

No. 20-5197

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

STANDING ROCK SIOUX TRIBE, ET AL.

Plaintiffs-Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.

Defendants-Appellants.

*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 DEFENDANT DAKOTA ACCESS, LLC'S
MOTION FOR STAY PENDING APPEAL**

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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).

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STATEMENT OF AMICUS CURIAE AND INTRODUCTION

Without a stay of the order requiring the Dakota Access Pipeline (“DAPL”) to shut down, the State of North Dakota and the public interest will suffer significant and immediate irreparable harm. A shutdown will force North Dakota’s oil industry to shut in massive amounts of oil production, and shift the remainder of production to more expensive and uncertain modes of transportation. This, in turn will significantly impact commercial activity, leading to *billions* of dollars in economic loss to the industry and *thousands* of unemployed workers. And it will have an immediate effect on State tax and royalty revenue, causing *billions* in budget shortfalls that cannot be addressed without significant budget cuts, endangering critical State programs. These concrete and immediate harms far outweigh the speculative, extremely unlikely harm that Appellees cited and on which the district court relied. The Court should stay the DAPL shutdown pending resolution of Dakota Access’s appeal.

STATEMENT OF FACTS

DAPL carries crude oil along a 1,200-mile path from North Dakota to Illinois. The segment at issue here crosses the Missouri River in North Dakota more than 90 feet beneath Lake Oahe. After the U.S. Army Corps of Engineers (“Corps”) issued an easement on February 8, 2017, Dist. Ct. Case No. 16-1534, ECF No.172-11, Dakota Access installed DAPL and has safely operated it for more than three years.

In 2019, Appellees sought summary judgment, claiming, *inter alia*, that the Corps’ easement decision violated the National Environmental Policy Act (“NEPA”). The district court granted partial summary judgment in favor of

Appellees and ordered the Corps to prepare an Environmental Impact Statement (“EIS”), ECF No.496 at 2, 35, 42, and requested briefing to address whether the easement should be vacated. *Id.* at 42. As established in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146 (D.C. Cir. 1993), “[t]he decision whether to vacate depends on ‘[1] the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequence of an interim change that may itself be changed.’” *Id.* at 150-151 (quoting *Int’l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)). North Dakota filed an *amicus* brief, supported by four declarations, detailing the serious disruption that vacatur would cause. ECF Nos. 504, 504-1 through 504-4. North Dakota filed another *amicus* brief, supported by two additional declarations, refuting Appellees’ inaccurate predictions. ECF. Nos. 537, 537-1 & 537-2.

Notwithstanding the significant disruptions described in North Dakota’s declarations, the district court vacated the easement and ordered Dakota Access to stop operating and empty the pipeline by August 5, 2020. ECF No.546 at 23-24. Dakota Access moved to provisionally stay the order, ECF No.547, and filed a Notice of Appeal, ECF No.548. After the district court denied the provisional stay request, Dakota Access moved for a stay pending its appeal which the court denied on July 9, 2020. ECF Nos.551-1 & 553. The following day, Dakota Access filed an emergency motion in this Court for a stay pending its appeal. North Dakota seeks to be heard on the reasons why a stay is imperative to its residents and the public health.

SUMMARY OF ARGUMENT

North Dakota respectfully urges the Court to grant the Motion For Stay Pending Appeal. Although the district court recognized proof of the “reverberating” effects a shutdown would have, ECF No.546 at 15, it declined to meaningfully confront the devastating and irreparable impacts a shutdown will have on *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 specifically.

A shutdown will result in literally billions of dollars in losses to North Dakota’s oil industry and will cause drastic reductions in 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. Further, thousands of North Dakotans will lose employment that DAPL makes possible. 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. The factors of harm to others and the public interest weigh sharply in favor of a stay.

ARGUMENT

In deciding a motion to stay, courts consider the four familiar factors: (1) the likelihood of success on the merits of the appeal, (2) the likelihood of irreparable harm absent a stay, (3) the prospect of harm to others if the court grants the stay, and (4) the public interest. *Dunlap v. Presidential Advisory Comm’n on Election Integrity*, 390 F. Supp. 3d 128, 131 (D.D.C. 2019).

This brief focuses on the irreparable harm to third parties and the public interest caused by a shutdown of DAPL, and briefly addresses likelihood of success on the merits.

I. A Stay Pending Appeal Prevents Immediate, Severe, and Irreparable Harm To Third Parties and The Public Interest.

The district court recognized the “serious effects that a DAPL shutdown could have for many states, companies, and workers,” including North Dakota and its citizens. ECF No.546 at 17. And it mentioned in passing that shutting down DAPL would “have a reverberating effect on the state of North Dakota, whose economy derives a large part of its revenue from oil and gas taxes.” *Id.* at 16-17. But the district court failed to give these effects anywhere near the weight they deserved in its analysis.

A. North Dakota Citizens Will Suffer Immediate and Severe Harms From Reduced Tax Revenue.

North Dakota is a small, sparsely populated state, whose economy depends heavily on oil and gas production, deriving *twenty percent* of the State’s general fund revenues directly from oil and gas taxes and almost *fifty percent* of general fund revenues from sources closely tied to, and dependent upon, oil and gas extraction and production. ECF Nos. 504 at 6; 504-1, ¶9; 537-2, ¶6. Revenues from DAPL itself comprise an outsized portion of these proceeds. Today, DAPL transports more than 40 percent of the crude oil produced in North Dakota. ECF No.537-1, ¶9. It would be cost-prohibitive for the vast majority of that production to try to shift to alternate transport. ECF Nos. 504-2, ¶14; 512-2, ¶5. And, it would take years to do so. *See Adam Willis, N.D. Indus. Comm’n looks for oil indus. fixes after DAPL*

ruling, INFORUM, July 7, 2020, <https://www.inforum.com/business/energy-and-mining/6565371-North-Dakota-Industrial-Commission-looks-for-oil-industry-fixes-after-DAPL-ruling>. Imagine the chaos if the court shut down an interstate highway handling a significant portion of a state's interstate commerce, with only 30 days' notice. And, while the merits of the shutdown are being considered by this Court. Shutting down DAPL is no different.

While some oil production will shift to alternate forms of transportation, the increased cost of doing so (\$5-\$10 per barrel of oil) will mean a significant reduction in tax revenues. ECF No.537-2, ¶9. 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. ECF No.504-1, ¶10. 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. *Id.* at ¶4. A \$2 billion revenue loss from an unneeded shutdown would be devastating.

Such losses must be considered against the backdrop of COVID-19's impacts to the State's economy. ECF No.537 at 6. 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.” ECF No.546 at 17. North Dakota has already witnessed a \$133 million year-over-year tax revenue shortfall from February to May 2020. *Id.* at 6; ECF No.537-2, ¶7. 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*

(June 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.*

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; law enforcement; road construction and maintenance; and parks and recreation. ECF Nos. 537 at 7; 537-2, ¶10.

Any reduction in these essential services threatens negative health, safety, and public-welfare outcomes for North Dakota's residents. For example, approximately 80% of the general fund budget is spent on K-12 education, higher education, and health and human services. 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>. 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 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.

Shutting down DAPL will also result in *thousands* of lost jobs in North Dakota. ECF No.504-2 (estimating “temporary loss of around 8,950 full time jobs and permanent loss of 4,475 to 7,175 full time jobs.”). 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. ECF No.537-2, ¶8. Expenditures on critical services and public-health have also sharply increased, ECF No.537 at 6, right at the time that revenue from the State’s largest industry sector has fallen precipitously.

The district court assumed that a shutdown of 13 months—the time the Corps estimates it would take to prepare an EIS—would somehow lessen the blow. ECF No.546 at 17-18. But that ignores the capital-intensive nature of the oil transport industry. The majority of rail-car leases are long-term, typically five to seven years. ECF No.542-2, ¶14. The infrastructure for oil transport “is built on long-term investments and similarly long-term agreements.” ECF No.542-2, ¶18. A shutdown suddenly forces market participants to upend, and seek to reforge, transport modes that have taken years to establish.

Shutting down DAPL will also cause environmental and human health harms separate from these tax-revenue shortfalls. Inevitably, a portion of the oil currently being transported on DAPL would need to shift to rail. *E.g.*, ECF No.546 at 22. The record makes clear that increased rail traffic means increased vehicle accidents and

fatalities at grade crossings, as well as traffic congestion and delays and increased emissions. *See* ECF Nos. 512-2, ¶¶86-94; 514 at 15-17; 520-1 at 30.

The district court minimized these harms or ignored them altogether. *See* ECF No.546 at 14-22. But these impacts to North Dakota residents are important to the analysis of Dakota Access's likelihood of success in appealing vacatur, *see infra*, and germane to the public interest and balance of the equities in issuing a stay. *See Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (injunction pending appeal granted when it would "serve[] public health interests"); *Gun Owners of Am., Inc. v. Barr*, No. 19-1298, 2019 WL 1395502, at *1 (6th Cir. Mar. 25, 2019) ("the public interest in safety" is relevant to consideration of stay pending appeal).

B. The District Court Failed To Consider The Extent To Which Innocent Third Parties Would Suffer.

The district court's recognition that North Dakota, and its oil and gas industry, would experience "some immediate harm" is an unfortunate understatement. Shutting down DAPL will inflict unrecoverable losses on a crucial industry for North Dakota that will radiate outward to third parties and the citizens of North Dakota. The district court gave wholly insufficient weight to the effects on those who were uninvolved in Dakota Access's decision to build and operate DAPL

The district court claims it does "not take lightly the serious effects that a DAPL shutdown could have for many states," but it did. ECF No.546 at 17. The district court minimized those effects by incorrectly reasoning that Dakota Access and third parties "assume[d] much of its economic risk knowingly." *Id.* at 23. North Dakota's residents, whose well-being depends on essential services and a healthy state budget, did not assume any economic risk. Nor did the thousands who will be

forced into unemployment. The oil industry that the district court mentioned did not somehow assume a risk by making use of the most efficient and safe mode of transporting oil from the Bakken region. And how can it be said that other industries, and their employees, have only themselves to blame for the hardship the district court's Order would cause, including third-party oil and natural gas gatherers, processors, transmission providers, vendors, and the many supporting local industries such as restaurants and hotels. Or, other industries such as farming that would experience serious disruption from rail congestion. *See* ECF No.504 at 11-12; Amy R. Sisk, *Fed. judge orders Dakota Access Pipeline shut down*, Bismarck Tribune, July 6, 2020, https://bismarcktribune.com/bakken/federal-judge-orders-dakota-access-pipeline-shut-down/article_2cc387a3-f003-5557-b356-4063123a62ad.html. Shutting down DAPL will seriously disrupt the lives of hundreds of thousands who had nothing to do with the Corps decision that the district court criticized.

II. These Definite Harms To North Dakota Far Outweigh Any Speculative Harm To Plaintiffs.

Contrasting with the irreparable harm that North Dakota and its citizens will endure, Appellees will not be harmed if the Court preserves the status quo. Before the North Dakota Public Service Commission, an expert agency, granted its permit to Dakota Access, it carefully evaluated DAPL and determined that it would “produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota.” *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).

North Dakota's views on DAPL's safety are *consistent* with the district court's determination that the "risk of rupture under Lake Oahe is low." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 100 (D.D.C. 2017). Appellees' *speculative possibility* of harm pales in comparison to the *actual, immediate, severe, and irreparable* harm facing North Dakota's people. The scale weighs heavily in favor of preserving the status quo.

III. Dakota Access Has A High Likelihood Of Success On The Merits.

Dakota Access has a high likelihood of success on appeal because all these harms favor denial of vacatur under the second prong of the *Allied-Signal* test: "[T]he disruptive consequences of an interim change that may itself be changed." 988 F.2d 146 at 150-151 (quoting *Int'l Union*, 920 F.2d at 967).

The district court dismissed these impacts as "economic myopia." ECF No.546 at 19. But these are precisely the type of disruptive consequences justifying denial of vacatur under *Allied-Signal*. See *Pub. Emps. for Env'tl. Responsibility v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (explaining that the *Allied-Signal* standard requires consideration of "social and economic costs"). Dakota Access is likely to succeed on appeal in demonstrating that vacatur would have significant disruptive consequences that outweigh the seriousness of the Corps' deficiencies.

CONCLUSION

This Court should enter a stay pending its consideration of Dakota Access's appeal.

Dated: July 13, 2020

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CERTIFICATE OF COMPLIANCE**No. 20-5197**

The undersigned certifies pursuant to Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 32(f), that the text of Attorneys for Amicus Curiae State of North Dakota's Brief (excluding the table of contents, table of authorities, and statement with respect to oral argument) contains 2,595 words.

This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 word processing software in Times New Roman 14 point font, and complies with the length limitations set forth in Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6). The State of North Dakota's Amicus Curiae Brief has been scanned for viruses and is virus-free.

Dated this 13th day of July, 2020.

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

I hereby certify that on July 13, 2020, the following document: Brief of Amicus Curiae the State of North Dakota in Support of Defendant Dakota Access, LLC's Motion for Stay Pending Appeal, was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the attorneys of record who have registered ECF email addresses with this Court.

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