) (violation of Fifth Amendment rights constitutes

irreparable harm); *Korte*, 735 F.3d at 666 (the loss of RFRA-protected freedoms “constitutes irreparable harm”); cf. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006) (“[W]here a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination.”)

Further, to find irreparable harm under RFRA, a threatened harmful action is sufficient. In *O Centro*, the Supreme Court upheld a grant of preliminary injunction against the government to prevent enforcement of a drug law that violated a small sect’s religious exercise. 546 U.S. 418. The facts in front of the trial court were not that of an actual prosecution, but a mere threat of prosecution. The trial court found that “[a]lthough the United States has not filed any criminal charges . . . the government has threatened prosecution.” *O Centro Espirita Beneficent Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1240 (D. N.M. 2002). As in *O Centro*, the matter before the Court poses a clear threat to the Tribe’s and its member’s free exercise of religion. The government has granted the easement and Dakota Access has begun to drill. This Court cannot wait until the harm begins to issue equitable relief. When the free exercise of religion is at stake, a threat certain to that right is enough to constitute irreparable harm.

B. The Balance of Harms Weighs in the Cheyenne River Sioux Tribe’s Favor

The United States Army Corps of Engineers will suffer no injury from a temporary restraining order or a preliminary injunction. Indeed, between September 9, 2017 and January 24, 2017, the Corps affirmatively supported the indefinite suspension of the granting of the easement and even committed itself on December 4, 2016 to preparing in full an Environmental Impact Statement, a process that takes an agency at least 360 days. *E.g.*, *Jamul*, 837 F.3d at 965. Although

Dakota Access has repeatedly, but inconsistently,¹⁴ complained of economic harms arising from delay in this case, the Cheyenne River Sioux Tribe has demonstrated that it will suffer irreparable harm if Dakota Access constructs and operates its crude oil pipeline under the waters of Lake Oahe. It is well settled that mere economic harm is not itself an irreparable harm, and thus plainly cannot outweigh an irreparable harm in this calculus. *See, e.g., Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Further it is significant that the Tribe and its members do not request relief that prohibits Dakota Access from having a crude oil pipeline that carries oil from North Dakota to Illinois; rather the Tribe only argues that the siting of this pipeline through the sacred waters of Lake Oahe must be enjoined. If the oil company wishes to reroute its pipeline away from the Tribe's sacred waters, an alternative that the Corps recommended in both its December 4, 2016 Memorandum stating its intent to prepare an EIS for this pipeline and its Notice of Intent to prepare EIS. ECF No. 65-1 at ¶ 12; 82 Fed. Reg. 5544 (Jan. 18, 2017). Likewise, the Tribe and its members do not request relief that would prohibit all pipelines crossing through its territories or its sacred waters. Indeed the Tribe has tolerated the construction and operation of natural gas pipelines under Lake Oahe because these natural gas pipelines are not the Black Snake of Lakota prophecy and do not burden Tribal religious practice.

Finally, where there is a strong likelihood of success on the merits, “the balance of harms ‘normally favors granting preliminary injunctive relief’ because ‘injunctions protecting First

¹⁴ Dakota Access has repeatedly advised the Court that the failure to have the project in operation by January 1, 2017, would threaten the viability of the project. ECF No. 22-1 at ¶ 79. Yet, Dakota Access spokespeople have publicly repudiated those statements and denied that delay of the pipeline would cause economic harm to the company. ECF No. 78-5 at pp. 42.

Amendment freedoms are always in the public interest.” *Korte*, 735 F.3d at 666 (quoting *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012)).

C. The Public Interest Favors Granting an Injunction

As demonstrated by the overwhelming support that the Cheyenne River Sioux Tribe and the Standing Rock Sioux Tribe have received from every day private citizens across the world, environmental and social justice nonprofits, legal advocacy organizations,¹⁵ members of Congress, the Environmental Protection Agency, the Department of Interior, and American Council on Historic Preservation (Ducheneaux Decl. Exs. B - E), and the Army Corps itself (ECF 65-1), there can be no doubt that the public interest favors granting the instant injunction. Moreover, “there is undoubtedly also a public interest in ensuring that the rights secured under . . . RFRA are protected.” *Tyndale*, 904 F. Supp. 2d at 130. Indeed, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Hobby Lobby*, 723 F. 3d at 1147; *O Centro Espiriat Benficienta Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) (en banc), *aff’d* 546 U.S. 418 (2006) (“There is a strong public interest in the free exercise of religion.”)).

¹⁵ *Stop the Bakken Pipeline*, Sierra Club, Iowa Chapter (2017), <http://www.sierraclub.org/iowa/stop-bakken-pipeline> (last visited Feb. 8, 2017) (Iowa farmers oppose pipeline); Jack Healy, *North Dakota Oil Pipeline Battle: Who’s Fighting and Why*, New York Times (Aug. 26, 2016), available at https://www.nytimes.com/2016/11/02/us/north-dakota-oil-pipeline-battle-whos-fighting-and-why.html?_r=1; Brian Roewe, *Faith groups express Dakota Access Pipeline opposition to Obama*, National Catholic Reporter (Nov. 18, 2016), <https://www.ncronline.org/blogs/eco-catholic/faith-groups-express-dakota-access-pipeline-opposition-obama> (religious leaders oppose pipeline); Kiah Collier, *Opposition to Dakota Access pipeline boils over in Austin*, The Texas Tribune (Nov. 15, 2016), available at <https://www.texastribune.org/2016/11/15/opposition-dakota-access-pipeline-boils-over/> (Texans march against pipeline); Derrick Broze, *19 Members of Congress Call On Obama to Halt Dakota Access Pipeline*, MintPress News (Oct. 5, 2016), <http://www.mintpressnews.com/19-members-of-congress-call-of-obama-to-halt-dakota-access-pipeline/221152/> (19 members of Congress oppose pipeline).

In addition, the documented history of protests at or near the pipeline construction site indicate that violent clashes between tribal members, protesters and police/private militia forces are likely to occur should an injunction not be issued to preserve the status quo pending a hearing and decision on the present motion.

CONCLUSION

As set forth in detail herein, the Cheyenne River Sioux Tribe respectfully urges this Court to grant its motions for temporary restraining order and for a preliminary injunction.

Dated: February 9, 2017

CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2017, a copy of the foregoing was filed electronically with the Clerk of the Court. The electronic filing prompted automatic service of the filing to all counsel of record in this case who have obtained CM/ECF passwords.

/s/ Nicole E. Ducheneaux

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

-----X

STANDING ROCK SIOUX TRIBE,

Plaintiff

v.

Civil Action 16-1534.

U.S. ARMY CORPS OF ENGINEERS,

Defendant

-----X

Washington, D.C.
Tuesday, February 28, 2017
11:00 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

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1 P R O C E E D I N G S

2 THE DEPUTY CLERK: This is Civil Action 16-1534.
3 Standing Rock Sioux Tribe versus United States Army Corps
4 of Engineers, et al.

5 Would counsel please approach the lecturn and
6 identify yourselves for the record.

7 MS. DUCHENEAUX: Good morning, Your Honor. My
8 name is Nicole Ducheneaux, on behalf of the Cheyenne River
9 Sioux Tribe, and I'm here with my partners, Conly Schulte
10 and Joe Messineo.

11 THE COURT: Okay. Good morning.

12 Do we have Mr. Hasselman on the phone?

13 MR. HASSELMAN: Yes, Your Honor, I'm here in
14 Seattle. Thank you.

15 THE COURT: There is no other plaintiffs' counsel
16 here. Is that correct?

17 MS. DUCHENEAUX: Yes, Your Honor.

18 THE COURT: And for the defense?

19 MR. SCHIFMAN: Good morning, Your Honor. I'm Ben
20 Schifman, for the Army Corps of Engineers. I'm joined by
21 my colleagues, Erica Zilioli and, from the Army Corps,
22 Millie Creitzman (ph).

23 MR. DEBOLD: Good morning, Your Honor. David
24 Debold, appearing on behalf of Dakota Access. With me at
25 counsel table are Bill Scherman, Jason Fleischer, and Bob

1 Comer.

2 THE COURT: Welcome to all of you.

3 To remind the public of where we now stand -- and
4 I know people are present for this hearing, and welcome to
5 all of you -- that on February 13th, to remind everyone, I
6 held a hearing on the Cheyenne River Sioux Tribe's
7 application for a temporary restraining order.

8 The sole claim in the TRO was that the
9 introduction of oil into the pipeline that ran underneath
10 Lake Oahe would constitute a violation of the Religious
11 Freedom Restoration Act, RFRA, because of the presence of
12 the oil in the pipeline, whether it touches the water or
13 not, would render the water impure for certain religious
14 rights that the tribe wished to engage in.

15 At the conclusion of the hearing on February 13,
16 I denied the TRO on the ground that the harm was not
17 imminent because the oil was not going to be immediately
18 introduced into the pipeline. And in fact, Dakota Access
19 has been providing weekly updates at my instruction
20 regarding the introduction of oil into the pipeline, and
21 they provided one just yesterday as well.

22 In any event, in my ruling on February 13th, I
23 held that because a TRO is an extremely expedited
24 proceeding -- in fact, in that case the application was
25 filed on February 9th, and the opposition was filed the

1 morning of February 13th, and the hearing on the afternoon
2 of February 13th -- it seemed more prudent to let the
3 parties more fully brief the question in the context of a
4 preliminary injunction, which would also give me an
5 opportunity look more deeply and fully into the issues.
6 And so that is what has happened.

7 Since we were last here, the Corps and Dakota
8 Access have each filed oppositions to the preliminary
9 injunction motion filed by Cheyenne River, and Cheyenne
10 River has filed a reply, as has Standing Rock.

11 We will now have oral argument on the motion for
12 preliminary injunction, which again is based on precisely
13 the same arguments as the application for temporary
14 restraining order, namely that the oil in the pipeline
15 constitutes a violation of RFRA.

16 I will not be issuing an oral ruling today.
17 Because of the complexity of the questions involved here, I
18 will issue a written opinion, and I would hope to issue
19 that within a week of today's hearing.

20 At the conclusion of the hearing, I would also
21 like to go through, with the attorneys, some housekeeping
22 matters on pending motions and make sure that -- although
23 our attention is focused on the hearings and the motion
24 that is teed up today, I want to make sure that everyone is
25 clear on where things stand on the other motions.

1 All right. With that said, we will begin with
2 Ms. Ducheneaux, whenever you are ready.

3 MS. DUCHENEAUX: Thank you, Your Honor, good
4 morning.

5 Putting first things first Your Honor, the
6 defendants have argued that the Cheyenne River Sioux
7 Tribe's challenge under RFRA is barred by the doctrine of
8 laches. This argument fails for two reasons.

9 First, their argument is based on the claim that
10 the tribe did not properly raise their religious concerns
11 in the administrative process.

12 While we disagree with that strenuously;
13 factually, that argument itself is beside the point. The
14 RFRA claim is not an APA claim. It is a separate cause of
15 action brought under a separate waiver of the government's
16 immunity at section -- subsection C of the RFRA. The tribe
17 was not required to do anything in the administrative
18 process in order to bring this RFRA claim.

19 In addition to that, the RFRA claim was right on
20 time. The Court and the parties have been clear throughout
21 this proceeding that the harm would occur upon construction
22 at the earliest of the pipeline, and the Cheyenne River
23 Sioux Tribe brought their claim timed precisely with that
24 occurrence.

25 In addition to that, to the extent that there is

1 some requirement, which we believe that there is not, that
2 the tribe must have raised their religious concerns in the
3 administrative proceeding, in fact, the tribe has been
4 raising those religious concerns in the administrative
5 proceeding since 2015, which we've shown in the record.

6 And even the administrative cases -- and let me
7 be clear, all of the cases that they have raised which
8 showed that we should have done this or that in the
9 administrative proceeding are cases in which the claimant
10 was pursuing under the APA.

11 THE COURT: Let me ask you, it is an
12 interesting -- laches is an interesting question, and the
13 defense raises it both as a substantive bar to your
14 proceeding. But if we look at it as a question of going to
15 irreparable harm, a preliminary injunction factor, did the
16 Cheyenne River ever communicate to the Corps or the Dakota
17 Access its belief that the presence of oil under the
18 lakebed, absent any threat of rupture, would render the
19 water spiritually or ritually impure and, therefore, impose
20 a substantial burden.

21 It seems to me it is a different question from
22 saying, "We don't want the pipeline, we think it
23 contaminates the water with rupture," but was there the
24 specific RFRA action about the oil itself absent rupture?

25 MS. DUCHENEAUX: Your Honor, I would direct your

1 attention to the supplemental document that we filed of
2 Steve Vance, his declaration, which is a portion of a
3 transcript of a meeting that he attended with the regard to
4 the National Historic Preservation Act issues that arose in
5 this case in Niobrara, Nebraska, in which Mr. Vance did
6 discuss those things.

7 In Mr. Vance's way, he did raise the notion that
8 this river, the Mineshoshe -- in the Lakota language, which
9 is now Lake Oahe -- is sacred to the Lakota people, and
10 that the presence of the pipeline would produce a harm to
11 them.

12 I would note that Mr. Vance, who expresses this
13 in his declaration upon which we based our briefing, noted
14 that there are some difficulties between expressing what is
15 contained in the Lakota faith, which is tied to the Lakota
16 language, and translating those things to English.

17 Did he say precisely what is at issue here in
18 that meeting? No. But even the cases that the Corps and
19 Dakota Access rely upon note that you have to reasonably
20 notice the agency of your concern. It does not say that
21 you have to advise them of a specific cause of action under
22 a specific statute that you may later bring.

23 They were on notice that there were religious
24 concerns with the river and this pipeline. And they're
25 certainly not prejudiced today. We've operated under the

1 presumption that the harm would not occur until
2 construction happened. It wouldn't have mattered if we had
3 sued on this back in August versus suing on this now. We
4 would still be here today, two weeks after the granting of
5 the easement on this particular issue.

6 THE COURT: Let's talk for a minute about the
7 beliefs and the claim here about the oil. And again, as we
8 said last time, and you've made clear, that the Lakota
9 people believe that the crude oil that will flow through
10 the pipeline is the black snake which has long ago been
11 prophesied to harm or devour the Lakota people. And we
12 talked last time that the oil in the pipeline desecrates
13 the water and renders it impure, even if it doesn't rupture
14 and literally contaminate the water. That is the position
15 of plaintiffs, correct?

16 MS. DUCHENEAUX: Yes.

17 THE COURT: My question here is, the pipeline
18 itself doesn't even touch the water here. In other words,
19 this is not a question that the pipeline goes through the
20 water, and the pipeline touches the water, and that the oil
21 running through pipeline therefore contaminates the water.

22 In this case the pipeline is drilled from land on
23 one side of the river, under the lakebed -- the lake or the
24 river, under the bed, and then emerges on the other side
25 again through land. So the pipeline itself doesn't even

1 touch the water, right?

2 MS. DUCHENEAUX: Yes, that's true.

3 THE COURT: So tell me how there is a
4 contamination under those facts.

5 MS. DUCHENEAUX: Thank you, Your Honor. I think
6 that's a good question. That gives me an opportunity to
7 distinguish between what would be an actual literal
8 environmental contamination of the water. Those things
9 have been raised in both tribes' summary judgment briefs,
10 and those are very serious concerns that threaten the
11 tribes' existence.

12 THE COURT: Again, that is largely under the
13 National Environmental Protection Act.

14 MS. DUCHENEAUX: Yes, it's under a completely
15 different statutory framework wholly separate from this
16 claim.

17 This claim ties into and is focused upon what the
18 beliefs of these people are. It is the belief, and this
19 has not been disputed by any defendant here, that the
20 existence of this crude oil pipeline under sacred waters of
21 Lake Oahe will ritually contaminate that for use in their
22 sacred sacraments.

23 So questions about, well, how does this work
24 exactly, or what is the contamination, those in fact are
25 questions that go to the sincerity of the belief, which no

1 one has actually had the gall to challenge in this case.
2 To the extent that they have suggested some questions about
3 it, they have done it in a backdoor way which I don't think
4 should be considered.

5 But as the Supreme Court has said over and over
6 again, those kinds of questions are about the plausibility
7 of belief, and that's an area into which the Corps should
8 not tread. A man may not be put to proof of his beliefs.

9 THE COURT: I think that it is not that it
10 shouldn't tread, it should tread lightly.

11 MS. DUCHENEAUX: That's right.

12 THE COURT: I agree that is certainly what the
13 law says. So let me pursue that a little bit further.

14 So the Dakota Access pipeline, where it runs
15 under the lake, how far in miles is that from, in river
16 miles, from the northern edge of the Cheyenne River's
17 reservation?

18 MS. DUCHENEAUX: I think it is approximately
19 between 50 and 70 miles.

20 THE COURT: Isn't there another crude oil
21 pipeline that runs about seven and a half miles north of
22 the Dakota Access pipeline?

23 MS. DUCHENEAUX: Yes there is, that is correct.

24 THE COURT: So I guess what I'm asking here is:
25 Your argument is that the Dakota Access pipeline, 50 to

1 70 miles away, contaminates the water, making it ritually
2 impure; but this other crude oil pipeline which is 57 to 77
3 miles away doesn't?

4 MS. DUCHENEAUX: Yes, Your Honor. And there is a
5 strong factual distinction there. And that is that that
6 other pipeline is outside of what is considered to be Lake
7 Oahe, which is what is illegally Lake Oahe.

8 In the 1950s, when the Cheyenne River Sioux and
9 the Standing Rock Sioux reservations were flooded, as we
10 know, to make life easier downstream in St. Louis for
11 people who had built their homes unfortunately on a
12 floodplain, they flooded hundreds of thousands of acres of
13 the Cheyenne River Sioux Tribe. And in so doing, they also
14 defined -- they changed the river and defined a new area
15 that the Cheyenne River considers to be part of the
16 spiritual territory of this river, and that is Lake Oahe.

17 The government defined that, and we have accepted
18 that. And the Lakota adherence who use this waters have
19 accepted the -- it took them time, but they did accept the
20 reservoir, and they consider that to be the area of concern
21 for the tribe. So they will not be concerned with things
22 that exist outside of the Lake Oahe project area.

23 THE COURT: So how far does that run down the
24 area of concern in terms of being situated near the
25 Cheyenne River Reservation?

1 MS. DUCHENEAUX: We have submitted a map that
2 shows the Lake Oahe project area. It goes from Fort Peer,
3 which is down below the Cheyenne River Sioux Reservation,
4 up to just below Mandan.

5 THE COURT: How many river miles does that run
6 approximately?

7 MS. DUCHENEAUX: I'm not 100 percent sure. It's
8 quite large.

9 THE COURT: A couple of hundred?

10 MS. DUCHENEAUX: Yes, I think that's true. It's
11 quite a large reservoir. And most of it, as the maps
12 demonstrate, most of them about these two Indian
13 reservations, this is their territory. The United States
14 government has seriously dispossessed our people, and they
15 have defined an area that is our area, and that includes
16 Lake Oahe.

17 THE COURT: All right. Let's move to another
18 subject, if I might, which is: We talked a little last
19 time, and you've had a chance to do some more work on this,
20 about distinguishing this case from the case of Lyng versus
21 Northwest Indian Cemetery Protection Association, the 1988
22 Supreme Court case in which the forest service cut down
23 trees in a grove that was sacred and significant in
24 practicing the tribe at issue's rights.

25 Why isn't this really the same case as Lyng?

1 MS. DUCHENEAUX: Your Honor, it is our position
2 that it is very different. As we set forth in our reply
3 brief, the United States Supreme Court has demonstrated why
4 pre-Smith First Amendment cases have less applicability
5 today in light of the enactment of RFRA and the subsequent
6 amendment of the RLUIPA.

7 And the reason is that what Congress intended to
8 do when it enacted RFRA was to free, essentially, this new
9 free exercise, religious exercise analysis from the prior
10 First Amendment authorities.

11 THE COURT: Would you agree that Lyng would bar
12 you absent -- that if Lyng were still good law, it would
13 bar you here?

14 MS. DUCHENEAUX: You know, it is hard to say. If
15 there were no RFRA, if there were no RLUIPA, I don't think
16 we would be here. But these claims are --

17 THE COURT: Wasn't it pretty clear that RFRA and
18 its legislative history made clear that it wasn't
19 overruling Lyng?

20 MS. DUCHENEAUX: Yes, that's exactly right. And
21 that was in 1993. And as the defendants have suggested,
22 there was discussion on intending to preserve Lyng. But as
23 we made clear in our reply briefing, Congress saw fit,
24 seven years later, again to amend RFRA by enactment of the
25 RLUIPA. And the substance of that enactment was very

1 significant to this.

2 It was to say that it completely extracted from
3 that definition reference to First Amendment claims. And
4 what those Supreme Court said in Hobby Lobby was, that
5 was -- made it crystal clear that Congress's intent was to
6 free up the courts to consider things that -- to consider
7 this broader protection that was afforded by RFRA and
8 RLUIPA.

9 THE COURT: Then you have Navajo Nation, the
10 Ninth Circuit case in 2008, which was about use of
11 artificial snow on a mountainside that was again deemed
12 to -- was argued by the tribe at issue to render their
13 ability to practice their rights impure.

14 So why isn't this case just like Navajo Nation?

15 MS. DUCHENEAUX: For one thing, Your Honor, one
16 of the things that Navajo Nation did was, it relied very
17 heavily on the free exercise First Amendment cases,
18 Sherbert and Verner. And we know now, in Hobby Lobby and
19 Holt, that the Court has said, and particularly in Holt,
20 that to the extent that you are relying on these more rigid
21 formulations of what constitutes a substantial burden that
22 are contained in these free exercise cases that Hobby Lobby
23 and Holt have said do not necessarily guide courts today,
24 that that may be wrong.

25 And I think that that's true, that the Court's

1 reliance on Sherbert v. Verner, this dichotomy that the
2 defendants have set forth, that you either need to have a
3 sanction or foregoing of a government benefit, that that
4 dichotomy is in fact wrong.

5 So to the extent that Navajo Nation did that, it
6 was not correct, and Hobby Lobby and Holt have moved beyond
7 that.

8 THE COURT: But the question, if you are looking
9 at a government's ability to take actions on its own land,
10 whether it be -- particularly in regard to natural land.
11 So we're talking about, the government wanted to stock a
12 lake with fish, to cut down trees to install shelters he
13 for hikers or campers, where are we going to draw -- and
14 each of those acts was claimed by a group -- obviously a
15 number of these are Indian tribe cases, but certainly not
16 confined to that, but some other group who claimed that it
17 infringed or burdened their religious beliefs in the
18 specific land at issue, where do we draw the line?

19 MS. DUCHENEAUX: A clear line exists already
20 here, Your Honor, and this is one of the key primary
21 differences that we discussed at the last hearing, is that
22 the tribe actually does have a right, a recognized right,
23 to the flow of that river which indisputably exists up
24 where that pipeline has gone in. It may be a usufructuary
25 right, but as we discussed in our briefing, for Indian

1 usufructuary rights, what that suggests is that the
2 government is the trustee.

3 But more than that, Your Honor, the Army Corps of
4 Engineers is already committed to considering tribal
5 concerns in Lake Oahe in their own promulgated rule, the
6 master manual, which the Eighth Circuit determined was
7 binding on the Corps.

8 In Lyng, the Indian religious adherence
9 unfortunately had no more right to use that land than
10 anybody else.

11 THE COURT: But in this case -- and I see your
12 distinction, and that's, I think, a wise one for you to try
13 to draw here. But in this case, as we talked about earlier
14 on the facts, it's not the use of the water that Dakota
15 Access is -- where the Dakota Access is drilling or where
16 the government is -- Again, they're not touching the water.
17 They're going from land on one side, under the bed, to
18 another side.

19 So can you claim a property interest in the land
20 as well as the water?

21 MS. DUCHENEAUX: The distinction is this, Your
22 Honor, that we're claiming a contamination, although -- you
23 know, although what we're talking about here is not an
24 actual physical contamination, what we're talking about is
25 a contamination of the water.

1 And unless they had questioned -- unless the
2 government's question was, "is this really contaminating
3 the water," which it's not, you know, then we do have a
4 right, the tribe does have a right to -- a religious right
5 to the waters.

6 THE COURT: But on that same question, when you
7 speak of reserve water rights in the Winters case, which I
8 know you talk about, has any court ever held that that
9 includes the right to ritually pure water; in other words,
10 as opposed to simply drinkable potable water.

11 MS. DUCHENEAUX: Your Honor, no, no court has
12 ever had an opportunity to address that question. But in
13 my briefing, I do refer you to the United States Supreme
14 Court decision in Arizona v. California, in which they said
15 very clearly that when Congress created these reservations,
16 when the United States created Indian reservations, that
17 they created them knowing that water is essential to life.

18 And we know that the purposes of reservations
19 include irrigating your crops and making sure that you have
20 salmon to fish, but there is no question that the purpose
21 of a reservation is also to have a full existence.

22 The United States, although they may have wanted
23 to, when they created these reservations they had to
24 contemplate a spiritual life for the people that lived
25 there, and understand that the water is essential to that

1 life and existence. That is a purpose of the reservation,
2 one of the purposes has to be the religious life of the
3 people.

4 THE COURT: When you speak of the water from Lake
5 Oahe as the only water that you can use in the tribe's
6 religious ceremony, is that for logistical or sacramental
7 reasons?

8 MS. DUCHENEAUX: I would direct you to Exhibit A
9 of my declaration in the original opening briefing on this,
10 which is a document created by the U S. Army Corps of
11 Engineers in 2005, when the Cheyenne River Sioux Tribe was
12 suffering from a terrible drought that was threatening the
13 intake, the sole water intake for the water that the people
14 use in this reservation that is the size of the state of
15 Connecticut.

16 It was an emergency situation. They were about
17 to lose that water. The Corps came and submitted a report
18 that demonstrated that there is not another source of clean
19 unadulterated water on the Cheyenne River Sioux
20 Reservation.

21 The Cheyenne River, which forms the southern
22 border of the reservation, is absolutely contaminated with
23 arsenic tailings, mine tailings from the Black Hills, and
24 the reservation is unsuitable for wells because there's
25 hard minerals.

1 THE COURT: But why is the -- I'm sorry, you said
2 the Cheyenne River runs the southern border.

3 MS. DUCHENEAUX: Yes.

4 THE COURT: But the contamination in your case is
5 the black snake of oil.

6 MS. DUCHENEAUX: Uh-huh.

7 THE COURT: So what is the contamination?

8 Even if it is, let's say, impure to drink, why
9 can't you use it for religious ceremonies?

10 MS. DUCHENEAUX: Your Honor, what is not
11 contained in our briefings, if there were crude oil in Lake
12 Oahe, it would make it impure for us to use and people to
13 use for their sacred ceremonies. The tribe doesn't -- it
14 has difficult -- or it cannot use physically contaminated
15 water or spiritually contaminated water.

16 THE COURT: So you are saying that the water of
17 Lake Oahe is physically uncontaminated but would be
18 spiritually contaminated by the pipeline oil.

19 MS. DUCHENEAUX: That's exactly right.

20 THE COURT: And the Cheyenne River is not
21 spiritually contaminated but physically contaminated.

22 MS. DUCHENEAUX: I do know that it is physically
23 contaminated. I actually couldn't tell you what spiritual
24 contaminations there may be existing on that river.

25 THE COURT: But what is the -- but tell me the

1 basis -- I'm not questioning the belief, but I'd just like
2 to know what it is. What is the belief that you can't use
3 the Cheyenne River for religious exercises?

4 MS. DUCHENEAUX: Your Honor, my understanding is
5 that it's because it is full of arsenic. If it would be
6 poisonous to drink, it would likewise be poisonous for
7 religious ceremonies.

8 We've focused on the Ahnapee ceremony which uses
9 the water in a way that diffuses it into the air, but other
10 ceremonies of the Lakota which are just as important
11 concerned by drinking water also.

12 THE COURT: You've kindly and very responsibly
13 answered all my questions. If you have a couple of minutes
14 you want to wrap up with an argument, I'll let you do it,
15 and I'll also give you a rebuttal when I'm done with
16 questioning the other folks.

17 MS. DUCHENEAUX: Thank you, Your Honor.

18 Moving back to Hobby Lobby and Holt, which I
19 think are such powerful, strong, simple statements of what
20 constitutes a substantial burden, that they have said
21 simply, the substantial burden question is whether the
22 government action requires the religious adherent to
23 seriously violate their religion. Notwithstanding
24 discussions about Sherbert and Verner, it is clear that
25 this more simple formulation is what the law is today.

1 Looking at the cases, many cases fall into the
2 sanction or the foregoing of public benefit case, but those
3 are clearly not the only ways that the Court can find a
4 substantial burden, and they aren't the only ways that the
5 Court finds a substantial burden, particularly in cases
6 including one that we cited in our briefing, *Native*
7 *American Church v. Webber*, which was a prison case in which
8 the court held that it was a substantial burden when a
9 prison deprived a prisoner of access to tobacco.

10 And there are a number of other cases in which
11 courts have held that depriving a religious adherent of
12 access to something that they need for their religion, even
13 though there may be no sanction or foregoing of government
14 benefits, that that constitutes a substantial burden.

15 Those things happen a lot in prison cases which
16 fall under the RLUIPA. As we know, RLUIPA amended RFRA in
17 such a way that those principles apply to cases proceeding
18 under RFRA. And it provides a good example for us because,
19 in those prison cases, those are circumstances in which the
20 federal government -- a substantial burden has been found
21 where there the federal government is using its own
22 property, which I think is particularly applicable here.

23 In light of those arguments, we believe that it
24 is very clear that *Lyng* does not offer us a good model
25 anymore. It includes a kinds of weighing and balancing

1 that Hobby Lobby and Hold have found impermissible. In
2 those cases there was no there was no property right of the
3 Indians involved, and no preexisting commitment on the part
4 of federal government to --

5 THE COURT: But you would agree that if you drew
6 the line and said the distinction with Lyng is -- and my
7 hypothetical was, here the tribe has property interest in
8 the land. Would you agree that if the tribe didn't have
9 such interest, that Lyng would govern and you would be out
10 of luck?

11 MS. DUCHENEAUX: If the tribe had no property
12 interest?

13 THE COURT: Yes.

14 MS. DUCHENEAUX: I think that it is possible. I
15 wouldn't go so far as to -- I would certainly wish to argue
16 to preserve a tribal right. But I think that the clear
17 distinction here is the tribe's undisputed interest in the
18 waters.

19 And so the tribal use that a substantial burden
20 exists in this case, and having shown that, the burden
21 would then shift to the government to demonstrate that
22 there was a compelling governmental interest or that the
23 least restrictive means would be used. And, in fact, the
24 government did none of those things in this briefing. So,
25 therefore, we think that they can't prevail.

1 THE COURT: Okay. Thank you very much.

2 All right. Who wants to go next?

3 MR. SCHIFMAN: Good morning, Your Honor, Ben
4 Schifman for the Army Corps.

5 Your Honor, the Corps takes the tribe's religious
6 concerns very seriously. When those concerns were
7 expressed to the Corps, in a specific and prompt way they
8 took action to address them.

9 For instance, the Corps actually rerouted the
10 pipeline to avoid sacred sites that were specifically
11 identified by the tribe in time for the Corps to understand
12 and address that.

13 However, the tribe's most recent objections were
14 simply not raised during the more than two-year
15 administrative process. The tribe's specific RFRA claim
16 is, therefore, barred by laches, and the tribe cannot
17 succeed on the merits of its claim.

18 But even if not barred by laches, as has been
19 discussed already today, the tribe can't succeed on the
20 merits of their RFRA claim because of Lyng, because --

21 THE COURT: Let's talk a minute about laches
22 before we get to Lyng. Ms. Ducheneaux has said: Look,
23 even if we didn't raise a specific RFRA claim, and she said
24 there is some ambiguity of whether they did or didn't, what
25 is the prejudice to you?

1 In other words, the Corps knew that the tribe was
2 protesting the construction of the pipeline under Lake
3 Oahe, so whether it's because of a possible rupture under
4 NHPA, National Historic Preservation Act violation, or
5 RFRA, why are you prejudiced by their late invocation of
6 RFRA?

7 MR. SCHIFMAN: So's the prejudice to the Corps is
8 actually quite significant. The Corps conducts permitting
9 all across the country, thousands and thousands of
10 permitting processes. There is a set time for considering
11 any concern, religious, environmental, or otherwise. And
12 the Corps has only a limited amount of personnel to make
13 available to consider those concerns, and then at some
14 point they have to move on and turn to other matters.

15 So, it is a similar -- I want to make a
16 distinction between the Vermont Yankee Administrative
17 Procedure Act concern, which plaintiffs talked about, and
18 laches.

19 We are talking, I agree with plaintiff's counsel,
20 not the specific circumstances in Vermont versus Yankee,
21 but the same type of concern. And that concern is that
22 plaintiffs would be silent about their concern --
23 religious, environmental, whatever it is -- during the
24 process, and then raise it as soon as the decision is made
25 in a lawsuit that is both very problematic for the Corps in

1 terms of how could it respond to a concern that it didn't
2 know about until litigation, and also for the Corps'
3 courses, the Corps personnel, and the agencies of United
4 States, and the courts, dealing with this through
5 litigation instead of through the administrative process.

6 THE COURT: But Ms. Ducheneaux says that only is
7 relevant if this were solely an APA claim, and it's not.
8 So why is that applicable in a RFRA claim?

9 MR. SCHIFMAN: So that's why we have looked to
10 the doctrine of laches, which is not tied to the APA, and
11 courts -- I would draw the Court's attention to the Apache
12 Survival Coalition case which we cite in our brief from the
13 Ninth Circuit.

14 So, they did not use the -- so Vermont Yankee,
15 which I've mentioned before -- the Supreme Court case, I
16 know Your Honor is aware of it -- that was in the process
17 of an APA administrative context, did not use laches.

18 In Apache Survival Coalition they did the
19 doctrine of laches. They said, even though there was a
20 administrative process, even though the plaintiffs could
21 have participated and could have made the Corps or the
22 agency aware --

23 THE COURT: So let's say they made you aware,
24 what might you have done differently in the face of a RFRA
25 claim?

1 MR. SCHIFMAN: Well, that's an excellent
2 question, and it's difficult to answer because we don't
3 have the full -- in order to answer that, we would need to
4 have fuller information from the tribe, have meetings, have
5 information, have Corps personnel evaluating the specific
6 concern.

7 I'll use the example of the sacred sites. They
8 indicated where they were; they indicated what type of
9 activity would be disruptive and what wouldn't; and the
10 Corps was able to kind of get down to brass tacks and say:
11 Okay, here is how we're going to address that.

12 I can't say right now how they could, or if they
13 could, address the tribe's concern, and that's the point.

14 THE COURT: But if you knew that they thought
15 that there would be a rupture, potential rupture which
16 would physically contaminate the water as opposed to
17 spiritually contaminate the water, isn't that enough for
18 you to have been aware of as you went about your permitting
19 and easement process?

20 MR. SCHIFMAN: I'm afraid not. The physical
21 rupture, as we've recognized today, is actually distinct.
22 The tribe's concern is not that the oil enter the water
23 physically and make it impure, but rather its presence
24 underneath the bed of the river.

25 So those are actually different types of

1 concerns. And to the extent that difference is important,
2 and the tribe has indicated that it is, it really has to be
3 on the tribe to bring that distinction and that importance
4 to the Corps.

5 Because, unlike certain environmental concerns
6 which the Corps has within its core competence -- impacts
7 on wetlands, for example -- the Corps can't be aware of an
8 individual or a tribe's -- the specifics of their religious
9 belief. By definition, it is a personal thing. The
10 individual with those beliefs have to come forward if they
11 want them to be understood.

12 THE COURT: Let say they came to you during the
13 permitting process and raised the issue. Then you could
14 have said: Fine, we'll move the pipeline seven miles
15 north, or we'll move it north where its out of the Lake
16 Oahe protected area and, say, nearer the pipeline that
17 already runs seven and a half miles further north.

18 MR. SCHIFMAN: I can't say for sure what is
19 geologically or what is possible, but that certainly sounds
20 plausible to me that that could be one possibility. But
21 having not seen the details, and having not had the
22 process, I can't say today.

23 THE COURT: Okay. You were going to move to the
24 Lyng issue, so go ahead.

25 MR. SCHIFMAN: I think what is really important

1 to understand, and I think a misunderstanding the
2 plaintiffs have in this case is what the effect of Hobby
3 Lobby and what the effect of RLUIPA and the -- I'm not
4 going to try the acronym here, but the institutionalized
5 person's act, what effect do they have.

6 They have represented today that they really
7 fundamentally change how Court's should address the
8 entirety of First Amendment case law. But I don't think
9 that's correct, and I think it is very important to
10 understand why that is so.

11 I think if Hobby Lobby -- plaintiffs are
12 essentially arguing Hobby Lobby overturned Lyng, as well as
13 all the other RFRA cases. But Hobby Lobby was actually a
14 very specific case. I think it is easily distinguishable
15 because it fits squarely within the sanction type of cases.

16 Essentially in Hobby Lobby, the situation was:
17 Violate your religious beliefs, cover contraception, or
18 face a significant monetary penalty.

19 And that is simply not at issue here, nor was it
20 the case in Hobby Lobby that they said, depart entirely
21 from First Amendment and Supreme Court case law. In fact,
22 quite the opposite. But the specific portion that
23 plaintiffs keep referencing, about where the Supreme Court
24 said Congress deleted references to the First Amendment
25 case law and said it was meant to be more expansive,

1 they're quite correct, but that was not for the entire act.
2 That was for one specific phrase in the act, which was the
3 phrase "exercise of religion," and it is crucial that that
4 was not for the phrase "substantial burden," which the
5 legislative history of RLUIPA makes clear.

6 And I can read it, but I'll cite it in our future
7 brief, it was meant to remain the same. So to the extent
8 that Lyng says what is not a substantial burden is the
9 government managing its own land, it is absolutely still
10 good law. It was not overturned by Hobby Lobby. It was
11 not changed by RLUIPA. And indeed, RFRA explicitly
12 intended to incorporate it.

13 THE COURT: But Ms. Ducheneaux, although not
14 conceding too much when pushed about whether, if the tribe
15 didn't have a property interest, that she would agree that
16 Lyng would govern. She didn't go so far as to say that.
17 She said that's possible.

18 But she then laid down the marker of: Look, this
19 is the tribe's land, that's what distinguishes this from
20 Navajo Nation and Lyng.

21 So why isn't she right about that?

22 MR. SCHIFMAN: It's an interesting argument, but
23 as Your Honor pointed out, it is not one that's been
24 endorsed by any court that I have been able to find, and I
25 think there a good reason for that.

1 The first is the nature of the tribe's vested
2 water right is actually quite different from a normal or
3 full property right. It is a right of use of water that
4 flowed by the reservation. And nothing the United States
5 is doing -- and recall, the United States is granting an
6 easement. That easement does not require use of water,
7 does not divert the flow of water; and, as Your Honor
8 pointed out, the pipeline doesn't even touch the water.

9 So, the fact that the tribe has this vested water
10 right, I don't think is particularly relevant to the Lyng
11 calculus. But even aside from that, I think it is
12 important to note that while a Winters right might give the
13 United States the option or the right to take some action,
14 for instance, against an upstream user that has diverted
15 the flow of water, it does make the United States require
16 to, in every circumstance, take such an action if the tribe
17 believes that there is not enough water or that the water
18 might be contaminated.

19 The case that we cite in our brief is from the
20 Federal Circuit, Hopi Tribe versus United States. So in
21 that case, the court held that -- so Winters gives a right
22 for the United States to exclude others. It does not,
23 quote, however, give the United States responsibility for
24 quality of water within the reservation.

25 So I think that is an important distinction to

1 draw as well.

2 THE COURT: Now, we -- you sort of -- we've
3 talked about government land for a little bit. And I spent
4 a fair amount of time in the last hearing discussing the
5 Bensonville case which both you and Dakota Access, I think,
6 still rely on.

7 But isn't there a distinction between Bensonville
8 and the current case, inasmuch as Bensonville involved
9 federal government approval of third-party action on
10 third-party land as opposed to here, which is approval on
11 third-party action on federal land.

12 MR. SCHIFMAN: That is absolutely a distinction,
13 factual distinction. I still think the reasoning of
14 Bensonville applies quite strongly to this case, even with
15 that important distinction. Because Bensonville was
16 focused on, what effect would it have if every time the
17 United States funded, permitted, or was involved in the
18 regulation of third-party activity, if the RFRA was to
19 apply to that.

20 That would be an extreme expansion and beyond
21 what the framers of that law intended. So I think that is
22 what -- one of the important things that animated that
23 case. And that absolutely applies regardless of whether it
24 is on private or federal land.

25 THE COURT: Wouldn't Ms. Ducheneaux's argument

1 about tribal interest in land similarly defeat a
2 Bensonville argument if I accepted her position on that?

3 MR. SCHIFMAN: The position as to water rights,
4 Your Honor?

5 THE COURT: Yes.

6 MR. SCHIFMAN: I don't believe it would, because
7 the United States permits or funds many activities
8 throughout the United States that could potentially have an
9 impact on the physical purity or the religious purity of a
10 tribe's water rights.

11 The FAA regulate planes that could potentially
12 crash, or there could be trains, hazardous materials
13 transported. Dakota Access has indicated there is, in
14 fact, a train transporting crude oil passing over Lake
15 Oahe.

16 THE COURT: Let's say the belief had to do with
17 iron or machines crossing the water arguably, then you
18 couldn't have a train that went over the water whether you
19 touched the water, no matter whether the train was carrying
20 oil or anything else.

21 MR. SCHIFMAN: That's right. The question is, is
22 the United States' involvement in that regulation or the
23 funding sufficient to make the United States the
24 responsible party under RFRA.

25 I think regardless of whose land it is,

1 Bensonville is clear that the involvement of the FAA in
2 that case was not sufficient. And the involvement of the
3 FAA is much greater than we have in this case.

4 THE COURT: I'll let you wrap up if there are any
5 last points you would like to make.

6 MR. SCHIFMAN: I'll make one point touching on
7 the issues you discussed with opposing counsel having to do
8 with the plaintiffs' burden to demonstrate that their
9 religious exercise has been substantially burdened.

10 We absolutely want to be and are respectful of
11 the tribe's beliefs. But as a legal matter, they must come
12 forward and they must demonstrate -- it is their burden to
13 show that their religion is substantially burdened. That
14 means they that have to show, in order to succeed on the
15 merits, that they can't go upstream of the pipeline, they
16 can't go to other water sources.

17 We've indicated on a map that there is a wildlife
18 refuge and other water sources that are nearby at the
19 reservation. I don't know whether those are religiously
20 significant, but it is the tribe that has to demonstrate.

21 Additionally, the tribe has to demonstrate what
22 is the effect of the other infrastructure, the oil
23 pipelines that are seven river miles at the Mandan refinery
24 just north, the crude oil pipelines that cross the rivers
25 further upstream.

1 So without having made that determination, the
2 tribe, I think, has not demonstrated the type of harm that
3 they need to get this injunctive relief, nor have they met
4 their burden under RFRA.

5 In conclusion, Your Honor, I think that without
6 raising the specific concern in a way that the Corps could
7 respond to it, the plaintiffs simply have not done what
8 they needed to do to allow the Corps to respond to their
9 concern, and therefore laches should control.

10 But even if the RFRA claim is not harmed by
11 laches, the tribe is still not likely to succeed due to the
12 Lyng and the other cases we've discussed. The tribe has
13 not demonstrated a likelihood of success on the merits, and
14 its claims should be denied.

15 THE COURT: Okay. Thank you.

16 Mr. Debold.

17 MR. DEBOLD: Thank you, Your Honor. I would like
18 to take the questions -- or take the issues pretty much in
19 the same order that Your Honor has already heard them. And
20 I'm happy to talk about any other issues that the Court may
21 wish.

22 The few things to add on laches, and I agree with
23 much of what counsel for the Corps has said, but the Court
24 asked first of all, did the tribe actually give enough
25 information to the Corps to know that this was an issue.

1 And the answer to that is unequivocally no.
2 There is no ambiguity. In their reply brief they cite to
3 two sources in which the Corps should have figured out what
4 that -- just the presence of oil underneath the pipeline
5 would cause a harm to their religious exercise.

6 They cite an August 17, 2015, letter from, of all
7 people, Steve Vance to the Corps, in which he raised five
8 points that were relevant to water.

9 He said the risk of dredging the -- that there
10 was a risk that dredging the Missouri River would disturb
11 burials because the river resulted from flooding -- or the
12 lake resulted from flooding of the Missouri River to create
13 the dam.

14 He said: There is concern -- second, a concern
15 for all residents along the proposed route of the quality
16 of the water.

17 He said: Third, the proposed route crosses many
18 bodies of water, and birds have to land in those waters.

19 Fourth, he said that the tribe has a concern that
20 all the bodies of water proposed to be crossed, not just
21 the Missouri, his words, and so the other crossings of
22 creeks, streams, lakes, rivers, will all eventually empty
23 into Lake Oahe, and then travel to the Mississippi and the
24 Gulf. It's not a local concern but a global concern. And
25 then he raised concerns about spills or leaks.

1 We submit that, in raising the concerns in this
2 manner, not only did they fail to raise a separate issue
3 about the mere presence of oil, but in some sense they
4 misdirected the Corps' attention away from any possible
5 addressing of that concern.

6 The other document that they refer to in their
7 reply was a declaration that Dave Nelson supplied in
8 support of the Standing Rock motion for a preliminary
9 injunction based on the NHBA, back in August.

10 And they refer to Paragraphs 5 and 6, which say
11 that there are archaeological sites along the banks of the
12 river, and that the waters and its tributaries are used for
13 ceremonies. But what they don't mention is that
14 Paragraph 7, the next paragraph says: The future of the
15 tribe depends on access to clean, safe water from the
16 Missouri River.

17 And then Paragraph 9, where they actually say,
18 "This is why we care, because this is how the project might
19 actually harm us," they said: We'll be irreparably harmed
20 for three reasons: First, the use of explosives on the
21 riverbed might destroy or damage hidden burial sites.

22 Second, construction operations will probably
23 destroy plants in the area, vegetation.

24 And, third, because there are pollutants on the
25 riverbed already from old mine tailings, like arsenic, that

1 the operation might raise those pollutants up and,
2 therefore, cause a negative impact on the water that they
3 use for their ceremonies.

4 So again, affirmatively focusing the Corps'
5 attention from the issue that they now want to present,
6 what could the Corps have done differently?

7 A number of things. First of all, they could
8 have created the record that Your Honor is now saddled with
9 should you allow this claim to go forwards.

10 What are the actual religious beliefs here?

11 They cite one declaration from Mr. Vance, the
12 only one who refers to the black snake prophecy. Even in
13 their own complaint, in the paragraph where they talk
14 about -- or the proposed amended complaint where they talk
15 about this issue, they make no mention of the black snake
16 prophecy. Instead, they talk about possible harms in
17 general from construction and operation that the Lakota
18 people are concerned about.

19 So it is very important to keep in mind that the
20 Corps would have had an opportunity to find out: Well,
21 what are these beliefs; how many people hold them; is there
22 a consistency or inconsistency to figure out how those
23 beliefs may actually bear on the questioning of the
24 pipeline.

25 Would rerouteing the pipeline just a few miles

1 north resolve the concern, or is this a concern that
2 affects the entirety of the Missouri River, which basically
3 their brief suggests is possibly the case.

4 THE COURT: So the prejudice issue which
5 Ms. Ducheneaux raised, and I talked about with
6 Mr. Schiffman, is you are saying that the Corps or Dakota
7 Access could have -- the Corps could have instructed and
8 Dakota Access could have rerouted the pipeline closer to
9 the one seven and a half miles north that apparently does
10 not cause any ritual contamination.

11 MR. DEBOLD: Or at least have the opportunity to
12 consider that option in light of the fact that we're not
13 talking now about the risk of leaks. Because they put a
14 lot of attention into the risk that the pipeline might
15 rupture and spill, and a lot of attention into why that was
16 not a significant impact because of, A, the low likelihood;
17 and, B, that there were measures in place that would
18 contain that kind of harm.

19 THE COURT: So what is your response to
20 Ms. Ducheneaux's argument that the laches isn't a valid
21 defense on a RFRA claim as opposed to an APA claim under,
22 say, NHPA.

23 MR. DEBOLD: Laches is available especially when
24 a person who is asserting the claim is seeking equitable
25 relief. In this case, that's all they're seeking.

1 Moreover, keep in mind that they brought the
2 claim for the first time at a point where the only remedy
3 would be to strip Dakota Access of its property rights from
4 the easement, and to basically order the Corps to breach
5 the contract that was reached.

6 They waited until after the Corps had actually
7 made the decision to issue the easement, collected the
8 money from Dakota Access, and allowed the construction to
9 go forward, without raising any concerns in the
10 two-plus-year process that this was a unique harm that
11 needed some unique consideration.

12 I'd like to move next to the -- I'll call this
13 generally the role of facts and sincerity in this process.
14 As I just said, one reason they needed to raise this claim
15 during the administrative process was so that a record
16 could be developed before the Corps made a decision.

17 The case law talks about the opportunity to make
18 corrections and modifications as being very important.
19 Here, the Corps is going to need to explore, if the claim
20 can go forward, what exactly the beliefs are. And that's
21 going to vary from individual to individual according to
22 the tribe's own brief.

23 The Court is going to need to figure out what the
24 implications are of that belief on placement and particular
25 locations: How far does this go; does this mean that no

1 oil pipeline can cross the Missouri River? And certain
2 things that have been said have suggested that's the case.

3 So there are number of issues that will need to
4 be developed. The fact that we haven't raised them in the
5 preliminary injunction motion doesn't mean that those are
6 not issues that the Court would need to face.

7 Another factual question that I think bears upon
8 whether there is really a unique burden here is, they are
9 relying on a pipeline crossing a body of water, Lake Oahe,
10 that has only been in existence since the 1950s, over the
11 objection of both tribes who are bringing this claim.

12 There used to be just the Missouri River.
13 Lake Oahe didn't exist until the Corps needed to prevent
14 the flooding that Ms. Ducheneaux referred to at points
15 further downstream.

16 So the idea that somebody who is an adherent to
17 the Lakota religion would believe that the lake part would
18 burden their free exercise of religion because of
19 contamination of the water, but not seven miles north,
20 where the same water is coming seven miles further south.

21 It is an issue that, of course, the Court will
22 need to grapple with if this claim goes forward. It
23 certainly bears on whether or not there would be a
24 substantial burden on the religion from the permission of
25 the easement to stay in place.

1 One thing I wanted to correct on that, so the
2 pipeline crossing for Dakota Access is about 75 miles north
3 of the northern border of the Cheyenne River Reservation.
4 That's on the map the Corps has provided.

5 Then the other pipeline that you refer to is a
6 little bit further north. I would like to show the Court,
7 this is a blowup of Exhibit C to our opposition. You can
8 follow along on the version that is on the record. But the
9 inset, each inset, A through F, is a place where there is
10 either a current crossing or the crossing that is at issue
11 here. This is the pipeline where it will cross.

12 Particularly important is what has been designated
13 as Inset E. We have oil pipelines and gas pipelines already
14 crossing at that point, just a little bit north at Mandan.
15 And this is a blowup -- blowup of the oil refinery that is
16 sitting right on the shore of the river, just north -- a few
17 miles north of where the pipeline will cross.

18 The other insets are all places -- A, B, C, and
19 D -- other places where there is at least one oil pipeline
20 and sometimes a gas pipeline alongside of it, crossing the
21 river at different points along the way.

22 The other thing that should be noted is that there
23 are a whole host of oil and gas wells in the whole area,
24 including some on the reservations, which are designated by
25 this dot, and then wastewater treatment facilities in a

1 number of locations, including one at Fort Yates, which is
2 closer to the reservation than the pipeline crossing.

3 There are a number of things that are going on with
4 this river in addition to whatever additional burden could be
5 claimed as a result of the pipeline going through.

6 I'd like to talk a little bit about Lyng and the
7 property rights issues, and where RFRA is --

8 THE COURT: Before you do that, you argue in the
9 brief that RFRA doesn't even apply because the tribe isn't
10 a person.

11 MR. DEBOLD: Correct.

12 THE COURT: But if I permitted Mr. Vance to
13 intervene, that would moot out that argument, fair enough?

14 MR. DEBOLD: If Mr. Vance intervenes, he is a
15 person, he can make the claim. But we have other reasons,
16 as we argue in our opposition, this intervention.

17 At least the Cheyenne River Tribe has been in
18 this case since August. Other individuals -- this case has
19 gotten some publicity, in case you hadn't noticed, Your
20 Honor, and there have been plenty of opportunity for people
21 to jump in and be heard.

22 THE COURT: Maybe the argument is, they want to
23 intervene, not because they don't think they're being
24 heard, but to -- so that standing can be established to the
25 extent that RFRA bars the tribe from proceeding.

1 MR. DEBOLD: They would still be coming in just a
2 few days after the first time this claim was ever raised
3 before the Court, so you have a lot of same issues that
4 pertain to --

5 THE COURT: Let's move on to the Lyng issue,
6 which I've talked about with the other counsel, and tell me
7 why you believe that that applies here.

8 MR. DEBOLD: Sure. First, I want to add one
9 thing to Mr. Schiffman's point, that Hobby Lobby did not
10 somehow undue all of the pre-Smith case law.

11 I particularly point the Court's attention to
12 page 2167 of the Supreme Court version of the opinion where
13 Justice Scalia said that RLUIPA imposes, quote, the same
14 general test as RFRA, but on a more limited category of
15 governmental actions.

16 And the other thing it did, he said, was amend
17 the definition of exercise of religion by removing the
18 First Amendment reference.

19 So why is that important? In Navajo Nation, they
20 specifically said, exercise of religion is separate from
21 burden. So the burden analysis that was applicable in Lyng
22 and other cases has survived Hobby Lobby, and the
23 legislative history is very clear on that.

24 As far as Lyng goes, the tribe's argument is: We
25 have a property right here, and the Indians in Lyng didn't

1 because they didn't own the part of the national forest.

2 First of all, in Lyng, the Court did make note of
3 the fact that this portion of the forest had traditionally
4 been used by members of three tribes for religious
5 purposes, and the tribes had invoked the government's trust
6 responsibilities to those Indians who lived on the local
7 reservation.

8 Lyng also noted that there would be severe
9 adverse effects on the practice of religion. There was no
10 question about that. The only question was whether the
11 government's action would create a burden.

12 And as Navajo Nation points out, you have to fall
13 into one or two categories: Either you have to show the
14 government is coercing you to act contrary to your wishes
15 under threat of sanction or the government is forcing you
16 to choose between following your religion or receiving a
17 government benefit.

18 Those two cases, Yoder and Sherbert, the two
19 previous cases, stand for those propositions. Lyng simply
20 applied to that rule. The government is not forbidding
21 anybody from exercising their religion under threat of
22 sanction, and the government is not forcing them to choose
23 between exercising their religion or foregoing a government
24 benefit.

25 Now, the tribe --

1 THE COURT: Doesn't Hobby Lobby expand those?

2 Ms. Ducheneaux's argument is that those really
3 are not still valid law anymore.

4 MR. DEBOLD: They certainly are. Hobby lobby was
5 a clear example of the Yoder type of burden. The
6 government said: You must provide your employees with
7 insurance that includes contraception, which violated the
8 religious beliefs of the plaintiffs there; and if you
9 don't, you are going to pay a fine.

10 The Court went at great length explaining how
11 much penalty each of the plaintiffs in that case would have
12 suffered had they had to make the choice between following
13 their religion and doing what the government asked them to
14 do.

15 THE COURT: But here the argument is, they can't
16 follow their religion at all.

17 MR. DEBOLD: It is not that they can't follow
18 their religion at all. It's that the government is doing
19 something that would make it harder for them and, in fact,
20 just like in Lyng, would have a significant adverse effect
21 on how they exercise their religion. Doesn't prevent
22 them -- didn't prevent the plaintiffs in Lyng from trying
23 to exercise their religion, either at the location after
24 the road had been put in or elsewhere, but it said: When
25 the government is not saying, "Do this or else you will be

1 sanctioned," which is the category that we'd be in here,
2 you don't have a substantial burden on religion.

3 Now, they try to distinguish it by saying: Well,
4 we've got property rights.

5 I'd really like to have the Court look closely at
6 their citations in their reply brief for this point,
7 because they make the point that water is life, and that
8 Arizona versus California somehow recognized this religious
9 aspect of the water as distinct from water as something we
10 all need to live.

11 The Court, the full quote which they excerpted
12 is: "It's impossible to believe that Congress created
13 these reservations, when they did that they were unaware
14 that most of lands were of the desert kind, hot scorching
15 sands, and that water from the river would be essential to
16 the life of the Indian people -- that's where they stop --
17 and to the animals they hunted and the crops they raised.

18 And they quote from a delegate to the Territory
19 of Arizona from 1865, who was basically saying: Without
20 water there can be no life because we need water to grow
21 crops, and people will not be able to live if they can't
22 grow their crops.

23 Never has the government recognized that the
24 right to use the water which is necessary for everybody to
25 live extends to the right to have the water in a form that

1 would be consistent with the religious exercise.

2 THE COURT: But Ms. Ducheneaux argues that's
3 implicit given that Congress would have, and the court in
4 its cases, would of course have understood that people's
5 ability to live includes their ability to perform their
6 religious sacraments, and that water could be expected to
7 be a part of that.

8 MR. DEBOLD: There are two problems with that
9 argument. First of all, South Dakota versus Bourland,
10 which is a case involving the Cheyenne River Sioux Tribe.
11 where the Court said: You have to point to something
12 specific as to what your properties rights are. You can't
13 infer them from the fact that they're not mentioned.

14 And it said the property rights there were
15 limited -- the right to fish, the right to hunt, certain
16 other rights were enumerated -- and said: For everything
17 else, we have to assume that the's Indians, this tribe,
18 will be treated just like any other person. The second
19 problem is, it would greatly expand what anybody has ever
20 understood the usufructuary right of water. If I am a
21 landowner and I have a property on the river, I have a
22 right, just like the Indian tribes here assert they have a
23 right, to prevent somebody upstream from contaminating the
24 water if it is something needed for my property.

25 It is very easy for the government to police

1 that, and for that to be enforced. But if you start
2 expanding it to, "Well, this pipeline 10 miles away,
3 30 miles away, could be 100 miles away for some adherents
4 just its presence make that water unusable for my religious
5 exercise," that is a right that no court has ever
6 recognized.

7 It's contrary to the teaching in Lyng that we're
8 talking not about the government is making something harder
9 for you to do, we're talking about under the RFRA
10 requirements whether the government is actually imposing a
11 sanction on you if you don't abandon the exercise of
12 religious or if you do exercise your religion.

13 THE COURT: Let's move on to the Bensonville
14 issue which Mr. Schiffman talked about. He agreed that the
15 distinction between federal land involved here and
16 third-party land involved there was a relevant distinction.
17 He said that Bensonville still could be extended to support
18 the Corps' argument here, but why is that so?

19 MR. DEBOLD: I do agree that it is a
20 distinction -- in fact, our brief pointed it out -- that
21 the court distinguished an argument made by the dissent
22 based on the fact that it wasn't the government's own land.

23 But if you look at Lyng, and if you look at the
24 reasoning behind Bensonville -- in Navajo Nation,
25 frankly -- it leads you to the same result. The Corps

1 didn't need to deal with the issue in Bensonville of who
2 owned the land. But had they done so, they would have gone
3 through the same analysis of the two ways in which the
4 government can burden your religion and violate RFRA.

5 One is if they have coerced you to act contrary
6 to your belief under threat of sanction. That does not
7 happen when the government is using its own property or
8 making some approval for other people to use its own
9 property; and the government is not forcing somebody to
10 choose between the tenets of their religion or receiving a
11 government benefit in that situation either.

12 This kind of ties back to whose property is it
13 anyway. I suppose if the tribe actually owned a piece of
14 property free and clear, no -- a right to exclude others,
15 then they might have a valid claim, probably under RLUIPA
16 because it would be a land-use situation, but nonetheless
17 might have a valid claim that if somebody from the
18 government came in and said, "You can't pray on that land,"
19 then you probably have a valid claim.

20 But once you add in the fact that other people
21 are using the same property and have a right to use the
22 same property -- which was a central point in Lyng, this is
23 land that is for everybody's benefit -- then you have a
24 different question.

25 THE COURT: Let me go to one other point which we

1 talked about last time, especially with Mr. Hasselman,
2 which was the irreparable harm question. I think you
3 raised this in your brief, that there is not irreparable
4 harm because the oil can be stopped, the flow can be turned
5 off. So it is not a question of having -- that the oil
6 running once contaminates forever the river.

7 But isn't it a reasonable argument from the
8 plaintiffs that irreparable harm, if you credit the
9 sincerity of their belief, that irreparable harm occurs
10 while the oil is flowing at any time.

11 So even if it can be -- even if the harm can be
12 stopped, they are irreparably harmed during the pendency of
13 the flow.

14 MR. DEBOLD: Well, that depends on their separate
15 point, which we disagree with, that they have no other
16 access to any other source of water.

17 Ms. Ducheneaux attached an exhibit to the
18 original motion. I think she referred to it as Exhibit A
19 to her clarification. I believe this is at Docket
20 Entry 99-7. It is the report about the need to do a new
21 water intake relevant to this reservation.

22 On page 11 of that document, it is page 12 of 35
23 of the ECF numbering, it refers to groundwater wells being
24 discontinued, not because -- because they couldn't be used
25 for consumption, but not because they couldn't be used for

1 other purposes.

2 It said there was poor water quality in the
3 aquifer, and the depth of the aquifer was a problem. They
4 referred to one particular well that was dug nearby that
5 was installed to a depth of 4,700 feet. And the problem
6 there is that the water was very hard and had a high
7 mineral content.

8 That's just another example of how, yes, there is
9 water. It may not be consumable water, but they have not
10 established that there is no other place they could go to
11 get water, especially if you looking at it through the lens
12 of irreparable harm while the Court is able to reach the
13 merits of an issue.

14 THE COURT: Okay. I'll give you one more minute
15 to -- if there is any final point you want to make,
16 Mr. Debold.

17 MR. DEBOLD: I think -- I agree very much with
18 Mr. Schiffman on the fact that if the Court were to accept
19 this view of what a government burden is, it would have a
20 tremendously significant impact on the ability of one
21 individual or a group of individuals to essentially veto
22 not only public projects but private projects because of
23 the perceived effect of the exercise of their religion.

24 Keep in mind that when you were hearing from the
25 parties back on the HPA preliminary injunction motion,

1 there were reference to the fact that the tribe has
2 significant interests in land wherever the buffalo roam,
3 and they have continued to assert in their summary judgment
4 briefing that treaty rights, that they had rights to land
5 that were taken away improperly and the Court should
6 account for the fact that much of the land that is further
7 north of these reservations was once theirs.

8 If somebody has a belief that the use of land --
9 and this came up in Lyng. If they say, "Look, if you use
10 that land and I'm not the only one that can use it, then I
11 can't exercise my religion because my religion requires the
12 quiet and pristineness."

13 The Court said: If we go down that path, we're
14 going to have a very serious expansion of what anybody ever
15 understood to be the free exercise of religion, as well as
16 whether the government burdens it.

17 We think the Court should deny the motion to
18 amend the complaint, should conclude that laches bar the
19 tribe from pursuing this claim, and should, if it needs to,
20 conclude that there is no likelihood of success on the
21 merits, and no irreparable harm or balancing of factors in
22 their favor.

23 THE COURT: Thank you very much.

24 Ms. Ducheneaux, a brief rebuttal from you.

25 MS. DUCHENEAUX: Thank you, Your Honor. If I

1 may, I'm going to put this map back up.

2 THE COURT: Okay.

3 MS. DUCHENEAUX: Mr. Debold did a lot of
4 describing of what all these things mean, Inset A, B, C, D,
5 E, and these various little notations here in the legend,
6 but what you see here is very clear.

7 Here is the Lake Oahe project area. Here is hire
8 the pipeline. That is the only crude oil pipeline either
9 proposed or existing in this area.

10 All of this stuff about oil and gas wells, there
11 are no oil and gas wells contained in this part of this
12 map. I assume he means up here on this other reservation
13 that involves a different Indian tribe.

14 Wastewater wells, things of that nature, those
15 things are not relevant to this claim. We are discussing
16 this proposed crude oil pipeline. Likewise, Mr. Debold
17 parade of horrors about hypotheticals about 100 miles
18 away, where the buffalo roam, in a motion that Cheyenne
19 River was not even a party to, those hypotheticals are
20 beside the point. We have identified a specific
21 geographical area and a specific harm that doesn't extend
22 outside of that. Those kinds of arguments are intended to
23 distract.

24 THE COURT: But what he does point out is that if
25 this -- how can this belief actually be sincerely held if

1 it is supposed to be an ancient belief and Lake Oahe didn't
2 even exist prior to -- I'm sorry, it was 1950s?

3 MS. DUCHENEAUX: Yes, that's accurate.

4 I think that is important. They have carefully
5 structured their briefing not to offend the Lakota people
6 of the Cheyenne River Sioux Reservation by challenging
7 their sincerely held belief, but do it over here sort of
8 slyly.

9 The Cheyenne River Sioux people, the Lakota
10 people, have over 200 years confronted changes to their
11 territory, to their beliefs, to their people. And the fact
12 is that the sincerely held belief of the Cheyenne River
13 Sioux people is that the waters of Lake Oahe constitute
14 their area of concern from which they require pure waters.

15 If Mr. Debold would like to challenge Mr. Vance's
16 belief on that, he may do so, but he has taken care not to
17 do that in his briefing.

18 We have not challenged the imposition of that dam
19 back in the 1950s because that's not a belief of the
20 Cheyenne River Sioux people. And I think that's the end of
21 the analysis there.

22 THE COURT: Okay.

23 MS. DUCHENEAUX: Again, both sides continue to
24 talk about this Sherbert and Verner dichotomy. Even the
25 way that Holt and Hobby Lobby describe the rule is that the

1 government action has to require a person to violate,
2 seriously violate their religious beliefs. They don't say
3 anything about requiring either a sanction or foregoing a
4 government benefit. Cases, including the ones I've cited,
5 have shown the various ways that courts are very willing to
6 find a substantial burden without that.

7 THE COURT: If you have other sources of water,
8 why, to perform your ceremonies, so how about the wells
9 Mr. Debold mentioned.

10 MS. DUCHENEAUX: I think that's a very good
11 point. What is contained in that document that we both
12 describe is that the wells were not suitable and were not
13 functioning because somebody had to drill 4,000 feet below
14 the surface of the ground in order to even access that
15 aquifer, and the aquifer contained water that would not
16 even be suitable for drinking. And for the same reasons
17 that we said of the Cheyenne River, which is not potable
18 water, would not be useful in the Lakota religious
19 ceremonies, that is the same reason.

20 Those wells are not functional. It sounds as
21 though Mr. Debold would have us drill a 4,700-foot well in
22 order to exercise our religion. That would be burdensome.
23 They have also suggested that we need to go off of the
24 reservation in order to find sources of water.

25 Hope v. Hobbs was very clear on this point, that

1 RFRA provides greater protection than that, that RFRA's
2 substantial burden inquiry asks whether the government has
3 substantially burdened religious exercise, not whether the
4 RFRA claimant is able to engage in other forms of religious
5 exercise.

6 Holt is important also, because despite what
7 defendants have represented today, Holt indeed did rule
8 that the break from First Amendment authority applies to
9 the substantial burden test, and particularly on that
10 point, where the lower court had said that the person
11 should have -- it had other ways that they could practice
12 their religion --

13 THE COURT: But there is a sanction in both Hobby
14 Lobby and Holt, right --

15 MS. DUCHENEAUX: Yes, that is true.

16 THE COURT: -- and not here.

17 MS. DUCHENEAUX: That is true. But neither Hobby
18 Lobby nor Holt foreclosed those cases where there was not a
19 sanction and when there was not a foregoing of government
20 benefit.

21 THE COURT: Then why are we back in the land of
22 Lyng and Navajo Nation?

23 In other words, Holt and Hobby Lobby, you are
24 saying: Don't buy Lyng and Navajo Nation because Holt and
25 Hobby Lobby narrow them.

1 MS. DUCHENEAUX: Yes, that's true. I see your
2 points, Your Honor, and it is a good point. The reason, it
3 would be to misconstrue what I have said to say that Holt
4 and Hobby Lobby necessarily overrule Lyng or other First
5 Amendment cases. But what Holt and Hobby Lobby do is they
6 say, to the extent that it is inconsistent with a
7 post-Smith interpretation of RFRA and RLUIPA, then those
8 are not good authority.

9 As I demonstrated in my briefing, one of the
10 things that Lyng did was this reasonability balancing:
11 Where was the burden heavier, on the government or the
12 tribe?

13 Specifically in Hobby Lobby, the court said that
14 that kind of balancing constitutes a reasonability
15 determination that is not a substantial burden inquiry.
16 That's a sincerity inquiry to say whether this is heavy
17 enough.

18 And Holt reiterated that to say that the burden
19 on the tribe or the burden on the person in Holt was too
20 slight, was not an appropriate consideration.

21 THE COURT: Okay. Thank you very much,
22 Ms. Ducheneaux.

23 MS. DUCHENEAUX: Thank you.

24 THE COURT: Thank you, Counsel, for your diligent
25 work and strong arguments on this matter. Just a few

1 housekeeping matters.

2 Mr. Debold, you filed a status report as
3 requested by the Court regarding the likelihood of the
4 timetable for the introduction of oil. But I am going to
5 ask you to be a little more specific today than you were in
6 that, which simply I think said the week of March 6 through
7 the week of April 1, I believe.

8 MR. DEBOLD: It's the week of March 6, sometime
9 during that week, up until the end of the month.

10 THE COURT: Okay. Even today, on February 28th,
11 you are telling me you can't be any more specific than
12 that.

13 MR. DEBOLD: I could go back and check, but I
14 believe that we are still dealing with a number of factors
15 that could extend it out or allow us to finish earlier. I
16 can certainly go back and check and see if there is any
17 additional information we could provide on that.

18 THE COURT: Any of your clients here you could
19 check with?

20 MR. DEBOLD: I'll try to do that.

21 THE COURT: I'll wait.

22 (There was a pause in the proceedings.)

23 MR. DEBOLD: Your Honor, based on the progress so
24 far, we think there is a pretty low likelihood that it is
25 going to happen the week of March 6.

1 THE COURT: A low likelihood.

2 MR. DEBOLD: Yes, a low likelihood. Very high
3 likelihood we'll be done by April 1. We're still doing the
4 hole, and we're about halfway there. We don't know if we
5 will be able to finish the rest in the same amount of time.
6 It's been about 20 days since they started.

7 THE COURT: So what I'm going -- until this
8 opinion issues, I'm going to require you to give 48 hours'
9 notice before the introduction of oil into the pipeline.

10 So in other words, I'm hoping that I will be able
11 to issue this within a week, which would be by March 7th.
12 But in the event that you expect the oil to be introduced
13 before this opinion issues, I'm requiring you to give
14 48 hours' notice.

15 MR. DEBOLD: Sure.

16 THE COURT: Second housekeeping issue: I asked
17 you last time about your cross-claim, and part of this is
18 to try to clean up the docket as much as we can.

19 Is there any objection to denying without
20 prejudice your Motion for Summary Judgment on the
21 cross-claim?

22 Then I would similarly ask the other parties, the
23 government and the tribes, whether there is any objection
24 to denying that prejudice since the cross-claim is moot
25 here. I'm not requiring you to withdraw it --

1 MR. DEBOLD: Right.

2 THE COURT: -- even though I think we could
3 probably do that, but is there any reason why these motions
4 need to sit out there?

5 MR. DEBOLD: I guess I just want to clarify. If,
6 for some reason, we needed to get back to that cross-claim,
7 if we would basically be allowed to reinstate it at the
8 same point as we are now.

9 THE COURT: I'm not even asking that you
10 withdraw, just deny the motion without prejudice as moot.
11 And then if we need to proceed on the cross-claim, I would
12 have the motions, they could immediately be refiled without
13 any lengthy timetable.

14 MR. DEBOLD: If I could just have one minute.

15 THE COURT: Sure.

16 (There was a pause in the proceedings.)

17 MR. DEBOLD: Yes, I think we're saying the same
18 thing. But if the Court denies it without prejudice and we
19 decide we need to reinstate it, refile it, as long as we're
20 picking up where we left off, my only concern is whether we
21 lose time.

22 THE COURT: Sure. I understand. That wouldn't
23 happen.

24 So any objection by the government or the tribes
25 to denying those motions without prejudice?

1 MS. DUCHENEAUX: No objection from Cheyenne
2 River.

3 THE COURT: Mr. Hasselman?

4 MR. HASSELMAN: No objection.

5 MR. SCHIFMAN: No objection.

6 THE COURT: Next, the motion to amend a
7 complaint, I will assume for purposes of the preliminary
8 injunction motion that the motion was successful, but the
9 defendants can oppose it on futility grounds that we're
10 sort of back in the same box, or it can be granted, and
11 then there can be a subsequent summary judgment briefing.

12 I don't know how you want to -- it doesn't matter
13 to me how you want to proceed, I just want to do it the
14 most efficient way possible.

15 Do you have a preference, because the time is
16 coming up, I assume.

17 MR. DEBOLD: I think Your Honor gave us an extra
18 30 days, so it is not until the end of March.

19 THE COURT: That may well have been true to avoid
20 that issue.

21 MR. DEBOLD: I think we anticipated that last
22 time.

23 THE COURT: I see it. Right, that 30-day
24 extension was issued on February 13th. We'll just leave
25 those the way they are. Based on how I rule in the

1 preliminary injunction motion, counsel can confer and see
2 about other scheduling issues.

3 Again, Mr. Hasselman has filed his Motion for
4 Summary Judgment by Standing Rock.

5 I think, Ms. Ducheneaux, you've also filed one on
6 the NHPA issue; is that right?

7 MS. DUCHENEAUX: That's right, Your Honor.

8 THE COURT: That's under the briefing schedule we
9 already set last time. I think that's all I have on my
10 housekeeping list.

11 Ms. Ducheneaux, anything else that you want to
12 raise procedurally today?

13 MS. DUCHENEAUX: No, Your Honor, thank you.

14 THE COURT: Thank you.

15 Mr. Hasselman?

16 MR. HASSELMAN: No, thank you.

17 THE COURT: Thank you.

18 Mr. Debold, anything else?

19 MR. DEBOLD: Yes. On the summary judgment
20 motions, Your Honor, there are two motions pending, and our
21 oppositions have two different deadlines. We don't want to
22 stop or slow down in any way Mr. Hasselman's motion. But
23 if the Court is planning to consider them together at a
24 hearing rather than separately, I want to raise the
25 possibility of filing a joint opposition, because right now

1 we have very similar issues in both motions. They both
2 challenge both the July 25th decision, the easement
3 decision in February of this year.

4 As I said, if you are going to consider Standing
5 Rock separately on a faster track, we have no problem with
6 filing an opposition next Tuesday when it is due. Frankly,
7 if both motions had been filed simultaneously, we would be
8 filing a single opposition.

9 I know Mr. Hasselman opposes this. I meant to
10 talk with him about it. I didn't realize he would be
11 appearing by phone today.

12 THE COURT: So the Cheyenne River motion was
13 filed February 22. So what that means, isn't your
14 opposition of theirs just do due the day after?

15 MR. DEBOLD: No. There was an agreement on the
16 schedule that our opposition would be due on March 23 to
17 the Cheyenne River motion.

18 THE COURT: I see it now. Okay. Right. That's
19 the minute order of February 23. Got it. That's quite a
20 docket. A lot of filings from everybody.

21 Mr. Hasselman, I know you want to move quickly.
22 Obviously, from my perspective, I have more consolidated
23 briefing is better, but if it is largely the same issues,
24 can you simply say: We ask that our opposition to Standing
25 Rock be treated as our opposition to Cheyenne River's?

1 MR. DEBOLD: The problem with that is, we would
2 have to brief the issues that Cheyenne River is raising or
3 brief them separately.

4 THE COURT: Are they separate issues?

5 MR. DEBOLD: They overlap quite a bit in our
6 view. They may not view it that way. But our defense to
7 them is going to be very similar regardless of which
8 parties raise the claims.

9 THE COURT: All right. Mr. Hasselman?

10 MR. HASSELMAN: Yes, we have gone to considerable
11 effort to get our motion in front of you with the goal of
12 getting that decided if at all possible before operations
13 can begin or, if not, as soon thereafter as possible.

14 We've also gone to quite a bit of effort with
15 counsel for Cheyenne River to coordinate our briefing so
16 that the issues are not the same. They haven't simply
17 submitted a brief that, you know, mirrors ours.

18 So where we are right now, we have a staggered
19 briefing schedule. Oppositions are due next week, and then
20 oppositions to a Cheyenne River motion would be due
21 sometime after that. That's where we'd like to leave it.

22 THE COURT: All right. It is not optimal, but I
23 know that Standing Rock has been seeking to move
24 expeditiously, so I won't require a delay in the briefing
25 schedule on Standing Rock.

1 But you may feel free in your opposition to
2 Cheyenne River, Mr. Debold and Mr. Schiffman, to incorporate
3 by reference Standing Rock -- your arguments in the
4 Standing Rock motion. Okay?

5 MR. DEBOLD: Yes, Your Honor.

6 THE COURT: Mr. Schiffman, any procedural issues
7 from the government?

8 MR. SCHIFMAN: No, Your Honor.

9 THE COURT: Thank you again, everyone. I will
10 attempt to issue this opinion in the very near future.

11 (Whereupon at 12:44 p.m., the hearing
12 adjourned.)

13

14

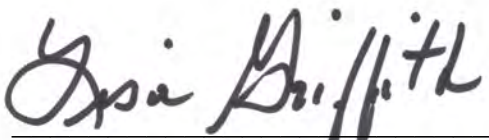
15

16 CERTIFICATE OF REPORTER

17 I, Lisa Walker Griffith, certify that the
18 foregoing is a correct transcript from the record of
19 proceedings in the above-entitled matter.

20

24



Lisa Walker Griffith, RPR

25

Date

EXHIBIT 3

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June 3, 2016

U.S. Army Corps of Engineers
Omaha District
Attn: CENWO-OD-TN
1616 Capitol Avenue Suite 9000
Omaha, NE 68102

Re: Dakota Access Pipeline Tribal Consultation

Dear Sir or Madame,

The Dakota Access Pipeline ("Pipeline") is a matter of supreme concern for the Cheyenne River Sioux Tribe ("Tribe"). The proposed route of the Pipeline will significantly impact cultural resources and historic sites which are important to the Tribe. The Tribe has legally cognizable rights, as well as an ethical duty to its constituent tribal members, to protect such resources and historical sites. Moreover, the U.S. Army Corps of Engineers ("Corps") has a non-dischargeable legal obligation to engage in meaningful, pre-decisional government-to-government consultation with the Tribe regarding the issuance of permits related to the Pipeline. To date the Corps has failed to initiate such consultation.

As currently drafted, the Environmental Assessment ("EA") fails to meaningfully analyze issues regarding the protection of the Tribe's cultural resources and historic sites. Indeed, upon a thorough review of the EA, it is the Tribe's position that this Pipeline project has been rushed without proper environmental analysis or tribal consultation. The draft EA essentially admits as much, stating that tribal consultation "has been initiated but has not been concluded." Draft EA at 58. Clearly it is the position of the Corps that, although consultation is not yet concluded, consultation has been initiated with at least some tribes. *Id.* It may very well be that the Corps is in the process of consulting with other tribes; however, such ancillary consultation with separate tribes does not satisfy or otherwise discharge the Corps of its legal duty to consult with the Cheyenne River Sioux Tribe.

TRIBAL COUNCIL MEMBERS

DISTRICT 1

Bernita In The Woods
Johnlyn Garrett

DISTRICT 2

Theodore Knife, Jr.

DISTRICT 3

Edward Widow
Ben Elk Eagle

DISTRICT 4

Wayne L. Ducheneaux II
Kevin Keckler
Merrie Miller
Mark J. Knight

DISTRICT 5

Ryman LeBeau
Raymond Uses The Knife
Robert Chasing Hawk
Derek Bartlett

DISTRICT 6

Tuffy Thompson
Richard Rousseau

The blue represents the thunderclouds above the world where live the thunder birds who control the four winds. The rainbow is for the Cheyenne River Sioux people who are keepers of the Most Sacred Calf Pipe, a gift from the White Buffalo Calf Maiden. The eagle feathers at the edges of the rim of the world represent the spotted eagle who is the protector of all Lakota. The two pipes fused together are for unity. One pipe is for the Lakota, the other for all the other Indian Nations. The yellow hoops represent the Sacred Hoop, which shall not be broken. The Sacred Calf Pipe Bundle in red represents Wakan Tanka – The Great Mystery. All the colors of the Lakota are visible. The red, yellow, black and white represent the four major races. The blue is for heaven and the green for Mother Earth.

USACE_DAPL0064137

The United States, as well as its subsidiary agencies, including the Corps, have a trust responsibility to Indian tribes. Included in the trust duty is an obligation to engage in meaningful government-to-government consultation whenever federal action affects tribal interests. This duty to consult with tribes has been reaffirmed time and again; including President Obama's 2009 Memorandum on Tribal Consultation, which asserts that:

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

Memorandum for the Heads of Executive Departments and Agencies, Tribal Consultation (Nov. 5, 2009). In this Memorandum, the President instructed each federal agency to develop a plan for actions it would take to implement the requirement of tribal consultation. In response, various agencies, including the Corps, developed tribal consultation policies. The Corps' policy "affirms...[the Corps'] commitment to engage in consultation with federally recognized tribes." U.S. Army Corps of Engineers, *Tribal Consultation Policy and Related Documents* (2013). Of special note is the Corps' own definition of "consultation":

b. Consultation: Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the USACE that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands.

The Corps' failure to initiate meaningful, pre-decisional consultation to date is disconcerting to the Tribe. Indeed, the Pipeline's proximity to the Tribe's reservation, as well as the fact that the project crosses through the Tribe's ancestral and Treaty protected homelands, makes the Corps' failure to consult especially egregious. The Tribe respectfully reminds and asks the Corps to engage in the process outlined in the above policies – "an active and respectful dialogue" that occurs "before decisions are made and actions taken" with respect to the Pipeline permits.

In addition to the consultation policies detailed above, the Corps also has a legal duty to consult pursuant to the National Historic Preservation Act (NHPA). The NHPA requires full tribal consultation during the "earliest" stages of project planning. It is the understanding of the Tribe that archeological surveys have already been "completed" for the proposed Pipeline. Such surveys were done without the consultation and contribution of the CRST Tribal Historic Preservation Officer ("THPO"). To the Tribe's knowledge there has been absolutely no effort by the Corps to include the CRST THPO in the identification of sites. In short, it appears as though the entire permit proceeding to this point has been non-compliant with section 106 of the NHPA.

For these reasons the Tribe respectfully asserts that the Corps has failed to initiate, much less engaged in and satisfied, its consultation obligations. The Tribe and the CRST THPO must be allowed to meaningfully participate in the proceedings. The Corps must also engage in a more cooperative and comprehensive analysis of the Pipeline's impact on the Tribe's cultural resources and historic sites. Therefore, the Tribe asks that the Corps initiate tribal consultation with the Cheyenne River Sioux Tribe immediately.

Respectfully,

A handwritten signature in blue ink, appearing to read 'H. Frazier', is written over the typed name and title.

Harold Frazier
CRST Chairman

EXHIBIT 4

ENVIRONMENTAL ASSESSMENT

Dakota Access Pipeline Project

Crossings of Flowage Easements

and Federal Lands

Prepared on behalf of:

U.S. Army Corps of Engineers – Omaha District

1616 Capitol Avenue, Suite 9000

Omaha, NE 68102

July 2016

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EXECUTIVE SUMMARY

In accordance with the National Environmental Policy Act (NEPA) and implementing regulations, the following Environmental Assessment (EA) has been prepared to evaluate the effects of the United States Army Corps of Engineers (USACE), Omaha District (District) granting permission to Dakota Access, LLC (Dakota Access) to place a portion of the Dakota Access Pipeline Project (DAPL Project) on federal real property interests acquired and managed for the Garrison Dam/Lake Sakakawea and Oahe Dam/Lake Oahe Projects in North Dakota. Section 14 of the Rivers and Harbors Act of 1899, codified 33 U.S.C. Section 408 (Section 408), authorizes the Corps to grant permission to Dakota Access to modify federal flood control and navigation projects, provided the modifications are not injurious to the public interest and will not impair the usefulness of the projects. The EA addresses the purpose and need of the pipeline, as well as the location and method of installation of the pipeline, but the analysis is limited to the effects of allowing the pipeline to cross federal flowage easements near Lake Sakakawea and federally owned lands at Lake Oahe in North Dakota, to determine whether the placement of the pipeline on federal real property interests is injurious to the public interest or will impair the usefulness of the federal projects.

This EA was prepared by Dakota Access on behalf of the Corps in compliance with the NEPA Act of 1969; the Council on Environmental Quality (CEQ) Regulations (40 CFR 1500-1508); Corps of Engineers Regulation ER 200-2-2 (33 CFR Part 230), and related environmental compliance requirements, including the Section 106 of the National Historic Preservation Act (Section 106). Tribes, Tribal Historic Preservation Offices, State Historic Preservation Offices, the Advisory Council on Historic Preservation, and interested parties were consulted by representatives from Dakota Access and the Corps Omaha District as required by the Programmatic Agreement and the National Historic Preservation Act.

This EA was prepared in accordance with CEQ regulations in Section 1506.5(a) and 1506.5(b), which allow an applicant to prepare an EA for federal actions. The Corps has independently evaluated and verified the information and analysis undertaken in this EA and takes full responsibility for the scope and content contained herein.

The Corps published a draft EA on December 8, 2015, on the U.S. Army Corps of Engineers (USACE) Omaha District website (<http://www.nwo.usace.army.mil/Missions/CivilWorks/Planning/ProjectReports.aspx>) and hard copies were made available at public libraries in Bismarck, Williston, and Pierre. Additionally, notifications were made to cooperating agencies, other federal, state and local agencies, and signatory and non-signatory Tribes to the Omaha Corps District Programmatic Agreement.

The Corps received comments from 20 reviewers in response to the Draft EA, primarily from individuals believed to be members of the Standing Rock Sioux Tribe, and two sets of comments from EPA. These comments relate to topics in the EA. The Corps fully considered and responded to these comments. There is no new, significant information on environmental effects as a result of these comments. As such, neither a supplemental nor a revised EA will be published for further public review nor are additional NEPA compliance actions required prior to the Corps making a decision on the proposed action.

Impacts on the environment resulting from the placement of the pipeline on federal real property interests is anticipated to be temporary and not significant as a result of Dakota Access's efforts to avoid, minimize, and mitigate potential impacts. Dakota Access will comply with all applicable local, state, and

federal regulations and permits associated with the construction and operation of the pipeline, which is not expected to have any significant direct, indirect, or cumulative impacts on the environment.

1.0 INTRODUCTION

Dakota Access is proposing to construct a new crude oil pipeline that would provide transportation service from the Bakken and Three Forks plays in North Dakota through portions of South Dakota and Iowa to a terminus in Patoka, Illinois (Figure 1). In coordination with the U.S. Army Corps of Engineers, the Applicant, Dakota Access, LLC (Dakota Access), as the non-federal representative for compliance with the NEPA of 1969, the CEQ Regulations (40 CFR 1500-1508), Corps of Engineers Regulation ER 200-2-2 (33 CFR Part 230), and related environmental compliance requirements, prepared this Environmental Assessment to analyze whether the Corps could grant Section 408 permissions for the placement of Dakota Access Pipeline Project (DAPL Project) on federal flowage easements near the upper end of Lake Sakakawea, and federally owned lands at Lake Oahe in North Dakota (“the Requester’s Preferred Alternative” or “Proposed Action”). Areas that are potentially impacted by construction and/or operation of the Proposed Action are referred to herein as the Project Area.

1.1 DAPL Project

The DAPL Project is an approximately 1,100-mile long crude oil pipeline project beginning near Stanley, North Dakota, and ending at Patoka, Illinois. The DAPL project, as proposed and being evaluated herein, would cross federal flowage easements near the upper end of Lake Sakakawea north of the Missouri River in Williams County, North Dakota, and federally owned lands at Lake Oahe in Morton and Emmons counties, North Dakota. The EA analysis is limited to these portions of the pipeline only.

1.2 Purpose and Need

The purpose and need of the federal action is to determine whether USACE may grant permission for Dakota Access to place the pipeline on federal real property interests acquired and managed by USACE for the Garrison Dam/Lake Sakakawea and Oahe Dam/Lake Oahe projects. Section 408 authorizes the Corps to grant permission to Dakota Access to modify federal flood control and navigation projects, provided the modifications are not injurious to the public interest and will not impair the usefulness of the projects. The EA addresses the purpose and need of the pipeline, as well as the location and method of installation of the pipeline, but the analysis is limited to the effects of allowing the pipeline to cross federal flowage easements near the upper end of Lake Sakakawea and federally owned lands at Lake Oahe in North Dakota.

1.3 Authority and Scope of the EA

The proposed crossings of Corps-owned lands and easements would require the Corps to grant the Section 408 permissions as well as real estate outgrants. Therefore, the scope of this EA is limited to the crossings of Corps-owned lands and flowage easements. As noted below, separate Corps authorizations are being sought for Section 404, Section 10, and Section 408 crossings on other portions of the DAPL route. Those actions are not discussed in the EA.

The Proposed Action does not qualify for a Categorical Exclusion from NEPA documentation as defined by ER 200-2-2, 4 March 1998 paragraph 9. Thus, this EA has been prepared as required under NEPA to determine potential impacts that may occur as result of implementing the Proposed Action. If it is determined that no significant impacts would be incurred after implementing the mitigation measures

described within this document, the USACE would issue a finding of no significant impact (FONSI). If it is determined that significant impacts would be incurred as a result of construction and/or operations of the Proposed Action, an environmental impact statement (EIS) would be prepared to further evaluate the Proposed Action under NEPA.

This effect analysis is being completed in accordance with CEQ regulations in Section CFR 1506.5(b), which allow an applicant to prepare an EA for a federal action in coordination with the lead federal agency (i.e., Corps). The Corps will use the information in the EA to make a final determination whether to grant the required Section 408 permissions using the information contained herein. The Corps independently evaluated and verified the information and analysis undertaken in this EA and takes full responsibility for its scope and content.

2.0 ALTERNATIVES

Dakota Access proposes the DAPL Project to efficiently and safely transport at least 570,000 barrels of crude oil per day (bpd) from the Bakken and Three Forks production region in North Dakota to a crude oil market hub located near Patoka, Illinois, and ultimately to refineries located in the Midwest and the Gulf Coast, where 80% of the U.S. refining capabilities exist. Because the Corps can only grant permission for the modification of a federal project if it would not be injurious to the public interest, the EA evaluated alternatives to the construction of the pipeline as a whole, as well as the alignment of the pipeline and method for installation on federal property. The alternatives were compared using the proposed purpose of the DAPL project. The EA also analyzed the potential for the pipeline to impair the usefulness of the federal projects.

2.1 Alternatives Considered but Eliminated from Detailed Analysis

2.1.1 Alternative 1 – Modification of Existing Infrastructure

There are no other major interstate pipelines that would meet the purpose and need of the Project. The DAPL Project would be Energy Transfer's (Company's) first asset in the state. For this reason, the manipulation of operating pressures or additional of pump stations to increase transport capacity in pipelines or altering existing infrastructure to increase storage and transport capacity are not viable options to meet the purpose and need of the Project.

2.1.2 Alternative 2 – Trucking Transportation Alternative

While trucking is instrumental in the gathering and distribution of crude on a limited scale, trucking as an alternative for transporting volume of crude oil the distances planned for the DAPL Project is not viable. Based on data recorded by the North Dakota Pipeline Authority as recently as November of 2015, approximately 1% of the crude oil in the Williston Basin is transported via truck out of the Williston Basin due to a lack of transport capacity (Kringstad, 2016). Factors such as road safety, roadway capacity, and a lack of reliability due to seasonal constraints, in addition to other logistical issues involving availability of labor force, trailer truck capacity, and economics, all contribute to truck transportation not being a realistic alternative.

A sharp increase in traffic on North Dakota roads as a result of the rapid expansion in the number of commercial trucks linked to the oil industry speaks to the issues associated with road safety. In 2012, the Federal Motor Carrier Safety Administration reported a traffic fatality rate in North Dakota of 0.48 per million vehicle miles traveled, with 48 deaths involving a bus or large truck, far surpassing any other state (U.S. Department of Transportation [DOT], 2014). In the pre-boom years of 2001 to 2005, there was an average of only 13 annual deaths involving commercial trucks. Furthermore, the economic cost of severe truck crashes has more than doubled between 2008 and 2012. Much of the increase in the fatality rate can be attributed to the energy production boom, along with the fact that the state's infrastructure still consists of single-lane, rural, and unpaved roads in many areas (Bachman, 2014). Harsh winter weather and seasonal road restrictions compromise the reliability of truck transportation even further. Based on the above, a pipeline is a safer and more economical alternative than trucking for the volumes transported and distances covered by the DAPL Project.

Assuming the average oil tanker truck is capable of holding about 220 barrels of oil, the transportation of the initial capacity of the proposed Project (450,000 bpd), would require a total of 2,045 (450,000/220) full trucks to depart the proposed tank terminals daily, and more than 85 (2,045/24) trucks would have to be filled every hour with a 24-hour/day operation. Time spent in transit, loading/offloading, and additional time for maintenance would add to the number of trucks needed to offset for the DAPL Project. For a trucking mode, an increase in daily truck traffic would lead to an increase in the degradation of public roads as well as contribute to the noise pollution adjacent to the roads. For both truck and rail modes, an increase in exhaust would be anticipated due to truck and locomotive combustion. An increase in air pollution would also be anticipated from potential releases during the filling operations for trucks or rail cars.

Analysis of infrastructure considerations (the burden of thousands of additional trucks on county, state, and interstate highways, as well as the loading and offloading facilities that would have to be constructed which would incur their own environmental impacts), economic considerations (e.g., labor costs, purchase and maintenance of hauling equipment, fuel, public infrastructure, etc.), and reliability considerations (e.g., weather, mechanical, manpower, road closures) all contribute to making the truck transportation alternative unviable.

2.1.3 Alternative 3 – Rail Transportation Alternative

Reliance on rail as a transportation method in the Williston Basin has drastically increased in recent years, carrying a negligible percentage of the overall market share as recently as 2010 to nearly 60% of the overall market share by mid-2014 (Nixon, 2014). The rise in the use of rail as a primary transportation method has been driven in large part by the rapid increase in production of crude oil coupled with a lack of pipeline capacity to account for additional supplies.

Negative impacts from the growth in popularity of rail as a method of long-distance transportation of crude oil include delays that disrupt the agricultural sector, reductions in coal-fired power plant inventories, and significant production issues in the food production industry. In August 2014, reports filed with the federal government indicated that the Burlington Northern Santa Fe Railway had a backlog of 1,336 rail cars waiting to ship grain and other products, while Canadian Pacific Railway had a backlog of nearly 1,000 cars (Nixon, 2014). For industries, such as those listed, in which the use of pipelines is not an option, the only viable alternative would be increased reliance on trucking, which would exacerbate some of the issues listed in the section above.

Assuming a carrying capacity of 600 barrels per car, a total of 750 rail cars would be required to depart the tank terminal daily to transport 450,000 barrels of crude oil to its final destination. Loading and offloading 750 rail cars in a day would require servicing more than 31 rail cars per hour. With an assumption of 125 rail cars per train, six trains would have to depart the tank terminal every day. With 10 to 12 trains currently leaving the state per day carrying Bakken crude, the DAPL Project would represent a 50 to 60% increase in the number of trains transporting crude oil out of the state, likely exacerbating issues with delays (Horwath and Owings, 2014).

Rail operations on the scale of the DAPL Project do not exist in the U.S. An oil-by-rail facility designed to handle an average of 360,000 bpd has been proposed in the Port of Vancouver, Washington. Known as the Vancouver Energy proposal, the project would be the largest rail terminal in the country (Florip, 2014).

A rail transportation alternative to handle the volumes of the DAPL Project would require the design and construction of 125 to 158% of that of the Vancouver Energy proposal. A facility of this size would incur its own environmental consequences.

From a safety standpoint, railroad transport consistently reports a substantially higher number of transportation accidents than pipelines (DOT, 2005). A series of major accidents taking place in 2013 to 2014 in Canada and the U.S. has heightened concern about the risks involved in shipping crude by rail (Fritelli, 2014).

Increases in rail traffic necessary to transport the volume of crude oil proposed by the DAPL project would increase the emissions of combustion products due the use of diesel engines which could have an adverse impact on air quality in the region. This alternative would also directly affect communities along utilized rail lines by increasing noise and creating transportation delays due to the substantial increasing rail traffic across railroad crossings of roads.

While rail tanker cars are a vital part of the short-haul distribution network for crude oil, pipelines are a more reliable, safer, and more economical alternative for the large volumes transported and long distances covered by the DAPL Project. This alternative would create delays on the rail lines due to the substantial increase in rail traffic, resulting in shipping delays in other industries such as agriculture that cannot rely on pipeline transportation. Furthermore, the purpose and need of the Project would not be attainable with the current oil-by-rail infrastructure in the country because rail loading facilities of sufficient size do not exist. As such, rail transportation is not considered a viable alternative.

2.1.4 Alternative 4 – Route Alternatives

Although this EA is limited to the pipeline placement on federal real property interests administered by the Corps, major route alternatives were evaluated for the pipeline route as a whole. During the DAPL Project fatal flaw analysis and early routing process, Dakota Access utilized a sophisticated and proprietary Geographic Information System (GIS)-based routing program to determine the pipeline route based on multiple publicly available and purchased datasets. Datasets utilized during the Project routing analysis included engineering (e.g., existing pipelines, railroads, karst, powerlines, etc.), environmental (e.g., critical habitat, fault lines, state parks, national forests, brownfields, national registry of historic places, etc.), and land (e.g., fee owned federal lands, federal easements, dams, airports, cemeteries, schools, mining, tribal lands, and military installations, etc.).

Each of these datasets was weighted based on the risk (e.g., low, moderate, or high based on a scale of 1,000) associated with crossing or following certain features. In general, the route for the pipeline would follow features identified as low risk, avoid or minimize crossing features identified as moderate risk, and exclude features identified as high risk. For example, the existing pipelines dataset was weighted as a low risk feature, so that the routing tool followed existing pipelines to the extent possible to minimize potential impacts. An example of a high risk feature is the national park dataset. Since national parks were weighted for the DAPL Project as high risk, the GIS routing program excluded any national parks from the pipeline route to avoid impacts on these federal lands. In addition, the routing program established a buffer between the proposed route and certain types of land, such as maintaining a 0.5-mile buffer from tribal lands.

Route Alternative for the Crossing of Flowage Easements at the Missouri River

Early in the routing process Dakota Access performed a cursory route evaluation to attempt crossing the Missouri River at a location that does not contain flowage easements. This would dictate moving the centerline west of the flowage easements in Williams County. This alternative was not carried forward through the environmental consequences analysis, given that this would require approximately eight additional miles of pipe, an exceedance of an additional 130 acres of workspace, and another major river crossing (Yellowstone River) in addition to the Missouri River. Furthermore, other state and federal properties are located along the river west of the confluence of Missouri and Yellowstone Rivers.

Route Alternative for the Crossing of Federal Lands at Lake Oahe

Early in the routing phase of the DAPL Project, Dakota Access considered but eliminated an alternative centerline that originated in Stanley, North Dakota, within Mountrail County, where it connected to customer receipt points and headed southwest through Williams County and crossed the Missouri River approximately 8.5 miles east of the Yellowstone River and Missouri River confluence (**Figure 12**). The centerline then headed southeast across the state and crossed Lake Oahe approximately 10 miles north of Bismarck (**Figure 13**), where it then headed south again and entered South Dakota approximately 35 miles east of Lake Oahe in McIntosh County. In addition to other evaluation criteria listed in Table 2.1, the route alternative was in proximity to and/or crossing multiple conservation easements, habitat management areas, National Wildlife Refuges, state trust lands, waterfowl production areas, and private tribal lands.

As a result of public input and comment during this EA process, additional desktop evaluation of the North Bismarck alternative portion of the early route (**Figure 13**) was undertaken. The comparison of this alternative to the preferred route is included in **Tables 2-1** and **2-2** contained herein. As illustrated in the tables, the data substantiates eliminating this route as a viable alternative. While the alternative does avoid Corps fee owned land at Lake Oahe; therefore, would not require a Corps real estate outgrant or Corps EA review, approximately 11-miles of length would be added to the pipeline route, consisting of roughly 165 additional acres of impact, multiple additional road crossings, waterbody and wetland crossings, etc. In addition to the criteria shown in the tables, due to the proximity to Bismarck, the North Bismarck route alternative crossed through or in close proximity to several wellhead source water protection areas that are identified and avoided in order to protect areas that contribute water to municipal water supply wells. The route was also severely constrained by the North Dakota Public Service Commission's 500-ft residential buffer requirement at multiple locations. Furthermore, this route alternative crossed other populated PHMSA high consequence areas (HCAs), that are not present on the preferred route. Pipeline safety regulations use the concept of HCAs to identify specific locales where a release from a pipeline could have the most significant adverse consequences.

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Table 2-1 Alternatives Evaluation Matrix Between Preferred Crossing at Lake Oahe and Alternative Crossing North of Bismarck			
Evaluation Factors	ALTERNATIVE ROUTE Crossing North of Bismarck	PREFERRED ROUTE Crossing at Lake Oahe	PREFERRED COMPARED TO ALTERNATIVE ROUTE
Total Overall Route Mileage			
Total Mileage	111.0	100.4	-10.6
Collocation			
Pipeline (mi)	0.0	34.6	+34.6
Powerline (mi)	2.9	6.1	+3.2
Overall Corridor Collocation (%)	3%	41%	+38%
Amount of Greenfield Crossed (non-collocated areas-mi)	108.1	59.6	-48.4
Existing Pipeline Crossing (count)			
Crossing Count	6	10	+4
Floodplain 100 Year			
Floodplain Crossings (Count)	13	2	-11
Total Mileage	1.4	0.2	-1.2
Land Cover Types (mi)			
Agriculture	42.5	36.1	-6.4
Developed/Low Intensity	0.2	0.1	-0.1
Developed/Open Space	6.6	2.0	-4.6
Grass/Pasture	59.3	60.7	+1.4
Land Ownership Potential Conflicts			
USACE Reservoirs - Lake Oahe	0	1	+1
Flowlines - NHD*			
Waterbody Count	149	116	-33

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Table 2-1 Alternatives Evaluation Matrix Between Preferred Crossing at Lake Oahe and Alternative Crossing North of Bismarck			
Evaluation Factors	ALTERNATIVE ROUTE Crossing North of Bismarck	PREFERRED ROUTE Crossing at Lake Oahe	PREFERRED COMPARED TO ALTERNATIVE ROUTE
Waterbodies- NHD*			
Perennial	3	1	-2
Intermittent	1	0	-1
NWI Wetland (count)			
Freshwater Emergent Wetland	26	5	-21
Freshwater Forested/Shrub Wetland	1	0	-1
Freshwater Pond	2	0	-2
PHMSA Populated Areas Dissolved (mi)			
Ecological HCA	2.6	2.6	0
Highly Populated Areas	0	0	0
Other Populated Areas	1.6	0	-1.6
Drinking Water HCA	0	0	0
Powerline Crossing			
Total Crossing Count	14	13	-1
Transportation Crossing			
Total Crossing Count	139	112	-27

* Flowline and waterbody crossings from the U.S. Geological Survey (USGS) National Hydrography Dataset

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Table 2-2
Construction Cost Comparison Between Crossing at Lake Oahe and Alternative Crossing North of Bismarck

	ALTERNATIVE ROUTE Crossing North of Bismarck		PREFERRED ROUTE Crossing at Lake Oahe	
Length of Segment	111.0	miles	100.4	miles
	585,974	feet	530,112	feet
Cost for Road/Railroad Bores				
Number of Road/Railroad Bores	139	bores	112	bores
Total Cost for Road Bores (at \$34,600/bore)	\$ 4,809,400	USD	\$ 3,875,200	
Cost of Installation for Non-HDD Areas				
Length of Pipeline Non-HDD	580,008	feet	522,312	feet
Total Cost for Installation of Non-HDD Section	\$ 201,262,915	USD	\$ 181,242,264	USD
Horizontal Directional Drill (HDD) Across Mo River/Lake Oahe				
Length of HDD	5,966	feet	7,800	feet
Total Cost of HDD Crossing	\$ 7,696,140	USD	\$ 10,062,000	USD
Cost of Geotechnical Investigation				
	\$ 140,000	USD	\$110,000	USD
Aboveground Facility Costs				
Mainline Valves Needed (one per each 10 mile segment)	11	valves	10	valves
Total Cost of Mainline Valves (at \$450,000/valve location)	\$ 4,995,000	USD	\$ 4,500,000	USD
Right-of-Way Acquisition Costs (at \$37/foot)	\$ 21,681,053	USD	\$ 19,614,144	USD
Additional Cost Including Engineering and Consultants (at \$131,000/mile)	\$ 14,538,380	USD	\$ 13,152,400	USD
Total Cost of Alternative	\$ 255,122,888	USD	\$ 232,556,008	USD

A negative number indicates that the value for the proposed action is less than the value for the population that the proposed action is being compared to.

2.1.5 Alternative 5 – Major Waterbody Crossing Method Alternatives

Once an optimal route was selected based on the evaluation of impacts discussed in Section 2.1.3, Dakota Access then identified the preferred major waterbody crossing construction method that would meet the purpose and need while minimizing impacts to resources. Pipeline construction methods utilized at waterbody crossings are highly dependent on the characteristics of the waterbody encountered. A variety of waterbody crossing techniques were considered during the DAPL Project planning stages for the crossings of major waterbodies, including Dam and Pump, Flume, Open-Cut, and Horizontal Directional Drill.

Dry Crossings Methods

Two different techniques, including dam and pump and flume crossing methods, are typically used on waterbody crossings well under 100 feet in width and require a temporary diversion of flow within the waterbody. Because of the large volume of water within the Missouri River system, it is not feasible to temporarily divert the water either by pump or flume, and these methods were ruled out of consideration for the crossing of the Missouri River and Lake Oahe.

Wet Open-Cut Crossing Method

Aside from trenchless or HDD crossing techniques, the only feasible crossing method from a constructability standpoint for the major waterbodies associated with the Proposed Action is the wet open-cut crossing method, in which flow would be maintained throughout installation of the pipeline. This method of construction would require the construction right-of-way (ROW) to extend right up to the waterbody itself, allowing equipment to operate from the banks of the waterbody to excavate a trench. The sensitive habitat adjacent to the banks of the waterbodies would be cleared of vegetation and graded to create a safe and level workspace that could accommodate excavation equipment and spoil storage for the duration of the open-cut installation (approximately 6 months). Since the widths of the Missouri River and Lake Oahe at the crossing locations is such that operating trenching equipment entirely from the banks would not be possible, trench excavation in the waterbodies would require equipment operating from barges. Furthermore, the depth of the waterbodies crossed (15 to 25 feet) exceeds the reach of a backhoe, and the use of mechanical dragline dredgers would be necessary. Spoil dredged from the bottom of the waterbody would be stored on a spoil barge or otherwise temporarily stockpiled in the waterbody itself. This method of excavation would greatly influence the overall sediment load generated in the waterbody for the duration of the installation. The generation of a downstream turbidity plume would have a direct effect on the aquatic habitat of the waterbody. In addition, the operation of equipment within and on the banks of the waterbody has the potential for adverse effects on surface water quality (i.e., potential contamination of surface water resources from fuel or leaks from the equipment). Compared to trenchless technology, the open-cut method would incur far greater impacts on sensitive habitat located on both the banks of the waterbodies and within the waterbodies. Therefore, this method of construction was eliminated from consideration.

The trenchless construction method known as HDD was selected as the preferred construction method of the Proposed Action, because this method of construction involves far less impacts on resources. In addition, the Garrison Project – Lake Sakakawea Oil and Gas Management Plan explicitly states that: Oil and gas pipelines should use directional drilling technology to traverse beneath sensitive habitat areas. Further information regarding the HDD construction method is provided in Section 2.3.2.6 below.

2.2 No Action Alternative

Under the “no action” alternative, Dakota Access would not construct the DAPL Project. The “no action” alternative would not provide the infrastructure necessary to transport light sweet crude oil to refining facilities. In northwest North Dakota, exploration and production of oil is a major economic activity, with crude oil production being the primary mineral resource of interest. Although the “no action” alternative itself would not incur direct environmental impacts, it would also not address the existing demand to transport crude oil to refining facilities. Market demands would likely compel shippers to rely on alternative methods of crude oil transport such as truck or rail. Although, both the truck and rail alternatives are not sufficient to meet the purpose and need of the Project due to the lack of available infrastructure and other limitations described in Sections 2.1.3 and 2.1.4, it is reasonable to assume that truck and rail traffic would increase if the “no action” alternative were implemented. These alternative shipping methods would adversely affect resources as described in Sections 2.1.3 and 2.1.4 and throughout this EA.

It is purely speculative to predict the resulting effects and actions that could be taken by another company or Dakota Access’ shippers and any associated direct or indirect environmental impacts in response to the “no action” alternative. However, if this alternative is implemented, it is likely that other methods of transporting crude oil to the marketplace would be implemented and anticipated effects of the “no action” alternative has been carried forward in the environmental analysis of this EA to provide a comparison between it and the impacts of implementing the Preferred Alternative.

2.3 The Proposed Action (Preferred Alternative)

2.3.1 Location and Detailed Description of the Proposed Action

The DAPL Project originates near Stanley, North Dakota, traversing westerly northwest of Williston then turning south, crossing the Missouri River and traverses southeasterly across the state, exiting through the central portion of the southern border. Dakota Access proposes to construct the pipeline, ranging in size from 12 to 30 inches in diameter, so that the majority of lands crossed would be privately-owned lands. The locations for collecting product into the proposed system were largely fixed based on the location of existing terminals. The first of the six fixed input locations is located at the pipeline’s origin near the town of Stanley in Mountrail County. Three other input locations exist near the towns of Ramberg, Epping, and Trenton in Williams County. Two additional collection points are located south of the proposed Missouri River crossing on the flowage easements in McKenzie County near the towns of Waterford City and Johnson’s Corner. Connecting the input locations was largely a matter of minimizing length and maximizing the avoidance of sensitive features, developments, public lands, and constructability issues (e.g., steep terrain, potholes, excessive bedrock, etc.), as discussed above in Section 2.1.4 Route Alternatives. Based on the location of the collection points, crossing the Missouri River (Lake Sakakawea) was unavoidable. The selected crossing location of the Proposed Action avoids federally-

owned lands to the extent practical, is at a narrow width of the river upstream of the wider Lake Sakakawea, and minimizes impacts on sensitive resources (e.g., piping plover critical habitat, eagle nests, etc.). The pipeline is 24 inches in diameter where it crosses approximately 14,942 feet (2.83 miles) of the Corps flowage easements at the Missouri River and is 30 inches in diameter where it crosses approximately 1,109 feet (0.21 mile) of the Corps-owned federal lands at Lake Oahe.

Within North Dakota, the proposed Supply pipeline crosses seven tracts of flowage easement retained by the Corps located north of the Missouri River in Williams County (**Figure 2**). The proposed DAPL Project Mainline route travels through land owned and managed by the Corps on both sides of the Lake Oahe crossing at the border between Morton and Emmons counties, approximately 0.55 mile north of the northern boundary of the Standing Rock Sioux Reservation (**Figure 3**).

The following narrative relates to **Figures 1 through 3** in Section 12.0 and is provided to assist the reader in identifying the Project Area under consideration in this analysis. **Purple polygons** indicate real estate interests; either the flowage easements that the Corps has with private landowners upstream of Lake Sakakawea, or the fee title lands that the Corps has on the upper end of Lake Oahe. The **red hyphenated line** shows the DAPL Project centerline as it approaches Federal property at the Lake Oahe crossing and temporary workspace areas. The **straight solid redline** indicates the HDD pipeline that will go beneath Corps managed federal surfaces and is the Project Area being considered as part of the Federal action to issue a real estate easement. The **yellow polygon** indicates workspace where temporary work is proposed to be completed that directly supports the HDD installation of the pipeline underneath the river/reservoir. Temporary activities that would occur in this workspace include: welding together pipe, inspecting and testing the pipeline to ensure no leaks are present prior to preparing to install beneath the river/reservoir at both locations.

Potential impacts have to be evaluated in temporary workspace, as actions completed here are directly connected to the ability for the applicant to complete the proposed project (both the **purple and yellow polygons**). Further, these actions are directly connected to the federal decision to allow an easement for the pipeline to cross federal lands in this area. Notice that the Corps is not analyzing the effects of the **red hyphenated line** (DAPL centerline) at the Lake Oahe crossing as it is outside the EA review area. This is an important difference compared to the flowage easement location where temporary work happens to coincide with the orientation of the flowage easements perpendicular to the Missouri River. Therefore, temporary workspace required for portions of the pipeline installed via conventional (non-HDD) methods on the flowage easements is included in the EA review area.

The flowage easements and Corps owned lands associated with the Proposed Action, and the associated Project impact acreages, expressed as construction workspace, are identified in **Table 2-3** below.

Table 2-3		
Flowage Easements and Federal Land Crossings		
Grant of Easement Document Number	County	Construction Workspace Within Tract (acres)
Flowage Easements		
LL3440E	Williams	9.4
LL3483E-1	Williams	10.8

Table 2-3 Flowage Easements and Federal Land Crossings		
Grant of Easement Document Number	County	Construction Workspace Within Tract (acres)
Flowage Easements		
LL3453E	Williams	10.7
LL3430E	Williams	5.0
LL3450E-2	Williams	5.2
LL3431E	Williams	14.7
LL3426E-2	Williams	3.4
Total Acres	--	59.2
Federally-Owned Lands		
Federal Land	Morton	0.4
Federal Land	Emmons	0.8
Total Acres	--	1.2

The EA review area includes areas within the Corps flowage easements and federal lands that are potentially impacted by construction and/or operation of the DAPL Project. The EA review area is hereafter referred to as the Project Area(s). Actions that occur outside of the flowage easements and the federal lands at the Lake Oahe crossing are considered Connected Actions. Connected Actions are those actions that are “closely related” and “should be discussed” in the same NEPA document (40 CFR § 1508.25 (a)(i)). Actions are connected if they automatically trigger other actions that may require an EA, cannot or will not proceed unless other actions are taken previously or simultaneously or if the actions are interdependent parts of a larger action and depend upon the large action for their justification (40 CFR § 1508.25 (a)(i, ii, iii)). Connected Actions are limited to actions that are currently proposed (ripe for decision). Actions that are not yet proposed are not Connected Actions, but may need to be analyzed in the cumulative effects analysis if they are reasonably foreseeable. The only Connected Actions at each individual crossing location associated with the Proposed Action are those that relate to the HDD workspace at the Missouri River crossing and the HDD workspace, HDD stringing area, and the permanent easement on private lands in the vicinity of the Lake Oahe crossing. The two federal permissions are not connected actions because the locations of each crossing are independent of one another and the location of the first does not dictate the location of the second.

Dakota Access initially proposed an isolation valve to be located within the flowage easements (easement LL3453E); however, the Omaha District has assessed the potential for open water and ice jam flooding within the vicinity of the Project Area in the “Reconnaissance Report, Missouri River, Buford-Trenton Irrigation District, North Dakota” and based on the findings the valve would be located within an area that has the potential to be submerged or damaged by ice jam flooding. Therefore, the valve has been removed from the Project Area.

The Project Area and Connected Actions analyzed within this EA for both crossings are outlined in **Table 2-4**, which identifies land status (private, Federal or Easement) and provides associated acreages.

Table 2-4 Environmental Assessment Areas of Interest			
Action/Activity	Federal/ Private Land	EA Review	Acres
Flowage Easements--Williams County			
Construction ROW within Corps flowage easements	Private; Federal Easement	Project Area	58.0
HDD workspace (exit point) within Corps flowage easement	Private; Federal Easement	Project Area	1.2
Permanent easement over HDD profile within Corps flowage easement and placement of temporary waterline	Private; Federal Easement	Project Area	1.2
Flowage Easements Connected Actions – McKenzie County			
HDD workspace (entry point) on private land	Private	Connected Action	2.0
Federal Lands and Connected Actions - Morton County			
HDD workspace (exit point) on private land	Private	Connected Action	1.2
HDD stringing area on private land	Private	Connected Action	13.1
Permanent easement over HDD profile on private land between HDD workspace (exit point) and federal lands	Private	Connected Action	0.8
Permanent easement over HDD profile on federal lands	Federal	Project Area	0.4
Federal Lands and Connected Actions - Emmons County			
Permanent easement over HDD profile on federal land	Federal	Project Area	0.8
Permanent easement over HDD profile on private land between federal land and HDD workspace (entry point)	Private	Connected Action	0.3
HDD workspace (entry point) on private land	Private	Connected Action	1.2
Lake Oahe			
Permanent easement over HDD profile across Lake Oahe	N/A	Project Area	6.3

2.3.1.1 Flowage Easements

The Missouri River HDD is located just upstream of Lake Sakakawea and downstream of the confluence of the Yellowstone and Missouri rivers. The proposed crossing of flowage easements near upper Lake Sakakawea (flowage easements) is located in Sections 7, 18, 19, and 30, Township 152 North, Range 103 West, in Williams County, North Dakota (**Figure 2**). The proposed pipeline is routed parallel to an existing buried natural gas pipeline and associated valve sites, which cross the Missouri River and flowage easements just west of the proposed Dakota Access pipeline.

The HDD exit workspace would be located on a flowage easement tract. Access to the Project Area on the flowage easements would be via the construction ROW from an existing road (38th Street NW). No additional temporary access roads would be required. The Connected Action at the flowage easements includes the HDD entry workspace, located on the south side of the Missouri River on private lands in McKenzie County. Access to the HDD entry workspace will be via the existing access road located adjacent to the HDD entry workspace. No additional temporary access roads would be required.

2.3.1.2 Federal Lands

The proposed crossing of federally-owned tracts at Lake Oahe (federal lands) is located in Section 10, Township 134 North, Range 79 West in Morton County, North Dakota, and Section 11, Township 134 North, Range 79 West in Emmons County, North Dakota (**Figure 3**). The proposed pipeline is routed to parallel existing linear infrastructure (an overhead powerline and a buried natural gas pipeline) in this area. The HDD entry and exit point workspaces and stringing area would be located on private land outside of the federal lands and are considered Connected Actions in this analysis. HDD design reflects a crossing length of approximately 7,500 feet, of which approximately 5,420 feet occurs beneath the bed of Lake Oahe.

2.3.2 Description of Construction Techniques and Construction Mitigation Measures

All facilities associated with the Proposed Action would be designed, constructed, tested, operated, and maintained in accordance with the U.S. DOT regulations in Title 49 CFR Part 195. Dakota Access is currently developing project-specific plans and would implement best management practices (BMPs) to mitigate for potential construction-related impacts associated with stormwater runoff. This includes implementation of their Stormwater Pollution Prevention Plan (SWPPP; see **Appendix A**), which includes the Spill Prevention Control and Countermeasure Plan (SPCC Plan) as an appendix. Additionally, Dakota Access would implement their HDD Construction Plan and HDD Contingency Plan (HDD Construction/Contingency Plan; see **Appendix B**) for inadvertent release of drilling mud during HDD construction work at wetland and waterbody crossings to protect sensitive resources from such releases. The Proposed Action would be constructed via a combination of conventional and specialized construction procedures, as described below.

2.3.2.1 Clearing and Grading

Prior to commencement of ground-disturbing activities, a standard survey and stakeout would be conducted to identify ROW and workspace boundaries and to locate existing foreign utility lines within the construction ROW. Following completion of the surveys, the construction ROW would be cleared of vegetation and debris. Clearing of wetlands is limited to removal of woody debris in the forested wetlands above the HDD profile on the north bank of the Missouri River within the flowage easements. Stumps would be cut flush with the ground and left in place, as described in Section 3.2.3. Cleared vegetation and debris along the ROW would be disposed of in accordance with federal, state, and local regulations either by burning, chipping and spreading, or transportation to a commercial disposal facility. Where necessary, to contain disturbed soils during clearing and grading in upland areas, and to minimize potential erosion and sedimentation of wetlands and waterbodies, temporary erosion control devices (ECDs) would be installed prior to initial ground disturbance and maintained throughout construction. Vegetative buffers would be left where practical at all waterbody crossings to limit the exposure and impact to these features. Final clearing would take place immediately prior to crossing the feature rather than advance.

2.3.2.2 Trenching

Trenching involves excavation of a ditch for pipeline placement and is accomplished through the use of a trenching machine, backhoe, or similar equipment. Trench spoil would be deposited adjacent to each trench within the construction work areas, with topsoil segregation utilized where necessary based on

land use (see the typical ROW configuration drawings in **Appendix C**). In standard conditions, the trench would be excavated to an appropriate depth to allow for a minimum of 36 inches of cover over the pipe. Ground disturbance associated with conventional pipeline construction is generally limited to approximately 6 to 10 feet below the existing ground surface. Typically the bottom of the trench would be cut at least 12 inches greater than the width of the pipe. The width at the top of the trench would vary to allow the side slopes to adapt to local conditions at the time of construction.

2.3.2.3 Pipe Stringing, Bending, and Welding

Following preparation of the trench, the new pipe would be strung and distributed along the ROW parallel to the trench. Depending on available workspace, some pipe may be fabricated off-site and transported to the ROW in differing lengths or configurations. Pipe would be bent by hydraulic bending machines, as necessary, to conform the pipe to the trench. Once in place along the ROW, pipe lengths would be aligned, bends fabricated, and joints welded together on skids (i.e., temporary supports). Welding would be performed in accordance with the American Petroleum Institute Standards, PHMSA pipeline safety regulations, and Company welding specifications. All welds would be coated for corrosion protection and visually and radiographically inspected to ensure there are no defects. Segments of completed pipeline would undergo hydrostatic pressure testing as described in Sections 3.2.1.2 and 3.11.

2.3.2.4 Pipeline Installation and Trench Backfilling

Completed sections of pipe would be lifted off the temporary supports by side boom tractors or similar equipment and placed into the trench. Prior to lowering-in, the trench would be visually inspected to ensure that it is free of rock and other debris that could damage the pipe or the coating. Additionally, the pipe and the trench would be inspected to ensure that the configurations are compatible. Tie-in welding and pipeline coating would occur within the trench to join the newly lowered-in section with the previously installed sections of pipe. Following this activity, the trench would be backfilled with the previously excavated material and crowned to approximately 6 inches above its original elevation to compensate for subsequent settling.

2.3.2.5 Clean-up and Restoration

Following pipeline installation and backfilling, disturbed areas would be restored and graded to pre-construction contours as closely as practicable. Construction debris and organic refuse unsuitable for distribution over the construction ROW would be disposed of at appropriate facilities in accordance with applicable regulations. Permanent ECDs would be installed as appropriate, and revegetation measures would be applied in accordance with the Environmental Construction Plan (ECP; see **Appendix G**), SWPPP, and requirements of applicable state and federal permits.

2.3.2.6 Major Waterbody Crossing Method

As previously discussed, the preferred waterbody crossing technique for the Proposed Action is the HDD method. The HDD method allows for construction across a feature without the excavation of a trench by drilling a hole significantly below conventional pipeline depth and pulling the pipeline through the pre-drilled hole. As described in subsequent sections of this document and in greater detail in the HDD Construction Plan (**Appendix B**), by utilizing the trenchless technology, Dakota Access would minimize

impacts to resources within and adjacent to the waterbodies crossed and reduce the anticipated duration of the crossing. The HDD equipment would be staged well outside of the riparian area, avoiding impacts on the steep banks, cultural resources, and sensitive habitat immediately adjacent to the waterbody. Cross sections of the Missouri River and Lake Oahe HDDs are provided in **Figure 14** and **Figure 15**.

Depending on the HDD equipment utilized, to help guide the drill bit along the pipeline ROW, electric-grid guide wires may be laid along the predetermined HDD route. In thickly vegetated areas, a small path may be cut to accommodate laying the electric-grid guide wires. Once the electric-grid guide wires are installed, the directional drilling rig would drill a small diameter pilot hole along the prescribed profile. Following the completion of the pilot hole, reaming tools would be utilized to enlarge the hole to accommodate the pipeline diameter. The reaming tools would be attached to the drill string at the exit point and would then be rotated and drawn back to incrementally enlarge the pilot hole. During this process, drilling fluid consisting of primarily bentonite clay and water would be continuously pumped into the pilot hole to remove cuttings and maintain the integrity of the hole. When the hole has been sufficiently enlarged, a prefabricated segment of pipe would be attached behind the reaming tool on the exit side of the crossing and pulled back through the drill hole towards the drill rig.

Fluid pressures can build up within the borehole during HDD operations. In some instances, this can result in hydraulic fracturing of the substrate and subsequent migration of drilling fluids either into the waterway or to the land surface—this is known as a “frac-out.” The depth of the proposed HDD profiles below the beds of the surface waters to be crossed would minimize the potential for frac-outs to occur. Additionally, precautions would be taken during all phases of the drilling operation. A high quality drilling fluid would be used to maintain and protect the integrity of the borehole during the entire HDD operation until the final pipe pull is completed. The HDD Construction Plan (**Appendix B**) includes more details regarding HDD construction technology and methods. The work would be performed by an experienced drilling contractor, Michels Directional Crossings, a Division of Michels Corporation, that is knowledgeable in effective HDD practices, including maintaining proper drilling rate, drilling fluid composition, pumping rate of the drilling fluid, pull-back rate, and pumping rate on the back ream, and adjusting these as appropriate for the conditions.

The potential for river channel changes associated with water erosion and scour were considered when selecting the major waterbody crossing methods and locations. Dakota Access has coordinated with the North Dakota Office of the State Engineer as part of the Sovereign Lands Permitting Process to verify adequate depths for the pipe to be buried relative to geomorphological movements for the Lake Oahe and the Missouri River crossings. Accordingly, the professional engineering firm evaluating HDD depths for the Proposed Action, GeoEngineers, has performed a scour analysis in order to evaluate the scour risk to the proposed pipeline during 100- and 500-year discharge events for the Lake Oahe and the Missouri River crossings.

The proposed HDD profile under Lake Oahe is designed to provide 92 feet of cover below the bottom of the lake. Because of the depth of the pipe below the waterbody, and the ponded condition of Lake Oahe, this crossing is at a low risk to geomorphologic movements at the proposed crossing. The North Dakota Office of the State Engineer has issued Sovereign Lands Permit for the Lake Oahe crossing. A copy of the permit is included in Appendix M.

The Missouri River HDD profile is designed to provide a minimum of 36 feet of cover at the crossing location beneath the lowest point of the Missouri River. This crossing has less proposed cover between the bottom of the waterbody and the top of the buried pipe and it is an active channel. As part of the Sovereign Lands Permitting Process with the Office of the State Engineer, conservative assumptions were utilized in the analysis of the Missouri River HDD design profile as a factor of safety. For example, the proposed crossing is not located at a bend in the channel and is located over 3,000 feet downstream of the nearest upstream channel bend. An analysis of historic photographs of the proposed crossing show that the upstream bend has been stable and in the same location and that the potential downstream migration of this bend is highly unlikely. However, although bend scour is not likely to propagate downstream to the proposed crossing, to be conservative in their evaluation GeoEngineers assumed that the bend could migrate downstream and negatively influence the crossing.

GeoEngineers estimated the maximum bend scour at the proposed pipeline to be 23 to 25 feet for the 100- and 500-year peak flow events, respectively. The bend scour at the crossing location would not be additive for successive storms as long-term degradation is assumed to be zero. Historic aerial imagery and recent Google Earth imagery indicates bar building and deposition of sediments in the Project Area, representing a dynamic sediment environment. This equates to a high likelihood that there is an adequate upstream sediment supply and likely minimal long term degradation at the proposed crossing location. In general terms, if the area over the pipeline was to experience a large scour event from one large storm event (up to 23 feet of scour during the 500-year peak flow event following the conservative assumptions), this area would be filled in/covered after the storm event by deposition of sediments from upstream and potential exposure of the pipeline would be negligible.

In addition to bend scour, there is potential for contraction scour that occurs when channel width varies within a short reach of the river. There is a small contraction upstream of the proposed crossing at the downstream end of the bend approximately 3,000 feet upstream. The DAPL proposed crossing is not located in a contraction, but actually a small expansion and the contraction point is not likely to migrate downstream to the proposed crossing. However, to be conservative in their analysis as an additional factor of safety, GeoEngineers assumed that the contraction scour upstream of the proposed crossing could migrate downstream to the proposed crossing location. Based on this conservative assumption, contraction scour estimates for the 100-year discharge event are approximately 9 feet. This 100-year contraction scour depth is greater than what would occur during the 500-year event as flood waters spreading across the floodplain actually reduce contraction and therefore reduce the contraction scour depth.

Combining the conservative assumptions from above, the maximum estimated total potential scour depth at the proposed Missouri River HDD site would occur during a 100-year flood event. This conservatively assumes "worst case" that both the bend scour and the contraction scour migrate downstream and are both realized directly over the pipeline crossing at the same time. Under this scenario, the bend scour would create a scour of 23 feet and the contraction scour would contribute another 9 feet creating the maximum estimated total potential scour depth of 32 feet below the existing channel elevation during a 100-year flood event. To assess the factor of safety applied using these assumptions, GeoEngineers utilized general scour equations that take into account bend and contraction scour and compared them to the total scour estimated using the Maynard equation for bend scour and Laursen's live-bed contraction scour equation. Utilizing the Blodgett equation, Lacey equation, and Blench equation for

general scour, the estimated general scour at the proposed pipeline crossing ranges between 14 to 23 feet for the 100- and 500-year peak flow events. This results in a total factor of safety of 1.4 to 2.3 for total scour at the proposed crossing.

Based upon their calculated worst-case scenario scour estimate, GeoEngineers considers the risk of scour occurring down to the level of the proposed pipeline to be low and the proposed Missouri River HDD design profile to be appropriate. The North Dakota Office of the State Engineer has issued Sovereign Lands Permit for the Missouri River crossing. A copy of the permit is included in Appendix M.

2.3.2.7 Minor Waterbody Crossing Methods

There are no minor waterbodies crossed by the pipeline on Corps Fee Lands. All minor waterbodies encountered on the flowage easements have been identified as falling under the jurisdiction of the Buford/Trenton Irrigation District (BTID) and, in compliance with their regulations, would be crossed via trenchless pipeline construction methods (bores). Dakota Access is working through the BTID permitting and approval process separately. One intermittent waterbody has been identified on the south side of the Missouri River crossing, within the connected action area but outside of the flowage easements, and within the HDD workspace. Temporary impacts to this waterbody would be mitigated during construction with a customized HDD equipment configuration, including the placement of temporary matting/bridging over the feature as necessary to maintain natural water flow during construction, and installation of appropriate ECDs. Therefore, impacts on surface waters and adjacent sensitive habitat would be minimized by eliminating open-cut pipeline installations and in-stream work for all crossed waterbodies.

2.3.2.8 Wetland Crossings

As discussed in Section 3.2.3 below, the only wetlands that would be crossed by the Proposed Action are located within the permanent easement between HDD workspace and the Missouri River on the flowage easements. As such, no wetlands would be impacted by construction or operation of the facilities within the Project Area/Connected Actions of the federal lands, and no trenching within wetlands would occur within the Project Area on the flowage easements. A temporary waterline would be laid aboveground, across the wetlands located between the HDD workspace and the north bank of the Missouri River on flowage easement LL3440E (**Figure 6-B**). No ground disturbing activity would be required for installation of the temporary waterline. A more detailed discussion regarding wetlands is provided in Section 3.2.3.

2.3.2.9 Operation and Maintenance

Following completion of construction, a 50-foot-wide permanent easement that is generally centered on the pipeline (25 feet on either side of the centerline) would be retained along the pipeline route. The 50-foot-wide easement would be maintained by the Operator in an herbaceous state (cleared of large diameter woody vegetation) to facilitate inspection of the pipeline, operational maintenance, and compliance with the federal pipeline safety regulations. This 50-foot-wide maintained corridor would be reduced to a 30-foot-wide corridor centered on the proposed pipeline within the wetland area north of the Missouri River in Corps Flowage Easement LL3440E (**Figure 6-B**).

Maintenance of the permanent ROW would entail periodic vegetation clearing measures, in accordance with PHMSA regulation for pipeline inspection. This may involve selective tree cutting and periodic

mowing. The use of herbicides would not occur on Corps Fee Lands without obtaining prior approval from the Corps. Vegetation maintenance of the ROW in areas of active cropland is not expected to occur due to agricultural practices.

3.0 THE AFFECTED ENVIRONMENT AND POTENTIAL ENVIRONMENTAL IMPACTS OF THE PROPOSED ACTION AND NO ACTION ALTERNATIVE

3.1 Geology and Soils

Under the “no action” alternative, Dakota Access would not construct the DAPL Project and no impacts on geology and soils would occur. However, if the objectives of the DAPL Project are to be met under the “no action” alternative, other projects and activities would be required and these projects would result in their own impacts on geology and soils, which would likely be similar to or greater than the DAPL Project. If the Project is not constructed, less reliable shipping methods such as truck or rail could result in an adverse effect on geology and soils due to increases in transportation accidents and future construction of infrastructure necessary to support these methods (i.e. additional loading/offloading facilities, rail spurs, etc.).

3.1.1 Geology

3.1.1.1 Affected Environment

The Corps flowage easements to be crossed extend approximately 2.83 miles north of the Missouri River in Williams County (**Figure 2**). Conventional open trench construction methods would be used to install the pipeline on approximately 13,553 feet of the 14,953 feet of flowage easements. The remaining 1,400 feet would be installed via HDD for the adjacent Missouri River crossing. The easements and Connected Action lie within the Missouri River valley and floodplain on top of the Quaternary Oahe Formation (Clayton, 1980). The Oahe Formation is comprised of unconsolidated sediments, including clay, sand, silt, and gravel, with some dispersed organic material. Geotechnical borings placed on both sides of the river, ranging in depth from 75 to 95 feet below ground surface, confirm the presence of unconsolidated sand, gravel, and clay to at least these depths. At this location, the Oahe Formation unconformably overlies the Paleocene Bullion Creek Formation, which is made up of silt, sand, clay, sandstone, and lignite, and is the uppermost part of a thick sequence of early Tertiary and late Mesozoic sedimentary formations. Well borehole data from McKenzie County indicates that this sequence occurs in excess of 15,000 feet thick in certain locations (Freers, 1970). No soil borings were obtained below the Missouri River crossing because the banks of the Missouri River the length of the crossing is sufficiently short (930 feet) to allow for a comprehensive geotechnical analysis without testing directly beneath the river itself.

The flowage easements crossed by the Proposed Action and area crossed by the Connected Action occur within the Great Plains Physiographic Province, which is characterized by a broad expanse of flat land in the central portion of the U.S. The easements and the Missouri River Project Area lie within an area where physiography is characterized by low-relief alluvial and floodplain deposits and range in elevation from 1,856 to 1,879 feet above mean sea level (MSL).

The bedrock geology of the Lake Oahe crossing area is characterized by Cretaceous sedimentary formations (Clayton, 1980). The Fox Hills Formation (sandstone and shale) overlies the Pierre Formation (shale), which has been exposed through erosion along the axis of the Lake Oahe reservoir of the Missouri River. The surficial geology is characterized by alluvium within the valley and dune deposits moving in an eastward direction. This was corroborated by geotechnical soil borings that were placed on private lands

on both sides of Lake Oahe that indicate the presence of sands and clays to depths ranging from at least 150 to 235 feet below ground surface (**Appendix D**).

The Lake Oahe crossing area also lies within the Great Plains Physiographic Province. On the west side of Lake Oahe, the federal land tracts range in elevation from 1,609 to 1,712 feet above MSL. The HDD exit point workspace ranges from 1,699 to 1,711 feet MSL, and the stringing area ranges from 1,671 to 1,766 feet MSL. On the east side of Lake Oahe, the federal lands range in elevation from 1,613 to 1,664 feet MSL, and the HDD entry point workspace ranges from 1,636 to 1,644 feet MSL.

3.1.1.2 Impacts and Mitigation

To protect the terrain of the Project Area and Connected Actions, Dakota Access would, to the extent feasible, restore the areas affected by pipeline construction to pre-construction contours and similar vegetation (excepting trees within approximately 15 feet of the centerline). Pre-construction and as-built surveys would be completed and provided to the Garrison Project.

Construction of the pipeline on the flowage easements and Connected Action at the Missouri River crossing would result in minor impacts on topography and geology, and no unique geologic features that have received state or federal protection would be impacted within the Corps flowage easements or Connected Action.

The impacts attributable to the HDD would not be significant. Vibrations produced during the HDD process are not of a magnitude that would cause any impacts to geologic features or other resources. Any vibrations associated with the drilling process would be limited to the immediate vicinity of the drilling equipment on the surface and downhole. The vibrations produced from the downhole tooling are of a very low magnitude and are attenuated very quickly by the formation such that vibrations are not felt at the surface. A vibration monitoring analysis conducted by GeoEngineers in 2009 found that peak particle velocities were less than 0.07 inches/second within approximately 50 feet of HDD operations. These velocities are well below that which would cause any structural impacts and moreover, the recorded vibrations were, in fact, imperceptible to human senses (GeoEngineers, 2009). Primary impacts of open trench installation within the Corps flowage easements or Connected Action would be limited to construction activities and consist of temporary alteration due to grading and trenching operations.

Construction of the pipeline at the Lake Oahe crossing would not result in adverse impacts on topography or geology on federal lands of the Project Area. Similarly, construction impacts on topography and geology from the Connected Actions would be low to non-existent. No unique geologic features would be impacted by any aspect of the HDD installation.

No impacts on topography or geology would occur during operations.

Based on recently obtained geotechnical analysis, no blasting would be expected to occur in association with pipeline installation on the Project Area or Connected Actions, given that the HDD would be conducted in unconsolidated or loosely indurated sediments, as described in Section 3.1.1.1. Although not anticipated, if blasting is found to be necessary, Dakota Access would follow procedures specified in its Blasting Plan (**Appendix E**).

3.1.2 Mineral Resources

3.1.2.1 Affected Environment

Williams and McKenzie counties have numerous mineral resources that include petroleum, lignite, halite, sand and gravel, and scoria. Scoria, sediments baked from the in situ combustion of lignite (Carlson, 1985), is commonly used to surface roads. Although lignite occurs throughout Williams and McKenzie Counties, there are no lignite beds in the vicinity of the Corps flowage easement crossings (Murphy, 2006; 2007). A review of aerial photographic and USGS 1:24K topographic coverage indicates that there are no sand, gravel, or scoria pits within 1.5 miles of the Corps flowage easement crossing areas.

Two oil/gas wells are located within the Corps flowage easements (LL3440E), but neither occur within 150 feet of the proposed HDD workspace. In addition, no oil/gas wells are located within 150 feet of the Connected Action at the Missouri River (North Dakota Department of Mineral Resources, 2015). Impacts within 150 feet of the Project was used following the Federal Energy Regulatory Commission (FERC) guidelines for the evaluation of construction impacts to well integrity. Although the Project is not under the jurisdiction of the FERC, FERC guidance was deemed to be an appropriate distance for this evaluation.

The primary mineral resources of Morton and Emmons counties are sand and gravel aggregates. The older Cretaceous sediments in the vicinity of the Lake Oahe crossing (i.e., scoria) do not contain economical deposits of fossil fuels. Although lignite occurs in Morton County, no lignite beds were identified in the vicinity of the Lake Oahe crossing. A review of aerial photographic and USGS 1:24K topographic coverage indicates that there are no sand, gravel, or scoria pits within 1.5 miles of the Lake Oahe crossing.

Since Morton and Emmons Counties are located outside the areal extent of the Bakken Formation, there is little to no development of oil/gas resources. This is reflected in the fact that no oil/gas wells were located within 150 feet of the federal lands or HDD workspace and stringing area. However, the proposed pipeline would be co-located with an existing buried natural gas pipeline and an overhead electric transmission line across the lake.

3.1.2.2 Impacts and Mitigation

As noted previously, mineral resources, including lignite, halite, sand and gravel, and scoria occur within the region around the Corps flowage easements and Connected Action; however, the only commercially exploited mineral resources in the direct vicinity of the route are oil and gas, as evidenced by the two wells found within the Corps flowage easements. These wells would not be impacted by the Proposed Action due to proposed conventional construction methods and distance from the wells. No impacts on any mineral resources are expected as a result of the proposed flowage easement crossings or Connected Action.

The Proposed Action does not cross active mining areas nor any oil or gas wells and facilities in the vicinity of Lake Oahe. No impacts to any mineral resources are expected as a result of the proposed Lake Oahe crossing.

Dakota Access, in accordance with North Dakota One Call, would require that the construction contractor, prior to initiating any ground disturbance activities, identify all underground utilities to minimize the potential for encountering buried utility structures. Accordingly, the Proposed Action is not expected to have any impact on mineral resources, because there would be no additional surface disturbance required beyond that used for construction.

3.1.3 Geologic Hazards

3.1.3.1 Affected Environment

Earthquakes and Seismic Hazards

The Project Area, traverses terrain that overall is geologically stable. The potential seismic hazard was assessed by evaluating the USGS 2014 Seismic Hazard Map. According to the Seismic Hazard Map, an earthquake that has a 2% chance of being exceeded in a 50-year period would result in peak ground accelerations (PGAs) of 2 to 4 percent gravity (g) in the Project Area and Connected Actions (USGS, 2014a).

Ground movement from an earthquake of this magnitude may cause a light perceived shaking but is not expected to cause any structural damage. The low seismic hazard of the Project Area is further corroborated by the relatively low number of earthquakes that have historically occurred in North Dakota (North Dakota GIS Hub Data Portal, 2010).

Landslides

Landslides refer to the gravity-induced downward and outward movement of slope-forming materials and pose the greatest risk to facilities on or near steep slopes or on soil materials that are susceptible to failure particularly in response to earthquakes or heavy precipitation. A map developed by the USGS that illustrates the regional potential for the occurrence of landslides was used to evaluate the Project Area for landslide incidence and susceptibility (Radbruch et al., 1982).

Portions of the Project Area within the Corps flowage easements are moderately susceptible to landslides. This includes 59.2 acres (100%) of construction workspace, of which 17.0 acres lies within the 50-foot-wide permanent easement, and 0.55 acre occurs within the 30-foot-wide maintained corridor above the HDD profile within the Corps flowage easement (which would not have surface disturbance aside from selective tree cutting and roots would remain in place). The HDD entry point on the south side of the Missouri River outside of the flowage easements is considered the Connected Action. The HDD entry workspace is approximately 2.0 acres and is also moderately susceptible to landslides.

As designed, the Proposed Action does not require any surface impacts to the federally owned lands at Lake Oahe, although, 0.4 acre of the permanent easement through the federal property on the west side of the Lake Oahe (Morton County) is classified as having a high incidence of landslides. Slopes greater than 25% in the Project Area within federal lands are not found on the east side of Lake Oahe (Emmons County) and comprise less than 0.02 acre on the west side. Activities related to the HDD crossing outside of the federal lands at the Lake Oahe crossing are considered Connected Actions. On the west side of Lake Oahe, 1.2 acres of the HDD workspace (exit point) and 13.1 acres of the pipe stringing area are designated as having a high incidence for landslides. Additionally, the stringing area encompasses

approximately 1.8 acres of land that is classified as highly susceptible to landslides. Approximately 0.9 acre within the stringing area has slopes exceeding 25%. Approximately 1.2 acres of the HDD entry point workspace on the east side of Lake Oahe is designated as having a high incidence of landslides, but there are no slopes within either the east or west HDD workspace that exceed 25%.

Karst and Subsidence

Geologic terrane beneath the flowage easements as well as the Connected Actions has potential for karst development owing to the presence of evaporite deposits, consisting of gypsum, salt, anhydrite, and/or potash (Weary and Doctor, 2014). These deposits range in age from Devonian to Jurassic and occur at depths ranging from 900 to 3,700 meters (3,000 to 12,000 feet). Fresh water must be present for the necessary dissolution to occur for karst development. However, since fresh water is not likely to be found at these depths, dissolution and karst development are not likely to occur (Ackerman, 1980). Even if karst conditions were to develop, any physiographic expression at the ground surface would be negligible given the great depth of these formations.

Geologic terrane beneath the federal lands crossings as well as the HDD workspaces at Lake Oahe area may have potential for karst development due to deposits of gypsum and other evaporates (Weary and Doctor, 2014). However, a review of topographic and aerial photographic coverages as well as geotechnical testing gave no indication of karst feature development, and no documentation was found to indicate that karst features have actually developed in this area. Furthermore, an existing buried pipeline and overhead electric transmission line also cross in this location, and no information was found indicating those utilities have been impacted by karst.

Land subsidence may be caused by mining, underlying karst features, and extraction of fluids, such as oil or groundwater. No surface subsidence effects are expected to be incurred in the Project Area since no mines, oil/gas wells, water wells, or karst development have been identified in the Project Area. Moreover, despite the fact that oil and gas production has occurred for decades in the Williston Basin, no surface subsidence effects have been documented in that area and, therefore, are not expected to impact the Project Areas within or near the margin of the Williston Basin.

3.1.3.2 Impacts and Mitigation

Although landslides can represent a significant geologic hazard during construction and operation of the pipeline, the pipeline would be installed via the HDD to significantly reduce ground disturbing activities in areas with steep slopes (greater than 25%), effectively mitigating the risk.

As previously discussed, no ground disturbing activities would occur within the Project Area on the federal lands. Ground disturbing activities associated with the HDD workspace and pipe stringing area would be required as part of the Connected Action; however, these activities would consist of clearing and grading only and would occur, at the closest distance, 1,040 feet from the bank of Lake Oahe. As such, no trenching or excavation activities would occur within the Project Area or Connected Action of the federal lands, thereby reducing the potential for erosion and off-site sedimentation which could otherwise occur as a result of side-slope trench excavation methods and accumulation of water within the trench.

To further mitigate impacts during construction, Dakota Access would utilize erosion and sediment control devices in accordance with the ECP and SWPPP, and in compliance with the National Pollutant Discharge Elimination System (NPDES) program, during construction in these areas with slopes greater than 25%. Dakota Access would install sediment barriers (e.g., silt fence) at the base of slopes and along the sides of slopes, as necessary, to prevent potential siltation downslope of the construction area from entering waterbodies.

Temporary ECDs would be maintained until the areas disturbed by construction have been successfully revegetated or are replaced with permanent ECDs. Following the completion of construction activities, disturbed areas would be restored and graded to pre-construction contours as closely as practical. In order to minimize the potential for future slip or landslide events during operation of the Proposed Action, Dakota Access may install permanent ECDs in addition to performing regular restoration and revegetation activities. Permanent ECDs would be installed in accordance with revegetation measures outlined in the ECP, SWPPP, and specific landowner requests. The effectiveness of revegetation and permanent ECDs would be monitored by Dakota Access' operating personnel during the long-term operation and maintenance of the Proposed Action facilities. Therefore, construction and operation of the Proposed Action facilities on the Project Area and Connected Action of the federal lands would not be expected to increase the potential for significant landslide or slip events or result in adverse impacts on aquatic life resources within Lake Oahe.

Dakota Access has completed a geotechnical analysis of the flowage easement and federal land crossing sites to facilitate engineering and design, including selection of appropriate materials and construction methods to limit any environmental impacts attributable to landslides. Results of the geotechnical analysis are included in **Appendix D**.

The strength and ductility of a properly designed pipeline would allow it to span a considerable distance without compromising its integrity in the event of a landslide or other ground movement, such as subsidence. Arc-welded steel pipelines are the most resistant type of piping, vulnerable only to very large and abrupt ground displacement (e.g., earthquakes, severe landslides) and are generally highly resistant to moderate amounts of permanent deformation. This strength and ductility effectively mitigates the effects of fault movement, landslides, and subsidence. Therefore, by implementing the mitigation measures presented here, impacts on the pipeline from geologic hazards are expected to be minimal.

No impacts associated with seismic activity within the Project Area are anticipated. Due to the limited potential for large, seismically induced ground movements, there is minimal risk of earthquake-related impacts on the pipeline. Therefore, no mitigation beyond designing the proposed pipeline to currently accepted industry specifications is necessary.

3.1.4 Paleontology

3.1.4.1 Affected Environment

The surficial geology at the Missouri River crossing is dominated by Quaternary glacial drift materials within the floodplain overlying the Bullion Creek and Sentinel Butte Formations. These bedrock formations have been known to contain wide variety of fossils, including fossilized wood and tree stumps,

mollusks, leaves, and insects (Hoganson and Campbell, 2002). Additionally, vertebrate fossils have been found, including turtles, crocodile-like champosours, and bear-like titanoides.

The surficial geology at the Lake Oahe crossing is also characterized by Quaternary glacial drift materials; however, it is underlain by the Fox Hills and Pierre Formations. These formations could contain diverse fossils, including marine reptiles (e.g., mosasaurs, plesiosaurs, sea turtles), fish (e.g., sharks and rays), birds, and invertebrates (Hoganson, 2006).

While there is potential for the bedrock formations underlying the Missouri River and Lake Oahe crossings to contain fossils, all activities, including HDDs, would only penetrate the surficial geology that is dominated by unconsolidated sediments, as evidenced in the geotechnical report provided in **Appendix D**. The potential for encountering fossils in these unconsolidated sediments at the Missouri River and Lake Oahe crossings is low, as fossils are primarily found in sedimentary rock.

3.1.4.2 Impacts and Mitigation

Activities associated with pipeline construction that have the potential to impact paleontological resources are clearing, grading, and trenching, as well as site preparation for HDD operations. The paleontological resources of concern pertaining to construction of the Proposed Action are vertebrate fossils that may be present in the Paleocene bedrock sediments, and to a lesser degree, in Quaternary alluvium since this type of deposit only rarely contains vertebrate fossils.

In the event paleontological resources are discovered during construction, Dakota Access would implement measures outlined in its Unanticipated Discoveries Plan Cultural Resources, Human Remains, Paleontological Resources and Contaminated Media (UDP) (**Appendix F**) to avoid further impacts on these resources.

Invertebrate fossils are considered to be insignificant, and mitigation measures would not be required, should they be encountered. However, if vertebrate fossils are found during pipeline construction, Dakota Access would immediately cease construction activities and notify appropriate agency personnel, including the North Dakota state paleontologist as well as the Corps archaeologist. The appropriate authorities would determine the significance of the find and prescribe the mitigation procedures to be completed prior to resuming pipeline construction.

Operation of the pipeline would not disturb paleontological resources.

3.1.5 Soils

3.1.5.1 Affected Environment

Dakota Access identified and assessed soil characteristics in the Project Area and Connected Actions using the Soil Survey Geographic Database, which is a digital version of the original county soil surveys developed by the Natural Resources Conservation Service (NRCS) for use with GIS (NRCS, 2015). The areas are located within the Rolling Soft Shale Plain of North Dakota, South Dakota, and Montana. The dominant soil orders in the Rolling Soft Shale Plain are Mollisols and Entisols, which are shallow to very deep, generally somewhat excessively drained and loamy or clayey (NRCS, 2006).

The flowage easements and Connected Action are within Zone A of the Missouri River floodplain. Soils within the Project Area are formed out of alluvium deposited by the river over time. Slopes throughout this Project Area are very flat, ranging from 0-2%. Approximately 94% of the flowage easement Project Area and Connected Action would be located within either Scorio silty clay or Lohler silty clay (**Table 3-1, Figure 4**). The Scorio and Lohler silty clay soils are moderately well drained and formed in clayey alluvium. In the case of the Scorio silty clay, the clay alluvium is deposited over a loam alluvium. The Scorio and Lohler soils are identified as Hydrologic Soil Group C, which have slow infiltration rates when thoroughly wet and a slow rate of water transmission. The average depth to the water table across the majority of this Project Area is 4.25 feet. The soils within the flowage easements experience occasional flooding but are not generally ponded. Soil boring data is provided in (**Appendix D**).

Table 3-1 Soil Types Mapped on the Flowage Easements Project Area and Connected Action						
Soil Map Unit	Soil Map Unit Name	Project Area (acres) ¹	Farmland Rating	Hydrologic Group ² (infiltration)	Hydric Rating ³	Wind Erodibility Group ⁴
E4039A	Mckeen loam, 0-1% slopes, frequently flooded	0.1	None	B/D	96%	4L
E4051A	Trembles fine sandy loam, slightly wet, 0-1% slopes, occasionally flooded	0.5	Farmland of Statewide Importance	A	0%	3
E4103A	Lohler silty clay, saline, 0-1% slopes, occasionally flooded	0.9	None	C	0%	4
E4106A	Lohler silty clay, slightly wet, 0-2% slopes, occasionally flooded	27.8	Farmland of Statewide Importance	C	5%	4
E4159A	Scorio silty clay, slightly wet, 0-2% slopes, occasionally flooded	29.9	Farmland of Statewide Importance	C	0%	4
E2725F	Arikara-Shambo-Cabba loams, 9-70% slopes	2.0	None	B	0%	6
EW	Water	0.3	None	N/A	N/A	N/A
Total		61.5	--			

¹ The Project Area includes the construction workspace (58.0 acres) and 30-foot maintenance easement (1.0 acre) located on the flowage easements as well as the Connected Action workspace (2.0 acres).

² Hydrologic Soil Groups are used to estimate runoff from precipitation: A = high infiltration rate, low runoff potential; B = moderate infiltration rate; C = slow infiltration rate; D = very slow infiltration rate, high runoff potential.

³ Hydric Rating: Hydric (100%), Hydric (66-99%), Hydric (33-65%), Hydric (1-32%), Not Hydric (0%).

⁴ Wind erodibility group in cultivated areas: Group 1 are the most susceptible to wind erosion, and those assigned to group 8 are the least susceptible. 4L indicates calcareous soils.

The predominant soil type at the federal lands at Lake Oahe is the Flasher-Vebar-Parshall complex. This complex would comprise 7.5 acres (34%) of the Project Area and Connected Action (**Table 3-2, Figure 5**). The Flasher-Vebar-Parshall complex contains 36% Flasher or similar soils, 22% Vebar or similar soils, 15% Parshall or similar soils, and 27% minor components. The Flasher-Vebar-Parshall complex is formed from sandy residuum weathered from sandstone and is steep within the Project Area and Connected Action, with slopes ranging from 9 to 35% (NRCS, 2015). The Flasher-Vebar-Parshall complex is Hydrologic Soil Group D, which has very slow infiltration (high runoff potential) when thoroughly wet. The depth to the water table is greater than 6.5 feet. A majority of the soils within the Project Area and Connected Action are neither frequently flooded nor frequently ponded.

Table 3-2 Soil Types Mapped on the Federal Lands Project Area and Connected Action						
Soil Map Unit	Soil Map Unit Name	Project Area (acres) ¹	Farmland Rating	Hydrologic Group ² (infiltration)	Hydric Rating ³	Wind Erodibility Group ⁴
E0623B	Grail-Belfield clay loams, 2-6% slopes	2.9	Farmland of Statewide Importance	C	0%	6
E0701F	Dogtooth-Janesburg-Cabba complex, 6-35% slopes	0.8	None	D	3%	6
E1423F	Flasher-Vebar-Parshall complex, 9-35% slopes	5.8	None	D	0%	2
E1823A	Parshall fine sandy loam, 0-2% slopes	0.7	Farmland of Statewide Importance	A	0%	3
E2601C	Amor-Cabba loams, 6-9% slopes	0.3	None	C	0%	6
E2803B	Amor-Shambo loams, 3-6% slopes	2.0	Farmland of Statewide Importance	C	0%	6
E3802B	Linton-Mandan silt loams, 2-6% slopes	2.6	Farmland of Statewide Importance	B	0%	5
E3813A	Grassna silt loam, loess, 1-2% slopes	1.7	Prime Farmland	B	2%	6
E3813B	Grassna silt loam, loess, 2-6% slopes	0.5	Prime Farmland	B	2%	6
E4139A	Korchea-Fluvaquents complex, channeled, 0-2% slopes, frequently flooded	0.4	None	B	43%	4L
EW /E49999	Water	6.4	None	N/A	N/A	N/A
Total		24.1	--			

Table 3-2 Soil Types Mapped on the Federal Lands Project Area and Connected Action						
Soil Map Unit	Soil Map Unit Name	Project Area (acres) ¹	Farmland Rating	Hydrologic Group ² (infiltration)	Hydric Rating ³	Wind Erodibility Group ⁴

¹ The Project Area includes Connected Action areas.

² Hydrologic Soil Groups are used to estimate runoff from precipitation: A = high infiltration rate, low runoff potential; B = moderate infiltration rate; C = slow infiltration rate; D = very slow infiltration rate, high runoff potential.

³ Hydric Rating: Hydric (100%), Hydric (66-99%), Hydric (33-65%), Hydric (1-32%), Not Hydric (0%).

⁴ Wind erodibility group in cultivated areas: Group 1 are the most susceptible to wind erosion, and those assigned to group 8 are the least susceptible. 4L indicates calcareous soils.

Prime Farmland

Prime farmland has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops and is available for these uses. Other soils that do not meet the criteria for prime farmland may be considered farmland of statewide importance. These soils may produce high yields of crops when managed appropriately (NRCS, 2013). Climate is the primary limiting factor preventing farmland of statewide importance in North Dakota from being considered prime farmland; therefore, specific management techniques or other soil amendments cannot elevate farmland of statewide importance to a prime farmland designation (Sieler, 2015).

Within the flowage easements and Connected Action, 95% of soils are considered farmland of statewide importance, and none of the soils are considered prime farmland. Approximately 9.5% of the soils on the federal lands, consisting only of Grassna silt loams, are considered prime farmland. Additionally, Linton-Mandan silt loam and Armo-Sambo loam, which comprise 25% of the soils on federal lands, are designated as farmland of statewide importance. The remaining soils do not have a farmland designation.

3.1.5.2 Impacts and Mitigation

Pipeline construction activities such as clearing, grading, trench excavation, and backfilling, as well as the movement of construction equipment along the ROW may result in temporary impacts on soil resources. Clearing removes protective cover and exposes soil to the effects of wind and precipitation, which may increase the potential for soil erosion and movement of sediments into sensitive environmental areas. Grading and equipment traffic may compact soil, reducing porosity and percolation rates, which could result in increased runoff potential and decreased soil productivity. Trench excavation and backfilling could lead to a mixing of topsoil and subsoil and may introduce rocks to the soil surface from deeper soil horizons.

Dakota Access would minimize or avoid these impacts on soils by implementing the mitigation measures described in the DAPL Project's SPCC, SWPPP, and ECP as well as requirements of applicable state and federal permits. These documents would be included as contract documents and enforced as such throughout the DAPL Project. As a result, impacts on soils as a result of the Proposed Action are expected to be insignificant.

Temporary erosion and sedimentation control measures may include installation of silt fence, straw bales, slope breakers, trench breakers, erosion control fabric, and mulch.

To minimize potential impacts on soil productivity, topsoil would be separated during trench excavation in agricultural land, and if applicable, other areas where soil productivity is an important consideration. Unless otherwise requested by the landowner, topsoil in cropland would be removed to a maximum depth of 12 inches from the trench and spoil storage area and stored separately from the trench spoil. After the trench is backfilled, topsoil would be returned to its approximate original location in the soil horizon.

Compaction of agricultural soils would be minimized by restricting construction activities during periods of prolonged rainfall. Where unacceptable levels of compaction occur in agricultural lands, a chisel plow or other deep tillage equipment would be utilized to loosen the soil.

Dakota Access would retain environmental inspectors (EIs) to monitor the contractor's compliance with applicable requirements to protect soil resources during construction of the DAPL Project. The Garrison Project would be notified if the EIs document non-compliant activities by the contractor(s) on the Project Area or Connected Action Areas.

Soils would be temporarily disturbed within HDD workspaces during construction at the Missouri River and Lake Oahe crossings. Primary impacts attributable through open trench installation within the Corps flowage easements and Connected Action would be limited to construction activities and consist of temporary alteration of the construction ROW due to grading and trenching operations. **Tables 3-3 and 3-4** present the soil types that would be impacted by construction and maintenance activities. By implementing BMPs and recognized construction methods identified in the ECP (**Appendix G**), impacts to soils should be limited.

Additionally, temporary workspace used for staging HDD operations would impact soils, particularly in association with the HDD entry excavation pit (approximately 5 feet to 15 feet across). The pits would contain the drilling fluid that would be circulated through the borehole during drilling operations and the cuttings that are removed from the borehole. All drilling mud and cuttings would be disposed at an approved location on non-federal lands, which may include land farming on private property or disposal at a licensed disposal facility. Drilling fluid pits at the HDD entry and exit workspaces would be backfilled and the area returned as closely as practical to pre-construction conditions. Dakota Access would implement the erosion control measures described in the SWPPP (**Appendix A**). The HDD workspace sites would be cleared, graded and matted as needed to avoid rutting and minimize compaction.

There would be no soil disturbance outside of the construction workspace. Permanent impacts on soils would be avoided through the implementation of BMPs during construction, restoration, and post-construction revegetation management. A more complete description of BMPs and recognized construction methods can be found in the ECP (**Appendix G**).

There would be no conversion of prime farmland soils to non-agricultural use.

Table 3-3 Soil Impacts on the Flowage Easements Project Area and Connected Action				
Soil Map Unit	Map Unit Name	Project Area Temporary Impacts (acres)	Connected Action Temporary Impacts (acres)	Permanent Impacts (acres)
E4039A	McKeen loam, 0-1% slopes, frequently flooded	0.1	0	0
E4051A	Trembles fine sandy loam, slightly wet, 0-1% slopes, occasionally flooded	0.5	0	0
E4103A	Lohler silty clay, saline, 0-1% slopes, occasionally flooded	0.9	0	0
E4106A	Lohler silty clay, slightly wet, 0-2% slopes, occasionally flooded	27.8	0	0
E4159A	Scorio silty clay, slightly wet, 0-2% slopes, occasionally flooded	29.9	0	0
E2725F	Arikara-Shambo-Cabba loams, 9-70% slopes	0	2.0	0
Total		59.3	2.0	0

Table 3-4 Soil Impacts on the Federal Lands Project Area and Connected Action				
Soil Map Unit	Map Unit Name	Project Area Temporary Impacts (acres)	Connected Action Temporary Impacts (acres)	Total Impact Acres ¹
E0623B	Grail-Belfield clay loams, 2-6% slopes	0	2.9	2.9
E0701F	Dogtooth-Janesburg-Cabba complex, 6-35% slopes	0	0.8	0.8
E1423F	Flasher-Vebar-Parshall complex, 9-35% slopes	0.4	5.4	5.8
E1823A	Parshall fine sandy loam, 0-2% slopes	0	0.7	0.7
E2601C	Amor-Cabba loams, 6-9% slopes	0	0.3	0.3
E2803B	Amor-Shambo loams, 3-6% slopes	0	2.0	2.0
E3802B	Linton-Mandan silt loams, 2-6% slopes	0	2.6	2.6
E3813A	Grassna silt loam, loess, 1-2% slopes	0.7	1.0	1.7
E3813B	Grassna silt loam, loess, 2-6% slopes	0	0.5	0.5
E4139A	Korchea-Fluvaquents complex, channeled, 0-2% slopes, frequently flooded	0	0.4	0.4
EW	Water	0.1	0	0.1
Total		1.2	16.6	17.8

¹ All soil impacts on Federal Lands and Connected Action at Lake Oahe are considered to be temporary.

3.2 Water Resources

Under the “no action” alternative, Dakota Access would not construct the DAPL Project, and no impacts on water resources would occur. However, if the objectives of the DAPL Project are to be met under the “no action” alternative, other projects and activities would be required and these projects would result in their own impacts on water resources, which would likely be similar to or greater than the DAPL Project. Less reliable shipping methods such as truck or rail could result in an adverse effect on water resources due to increases in transportation accidents and future construction of infrastructure necessary to support these methods (i.e. additional loading/offloading facilities, rail spurs, etc.).

3.2.1 Surface Waters

3.2.1.1 Affected Environment

The Missouri River is a large perennial river and forms the border between Williams and McKenzie counties. The flowage easements are located on the north side of Lake Sakakawea in the Lake Sakakawea sub-basin (HUC 11010101) within the Upper Missouri River Basin. All drainage patterns from the flowage easements flow east and south towards and into the Missouri River/Lake Sakakawea ending at the Garrison Dam. Once released from the dam, water flows south into the Missouri River (NRCS, 2008).

Lake Oahe is a large reservoir formed behind the Oahe Dam on the Missouri River. Lake Oahe forms the border between Morton and Emmons counties. The northern boundary of the Standing Rock Sioux Reservation is located in Sioux County, North Dakota approximately 0.55 mile south of the DAPL Project Area. The Project Area is located in the Upper Lake Oahe Watershed (HUC 10130102) within the Missouri River Basin and adjoins both sides of Lake Oahe at the crossing.

The Oahe Dam/Lake Oahe project is part of the chain of Missouri River main stem lakes authorized in the Flood Control Act of 1944. The Oahe Dam is located 6 miles north of Pierre, South Dakota and was placed into operation in 1962. The dam and associated reservoir (Lake Oahe) are congressionally authorized to provide flood control, hydroelectric power, navigation, irrigation, fish and wildlife enhancement, municipal water supply, water quality, and recreational opportunities to the residents of both South Dakota and North Dakota. At maximum normal operating pool level (1,617 feet MSL), Lake Oahe extends roughly 231 miles from the Oahe Dam in South Dakota to near Bismarck, North Dakota. At this level, the lake covers approximately 360,000 acres. At elevation 1,607.5 feet MSL base flood control elevation, the lake has over 2,250 miles of shoreline.

Lake Oahe can be divided into three segments based on the character of the lake. The Project Area is located within the northern segment. The northern segment extends north from the North Dakota/South Dakota state line to the upstream Oahe Dam/Lake Oahe project boundary near Bismarck, North Dakota. This segment is more river-like in appearance and is characterized by both submerged and emergent snags, sandbars, many shallow areas, and a definite current (USACE, 2010a).

Dakota Access conducted field and desktop delineations of the Project Area/Connected Action on the flowage easements and the Project Area/Connected Action of the federal lands. Field surveys took place upon permission to access the properties in order to verify desktop delineations and ensure that the most accurate, up-to-date data is used for Section 404 of the CWA and/or Section 10 of the RHA permit filings.

There are four waterbodies (one perennial stream and three ephemeral ditches) within the Project Area on the flowage easements and one intermittent waterbody within the Connected Action (**Figure 6**). The Project Area and Connected Action of the federal lands encompass two waterbodies (one lake [Lake Oahe] and one ephemeral stream) (**Figure 7**). Waterbody ID, type, surface water classification, and approximate milepost (MP) are summarized in **Table 3-5** and **Table 3-6**.

3.2.1.2 Impacts and Mitigation

Direct and indirect impacts on Lake Oahe and the Missouri River would be minimized by using HDD construction methods to install the proposed pipeline underneath the Missouri River and Lake Oahe. At the Missouri River crossing, a 24-inch pipeline would be installed at least 36 feet below the bottom of the Missouri River. At Lake Oahe, a 30-inch pipeline would be installed approximately 140 to 210 feet below the ground surface of federal lands and approximately 92 feet below the bottom of Lake Oahe (**Appendix H**). Additional documentation elaborating on the rationale used to determine suitable HDD depth is provided in Appendix D. Appendix M includes the Sovereign Lands Permits issued by the North Dakota Office of the State Engineer.

The primary impact that could occur as a result of an HDD is an inadvertent release of drilling fluid directly or indirectly into the waterbody. Drilling fluid (also referred to as drilling mud) is primarily comprised of water. However, bentonite clay is added to the water to enhance lubricating, spoil transport and caking properties of the drilling fluid. Bentonite is a naturally occurring, non-toxic, inert substance that meets National Science Foundation (NSF)/American National Standards Institute (ANSI) Standard 60 Drinking Water Additives Standards and is frequently used for drilling potable water wells. The potential exists for drilling fluid to leak through previously unidentified fractures in the material underlying the river bed. Potential release sources of the drilling fluid include the drilling fluid entry/exit pit(s) and the directional borehole itself, which is maintained under pressure to keep it open. The probability of an inadvertent release is greatest when the drill bit is working near the surface (i.e., near the entry and exit points). To alleviate this concern, the HDD Contractor plans to install steel surface casing at both the entry and exit locations of the Lake Oahe crossing. Because the HDD entry and exit points would be set back from the banks of the Missouri River (approximately 1,400 feet north and 300 feet south) and Lake Oahe (approximately 900 feet east and 1,100 feet west) the potential for an inadvertent release to occur in the water would be minimized. Additionally, geotechnical investigations conducted by Dakota Access indicated that the drill path is not located in materials where there is a high probability of an inadvertent release of drilling fluids that would reach ground surface or enter Lake Oahe. Therefore, the potential for inadvertently released drilling fluids to enter any waterbody from below or from the shoreline is low. No downstream impacts to Sovereign Nations from inadvertent release of drilling fluid are anticipated.

The drilling mud and cuttings would be disposed of in accordance with applicable laws and regulations, likely in an existing landfill or by land farming. Final disposition would be negotiated with the facility or private landowner prior to disposal. Dakota Access would conduct all HDD work according to the HDD Construction Plan (**Appendix B**), and would implement the HDD Contingency Plan (**Appendix B**) in the event of an inadvertent release. The HDD Construction Plan establishes a 24-hour a day monitoring program for monitoring and detection of inadvertent releases, including monitoring for loss of drilling fluids. The HDD Contingency Plan describes monitoring and mitigation procedures for any inadvertent release of drilling mud into the waterbody or areas adjacent to the waterbody and includes procedures to contain and clean up inadvertent releases.

Dakota Access plans to hydrostatically test the HDD pipeline segments prior to installation at the Lake Oahe and Missouri River crossings. Hydrostatic testing involves filling the new pipeline segments with water acquired in accordance with applicable permits, raising the internal pressure level, and holding that pressure for a specific period of time per U.S. DOT requirements.

Dakota Access is requesting permission to withdraw water from the Missouri River that would be required for installation of the HDD and hydrostatic testing of the pipeline at the Missouri River crossing. Approximately 470,000 gallons of water would be required for activities associated with the installation of HDD and the hydrostatic testing of HDD pipeline segment. Dakota Access intends to submit an application to the North Dakota State Water Commission, Water Appropriations Department for a Temporary Water Permit. The exact number and size of the withdrawal pumps would be determined as a result of the limits imposed by the Temporary Water Permit. The withdrawal activity would comply with all applicable permit conditions and regulations, including the specifications on permitted intake structures outlined in the Corps' Regional Conditions for North Dakota applicable to NWP 12 (Utility Line Activities) (Corps, 2012). This regional condition requires that the applicant 1) utilize an intake screen with a maximum mesh opening of ¼-inch; 2) wire, Johnson-like screens must have a maximum distance between wires of 1/8-inch; 3) water velocity at the intake screen shall not exceed ½-foot per second; 4) intake structure shall be floating; and 5) at the beginning of pumping, the intake shall be placed over water with a minimum depth of 20 feet.

The Acquisition point would coincide with the proposed pipeline crossing of the Missouri River. An 8"x 8" Power Associates 2500 Single Stage Pump would be set on a barge or float anchored just offshore at the proposed permanent easement. The barge/float would be approximately 12 feet wide by 14 feet long and fitted with a secondary containment structure (an Eagle 4Drum Flexible Containment SpillNest-T8103 or similar). The pump, capable of withdrawing 2,400 gallons per minute withdrawal and 120 feet of head pressure, would be placed within the secondary containment on the barge/float.

The pump's flexible intake hose would be 8 inches in diameter and connect the screened intake to the pump. The screened intake (approximately the size of a 55 gallon drum) would be suspended by floats (approximately the size of a tire) within the water column and would be screened to prevent impingement entrainment of foreign objects and aquatic life. A hard 8-inch diameter take-way pipe extending from the pump would push the water to the top of bank then to the HDD equipment or pipeline section. This temporary waterline would be laid by hand on top of the ground surface within the permanent ROW, and thus would not require any ground disturbance or trench excavation. The waterline, barge, pump, and associated equipment would be removed following completion of construction activities. A depiction of the layout of the barge, pump, and waterline is provided in **Figure 6-B**.

Water needed for HDD construction and hydrostatic testing at the Lake Oahe Crossing in Emmons and Morton counties, North Dakota would not be obtained from Lake Oahe. Required water would instead be obtained from an alternate surface water, groundwater, or commercial source and transported to the Project Area via water trucks. Water trucks would not be required to cross Corps Fee Lands. Prior to construction, Dakota Access would identify a water source for construction activities at the Lake Oahe crossing in accordance with all applicable permits and regulations.

Water discharges associated with hydrostatic testing on Corps flowage easements would be conducted in accordance with applicable permits. Hydrostatic test water discharges would not occur on Corps fee

property. Dakota Access would conduct trench dewatering and hydrostatic test discharges in a manner consistent with the North Dakota Pollutant Discharge Elimination System (NDPDES) General Permit NDG-070000. Discharged hydrostatic test water would not contain additives unless written approval is received from Dakota Access and applicable permits authorize such additives. EIs would monitor permit compliance. Where appropriate, water would be discharged into an energy dissipation and/or filtering device, as described in Dakota Access' SWPPP (**Appendix A**) to remove sediment and to reduce the erosive energy of the discharge.

Of the five waterbodies located within the flowage easements Project Area and Connected Action, one ephemeral ditch (d-k8-wi-011) is located within the portion of the Project Area that would be crossed via the Missouri River HDD; therefore, no trenching would occur within this feature. However, a temporary waterline would be installed across this feature to transport surface water from the Missouri River to the HDD equipment. The temporary waterline would be laid on top of the ground surface, and no grading or ground disturbance in the vicinity of the waterbody crossed by the waterline would be required. The hard pipe segments would be hand-carried down the slope and assembled by hand. No tracked or wheeled equipment would be necessary for construction or removal of the temporary aboveground waterline. Four waterbodies would be temporarily impacted by pipeline construction. However, impacts on waterbodies would be minimized by conducting pipeline construction activities in accordance with applicable regulatory requirements and implementing trenchless waterbody construction procedures, as described in sections 2.3.2.6 and 2.3.2.7 and the ECP.

No waterbody would be permanently drained or filled as part of the DAPL Project, and effects on waterbodies are expected to be short-term and minor. Dakota Access would restore the area as close to its previous state and naturally functioning condition as practicable. Additionally, Dakota Access would take measures described in Dakota Access' SPCC, SWPPP (Appendix A), and ECP (Appendix G) to minimize the potential for surface water contamination from an inadvertent spill of fuel or hazardous liquids during refueling or maintenance of construction equipment or during operation of aboveground facilities. Fuel and all other hazardous materials would be stored in accordance with the requirements of Dakota Access' SPCC, SWPPP, and ECP. These documents also describe response, containment, and cleanup measures.

Drinking water intakes located downstream from the Missouri River and Lake Oahe crossings could be at risk if there was a release that reached these bodies of water in the vicinity of the intake structures. The Standing Rock Sioux Reservation is located south of the Lake Oahe Project Area and the majority of reservation residents depend on wells for water supply (Standing Rock Sioux Tribe, 2016). However, the Standing Rock Sioux also have intake structures within the river downstream of the Lake Oahe Project Area.

In order to maintain the integrity of the pipeline, prevent Project losses, and protect the general public and the environment, the operator will inspect, exercise, and deploy Company-owned protective and response equipment in accordance with the National Preparedness for Response Exercise Program (PREP) guidelines. However, in the unlikely event of a pipeline leak, response measures to protect the users of downstream intakes will be implemented to minimize risks to water supplies. Dakota Access would be responsible party for implementing the response actions in accordance with Geographical Response Plan (GRP) and the Facility Response Plan (FRP). The potential for a spill to compromise a potable water supply intake would be continually evaluated as part of the response action. Alternative sources would be included as part of the contingency planning. Shutting down certain intakes and utilizing others or

different drinking water sources or bottled water will be evaluated as part of this process. The Federal On-Scene Incident Commander (USEPA) would be responsible for assimilating and approving the response actions under the Unified Command. Dakota Access maintains financial responsibility for the duration of the response actions. The Dakota Access has prepared a FRP that includes measures such as notifications to surrounding communities, affected governments, and utilities in the event of an inadvertent pipeline release.

The FRP complies with the applicable requirements of the Oil Pollution Act of 1990 (OPA 90), and has been prepared in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and the Mid-Missouri Sub-Area Contingency Plan (SACP). Specifically, this Plan is intended to satisfy the applicable requirements of:

- Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation requirements for an OPA 90 plan (49 CFR 194)
- South Dakota Environmental Protection Oil Pipeline Plan Requirements (34A-18).
- American Petroleum Industry (API) RP 1174 - Recommended Practice for Pipeline Emergency Preparedness and Response.
- North Dakota Administrative Code 69-09-03-02

The operator has contractually secured personnel and equipment necessary to respond, to the maximum extent practicable, to a worst case discharge or a substantial threat of such discharge. The operator requires an annual certification from each Oil Spill Response Organization (OSRO) to assure compliance with the National PREP guidelines. Each listed OSRO has its own response equipment, including containment booms, absorbents, boats, and vacuum trucks.

Sub-freezing temperatures during the winter months could cause ice to form on the surface of Lake Oahe and the Missouri River. This layer of ice could impede the deployment of traditional containment booms. However, the ice itself often serves as a natural barrier to the spread of oil (Dickens 2011). Pockets of oil naturally contained by the ice can be drilled to and removed using vacuum trucks. Dakota Access's contracted professional emergency responders are prepared to respond under winter conditions so that response procedures can be carried out in accordance PHMSA operational regulations. Therefore, a release during winter conditions is anticipated to have lesser impacts to water resources, particularly with respect to area of extent, as compared to a release during the warmer months.

A copy of the Draft FRP for the Dakota Access Pipeline North Response Zone is included in Appendix L. Dakota Access anticipates submitting this plan to PHMSA for review and approval in the third quarter of 2016 and will provide a copy of the updated draft to the Corps concurrent with the submittal to PHMSA. The FRP would be in place prior to operating the DAPL Project in accordance with PHMSA and federal regulations.

Table 3-5 Waterbodies within the Flowage Easements Project Area and Connected Action							
MP	Waterbody ID	Waterbody Type	Flow Type	Delineation Source	Class of Aquatic Resource	ND Surface Water Classification	Area of Impact
92.7	d-k8-wi-013	Ditch	Ephemeral	Field	\$404	III	Construction and Permanent ROW
92.77	s-k8-wi-002	Stream	Perennial	Field	\$404	III	Construction and Permanent ROW
93.23	d-k8-wi-007	Ditch	Ephemeral	Field	\$404	III	Construction and Permanent ROW
94.64	d-k8-wi-011	Ditch	Ephemeral	Field	\$404	III	Permanent ROW over HDD Profile (Temporary Waterline)
94.9	s-m10-wi-001/s-k2-mk-001	Stream	Perennial	Field	\$10	I	Construction and Permanent ROW
95.1	s-k2-mk-002	Stream	Intermittent	Field	\$404	III	Construction and Permanent ROW

Surface water classifications from North Dakota Administrative Code 33-16-02.1-09:

Class I Streams: quality of the waters in this class shall be suitable for the propagation or protection, or both, of resident fish species and other aquatic biota and for swimming, boating, and other water recreation. The quality of the waters shall be suitable for irrigation, stock watering, and wildlife without injurious effects. After treatment consisting of coagulation, settling, filtration, and chlorination, or equivalent treatment processes, the water quality shall meet the bacteriological, physical, and chemical requirements of the department for municipal or domestic use.

Class III Streams: The quality of the waters in this class shall be suitable for agricultural and industrial uses. Streams in this class generally have low average flows with prolonged periods of no flow. During periods of no flow, they are of limited value for recreation and fish and aquatic biota. The quality of these waters must be maintained to protect secondary contact recreation uses (e.g. wading), fish and aquatic biota, and wildlife uses.

The only surface waterbody identified on the federal lands Project Area is Lake Oahe (s-kc4-em-001/s-kc4-mo-002), which would be avoided via HDD. The pipe stringing corridor (Connected Action) at Lake Oahe crosses two drainageways that are indicated on the National Hydrography Dataset. Field delineations carried out by Dakota Access identified one ephemeral stream (s-kc-4-mo-004) associated with these two drainageways that intersect the pipe stringing corridor of the Connected Action. Impacts on the delineated waterbody would be entirely within the pipe stringing additional temporary workspace (ATWS) and are expected to be avoided by bridging the waterways for equipment and vehicle traffic during pipe stringing, fabrication and pullback. No trenching would occur within the pipe stringing ATWS. While limited grading may be necessary within the pipe stringing ATWS, no grading would be expected to occur within the waterbody itself. Vegetation may be mowed/brush-hogged, however, no root masses are anticipated to be removed. Revegetation of these areas would be in accordance with the North

Dakota tree and shrub regulations and would not be impacted during operation of the Proposed Action. No trees are expected to be cleared on Corps fee-owned lands.

Table 3-6 Waterbodies within the Federal Lands Project Area and Connected Action							
MP	Waterbody ID	Waterbody Type	Flow Type	Delineation Source	Class of Aquatic Resource	ND Surface Water Classification	Area of Impact
166.3	s-kc4-em-001 / s-kc4-mo-002	Lake (Lake Oahe)	N/A	Field	§10	I	Project Area – Permanent ROW over HDD Profile
166	s-kc4-mo-004	Stream	Ephemeral	Field	§404	III	Connected Action – HDD Stringing Area

Surface water classifications from North Dakota Administrative Code 33-16-02.1-09:

Class I Streams: quality of the waters in this class shall be suitable for the propagation or protection, or both, of resident fish species and other aquatic biota and for swimming, boating, and other water recreation. The quality of the waters shall be suitable for irrigation, stock watering, and wildlife without injurious effects. After treatment consisting of coagulation, settling, filtration, and chlorination, or equivalent treatment processes, the water quality shall meet the bacteriological, physical, and chemical requirements of the department for municipal or domestic use.

Class III Streams: The quality of the waters in this class shall be suitable for agricultural and industrial uses. Streams in this class generally have low average flows with prolonged periods of no flow. During periods of no flow, they are of limited value for recreation and fish and aquatic biota. The quality of these waters must be maintained to protect secondary contact recreation uses (e.g. wading), fish and aquatic biota, and wildlife uses.

Environmental Inspectors would monitor compliance with applicable waterbody protection requirements during construction of the facilities. The ECP (**Appendix G**) and SWPPP (**Appendix A**) describe additional mitigation measures and contain illustrations of how sediment control devices are typically installed at waterbody crossings. Additionally, Dakota Access would maintain a vegetative buffer until the actual crossing of the waterbody takes place. Temporary sediment control measures, such as silt fence installed at each crossing, would minimize the introduction of sediment into waterbodies during construction and minimize the movement of spoil and sediment from surface runoff during and after construction. Permanent erosion control measures, such as vegetation and installation of slope breakers, would effectively stabilize riparian zones. Dakota Access would stabilize stream banks disturbed during construction using methods as directed by applicable state and/or federal permits. Trenching and dewatering activities used in construction of the proposed pipeline could temporarily alter surface drainage patterns. However, these impacts are expected to be localized and temporary, since the contours and vegetation would be returned as closely as practical to pre-construction conditions. Dewatering activities would be conducted in accordance with applicable permits and Dakota Access' SWPPP and ECP.

All construction equipment utilized on or in waters of the state would be subject to inspection by the Department in accordance with the North Dakota Administrative Code (Title 30, Article 3, Chapter 6-01). Further, Dakota Access would implement required measures including the removal of all aquatic

vegetation from vessels, motors, trailers, or construction equipment. All water would be drained from bilges or confined spaces. All Aquatic Nuisance Species will be removed from equipment in accordance with the North Dakota Administrative Code (Title 30, Article 3, Chapter 6). The contractor or his agents or subcontractors must provide the North Dakota Game and Fish Department a reasonable opportunity to inspect any and all vehicles, vessels, pumps and equipment that will be used in the project in or on the waters of the state prior to those items being launched or placed in the waters of the state.

Water Intake Mitigation Measures

In the unlikely event of a release during pipeline operations, drinking and irrigation water intakes located downstream from the Missouri River and Lake Oahe crossings could be at risk if hydrocarbons were to reach these bodies of water in the vicinity of the intake structures. In order to minimize the risk of a pipeline leak and protect the users of downstream intakes, Dakota Access will implement the design and operation measures summarized below as well as all other measures described throughout this EA and in the FRP.

- Pipe specifications that meet or exceed applicable regulations, with a quality assurance program for pipe manufacturers
- Use of the highest quality external pipe coatings (fusion bond epoxy or FBE) to reduce the risk of corrosion, and stress corrosion cracking.
- Active Cathodic Protection applied to the pipeline and facilities
- Four feet of soil cover will be provided over the buried pipeline on either side of the HDD crossings. The proposed HDD profiles under the Missouri River and Lake Oahe are designed to provide a minimum of 36 feet and 92 feet of cover below the water bodies, respectively.
- Pipeline system inspection and testing programs will be implemented prior to operation to ensure the pipeline is built in accordance with the standards and specifications.
- Non-destructive testing of 100 percent of girth welds
- Hydrostatic testing of the pipeline to 125% percent of the Maximum Operating Pressure (MOP).
- A continuous SCADA pipeline monitoring that remotely measures changes in pressure and volume on a continual basis at all valve and pump stations, is immediately analyzed to determine potential product releases anywhere on the pipeline system.
 - Pipeline variables are the parameters pertaining to SCADA systems, instrumentation, fluid properties, physical attributes of pipelines, pressure, temperature, and flowrate
 - Includes pressure transmitters to monitor flowing pressure in real-time and alarm in the event of adverse pressure changes due to potential leaks / releases
 - Includes custody transfer quality meters to monitor pipeline Receipts / Deliveries in real-time and alarm in the event of flowrate discrepancies due to potential leaks / releases
- Leak Detection System - LeakWarn - A Computational Pipeline Monitoring System (CPM) to monitor the pipeline for leaks via computational algorithms performed on a continual basis.
 - Includes separate ultrasonic meters at each pump station to continuously verify and compare flowrates along the pipeline in real-time as part of a leak detection system.
 - This measurement data is immediately analyzed to determine potential product releases anywhere on the pipeline system.
 - The mathematical algorithms are based on physics and abide by the conservation principles of mass, momentum and energy.

- Periodic pipeline integrity inspection programs using internal inspection tools to detect pipeline diameter anomalies indicating excavation damage, and loss of wall thickness from corrosion.
- Periodic above-ground Close Interval Surveys (CIS) conducted along the pipeline.
- Aerial surveillance inspections will be conducted 26 times per year (not to exceed 3 weeks apart) to detect leaks and spills as early as possible, and to identify potential third-party activities that could damage the pipeline.
- Mainline valves are installed along the pipeline route to reduce or avoid spill effects to PHMSA-defined HCAs.
- Periodic landowner outreach and the implementation of a Public Awareness program
- Participation in "One-Call" and "Before You Dig" notification systems.

Immediately upon discovery of a release of oil that could impact the Missouri River or Lake Oahe, Dakota Access will initiate emergency response efforts, including containment and recovery.

Site-specific GRPs have been developed for the Missouri River and Lake Oahe crossings. These security sensitive documents, submitted to the USACE as Privileged and Confidential, identify site-specific resources and response measures for an immediate, safe, and effective response to a release of crude oil from the Dakota Access Pipeline with the potential to impact the Missouri River near these two crossings. Response measures include, but are not limited to, the deployment of containment or diversionary booms at predetermined locations and oil collection/recovery activities to prevent further migration of crude oil.

Emergency response notifications will be made to Federal, State, and Local agencies and tribal officials as outlined in the FRP. Dakota Access and its contractors will work with Federal, State, local and Tribal officials to protect downstream water intakes. To minimize potential impacts to intakes, protection and mitigation measures will be implemented in cooperation with intake operators.

Dakota Access will identify an all-weather access and collection point downstream of both the Missouri River crossing and Lake Oahe crossing. At each location, Dakota Access will provide an equipment storage facility that includes a permanent storage area for winter and open water spill response equipment. Dakota Access would coordinate with the USACE and any other applicable stakeholders to obtain all necessary permits and approvals prior to construction for any ground disturbing activities associated with these facilities.

Dakota Access will conduct emergency response drills/exercises at both the Missouri River crossing near Williston and the crossing at Lake Oahe. These exercises will include both open water and ice response activities. Regulatory and stakeholder participation will be encouraged and solicited for the exercises. Section 3.2.2.2 Impacts and Mitigation Remediation, Section 3.11 Reliability and Safety and the FRP (Appendix L) contain more detail regarding spill prevention, detection and response measures. The emergency response drills/exercises are further discussed in Section 3.11.

3.2.2 Groundwater

3.2.2.1 Affected Environment

Groundwater occurs within the Project Area of the Corps flowage easements and federal lands in both glacial drift and bedrock aquifers. Although bedrock aquifers tend to have a greater distribution and be more continuous than Quaternary aquifers, Quaternary aquifers typically provide higher yields to wells.

Groundwater in the bedrock aquifers flows towards the Missouri River and Lake Oahe, a regional groundwater discharge zone. The water table within phreatic aquifers, which may include both Quaternary and bedrock formations, is typically a subdued replica of the surface topography. Although groundwater flow directions may vary widely particularly within localized flow regimes, overall regional flow of groundwater in the phreatic aquifer would be to the Missouri River and Lake Oahe.

The most economically important aquifers in the vicinity of the Corps flowage easements are the Cretaceous Dakota Group, the Tertiary Fort Union Group (which includes the Sentinel Butte and Bullion/Tongue River Formations), and glacial drift aquifers of the Quaternary Period (Armstrong, 1969). The glacial drift aquifers are relatively thin at the Project Area, except where they occur in buried or present-day bedrock valleys. In the absence of Quaternary aquifers, members of the Paleocene Fort Union Group commonly serve as the shallowest aquifer. Individual aquifer members of the Fort Union Group include, in descending order, the Sentinel Butte, Tongue River, Cannonball, and Ludlow Formations (Croft, 1985). Other bedrock aquifers of economic importance in the flowage easement region are the late Cretaceous Hell's Creek and Fox Hills Aquifer system and the Cretaceous Dakota Group.

Three domestic wells and six observation wells (one of which has been destroyed) are located on the flowage easements, but occur outside of the Project Area. The closest well to the proposed pipeline centerline is a domestic well located approximately 430 feet from the centerline. The flowage easements or Connected Action do not overlie any source water protection areas.

The most economically important aquifers in Morton and Emmons counties, where the federal lands along Lake Oahe are located, include aquifers within the Cretaceous Fox Hills and Hell Creek Formations; the Tertiary Fort Union Group, which includes the Cannonball and Ludlow Formations, Tongue River Formation, and Sentinel Butte Formation (northwest part of the county only); and alluvial and glacial drift aquifers of the Quaternary Period (Ackerman, 1980; Armstrong, 1978). The Pierre Formation is considered the base of the active near-surface aquifers, because it is thick and relatively impervious.

No water wells are located within 150 feet of the federal lands or Connected Actions at the Lake Oahe crossing. Impacts within 150 feet of the Project was used following the Federal Energy Regulatory Commission (FERC) guidelines for the evaluation of construction impacts to water wells and springs. Although the Project is not under the jurisdiction of the FERC, FERC guidance was deemed to be an appropriate distance for this evaluation. Additionally, none of the Project Area or Connected Action overlie any source water protection areas.

3.2.2.2 Impacts and Mitigation

Ground disturbance associated with conventional pipeline construction is generally limited to approximately 6 to 10 feet below the existing ground surface. Where excavation penetrates the water table, potential groundwater impacts from pipeline construction are primarily limited to the radius of influence around the excavation profile.

Construction activities, such as trenching, dewatering, and backfilling that encounter shallow aquifers would cause minor direct and indirect impacts via fluctuations in groundwater levels and/or increased turbidity within the aquifer adjacent to the activity due to dewatering activities. Dewatering would consist of a single or series of submersible pumps that would be lowered into the pipe trench to remove excess water to facilitate pipe installation. In cases of greater water infiltration, well pointing (a series of dewatering points along the outside of the trench connected in series to a pump to enable effective dewatering of the trench) may be used. These impacts are temporary (only while the trench is open) and highly localized as the infiltration of the dewatered groundwater is in the immediate vicinity of the dewatering activity.

Construction and dewatering activities are not expected to have a significant direct or indirect effect on regional groundwater flow patterns. Shallow aquifers would quickly reestablish equilibrium if disturbed, and turbidity levels would rapidly subside. Consequently, the effects of construction would be minor and short-term. Impacts on deeper aquifers are not anticipated.

The introduction of contaminants to groundwater due to accidental spills of construction-related chemicals, fuels, or hydraulic fluid could have an adverse effect on groundwater quality. Spill-related impacts from construction activities are typically associated with improper fuel storage, equipment refueling, and equipment maintenance. Dakota Access' SPCC Plan outlines measures that would be implemented to avoid, minimize, prevent, and respond to releases of fuels and other hazardous substances during construction and includes measures for cleanup, documentation, and reporting of spills (**Appendix A**). Project-specific SPCCs would be developed by the selected contractor and implemented throughout construction. By implementing the protective measures set forth in these plans, groundwater contamination due to construction activities is not anticipated. The draft SPCC is included as Appendix B of **Appendix A** (SWPPP); the project-specific plan to be developed by the Contractor would meet or exceed all conditions presented in the draft plan.

Accidental releases from the pipeline system during operations could potentially affect groundwater. Although most components of crude oil are relatively insoluble (Neff and Anderson, 1981), crude oil released into soil can migrate toward water where certain constituents can dissolve into groundwater or surface water in limited amounts. As a liquid, the product would travel along the path of least resistance both laterally and vertically at a rate determined by a number of factors including volume released, soil conditions (permeability, porosity, moisture, etc.), depth to groundwater, and the speed and effectiveness of response and remediation measures.

The DAPL Project would transport light sweet crude oil from the middle Bakken and upper Three Forks formations (Bakken). The Energy Information Administration (EIA) categorizes light sweet crude oil as having an API gravity between 35° and 50° and less than 0.3 wt % sulfur. API gravity is a measure of how heavy or light liquid oil is compared to water: if its API gravity is greater than 10, it is lighter and floats on

water. The oil extracted from the Bakken has an API gravity generally between 40° and 43° and a sulfur content of less than 0.2 weight percentage (wt %) (Turner, Mason and Company, 2014). Therefore, the Bakken oil has properties that fall within the mid-range of light sweet crude.

Most crude oil constituents are not very soluble in water. The dissolved concentration of water soluble compounds (e.g., benzene) is not controlled by the amount of oil in contact with the water, but by the concentration of the specific constituent in the oil (Charbeneau et al., 2000; Charbeneau, 2003; Freeze and Cherry, 1979). Studies of 69 crude oils found that benzene was the only aromatic or polycyclic aromatic hydrocarbon compound tested that is capable of exceeding the 0.005 ppm groundwater protection threshold values for drinking water (i.e., maximum contaminant levels (MCLs) or Water Health Based Limits) (Kerr et al., 1999 as cited in O'Reilly et al., 2001).

In aquatic environments, crude oil's toxicity is a function of the concentration of its constituent compounds and their toxic effects, along with their solubility (and bioavailability) in water. Based on the combination of toxicity, solubility, and bioavailability, benzene is commonly considered to pose the greatest toxicity threat from crude oil spills (Muller, 1987). The lowest acute toxicity threshold for aquatic organisms for benzene is 7.4 ppm based on standardized toxicity tests (USEPA, 2016).

Accordingly, theoretical concentrations of benzene in river water for a range of potential DAPL Project spills at the two pipeline river crossings are presented in **Table 3-7**. An assumption of a 1-hour release period for the entire spill volume at each location was used. The following additional conservative assumptions were developed to estimate potential spill effects for planning purposes:

- The entire volume of a crude oil spill was released due to a catastrophic failure of the pipeline and reached the waterbody;
- Complete, instantaneous mixing occurred;
- The entire benzene content of the crude oil was solubilized into the water column; and
- The receptor is located at the immediate site of the crude oil spill and there is no loss due to evaporation or degradation.

The conservative analysis presented in **Table 3-7** includes a range of values from 4 barrels to 10,000 barrels spilled. However, examination of the PHMSA dataset from 2002 to 2015 (PHMSA, 2016) indicates that the majority of actual pipeline spills are relatively small and fifty percent of the spills consist of 4 bbls or less. The spill volume would be likely small due to a number of factors including:

- Most releases are not caused by full ruptures of the pipeline;
- The overburden on the HDD section of the pipeline or the compacted back-fill over a buried pipeline restricts the volume that could be released during a spill and restricts the affected area; and
- Due to anti-siphoning effects, a full gravity drain-down between valve locations on either side of the river crossings rarely occurs.

As indicated in **Table 3-7**, the acute toxicity threshold for aquatic organisms for benzene of 7.4 ppm is not exceeded under any of the hypothetical spill volume scenarios. The most probable spill volume (4 barrels

or less) does not yield benzene concentrations that exceed the drinking water criteria even with the ultra conservative mixing assumptions. It should be noted that under real life conditions, the spill and mixing events outlined by the assumptions are beyond physical actualities. Therefore the use of the upper ranges of spill volumes and the concentrations in the table is limited and is not recommended beyond this NEPA analysis.

Table 3-7 Estimated Benzene Concentrations Following a Hypothetical Crude Oil Spill at Project River Crossings							
River Crossing	River Flow (cfs)	Acute Toxicity Threshold (ppm)	Benzene MCL (ppm)	Estimated Benzene Concentration in Surface Water (ppm)			
				Very Small Spill: 4 bbl	Small Spill: 100 bbl	Moderate Spill: 1,000 bbl	Large Spill: 10,000 bbl
Missouri River	20,374	7.4	0.005	0.00075	0.019	0.19	1.88
Lake Oahe	22,484	7.4	0.005	0.00068	0.017	0.17	1.70

Notes:

- Adapted from Stantec, 2015
- Estimated concentration is based on release of benzene into water over a 1-hour period with uniform mixing conditions.
- Concentrations are based on a 0.28 percent by volume benzene content of the transported material (Marathon Oil 2010).
- bbl - An oil barrel defined as 42 US gallons,
- MCL - Maximum contaminant levels
- ppm – Parts per million
- cfs – Cubic feet per second
- Stream flows are measured mean discharge from the gage stations closest to the pipeline crossings located on the Missouri River at Williston (USGS Station 06330000) and Bismarck (USGS Station 06342500)(USGS 2016; 2016b).

Sub-freezing temperatures during the winter months could cause ice to form on the surface of Lake Oahe and the Missouri River. This layer of ice will trap oil released below the lake's surface and prevent benzene evaporation from occurring. Therefore, during the winter, evaporative loss will be negligible, and will allow a longer contact between the crude oil and the water column. Additionally, natural undulations in the bottom of the ice will trap the material and reduce horizontal spreading, potentially causing very localized impacts to organisms in prolonged contact with the near-surface water (e.g., phytoplankton) (Dickens 2011). Exposure to fish deeper in the water column would not likely experience adverse impacts. The natural containment of winter releases facilitates cleanup efforts as the pockets of oil can be drilled to and removed using vacuum trucks. Thus, winter releases are predicted to have lower impacts, particularly with respect to area of extent, as compared to releases occurring during the warmer seasons.

If no active ground water remediation activities were undertaken (see discussion below), dispersion, evaporation, dissolution, sorption, photodegradation, biodegradation, and natural attenuation ultimately would allow a return to preexisting conditions in both soil and groundwater.

Remediation

As part of the pipeline operation, which is regulated by the PHMSA, Dakota Access has an ongoing maintenance, inspection, and integrity testing program to monitor the safety of the pipeline system. Monitoring activities include constant remote oversight of the entire system 24/7/365 from the control center, routine inspection of the cathodic protection system, and the use of inspection tools that travel through the inside of the pipeline to check pipe integrity (see Section 3.11 for additional information regarding reliability and safety and the proposed methods for monitoring the Proposed Action facilities). Dakota Access also performs regular aerial flyovers to inspect the pipeline ROW. In the event of a leak, Dakota Access would work aggressively to isolate the source through the use of remote-controlled shut-off valves, initiate cleanup activities, and contact the appropriate federal and state authorities to coordinate leak containment and cleanup. To prevent pipeline failures resulting in inadvertent releases, Dakota Access would construct and maintain the pipeline to meet or exceed industry and governmental requirements and standards. Specifically, the steel pipe would meet PHMSA specifications under 49 CFR § 195, follow standards issued by the American Society of Mechanical Engineers, National Association for Corrosion Engineers and API. Once installed, the pipeline would be subjected to testing to verify its integrity and compliance with specifications, including hydrostatic pressure testing at the crossings, checking coating integrity, and X-ray inspection of the welds. The pipeline would be placed into service only after inspection to verify compliance with all construction standards and requirements. Dakota Access would maintain and inspect the pipeline in accordance with PHMSA regulations, industry codes and prudent pipeline operating protocols and techniques. The pipeline ROW would be patrolled and inspected by air every 10 days, weather permitting, but at least every three weeks and not less than 26 times per year, to check for abnormal conditions or dangerous activities, such as unauthorized excavation along the pipeline route.

While a release of crude oil into groundwater or a surface waterbody has the potential to cause environmental impacts, the likelihood of such an event is very low. Dakota Access has detailed provisions for protecting and mitigating potential impacts to water resources in Section 3.11 Reliability and Safety. Emergency response and remediation efforts have the potential for dramatically reducing the appreciable adverse environmental effects.

In the unlikely event of a spill during operations of the pipeline, impacts to water resources would be further mitigated by following the cleanup procedures and remediation activities described in the Dakota Access' FRP (**Appendix L**).

Specific clean-up procedures and remediation activities would be determined by groundwater remediation specialists within Dakota Access and contracted professional consultants. Each groundwater mitigation situation is unique and will be treated according to the actual circumstances present.

The first step in the mitigation process consists of the delineation of the plume to define the nature and extent of the release. If appropriate, Dakota Access would recover product as soon as practical to prevent the spread of contamination using excavators to remove the impacted soils, oil skimmers installed within

collection wells, pumps, and storage containers or vacuum trucks at collection areas or some other method appropriate for the site conditions.

Dakota Access would develop a groundwater remediation plan in coordination with the North Dakota Department of Health and other responsible federal, state or other governmental authorities. The proposed groundwater remediation system would be designed to treat the impacted groundwater by removing the released oil, converting it into harmless products, monitoring natural attenuation, etc.

Released product can often be physically removed from groundwater by several methodologies. The pump and treat method is one of the most widely used physical methods of ground water remediation and consists of pumping the groundwater to surface and then using either biological or chemical treatments to remove the oil. Another common method of removing floating hydrocarbon contaminants is the use of a monitoring-well oil skimmer. This method utilized a belt material with a strong affinity for hydrocarbons to bring the oil to the surface where it can be removed. A dual-phase vacuum extraction removes both contaminated groundwater and soil vapor. A high-vacuum extraction well is installed with its screened section in the zone of contaminated soils and groundwater to remove contaminants from above and below the water table. Released product can also be removed from groundwater by applying various chemical methodologies including ozone and oxygen gas injection, surfactant enhanced recovery, Biological treatment techniques can also be utilized including bioventing and bioaugmentation.

The ground water treatment remediation plan would be selected in coordination with the North Dakota Department of Health and other responsible governmental authorities and may utilize a combination of technologies.

A preliminary evaluation of geology indicates that groundwater within the floodplain throughout most of the Corps flowage easements is less than 6.5 feet deep (GeoEngineers, 2014). The pipeline would be installed in saturated sediments as part of the HDD crossing of Lake Oahe. Due to the nature of HDD methodology, this construction method is inherently not a risk to groundwater resources and uses benign substances (bentonite and water) to penetrate through soil, rock, and groundwater. Construction of the Project Area and Connected Action would not be expected to result in significant negative direct or indirect impacts on groundwater resources.

3.2.3 Wetlands

3.2.3.1 Affected Environment

Wetland data for the Project Areas was derived from desktop analyses along the entire route and verified by field delineations. Using data from the U.S. Fish & Wildlife Service's (USFWS) National Wetlands Inventory (NWI) dataset, aerial imagery, and topography, an experienced biologist applied professional judgment to create polygon coverage in GIS to define the areal extent of wetlands. These areas have been field-verified to ensure that the most accurate, up-to-date data is being used for permit filings.

The field wetland investigations were conducted using the on-site methodology set forth in the 1987 Corps of Engineers Wetland Delineation Manual and the 2010 Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Great Plains Region (USACE, 1987; 2010b). In addition to the 1987 Manual and the Regional Supplement, wetland areas were examined through analysis of the

vegetation, soils, and hydrology, as described in the Classification of Wetland and Deepwater Habitats of the U.S. and The National Wetland Plant List (Cowardin et al., 1979; Lichvar et al., 2014).

3.2.3.2 Impacts and Mitigation

The routing analysis utilized to determine the crossing locations was designed to avoid impacts to sensitive environmental resources including wetlands. Construction workspace on the flowage easements has been selected based on an absence of wetlands within the Project Area and, as confirmed by field verification in 2015, no wetlands would be impacted by trench excavation within the construction ROW, ATWS, HDD workspace, or HDD stringing corridor on the flowage easements or Connected Action.

The field wetland investigations conducted by Dakota Access results identified four wetlands located within the permanent easement on the flowage easements (w-m10-wi-001_PSS, w-m10-wi-001_PEM, w-m10-wi-001_PFO, and w-m10-wi-002_PSS). These wetlands occur in the portion of the Project Area on the flowage easements that would be constructed via HDD; therefore, no trenching would occur within these wetlands. However, following construction, a 30-foot-wide corridor centered on the proposed pipeline would be maintained in non-forested state to facilitate inspections of the pipeline, operational maintenance, and compliance with the federal pipeline safety regulations. The 30 foot permanent ROW would encompass a total of approximately 0.30 acre of the four wetlands. One of these wetlands (w-m10-wi-001_PFO), approximately 0.05 acre, is classified as a palustrine forested (PFO) wetland and would be converted to shrub-scrub or herbaceous wetland as a result of the Proposed Action since trees would be routinely removed for the life of the pipeline. The remaining palustrine emergent (PEM) wetland (w-m10-wi-001_PEM) and two palustrine scrub-shrub (PSS) wetlands (w-m10-wi-001_PSS and w-m10-wi-002_PSS), comprising a total of 0.25 acres of the permanent pipeline easement, may require infrequent vegetation clearing of encroaching woody vegetation but would otherwise remain in their natural state. Dakota Access is in the process of obtaining verification for use of NWP 12 for the crossings of wetlands and waterbodies associated with DAPL Project.

Pending approval and receipt of applicable permits and easement permission, a temporary waterline would be installed between the shoreline and the HDD workspace on the flowage easements within the permanent ROW (**Figure 6-B**), in order to supply the HDD equipment with water needed for drilling fluid preparation and hydrostatic testing. The temporary waterline would be laid on top of the surface, and no ground disturbance of the four wetland features along the permanent easement is anticipated. The hard pipe segments would be hand-carried down the slope and assembled by hand. No tracked or wheeled equipment would be necessary for construction or removal of the temporary aboveground pipeline. No excavation or disturbance of wetlands or the river bank is anticipated.

Table 3-8 summarizes wetlands within the flowage easements that occur within the permanent ROW, which is 30-foot-wide centered on the centerline over the HDD profile and 50-foot-wide elsewhere.

No wetlands would be impacted by the HDD workspace on private land and the permanent ROW on federal land at the crossing of Lake Oahe, because no wetlands exist within the Project Area and Connected Action Area at the Lake Oahe Crossing.

The ECP and SWPPP specify several measures to protect wetlands and waterbodies from becoming polluted with fuels or other hazardous materials during construction. These plans prohibit the storage of

fuel or other hazardous materials within 100 feet of a wetland or waterbody. The ECP also specifies that equipment must be refueled at least 100 feet from waterbodies unless, due to site-specific conditions, there is no practical alternative such as the proposed pumping intake structure located on the barge at the Missouri River Crossing. In that case, the contractor must implement site-specific protective measures and containment procedures described in the ECP. Contractors would be required to provide trained personnel, appropriate equipment, and materials to contain and clean up releases of fuel, lubricating oil, or hydraulic fluid that result from equipment failure or other circumstances in accordance with containment plans as described above.

Table 3-8 Wetlands within the Flowage Easements Project Area						
MP	Wetland ID	Wetland Type	Pre-Construction Notice?	Delineation Source	Area (acres)	Impacted Area ¹
94.7	w-m10-wi-001	Palustrine Scrub-Shrub	No	Field	0.07	Permanent ROW over HDD Profile
94.7	w-m10-wi-001	Palustrine Emergent	No	Field	0.04	Permanent ROW over HDD Profile
94.8	w-m10-wi-001	Palustrine Forested	No	Field	0.05	Permanent ROW over HDD Profile
94.9	w-m10-wi-002	Palustrine Scrub-Shrub	No	Field	0.14	Permanent ROW over HDD Profile

3.2.4 Floodplain

3.2.4.1 Affected Environment

Floodplains refer to the 100-year floodplain, as defined by Federal Emergency Management Agency (FEMA), and as shown on Flood Insurance Rate Maps (FIRM) or Flood Hazard Boundary Maps for all communities participating in the National Flood Insurance Program (NFIP). The 100-year floodplain is an area subjected to inundation by the 1% chance of an annual flood event. Executive Order (EO) 11988 (Floodplain Management) requires federal agencies to avoid direct or indirect support of development within the 100-year floodplain whenever there is a practical alternative.

According to the FEMA FIRM map, the seven flowage easements are located within Zone A (the 100-year floodplain) of the Missouri River in Williams County. A FEMA flood map is not available for the Connected Action within McKenzie County. The Lake Oahe crossing in Emmons County is located in Zone D, which is an area of undetermined, but possible flood hazards (FEMA, 1987). FEMA has not completed a study to determine flood hazards for Morton County; therefore, a flood map has not been published at this time.

3.2.4.2 Impacts and Mitigation

The Proposed Action has been designed in accordance with accepted floodplain management practices; therefore, no impacts on floodplain elevations or velocities are anticipated. Following construction,

disturbed areas would be restored to pre-construction grades and contours, as practical. If necessary, soil displaced by installation of the 24-inch pipeline on the flowage easements would be removed from the floodplain and hauled to an upland location in order to ensure original floodplain elevations are restored

The Corps Omaha District Flood Risk and Floodplain Management Section (FRFM) is responsible for coordinating compliance with the requirements of EO 11988. The FRFM reviewed the proposed pipeline plans for the portion of the DAPL Project that crosses the flowage easements for compliance with Appendix A (Typical Cut and Fill Volumes for Land Development Proposals) of NWDR 1110-2-5, Land Development Guidance at Corps Reservoir Projects, and found that the lowest elevation of the Proposed Action on the flowage easements (1872.25 feet MSL) would be above the Garrison flood control pool maximum operation elevation (1854.0 feet MSL). Therefore, there would be no adverse impacts on the operation of the Garrison flood control pool. Provided that the site topography is left at its natural ground elevation after construction and all excess material is hauled off site, the FRFM concluded that there are no flood risk and floodplain management concerns associated with the Proposed Action. On April 7, 2015 the FRFM provided Dakota Access with a memorandum verifying compliance under EO 1198 and recommending approval of the Proposed Action (Krause, 2015).

3.2.5 Levees

Based on a search of the Corps National Levee Database and FEMA FIRM maps, no levees are located within 10 miles of the Lake Oahe or flowage easement crossings (Corps, 2014). Because no levees are located within 10 miles of either crossing, construction of the Proposed Action is not expected to impact levees.

3.3 Vegetation, Agriculture, and Range Resources

Under the “no action” alternative, Dakota Access would not construct the proposed DAPL Project and no impacts on vegetation, agriculture, and range resources would occur. However, if the objectives of the DAPL Project are to be met under the “no action” alternative, other projects and activities would be required and these projects would result in their own impacts on vegetation, agriculture, and range resources, which would likely be similar to or greater than the DAPL Project. Impacts associated with a future project developed in response to the “no action” alternative are unknown, while only temporary and minor impacts or insignificant permanent impacts on vegetation, agriculture, and range resources would occur as a result of the Proposed Action, as described in the sections below.

3.3.1 Vegetation

3.3.1.1 Affected Environment

Land cover was analyzed for the flowage easements and federal lands and associated Connected Actions based on the 2011 USGS National Land Cover Dataset (NLCD) and was field-verified where access was available. Land cover on the flowage easements is comprised mostly of cultivated crops, which include corn, sugar beets, alfalfa, soybeans, and spring wheat. Other present land cover types include developed areas, which are primarily roads, pasture/hay/grassland areas that are interspersed with the cultivated crops, emergent wetlands, woody wetlands, mixed forest and deciduous forest associated with the Missouri River.

Land cover on the federal lands is comprised of cultivated crops, emergent herbaceous wetlands, grassland/herbaceous, and open water. Over half of the area of the tracts is characterized as grassland/herbaceous, which primarily occurs on the west side of Lake Oahe. Cultivated cropland consists mainly of oats and canola on the east side of the Lake.

A description of each land cover type encountered at both crossing areas is provided below.

Cultivated Crop

The cultivated cropland community is characterized by land used for the production of annual crops, such as corn and soybeans. This class includes all land being actively tilled.

Deciduous Forest

Deciduous forest typically includes trees that are greater than 16 feet tall. More than 75% of the tree species in this land cover class shed foliage simultaneously in response to seasonal change.

Mixed Forest

Mixed forest are generally areas dominated by trees generally greater than 5 meters tall, and greater than 20% of total vegetation cover. The vegetation cover within mixed forest typically does not have either deciduous or evergreen species greater than 75% of the total tree cover.

Developed/Open Space

The developed/open space community type is dominated by lawn grasses and may include some developed areas and roads. Impervious surfaces account for less than 20% of the total cover. This class would typically include minor roads and associated ditches.

Developed/Low Intensity

The developed/low intensity community includes areas with a mixture of constructed material and vegetation. These areas most commonly include single-family housing units. Developed/low intensity in the Project Area is associated with impervious surfaces of larger roads.

Emergent Herbaceous Wetland

Refer to Section 3.2.3, which provides a description of data obtained during delineations of the wetlands that would be impacted by the Proposed Action.

Woody Wetlands

Refer to Section 4.2.3, which provides a description of data obtained during delineations of the wetlands that would be impacted by the Proposed Action.

Grassland/Herbaceous

The grassland/herbaceous community is dominated by graminoid or herbaceous vegetation. These areas are not subject to intensive management such as tilling but can be utilized for grazing.

Pasture/Hay

The pasture/hay community type consists of areas of grasses, legumes, or grass-legume mixtures planted for livestock grazing or the production of seed or hay crops, typically on a perennial cycle.

Open Water

The open water cover type includes areas of open water. This land cover type is associated with Lake Oahe and the Missouri River.

3.3.1.2 Impacts and Mitigation

Temporary impacts on land cover would occur in essentially all areas within the construction footprint of the Project Area and Connected Actions, the vast majority of which would return to pre-construction land cover upon completion of construction. One exception is at the flowage easement Project Area in forested areas along the permanent easement. Impacts on cultivated crops make up the majority of temporary impacts and would return to cultivated crops post-construction.

Tables 3-9 and 3-10 show land cover types impacted by construction and maintenance activities. A description of each category is provided below.

Table 3-9 Land Cover Impacts on the Flowage Easements Project Area and Connected Action				
Land Cover Type	Connected Action- Construction Workspace (acres)	Connected Action- Permanent ROW (acres)	Construction Workspace (acres) ¹	Permanent ROW (acres)
Cultivated Crops	0	0	47.4	13.3
Deciduous Forest	0.9	0.2	0	0
Developed, Low Intensity	0	0	0.4	0.4
Developed, Open Space	0.1	0.01	1.2	0.4
Emergent Herbaceous Wetlands	0	0	0.9	0.4
Hay/Pasture	0	0	6.6	1.8
Grassland/Herbaceous	0.1	0	1.7	0.5
Mixed Forest	0.2	0.03	0	0
Open Water	0.7	0.1	0	0
Woody Wetlands	0	0	1.4	0.8
Total	2.0	0.3	59.3	17.6

¹ Construction workspace includes permanent ROW.

Permanent impacts on land cover in the federal lands would be limited to the permanent ROW and involve limited tree removal within the permanent easement. Impacts on land cover as part of the Connected Action would occur on private lands and include the HDD workspaces, stringing area, and the permanent easements between the HDD workspaces and federal lands.

Table 3-10 Land Cover Impacts on the Federal Lands Project Area and Connected Action			
Land Cover	Connected Action– Construction Workspace (acres)	Connected Action– Permanent ROW (acres)	Federal Lands Permanent ROW (acres) ¹
Cultivated Crops	0.0	0.0	0.1
Emergent Herbaceous Wetlands	0.0	0.0	0.4
Woody Wetlands	0.2	0.0	0.0
Grassland/ Herbaceous	15.3	1.1	0.6
Total	15.5	1.1	1.2

¹ Land cover impacts on federal lands are limited to the maintained 50-foot permanent easement and do not include approximately 6.3 acres of permanent easement over the HDD profile across Lake Oahe. Land cover within the banks of Lake Oahe (open water, woody wetlands, and emergent herbaceous wetlands) would not be disturbed during construction.

Measures to Protect Vegetation

Dakota Access would clear the ROW to the extent necessary to assure suitable access for construction, safe operation, and maintenance of the DAPL Project. Clearing of herbaceous vegetation during construction is anticipated to result in short-term impacts. Within areas disturbed by construction in the flowage easements Project Area and Connected Actions, Dakota Access would implement active revegetation measures and rapid colonization by annual and perennial herbaceous species to restore most vegetative cover within the first growing season. In areas that require permanent revegetation, Dakota Access would utilize an NRCS native seed mix that has been selected for the Proposed Action based on the North Dakota State University Extension Service Publication, *Successful Reclamation of Lands Disturbed by Oil and Gas Development and Infrastructure Construction*. . Ground disturbing activities would not occur on Corps fee-owned lands; therefore, reseeding is not anticipated in these areas. However, if reseeding were to become necessary on Corps fee-owned lands, all activities would be conducted in accordance with applicable Lake Oahe or Garrison Project revegetation guidelines.

In non-agricultural areas, vegetation cleared from ATWS would be allowed to revegetate after construction depending on arrangements with the landowner. Consequently, significant changes in cover types are not anticipated. Revegetation would allow wildlife species to return to the area after construction is completed. Temporary revegetation measures may also be implemented to quickly establish ground cover to minimize the potential for soil erosion and noxious weeds to establish. A temporary seed mix may be applied in these situations. Revegetation of trees and shrubs would take

place in accordance with the North Dakota tree and shrub regulations. The ECP (**Appendix G**) contains more details regarding temporary revegetation.

After completion of waterbody crossings, Dakota Access would revegetate disturbed stream banks in accordance with the ECP, SWPPP, and requirements of applicable state and federal permits. When constructing in agricultural areas, up to 1 foot of topsoil (organic layer) would be stripped from the trench line and stockpiled separately from trench spoil to preserve the native seed stock. The ECP contains additional details regarding topsoil segregation.

At stream approaches, the Contractor would leave a 20-foot buffer of undisturbed herbaceous vegetation on all stream banks during initial clearing, except where grading is needed for bridge installation or where restricted by applicable regulations and/or permit conditions.

3.3.2 Invasive and Noxious Weeds

3.3.2.1 Affected Environment

The state of North Dakota has 11 state-listed noxious and invasive weeds (“invasive species”). The species listed are: Russian knapweed (*Acroptilon repens*), absinth wormwood (*Artemisia absinthium*), musk thistle (*Carduus nutans*), diffuse knapweed (*Centaurea diffusa*), yellow toadflax (*Linaria vulgaris*), spotted knapweed (*Centaurea maculosa*), Canada thistle (*Cirsium arvense*), leafy spurge (*Euphorbia esula*), dalmatian toadflax (*Linaria dalmatica*), purple loosestrife (*Lythrum salicaria*), and saltcedar (*Tamarix chinensis*). These state invasive species are controlled and regulated under North Dakota Law (NDCC § 4.1-47-02) (North Dakota Department of Agriculture, 2014a).

Each county in North Dakota has a County Weed Board, which consists of a regulation committee to manage noxious and invasive weeds. Each of these county boards is responsible for the addition of county-specific invasive species to the state-listed species. Additional noxious weeds are listed in McKenzie County including field bindweed (*Convolvulus arvensis*), burdock (*Arctium* sp.), black henbane (*Hyoscyamus niger*), houndstongue (*Cynoglossum officinale*), and yellow starthistle (*Centaurea solstitialis*). No additional invasive species have been identified for listing in Williams, Morton, and Emmons counties.

3.3.2.2 Environmental Impact and Mitigation

Dakota Access sent notifications to the McKenzie, Williams, Morton, and Emmons counties weed boards describing the Proposed Action and requesting any guidance regarding the known locations of noxious and invasive weeds pertaining to that county. Dakota Access would work with the county weed boards to ensure the ECP contains relevant and necessary mitigation measures that would be implemented to prevent the spread of noxious weed species during construction and operation of the Proposed Action.

3.3.3 Threatened, Endangered, Candidate, and Proposed Plant Species

3.3.3.1 Affected Environment

There is one federally-listed plant species in North Dakota, the threatened western prairie fringed orchid. This plant species is associated with high quality moist, tall grass prairie. Most of the orchids in North Dakota are located in the Sheyenne National Grasslands in Ransom and Richland counties in the southeastern corner of the state. The population at Sheyenne National Grasslands is the largest population left in the world, with over 7,000 orchids (USFWS, 2013a).

North Dakota does not have a state threatened and endangered species program or track plant species that are not federally listed.

3.3.3.2 Impacts and Mitigation

There are no known records of western prairie fringed orchids in the Project Area counties, and no suitable habitat was documented; therefore, no effect on the western prairie fringed orchid is expected as a result of the proposed undertaking. In the unlikely event that any are observed during construction on federal lands, work would stop and the Corps would be contacted.

3.4 Wildlife Resources

Under the “no action” alternative, Dakota Access would not construct the DAPL Project, and no impacts on wildlife resources would occur. However, if the objectives of the DAPL Project are to be met under the “no action” alternative, other projects and activities would be required and these projects would result in their own impacts on wildlife resources, which would likely be similar to or greater than the DAPL Project. Impacts associated with a future project developed in response to the “no action” alternative are unknown, while only temporary and minor impacts, if any, on wildlife resources would occur as a result of the Proposed Action, as described in the sections below.

3.4.1 Recreationally and Economically Important Species and Nongame Wildlife

3.4.1.1 Affected Environment

The Proposed Action region is home to a large number of mammal and bird species. Big game species that occur in the Proposed Action region include pronghorn and white-tailed deer. Game birds potentially using the types of wildlife habitat in the Project Area include the ruffed grouse, sharp-tailed grouse, pheasant, woodcock, snipe, and doves. Furbearers and predators potentially occurring within the Project Area include coyote, beaver, badger, red fox, raccoon, bobcat, fisher, mink, weasel, and muskrat. Potential small mammal species occurring within the habitat types associated with the Project Area include pocket gopher, skunk, and white-tailed jackrabbit.

Waterfowl and shorebird species potentially occurring within the Project Area include mallards, pintails, American wigeon, blue-winged teal, western grebe, California gull, Canada goose, common tern, killdeer, Wilson’s phalarope, and lesser yellowlegs. Numerous songbirds, including the American goldfinch, black-

capped chickadee, cedar waxwing, clay-colored sparrow, lark bunting, song sparrow, tree swallow, western kingbird, western meadowlark, and yellow warbler can be expected to occur in the Project Area.

Numerous species of reptiles and amphibians may also occur within the Project Area. Some amphibian species that may be expected to occur in the Project Area include the northern leopard frog, tiger salamander, and western chorus frog. Reptile species that may be expected to occur within the Project Area include common snapping turtle, western painted turtle, common garter snake, and racer (Hoberg and Gause, 1992).

3.4.1.2 Impacts and Mitigation

Temporary impacts on wildlife could occur during construction due to clearing of vegetation and movement of construction equipment along the ROW. The ROW and ATWS would remain relatively clear of vegetation until restoration is completed. Most wildlife, including the larger and more mobile animals, would disperse from the Project Area as construction activities approach. Displaced species may recolonize in adjacent, undisturbed areas, or reestablish in their previously occupied habitats after construction has been completed and suitable habitat is restored. Some smaller, less mobile wildlife species such as amphibians, reptiles, and small mammals have the potential to be directly impacted during clearing and grading activities, but given the limited extent of the proposed crossing, measurable impacts are not anticipated. No impacts to treaty fishing and hunting rights are anticipated due to construction within the Project Area or Connected Actions.

Herbaceous cover would be seeded on disturbed upland areas during restoration, and it is expected that pre-existing herbaceous and shrub habitats would quickly reestablish themselves. Consequently, it is expected that the wildlife species that use these habitats would also return within one growing season of construction completion. Routine clearing of the permanent easement to improve visibility and remove encroaching trees would be performed in compliance with PHMSA requirements. The lack of trees reestablishing would be the only potential long-term impact to wildlife that depends on forested communities. This impact is expected to be negligible, as it only pertains to extremely small portions of the permanent easement and very little forested habitat is present within the Project Area and Connected Actions.

3.4.2 Threatened, Endangered, Candidate, and Proposed Wildlife Species

The Endangered Species Act (ESA) directs all federal agencies to work to conserve endangered and threatened species. Crossing the Corps flowage easements and federal lands triggers the consultation procedures of section 7 of the ESA. This section serves as the Biological Evaluation or written analysis documenting the Corps' conclusions and the rationale to support those conclusions regarding the effects of the Proposed Action on protected wildlife resources. The Bald Eagle (*Haliaeetus leucocephalus*) was removed from the federal list of threatened and endangered species on August 9, 2007 and is no longer protected under the ESA. However, the bald eagle is provided protection under the Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird Treaty Act (MBTA), which prohibits disturbance of eagles and other raptors. In order to ensure compliance with these acts, Dakota Access obtained USFWS and state agency data regarding known eagle nests in the vicinity of the Missouri River and Lake Oahe crossings from the North Dakota Game and Fish Department, who houses the eagle location database. The Proposed Action and Connected action will be over 1,000 feet from known or historic eagle nesting areas.

Based on the known nest data, there are no eagle nests within the USFWS National Bald Eagle Management Guidelines recommend nest buffers of 660 feet for linear construction activities if the activity will be visible from the nest and 330 feet if the activity will not be visible from the nest (USFWS, 2007). These guidelines are intended to help the public minimize impacts to bald eagles, particularly where they may constitute “disturbance”, which is prohibited by the BGEPA. Given the distance from known eagle nesting areas, and the mitigation of use of the HDD method for both the Missouri and Lake Oahe crossings, the Proposed Action is not anticipated to have any effect on Bald or Golden eagles

3.4.2.1 Affected Environment

Nine federally listed species have been identified in Williams, McKenzie, Morton, and Emmons counties. Designated critical habitat for the piping plover also occurs in each of the four counties. The USFWS concurred with the Corps effect determinations included below in Section 3.4.2.2 for all listed species within the EA review area.

Interior Least Tern

In North Dakota, the interior least tern (*Sterna antillarum*) utilizes sparsely vegetated sandbars on the Missouri River. Birds nest, raise young, and relax on barren river sandbars. In North Dakota, the least tern is found mainly on the Missouri River from Garrison Dam south to Lake Oahe and on the Missouri and Yellowstone Rivers upstream of Lake Sakakawea. Approximately 100 pairs breed in North Dakota during the summer before flying to coastal areas of Central and South American and the Caribbean Islands (USFWS, 2013b).

Whooping Crane

Whooping cranes (*Grus Americana*) embark on a bi-annual migration from summer nesting and breeding grounds in Wood Buffalo National Park in northern Alberta to the barrier islands and coastal marshes of the Aransas National Wildlife Refuge on the Gulf Coast of Texas. Twice yearly in the spring and fall, whooping cranes migrate along the Central Flyway, a migratory corridor approximately 220 miles wide and 2,400 miles in length. The Central Flyway includes eastern Montana and portions of North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and eastern Texas (USFWS, 2014a) (**Figure 16**). During the migration, cranes make numerous stops, roosting for short durations in large shallow marshes, and feeding in harvested grain fields. Approximately 75% of the whooping crane sightings in North Dakota occur within the Central Flyway. The primary threats to whooping cranes are power lines, illegal hunting, and habitat loss.

Black-footed Ferret

The black-footed ferret (*Mustela nigripes*) is a small member of the Mustelidae family native to North American shortgrass and mixed grass prairie. Prairie dogs make up approximately 90% of the black-footed ferret diet and as such, the species is associated almost exclusively with large complexes of prairie dog towns (USFWS, 2013c; Black-footed Ferret Recovery Implementation Team [BFFRIT], 2011). Black-footed ferrets are fossorial, nocturnal predators, spending the majority of their time underground in prairie dog burrows, leaving only to hunt (BFFRIT, 2011). Once thought to be extirpated in the wild, captive-born

individuals have been reintroduced to 21 sites in Wyoming, Montana, South Dakota, Colorado, Utah, Kansas, New Mexico, and Arizona since 1991 (USFWS, 2013c).

Gray Wolf

A habitat generalist, the gray wolf (*Canis lupus*) historically occupied most habitat types in North America. They show little preference for one cover type over another and successfully utilize alpine, forest, grassland, shrubland, and woodland habitats across their range (Mech, 1974). Once thought to require wilderness areas with little to no human disturbance, recent range expansions have demonstrated the species' ability to tolerate higher rates of anthropogenic development than previously thought. Given abundant prey and low rates of human-caused mortality, wolves can survive in proximity to human-dominated environments (Fuller, 1989).

Northern Long-eared Bat

Northern long-eared bats (*Myotis septentrionalis*) occur throughout the eastern and north-central U.S. Eastern populations have declined significantly in recent years as a result of white-nose syndrome (WNS), a contagious fungal infection. Although historically less common in the western portion of its range than in the northern portion, northern long-eared bats occur throughout North Dakota. Habitat throughout its range includes caves and abandoned mines during the winter and hardwood or mixed forests for roosting and foraging during the summer (USFWS, 2015).

Northern long-eared bats may roost singly or in colonies in cavities, crevices, hollows, or beneath the bark of live and dead trees and/or snags, regardless of tree species. They prefer trees with a diameter at breast height of at least 3 inches. Less frequently, Northern long-eared bats have been observed roosting in man-made structures such as sheds or barns. Northern long-eared bats primarily forage at dusk on insects in forests, but will occasionally forage over small forest clearings and water (USFWS, 2015).

Piping Plover

Piping plovers (*Charadrius melodus*) are shore birds that inhabit areas near water, preferring river sandbars and alkali wetlands in the Great Plains for nesting, foraging, sheltering, brood-rearing, and dispersal. Piping plovers winter along large coastal sand or mudflats near a sandy beaches throughout the southeastern U.S. Critical Habitat for the piping plover is designated along the Missouri River system throughout North Dakota (USFWS, 2012).

Dakota Skipper

The Dakota skipper (*Hesperia dacotae*) is a small butterfly found in dry-mesic and wet-mesic tallgrass and mesic mixed grass prairie remnants characterized by alkaline and composite soils. The Dakota skipper is a habitat specialist requiring high-quality prairie habitat (i.e., grasslands or discrete patches of habitat within grasslands that are predominantly native and that have not been tilled). Only 146 populations are documented in three states and two Canadian provinces (McCabe, 1981; Royer and Marrone, 1992; Cochrane and Delphey, 2002; USFWS, 2011; 2013d). Remaining populations vary in size and density and for the most part are not influenced by dispersal between populations (McCabe, 1981; Dana, 1991; Dana, 1997; Cochrane and Delphey, 2002). The species overwinters at the base of grasses in the soil of the site

which they inhabit. In North Dakota, the skipper typically occupies both wet-mesic and dry-mesic prairie (Royer and Marrone, 1992; Cochrane and Delphey, 2002). The current status of the Dakota skipper in the state is considered tenuous, and most populations are considered vulnerable due to their extremely isolated nature.

Rufa Red Knot

The rufa red knot (*Calidris canutus rufa*) is a large sandpiper noted for its long-distance migration between summer breeding grounds in the Arctic and wintering areas at high latitudes in the Southern Hemisphere (USFWS, 2014b). Some rufa red knots wintering in the northwestern Gulf of Mexico migrate through interior North America during both spring and fall and use stopover sites in the Northern Great Plains. During spring and fall migrations, rufa red knots are typically found in marine habitats along the Pacific and Atlantic coasts of North America, generally preferring sandy coastal habitats at or near tidal inlets or the mouths of bays and estuaries. However, some migrating rufa red knots use sandbars and sandy shore and beach habitats along large rivers and reservoirs of the interior of North America. This area contains the Atlantic, Mississippi, and Central Flyways (USFWS, 2014g). The species also heavily relies on exposed substrate at wetland edges for stopover habitat, and the suitability of a wetland for rufa red knots depends on water levels and may vary annually (Gratto-Trevor et al., 2001).

Pallid Sturgeon

Pallid sturgeon (*Scaphirhynchus albus*) prefer benthic environments associated with swift waters of large turbid, free-flowing rivers with braided channels, dynamic flow patterns, periodic flooding of terrestrial habitats, and extensive microhabitat diversity. Pallid sturgeon inhabit the Missouri and Mississippi Rivers from Montana to Louisiana and have been documented in the Missouri River downstream from the Fort Peck Dam in Montana to the headwaters of Lake Sakakawea, North Dakota, and downstream from Garrison Dam, North Dakota to the headwaters of Lake Oahe, South Dakota (USFWS, 2014c). Pallid sturgeon populations are fragmented by dams on the Missouri River and are very scarce in the Lake Oahe portion of the Missouri River.

3.4.2.2 Impacts and Mitigation

Dakota Access conducted pedestrian surveys of the workspace within the Project Area at the flowage easements in September 2014 and July 2015 and at the Lake Oahe crossing in April 2015 to assess suitable habitat for listed species. Given the limited scope of the Proposed Action, minimization measures, and the implementation of specialized construction techniques, the Corps has determined that the Proposed Action would have no effect on the black-footed ferret, gray wolf, northern long-eared bat, and Dakota skipper within the Project Area. The Corps also determined that the Proposed Action may affect, but is not likely to adversely affect the interior least tern, whooping crane, piping plover, rufa red knot, and pallid sturgeon in the Project Area. The effect determination for these species that may be affected, but are not likely to be adversely affected was concurred with in a letter received from the USFWS on May 2, 2016. A Biological Opinion (BO) associated with other portions of the DAPL Project, outside of the EA review area, was issued by the USFWS on May 31, 2016 but is not applicable to this document. **Table 3-11** lists the impact determinations of the protected species with potential to occur within the Project Area and Connected Action. A summary of habitat evaluations and the basis for the determination of impacts for each listed species is provided below.

Table 3-11 Federally Listed Species with Potential to Occur within the Project Area and Connected Action						
Species	Status	County				Impact Determination
		Williams	McKenzie	Morton	Emmons	
Interior Least Tern	Endangered	X	X	X	X	May Affect, Not Likely to Adversely Affect
Whooping Crane	Endangered	X	X	X	X	May Affect, Not Likely to Adversely Affect
Black-footed Ferret	Endangered		X	X		No Effect
Gray Wolf	Endangered	X	X	X		No Effect
Northern Long-eared Bat	Threatened	X	X	X	X	No Effect
Piping Plover	Threatened	X	X	X	X	May Affect, Not Likely to Adversely Affect
Dakota Skipper	Threatened		X	X	X	No Effect
Rufa Red Knot	Threatened	X	X	X	X	May Affect, Not Likely to Adversely Affect
Pallid Sturgeon	Endangered	X	X	X	X	May Affect, Not Likely to Adversely Affect

Interior Least Tern

Suitable habitat may exist for interior least terns at the Missouri River and at the Lake Oahe crossing depending on precipitation and seasonal flow variations as exposed sand/gravel bars suitable for nesting may be present. Dakota Access proposes to cross the Missouri River and Lake Oahe utilizing the HDD construction method. Pipeline installation via HDD will avoid in-stream disturbance that would otherwise occur if the pipe was installed via the traditional open-cut method, as described in Section 2.1.4.

Potential sources for indirect impacts on interior least terns include the inadvertent release of non-toxic bentonite mud (used for lubricating the drill path) into the waterbody or nesting habitat and noise associated with the drilling equipment. Dakota Access conducted geotechnical analyses at each of the proposed HDD crossings and designed the HDD to minimize the likelihood that the drilling mud is inadvertently released. While the likelihood of an inadvertent release has been minimized to the maximum extent practicable, were it to occur, implementation of Dakota Access' HDD Contingency Plan (**Appendix B**) would minimize any potential impacts on interior least terns by quickly and efficiently containing and removing the released, non-toxic mud.

Operation of the HDD equipment will result in a temporary increase in noise in the immediate vicinity of the HDD activities. Although the HDD entry and exit sites are located more than 960 feet from any suitable interior least tern habitat, it is possible that the activities would be audible if interior least terns are nesting in the area. However, Atwood et al. (1977) found that noise associated with human activities (an airfield in the case of the referenced study) did not affect site fidelity or nesting success of least terns. Similarly, Hillman et al. (2015) found that noise from military and civilian overflights did not impact nest success and that restricting human disturbance to greater than 50 meters (164 feet) from colony boundaries mitigated

adverse impacts to nesting birds. Noise associated with aircraft overflights at low altitudes in the Hillman et al. (2015) study were a minimum of 67.7 decibels (A-weighted) (dBA), greater than the anticipated sound levels generated by HDD equipment. Noise studies conducted at the proposed HDD entry and exit locations indicate that sound levels would be less than 60 dBA at approximately 600 feet from the equipment. Therefore, noise associated with the HDD crossings of the Missouri River and Lake Oahe may affect, but are not likely to adversely affect interior least terns potentially nesting in the area.

Dakota Access plans to withdrawal water from the Missouri River, which is required for activities associated with the installation of the HDD and the hydrostatic testing of the HDD segment. A temporary waterline would be installed at the Missouri River between the shoreline and the HDD workspace on the flowage easements within the permanent ROW (**Figure 6-B**). The temporary waterline would be laid by hand on top of the surface, and no tracked or wheeled equipment would be necessary for installation or removal of the temporary aboveground waterline. No disturbance of the river banks is anticipated. Additionally, installation and removal of the waterline are anticipated to be complete prior to nesting season; therefore, no impacts on the interior least tern are anticipated to occur at the Missouri River. If the water withdrawal activities are not able to be completed prior to nesting season, Dakota Access would conduct surveys prior to placement of the waterline to confirm the presence/absence of interior least terns within the pipeline ROW. If interior least terns are nesting within the pipeline ROW, Dakota Access would postpone water withdrawal activities and contact the Corps and USFWS. Work would only resume when the USFWS has given permission following a survey to ensure interior least terns would no longer be affected. No water withdrawal from or access to Lake Oahe is required to complete the Lake Oahe crossing.

As discussed in Section 2.3.2 above, Dakota Access would routinely maintain its 30 to 50-foot-wide permanent easement, including periodic mowing and removal of woody vegetation. Because suitable interior least tern nesting habitat is on unvegetated flats within the Missouri River and Lake Oahe, routine maintenance activities would not occur within suitable habitat. During operation of the pipeline, in the unlikely event that a leak or spill were to occur and reach interior least tern habitat, Dakota Access would implement its FRP and strictly adhere to PHMSA regulations.

Based on the avoidance and minimization measures, literature review, field investigations, and habitat types present in the proposed Project Area, USACE has determined that the Proposed Action may affect, but is not likely to adversely affect the interior least tern.

Whooping Crane

In North Dakota, whooping cranes are only present during the twice-yearly migration between winter grounds and summer nesting sites. As the whooping crane is a migrant and does not breed in North Dakota, the species cannot be confirmed as present in or absent from the Project Area. The results of the habitat assessment field surveys indicate that the Project Area may contain suitable stopover habitat (i.e., agricultural fields). It is anticipated that whooping cranes would avoid the Project Area during active construction, as they tend to avoid areas with human disturbance (Howe, 1989; USFWS, 1994; Lewis and Slack, 2008). The noise and land disturbance from construction activities during the migration periods would likely cause birds to choose more suitable landing and overnight roosting locations away from construction activities given the abundance of similar habitat throughout the migration corridor in North Dakota and in the general vicinity of the Project Area.

While there is potential for individuals to land in the Project Area during construction, work would halt if a whooping crane is observed within the Project Area and would not resume until the bird leaves the area. Additionally, Dakota Access would notify the Corps and USFWS of the observation. The presence of construction activities within potentially suitable stopover habitat during migration could disturb whooping cranes in the area or cause flying whooping cranes to avoid the area and select other suitable stopover habitat. Due to the abundance of available stopover habitat along the North Dakota migration corridor and in the vicinity of the Project Area (USFWS, 2009a), impacts would be negligible. As illustrated in **Figure 16**, the Project Area represents a minute fraction of the whooping crane migration corridor in North Dakota.

As discussed in Section 2.3.2 above, Dakota Access would routinely maintain its 30 to 50-foot-wide permanent easement, including periodic mowing and removal of woody vegetation. As whooping cranes utilize open fields and emergent wetlands for stopover habitat, affects from maintenance activities would be minimal and would be similar to those described above during construction activities. If whooping cranes were observed in the area during maintenance activities, maintenance personnel would suspend activities until the cranes leave the area. Similarly, if maintenance activities are ongoing at the time of migration, whooping cranes would likely avoid the disturbance area.

In order for whooping cranes to be affected by a spill or leak during operation, an individual would have to be present when the leak or spill occurred or land in the spill itself. Due to the strict adherence to PHMSA regulations designed to prevent spills and leaks during operation, the short timeframe that whooping cranes are present during migration, and the abundance of available stopover habitat along the migration corridor in North Dakota (USFWS, 2009a), the measures implemented by Dakota Access in the event of a leak in accordance with the FRP, such occurrences are unlikely.

Based on the avoidance and minimization measures, literature review, field investigations, and habitat types present in the Project Area, USACE has determined that the Proposed Action may affect, but is not likely to adversely affect the whooping crane.

Black-footed Ferret

No suitable black-footed ferret habitat is present in the Project areas. The black-footed ferret has been recorded in Morton County; however, based on occurrence data received from North Dakota Parks and Recreation, there are no documented occurrences within the vicinity of the Proposed Action. Further, it is believed that black-footed ferrets have been extirpated from North Dakota, and no reintroductions have occurred in the state (USFWS, 2013f; North Dakota Game and Fish Department, 2012). Due to the lack of suitable habitat and the distance of the Project areas from known black-footed ferret occurrences, construction, operation, and maintenance activities associated with the Proposed Action would have no effect on black-footed ferrets.

Gray Wolf

The gray wolf is listed as endangered in all three counties of the Proposed Action areas in North Dakota (south and west of the Missouri River upstream to Lake Sakakawea and west of the centerline of Highway 83 from Lake Sakakawea to the Canadian border). Wolves in eastern North Dakota are part of the Great Lakes Distinct Population Segment that was delisted by the USFWS in January 2012 (USFWS, 2014e).

North Dakota does not currently have an established breeding population (North Dakota Department of Agriculture, 2014b). Observations of wolves are sporadic, and it is believed that these individuals are dispersers from adjacent populations (i.e., from Minnesota and Manitoba) (USFWS, 2006; Licht and Fritts, 1994). Given the unlikely occurrence and high mobility of this species, construction, operation and maintenance activities associated with the Proposed Action would have no effect on gray wolves.

Northern Long-eared Bat

The northern long-eared bat is currently listed by the USFWS as threatened in North Dakota. On April 2, 2015, the USFWS published the final listing in the Federal Registrar with an effective date of May 4, 2015. The USFWS listed the northern long-eared bat as threatened and chose to exercise the option of issuing an interim 4(d) rule to allow for more flexible implementation of the ESA and “to tailor prohibitions to those that make the most sense for protecting and managing at-risk species.” In areas outside of the 150-mile WNS buffer zone, incidental take from lawful activities is not prohibited. The State of North Dakota currently falls outside of the WNS 150-mile buffer zone. Per the exemptions of the interim 4(d) rule, construction, operation and maintenance activities associated with the Proposed Action would have no effect on the northern long-eared bat (USFWS, 2015).

Piping Plover

Due to the similarity in life history and habitat requirements, impacts on piping plovers would be similar to those discussed in above for the interior least tern. Suitable habitat may exist for piping plover at the Missouri River and at the Lake Oahe crossing, depending on precipitation and seasonal flow variations, as exposed sand/gravel bars suitable for nesting may be present. These areas are also designated as critical habitat for this species under the ESA. Dakota Access proposes to cross the Missouri River and Lake Oahe utilizing the HDD construction method. Pipeline installation via HDD will avoid in-stream disturbance that would otherwise occur if the pipe was installed via the traditional open-cut method, as described in Section 2.1.4.

Potential sources for indirect impacts on piping plovers include the inadvertent release of non-toxic bentonite mud (used for lubricating the drill path) into the waterbody or nesting habitat and noise associated with the drilling equipment. Dakota Access conducted geotechnical analyses at each of the proposed HDD crossings and designed the HDD to minimize the likelihood that the drilling mud is inadvertently released. While the likelihood of an inadvertent release has been minimized to the maximum extent practicable, were it to occur, implementation of Dakota Access’ HDD Contingency Plan would minimize any potential impacts on piping plovers by quickly and efficiently containing and removing the released, non-toxic mud.

Operation of the HDD equipment will result in a temporary increase in noise in the immediate vicinity of the HDD activities. Although the HDD entry and exit sites are located more than 960 feet from any suitable piping plover habitat, it is possible that the activities would be audible if piping plovers are nesting in the area. However, piping plovers are frequently observed nesting in and around active sand and gravel mines and do not appear to be deterred by elevated noise levels associated with the operation of equipment (Marcus et al., 2008; Brown et al., 2013).

As discussed for the interior least tern above, impacts associated with installation of the temporary waterline at the Missouri River required for activities associated with the installation of the HDD and the hydrostatic testing of the HDD segment would be avoided. If the water withdrawal activities are not able to be completed prior to nesting season as expected, Dakota Access would conduct surveys prior to placement of the waterline to confirm the presence/absence of piping plovers within the pipeline ROW. If piping plovers are nesting within the pipeline ROW, Dakota Access would postpone water withdrawal activities and contact the USFWS and the Corps. Work would only resume when the USFWS has given permission following a survey to ensure piping plovers would no longer be affected. No water withdrawal from or access to Lake Oahe is required to complete the Lake Oahe crossing.

As discussed in Section 2.3.2 above, Dakota Access would routinely maintain its 30 to 50-foot-wide permanent easement, including periodic mowing and removal of woody vegetation. Because suitable piping plover nesting habitat is on unvegetated flats within the Missouri River and Lake Oahe, routine maintenance activities would not occur in suitable piping plover habitat. In the unlikely event that a leak or spill occurs and reaches piping plover habitat during operation of the pipeline, Dakota Access would implement its FRP and strictly adhere to PHMSA regulations.

Based on the avoidance and minimization measures, literature review, field investigations, and habitat types present in the Project Area, USACE has determined that the Proposed Action may affect, but is not likely to adversely affect the piping plover.

Dakota Skipper

There is no suitable Dakota skipper habitat within the Project Area based on species occurrence and grassland analysis. As such, construction, operation and maintenance activities associated with the Proposed Action would have no effect on this species.

Rufa Red Knot

Rufa red knots do not nest in the Project Area and only occur as an occasional migrant. During spring and fall migrations, the rufa red knot has the potential to occur in North Dakota. Migrating rufa red knot would likely only occur at migratory stopover habitat (suitable shoreline and sandy beach habitat along major rivers, streams, waterbodies, and wetlands) for a brief amount of time (24 hours or less). The results of the habitat assessment field surveys indicate that potentially suitable stopover habitat (sandbar and beach habitats) for migrating rufa red knots is present at the Lake Oahe crossing. Lake Oahe would be crossed using the HDD construction method, and thus would avoid direct impacts on potentially suitable rufa red knot stopover habitat. While direct impacts to the rufa red knot migratory habitat would be avoided through the HDD construction method at Lake Oahe, indirect impacts could occur due to potential disturbance during construction (i.e., noise or an inadvertent release of non-toxic drilling mud).

During construction, noise associated with the HDD may act as deterrent to rufa red knots potentially migrating through the area. These individuals may have to travel to other suitable stopover habitat in the area (e.g., upstream or downstream of the Proposed Action area). Similarly, if an inadvertent release of non-toxic drilling mud were to occur when rufa red knots were present, it could cause individuals to relocate to nearby habitat.

As discussed in Section 2.3.2 above, Dakota Access would routinely maintain its 30 to 50-foot-wide permanent easement, including periodic mowing and removal of woody vegetation. As rufa red knots utilize suitable shoreline and sandy beach habitat along major rivers, streams, waterbodies, and wetlands for stopover habitat, effects from maintenance activities would be negligible and would be similar to those described above during construction activities. If rufa red knots were present in the area during maintenance activities they would likely relocate to nearby suitable habitat. Similarly, if maintenance activities are ongoing at the time of migration, rufa red knots would likely avoid the disturbance area.

In order for rufa red knots to be affected by a spill or leak during operation, an individual would have to be present when the leak or spill occurred or stop on the spill or leak. Due to the strict adherence to PHMSA regulations designed to prevent spills and leaks during operation and the short timeframe that rufa red knots are present during migration, such occurrences are unlikely.

Based on the avoidance and minimization measures, literature review, field investigations, and habitat types present in the Project Area, USACE has determined that the Proposed Action may affect, but is not likely to adversely affect the rufa red knot.

Pallid Sturgeon

Suitable habitat for the pallid sturgeon occurs at the Missouri River and Lake Oahe crossings. Impacts on suitable habitat would be avoided by crossing these waterbodies via HDD. As discussed in for the interior least tern above, pipeline installation via HDD will avoid in-stream disturbance that would otherwise occur if the pipe was installed via the traditional open-cut method.

Dakota Access has also minimized the potential for pallid sturgeon to be indirectly affected by the HDD installation across the Missouri River and Lake Oahe. The only potential source for indirect impacts on pallid sturgeon associated with the HDDs is an inadvertent release of non-toxic bentonite mud (used for lubricating the drill path) into the waterbody. Dakota Access conducted geotechnical analyses at each of the proposed HDD crossings and designed the HDD to minimize the likelihood that the drilling mud is inadvertently released. While the likelihood of an inadvertent release has been minimized to the maximum extent practicable, were it to occur, implementation of Dakota Access' HDD Contingency Plan would minimize any potential impacts on pallid sturgeon by quickly and efficiently containing and removing the released, non-toxic mud.

Dakota Access plans to withdraw water from the Missouri River for installation activities and hydrostatic testing of the HDD segment for the Missouri River. However, potential impacts on the pallid sturgeon or suitable habitat present within the Missouri River would be avoided by implementing the conditions for permitted intake structures outlined in the Corps' Regional Conditions for North Dakota applicable to NWP 12 Utility Line Activities (Corps, 2012) (see Section 3.2.1.2) and as described in the USFWS Recovery Plan for the Pallid Sturgeon (USFWS, 2014f). No water withdrawal from or access to Lake Oahe is required to complete the Lake Oahe crossing. The HDD construction method, application of the HDD Contingency Plan, and implementation of the Corps' conditions for the intake structure within the Missouri River would avoid and minimize potential impacts to the pallid sturgeon.

Maintenance activities will not occur within the Missouri River or Lake Oahe; therefore, no impacts on pallid sturgeon would occur. The depth of the pipeline below the respective rivers and the design and

operation measures that meet or exceed the respective PHMSA regulations make a release into either waterbody extremely unlikely. However, in the unlikely event a leak or spill was to occur and reach the Missouri River or Lake Oahe, impacts would be localized. If pallid sturgeon were present in the area where the spill or leak occurred, they would likely relocate outside of the contaminated area. Further, oil floats and, as pallid sturgeon are bottom dwellers primarily inhabiting the lower water column (USFWS, 2014c), impacts on pallid sturgeon in the event of a spill, would be minimal.

Based on the avoidance and minimization measures, literature review, field investigations, and habitat types present in the Project Area, USACE has determined that the Proposed Action may affect, but is not likely to adversely affect the pallid sturgeon.

3.5 Aquatic Resources

Under the “no action” alternative, Dakota Access would not construct the DAPL Project, and no impacts on aquatic resources would occur. However, if the objectives of the DAPL Project are to be met under the “no action” alternative, other projects and activities would be required and these projects would result in their own impacts on aquatic resources, which would likely be similar to or greater than the proposed DAPL Project. Impacts associated with a future project developed in response to the “no action” alternative are unknown, while only temporary and minor impacts, if any, on aquatic resources would occur as a result of the Proposed Action, as described in the sections below.

3.5.1 Habitat and Communities

3.5.1.1 Affected Environment

West of Williston, the Missouri River is a braided channel varying in width from 800 feet to over 1,500 feet, with sand bars in many locations. The Yellowstone River confluence with the Missouri River is approximately 20 miles west of Williston and 3.5 river miles upstream from the proposed Missouri crossing. East of Williston, the Missouri River feeds into Lake Sakakawea, the third largest man-made lake in the U.S. formed by the Garrison Dam, several hundred miles downstream. This portion of the Missouri River is home to several fish species, including cutthroat trout, rainbow trout, brown trout, walleye, northern, and sauger. Amphibians are found along the shores and nearby riparian areas of the Missouri River. Common species found near the Missouri River crossing include Woodhouse’s toad, the northern leopard frog, and western chorus frog (Hoberg and Gause, 1992).

Lake Oahe is a 232-mile-long reservoir that extends upriver from the Oahe Dam on the Missouri River from Pierre, South Dakota, to Bismarck, North Dakota. Approximately three-quarters of a mile south of the proposed pipeline crossing is the confluence of the Cannonball River into the Missouri. This portion of the Missouri River is home to several fish species, including walleye, northern pike, and channel catfish. Amphibians are found along the shores and nearby riparian areas of Missouri River. Common species found near the Lake Oahe crossing include the Great Plains toad, Woodhouse’s toad, northern leopard frog, and tiger salamander (Hoberg and Gause, 1992).

3.5.1.2 Impacts and Mitigation

The Missouri River, including Lake Oahe, is the only waterbody that would be crossed by the Proposed Action with aquatic resources that have potential to be impacted by the Proposed Action.

All subsurface disturbing activities would be set back from the banks of Lake Oahe at the HDD entry point. This provides a buffer of undisturbed land between active construction and the Lake. There is potential, although very low due to setbacks of approximately 1,100 feet on the west bank and 900 feet on the east bank, for sediment to be transported from the workspace into the river during precipitation events, which could increase the local turbidity and sediment load in the lake. These increased loads have potential to temporarily affect sensitive fish eggs, fish fry, and invertebrates inhabiting the river. However, sediment levels would quickly attenuate both over time and distance and would not adversely affect resident fish populations or permanently alter existing habitat. By also implementing the erosion and sediment control measures specified in the ECP (**Appendix G**) and SWPPP (**Appendix A**), the potential for sediment transport is likely avoided or minimized. Following construction, the ROW would be restored, revegetated, maintained in an herbaceous or scrub-shrub state, and monitored in accordance with applicable regulations and permit conditions.

A successfully completed HDD crossing would minimize environmental impacts on Lake Oahe since the pipeline would be installed without disturbing the aquatic and benthic environments. However, crossings via HDD carry a low risk of an inadvertent release of drilling mud, composed primarily of bentonite (a naturally occurring fine clay) slurry. Increased levels of sedimentation and turbidity from an inadvertent release could adversely affect fish eggs, juvenile fish survival, benthic community diversity and health, and spawning habitat. Dakota Access' HDD Construction/Contingency Plan (**Appendix B**) establishes monitoring procedures and prescribes measures to be implemented to minimize the impact in the event it occurs. All HDD operations conducted for crossing the Lake Oahe would adhere to the HDD Contingency Plan and applicable permit conditions to reduce the likelihood of an inadvertent release to minimize and mitigate environmental impacts. Dakota Access' construction contractor would ensure that the appropriate response personnel and containment equipment are available onsite to effectively implement the HDD Contingency Plan.

In addition to the crossing of Lake Oahe, aquatic resources could also be impacted during water withdrawal from the Missouri River, which is required for activities associated with the installation of HDD and the hydrostatic testing of HDD pipeline segment located on the flowage easements. However, water withdrawal activities would be conducted in accordance with all applicable permit conditions and regulations and in a manner that would not reduce water flow to a point that would impair flow or impact aquatic life. Intake screens and floats would also be utilized, as previously discussed in Section 3.2.1.2, to prevent entrainment of aquatic life and avoid impacts on aquatic resources. In addition, by placing the pump within a secondary containment structure on the barge, the potential for impacts on aquatic resources associated with accidental fuel spills or leaks is likely avoided or minimized.

The primary issue related to impacts on the aquatic environment from operation of the Proposed Action would be related to a release from the pipeline. For portions of the pipeline installed beneath the lake, the depth of the pipeline profile, increased wall thickness of the pipe, installation of remotely operated valves on both sides of the river crossing, and monitoring of the system 24/7 would further limit the potential for an inadvertent release into the waterbody. As a result, operations activities are not

anticipated to impact aquatic resources or their habitat. Adherence to the Dakota Access FRP would minimize potential impacts on aquatic wildlife from potential spills during the operation of the pipeline. In the event of a leak, Dakota Access would work aggressively to contain the leak, initiate cleanup activities, and contact the appropriate authorities, including the Corps. The FRP is discussed under Section 3.2.1.2 and a draft of the FRP is included in Appendix L.

3.6 Land Use and Recreation

Under the “no action” alternative, Dakota Access would not construct the DAPL Project, and no impacts on land use and recreation would occur. However, if the objectives of the DAPL Project are to be met under the “no action” alternative, other projects and activities would be required and these projects would result in their own impacts on land use and recreation, which would likely be similar to or greater than the DAPL Project. The impacts associated with a future project developed in response to the “no action” alternative are unknown, while only temporary and minor impacts or insignificant permanent impacts on land use and recreation would occur as a result of the Proposed Action, as described in the sections below.

3.6.1 Land Ownership

The proposed 24-inch pipeline would cross seven contiguous Corps flowage easements over eight privately-owned parcels (**Figure 2**) that are associated with the Buford-Trenton-Irrigation District (Garrison Dam). Based upon Corps-provided easement documents and mapping, the distance across the flowage easements on the north side of the Missouri River in Williams County is approximately 14,953 feet (2.83 miles).

The flowage easements allow the Government to flood and saturate the land, surface, and subsurface of these properties. Generally, these easements prohibit the construction of structures for human habitation; provide that any other structures require written approval by the Corps; and provide that no mineral exploration, excavation or placement of fill material may occur on the easement area without the prior approval of the Corps.

The proposed pipeline route would also cross federal lands on the east and west banks of Lake Oahe in Morton and Emmons counties. The distance from the western boundary of federally-owned lands to the eastern boundary of federally-owned lands on both sides of the lake, including the width of the lake, at the proposed crossing location is approximately 6,450 feet. The proposed pipeline would be routed to parallel existing linear infrastructure (an overhead power line and a buried gas transmission pipeline) across Lake Oahe in the same area. The HDD entry and exit points, measuring approximately 200 by 250 feet, would be located on private lands, as would the stringing corridor required to facilitate the installation. The northern boundary of the Standing Rock Sioux Reservation is located approximately 0.55 mile south of the Lake Oahe Project Area.

Dakota Access is securing a 50-foot-wide permanent easement that is generally centered on the pipeline (25 feet on either side of the centerline). Within the 50-foot-wide easement, a 30-foot corridor free of large woody vegetation, located within flowage easement LL3440E on the north bank of the Missouri River, would be required to allow for a clear line of sight once construction is completed to perform visual inspections during operation of the pipeline. The corridor would be maintained in a vegetative state.

3.6.2 Land Use

3.6.2.1 Affected Environment

Land use within the Project Area was assigned a classification based on the principal land characteristic in a given area. Aerial photography, the National Land Cover Database (Multi-Resolution Land Characteristics Consortium, 2011), the Morton County Zoning Map (Morton County, 2014), and the Williams County Comprehensive Plan were used to identify and classify general land use for the Project Area (Figures 10 and 11).

Agricultural Land

Agriculture is the primary land use within the Project Area. These lands are primarily used for ranching and cultivating crops. Agricultural lands allows for land uses such as farming, ranching, animal feeding operations, grain storage, and related functions. Agricultural land within the flowage easements are primarily pivot irrigated cropland (i.e., areas used for production of annual crops such as corn and soybeans).

Developed Land

Developed land includes open space around structures such as homes, farmsteads, outbuildings, well sites, and areas associated with roads and ditches.

Open Space

Open space includes all land that is not agriculture or developed; namely wetlands, open water, grasslands, and scrub-shrub. Open space is found primarily along the river banks. See sections 3.2 and 3.3 for a discussion on water resources and vegetation.

3.6.2.2 Impacts and Mitigation

The Proposed Action would result primarily in temporary, short-term impacts on land use during construction. Construction activities would require the temporary and short-term removal of existing agricultural land from crop and forage production within the construction footprint. During construction, temporary impacts such as soil compaction and crop damage are possible along the construction ROW. Mitigation measures to minimize impacts such as topsoil segregation and decompaction practices would be fully implemented in accordance with the ECP and SWPPP. Upon the completion of construction activities, the Project Area would be restored and returned to pre-construction land use.

As mentioned above, much of the cropland within the Corps flowage easements uses pivot irrigation systems. Dakota Access would coordinate with all landowners on acceptable methods for construction and restoration, including potential impacts to irrigated fields. Compensatory damages would be paid accordingly.

The nearest residence to the Proposed Action on the flowage easements is approximately 1,750 feet east of the pipe centerline. Temporary impacts on nearby residences could include inconvenience caused by

noise and dust generated from construction equipment and traffic congestion associated with the transport of equipment, materials, and construction workers. Impacts from noise and dust during construction would diminish with distance from these areas and would be limited to the time of construction which would typically occur during daylight hours.

The primary impact on family farms would be the loss of standing crops and use of the land within the work area for the seasons during which DAPL Project-related activities occur, as well as potential diminished yields for a few years following construction. Dakota Access proposes to implement mitigation measures to minimize these potential impacts as described in the ECP. Dakota Access would repair surface drains and drainage tiles disturbed during ROW preparation, construction, and maintenance activities. Dakota Access would repair or replace fences and gates removed or damaged as a result of ROW preparation, construction, or maintenance activities.

At Lake Oahe, primary impact on ranching operations would be temporary prohibition of livestock grazing in the construction ROW, workspace areas, and restrictions on livestock movement across the construction ROW and workspace areas during construction. Given the narrow, linear nature of the DAPL Project and the alignment of the pipeline along property boundaries, livestock grazing reductions and livestock movement restrictions would be minor. Long-term or permanent impacts on family ranches are not anticipated. Following construction and restoration, the work area would be restored and ranching would be allowed to continue over the operational ROW. Landowners would be compensated for temporary loss of land and lower yields. Grazing activities would return to normal after Revegetation of the disturbed areas.

Once in operation, a permanent 50-foot ROW would be maintained except at segments of the ROW above the HDD profile on the flowage easements (between the HDD workspace and the river shore) that would be maintained by clearing woody vegetation over a 30 foot corridor (a 50 foot easement would still be obtained). Maintenance would include the removal of any large trees and shrubs; agricultural land use would not be impacted by maintenance activities in this area. Trees outside of the ROW would be protected by Dakota Access in a manner compatible with the safe operation, maintenance, and inspection of the pipeline. Applicable regulations would be adhered to regarding tree and shrub removal from along the route. Field surveys have confirmed that no shelter belts would be impacted within the Project Area or Connected Actions.

Tables 3-12 and 3-13 below detail the acreage of land use impacts associated with the Proposed Action.

Table 3-12		
Land Use Impacts on the Flowage Easements Project Area and Connected Action		
Land Use	Construction Workspace (acres) ¹	Permanent ROW (acres) ²
Agricultural Land	54.0	15.1
Developed	1.6	0.8
Open Space	6.0	2.0
Total	61.3	17.9

¹ Construction Workspace includes the permanent ROW.

² Permanent ROW includes the 50-foot permanent easement and the 30-foot maintenance easement.

Table 3-13			
Land Use Impacts on the Federal Lands Project Area and Connected Action			
Land Use	Construction Workspace (acres)	Connected Action - Permanent ROW (acres)	Federal Lands - Permanent ROW (acres)¹
Agricultural Land	0.0	0.0	0.1
Open Space	15.5	1.1	1.0
Total	15.5	1.1	1.2

¹ Land Use Impacts on federal lands are limited to the maintained 50 foot permanent easement and do not include approximately 6.3 acres of permanent easement beneath the HDD profile within the banks of Lake Oahe.

Dakota Access would obtain and comply with applicable state regulations, county permits, and zoning and land use regulations. Permits may include, but are not limited to, grade and fill permits, ditch crossing permits, road and utility permits, and conditional use permits. Dakota Access would retain one or more EIs to monitor compliance with environmental conditions of county permits.

3.6.3 Recreation and Special Interest Areas

3.6.3.1 Affected Environment

Generally, recreation and special interest areas include federal, state, or county parks and forests; conservation lands; wildlife habitat management areas; hunter management areas; natural landmarks; scenic byways; designated trails; recreational rivers; and campgrounds. Nearby recreational opportunities in the vicinity of the Project Area and the Connected Action include Wildlife Management Areas (WMAs), Lake Oahe, and the Missouri River, none of which are being impacted by the construction, although the HDD would cross under Lake Oahe itself.

The Missouri River and its shoreline are open to the public and used for recreational activities such as boating, swimming, and fishing. Because the flowage easements are federally regulated and privately owned, there is very limited, if any, recreational opportunities within the flowage easements. Additionally, there is little boating and open water angling on the entire upper end of Lake Sakakawea because of lack of access and extremely turbid water throughout much of the recreational season (USACE, 2007).

Lake Oahe's 2,250 mile shoreline is open to the public and offers a variety of opportunities to outdoor recreationists such as fishing, swimming, sightseeing, camping, and picnicking. More than 1.5 million visitors enjoy Lake Oahe's recreation facilities each year. Fishing is the major recreational activity of visitors to the Oahe project, with 44% of visitors engaging in this activity (USACE, 2010c).

There are no public boat access sites, marinas, or public swimming beaches within one mile of the flowage easements or federal lands crossings. There are no designated state parks or recreation areas, historic

trails, scenic by-ways, designated wilderness or natural areas or other sensitive land uses that would be affected by the crossings (North Dakota Parks and Recreation Department, 2014).

At the flowage easement crossing, the closest Nationwide Rivers Inventory (NRI) segment is a one mile stretch of the Missouri River within the Fort Union Trading Post National Historic Site, which is about 9.2 river miles upstream from the crossing. At the federal lands crossing, the closest NRI segment is Square Butte Creek to the Oliver/Mercer County Line, which is about 50 river miles upstream from the Project Area (National Park Service, 2009).

North Dakota has approximately 54,373 miles of river, but no designated wild & scenic rivers (USFWS et al., 2014).

Wildlife Management Areas

The North Dakota Game and Fish Department manages the Trenton and Overlook WMAs; neither of which are crossed by the Proposed Action. The Trenton WMA encompasses 2,647 acres and is located southwest of Williston near Trenton, along the Missouri River and Lake Sakakawea. About 13.55 acres of the Trenton WMA extends into the eastern portion of flowage easement LL3440E (**Figure 6**) but the closest edge is approximately 800 feet from the HDD workspace. This area is largely primitive and the landscape has been allowed to develop naturally. The WMA provides recreational opportunities for fishing and hunting waterfowl, deer, and pheasants. The Overlook WMA encompasses 32 acres and is located 6.5 miles north of Cartwright, about 1,430 feet west of the HDD entry point in McKenzie County. The Overlook WMA is only accessible by boat and is used for hunting deer.

The Oahe WMA is located along Missouri River and Oahe Reservoir, about 17 miles south of Bismarck (USGS, 2014b). The proposed pipeline at the Lake Oahe crossing is about 14.5 miles south of the Oahe WMA.

Water Quality and Recreation

Section 303(d) of the CWA requires states to submit their lists of water quality limited waterbodies. This list has become known as the "TMDL list" or "Section 303(d) list." A TMDL is the amount of a particular pollutant a stream, lake, estuary, or other waterbody can "handle" without violating State water quality standards. The final 2014 Section 303(d) list, which was submitted to Environmental Protection Agency (EPA) as part of the integrated Section 305(b) water quality assessment report and Section 303(d) TMDL list, includes a list of waterbodies not meeting water quality standards and those for which a TMDL is needed.

Lake Sakakawea is on the 2014 Section 303(d) list of impaired waters as not supporting fish consumption because of high levels of methyl-mercury; however, Lake Sakakawea would not be crossed or otherwise impacted as a result of the Proposed Action on the flowage easements. Lake Oahe is not listed as needing a TMDL and fully supports recreational use (North Dakota Department of Health, 2015). Because Lake Oahe already meets the state water quality standards, the Proposed and Connected Action Areas are not anticipated to result in impacts that would cause an impairment of water quality or the designated use of Lake Oahe.

Wilderness Areas

The Wilderness Act of 1964 defines wilderness as lands that may contain ecological, geological, scientific, educational, scenic or historical value. There are three designated wilderness areas within North Dakota: Chase Lake, Lostwood, and Theodore Roosevelt Wilderness Areas. There are no designated wilderness areas, and no designated Nature Preserves or Natural Areas within one mile of either crossing (Wilderness Institute, 2014).

Standing Rock Sioux Reservation

The Standing Rock Sioux Reservation is situated at the border of South Dakota and North Dakota, approximately 0.55 miles south of the Lake Oahe Project Area. The Cannon Ball River is located along the northern border of the Standing Rock Sioux Reservation in Sioux County, North Dakota. The western border of the reservation ends at the Perkins County, South Dakota and Adams County, North Dakota lines, while the Missouri River is the eastern border of the reservation. The southern border of the reservation is located within Dewey and Ziebach counties in South Dakota. The total land area of the Standing Rock Sioux Reservation is 2.3 million acres and of that, 1,408,061 million is tribally owned. The Standing Rock Sioux Tribal members are descendants of the Teton and Yankton Bands of the Lakota/Dakota Nations (Standing Rock Sioux Tribe, 2016). Some of the many attractions within the reservation include Sitting Bull Grave Site, Standing Rock Monument, Fort Manuel, Lewis and Clark Legacy Trail, and the Standing Rock Tribal Office (Standing Rock Tourism, 2016). The terrain of the reservation consists of river valleys, lakes, woodlands, prairies, and rolling hills. Big game on the reservation includes white tail deer, mule deer and antelope, while small game includes jackrabbit, cottontail, and squirrel (Standing Rock Sioux Tribe and Standing Rock Sioux Tribe Game & Fish Department, 2016).

3.6.3.2 Impacts and Mitigation

The recreational enjoyment of wildlife (such as hunting or bird watching) may be temporarily affected by construction activities, depending on season and location. However, this effect would be short-term.

Recreationists may observe ROW clearing along the river banks. Because the pipeline would cross underneath the river via the HDD method, there would be no disruption to the course or cross-current of the river, and would not impact lake/river recreationists.

3.7 Cultural and Historic Resources and Native American Consultations

Section 106 of the National Historic Preservation Act of 1966 (NHPA), as amended, and implemented by 36 CFR Part 800, requires Federal lead agencies to assess the effects of permitted actions on historic properties. Historic properties are defined in the NHPA as prehistoric and historic archaeological sites, standing structures, or other historic resources listed in, or eligible for listing in the National Register of Historic Places (NRHP).

Under the “no action” alternative, Dakota Access would not construct the DAPL Project and no impacts on cultural and historic resources would occur. However, If the objectives of the DAPL Project are to be met under the “no action” alternative, other projects and activities would be required and these projects could result in their own impacts on cultural and historic resources, which would likely be similar to or

greater than the DAPL Project. The “no action” alternative would likely result in an increase in truck and rail traffic that could have an adverse effect on cultural, historic and Native American resources. Furthermore, impacts to resources associated with these methods may not be identified and evaluated because the protections afforded under Section 106 of the NHPA would not apply unless a federal permit were to be required.

3.7.1 Cultural Resources Studies

The scope of the cultural resource analysis was designed to be commensurate with the Proposed Action. The Proposed Action is to authorize the crossing of federal flowage easements near the upper end of Lake Sakakawea north of the Missouri River in Williams County, North Dakota and federally owned lands at Lake Oahe in Morton and Emmons counties, North Dakota.

The cultural resource information for the Project Area, and for areas in the vicinity of the Proposed Action (to provide context) was obtained through a combination of cultural resources investigations commissioned by Dakota Access on private lands within a 400-foot-wide linear corridor as defined by the DAPL centerline and previous cultural investigations conducted on private lands adjacent to the Proposed Action area, and previous cultural investigations conducted on federal lands. New cultural resources investigations were not conducted on federal lands as part of the Proposed Action, as no impacts are anticipated to occur on federal lands.

Based on data compiled from previously executed archaeological investigations, it is recognized that much of the region has been inhabited by human populations for approximately 12,000 years. Throughout much of the state the recorded prehistoric occupations range from Paleoindian Period encampments to Late Prehistoric Period sites. Multiple sites have been explored that suggest the area was inhabited by societies adapted for lifestyles on the Plains and in the various geographical regions of the state dating back to 6000 BC. The current Project Area has a moderate to high probability for archaeological deposits based on proximity to permanent water sources, topography, lack of significant ground disturbances, and depositional processes.

3.7.1.1 Affected Environment

Flowage Easements, Williams County, North Dakota

The Missouri River is a large perennial river that serves as the border between Williams and McKenzie counties, North Dakota. The flowage easements consist of a series of expansive agricultural fields located on the northern side of the River. While the individual tracts are privately owned, the USACE maintains easement rights across these tracts to facilitate floodwater control throughout the region. The DAPL Project proposes to traverse certain sections of these easements, and install the pipeline via HDD under the Missouri River. As these tracts are federally managed, cultural resources investigations were conducted in accordance with Section 106 of the NHPA, and in compliance with the North Dakota State Historic Preservation Office (NDSHPO) Guidelines Manual for Cultural Resources Inventory Projects (SHSND, 2012). Specifically, the cultural resources investigations were confined to a 400-foot-wide linear corridor (*survey corridor*), as defined by the DAPL centerline. Prior to field investigations, a Class I literature and records search was conducted within an expanded *study area corridor*, which extended for a mile on either side of the DAPL centerline. The Class I literature review determined that the DAPL survey

corridor traverses one previously recorded site (32WI1367), and that portions of the DAPL survey corridor have been subject to previous surveys (Larson et al. 1987). Site 32WI1367, also known as the Buford-Trenton Irrigation System (BTIS), is a National Register nominated cultural resource consisting of a pumping plant, main canal, and associated irrigation components. The BTIS construction began in 1940 and continued through the 1950's managed by the Department of Interior, Work Progress Administration, and the Farm Security Administration. The DAPL survey corridor traverses one of the extant irrigation canals listed as a contributing element of the BTIS in the northeastern corner of Section 30 of Township 152 North, Range 103 West.

The Class II/III inventory investigations within the DAPL survey corridor across the flowage easements consisted of a combination of pedestrian surveys and shovel probing. Archaeologists walked along fixed transects spaced 30 m (98 ft.) apart within the survey corridor, and systematically excavated shovel probes across high probability settings, or in areas with low surface visibility. The Class II/III investigations resulted in the revisit of the portion of Site 32WI1367 within the survey corridor, and the documentation of a new prehistoric site (32MZ2874) located on the southern banks of the Missouri River (Appendix I). The assessment of site 32WI1367 consisted of mapping and documentation of the canal feature. No artifacts, evidence of features, or other undocumented components were noted. Dakota Access has designed an HDD to install the pipeline below this canal feature. Additionally, the HDD workspace would be off-set a sufficient distance to ensure that no components or associated features of this canal would be adversely impacted.

As site 32MZ2874 is located on the southern banks of the Missouri River, it is not located on USACE-managed flowage easement tracts. However, the site is referenced herein given its proximity to the workspace associated with HDD of the Missouri River. Site 32MZ2874 is a small prehistoric artifact scatter that is recommended as unevaluated for listing in the NRHP pending further testing investigations. The HDD workspace on the southern banks of the Missouri River has been designed to avoid impacting this site and is situated beyond the mapped site boundary. Exclusionary fencing would be installed along the eastern border of the HDD workspace during drilling activities to prevent inadvertent impacts or trespassing.

Federal Lands – Lake Oahe Crossing: Morton and Emmons Counties, North Dakota

The proposed crossing of federally-owned tracts at Lake Oahe is located in Section 10, Township 134 North, Range 79 West in Morton County, North Dakota, and Section 11, Township 134 North, Range 79 West in Emmons County, North Dakota (see **Figure 3**). Dakota Access proposes to install the pipeline via HDD below Lake Oahe, and the HDD entry and exit point workspaces and stringing area would be located on private land beyond the boundary of the federal lands. While no activities associated with the Proposed Action will occur on the surface of federal lands, the HDD entry and exit point workspaces and stringing areas are considered Connected Actions, and as such were subject to cultural resources investigations in accordance with Section 106 of the NHPA, and in compliance with the NDSHPO Guidelines (SHSND, 2012). No new cultural resources investigations of any kind were conducted on federal lands in association with the DAPL project as no impacts are anticipated to occur between the HDD workspaces on either side of Lake Oahe. However, previous cultural resource surveys of USACE managed lands are cited in the report; Dakota Access Pipeline Project, Class II/III Cultural Resources Inventory of the Crossings of Flowage Easements and Federal Lands. Prepared collaboratively for Dakota Access, LLC in March of 2016 (Landt and McCord 2016). This report is contained in Appendix I.

Prior to field investigations, a Class I literature and records search was conducted within an expanded study area corridor, which extended for a mile on either side of the DAPL centerline. The Class I literature review determined that no previously recorded sites are located on the private lands within the Connected Action areas (i.e., HDD workspaces and stringing area). A total of 43 previously recorded cultural resources are located within the study area corridor. Of these, 18 are located in Morton County and the remaining 25 are located in Emmons County. These consist of isolated finds and site leads (i.e., resources reported to the SHSND without field verification), prehistoric artifact scatters, and historic resources. A total of 10 of the previously recorded sites within the study area corridor are located on federal lands directly adjacent to the banks of Lake Oahe and the Cannonball River. Specifically, seven of these sites (32MO0001, 32MO0004, 32MO0054, 32MO0060, 32MO0061, 32MO0064, and 32MO0259) are located in Morton County, on the western side of the Lake Oahe. The remaining three sites (32EM0019, 32EM0021, and 32EM0221) are located in Emmons County, on the eastern side of Lake Oahe. A more comprehensive discussion of these sites and associated mapping detail is provided in Appendix I.

The Class II/III inventory investigations at Lake Oahe took place exclusively within the Connected Action areas located on private lands beyond the limits federal lands (i.e., HDD workspaces and stringing area). The Class II/III inventory investigations within the Connected Action areas associated with the Lake Oahe crossing consisted of a combination of pedestrian surveys and shovel probing. Archaeologists walked along fixed transects spaced 30 m (98 ft.) apart within the survey corridor, and systematically excavated shovel probes across high probability settings, or in areas with low surface visibility. The Class II/III investigations within the Connected Action areas resulted in the documentation of one new archaeological site (32MO570). This site consists of a singular lithic flake in isolated contexts and is recommended as not eligible for listing in the NRHP and no further work is warranted.

3.7.1.2 Impacts and Mitigation

The impacts attributable to the HDD on cultural resources would not be significant. The geotechnical analysis performed to support the HDD crossings supports the lack of anticipated impacts due to vibrations related to construction and HDD activities. Vibrations produced during the HDD process are not of a magnitude that would cause any impacts to cultural resources. Vibrations associated with the drilling process would be limited to the immediate vicinity of the drilling equipment on the surface and downhole. The vibrations produced from the downhole tooling are of a very low magnitude and are attenuated very quickly by the formation such that vibrations are never felt at the surface. A vibration monitoring analysis conducted by GeoEngineers in 2009 found that peak particle velocities were less than 0.07 inches/second within approximately 50 feet of HDD operations. These velocities are well below that which would cause any structural impacts and moreover, the recorded vibrations were, in fact, imperceptible to human senses (GeoEngineers, 2009).

Flowage Easements

Dakota Access has conducted Class II/III inventory surveys within the 400-foot-wide survey corridor across the flowage easements. The survey investigations resulted in the revisit of site 32WI1367 on the northern side of the Missouri River, and the documentation of site 32MZ2874 on the southern banks of the Missouri River. Impacts to site 32WI1367 would be avoided via HDD to ensure the integrity of construction design for these historic-age features is preserved. Additionally, no impacts to site 32MZ2874 are anticipated to occur as the HDD workspace is located beyond the site boundaries. These management

recommendations have been included as viable avoidance options in the Class II/III report submitted to the USACE regional archaeological staff. A more thorough discussion of the cultural setting, relevant previous studies, as well as geologic and geomorphic analysis of the region, and results of the current survey with associated mapping detail can be referenced in Appendix I.

Federal Lands

Dakota Access has conducted Class II/III inventory surveys within the Connected Action areas on private lands associated with the Lake Oahe crossing. These investigations resulted in the documentation of one prehistoric site consisting of a singular lithic artifact (32MO570). This site is recommended as not eligible for listing in the NRHP. No additional cultural resources were documented within the Connected Action areas associated with the Lake Oahe crossing. While the Class I background review determined that eight previously recorded sites are located on federal lands, no evidence of these sites was encountered within the Connected Action areas on private lands.

Dakota Access' UDP was developed (Appendix F) for use during all DAPL Project construction activities regardless of jurisdiction or landownership. The UDP describes actions that would take place in the event that an undocumented cultural resource site is discovered during construction activities. The UDP explicitly calls for work to stop until the correct authority or agency can be contacted and the find can be properly evaluated.

3.7.2 Native American Consultations

The 2004 Programmatic Agreement for the Operation and Management of the Missouri River Main Stem System for Compliance with the National Historic Preservation Act, as amended, (PA) was developed to address challenges associated with cultural and historic resource impacts involved with the ongoing operation and maintenance of the Missouri River system of main stem dams. This agreement outlines the processes through which affected Tribes, agencies and interested parties are consulted by the Corps on issues that may affect important historic and cultural resources. These processes are essential to fulfill the Corps' Tribal Trust Responsibilities and also comply with Section 106 of the NHPA.

The United States Department of Defense recognizes its trust responsibilities to federally recognized Indian Tribes and has established an American Indian and Native Alaskan Trust policy that directs its agencies, including the Corps, to work with Tribes in a manner that incorporates tribal needs, traditional resources, stewardship practices, and the development of viable working relationships. In addition, EO 13175, Consultation and Coordination with Indian Tribal Governments (EO 13175), outlines policy and criteria regarding the establishment of "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes" (<https://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>).

EO 13175 continues with the following; "History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a

sound and productive Federal-tribal relationship". These concepts are reflected in the Omaha District's PA/Section 106 coordination/consultation process.

Section 106 coordination/consultation was initiated for the Proposed Action beginning in October 2014, with an information letter regarding a preliminary geo-testing of the proposed Oahe crossing alignment. Per the Omaha District's usual process, this letter was sent to Tribes, THPOs, SHPOs, agencies and interested parties, soliciting information relevant to the Proposed Action. Subsequently, the same process was utilized in circulating information and pertinent data for the installation of the Oahe pipeline crossing, in the form of a letter distributed in July 2015. The USACE recommended a "No Historic Properties Subject to Effect" Determination to the North Dakota SHPO and the SHPO concurred on April 22, 2016.

3.8 Social and Economic Conditions

Under the "no action" alternative, Dakota Access would not construct the DAPL Project and no impacts on social and economic conditions would occur. Although the impacts associated with a future project developed in response to the "no action" alternative are unknown, if the objectives of the DAPL Project are to be met under the "no action" alternative, other projects and activities would likely be required (e.g. transportation of oil by truck or rail). Alternative shipping methods would likely result in their own impacts on social and economic conditions, such as increases in vehicular accidents and personal injury, worsening traffic congestion, and increased infrastructure deterioration.

The overall DAPL Project is a \$3.78 billion dollar investment directly impacting the local, regional, and national labor force by creating nearly 12,000 construction jobs. Dakota Access has publically committed to utilizing American labor to build the pipeline. Dakota Access has teamed up with the various craft and labor unions in the DAPL Project regions and nationally to ensure the DAPL Project is constructed by highly qualified and experienced local and regional labor resources. These construction jobs would create considerable labor income and state income tax revenue – including the generation of more than \$13.4 million in ad valorem taxes. Upon authorization, the DAPL Project would put welders, mechanics, electricians, pipefitters, heavy equipment operators, and others within the heavy construction industry to work.

3.8.1 Demographics, Employment, Income and Economic Justice

3.8.1.1 Affected Environment

The Proposed Action at the flowage easements and the Missouri River are in McKenzie County and Williams County. The two census tracts (CT) crossed are CT9625 and CT 9535, respectively. Demographic information including population, income, and employment statistics for these census tracts, counties in the general geographic area, and the state of North Dakota are provided in **Table 3-14**. The industries employing the greatest number of persons in these census tracts is agriculture followed by educational services health care and social assistance fields; and construction.

At the Lake Oahe crossing, two Census tracts are crossed, CT9665 in Emmons County and CT204 in Morton County. Demographic information including population, income, and employment statistics for these census tracts, counties, and the state of North Dakota are provided in **Table 3-15**. The top three industries

providing employment in Emmons County are agriculture followed by educational services, health care and social assistance fields, and then construction. Educational services, health care and social assistance are the leading industry employers in CT204 in Morton County followed by agriculture and retail trade. Although not directly affected by the Proposed Action or Connected Action Areas, Sioux County borders the Missouri River to the west and is south of the Lake Oahe crossing point. Due to proximity of this county to the project, it has been incorporated as part of the geographical area for the county baseline data for analysis purposes relating to the Lake Oahe crossing.

3.8.1.2 Impacts and Mitigation

The Proposed Action is assumed to have a short construction window with a small number of construction workers dedicated to these crossings. It is possible that counties within the general Project Area (McKenzie, Williams, Morton, Emmons, and Sioux) could experience short-term temporary effects to the local economy through induced spending from construction employees working on the crossing. No residential homes or farms would be relocated resulting from the proposed action. Additionally, no demographic changes in the Census tracts affected or the counties representing in the geographical area are anticipated because no permanent employment would be created as a result of the Proposed Action.

The DAPL Project also has tremendous secondary and sustainable economic benefits to the United States by supporting energy independence, increasing employment opportunities, and adding to demand in many manufacturing sectors, which would be a boost to the overall economy. When considering the economic impact and benefit, once U.S. workers are employed on the DAPL Project, consistent with most infrastructure projects, the workers would spend their earnings in the communities where they work and live, resulting in multiplied economic impacts that would be nearly \$5 billion just during the construction phase. This economic impact would affect manufacturing in many domestic sectors such as the following examples. It results in new vehicles being purchased, which positively impacts the auto industry. It would result in new homes being built, which improves and increases the housing construction, resale, and lending business located in the region and across the U.S. It impacts the food industry by requiring more food services and products to be delivered and consumed in the DAPL Project region. And it delivers abundant American energy to U.S. markets, thereby enhancing supply. The list could continue with a description of many secondary benefits, but in summary, the economic impact to the U.S. as well as the immediate region where the pipeline is located is considerable.

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Table 3-14										
Minority and Low Income Population Statistics for the Flowage Easements Project Area and Connected Action										
Geographic Area	Total Population	Percent								
		White	Black or African Am.	Am. Indian and Alaska Native	Asian	Native Hawaiian and Other Pacific Islander	Some Other Race	Two or More Races	Total Minority Population	Persons Below the Poverty Level
State										
North Dakota	704,925	89.20	1.53	5.25	1.15	0.04	0.73	2.10	10.80	11.9
Counties Within Baseline Analysis (Baseline Area)										
McKenzie	8,333	78.98	0.22	17.16	0.60	0.00	1.04	2.00	21.02	14.6
Williams	27,066	90.76	1.12	4.16	0.55	0.03	1.27	2.12	9.24	8.2
Average	17,700	84.87	0.67	10.66	0.58	0.01	1.16	2.06	15.13	11.40
Proposed Action Area										
CT9625	1,522	97.50	0.00	1.05	0.20	0.00	0.53	0.72	2.5	5.8
CT9535	1,708	74.41	0.47	17.15	0.00	0.00	0.00	7.96	25.59	7.7
Average	1,615	85.96	0.23	9.10	0.10	0.00	0.26	4.34	14.04	6.75
State Comparison to Proposed Action Area										
Proposed Action	-703,310	-3.24	-1.30	3.86	-1.05	-0.04	-0.46	2.24	3.24	-5.15
County Comparison to Proposed Action Area										
Proposed Action	-16,085	1.09	-0.43	-1.56	-0.48	-0.01	-0.89	2.28	-1.09	-4.65

Source: U.S. Census Bureau, American Community Survey (2010-2014 5-year estimates).

Note: totals may not sum across the table due to rounding used in data collection.

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Table 3-15 Minority and Low Income Population Statistics for Federal Lands Project Area										
Geographic Area	Total Population	Percent								
		White	Black or African Am.	Am. Indian and Alaska Native	Asian	Native Hawaiian and Other Pacific Islander	Some Other Race	Two or More Races	Total Minority Population	Persons Below the Poverty Level
State										
North Dakota	704,925	89.20	1.53	5.25	1.15	0.04	0.73	2.10	10.80	11.9
Counties Within Baseline Analysis (Baseline Area)										
Morton	27,439	93.98	0.50	3.70	0.20	0.00	0.50	1.30	6.20	8.7
Emmons	3,491	99.28	0.00	0.23	0.17	0.00	0.00	0.32	0.72	13.5
Sioux	4,317	13.67	0.02	82.26	0.25	0.07	0.53	3.20	86.33	36.4
Average	15,465	68.98	0.17	28.73	0.21	0.02	0.34	1.60	31.08	58.6
Proposed Action Area										
CT204	3,143	96.5	0	1.4	0	0	0.8	1.3	3.5	4.4
CT9665	3,491	99.3	0	0.2	0.2	0	0	0.3	0.7	13.5
Average	3,317	97.88	0.00	0.83	0.09	0.00	0.40	0.81	2.12	8.95
State Comparison to Proposed Action Area										
Proposed Action	-701,608	8.68	-1.53	-4.42	-1.07	-0.04	-0.33	-1.29	-8.68	49.65
Baseline Area Comparison to Proposed Action Area										
Proposed Action	-12,148	28.90	-0.17	-27.90	-0.12	-0.02	0.05	-0.79	-28.96	-2.95

Source: U.S. Census Bureau, American Community Survey (2010-2014 5-year estimates).

Note: totals may not sum across the table due to rounding used in data collection.

3.9 Environmental Justice

EO 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, requires federal agencies to identify and address disproportionately high and adverse human health or environmental of their programs and policies on minority and low-income populations and communities and Indian tribes. The CEQ guidance suggests that an environmental justice population may be identified if “the minority population percentage of the affected area exceeds 50%, or if the minority population percentage of the affected area is meaningfully greater than the minority population in the general population or other appropriate unit of geographic analysis” (CEQ, 1997). The CEQ defines low-income populations based on an annual statistical poverty threshold. In 2013, the poverty threshold for the 48 contiguous states for an individual under the age of 65 living alone was \$12,119 (U.S. Census Bureau, 2014).

Under the “no action” alternative, Dakota Access would not construct the proposed Project and no environmental justice impacts would occur. However, If the objectives of the Project are to be met under the “no action” alternative, other projects and activities would be required and these projects could result in their own environmental injustice impacts, which would likely be similar to or greater than the proposed Project. It is reasonable to assume that alternative methods of crude oil transportation would be relied on to meet market demands. Minority or low income communities along utilized rail lines or truck routes could be affected by increasing noise and creating transportation delays due to the substantial increasing truck traffic on county, state and interstate highways as well as rail traffic across railroad crossings.

3.9.1 Affected Environment

Transportation projects, such as under the Federal Transit Administration, and natural gas pipeline projects under the Federal Energy Regulatory Commission (e.g. Docket Nos. CP12-507-000 and CP12-508-000, DOE FE 12-97-LNG, and FERC/EIS-0252F), typically use a 0.5 mile buffer area to examine Environmental Justice effects. The census tracts crossed by the Proposed Action encompass an area greater than 0.5 mile radius for the project; therefore additional census tracts were not evaluated.

Since two census tracts are within 0.5 mile of the Flowage Easements at the Missouri River, and another two census tracts are located within 0.5 mile of the federal lands at Lake Oahe, an average of the demographic data from two respective census tracts was compared to the average demographic data of the counties in the general vicinity of each crossing as well as the state of North Dakota demographic data.

For the Flowage easements and Missouri River crossing, which are generally centrally located within McKenzie and Williams Counties, the averaged data from those two counties was used to obtain the Baseline Area data set.

Lake Oahe crossing is generally centrally located within Emmons County on the east side of the Lake, however it is near the southern boundary of Morton County. Therefore Sioux County (located greater than 0.5 miles) was included in the geographical area of the Lake Oahe. Thus Morton, Emmons, and Sioux county data was averaged to obtain the Baseline Area data set.

3.9.2 Impacts and Mitigation

For analyzing impacts to the minority and low income populations at the Proposed Action Area at the flowage easements and Missouri River Crossing, Census Tracts CT9625 and CT9535 were compared to the averaged county baseline (McKenzie and Williams Counties – “Baseline Area”) data and then to the state data to determine if there were any siting concerns relative to Environmental Justice.

The minority population of the Proposed Action Area at the Missouri River is greater than the state as a whole (3% greater) but lower than surrounding county geographical area (1% lower). Neither of these differences is considered meaningful.

The percentage of the population below the poverty level for the Proposed Action Area at the Missouri River is 5% lower than the state as a whole and also 5% lower than surrounding county geographical area. These differences are not considered meaningful.

For analyzing impacts to the minority and low income populations at the Lake Oahe Crossings, data for the averaged Census Tracts (CT204 and CT9665) was compared to the averaged county baseline (Morton, Emmons and Sioux – “Baseline Area”) for the county geographical area (Morton, Emmons, and Sioux Counties – “Baseline Area”) data and then to the state to determine if there were any siting concerns relative to Environmental Justice.

Based on this analysis, the minority population of the Proposed Action Area at Lake Oahe is lower than the state as a whole (9% lower). Although the average minority population of the counties geographical baseline is greater than the state as a whole, the minority population in the averaged census tract of the Proposed Action Area at Lake Oahe is much lower than surrounding county geographical area. In this case, the census tracts associated with the Proposed Action Area at Lake Oahe have a meaningfully lower minority percentage (29% lower) than the Baseline Area consisting of the three county area.

No appreciable minority or low-income populations exist within the Census tracts directly affected by the Proposed Action at either crossing (**Tables 3-14 and 3-15**). No local community with appreciable minority or low-income populations exists at either the crossing of federal lands or flowage easements (**Tables 3-14 and 3-15**). Based on this analysis, there is no concern regarding environmental justice to minority populations at the Proposed Action Area at the Missouri River Crossing or at Lake Oahe.

3.9.2.1 Standing Rock Sioux Reservation

It is recognized that the Standing Rock Sioux Tribe is downstream of the Lake Oahe Crossing, which has a high population of minorities and low-income residents. Dakota Access and the Corps sought to engage Tribal representatives in the vicinity of the Proposed Action, and especially the Standing Rock Sioux Tribe, in discussion as to the nature of the Project, cultural resource concerns and the Lake Oahe crossing. The initial contact by Dakota Access with the Standing Rock Sioux Tribe was in October of 2014 with additional contacts and subsequent meetings occurring through March 2016. Direct and Indirect impacts from the Proposed and Connected Actions will not affect members of the Standing Rock Sioux Tribe or the Tribal reservation. The Lake Oahe crossing will be installed via HDD beneath the river from private lands adjacent to Corps owned lands to avoid impacts to environmental resources (e.g. water, soil, cultural resources, vegetation, etc.). The HDD drilling process is an expensive technique that itself is a mitigation

measure with no anticipated effects to the environment including vibration or frac-out within or outside of the Proposed Action for the short duration of the construction project (see sections 2.3.2.6 and 3.1.1.2 for additional information).

As discussed in more detail in sections of this Environmental Assessment (i.e. Section 2.3.1), Dakota Access utilized a complex routing model to examine alignment options for the Project and an array of environmentally protective criteria were used to cite the Project. Perhaps most important for purposes of this analysis, are the citing criteria that require the avoidance of Tribal reservations and federal lands. Since the route must cross the Missouri River, it was not practicable to fully avoid federal land (see discussion in Section 2.1.3), and hence the necessity for this EA. However, maintaining a minimum distance of 0.5 mile from Tribal land, consistent with other federal citing criteria, avoided tribal land as a mitigation and routing measure. Furthermore, the Proposed Action, and hence the route and installation methods, is at a distance sufficient such that there are no direct or indirect impacts to Tribal lands, members or protected cultural resources.

Another primary consideration in routing included a preference for co-locating the route with existing infrastructure. The Proposed Action is co-located with existing power and pipe lines across Lake Oahe and partially co-located with a gas line at the flowage easements and Missouri River. As examples, the routing model affirmatively excludes such locations as Tribal lands, National Registry Historic Places, wilderness, parks, landmarks and an array of other special needs areas.

As a result of this routing criteria, the nature of the action (construction associated with laying an underground oil pipeline), the short term duration of effects, construction and operation on private lands, the concurrent reclamation activities, state of the art construction techniques, use of high quality materials and standards that meet or exceed federal standards, there will be no direct or indirect effects to the Standing Rock Sioux tribe. This includes a lack of impact to its lands, cultural artifacts, water quality or quantity, treaty hunting and fishing rights, environmental quality, or socio-economic status. Therefore, there is no resulting adverse or disproportionate impacts of the Proposed Action with respect to Environmental Justice considerations.

The Standing Rock Sioux Reservation boundary is over 0.5 miles south of the Lake Oahe Project Area crossing. Based on aerial imagery, the closest residence on the Standing Rock Sioux Reservation is a rural residence located greater than 1.5 miles from the Lake Oahe Project Area Crossing. This distance is well beyond any federal or state siting criteria. The North Dakota Energy Conversion and Transmission Facility Siting Act Exclusion and Avoidance Areas Criteria (49-22-05.1) establishes an avoidance setback requirement of 500 feet from inhabited rural residences.

The pipeline route expressly and intentionally does not cross the Standing Rock Sioux Reservation and is not considered an Environmental Justice issue. If it were it determined that there would be some effects to the Standing Rock Sioux Tribe as a low income, minority population, it would not disproportionately or predominately bear impacts from the Proposed Actions (the impacts will actually disproportionately affect private lands, non-low income populations and non-minority populations). The impacts along the Missouri River and the Lake Oahe crossing are not disproportionate to the tribe. The Missouri River crossing is on private lands with private lands and US federal lands downstream; the nearest reservation is Fort Berthold approximately 50 miles due east and Standing Rock Reservation is approximately 160 miles southeast. The Lake Oahe HDD crosses under US Federal lands from lands that are privately owned;

private lands continue downstream of the crossing on the east side of the Lake and Standing Rock Reservation (0.55 miles). Thus, the impacts at best can be said to be equivalent between tribal lands and private landowners at the Lake Oahe crossing. As stated above, linear projects typically use a 0.5 mile buffer area to examine Environmental Justice effects. There are no low-income, minority or tribal lands within 0.5 mile of the Proposed Action.

Concerns have been expressed regarding an inadvertent release reaching intake structures on Lake Oahe. Given the engineering design, proposed installation methodology, quality of material selected, operations measures and response plans the risk of an inadvertent release in, or reaching, Lake Oahe is extremely low. While the locations of water intakes is not public information for disclosure in this document, there are private and/or non-tribal intakes closer to the Lake Oahe crossing than any intakes owned by the tribe; further demonstrating the lack of disproportionate impacts of an inadvertent release to the Tribe and the reservation. We understand that due to the rural nature of this area, tribal drinking water supplies are obtained from a combination of wells and surface water. The siting and construction of oil pipelines upstream of drinking water intakes is not uncommon throughout the United States and is not considered an Environmental Justice issue. In the unlikely event of a release, sufficient time exists to close the nearest intake valve to avoid human impact.

Dakota Access has committed to plan for the protection of this and other water crossings and associated water intakes as part of its emergency preparedness protocol and in accordance with PHMSA requirements outlined in 49 CFR §§ 194 and 195 (see section 3.11 for further detail). Tribal representatives have been identified for early contact along with other federal, state and local governments by the Corps as well as independently by the applicant.

Based on the above sections, it has been determined that there are no environmental justice issues or concerns resulting from the Proposed Action.

3.10 Hazardous Waste

The EPA (2015) defines hazardous waste as waste that is dangerous or potentially harmful to human health or the environment, occurring as liquids, solids, gases, or sludges. They can be generated through the disposal of commercial products, such as cleaning fluids or pesticides, or manufacturing processes. Improper management and disposal of hazardous substances can lead to pollution of groundwater or other drinking water supplies and the contamination of surface water and soil. The primary federal regulations for the management and disposal of hazardous substances are the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA).

A review of regulated facilities for hazardous materials along the Proposed Action corridor was conducted by searching online records maintained by the EPA (2014). Presently, there are no recognized Radiation Information Database, Brownfields, Superfund, Toxic Release Inventory, or air emission sites within one mile of the flowage easements and Lake Oahe crossings. No operating sensitive receptors, such as schools or hospitals, are reported within at least one mile. Additionally, there are no NPDES discharge sites within one mile of the Project Areas.

With the Proposed Action, there is potential for temporary impacts to public safety from hazardous material use. Other hazards to worker safety may also exist along the Proposed Action corridor, but do not pose a significant impact. Because there were no regulated sites found within the one-mile search radius of the Project Area, no impacts to the Proposed Action, Proposed Action media, or worker safety are expected. In the unlikely event contamination is encountered during construction, the UDP (**Appendix F**) would be implemented to protect people and the environment and avoid or minimize any effects from unearthing the material.

Any hazardous materials discovered, generated, or used during construction would be managed and disposed of in accordance with applicable local, tribal, state, and federal regulations. Should emergency response be required during construction, the contractor would have some of their own trained or contracted responders, and local response teams would be expected to assist.

Dakota Access would comply with any laws, regulations, conditions, or instructions issued by the EPA, or any Federal, state, or local governmental agency having jurisdiction to abate or prevent pollution, such as the RCRA, and State hazardous waste management rules.

3.11 Reliability and Safety

The PHMSA, a federal agency within the U.S. DOT is the primary federal regulatory agency responsible for ensuring the safety of America's energy pipelines, including crude oil pipeline systems. As a part of that responsibility, PHMSA established regulatory requirements for the construction, operation, maintenance, monitoring, inspection, and repair of liquid pipeline systems.

Construction activities could present safety risks to those performing the activities, residents and other pedestrians in the neighborhood. Given the low population density of the area, risks would be limited to workers involved with the Proposed Action. All activities would be conducted in a safe manner in accordance with the standards specified in the Occupational Safety and Health Administration (OSHA) regulations.

To prevent pipeline failures resulting in inadvertent releases, Dakota Access would construct and maintain the pipeline to meet or exceed industry and governmental requirements and standards. Specifically, the steel pipe would meet PHMSA specifications under 49 CFR § 195, follow standards issued by the American Society of Mechanical Engineers, National Association for Corrosion Engineers and API. Once installed, the pipeline would be subjected to testing to verify its integrity and compliance with specifications, including hydrostatic pressure testing at the crossings, checking coating integrity, and X-ray inspection of the welds. The pipeline would be placed into service only after inspection to verify compliance with all construction standards and requirements. Dakota Access would maintain and inspect the pipeline in accordance with PHMSA regulations, industry codes and prudent pipeline operating protocols and techniques. The pipeline ROW would be patrolled and inspected by air every 10 days, weather permitting, but at least every three weeks and not less than 26 times per year, to check for abnormal conditions or dangerous activities, such as unauthorized excavation along the pipeline route.

As discussed in Section 3.2.1.2, Dakota Access has drafted a FRP, in accordance with 49 CFR 194, which details the procedures to be implemented in the event of an inadvertent pipeline release and would be in

place prior to commencing transportation of crude oil. The FRP is discussed under Section 3.2.1.2 and a draft of the FRP is included in Appendix L.

Following completion of construction and throughout operation of the Proposed Action facilities, the Operator and qualified contractors would maintain emergency response equipment and personnel at strategic points along the pipeline route. These personnel would be trained to respond to pipeline emergencies as well as in the National Incident Management System (NIMS) Incident Command System (ICS). Additionally, contracts would be in place with oil spill response companies that have the capability to mobilize to support cleanup and remediation efforts in the event of a pipeline release. The Operator would also coordinate with local emergency responders in preventing and responding to any pipeline related problems. These activities would include conducting and hosting, over a period of time, emergency response drills with both Dakota Access employees and local emergency responders along the pipeline route.

Dakota Access will conduct emergency response drills/exercises in accordance with PREP, which is recognized, and approved, by the EPA, US Coast Guard, and PHMSA. These emergency response exercises will consist of annual table top exercises and equipment deployment drills. Dakota Access is committed to conducting a worst case discharge full scale exercise at either the Missouri River crossing near Williston or the crossing at Lake Oahe once every 6 years and will include both open water and ice response. Dakota Access will alternate the location and type of exercise. Regulatory and stakeholder participation will be encouraged and solicited for the exercises.

In addition to the testing and inspection measures listed above, Dakota Access would utilize a supervisory control and data acquisition (SCADA) system to provide constant remote oversight of the pipeline facilities. Power for the SCADA system would be provided from an existing power grid. In the event of a power outage, a 500 watt Uninterruptable Power Supply would supply low voltage power to the Programmable Logic Controller and communication equipment. Communication with the SCADA system would be accomplished via satellite (Hughes Global Network) and telephone (4G cellular [ATT] or landline depending on availability/coverage). Both forms of communication are continually engaged to poll information from these sites for 100% reliable remote monitoring / operation of these sites through the SCADA system to the Operations Control Center (OCC) in Sugarland, Texas (a backup control room is located in Bryan, Texas), and are proven to have the least potential for interruption during pipeline operations.

If an alarm criteria threshold is met, the SCADA system would alert Dakota Access' OCC Operators, located in Sugarland and Bryan, Texas, of rapid drops in pressure, who would then activate the controls as necessary and initiate procedures for an appropriate response. The OCC prioritizes and responds to all alarms in accordance with the control room management regulations referenced in PHMSA CFR 195.446 (e). This regulation requires that the OCC Operator have a SCADA system alarm management plan; in general, the plan must include review of the SCADA alarm operations to ensure alarms support safe pipeline operations, identify any required maintenance that may affect safety at least once every calendar month, verify correct safety-related alarm values and descriptions at least once every calendar year when associated field equipment are changed or calibrated, determine effectiveness of the alarm management plan through a yearly review, and monitor content and volume of activity at least once a calendar year to assure controllers have adequate time to review incoming alarms. Leak Warn, a leading software program for monitoring pipelines, is being tailored to the pipeline facilities, in accordance with Pipeline and

Hazardous Materials Safety Administration requirements. The Operator would utilize a Computational Pipeline Monitoring System (CPM) to monitor the pipeline for leaks. The CPM is a state-of-the-art pipeline monitoring tool and features a real-time transient model that is based on pipeline pressure, flow, and temperature data, which is polled from various field instruments every 6 seconds and updates the model calculations to detect pipeline system variations every 30 seconds. After the system is tuned, this state-of-the-art CPM system is capable of detecting leaks down to 1 percent or better of the pipeline flow rate within a time span of approximately 1 hour or less and capable of providing rupture detection within 1 to 3 minutes. State-of-the-art leak detection equipment and software utilized during operations on the pipeline will be updated per federal standards in accordance with PHMSA requirements. In the event that a leak is confirmed through verification, pump station shutdown would be initiated within a predetermined amount of time to effectuate. Next, the remotely controlled isolation valves (mainline valve sites would be installed on both sides of large waterbody crossings for isolation in the event of an emergency shutdown), which are operable from the OCC, would be closed. These valves have a closure time of no greater than three (3) minutes. Monitoring of the pipeline segments installed via HDD would be accomplished in the same manner as those segments installed by conventional methods (i.e., SCADA, internal inspection devices, and aerial patrols). Typically, repairs are not made on any section of pipe greater than 10 to 20 feet below the ground surface depending on the repair needed. If a material impact was on the pipeline below the 10-foot depth, operation of the system would be modified accordingly (e.g., reduce operating pressure) or the line would be re-drilled. If inspections identify an anomaly, requirements would be followed to comply with U.S. DOT requirements.

In the unlikely event of a leak during operations of the pipeline, the Operator would implement the response measures described in the FRP. Below is a list of typical response activities. However, each spill mitigation situation is unique and will be treated according to the actual spill circumstances present at the time of release.

Notification: The Operator will conduct notifications in accordance with federal and state guidelines. These guidelines, along with additional notification forms/procedures are presented in Appendix B of the FRP. Local government response agencies would be notified first followed by federal and state agencies as well as surrounding communities, and governments (including tribal governments and utilities) in accordance with the relevant provisions of the FRP and relevant law. Response notification to such entities as the National Response Center, PHMSA, EPA, USACE, and affected state regulatory entities will be made in accordance with the requirements dictated by the incident type. A complete list of required notifications is included in the FRP. In accordance with PHMSA policy, the FRP will be updated every five years or sooner if there are material changes to the Plan.

Mobilize Response Equipment: Emergency equipment would be available to allow personnel to respond safely and quickly to emergency situations. Company-owned equipment will be inspected and exercised in accordance with PREP guidelines and would be mobilized and deployed by the Operator from strategic staging locations along the pipeline. Additionally, the operator will contractually secure OSROs to provide trained personnel and equipment necessary to respond, to the maximum extent practicable, to a worst case discharge or substantial threat of such discharge. At a minimum, each OSRO will have a containment booms, absorbents, boats, and vacuum trucks available. A complete list of equipment and list of trained personnel necessary to continue operations of the equipment and staff the oil spill removal organization for each of the OSRO contractors is included in the FRP.

Response Activities: Following incident command protocols, the Operator would work in unison to cooperate with and assist fire, police and other first responders when implementing actions to protect personnel, public safety and the environment. The FRP includes a spill response checklist which lists activities that could be conducted during a spill which would be modified to best address the specific circumstances of a spill event. Incident response activities may include: initiating spill assessment procedures including surveillance operations, trajectory calculations, and spill volume estimating; berming or deployment of containment and/or sorbent booms; lining shorelines with sorbent or diversion booms to reduce impacts; and recovering contained product as soon as possible to prevent the spread of contamination using appropriate hoses, skimmers, pumps, and storage containers or vacuum trucks at collection areas. The response activities would continue until an appropriate level of cleanup is obtained as provided by the responsible federal, state or other governmental authorities. The nature and location of the incident will affect the regulatory and notification requirements, for which more detail is provided in the FRP. Incidents involving discharges to navigable waters are governed the Oil Pollution Act of 1990.

Dakota Access will implement numerous measures to minimize the risk of a pipeline leak and protect the users of downstream intakes:

1) Spill Prevention, Leak Detection and Spill Response Measures:

Based on a worst case discharge (WCD) scenario specific to Lake Sakakawea and Lake Oahe, calculated by guidance in 49 CFR § 194.105, a largest possible release volume was determined specific to the segment of the pipeline that would cross Corps-managed lands. This calculation was based on environmental assumptions such as air temperature, wind direction/probability and wind speeds that were averaged from data over a one-year period derived from the U.S. Geological Survey National Hydrological Dataset (NHD, version 2). This information was extrapolated into a 24-hour model. The WCD, at the end of the 24-hour period, produced a surface oil slick attenuation distance, volume remaining in the water column, volume that would be ashore and the volume would evaporate within this timeframe. It is important to note, this WCD scenario is also calculated on the assumption that the pipeline is on top of the river verses HDD. Because the proposed pipeline would be installed at a minimum depth of 36 feet below the Missouri River above Lake Sakakawea and 92 feet below the lakebed of Lake Oahe, there is a greater response time combined with the use of the automated SCADA system.

While the potential risk for a WCD scenario is low, such a spill would result in high consequences. Review and approval of the overall regional FRP, which encompasses the regional DAPL Pipeline response strategies in the event of an oil spill, is the responsibility and jurisdiction of PHMSA. Federal regulations 49 CFR 194 specify minimum requirements of such an FRP. For the proposed project, the DAPL Pipeline FRP will be required to align with the content and directions identified in the Mid-Missouri Sub-Area Contingency Plan. A tactical GRP specific to a response strategy for Lake Sakakawea and Lake Oahe was provided by the applicant and includes specific response strategies and equipment for all affected water. Both the FRP and GRP will be finalized after construction and be submitted to the USACE for review and the incorporation of USACE comments prior to submittal to PHMSA.

Within these response plans, DAPL training exercise program would be consistent with the exercise requirements as outlined in the PREP Guidelines that were developed by the U.S. Coast Guard in conjunction with PHMSA and EPA. Training exercises include quarterly notification exercise, annual

tabletop exercises to include a WCD scenario every three years, annual facility-owned equipment deployment exercises annual contractor exercises and unannounced exercises by government agencies.

The applicant has committed to additional full scale open water and full scale winter/ice exercises that will be conducted at Lake Sakakawea and Lake Oahe. A full scale exercise will occur once every 3 years (triennial cycle) with the location and type of exercise occurring on alternating schedules (e.g. open water exercise at Oahe the first triennial cycle, followed by winter exercise at Sakakawea the following triennial cycle, followed by a winter exercise at Oahe the following triennial cycle, etc.). Stakeholder (federal, state, local, and Tribal) involvement will be solicited for each exercise. The first exercise will occur within the first 3 years after the pipeline becomes operational.

2) Risk Analysis

While an oil spill is considered unlikely and a high precaution to minimize the chances has been taken, it is still considered a low risk/high consequence event. A risk analysis conducted by DAPL addressed nine industry-recognized pipeline integrity threat categories in combination with public and environmental impact that could occur in the event of a release into Lake Sakakawea and Lake Oahe. These threat categories include the following: 1) third-party damage, 2) external corrosion, 3) internal corrosion, 4) pipe manufacturing defects, 5) construction related defects 6) incorrect operations, 7) equipment failure, 8) stress corrosion cracking and 9) natural forces. DAPL derived the following analysis risk process from the W. Kent Muhlbauer Relative Index Methodology (2004), in accordance with 49 CFR 195.452 "Hazardous Liquid Pipelines in High Consequence Area", API RP 1160 "Managing System Integrity for Hazardous Liquid Pipelines", and ASME B31.8S "Managing System Integrity of Gas Pipelines".

1 - Third Party Damage

Pipeline failure due to third party damage is ranked low for the Missouri River above Lake Sakakawea and Lake Oahe (36 and 92 feet below the river and lakebed, respectively). The only third party damage that would threaten this portion of the pipeline would be another HDD in the same location of the DAPL Pipeline. Due to tracking technological advances such as submeter accuracy, a permanent and accurate record of the proposed pipeline would be documented so no such possibility of another pipeline being placed via HDD in the same location would occur.

2 - External Corrosion

Pipeline failure for the portion of the proposed project that crosses Lake Sakakawea is classified as low. The potential is ranked low due to the high performance external coating system that is being used (heavy epoxy-concrete abrasion resistant layer over fusion bonded epoxy) and deep well cathodic protection. This portion of the pipeline is constructed with a thicker wall pipe compared to segments of the pipeline in upland-classified areas. A conservative corrosion growth rate was determined to take 70 years before a through-wall metal loss could occur. Because in-line inspection metal loss detection tools run every five years, external corrosion activity would be detected and mitigated prior to it becoming an integrity threat.

3 - Internal Corrosion

Pipeline failure due to the internal corrosion threat for the portion of the proposed project that would cross Lake Sakakawea is ranked low. Causes of internal corrosion would be due to accumulation of water and solids in low spots of the pipeline. However, DAPL internal corrosion mitigation program for the entire DAPL pipeline include chemical analysis of the crude product stream, pipeline operations (maintenance of minimum flow rates that keep entrained water and solids moving through the system), a maintenance pigging program, wall pipe design and in-line inspection performed every five years. The potential does exist, but successful implementation and continual monitoring of the effectiveness of the above programs will mitigate the risk. As with the external corrosion threat, the internal corrosion would be detected and mitigated prior to it becoming an integrity threat.

4 - Pipe Manufacturing Defects

Pipeline failure due to manufacturing defects is considered low for the portion of the pipeline that crosses Lake Sakakawea and Lake Oahe. Upon completion of construction and prior to the commissioning of the pipeline, the segment of the pipeline crossing Corps-managed lands would be hydrostatically strength-tested for eight hours at 1,800 psig which would be 1.25 times greater than the 1,440 MAOP. Should any strength-related defects be found in the pipe as a result of the hydrostatic test, this segment of the pipeline would have been over-pressured by more than two-times to have a potential effect on those defects. An over-pressure event of this magnitude is not likely with the equipment installed.

5 - Construction Related Defects

Pipeline failure for the segment that crosses under Lake Sakakawea due to construction related defects is categorized as low. All pipe joints would be welded by qualified welders and the required 100% girth weld radiography would provide a two-dimensional grayscale image of the weld. After construction and prior to commissioning of the pipeline, the hydrostatic testing would be performed. After the drill string is installed and prior to the line being put into service, an in-line inspection tool would be ran to identify an injurious mechanical damage that may have gone undetected during construction.

6 - Incorrect Operations

Pipeline failure due to incorrect operations (e.g. overpressure event caused by human error) is ranked low for the section of the pipeline that crosses Lake Sakakawea and Lake Oahe. This section of the DAPL pipeline has a design factor nearly 2-times greater than the maximum allowable operating pressure (1440 psig) of the pipeline. In addition, the system is controlled and monitored 24 hours a day, 365 days a year by experienced controllers in the control center in Sugarland, Texas. The system is designed with instruments and pressure relief systems to minimize the opportunity for overpressure.

7 - Equipment Failure

Pipeline failure due to equipment failure for the section of the pipeline that crosses the Missouri River above Lake Sakakawea and Lake Oahe are categorized as low. The only equipment located in this section of the pipeline are the shut-off valves on either side of the Missouri River above Lake Sakakawea and Lake Oahe which are remotely operated. These valves are secured in perimeter fencing.

8 - Stress Corrosion Cracking

The potential for pipeline failure due to stress corrosion cracking for the portion of the pipe that crosses the Missouri River above Lake Sakakawea and Lake Oahe is ranked as low because this section will operate at a low stress and is externally coated with a fusion bond epoxy coating.

9 - Natural Forces

The potential for pipeline failure due to natural forces is ranked low for the segment of the pipeline that crosses Lake Sakakawea and Lake Oahe. The National Pipeline Mapping System, maintained by PHMSA, rates this geographic location for natural hazards as the following: Hurricane- Low; Earthquake- Low; Flood- High and; Landslide-High. Erosion of cover/ exposure of the pipeline to debris during flood conditions is highly unlikely due to the depth of cover at the Missouri River and Lake Oahe crossings (36 feet and 92 feet below the river and lakebed, respectively). In addition, landslide/ creep of the pipeline is highly unlikely as the pipe is at a depth below that which would be affected by land movement.

10 - Consequences

In the event that a pipeline failure occurs and product is released into the Missouri River at either crossing, the worst case consequence scenario is ranked high because several drinking water intake High Consequence Areas (HCAs) and multiple ecologically sensitive HCAs could be impacted. To minimize the impact of a release (e.g. size and spread) the pipeline will continuously be monitored by a real-time monitoring and leak detection system, which is considered to be the best available technology; motor operated isolation and/or check valves are installed on either side of the Missouri River above Lake Sakakawea and Lake Oahe which can be actuated to close as soon as a leak is detected; PHMSA-approved FRP will be in place, all weather access and collection points will be staged strategically downstream of each lake crossing, and DAPL has committed to additional full scale open water and full scale winter/ice exercises that will be conducted at Lake Sakakawea and Lake Oahe. A full scale exercise will occur once every 3 years (triennial cycle) with the location and type of exercise occurring on alternating schedules (e.g. open water exercise at Oahe the first triennial cycle, followed by winter exercise at Sakakawea the following triennial cycle, followed by a winter exercise at Oahe the following triennial cycle, etc.). Stakeholder (federal, state, local, and Tribal) involvement will be solicited for each exercise. The first exercise will occur within the first 3 years after the pipeline becomes operational.

3.12 Air Quality and Noise

Under the “no action” alternative, Dakota Access would not construct the DAPL Project and no impacts on air quality and noise would occur. However, if the objectives of the DAPL Project are to be met under the “no action” alternative, other projects and activities would be required and these projects would result in their own impacts on air quality and noise, which would likely be similar to or greater than the DAPL Project. If the “no action” alternative is implemented and the Project is not constructed, shippers will likely rely on truck or rail to transport crude oil. Additional road and rail traffic necessary to transport the volume of crude oil proposed by the DAPL project would increase the emissions of combustion products due to the potential releases during the filling operations of trucks or rail cars and the use of diesel engines. These would be recurring inputs into the environment which could have an adverse impact on air quality in the region. Similarly, an increase in noise from truck and rail traffic would be widespread

and long term as opposed to the noise impacts of the preferred action which are temporary and primarily limited to the vicinity of the construction workspace.

3.12.1 Air Quality

3.12.1.1 Affected Environment

The Clean Air Act (CAA) of 1970 requires that states adopt ambient air quality standards. The CAA (42 USC 7401 et seq.) establishes ambient air quality standards, permit requirements for both stationary and mobile sources, and standards for acid deposition and stratospheric ozone (O₃) protection. The standards have been established in order to protect the public from potentially harmful amounts of pollutants. Under the CAA, the EPA establishes primary and secondary air quality standards. Primary air quality standards protect public health, including the health of “sensitive populations, such as people with asthma, children, and older adults.” Secondary air quality standards protect public welfare by promoting ecosystem health, and preventing decreased visibility and damage to crops and buildings.

According to the EPA, North Dakota has no nonattainment areas for criteria pollutants. The Bismarck air quality monitoring station in Burleigh County is located approximately 23 miles north-northwest of the Lake Oahe crossing. The Bismarck air quality monitoring station measures sulfur dioxide, nitrogen dioxide, particulate matter, ground-level ozone, and meteorological data (North Dakota Department of Health, 2013). The Williston air quality monitoring station in Williams County is located approximately 18 miles northeast of the flowage easement crossing. The Williston air quality monitoring station measures particulate matter, ground-level ozone, and meteorological data. The monitoring objective of both stations is to measure population exposure to air quality parameters.

Monitoring data for these stations from 2003-2013 show pollutant levels for sulfur dioxide, nitrogen dioxide, ozone, and particulate matter did not exceed state or deferral ambient air quality standards at any of the state-operated monitoring sites (North Dakota Department of Health, 2013).

3.12.1.2 Impacts and Mitigation

With the Proposed Action, no long-term impacts to air quality would occur; the proposed pipeline would not emit any criteria air pollutants. Short-term impacts to air quality may occur during construction phase of the Proposed Action. The contribution of the Proposed Action to greenhouse gas emissions during construction would be considered a minor indirect impact to climate change.

During construction, emissions from fuel-burning internal combustion engines (e.g., transportation trucks, heavy equipment, drill rigs, etc.) would temporarily increase the levels of some criteria pollutants, including carbon monoxide, nitrogen dioxide, ozone, particulate matter, and non-criteria pollutants such as volatile organic compounds. Construction of the Lake Oahe crossing is likely to take six to eight weeks to complete. Conventional pipeline construction across the flowage easements would take approximately two weeks and activities at the HDD exit point for crossing the Missouri River on the flowage easement LL3440E would likely operate for four to six weeks. To reduce the emission of criteria pollutants, fuel-burning equipment running times would be kept to a minimum and engines would be properly maintained. This temporary increase in emissions is not expected to impact air quality or visibility in the region long-term.

3.12.2 Noise

3.12.2.1 Affected Environment

Sound is a sequence of waves of pressure that propagates through compressible media such as air or water. When sound becomes excessive, annoying, or unwanted it is referred to as noise.

Decibels (dB) are the units of measurement used to quantify the intensity of noise. To account for the human ear's sensitivity to low level noises, the decibel values are corrected for human hearing to weighted values known as decibels of the A-weighted scale (dBA; see **Table 3-16**). The EPA has set values that should not be exceeded. While the primary responsibility of regulating noise was transferred from the EPA to state and local governments in 1981, the Noise Control Act of 1972 and the Quiet Communities Act of 1978 are still in effect.

Table 3-16 Noise Values		
Area	Noise Level	Effect
All areas	Leq (24) < 70 dBA	Hearing
Outdoors in residential areas and farms where people spend varying amounts of time in which quiet is a basis for use	Ldn < 55 dBA	Outdoor activity interference and annoyance
Outdoor areas where people spend limited time such as school yards, playgrounds, etc.	Leq (24) < 55 dBA	Outdoor activity interference and annoyance
Indoor residential areas	Ldn < 45 dBA	Indoor activity interference and annoyance
Indoor areas with human activities such as schools, etc.	Leq (24) < 45 dBA	Indoor activity interference and annoyance

Source: (The Engineering ToolBox, 2015)

Leq: 24-hr equivalent sound level

Ldn: day-night average sound level

The dominant land use in the proposed Project Area is agricultural. The Day-Night Average Sound (Ldn) level for agricultural crop land is 44 dBA, and rural residential is 39 dBA (The Engineering ToolBox, 2015).

3.12.2.2 Impacts and Mitigation

Construction of the Proposed Action would temporarily affect the noise levels on and around the flowage easement and federal lands crossing areas. Construction would cause temporary increases in the ambient sound environment in the areas immediately surrounding active construction. The use of heavy equipment or trucks would be the primary noise source during construction and excavation. The level of impact would vary by equipment type, duration of construction activity and the distance between the noise source and the receptor. Construction activities would typically be limited only to daytime hours. Potential exceptions include work determined necessary based on weather conditions, safety

considerations, and/or critical stages of the HDD [e.g. if pausing for the night would put the drill at risk of closing or jamming].

Once constructed and in-service, normal pipeline operations are not audible and noise impacts would be limited to the short-term construction window. Dakota Access would mitigate noise impacts by limiting equipment running times and the duration of Proposed Action construction to the minimum amount necessary to complete the Proposed Action. Noisy construction activities would typically be limited to the least noise-sensitive times of day (daytime only).

It is not anticipated that the temporary increase in ambient sound levels associated with construction would result in a significant noise impact.

4.0 CUMULATIVE IMPACTS

Cumulative impacts to the environment result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts may result from individually minor but collectively significant actions taking place over a period of time 40 CFR Part 1508.

Consultation with the North Dakota Public Service Commission (NDPSC) personnel, and subsequent evaluation of its online resources, provided a systematic source of information that was useful for evaluating cumulative impacts. Although the NDPSC does not maintain a centralized repository for energy infrastructure development projects, it provides a summary of siting applications, which offers one metric of energy project development (excluding gathering lines), particularly over time (NDPSC, 2012a). The siting application summary (NDPSC, 2012b) contains records starting in 1996. The number of statewide siting applications increases markedly starting in 2007, coinciding with development of the Bakken Formation oil field. Prior to that, only three to four applications would typically be submitted on an annual basis (NDPSC, 2012a).

Past actions in the vicinity of the Proposed Action include oil and gas development and associated infrastructure, utility installation, and agriculture. These past activities most likely have had effects on soils, water resources, vegetation, wildlife, land use, visual resources, paleontological resources, and cultural resources. The DAPL Project route was sited to minimize green-space impacts by co-locating with existing utility corridors over much of its length. As a result, the flowage easement crossing, as designed, would be co-located with a Oneok/TransCanada natural gas pipeline and the Lake Oahe HDD would be co-located with a natural gas pipeline and a 345 kV power line. At both of these locations, the predominant land use is agriculture. In addition to ongoing agricultural practices and the expansion of regional oil and gas development activities, cumulative impacts associated with the DAPL Project as whole were also considered.

If the Corps approval of the Proposed Action markedly changed the rate at which the oil and gas industry grows, or facilitated a rapid increase in production, then the changes in the industry's rate of growth and the associated environmental consequences could be considered along with the effects of the Proposed Action as a cumulative impact and would need to be quantified in this EA. However, according to Bruce Hicks, North Dakota Industrial Commission's Department of Mineral Resources Oil and Gas Division, the critical factors limiting the rate at which the industry grows within North Dakota is the availability of drill rigs and hydrofracing crews (U.S. Army Corps of Engineers, 2011). Because the availability of rigs and crews is the critical factor affecting the growth of the industry in the region, approval of the Proposed Action is not anticipated to have a cumulative impact of increasing production or reliance upon non-renewable resources.

Cumulative impacts were evaluated for the following resources and were determined to be negligible or nonexistent based on past and foreseeable future actions in the Project Area and the minor and temporary contribution of the Proposed Action to effects on these resources:

- Geology and Soils Section 4.1
- Water and Aquatic Life Resources Section 4.2

• Vegetation, Agriculture, and Range Resources	Section 4.3
• Threatened, Endangered, Candidate, and Proposed Species	Section 4.4
• Wildlife Resources	Section 4.5
• Land Use and Recreation	Section 4.6
• Cultural and Historic Resources and Native American Consultations	Section 4.7
• Social and Economic Conditions	Section 4.8
• Transportation and Traffic	Section 4.9
• Environmental Justice	Section 4.10
• Air Quality and Noise	Section 4.11

4.1 Geology and Soils

The continued development of oil and gas exploration and production in the region at its current level increases the potential for adverse cumulative impacts to geologic and soil resources. Cumulative impacts could occur when future utilities seek to be co-located within existing corridors or alternatively when greenfield development occurs in landslide prone or highly erodible areas. However, with the proper implementation of reclamation and restoration BMPs these impacts can be reduced.

Another potential cumulative impact to geologic resources is the continued development of the mineral resource, which could lead to its depletion. The mineral resource is understood to be finite. The effect would be primarily economic to the various entities with financial interests; secondarily there could be indirect impacts, potentially beneficial, associated with technological advances within the industry that would facilitate the recovery of mineral resources that cannot be recovered currently.

Agricultural practices throughout the region as well as the thousands of miles of gathering pipelines that may be built in the region could contribute to cumulative impacts on soils. Agricultural practices can result in increased erosion and runoff when soils are exposed for long periods such as when fields are fallow or prior to seeding. Impacts to soils as a result of pipeline installation are temporary and typically associated with excavation activities which may result in compaction and erosion when soils are exposed prior to revegetation. Impacts to soils as a result of the Proposed Action would be mitigated through the implementation of BMPs which may include topsoil segregation, erosion controls, and decompaction. Furthermore, adherence to NPDES stormwater permits would require adequate design, grading, and use of BMPs to ensure that erosion and sediment control measures are properly utilized. Generally, because of the utilization of top soil segregation and erosion controls, as well as the minimal workspace requirements and minimum duration of exposed excavations during construction of the Proposed Action, the cumulative impacts on soils when combined with agricultural practices and other pipeline installations would not be significant.

No impacts on mineral extraction, mining, or other deeper geologic resources would be cumulative, since these uses of geologic resources (*i.e.*, mining) do not occur in the Project Area. Clearing and grading associated with construction of the Proposed Action and other projects in the vicinity could increase soil erosion in the area. The introduction of contaminants to groundwater due to accidental spills of construction-related chemicals, fuels, or hydraulic fluid could have an adverse effect on groundwater quality. Because the direct effects would be localized and limited primarily to the period of construction,

cumulative impacts on geology, soils, and sediments would only occur if other projects were constructed at the same time and place as the Proposed Action facilities.

There are smaller diameter, unregulated, crude oil gathering lines that have leaked and affected soil and ground/surface water. These pre-existing lines have limited cathodic protection (external corrosion protection) and as such they are not routinely monitored. The Proposed Action is the construction of a regulated large diameter crude oil transmission line and, as discussed throughout this document, is highly regulated and monitored. The cumulative impacts of this pipeline are minimized by the regulatory criteria, the monitoring, protections and response implemented by Dakota Access during the operation of the pipeline.

4.2 Water and Aquatic Life Resources

Cumulative impacts on water resources (i.e., groundwater, surface waters, wetlands) associated with the Proposed Action would be avoided, temporary, and/or minor, as all surface waterbodies would be crossed via trenchless methods (i.e., HDD or bore), no permanent fill or loss of wetlands are anticipated, and potential spill-related impacts would be avoided or greatly reduced by regulating fuel storage and refueling activities and by requiring immediate cleanup should a spill or leak occur. Spill response and remediation measures associated with construction activities are discussed in detail in Dakota Access' SWPP, SPCC and ECP.

Recently completed construction or current construction within the vicinity of the Project Area could extend the period of exposure of soils as a result of incomplete revegetation. These exposed soils may increase the potential for soil erosion or sediment transport via overland flow during precipitation events resulting in sedimentation in surface waterbodies. These increased loads could have the potential to temporarily impact water quality, wetlands, and sensitive fish eggs, fish fry, and invertebrates inhabiting waterbodies in the Project Area watersheds. However, all projects, including the DAPL Project as a whole, are subject to regulation by the USACE under the CWA. By installing the pipeline using the HDD technique at the Missouri River and Lake Oahe crossings, as well as other crossings associated with the DAPL Project as a whole, and implementing the erosion and sediment control measures specified in the ECP (**Appendix G**) and SWPPP (**Appendix A**), the potential for increased sediment loading from terrestrial sources is minimized and the cumulative effect is considered to be negligible.

In addition to water quality impacts associated with sediment loading from erosion and run-off, an inadvertent release of non-hazardous drilling mud could occur during HDD activities, including those at Lake Oahe and the Missouri River. The likelihood of inadvertent releases of drilling mud is greatly minimized through thorough geotechnical analysis and detailed design/mitigation plans at each crossing and careful monitoring of drilling mud returns and pressure during HDD activities. If an inadvertent release were to occur within a waterbody during HDD activities, such as those at the Missouri River and Lake Oahe crossings, impacts on water quality and aquatic resources would be minor. Drilling mud is non-hazardous and impacts on water quality and aquatic resources would be akin to those associated with sediment loading. Due to the quantity of drilling mud used in relation to the size of waterbodies typically crossed via HDD, impacts would be temporary and mitigated through implementation of an HDD Contingency Plan (**Appendix B**). Impacts on all waterbodies crossed by the DAPL Project in its entirety would be minimized or avoided via HDD and/or use of erosion and sediment control measures; thereby minimizing the potential for cumulative impacts on water and aquatic life resources.

Impacts on water and aquatic life resources associated with sediment loading, including potential inadvertent releases of non-hazardous drilling mud, as a result of the Proposed Action and the DAPL Project as a whole would be temporary and short-term. Therefore, these impacts, when evaluated with other oil and gas development and infrastructure projects in the region and agricultural practices, would result in minor cumulative impacts on water and aquatic life resources.

Spills or leaks of hazardous liquids during construction and operation of the Proposed Action, or other projects in the vicinity, have the potential to result in long-term impacts on surface and groundwater resources as well as aquatic life resources. However, construction impacts would be mitigated by the proper design and implementation of BMPs would ensure avoidance, minimization, and/or mitigation of potential impacts on water resources and aquatic resources, as required by the various regulating agencies that have jurisdiction over the DAPL Project. Operational risks are being mitigated by DAPL Project design to meet or exceed the applicable federal regulations as detailed in Sec 3.11- Reliability and Safety. In the unlikely event of an unanticipated release during operations of the pipeline, the effects would be remediated following the cleanup procedures and remediation activities described in Section 3.2.2.2. Therefore, the potential cumulative impacts from the Proposed Action on water resources and aquatic resources resulting from spills would be minor.

In addition, while construction and operation of the Proposed Action along with the other potential projects and activities could result in cumulative impacts on existing wetlands in the Project Area watersheds, regulation of activities under the CWA by the Corps requires permitting and mitigation for wetland impacts so that there would be no net loss in the regional wetland resources. Therefore, cumulative impacts on wetland resources in the Project Area would be minimal.

4.3 Vegetation, Agriculture, and Range Resources

As described within Section 3.3.1, all vegetation disturbed by construction within the flowage easements and the Project Area/Connected Actions of the federal lands would be restored to pre-construction conditions following the completion of construction activities, with the exception of one PFO wetland located within the permanent ROW on the flowage easements that would be converted to shrub-scrub or herbaceous wetlands.

No forest fragmentation would occur as a result of construction and operation of the Proposed Action. No interior (core) forest habitat is crossed by the Proposed Action, and the only wooded area that would be permanently impacted by the Proposed Action include one PFO wetland (0.05 acre) located within the permanent ROW on the flowage easements between HDD boxes. However, much of the forest and PFO wetlands in the vicinity of the Project Area have already been fragmented by agricultural activities, roads, and other commercial or industrial developments. Further, construction of the Proposed Action facilities would not result in the permanent loss of wetland features. Although trees within a 30-foot corridor centered on the pipeline that could compromise the integrity of the pipeline coating would be selectively removed throughout the operational life of the Proposed Action, this portion of the PFO wetland impacted by the Proposed Action would be converted to PEM or PSS and allowed to revegetate with scrub-shrub or herbaceous species. Therefore, further fragmentation of wetlands or creation of new forest-edge habitat as a result of the Proposed Action would be negligible.

Generally, the greatest impact to the native vegetative community is associated with past and current agricultural practices. Pipeline projects impact a relatively small area in relation to the total landscape, as these impacts are typically short in duration and temporary in nature. Examples of impacts to vegetation, agriculture, and range resources could include introduction of non-native plants and/or noxious weeds, habitat fragmentation, altered vegetative structure, reduced population sizes below critical threshold levels, sedimentation or degradation of surface waters, erosion, and siltation. However, the implementation of BMPs outlined in the SWPPP (**Appendix A**) and ECP (**Appendix G**) and reclamation of disturbed areas with native vegetation would reduce the chances of adverse individual or cumulative impacts. In addition, while other project pipeline corridors may require clearing of forested areas and potential habitat fragmentation, temporary workspace areas would be revegetated upon completion of construction. Further, these projects would be located in a region of North Dakota that is dominated by open or agricultural land, thereby minimizing the potential for permanent habitat fragmentation. Regionally, there have been releases of hazardous material from unregulated, smaller diameter gathering pipelines that have had an adverse effect on vegetation, agriculture and range resources. In the unlikely event of an unanticipated release during operations of the pipeline, the effects would be remediated following the cleanup procedures and remediation activities described in Section 3.11. Therefore, the potential cumulative impacts from the Proposed Action on vegetation, agriculture and range resources would be minor.

4.4 Threatened, Endangered, Candidate, and Proposed Species

As required by the ESA, the status of each species listed as threatened or endangered is evaluated every 5 years by USFWS to assess its recovery and determine if a change in its listing status is warranted. Where available, these documents were utilized to identify the potential for ongoing regional oil and gas development to significantly threaten the species listed in the Project area. For species in which a 5-Year Review was not available, Dakota Access utilized the species Recovery Plan and/or Final Rule to evaluate potential threats on the species resulting from regional oil and gas development.

Species for which no suitable habitat is present in the Project Area or Connected Action Area, such as the black-footed ferret, Dakota skipper, and gray wolf, were not evaluated, as the Proposed Action would not contribute to cumulative impacts on these species. Further, the northern long-eared bat was not evaluated since the species is not provided federal protection in the Project Area or Connected Action Area under the Interim 4(d) Rule; this area is well outside of the published White-Nose Syndrome Buffer Zone.

Habitat loss and modification are the primary threats to the continued existence of interior least tern, whooping crane, piping plover, rufa red knot, and pallid sturgeon. The potential cumulative impacts from oil and gas activities in the region on the current listing or potential elevated future listing of these five species are discussed in detail below.

4.4.1 Interior Least Tern

The USFWS does not address oil and gas activities, including potential spills, as a potential or ongoing threat to the interior least tern in either the 5-year review, or the recovery plan (USFWS, 2013e). The primary threat to interior least terns and the cause of the initial population declines resulted from river

channelization, impoundments, and changes in river flow resulting in loss of suitable habitat throughout their range.

4.4.2 Whooping Crane

According to the USFWS (2007) International Recovery Plan for the Whooping Crane (*Grus Americana*) the USFWS considers oil and gas activities as a secondary threat, especially within the wintering range in the southeast United States. Potential threats on whooping cranes along the Central Flyway migratory route in the region of the Proposed Action include loss of stopover habitat from conversion of natural wetlands (e.g., prairie potholes) to croplands, as well as development activities associated with natural gas and oil production. The Proposed Action would not result in any loss of stopover habitat for the whooping crane; therefore, it would not contribute to cumulative impacts on the species.

4.4.3 Piping Plover

The USFWS (2009b) 5-Year Review for the piping plover does specifically address threats from oil and gas activities in North Dakota. However, impacts from oil and gas activities that are threatening piping plover are associated with the development of oil and gas exploration wells located near the alkali lakes habitat, which accounts for 83% of the U.S. Northern Great Plains piping plover breeding habitat. The Proposed Action is not located within the vicinity of any of these areas and would therefore not contribute to cumulative impacts on piping plovers.

4.4.4 Rufa Red Knot

According to the Final Rule (79 FR 73706) for the rufa red knot (USFWS, 2014b), the USFWS considers oil and gas activities as a secondary threat, especially near the coast (primarily in southeast Texas in the wintering range). Potential threats to these species along the Central Flyway migratory route in the region of the Proposed Action include loss of stopover habitat from conversion of natural wetlands (e.g., prairie potholes) to croplands and development (including oil and gas exploration). The Proposed Action would not result in any loss of stopover habitat for the rufa red knot; therefore, it would not contribute to cumulative impacts on the species.

4.4.5 Pallid Sturgeon

The USFWS (2014c) Revised Recovery Plan for the Pallid Sturgeon (*Scaphirhynchus albus*) specifically addresses the potential effects of energy development such as oil and gas pipelines on pallid sturgeon. It states that while a rupture of a pipeline within sturgeon habitat could pose a threat, the impacts would be localized and the magnitude of the impact would be dependent on the quantity and timing of the material released. It is highly unlikely that a cumulative impact resulting from a spill or leak would occur, as it would require multiple pipelines in the same general area to experience anomalous events simultaneously. Even if this were to occur, these impacts would be localized and temporary and would likely not result in a significant impact on the recovery of pallid sturgeon, as a whole, as it is found in other waterbodies and in other regions throughout its range (USFWS, 2014c).

4.4.6 Conclusion

The collocation of utilities in established corridors; the proper implementation of erosion control devices; compliance with permits issued for regulated activities; and rapid, thorough, environmentally appropriate reclamation efforts, and design and operation of projects to meet or exceed regulatory requirements are industry standards that, when applied consistently, on a regional basis, would minimize cumulative impacts now and in the future. Based on the pipeline route, and the utilization of HDDs, the Proposed Action is not likely to have any permanent adverse impacts to habitat utilized by listed species, including aquatic species as discussed in Section 3.4. Therefore, the Proposed Action will not have a cumulative effect on listed species.

4.5 Wildlife Resources

Regionally, the greatest impacts to wildlife (past, present or future) can be associated with agricultural development. Agricultural land use replaced the existing natural diversity with the monoculture row crops. The practice also introduced noxious weeds, soil pests, and other exotics, which all had significant cumulative impacts on regional wildlife. Relative to the habitat and land use impacts associated with past agricultural activities, the Proposed Action impacts, as well as those associated with the oil and gas industry on a regional basis and Connected Actions would be nominal. This is due to the short duration and small scale of the Proposed Action relative to the regional landscape and the large scale of agricultural activities in the region.

The Proposed Action would not permanently alter the character of the majority of available habitats as most impacts are expected to be temporary (see Section 4.3 for a discussion of vegetation impacts associated with the Proposed Action and the DAPL Project as a whole). Possible temporary, short-term impacts on wildlife include the temporary displacement of some mobile individuals to similar, adjacent habitats during construction activities. Further, while other oil and gas projects' pipeline corridors may require clearing of forested habitat (if present), once construction is complete, temporary workspace areas would be able to revegetate. In addition, the permanent easement would be allowed to revegetate with herbaceous species, which provides habitat to a variety of species that utilize herbaceous and edge habitats. When analyzed on a regional basis, these impacts do not change significantly in magnitude when compared to the current and historic impacts previously imposed upon the regional wildlife by agricultural development. Therefore, further habitat fragmentation as a result of the Proposed Action or other oil and gas developments in the region would be negligible and is not anticipated to significantly contribute to cumulative effects on wildlife.

4.6 Land Use and Recreation

Regional oil and gas development and related activities could cause an impact to land use and recreation in the Project Area. However, increased impacts are not anticipated based on the design of the DAPL Project and BMPs that would be implemented to restore the impacted area. Temporary impacts to land use would potentially occur during the period of active construction but areas would revert to preconstruction use following restoration. Because construction would be short term and land use conversion would be minimal, the cumulative impact on land use as a result of the Proposed Action would be temporary and minor.

The flowage easement crossing would be located in an area with a greater density of prior development, while the Lake Oahe crossing would be located in an area with relatively little surface development. That said, since the Proposed Action has been co-located with existing pipelines the additional impact incurred by the Proposed Action would be negligible if restored as proposed.

The potential cumulative impacts from the Proposed Action on land use and recreation resources resulting from spills would be minor. Although there have been releases of hazardous material from small diameter, unregulated gathering pipelines that have had an adverse effect on land use and recreation resources, it is highly unlikely for an unanticipated release to occur within the EA review area during operations of the DAPL pipeline, which is subject to DOT construction regulations and pipeline leak detection monitoring guidelines.

In the event of an unanticipated release during operations of the pipeline, the effects would be remediated following the cleanup procedures and remediation activities described in Section 3.11. Cumulatively, the impacts associated with land use and recreation resources would be minimal.

4.7 Cultural and Historic Resources and Native American Consultations

Dakota Access would implement measures to avoid or mitigate adverse effects to cultural resources that have been determined, in consultation with the federal land managing agencies, NDSHPO, and Native American tribes, to be eligible for listing in the NRHP. At the one potential NRHP-eligible site mapped adjacent to the workspace within the EA review area, Dakota Access would install exclusionary fencing along the outer workspace boundary during construction to prevent inadvertent trespassing by construction staff or vehicles. This area would be classified generically as sensitive environmental areas, and would be closely monitored by EI staff. If an unanticipated discovery occurs during construction, Dakota Access would follow the measures described in its UDP (**Appendix F**).

Although the possibility of an unanticipated discovery is low based on the negative findings of the field survey efforts in the Project Area, the measures outlined in the UDP includes a thorough notification protocol which would ensure that the necessary cultural resources specialists and agency personnel are involved to appropriately address the nature and significance and of the find. The Proposed Action is not anticipated to impact cultural resources; therefore, cumulative impacts associated with the Proposed Action would not occur.

4.8 Social and Economic Conditions

Construction of the overall DAPL Project would contribute more than \$1 billion in direct spending just for materials – the majority of which would be purchased in the U.S. Fifty-seven percent of the pipe; the majority of the valves, fittings, valve actuators; and the majority of the remaining materials would be manufactured in the U.S., creating significant opportunities for regional and national manufacturing. In addition to manufactured goods and services, the DAPL Project would provide \$195 million in easement payments to the landowners whose property is crossed by the DAPL Project.

The Proposed Action would have a relatively short construction window with a small number of construction workers dedicated to the crossings. It is possible that nearby towns could experience short-term temporary increases to the local economy through induced spending from construction employees working on the Proposed Action. No residential homes or farms would be relocated as a result of the Proposed Action. Additionally, no demographic changes in the Census tracts affected within the Project Area counties are anticipated because no permanent employees would be created as a result of the Proposed Action. Therefore, the only indirect socioeconomic impacts from the Proposed Action are likely to be related to the temporary influx of workers, such as increased demand for short term housing and the secondary economic benefits discussed in Section 4.10.

The regional population has dramatically increased over the last seven year period due to oil and gas development; concentrated in the Project Area. The majority of the current available and transient labor force in the region is involved in the exploration and production of the resources, or construction of related infrastructure, both of which are labor intensive efforts though temporary in nature. Well rigs are mobile and the number of available drilling leases is limited as well as the mineral resource itself. For these reasons the labor pool effects associated with the exploration and production of the resource are considered to be a temporary impact.

Regarding cumulative impacts to socioeconomic resources, the Proposed Action would provide a benefit to local merchants and vendors as well as providing potential temporary employment opportunities to the local workforce. As such, no substantive negative direct, indirect, or cumulative impacts to socioeconomic resources would result from the Proposed Action.

4.9 Transportation and Traffic

As discussed in Section 3.3, roads throughout North Dakota have received a sharp increase in truck traffic due to increased oil and gas activity. The greater amount of traffic has led to a decline in the transportation infrastructure and a decrease in road safety throughout the state. Additional oil and gas development and production may continue to contribute to cumulative effects on roads in the vicinity of the Project Area requiring a higher frequency of road maintenance and repair on public roadways.

Cumulative impacts from construction of the Proposed Action would temporarily increase traffic in the immediate vicinity of the Project Area. This increase in traffic would be temporary and is not expected to result in significant impacts to North Dakota's transportation infrastructure. Road improvements such as grading would be made as necessary and any impacts resulting from Dakota Access's use would be repaired in accordance with applicable local permits. Traffic interruptions would be minimized to the extent practical and would result in insignificant, temporary cumulative impacts on regional transportation resources as it would be localized to the immediate vicinity of the Project Area and major delivery routes.

During operations of the Proposed Action, there is expected to be a positive effect on traffic resources in North Dakota. Once in operation, Dakota Access plans to transport 450,000 bpd of crude oil via pipeline which would significantly reduce the demand for the commercial trucking of crude oil on county, state and interstate highways. It is anticipated that the cumulative effects of the DAPL Project and other future pipeline projects would be beneficial to the transportation infrastructure in North Dakota by decreasing oil hauled by truck traffic and therefore reducing wear and tear on roads and highways.

4.10 Environmental Justice

The Proposed Action and Connected Actions and associated cumulative effects where practicable have been co-located with existing utilities and across USACE easements and fee owned property. The DAPL Project avoids crossing Tribal reservation lands across its entire length. There are no reasonable past, present or reasonably foreseeable actions that together with these Proposed Actions will have a cumulative significant adverse effect on the environment or a disproportionate impact on low income or minority populations, including the Standing Rock Sioux or other tribes in or around the Project.

Additionally, the holders of the mineral rights and landowners in the region, including particular tribes and tribal members, have witnessed a recent windfall from oil and gas development. Oil and gas development generally occurs on private land with permission of the landowner. Given this ascent, there is no disproportionate impact to low income, minority or tribal populations benefited by the Environmental Justice policy. The DAPL Project was routed to avoid sensitive lands and populations, including tribal lands, and areas and does not have a disproportionate impact on any low income, minority or tribal population benefited by Environmental Justice policy, as discussed in section 3.9, above. For these reasons, the Proposed Action and its associated cumulative actions and effects have no significant cumulative impact to low-income, minority or tribal populations.

4.11 Air Quality and Noise

No operation emissions are associated with the Proposed Action, as no major aboveground facilities would be constructed in the Project Area. Potential cumulative impacts on air quality would result from concurrent construction of the Project and other development projects in the region. Cumulative impacts on air quality associated with construction of the Proposed Action would be temporary and short-term; therefore, even if construction of other projects were concurrent with the Proposed Action, cumulative construction-related air quality impacts would be negligible.

Construction of the Proposed Action would affect ambient noise levels at some nearby residences during active construction. The noise impact of the pipeline construction would primarily originate from the HDD equipment and would be highly localized to the HDD entry and exit sites. However, because the duration of construction would be short-term, the contribution of the Proposed Action to cumulative impacts on noise would be negligible.

5.0 IRREVERSIBLE AND IRRETRIEVABLE COMMITMENT OF RESOURCES

As required by NEPA, irreversible and irretrievable commitments of resources involved in the Proposed Action should it be implemented, must be addressed in the EA. Irreversible commitments of resources result in a loss of future options. Commitments of resources which are irreversible are those resources which are destroyed or consumed and are neither renewable nor recoverable for use by future generations. Examples of irreversible commitments of resources include consumption of petroleum-based fuels or minerals and destruction cultural resources. Irretrievable commitments of resources result in a loss of productivity. Commitments of resources which are irretrievable occur when the productive use or value of a renewable resource is lost for a period of time. For example, timber or soil productivity may be lost for a period of time resulting in an irretrievable loss of production, but the action is reversible.

Construction activities associated with the Proposed Action would result in the consumption of materials such as aluminum, steel, other metals, wood, gravel, sand, plastics, and various forms of petroleum-based fuels, the use of which would constitute an irreversible commitment of resources. Most of these materials are nonrenewable and would be irreversibly committed if not recycled or reused during maintenance or at the end of the life of the Proposed Action.

Areas of vegetation removal or conversion along the permanent right-of-way, such as areas where trees or shrubs were established prior to construction but would be maintained in an herbaceous state during operation, would represent an irretrievable commitment of resources. Additionally, erosion, compaction, or an overall loss of soil productivity could occur if these impacts are not properly mitigated. Use of water for dust control and hydrostatic testing would also be irretrievable. Other irretrievable commitments of resources could occur if areas temporarily impacted by construction were not restored.

Overall, there would be a very minimal commitment of irreversible and/or irretrievable resources as a result of the Proposed Action since the majority of impacts would be temporary and would occur within agricultural land. Additionally, irreversible and/or irretrievable commitments of resources would be minimized through the mitigation measures for the affected environments identified throughout this EA.

6.0 MITIGATION SUMMARY

Dakota Access has selected the Proposed Action to minimize impacts to natural/cultural resources as summarized in Table 8-2. System and routing alternatives were considered for the entire DAPL Project in order to meet purpose and need, design criteria and construction requirements, while minimizing potential impacts to the existing environment and socioeconomic setting. Impacts to the environment would be temporary and not significant as a result of avoiding, minimizing and mitigation any potential impacts. The majority of potential impacts would be mitigated by HDD technology which would bore beneath resources and allow pipeline construction to proceed with the least amount of impacts possible. Dakota Access has would also implement general mitigation measures such as those described in the ECP (**Appendix G**). The ECP has been developed based on decades of experience implementing BMPs during construction in accordance with generally accepted industry practices for linear infrastructure and cross-county pipelines. It is intended to meet or exceed federal, state, and local environmental protection and erosion control requirements, specifications and practices. The ECP describes current construction techniques and mitigation measures that would be employed to minimize the effects of construction on environmental resources. Some of the basic procedures identified in the ECP are listed below:

- BMPs designed to minimize the effects of construction on environmental resources;
- Temporary and permanent erosion and sediment control measures;
- Soil handling procedures designed to preserve the integrity of the soil (e.g., topsoil segregation, decompaction, etc.);
- Wetland and waterbody crossing and stabilization procedures
- Wildlife and livestock mitigation measures
- Restoration and revegetation procedures
- Refueling and waste management procedures
- Weed management procedures
- Winter construction practices
- Stormwater management procedures

Dakota Access incorporates environmental requirements into all construction specifications and the ECP would be included in contract documents and enforced as such throughout the proposed action. The construction contractor(s) must comply with all applicable permits and plans during all phases of construction. In addition to the ECP, the Proposed Action would be constructed in accordance to the measures detailed in Dakota Access' SWPPP, SPCC, HD Construction Plan, HDD Contingency Plan, and UDP.

To further ensure compliance with permits, plans, obligations, and commitments, Dakota Access would have full-time EIs to monitor construction and compliance. The EIs would be responsible for observing construction activities to verify that work is carried out in accordance with environmental permit requirements and ensure that designed avoidance and mitigation measures are properly executed during construction.

No additional mitigation measures were identified for geology and soils; water resources; vegetation, agriculture, and range resources; wildlife resources; aquatic resources; land use and recreation; cultural and historic resources, social and economic conditions; environmental justice; or air and noise. General

mitigation measures, as described in sections 3.1 through 3.7, or avoidance associated with the trenchless installation (i.e., HDD or bore) of the proposed pipeline are expected to mitigate adverse impacts to resources.

7.0 FEDERAL, TRIBAL, STATE, AND LOCAL AGENCY CONSULTATION AND COORDINATION

The following is a listing of all individuals and agencies consulted during preparation of the EA regardless of whether a response was received. On March 30, 2015, Dakota Access sent letters to interested parties (indicated by the Corps) requesting comments on the federal actions associated with crossing Corps flowage easements and Corps owned and managed federal land. A sample request for comment letter sent to individuals and agencies consulted, along with the mailing list and comments received, is included in **Appendix J**. **Appendix K** contains the Notice of Availability of the Draft EA for comment. **Table 7-1** includes a summary of agency personnel consulted.

Table 7-1 Agency/Entity Consultation List			
Agency/Entity	Name	Address	Date Received/ Relevant EA Section
American Rivers	Kristen McDonald	1101 14th Ave. NW STE 1400 Washington, DC 20005-5637	N/A
Bureau of Indian Affairs - Fort Berthold Agency	Howard Bemer	PO Box 370 New Town, ND 58763	N/A
Bureau of Indian Affairs - Great Plains Regional Office	William Benjamin	115 Fourth Avenue S.E. Aberdeen, SD 57401	N/A
Bureau of Indian Affairs-Fort Berthold Agency	Earl Silk	P.O. Box 370 New Town, ND 58763	N/A
Bureau of Indian Affairs- Standing Rock	Robert Demery	P.O. Box E Fort Yates, ND 58538	N/A
Bureau of Land Management	Rick Rymerson	99 23rd Avenue West, Suite A Dickinson, ND 58601	N/A
Dakota Prairie Grasslands	Dennis Neitzke	1200 Missouri Ave Bismarck, ND 58504	N/A
Dakota Resource Council	Mark Trechock	P.O. Box 1095 Dickinson, ND 58601	N/A
Bismarck-Mandan Development Association	Brian Ritter	400 East Broadway Avenue, Suite 417 Bismarck, ND 58501	N/A
Morton County Commissioners	Dawn Rhone	210 2nd Ave NW Mandan, ND 58554	N/A
Morton County Extension Agent	Kari Presler	210 2nd Ave NW Mandan, ND 58554-3158	N/A
Morton County Weed Board	Wayne Carter	2916 37th St. NW Mandan, ND 58554	N/A
Emmons County Commissioners	Marlys Ohlhauser	P.O. Box 129 Linton, ND 58552	N/A
Emmons County Extension Agent	Connie Job	Courthouse, Box 278 Linton, ND 58552-0278	N/A

Table 7-1 Agency/Entity Consultation List			
Agency/Entity	Name	Address	Date Received/ Relevant EA Section
Emmons County Weed Board	Sam Renschler	510 Sampson Ave. Linton, ND 58552	N/A
Williams County Commissioners	Beth Innis	205 East Broadway PO Box 2047 Williston, ND 58802-2047	N/A
Williams County Extension Agent		302 East Broadway PO Box 1109 Williston, ND 58802-1109	N/A
Williams County Weed Board	Jim Basaraba	109 Main St Williston, ND 58801-6018	N/A
National Audubon Society State Office	Genevieve Thompson	118 Broadway, Suite 512 Fargo, ND 58102	N/A
Natural Resources Conservation Service	Kyle Hartel	PO Box 583 Watford City, ND 58854	N/A
Natural Resources Conservation Service	Michele R. Doyle	2540 Overlook Lane Mandan, ND 58554-1593	N/A
Natural Resources Conservation Service	Jennifer M. H. Vetter	318 Broadway St. S Linton, ND 58552-7612	N/A
Natural Resources Conservation Service	David Schmidt	1106 West 2nd St Williston, ND 58801-5804	N/A
NDSU Dept of Soil Science- Department Chair		NDSU Dept 7680 PO Box 6050 Fargo, ND 58108-6050	N/A
North Dakota Council of Humane Societies	Leo Keelan	1948 Anderson Drive Minot, ND 58701	N/A
North Dakota Department of Health	Peter Wax	600 East Boulevard Bismarck, ND 58505	N/A
North Dakota Farm Bureau		4900 Ottawa Street Bismarck, ND 58503	N/A
North Dakota Forest Service	Larry Kotchman	307 1st Street East Bottineau, ND 58318-1100	April 22, 2015/ Section 2.0 and Section 3.5
North Dakota Game & Fish Department	Steve Dyke	100 N. Bismarck Expressway Bismarck, ND 58501-5095	N/A
North Dakota Game & Fish Department	Dave Fryda	406 Dakota Ave Riverdale, ND 58565	N/A
North Dakota Game & Fish Department	Bruce Kreft	100 North Bismarck Expressway Bismarck, ND 58501-5095	N/A

Table 7-1 Agency/Entity Consultation List			
Agency/Entity	Name	Address	Date Received/ Relevant EA Section
North Dakota Game & Fish Department	Kent Luttschwager	13932 West Front Street Williston, ND 58801-8602	N/A
North Dakota Game & Fish Department	Fred Ryckman	406 Dakota Ave Riverdale, ND 58565	N/A
North Dakota Game & Fish Department	Terry Steinwand	100 North Bismarck Expressway Bismarck, ND 58501-5095	N/A
North Dakota Industrial Commission - Oil and Gas Division	Lynn Helms	600 East Boulevard Bismarck, ND 58505	April 16, 2015/ Section 3.1.2, Section 3.1.3, and Section 3.1.4
North Dakota Industrial Commission - Oil and Gas Division	Bruce E. Hicks	600 East Boulevard Bismarck, ND 58505	N/A
North Dakota Land Department	Mike Brand	1707 North 9th St. P.O. Box 5523 Bismarck, ND 58506-5523	N/A
North Dakota Parks & Recreation Department	Kathy Duttonhefner	1600 East Century Avenue, Suite 3 Bismarck, ND 58503-0649	April 20, 2015/ Section 3.3.1, Section 3.4 and Section 3.5.
North Dakota Petroleum Council	Ron Ness	P.O Box 1395 Bismarck, ND 58502	N/A
North Dakota State Historical Society	Susan Quinnell	612 East Boulevard Ave. Bismarck, ND 58505	April 2, 2015/ Section 3.7.1
North Dakota State Water Commission	John Paczkowski	900 East Boulevard Ave. Bismarck, ND 58505-0850	N/A
North Dakota Tourism Division	Sarah Otte Coleman	P.O. Box 2057 Bismarck, ND 58502-2057	N/A
U.S. Army Corps of Engineers, Regulatory Office	Daniel Cimarosti	1513 12th St. SE Bismarck, ND 58504	N/A
U.S. Fish and Wildlife Service, North Dakota Field Office	Scott Larson	3425 Miriam Avenue Bismarck, ND 58501-7926	N/A
USDA-APHIS-WS	Philip Mastrangelo	2110 Miriam Drive, Suite A Bismarck, ND 58501	N/A
USDA-Natural Resources Conservation Service-North Dakota State Office	Mary Podoll	220 East Rosser Avenue, Room 270 Bismarck, ND 58502-5020	April 13, 2015/ Section 3.1.5 and Section 3.2.3
USDOL-Office of Surface Mining Reclamation and Enforcement-Dick Cheney Federal Building	Jeffrey Fleischman	P.O. Box 11018, 150 East B Street, Rm 1018 Casper, WY 82602	April 13, 2015/ Section 1.1

Table 7-1 Agency/Entity Consultation List			
Agency/Entity	Name	Address	Date Received/ Relevant EA Section
U.S. Army Corps of Engineers	Omaha District; CENWO-PM-AA	1616 Capitol Avenue Omaha, NE 68101-4901	N/A
North Dakota Parks & Recreation Department	Mr. Jesse Hanson	1600 E. Century Ave. Suite 3 Bismarck, ND 58503-0649"	N/A
North Dakota Chapter of the Wildlife Society	Mr. Kory Richardson	PO Box 1442 Bismarck, ND 58502	N/A
Sierra Club - North Dakota Office	Mr. Blaine Nordwall	311 East Thayer Ave Suite 113 Bismarck, ND 58501	N/A

8.0 STATUS OF ENVIRONMENTAL COMPLIANCE

Table 8-1 is a listing of environmental protection statutes and other environmental requirements, as well as the status of Applicant compliance with these statutes and requirements, regarding this EA.

Table 8-1 Environmental Permits, Approvals, and Consultations			
Jurisdiction	Permit or Authorization	Status	Requirement or Action
Federal			
Corps	RHA, Section 10	Pending, Application Submitted Dec 2014	RHA, Section 10: Missouri River/Lake Oahe
Corps – Omaha District	Section 404 CWA	Pending, Application Submitted Dec 2014	NWP 12, Section 404 Waters with PCN
	Survey permission, geotechnical investigation	Received April 2015	Survey permission, geotechnical investigation
	Title 30 Rights-of-Way for pipelines through Federal Lands and Temporary Construction License	Pending	Real Estate Outgrant and EA for Crossing the Missouri River/Lake Oahe (Fee title Lands on both sides of river/lake)
	Flowage Easement Consent to Cross	Pending	Consent to Cross
USFWS	Section 7 Endangered Species Act (ESA) Consultation	Received May 2016	Compliance under 404 Permit NWP 12 Joint Application
Bureau of Reclamation	Letter of consent to cross irrigation works	Received December 2015	BOR water conveyance facilities, near cities of Buford and Trenton, ND
State			
North Dakota Public Service Commission (NDPSC)	North Dakota Energy Conversion and Transmission Facility Siting Act: Certificate of Corridor and Route	Received January 2016	Siting Application, PU-14-842
North Dakota Office of the State Engineer	Sovereign Land Permit	Permits Received April 2016	Crossing Permits for the Lake Oahe and the Missouri River Crossings
State Historical Society of North Dakota	Section 106 NHPA	Received April 2016	Section 106 Concurrence/Consultation

Table 8-1 Environmental Permits, Approvals, and Consultations			
Jurisdiction	Permit or Authorization	Status	Requirement or Action
North Dakota Department of Health	Section 401 Water Quality Certification	Pending	Automatic with NWP 12
	Hydrostatic Test Water Discharge Permit No. NDG07-0000	Permits Received May 2016	Obtain permit coverage prior to discharge
	North Dakota Pollutant Discharge Elimination System (NDPDES) Construction Stormwater General Permit (NDR10-0000)	Permit Received April 2016	Obtain permit coverage

Table 8-2 provides a summary of the environmental mitigation measures discussed throughout this EA that Dakota Access has committed to as part of the Proposed Action design to avoid or minimize potential impacts on environmental and human resources throughout construction and operation activities.

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Dakota Access Pipeline Project

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Table 8-2 Summary of Environmental Impact Avoidance and Mitigation Measures	
Resource	Environmental Avoidance/Mitigation Measures
Geology and Soils	To protect the terrain of the Project Area and Connected Actions, Dakota Access would, to the extent feasible, restore the areas affected by pipeline construction to pre-construction contours and similar vegetation (excepting trees within approximately 15 feet of the centerline). Pre-construction and as-built surveys would be completed and provided to the Garrison Project.
	Although not anticipated, if blasting is found to be necessary, Dakota Access would follow procedures specified in its Blasting Plan (Appendix E).
	Dakota Access, in accordance with North Dakota One Call, would require that the construction contractor, prior to initiating any ground disturbance activities, identify all underground utilities to minimize the potential for encountering buried utility structures.
	Dakota Access has completed a geotechnical analysis of the flowage easement and federal land crossing sites to facilitate engineering and design, including selection of appropriate materials and construction methods to limit any environmental impacts attributable to landslides.
	The proposed pipeline would be designed and constructed to meet or exceed industry specifications, which would effectively mitigate the effects of fault movement, landslides, subsidence, and subsidence.
	In the event paleontological resources are discovered during construction, Dakota Access would implement measures outlined in its Unanticipated Discoveries Plan Cultural Resources, Human Remains, Paleontological Resources and Contaminated Media (UDP) (Appendix F) to avoid further impacts to these resources.
	If any vertebrate fossils are found during pipeline construction, Dakota Access would immediately cease construction activities and notify the appropriate agency personnel, including the North Dakota state paleontologist as well as the USACE archaeologist. The appropriate authorities would determine the significance of the find and prescribe the mitigation procedures to be completed prior to resuming pipeline construction.
	Dakota Access would minimize or avoid impacts on soils by implementing the mitigation measures described in the DAPL Project's SPCC, SWPPP, and ECP as well as requirements of applicable state and federal permits. These documents would be included as contract documents and enforced as such throughout the DAPL Project.
	To minimize potential impacts on soil productivity, topsoil would be separated during trench excavation in agricultural land, and if applicable, other areas where soil productivity is an important consideration. Unless otherwise requested by the landowner, topsoil in cropland would be removed to a maximum depth of 12 inches from the trench and spoil storage area and stored separately from the trench spoil. After the trench is backfilled, topsoil would be returned to its approximate original location in the soil horizon.

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Table 8-2 Summary of Environmental Impact Avoidance and Mitigation Measures	
Resource	Environmental Avoidance/Mitigation Measures
	Compaction of agricultural soils would be minimized by restricting construction activities during periods of prolonged rainfall. Where unacceptable levels of compaction occur in agricultural lands, a chisel plow or other deep tillage equipment would be utilized to loosen the soil.
	Dakota Access would retain EIs to monitor the contractor's compliance with applicable requirements to protect soil resources during construction of the DAPL Project. The Garrison Project would be notified if the EIs have concerns on the Project Area or Connected Action Area.
	The HDD workspace sites would be cleared, graded and matted as needed to minimize rutting and compaction.
	Permanent impacts to soils would be avoided through the application of BMPs during construction, restoration, and post-construction revegetation management, as outlined in the ECP (Appendix G).
Water Resources	Impacts to Lake Oahe and the Missouri River would be minimized by using HDD construction methods to install the proposed pipeline underneath the Missouri River and Lake Oahe.
	The HDD Contractor plans to install steel surface casing, where defined in the site specific HDD plans, to reduce the probability of an inadvertent release when the drill bit is working near the surface.
	The drilling mud and cuttings would be disposed of in accordance with applicable laws and regulations, likely in an existing landfill or by land farming.
	Dakota Access would conduct all HDD work according to the HDD Construction Plan (Appendix B) that it has prepared, and implement the HDD Contingency Plan (Appendix B) in the event of an inadvertent release.
	The Missouri River water withdrawal activity would comply with all applicable permit conditions and regulations, including the specifications on permitted intake structures outlined in the USACE's Regional Conditions for North Dakota applicable to NWP 12 (Utility Line Activities). This regional condition requires that the applicant 1) utilize an intake screen with a maximum mesh opening of ¼-inch, 2) wire, Johnson-like screens must have a maximum distance between wires of 1/8-inch, 3) water velocity at the intake screen shall not exceed ½-foot per second, 4) intake structure shall be floating, and 5) at the beginning of pumping, the intake shall be placed over water with a minimum depth of 20 feet.
	The barge/float required for water withdrawal from the Missouri River would be fitted with a secondary containment structure, and the pump would be placed within this structure to contain accidental spills of fuels. The intake hose would be suspended by floats within the water column and screened to prevent impingement entrainment of foreign objects and aquatic species.
	Water discharges associated with hydrostatic testing on Corps flowage easements would be conducted in accordance with applicable permits. Hydrostatic test water discharges would not occur on Corps fee property.

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Table 8-2
Summary of Environmental Impact Avoidance and Mitigation Measures

Resource	Environmental Avoidance/Mitigation Measures
	Dakota Access would conduct trench dewatering and hydrostatic test discharges in a manner consistent with the North Dakota Pollutant Discharge Elimination System (NDPDES) General Permit NDG-070000, as applicable.
	Discharged hydrostatic test water would not contain additives unless written approval is received from Dakota Access and applicable permits authorize such additives.
	Where appropriate, water would be discharged into an energy dissipation and/or filtering device as described in Dakota Access' SWPPP (Appendix A) to remove sediment and to reduce the erosive energy of the discharge.
	Impacts to waterbodies would be minimized by conducting pipeline construction activities in accordance with applicable regulatory requirements and waterbody construction procedures described in Section 2.3.2.8 and the ECP.
	Fuel and all other hazardous materials would be stored in accordance with the requirements of Dakota Access' SPCC, SWPPP, and ECP. These documents also describe response, containment, and cleanup measures.
	EIs would monitor compliance with applicable waterbody protection requirements during construction of the facilities. The Project ECP (Appendix G) and SWPPP (Appendix A) describe additional mitigation measures and contains illustrations of how sediment control devices should be utilized.
	Dakota Access would maintain a vegetative buffer until the actual crossing of the waterbody takes place.
	Temporary sediment control measures, such as silt fence, would minimize the introduction of sediment into waterbodies during construction and minimize the movement of spoil and sediment from surface runoff during and after construction.
	Dewatering activities would be conducted in accordance with applicable permits and Dakota Access' SWPPP, and ECP.
	All surface drainage contours and vegetation would be returned as closely as practical to preconstruction conditions.
	The potential for groundwater contamination would be avoided by implementing the protective measures set forth in the Project specific SPCCs prepared by the contractor and in Dakota Access' SPCC Plan (Appendix A).
	In the event of a leak, Dakota Access would work aggressively to isolate the source through the use of remote-controlled shut-off valves, initiate cleanup activities, and contact the appropriate federal and state authorities to coordinate leak containment and cleanup. Dakota Access proposes to meet or exceed all applicable regulations and requirements for pipeline design, construction, and operation.
	Construction workspace on the flowage easements has been selected based on an absence of wetlands within the Project area.
	Dakota Access is in the process of obtaining verification for use of NWP 12 for the crossings of both the Missouri River and Lake Oahe Section 10 waterbodies.

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Table 8-2 Summary of Environmental Impact Avoidance and Mitigation Measures	
Resource	Environmental Avoidance/Mitigation Measures
	The Project ECP and SWPPP specify several measures to protect wetlands and waterbodies from becoming polluted with fuels or other hazardous materials during construction. This plan prohibits the storage of fuel or other hazardous materials within 100 feet of a wetland or waterbody. The ECP also specifies that equipment must be refueled at least 100 feet from waterbodies unless, due to site-specific conditions, there is no practical alternative such as the proposed pumping intake structure located on the barge at the Missouri River Crossing. In that case, the contractor must implement site-specific protective measures and containment procedures described in the ECP. Contractors would be required to provide trained personnel, appropriate equipment, and materials to contain and clean up releases of fuel, lubricating oil, or hydraulic fluid that result from equipment failure or other circumstances.
	The Project has been designed in accordance with accepted floodplain management practices; no impacts to floodplain elevations or velocities are anticipated. Following construction, disturbed areas would be restored to pre-construction grades and contours as practical.
	If necessary, soil displaced by the installation of the 24-inch pipeline on the flowage easements would be removed from the floodplain and hauled to an upland location in order to ensure original floodplain elevations are restored.
	Remotely operated above-ground mainline valve sites would be installed on both sides of the Missouri River and Lake Oahe crossings for isolation in the event of an emergency shutdown.
	Dakota Access will identify an all-weather access and collection point downstream of both the Missouri River crossing and Lake Oahe crossing. At each location, Dakota Access will provide an equipment storage facility that includes a permanent storage area for winter and open water spill response equipment.
	Impacts to cultivated crops make up the majority of temporary impacts and would return to cultivated crops post-construction.
	Within areas disturbed by construction of the Project, and not being actively cultivated, including the flowage easement Project Area, Dakota Access would implement active revegetation measures and rapid colonization by annual and perennial herbaceous species to restore most vegetative cover within the first growing season.
	In areas that require permanent revegetation, Dakota Access would specify appropriate seed mixes, application rates, and seeding dates, taking into account recommendations of appropriate state and federal agencies and landowner requests.
	In non-agricultural areas, vegetation cleared from ATWS would be allowed to revegetate after construction depending on arrangements with the landowner.
	Temporary revegetation measures may also be implemented to quickly establish ground cover to minimize the potential for soil erosion and noxious weeds to establish. A temporary seed mix may be applied in these situations. The Project ECP (Appendix G) contains more details regarding temporary revegetation.

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Table 8-2 Summary of Environmental Impact Avoidance and Mitigation Measures	
Resource	Environmental Avoidance/Mitigation Measures
	When constructing in agricultural areas, a minimum of 1 foot of topsoil (organic layer) would be stripped from the trench line and stockpiled separately from trench spoil to preserve the native seed stock. The ECP contains additional details regarding topsoil segregation.
	At stream approaches, the contractor would leave a 20-foot buffer of undisturbed herbaceous vegetation on all stream banks during initial clearing, except where grading is needed for bridge installation or where restricted by applicable regulations and/or permit conditions.
	Dakota Access would work with County Weed Boards to ensure the Project ECP contains relevant and necessary mitigation measures that would be implemented to prevent the spread of noxious weed species during construction and operation of the Project.
	Herbaceous cover would be seeded on disturbed upland areas during restoration and it is expected that pre-existing herbaceous and shrub habitats would quickly reestablish themselves.
	In the unlikely event that a listed species is encountered on the Project at Corps owned lands during construction, construction activities would stop and the Corps would be contacted.
Wildlife Resources	Herbaceous cover would be seeded on disturbed upland areas during restoration and it is expected that pre-existing herbaceous and shrub habitats would quickly reestablish themselves.
	In the unlikely event that a listed species is encountered on the Project at Corps owned lands during construction, construction activities would stop and the Corps would be contacted.
	Installation and removal of the temporary waterline on the flowage easements are anticipated to be complete prior to nesting season; therefore, impacts on the interior least tern and piping plover are not anticipated. However, if the water withdrawal activities are not able to be completed prior to nesting season as expected, Dakota Access would conduct surveys prior to placement of the waterline to confirm the presence/absence of these species within the pipeline ROW. If these species are nesting within the Project Area, Dakota Access would postpone water withdrawal activities at the Missouri River until these species have left the area.
	Direct impacts on potentially suitable habitat for the interior least tern and piping plover at the Missouri River and Lake Oahe would be avoided by crossing the waterbodies via HDD.
	Lake Oahe would be crossed using a HDD construction method, avoiding impacts on potential migrating rufa red knot loafing habitat.
	Impacts on the pallid sturgeon or suitable habitat present within the Missouri River would be avoided by implementing the conditions on permitted intake structures outlined in the USACE's Regional Conditions for North Dakota applicable to NWP 12 (Utility Line Activities) and as described in the USFWS Recovery Plan for the Pallid Sturgeon.

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Dakota Access Pipeline Project

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Table 8-2 Summary of Environmental Impact Avoidance and Mitigation Measures	
Resource	Environmental Avoidance/Mitigation Measures
	Impacts on the pallid sturgeon or suitable habitat present within Lake Oahe would be avoided by crossing the lake via HDD.
Aquatic Resources	A successfully completed HDD crossing would avoid aquatic resource impacts to Lake Oahe since the pipeline would be installed without disturbing the aquatic and benthic environments.
	All construction equipment utilized on or in waters of the state would be subject to inspection by the Department in accordance with the North Dakota Administrative Code (Title 30, Article 3, Chapter 6-01). Further, Dakota Access would implement required measures including the removal of all aquatic vegetation from vessels, motors, trailers, or construction equipment. All water would be drained from bilges or confined spaces. All Aquatic Nuisance Species will be removed from equipment in accordance with the North Dakota Administrative Code (Title 30, Article 3, Chapter 6).
	All HDD operations conducted for the Missouri River and Lake Oahe crossings would adhere to the HDD Contingency Plan and applicable permit conditions to reduce the likelihood of an inadvertent release to minimize and mitigate environmental impacts. Dakota Access' construction contractor would ensure that the appropriate response personnel and containment equipment are available onsite to effectively implement the HDD Contingency Plan.
	Water withdrawal activities at the Missouri River would be conducted in accordance with all applicable permit conditions and regulations and in a manner that would not reduce water flow to a point that would impair flow or impact aquatic life.
	Intake screens and floats would also be utilized during the withdrawal of water from the Missouri River to prevent entrainment of aquatic life and avoid impacts on aquatic resources.
	The potential for impacts on aquatic resources associated with accidental fuel spills or leaks during the withdrawal of water from the Missouri River would be avoided or minimized by placing the pump within a secondary containment structure on the barge.
	For portions of the pipeline installed beneath the lake, the depth of the pipeline profile, the increased wall thickness of the pipe, the installation of remotely operated valves on both sides of the river crossing, monitoring of the system 24/7, aerial patrols, and in-line inspection, would further limit the potential for an inadvertent release into the river.
	Adherence to the GRPs for Lake Oahe and the Missouri River would minimize potential impacts on aquatic wildlife from potential spills during the operation of the pipeline.

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Table 8-2 Summary of Environmental Impact Avoidance and Mitigation Measures	
Resource	Environmental Avoidance/Mitigation Measures
	Conduct emergency response drills/exercises in accordance with the National Preparedness for Response Exercise Program (PREP) consisting of table top exercises and equipment deployment drills. Dakota Access has committed to additional full scale open water and full scale winter/ice exercises that will be conducted at Lake Sakakawea and Lake Oahe. A full scale exercise will occur once every 3 years (triennial cycle) with the location and type of exercise occurring on alternating schedules (e.g. open water exercise at Oahe the first triennial cycle, followed by winter exercise at Sakakawea the following triennial cycle, followed by a winter exercise at Oahe the following triennial cycle, etc.). Stakeholder (federal, state, local, and Tribal) involvement will be solicited for each exercise. The first exercise will occur within the first 3 years after the pipeline becomes operational.
	In the event of a leak, Dakota Access would work aggressively to contain the leak, initiate cleanup activities, and contact the appropriate authorities, including the Corps.
Land Use and Recreation	Mitigation measures to minimize impacts to soils, such as topsoil segregation and decompaction practices, would be fully implemented in accordance with the ECP and SWPPP.
	Dakota Access would coordinate with all landowners on acceptable methods for construction and restoration, including potential impacts to irrigated fields.
	Dakota Access would repair surface drains and drainage tiles disturbed during ROW preparation, construction, and maintenance activities.
	Dakota Access would repair or replace fences and gates removed or damaged as a result of ROW preparation, construction, or maintenance activities.
	Following construction and restoration, the work area would be restored and ranching would be allowed to continue over the operational ROW. Landowners would be compensated for temporary loss of land and lower yields. Grazing activities would return to normal after revegetation of the disturbed areas.
	Trees would be protected by Dakota Access in a manner compatible with the safe operation, maintenance, and inspection of the pipeline. Applicable regulations would be adhered to regarding tree and shrub removal from along the route.
	Dakota Access would obtain and comply with applicable state regulations, county permits, and zoning and land use regulations. Permits may include, but are not limited to, grade and fill permits, ditch crossing permits, road and utility permits, and conditional use permits. Dakota Access would retain one or more EIs to monitor compliance with environmental conditions of county permits.
Cultural and Historic Resources	In accordance with Section 106 of the NHPA, Dakota Access has made a good faith effort to identify significant historic properties within the Project area. Based on the result of these efforts, no properties consisted to be eligible, or potentially eligible for listing in the NRHP would be adversely impacted by the proposed Project or Connected Action.

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Table 8-2 Summary of Environmental Impact Avoidance and Mitigation Measures	
Resource	Environmental Avoidance/Mitigation Measures
	Impacts to the NRHP-eligible BTIS (site 32WI1367) would be avoided via HDD to ensure the integrity of construction design for these historic-age features is preserved.
	HDD workspaces, as well as staging and stringing areas, would be positioned in excess of 100 feet beyond the mapped boundaries of the previously recorded cultural sites in the vicinity of the Lake Oahe crossing.
	Dakota Access' UDP was developed (Appendix F) for use during all DAPL Project construction activities which describes actions that would be taken in the event of a previously unrecorded cultural resource site is discovered during construction activities. The UDP explicitly calls for work to stop until the correct authority or agency can be contacted and the find can be properly evaluated.
	The USACE will conduct archeological monitoring of construction for the HDD activities on both sides of Lake Oahe.
Social and Economic Conditions	No residential homes or farms would be relocated resulting from the proposed action.
	No demographic changes in the Census tracts affected are anticipated, because no permanent employees would be created as a result of the Proposed Action.
Hazardous Waste	In the unlikely event contamination is encountered during construction, the UDP (Appendix F) would be implemented to protect people and the environment and avoid or minimize any effects from unearthing the material.
	Any hazardous materials discovered, generated, or used during construction would be managed and disposed of in accordance with applicable local, tribal, state, and federal regulations. Should emergency response be required during construction, the contractor would have some of their own trained or contracted responders, and local response teams would be expected to assist.
	Dakota Access would comply with all applicable laws and regulations to abate or prevent pollution, such as the RCRA, and State hazardous waste management rules.
Reliability and Safety	All activities would be conducted in a safe manner in accordance with the standards specified in the OSHA regulations.
	To prevent pipeline failures resulting in inadvertent releases, Dakota Access would construct and maintain the pipeline to meet or exceed industry and governmental requirements and standards. Specifically, the steel pipe would meet PHMSA specifications under 49 CFR § 195, follow standards issued by the American Society of Mechanical Engineers, National Association for Corrosion Engineers and API.
	Dakota Access would maintain and inspect the pipeline in accordance with PHMSA regulations, industry codes and prudent pipeline operating protocols and techniques. The pipeline ROW would be patrolled and inspected by air every 10 days, weather permitting, but at least every three weeks and not less than 26 times per year, to check for abnormal conditions or dangerous activities, such as unauthorized excavation along the pipeline route.

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Table 8-2 Summary of Environmental Impact Avoidance and Mitigation Measures	
Resource	Environmental Avoidance/Mitigation Measures
	Dakota Access is currently drafting a FRP, in accordance with 49 CFR 194, which details the procedures to be implemented in the event of an inadvertent pipeline release and would be in place prior to commencing transportation of crude oil.
	Following completion of construction and throughout operation of the Project facilities, the Operator and qualified contractors would maintain emergency response equipment and personnel at strategic points along the pipeline route.
	Contracts would be in place with oil spill response companies that have the capability to mobilize to support cleanup and remediation efforts in the event of a pipeline release. The operator would also coordinate with local emergency responders in preventing and responding to any pipeline related problems.
	A SCADA system would be utilized to provide constant remote oversight of the Project facilities.
	A Computational Pipeline Monitoring System (CPM) would be utilized to monitor the pipeline for leaks.
	LeakWarn is being tailored to the Project facilities, in accordance with PHMSA requirements, to monitor the pipeline for leaks.
Air Quality and Noise	To reduce the emission of criteria pollutants, fuel-burning equipment running times would be kept to a minimum and engines would be properly maintained.
	Dakota Access would mitigate noise impacts by limiting equipment running times and the duration of Project construction to the minimum amount necessary to complete the Project. Noisy construction activities would typically be limited to the least noise-sensitive times of day (daytime).

9.0 LIST OF PREPARERS AND REVIEWERS

Dakota Access, in cooperation with the USACE Preparers, reviewers, consultants and Federal officials include the following:

Table 9-1 List of Preparers and Reviewers		
Name	Title/Office	Agency
Omaha District Planning Staff	Environmental Resource Specialist	Corps of Engineers, Omaha District
Omaha District Operations Staff	Natural Resource Specialist, Environmental Stewardship	Corps of Engineers, Omaha District
Garrison Project Archaeologist	Garrison Dam / Lake Sakakawea Project	Corps of Engineers, Omaha District
Bismarck Regulatory Chief	Operations Division	Corps of Engineers, Omaha District
Oahe Project Archaeologist	Oahe Dam and Lake Project	Corps of Engineers, Omaha District
Omaha District Operations Branch Chief	Operations Division	Corps of Engineers, Omaha District
Omaha District Project Engineer	Flood Risk and Floodplain Management Section	Corps of Engineers, Omaha District
Garrison Project Staff	Garrison Dam	Corps of Engineers, Omaha District
Omaha District Planning Chief	Planning Branch	Corps of Engineers, Omaha District
Garrison Operations Project Manager	Garrison Dam / Lake Sakakawea Project	Corps of Engineers, Omaha District
Omaha District Real Estate Branch Chief	Real Estate Division	Corps of Engineers, Omaha District
Omaha District Cultural Resources	Planning Branch	Corps of Engineers, Omaha District
Oahe Project Staff	Oahe Dam	Corps of Engineers, Omaha District
Oahe Project Operation Project Manager	Operations Division	Corps of Engineers, Omaha District
Omaha District Geotechnical Engineers	Geotechnical Branch	Corps of Engineers, Omaha District
Omaha District Attorney	Office of Counsel	Corps of Engineers, Omaha District
Omaha District Regulatory Staff	Operations Division	Corps of Engineers, Omaha District
Monica Howard	Director Environmental Sciences	Dakota Access, LLC
Jonathan Fredland	Environmental Specialist	Perennial Environmental Services, LLC
Ashley Thompson	Environmental Specialist	Perennial Environmental Services, LLC

Table 9-1 List of Preparers and Reviewers		
Name	Title/Office	Agency
Dennis Woods	Managing Partner	Perennial Environmental Services, LLC

10.0 ACRONYMS, INITIALS, AND ABBREVIATIONS

ANSI	American National Standards Institute
API	American Petroleum Institute
ATWS	Additional Temporary Workspace
BMP	Best Management Practice
bpd	barrels per day
BTIS	Buford-Trenton Irrigation System
CAA	Clean Air Act
CERCLA	Comprehensive Environmental Response Compensation and Liability Act
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
Corps	U.S. Army Corps of Engineers
Company	Energy Transfer Company
CWA	Clean Water Act
DA	Department of the Army
dB	Decibels
Dakota Access	Dakota Access, LLC
DAPL Project	Dakota Access Pipeline Project
DOT	Department of Transportation
EA	Environmental Assessment
ECP	Environmental Construction Plan
ECD	Erosion Control Device
EI	Environmental Inspector
EO	Executive Order
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act
FEMA	Federal Emergency Management Agency

FERC	Federal Energy Regulatory Commission
FIRM	Flood Insurance rate Maps
FRP	Facility Response Plan
FRFM	Flood Risk and Floodplain Management Section
g	gravitational acceleration
GIS	Geographic Information System
GRP	Geographical Response Plan
HDD	Horizontal Directional Drilling
MP	milepost
MSL	Mean Sea Level
NDPSC	North Dakota Public Service Commission
NDPDES	North Dakota Pollutant Discharge Elimination System
NDSHPO	North Dakota State Historic Preservation Office
NEPA	National Environmental Preservation Act
NFIP	National Flood Insurance Program
NHPA	National Historic Preservation Act
NLCD	National Land Cover Dataset
NPDES	National Pollutant Discharge Elimination System
NPS	U.S. National Park Service
NRCS	Natural Resources Conservation Service
NRHP	National Register of Historic Places
NRI	Nationwide Rivers Inventory
NSF	National Science Foundation
NWI	National Wetland Inventory
NWP	Nationwide Permit
OSHA	Occupational Safety and Health Administration
OSRO	Oil Spill Response Organization

PA	Programmatic Agreement
PEM	Palustrine Emergent
PFO	Palustrine Forested
PHMSA	Pipeline and Hazardous Materials Safety Administration
PREP	National Preparedness for Response Exercise Program
Project Area	Areas that are potentially impacted by construction and/or operation of the Proposed Action
Proposed Action	Crossing of federal flowage easements near the upper end of Lake Sakakawea north of the Missouri River in Williams County, North Dakota and federally owned lands at Lake Oahe in Morton and Emmons counties, North Dakota
RCRA	Resource Conservation and Recovery Act
RHA	Rivers and Harbors Act
ROW	Right-of-Way
SPCC	Spill Prevention, Control and Countermeasure Plan
SWPPP	Stormwater Pollution Prevention Plan
THPO	Tribal Historic Preservation Office
UDP	Unanticipated Discoveries Plan Cultural Resources, Human Remains, Paleontological Resources and Contaminated Media
USACE	U.S. Army Corps of Engineers
USDA	U.S. Department of Agriculture
USFWS	U.S. Fish and Wildlife Service
USGS	U.S. Geological Survey
WMA	Wildlife Management Area

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12.0 FIGURES

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- Figure 6:** Natural Resources—Flowage Easements
- Figure 7:** Natural Resources—Federal Lands
- Figure 8:** Cultural Resources—Flowage Easements
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- Figure 10:** Land Cover—Flowage Easements
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- Figure 14:** HDD Cross Section—Missouri River Crossing
- Figure 15:** HDD Cross Section—Lake Oahe Crossing
- Figure 16:** Whooping Crane—Central Flyway



— Proposed DAPL Centerline

0 40
Miles



DAKOTA ACCESS, LLC

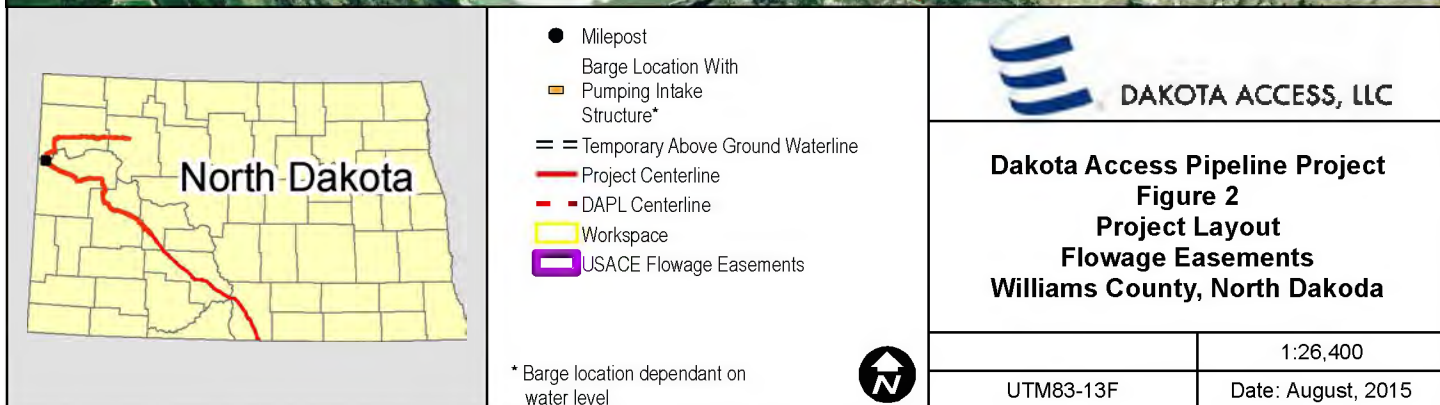
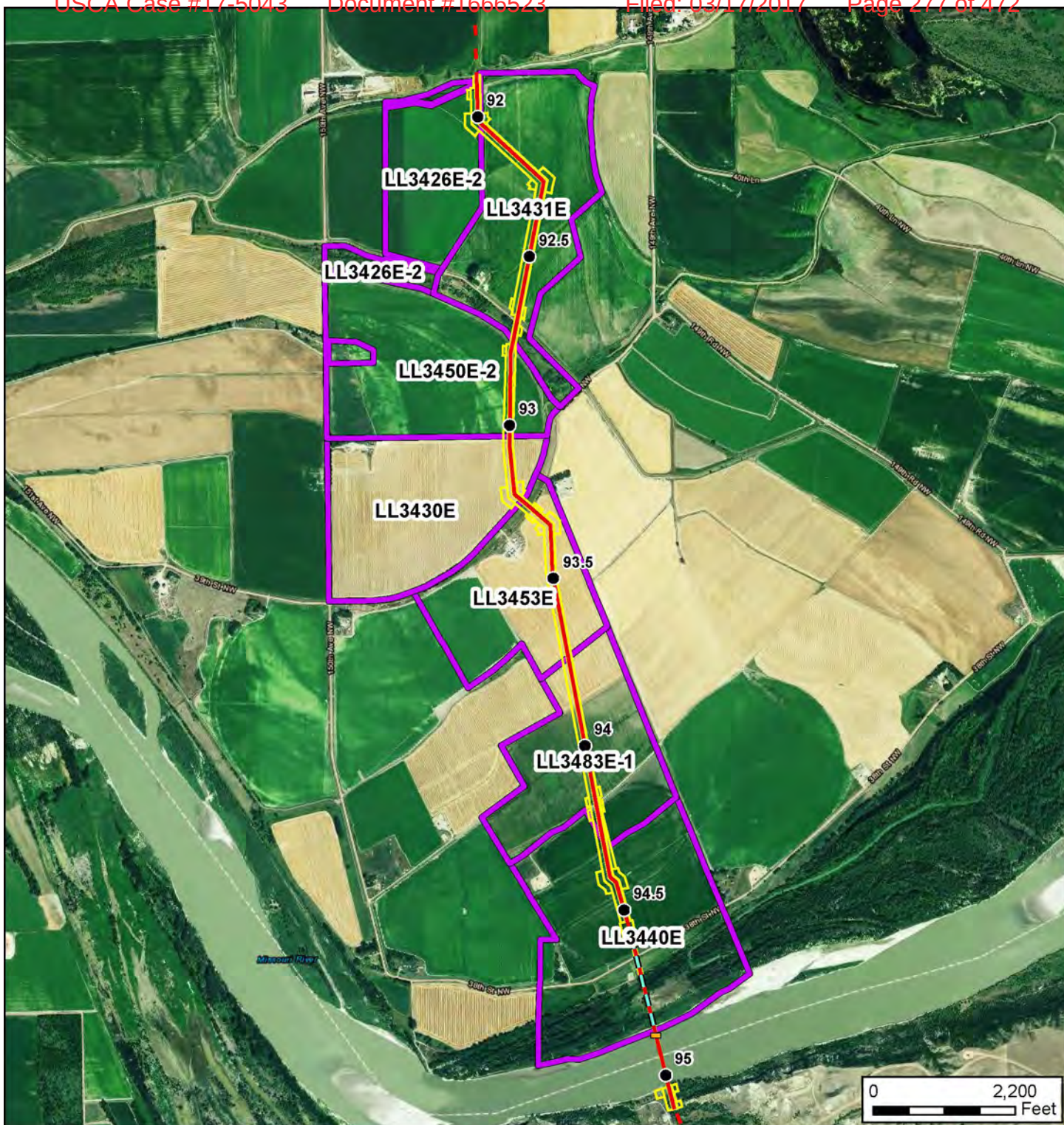
**Dakota Access Pipeline Project
Figure 1
Project Location
Federal Lands and Flowage Easements**

UTM 83-14F

1:2,534,400

Date: April, 2015

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Source: ArcGIS Online Mapping



Path: P:\GIS\Client\ETC_EnergyTransfer\DakotaAccess_DAPL\Maps\ENV\ND_FlowEasements\02ND_FlowEasement_Layout.mxd



- Milepost
- Project Centerline
- - - DAPL Centerline
- Workspace
- USACE Federal Lands
- Standing Rock Sioux Reservation

0 1,750
Feet



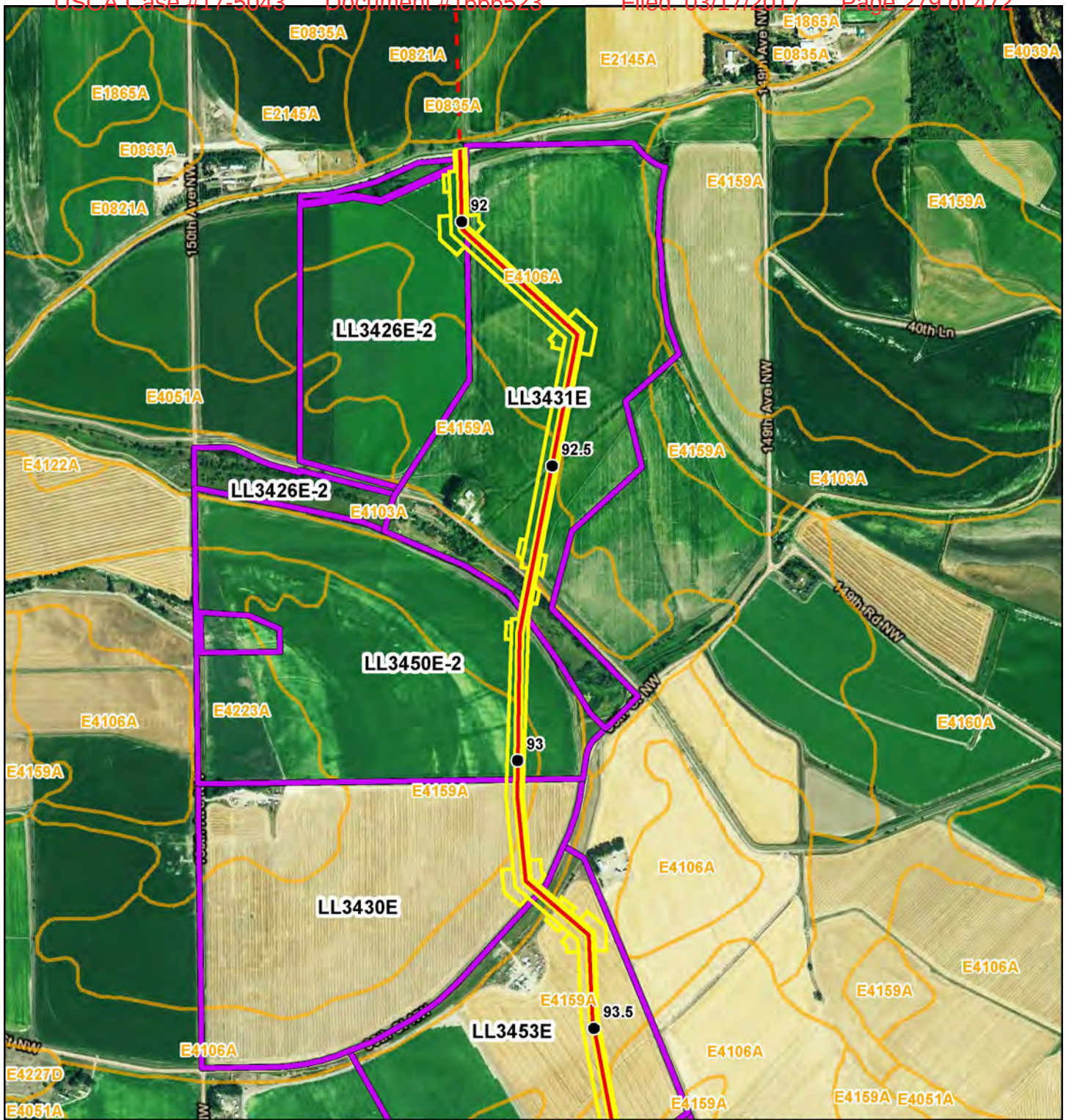
DAKOTA ACCESS, LLC

**Dakota Access Pipeline Project
Figure 3
Project Layout
Federal Lands
Morton County and
Emmons County, North Dakota**

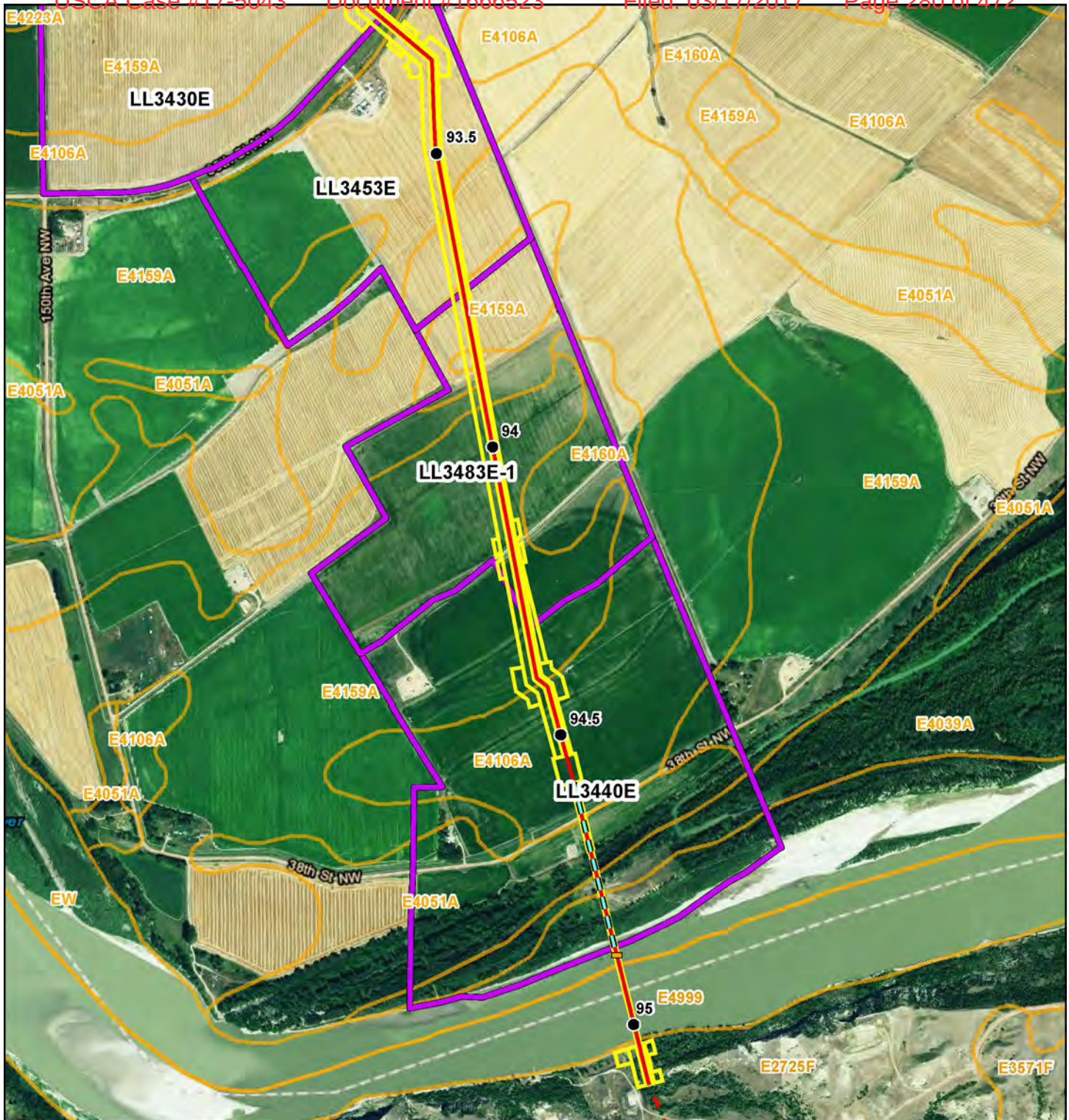
UTM 83-14F

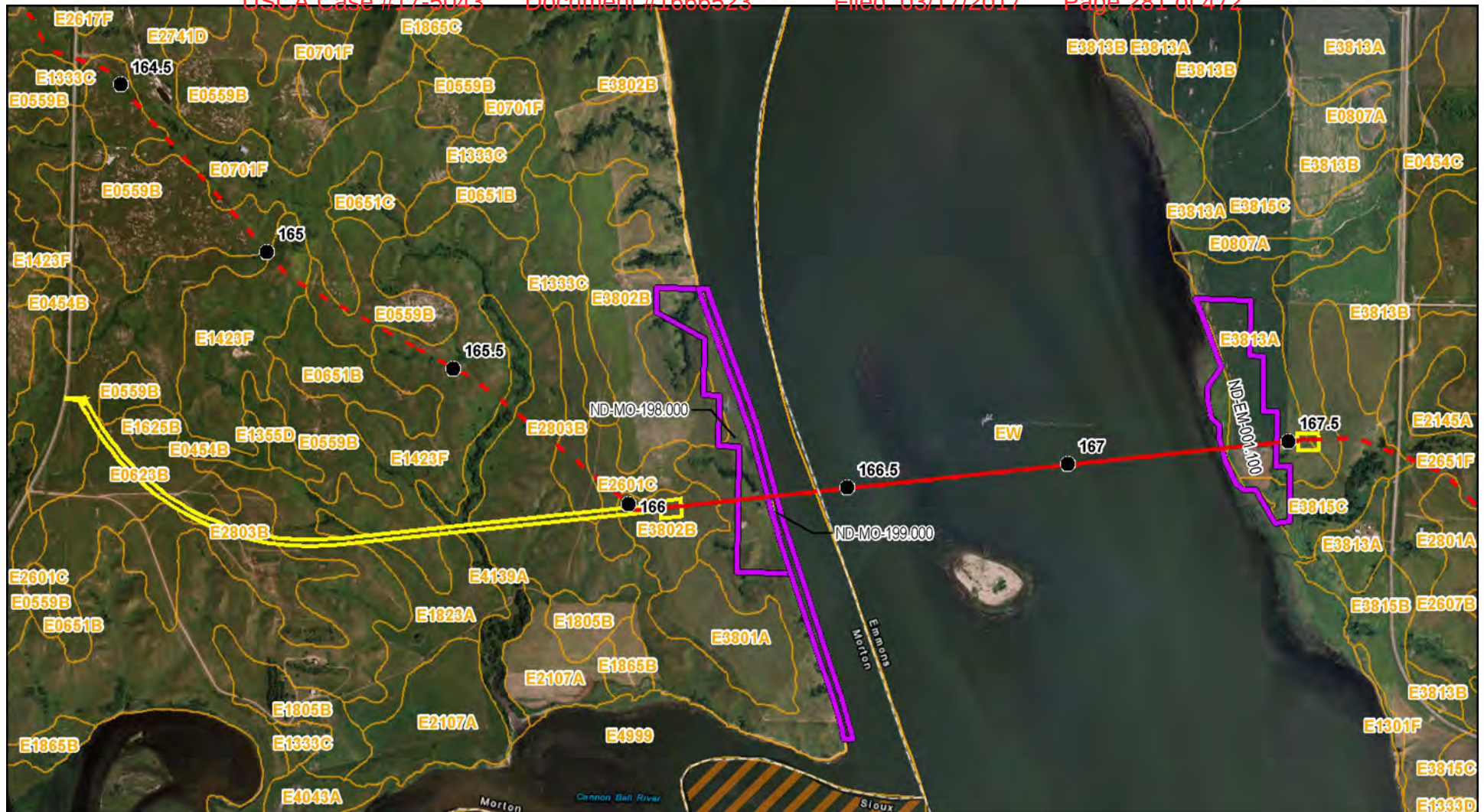
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Date: February, 2016



North Dakota	● Milepost — Project Centerline - - DAPL Centerline □ Workspace ■ USACE Flowage Easements ■ NRCS Soil 0 1,200 Feet	DAKOTA ACCESS, LLC	
		Dakota Access Pipeline Project Figure 4-A Soils Flowage Easements Williams County, North Dakota	
		Page 1 of 2 UTM83-13F	1:15,000 Date: August, 2015





- Milepost
- Project Centerline
- - DAPL Centerline
- Workspace
- USACE Federal Lands
- NRCS Soils
- Standing Rock Sioux Reservation

0 1,750
Feet



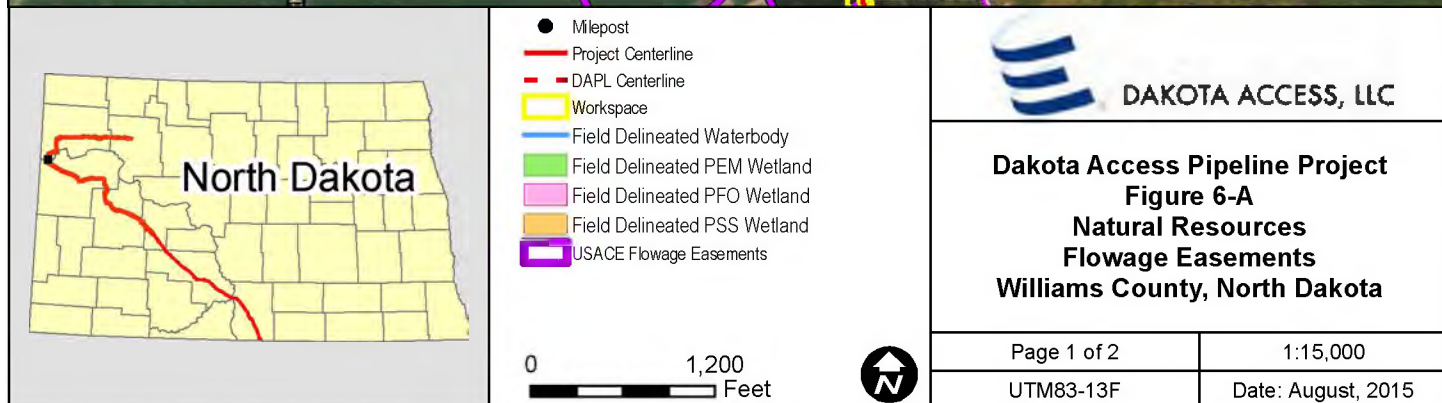
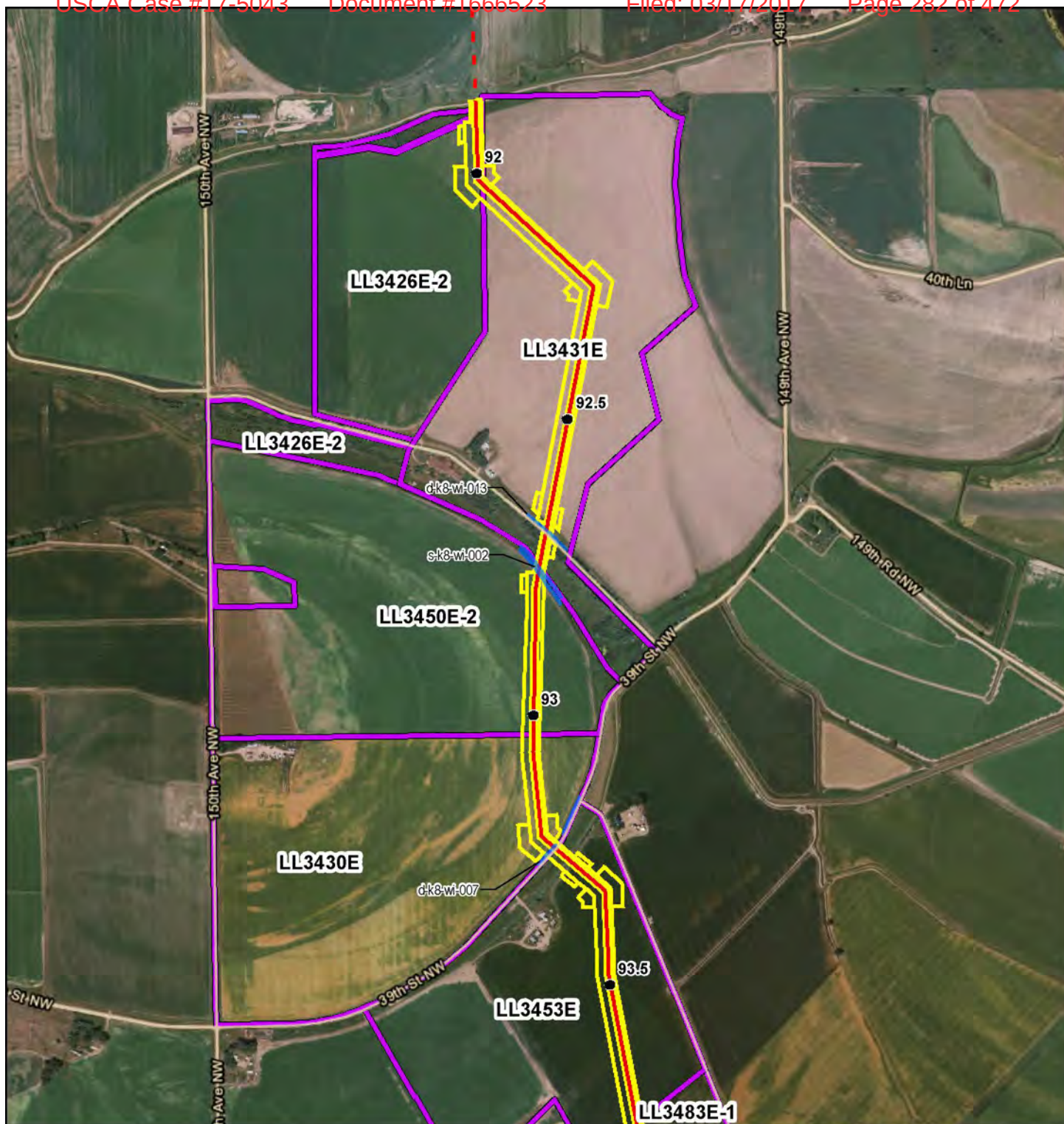
DAKOTA ACCESS, LLC

**Dakota Access Pipeline Project
Figure 5
Soils
Federal Lands
Morton County and
Emmons County, North Dakota**

UTM 83-14F

1:21,000

Date: February, 2016



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USACE_DAPL0071370



- Milepost
- Barge Location With Pumping Intake Structure
- Project Centerline
- - - DAPL Centerline
- Temporary Above Ground Waterline
- Workspace
- Field Delineated Waterbody
- Field Delineated PEM Wetland
- Field Delineated PFO Wetland
- Field Delineated PSS Wetland
- USACE Flowage Easements

0 1,200 Feet



DAKOTA ACCESS, LLC

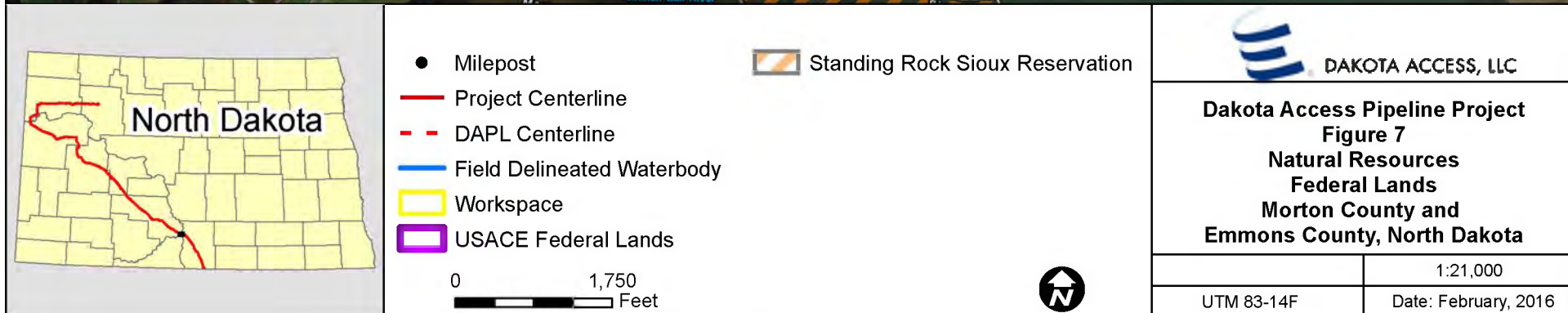
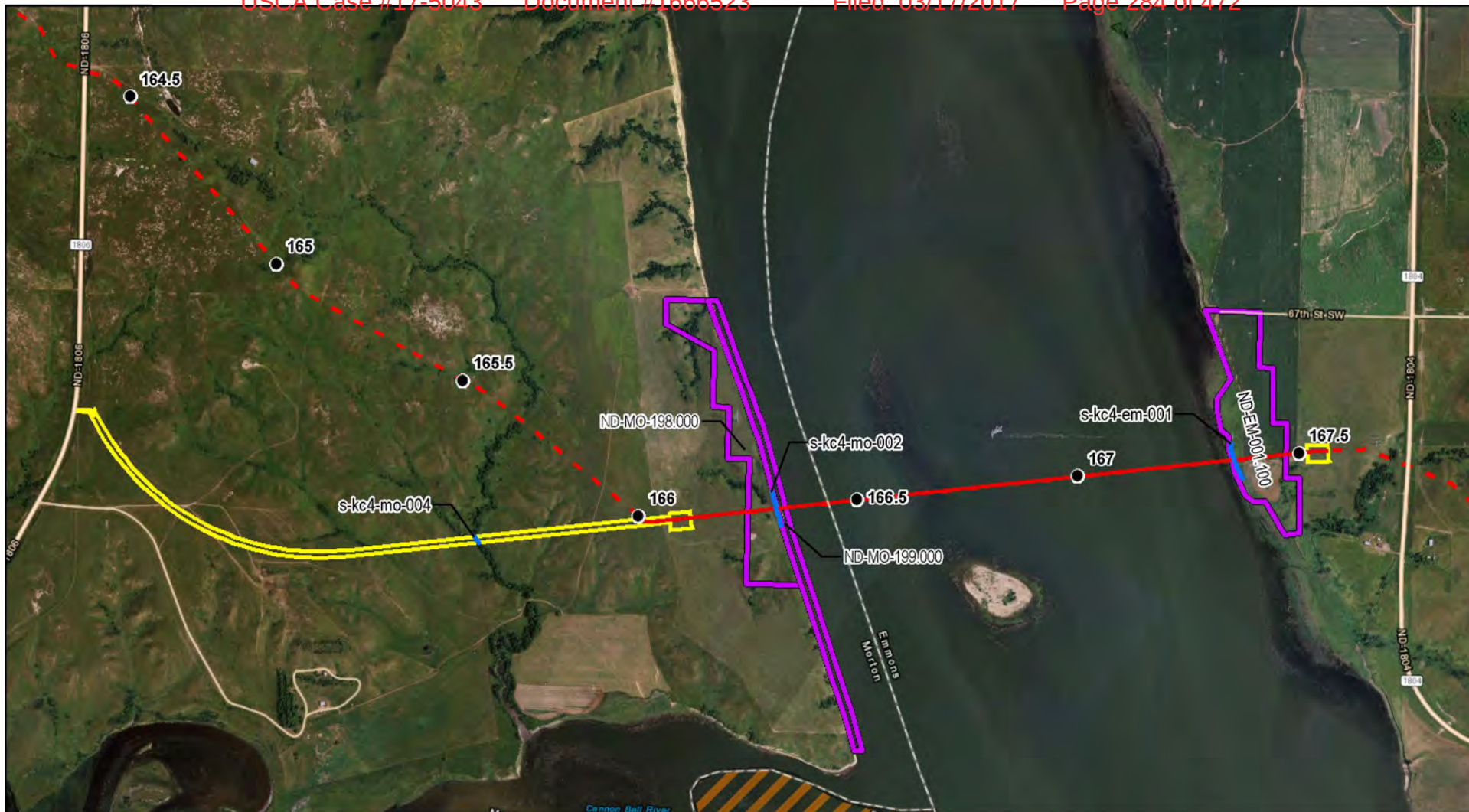
**Dakota Access Pipeline Project
 Figure 6-B
 Natural Resources
 Flowage Easements
 Williams County, North Dakota**

Page 2 of 2

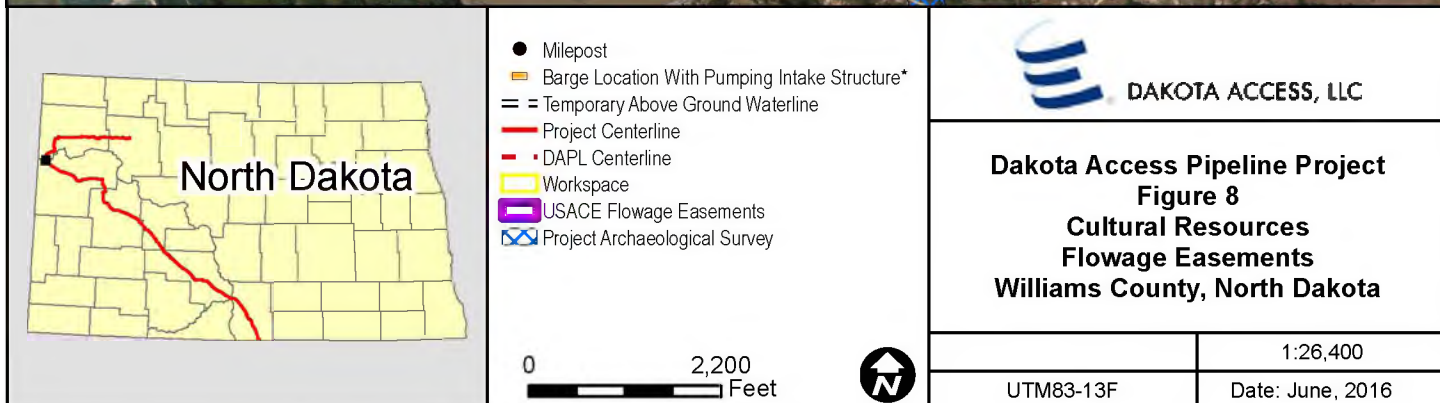
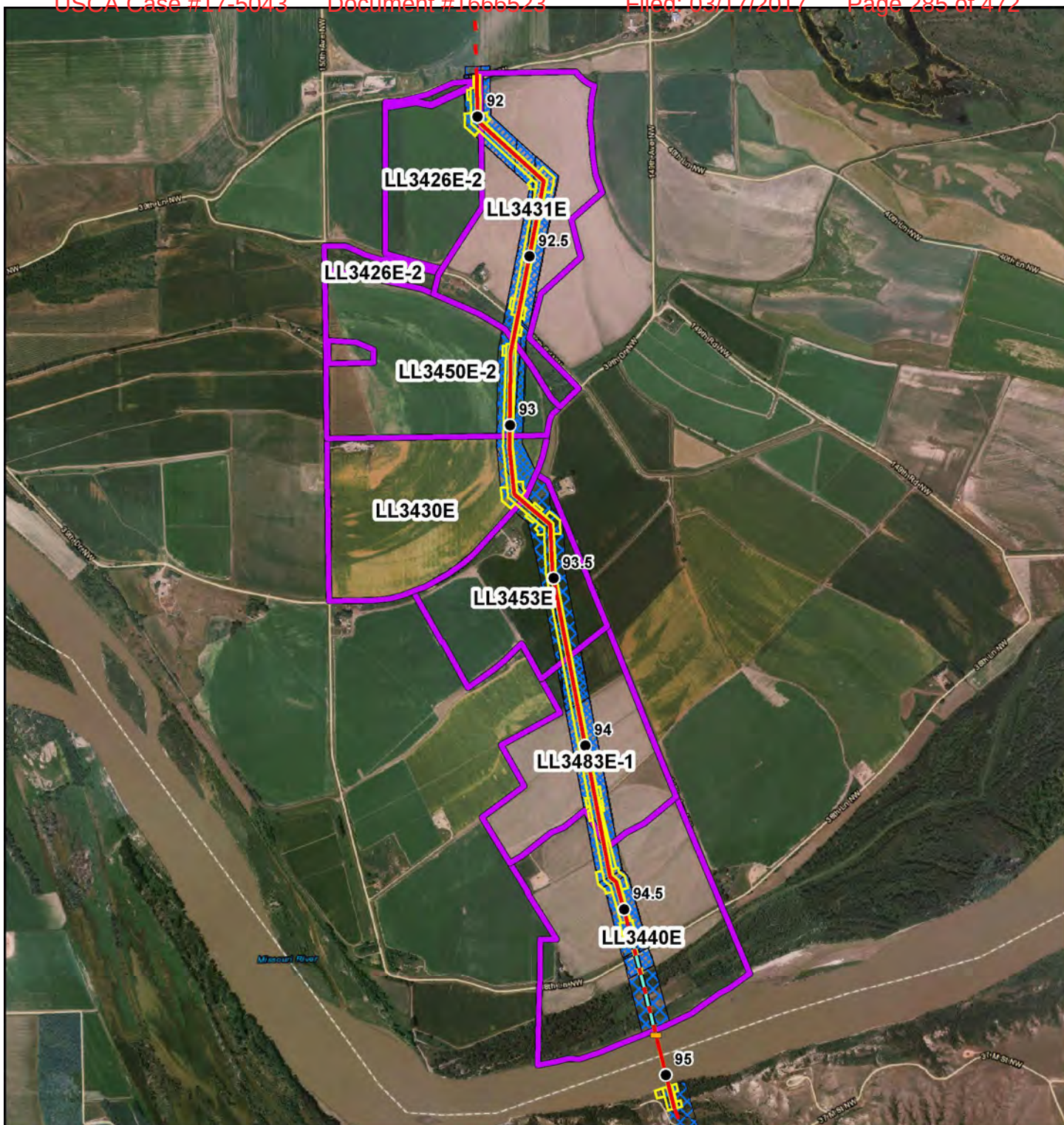
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Date: August, 2015

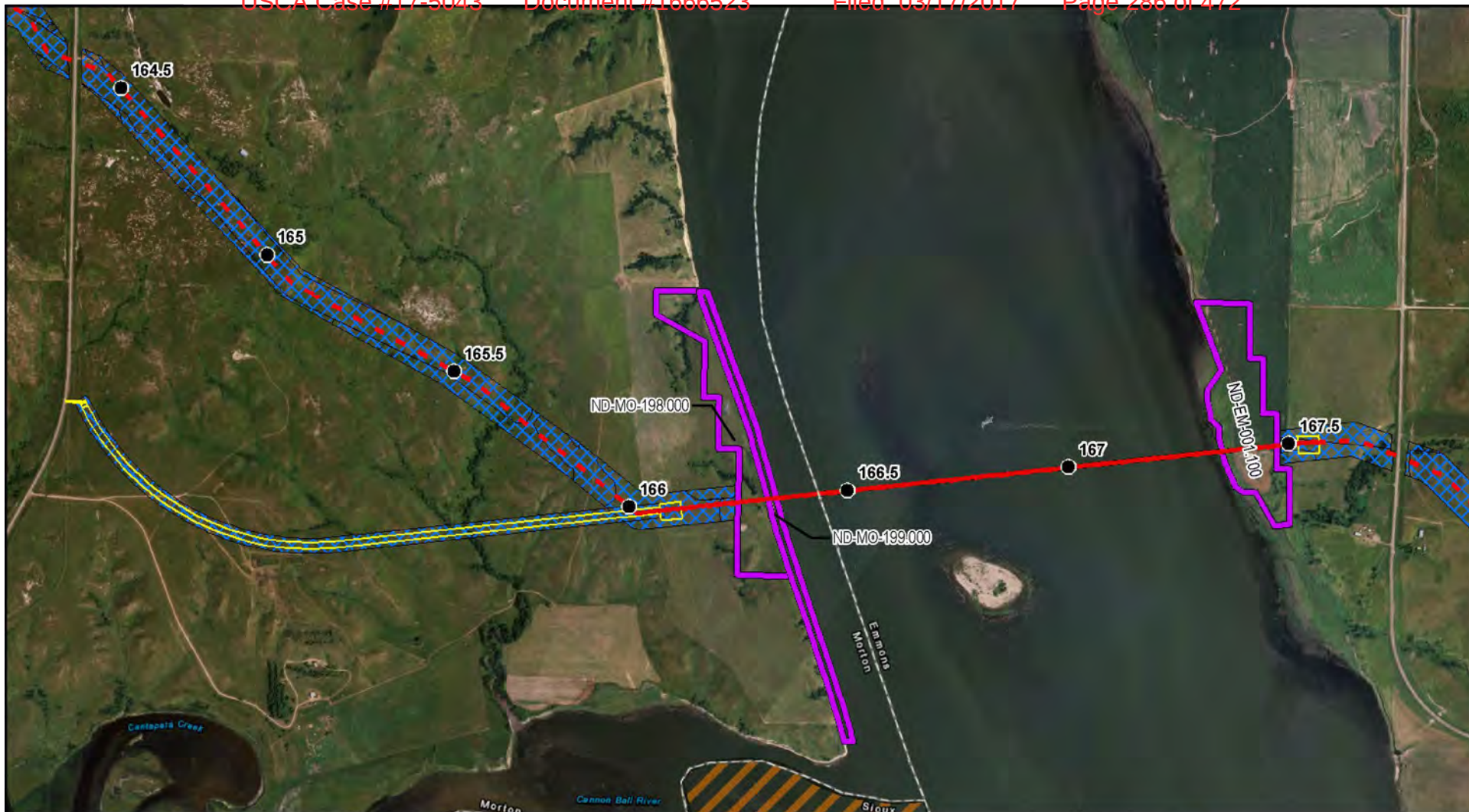


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USACE_DAPL0071373



- Milepost
- Project Centerline
- - DAPL Centerline
- ▭ USACE Federal Lands
- ▨ Project Archaeological Survey
- ▭ Workspace
- ▨ Standing Rock Sioux Reservation

0 1,750
Feet



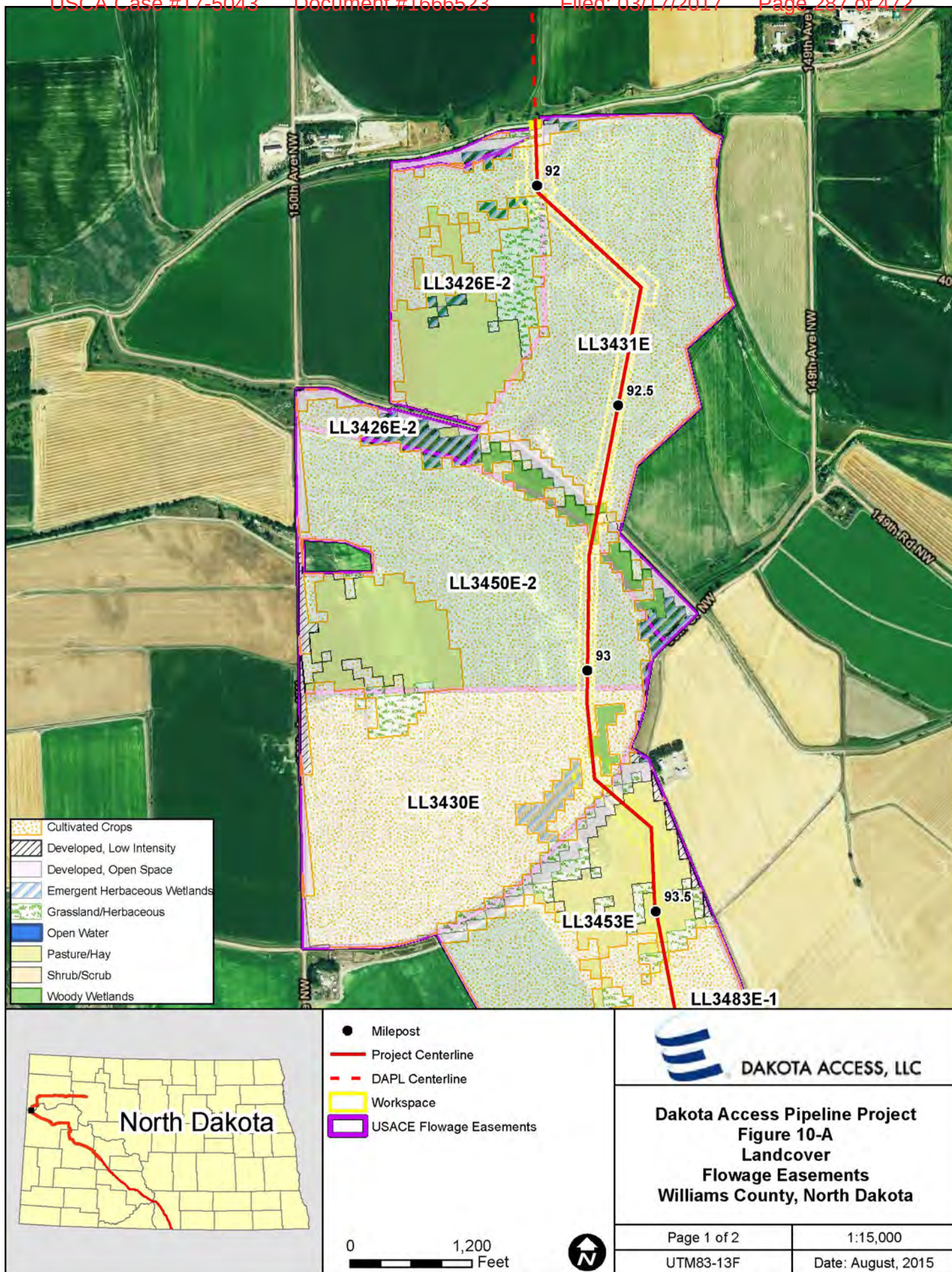
DAKOTA ACCESS, LLC

**Dakota Access Pipeline Project
Figure 9
Cultural Resources
Federal Lands
Morton County and
Emmons County, North Dakota**

UTM 83-14F

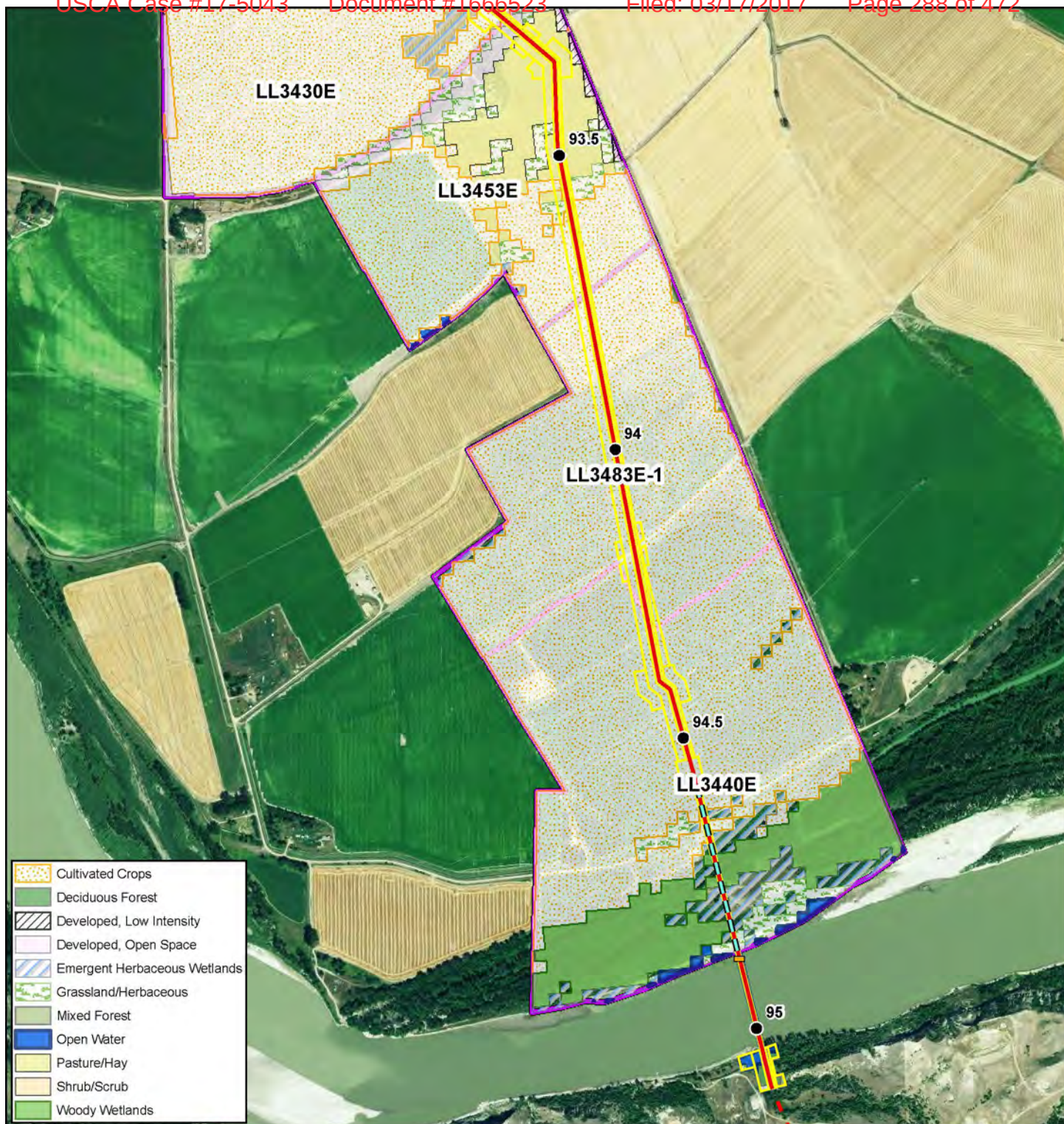
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Date: June, 2016



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USACE_DAPL0071375



- Barge Location With Pumping Intake Structure
- Milepost
- Temporary Above Ground Waterline
- Project Centerline
- DAPL Centerline
- Workspace
- USACE Flowage Easements

0 1,200 Feet



DAKOTA ACCESS, LLC

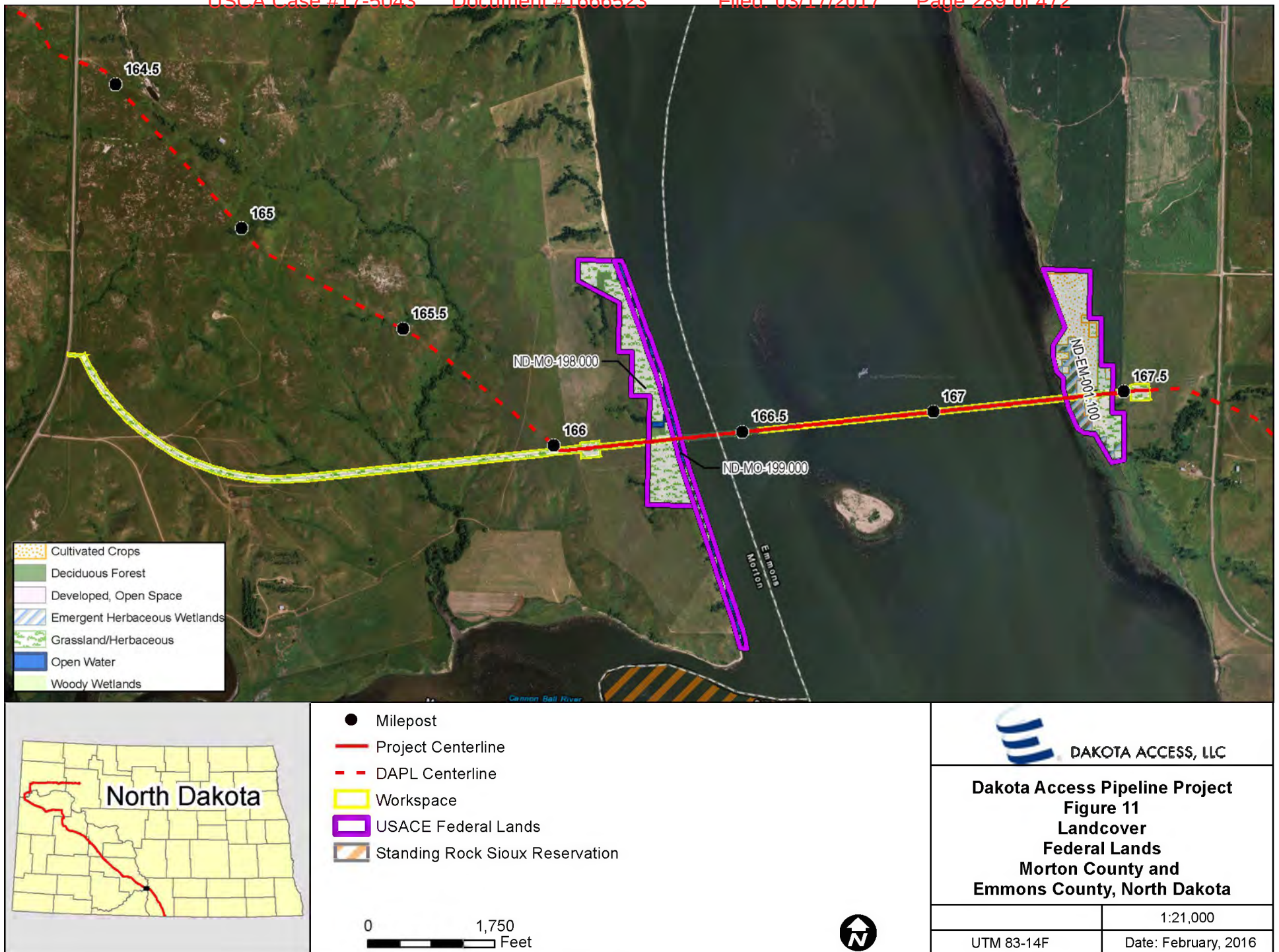
**Dakota Access Pipeline Project
 Figure 10-B
 Landcover
 Flowage Easements
 Williams County, North Dakota**

Page 2 of 2

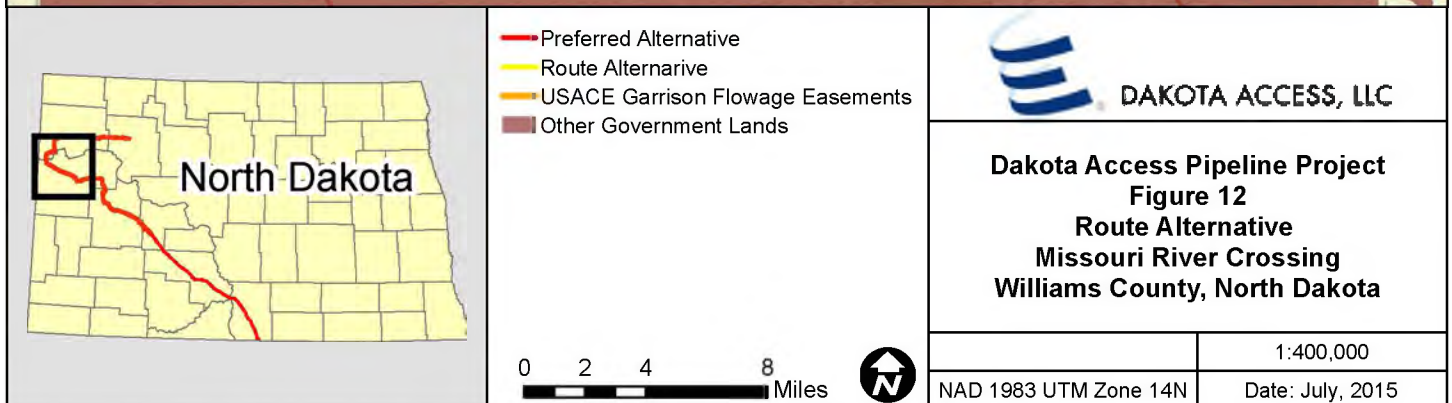
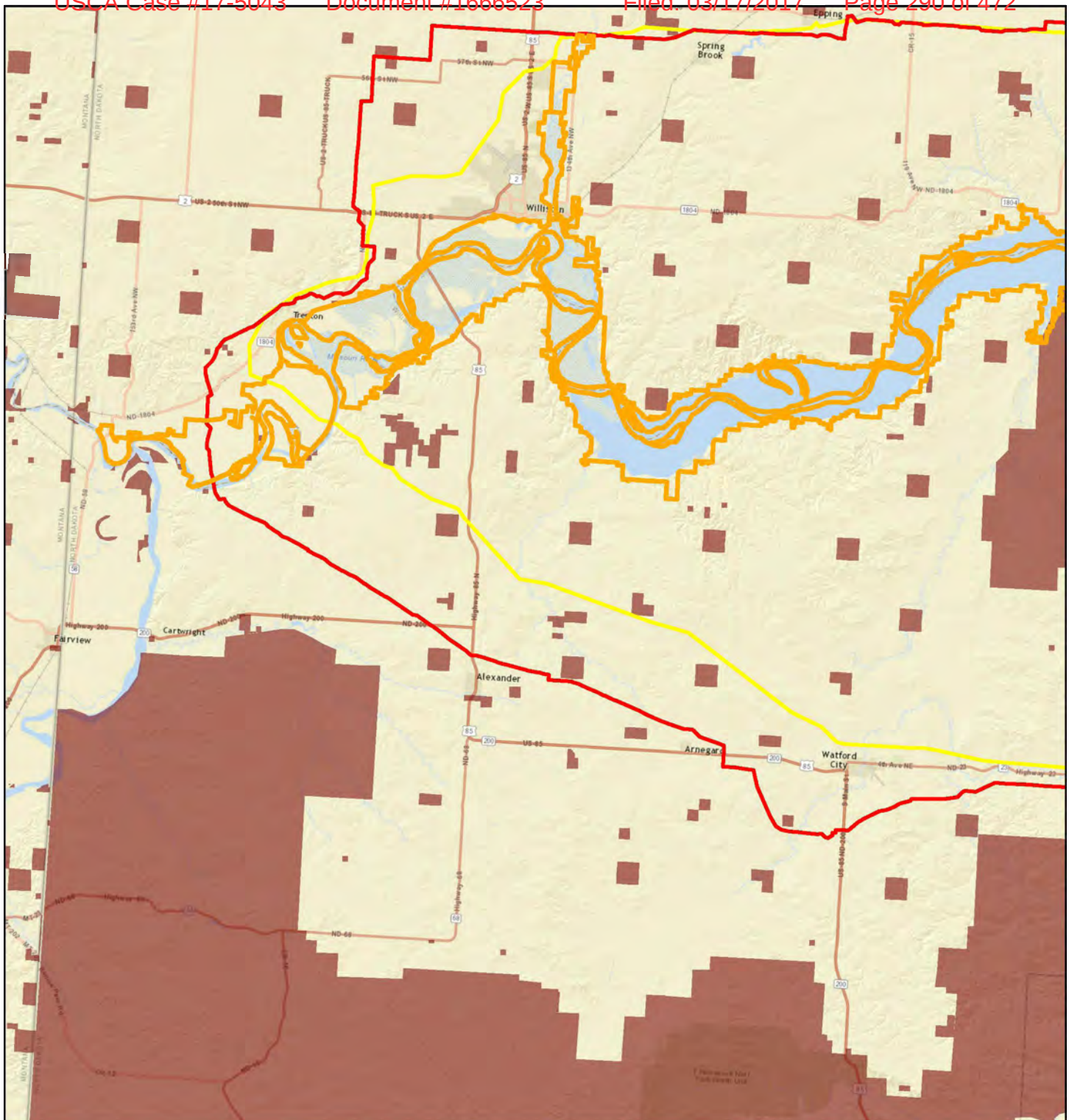
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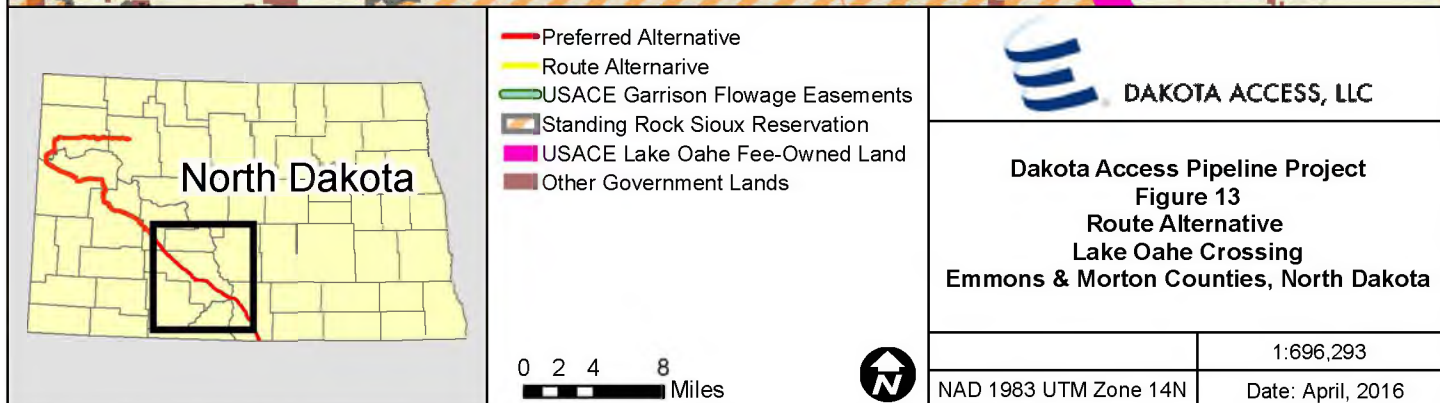
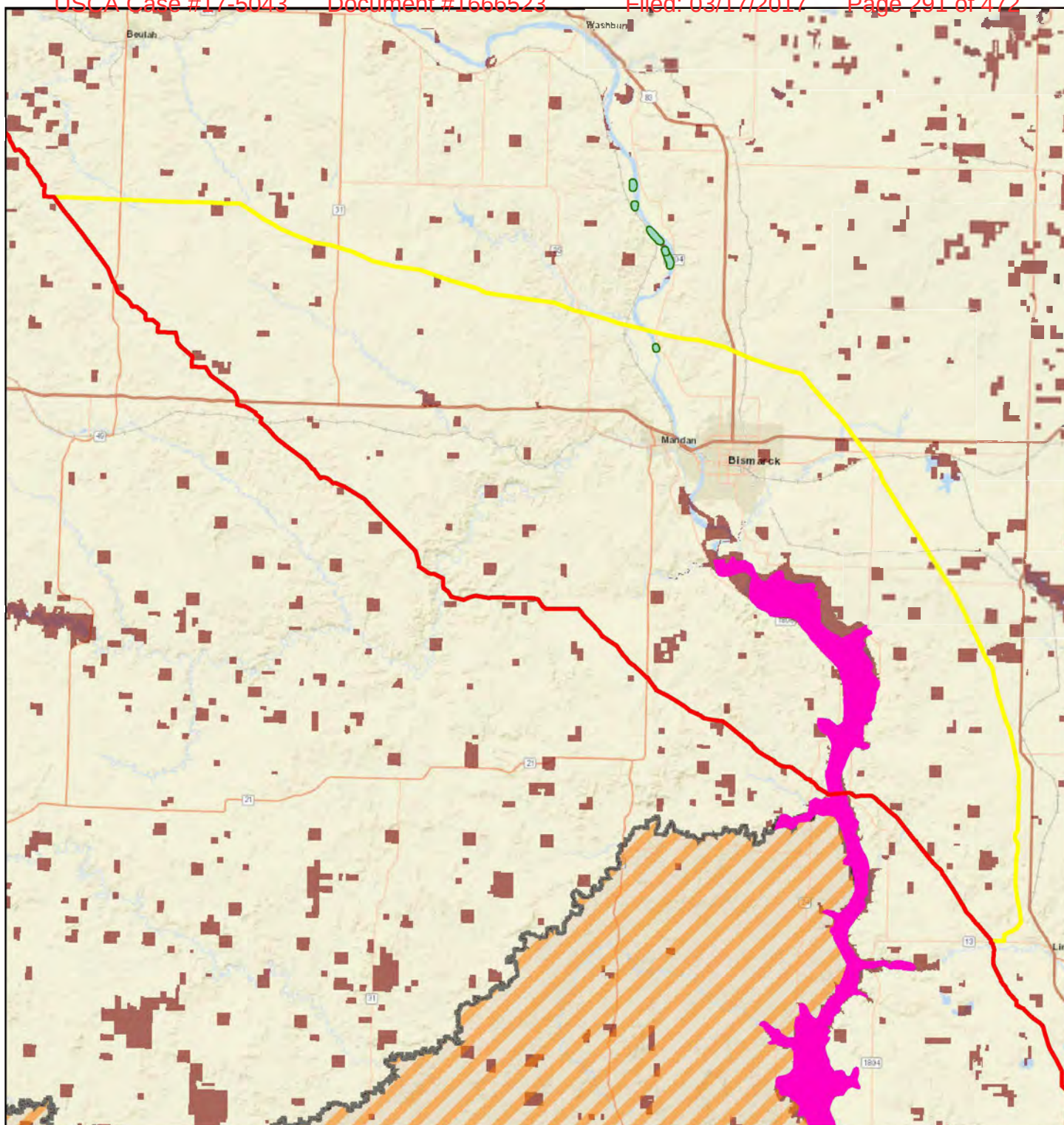
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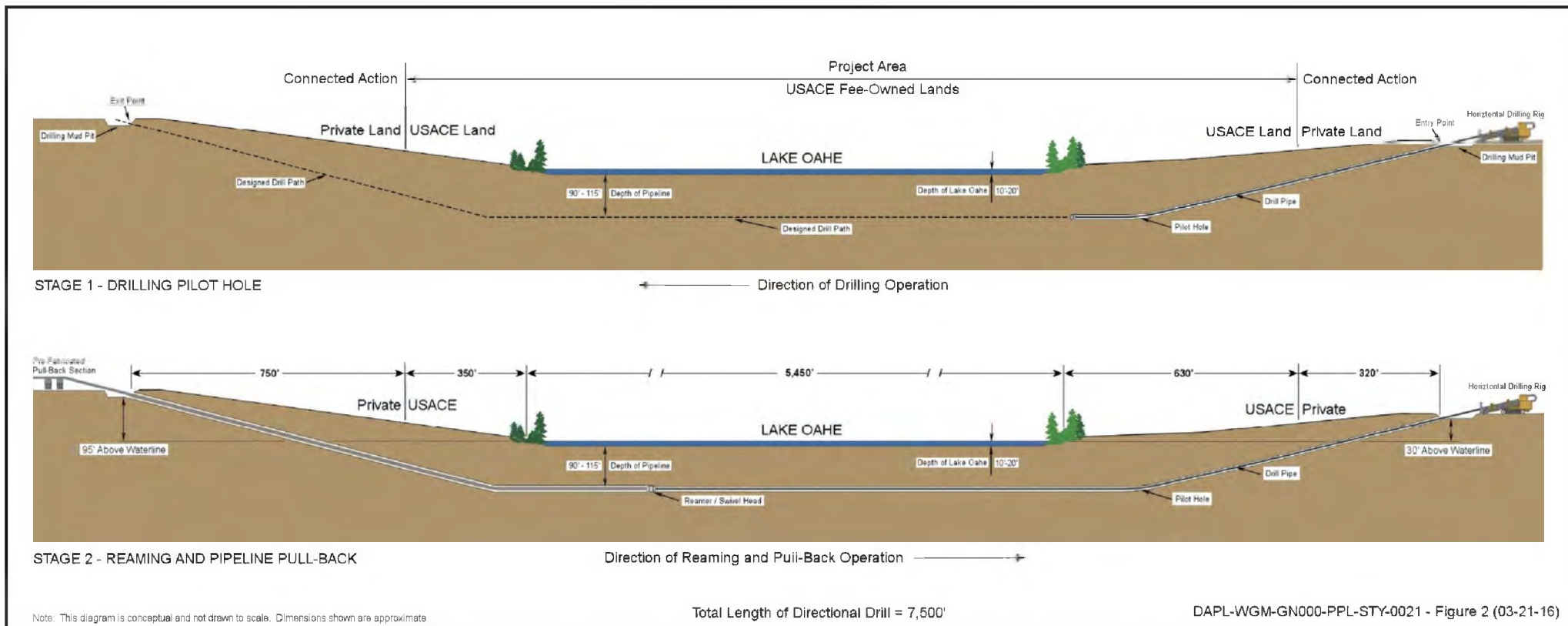


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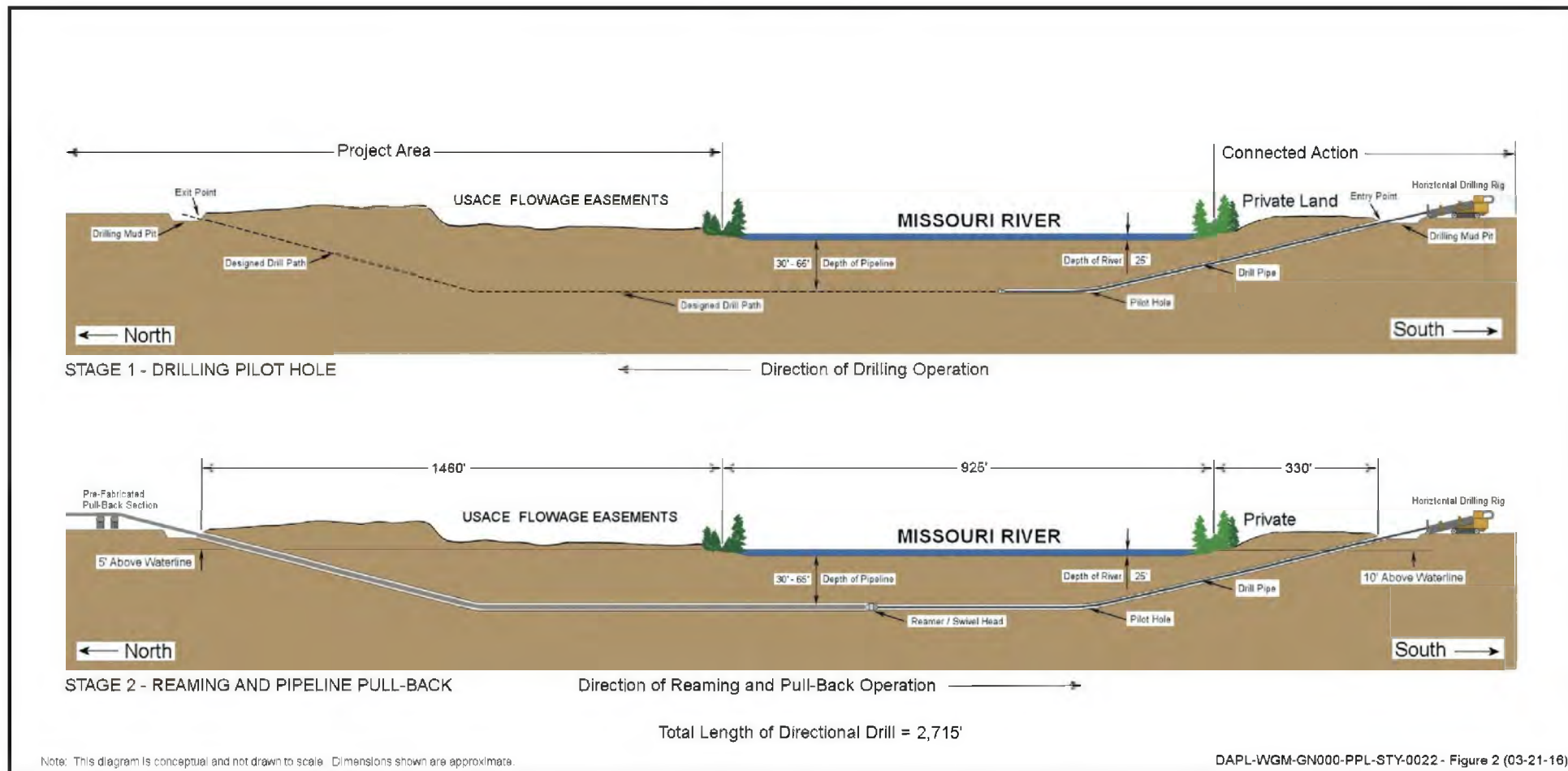
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FIGURE 14

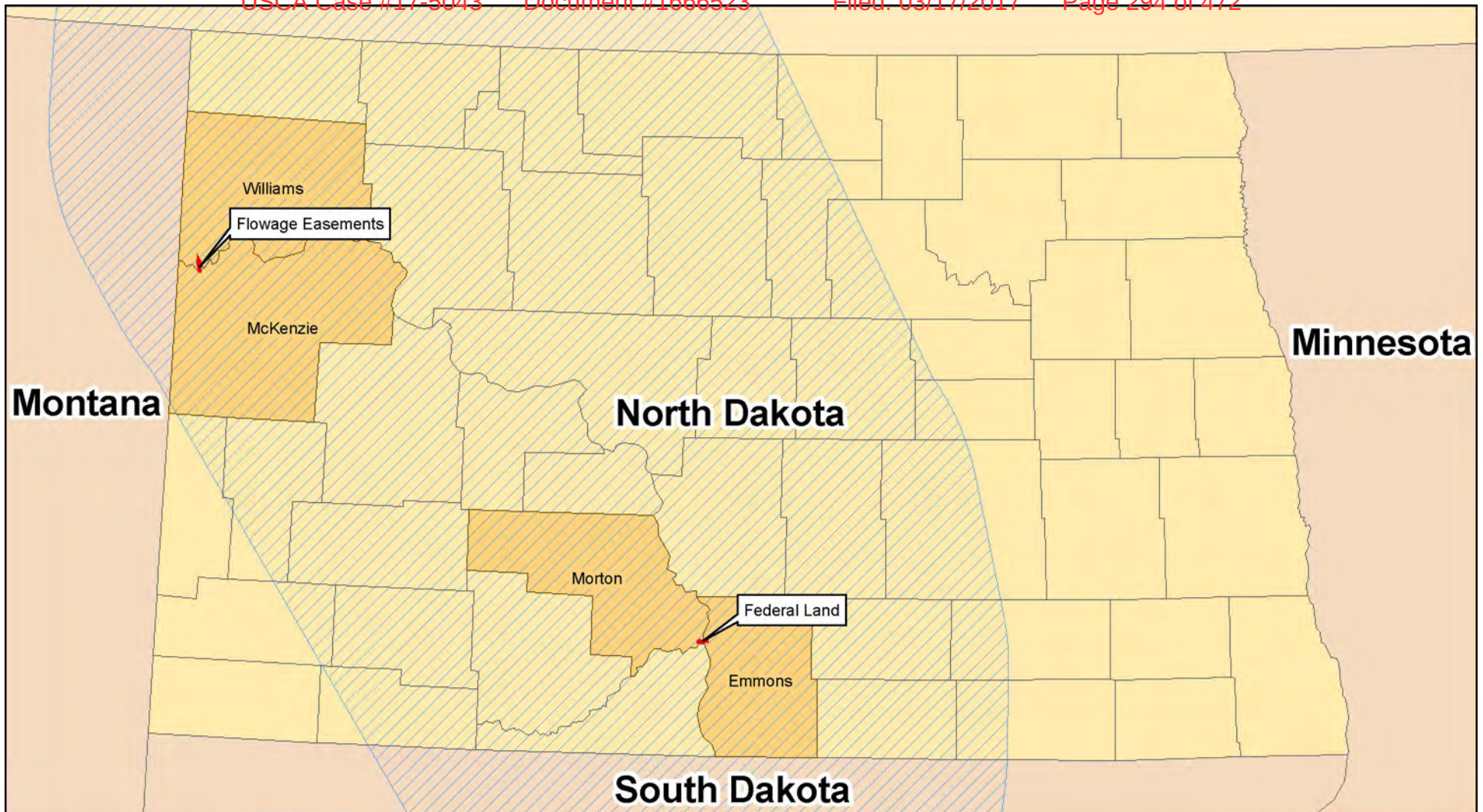


CROSS-SECTION DIAGRAM OF LAKE OAHE HDD CROSSING

FIGURE 15



CROSS-SECTION DIAGRAM OF MISSOURI RIVER HDD CROSSING



- DAPL Action Area
- Whooping Crane Migration Corridor

Whooping Crane Migration Corridor from Whooping Cranes & Wind Development - An Issue Paper By Regions 2 and 6, U. S. Fish and Wildlife Service April 2009 (Stehn, T, and T. Wassenich. 2008. Whooping crane collisions with power lines: an issue paper. 2006 North American Crane Workshop. In press.)

0 40
Miles



DAKOTA ACCESS, LLC

Figure 16
**Dakota Access Pipeline Project
 USACE ND Flowage Easement/408 Areas**

Whooping Crane Migration Corridor

UTM 83-14F

1:2,800,000

Date: March, 2016

EXHIBIT 5

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STANDING ROCK SIOUX TRIBE,

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant.

Case No. 1:16-cv-1534-JEB

CHEYENNE RIVER SIOUX TRIBE’S MOTION TO INTERVENE

The Cheyenne River Sioux Tribe (“Tribe”), a federally-recognized Indian tribe (81 Fed. Reg. 26826 (May 4, 2016)), by and through its undersigned counsel, hereby respectfully submits this Motion, the accompanying Memorandum of Points and Authorities, and Complaint in accordance with Local Rule 7(j), to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a)(2), or in the alternative, to intervene permissively pursuant to Federal Rule of Civil Procedure 24(b)(1)(B). The Tribe has contacted the Defendant U.S. Army Corps of Engineers, Intervenor-Defendant Dakota Access, LLP (“Dakota Access”), and Plaintiff Standing Rock Sioux Tribe. Dakota Access is the only party that opposes this motion.

Proposed Intervenor-Plaintiff is similarly situated to the Standing Rock Sioux Tribe, and states that if intervention is granted, it will participate in this action on the schedule that has been established for the existing parties, avoid unnecessary duplication of effort in areas satisfactorily addressed and represented by the existing Plaintiff to the extent possible, and coordinate proceedings with the existing parties to the extent possible.

The grounds for this motion, more fully set forth in the accompanying Memorandum of Points and Authorities, are briefly set forth below.

1. Plaintiff Standing Rock Sioux Tribe brought this action for declaratory and injunctive relief challenging federal permits granted by the Army Corps of Engineers to Dakota Access to construct a pipeline intended to transport crude oil from Stanley, North Dakota to Patoka, Illinois, through ancestral lands of the Cheyenne River Sioux Tribe containing Tribally significant and historical sites and under waters sacred to the Cheyenne River Sioux Tribe.
2. As set forth in detail herein, the Cheyenne River Sioux Tribe's Motion to Intervene as of right is warranted. First, this Motion is timely as it is filed a mere 14 days after the filing of the Plaintiff's Complaint, just five days after Intervenor-Defendant's successful motion to intervene, and before the filing of any Answer. Second, the Cheyenne River Sioux Tribe has a legally protected interest in this litigation in light of the fact that the construction site that is the primary subject of this litigation is on ancestral lands of the Cheyenne River Sioux Tribe such that the Army Corps of Engineers had an obligation to consult with the Tribe prior to granting permits under § 106 of the National Historic Preservation Act, 54 U.S.C. § 306108. Moreover, the construction site is a mere 70 miles upstream of the Tribe's existing lands. Third, an unfavorable disposition of the present case has the potential to threaten or impair the Tribe's interest as it would permit Dakota Access to cause potential harm both to culturally significant sites and the waters on which the Tribe relies for its health, well-being, and culture. Finally, the Plaintiffs Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe are wholly separate sovereign Indian nations with the potential for their interests to diverge such that the Standing Rock Sioux Tribe cannot adequately represent the Tribe's interest.
3. In the alternative, the Tribe submits that permissive intervention pursuant to Rule 24(b)(1)(B) is warranted. First, an independent basis for subject matter jurisdiction exists in light of the fact that the U.S. Army Corps of Engineers had an independent duty under the National

Historic Preservation Act to consult with the Cheyenne River Sioux Tribe, and the Tribe has an independent interest in the safety of the waters under which the pipeline is scheduled to be constructed. Furthermore, jurisdiction exists pursuant to 28 U.S.C. § 1362, which states “district courts shall have original jurisdiction of all civil actions, brought by any Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.” Second, this Motion is timely, having been filed during the infancy of this litigation. Finally, there is no risk of delay or prejudice as the Tribe does not propose to add any new claims.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Memorandum of Points and Authorities below, the Cheyenne River Sioux Tribe respectfully requests to be granted leave to intervene as of right under Federal Rule of Civil Procedure 24(a)(2). In the Alternative, the Tribe requests to be granted permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(1)(B).

Respectfully submitted this 10th day of August, 2016

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STANDING ROCK SIOUX TRIBE,

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant.

Case No. 1:16-cv-1534-JEB

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO INTERVENE**

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MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW the Cheyenne River Sioux Tribe (“Tribe”) and hereby submits its Memorandum in Support of Motion to Intervene pursuant to Fed. R. Civ. P. 24(a)(2).

INTRODUCTION

On July 25, 2016, the United States Army Corps of Engineers (“Corps”) issued multiple federal authorizations to Dakota Access, LLC (“Dakota Access”), an entity owned by Energy Transfer Partners, L.P., Sunoco Logistics Partners, L.P., and Phillips 66, that Dakota Access required to construct the proposed Dakota Access Pipeline (“DAPL”). ECF No. 7-1 at p. 2 n.1. One of these authorizations permits DAPL to construct the pipeline underneath Lake Oahe, a manmade reservoir created when the Corps inundated hundreds of thousands of acres of Cheyenne River Sioux Tribal lands during the 1950s by construction of the Oahe Dam. The particular permit at issue is known as PCN 4. The PCN 4 site is located on lands that are considered to be sacred by the Cheyenne River Sioux Tribe, on ancestral lands that were later ceded in a series of treaties with the United States and which are rife with culturally important archeological sites and the graves of the Tribe’s ancestors. The Tribe considers the waters of Lake Oahe to be sacred and relies upon them for its drinking water and the livelihoods of the Tribal people. PCN 4 permits Dakota Access to dig into these grounds and construct a tunnel that will carry crude oil under the waters. The Tribe considers the destruction of any of its spiritually and culturally significant ancestral lands and any discharges, whether deliberate or accidental, into the sacred waters of the Lake Oahe to be a desecration.

The Tribe further asserts that the Corps has failed to meet its legally required duty to consult with the Tribe regarding the impact of PCN 4 on its cultural and spiritual sites under § 106 the National Historic Preservation Act (“NHPA”), 54 U.S.C. § 306108, the Clean Water Act, 33 U.S.C.

§ 1344, and the Rivers and Harbors Act, 33 U.S.C. §§ 403, 408, and further that the Corps did not ensure proper environmental review under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, et seq. These are the claims that the Standing Rock Sioux Tribe has identified in its Complaint filed in this matter on July 27, 2016. ECF No. 1. The Cheyenne River Sioux Tribe does not intend to bring any additional claims. The Cheyenne River Sioux Tribe seeks intervention in this matter to protect its interests with respect to these powerfully important sacred sites.

FACTUAL BACKGROUND

The Cheyenne River Sioux Tribe is comprised of four of the seven bands of the Lakota¹ Tribe who reside on the Cheyenne River Sioux Indian Reservation in north-central South Dakota: the *Itazipco* or *Sans Arc* band, the *Siha Sapa* or Blackfoot band, the *Oohenumpa* or Two Kettle band, and the *Minnicoujou*. Declaration of Steve Vance (“Vance Decl.”) at ¶ 15. The Tribe has approximately 16,000 members, about half of whom presently reside on the Reservation. Declaration of Chairman Harold Frazier (“Frazier Decl.”) at ¶ 9. The Tribe and its four bands are successors to the Great Sioux Nation, with which the United States entered into the Fort Laramie Treaty of 1851, 11 Stat. 749, and the Fort Laramie Treaty of 1868, 15 Stat. 635. *See South Dakota v. Bourland*, 508 U.S. 679, 682 (1993); Vance Decl. at ¶ 14. Pursuant to these treaties, the Great Sioux Nation ceded its right to ancestral lands that included a vast territory spanning all of the Dakotas and much of Montana, Wyoming, and Nebraska. *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046, 1047 (Fed. Cir. 1986). In exchange, the United States reserved to the Great Sioux Nation for its “absolute and undisturbed use and occupation . . .” “a tract of land bounded

¹ Non-Indians and the United States have long referred to the Lakota, Dakota, and Nakota people (tribal peoples that share a similar language and culture) as “Sioux,” a word used by another tribe to refer to these people. *See* Cheyenne River Sioux History, <http://www.sioux.org/cheyenne-river-sioux-history.html> (last accessed Aug. 10, 2016). “Lakota” is used herein to describe the people of the seven bands of the Lakota Tribe, to which the people of the Cheyenne River Sioux and the Standing Rock Sioux Tribes belong.

on the east by the Missouri River, on the south by the northern border of the State of Nebraska, on the north by the forty-sixth parallel of north latitude, and on the west by the one hundred and fourth meridian of west longitude. . . .” *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980) (quoting 15 Stat. 635). In 1877, after gold had been discovered in the Black Hills within the Great Sioux Reservation and American prospectors entered the Tribe’s territory in violation of the Treaty, the United States abrogated the Treaty to validate the intrusion and further diminished the Great Sioux Nation’s lands. *Id.* at 382-84. The United States Supreme Court later held this abrogation to have been unlawful. *Id.* The present day exterior boundaries of the existing Cheyenne River Sioux Reservation were established by an additional diminishment effected by the Act of March 2, 1889, 25 Stat. 888. *Bouland*, 508 U.S. at 681. As the four bands of the Cheyenne River Sioux Tribe are a nomadic people who once ranged the vast territory described herein, the Tribe’s ancestral territory is not limited to the present day exterior boundaries. Vance Decl. at ¶¶ 23, 28.

The eastern boundary of the Cheyenne River Sioux Reservation is the Missouri River or *Mni Sose*. *Bouland*, 508 U.S. at 683. The Tribe has relied upon the waters of the Missouri River for its survival from time immemorial. Vance Decl. at ¶¶ 9, 16, 20; Declaration of Joye Braun (“Braun Decl.”) at ¶ 14. The very waters of the River are considered by the Tribe to be sacred, inviolable, and essential to the Lakota way of life. Vance Decl. at ¶ 17; Braun Decl. at ¶ 14. Today, the waters of the River are the major source of drinking water for the Tribe and are critical to agriculture and tourism, the primary industries on this Reservation, which encompasses what has been determined in recent studies to be the poorest county in the United States with more than

60% of the population living below the poverty line.² Frazier Decl. at ¶¶ 13-16. Significantly, before inundation, the Missouri River bottomlands provided game, timber, and shelter for the Tribe from time immemorial. And prior to establishment of the reservations and prior to the arrival of non-Indians in the American West, the Missouri River served as a kind of super highway for the Lakota people and other tribes to travel this country to trade with other tribes, attend spiritual gatherings, and follow game. Vance Decl. at ¶¶ 16, 20. Consequently, there are uncounted archeological and sacred sites along the banks of the Missouri, including the site of PCN 4 at the confluence of the Missouri and the Cannonball Rivers. *Id.* at ¶ 20.

PCN 4 is adjacent to the confluence of the Cannonball and Missouri Rivers. Braun Decl. at ¶ 8. The Cannonball River is so named because of the presence of a collection of unusual rocks at this site that are of critical spiritual significance to the Tribe. *Id.* at ¶ 10. Prior to the damming of the Missouri River, the confluence of the Cannonball and the Missouri Rivers created a kind of whirling hydrological feature that sucked in boulders being forced downstream in high currents, spun the boulders in an eddy until they were smooth and perfectly spherical, and deposited them on the bank. *Id.* The people of the Tribe pilgrimaged and worshiped there from time immemorial. *Id.* at ¶ 11. Community organizers that are members of the Tribe and who are currently occupying the site adjacent to PCN 4 in protest of the proposed pipeline report they have observed Lakota burial cairns, sundance grounds, and other culturally significant material in wide distribution around this area. *Id.* at ¶ 13. The sacred stone site at PCN 4 is of especially profound importance to the Tribe because it was spared from the massive deluge that occurred during the 1950s as a result of the Flood Control Act of 1944, ch. 665, 58 Stat. 877, in which the United States directed

² Mary Garrigan, *Ziebach County Still Poorest in America*, Rapid City J., Dec. 10, 2010, http://rapidcityjournal.com/news/ziebach-county-still-poorest-in-america/article_ed45bae-040a-11e0-92aa-001cc4c03286.html (last accessed Aug. 10, 2016).

Defendant Army Corps of Engineers to construct a series of dams and reservoirs on the Missouri River that destroyed over 550 square miles of Indian land alone—this figure excludes deluged lands in ancestral territories that went out of tribal ownership in the nineteenth century. Braun Decl. at ¶ 12; MICHAEL L. LAWSON, DAMMED INDIANS REVISITED 25 (2009). The Oahe Dam destroyed more Indian land than any other single public works project in the United States. LAWSON at 25. The Cheyenne River Sioux Tribe lost 104,420 acres to the deluge, including unfathomed archeological and sacred sites. *Id.* at 47; Vance Decl. at ¶ 19; Braun Decl. at ¶ 12.

On February 17, 2015, Steve Vance, Tribal Historic Preservation Officer for the Cheyenne River Sioux Tribe, received a letter from the Corps indicating that the Corps was currently evaluating 55 preconstruction notifications (“PCN”) pursuant to § 10 of the Rivers and Harbors Act (33 U.S.C. § 401, et seq.) and § 404 of the Clean Water Act (33 U.S.C. § 1344) from DAPL consultants permitting Dakota Access to begin construction of the DAPL project at issue here. The letter further advised that the Corps was the sole federal agency responsible for conducting consultation with interested tribes in accordance with Section 106 of the NHPA. Vance Decl. at ¶ 26, Ex. 1. The purpose of the Corps’ letter was to initiate Section 106 consultation and review, determine the Cheyenne River Sioux Tribe’s interest in consulting, and to gather information regarding historic properties. *Id.* However, since the issuance of the letter, the Corps has failed to engage in meaningful face-to-face government-to-government consultation with the Cheyenne River Sioux Tribe. Frazier Decl. at ¶ 21; Vance Decl. at ¶ 30.

Although the Corps made some overtures to the Cheyenne River Sioux Tribe to attend general public meetings, including public meetings held in May 2015 and December 2015, specific requests from the Tribe to engage in government-to-government consultation with the Tribe’s executive and legislative branches resulted only in a single meeting between Mr. Vance and

representatives of another federal agency in February of 2016. Vance Decl. at ¶ 27 Exs. 2 and 3; ¶ 32, ¶ 33 Ex. 3; Frazier Decl. at ¶¶ 17-21, Exs. 1-3. The Corps refused to attend any government-to-government consultation with the Tribe's Chairman and its Tribal Council as specifically and repeatedly requested by the Tribe between March 2015 and July 2016. Frazier Decl. at ¶¶ 17-21, Exs. 1-3. Significantly, Tribal officials who attended the public meetings felt that such meetings were not sufficient to meet the Corps' consultation obligations as they either did not provide project information in advance of the meeting or provided insufficient notice of the meetings, and Tribal officials felt they were not, therefore, sufficiently informed to participate in meaningful discussion. Vance Decl. at ¶ 28 Ex. 4, ¶ 29.

Despite the fact that the Tribe deemed that the Corps has failed to engage in meaningful efforts to consult with it pursuant to Section 106, the Cheyenne River Sioux Tribe attempted at various times to engage in the comment process related to DAPL including, supporting the Standing Rock Sioux Tribe's formal comment to the Corps regarding various aspects of environmental and historic preservation identification concerns previously raised by the Standing Rock Sioux Tribe on August 17, 2015. These comments included specific questions and concerns regarding geotechnical boring, insufficiencies arising from NEPA environmental review, a need for a Class III Archaeological Study, disagreement with Corps' determinations, and concerns about water quality. *Id.* at ¶ 28, Ex. 4. The Tribe further provided the United States Forest Service with comments on the proposed DAPL. *Id.* at ¶ 27, Ex. 3.

Finally, the Tribe has perceived its limited interactions with the Corps to be confusing as it appears that the Corps has attempted to hold out its interactions with one federally-recognized Indian tribe as sufficient to satisfy its consultation with all affected tribes. For example, at a meeting between the Corps and multiple tribes in 2015, Colonel Henderson indicated that "official

[tribal] consultation started September 2015”; however, this date has no relation to any interactions by the Corps with the Cheyenne River Sioux Tribe. Vance Decl. at ¶ 27 Ex. 3.

DISCUSSION

The Cheyenne River Sioux Tribe moves pursuant to Fed. R. Civ. P. 24(a) to intervene in this action as a matter of right. In the alternative, the Tribe seeks leave of this Court pursuant to Fed. R. Civ. P. 24(b) to intervene permissibly in this action.

I. THE CHEYENNE RIVER SIOUX TRIBE SHOULD BE PERMITTED TO INTERVENE AS A MATTER OF RIGHT

Rule 24(a) of the Federal Rules of Civil Procedure provides that, on timely motion, the court must permit anyone to intervene who “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). The D.C. Circuit has identified four requirements for intervention as a matter of right: (1) the motion must be timely; (2) the intervenor must have a “legally protected” interest in the action; (3) the disposition of the action must threaten to impair or impede the intervenor’s interest in the action; and (4) the intervenor’s interest may not be adequately represented by an existing party. *E.g., Fund for Animals v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003) (citing *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998)). A prospective intervenor must also demonstrate the existence of standing under Article III of the Constitution just like any litigant, demonstrating injury-in-fact, causation, and redressability. *Id.* at 732-33 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). However, in the D.C. Circuit, successful intervention of right under Rule 24(a) is sufficient to establish Article III standing. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (citing *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000)). As such, the Cheyenne River

Sioux Tribe submits that in light of its entitlement to intervention as of right, discussed below, it also enjoys Article III standing in this matter.

a. The Cheyenne River Sioux Tribe's Motion Is Timely

Fed R. Civ. P. 24(a) requires that a motion to intervene must be timely. Timeliness is a “context-specific inquiry” that considers the time elapsed since commencement of the action, risk of prejudice to existing parties, the purpose for which intervention is sought, and the need for intervention to preserve an intervenor’s rights. *Karsner v. Lothian*, 532 F.3d 876, 885-86 (D.C. Cir. 2008). An intervenor-plaintiff’s motion to intervene is timely when it is filed early in the proceeding, especially before defendants have filed an answer. *Fund for Animals*, 332 F.3d at 735 (finding a motion to intervene was timely filed when it was filed before defendants filed their answer); *see also Forest County Potawatomi Comty. v. United States*, No. 15-105, ___ F.R.D. ___, 2016 WL 1465324, at *6 (D.D.C. Apr. 14, 2016) (finding a motion to intervene timely that was filed before defendants filed their answer). The instant motion has been filed a mere 14 days after the filing of the Standing Rock Sioux Tribe’s Complaint (ECF No. 1), five days after the filing of Intervenor-Defendants successful motion to intervene (ECF Nos) and prior to the filing of any answer. Consequently, there is no risk of prejudice to any party, and this motion is timely.

b. The Cheyenne River Sioux Tribe Has a Legally Protected Interest in this Suit to Enjoin the Corps from Harming Its Sacred Sites, Ancestral, Lands, and the Health and Welfare of Its Members

The second prong requires an intervenor to demonstrate a “legally protected” interest in the action. *Karsner*, 532 F.3d at 885 (citing *SEC v. Prudential Sec. Inc.*, 136 F.3d 143, 156 (D.C. Cir. 1998)). Courts evaluate this prong under a liberal standard, aiming to “involve as many apparently concerned persons as is compatible with efficiency and due process.” *Nuesse v. Camp*,

385 F.2d 694, 700 (D.C. Cir. 1967); *see also So. Utah Wilderness v. Norton*, No. 01-2518, 2002 WL 32617198, *5 (D.D.C. June 28, 2002).

The Cheyenne River Sioux Tribe has a legally protected right in this proceeding. As set forth herein, PCN 4 and the areas surrounding it are not only within the Tribe's ancestral and treaty-based lands, but PCN 4 is also directly adjacent to a recognized Tribal sacred site: the sacred stones site at the confluence of the Cannonball and Missouri Rivers. Vance Decl. at ¶¶ 14, 20, 23, 28; Braun Decl. at ¶¶ 10-13. Under Section 106 of the National Historic Preservation Act ("NHPA"), the Corps was required to take into consideration the effects of the pipeline site on historic properties. 54 U.S.C. § 306108. This process obligated the Corps to consult with Indian tribes prior to granting the permit on the extent to which the permit would affect sites that are culturally or spiritually significant to those tribes even if those sites are on ancestral or ceded lands. 36 C.F.R. § 800.2(c)(2)(II)(D); 54 U.S.C. § 302707. Section 106 imposed upon the Corps the duty to provide the Cheyenne River Sioux Tribe with "a reasonable opportunity" to identify historic properties and its concerns related thereto, to advise on identification and evaluation, to articulate its views on the effects of the permit, and to participate in the resolution of adverse effects. 36 C.F.R. § 800.2(c)(ii)(A). This obligation includes the duty to use a "reasonable and good faith effort" to consult with tribes in a "manner respectful of tribal sovereignty." *Id.* § 800.2(c)(2)(II)(B).

Like the Standing Rock Sioux Tribe, moreover, the Cheyenne River Sioux Tribe also has a legally protected interest arising under the Clean Water Act and the Rivers and Harbors Act because of their historical and cultural connection to PCN 4, and also because of their interest in the waters of Lake Oahe. First, as alleged in the Standing Rock Sioux Tribe's Complaint, the Clean Water Act and the Rivers and Harbors Act both authorize the Corps to issue permits for

projects that will discharge into waters of the United States (33 U.S.C. §§ 13111(a); 1344(a)-(e)) and permits to tunnel under navigable waters (33 U.S.C. §§ 403, 408; 33 C.F.R. § 322.3(a)). The Corps issued a set of general nationwide permits under these authorities in February 2012 (77 Fed. Reg. 10184 (Feb. 21, 2012)), an action that constituted a federal undertaking under the NHPA. 54 U.S.C. § 300320; 36 C.F.R § 800.16(y). As such, issuance of this NWP required the Corps to consult with tribes, including the Cheyenne River Sioux Tribe, regarding effects on historic properties under Section 106 of the NHPA prior to issuance. 54 U.S.C. § 306108; 36 C.F.R. § 800.1(c). The Corps did none of these things prior to issuing the permit in 2012.

Second, as alleged in the Standing Rock Sioux Tribe's Complaint, § 408 of the Rivers and Harbor Act requires the Corps to issue a separate permit for any undertaking that proposes to "build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States" 33 U.S.C. § 408. The § 408 permit in this matter triggered an environmental review under the National Environmental Policy Act ("NEPA"). Like the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe has communicated with the Corps and other agencies concerning the deficiencies in the environmental review process and has objected to the use of an Environmental Assessment rather than an Environmental Impact study and the Corps' Finding of No Significant Impact, issues that greatly concern the Tribe in light of the fact that any discharges or spills flow directly into the Tribe's drinking water in Lake Oahe.

The Administrative Procedures Act, 5 U.S.C. §§ 701, et seq., provides a cause of action for the Cheyenne River Sioux Tribe to protect its interests under the NHPA, Clean Water Act, Rivers and Harbors Act, and NEPA.

c. The Disposition of this Action Concerning Federal Permitting of the Dakota Access Pipeline Threatens to Impair the Cheyenne River Sioux Tribe's Interest in Its Sacred Sites, Ancestral Lands, and the Health and Welfare of Its Members

The third prong requires the intervenor to demonstrate that disposition of the action has the potential to threaten or impair the intervenor's proffered interest in the action. *Karsner*, 532 F.3d at 885. This inquiry is not rigid, rather it looks to the "practical consequences of denying intervention, even where the possibility of future challenge to the regulation remains available." *Fund for Animals*, 322 F.3d at 735; see also *Forest County Potawatomi*, 2016 WL 1465324, at *3. This is especially true where it would be difficult to reestablish the status quo after a court ruling against the proposed intervenor's favor. *Fund for Animals*, 322 at 735 ("Regardless of whether [proposed intervenor] could reverse an unfavorable ruling by bringing a separate lawsuit, there is no question that the task of reestablishing the status quo . . . will be difficult and burdensome.").

In the instant matter, if the Court denies the Standing Rock Sioux Tribe's motion for Preliminary Injunction, it will issue an order permitting the DAPL to proceed with construction of the pipeline that could cause immediate harm to the Tribe's sacred sites and potential harm to the waters upon which it relies for its health and well-being. Even if the Tribe were able to reverse such a ruling in a separate lawsuit, reestablishing the status quo—undigging the pipeline—would be difficult and burdensome, if not impossible.

d. The Cheyenne River Sioux Tribe's Interests Are Not Adequately Protected by the Standing Rock Sioux Tribe

The United States Supreme Court has held that intervenors must only make a *de minimis* showing that its interests will not be adequately represented under Fed. R. Civ. P. 24(a) in order to succeed on a motion to intervene. *Trobovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972); *Fund for Animals*, 322 F.3d at 735. A petitioner "ordinarily should be allowed to intervene

unless it is clear that the party will provide adequate representation for the absentee.” *Fund for Animals*, 322 F.3d at 735 (quoting *Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981).

The Cheyenne River Sioux Tribe and the Standing Rock Sioux Tribe are sister Tribes. Two of seven bands of Lakota reside on the Standing Rock Sioux Reservation, the *Hunkpapa* and the *Siha Sapa*. See <http://www.standingrock.org/history.html> (last accessed Aug. 10, 2016). Members of the *Siha Sapa* band also reside on the Cheyenne River Sioux Reservation. The Standing Rock Sioux Reservation is adjacent to the Cheyenne River Sioux Reservation to the north and both tribes are bordered by the Missouri River to the east. See *Bourland*, 508 U.S. at 683. The two Tribes share a language and culture, and they are both successors to the Great Sioux Nation and signatories to the 1851 and 1868 Treaties of Fort Laramie.

Despite their similarities, however, the two Tribes are separate sovereign nations with separate sovereign governments. They have separate present-day geographical territory; and the *Hunkpapa*, *Siha Sapa*, *Minnicoujou*, *Oohenumpa*, and *Itazipco* bands have been separate and distinct from one another since before recorded history. In short, although the two Tribes share much, their present-day government and geography, their history, and their relationship to the land and the River are distinct. In the event that this Court enters an injunction in this matter, the contours of such relief has the potential to affect the Cheyenne River Sioux Tribe differently than the Standing Rock Sioux Tribe. Moreover, the Tribe has had its own separate relationship and interactions with Defendant Corps throughout this process. As the two tribes are separate sovereigns, the Corps had an independent duty to consult with the Cheyenne River Sioux Tribe. The extent of the Corps’ consultation efforts with the Cheyenne River Sioux Tribe (“CRST”) was dramatically different than its efforts with the Standing Rock Sioux Tribe (“SRST”). The Corps apparently regarded its interactions with the SRST to be sufficient to satisfy some of its

consultation duties with the CRST and thus accomplished very little consultation with the CRST. As these deficiencies were fact-specific and unique to the CRST-Corps interaction, the SRST cannot adequately represent CRST's interests.

The D.C. Circuit Court of Appeals has held that “[a]lthough there may be a partial congruence of interests, that does not guarantee the adequacy of representation.” *Fund for Animals*, 322 F.3d at 737. Further, the interests of an intervenor need not be wholly adverse as “even a shared general agreement does not necessarily ensure agreement in all particular respects and the tactical similarity of the present legal contentions of the parties does not assure adequacy of representation or necessarily preclude the intervenor from the opportunity to appear in its own behalf.” *Id.* (quoting *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977); *Neusse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967)). This must be especially so when the existing party is one government and the proposed intervenor is a sister government with separate territory, structure, and citizenship as here. Notwithstanding any congruency between the two parties, the possible circumstances under which the two might diverge in interest and litigation strategy is easy to conceive. In light of the permissive standard under this prong, the facts at issue here and the relationship between the two Tribes easily demonstrates that the Standing Rock Sioux Tribe will not adequately represent the Cheyenne River Sioux Tribe's interests and the Cheyenne River Sioux Tribe is entitled to intervene in this matter as of right.

II. ALTERNATIVELY, THE CHEYENNE RIVER SIOUX TRIBE SHOULD BE PERMITTED TO INTERVENE UNDER RULE 24(b)(1)(B)

For the reasons discussed above, the Cheyenne River Sioux Tribe should be entitled to intervene as a matter of right. Should the Court find otherwise, then the Tribe respectfully moves for permissive intervention pursuant to Fed. R. Civ. P. 24(b), which empowers this Court to allow timely intervention where the proposed intervenor “has a claim or defense that shares with the

main action a common question of law or fact.” This jurisdiction applies a “flexible reading of Rule 24(b)” that gives the “Court considerable latitude to grant or deny intervention based on the particular circumstances of the case.” *Ctr. for Biological Diversity v. E.P.A.*, 274 F.R.D. 305 (D.D.C. 2011) (citing *EEOC v. Nat’l Children’s Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998); *Crow Tribe of Indians v. Norton*, No. Civ. A. 02-2847, 2006 WL 908048, at *2 (D.D.C. Apr. 7, 2006) (internal quotation marks omitted)). “The requirements for permissive intervention . . . are to be construed liberally, with all doubts resolved in favor of permitting intervention.” *In re Vitamins Antitrust Litigation*, No. MISC. 99-197, MDL 1285, 2001 WL 34088808, * 3 (D.D.C. Mar. 19, 2001) (internal quotation marks omitted).

Permissive intervention is governed by three traditional requirements, all of which the Cheyenne River Sioux Tribe meets. First, there must be an independent basis for subject matter jurisdiction. *Nat’l Children’s Ctr.*, 146 F.3d at 1046. The Corps had an independent duty under Section 106 of the NHPA to consult with the Cheyenne River Sioux Tribe regarding historical and cultural sites in the PCN 4 area because they were on ceded and ancestral lands of the Tribe as successors to the Great Sioux Nation and the treaties entered into by that Nation. *See* 36 C.F.R. § 800.2(c)(2)(II)(D); 54 U.S.C. § 302707. Likewise, an independent basis for jurisdiction exists deriving from the fact that the Tribe draws its drinking water and the waters that support its economy from the body of water under which DAPL has proposed to tunnel. Second, the motion to intervene permissively must be timely. *Nat’l Children’s Ctr.*, 146 F.3d at 1046. As discussed above, this motion is filed a mere 14 days after filing of the initial Complaint in this matter, prior to the filing of any answer, and five days after the filing of Intervenor-Defendant’s successfully filed motion to intervene. This motion is timely. Finally, the Court must consider whether the requested intervention will unduly delay or prejudice the original parties. *Id.* The D.C. Circuit

has explained that the “delay or prejudice” standard is intended to consider the potential consequences of “piling on parties,” as well as “issue proliferation and confusion,” that could result from intervention. *Butte County v. Hogen*, No. 08-519, 2008 WL 2410407, *3 (D.D.C. Jun. 16, 2008) (quoting *Mass. Schl. Of Law at Andover, Inc. v. United States*, 118 F.3d 776, 782 (D.C. Cir. 1997)). Risks of delay and prejudice are minimal in cases where, as here, the proposed intervenor does not seek to add new claims and, therefore, requires no additional discovery. *Butte County*, 2008 WL 2410407, *3.

As set forth above, permissive intervention in the instant matter is also warranted.

CONCLUSION

For the foregoing reasons, the Cheyenne River Sioux Tribe respectfully requests this Court to grant its Motion to Intervene as of right, or in the alternative, permissively.

Dated: August 10, 2016

CHEYENNE RIVER SIOUX TRIBE, Intervenor-
Plaintiff-Applicant,

By: /s/ Conly J. Schulte

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2016, a copy of the foregoing was filed electronically with the Clerk of the Court. The electronic filing prompted automatic service of the filing to all counsel of record in this case who have obtained CM/ECF passwords.

I FURTHER CERTIFY that on August 10, 2016, true and correct copies were served on the following via Federal Express overnight mail:

Office of the Attorney for the District of Columbia 441 Fourth Street NW Washington, DC 20001	Milton Boyd U.S. Army Corps of Engineers 441 G Street NW Washington, DC 20314-1000
U.S. Attorney's Office Attn: Civil Process Clerk 555 Fourth Street NW Washington, DC 20530	Office of the Attorney General 1350 Pennsylvania Avenue NW, Suite 409 Washington, DC 20004

A courtesy copy was sent via email to Michael Thorp, counsel for U.S. Department of Justice Environment and Natural Resources Division at michael.thorp@usdoj.gov.

/s/ Conly J. Schulte

EXHIBIT 6



Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, SEPTEMBER 9, 2016
WWW.JUSTICE.GOV

OPA
(202) 514-2007
TTY (866) 544-5309

**JOINT STATEMENT FROM THE DEPARTMENT OF JUSTICE, THE DEPARTMENT
OF THE ARMY AND THE DEPARTMENT OF THE INTERIOR REGARDING
STANDING ROCK SIOUX TRIBE V. U.S. ARMY CORPS OF ENGINEERS**

WASHINGTON - The Department of Justice, the Department of the Army and the Department of the Interior issued the following statement regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*:

“We appreciate the District Court’s opinion on the U.S. Army Corps of Engineers’ compliance with the National Historic Preservation Act. However, important issues raised by the Standing Rock Sioux Tribe and other tribal nations and their members regarding the Dakota Access pipeline specifically, and pipeline-related decision-making generally, remain. Therefore, the Department of the Army, the Department of Justice, and the Department of the Interior will take the following steps.

“The Army will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other federal laws. Therefore, construction of the pipeline on Army Corps land bordering or under Lake Oahe will not go forward at this time. The Army will move expeditiously to make this determination, as everyone involved — including the pipeline company and its workers — deserves a clear and timely resolution. In the interim, we request that the pipeline company voluntarily pause all construction activity within 20 miles east or west of Lake Oahe.

“Furthermore, this case has highlighted the need for a serious discussion on whether there should be nationwide reform with respect to considering tribes’ views on these types of infrastructure projects. Therefore, this fall, we will invite tribes to formal, government-to-government consultations on two questions: (1) within the existing statutory framework, what should the federal government do to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights; and (2) should new legislation be proposed to Congress to alter that statutory framework and promote those goals.

“Finally, we fully support the rights of all Americans to assemble and speak freely. We urge everyone involved in protest or pipeline activities to adhere to the principles of nonviolence.

Of course, anyone who commits violent or destructive acts may face criminal sanctions from federal, tribal, state, or local authorities. The Departments of Justice and the Interior will continue to deploy resources to North Dakota to help state, local, and tribal authorities, and the communities they serve, better communicate, defuse tensions, support peaceful protest, and maintain public safety.

“In recent days, we have seen thousands of demonstrators come together peacefully, with support from scores of sovereign tribal governments, to exercise their First Amendment rights and to voice heartfelt concerns about the environment and historic, sacred sites. It is now incumbent on all of us to develop a path forward that serves the broadest public interest.”

#

EXHIBIT 7



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

The Honorable Dave Archambault II
Chairman, Standing Rock Sioux Tribe
P.O. Box D
Fort Yates, North Dakota 58538

Kelcy Warren
Chairman and Chief Executive Officer
Energy Transfer Partners, L.P.
8111 Westchester Drive
Dallas, TX 75225

Joey Mahmoud
Executive Vice President
Dakota Access LLC
3738 Oak Lawn Avenue
Dallas, TX 75219

Dear Gentlemen:

I am writing regarding the review that the Department of the Army initiated in September regarding the proposed crossing of the Dakota Access Pipeline (DAPL) under Lake Oahe. As you know, on September 9, 2016, the Department of Justice, the Department of the Army, and the Department of the Interior stated that the Army would move expeditiously to determine whether it would need to reconsider any of its previous decisions regarding DAPL's proposed crossing at the Lake Oahe site. The Army has completed that review, accounting for information it has received from the Tribes and the pipeline company since September, and has concluded that its previous decisions comported with legal requirements.

The Army is mindful of the history of the Great Sioux Nation's repeated dispossessions, including those to support water-resources projects. This history compels great caution and respect in considering the concerns that the Standing Rock Sioux Tribe has raised regarding the proposed crossing of Lake Oahe north of its reservation. The Army recognizes that portions of Lake Oahe remain within the Standing Rock Sioux Tribe's reservation boundaries and the Tribe retains hunting and fishing rights in the lake. Additionally, the Army recognizes that the Tribe relies on Lake Oahe and the Missouri River for drinking water. We take seriously our government-to-government relationship with the Tribe. This history, the importance of Lake Oahe to the Tribe, and our government-to-government relationship call for caution, respect, and particular care regarding the proposed DAPL crossing at Lake Oahe.

As you are aware, the statute governing rights of way for pipelines through Federal lands mandates that the Army "impose requirements for the operation of the pipeline and related facilities in a manner that will protect the safety of workers and protect the public

from sudden ruptures and slow degradation of the pipeline." 30 U.S.C. §185(g). It also requires the Army to "protect the interests of individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes," 30 U.S.C. §185(h)(2)(D). In addition, the statute authorizes the Army to subject a right-of-way to "terms and conditions" "regarding extent, duration, survey, location, construction, operation, maintenance, use, and termination," to protect the environment and public health and safety, 30 U.S.C. §185(k).

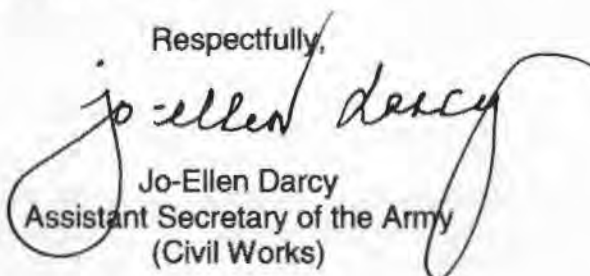
Accordingly, the Army has determined that additional discussion with the Standing Rock Sioux Tribe and analysis are warranted. The Army invites the Standing Rock Sioux Tribe to engage in discussion concerning the following topics:

- Potential conditions in an easement for the pipeline crossing, which would further reduce the risk of a spill or rupture, hasten detection and response, or otherwise enhance the protection of Lake Oahe, the Tribe's water supplies, and its treaty rights;
- With such conditions, the risk to the Tribe of a spill from the pipeline crossing Lake Oahe at the proposed location; and
- In light of such conditions, whether to grant an easement for the pipeline to cross Lake Oahe at the location currently proposed.

The Army plans to provide a framing paper to facilitate this discussion with the Standing Rock Sioux Tribe regarding these topics. While these topics are of particular interest to the Army, we welcome any input that the Tribe believes is relevant to the proposed pipeline crossing or easement. The Army will work with the Tribe on a timeline that allows for robust discussion and analysis to be completed expeditiously.

While these discussions and analysis are ongoing, construction on or under Corps land bordering or under Lake Oahe cannot occur because the Army has not made a final decision on whether to grant an easement.

Respectfully,



Jo-Ellen Darcy
Assistant Secretary of the Army
(Civil Works)

EXHIBIT 8



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

4 DEC 2016

MEMORANDUM FOR Commander, U.S. Army Corps of Engineers

SUBJECT: Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota

1. On July 25, 2016, the U.S. Army Corps of Engineers (Corps) granted a permission to applicant Dakota Access, L.L.C., under Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 408 (Section 408 permission), for a proposed crossing of Lake Oahe, a Corps project on the Missouri River, by the Dakota Access Pipeline, an approximately 1,172 mile pipeline that would connect the Bakken and Three Forks oil production areas in North Dakota to an existing crude oil market near Patoka, Illinois. The pipeline is 30 inches in diameter and is projected to transport approximately 470,000 barrels of oil per day, with a capacity as high as 570,000 barrels per day. Total North Dakota field production of crude oil, as of September 2016, was 962,000 barrels per day.
2. The Section 408 permission was accompanied by an Environmental Assessment, as contemplated under the National Environmental Policy Act (NEPA), 42 U.S.C. §4321-4335, and its implementing regulations. The Environmental Assessment was prepared and evaluated in accordance with Section 1506.5 of the Council on Environmental Quality regulations for implementing NEPA, 40 C.F.R. §1506.5, which allow an applicant to prepare an environmental assessment if the Federal agency independently evaluates and verifies its information and analysis. The Environmental Assessment included a finding that granting the Section 408 permission for the proposed crossing of Lake Oahe did not constitute a major Federal action that would have significant environmental impacts.
3. The proposed crossing of Lake Oahe is approximately 0.5 miles upstream of the northern boundary of the Standing Rock Sioux Tribe's reservation. The Tribe relies on Lake Oahe for drinking water and irrigation, portions of Lake Oahe downstream from the proposed crossing remain within the Tribe's reservation boundaries, and the Tribe retains water, hunting and fishing rights in the lake.
4. The Environmental Assessment included a brief description and characterization of factors used in evaluating a potential alternative route and crossing location that it said was considered and eliminated "early in the routing phase." The alternative route would cross the Missouri River approximately 10 miles north of Bismarck, ND.
5. Because of security concerns and sensitivities, several documents supporting the Environmental Assessment were marked confidential and were withheld from the public or representatives and experts of the Standing Rock Sioux Tribe. These documents include a North Dakota Lake Oahe Crossing Spill Model Discussion prepared by the

Wood Group Mustang, the Lake Oahe HDD Risk Analysis Report, and the DAPL – Route Comparison and Environmental Justice Considerations Memorandum.

6. In addition to the Section 408 permission, the proposed crossing of Corps property requires the granting of a right-of-way (easement) under the Mineral Leasing Act, 30 U.S.C. §185. To date, the Army has not made a final decision on whether to grant the easement pursuant to this section.

7. On September 9, 2016, the Army, along with the Departments of Interior and Justice, issued a joint statement noting that there were “important issues raised by the Standing Rock Sioux Tribe and other tribal nations and their members regarding the Dakota Access pipeline,” and that it “will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other federal laws.”

8. After completing that review of its previous decisions, as well as information received from Tribes and the applicant, the Army concluded on November 14, 2016 that, although its previous decisions comported with legal requirements, additional discussion with the Standing Rock Sioux Tribe and analysis were warranted in light of the history of the Great Sioux Nation’s dispossessions of lands; the importance of Lake Oahe to the Tribe; our government-to-government relationship; and the Mineral Leasing Act’s direction to protect the environment, those who rely on fish and wildlife in the area for subsistence, and the public. See, for example, 30 U.S.C. §185(h)(2).

9. On November 22, 2016, the Omaha District Commander requested the Standing Rock Sioux Tribe to meet in order to engage in additional discussion and analysis during the week of November 28, 2016. On November 23, 2016, the Chairman of the Standing Rock Sioux Tribe responded that he was willing to engage in discussions, but that the Tribe needed additional detailed information for a full assessment of oil spill risk.

10. On December 2, 2016, the Omaha District Commander convened representatives of the Standing Rock Sioux Tribe, the applicant, and Omaha District staff. The express purpose of the meeting was to review the Tribe’s concerns that were expressed in its October 29, 2016 letter. The group also discussed over 30 additional terms and conditions that could further reduce the risk of a spill or pipeline rupture. For example, the additional terms and conditions discussed include enhanced documentation (plans, drawings and records), and numerous pipeline safety enhancements, for example, a Supervisory Control and Data (SCADA) System, Computational Pipeline Monitoring (CPM) Leak Detection, Overpressure Protection Control, Interference and Corrosion Surveys, High Resolution Deformation Analysis, and Pipeline Patrolling. While the 5-hour long meeting did not produce any definitive mutual agreements, the technical discussions produced a meaningful exchange of information.

11. NEPA requires that Federal agencies consider reasonable alternatives to recommended actions whenever those actions “involve[] unresolved conflicts concerning alternative uses of available resources.” See 42 U.S.C. §4332(2)(E). The Council on Environmental Quality’s (CEQ) has advised that in some circumstances, including in some cases where environmental effects on Tribal resources are at stake, agencies “should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.” See CEQ, “Environmental Justice Under the National Environmental Policy Act” at p. 10 (1997).

12. This more heightened analysis, in my judgment, is appropriate in the circumstances present here. Thus, after careful review and consideration, to include the revised proposed easement furnished to me on December 3, 2016, I have concluded that a decision on whether to authorize the Dakota Access Pipeline to cross Lake Oahe at the proposed location merits additional analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation and comments as contemplated in the CEQ’s National Environmental Protection Act (NEPA) implementing regulations, 40 C.F.R. §1502.14 and §1503.1. Accordingly, the Army will not grant an easement to cross Lake Oahe at the proposed location based on the current record. The robust consideration of reasonable alternatives that I am directing, together with analysis of potential spill risk and impacts, and treaty rights, is best accomplished, in my judgment, by preparing an Environmental Impact Statement (EIS) that satisfies the accompanying procedures for broad public input and analysis. See, for example, 40 C.F.R. §1502 *et seq.*

13. Consistent with 40 C.F.R. §1500.2(e), the Corps shall engage in the following additional review and analysis (at a minimum):

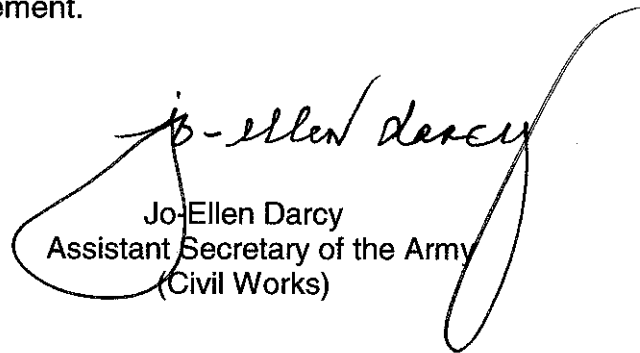
- A robust consideration and discussion of alternative locations for the pipeline crossing the Missouri River, including, but not limited to, more detailed information on the alternative crossing that was considered roughly ten miles north of Bismarck;
- Detailed discussion of potential risk of an oil spill, and potential impacts to Lake Oahe, the Standing Rock Sioux Tribe’s water intakes, and the Tribe’s water rights as well as treaty fishing and hunting rights; and
- Additional information on the extent and location of the Tribe’s treaty rights in Lake Oahe.

14. The Corps is encouraged to allow, with appropriate safeguards (including redaction), tribal government leaders and their representatives or experts, as well as relevant Federal agencies, the ability to review and respond to all analyses that are central to the concerns raised by the Standing Rock Sioux Tribe and other Tribal Nations, including the Lake Oahe Spill Model Discussion Report, the Lake Oahe HDD

Risk Analysis Report, and the DAPL – Route Comparison and Environmental Justice Considerations Memorandum.

15. This policy decision is based on the totality of circumstances in this case, more specifically, the specific mandates of the Mineral Leasing Act (30 U.S.C. §185), the involvement of historic tribal homelands, the close proximity to reservation lands that extend into the potentially affected waters, and the potential impacts on treaty hunting and fishing rights. I want to be clear that this decision does not alter the Army's position that the Corps' prior reviews and actions have comported with legal requirements. Rather, my decision acknowledges and addresses that a more robust analysis of alternatives can be done and should be done, *under these circumstances*, before an easement is granted for the Dakota Access Pipeline to cross the Missouri River on Corps land.

16. The Corps, and particularly the Omaha District and Northwestern Division, have performed with remarkable diligence and professionalism in responding to a demanding situation that has galvanized tribal communities across the nation, and presented difficult and unique challenges in protecting public safety, First Amendment rights, property rights, and law enforcement.



Jo-Ellen Darcy
Assistant Secretary of the Army
(Civil Works)

EXHIBIT 9

the WHITE HOUSE PRESIDENT DONALD J. TRUMP



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The White House

Office of the Press Secretary

For Immediate Release

January 24, 2017

Presidential Memorandum Regarding Construction of the Dakota Access Pipeline

MEMORANDUM FOR THE SECRETARY OF THE ARMY

SUBJECT: Construction of the Dakota Access Pipeline

Section 1. Policy. The Dakota Access Pipeline (DAPL) under development by Dakota Access, LLC, represents a substantial, multi-billion-dollar private investment in our Nation's energy infrastructure. This approximately 1,100-mile pipeline is designed to carry approximately 500,000 barrels per day of crude oil from the Bakken and Three Forks oil production areas in North Dakota to oil markets in the United States. At this time, the DAPL is more than 90 percent complete across its entire route. Only a limited portion remains to be constructed.

I believe that construction and operation of lawfully permitted pipeline infrastructure serve the national interest.

Accordingly, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct as follows:

Sec. 2. Directives. (a) Pipeline Approval Review. The Secretary of the Army shall instruct the Assistant Secretary of the Army for Civil Works and the U.S. Army Corps of Engineers (USACE), including the Commanding General and Chief of Engineers, to take all actions necessary and appropriate to:

(i) review and approve in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary or appropriate, requests for approvals to construct and operate the DAPL, including easements or rights-of-way to cross Federal areas under section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. 185; permits or approvals under section 404 of the Clean Water Act, 33 U.S.C. 1344; permits or approvals under section 14 of the Rivers and Harbors Act, 33 U.S.C. 408; and such other Federal approvals as may be necessary;

(ii) consider, to the extent permitted by law and as warranted, whether to rescind or modify the memorandum by the Assistant Secretary of the Army for Civil Works dated December 4, 2016 (Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota), and whether to withdraw the Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe, North Dakota, dated January 18, 2017, and published at 82 Fed. Reg. 5543;

(iii) consider, to the extent permitted by law and as warranted, prior reviews and determinations, including the Environmental Assessment issued in July of 2016 for the DAPL, as satisfying all applicable requirements of the National Environmental Policy Act, as amended, 42 U.S.C. 4321 et seq., and any other provision of law that requires executive agency consultation or review (including the consultation or review required under section 7(a) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a));

(iv) review and grant, to the extent permitted by law and as warranted, requests for waivers of notice periods arising from or related to USACE real estate policies and regulations; and

(v) issue, to the extent permitted by law and as warranted, any approved easements or rights-of-way immediately after notice is provided to the Congress pursuant to section 28(w) of the Mineral Leasing Act, as amended, 30 U.S.C. 185(w).

(b) Publication. The Secretary of the Army shall promptly provide a copy of this memorandum to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Majority Leader of the Senate, and the Governors of each State located along the Dakota Access Pipeline route. The Secretary of the Army is authorized and directed to publish this memorandum in the Federal Register.

(c) Private Property. Nothing in this memorandum alters any Federal, State, or local process or condition in effect on the date of this memorandum that is necessary to secure access from an owner of private property to construct the pipeline and facilities described herein. Land or an interest in land for the pipeline and facilities described herein may only be acquired consistently with the Constitution and applicable State laws.

Sec. 3. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

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EXHIBIT 10

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

-----X

STANDING ROCK SIOUX TRIBE,

Plaintiff

v.

Civil Action 16-1534.

U.S. ARMY CORPS OF ENGINEERS,

Defendant

-----X

Washington, D.C.
Monday, February 6, 2017
11:30 a.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Stephanie Tsosie, Esq. (telephone)
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River Sioux Tribe: FREDERICKS PEEBLES & MORGAN LLP
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Court Reporter: Lisa Walker Griffith, RPR
U.S. District Courthouse
Room 6507
Washington, D.C. 20001
(202) 354-3247

APPEARANCES: (Cont'd.)

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1 P R O C E E D I N G S

2 THE DEPUTY CLERK: This is Civil Action 16-1534.
3 Standing Rock Sioux Tribe versus United States Army Corps
4 of Engineers.

5 Would counsel on the phone please identify
6 yourselves for the record.

7 MS. GOLDMAN: Good morning, Your Honor. This is
8 Patti Goldman on behalf of Standing Rock Sioux Tribe.

9 MS. TSOSIE: Good morning. This is Stephanie
10 Tsosie on behalf of Standing Rock Sioux Tribe.

11 THE COURT: Thank you.

12 Anyone else? We'll have plaintiffs approach.

13 MR. HASSELMAN: Jan Hasselman for plaintiffs,
14 Standing Rock Sioux Tribe.

15 MS. DUCHENEAUX: Good morning, Your Honor.
16 Nicole Ducheneaux on behalf of the Cheyenne River Sioux
17 Tribe.

18 MR. MARINELLI: Good morning, Your Honor. Matt
19 Marinelli from for the Department of Justice for the Corps
20 of Engineers. With me at counsel table are Erica Zilioli
21 also from Department of Justice and Milt Boyd from the Army
22 Corps of Engineers.

23 THE COURT: Okay. Welcome to you folks.

24 MR. DEBOLD: Good morning, Your Honor. David
25 Debold appearing on behalf of Dakota Access. With me at

1 counsel table are Bill Scherman and Bob Comer.

2 THE COURT: Okay, welcome.

3 I think there was an issue at last hearing --
4 first of all I should say to those in attendance that the
5 Court rules prohibit any audio or videotaping of these
6 proceedings. So given the technology can be -- has made
7 advances so as to be somewhat surreptitious. I'm advising
8 anybody here, it is a violation of Court's rules for any
9 audio or videotaping of this court proceeding absent
10 specific leave of court. Thank you.

11 All right. Mr. Marinelli, we're ready for
12 detailed update from you.

13 MR. MARINELLI: Thank you, Your Honor.

14 The Army continues to undertake the review
15 process set forth in paragraph two of the presidential
16 memorandum. The Corps has prepared a review and analysis
17 pursuant to paragraph two of the January 24th memorandum.
18 That review is currently pending before the Department of
19 the Army. We anticipate that the Army review process may
20 be completed as early as the end of this week.

21 THE COURT: All right. And then, what would then
22 derive therefrom?

23 MR. MARINELLI: I think the process could take
24 two broad paths. One would be going forward with an
25 easement at Lake Oahu, the other would be denying the

1 easement at Lake Oahe.

2 THE COURT: I know you are doing the best you can
3 to explain to me where things stand, so I know you are not
4 being evasive at all. I'm just trying to pin down as best
5 I can details. So let's assume by the end of the week.
6 Again you are not committing that but let's assume by the
7 end of the week the process has reached its end. Would
8 that mean that an announcement would be made very shortly
9 thereafter as to one of the two alternatives you just
10 mentioned?

11 MR. MARINELLI: I would expect -- so taking --
12 that path is a little more clear in the event that an
13 easement is granted because I think, as we've said to this
14 Court, there is a provision of the Mineral Leasing Act that
15 requires notice to Congress. I would anticipate that if
16 that is the path taken that we will file any notice to
17 Congress with this Court.

18 THE COURT: Okay. And so that could occur,
19 again, in the event an easement is granted, that notice to
20 Congress could occur as early as the end of the week?

21 MR. MARINELLI: I hesitate to say more than it
22 may occur by the end of this week. As the earliest it will
23 occur -- and it has not occurred yet. But I cannot give a
24 more definite timetable today.

25 THE COURT: Okay. And then, do you know whether

1 the government's position is that there is still a two week
2 requirement between the time of the notifying Congress and
3 the giving Dakota Access the actual easement or has the
4 Department reached a position on whether it would follow
5 that earlier practice? I know, I'm pretty sure it's not in
6 an actual regulation or rule, it's a practice. And has the
7 Department reached a decision on that?

8 MR. MARINELLI: The short answer is no. The
9 Department has not reached a decision on a waiver of that
10 policy that we cited to in our briefing on Dakota Access'
11 Motion for Summary Judgment.

12 THE COURT: All right. So again, I don't want to
13 waste anybody's time. We've got a lot of folks who are
14 busy. But I also want to stay on top of this the best I
15 can so that we can give everybody as much notice as
16 possible as well. So, what do you think is a good
17 timetable to return here?

18 MR. MARINELLI: Well, given that we have a reply
19 brief due next Friday, and what I've said, that we may, the
20 Department of Army may have reached a discussion by the end
21 of this week, we propose coming back on Monday if that is
22 acceptable to the parties and the Court.

23 THE COURT: Okay. The 13th. Okay. Thank you
24 very much.

25 Let me hear from Mr. Debold first on the briefing

1 question is the first issue I have for you, which is do you
2 want -- there are a couple of pieces. We talked about this
3 last time. Do you want me not to rule on your pending
4 motion, given what you have heard from the government, do
5 you still want them to file their final brief as proposed
6 or do you -- are you happy for the government to put that
7 off given what is occurring here?

8 MR. DEBOLD: We're not asking for a change in
9 that due date at this time, Your Honor. The only
10 difference I would have with Mr. Marinelli, we agree that
11 we should come back to court, he said Monday, we would
12 prefer Friday. That's really the only area where I think
13 we have a disagreement. But we're not asking the Court to
14 move ahead and try to rule on the summary judgment with
15 this prospect, you know, a little bit more definite given
16 what we heard today.

17 THE COURT: All right, thank you. I'll be
18 getting back to you on the timeline issue we talked about
19 last time.

20 Mr. Hasselman, Ms. Ducheneaux, do you want to be
21 heard on what we've just discussed with both of these
22 counsel?

23 Mr. Hasselman?

24 MR. HASSELMAN: I'm not sure if you want to talk
25 about this now or at the next step, but I do want to

1 acknowledge the predicament that we're in. Our position is
2 that the easement, the issuance of the easement without the
3 previously announced EIS process would be unlawful. There
4 are very formidable legal issues involved, under tribal
5 treaties, under NEPA, under the Clean Water Act.

6 We're in a situation where we can't raise those
7 issues until the actual decision is made. And then things
8 start moving very fast. So, we're going to be approaching
9 you for very, for relief on a very short timeline.

10 We did have some thoughts about maybe some ways
11 to structure that to make it a little more manageable for
12 all the parties. One thought is in the past the Corps has
13 asked you for 48 hours notice prior to a decision. I think
14 that is an appropriate standard for us to ask the Corps so
15 we at least know when things are going to happen.

16 The second thought is this is a decision on a
17 short timeline. We would think it would be appropriate
18 for the Court to order the Corps to compile the
19 administrative record while it is making its decision and
20 file the administrative record at the time that it makes
21 the decision. So that the Court and the parties have an
22 opportunity to look at that material while we're in this
23 emergency motion phase.

24 THE COURT: Okay. Thank you.

25 Ms. Ducheneaux.

1 MS. DUCHENEAUX: Your Honor, thank you. What Mr.
2 Hasselman just said on behalf of the Standing Rock reflects
3 Cheyenne River's position as well.

4 THE COURT: Thank you.

5 Let me then go to Mr. Debold on the question that
6 I raised, rather that Mr. Hasselman raised last time
7 regarding a timeline from the potential receipt of an
8 easement through the commencement of oil flow through the
9 pipeline. If you could sketch that out for us as best you
10 understand, that would be helpful.

11 MR. DEBOLD: Yes, I'm happy to do that, Your
12 Honor. I would like to just take a minute or two to put it
13 in context especially in light of points that Mr. Hasselman
14 just raised.

15 The last time we were before Your Honor a week
16 ago today, Standing Rock raised the idea of what he called
17 a waiting period after we got permission through a signed
18 easement to go forward with the completion of the pipeline
19 below Lake Oahe. Obviously, that would require an
20 injunction or a temporary restraining order or something of
21 that nature. Dakota Access is not going to agree to a
22 further delay.

23 As Your Honor sort of previewed with your
24 question to us, one of the things they would have to show
25 is irreparable harm, probable, immediate, not remote or

1 speculative. You know, that the injury here would
2 presumably attach to the opening of the pipeline which led
3 to your question about the timeline.

4 But we want to make clear before I give you the
5 detail there is that for purposes of any request to stall,
6 halt, enjoin or whatever you want to call it, it would be
7 wrong for the Court to be focused on what is the first day
8 that oil is flowing through the pipeline, or even really
9 what is the first year that oil is flowing through the
10 pipeline.

11 Every harm, as you noted in the status conference
12 last week, every harm the tribes have raised relates to a
13 possibility that the oil would leak through the pipeline.
14 I've gone back through all their comment letters and that's
15 really the harm they are point to.

16 THE COURT: The earlier harm was destruction in
17 the actual construction of the pipeline. So I assume --
18 that they haven't raised it yet but I'm assuming that the
19 harm they will raise will be the potential injury from the
20 oil itself, from a rupture.

21 MR. DEBOLD: Right, which leads to the question
22 of when is there is actually going to be oil in the
23 pipeline. We just want the Court to be aware that it is
24 really not going to be sufficient to focus on that first
25 day that the oil is running, although that will be several

1 days off and I will explain in a minute. But if you look
2 at the raw statistical data referenced in the environmental
3 assessment, not one of the types of risk that they're
4 talking about would be a day one risk.

5 In fact, for any pipeline anywhere in the U.S.,
6 any one-mile segment of it, the data show that the risk of
7 a leak or a spill is on the order of, at the most
8 pessimistic view, once every 474 years. And that is
9 assuming that you have got other kinds of problems like
10 third party damage, which happens when you have a shallow
11 pipeline or one that is exposed, or a pipeline exposed to
12 natural elements or deterioration over time.

13 And they refer to certain pipelines, one is
14 Kalamazoo, Michigan; Marshall, Michigan, the Kalamazoo
15 River. One in the Yellowstone River where the pipelines
16 were exposed and were more than 40 years old. We have not
17 seen anything dealing with this type of construction, the
18 HDD, horizontal directional drill with lots of extra
19 precautions that have been taken here.

20 So I just want the Court to understand that,
21 although we're going to give you the information about how
22 long it is going to take for there to be actual oil in the
23 pipeline, from the standpoint of when do we need to have a
24 decision from Your Honor, we do not need to be looking at
25 that as a day one decision.

1 The one out of 474 years statistic is also for
2 releases of less than four barrels of oil. If you are
3 talking about crossing a stream, the risk is now one in
4 every 1430 years for that small amount of release. If
5 you're talking about a large spill, it's once every 142,993
6 years. This is all in the administrative record. Plus the
7 response plans that have been put in place deal with the
8 pipeline as sort of a contingency, what would happen in the
9 worse case scenario. The worse case scenario that they
10 have mapped out is if the pipeline were resting on top of
11 the water and was totally sliced in half, a guillotine cut.

12 And they've prepared to respond to that kind of a
13 spill, even though there is no way possible that this
14 pipeline, 92 below the river bed, would have that kind of a
15 cut.

16 THE COURT: Right. Well this all goes to your
17 irreparable harm argument.

18 MR. DEBOLD: Exactly. So I just wanted to make
19 sure we're reviewing this in the right context. The other
20 final point, and then I'll move to the timeline, is that
21 the environmental assessment, it's been undisputed. I've
22 gone through the comment letters, nobody has disputed that
23 the pipeline in the aggregate is safer than the other modes
24 of transportation which is either trucking or rail lines.

25 The tribe has oil and gas leases on their

1 reservation. There is a rail line that runs within two
2 miles of the new water intake that was built, which is 70
3 miles south of pipeline. So in fact, if you are talking
4 about preserving the status quo is that actually a more
5 risky proposition.

6 So getting to the question, when oil would be
7 flowing through the pipeline, the best case scenario for
8 oil flowing through for commercial service would be 83 days
9 after the work resumes at Lake Oahe. Now, there will be
10 oil in the pipeline earlier than that. The best case
11 scenario for when there's actually oil present in the
12 pipeline under Lake Oahe is 60 days.

13 I'll explain to you how we get to two different
14 figures. There are two drill boxes, as Your Honor knows,
15 one on either side of the lake. They're over 6500 feet
16 apart.

17 The initial drilling has occurred on both of
18 those drill boxes. And the drilling has gone down and
19 stopped where the border is for the federal land which is
20 about 6450 feet apart. Ultimately the hole is going to be
21 between 42 and 48 inches in diameter. So it can
22 accommodate a 30 inch diameter pipe. But the first stage
23 is to drill the smaller hole, are eight inches in diameter.
24 So the two holes will meet at eight inches diameter. Then
25 there will be a back and forth process of expanding the

1 hole through a number of passes until it is between 42 and
2 48 inches.

3 Then they're going to well the pipeline above
4 ground and check every one of the wells, the girth wells
5 through xray or ultrasonic testing, there will be seven
6 different tests done on the pipeline before that process.

7 Once the pipe has been put together above ground,
8 they're going to run a hydrostatic test, a four hour test
9 where it has to maintain pressure using water which is 25
10 percent above the maximum operating pressure. If it passes
11 that test, they run the pipe through, they connect it, they
12 do a second test for eight hours, the same process, the
13 same high pressure testing.

14 They also inspect the pipeline that came out the
15 other end to make sure there is no harm to the coating and
16 what not, or any dents. They do another test with what is
17 called a caliper, what is called a caliper pig, which they
18 run through the pipeline to make sure that there is no
19 damage on the inside, no dents, et cetera.

20 Once that is all done they do a final welding,
21 those are inspected through x-ray ultrasonic. That's the
22 end of the process that takes about 60 days, it could take
23 as long as 90.

24 The next step is to start filling the pipe with
25 oil which they do in segments. They start -- by the time

1 the pipeline is ready underneath Lake Oahe, the oil should
2 be at about 161 mile mark from the beginning of the
3 pipeline. And Lake Oahe is about 166 and a half mile mark.
4 So they start filling that. It fills all the way through
5 and reaches the end in Illinois. And that takes the extra
6 23 days.

7 THE COURT: Okay. So it seems that the
8 potential, that the plaintiffs' potential arguments are,
9 one, that the approval violated NEPA, that's part of their
10 complaint. In their earlier preliminary injunction they
11 only raised the National Historic Preservation Act
12 violation. Again, just so everyone including the public is
13 clear, the claim in the earlier preliminary injunction had
14 nothing to do with any rupture or any leak of oil into Lake
15 Oahe. The prior preliminary injunction related only to
16 damage to tribal and sacred lands by virtue of construction
17 of the pipeline.

18 So the plaintiffs still have two arguments. They
19 may have more. But two central ones which would be that
20 the earlier process violated NEPA, and second that, given
21 that the government agreed to more recently to go forward
22 with an EIS, they can't now turn their back on this and
23 simply grant the easement.

24 But in seeking a preliminary injunction, if they
25 do, it sounds like we have at least 60 days for me to make

1 a determination before any oil would flow and before any
2 harm could potentially accrue to the plaintiffs. Now I
3 understand your argument that there is no irreparable harm
4 anyway because the odds are so low. But their argument
5 would be, that there would be such harm.

6 The reason Mr. Hasselman asked, and I think it
7 was a very reasonable request which I endorsed, to get the
8 timeline so we have a sense of what we're looking at going
9 forward.

10 MR. DEBOLD: Understood. Sometimes you focus on
11 a question and sometimes that starts defining what the
12 issue is. We wanted to make sure that the Court is aware
13 that there is nothing magic about that day, except that
14 there will be oil in the pipeline. And sure they can make
15 different arguments based on that. But we believe that
16 they would still have a very, very difficult task, in fact
17 an impossible task, of saying we need to have a decision by
18 this day, otherwise the requirements or either a injunction
19 or temporary restraining order would be triggered.

20 THE COURT: Thank you.

21 So Mr. Hasselman, now that you have heard this
22 time estimate, do you agree that all of us in briefing, and
23 me in deciding, will have 60 days from the date of the
24 grant of the easement?

25 Again, just so everyone is clear, including the

1 public, Mr. Marinelli has not said that any easement will
2 be granted. We're just hypothesizing about potential legal
3 steps in the event it is granted.

4 MR. HASSELMAN: Yes. For sure the risk of oil
5 spill ruptures which can take place outside of the HDD and
6 still wind up in Lake Oahe has been a central narrative in
7 this case. And it is a central part of the reason we're
8 here. It is not the only reason. And we don't agree that
9 the drilling of the pipeline, the construction of the
10 pipeline is harmless.

11 I think we need to go back and think hard amongst
12 ourselves in light of this timeline, which is considerably
13 different than we anticipated it to be, whether we will
14 seek relief on construction as well, which would have to be
15 on a faster time scale, or whether we would sort of agree
16 with your premise that we have at least 60 days. I think
17 we need to confer with our client before we can make that
18 commitment.

19 THE COURT: Understood.

20 Ms. Ducheneaux, anything you want to add to that
21 issue?

22 MS. DUCHENEAUX: No, Your Honor, thank you.

23 THE COURT: So let me ask you, Mr. Marinelli,
24 just to go back to Mr. Hasselman's earlier request about
25 the administrative record filing, again to the extent

1 they're bringing challenges based on earlier, under earlier
2 alleged NEPA violations, that administrative record I trust
3 is complete already.

4 MR. MARINELLI: Correct.

5 THE COURT: In other words, anything predating
6 July 25th.

7 So the question then would be the administrative
8 record that relates to any grant of an easement this week
9 or next week. How soon would you be able to file the
10 administrative record for that? Which I imagine would not
11 be terribly extensive.

12 MR. MARINELLI: Your Honor, I would like to
13 respond by first noting that I have a general objection,
14 it's the same objection that I raised to Dakota Access'
15 efforts to get us to file an administrative record before
16 making a decision. And that's that, we really can't
17 compile an administrative record before we've made a
18 decision.

19 THE COURT: They're just saying when you make a
20 decision, they would like the administrative -- if you
21 decide to grant an easement they would like the
22 administrative record for the such decision, they want it
23 simultaneously.

24 MR. MARINELLI: I understood in that manner, I
25 think there are still a few problems with that. One is

1 they don't even have a claim pending regarding an ungranted
2 easement today. Tribes do not have a claim pending
3 regarding an ungranted easement. Even if they did, there
4 is no final agency action. That said, and we have been
5 compiling documents related to the decision-making process
6 as we were going along.

7 I cannot predict how long it would take us to
8 compile those documents into an administrative record. I
9 would note that the timeline that we previously stated,
10 that it takes approximately a week once we, DOJ, receives
11 the documents to process them in a manner that allows us to
12 serve the administrative record still I assume would hold.
13 But as to the Corps compiling that record, conducting the
14 reviews necessary which include the SSI review that is
15 currently pending before the Court or for which a related
16 SSI review is pending before the Court on Dakota Access'
17 motion. It is difficult for me to predict how long it
18 would compile that record.

19 THE COURT: I'm not going to then order you to
20 produce it on a specific date now. But I would ask you to
21 attempt to compile this on an ongoing basis so that we
22 could do it in some expedited fashion. We may have 60 days
23 but we're going to need to work on a compressed timeframe
24 in the event an easement is granted.

25 So let's pick a date to come back. I'm happy to

1 do it on Monday. Is 11:30 same time, same channel good for
2 everybody?

3 MR. DEBOLD: Afternoon would be better if that is
4 possible.

5 THE COURT: Any particular time in the afternoon?

6 MR. DEBOLD: 2:00.

7 THE COURT: All right.

8 Mr. Hasselman is 2:00 convenient for you on the
9 13th?

10 MR. HASSELMAN: Yes, Your Honor.

11 THE COURT: Ms. Ducheneaux?

12 MS. DUCHENEAUX: Yes, Your Honor.

13 THE COURT: Mr. Marinelli?

14 MR. MARINELLI: Yes, Your Honor.

15 THE COURT: Okay. February 13 at 2:00 P.M. Any
16 material that relates to the grant easement I would again
17 ask the government to give me notice.

18 Let me ask the government, do you have a position
19 on the protective order motion filed on Wednesday filed by
20 Dakota Access?

21 MR. MARINELLI: Your Honor, I believe our
22 position is that we will oppose that motion.

23 THE COURT: Okay.

24 MR. MARINELLI: We would like the time to respond
25 to it.

1 THE COURT: Okay.

2 All right. Any other issues anybody wants to
3 raise now this afternoon?

4 Mr. Hasselman?

5 MR. HASSELMAN: No, thank you.

6 THE COURT: Ms. Ducheneaux?

7 MS. DUCHENEAUX: No, thank you.

8 THE COURT: Mr. Marinelli?

9 MR. MARINELLI: No, Your Honor.

10 THE COURT: Mr. Debold?

11 MR. DEBOLD: No, Your Honor.

12 THE COURT: Okay. Thank you all very much,
13 appreciate it. We'll see you next week.

14 (Whereupon, at 12:03 p.m., the hearing
15 adjourned.)

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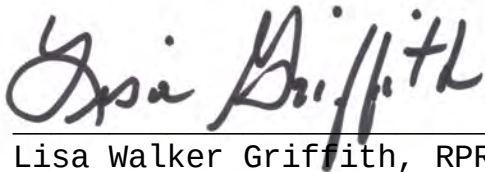
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CERTIFICATE OF REPORTER

I, Lisa Walker Griffith, certify that the
foregoing is a correct transcript from the record of
proceedings in the above-entitled matter.



Lisa Walker Griffith, RPR

Date

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EXHIBIT 11



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
INSTALLATIONS, ENERGY AND ENVIRONMENT
 110 ARMY PENTAGON
 WASHINGTON DC 20310-0110

FEB 07 2017

The Honorable Raul Grijalva
 Ranking Member, Committee on Natural Resources
 United States House of Representatives
 Washington, D.C. 20515

Dear Representative Grijalva:

Pursuant to the Mineral Leasing Act of 1920, as amended (30 U.S.C. §185 (w)), the Army is hereby providing notice of an intent to grant an easement to Dakota Access LLC, a Delaware limited liability company ("Company"), with its principal office at 1300 Main Street, Houston, Texas, operating as a subsidiary of Energy Transfer Partners and authorized to do business in the State of North Dakota, for installation, construction, operation, maintenance, and repair of a 30-inch diameter underground light crude pipeline. The Army provided notice on September 3, 2015, that the Company filed an application with the Army for an easement for a right-of-way across Government land at Lake Oahe Dam and Reservoir, North Dakota.

On Government land, the pipeline will cross approximately 7.37 acres at Tracts 3214, 3215, 3218, 3219-1, and 3225 at Lake Oahe Dam and Reservoir. The pipeline will cross Lake Oahe and Government property on both the east and west of Lake Oahe. The crossing is located in Section 10, Township 134 North, Range 79 West in Morton County, North Dakota, and Section 11, Township 134 North, Range 79 West in Emmons County, North Dakota. A map and legal description are enclosed. Since the line is being buried using a horizontal directional drill under the lake, a construction license will not be needed. The pipeline will not cross the property of any other federal agency.

The Army intends to issue the easement for a term of 30 years. The width of the right-of-way will not exceed fifty feet plus the ground occupied by the pipeline. Easement terms will establish the following major responsibilities on the Company: mitigation of any damages to the property or to the Lake Oahe Project during construction, operation, and maintenance of the pipeline; construction, operation, and maintenance in accordance with applicable federal, state, county, and municipal laws, regulations, and ordinances; pipeline installation in accordance with the U.S. Department of Transportation's Minimum Federal Safety Standards and any other applicable federal or state safety requirements; supervision of the pipeline with inspections at reasonable intervals; the immediate repair of any defects or leaks found by such inspection; protection of government property; Company liability to the United States for damage or injury which may arise from or be incident to the activities of the Company under the easement; soil and water conservation measures including restoration, revegetation, and erosion control; environmental and natural resource protection requirements; non-disturbance of any historical, archeological, architectural or other cultural artifacts encountered; hazardous waste management; a plan for responding to hazardous waste, fuel, and other chemical spills; and compliance with the conditions set forth in the Federal Energy Regulatory Commission's Order Issuing Certificate

dated December 24, 2014, as applicable, to Docket No. OR14-42-00, Dakota Access LLC. In addition, special easement conditions include: responsibility for commitments and mitigation measures in the Final Environmental Assessment; consideration of Army comments prior to the Company's submission of a Facility Response Plan, Geographical Response Plan, Operations and Maintenance Manual, Risk Assessment (Integrity Management Plan), and Spill Models to the Pipeline and Hazardous Materials Safety Administration; as-built drawings; execution of training exercises; and compliance with specified pipeline safety conditions during construction and operation of the pipeline.

Consistent with the direction in "Presidential Memorandum Regarding Construction of the Dakota Access Pipeline" dated January 24, 2017, the U.S. Army Corps of Engineers intends to waive its policy to wait 14 days after Congressional notification before granting an easement under 30 U.S.C. §185. The Corps intends to execute this easement at a time that is mutually convenient to the Corps and the Company, no earlier than 24 hours following delivery of this notification letter.

If you have questions on this action, MAJ Richard Trimble, Office of the Chief of Legislative Liaison, may be reached at 703-697-2417 or LTC Elizabeth Walker at (703) 697-0275.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul D. Cramer", with a long horizontal flourish extending to the right.

Paul D. Cramer
Deputy Assistant Secretary of the Army
(Installations, Housing and Partnerships)

Enclosure



DEPARTMENT OF THE ARMY
 OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
 INSTALLATIONS, ENERGY AND ENVIRONMENT
 110 ARMY PENTAGON
 WASHINGTON DC 20310-0110

FEB 07 2017

The Honorable Rob Bishop
 Chairman, Committee on Natural Resources
 United States House of Representatives
 Washington, D.C. 20515

Dear Chairman Bishop:

Pursuant to the Mineral Leasing Act of 1920, as amended (30 U.S.C. §185 (w)), the Army is hereby providing notice of an intent to grant an easement to Dakota Access LLC, a Delaware limited liability company ("Company"), with its principal office at 1300 Main Street, Houston, Texas, operating as a subsidiary of Energy Transfer Partners and authorized to do business in the State of North Dakota, for installation, construction, operation, maintenance, and repair of a 30-inch diameter underground light crude pipeline. The Army provided notice on September 3, 2015, that the Company filed an application with the Army for an easement for a right-of-way across Government land at Lake Oahe Dam and Reservoir, North Dakota.

On Government land, the pipeline will cross approximately 7.37 acres at Tracts 3214, 3215, 3218, 3219-1, and 3225 at Lake Oahe Dam and Reservoir. The pipeline will cross Lake Oahe and Government property on both the east and west of Lake Oahe. The crossing is located in Section 10, Township 134 North, Range 79 West in Morton County, North Dakota, and Section 11, Township 134 North, Range 79 West in Emmons County, North Dakota. A map and legal description are enclosed. Since the line is being buried using a horizontal directional drill under the lake, a construction license will not be needed. The pipeline will not cross the property of any other federal agency.

The Army intends to issue the easement for a term of 30 years. The width of the right-of-way will not exceed fifty feet plus the ground occupied by the pipeline. Easement terms will establish the following major responsibilities on the Company: mitigation of any damages to the property or to the Lake Oahe Project during construction, operation, and maintenance of the pipeline; construction, operation, and maintenance in accordance with applicable federal, state, county, and municipal laws, regulations, and ordinances; pipeline installation in accordance with the U.S. Department of Transportation's Minimum Federal Safety Standards and any other applicable federal or state safety requirements; supervision of the pipeline with inspections at reasonable intervals; the immediate repair of any defects or leaks found by such inspection; protection of government property; Company liability to the United States for damage or injury which may arise from or be incident to the activities of the Company under the easement; soil and water conservation measures including restoration, revegetation, and erosion control; environmental and natural resource protection requirements; non-disturbance of any historical, archeological, architectural or other cultural artifacts encountered; hazardous waste management; a plan for responding to hazardous waste, fuel, and other chemical spills; and compliance with the conditions set forth in the Federal Energy Regulatory Commission's Order Issuing Certificate

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If you have questions on this action, MAJ Richard Trimble, Office of the Chief of Legislative Liaison, may be reached at 703-697-2417 or LTC Elizabeth Walker at (703) 697-0275.

Sincerely,



Paul D. Cramer
Deputy Assistant Secretary of the Army
(Installations, Housing and Partnerships)

Enclosure



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
INSTALLATIONS, ENERGY AND ENVIRONMENT
110 ARMY PENTAGON
WASHINGTON DC 20310-0110

FEB 07 2017

The Honorable Lisa Murkowski
Chairwoman, Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Madam Chairwoman:

Pursuant to the Mineral Leasing Act of 1920, as amended (30 U.S.C. §185 (w)), the Army is hereby providing notice of an intent to grant an easement to Dakota Access LLC, a Delaware limited liability company ("Company"), with its principal office at 1300 Main Street, Houston, Texas, operating as a subsidiary of Energy Transfer Partners and authorized to do business in the State of North Dakota, for installation, construction, operation, maintenance, and repair of a 30-inch diameter underground light crude pipeline. The Army provided notice on September 3, 2015, that the Company filed an application with the Army for an easement for a right-of-way across Government land at Lake Oahe Dam and Reservoir, North Dakota.

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If you have questions on this action, MAJ Richard Trimble, Office of the Chief of Legislative Liaison, may be reached at 703-697-2417 or LTC Elizabeth Walker at (703) 697-0275.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul D. Cramer", with a long horizontal line extending to the right.

Paul D. Cramer
Deputy Assistant Secretary of the Army
(Installations, Housing and Partnerships)

Enclosure



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
INSTALLATIONS, ENERGY AND ENVIRONMENT
110 ARMY PENTAGON
WASHINGTON DC 20310-0110

FEB 07 2017

The Honorable Maria Cantwell
Ranking Member, Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Senator Cantwell:

Pursuant to the Mineral Leasing Act of 1920, as amended (30 U.S.C. §185 (w)), the Army is hereby providing notice of an intent to grant an easement to Dakota Access LLC, a Delaware limited liability company ("Company"), with its principal office at 1300 Main Street, Houston, Texas, operating as a subsidiary of Energy Transfer Partners and authorized to do business in the State of North Dakota, for installation, construction, operation, maintenance, and repair of a 30-inch diameter underground light crude pipeline. The Army provided notice on September 3, 2015, that the Company filed an application with the Army for an easement for a right-of-way across Government land at Lake Oahe Dam and Reservoir, North Dakota.

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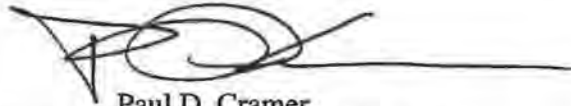
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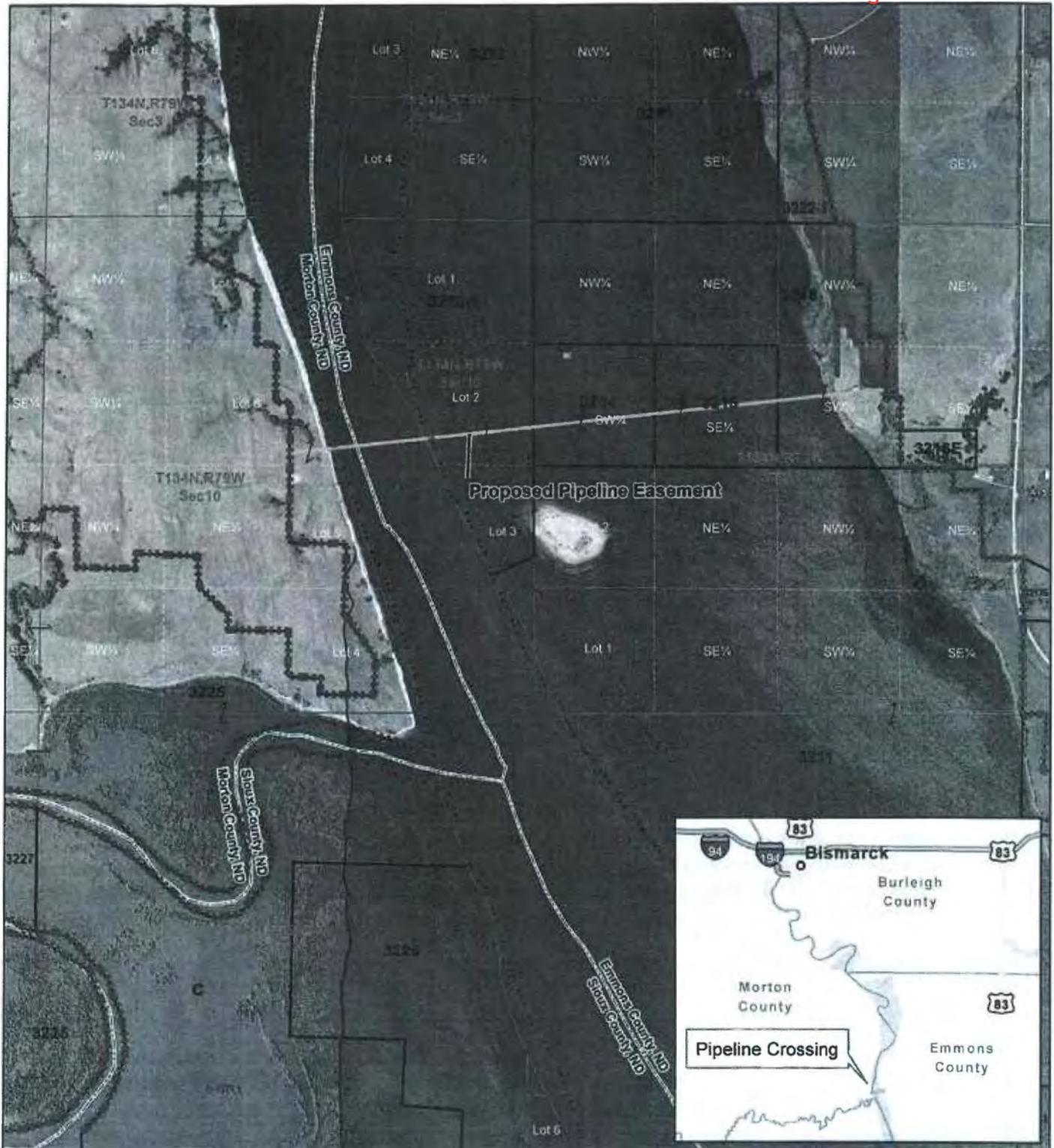
If you have questions on this action, MAJ Richard Trimble, Office of the Chief of Legislative Liaison, may be reached at 703-697-2417 or LTC Elizabeth Walker at (703) 697-0275.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul D. Cramer", with a long horizontal line extending to the right.

Paul D. Cramer
Deputy Assistant Secretary of the Army
(Installations, Housing and Partnerships)

Enclosure



OAHE DAM AND RESERVOIR



Date: 28-May-2015

Path: (regis1)\re2\esse\bob_incontro\Oahe\DAPL_Easement\DAPL_Easement.mxd

Disclaimer: The Government furnishes this data and the recipient accepts and uses it with the express understanding that the United States Government makes no warranties, expressed or implied, concerning the accuracy, completeness, reliability, usability, or suitability for any particular purpose of the information and data furnished. The United States shall be under no liability whatsoever to any person by reason of any use made thereof. Data displayed on this map are approximations derived from GIS layers and should NOT be used in place of survey data or legal land descriptions.

0 600 1,200 2,400
Feet



Legend

- Project Boundary (Fee)
- 50' Wide Proposed Easement (±7.37 Acres)
- Tracts
- Sections
- Counties

EXHIBIT "A" ATTACHED TO AND
MADE A PART OF DACW45-2-16-8059

METES AND BOUNDS DESCRIPTION
CENTERLINE 50' WIDE PERMANENT EASEMENT

Being a centerline description located in the Section 10, Township 134 North, Range 79 West of the 5th P.M., in Morton and Emmons County, North Dakota and Section 11, Township 134 North, Range 79 West of the 5th P.M., in Emmons County, North Dakota, and crossing the following tracts of land and described as follows:

Basis of Bearing:

Bearing are based on UTM Zone 14 Grid North.

Tracts of land:

Tract 1: Portion of Lot 4 and Lot 7; Book 125, Page 395; Deed Records, Morton County.

Tract 2: Lake Oahe.

Tract 3: Portion of the N1/2 of Section 11; Civil Case No. 406; Probate Records, Emmons County.

COMMENCING at a 3/8-inch iron rod found for the Northwest corner of said Section 10;

THENCE, crossing said Section 10, South 46 degrees 08 minutes 26 seconds East a distance of 3,664.72 feet to the west line of said United States of America Tract 1 for the **POINT OF BEGINNING** of this centerline description;

THENCE, crossing the United States of America tracts and through said Section 10 and said Section 11, North 83 degrees 59 minutes 34 seconds East a distance of 6,420.72 feet to the east line of said United States of America Tract 3 for the **TERMINAL POINT** of this centerline description, from which a 1-inch USGS monument found on said east line bears South 01 degrees 17 minutes 30 seconds West a distance of 296.68 feet. Said centerline having a length of 6,420.72 feet, 389.14 rods, and said fifty foot (50') wide.

Permanent Easement containing 7.37 acres of land.

Wood Group Mustang, Inc.
17325 Park Row
Houston, Texas 77084
(832) 809-8000
April 23, 2015
Job No. 103957

Exhibit "B"
DACW45-2-16-8059

EXHIBIT 12

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Intervenor-Plaintiff,

v .

U.S. ARMY CORPS OF ENGINEERS,

Defendant.

and

DAKOTA ACCESS, LLP,

Intervenor-Defendant.

Case No. 1:16-cv-1534-JEB

**DECLARATION OF STEVE VANCE IN SUPPORT OF MOTION FOR A
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

I, Steve Vance, declare as follows:

1. My name, office address, telephone and facsimile numbers, and email address are as follows:

Steven Vance, Tribal Historic Preservation Officer
P.O. Box 590
Eagle Butte, SD 57625 Phone:
(605) 964-7554
Facsimile : (605) 964-7552
Email: stevev.crstpres@outlook.com

2. I am the Tribal Historic Preservation Officer of the Cheyenne River Sioux Tribe, and have held that position since May of 2010. In this role, I am responsible for being involved in the preservation and protection of cultural and historic sacred estates of interest to the Cheyenne River

Sioux Tribe. I am responsible for participating in the protection and preservation of sacred estates of interest in all aboriginal, treaty, and other geographic areas where such sacred estates are located.

3. Prior to that employment position, I was employed for approximately seven years as a Certified Lakota Studies Instructor in the instruction of Lakota language, culture, history, and government at Takini School and Tiospaye Topa School. I received my formal education in Lakota studies from Sinte Gleska University to obtain a South Dakota Teaching Certification.

4. I am an enrolled member of the Cheyenne River Sioux Tribe, and a member of the Hoh'woju or what is now called by the United States the Minnecoujou Band of the seven bands of Lakota. I was born on Cottonwood Creek on the Cheyenne River Sioux Reservation. I actually have a delayed birth certificate, as I was not born in a hospital. My grandfather Reuben Ward actually delivered me. He wore the bonnet passed down from traditional Minnecoujou leader Hump. A legacy of traditional leadership and Lakota culture have been passed on to my family. I was placed in boarding school at six years old, went on to serve in the military, but I moved home to Cheyenne River to live our Lakota ways of life. Now, I live near Takini, South Dakota on our family property on the Cheyenne River Sioux Reservation. In our communities, we speak Lakota daily and practice our Lakota ways in everyday life. The River south of where I live is the traditional campgrounds of Lakota leaders including Spotted Elk, Touch the Cloud, Hump, and Crazy Horse.

5. The only way to fully understand Lakota spiritual and religious practices is to experience them and to discuss them in Lakota. Traditionally, these practices are discussed in Lakota language and in spiritual settings orally. This is the only way to fully understand the meaning of these spiritual practices. This makes it difficult to translate and bring full understanding of the importance of our spiritual practices and our belief systems. Speaking about these things in English is difficult, because the act of speaking in English and in a written setting loses meaning.

6. I have practiced Lakota spiritual and ceremonial practices, and I have spoken Lakota language and been around Lakota cultural practices and knowledge as a young child and for the majority of my life.

7. Because ours is an oral tradition, there is more than one version of Lakota creation stories, but a common version that I was taught holds that our world in the beginning was water. The world began from water. From there, the world's life source, and our life path is to be born from water in the womb. Our life begins in water. For this reason, water is very important to Lakota people. The elements of the world must be in balance in nature for survival. Heat is good but it can cook you, cold can help us, but it can also freeze us.

8. In the beginning of our world, there was Inyan. Inyan was the only energy in the world. Inyan gave of itself to create everything. Earth was just a shadow, and Inyan added color. Humans were created at the very last. The original peoples were the last creation here before us. This is a central belief in other major world religions, that the world was created by a power, such as the Bible book in Genesis- that the earth and its waters came before human beings.

9. We, the Lakota, including the four bands of the Cheyenne River Sioux Tribe (Itazipco, Hoh'woju (Minnecoujou), Oohenumpa, and Siha Sapa) were created beneath the present world. We lived there, and we emerged at a site in our sacred He Sapa or Black Hills. At first we suffered, but Creator caused the sacred tatanka or buffalo to lead us to food and water. Mni ki pejuta tokaheya-water is our first medicine. Clean, pure water is an essential part of the Lakota way of life that Creator has taught us. Clean, pure water is necessary for the rites and sacraments that comprise our religion. Minnecoujou means "plants by the water." Oohenumpa means "two kettle" or "boils twice." Water is a part of who we are.

11. In the Lakota language, the Missouri River is called Mni Sose. Translation to English is always difficult because the meaning of Lakota words is multidimensional where English is not. The waters of Mni Sose have always been necessary for our existence as Lakotas and for our spiritual practices. Mni Sose was here before the human beings were here. We chose to live by Mni Sose because of its importance to our existence. Similarly, Mni Sose is essential to all of the plant and animal life that relies upon Mni Sose for life. All of that life is also essential to Lakota life ways. These things are all related. Mni Sose has become even more important than in days past because the other bodies of water important in our culture were removed from our access, such as waters in the Black Hills. It is important to our spirituality. It is an important source of our foods, medicines, water for drinking, and for living. It is the bloodline and the lifeline of the people at this time, and we cannot live without it.

11a. The Lakota religion is characterized by our unique Lakota worldview and several essential ceremonies. Examples of some of our ceremonies are:

- i. Inipi -a ceremony where we pray inside a sweat lodge;
- ii. Hanbleceya -a ceremony where we fast and pray for a vision in a solitary place;
- iii. Wiwanyang Wacipi - or Sundance - an annual ceremony of renewal and rebirth where we gather and dance, pray, and sacrifice so that the welfare of our relatives and loved ones is enhanced for the next year.
- iv. Isnati Awicaliwanpi - a coming of age ceremony for young women; and
- v. Wiping of the tears - a ceremony that is held one year after a loved one has passed away, which signifies the end of a mourning period.

We cannot practice our religion without our ceremonies.

12. Water is necessary to perform all of our ceremonies, except the Sundance, which

requires the deprivation of water. Therefore, water is even essential, in its absence, to the Sundance. Water is essential to bring the energies from above to below. Other symbols in other cultures that speak to this are the yin and the yang, and the infinity sign, and the hourglass design. The hourglass shape is very sacred in Lakota. Lakotas are at the bottom of the hourglass and we want to get where the sand comes through. To get there, we must deplete ourselves. The four days of fasting in this ceremony teach us why water is essential to life. This is why this ceremony is a time of not using water to respect water. In inipi, burial ceremonies, coming of age for young women ceremonies, and our other ceremonies, the physical use of clean water is essential.

13. Even though for hundreds of years, the United States has acted to suppress and destroy our religion from us by outlawing our religious and spiritual practices and forcing assimilation on us and destroying our sacred sites, today our Lakota culture and our sacred rites and our spiritual beliefs and religion are strong among our old people and young people alike.

14. Inipi is one of our very important ceremonies. Inipi is the word we use for the purification ceremony we perform in a sweat lodge. To the Lakota people, Inipi is essential to remain in balance. It is important for taking away the negative energy, isolation, and separation from surroundings that interferes with balance. The fire brings warmth, and the rocks bring the cold. Lakotas have a totally different idea of the rock (Inyan) because it gave everything of itself for us to exist. The water gives the rock the healing energy. Water in our ceremonies is known as mni wiconi or "the water of life." The steam that issues when the water touches the hot rocks is the "breath of life" and pierces you to your spirit.

15. Just as all of our water for drinking and municipal purposes comes from Lake Oahe today, all of the water that we use for the practice of our religion comes from Lake Oahe.

16. We are taught that anything that we use, especially water, for our sacred ceremonies,

especially Inipi, must to be pure, natural. If we are using sage, we do not gather sage from the roadside where it is growing near trash; we have to go out in the country and find clean fresh unadulterated plants. It is the same for water. It must be natural, preferably collected from nature. We cannot use bottled water. We cannot use contaminated water. To practice my Lakota religion, I must gather clean natural water from Lake Oahe.

17. We are also taught in our religion that we must walk in balance. We walk in balance with our thinking, walk in balance with every step we take. In order for our water to be pure for use in our religion, it must be in balance.

18. Long ago our prophets told of the coming of a Black Snake that would be coiled in our homeland and which would harm us. In the prophecy, the Black Snake devoured the people. We would as children go out in the dark with this monster in the back of our heads. There was this black dark figure, and it was a huge snake that was going to devour the people so the people became scared and ran back inside. This pipeline, like this story, is black, it is slippery and it moves. We Lakota people believe that the crude oil that is proposed to flow through the Dakota Access pipeline is the Black Snake. We believe that the very act of pumping this black crude oil under our sacred Mni Sose, the very existence of the crude oil pipeline will pollute the pure, natural water of Lake Oahe and cause a critical imbalance that will contaminate the water. We believe that the existence of this crude oil pipeline under the Lake Oahe Reservoir poses a special threat to the way we practice our religion because my people own these waters that comprise Lake Oahe. It is this location and area where we travel to the river to draw this pure water. The close proximity of the pipeline to this area and the desecration to the river bed itself will contaminate the spiritual energy of the water and poses a special threat to our religious practices.

19. This contamination will make the waters of Lake Oahe unsuitable for uses in our religious practices, especially Inipi. We cannot use this water once the pipeline is under the Mni Sose. This will limit its use as our mni wiconi (water of life) to provide the sacred "breath of life" that issues from our heated rocks and heals us and pierces our spirit in the Inipi ceremony.

20. The use of unnatural waters is not a substitute that adherents to our religious principles, including myself, can accept. Bottled water for example is not a natural source of water-it is surrounded by chemicals used in plastic. When we conduct ceremony, we do not wear jewelry or man-made items. For example, carrying our ceremony water in a metal bucket is not okay. We use a wooden bucket because wood is from nature. The construction and operation of the pipeline will make the water unsuitable for use in our ceremonies because it will change the energy and the spirit of Mni Sose.

I declare under the penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

Dated: January 30, 2017

A handwritten signature in black ink, appearing to read 'Steve Vance', is written over a horizontal line.

Steve Vance

EXHIBIT 13

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Plaintiff-Intervenor,

v.

U.S. ARMY CORPS OF ENGINEERS

Defendant,

and

DAKOTA ACCESS, LLC,

**Defendant-Intervenor and Cross-
Claimant.**

Civil Action No. 16-1534 (JEB)

MEMORANDUM OPINION

Since last summer, the question of whether Dakota Access should route its oil pipeline near the reservations of American Indian tribes has engendered substantial debate both on the ground in North and South Dakota and here in Washington. This Court, meanwhile, has focused on the specific legal challenges raised by the Standing Rock and Cheyenne River Sioux Tribes in their efforts to block government permitting of the pipeline. See Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Standing Rock I), 2016 WL 4734356 (D.D.C. Sept. 9, 2016).

At the start of 2017, that pipeline was nearly complete, save a stretch — awaiting an easement — that was designed to run under the bed of Lake Oahe, a federally regulated

waterway that forms part of the Missouri River and straddles North and South Dakota. Upon assuming office, President Trump directed an expedited approval process, and on February 8, the Army Corps of Engineers issued the easement that permitted Dakota Access to drill under the lake.

Fearing that the presence of oil in the pipeline under Lake Oahe will cause irreparable harm to its members' religious exercise, Cheyenne River responded with a Motion for Preliminary Injunction, in which it argues that the easement's grant violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, and requests that the Court enjoin the effect of the easement and thus the flow of oil, which is expected to commence in the next week or two. See ECF No. 156 (Status Report of Dakota Access, Mar. 6, 2017). As the Court concludes that the extraordinary relief requested is not appropriate in light of both the equitable doctrine of laches and the Tribe's unlikelihood of success on the merits, it will deny the Motion.

I. Background

The Dakota Access Pipeline (DAPL) is a domestic-oil pipeline designed to move more than half a million gallons of crude oil across four states every day. Standing Rock I, 2016 WL 4734356, at *1. Its construction has sparked legal challenges from several American Indian tribes: the Standing Rock and Cheyenne River Sioux Tribes here, as well as others. See Yankton Sioux Tribe v. U.S. Army Corps of Engineers, No. 16-1796 (D.D.C., filed Sept. 8, 2016); Oglala Sioux Tribe v. U.S. Army Corps of Engineers, No. 17-267 (D.D.C., filed Feb. 11, 2017). The present action originally sought, in principal part, to block permitting by the Corps of the construction and operation of DAPL underneath Lake Oahe, a federally regulated waterway created by the Corps in 1958 via a dam constructed on the Missouri River. Standing Rock I, 2016 WL 4734356, at *6. The Lake Oahe crossing sits about half a mile north of the Standing

Rock Reservation and 73 miles north of the Cheyenne River Reservation. Id.; ECF No. 127-3, Exh. 1. The crossing, which will run under the lakebed but not through the water itself, is the only portion of DAPL that is not yet finished. See ECF No. 89-1 (Presidential Memorandum of Jan. 24, 2017), § 1; Preliminary Injunction Oral Argument Transcript (Feb. 28, 2017) at 9:22-10:2.

The Court has previously discussed the permitting schemes for construction activities in federally regulated waters and documented the Corps' application of those schemes to DAPL. See Standing Rock I, 2016 WL 4734356, at *1-17. It thus will recap only the developments relevant to the present Motion.

Dakota Access formally requested a permanent easement at Lake Oahe in October 2014, see ECF No. 73-4 at 2, and submitted an application for such an easement to the Corps in June 2015. See ECF No. 73-5. On July 25, 2016, the Corps granted permission under the Rivers and Harbors Act, 33 U.S.C. § 408, for DAPL's placement at Lake Oahe. See ECF No. 73-7. The parties disagree as to whether the Corps also at that time granted an easement pursuant to the Mineral Leasing Act, 30 U.S.C. § 185. See ECF No. 57 (Dakota Access Cross-Claim); ECF No. 66 (Dakota Access Mot. for Summary Judgment); ECF No. 73 (Corps Mot. for Summary Judgment). Two days later, the Standing Rock Sioux Tribe filed this suit against the Corps for declaratory and injunctive relief pursuant to the National Historic Preservation Act, National Environmental Policy Act, Clean Water Act, and the Rivers and Harbors Act. See ECF No. 1 (Complaint), ¶¶ 128-212. Dakota Access successfully moved to intervene in support of the Corps on August 5, see ECF No. 7, and Cheyenne River joined as a Plaintiff on August 10. See ECF No. 11. Cheyenne River then filed its own Complaint, see ECF No. 11-12, which it later amended on September 8. See ECF No. 37. Like Standing Rock's Complaint, Cheyenne

River's pleadings stated claims under the NHPA, NEPA, CWA, and RHA, as well as for breach of trust responsibility, and violations of the Flood Control Act and the Administrative Procedure Act. Id. at 38-55. Significantly, neither Plaintiff asserted a count under the Religious Freedom Restoration Act.

The Tribes initially sought a preliminary injunction — based solely on the NHPA — contending principally that the clearing and grading of land along the pipeline route desecrated sites sacred to them. On September 9, 2016, immediately after this Court issued its Opinion denying that motion, see Standing Rock I, 2016 WL 4734356, the Departments of Justice, the Interior, and the Army issued a joint statement explaining that because “important issues raised by the Standing Rock Sioux Tribe and other tribal nations and their members regarding the Dakota Access pipeline” remained, “construction of the pipeline on Army Corps land bordering or under Lake Oahe [would] not go forward” until the Army could determine whether reconsideration of any of its previous decisions regarding the Lake Oahe crossing under NEPA or other federal laws was necessary. See ECF No. 42-1 at 1.

Two months later, on November 14, 2016, Assistant Secretary of the Army for Civil Works Jo-Ellen Darcy wrote to Dakota Access and Standing Rock to explain that the Army had completed the review called for on September 9 and had “determined that additional discussion with the Standing Rock Sioux Tribe and analysis [were] warranted.” ECF No. 56-1 at 2. The Army invited Standing Rock to engage in discussions concerning “[p]otential conditions in an easement for the pipeline crossing” and “[i]n light of such conditions, whether to grant an easement for the pipeline to cross Lake Oahe at the location currently proposed.” Id.

Then, on December 4, Assistant Secretary Darcy issued a memorandum to the Corps' Commander stating that the Army would “not grant an easement to cross Lake Oahe at the

proposed location based on the current record.” ECF No. 65-1, ¶ 12 (emphasis added). She directed a “robust consideration of reasonable alternatives,” which she thought would be “best accomplished . . . by preparing an Environmental Impact Statement.” Id. On January 18, 2017, Darcy published in the Federal Register a notice of intent to prepare an EIS. See 82 Fed. Reg. 5,543 (Jan. 18, 2017).

The government’s position on the easement shifted significantly, however, once President Trump assumed office. A Presidential Memorandum issued on January 24, 2017, directed the Secretary of the Army to instruct the Assistant Secretary of the Army for Civil Works and the Corps “to take all actions necessary and appropriate to . . . review and approve in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary or appropriate, requests for approvals to construct and operate the DAPL, including easements or rights-of-way” and to “consider, to the extent permitted by law and as warranted, whether to rescind or modify” the December 4 memorandum. See ECF No. 89-1, § 2. The Army completed a review, see ECF No. 114-1 (Memorandum re: Dakota Access Pipeline; USACE Technical & Legal Review for the Dep’t of the Army, Feb. 3, 2017), provided notice to Congress of its intent to issue the easement, see ECF No. 95, and did so on February 8. See ECF No. 96-1.

The next day, Cheyenne River filed the present Motion for Preliminary Injunction along with an Application for a Temporary Restraining Order. See ECF No. 99. The Tribe does not consistently describe the nature of the requested injunctive relief. At points, it asks that the Court direct the Corps “to withdraw the easement.” Notice of Mot. at 1; ECF No. 98-12 (Text of Proposed PI Order) at 1. It elsewhere asks the Court to enjoin “the effect of the easement” and to enjoin further construction by Dakota Access “in the area described in the easement.” Mot. at 1;

see also id. at 2, 3-4. Because the impact of withdrawing the easement or suspending its effect would presumably be the same — halting any additional construction under and on either side of Lake Oahe and preventing the flow of oil — the Court need not parse the different terminology.

The sole cause of action raised in the TRO and this Motion is the Religious Freedom Restoration Act. Id.; ECF No. 98 (Mot.). Specifically, Cheyenne River contends:

The Lakota people believe that the mere existence of a crude oil pipeline under the waters of Lake Oahe will desecrate those waters and render them unsuitable for use in their religious sacraments. . . . The Lakota people believe that the pipeline correlates with a terrible Black Snake prophesied to come into the Lakota homeland and cause destruction. . . . The Lakota believe that the very existence of the Black Snake under their sacred waters in Lake Oahe will unbalance and desecrate the water and render it impossible for the Lakota to use that water in their Inipi ceremony.

Mot. at 2-3. Because Cheyenne River had not previously pled a RFRA claim, it has also sought leave to file a Second Amended Complaint. See ECF No. 97. For purposes of resolving the present Motion, the Court assumes it will grant the Tribe's motion for leave to amend, such that the RFRA claim is properly before it.

The Court held a hearing on the TRO on February 13. Finding that no harm to religious exercise was imminent, as oil was not yet set to flow through DAPL, the Court denied the application. See Minute Order of Feb. 13, 2017; ECF No. 119 (TRO Oral Argument Transcript, Feb. 13, 2017) at 29:20-30:19. It then set a compressed briefing schedule on the instant Motion for Preliminary Injunction and heard argument on February 28. It issues this Opinion on an expedited basis.

II. Legal Standard

“[I]njunctive relief” is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Winter v. Nat. Res. Def. Council, Inc., 555

U.S. 7, 22 (2008). “A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” Id. at 20.

Before the Supreme Court’s decision in Winter, courts weighed the preliminary-injunction factors on a sliding scale, allowing a weak showing on one factor to be overcome by a strong showing on another. See, e.g., Davenport v. Int’l Bhd. of Teamsters, 166 F.3d 356, 360-61 (D.C. Cir. 1999). This Circuit, however, has suggested that Winter should be read to abandon the sliding-scale analysis in favor of a “more demanding burden” requiring plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm. See Sherley v. Sebelius, 644 F.3d 388, 392-93 (D.C. Cir. 2011); Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1292 (D.C. Cir. 2009). Whether a sliding-scale analysis still exists or not, courts in our Circuit have held that a failure to show a likelihood of success on the merits alone is sufficient to defeat the motion. Ark. Dairy Co-op Ass’n, Inc. v. USDA, 573 F.3d 815, 832 (D.C. Cir. 2009) (citing Apotex, Inc. v. FDA, 449 F.3d 1249, 1253 (D.C. Cir. 2006)).

III. Analysis

Cheyenne River seeks preliminary-injunctive relief to protect its members’ free exercise of religion, which it argues will be compromised by the presence of crude oil in the Dakota Access pipeline under Lake Oahe. See TRO Tr. at 9:10-12, 11:3-4. Because construction on that portion of the pipeline is now underway and oil is likely to start flowing through the completed pipeline in the next week or two, see DA Mar. 6 Status Report, the Tribe asserts that its members’ rights are in imminent danger. It thus insists that the Court must enjoin the effect

of the easement — namely, Dakota Access’s ability to operate the pipeline under Lake Oahe — while it weighs the merits of the Tribe’s RFRA claim.

In response, the Corps and Dakota Access raise myriad arguments, among them that the Tribe has not demonstrated a likelihood of success on the merits both because its RFRA claim is barred by laches and because it failed to show a substantial burden on its members’ religious exercise. The Court largely agrees, concluding that laches bars the preliminary-injunctive relief requested (but not the RFRA claim itself) and that the Tribe’s substantial-burden position is unlikely to achieve success on the merits. Having so decided, the Court need not consider the remaining three factors of the preliminary-injunction analysis — irreparable harm, balance of equities, and public interest — or Defendants’ other contentions.

A. Laches

Laches is an equitable defense “‘designed to promote diligence and prevent enforcement of stale claims’ by those who have ‘slumber[ed] on their rights.’” Menominee Indian Tribe of Wisc. v. United States, 614 F.3d 519, 531 (D.C. Cir. 2010) (quoting Gull Airborne Instructions, Inc. v. Weinberger, 694 F.2d 838, 843 (D.C. Cir. 1982)). As a general matter, it applies “where there is (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” Id. (quotation marks and citation omitted). How a court applies laches, however, turns on whether the relief requested is legal or equitable, whether the legislature has supplied a statute of limitations, and, if so, whether that limitations period has run. See Petrella v. Metro-Goldwin-Mayer, Inc., 134 S. Ct. 1662, 1673-74 (2014).

Where Congress has provided a statute of limitations and a plaintiff brings a claim for legal relief within the time period, laches cannot be invoked to preclude adjudication of the claim or to bar that type of relief. Id. at 1667, 1674. Where a plaintiff brings a claim for equitable

relief within the time period, conversely, “laches may bar at the very threshold the particular relief requested” only if “extraordinary circumstances” are present. Id. at 1967; 1977-78 (citing Chirco v. Crosswinds Communities, Inc., 474 F.3d 227 (6th Cir. 2007); New Era Publications Int’l v. Henry Holt & Co., 873 F.2d 576, 584-85 (2d Cir. 1989)). Absent such circumstances, a court may take account of the plaintiff’s delay at the remedial stage when determining the appropriate injunctive relief. Id. at 1967; 1978-79.

RFRA is subject to a four-year statute of limitations. See 28 U.S.C. § 1658; see also Garraway v. Lappin, 2012 WL 959422, at *3 (M.D. Penn. Mar. 21, 2012); Al-Sadun v. DCFCS, 2011 WL 1378638, at *3 (N.D. Ill. Apr. 11, 2011); Pineda-Morales v. De Rosa, 2005 WL 1607276, at *8 (D.N.J. July 6, 2005); Jama v. U.S. INS, 343 F. Supp. 2d 338, 365 (D.N.J. 2004). Defendants do not mention this statute or assert that extraordinary circumstances are present here. The Court, consequently, does not acquiesce in their position that laches bars the RFRA claim in its entirety. See DA Opp. at 1, 10; Corps Opp. at 10-15.

That conclusion, however, does not mean that laches is an irrelevant consideration here. On the contrary, a court assessing whether to award the “extraordinary remedy” of preliminary-injunctive relief, Winter, 555 U.S. at 22, may determine whether laches renders that relief inappropriate. See, e.g., Perry v. Judd, 840 F. Supp. 2d 945, 953-55 (E.D. Va. 2012) (discussing whether laches precluded preliminary-injunctive relief prior to undertaking four-factor analysis). The Court will thus proceed to analyze Defendants’ contention that the Tribe delayed in filing suit on its RFRA claim and thereby caused them prejudice.

1. *Lack of Diligence*

Run-of-the-mill delay is not sufficient to warrant the application of laches. Menominee Indian Tribe, 614 F.3d at 531. The “party seeking relief” must have delayed “inexcusably or

unreasonably.” Id. (quotation marks and citation omitted) (emphasis added). As explained below, although the Tribe learned of DAPL’s proposed route in October 2014, when the Corps solicited its input on the project, and the Corps issued some of the authorizations necessary for Dakota Access to drill at Lake Oahe in July 2016, Cheyenne River waited until February 2017 to voice its concern that, given the Black Snake prophecy, the mere presence of oil in the pipeline would impose a substantial burden on its members’ religious exercise and to seek to raise a RFRA claim.

In accordance with the consultation process required by Section 106 of the NHPA, the Corps sent a letter to tribes, including Cheyenne River, on October 24, 2014, with information about the proposed DAPL project and maps illustrating its location and nearby cultural sites. See ECF No. 127-5 (Declaration of Richard Harnois), ¶ 7. The letter requested comments from the Tribe within 30 days of its receipt. Id. Cheyenne River did not respond until March 23, 2015. Id., ¶¶ 8-9, 12.

Over the next several months, the Corps invited the Tribe to weigh in on DAPL, including via site visits and meetings. Id., ¶¶ 12-30. Cheyenne River submitted comments in person and via email, phone, and letter, id., ¶ 30, some of which alerted the Corps in general terms that DAPL might affect sacred sites, including water. But the Tribe never asserted that the pipeline’s operation itself under Lake Oahe — absent any spill or rupture — would somehow compromise the purity of the water and pose a religious-exercise problem. See, e.g., ECF No. 115-2, Exh. B (Letter from Steve Vance to Richard Harnois, Corps Sr. Field Archaeologist, Aug. 17, 2015) at 2 (“DAPL cannot address the [e]ffects to cultural and historical resources, Sacred sites (water included), Traditional Cultural Properties, Properties of Cultural or Religious Significan[ce] to Tribe, etc., of the proposed pipeline when they have not been properly

identified.”); ECF No. 115-2, Exh. C (Federal Consultation with Tribes Regarding Infrastructure Decision-Making, Oct. 27, 2016) at 145:15-17 (“Water is sacred to us.”); Hanois Decl., ¶¶ 31-33; ECF No. 143-1 (Transcript of NHPA Consultation Meeting, Feb. 18-19, 2016) at 3 (Steve Vance, Cheyenne River’s Tribal Historic Preservation Officer: “The water is the big thing. You know, we as tribes and Cheyenne River went on record and saying that water is a sacred object. If you look at the sacred site policy and that it says ‘other things’, it [doesn’t] say the water. . . . And here we are[,] this is it. I mean, when that’s gone we’re all hurting.”).

In August and September 2016, a few weeks after the Corps granted some of the authorizations necessary for Dakota Access to drill under Lake Oahe, the Tribe filed its Complaint and Amended Complaint. In those pleadings, Cheyenne River continued to refer only generally to water as religiously significant and to focus on the risk posed by spills or leaks and the possible harm to sacred sites from clearing, grading, and construction activities. See, e.g., ECF No. 11-12, ¶ 1 (“The construction and operation of the pipeline . . . will damage and destroy sites of great historic, religious, and cultural significance to the Tribe.”); id., ¶ 42 (“The Tribe is greatly concerned with the possibility of oil spills and leaks from the pipeline should it be constructed and operated, particularly into waters that are of considerable economic, religious, and cultural importance to the Tribe.”); id., ¶ 74 (“[T]he cultural and religious significance of these waters cannot be overstated. An oil spill from the pipeline into Lake Oahe would cause an economic, public health and welfare, and cultural crisis of the greatest magnitude.”); id., ¶ 76 (“[T]he Lake Oahe crossing will take place in an area of great cultural, religious and spiritual significance to the Tribe. Construction of the pipeline . . . would destroy burial grounds, sacred sites, and historically significant areas on either side of Lake Oahe.”); ECF No. 37, ¶ 2 (“The waters of the Missouri River . . . are sacred to the Lakota people of the Cheyenne River Sioux

Tribe and constitute the lifeblood of our religion and traditions.”); ¶ 61 (“The waters of the Missouri River moreover are sacred to the Tribe and essential to the Tribe’s practice of our religion.”).

A declaration from the Tribe’s Environmental Director/Research Specialist, filed in August 2016 with its motion to join Standing Rock’s NHPA preliminary-injunction motion, likewise did not state that the mere presence of oil in a pipeline under the lake’s floor would render the Tribe’s members unable to perform religious ceremonies, nor did it mention the Black Snake. See ECF No. 19-6 (Declaration of Dave Nelson). Instead, it explained that “numerous . . . spiritual sites [exist] beneath the waters of the proposed DAPL pipeline crossing,” that “[t]he water of the Missouri river and its tributaries is an essential component of many traditional Lakota cultural and spiritual practices” and is “used in numerous traditional ceremonies,” and that construction of DAPL could harm the Tribe and its members because “the proposed use of explosives on the river bed . . . has a high likelihood of destroying or irreversibly damaging . . . spiritual sites,” construction operations could destroy plants, and “due to the presence of historic pollutants . . . [,] construction and pipeline operation activities [could] contaminate the region’s water in such a way that would negatively impact the Tribe’s and its members’ ability to conduct traditional medicinal and spiritual ceremonies and practices.” Id., ¶¶ 5, 6, 9.

After the government announced in September 2016 that it intended to pause construction at the Lake Oahe crossing pending further review, Standing Rock explained in a letter to Assistant Secretary Darcy that “water itself plays a central role in the religious and cultural beliefs of the Tribe.” ECF No. 115-4, Exh. D (Letter from Standing Rock Sioux Tribe to Jo-ellen Darcy, Sept. 22, 2016) at 5. To support that contention, it quoted part of a declaration from Standing Rock’s Chairman in which he discussed the risks to the Tribe’s religious practice from

an oil spill: “Our Sundance, a spiritual ceremony sacred to us, is performed on the banks of the river. [When a pipeline leaks into Lake Oahe], [t]he source of life, as well as spiritual continuity, would be damaged.” *Id.* at 6 (emphasis added) (alterations in original) (quoting ECF No. 6-1 (Declaration of Dave Archambault II, Aug. 4, 2016), ¶ 12). (The unaltered declaration reads: “When the pipeline leaks, the Missouri river — the source of our drinking water, where we fish, swim, and conduct ceremonies — will be contaminated. Our Sundance, a spiritual ceremony sacred to us, is performed on the banks of the river. The source of life, as well as spiritual continuity, would be damaged.”). The letter then stated that “[t]he close connection between the waters of Lake Oahe and the religious practices of the Tribe implicate federal laws protecting Indian religious freedom,” quoted language from the American Indian Religious Freedom Act and RFRA, and noted, “The Final EA does not mention these laws.” *Id.*

For more than two years after becoming aware of DAPL’s proposed route, construction, and operation, then, Cheyenne River remained silent as to the Black Snake prophecy and its concerns about the presence of oil in the pipeline under Lake Oahe absent any issue of rupture, as well as about the possible applicability of RFRA. In an effort to explain its delay, the Tribe argues that the Corps never engaged in proper consultations and that it was told by the Corps that the review process announced by Assistant Secretary Darcy on December 4, 2016, “would be the vehicle by which they could express their concerns and press their rights with the government.” ECF No. 97 (Mot. to Amend Complaint) at 3; ECF No. 141 (Reply) at 3-4; TRO Tr. at 7:17-23.

This explanation is unsatisfactory. In spite of an allegedly inadequate consultation process, the Tribe was still able to raise specific concerns about, for example, harm to water safety and burial sites, and to plead claims under the NHPA, NEPA, and other environmental statutes in its August and September filings. It is not clear what prevented Cheyenne River from

also raising its specific religious-exercise concerns with the Corps or in its Complaints here. The Court, accordingly, concludes that Defendants have shown that the Tribe inexcusably delayed in voicing its RFRA objection.

2. Prejudice

Defendants argue, moreover, that they have suffered prejudice from Cheyenne River's unjustified delay because had they been made aware of the Tribe's specific religious objection to the Lake Oahe crossing earlier, they could have considered whether and how to accommodate this concern. See ECF No. 127 (Corps Opp.) at 11; ECF No. 124 (DA Opp.) at 10-11. The Corps represented at oral argument on the instant Motion that had it known of the Tribe's beliefs during the permitting process, rerouting the pipeline north of Lake Oahe could have been "one possibility." PI Tr. at 28:12-22. Indeed, Defendants previously modified the pipeline workspace and route more than a hundred times in response to cultural surveys and Tribes' concerns regarding historic and cultural resources. See Standing Rock I, 2016 WL 4734356, at *7, 13. The Corps also imposed additional construction conditions on DAPL in response to tribal positions regarding environmental safety. Id. at *14. Notably, such changes were made prior to any litigation.

At this point, however, the Corps has granted the permits and easement, and DAPL's construction under Lake Oahe is days from completion. See DA Mar. 6 Status Report. Suspending the effect of the easement now would undercut the purpose behind the consultation obligations built into the Corps' permitting processes, which aim to surface tribal concerns in a timely manner. Such injunctive relief would also, by delaying the flow of oil, impose significant costs on a private third party, Dakota Access. And if the Tribe were ultimately to prevail on the merits of its RFRA claim, rerouting the pipeline around Lake Oahe would be more costly and

complicated than it would have been months or years ago, as doing so now requires not simply changing plans but abandoning part of a near-complete project and redoing the construction elsewhere. See, e.g., Daingerfield Island Protective Soc’y v. Lujan, 920 F.2d 32, 39 (D.C. Cir. 1990) (explaining whether relief sought “is still practicable” is a “crucial” consideration that “has turned on the degree to which construction is complete”) (listing cases).

In asking the Court to grant a preliminary injunction suspending the effect of the easement and halting the construction and operation of the pipeline below Lake Oahe, Cheyenne River requests “an extraordinary and drastic remedy.” Munaf v. Green, 553 U.S. 674, 689 (2008) (citation omitted). Although it does so within RFRA’s four-year statute of limitations, the request comes long after Cheyenne River learned of the pipeline’s proposed route, was invited to offer feedback, articulated other specific environmental and cultural issues, and filed suit on other claims. Only once Dakota Access had built up to the water’s edge and the Corps had granted the easement to proceed did Cheyenne River inform Defendants that the pipeline was the realization of a long-held prophecy about a Black Snake and that the mere presence of oil in the pipeline under the lakebed would interfere with the Tribe’s members’ ability to engage in important religious practices. Because of the Plaintiff’s delay in raising this religious-exercise objection and the negative impact of that delay on the Corps and Dakota Access, the Court concludes that the requested preliminary-injunctive relief is barred by laches.

B. Likelihood of Success on the Merits

The Court also believes the Tribe has failed to demonstrate a likelihood of success on the merits of its RFRA claim. Enacted in 1993, the Religious Freedom Restoration Act provides that the “Government shall not substantially burden a person’s exercise of religion” unless “it demonstrates that application of the burden . . . (1) is in furtherance of a compelling

governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1. A person who brings a challenge under RFRA bears the initial burden of proving that (1) the Government’s policy or action implicates her religious exercise, (2) the relevant religious exercise is grounded in a sincerely held religious belief, and (3) the policy or action substantially burdens that exercise. See Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) (discussing burdens in Religious Land Use and Institutionalized Persons Act action); id. at 860 (explaining RLUIPA is governed by same standard as set forth in RFRA) (citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006)). The Court discusses whether the Tribe is likely to satisfy each of these initial three prongs in turn. As it answers this question in the negative, the Court need not look into whether the government interest is compelling or if its action is the least restrictive means.

1. *Implicates Religious Exercise*

Here, the religious exercise at issue is the performance of water-based ceremonies. Cheyenne River is composed of four bands of the Lakota people, see Mot. at 4, who “believe generally that water is sacred and that clean, pure water is an essential part of the Lakota way of life.” Id. at 7. Water plays a “specific, critical role in the practice of the Lakota sacred rites,” including the Hanbleceya (vision-questing), Wiwanyan Wacipi (birth and renewal), Isnati Awiciliwanpi (coming of age for young women), Wiping of the Tears (conclusion of mourning), and Inipi (prayer and purification) ceremonies. Id. at 7-8 (citing Declaration of Steve Vance (Jan. 30, 2017), ¶ 11a). According to Steve Vance, Cheyenne River’s Tribal Historic Preservation Officer, these ceremonies are an essential aspect of the Lakota religion; its adherents “cannot practice [their] religion without [their] ceremonies.” Vance Decl., ¶ 11a.

Defendants do not dispute that these sacred rites constitute religious exercise. Instead, they argue that it is Dakota Access, not the government, whose actions implicate such exercise, thereby removing this case from the protections of RFRA. See DA Opp. at 14-16; Corps Opp. at 24-27. They rely for that argument on Village of Bensenville v. Federal Aviation Administration, 457 F.3d 52 (D.C. Cir. 2006), which considered whether RFRA required strict scrutiny of the FAA's approval of Chicago's plan to update and reconfigure O'Hare International Airport. Id. at 57. The plan involved relocating a church cemetery, and several individuals and entities sued the FAA, arguing that its approval violated RFRA. Id. The D.C. Circuit held that the Act did not apply because any burden caused by the City's plan was "not fairly attributable to the FAA." Id. "[C]onstitutional standards do not attach to conduct by third parties in which the federal government merely acquiesces," it explained. Id. There must be a "sufficiently close nexus between the [federal government] and the challenged action" of the third party "so that the action of the latter may be fairly treated as that of the [federal government] itself." Id. at 62 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)) (alterations in original).

Defendants contend that, as in Bensenville, Dakota Access's operating of the pipeline is the third-party conduct that burdens Cheyenne River's members' free exercise of religion, and the Corps' permitting is mere acquiescence. Whereas Bensenville involved "the government's regulation of a third party's use of the third party's land," however, this case involves "the government's use of its own land." Id. at 67. The Corps and Dakota Access argue that the opinion's logic regarding responsibility for the burden on religious exercise nonetheless applies here, see PI Tr. at 32:12-19, 49:19-50:4, but because the Court ultimately concludes that Cheyenne River is unlikely to succeed on the merits for other reasons, it need not resolve this

dispute. It therefore assumes without deciding that the Corps' action implicates the Tribe's religious exercise.

2. Sincerely Held Religious Belief

Cheyenne River's members believe that the water used in Lakota ceremonies, particularly the Inipi ceremony, must be "ritually pure." Mot. at 9; see Vance Decl., ¶ 16 (water must be "pure, natural," not "bottled" or "contaminated"); ECF No. 98-3 (Declaration of Marcella Gilbert), ¶ 6 ("Clean, undisturbed water is necessary in every ceremony."); ECF No. 98-4 (Declaration of Russ Cournoyer), ¶ 7 ("We cannot use . . . water that has been affected by artificial chemicals."); ECF No. 98-5 (Declaration of Ron Black Bird), ¶ 9 (same). Tribe members further believe that the mere presence of oil in the Dakota Access Pipeline will contaminate the lake's waters and render them unsuitable for use in their religious practices. See Vance Decl., ¶¶ 18-19; see also TRO Tr. at 9:9-12. According to Plaintiff, such desecration occurs whether or not the pipeline ruptures and the oil actually touches the water, and even though the pipeline itself never enters the lake's waters but instead runs under the lakebed. The existence of the oil within the pipeline under the lake is enough. See PI Tr. at 9:22-10:2.

In addition to the religious significance attaching to water generally, the Tribe ascribes particular meaning to the Missouri River, of which Lake Oahe is part. The Lakota chose to live near the Missouri "because of its importance to [their] existence." Vance Decl., ¶ 11; Mot. at 9-10. As "other bodies of water important in [their] culture were removed from [their access]" by the United States, "such as waters in the Black Hills," the Missouri took on even greater importance to the Tribe. See Vance Decl., ¶ 11. Vance states, "[The Missouri River] is important to our spirituality. It is an important source of our foods, medicines, water for

drinking, and for living. It is the bloodline and the lifeline of the people at this time, and we cannot live without it.” Id.

The Tribe contends in its Motion, moreover, that its members “must rely on Lake Oahe exclusively . . . for the water they use in their religious ceremonies because Lake Oahe is the only source of natural, pure, uncontaminated water available to the people of the Cheyenne River Sioux Reservation.” Mot. at 13; see also Vance Decl., ¶¶ 15-16. The Lakota also contend that they “own . . . these waters that comprise Lake Oahe,” and so “believe that the existence of this crude oil pipeline under the Lake Oahe Reservoir poses a special threat to the way [they] practice [their] religion.” Vance Decl., ¶ 18.

As the Corps and Dakota Access note, Lake Oahe is not untouched by manmade projects. See DA Opp. at 28; Corps Opp. at 4. DAPL’s crossing, for instance, runs parallel, at a distance of 22 to 300 feet, to a natural-gas pipeline that was built under the lake in 1982. Standing Rock I, 2016 WL 4734356, at *7, 26. It also tracks an already existing overhead utility line. Id. at *7. Several other oil pipelines cross the Missouri River upstream of Lake Oahe, including one located just 7.5 miles north of the lake (44 miles north of the DAPL crossing). See Corps Opp. at 5; ECF No. 127-3, Exh. 1. In addition, three vehicle bridges and one railroad bridge cross over Lake Oahe at locations closer to the Cheyenne River Reservation than the DAPL crossing, which is 73 miles away. See ECF No. 127-3, Exh. 1. And a wastewater-treatment plant is authorized to discharge into a tributary to a river that flows through the Reservation into Lake Oahe. See Corps Opp. at 5 (citing City of Eagle Butte NPDES Permit (Sept. 30, 2011), <https://www.epa.gov/region8/city-eagle-butte-npdes-permit>).

The Tribe acknowledges the presence of the natural-gas pipeline under Lake Oahe but explains that it does not believe that that pipeline burdens its religious practice. See Mot. at 43.

The difference between the natural-gas pipeline and DAPL is that the Tribe believes that the crude oil that is proposed to flow through the latter is the fulfillment of a Lakota prophecy of “a Black Snake that would be coiled in the Tribe’s homeland and which would harm . . . [and] devour the people.” Mot. at 19; see also Vance Decl., ¶ 18. According to Vance, the oil in DAPL, like the Black Snake, “is black, it is slippery, and it moves.” Id. As to the other oil pipelines upstream of Lake Oahe, Cheyenne River asserts that only Lake Oahe constitutes its “area of concern.” TRO Tr. at 14:24; see also id. at 15:3-5 (“[W]e’re not concerned about oil pipelines that may be somewhere above outside of waters that we own in Lake Oahe.”).

The record is not clear whether the Black Snake prophecy was made before or after Lake Oahe was created nearly 60 years ago. The Tribe’s brief contends that “Lakota religious adherents now in their 50s and 60s were warned of the Black Snake by their elders as children,” Mot. at 19; see also id. at 28, and Vance states that the prophecy was made “[l]ong ago.” Vance Decl., ¶ 18. Presumably, the prophecy was issued after Lake Oahe was created; otherwise, the presence of pipelines upstream of the lake, including one that crosses 7.5 miles to its north, would be hard to reconcile with the Tribe’s belief that DAPL alone is the Black Snake. See TRO Tr. 15:3-5.

“To qualify for RFRA’s protection, an asserted belief must be ‘sincere,’” not pretextual. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 n.28 (2014). Courts generally handle “the sincerity inquiry . . . with a light touch, or ‘judicial shyness.’” Moussazadeh v. Tex. Dep’t of Criminal Justice, 703 F.3d 781, 792 (5th Cir. 2012); see also Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”); Kay v. Bemis, 500 F.3d 1214, 1219 (10th Cir. 2007)

(“The inquiry into the sincerity of a free-exercise plaintiff’s religious beliefs is almost exclusively a credibility assessment.”) (citation omitted). In light of instructions to tread gently with its sincerity inquiry, therefore, the Court finds that the Tribe is likely to successfully establish a sincerely held belief that the presence of oil in the Dakota Access pipeline running under Lake Oahe interferes with its members’ religious ceremonies.

Having so concluded, the Court now proceeds to consider whether the Tribe is likely to satisfy the third of its *prima facie* RFRA obligations: a substantial burden on its religious exercise.

3. *Substantial Burden*

RFRA does not define “substantial burden,” and the Supreme Court has not articulated a precise definition. This Circuit, however, has stated that “[a] substantial burden exists when government action puts ‘substantial pressure on an adherent to modify his behavior and to violate his beliefs.’” Kaemmerling v. Lappin, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting Thomas v. Review Bd., 450 U.S. 707, 718 (1981)). It offered Sherbert v. Verner, 374 U.S. 398 (1963), as an example of such substantial pressure. That case involved “the denial of unemployment benefits to a Sabbatarian who could not find suitable non-Saturday employment,” which “forced her ‘to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.’” Kaemmerling, 553 F.3d at 678 (quoting Sherbert, 374 U.S. at 404).

Using that test, the Circuit rejected Kaemmerling’s RFRA claim. The plaintiff, a federal prisoner, objected on religious grounds to the government’s extracting DNA information from a fluid or tissue sample taken from him by the Bureau of Prisons. Id. at 673, 678-79. The Circuit concluded that he had failed to allege facts sufficient to state a substantial burden cognizable

under RFRA because the government's actions did not "pressure [him] to modify his behavior and to violate his beliefs" or require him to choose "between criminal sanction and personally violating his own religious beliefs." Id. at 679-80 (quoting Thomas v. Review Bd., 450 U.S. 707, 718 (1981)).

The government action here — *i.e.*, granting the easement to Dakota Access and thereby enabling the flow of oil beneath Lake Oahe — does not impose a sanction on the Tribe's members for exercising their religious beliefs, nor does it pressure them to choose between religious exercise and the receipt of government benefits. Cheyenne River argues that whether it has been subjected to such sanction or pressure is irrelevant, see Reply at 14-16, and contends instead that it is sufficient for purposes of showing substantial burden that the effect of the government's action is to prevent the Tribe's members from performing required religious sacraments at Lake Oahe. See Mot. at 30-31; Reply at 14. That argument, however, is directly at odds with Supreme Court precedent.

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988), was a case concerning an American Indian tribe's Free Exercise challenge to federal government actions involving sacred sites on federal land. The Supreme Court held that the incidental effect on religious exercise of a government action undertaken in furtherance of the management and use of government land, even if extreme, is not alone enough to give rise to a Free Exercise claim. That decision leads this Court to conclude that Cheyenne River is unlikely to establish that the Corps' grant of the easement imposes a substantial burden on its religious exercise such that it will succeed on the merits of its RFRA claim.

a. The Force of Lyng

In Lyng, “an Indian organization, individual Indians, nature organizations and individual members of those organizations, and the State of California” challenged under the Free Exercise Clause the United States Forest Service’s decision to build a six-mile segment of paved road and permit significant timber harvesting in a government-owned area considered sacred by several tribes. Id. at 442-43. The plaintiffs contended that the “disruption of the natural environment caused by the . . . road will diminish the sacredness of the area in question” and interfere with tribal members’ use of sites there for religious practice. Id. at 448.

The Supreme Court acknowledged that the Forest Service’s decisions “would interfere significantly with private persons’ ability to pursue spiritual fulfillment according to their own religious beliefs.” Id. at 449. Indeed, it explained that it had “no reason to doubt[] that the logging and road-building projects at issue . . . could have devastating effects on traditional Indian religious practices,” including their inability “to conduct a wide variety of specific rituals that aim to accomplish their religious goals.” Id. at 451. But the Court nonetheless concluded that the government’s actions did not cause the kind of harm cognizable under the Free Exercise Clause because they did not “coerce[]” the affected individuals “into violating their religious beliefs” or “penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.” Id. at 449. Ultimately, the Court explained, these harms were “incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs.” Id. at 450. “Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of

a governmental action on a religious objector's spiritual development," even where the effect on religious practice is "extremely grave." Id. at 451.

As should be evident from the language it used to discuss the impact on the tribe's religious exercise — *e.g.*, "devastating" and "extremely grave," id. at 451 — the Supreme Court was not unsympathetic to the plight of the affected individuals. Id. at 456. And it cautioned that "[n]othing in [its] opinion should be read to encourage governmental insensitivity to the religious needs of any citizen" or to dissuade the government from accommodating religious practices. Id. at 453. But the effects of the Forest Service's actions simply did not raise a constitutional concern: "However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires." Id. at 452. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." Id. at 451 (quoting Sherbert, 374 U.S. at 412 (Douglas, J., concurring)).

Cheyenne River's religious-exercise claim is much like the one at issue in Lyng. It involves a government action — granting an easement to Dakota Access to build and operate a pipeline — regarding the use of federal land — the land under Lake Oahe, as discussed *infra* — that has an incidental, if serious, impact on a tribe's ability to practice its religion because of spiritual desecration of a sacred site. Just as the government's tree cutting and road building in Lyng did not give rise to an actionable Free Exercise claim, neither does its easement granting here likely violate RFRA.

That Lyng was a Free Exercise, rather than a RFRA, case does not change its applicability here. RFRA was enacted in response to the Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), which rejected, in certain circumstances, the Free

Exercise test employed in cases like Sherbert and Wisconsin v. Yoder, 406 U.S. 205 (1972).

Those cases “used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest.” Hobby Lobby, 134 S. Ct. at 2760. Smith held instead that “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.” Id. at 2761 (quoting City of Boerne v. Flores, 521 U.S. 507, 514 (1997)). In enacting RFRA, Congress restored the compelling-interest test set forth in pre-Smith cases. See 42 U.S.C. § 2000bb.

Lyng is a pre-Smith case. When drafting and debating RFRA, Congress expressly noted that RFRA did not undermine Lyng. The Senate Committee Report on RFRA explained:

The committee expects that courts will look to free exercise cases decided prior to Smith for guidance in determining whether the exercise of religion has been substantially burdened And, while the committee expresses neither approval nor disapproval of that case law, pre-Smith case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government’s own property or resources.

S. Rep. No. 103-111 at 8-9 (1993) (emphasis added).

As an example of a case falling into the latter category, the Report cited Lyng and recited its holding “that the construction of mining or timber roads over public lands which were sacred to the Native American religion did not constitute a burden on the Native Americans’ free exercise rights triggering the compelling interest test.” Id. at 9 n.19. Although RFRA “is not a codification of the result reached in any prior free exercise decision,” the Committee continued, it is “the restoration of the legal standard that was applied in those decisions.” Id. at 9; see also 139 Cong. Rec. S14461, at S14470 (Statement of Sen. Orrin Hatch, Oct. 27, 1993) (RFRA “does not effect [sic] Lyng . . . , a case concerning the use and management of government resources,

because . . . the incidental impact on a religious practice does not ‘burden’ anyone’s free exercise of religion. In Lyng, the court ruled that the way in which government manages its affairs and uses its own property does not impose a burden on religious exercise.”).

Several circuit courts, including the D.C. Circuit, have cited Lyng approvingly when resolving a RFRA or RLUIPA claim. See, e.g., Priests for Life v. U.S. Dep’t of Health & Hum. Servs., 772 F.3d 229, 246, 248 (D.C. Cir. 2014), vacated and remanded by Zubik v. Buwell, 136 S. Ct. 1557 (2016); Eternal World Television Network, Inc. v. Sec’y of U.S. Dep’t of Health & Hum. Servs., 818 F.3d 1122, 1146 (11th Cir. 2016); Yellowbear v. Lampert, 741 F.3d 48, 55 (10th Cir. 2014); Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 349-50 (2d Cir. 2007). One such decision is particularly applicable to this case.

In Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008) (*en banc*), a tribe challenged the federal government’s approval of the use of artificial snow on a mountain the tribe considered sacred. It asserted that the use of ersatz precipitation would “spiritually contaminate the entire mountain and devalue their religious exercises.” Id. at 1063. Relying heavily on Lyng, the Ninth Circuit held that the government’s decision to permit artificial snow did not impose a substantial burden under RFRA because it did not force the tribe to choose between exercising their religion and receiving a government benefit, nor did it coerce them to act contrary to their religion under threat of civil or criminal sanction. Id. at 1071-73. The “sole effect” was on their “subjective spiritual experience” — *i.e.*, “the presence of the artificial snow on the Peaks is offensive to the Plaintiffs’ feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain.” Id. at 1063. “[U]nder Supreme Court precedent,” the court explained, “the diminishment of spiritual fulfillment — serious though it may be — is not a ‘substantial burden’ on the free exercise of

religion.” Id. at 1070. In so concluding, the Ninth Circuit echoed the prudential concerns discussed in Lyng:

Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. . . . No matter how much we might wish the government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government — let alone a government that presides over a nation with as many religions as the United States of America — could function were it required to do so.

Id. at 1063-64 (citing Lyng, 485 U.S. at 452); see also Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm’n, 545 F.3d 1207, 1214-15 (9th Cir. 2008) (rejecting tribe’s argument that FERC’s decision to relicense hydroelectric dam at sacred site imposed substantial burden on religious exercise).

Just as the Ninth Circuit and other courts must follow Lyng until the Supreme Court instructs otherwise, this Court must do the same.

b. Cheyenne River’s Rebuttal

Cheyenne River offers several arguments as to why Lyng and Navajo Nation do not apply to the present case or are no longer good law. First, the Tribe attempts to distinguish those cases by arguing that the facts here are distinct and that its members are more analogous to prisoners than the plaintiffs in Lyng and its Ninth Circuit progeny are. Second, Plaintiff contends that recent Supreme Court decisions — Hobby Lobby and Holt — lessen Lyng’s force. Third, the Tribe asserts that its property interest in Lake Oahe dictates a different outcome from Lyng. None of these arguments is persuasive.

i. Factual Differences

The Tribe first posits that this case is factually distinct from Navajo Nation and its progeny because “although a kind of spiritual contamination was alleged, the [federal] regulations at issue did not foreclose religious adherents’ ability to practice any part of their religion.” Mot. at 33. Instead, “plaintiffs were left other options to practice the rites at issue.” Id. The daylight between those cases and this one, in fact, is more limited than Cheyenne River suggests. In Navajo Nation, the Ninth Circuit concluded that Lyng would have compelled it to reach the same result even if it had assumed that the use of artificial snow would “virtually destroy the . . . Indians’ ability to practice their religion.” 535 F.3d at 1072 (quoting Lyng, 485 U.S. at 451).

Relatedly, the Tribe also asserts that “unlike the plaintiffs in Navajo Nation, Snoqualmie, and Lyng, the resource that the Corps’ action is proposed to burden is the only one available to the Cheyenne River Sioux Tribe to practice its religion as the United States has systematically deprived the Tribe of access to other water sources as a function of its more than 200-yearlong campaign to dispossess the Lakota people of their aboriginal lands and resources.” Mot. at 34. Consequently, Cheyenne River argues, “the Tribe and its members here are more closely analogous to the prisoners whose only options in the exercise of their religion are closely controlled by the government.” Id.

The Court readily recognizes the sordid chronicle of the United States’ dispossessing the Lakota people of swaths of land, see, e.g., United States v. Sioux Nation, 448 U.S. 371 (1980); Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001), and takes seriously that the Tribe feels such deep oppression as to warrant analogy to the prisoner cases. Yet Lyng expressly cautions that “measuring the effects of a governmental action on a religious objector’s spiritual

development” is not the proper inquiry when the challenged action is the federal government’s management of its own land. See 485 U.S. at 451.

The RLUIPA cases on which the Tribe relies, furthermore, offer little succor. Not only have inmates suffered a total loss of liberty, whereas the Tribe’s members have not, but the cases cited involved either a specific prohibition on a particular form of religious exercise or the imposition of a sanction or other collateral, non-religious harm in response to religious exercise. See, e.g., Native Am. Council of Tribes v. Weber, 750 F.3d 742 (8th Cir. 2014) (total ban on tobacco use in prisons, including during Native American religious ceremonies, violated RLUIPA); Yellowbear, 741 F.3d at 55-56 (prison’s refusal to permit inmate housed in special protective unit access to sweat lodge in general prison yard imposed substantial burden); Haight v. Thompson, 763 F.3d 554, 564-65 (6th Cir. 2014) (prison’s decision to totally bar certain traditional foods at powwow imposed substantial burden); Holt, 135 S. Ct. at 862 (grooming policy prohibiting beards imposed substantial burden on Muslim inmate because he “face[d] serious disciplinary action” for contravening policy); Williams v. Wilkinson, 645 Fed. Appx. 692, 702 (10th Cir. 2016) (“[T]he failure to provide Mr. Williams with a kosher diet will either prevent him from exercising his sincerely held religious belief or force him to make the Hobson’s choice of eating a diet contrary to his beliefs or not eating at all.”); Love v. Reed, 216 F.3d 682, 689-90 (8th Cir. 2000) (A choice “between fasting and compromising his religious convictions[] is really no choice at all.”).

Here, although the Tribe’s members may feel unable to use the water from Lake Oahe in their religious ceremonies once the pipeline is operational, there is no specific ban on their religious exercise, nor does performance of their sacraments trigger a sanction, loss of a government benefit, or other collateral harm. If a Jewish prisoner is denied kosher meals and

adheres to his belief that he cannot consume non-kosher food, he will starve. If a Muslim prisoner forbidden from growing a beard nonetheless grows one, he will be punished. But if the Tribe persists in its belief that DAPL will render the waters of Lake Oahe spiritually impure, it suffers no collateral consequence. In so stating, the Court does not diminish the significance of such a loss; indeed, inability to engage in religious conduct may cause deep personal and communal harm. The point is simply that the prisoner cases to which Cheyenne River draws a comparison involve an additional harm beyond the spiritual that is not present here.

ii. Recent Supreme Court Decisions

The Tribe next contends that Lyng and its Ninth Circuit progeny “are no longer good law” because of Hobby Lobby and Holt. See Mot. at 34; TRO Tr. 18:10-22. It offers two related arguments on this point. First, on the Tribe’s reading of the cases, Navajo Nation held that the government’s approval of the artificial snow could not constitute a substantial burden because its only effect was “on the Plaintiffs’ subjective, emotional religious experience,” Mot. at 35 (quoting Navajo Nation, 535 F.3d at 1070), but Hobby Lobby “rejected the premise that courts can determine the existence of a substantial burden under RFRA based upon whether it is reasonable in light of the government regulation.” Id. Those holdings, however, are not in tension. The Ninth Circuit’s conclusion that there was no substantial burden was not based on the notion that the plaintiffs’ view that the artificial snow would desecrate the affected peaks was unreasonable; it was based on the lack of coercion in the face of a threatened sanction or a government benefit conditioned on religious adherence or forbearance. See 535 F.3d at 1063. The harm asserted by the affected tribes there lacked an essential element the appellate court deemed necessary to conclude that a substantial burden was present. Lyng, likewise, never concluded that the affected tribe’s belief that constructing a road and harvesting timber in a

particular area would desecrate the site was unreasonable. It held that the government's actions did not constitute a substantial burden on the free exercise of such belief.

Hobby Lobby is not to the contrary. There, the Supreme Court concluded that the government mandate imposed a substantial burden because the owners of closely held corporations had to choose between providing insurance coverage to their employees for contraceptive methods that they believed to be abortifacients and incurring significant economic sanctions. See 134 S. Ct. at 2775-76. True, the Court accepted the owners' assertions that the covered contraceptive methods were "connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage," id. at 2778, but the ultimate conclusion that the mandate imposed a substantial burden rested on the fact that the owners had to choose between violating their beliefs and paying financial penalties. The same was so in Holt. See 135 S. Ct. at 862 ("Because the grooming policy puts petitioner to this choice" between growing a beard and "serious disciplinary action," the policy "substantially burdens his religious exercise."). Again, the Tribe here faces no such coercion or sanction.

Second, Cheyenne River argues that this Court is not bound by Lyng because, as explained by the Supreme Court in Hobby Lobby and Holt, Congress did not intend to limit the analysis in RFRA cases to that undertaken in pre-Smith Free Exercise cases, of which Lyng was one. See Reply at 11-13. Hobby Lobby and Holt do provide that RFRA's religious-exercise protections are separate from and broader than the protections provided under First Amendment case law, but only in certain respects, none of which is helpful to the Tribe.

In Hobby Lobby, the Court discussed Congress's intent to "effect a complete separation from First Amendment case law" with regard to the definition of "exercise of religion." 134 S. Ct. at 2762; see also id. at 2772-73. After the Supreme Court held in City of Boerne v. Flores,

521 U.S. 507 (1997), that Congress lacked the power to apply RFRA to the States and its subdivisions, the legislature passed RLUIPA, which “imposes the same general test as RFRA but on a more limited category of governmental actions.” Hobby Lobby, 134 S. Ct. at 2761. Prior to RLUIPA’s enactment, RFRA defined “exercise of religion” as “the exercise of religion under the First Amendment.” Id. (citing 42 U.S.C. § 2000bb-2(4) (1994 ed.)). In RLUIPA, “Congress deleted the reference to the First Amendment and defined the ‘exercise of religion’ to include ‘any exercise of religion, whether or not compelled by, or central to, a system of religious belief.’” Id. at 2762 (quoting 42 U.S.C. § 2000cc-5(7)(A)). It then amended RFRA to include the same definition. Id. at 2761 (citing 42 U.S.C. § 2000bb-2(4)).

The problem for Cheyenne River is that Hobby Lobby’s rejection of the premise that “RFRA did no more than codify th[e Supreme] Court’s pre-Smith Free Exercise Clause precedents” as they related to the concept of the “exercise of religion” makes no difference in this case. Id. at 2772. No one disputes that the Corps’ grant of the easement to Dakota Access implicates the Tribe’s religious exercise. The debate is instead about whether the action imposes a substantial burden on that exercise. Hobby Lobby nowhere suggested that the Supreme Court’s reasoning or conclusion in Lyng that the parties there did not prove substantial burden is no longer good law.

In Holt, the Supreme Court rejected the district court’s conclusion that the Department of Corrections’ ban on beards did not substantially burden a Muslim inmate’s religious exercise because “he had been provided a prayer rug and a list of distributors of Islamic material, . . . was allowed to correspond with a religious advisor, and was allowed to maintain the required diet and observe religious holidays.” 135 S. Ct. at 862. It explained that the district court had “improperly imported a strand of reasoning from cases involving prisoners’ First Amendment

rights,” under which “the availability of alternative means of practice religion is a relevant consideration.” Id. (citing O’Lone v. Estate of Shabazz, 482 U.S. 342, 351-52 (1987); Turner v. Safley, 482 U.S. 78, 90 (1987)). RLUIPA, Holt said, “provides greater protection.” Id. Its “‘substantial burden’ inquiry asks whether the government has substantially burdened religious exercise . . . , not whether the RLUIPA claimant is able to engage in other forms of religious exercise.” Id.

Again, this break with certain pre-Smith cases simply does not matter here. Lyng’s substantial-burden inquiry did not turn on whether the affected tribal members were able to engage in other forms of religious exercise. As previously noted, the Supreme Court would have reached the same result in Lyng — no substantial burden — had the construction of the road totally destroyed the affected tribe’s ability to practice its religion. See Lyng, 485 U.S. at 451. Likewise, this Court’s decision that Cheyenne River is unlikely to satisfy the substantial-burden inquiry is wholly unrelated to whether the Tribe’s members are able to exercise their religion in other ways besides using water from Lake Oahe in Lakota ceremonies. Holt’s caution that RLUIPA’s substantial-burden inquiry is broader in one specific way than the inquiry undertaken in certain pre-Smith cases does not impliedly overrule Lyng or otherwise undermine its relevance here.

iii. Tribe’s Property Interest

Cheyenne River last argues that this case diverges from Lyng and its Ninth Circuit progeny because whereas those cases “concerned sacred sites located on lands owned solely by the federal government and in which . . . none of the plaintiffs could claim any cognizable property interest,” here, “the Tribe and its members enjoy an actual legal ownership interest in the waters of Lake Oahe.” Mot. at 33-34; see also TRO Tr. at 15:4-5, 16:24-25. The Court

cannot agree. As the pipeline runs through the land under the lake, rather than the lake's waters, the Court first discusses ownership of the land and then turns to the Tribe's interest in the water.

In 1944, Congress passed the Flood Control Act, which "authorized the establishment of a comprehensive flood control plan along the Missouri River." South Dakota v. Bourland, 508 U.S. 679, 683 (1993). "Seven subsequent Acts of Congress authorized limited takings of Indian lands for hydroelectric and flood control dams on the Missouri River in both North and South Dakota." Id. One of these takings "involved the Oahe Dam and Reservoir Project, for which Congress required the Cheyenne River Sioux Tribe to relinquish 104,420 acres of its trust lands, including roughly 2,000 acres of land underlying the Missouri River." Id. In exchange, the Tribe received more than \$10 million. Id. at 683 n.2. An additional \$290 million in compensation was appropriated in 2000. See Cheyenne River Sioux Tribe Equitable Compensation Act, P.L. No. 106-511, § 104(b)(1), 114 Stat. 2365 (2000).

The agreement between the Tribe and the United States to convey the land needed for the Oahe Dam, which created Lake Oahe, was memorialized in the Cheyenne River Oahe Act, Pub. L. No. 81-776, 68 Stat. 1191 (1954). That Act states that payment for the lands at issue was "in settlement of all claims, rights, and demands of said Tribe or allottees or heirs thereof arising out of the construction of the Oahe project." Id. Section 10 addresses the Tribe's continued use of the land and provides that it "shall have the right, without cost, to graze stock on the land between the water level of the reservoir and the exterior boundary of the taking area" and that the Tribe and its members "shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States." 68 Stat. at 1193.

The Supreme Court has since explained that, through the Flood Control and Cheyenne River Acts, Congress “clearly abrogated the Tribe’s ‘absolute and undisturbed use and occupation’ of these tribal lands.” Bourland, 508 U.S. at 697 (quoting 15 Stat. 636). “Thus, when the United States acquired reservation land to construct the [dam], the [Tribe] necessarily lost their treaty rights to exclusively own, occupy and utilize that land.” Lower Brule Sioux Tribe v. State of South Dakota, 711 F.2d 809, 823 (8th Cir. 1983) (discussing whether the Fort Randall and Big Bend Acts — statutes similar to the Cheyenne River Act that authorized takings of Indian land for dams on the Missouri River — disestablished reservation boundaries or abrogated treaty rights to hunt and fish). Consequently, Cheyenne River cannot distinguish Lyng on the ground that, here, the Tribe has an ownership interest in the land under Lake Oahe. To the extent that Plaintiff has rights of access and use to the land, Lyng directly spoke to such a situation: “Whatever rights the Indians may have to the use of the area,” the Court stated, “those rights do not divest the Government of its right to use what is, after all, its land.” 485 U.S. at 453.

The water rights reserved to Indians pursuant to Winters v. United States, 207 U.S. 564 (1908), do not change the Court’s conclusion. In Winters, water shortages near the Fort Belknap Reservation prompted a lawsuit to enforce tribal water rights against non-Indians who had been diverting water from the region. Id. at 565-67. The Supreme Court held that the United States had the power to reserve water and prevent its diversion from the reservation by private parties. Id. at 577. In so doing, it made clear that “when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose,” such as the creation of a reservation for an Indian tribe, “the Government, by implication, reserves appurtenant water then

unappropriated to the extent needed to accomplish the purpose of the reservation.” Cappaert v. United States, 426 U.S. 128, 138 (1976).

Cheyenne River asserts that the purpose of its Reservation, as set out in the 1851 and 1868 Fort Laramie Treaties and the Act of March 2, 1889, is “to provide for self-sufficiency.” Mot. at 14. The Tribe, however, does not persuasively support the proposition that this purpose requires the federal government to refrain from permitting infrastructure projects on its own land when doing otherwise would render water reserved for the reservation’s use spiritually impure. In an effort to so argue, the Tribe quotes the Supreme Court’s observation in Arizona v. California, 373 U.S. 546 (1963), that it was “impossible to believe” that when the federal government created reservations, it was “unaware . . . that water from the river would be essential to the life of the Indian people.” Reply at 8-9 (quoting Arizona, 373 U.S. at 599). The Tribe then contends that, “[i]n America, . . . there is no question that our laws . . . enshrine religion and religious exercise as essential to the life of the people.” Reply at 9 (citing Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)).

The Court declines to embrace so broad a statement about the scope of Winters. When the Supreme Court spoke in Arizona of water sustaining life, it meant physical survival, not spiritual satisfaction. The Tribe’s Reply quoted selectively from the case, but the full sentence reads:

It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind — hot, scorching sands — and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.

373 U.S. at 598-99. The opinion then goes on to discuss the importance of an adequate water supply for irrigation and agricultural production. Id. at 599-600. It does not mention religion, spirituality, ceremonies, or the like.

The other cases cited by the Tribe likewise hold only that the reserved water rights recognized in Winters extend to “the right to clean, safe water” and the “right to hunt, fish, and gather.” Mot. at 15 (citing Bourland, 508 U.S. at 697; United States v. Dion, 476 U.S. 734, 738 (1986); United States v. Winans, 198 U.S. 371, 381 (1905); United States v. Adair, 723 F.2d 1394, 1409, 1411 (9th Cir. 1983); United States v. Gila River Irrigation Dist., 920 F. Supp. 1444, 1448 (D. Ariz. 1996)). Absent any colorable argument that the reserved water rights here extend to the right to access religiously pure water, the Court cannot conclude that Winters somehow permits the Tribe to circumvent Lyng.

In explaining its view on this issue, the Court notes that it is not deciding the Corps’ obligations under the Fort Laramie Treaties regarding oil-spill prevention or the Tribes’ rights to hunt, fish, or gather on Reservation lands. Indeed, Cheyenne River has clearly stated that its “RFRA claim does not rely on the Corps’ trust duties to the tribe.” Reply at 9. Those trust issues are among the subjects raised in Standing Rock’s and Cheyenne River’s summary-judgment motions, see ECF Nos. 117, 131, and the Court anticipates addressing them in that context.

* * *

For these reasons, the Court holds that Lyng likely prevents the Tribe from showing that the Corps’ decision to grant an easement to Dakota Access to operate an oil pipeline under Lake Oahe constitutes a substantial burden on its members’ free exercise of religion. The Tribe, accordingly, is unlikely to succeed on the merits of its RFRA claim.

IV. Conclusion

For the foregoing reasons, the Court will deny the Motion for Preliminary Injunction. A contemporaneous Order so stating will issue this day.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: March 7, 2017

EXHIBIT 14

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, *et al.*,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,

Defendants.

Civil Action No. 16-1534 (JEB)

ORDER

Last week this Court issued a decision denying Plaintiff Cheyenne River Sioux Tribe's Motion for a Preliminary Injunction, which sought to block the introduction of oil into the stretch of the Dakota Access Pipeline that runs under Lake Oahe. See Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 2017 WL 908538 (D.D.C. Mar. 7, 2017). Having filed its Notice of Appeal on March 10, see ECF No. 164, the Tribe that same day also filed with this Court a Motion for Injunction Pending Appeal. See ECF No. 165. As oil is likely to enter this segment of the pipeline next week, see ECF No. 169 (Status Report), that Motion asked for an immediate ruling. See Mot. at 1. After permitting Defendants only one day to respond, see Minute Order of March 13, 2017, the Court complies with the timing of Plaintiff's request, but not with its substance. The Motion will thus be denied.

I. Legal Standard

Federal Rule of Civil Procedure 62(c) provides: "While an appeal is pending from an interlocutory order . . . that . . . denies an injunction, the court may . . . grant an injunction on . . . terms that secure the opposing party's rights." To assess the propriety of a stay or an injunction

pending appeal, the Court looks to four factors: “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” Cuomo v. Nuclear Regulatory Comm’n, 772 F.2d 972, 974 (D.C. Cir. 1985); see also Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 842 n.1 (D.C. Cir. 1977); McCammon v. United States, 584 F. Supp. 2d 193, 197 (D.D.C. 2008) (consider same factors when party seeks stay or injunction pending appeal). In doing so, it bears in mind that an “injunction pending appeal is an extraordinary remedy.” Memphis Publishing Co. v. F.B.I., 195 F. Supp. 3d 1, 3 (D.D.C. 2012) (citing Cuomo, 772 F.2d at 978).

II. Analysis

As in the Motion for a Preliminary Injunction, the critical factor here is Cheyenne River’s lack of likelihood of success on the merits. The Court is well aware of the delicate position a movant like the Tribe faces in asking a court to conclude that its decision is likely to be overturned on appeal. See Loving v. I.R.S., 920 F. Supp. 2d 108, 110 (D.D.C. 2013). This Court is equally aware (via reversals or remands) that the Court of Appeals does not always agree with its decisions. That said, it nevertheless believes that Plaintiff does not have a strong case on appeal, and an injunction here, unlike a stay in some of the cases cited by Cheyenne River, would not preserve the status quo. See Mot. at 2-3 (citing Loving, 920 F. Supp. 2d at 109; CREW v. Office of Admin., 593 F. Supp. 2d 156, 158-60 (D.D.C. 2009)).

As to the remaining factors, the Court acknowledges that the Tribe is likely to suffer irreparable harm to its members’ religious exercise if oil is introduced into the pipeline, but Dakota Access would also be substantially harmed by an injunction, given the financial and

logistical injuries that would ensue. Finally, the public interest, if consistent with the principles articulated in the Presidential Memorandum Regarding Construction of the Dakota Access Pipeline, see ECF No. 124-1, Exh. G, likely sides with denial. As the Corps points out, moreover, the Court's laches analysis in the original Opinion, Standing Rock, 2017 WL 908538, at *4-7, also demonstrates that "[t]he public interest would not be served by an injunction pending appeal." Corps Opp. at 6. A weighing of all four factors, therefore, tips the scale against the Tribe.

III. Conclusion

The Court, consequently, ORDERS that the Motion for an Injunction Pending Appeal is DENIED.

IT IS SO ORDERED.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: March 14, 2017

EXHIBIT 15

Mnicoujou

Itazipco

CHEYENNE RIVER SIOUX TRIBE

Cultural Preservation Office
PO BOX 590 98 S. Willow St.
Eagle Butte, South Dakota 57625
Telephone: (605) 964-7554
Fax: (605) 964-7552



Steven Vance
Tribal Historic Preservation Officer
stevev.crstpres@outlook.com

Siha Sapa

Oohenumpa

Date: August 17, 2015

Richard Harnois
Sr. Field Archaeologist
Department of the Army
Corps of Engineers, Omaha District
Oahe Project
28563 Powerhouse Road
Pierre, SD 57501-6174

The Cheyenne River Sioux Tribe (CRST) appreciates the opportunity to comment to the proposed Dakota Access Pipeline (DAPL) project.

Information received from the Corp on October 29, 2014 was of proposed soil boring in Section 10 and 11, Township 134N, Range 79 W, Morton and Emmons Counties, North Dakota.

A formal comment was sent to Martha Chieply, Regulatory Chief for the Corp by the Tribal Historic Preservation Officer (THPO) of Standing Rock Sioux Tribe (SRST), Waste Win Young. Specific questions, concerns, suggestions, and requests were stated in the letter.

- Opposed to any geotechnical boring.
- Mitigation for site 32MO0001, an earth lodge village.
- The current Environmental Assessment (EA) is insufficient for oil pipelines.
- A request that an Environmental Impact Statement (EIS) be completed.
- A Class III Archaeological Study, with Tribal involvement, be conducted.
- Risks of disturbing burials by dredging the Missouri, other tributaries.
- Disagrees with the "No Historic Properties Affected" determination.
- Concerns for all residents along the proposed route of the quality of water.

Has any of these been addressed?

Respectfully she shared the comments with other THPO's that have ancestral connection to the location mentioned.

As THPO for CRST I support the comments submitted by THPO Waste Win Young and thought this would have initiated more dialog between agencies and Tribes. I assumed the Corp would have involved more of the Tribes with aboriginal association to the proposed project by offering a field visit or an opportunity to conduct a "Tribal Survey". The letter from the Corp dated October 24, 2014 noted 9 unevaluated sites, 2 not eligible, and 1 eligible. Studies were conducted in 1980, 1983, and 2009. Again no Tribal participation.

I have objection to the process of identification conducted by past and present companies who are contracted by proponents of applicants. Their archaeologists continue to state that Tribes migrated to this continent. Similar to the Columbus story, these do not reflect to the Oceti Sakowin.

Examples that discredit this would be buffalo skulls dating 500 – 10,000 years old with charcoal in them. Projectile points (arrow heads) dating to 8,000 years old. They may have no meaning to scientists and other disciplines but these match Tribal history and culture of the Northern Plains Indigenous People.

The reason for mentioning this is the few sites identified are unevaluated or not eligible. The two (2) "isolated find/flake" as not eligible I disagree with. Again the evaluation and determination was without Tribal involvement and reflect the European view.

DAPL cannot address the affects to cultural and historical resources, Sacred sites (water included), Traditional Cultural Properties, Properties of Cultural or Religious Significant to Tribe, etc., of the proposed pipeline when they have not been properly identified.

Another concern of mine is the question of the "Appendix C" of 33 CFR Part 325 that determines the permit area. I asked this of the Advisory Council on Historic Preservation (ACHP) and they also question it. ACHP needs to be invited into the discussion.

The other agencies not participating is a question. The proposed route crosses many bodies of water and birds have to land in these waters. There has been a concern of why birds have been slowly changing their migratory route by slowly moving west to travel north. Again a natural cycle Native Nations monitor. I sense it is from modern development that affects waterbodies. Fish and Wildlife needs to be in the discussion.

CRST has concern of all the bodies of water proposed to be crossed, not just the Missouri. Other crossing (horizontal directional drilling/boring), of creeks, streams, lakes, or rivers will all eventually empty into Lake Oahe. Which will then travel on to the Mississippi and the Gulf. This is not a local concern but a global concern.

These bodies of water were utilized by Natives and were "bloodlines" of survival when traveling across this land. Today America calls them Interstate Highways or Freeways.

Recent findings of the quality of pipes have serious concerns. Pipe that have been placed in fields and stored for numerous months are questioned of their condition by the time they are to be placed underground. There are specific timeframes these pipes are to be inspected for corrosion and prepared with a protective coating prior to installation. Photos of pipe stored for up to two (2) years by companies show no coating. These pipes sit stacked on top of each other, four pipes high, through all extremes of weather conditions in the northern plains area. Rodents and other animals have made nests or homes inside

the bottom pipes. Their waste deposits are corrosive. Birds have nested and defecated on the pipe which is also corrosive.

The welding also is a recent discovery on pipe previously buried and proposed to be buried. Welds have been examined and there is discovery of faulty welding. The difference from one welder finishing a shift and the next welder coming on have discrepancies. Fractures as long as six feet have been welded shut instead of replacing them. When these defects are brought to the attention of the company the person or persons reporting is usually terminated and replaced.

The aggressive pace this company has conducted itself brings these to question. It is not "if" the pipe will leak but "when". The long term effects of a leak or major spill will remain with local residence and those downstream, while companies move on.

The northern hemisphere of this continent has been long inhabited by numerous Native Nations and their travels took them into each other's territory. This happened long before the arrival of European immigrants and explorers. These Tribes maintained their own order as to where they would establish their territory or encampments. These homes were never permanent as homes are today. As Tribes traveled and bartered between each other their journey could take them far to the north into today Canada. They would also journey far south into now South America. These travels would span over several years and decades. Modern day studies attempt to portray these travels as annual, they are wrong.

The Tribes who were here before this managed to move about with little disturbance from other Nations, until the arrival of European and Spanish people. Tribes treated the land as a living being which they lived in harmony with. They did not disrupt the way the land evolved over time, they adjusted. The Spirit that came from Earth strengthened the Spirit in their bodies and respect was shown for this. Today this energy of Spirit is missing in the research of history. I will state that all Native sites identified have "feeling", one of the criterion for eligibility.

Never will the real history of this continent be discovered under the means of how this country wishes to educate people. Scientists continue to report theories when most of them were taught by their parents of a "creation".

We will continue to pass oral tradition and Creation Stories amongst our own, praying their generation will have better opportunity from the present.

CRST request continued communication with this proposed project.

Respectfully

Steve Vance

Cc; file

EXHIBIT 16

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE and
CHEYENNE RIVER SIOUX TRIBE,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant.

Case No. 1:16-cv-1534-JEB

**DECLARATION OF DAVE NELSON IN SUPPORT OF MOTION FOR PRELIMINARY
INJUNCTION**

I. QUALIFICATIONS AND RELEVANT EXPERIENCE

1. My name is Dave Nelson. I am an enrolled member of the Cheyenne River Sioux Tribe. I currently reside on the Cheyenne River Sioux Reservation.
2. I currently serve as the Cheyenne River Sioux Tribe's Environmental Director/Research Specialist. I have worked for the Tribe in the Department of Environment and Natural Resources for over twenty-six (26) years, twenty-five of which have been in my current position as Director. During my tenure as Director of the Tribe's Environmental Protection

agency I have attended numerous training courses related to water protection and safety, NEPA issues, and Section 106 surveys.

3. My current job duties include conducting site inspections, environmental reclamation and clean-up, testing water sources for pollutant contamination, water pollution prevention activities, and water reclamation and pollutant clean-up. I am also responsible for assisting the Tribe in the development and implementation of its proposed water quality and safety regulations. Finally, as part of my normal job duties I have undertaken Section 106 historical site identification projects and am often required to work closely with the Tribe's Historic Preservation Office.

4. I have reviewed numerous documents related to the Dakota Access Pipeline (DAPL). I am familiar with the determination of the U.S. Corps of Army Engineers to issue a permit to allow construction and operation of DAPL. I have first-hand knowledge of the proposed pipeline route, current construction site, and am very familiar with the area and physical landscape through which the pipeline will travel.

II. HISTORIC AND CULTURAL SIGNIFICANCE OF THE MISSOURI RIVER WATER SYSTEM.

5. Historically the ancestors of the Cheyenne River Sioux Tribe lived in communities along the banks of the Missouri river and its tributaries. As a result, numerous archeological sites exist along the historic banks of the water system. Numerous important historical, cultural, and spiritual sites were flooded after the construction of the Oahe Dam in the mid twentieth century. Meaning that there exists unknown numbers of important historic, cultural and spiritual sites beneath the waters of the proposed DAPL pipeline crossing. To my knowledge these potential sites have not been adequately surveyed to ensure their safety. These places are of significant historical importance to the Tribe and its members.

6. The water of the Missouri river and its tributaries is an essential component of many traditional Lakota cultural and spiritual practices. Water from these sources is gathered by tribal members and used in numerous traditional ceremonies. The Missouri River and its tributaries serve a central role in the life of the Tribe and its individual tribal members. It is an irreplaceable resource for the Tribe.

7. The Cheyenne River Sioux Reservation is located immediately downstream of the proposed pipeline construction site. The future of the Tribe and its members depends on the ability to have access to clean, safe water from the Missouri River and its many tributaries.

III. HISTORICAL, CULTURAL, AND RELIGIOUS SIGNIFICANCE OF THE PIPELINE CONSTRUCTION SITE.

8. The proposed construction route of the DAPL project includes the tribe's 1851 and 1868 Treaty territory. The land is the Cheyenne River Sioux Tribe's historic homeland which cannot be replaced. The land on which construction will take place has a high potential of containing culturally significant plants, the gathering of which is a treaty protected right, as well as undiscovered ancient and historical cultural and spiritual sites, which would likely be destroyed as a result of construction activities.

IV. THE CHEYENNE RIVER SIOUX TRIBE AND ITS INDIVIDUAL TRIBAL MEMBERS WILL BE IRREPARABLY HARMED BY THE CONSTRUCTION AND OPERATION OF THE PIPELINE.

9. If construction is allowed to continue it is my opinion that the Tribe and its individual tribal members will be permanently and irrevocably harmed. For instance, the proposed use of explosives on the river bed to construct the pipeline water crossing has a high likelihood of destroying or irreversibly damaging any unidentified historic and/or spiritual sites on the

flooded riverbed. Construction operations will also most likely destroy plants located in the area, thereby prohibiting tribal members from exercising their treaty protected right to gather such plants. Finally, due to the presence of historic pollutants on the river bed and the adjacent banks from old mine tailings, such as arsenic, I fear that construction and pipeline operation activities will contaminate the region's water in such a way that would negatively impact the Tribe's and its members' ability to conduct traditional medicinal and spiritual ceremonies and practices.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on August 16, 2016, at Eagle Butte, South Dakota.


Dave Nelson

EXHIBIT 17

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STANDING ROCK SIOUX TRIBE

Plaintiff,

V.

U.S. ARMY CORPS OF ENGINEERS

Defendant,

DAKOTA ACCESS, LLC

Intervenor.

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**Case No. 1:16-CV-01534**

**DECLARATION OF JOEY MAHMOUD IN SUPPORT OF DAKOTA ACCESS, LLP'S  
OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

1) My name is Joey Mahmoud. I am over 21 years of age, of sound mind, and duly qualified to make this declaration. I make this declaration based upon my personal knowledge, including without limitation (1) my personal involvement with the business dealings of Dakota Access and the Dakota Access Pipeline (“DAPL”); (ii) my personal involvement in the application, authorization, verification, and other permitting procedures that DAPL was subject to and that are subject of this litigation; and (iii) my position as Vice President of Dakota Access and Executive Vice President of Engineering & Construction of Energy Transfer Partners, L.P. (“ETP”), a beneficial owner of Dakota Access.

2) I received a Bachelor's of Science in Animal Science from Texas A&M University in 1993 and a Masters of Agriculture in Rangeland Ecology and Management (Ecosystem Management) with an emphasis in Rangeland and Wetland Ecology Management

from Texas A&M University in 1996. My professional experience is centered on the transportation and logistics of moving energy and related products across the United States. My career emphasis has been in project management and execution, leadership of projects for successful execution and deployment of development capital into energy infrastructure projects.

3) ETP (collectively with its affiliates) primarily is engaged in liquid petroleum and natural gas transportation in North American and, through subsidiaries, owns the largest liquid petroleum and natural gas pipeline system by volume in the United States. ETP's oil and gas pipeline systems have undergone significant expansion in recent years and span approximately 72,000 miles across North America.

4) ETP transports crude oil to multiple refineries primarily in the Midcontinent and Gulf coast states.

5) Dakota Access is a limited liability company formed to construct and own DAPL. In that capacity it has applied for, received and holds various federal permits, authorizations and verifications needed for the Project.

6) The DAPL Pipeline is a \$3.8 billion private project extending approximately 1,172 miles, commencing in Stanley, North Dakota, and traversing through North Dakota, South Dakota, Iowa and Illinois, terminating at the Patoka, Illinois hub.

7) Over the past three years, as the lead person in charge of project development and execution, I have approved, participated in and overseen the coordination, communication, survey and consultation regarding the cultural resources and tribal coordination. My team of professionals, contractors and consultants has spent nearly three years acquiring data to route the pipeline to avoid sensitive cultural resources.



**HISTORY OF CULTURAL RESOURCE SURVEYS AND TRIBAL  
COOPERATION AND CONSULTATION BY DAPL**

8) The team has surveyed nearly the entire route for cultural resources. Reports have been provided to the four State Historic Preservation Officers and the USACE archaeologists. The reports and their findings have been accepted and approved by each agency. The agencies then made the determination that the planned route will have no adverse effects to any known sites.

9) Additionally, over the course of project development, my team has attempted to reach out to and consult and coordinate with all of tribes in the region to identify any sensitive sites, such as Traditional Cultural Properties, and we have on multiple occasions shared the results of all of our surveys and data with each tribe, including the Standing Rock Sioux Tribe both in the form of electronic data and hard copy data.

10) In the absence of data from the tribes and to assure that the project will not knowingly impact any unknown sites, DAPL has developed and deployed a comprehensive Unanticipated Discoveries Plan for each state that spells out the procedures to stop work, notify the proper authorities, which includes tribal contacts, and implement guidelines for how to mitigate the discovery of any unanticipated cultural resource during construction. The Plan was provided to the tribes for comment and their comments were incorporated. The Plan has been reviewed and approved by permitting authorities both at the state and federal levels.

11) During the course of the planning process, my oversight and coordination also included multiple offers to the tribes to participate with my team to conduct tribal surveys along the proposed route where the private landowners would allow the surveys to occur. This offer was made for the federal jurisdictional areas subject to the Clean Water Act and the National

Historic Preservation Act Section 106 guidelines plus for any and all areas that could reasonably be identified as having intact tribal features, which included undisturbed land, locations that are considered to have a high probability of containing cultural sites and areas identified by the various authorities, inclusive of tribal considerations, as having the possibility of containing cultural sites. These efforts and consultation resulted in 76 percent of the project route being studied for cultural resources. Lake Oahe was one of the areas investigated, studied, and evaluated for cultural and tribal resources.

12) This offer to conduct tribal surveys was made multiple times throughout the development of the project all the way up until we began construction on May 16, 2016, and even at that time, DAPL voluntarily agreed to allow tribal monitoring at locations identified by various states, certain tribes, at the PCN locations identified by the USACE and where DAPL had identified sensitive locations.

13) The vast majority of the tribes, and specifically the Standing Rock Sioux Tribe, over the course of the project have not: 1) participated in or coordinated with the DAPL process and explicitly told Dakota Access that they would not because it is not a government entity, 2) provided any data to assist in the routing of the pipeline to avoid any particular sites, 3) identified boundary areas as exclusion zones to avoid the tribes having to divulge the specific locations of their sacred sites; or 4) participated in any tribal surveys with my staff in planning or routing, only participating when there was USACE coordination. The only response or comments we received from the Standing Rock Sioux Tribe were to stop the project and categorically avoid the entire western Great Plains Region as that is considered the "Greater Sioux Nation's "historical range," which is an impossible request to accommodate.



14) As late as the preparation of this affidavit only three tribes (which do not include the Standing Rock Sioux Tribe) have conducted some level of survey in coordination with Dakota Access, although all the federally recognized tribes with an historical interest in the region were given multiple opportunities over the period of two years to participate. In fact, the Standing Rock Sioux Tribe has never agreed to participate in surveys with DAPL, provide any comments or cooperate in any meaningful manner to protect and avoid any known sensitive areas or otherwise cooperate with DAPL. Similarly, and as further evidence of its approach to cooperative endeavors, the Standing Rock Sioux Tribe has refused to sign the Programmatic Agreement between the USACE and the 29 area tribes governing sovereign cooperation on Missouri River management issues. Even when DAPL, in coordination with the USACE held tribal coordination meetings, the Standing Rock Sioux Tribe chose to send a legal representative instead of a tribal or cultural professional. Their entire participation has provided the appearance of preparing for and provoking a legal dispute rather than sharing data to avoid and protect cultural and tribal sensitive areas.

15) Since Dakota Access has started construction on private lands near Lake Oahe north of the Standing Rock Sioux reservation, tribal members have conducted both violent and non-violent protests of the project and have denied DAPL, the private landowners who have signed easements, the shippers who are relying on the pipeline to transport their oil to monetize their upstream and downstream assets, the people of North Dakota who are relying upon the significant tax base the project will generate and the many, many jobs that have been and will be created, and the entire United States the lawful right to build the pipeline and to derive the benefits the project brings. Tribal members have been attempting to stop the project and block

the legal right of Dakota Access to construct on private land. Over the past week, multiple people have been arrested, including the Chairman of the Standing Rock Sioux Tribe, who on information and belief may have been personally leading these civil uprisings to block our work, including attempts to intimidate our employees, law enforcement and the landowner. On information and belief, the Chairman gave tribal employees the day off last Friday to participate in protests that became violent. See: <https://app.box.com/s/v7sctzjemi2mgatk20cojo5tngvspz74>

16) Instead of working with Dakota Access to protect the resources that the Standing Rock Sioux Tribe claims to want to protect, it has used this legitimate federal process to try to stop the project rather than to enter into good faith negotiations or data sharing to protect cultural resources. In no instance has the tribe provided any data, coordination, consultation or information to protect and avoid cultural resources, but rather they have tried to stop the project at and with any means possible, including violating DAPL's legal rights. This exact statement has been made by multiple tribes over the project duration.

17) In summary, although Dakota Access has attempted every avenue to facilitate surveys and cooperation with the tribes, specifically with respect to the Standing Rock Sioux Tribe, it has been met with opposition and obstructionism rather than any cooperative attempt to provide data or engage in efforts to avoid cultural resource impacts.

**DAPL WAS ROUTED TO AVOID CULTURAL AND ENVIRONMENTAL AREAS OF CONCERN AND IS CO-LOCATED WITH EXISTING INFRASTRUCTURE**

18) DAPL is co-located with existing utility, roadway and infrastructure wherever feasible. Specifically, where DAPL crosses Lake Oahe, it is 100% located adjacent to and within 22 to 300 feet from the existing Northern Border pipeline. It also is co-located parallel to



an existing overhead power line owned by the Basin Electric that crosses Lake Oahe. Thus all three projects, the existing Northern Border and transmission lines and DAPL all cross Lake Oahe at the same location, which itself is a man-made lake, created by flooding portions of the Missouri River.

19) The importance of DAPL paralleling these other utilities across man-made Lake Oahe, as well as certain other locations along the route, is that Dakota Access selected crossing locations that have been disturbed in the past - both above and below ground level - making it a "brownfield crossing location." The decision to cross at this brownfield location was made specifically to cross the man-made Lake in an area that had been previously disturbed by past and recent ground disturbing activities and where the likelihood of intact cultural or tribal features and resources would be extremely remote. This assessment was further validated by Dakota Access's very detailed, multiple cultural surveys with professional archaeologists and ethnographic specialists; by the USACE which had conducted its own surveys prior to Dakota Access for previous USACE endeavors and then specifically for Dakota Access, and by tribal representatives from the Standing Rock and Upper Sioux Tribes in conjunction with USACE site visits. In each case, no intact cultural or tribal features were found during any testing within the boundaries of the work area and Dakota Access was specifically told by the Standing Rock Sioux Tribe that it would not share any data because Dakota Access is not a government entity.

20) I personally led, participated and attended two tribal coordination meetings attempting to solicit their participation in the process and directly hired a tribal liaison to provide an additional level of outreach to the tribes, again attempting to engage them in the process. Additionally, as part of the consultation and outreach process, Dakota Access attempted to meet



with the Standing Rock Sioux Tribe Historic Preservation Office to ascertain if there were any sensitive sites that should be avoided at Lake Oahe as well as along the pipeline length, but our requests to consult and share data were met with resistance and the tribe shared no data.

21) The crossing at Lake Oahe will be installed using advanced construction technology called HDD or Horizontal Directional Drilling and will be installed between 90 to 115 feet deep beneath the bed and shoreline of the Lake to avoid impacts to unknown or undocumented sensitive cultural resources. Where the pipe becomes shallow at the Lake approaches, Dakota Access conducted detailed, above-ground surveys to insure the area was free of any intact cultural features. The depth of the crossing was chosen to avoid any potential cultural resource sites by being at depths that are too deep to contain cultural or tribal resources as the date of the geology and soils predates human occupation. Therefore, the construction activity surrounding installation of the pipe at Lake Oahe will simply not have any impacts to cultural or tribal resources as the impact zone is beneath the zone with the potential to contain human artifacts. This conclusion by DAPL's archeological consultant has been concurred with by the North Dakota SHPO through the Section 106 process.

22) DAPL as designed is a buried oil pipeline generally installed at a depth of 4 feet as measured from the top of the surface. DAPL is subject to stringent design, construction, operation, inspection and maintenance requirements of federal pipeline safety regulations at 49 CFR Parts 194 and 195, which are administered by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). In addition to federal pipeline safety regulations, the design and construction will also adhere to safety codes and industry best practices, such as those issued by the American Society of Mechanical Engineers, the National Association of Corrosion Engineers

and the American Petroleum Institute, among others. Crossing of certain streams and rivers is completed by either an HDD or various open-cut methods approved by state and Federal agencies. The HDD employs GPS guided technology to dig a tunnel for pipe placement well below the river bed or the land surface to avoid erosive impacts from water flow or banks and to protect sensitive cultural and environmental resources. Public road crossings are completed by an underground bore leaving the road surface undisturbed. All road crossings are subject to various state and local permits.

23) Dakota Access also incorporates a variety of safety specifications and best management practices that exceed those required by PHMSA, including: additional drain tile and topsoil protection measures important to the agricultural landowners; pipe mill inspections with on-site quality control measures including enhanced testing and record retention and additional pipe wall thickness (45% greater) at all public road, waterway and railroad crossings; installation of valves with motorized actuators to supplement local monitoring with remote monitoring; and, enhanced hydrostatic and other testing, including an inspection of the entire pipeline length by an internal deformation tool prior to startup and a cathodic protection system activated earlier than required. Exhibit A-1 provides a detailed list of the various commitments DAPL is executing “above and beyond” the state and federal regulations to insure the safety of the pipeline.

### **REGULATORY OVERVIEW**

24) *Unlike oil pipelines*, construction of new interstate *natural gas* pipelines must be approved and permitted by the Federal Energy Regulatory Commission under the National Gas Act. The NGA contains a detailed federal approval process requiring a finding of public



necessity and convenience before a new gas pipeline may be constructed. For example, the pipeline that Dakota Access parallels at many locations and specifically Lake Oahe is a natural gas pipeline that was placed into service in 1982 and is regulated by the Federal Energy Regulatory Commission. As part of that project's development and execution, a Federal Environmental Impact Statement was produced, which considered the potential impacts or effects to cultural and tribal resources and concluded with the approval and construction of the pipeline. This would indicate that no significant effects to resources occurred and the pipeline was allowed to be constructed as proposed. DAPL is partially within and immediately adjacent to the previously disturbed area of the approved natural gas pipeline, and based upon the data that has been collected, the surveys completed, previous disturbance and current concurrence from the state authorities and USACE, no impacts will occur to cultural resources as a result of DAPL. In the event of a find during construction, DAPL has developed an approved, comprehensive Unanticipated Discovery Plan that will result in stopping work, coordinating the find with the appropriate agencies and tribes, and then restarting construction once the site or find is mitigated or an alternative crossing is identified. In contrast, Congress has chosen to **not regulate oil pipeline** projects without some other significant federal nexus, and as such, most oil pipelines are not federalized. Importantly, there is no federal agency charged with determining whether or how a common carrier liquid petroleum pipeline, such as DAPL, should be built. Instead, the States play a substantial role in regulating petroleum pipelines. Each state traversed by Dakota Access contains extensive planning and review processes and requires a particularized public utility commission determination of public need for new pipeline construction. Dakota

Access has successfully received all the required state and local level permits to site, construct and operate the DAPL pipeline.

25) As part of the planning and permitting processes, Dakota Access submitted applications to the North Dakota Public Service Commission ("PSC") (filed on December 22, 2014), the South Dakota Public Utilities Commission ("PUC") (filed on December 15, 2014 and revised, December 22, 2014), the Iowa Utilities Board ("IUB") (filed on January 20, 2015) and the Illinois Commerce Commission ("ICC") (filed on December 22, 2014). Following an extensive evidentiary proceeding in each jurisdiction, a "Certificate of Good Standing" was issued by each Commission for the DAPL pipeline. Each Certificate was granted upon a finding that DAPL is safe, necessary and should be constructed to promote the security and convenience of the public.

26) To the extent there is federal permitting for domestic liquid petroleum pipelines, it tends to be for the isolated, site-specific jurisdictional components, *e.g.*, crossing individual wetlands under jurisdiction of the U.S. Army Corps of Engineers ("Corps") or acquisition of easements for land under jurisdiction of a federal agency. For DAPL, lands affected by federal jurisdictional crossings or that require a federal permit comprise a very minor component (approximately 3%) of the project. To my knowledge, no domestic, interstate oil pipeline constructed in the last decade, that does not cross substantial federal acreage, has been subject to project-wide federal permitting requirements, and none have triggered the need to prepare either a project-wide federal Environmental Assessment or an Environmental Impact Statement.

27) DAPL receives no federal funding and primarily crosses private land. Along its route, DAPL crosses approximately 0.02% (1,094 feet) of Corps owned property and



approximately 0.2% of the route (2.83 miles) of Corps managed private easements in North Dakota and approximately 0.2% of the route (2.42 miles) of Corps managed private easements in Illinois. The total crossing of Corps fee owned land and Corps easements over private land is 0.42% of the route. DAPL crosses no other jurisdictional federal or tribal trust lands.

28) DAPL was only required to obtain pre-construction authorization for permits for jurisdictional features under Federal permitting authority which includes approximately 3% of the entire route (which is inclusive of the permit review area or the "area of potential effect"). Overall, approximately 0.55% of the project traverses land with waters of the U.S. jurisdictional features. Essentially, other than very minor and minimal crossings, the project was routed to avoid Federal jurisdiction and to avoid and minimize impacts to regulated environmental resources, which included cultural, historical, traditional and tribal resources that would be protected under Section 106 of the National Historic Preservation Act. This was not done to avoid consultation, but rather in consultation and cooperation with the various authorities to avoid and minimize impacts, which is the preferred form of mitigation under federal policy.

29) DAPL crosses certain private lands on which the U.S. Fish and Wildlife Service has non-exclusive conservation or grassland easements. These are non-jurisdictional crossings of private land.

30) DAPL crosses land that is owned by the Three Affiliated Tribes of North Dakota, which is non tribal-trust land and where Dakota Access has secured an easement and agreement from the tribes to cross, construct and operate the pipeline. During this process, which included a 14 month long negotiation that resulted in a favorable plan to cross tribal property, I personally

worked with the Tribal Chairman and certain other tribal members, employees and consultants to negotiate and resolve a mutually agreeable crossing agreement and easement.

31) Dakota Access (and ETP) views the safety and integrity of its pipelines as its highest priority and its pipelines remain among the safest and most environmentally protective modes of transportation. There is no safer mode of crude transportation in the world than pipelines. Designed to move nearly 6.5% of the entire domestic production of crude oil, DAPL is an essential element to the domestic crude oil supply chain. Based upon U.S. Department of Transportation data and statistics it often is reported that pipelines are between 3.6 to 4.5 times safer than rail and 34 times safer than truck transportation of crude oil. For a large portion of the oil located on the western side of the Bakken oil field, there is no way to move this oil from its Bakken origin to the south and east without crossing the Missouri or Mississippi Rivers, and this includes rail, truck and pipelines mode of transportation. Pipelines by far minimize the potential for impacts.

32) DAPL's design employs the very latest operational, safety and environmentally protective technologies. For example, many locations involve horizontal directional drilling, which places the pipeline deep beneath the surface to avoid sensitive environmental and cultural resource impacts. Additionally, DAPL has developed and strictly adheres to a robust Facilities Response Plan to manage and respond to any type of pipeline event. All DAPL employees will be fully trained in emergency response planning to complement the capability of certified, professional response teams to ensure safe pipeline operation.

33) Although not a Federal or State requirement across the vast majority of the project area, DAPL made multiple attempts to work with the various tribes. For example, during the



initial development of the project, significant effort was made to avoid impacts to Federal and tribal lands. By focusing on this key routing criterion, Dakota Access was able to avoid 99.98% of federal land along the entire route, with the exception of three small crossings of USACE owned fee land at Lake Oahe. DAPL avoided all (100%) of tribal trust lands.

34) Even though public and tribal lands were avoided, Dakota Access still attempted to coordinate with the tribes to identify key sensitive locations within the various historical ranges of the tribes and/or key features of cultural and spiritual significance. As early as June 2014 in the project development cycle, Dakota Access had begun to reach out to the various tribes to identify these sensitive areas, and in fact, in September 2014 the Standing Rock Sioux Tribe was the first tribe Dakota Access met with in person as part of the coordination process.

#### **PURPOSE OF THE DAKOTA ACCESS PIPELINE**

35) The primary purpose of DAPL is to provide safe and cost effective shipment of Bakken/Three Forks crude to U.S. markets. DAPL will deliver Bakken crude on a very cost effective basis to Patoka, Illinois, for shipment primarily to eastern and Gulf refineries. 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. The importance of this pipeline and its low cost service is to allow certain producers to continue to produce in a depressed pricing environment effectively keeping the crude flowing to market, whereas without the pipeline, many producers would be forced to further curtail production or stop production entirely until the market conditions improved.



36) The expanded capacity of DAPL is approximately 570,000 barrels of oil per day, and DAPL is expected to initially transport approximately 450,000 barrels of oil per day. In response to shipper requests and following publicly announced open seasons, DAPL received contractual commitments from 9 eligible shippers with terms ranging up to 10 years. With the overwhelming commitments, DAPL has been requested to conduct a third open season to expand the initial capacity up to the expanded capacity case. That process is currently underway.

37) In connection with its long-term capacity transportation contracts with 9 committed shippers, Dakota Access has committed to complete, test and have DAPL in-service by January 1, 2017.

38) Increased access to growing supplies from the Bakken region is forecast to displace imported crude oil delivered to U.S. refineries from other production fields, including Mexico, Venezuela, Africa and the Middle East, and will enhance domestic national and energy security.

#### **DAPL PLANNING AND PUBLIC CONSULTATION**

39) Although not required by any Federal law, DAPL conducted a NEPA like alternatives analysis to identify and select the preferred route that minimized impacts to the most stakeholders and resources. Dakota Access engaged in over three years of planning, design, permitting, consultation and environmental survey work for the routing of DAPL. In selecting this specific route, Dakota Access evaluated options and identified the most feasible route that considered a host of factors including constructability, population centers, cost, and minimization of potential public, cultural and environmental impacts. To the extent feasible, Dakota Access avoids routes that cross federal, state, tribal trust and environmentally sensitive lands and

features and does not trigger any Environmental Justice concerns, for instance as compared with crossing to the north of Bismarck, North Dakota. See Environmental Assessment ("EA") prepared by the U.S. Army Corps of Engineers at:

<http://www.nwo.usace.army.mil/Missions/Civil-Works/Planning/Project-Reports/Article/633496/dakota-access-pipeline-environmental-assessment/>.

40) Route planning concluded that the preferred and most environmentally protective route would co-locate with existing linear utility features, such as transmission lines and the Northern Border Pipeline corridor to the greatest extent practical in order to minimize new land disturbance and maximize public safety benefits from co-locating with utility infrastructure. After many months of route planning, DAPL identified landowners for each tract of land as the initial route was refined and the construction alignment finalized. Landowners were asked for permission to conduct civil, cultural and environmental surveys. Following more detailed engineering, DAPL began acquisition of easements in November 2014 for all states except Iowa, which began in February 2015.

41) DAPL has identified 3,686 tracts of property along the approximately 1,172 mile route. DAPL has acquired or is finalizing acquisition of 100% of the private land rights along the route.

42) In addition to any specific public notice initiated by federal, state or local agencies with jurisdiction over DAPL, Dakota Access has implemented a public outreach and consultation programs, which include:

- a) A Public Awareness Program that meets and exceeds industry (American Petroleum Institute Recommended Practice 1162) and federal (49 CFR 195.440) requirements



addressed to the affected publics, local public officials, emergency officials, and excavators,

- b) DAPL has consulted with and coordinated with all state and Federal resource agencies regarding sensitive ecological resources including wetlands, sensitive vegetation, wildlife, and endangered and threatened species, many of which have been the subject of public review in state and federal open forums and documents.
- c) DAPL was amenable to the sharing of the Federal Response Plan as appropriate with Standing Rock Sioux tribal authorities and responding to its comments on the Plan, including notification contacts.
- d) Dakota Access offered access to all the known, federally recognized tribes interested in conducting cultural resource surveys, which resulted in project changes to avoid, mitigate and minimize impacts during the design stages. Dakota Access made multiple offers, met with interested tribes on three different occasions and communicated with each known interested tribe to solicit their input into the routing. However, no tribes (except the Osage Nation) proactively accepted the offer until late in the final steps of the permitting process and in fact only three tribes, the Osage Nation, Upper Sioux, and the Northern Arapaho agreed to do surveys at the PCN areas and only three tribes accepted our proposal to survey non-PCN areas – Three Affiliated Tribes, Osage Nation and Northern Arapaho.
- e) DAPL has developed, provided copies of, accepted comments from and modified its Unanticipated Discovery Plan in coordination with the various tribes who provided

comments, and in coordination with the various state and federal agencies to protect cultural resources during construction.

- f) DAPL has agreed, in coordination with the USACE and in compliance with the Nationwide Permit and other Federal approvals, to allow the various tribes to provide tribal member monitors during construction, which for instance, includes participation by the Tribal Historic Preservation Officer for the Standing Rock Sioux Tribe. This opportunity to monitor includes non-PCN areas where DAPL and the specific tribes have agreed to monitor non-jurisdictional or permitted areas.
- g) DAPL has funded and hosted three tribal consultation meetings to disseminate information and address the concerns of tribes and offered to fund tribal surveys prior to construction.
- h) Dakota Access has 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 (this included 100% of all work areas in North and South Dakota, 42.3% in Iowa and 45.8% in Illinois).
- i) During this outreach over a period of 25 months, Dakota Access has listened to, addressed and accommodated most concerns.

43) With minor exceptions, the vast majority of the public and public officials who have expressed a view generally support or have approved the project.



### DAPL STATUS

44) Dakota Access designed, is building and will eventually operate DAPL in compliance, and often in excess of all local, state and federal laws and regulations and any safety requirements. DAPL has hired the best and most experienced engineering design firms, has bought the best and highest standard materials on the market (also which are mostly domestically produced, fabricated, manufactured and supplied), has engaged the most experienced contractors in the business and along with some of the most well-trained, and experienced employees in the market providing for the safest pipeline in the industry.

45) Contractors have been selected and contracted to complete survey work; construct the pipeline; conduct environmental, archeological, craft, weld testing and other inspections; and provide spill response planning and other project related services. Contractors were screened based on ETP standards and industry safety and experience. Major construction and service firms already hired directly by Dakota Access and under contract include: 2 general contractors and 5 national craft unions to construct a total of nine pipeline spreads, pumping stations and associated facilities. In addition, monitors and inspectors are on site to assure construction quality and environmental, archeological and cultural resource protection, along with specialized testing organizations to independently test and document weld quality and complete hydrostatic pressure tests of the DAPL pipeline. In turn, those contractors and consultants have hired dozens of subcontractors from the local area and region. Approximately 10,000 U.S. jobs are involved in the construction of DAPL. In addition, there are multiple state and county inspectors across each state providing inspection and monitoring of the project construction to insure compliance with the state or local permits, rules and regulations and any project specific plans and procedures

approved by the various local and state authorities. Additionally, the Department of Transportation via the Pipeline Hazardous Materials Safety Administration is actively inspecting the materials and construction of the pipeline on a frequent and constant basis and will oversee the operations and maintenance once the pipeline goes into service.

46) Within the United States, there are a limited number of general contractors and workers qualified to complete large diameter pipeline construction, including both union and non-union work forces. Dakota Access has made commitments to the various trades who are part of the National Pipeline Agreement to build the pipeline, plus one additional national union. The labor unions involved with DAPL are the International Brotherhood of Teamsters, Laborers International Union of North America, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, International Brotherhood of Electrical Workers and International Union of Operating Engineers. Generally, the contractors provide approximately 50% of the workers from their own employee base and about 50% of the workers are hired from respective local union halls.

47) Dakota Access began construction of private portions of the DAPL Pipeline on May 16, 2016 in non-Preconstruction Notification areas (*i.e.*, non-NWP PCN and dryland private lands) following the receipt of the key local and state permits and just recently in the remaining PCN locations following the issuance of the USACE permits and verifications. Federal jurisdiction areas requiring advanced notice and receipt of the required authorization were not impacted until receipt of the relevant federal permit, easement or verification. For example, Dakota Access has temporarily agreed not to commence the HDD under Lake Oahe until this



court rules in this preliminary injunction proceeding on August 24, 2016, which based upon the 90 to 120 day schedule to execute the HDD, is a significant concession.

48) Enjoining DAPL construction while the court determines if the overall USACE regulatory program has a flaw would be an unfair decision isolating DAPL from the hundreds of thousands of projects that have been constructed or are currently working under the same premise and guidelines under NWP 12. An injunction would cause unjust, irreparable harm and damage not only to the thousands of people receiving their incomes from DAPL project work, the entire U.S. from an energy supply and security standpoint and the owners of DAPL, but to the entire U.S. societal infrastructure by denying this Congressionally provided for streamlined permitting mechanism for future roads and water, cable, transmission, oil, gas and similar utility corridors. An injunction against DAPL would necessitate revoking or rescinding all verified and programmatic NWPs creating a national state of non-compliance and a work stoppage on various infrastructure projects and lawful activities across the entire United States.

49) At this time, DAPL has concluded roughly 45% of construction.

50) Nearly \$1 billion in materials have been secured and are located on-site across the 1,172 miles of the system, being or ready to be installed. Total project spending through August 1, 2016 is approximately \$1.96 billion.

51) To complete construction by the January 1, 2017, in-service date, installation work must continue. Land reclamation activities will continue to meet landowner and permit requirements. Construction generally is occurring six days per week for a minimum of ten hours per day or as long as possible each day, but has been delayed for 5 months on properties with a federal nexus due to supplemental tribal coordination process implementation. The continued

delay is unacceptable and is unfair as DAPL has attempted in every manner to work with, educate, consult, coordinate and share any type of information with the tribes and has proven via detailed surveys and consultation with the states and the USACE that no impacts will occur that have not been otherwise permitted or mitigated through the legal and coordination process under § 106 of the National Historic Preservation Act or under state law.

52) As of this date, approximately 8,000 workers are currently in the field, which continues to ramp up daily and overall the project will employ approximately 10,000 people over the course of the job.

53) DAPL also is generating indirect economic stimulus and support jobs in local communities catering to the construction effort, such as food, hospitality and transport. With the majority of workers moving around up and down the job, they are spending their income on goods and services in the various communities traversed along the route. Couple this spending with the tax revenues from the income taxes and taxes on materials, the communities and states traversed by the project are benefiting from the influx of many millions of dollars into their communities. These benefits would simply cease if the project was suspended or stopped and each and every person, the communities and the states would be financially harmed immediately and permanently.

#### **IMPACTS FROM AN INJUNCTION**

54) Each remaining calendar day is vital to timely construction of the DAPL pipeline. Supplemental tribal consultation processes, above and beyond the normal and customary process for any nationwide permit, already have delayed project construction for 3 months resulting in



critical path timing at the Lake Oahe crossing. Additionally, project construction delays from a preliminary injunction are extremely costly and follow-on effects could effectively cause project development to cease. *See infra*. A bond to pay for delay costs would be very expensive for Plaintiff, but would be just as a result of the financial impacts that would occur to the multiple owners of the project, the impacts to the thousands of workers, the communities and states traversed by the project, the contractors and all American's who rely upon crude oil, its resulting products, fuels and lubricants utilized every day. The immediate financial damages to DAPL even for a temporary shut-down would be greater than \$430 million plus \$83.3 million per month resulting in damages of \$1.4 billion in the first year, not including the losses on the materials and expenses already spent on the construction, labor and equipment. If for some reason, DAPL was able to carry the cost of construction spreads, staff and equipment on a month-to-month basis to preserve its ability to restart construction, those costs would total \$372 million per month for every month of delay. However, this number would be too great to absorb and therefore the project would have to shut down. This level of economic harm would be direct, irreparable and not recoverable, and would have irreparable harm and damage to DAPL's and ETP's reputation and ability to conduct business in the future. Stopping work at this time is near impossible without causing significant and extreme harm. It would be an infeasible task without grave and irreparable impacts to DAPL, its workers, the landowners, economy, both the state and federal government, and the environment.

55) If a temporary injunction of indefinite term is granted pending consideration of a permanent injunction in the normal course of judicial business, DAPL's construction on the Lake Oahe Corps easement and PCN areas were to be halted, construction of the entire project would

cease, and the project itself jeopardized. It would be prohibitively costly to move people and equipment around outside the current construction schedule, which was created in reliance on long-established Corps permitting and verification procedures.

56) If an injunction is granted, Dakota Access estimates hundreds of deviations from the construction schedule and construction plan would occur, costing \$540,000 in relocation costs for each occurrence of having to move around each USACE jurisdictional feature. For example for the NWP's with PCNs, that could mean 203 permits x \$540,000 totaling \$109,260,000 in direct damages just to move around the PCN areas. DAPL already has had to move around some of these locations that resulted from the previous delay in the project timing from May to July, resulting in direct damages of nearly \$25 million dollars in move around damages. Extend these damages to all USACE jurisdictional areas (in addition to the PCN areas) and the costs are too severe to continue with construction and unfeasible to overcome. The court would be essentially condemning the project with no trial and no evidence of impacts to tribal or cultural properties (conversely there is a mountain of data suggesting and confirming there are no impacts as concurred by the four State Historic Preservation Officers and the USACE archaeologists).

57) An injunction would suggest that all nationwide permits across the entire U.S. would have to be placed on hold or suspended while the court heard and decided this case because if DAPL was suspended after and based upon the approval of the permits in accordance with the USACE policies and procedures of the USACE permitting program, then it would only stand to reason that all nationwide permits that relied upon the same policies and procedures of the USACE would be invalid. Therefore, an injunction decision logically would necessitate that



all existing, in progress and future nationwide permits would have to be suspended while this challenge was heard, resulting in a national non-compliance crisis and disruption to the entire U.S. economy.

58) Construction would come to a halt with jobs, income and union benefits such as healthcare and retirement irretrievably lost to these approximate 10,000 working class families.

59) As of August 1, 2016, Dakota Access has incurred approximately \$2 billion in project development costs. It plans to spend approximately \$3.8 billion to complete project construction. If this Court issues a preliminary injunction, the Dakota Access beneficial owners will incur substantial monetary costs and penalties under the terms of the contracts entered into with unions, other service providers and related project completion agreements and would suffer the loss of resources spent on the materials and equipment purchased to construct the pipeline, all of which would not be recoverable. Currently, DAPL is spending roughly \$1.3 million dollars per spread per day or approximately \$11.7 million dollars per day on contractor labor and equipment and has plans to move this \$14.3 million per day. In the event of a short-term cessation of work, Dakota Access simply could not sustain that cost with no production and without the certainty of capital recovery within the project economic predictions and therefore would cease construction and release the workforce and contractors.

60) In the event of a prolonged work cessation, contractors and equipment would be demobilized. At this point, the project is roughly 45% installed and project construction is advancing by roughly 1% per day with the goal of finishing installation around December 1, 2016 and then going into service January 1, 2017.

61) 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. For the majority of the pipeline length and over 98% in North Dakota and South Dakota, the right-of-way is cleared, graded and the pipe strung along the right-of-way waiting for the trenching activities and welding to occur (which construction is almost 90% complete in North and South Dakota). This means that the soils have been disturbed to the depth of the top soil in most places, roughly 1 to 3 feet below the surface where any cultural features are likely to occur. The only remaining digging activities left would be the actual trenching activities in less than 10% of the project areas in North and South Dakota that would include roughly a 5 to 8 foot wide trench along the remaining lengths of pipeline to depth of an additional 4 to 8 feet deep. Therefore to stop construction now would cause more harm than good and would not prevent any harm. Additionally, nothing to date has been uncovered in North and South Dakota of relevance to any interested parties.

62) In theory, demobilization would first require a very carefully and detailed plan to secure those portions of the route and road/river crossings that have been exposed, road/river crossings where drilling and boring have been initiated and other locations where project impacts have already occurred. Along the mileage where topsoil has been stripped and grading or trenching has begun, there would be significant incremental impact to the environment and landowners. To avoid or reduce such impacts, as part of any demobilization, subsoil and topsoil would need to be replaced and stabilized by re-seeding and implementing additional erosion control measures – all of which require additional capital not available to the project. Additionally, pipe sections would need to be lowered into trenches and trenches refilled. For



safety and other reasons, trenches should not be left open for any length of time to protect the public, wildlife and the environment, but with an injunction these unrecoverable economic and potential harmful impacts would result and the likelihood of safety issues would increase significantly.

63) Resuming work, if feasible, following demobilization would require development of a construction plan based on duration of the shutdown, environmental and landowner “windows” affecting the timing of activities in specific areas, and the availability of the contractors and workers who would have dispersed following an injunction-spawned layoff. If demobilization occurs, it is less than certain that the project will ever re-start.

64) In the majority of the easements, construction must finish within 18 months from starting. If an injunction is imposed, based on a May 16, 2016 start date, DAPL’s rights to construct terminate November 2017 for the majority of the project. In the event of an injunction, prior to restarting DAPL would have to repurchase the permanent or temporary easements, which would be a significant and unpredictable amount of money, to reenter the properties. This is a direct and unrecoverable harm to DAPL and its financial and equity partners.

65) Furthermore, the fields and farms along the route have been compensated for this growing season. A delay or suspension would then require an additional year or more of impact to the farmer and their crop production (2016). This means DAPL would have to compensate the farmers for those additional lost crops and the domestic and international consuming public of agricultural commodities would not have the benefit of those crops to purchase. This harm would be permanent and unrecoverable and would be approximately \$70 million (assuming the easements can be renewed).

66) The incremental cost (over and above project budget) to demobilize and then (once an injunction is lifted) to remobilize contractors, equipment and workers is estimated to have an approximate cost of at least \$200 million. This cost is inclusive of fixed costs for contract terminations and cancellation of service and supply contracts; completion of activities required to stabilize the right-of-way, roadways and river crossings; additional measures required to place an additional coating on the pipe to prevent ultraviolet degradation, application of corrosion inhibitor systems and payment of additional incremental crop damages; maintenance of the idle pipeline and facilities; and, the incremental cost expected to be incurred to enter into new contracts for qualified pipeline construction firms, inspectors and other services . These costs cannot be recovered. This estimate of the incremental cost is based on DAPL's knowledge of the higher bids of non-successful potential contractors not selected for this contract or delay and unit price items included in the existing contracts.

67) Dakota Access has spent many months in a competitive bidding process with General Contractors for the DAPL project and remobilization would not allow a similar competitive bidding process. Instead, a remobilization designed to re-commence work as swiftly as possible would require that construction services be secured through a negotiated contract price process. Contractors would be presumed to escalate their previous estimates due to the higher costs of remobilizing an extensive, full line of equipment in a shorter timeframe and hiring key workers in a much compressed timeframe *e.g.*, some major equipment now required to be leased at higher costs, premium paid to supervisory or key skilled trades to entice them back to the job and away from some other job they may then be on.



68) The additional “variable” costs per month of delay caused by an injunction include: (1) \$1.5 million per month to establish crews to maintain environmental controls at the worksites, inspect those worksites, maintain leases for field offices and pipe yards, and assure security of the facilities; and (2) a cost of capital expense of \$3 million per month. Further, \$15.5 million would be required to reacquire the project lending instrument. These costs cannot be recovered.

69) DAPL’s beneficial owners earn revenue based on negotiated terms for each barrel transported. Based on contracts negotiated with DAPL shippers and volumes that will be transported for other shippers, Dakota Access estimates that delay in initiation of DAPL operations will result in a 2017 revenue loss to its partners and the investing public of approximately \$913 million, rising to over \$1 billion in 2018, and increasing each year thereafter. These costs cannot be recovered.

70) In connection with its long-term transportation contracts with 9 committed shippers, Dakota Access has committed to complete, test and have DAPL in service by January 1, 2017. The long-term transportation contracts give shippers a right to terminate their commitments if DAPL is not in full service per the contract deadline. Meanwhile, faced with an uncertain delay, shippers would need to determine alternative sources for secure, reliable transportation of crude oil supplies to the refineries. These costs cannot be recovered and loss of shippers to the project could effectively result in project cancellation.

71) In addition, there are downstream losses to the beneficial owners of DAPL and other producers and shippers from the loss of: crude to other transportation and refining facilities; infrastructure costs to connect to DAPL; Bakken production due to the transport

economics of DAPL; royalty revenue to mineral owners, including the U.S. from lost production and lower market prices for Bakken supply absent DAPL; and, greater environmental health and safety risk due to increased reliance on rail and truck transport. These costs cannot be recovered. In addition to the impacts to the beneficial owners and users of DAPL, a workforce of approximately 10,000 people will face layoffs and associated adverse impacts. *See, e.g.*, Ex. D to Dakota Access LLC's Opposition to Plaintiff's Motion for Preliminary Injunction ("Opposition"), Decl. of Tom D. Gross on behalf of the United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of the United States and Canada; Ex. E to Opposition, Decl. of Mark Maher on behalf of the International Union of Operating Engineers; Ex. F to Opposition, Decl. of Robert Poteete on behalf of Precision Pipeline, LLC; Ex. G to Opposition, Decl. of Perry Schuldhaus on behalf of Enbridge Energy Partners, L.P. and Enbridge Holdings (DakTex) L.L.C.; Ex. H to Opposition, Decl. of Ross Eisenberg on behalf of the National Association of Manufacturers; Ex. I to Opposition, Decl. of Gregory Davis on behalf of the Laborers International Union of North America; Ex. J to Opposition, Aff. of Marion Davis on behalf of the International Brotherhood of Teamsters. These are highly paid construction jobs where laborers, equipment operators, welders, and environmental inspectors earn fully loaded wages of between \$53 and \$105 per hour and expect significant overtime hours during the six day/week - ten hour/day work schedule for much of the construction period. Many workers also qualify for a per diem for lodging and food. While it is feasible some of these workers could be hired to work construction jobs in other areas on other jobs that is not always possible because the pipeline workforce is so specialized and there are few large infrastructure or building projects that would absorb this many workers. Once forgone, income to these families is lost forever.



Thus, many would need to travel far from home to find work and many likely would face unemployment. Moreover, these jobs offer lucrative benefits, unlike most trade jobs in the current economy.

72) The construction process occurs in an assembly line fashion to minimize the time from grading to reclamation, which in turn minimizes the potential for environmental impacts. With the clearing, grading, trenching, pipe laying and welding portions of the construction sequence well underway, there already is significant mileage that has exposed soils and open excavations, and an injunction ordering work cessation would pose significant additional cost and incremental risk to the environment. For example, rain events during a shut down without proper man power and equipment to maintain those areas similar to conditions during construction could result in unnecessary sedimentation to wetlands and streams and impacts to wildlife and other environmental resources. This could mean impacts to off right-of-way cultural features that were specifically avoided by routing but could be impacted by the unsecured erosion and sedimentation resulting from a work stoppage.

73) Should this Court impose an injunction, there are also incremental impacts to landowners beyond those included in construction planning, mitigation and landowner damage settlements. Specifically, delay could defer construction to the peak of harvest in some areas and an injunction would significantly prolong the time that landowners, tenant farmers and the community need to be inconvenienced in having to work around construction in their communities that already has begun. Dakota Access has assured or established access points to fields and detours around construction prolong these temporary effects, especially to farmers.

Delays would impact these people which would ultimately delay or impact their ability to grow, harvest and sell their crop commodities.

74) Landowner and land use practices vary greatly across the 3,686 tracts of private land, and in many cases, special landowner accommodations have been made based on the current local construction schedule. For example, we are contractually obligated to complete construction by a certain date to accommodate agricultural practices for specialized seed in Illinois. If construction is delayed and reclamation is not completed this fall, next year's planting is likely to be delayed, which would jeopardize existing contracts. These damages would total \$4.5 million in damages for specialty seed contracts in Illinois alone. In another example, Dakota Access agreed to adjust its construction schedule to accommodate duck hunting in Illinois by agreeing to complete construction by a certain date to facilitate flooding the fields. If this obligation is not met, DAPL would be exposed to a \$3 million penalty. In addition to Illinois individual landowner damages, DAPL has multiple site-specific or individual provisions located across the remaining three states. For example in North Dakota, there are many tracts that have "completed-by" requirements that if DAPL is not completed with construction by the end of 2017, DAPL would suffer approximately \$4.3 million in damage payments to the landowners. Numerous other site-specific examples are factored into the current construction and tract-specific timing schedules now underway and a delay would result in missed commitments, lost revenue and substantial financial damages in the millions of dollars. A delay in construction now would make it impossible to meet the January 1, 2017 in-service date and risk inordinate, non-recompensable financial harm to the beneficial owners of DAPL and downstream industry participants, which directly, negatively impacts the American public



75) There also would be significant economic impacts to the communities and the public. DAPL represents a significant new asset that will be subject to property tax revenues in four states and potentially on certain prospective tribal trust lands. Specifically, annual property tax revenues in the four states are estimated, following consultation with respective taxing authorities, to be approximately \$55 million dollars. In addition to property tax, the mobilization of workers already has resulted in sales tax benefits to local and state governments as supplies, fuel, supplies, lodging, food, expendables and services are purchased from local business owners. While Dakota Access cannot speak for the states, I am aware, based on my discussions with elected officials over the last three years that the incremental property and sales/use tax revenues are welcome. The local spending from the project construction also contributes to the ongoing economic recovery. A delay in construction of DAPL has an immediate, direct and negative impact on the local economies of the states through which pipeline passes. In addition to consumption related taxes, each state and local community would suffer from the loss of income tax on the pipeline as it would not go into operation and therefore the states and local jurisdictions would only be able to assess a pro-rata amount of property tax on the pipeline based upon the depreciated value of the material instead of the actual revenue tax methodologies often utilized by the states to determine property tax on pipelines. This would be an irreparable harm to the states and local communities that could not be recovered.

76) In some cases, an injunction will cause workers from out-of-town to vacate their temporary housing and return home. Thus, local communities now experiencing the economic benefits of housing, feeding, and supplying workers, their families, and suppliers will be

adversely impacted. While Dakota Access was not required to complete an economic impact analysis for DAPL as a whole, during the proceedings before the state utility commissions, it engaged with economists to use commonly accepted economic input-output models. These models predicted the trickle down of local investments such as new workers hired by the hotel and hospitality industry or other jobs indirectly created as workers spend earnings and landowners spend payments received for acquisition of an easement. These economics 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 over the suspension.

77) Additional injunction-induced damages would result from the cost to crude producers and shippers and to society due to lower royalty income, reduced tax revenue and related to higher costs for interim shipping options and the attendant environmental and spill risks. Based upon the statistics of pipeline to rail or truck transportation methods, the incremental safety hazards of the alternate methods of transportation would increase 3.4 to 4.5 times with rail and 34 times with trucking, significantly increasing the potential harm, damage and safety to the public. This impact can simply be avoided by the construction and operation of this pipeline by removing the 5 to 7 unit trains of crude oil per day or the 200 plus trucks that would be removed from the roads each day.



**DUE PROCESS AND THE RULE OF LAW**

78) Throughout project development, which includes permitting the pipeline, Dakota Access has relied upon the current laws and regulations that govern the siting, routing and construction requirements of crude oil pipelines. Dakota Access made good faith decisions based upon the law to deploy precious capital and invest over \$3.8 billion dollars on a project that connects domestic crude oil supplies to domestic refineries for public consumption.

79) In all respects, DAPL has followed the laws and has relied upon the agencies with permitting authority to insure that the permits they have issued are valid and have been issued in accordance with governing regulations and laws. In this particular matter, DAPL relied upon the USACE and the Nationwide Permit program to make informed decisions. Any applicant should have the confidence that once a permit is issued it would remain valid unless the applicant violated the conditions or terms of the permit. For example, Dakota Access worked closely with the USACE to identify the preconstruction notification locations as well as to clearly identify the extent of the action area for which the nationwide permit preconstruction notification area would cover. Based upon those planning steps, Dakota Access made significant and substantial business decisions to deploy the resources to begin construction of the pipeline after 18 months of permitting with the USACE as well as spending more than 24 months (since June of 2014) working with all the various interested parties. Construction in lawful, duly authorized areas in accordance with the terms of the various permits that have issued is not wrong-doing in any sense, as DAPL has been accused of, but rather consistent with the law, due process and good economic stewardship of investor financial resources deployed in permitting this project. Billions of dollars have been invested into a U.S. energy infrastructure project that all Americans, even

the opponents of this project, materially benefit from once it is placed into service. Anything to the contrary would result in a flight of capital from deserving projects in the U.S. and invalidation of the USACE and U.S. regulatory processes.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate.

Executed on this 18<sup>th</sup> day of August, 2016.

  
Joey Mahmoud

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

## STANDING ROCK SIOUX TRIBE

Plaintiff,

**v.**

U.S. ARMY CORPS OF ENGINEERS

Defendant,

DAKOTA ACCESS, LLC

**Intervenor.**

SS SS SS SS SS SS SS SS SS SS

**Case No. 1:16-CV-01534**

# Exhibit A1



| DAPL Plans & Specifications                                                                                                                                                                                                                                           | DOT 49 C.F.R. § 195 Requirements                                                                                             | 49 C.F.R. § 195 Reference |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------|---------------------------|
| <b>Pipeline Cover and Separation Distances</b>                                                                                                                                                                                                                        |                                                                                                                              |                           |
| Providing a minimum clearance of 24 inches (2 feet) between drain tile and DAPL pipeline as indicated in the Agricultural Impact Mitigation Plan                                                                                                                      | Minimum clearance required between pipe and drain tile is 2 inches                                                           | 49 C.F.R. § 195.250       |
| Providing a minimum cover (from top of pipe to ground level) of 48 inches (4 feet) in cultivated fields                                                                                                                                                               | Pipe must be buried so that it is below the level of cultivation or to a depth of 30 inches of cover, whichever is deeper    | 49 C.F.R. § 195.248       |
| Providing a minimum cover (from top of pipe to ground level) of 60 inches (5 feet) at public road drainage ditches                                                                                                                                                    | Minimum cover required for public road drainage ditch crossings is 36 inches (3 feet)                                        | 49 C.F.R. § 195.248       |
| Providing a minimum cover (from top of pipe to ground level) of 48 inches (4 feet) through industrial, commercial, and residential areas                                                                                                                              | Minimum cover required is 36 inches (3 feet)                                                                                 | 49 C.F.R. § 195.248       |
| Providing at least 60 inches (5 feet) of cover for ALL waterbody crossings                                                                                                                                                                                            | Minimum cover required is 30 or 36 inches (3 feet)                                                                           | 49 C.F.R. § 195.248       |
| Drilling underneath water body crossings wider than 100 feet in width to a depth of at least 20 feet under the bottom of the waterbody                                                                                                                                | Minimum cover required is only 48 inches (4 feet)                                                                            | 49 C.F.R. § 195.248       |
| <b>Pipeline Strength</b>                                                                                                                                                                                                                                              |                                                                                                                              |                           |
| DAPL line pipe is specified to API 5L, PLS-2 standards which mandate additional metallurgical requirements, factory inspections and record retention. Longitudinal seam of all line pipe has been 100% examined by non-destructive testing (NDT)                      | Line pipe must be fit-for-purpose                                                                                            | 49 C.F.R. § 195.112       |
| All pipe mills were inspected for their quality assurance and quality testing programs prior to being allowed to bid to supply pipe for DAPL                                                                                                                          | No requirement                                                                                                               | N/A                       |
| An inspector for DAPL was placed in each pipe mill while DAPL pipe was being produced to ensure full compliance with all quality control measures                                                                                                                     | Line pipe inspection only required at the job site during installation                                                       | 49 C.F.R. § 195.206       |
| 0.50 Design factor will be used for all public road, waterway and railroad crossings, and for all above-ground sections of the DAPL system (mainline valve sites and pump stations). Line pipe with 0.625" wall thickness (WT) will be installed through these areas. | 0.72 Design Factor is permitted throughout the entire pipeline system - which equates to providing line pipe with 0.429" WT. | 49 C.F.R. § 195.106       |
| <b>Pipeline Valves</b>                                                                                                                                                                                                                                                |                                                                                                                              |                           |
| All mainline valves on DAPL will have motorized actuators to provide for the capability to remotely close all valves to isolate pipeline segments as needed. All mainline valves qualify as Emergency Flow Restriction Devices (EFRD).                                | No requirement                                                                                                               | N/A                       |
| <b>Pipeline Construction</b>                                                                                                                                                                                                                                          |                                                                                                                              |                           |
| Topsoil will be segregated during ditching and then placed back over the backfilled pipeline in the original location as the top layer of soil                                                                                                                        | No requirement for segregation                                                                                               | N/A                       |
| 100% of all mainline girth welds will have an NDT inspection, either by radiographic (x-ray) or ultrasonic means                                                                                                                                                      | Need to perform an NDT for only 10% of girth welds made by each welder each day                                              | 49 C.F.R. § 195.234       |
| Hydrotesting entire pipeline for 8 hours at 125%                                                                                                                                                                                                                      | Hydrotest for 4 hours at 125% plus 4 additional hours at 110%                                                                | 49 C.F.R. § 195.304       |
| Hydrotesting all valves and above-ground equipment for 8 hours at 125%                                                                                                                                                                                                | Manufacturing facilities only provide 1 hour leak tests                                                                      | 49 C.F.R. § 195.305       |
| An Internal Line Inspection deformation tool will be run through the entire pipeline prior to start-up                                                                                                                                                                | No requirement                                                                                                               | N/A                       |
| Cathodic Protection System will be activated in stages along the right of way as the pipeline is backfilled and completed.                                                                                                                                            | Cathodic protection must be activated within 1 year after the pipeline begins operation                                      | 49 C.F.R. § 195.563       |
| <b>Pipeline Operations</b>                                                                                                                                                                                                                                            |                                                                                                                              |                           |
| The pipeline right of way will be inspected weekly, weather permitting, by aerial means                                                                                                                                                                               | Right of way inspections are required 26 times per year, with intervals not to exceed three weeks                            | 49 C.F.R. § 109.412       |



# EXHIBIT 18



## Bakken Activity North Dakota

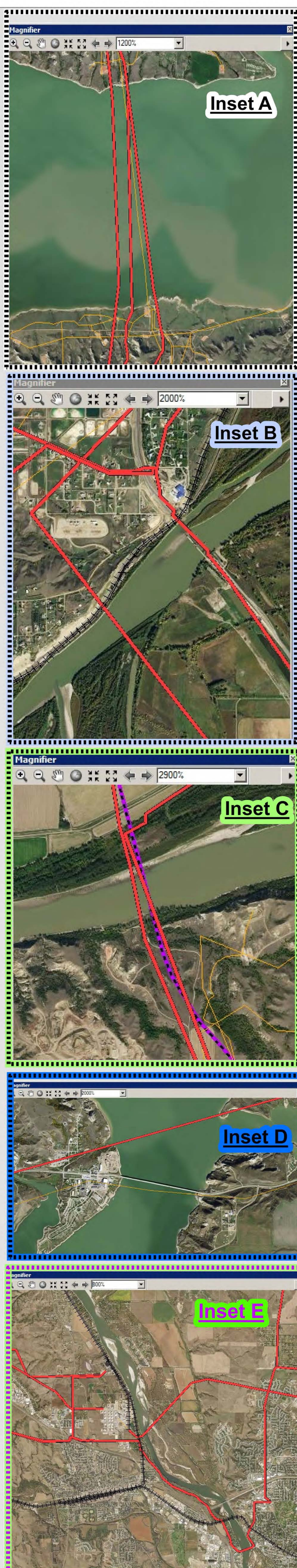
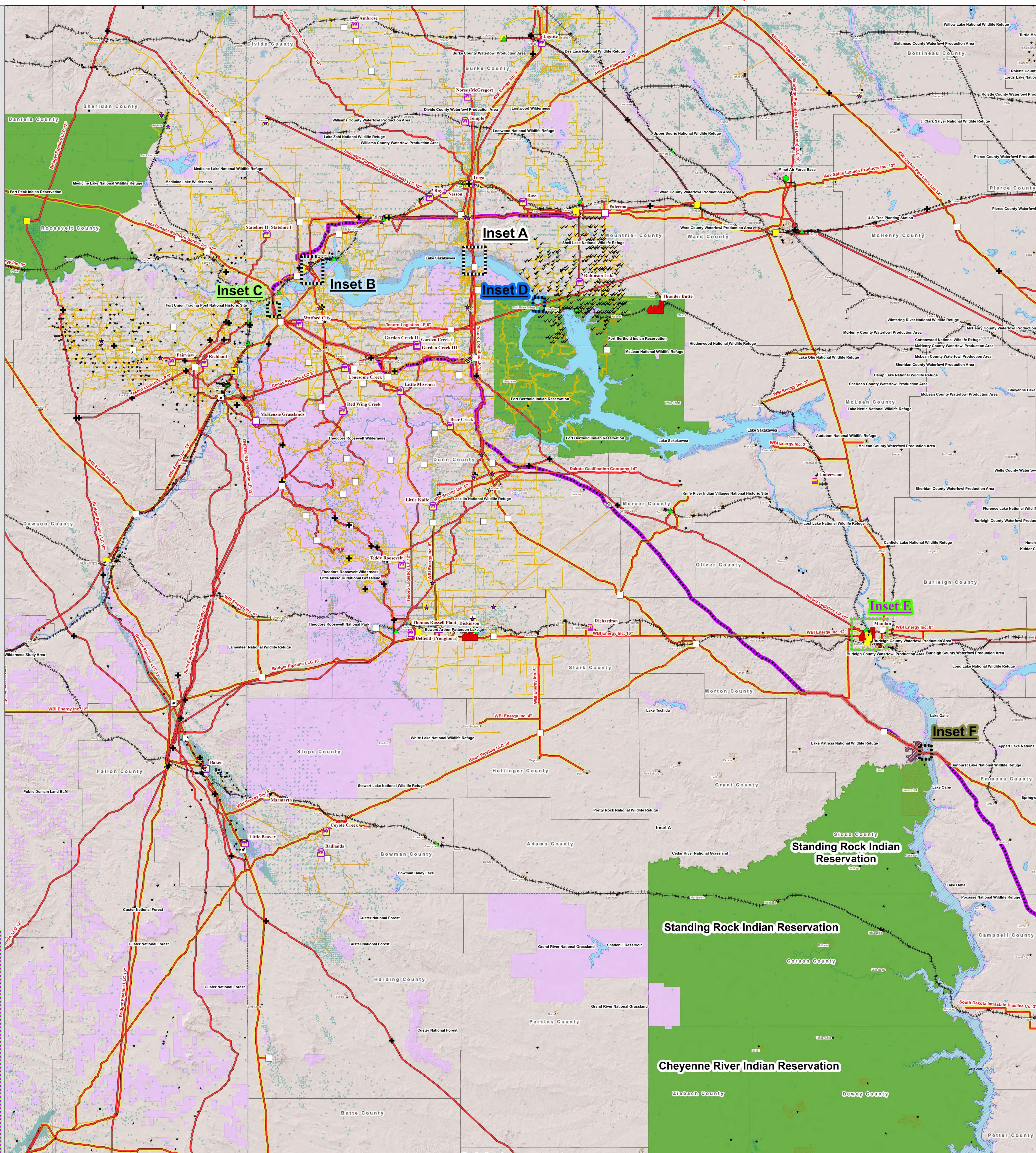
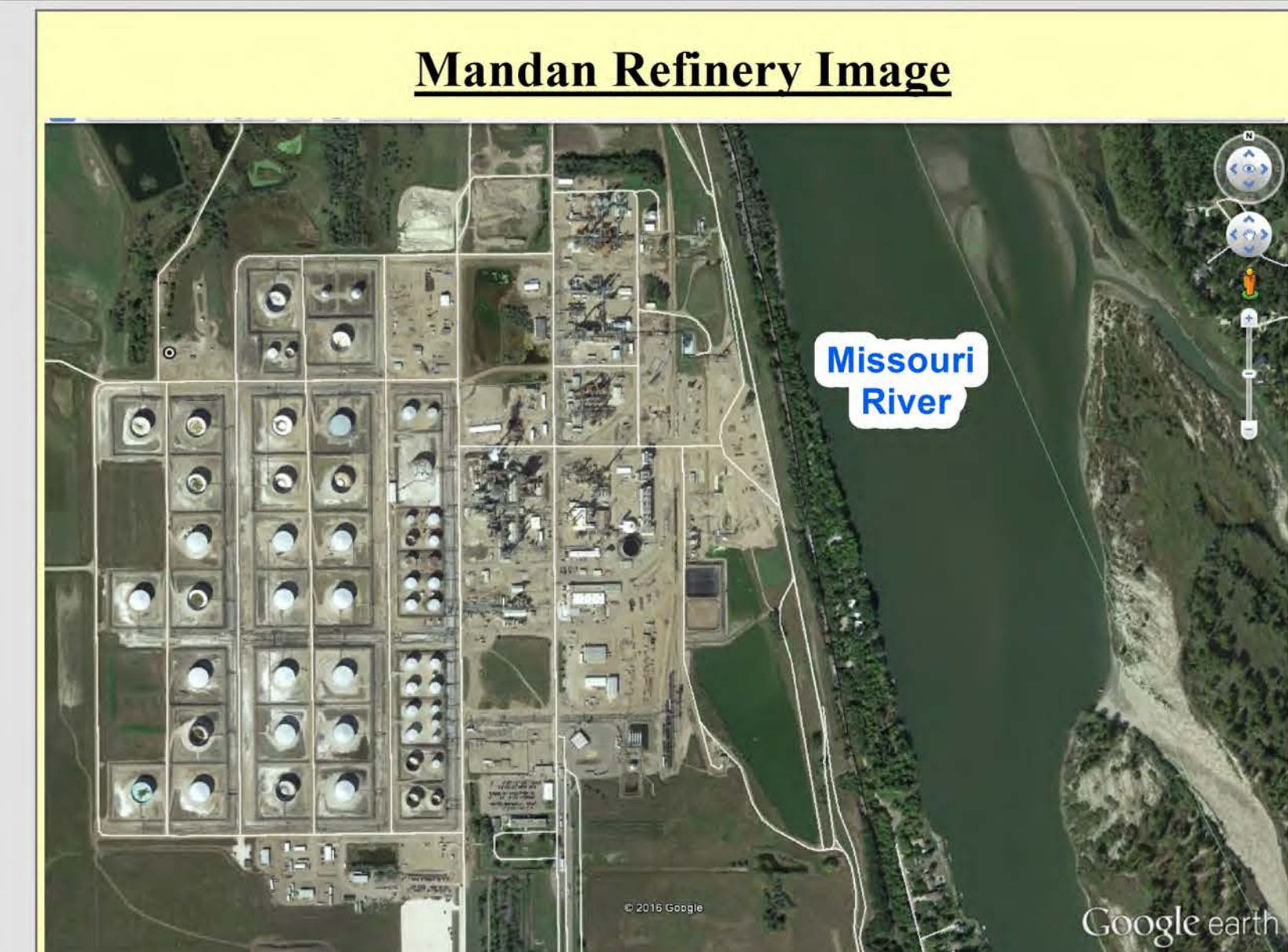
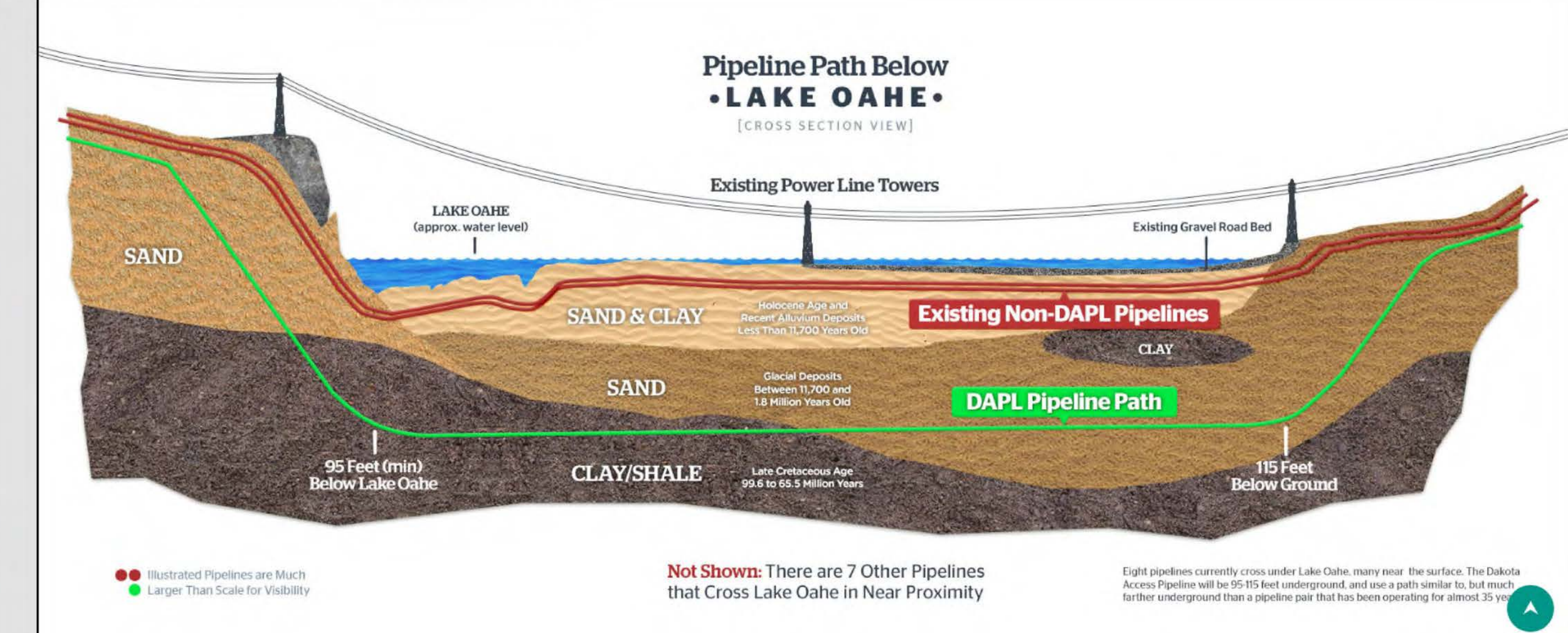
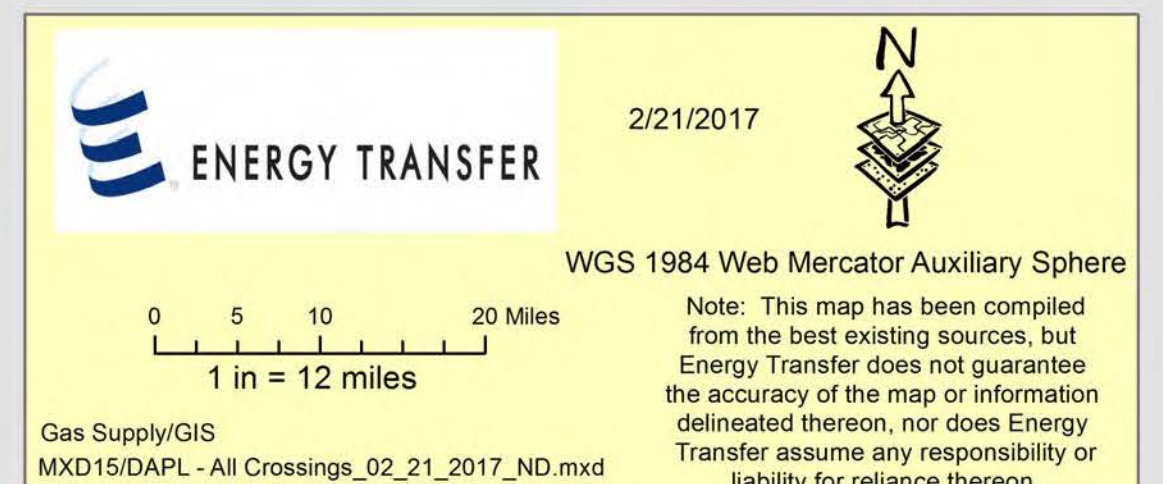


### Legend

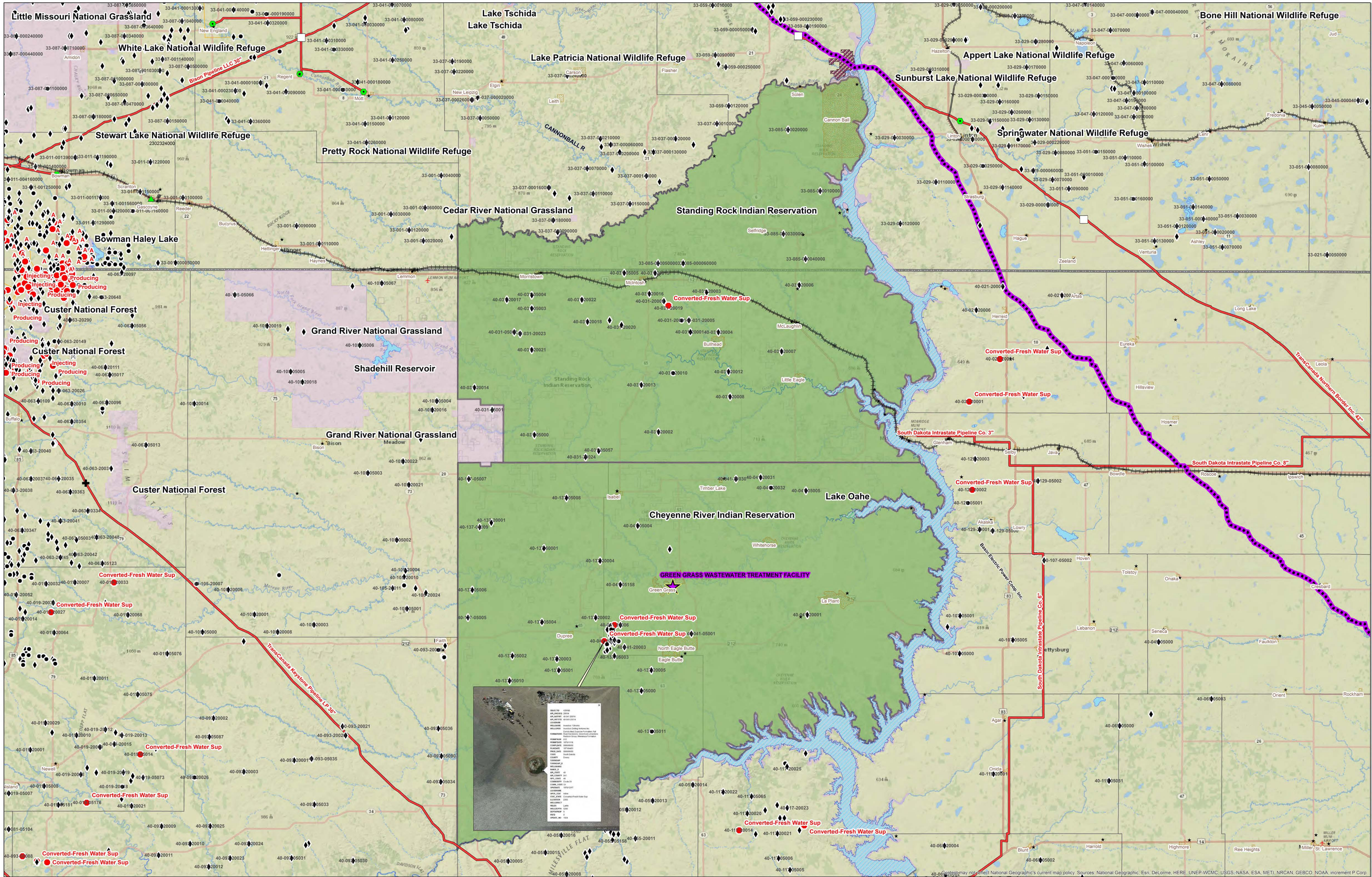
- Dakota Access Pipeline
  - Transmission Pipelines (All Commodities)
  - Natural Gas Halo
  - Gathering field Pipelines (All Commodities)
  - Rail Lines
  - All Wastewater Treatment Facilities
  - All Oil & Gas Wells
  - ETP Owned Land
  - City Limits
  - Indian Reservations
  - US Waterbodies
  - Federal Lands / Protected Lands
  - Lake Oahe
- ### All Petroleum Facilities
- Refinery
  - CO2 processing plant
  - Compressor station
  - Delivery to industrial plant
  - Delivery to power plant
  - Distribution/receiving terminal
  - Ethanol plant
  - Gas processing plant
  - LPG fractionator
  - Pump station
  - Storage/tank farm/terminal
  - Truck unloading facility
  - Underground storage
  - Wellhead meter



Source data for the layers depicted above are as follows:  
DAPL – Energy Transfer  
Wells – Harts  
Wastewater Facilities – EPA Facility Registry Service  
Third Party Pipelines/other facilities, including Fed Lands & Reservations – Pennwell Mapsearch







## Oil & Gas Infrastructure Activity Near Standing Rock Reservations



### Legend

- ★ All Wastewater Treatment Facilities
- ★ Green Grass Creek facilities
- Compressor station
- ▲ Distribution/receiving terminal
- Meter station
- ⊕ Pump station
- Well Status**
  - Active
  - Cancelled
  - ◆ Inactive, P/A
  - ⚡ Permitted
  - ✕ Unknown
- ▬ Dakota Access Pipeline
- ▬ Rail Lines
- ▬ Transmission/trunk Pipe Lines
- ▬ Gathering system field Pipe Lines
- ▬ Lake Oahe
- ▬ ETP Owned Land
- ▬ City Limits
- ▬ Indian Reservations

Source data for the layers depicted above are as follows:  
DAPL – Energy Transfer  
Wells – Harts  
Wastewater Facilities – EPA Facility Registry Service  
Third Party Pipelines/other facilities, including Fed Lands & Reservations – Pennwell Mapsearch

### Rail Road Crossing Lake Oahe



WGS 1984 Web Mercator Auxiliary Sphere

0 2 4 8 Miles

Gas Supply/GIS 2/21/2017

MXD15/DAPL - Standing Rock Oil & Gas Infrastructure Activity\_02\_21\_2017.mxd



Note: This map has been compiled from the best existing sources, but Energy Transfer does not guarantee the accuracy of the map or information contained therein, nor does Energy Transfer assume any responsibility or liability for reliance thereon.