

NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 20-5197, No. 20-5201

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

STANDING ROCK SIOUX TRIBE, ET AL.

Plaintiffs-Appellees,

CHEYENNE RIVER SIOUX TRIBE; STEVEN VANCE,

Intervenors for Plaintiff-Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant-Appellant.

DAKOTA ACCESS, LLC,

Intervenor for Defendant-Appellant.

*On Appeal From United States District Court for the District of Columbia in Case
No. 1-16-cv-01534-JEB, James E. Boasberg, United States District Judge*

**BRIEF OF *AMICUS CURIAE* THE STATE OF NORTH DAKOTA
IN SUPPORT OF INTERVENOR FOR DEFENDANT-APPELLANT,
DAKOTA ACCESS, LLC AND DEFENDANT-APPELLANT UNITED
STATES CORPS OF ENGINEERS FOR REVERSAL**

Wayne Stenehjem
Attorney General
State of North Dakota

Matthew A. Sagsveen
Solicitor General

David R. Phillips
Assistant Attorney General

Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640

Attorneys for Amicus Curiae.

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici. All parties, intervenors and amici appearing before the district court and this Court are listed in Defendant-Appellant United States Corps of Engineers' Opening Brief.

B. Ruling Under Review. References to the rulings at issue appear in Defendant-Appellant United States Corps of Engineers' Opening Brief.

C. Related Cases. References to any related cases appear in Defendant-Appellant United States Corps of Engineers' Opening Brief.

Dated this 2nd day of September, 2020.

Wayne Stenehjem
Attorney General
State of North Dakota

/s/ Matthew A. Sagsveen

Matthew A. Sagsveen
Solicitor General

/s/ David R. Phillips

David R. Phillips
Assistant Attorney General
Office of the Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640

Attorneys for Amicus Curiae.

CORPORATE DISCLOSURE STATEMENT

The State of North Dakota is a state government, not a corporation, and therefore, no corporate disclosure statement is required under Fed. R. App. P. 29(a)(4)(A) or Fed. R. App. P. 26.1.

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii
Introduction	1
Statement of the Interest of Amicus Curiae State of North Dakota and Interest in the Outcome	3
Summary of the Argument.....	3
Argument.....	4
I. North Dakota Produces a Significant Portion of the Country's Oil	4
II. A Majority of Oil Produced in North Dakota is Transported Out-of-State	6
III. North Dakota Derives A Major Portion Of Its Budget From The Oil and Gas Tax Revenue	7
IV. The Disruption From Vacatur Far Outweighs Any Asserted Benefits	10
A. Disruptive Effects in North Dakota if DAPL's Easement is Vacated and the Pipeline is Shut Down.....	10
1. It is Unlikely That Existing Oil Transportation Resources Could Timely Accommodate the Oil	10
2. The Inability to Accommodate DAPL's Capacity Will Result in Wells Being Shut-in, Significant Restart Costs, Lost Jobs, and Negative Consequences to Supporting Industries	11
3. Oil and Gas Operators Will Leave North Dakota	12
4. Transition to More Expensive Methods of Transporting Oil Will Have an Immediate Negative Fiscal Impact on the State and Other Stakeholders.....	13
5. Reduced Oil and Gas Tax Revenue Would Cause Further Injury to the State's Economy Already Impacted by COVID-19.....	14
6. State and Local Services Will Be Impacted by a DAPL Shutdown	16

B.	DAPL Does Not Pose a Threat to Lake Oahe or the Missouri River.....	19
V.	The District Court Did Not Find That COVID-19 Lessens the Disruption to North Dakota from a DAPL Shutdown and Neither Should This Court.....	21
	Conclusion	22

TABLE OF AUTHORITIES

Page(s)

Cases

<u>Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n</u> , 988 F.2d 146 (D.C. Cir. 1993).....	3-4
<u>Apache Corp. v. Fed. Energy Regulatory Comm’n</u> , 627 F.3d 1220 (D.C. Cir. 2010).....	5
<u>City of Oberlin, Ohio v. Fed. Energy Regulatory Comm’n</u> , 937 F.3d 599 (D.C. Cir. 2019).....	5
<u>Int’l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.</u> , 920 F.2d 906 (D.C. Cir. 1990).....	4-5
<u>Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs</u> , Civil Action No. 16-1534 (JEB), 2020 WL 3634426 (D.D.C. July 6, 2020).....	3

Statutes

N.D. Cent. Code ch. 57-51.....	13
N.D. Cent. Code ch. 57-51.1.....	13
D. C. Cir. R. 29(d).....	3
Fed. R. App. P. 29(a)(2).....	3

Other Authorities

Adam Willis, N.D. Indus. Comm’n looks for oil indus. <u>Fixes after DAPL ruling</u> , INFORUM (July 7, 2020, 6 PM)	7
<u>Dakota Access, LLC, Dakota Access Pipeline Project, Siting Application</u> , No. PU-14-842 (N.D. Pub. Serv. Comm’n Jan. 20, 2016).....	20
N. D. Legislative Counsel, Budget Status – Motion for Proposed March 2019 Forecast, 2 (2019).....	8
N.D. Legislative Council, <u>Oil & Gas Tax Revenues Monthly Update</u> (2020).....	16
N.D. Mineral Res., N.D. Oil & Gas Div., Director’s Cut, June 2020 Prod., (2020).....	14-15
N.D. Mineral Res., N.D. Oil & Gas Div., Gen. Statistics, Historical monthly oil prod. statistics,	2

N.D. Office of Mgmt. & Budget, <u>Legislative Appropriations 2019-2021 Biennium, 2 (2019)</u>	16
N.D. State Water Comm’n, <u>A Reference Guide to N.D. Waters (2014)</u>	19
N.D. State Water Comm’n, <u>Today’s Missouri River: A N.D. Perspective (2011)</u>	19
N.D. Water Comm’n & State Eng’r, <u>Missouri River Basin and James River Basin</u> (last visited May 27, 2020)	19
<u>PSC Approves Permit for Dakota Access Pipeline Pump Station in</u> <u>Emmons Cty., N.D. Pub. Serv. Comm’n (Feb. 19, 2020)</u>	20
U.S. Census Bureau, Quick Facts, North Dakota	1
U.S. Energy Info. Admin., U.S. States, North Dakota, State Profile & Energy Estimates, Profile Analysis	1

GLOSSARY

BPD	Barrels Per Day
Corps	U.S. Army Corps of Engineers
DAPL	Dakota Access Pipeline
DMR	Department of Mineral Resources
EA	Environmental Assessment
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act

INTRODUCTION

Vacatur, and shutdown of Dakota Access Pipeline (“DAPL”), will result in billions of dollars in losses to North Dakota’s oil industry and a drastic reduction in North Dakota’s tax revenue. App. A697-98. The budgets of State programs critical to the well-being of North Dakotans will be impacted, impairing the State and its residents, with thousands of North Dakotans losing employment which DAPL makes possible. The State’s economy, and its economic recovery from COVID-19, will be stymied so long as the United States Corps of Engineers’ (the “Corps”) easement is vacated and DAPL sits idle. These definite and detrimental consequences to North Dakota and its residents vastly outweigh the entirely speculative potential harm of a spill or leak while the remand proceeds. The factors of harm to others and the public interest weigh sharply in favor of reversal.

The State of North Dakota is a small state based upon its population (App. A694),¹ but it has an outsized impact on the production of oil in the United States. North Dakota has become the second largest producer of oil in the United States, and the largest in the Williston Basin. App. A700, A705: (describing the Williston Basin).² Since the beginning of 2017, oil production in North Dakota rose from under 1 million barrels per day (“bpd”) to a peak of 1.51 million bpd in November 2019. App. A705. Oil production in the State, however, has certain limiting factors, beginning with distance to refineries. App. A697. In February 2020, roughly 5% of

¹ U.S. Census Bureau, Quick Facts, North Dakota, <https://www.census.gov/quickfacts/ND> (last visited Sept. 2, 2020).

² U.S. Energy Info. Admin., U.S. States, North Dakota, State Profile & Energy Estimates, Profile Analysis, <https://www.eia.gov/state/analysis.php?sid=ND#1> (last updated Apr. 16, 2020)(last visited Sept. 2, 2020).

the oil produced in North Dakota was refined locally, meaning that at its recent production peak over a million barrels of oil were transported out of North Dakota, every day. App. A697, A704-05.³ Nearly two-thirds of the oil produced in the Williston Basin is transported by pipeline to refineries outside of the region. App. A705.

Although the production and transportation of a commodity such as oil may seem to the uninitiated like a simple process it is not. As the oil and gas industry expands so does the industry infrastructure surrounding it. State and local governments also must expand their mechanisms for delivering services to accommodate the thousands of additional workers necessary to maintain the industry. Tax revenue generated by industry expansion becomes an important component of these services. App. A694.

North Dakota's economy is based in large part upon the production, and sale, of oil and gas commodities. State lawmakers understand that the price of oil and gas commodities fluctuates based upon various market forces. But no government – state, county, city, or township – anticipates that non-market decisions, such as court ordered vacatur, could halt an operational oil pipeline with a large effect on state revenue, and drive a stake into government budgets and essential services. The law, and equity, necessitate that this Court reverse the district court based upon the unprecedented impacts on the State's revenue, economy, and residents.

³ N.D. Mineral Res., N.D. Oil & Gas Div., Gen. Statistics, Historical monthly oil prod. statistics, <https://www.dmr.nd.gov/oilgas/stats/historicaloilprodstats.pdf>.

STATEMENT OF THE INTEREST OF AMICUS CURIAE STATE OF NORTH DAKOTA AND INTEREST IN THE OUTCOME

The State of North Dakota, through its Attorney General, Wayne Stenehjem, is authorized to file an amicus brief without consent of the parties or leave of court under Fed. R. App. P. 29(a)(2) and D.C. Cir. R. 29. The State previously filed two amicus briefs, supported by six declarations, detailing the serious disruption that vacatur would cause. App. A676-710, A798-820.

North Dakota has a significant interest in the outcome of this case based upon the substantial disruptive effects vacatur would have on the State. DAPL satisfies the oil transportation needs for a large portion of the State's oil and gas economy, and generates significant tax revenue for the State. If the Court affirms the district court's vacatur of the Mineral Leasing Act easement issued by the Corps, and shuts down operation of DAPL before the Corps finishes its Environmental Impact Statement ("EIS"), the State will experience a severe reduction in economic output and loss of corresponding tax revenue, during an unusually fragile time.

The State's amicus brief supports the arguments of the Corps and Dakota Access, LLC ("Dakota Access"), and in particular the Defendants' arguments that the district court, in its July 6 opinion, erred in vacating the easement granted by the Corps. See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, Civil Action No. 16-1534 (JEB), 2020 WL 3634426 (D.D.C. July 6, 2020); App. A140-63.

SUMMARY OF THE ARGUMENT

The district court's unprecedented decision to vacate the Corps' easement for DAPL should be reversed due to the disruptive economic consequences of vacatur to North Dakota. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d

146, 150-51 (D.C. Cir. 1993). North Dakota submits this brief as amicus curiae to address the second Allied-Signal factor, in order to provide this Court with additional information on the disruptive consequences that will directly impact the State and its residents if the Court affirms the district court's order vacating the easement.

Although the district court recognized the “reverberating” effects vacatur and shutdown would have, App. A154, the court declined to meaningfully confront the devastating and irreparable impacts vacatur and a shutdown will have the State's economy and the innocent residents of North Dakota, rather than just DAPL's owners. The district court simply lumped the consequences to North Dakota, its citizens, and its industry with the disruptive consequences to Dakota Access.

Vacatur and shutdown would result in billions of dollars in losses to North Dakota's oil and gas economy and unprecedented reductions to North Dakota's tax revenue. State programs critical to the well-being of North Dakotans will have budgets reduced, impairing the State and its residents, and thousands of North Dakotans will lose their jobs. The State's economy, and its economic recovery, will be stymied so long as DAPL remains idle. These definite consequences vastly outweigh the entirely speculative potential harm of a spill or leak while the remand proceeds.

ARGUMENT

Under the second Allied-Signal factor, the Court should consider “the disruptive consequence of an interim change that may itself be changed.” 988 F.2d at 150-51 (citing Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety &

Health Admin., 920 F.2d 906, 967 (D.C. Cir. 1990)). This Court has previously recognized that when analyzing the potential disruption caused by vacatur, shutting down an operational pipeline would be quite disruptive. City of Oberlin, Ohio v. Fed. Energy Regulatory Comm’n, 937 F.3d 599, 611 (D.C. Cir. 2019); Apache Corp. v. Fed. Energy Regulatory Comm’n, 627 F.3d 1220, 1223 (D.C. Cir. 2010).

The district court recognized that Dakota Access’s central and strongest argument that the DAPL easement should not be vacated, was that vacating and shutting down the pipeline would cause Dakota Access, and the industries that rely on it, significant economic harm and job loss. App. A153. In fact, that court reasoned “it is clear that at least some immediate harm to the North Dakota oil industry should be expected from a DAPL shutdown” App. A156. The significant and documented economic harm to North Dakota, however, was insufficient for the court to “tip the scales” in favor of remanding without vacatur. Id. The State respectfully but vigorously disagrees, and maintains this was error.

I. North Dakota Produces a Significant Portion of the Country’s Oil.

North Dakota is a small state in terms of population and overall economic output. App. A694. Of the 50 states, North Dakota ranks 48th in population and 46th in gross domestic product. Id. Despite the small overall size of North Dakota’s economy, the State is a large producer of oil and natural gas. Id.; App. A700. The great majority of the oil and gas produced in North Dakota comes from the Williston Basin. App. A705. The Williston Basin is a large sedimentary basin located in the north-central United States and south-central Canada with multiple geologic formations currently producing oil and gas. Id. The United States portion of the

Williston Basin contains oil producing fields in the states of Montana, North Dakota, and South Dakota. Id. North Dakota is the largest oil producing state in the United States portion of the Williston Basin. Id. In February 2020 North Dakota produced 1.451 million barrels of oil and 3.1 billion cubic feet of natural gas, there were 54 active drilling rigs, 16, 118 active oil and gas wells, 2,091 inactive wells, and 1,694 approved drilling permits. App. A700.

II. A Majority of Oil Produced in North Dakota is Transported Out-of-State.

Although North Dakota accounts for approximately 12% of the crude oil produced in the United States, there is limited in-state capacity for refining. App. A697. North Dakota has two oil refineries with a combined refining capacity of about 90,000 barrels of crude oil per day, which is less than one-tenth of the State's daily oil production. Id. Consequently, continued oil production in North Dakota is dependent upon reasonable methods of transporting crude oil produced in the state to out-of-state refining facilities. Id.

Oil production in the Williston Basin is transported over public roads and through privately owned transportation systems to centers around the United States. App. A705. Oil produced in North Dakota makes up the largest share of pipeline and rail transportation volumes from the region. Id. The most efficient and cost-effective method of transporting crude oil is through existing pipeline infrastructure, including DAPL. App. A697. In February 2020, North Dakota Industrial Commission Pipeline Authority estimated that 66% of U.S. Williston Basin oil production was moved by pipeline to refineries outside of the region. App. A705. DAPL is the largest service provider in the region at just over 40% of regional egress

capacity. App. A697, A705, A812. Comparatively, it is estimated that 19% of oil produced in the region was moved by railcar to refineries outside of the region, and 10% was moved by truck⁴ north into the Canadian Williston Basin for further transport by pipeline or rail. App. A705-06.

III. North Dakota Derives A Major Portion Of Its Budget From The Oil and Gas Tax Revenue.

As a small state with a small population base and relatively small economy, North Dakota's State government is extremely dependent upon revenues from a leading industry, the extraction and production of oil and natural gas. App. A694. This economic activity results in direct revenue of \$4.9 billion, or twenty percent of the State's general fund revenue, over a two-year budget period, based on the official forecast for the State's current two-year budget period (July 1, 2019 to June 30, 2021). Id. It is further estimated that almost fifty percent of general fund revenues are derived from sources closely tied to, and dependent upon, oil and gas extraction and production. App. A697, A812. By comparison, the State expects to collect general fund revenues of \$3.7 billion from sources other than oil and gas taxes. Id.

The North Dakota Legislature has attempted to insulate the State general fund from the impact of fluctuations in oil and gas tax revenue by limiting the amount of such revenue that is directly allocated to the State's general fund for legislative appropriation. App. A694-95. The Legislature has created a series of designated

⁴ Long distance transportation by truck to most refining centers is generally not considered an economically feasible alternative to pipelines or rail, and it would take years to accomplish. Id.; App. A702. See Adam Willis, N.D. Indus. Comm'n looks for oil indus. fixes after DAPL ruling, INFORUM (July 7, 2020, 6 PM), <https://www.inforum.com/business/energy-and-mining/6565371-North-Dakota-Industrial-Commission-looks-for-oil-industry-fixes-after-DAPL-ruling>.

special funds in which oil and gas tax revenue is deposited. Id. Each fund is established for a specific purpose or program or to provide distributions to different levels of political subdivisions or tribal governments. Id. For the 2019-21 biennium, based on the official revenue forecast adopted by the 2019 legislature,⁵ those allocations are estimated as follows:

- \$661 million, or 14%, allocated to cities and counties in areas where oil and gas are produced.
- \$525 million, or 11%, allocated to tribal governments based on a revenue sharing agreement for production within reservation boundaries.
- \$1.3 billion, or 27%, to the Legacy Fund, a constitutional state endowment fund.
- \$213 million, or 4%, to the Foundation Stabilization Fund to support state school aid in the event of a revenue shortfall.
- \$213 million, or 4%, to the Common Schools Trust Fund to support the public schools.
- \$433 million, or 9%, to the Resources Trust Fund, to support water supply and flood control projects in the state.
- \$400 million, or 8%, to the state general fund, to support state government operations and services to citizens.
- \$200 million, or 4%, to the Tax Relief Fund, to support social services programs previously funded by county levied property taxes.
- \$75 million, or 2%, to the Budget Stabilization Fund, to build the state rainy day fund and support government services in the event of a revenue shortfall.
- \$250 million, or 5%, to county, city, township, and airport infrastructure.
- \$518 million, or 11%, to the state Strategic Investment and Improvements Fund to support state government operations and specific one-time projects.

⁵ N. D. Legislative Counsel, Budget Status – Motion for Proposed March 2019 Forecast, 2 (2019), <https://www.legis.nd.gov/files/fiscal/2019-21/docs/19.9507.02000.pdf>.

- \$65 million, or 1%, to various other funds including lignite coal research, outdoor recreation and conservation, oil well plugging and site reclamation, and energy research.

App. A695. Direct allocations of oil and gas tax revenue represent only 8% of total expected general fund revenues. App. A696. However, oil and gas tax revenue accumulated in the Strategic Investment and Improvements Fund are often transferred into the general fund as a budget balancing measure. Id. For the 2019-2021 biennium, transfers of accumulated oil and gas tax revenue represents 10% of total general fund revenues. Id.

The State has also taken additional steps to enable it to absorb short-term revenue shortfalls. The Legislature established a Budget Stabilization Fund to provide a means to continue essential government services in the event of a revenue shortfall. Id. The Budget Stabilization Fund receives funding through transfers from excess general fund balances (over \$65 million) at the end of a biennium, as well as a biennial transfer of \$75 million from oil and gas tax revenue. Id. The Budget Stabilization Fund balance can be accessed in the event of a revenue shortfall, but only after budget reductions ordered by the Governor. Id. The maximum balance in the Budget Stabilization Fund is set at 15% of general fund appropriations. Id. Although the Budget Stabilization Fund positions North Dakota to absorb short-term fluctuations in revenue, the fund is not sufficient to absorb the effect of a significant, ongoing change in the State's revenue structure. Id.

North Dakota has a biennial budget process and is one of the few states with a biennial legislative session. App. A696. The normal legislative session occurs from January to May of odd numbered years and is limited to a maximum of 80

days. Id. Significant reductions to the State's revenue outlook in the interim between regular legislative sessions is primarily addressed through executive authority to reduce spending authority and the ability to offset limited revenue reductions by accessing the Budget Stabilization Fund. Id. In exceptional circumstances, the Legislature can convene in a special legislative session. Id.

IV. The Disruption From Vacatur Far Outweighs Any Asserted Benefits.

All of these well-laid plans and intricate budget devices function well in a predictable economic environment. An economy driven by commodities is predictable in that it is always fluctuating. But vacatur and shut down of a primary transportation mode in North Dakota's oil and gas economy is not a predictable market fluctuation; economic disruption will be wide-spread and long lasting.

A. Disruptive Effects in North Dakota if DAPL's Easement is Vacated and the Pipeline is Shut Down.

A court ordered shutdown of DAPL, even if only temporary, would be highly disruptive in North Dakota and would have far-reaching economic and social consequences to industry, State Government, State's residents, the tribes, and political subdivisions in the State.

1. It is Unlikely That Existing Oil Transportation Resources Could Timely Accommodate the Oil Transported by DAPL.

It is highly unlikely that the oil transported by DAPL could be directly and seamlessly diverted to other modes of transportation, such as transportation by rail. Although North Dakota has not conducted a study examining the extent to which DAPL's flows can be diverted to rail under current economic conditions or otherwise, it is unlikely that a significant portion of DAPL's flows could be diverted

to rail due to insufficient rail capacity and low oil prices resulting from the COVID-19 pandemic. App. A702. Currently around 300,000 barrels of oil per day are being transported from North Dakota to coastal markets by railroad. App. A701. In 2014, the railroads were able to transport a maximum of about 800,000 barrels per day. Id. Based on historical data it could take two years to divert 500,000 barrels of DAPL's daily flows to rail transport.

2. The Inability to Accommodate DAPL's Capacity Will Result in Wells Being Shut-in, Significant Restart Costs, Lost Jobs, and Negative Consequences to Supporting Industries.

If additional transportation resources are unavailable to accommodate DAPL oil, it is estimated that 8,700 active oil and gas wells will be shut-in, decreasing over time to a final loss of 70,000 bpd and an estimated 1,450 oil wells shut in. App. A701. Each of those wells represents 1.6 full time jobs. Id. The estimated cost to return each well to production is \$25,000 to \$50,000 and can be as much as \$400,000 in some circumstances. Id. Returning wells to production also requires three to six months planning and scheduling. Id. History shows that 50-80% of the wells that are shut down are permanently abandoned. Id. Ultimately, if DAPL's flows could not be diverted, it is estimated that around 8,950 full time jobs would be lost temporarily, and 4,475 to 7,175 full time jobs would be lost permanently. App. A702. This at a time when the State has received over 76,000 unemployment claims and paid out more than \$146 million in unemployment benefits from February 1, 2020 to June 1, 2020, a fourfold increase over the same interval in 2019. App. A817. As the district court conceded, "[l]osing jobs and revenue, particularly in a highly uncertain economic environment, is no small burden," and that burden resulting

from shutting down DAPL will be “immediate.” App. A156.

The curtailment or shut-in of wells in North Dakota would also have an immediate negative financial and operational impact on third party oil gathering companies and local natural gas gathering, processing, and transmission providers. App. A706. Natural gas produced from the Bakken formation is produced together with the crude oil and cannot be produced independently if oil transportation options are constrained. Id. Attracting the necessary infrastructure investments to expand natural gas capture in North Dakota would become increasingly difficult if third party providers had additional uncertainty surrounding the ability of a producer to keep wells operating in the event of DAPL being required to cease operations. Id.

3. Oil and Gas Operators Will Leave North Dakota.

If the easement for DAPL is vacated and the pipeline is shut down, it is likely that a number of oil and gas operators in North Dakota will refocus their planned drilling activities from North Dakota to other areas, again assuming that the bulk of DAPL’s flows can be diverted to rail transport. App. A701. Ten of the top twenty operators in North Dakota have significant positions and activity in other unconventional plays that are closer to markets and have more stable pipeline capacity. App. A701-02. Those ten operators currently operate 23 drilling rigs that generate approximately 3,450 full time jobs. App. A702. In 2012-2014 when pipelines were inadequate and crude oil had to be shipped by rail, North Dakota drilling activity was reduced by 15% and migrated to Texas, Colorado, and Wyoming. Id. In 2017 when DAPL started up, the operators increased North Dakota drilling activity 20%. Id.

4. Transition to More Expensive Methods of Transporting Oil Will Have an Immediate Negative Fiscal Impact on the State and Other Stakeholders.

During the first thirty-two months after DAPL began operations (June 19, 2017 through February, 2020), based on oil and gas taxes imposed under N.D. Cent. Code chs. 57-51 & 57-51.1, North Dakota realized an estimated \$317 million in additional Oil and Gas Gross Production Tax revenue due to the decreased shipping cost associated with oil transported by DAPL, and higher price received for oil on the Gulf Coast. App. A709-10. If the easement for DAPL is vacated and the pipeline is shut down, these increased oil tax revenues will disappear as production is shut-in or diverted to higher-cost modes of transport. App. A710.

North Dakota oil producers typically sell their product at a price that is discounted from key benchmark price indicators in order to account for transportation costs associated with the great distances to major refining centers. App. A706. Price discounts have varied widely since increased oil development of the Bakken formation began in the mid-2000's. Id. Price discounts in North Dakota are minimized when safe, reliable, low-cost transportation exists to move adequate volumes of oil to key marketing centers around the United States. App. A706-07. Pipeline transportation is generally considered to be the most reliable and lowest cost option for oil movement out of North Dakota. App. A707.

If DAPL were to cease shipping service, even for a short duration, any and all incremental transportation expenses associated with the expansion of crude by rail, estimated to be as high as \$10 per barrel of oil, would further reduce the realized price per barrel for North Dakota's royalty owners, producers, and tax revenue

calculations. App. A707, A817. Transportation rates on DAPL and rail vary by destination, shipper status, and contract terms. App. A706. Additional costs, such as loading, unloading, and car leasing, will further increase the all-in rail transportation expense. Id.

North Dakota oil producers deduct transportation costs from the value of oil when determining the taxable basis for the State's oil extraction and gross production taxes. App. A696. Therefore, any increase in transportation costs also results in a direct reduction in tax revenues. Id. Simply put, increased transportation costs equates to lower tax revenue.

Sales, use, and motor vehicle excise tax revenue has also become increasingly volatile and strongly correlated to oil and gas activity. App. A697. During the oil price decline of 2015-2016, State sales tax collections fell by nearly 40%. App. A694. At the same time, oil and gas tax revenues fell by 50%. Id.

The State estimates that shutting down the pipeline will reduce North Dakota tax revenues by as much as **\$2 billion** during a two-year budget period. App. A697. Putting that in perspective, the State's official two-year budget forecast estimates collection of just \$8.6 billion in general fund revenues from all sources. App. 694. A \$2 billion revenue loss from an unneeded shutdown would be devastating.

5. Reduced Oil and Gas Tax Revenue Would Cause Further Injury to the State's Economy Already Impacted by COVID-19.

Since the onset of the COVID-19 pandemic in the United States, and the resulting impact to the economy, many oil wells were idled or shut in. App. A809-10. By May oil production had fallen to 859,362 bpd. N.D. Mineral Res., N.D. Oil

& Gas Div., Director's Cut, June 2020 Prod., (2020) <https://www.dmr.nd.gov/oilgas/directorscut/directorscut-2020-08-14.pdf>. The collapse in oil activity and the COVID-19 pandemic has affected all State tax revenues. App. A816. Considering oil and gas taxes and all general fund tax revenue types, North Dakota saw a \$133 million year-over-year reduction in overall tax receipts for February through May 2020, which represented a shortfall of \$161 million against expected revenues for that period. App. A816-17.

Although direct tax revenues from oil and gas extraction and production in February through May 2020 grew by \$4M year over year, an increase of less than 1%, the State's budget was based upon an expected increase in oil and gas tax revenues of over 13% during that time. App. A816. Actual revenues represent a shortfall of \$89.9 million compared the projected revenues upon which the official budget is based. Id.

Other crucial revenue sources have suffered heavily as well. For example, the State is heavily reliant on sales, use, and motor vehicle excise tax revenue, which for 2019-21 is expected to be \$2.1 billion, or 44%, of all general fund revenues. App. A697. The COVID-19 pandemic has temporarily reduced this revenue stream, as residents have been forced to avoid shopping and motor vehicle travel to avoid spreading the illness. App. A816. The State saw a \$39 million year-over-year decrease in sales, use, and motor vehicle excise tax revenues in February through May 2020, a 12% reduction. Id.

In June 2020, the State was able to allocate only \$38.05 million in oil and gas tax revenues, an 81% shortfall against the \$197.59 million projected allocation. N.D.

Legislative Council, Oil & Gas Tax Revenues Monthly Update (2020), https://www.legis.nd.gov/files/fiscal/2019-21/docs/21_9005_11000.pdf. This included only \$3.93 million allocated to the Three Affiliated Tribes, an 82% shortfall against a projected allocation of \$21.39 million. Id.

6. State and Local Services Will Be Impacted by a DAPL Shutdown.

Adding greater revenue losses from a DAPL shutdown would further strain the State's ability to cover its financial obligations. These obligations, which must be paid from the general fund, include critical government services that benefit all State residents, including: healthcare; education; law enforcement; road construction and maintenance; and parks and recreation. App. A818. For example, approximately 80% of the general fund budget is spent on K-12 education, higher education, and health and human services.⁶ This includes \$1.46 billion for 2019-2021 to the Department of Human Services; whose services help maintain quality of life for the most vulnerable North Dakotans. Id. It also includes \$36.4 million to the Department of Health, which oversees medical emergency preparedness and regulates food, lodging, and healthcare facilities. Id. at 70. Without the oil and gas tax revenue generated by DAPL, those essential services and others will see heavy funding shortfalls on top of those already experienced as a result of the pandemic. Cuts to general fund expenditures cannot be absorbed without impacting essential services.

⁶ N.D. Office of Mgmt. & Budget, Legislative Appropriations 2019-2021 Biennium, 2 (2019), <https://www.nd.gov/omb/sites/omb/files/documents/agency/financial/state-budgets/docs/budget/appropbook2019-21.pdf>.

An across-the-board budget reduction, which can be implemented by the executive branch without legislative involvement, would have a direct negative impact on all State employees, State programs, and services to citizens. App. A698. As explained above, the Budget Stabilization Fund provides a mechanism to cushion the budget during a short-term fluctuation in State revenues but would be of little benefit in the event of a long-term change in oil production activity and State revenues. Id. A long-term, ongoing reduction in State revenues from oil and gas taxes would result in the need to significantly reduce State services or significantly increase taxes on citizens. Id. To offset a \$2 billion reduction in State revenues, for example, would require a doubling of the State's general sales, use and motor vehicle excise tax rate from 5% to 10%, an unfeasible solution that would give North Dakota the highest sales and use tax rate of any state in the nation by a wide margin. Id.

It is also important to understand that all North Dakota residents—including Plaintiff Standing Rock Sioux Tribe—stand to lose from large reductions in State tax revenues. North Dakota's general fund supports various public programs and services benefitting all residents, including:

- Road construction and maintenance;
- State law enforcement;
- State parks and recreation areas;
- Development projects related to the State's water sources, including the Missouri River; and
- Healthcare services.

App. A818.

In addition, certain North Dakota counties assess DAPL with an annual ad valorem property tax based upon the presence of the pipeline within the county. The ad valorem property taxes assessed and collected by North Dakota counties from DAPL for 2018 are as follows: Dunn County \$653,673; Emmons County \$748,831; McKenzie County \$1,520,539; Mercer County \$511,720; Morton County \$1,264,394; Mountrail County \$658,238; and Williams County \$2,179,289; for a total of \$7,536,684. App. A709. Similar amounts were paid by DAPL in 2019. Id.

Further, a substantial portion of the oil produced in North Dakota is from development on Fort Berthold Indian Reservation and generates tax and royalty revenue for the Mandan, Hidatsa, and Arikara Nation, also known as the Three Affiliated Tribes and royalty revenue for individual tribal members as follows:

- Daily production of 364,642 barrels of oil (237,134 trust lands and 127,508 fee lands)
- 10 active drilling rigs (5 on trust lands and 5 on fee lands)
- 2,418 active oil and gas wells (1,797 on trust lands and 621 on fee lands)
- 326 approved drilling permits (258 on trust lands and 68 on fee lands)
- 4,134 potential future wells (2,991 on trust lands and 1,143 on fee lands)

App. A700-01.

Simply put, shutting down DAPL would be extremely disruptive to North Dakota's economy in any economic climate, but the worst possible time to shut down DAPL is in the midst of an economic crisis. Plaintiffs' suggestion otherwise is irresponsible. And DAPL—which transports 40% of all Bakken crude oil

production—will be integral to the much needed and rapidly approaching economic recovery.

B. DAPL Does Not Pose a Threat to Lake Oahe or the Missouri River.

Finally, it should go without saying that North Dakota takes the safety and environmental rights of all its residents seriously, and the State carefully considered those rights in weighing whether to join this matter in support of Dakota Access. North Dakota does not take lightly Lake Oahe's importance to the Tribes as a source of water, as well as its importance to the State's residents as a whole. Indeed, the "Missouri River is the [S]tate's most valuable and readily available water source, and it is needed for a broad spectrum of beneficial uses, such as irrigation, drinking water supplies, and industry." See N.D. Water Comm'n & State Eng'r, Missouri River Basin and James River Basin https://www.swc.nd.gov/basins/missouri_river/missouri_river.html (last visited May 27, 2020).

North Dakota has spent decades working diligently to protect and develop its interests in the Missouri River, and the State seeks to use it for the beneficial use of all its citizens. See id. Due in part to this longstanding commitment, the Missouri River has the best water quality of any river in the State. N.D. State Water Comm'n, A Reference Guide to N.D. Waters, at 17 (2014); N.D. State Water Comm'n, Today's Missouri River: A N.D. Perspective, at 8 (2011). As it has for decades, North Dakota remains committed at all levels of government to protecting and developing this vital natural resource.

Against this backdrop, the North Dakota Public Service Commission carefully reviewed DAPL's design, construction, and operational plans and determined that the pipeline "is compatible with the environmental preservation and the efficient use of resources," "will produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota," and "will minimize adverse human and environmental impact." See Findings of Fact, Conclusions of Law and Order, Dakota Access, LLC, Dakota Access Pipeline Project, Siting Application, No. PU-14-842, at 10 (N.D. Pub. Serv. Comm'n Jan. 20, 2016). An applicant for a permit to construct a pipeline in North Dakota must prove all of these elements to the Commission in order to proceed, and Dakota Access did so. The Public Service Commission recently re-reviewed DAPL's safety as part of an amendment to DAPL's permits, and after what one Commissioner called "one of the most extensive public hearings in Commission history" the Commission again concluded that the pipeline is safe. See News Release, PSC Approves Permit for Dakota Access Pipeline Pump Station in Emmons Cty., N.D. Pub. Serv. Comm'n (Feb. 19, 2020), <https://www.psc.nd.gov/public/newsroom/2020/2-19-20Approval-DAPL-Emmons-County-Pump-Station.pdf> (on file with authors). During that process, the Commission "fully vetted" all the evidence that Plaintiffs and Amici have filed in North Dakota proceedings related to safety of the pipeline. Id.

Simply put, the State is satisfied that the pipeline poses no risk to Lake Oahe and that there is a serious possibility that the Corps will be able to re-grant its easement on remand. And because DAPL is safe, a vital part of the North Dakota economy, and integral to the State's duty to further the public interest, shutting the

pipeline down would cause a multitude of disruptive consequences to North Dakota and its residents.

V. The District Court Did Not Find That COVID-19 Lessens the Disruption to North Dakota from a DAPL Shutdown and Neither Should This Court.

Appellees sought below to minimize the significant effects of vacatur and a shut-down in part by arguing that now is the perfect time for such an action because COVID-19 has depressed the price of oil. But they are wrong. The demand for crude oil was predicted to have “bottomed out,” or reach its lowest point, in May 2020. App. A809-10. From there the North Dakota Department of Mineral Resources (“DMR”), relying on forecasting from the U.S. Energy Information Administration (“EIA”), projects that the balance of liquid fuels consumption will return to 2019 levels by the fourth quarter of 2020, and global production, which includes North Dakota, will return to 2019 levels by the fourth quarter of 2021. *Id.* In fact the data for July already indicate a rebound in North Dakota oil production; the most recent available data indicate that production rose to 890,109 barrels by June. *Id.* This data is consistent with forecasts from the EIA.

While the potential impacts of the COVID-19 pandemic are impossible to quantify due to rapidly changing oil prices, employment numbers, and capital investment plans, it is certain that a court ordered shutdown of DAPL will result in greatly increased destabilization now and even more destabilization when oil and gas market recovery begins. App. A702.

CONCLUSION

The State of North Dakota respectfully requests that the Court reverse the district court's order vacating the easement for DAPL, and shutting down the pipeline.

Respectfully Submitted this 2nd day of September, 2020.

Wayne Stenehjem
Attorney General
State of North Dakota

/s/ Matthew A. Sagsveen

Matthew A. Sagsveen
Solicitor General

/s/ David R. Phillips

David R. Phillips
Assistant Attorney General
Office of the Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640

Attorneys for Amicus Curiae.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**No. 20-5197, No. 20-5201**

The undersigned certifies pursuant to Fed. R. App. P. 32(g) that the text of Amicus Curiae's Brief (excluding the table of contents, table of authorities, and statement with respect to oral argument pursuant to Fed. R. App. P. 32(f)) complies with Fed R. App. P. 29(a)(5) and contains 5,705 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365-word processing software in Times New Roman 14-point font. The Amicus Curiae's Brief has been scanned for viruses and is virus-free.

Dated this 2nd day of September, 2020.

Wayne Stenehjem
Attorney General
State of North Dakota

/s/ Matthew A. Sagsveen

Matthew A. Sagsveen
Solicitor General

/s/ David R. Phillips

David R. Phillips
Assistant Attorney General
Office of the Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640

Attorneys for Amicus Curiae.

CERTIFICATE OF SERVICE**No. 20-5197, No. 20-5201**

I hereby certify that on September 2, 2020, the following document: **Brief of *Amicus Curiae* the State of North Dakota in Support of Intervenor for Defendant-Appellant Dakota Access, LLC, and Defendant-Appellant United States Corps of Engineers for Reversal**, was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing to the attorneys of record who have registered ECF email addresses with this Court.

Wayne Stenehjem
Attorney General
State of North Dakota

/s/ Matthew A. Sagsveen
Matthew A. Sagsveen
Solicitor General
Email masagsve@nd.gov

David R. Phillips
Assistant Attorney General
Email drphillips@nd.gov

Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640