ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5201

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

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

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Defendant / Appellant.

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

FEDERAL APPELLANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL

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GLOSSARY

Corps	United States Army Corps of Engineers
EA	Environmental Assessment
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
PHMSA	Pipeline and Hazardous Materials Safety Administration
Tribes	Plaintiffs Standing Rock, Cheyenne River, Yankton, and Oglala Sioux Tribes

INTRODUCTION

In 2016 and 2017, the U.S. Army Corps of Engineers (the "Corps") granted the permits and easement necessary to allow the construction of the Dakota Access pipeline. That construction was completed, and the pipeline has been operating safely for three years.

But on March 25, 2020, the district court ruled against the Corps on a narrow set of issues under the National Environmental Policy Act ("NEPA") and directed the Corps to prepare an "environmental impact statement" ("EIS"). On July 6, 2020, the district court vacated the easement and ordered the pipeline's operator to "shut down the pipeline and empty it of oil by August 5, 2020."

The Corps hereby moves the Court to stay these orders pending appeal. The Corps satisfies the requirements for this stay. It is likely to succeed on the merits of its appeal because the district court wrongly concluded that the effects of the Corps' action here are "highly controversial" and require an EIS merely because of "consistent and strenuous opposition" by the plaintiffs and their experts. The Corps is likely to succeed on the merits of its appeal from the court's drastic remedy order because the court failed to apply the proper four-factor test for injunctive relief, did not make the required finding of irreparable injury, short-circuited the Corps' administrative procedure for dealing with encroachments on federal land, and misapplied the test for vacatur set out in *Allied-Signal v. U.S. NRC*, 988 F.2d 146 (D.C. Cir. 1993).

The district court's order shuts down a vital element of the Nation's energy infrastructure, and a stay is necessary to prevent immediate and irreparable economic harm to the oil and gas industry, the State of North Dakota, and the American public. Far from preventing irreparable harm, the district court's order increases the risk of an oil spill and does little to protect the plaintiffs here, who are not likely to be harmed by continued operations.

The district court was candid about its reasons for this injunction. It did not enter this injunction to protect the Tribes or to prevent irreparable harm. It saw the economic hardships that the order would create, and brushed them aside. Rather, the court entered this order because it wanted to (1) give NEPA more "bite"; (2) send a strong message that the Corps, Dakota Access LLC, and the oil and gas industry should not have relied on the "continued operation of this pipeline in the face of litigation"; and (3) give the Corps and Dakota Access a powerful "incentive to finish" an environmental impact statement "in a timely manner." 1 E.R. 157–58.[1] But NEPA is a procedural statute, not a substantive statute designed to have "bite" in the same way as the Clean Air Act or the Clear Water Act, especially not as to an already completed project. None of the court's reasons provide a proper legal foundation for this injunction. Because the district court erred, this Court should stay its injunction pending appeal.

[1] All E.R. citations are to the Excerpts of Record filed by Dakota Access LLC on July 10, 2020 in Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, D.C. Cir. No. 20-5197.

The district court denied a motion for stay pending appeal on July 9, 2020. 1 E.R. 164–66. Pursuant to D.C. Cir. Rule 8(a)(2), counsel for the Corps has notified counsel for all other parties of this motion by electronic mail.

BACKGROUND

The Dakota Access pipeline is a domestic oil pipeline that carries crude oil from North Dakota to Illinois. 1 E.R. 8. Along its path, it crosses Lake Oahe, an artificial reservoir in the Missouri River created by Oahe Dam, which is operated by the Corps. *Id*. Because the pipeline crosses federally regulated waters and Corps project lands, the Corps needed to issue permits and an easement to Dakota Access (the pipeline's owner and operator) before the construction of the pipeline could be completed. *Id*. at 9.

Before it issued the necessary permits and easement, the Corps completed an "environmental assessment" ("EA") under NEPA. 3 E.R. 492–654. Based on that EA, the Corps concluded that its actions here are not likely to have a significant impact on the environment and that it was not required to prepare an EIS. The pipeline was completed and began operations in 2017.

Plaintiffs Standing Rock, Cheyenne River, Yankton, and Oglala Sioux Tribes (collectively, "the plaintiffs" or "the Tribes") challenged the Corps' compliance with NEPA. In 2017, the district court resolved those claims—largely in the Corps' favor. 1 E.R. 21–54, 93. It remanded several discrete issues to the Corps for further explanation, and the Corps completed that remand in 2018. 1 E.R. 1, 4; 7 E.R. 1609–748. After another round of summary judgment motions, the district court held that the Tribes' experts had

shown that the effects of the Corps' action are "highly controversial" and require the preparation of an EIS. 1 E.R. 130. The district court then vacated the easement and ordered Dakota Access to shut down the pipeline. 1 E.R. 138–63.

ARGUMENT

The district ordered the Corps to prepare an environmental impact statement, vacated the easement that the Corps issued to Dakota Access, and enjoined Dakota Access to shut down the pipeline and empty it of oil. This Court should stay that relief pending appeal because the Corps is likely to succeed on the merits of its appeal, the public will suffer irreparable harm if the district court's order is not stayed, and the Tribes will not be harmed by this stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

I. The Corps is likely to succeed on the merits of its appeal.

A. The district court wrongly concluded that the effects of the Corps' action are "highly controversial" under NEPA.

The Corps is likely to succeed on the merits of its appeal because the district court erred when it concluded that the effects of the Corps' action on the environment are "highly controversial." The term "highly controversial" is a term of art under NEPA. NEPA's current regulations require agencies to consider the "degree to which the effects [of the agency's action] on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). The degree of controversy is one of ten factors that agencies

must weigh to determine whether an action's effects are "significant." *Id.* § 1508.27.

The effects of an action are "highly controversial" when "substantial dispute exists as to the size, nature, or effect of the major federal action." *Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003). This can mean a scientific or technical dispute about the effect that the action will have on the environment. *See, e.g., National Parks Conservation Ass'n v. Semonite,* 916 F.3d 1075, 1083 (D.C. Cir.), *amended on rehearing,* 925 F.3d 500 (D.C. Cir. 2019).

Even then, the effects of the action must not only be controversial, but *highly* controversial: there must be a "*substantial* dispute." *Town of Cave Creek*, 325 F.3d at 331 (emphasis added). And because controversy is only one of the factors to be weighed when making a finding of significance, it is not necessary dispositive of whether an EIS is required. *See Town of Marshfield v. FAA,* 552 F.3d 1, 5 (1st Cir. 2008); *Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1181 (10th Cir. 2012).

The courts have confirmed over and over again that controversy does not refer to the "existence of opposition to a use." *Town of Cave Creek*, 325 F.3d at 331. It is not "whether or how passionately people oppose" a project, but rather a dispute "over the size or effect of the action itself." *Wild Wilderness v. Allen*, 871 F.3d 719, 728 (9th Cir. 2017).

This is a critically important distinction. Something more is required "besides the fact that some people may be highly agitated and be willing to go to court over the matter." *Fund for Animals v. Frizzell*, 530 F.2d 982, 988 n.15

(D.C. Cir. 1975). It cannot be that "the hyperbolic cries of highly agitated, not-in-my-backyard neighbors" can compel an agency to prepare an EIS. *Semonite,* 916 F.3d at 1085. Every court to consider the matter has confirmed that this factor does not create a "heckler's veto." *See, e.g., North Carolina v. FCC*, 957 F.2d 1125, 1133–34 (4th Cir. 1992). Otherwise, "opposition"—and "not the reasoned analysis set forth in the environmental assessment"—"would determine whether an environmental impact statement would have to be prepared." *Id*.

Unfortunately, that is exactly what happened here: the district court got lost in its own meticulous weighing of the plaintiffs' complaints and forgot about the Corps' reasoned analysis. For example, the Corps explored how a "hypothetical, unmitigated, worst-case release to Lake Oahe" would affect the environment. 7 E.R. 1699. This sort of analysis is not required under NEPA, but rather by the Nation's expert agency on pipeline safety, the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), for use as "the basis for spill planning and preparedness." 7 E.R. 1719.

Using the factors set out in PHSMA's regulations for a "worst case discharge," the Corps estimated the total volume of oil that a full-bore rupture of the pipeline could release into Lake Oahe. 7 E.R. 1629–30, 1719; *see also* 49 C.F.R. § 194.105. Working with the operators, the Corps then modeled how the oil from that kind of catastrophic spill would affect the environment. 7 E.R. 1631–41. The Corps found that even a catastrophic spill would have only "temporary" and "short duration" effects, 7 E.R. 1695, and, importantly, such

a spill would not reach the Tribes' water intakes even after ten days, *id*. at 1676, 1695.

The Corps recognized that a catastrophic spill would have "high consequences." 3 E.R. 590. But it also found that chances of any kind of catastrophic spill are low—and the district court agreed. 7 E.R. 1627; 1 E.R. 32 (finding rational basis for Corps' "top-line conclusion that the risk of a spill is low"), 136 (noting that "this Court has accepted" that the possibility of a future spill is "low"), 159 (again noting that "likelihood of any such rupture may be low"). The Corps then concluded that its action here is not likely to have any significant adverse effects on human health or the environment, in part, "due to the low risk of a large or catastrophic spill." 7 E.R. 1699, 1708–09. *New York v. NRC*, 681 F.3d 471, 482 (D.C. Cir. 2012) (agencies should weigh probability and consequences to evaluate whether impact is significant under NEPA).

The Corps' catastrophic spill scenario was never meant to model a likely spill; it was used as an analytic exercise to test the limits of the effects of the pipeline and to ensure that Dakota Access has the right equipment, in the right quantities, and at the right locations to respond quickly if there were a catastrophic spill at Lake Oahe. The assumptions underlying this "worst case discharge" are highly conservative and defined by PHMSA's regulations. The Corps assumed, for example, that the pipeline would not just leak, but would be literally sheared in half in a "guillotine break," an accident that almost certainly will never occur. 7 E.R. 1627 n.8. The Corps assumed that all of the oil would be released directly into Lake Oahe—when the pipeline is buried 92

feet below the bed of the lake, and any oil spilled could only reach the water after it permeated through the ground or flowed up and exited the boreholes. 7 E.R. 1719–20. For the sake of assessing oil spill preparedness, the Corps assumed that there would be no attempt to respond to the spill for ten full days, 7 E.R. 1631, despite the fact that a rupture can be detected within seconds, 7 E.R. 1734, and despite the fact that the operators would be required to immediately implement their PHMSA-approved response plan, which includes detailed measures to ensure the safety of the Tribes by shutting down water intakes and switching to other drinking water sources, 3 E.R. 534–35.

The district court held that all of this *violated* NEPA—not because the Corps' reasoned analysis was "arbitrary and capricious"—but because the Corps had failed to persuade the plaintiffs to abandon their "consistent and strenuous" opposition to the Corps' catastrophic spill scenario. 1 E.R. 130. The pipeline's advanced leak detection systems are reasonably expected to detect this kind of catastrophic rupture within seconds, but the plaintiffs say that it could take eight hours or even weeks, and so the court held that the Corps must assume that it will take hours or weeks. 1 E.R. 123. The pipeline's electrically powered valves can be closed remotely within about three minutes, but the plaintiffs say that "human or machine error" might cause them to never close at all, and so the court held that the Corps must assume that the valves will never work. 1 E.R. 127. In the face of the plaintiffs' opposition, the court held that the Corps must assume that this pipeline will cause a disaster of epic proportions. 1 E.R. 128.

None of this analysis was required by NEPA. NEPA was amended decades ago to clarify that it does not require a "worst case analysis." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989); *compare* 40 C.F.R. § 1502.22 (1985) (requiring a "worst cast analysis") *with* 40 C.F.R. § 1502.22(b) (1987) (requiring instead "a summary of existing credible scientific information"). Instead, the district court found this requirement in this Court's recent decision in *Semonite*. 1 E.R. 109–13. *Semonite* concluded that a project to run power lines through historic areas of Jamestown was "highly controversial" because there was "consistent and strenuous opposition." 916 F.3d at 1085–86. The "consistent and strenuous opposition" in that case was the opposition of "highly specialized governmental agencies and organizations," the Nation's expert agencies on historic preservation. *Id*. at 1080.

This case is easily distinguished from *Semonite* because here the expert agency, PHMSA, did not oppose the Corps' analysis; to the contrary, it provided the method for calculating the catastrophic spill volume that the plaintiffs oppose. 7 E.R. 1629 (noting that worst-case scenario release was "calculated in accordance with [PHMSA's] 49 C.F.R. § 194.105 guidance"). And unlike *Semonite*, opposition has not come from disinterested public officials with specialized expertise, but from the plaintiffs and their consultants.

Even if the plaintiffs' opposition did show some sort of controversy, controversy by itself is not enough to trigger the requirement to prepare an EIS. As explained above, the controversy must be substantial; and the degree of

controversy, when weighed with the other NEPA factors and considered in context, must show that the effects of the action are likely to be significant.

The Corps rationally concluded that the plaintiffs' opposition to its "worst case scenario" did not somehow render the effects of the Corps' action here significant or highly controversial. 7 E.R. 1747–48. "While there may be other methods for predicting oil spill effects," the Corps found, "it is not likely that employing further methods will result in substantively different views or information that is more comprehensive than what the Corps considered here." *Id*. The Corps had already acknowledged that a catastrophic oil spill would be a "high consequence" event; but it found that the effects of its action on the environment are nonetheless not significant because the risk of this kind of catastrophic spill is very low. Ladling the plaintiffs' even more dire and more unrealistic assumptions into the Corps' spill analysis would increase the consequences, but also make a spill of such magnitude dramatically less likely. To the extent that there is any scientific or technical controversy here, it is not substantial and it fails to show that the effects of the pipeline will be significant.

In *Semonite*, in contrast, "[t]hree factors indicated that there would be serious environmental impacts as a result of the project." *National Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019). And unlike the catastrophic oil spill here, in *Semonite*, there were no question of probability or risk: the power lines were going up, and the only question was whether their effects were significant.

The district court did not review the Corps' findings. Instead, it focused on whether the Corps had somehow overcome all of the plaintiffs' objections. Because it found that the Corps had not successfully overcome the plaintiffs' "consistent and strenuous opposition," the court concluded that the effects of the Corps' action here are "highly controversial." 1 E.R. 130.

But by requiring the Corps to successfully overcome all of the plaintiffs' objections, the district court gave the plaintiffs the very "heckler's veto" that every other court to date has rejected. By requiring the Corps to prepare an EIS even if the effects of the Corps' action are insignificant, the district court ignored the law as set out in NEPA. By requiring the Corps not only to respond to the plaintiffs' objections, but to "successfully resolve" them, the district court impermissibly imposed additional, extra-statutory duties of its own creation on the agency. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553, 558 (1978); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, S. Ct., July 8, 2020, slip op. at 24.

And by focusing on the plaintiffs' opposition—and "not the reasoned analysis set forth in the environmental assessment"—the district court abandoned the principles of administrative law. *See North Carolina*, 957 F.2d at 1133–34. The court based its conclusions on its own "detailed analysis of some of the many expert critiques." 1 E.R. 145; *see also* 1 E.R. 113–130. But that is a textbook example of a court's impermissibly substituting its own judgment for the agency's. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). The Corps "must have discretion to rely on the reasonable opinions of its own

qualified experts even if . . . a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

All of this creates a new, heightened standard of judicial review that will be impossible for agencies to meet and that will accordingly generate powerful new headwinds against vital infrastructure projects like this pipeline. None of this is compelled by *Semonite* or consistent with the law. The Corps is likely to succeed on the merits of its appeal.

B. The district court improperly enjoined the operation of the pipeline and wrongly vacated the easement granted by the Corps.

The Corps has already undertaken an extensive scientific and technical review of this project. In particular, the Corps has repeatedly found that the risk of a catastrophic spill from this pipeline is low. *See, e.g.,* 7 E.R. 1627. The district court reviewed those findings and agreed. 1 E.R. 32, 136, 159. Despite all that, the court ordered the Corps to prepare an EIS, vacated the easement, and enjoined the operator to empty this pipeline of oil within 30 days. The district court erred for three reasons.

1. The district court erred by issuing an injunction without making a finding of irreparable harm.

An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). To obtain it, the plaintiffs had to satisfy the familiar four-factor test. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Most

importantly, they had to show that they would suffer "an irreparable injury" without the injunction: "the basis for injunctive relief in the federal courts has always been irreparable injury." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

The plaintiffs made no such showing here. In fact, they did not try to make that showing and did not move for injunctive relief at all. The district court did not apply the four-factor test for injunctive relief and made no finding that the plaintiffs would suffer irreparable harm without an injunction. Instead, it substituted the test for vacatur set out in *Allied-Signal*, seemingly assuming that the vacatur of the easement necessarily meant that the operator must be enjoined to shut down the pipeline. 1 E.R. 148.

While the district court's discussion of the second *Allied-Signal* factor gets at some of the same issues, it falls well short of making the required finding of irreparable harm. And as we explain below, the plaintiffs are not likely to suffer irreparable harm from the continued operation of this pipeline. The district court erred by issuing this injunction without applying the four-factor test for injunctive relief and without making the required finding of irreparable harm.

2. The district court exceeded its authority by directing the result of a Corps administrative process.

As stated above, the district court assumed that vacatur of the easement meant that the pipeline must be shut down. 1 E.R. 148. That does not follow. Once the easement is vacated, the pipeline will constitute an "encroachment"

on federal property. The Corps' regulations create a process for determining how the federal government should respond to such an encroachment.[2] That administrative process provides for a range of outcomes, from requiring the removal of the pipeline to consenting to its encroachment.

But that process has not yet begun. Once the district court decided to vacate the easement, its inquiry was at an end, and it should have left any further steps—at least in the first instance—to the Corps. The court should not have directed the outcome of that process by ordering the pipeline to be shut down. *Miguel v. McCarl,* 291 U.S. 442, 451 (1934); *Vermont Yankee,* 435 U.S. at 544. By ordering the pipeline to be shut down, the district court overstepped the limits of its authority. *Monsanto*, 561 U.S. at 164.

3. The district court misapplied the *Allied-Signal* test.

The district court misapplied this Court's *Allied-Signal* test, under which an "inadequately supported [agency] rule . . . need not necessarily be vacated" even if it "cannot be viewed as reasoned decision-making." 988 F.2d at 150. Under that test, the "decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)" and "the disruptive consequences of an interim change." *Id*. at 150–51 (internal quotation marks omitted).

[2] A copy of these regulations can be found at Docket No. 507-1, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-cv-1534 (D.D.C. *filed* Apr. 29, 2020).

The *Allied-Signal* factors do not support vacatur here. The thoroughness and robustness of the Corps' analysis and the narrow errors identified by the district court do not create significant doubt about whether Corps "chose correctly" when it decided to grant an easement for this portion of the pipeline. As discussed above, the district court wrongly concluded that the effects of the Corps' action are "highly controversial," but, even if it were, that error would not be serious enough to call into doubt the Corps' ultimate decision to grant the easement. This is especially true given the nature of the plaintiffs' NEPA claims, which go only to the decision-making process and not to any substantive outcome. This is simply not a case where the agency acted without knowledge of the likely effects of its decision on the environment, and the errors found by the district court are not "serious" in the context of the overall decisionmaking process.

The second *Allied-Signal* factor—the "disruptive consequences" of vacatur—overwhelmingly weighs against vacatur, if we assume (as the district court assumed) that vacating the easement necessarily means enjoining the operation of the pipeline. As discussed below, the minor procedural flaws that the court found cannot justify the profound economic harm that shutting down this pipeline will cause. The district court erred in its application of the *Allied-Signal* factors.

II. The public will suffer irreparable harm without a stay pending appeal.

The district court failed to make any findings about irreparable harm or the balance of harms. If it had, it could never have issued this injunction, which will cause immediate and irreparable economic harm to the operator, the oil and gas industry, the State of North Dakota, and ultimately the American public.

This injunction shuts down a vital element of the Nation's energy infrastructure. The Corps' role in this case is the proper management of the federal lands under its jurisdiction. In that role, the Corps found that granting this easement was in the public interest, in part, because the pipeline would create "tremendous . . . economic benefits to the United States by supporting energy independence, increasing employment opportunities, and adding to demand in many manufacturing sections." 3 E.R. 577. Those benefits are felt throughout the United States. *Id.*

Thus, while the effects of this injunction will be felt by Dakota Access first, the damage will then spread throughout the economy. It will be felt immediately in North Dakota's oil and gas industry. Without any practical way to ship the vast bulk of their oil, crude oil prices in North Dakota will plummet—in fact, they have already fallen since the district court announced this injunction. Declaration of Shawn Bennett ¶ 11, 13–14 (Attachment 1). That will be a sharp blow to the State of North Dakota, which could lose between $1.9 and $2.3 billion in state tax revenue. *Id.* ¶ 9. From there, the

damage will spread quickly to the Midwest refineries that otherwise would have processed this crude oil. *Id.* ¶ 6. As they struggle to find other sources of crude oil, their costs will go up, and they will pass some of those costs along to consumers through higher retail gasoline prices. *Id.* Eventually, the injunction will even be felt on the West Coast, where refiners will have to turn to other sources of crude oil for blending. *Id.* ¶ 15.

Even worse, the injunction will not reduce the overall risk of an oil spill. The risk of a catastrophic oil spill from this pipeline at Lake Oahe is very low. 1 E.R. 159. By enjoining the operation of the pipeline, the district court will avoid that small risk, but will force producers to ship their oil by rail instead. 3 E.R. 502. The shipment of oil by rail is "a vital part of the short-haul distribution network for crude oil," but shipment by pipeline remains "more reliable, safer, and more economical . . . for the large volumes transported and long distances covered by" this pipeline. 3 E.R. 503. As PHMSA explained in a report to Congress, pipelines are safer than rail if safety is measured either by the percent of oil spilled or the rate of safety incidents. PHMSA, Report on Shipping Crude Oil by Truck, Rail, Pipeline (Oct. 2018), ECF No. 507-2 (filed Apr. 29, 2020) ("PHMSA Report").

Thus, because the shipment of these large quantities of oil over long distances by rail is less safe than shipment by the Dakota Access pipeline (though, of course, the government makes every effort to ensure safe rail transportation as well), the district court's order increases, not decreases, the risk of an oil spill. The district court acknowledged these facts, but it dismissed

them as "speculative" and ignored PHSMA's analysis because it included caveats like "[e]ach mode has its own unique safety risks." 1 E.R. 161–62. But just because the Corps cannot quantify exactly how much oil will be moved by rail, that does not mean that this risk is not real. It was error for the court to enter an injunction that would increase the risk of an oil spill.

The district court also failed to fully and properly consider the economic harm that its injunction will cause. 1 E.R. 156 (acknowledging "immediate harm to the North Dakota oil industry"). The court conceded that "[l]osing jobs and revenue . . . is no small burden." *Id*. But the court nonetheless found that this admitted harm did not "tip the scale decisively in favor of remanding without vacatur." *Id*. And while the court observed that shutting down the pipeline would "mitigate" the "small risk" of a catastrophic oil spill, that was not the deciding factor. 1 E.R. 159.

No, the district court was candid about its reasons for entering this injunction: It wanted to make sure that NEPA did not "lose[] its bite." 1 E.R. 158. It wanted to send a message to the Corps, Dakota Access, and the oil and gas industry, all of whom had dared to rely "on the continued operation of the pipeline in the face of ongoing litigation." 1 E.R. 160. And it wanted to give the Corps and Dakota Access a powerful "incentive to finish the EIS in a timely manner." 1 E.R. 157.

None of these considerations is appropriate or sufficient under binding Supreme Court precedent to justify this injunction. The district court erred by entering an injunction that will cause irreparable harm instead of preventing it.

III. The Tribes will not be harmed by the requested stay.

The Tribes will not be harmed by the stay sought by the Corps here. Shipping oil by pipeline is safe. PHMSA Report at 2. This portion of the Dakota Access pipeline is especially safe because it was built over 90 feet beneath the bed of Lake Oahe. 3 E.R. 587. The Corps also imposed 36 conditions on this easement to further promote safety and minimize environmental risks (although the vacatur of the easement calls the enforceability of those terms into question, which is another reason that it should be stayed).

The Dakota Access pipeline has been operating safely for three years under strict supervision by PHMSA. *See, generally*, Declaration of Alan K. Mayberry ¶¶ 14–16 (Attachment 2). PHMSA routinely inspects pipelines. *Id.* ¶ 9. PHMSA conducted hundreds of hours of field inspections as this pipeline was being built and audited the final tests of the pipeline's integrity before it began operation. *Id.* ¶¶ 11, 13. PHMSA has continued to inspect the pipeline during its three years of operation. *Id.* ¶ 11.

During all of those inspections, PHMSA has never initiated an enforcement action against the operators of this pipeline. *Id.* ¶ 14. There have been only eight reported spills since it began operation, and the largest of those was only two barrels of oil—a mere 84 gallons. *Id.* ¶ 16. PHMSA has required the integrity of the pipeline to be checked regularly: in 2019, for example, the operator tested the integrity of 735 miles of this pipeline, found one anomaly, and repaired it. *Id.* ¶ 17. PHMSA has also reviewed the operator's oil spill

"facility response plans" and—after requiring corrections—approved them. *Id.* ¶ 19–20.

All of this confirms that the continued operation of the pipeline during the pendency of this appeal poses little risk to the Tribes.

CONCLUSION

The Court should grant this motion for a stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume requirements of Federal Rule of Appellate Procedure 27(d)(2) because the motion contains 5,162 words.

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

/s/ James A. Maysonett
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