





from Texas A&M University in 1996. My professional experience is centered on the transportation and logistics of moving energy and related products across the United States. My career emphasis has been in project management and execution, leadership of projects for successful execution and deployment of development capital into energy infrastructure projects.

3) ETP (collectively with its affiliates) primarily is engaged in liquid petroleum and natural gas transportation in North American and, through subsidiaries, owns the largest liquid petroleum and natural gas pipeline system by volume in the United States. ETP's oil and gas pipeline systems have undergone significant expansion in recent years and span approximately 72,000 miles across North America.

4) ETP transports crude oil to multiple refineries primarily in the Midcontinent and Gulf coast states.

5) Dakota Access is a limited liability company formed to construct and own DAPL. In that capacity it has applied for, received and holds various federal permits, authorizations and verifications needed for the Project.

6) The DAPL Pipeline is a \$3.8 billion private project extending approximately 1,172 miles, commencing in Stanley, North Dakota, and traversing through North Dakota, South Dakota, Iowa and Illinois, terminating at the Patoka, Illinois hub.

7) Over the past three years, as the lead person in charge of project development and execution, I have approved, participated in and overseen the coordination, communication, survey and consultation regarding the cultural resources and tribal coordination. My team of professionals, contractors and consultants has spent nearly three years acquiring data to route the pipeline to avoid sensitive cultural resources.

**HISTORY OF CULTURAL RESOURCE SURVEYS AND TRIBAL  
COOPERATION AND CONSULTATION BY DAPL**

8) The team has surveyed nearly the entire route for cultural resources. Reports have been provided to the four State Historic Preservation Officers and the USACE archaeologists. The reports and their findings have been accepted and approved by each agency. The agencies then made the determination that the planned route will have no adverse effects to any known sites.

9) Additionally, over the course of project development, my team has attempted to reach out to and consult and coordinate with all of tribes in the region to identify any sensitive sites, such as Traditional Cultural Properties, and we have on multiple occasions shared the results of all of our surveys and data with each tribe, including the Standing Rock Sioux Tribe both in the form of electronic data and hard copy data.

10) In the absence of data from the tribes and to assure that the project will not knowingly impact any unknown sites, DAPL has developed and deployed a comprehensive Unanticipated Discoveries Plan for each state that spells out the procedures to stop work, notify the proper authorities, which includes tribal contacts, and implement guidelines for how to mitigate the discovery of any unanticipated cultural resource during construction. The Plan was provided to the tribes for comment and their comments were incorporated. The Plan has been reviewed and approved by permitting authorities both at the state and federal levels.

11) During the course of the planning process, my oversight and coordination also included multiple offers to the tribes to participate with my team to conduct tribal surveys along the proposed route where the private landowners would allow the surveys to occur. This offer was made for the federal jurisdictional areas subject to the Clean Water Act and the National

Historic Preservation Act Section 106 guidelines plus for any and all areas that could reasonably be identified as having intact tribal features, which included undisturbed land, locations that are considered to have a high probability of containing cultural sites and areas identified by the various authorities, inclusive of tribal considerations, as having the possibility of containing cultural sites. These efforts and consultation resulted in 76 percent of the project route being studied for cultural resources. Lake Oahe was one of the areas investigated, studied, and evaluated for cultural and tribal resources.

12) This offer to conduct tribal surveys was made multiple times throughout the development of the project all the way up until we began construction on May 16, 2016, and even at that time, DAPL voluntarily agreed to allow tribal monitoring at locations identified by various states, certain tribes, at the PCN locations identified by the USACE and where DAPL had identified sensitive locations.

13) The vast majority of the tribes, and specifically the Standing Rock Sioux Tribe, over the course of the project have not: 1) participated in or coordinated with the DAPL process and explicitly told Dakota Access that they would not because it is not a government entity, 2) provided any data to assist in the routing of the pipeline to avoid any particular sites, 3) identified boundary areas as exclusion zones to avoid the tribes having to divulge the specific locations of their sacred sites; or 4) participated in any tribal surveys with my staff in planning or routing, only participating when there was USACE coordination. The only response or comments we received from the Standing Rock Sioux Tribe were to stop the project and categorically avoid the entire western Great Plains Region as that is considered the “Greater Sioux Nation’s “historical range,” which is an impossible request to accommodate.

14) As late as the preparation of this affidavit only three tribes (which do not include the Standing Rock Sioux Tribe) have conducted some level of survey in coordination with Dakota Access, although all the federally recognized tribes with an historical interest in the region were given multiple opportunities over the period of two years to participate. In fact, the Standing Rock Sioux Tribe has never agreed to participate in surveys with DAPL, provide any comments or cooperate in any meaningful manner to protect and avoid any known sensitive areas or otherwise cooperate with DAPL. Similarly, and as further evidence of its approach to cooperative endeavors, the Standing Rock Sioux Tribe has refused to sign the Programmatic Agreement between the USACE and the 29 area tribes governing sovereign cooperation on Missouri River management issues. Even when DAPL, in coordination with the USACE held tribal coordination meetings, the Standing Rock Sioux Tribe chose to send a legal representative instead of a tribal or cultural professional. Their entire participation has provided the appearance of preparing for and provoking a legal dispute rather than sharing data to avoid and protect cultural and tribal sensitive areas.

15) Since Dakota Access has started construction on private lands near Lake Oahe north of the Standing Rock Sioux reservation, tribal members have conducted both violent and non-violent protests of the project and have denied DAPL, the private landowners who have signed easements, the shippers who are relying on the pipeline to transport their oil to monetize their upstream and downstream assets, the people of North Dakota who are relying upon the significant tax base the project will generate and the many, many jobs that have been and will be created, and the entire United States the lawful right to build the pipeline and to derive the benefits the project brings. Tribal members have been attempting to stop the project and block

the legal right of Dakota Access to construct on private land. Over the past week, multiple people have been arrested, including the Chairman of the Standing Rock Sioux Tribe, who on information and belief may have been personally leading these civil uprisings to block our work, including attempts to intimidate our employees, law enforcement and the landowner. On information and belief, the Chairman gave tribal employees the day off last Friday to participate in protests that became violent. See: <https://app.box.com/s/v7sctzjemi2mgatk20cojo5tngvspz74>

16) Instead of working with Dakota Access to protect the resources that the Standing Rock Sioux Tribe claims to want to protect, it has used this legitimate federal process to try to stop the project rather than to enter into good faith negotiations or data sharing to protect cultural resources. In no instance has the tribe provided any data, coordination, consultation or information to protect and avoid cultural resources, but rather they have tried to stop the project at and with any means possible, including violating DAPL's legal rights. This exact statement has been made by multiple tribes over the project duration.

17) In summary, although Dakota Access has attempted every avenue to facilitate surveys and cooperation with the tribes, specifically with respect to the Standing Rock Sioux Tribe, it has been met with opposition and obstructionism rather than any cooperative attempt to provide data or engage in efforts to avoid cultural resource impacts.

**DAPL WAS ROUTED TO AVOID CULTURAL AND ENVIRONMENTAL AREAS OF CONCERN AND IS CO-LOCATED WITH EXISTING INFRASTRUCTURE**

18) DAPL is co-located with existing utility, roadway and infrastructure wherever feasible. Specifically, where DAPL crosses Lake Oahe, it is 100% located adjacent to and within 22 to 300 feet from the existing Northern Border pipeline. It also is co-located parallel to

an existing overhead power line owned by the Basin Electric that crosses Lake Oahe. Thus all three projects, the existing Northern Border and transmission lines and DAPL all cross Lake Oahe at the same location, which itself is a man-made lake, created by flooding portions of the Missouri River.

19) The importance of DAPL paralleling these other utilities across man-made Lake Oahe, as well as certain other locations along the route, is that Dakota Access selected crossing locations that have been disturbed in the past - both above and below ground level - making it a "brownfield crossing location." The decision to cross at this brownfield location was made specifically to cross the man-made Lake in an area that had been previously disturbed by past and recent ground disturbing activities and where the likelihood of intact cultural or tribal features and resources would be extremely remote. This assessment was further validated by Dakota Access's very detailed, multiple cultural surveys with professional archaeologists and ethnographic specialists; by the USACE which had conducted its own surveys prior to Dakota Access for previous USACE endeavors and then specifically for Dakota Access, and by tribal representatives from the Standing Rock and Upper Sioux Tribes in conjunction with USACE site visits. In each case, no intact cultural or tribal features were found during any testing within the boundaries of the work area and Dakota Access was specifically told by the Standing Rock Sioux Tribe that it would not share any data because Dakota Access is not a government entity.

20) I personally led, participated and attended two tribal coordination meetings attempting to solicit their participation in the process and directly hired a tribal liaison to provide an additional level of outreach to the tribes, again attempting to engage them in the process. Additionally, as part of the consultation and outreach process, Dakota Access attempted to meet



with the Standing Rock Sioux Tribe Historic Preservation Office to ascertain if there were any sensitive sites that should be avoided at Lake Oahe as well as along the pipeline length, but our requests to consult and share data were met with resistance and the tribe shared no data.

21) The crossing at Lake Oahe will be installed using advanced construction technology called HDD or Horizontal Directional Drilling and will be installed between 90 to 115 feet deep beneath the bed and shoreline of the Lake to avoid impacts to unknown or undocumented sensitive cultural resources. Where the pipe becomes shallow at the Lake approaches, Dakota Access conducted detailed, above-ground surveys to insure the area was free of any intact cultural features. The depth of the crossing was chosen to avoid any potential cultural resource sites by being at depths that are too deep to contain cultural or tribal resources as the date of the geology and soils predates human occupation. Therefore, the construction activity surrounding installation of the pipe at Lake Oahe will simply not have any impacts to cultural or tribal resources as the impact zone is beneath the zone with the potential to contain human artifacts. This conclusion by DAPL's archeological consultant has been concurred with by the North Dakota SHPO through the Section 106 process.

22) DAPL as designed is a buried oil pipeline generally installed at a depth of 4 feet as measured from the top of the surface. DAPL is subject to stringent design, construction, operation, inspection and maintenance requirements of federal pipeline safety regulations at 49 CFR Parts 194 and 195, which are administered by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). In addition to federal pipeline safety regulations, the design and construction will also adhere to safety codes and industry best practices, such as those issued by the American Society of Mechanical Engineers, the National Association of Corrosion Engineers

and the American Petroleum Institute, among others. Crossing of certain streams and rivers is completed by either an HDD or various open-cut methods approved by state and Federal agencies. The HDD employs GPS guided technology to dig a tunnel for pipe placement well below the river bed or the land surface to avoid erosive impacts from water flow or banks and to protect sensitive cultural and environmental resources. Public road crossings are completed by an underground bore leaving the road surface undisturbed. All road crossings are subject to various state and local permits.

23) Dakota Access also incorporates a variety of safety specifications and best management practices that exceed those required by PHMSA, including: additional drain tile and topsoil protection measures important to the agricultural landowners; pipe mill inspections with on-site quality control measures including enhanced testing and record retention and additional pipe wall thickness (45% greater) at all public road, waterway and railroad crossings; installation of valves with motorized actuators to supplement local monitoring with remote monitoring; and, enhanced hydrostatic and other testing, including an inspection of the entire pipeline length by an internal deformation tool prior to startup and a cathodic protection system activated earlier than required. Exhibit A-1 provides a detailed list of the various commitments DAPL is executing “above and beyond” the state and federal regulations to insure the safety of the pipeline.

### **REGULATORY OVERVIEW**

24) *Unlike oil pipelines*, construction of new interstate *natural gas* pipelines must be approved and permitted by the Federal Energy Regulatory Commission under the National Gas Act. The NGA contains a detailed federal approval process requiring a finding of public

necessity and convenience before a new gas pipeline may be constructed. For example, the pipeline that Dakota Access parallels at many locations and specifically Lake Oahe is a natural gas pipeline that was placed into service in 1982 and is regulated by the Federal Energy Regulatory Commission. As part of that project's development and execution, a Federal Environmental Impact Statement was produced, which considered the potential impacts or effects to cultural and tribal resources and concluded with the approval and construction of the pipeline. This would indicate that no significant effects to resources occurred and the pipeline was allowed to be constructed as proposed. DAPL is partially within and immediately adjacent to the previously disturbed area of the approved natural gas pipeline, and based upon the data that has been collected, the surveys completed, previous disturbance and current concurrence from the state authorities and USACE, no impacts will occur to cultural resources as a result of DAPL. In the event of a find during construction, DAPL has developed an approved, comprehensive Unanticipated Discovery Plan that will result in stopping work, coordinating the find with the appropriate agencies and tribes, and then restarting construction once the site or find is mitigated or an alternative crossing is identified. In contrast, Congress has chosen to **not regulate oil pipeline** projects without some other significant federal nexus, and as such, most oil pipelines are not federalized. Importantly, there is no federal agency charged with determining whether or how a common carrier liquid petroleum pipeline, such as DAPL, should be built. Instead, the States play a substantial role in regulating petroleum pipelines. Each state traversed by Dakota Access contains extensive planning and review processes and requires a particularized public utility commission determination of public need for new pipeline construction. Dakota

Access has successfully received all the required state and local level permits to site, construct and operate the DAPL pipeline.

25) As part of the planning and permitting processes, Dakota Access submitted applications to the North Dakota Public Service Commission (“PSC”) (filed on December 22, 2014), the South Dakota Public Utilities Commission (“PUC”) (filed on December 15, 2014 and revised, December 22, 2014), the Iowa Utilities Board (“IUB”) (filed on January 20, 2015) and the Illinois Commerce Commission (“ICC”) (filed on December 22, 2014). Following an extensive evidentiary proceeding in each jurisdiction, a “Certificate of Good Standing” was issued by each Commission for the DAPL pipeline. Each Certificate was granted upon a finding that DAPL is safe, necessary and should be constructed to promote the security and convenience of the public.

26) To the extent there is federal permitting for domestic liquid petroleum pipelines, it tends to be for the isolated, site-specific jurisdictional components, *e.g.*, crossing individual wetlands under jurisdiction of the U.S. Army Corps of Engineers (“Corps”) or acquisition of easements for land under jurisdiction of a federal agency. For DAPL, lands affected by federal jurisdictional crossings or that require a federal permit comprise a very minor component (approximately 3%) of the project. To my knowledge, no domestic, interstate oil pipeline constructed in the last decade, that does not cross substantial federal acreage, has been subject to project-wide federal permitting requirements, and none have triggered the need to prepare either a project-wide federal Environmental Assessment or an Environmental Impact Statement.

27) DAPL receives no federal funding and primarily crosses private land. Along its route, DAPL crosses approximately 0.02% (1,094 feet) of Corps owned property and

approximately 0.2% of the route (2.83 miles) of Corps managed private easements in North Dakota and approximately 0.2% of the route (2.42 miles) of Corps managed private easements in Illinois. The total crossing of Corps fee owned land and Corps easements over private land is 0.42% of the route. DAPL crosses no other jurisdictional federal or tribal trust lands.

28) DAPL was only required to obtain pre-construction authorization for permits for jurisdictional features under Federal permitting authority which includes approximately 3% of the entire route (which is inclusive of the permit review area or the “area of potential effect”). Overall, approximately 0.55% of the project traverses land with waters of the U.S. jurisdictional features. Essentially, other than very minor and minimal crossings, the project was routed to avoid Federal jurisdiction and to avoid and minimize impacts to regulated environmental resources, which included cultural, historical, traditional and tribal resources that would be protected under Section 106 of the National Historic Preservation Act. This was not done to avoid consultation, but rather in consultation and cooperation with the various authorities to avoid and minimize impacts, which is the preferred form of mitigation under federal policy.

29) DAPL crosses certain private lands on which the U.S. Fish and Wildlife Service has non-exclusive conservation or grassland easements. These are non-jurisdictional crossings of private land.

30) DAPL crosses land that is owned by the Three Affiliated Tribes of North Dakota, which is non tribal-trust land and where Dakota Access has secured an easement and agreement from the tribes to cross, construct and operate the pipeline. During this process, which included a 14 month long negotiation that resulted in a favorable plan to cross tribal property, I personally

worked with the Tribal Chairman and certain other tribal members, employees and consultants to negotiate and resolve a mutually agreeable crossing agreement and easement.

31) Dakota Access (and ETP) views the safety and integrity of its pipelines as its highest priority and its pipelines remain among the safest and most environmentally protective modes of transportation. There is no safer mode of crude transportation in the world than pipelines. Designed to move nearly 6.5% of the entire domestic production of crude oil, DAPL is an essential element to the domestic crude oil supply chain. Based upon U.S. Department of Transportation data and statistics it often is reported that pipelines are between 3.6 to 4.5 times safer than rail and 34 times safer than truck transportation of crude oil. For a large portion of the oil located on the western side of the Bakken oil field, there is no way to move this oil from its Bakken origin to the south and east without crossing the Missouri or Mississippi Rivers, and this includes rail, truck and pipelines mode of transportation. Pipelines by far minimize the potential for impacts.

32) DAPL's design employs the very latest operational, safety and environmentally protective technologies. For example, many locations involve horizontal directional drilling, which places the pipeline deep beneath the surface to avoid sensitive environmental and cultural resource impacts. Additionally, DAPL has developed and strictly adheres to a robust Facilities Response Plan to manage and respond to any type of pipeline event. All DAPL employees will be fully trained in emergency response planning to complement the capability of certified, professional response teams to ensure safe pipeline operation.

33) Although not a Federal or State requirement across the vast majority of the project area, DAPL made multiple attempts to work with the various tribes. For example, during the

initial development of the project, significant effort was made to avoid impacts to Federal and tribal lands. By focusing on this key routing criterion, Dakota Access was able to avoid 99.98% of federal land along the entire route, with the exception of three small crossings of USACE owned fee land at Lake Oahe. DAPL avoided all (100%) of tribal trust lands.

34) Even though public and tribal lands were avoided, Dakota Access still attempted to coordinate with the tribes to identify key sensitive locations within the various historical ranges of the tribes and/or key features of cultural and spiritual significance. As early as June 2014 in the project development cycle, Dakota Access had begun to reach out to the various tribes to identify these sensitive areas, and in fact, in September 2014 the Standing Rock Sioux Tribe was the first tribe Dakota Access met with in person as part of the coordination process.

#### **PURPOSE OF THE DAKOTA ACCESS PIPELINE**

35) The primary purpose of DAPL is to provide safe and cost effective shipment of Bakken/Three Forks crude to U.S. markets. DAPL will deliver Bakken crude on a very cost effective basis to Patoka, Illinois, for shipment primarily to eastern and Gulf refineries. DAPL transportation efficiencies will enable Bakken crude to be more cost competitive, creating substantial benefits to Bakken producers, mineral royalty owners, including the United States, shippers and the American consumers, especially in the current market downturn. The importance of this pipeline and its low cost service is to allow certain producers to continue to produce in a depressed pricing environment effectively keeping the crude flowing to market, whereas without the pipeline, many producers would be forced to further curtail production or stop production entirely until the market conditions improved.

36) The expanded capacity of DAPL is approximately 570,000 barrels of oil per day, and DAPL is expected to initially transport approximately 450,000 barrels of oil per day. In response to shipper requests and following publicly announced open seasons, DAPL received contractual commitments from 9 eligible shippers with terms ranging up to 10 years. With the overwhelming commitments, DAPL has been requested to conduct a third open season to expand the initial capacity up to the expanded capacity case. That process is currently underway.

37) In connection with its long-term capacity transportation contracts with 9 committed shippers, Dakota Access has committed to complete, test and have DAPL in-service by January 1, 2017.

38) Increased access to growing supplies from the Bakken region is forecast to displace imported crude oil delivered to U.S. refineries from other production fields, including Mexico, Venezuela, Africa and the Middle East, and will enhance domestic national and energy security.

#### **DAPL PLANNING AND PUBLIC CONSULTATION**

39) Although not required by any Federal law, DAPL conducted a NEPA like alternatives analysis to identify and select the preferred route that minimized impacts to the most stakeholders and resources. Dakota Access engaged in over three years of planning, design, permitting, consultation and environmental survey work for the routing of DAPL. In selecting this specific route, Dakota Access evaluated options and identified the most feasible route that considered a host of factors including constructability, population centers, cost, and minimization of potential public, cultural and environmental impacts. To the extent feasible, Dakota Access avoids routes that cross federal, state, tribal trust and environmentally sensitive lands and



features and does not trigger any Environmental Justice concerns, for instance as compared with crossing to the north of Bismarck, North Dakota. See Environmental Assessment (“EA”) prepared by the U.S. Army Corps of Engineers at:

<http://www.nwo.usace.army.mil/Missions/Civil-Works/Planning/Project-Reports/Article/633496/dakota-access-pipeline-environmental-assessment/>.

40) Route planning concluded that the preferred and most environmentally protective route would co-locate with existing linear utility features, such as transmission lines and the Northern Border Pipeline corridor to the greatest extent practical in order to minimize new land disturbance and maximize public safety benefits from co-locating with utility infrastructure. After many months of route planning, DAPL identified landowners for each tract of land as the initial route was refined and the construction alignment finalized. Landowners were asked for permission to conduct civil, cultural and environmental surveys. Following more detailed engineering, DAPL began acquisition of easements in November 2014 for all states except Iowa, which began in February 2015.

41) DAPL has identified 3,686 tracts of property along the approximately 1,172 mile route. DAPL has acquired or is finalizing acquisition of 100% of the private land rights along the route.

42) In addition to any specific public notice initiated by federal, state or local agencies with jurisdiction over DAPL, Dakota Access has implemented a public outreach and consultation programs, which include:

- a) A Public Awareness Program that meets and exceeds industry (American Petroleum Institute Recommended Practice 1162) and federal (49 CFR 195.440) requirements

addressed to the affected publics, local public officials, emergency officials, and excavators,

- b) DAPL has consulted with and coordinated with all state and Federal resource agencies regarding sensitive ecological resources including wetlands, sensitive vegetation, wildlife, and endangered and threatened species, many of which have been the subject of public review in state and federal open forums and documents.
- c) DAPL was amenable to the sharing of the Federal Response Plan as appropriate with Standing Rock Sioux tribal authorities and responding to its comments on the Plan, including notification contacts.
- d) Dakota Access offered access to all the known, federally recognized tribes interested in conducting cultural resource surveys, which resulted in project changes to avoid, mitigate and minimize impacts during the design stages. Dakota Access made multiple offers, met with interested tribes on three different occasions and communicated with each known interested tribe to solicit their input into the routing. However, no tribes (except the Osage Nation) proactively accepted the offer until late in the final steps of the permitting process and in fact only three tribes, the Osage Nation, Upper Sioux, and the Northern Arapaho agreed to do surveys at the PCN areas and only three tribes accepted our proposal to survey non-PCN areas – Three Affiliated Tribes, Osage Nation and Northern Arapaho.
- e) DAPL has developed, provided copies of, accepted comments from and modified its Unanticipated Discovery Plan in coordination with the various tribes who provided

comments, and in coordination with the various state and federal agencies to protect cultural resources during construction.

- f) DAPL has agreed, in coordination with the USACE and in compliance with the Nationwide Permit and other Federal approvals, to allow the various tribes to provide tribal member monitors during construction, which for instance, includes participation by the Tribal Historic Preservation Officer for the Standing Rock Sioux Tribe. This opportunity to monitor includes non-PCN areas where DAPL and the specific tribes have agreed to monitor non-jurisdictional or permitted areas.
- g) DAPL has funded and hosted three tribal consultation meetings to disseminate information and address the concerns of tribes and offered to fund tribal surveys prior to construction.
- h) Dakota Access has conducted cultural resource surveys along 76.5% of the project route, which includes all waters of the U.S. (inclusive of all PCN areas) and all areas where an agency, regulation or any of the many archaeological consultants identified an area as having the potential to contain cultural resources (this included 100% of all work areas in North and South Dakota, 42.3% in Iowa and 45.8% in Illinois).
- i) During this outreach over a period of 25 months, Dakota Access has listened to, addressed and accommodated most concerns.

43) With minor exceptions, the vast majority of the public and public officials who have expressed a view generally support or have approved the project.

**DAPL STATUS**

44) Dakota Access designed, is building and will eventually operate DAPL in compliance, and often in excess of all local, state and federal laws and regulations and any safety requirements. DAPL has hired the best and most experienced engineering design firms, has bought the best and highest standard materials on the market (also which are mostly domestically produced, fabricated, manufactured and supplied), has engaged the most experienced contractors in the business and along with some of the most well-trained, and experienced employees in the market providing for the safest pipeline in the industry.

45) Contractors have been selected and contracted to complete survey work; construct the pipeline; conduct environmental, archeological, craft, weld testing and other inspections; and provide spill response planning and other project related services. Contractors were screened based on ETP standards and industry safety and experience. Major construction and service firms already hired directly by Dakota Access and under contract include: 2 general contractors and 5 national craft unions to construct a total of nine pipeline spreads, pumping stations and associated facilities. In addition, monitors and inspectors are on site to assure construction quality and environmental, archeological and cultural resource protection, along with specialized testing organizations to independently test and document weld quality and complete hydrostatic pressure tests of the DAPL pipeline. In turn, those contractors and consultants have hired dozens of subcontractors from the local area and region. Approximately 10,000 U.S. jobs are involved in the construction of DAPL. In addition, there are multiple state and county inspectors across each state providing inspection and monitoring of the project construction to insure compliance with the state or local permits, rules and regulations and any project specific plans and procedures

approved by the various local and state authorities. Additionally, the Department of Transportation via the Pipeline Hazardous Materials Safety Administration is actively inspecting the materials and construction of the pipeline on a frequent and constant basis and will oversee the operations and maintenance once the pipeline goes into service.

46) Within the United States, there are a limited number of general contractors and workers qualified to complete large diameter pipeline construction, including both union and non-union work forces. Dakota Access has made commitments to the various trades who are part of the National Pipeline Agreement to build the pipeline, plus one additional national union. The labor unions involved with DAPL are the International Brotherhood of Teamsters, Laborers International Union of North America, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, International Brotherhood of Electrical Workers and International Union of Operating Engineers. Generally, the contractors provide approximately 50% of the workers from their own employee base and about 50% of the workers are hired from respective local union halls.

47) Dakota Access began construction of private portions of the DAPL Pipeline on May 16, 2016 in non-Preconstruction Notification areas (*i.e.*, non-NWP PCN and dryland private lands) following the receipt of the key local and state permits and just recently in the remaining PCN locations following the issuance of the USACE permits and verifications. Federal jurisdiction areas requiring advanced notice and receipt of the required authorization were not impacted until receipt of the relevant federal permit, easement or verification. For example, Dakota Access has temporarily agreed not to commence the HDD under Lake Oahe until this

court rules in this preliminary injunction proceeding on August 24, 2016, which based upon the 90 to 120 day schedule to execute the HDD, is a significant concession.

48) Enjoining DAPL construction while the court determines if the overall USACE regulatory program has a flaw would be an unfair decision isolating DAPL from the hundreds of thousands of projects that have been constructed or are currently working under the same premise and guidelines under NWP 12. An injunction would cause unjust, irreparable harm and damage not only to the thousands of people receiving their incomes from DAPL project work, the entire U.S. from an energy supply and security standpoint and the owners of DAPL, but to the entire U.S. societal infrastructure by denying this Congressionally provided for streamlined permitting mechanism for future roads and water, cable, transmission, oil, gas and similar utility corridors. An injunction against DAPL would necessitate revoking or rescinding all verified and programmatic NWPs creating a national state of non-compliance and a work stoppage on various infrastructure projects and lawful activities across the entire United States.

49) At this time, DAPL has concluded roughly 45% of construction.

50) Nearly \$1 billion in materials have been secured and are located on-site across the 1,172 miles of the system, being or ready to be installed. Total project spending through August 1, 2016 is approximately \$1.96 billion.

51) To complete construction by the January 1, 2017, in-service date, installation work must continue. Land reclamation activities will continue to meet landowner and permit requirements. Construction generally is occurring six days per week for a minimum of ten hours per day or as long as possible each day, but has been delayed for 5 months on properties with a federal nexus due to supplemental tribal coordination process implementation. The continued

delay is unacceptable and is unfair as DAPL has attempted in every manner to work with, educate, consult, coordinate and share any type of information with the tribes and has proven via detailed surveys and consultation with the states and the USACE that no impacts will occur that have not been otherwise permitted or mitigated through the legal and coordination process under § 106 of the National Historic Preservation Act or under state law.

52) As of this date, approximately 8,000 workers are currently in the field, which continues to ramp up daily and overall the project will employ approximately 10,000 people over the course of the job.

53) DAPL also is generating indirect economic stimulus and support jobs in local communities catering to the construction effort, such as food, hospitality and transport. With the majority of workers moving around up and down the job, they are spending their income on goods and services in the various communities traversed along the route. Couple this spending with the tax revenues from the income taxes and taxes on materials, the communities and states traversed by the project are benefiting from the influx of many millions of dollars into their communities. These benefits would simply cease if the project was suspended or stopped and each and every person, the communities and the states would be financially harmed immediately and permanently.

#### **IMPACTS FROM AN INJUNCTION**

54) Each remaining calendar day is vital to timely construction of the DAPL pipeline. Supplemental tribal consultation processes, above and beyond the normal and customary process for any nationwide permit, already have delayed project construction for 3 months resulting in

critical path timing at the Lake Oahe crossing. Additionally, project construction delays from a preliminary injunction are extremely costly and follow-on effects could effectively cause project development to cease. *See infra*. A bond to pay for delay costs would be very expensive for Plaintiff, but would be just as a result of the financial impacts that would occur to the multiple owners of the project, the impacts to the thousands of workers, the communities and states traversed by the project, the contractors and all American's who rely upon crude oil, its resulting products, fuels and lubricants utilized every day. The immediate financial damages to DAPL even for a temporary shut-down would be greater than \$430 million plus \$83.3 million per month resulting in damages of \$1.4 billion in the first year, not including the losses on the materials and expenses already spent on the construction, labor and equipment. If for some reason, DAPL was able to carry the cost of construction spreads, staff and equipment on a month-to-month basis to preserve its ability to restart construction, those costs would total \$372 million per month for every month of delay. However, this number would be too great to absorb and therefore the project would have to shut down. This level of economic harm would be direct, irreparable and not recoverable, and would have irreparable harm and damage to DAPL's and ETP's reputation and ability to conduct business in the future. Stopping work at this time is near impossible without causing significant and extreme harm. It would be an infeasible task without grave and irreparable impacts to DAPL, its workers, the landowners, economy, both the state and federal government, and the environment.

55) If a temporary injunction of indefinite term is granted pending consideration of a permanent injunction in the normal course of judicial business, DAPL's construction on the Lake Oahe Corps easement and PCN areas were to be halted, construction of the entire project would



cease, and the project itself jeopardized. It would be prohibitively costly to move people and equipment around outside the current construction schedule, which was created in reliance on long-established Corps permitting and verification procedures.

56) If an injunction is granted, Dakota Access estimates hundreds of deviations from the construction schedule and construction plan would occur, costing \$540,000 in relocation costs for each occurrence of having to move around each USACE jurisdictional feature. For example for the NWP's with PCNs, that could mean 203 permits x \$540,000 totaling \$109,260,000 in direct damages just to move around the PCN areas. DAPL already has had to move around some of these locations that resulted from the previous delay in the project timing from May to July, resulting in direct damages of nearly \$25 million dollars in move around damages. Extend these damages to all USACE jurisdictional areas (in addition to the PCN areas) and the costs are too severe to continue with construction and unfeasible to overcome. The court would be essentially condemning the project with no trial and no evidence of impacts to tribal or cultural properties (conversely there is a mountain of data suggesting and confirming there are no impacts as concurred by the four State Historic Preservation Officers and the USACE archaeologists).

57) An injunction would suggest that all nationwide permits across the entire U.S. would have to be placed on hold or suspended while the court heard and decided this case because if DAPL was suspended after and based upon the approval of the permits in accordance with the USACE policies and procedures of the USACE permitting program, then it would only stand to reason that all nationwide permits that relied upon the same policies and procedures of the USACE would be invalid. Therefore, an injunction decision logically would necessitate that

all existing, in progress and future nationwide permits would have to be suspended while this challenge was heard, resulting in a national non-compliance crisis and disruption to the entire U.S. economy.

58) Construction would come to a halt with jobs, income and union benefits such as healthcare and retirement irretrievably lost to these approximate 10,000 working class families.

59) As of August 1, 2016, Dakota Access has incurred approximately \$2 billion in project development costs. It plans to spend approximately \$3.8 billion to complete project construction. If this Court issues a preliminary injunction, the Dakota Access beneficial owners will incur substantial monetary costs and penalties under the terms of the contracts entered into with unions, other service providers and related project completion agreements and would suffer the loss of resources spent on the materials and equipment purchased to construct the pipeline, all of which would not be recoverable. Currently, DAPL is spending roughly \$1.3 million dollars per spread per day or approximately \$11.7 million dollars per day on contractor labor and equipment and has plans to move this \$14.3 million per day. In the event of a short-term cessation of work, Dakota Access simply could not sustain that cost with no production and without the certainty of capital recovery within the project economic predictions and therefore would cease construction and release the workforce and contractors.

60) In the event of a prolonged work cessation, contractors and equipment would be demobilized. At this point, the project is roughly 45% installed and project construction is advancing by roughly 1% per day with the goal of finishing installation around December 1, 2016 and then going into service January 1, 2017.

61) At this point, it will take as much work and land disturbance, if not more to temporarily stabilize, continuously maintain and protect the right-of-way than it would to finish the pipeline. For the majority of the pipeline length and over 98% in North Dakota and South Dakota, the right-of-way is cleared, graded and the pipe strung along the right-of-way waiting for the trenching activities and welding to occur (which construction is almost 90% complete in North and South Dakota). This means that the soils have been disturbed to the depth of the top soil in most places, roughly 1 to 3 feet below the surface where any cultural features are likely to occur. The only remaining digging activities left would be the actual trenching activities in less than 10% of the project areas in North and South Dakota that would include roughly a 5 to 8 foot wide trench along the remaining lengths of pipeline to depth of an additional 4 to 8 feet deep. Therefore to stop construction now would cause more harm than good and would not prevent any harm. Additionally, nothing to date has been uncovered in North and South Dakota of relevance to any interested parties.

62) In theory, demobilization would first require a very carefully and detailed plan to secure those portions of the route and road/river crossings that have been exposed, road/river crossings where drilling and boring have been initiated and other locations where project impacts have already occurred. Along the mileage where topsoil has been stripped and grading or trenching has begun, there would be significant incremental impact to the environment and landowners. To avoid or reduce such impacts, as part of any demobilization, subsoil and topsoil would need to be replaced and stabilized by re-seeding and implementing additional erosion control measures – all of which require additional capital not available to the project. Additionally, pipe sections would need to be lowered into trenches and trenches refilled. For

safety and other reasons, trenches should not be left open for any length of time to protect the public, wildlife and the environment, but with an injunction these unrecoverable economic and potential harmful impacts would result and the likelihood of safety issues would increase significantly.

63) Resuming work, if feasible, following demobilization would require development of a construction plan based on duration of the shutdown, environmental and landowner “windows” affecting the timing of activities in specific areas, and the availability of the contractors and workers who would have dispersed following an injunction-spawned layoff. If demobilization occurs, it is less than certain that the project will ever re-start.

64) In the majority of the easements, construction must finish within 18 months from starting. If an injunction is imposed, based on a May 16, 2016 start date, DAPL’s rights to construct terminate November 2017 for the majority of the project. In the event of an injunction, prior to restarting DAPL would have to repurchase the permanent or temporary easements, which would be a significant and unpredictable amount of money, to reenter the properties. This is a direct and unrecoverable harm to DAPL and its financial and equity partners.

65) Furthermore, the fields and farms along the route have been compensated for this growing season. A delay or suspension would then require an additional year or more of impact to the farmer and their crop production (2016). This means DAPL would have to compensate the farmers for those additional lost crops and the domestic and international consuming public of agricultural commodities would not have the benefit of those crops to purchase. This harm would be permanent and unrecoverable and would be approximately \$70 million (assuming the easements can be renewed).

66) The incremental cost (over and above project budget) to demobilize and then (once an injunction is lifted) to remobilize contractors, equipment and workers is estimated to have an approximate cost of at least \$200 million. This cost is inclusive of fixed costs for contract terminations and cancellation of service and supply contracts; completion of activities required to stabilize the right-of-way, roadways and river crossings; additional measures required to place an additional coating on the pipe to prevent ultraviolet degradation, application of corrosion inhibitor systems and payment of additional incremental crop damages; maintenance of the idle pipeline and facilities; and, the incremental cost expected to be incurred to enter into new contracts for qualified pipeline construction firms, inspectors and other services . These costs cannot be recovered. This estimate of the incremental cost is based on DAPL's knowledge of the higher bids of non-successful potential contractors not selected for this contract or delay and unit price items included in the existing contracts.

67) Dakota Access has spent many months in a competitive bidding process with General Contractors for the DAPL project and remobilization would not allow a similar competitive bidding process. Instead, a remobilization designed to re-commence work as swiftly as possible would require that construction services be secured through a negotiated contract price process. Contractors would be presumed to escalate their previous estimates due to the higher costs of remobilizing an extensive, full line of equipment in a shorter timeframe and hiring key workers in a much compressed timeframe *e.g.*, some major equipment now required to be leased at higher costs, premium paid to supervisory or key skilled trades to entice them back to the job and away from some other job they may then be on.

68) The additional “variable” costs per month of delay caused by an injunction include: (1) \$1.5 million per month to establish crews to maintain environmental controls at the worksites, inspect those worksites, maintain leases for field offices and pipe yards, and assure security of the facilities; and (2) a cost of capital expense of \$3 million per month. Further, \$15.5 million would be required to reacquire the project lending instrument. These costs cannot be recovered.

69) DAPL’s beneficial owners earn revenue based on negotiated terms for each barrel transported. Based on contracts negotiated with DAPL shippers and volumes that will be transported for other shippers, Dakota Access estimates that delay in initiation of DAPL operations will result in a 2017 revenue loss to its partners and the investing public of approximately \$913 million, rising to over \$1 billion in 2018, and increasing each year thereafter. These costs cannot be recovered.

70) In connection with its long-term transportation contracts with 9 committed shippers, Dakota Access has committed to complete, test and have DAPL in service by January 1, 2017. The long-term transportation contracts give shippers a right to terminate their commitments if DAPL is not in full service per the contract deadline. Meanwhile, faced with an uncertain delay, shippers would need to determine alternative sources for secure, reliable transportation of crude oil supplies to the refineries. These costs cannot be recovered and loss of shippers to the project could effectively result in project cancellation.

71) In addition, there are downstream losses to the beneficial owners of DAPL and other producers and shippers from the loss of: crude to other transportation and refining facilities; infrastructure costs to connect to DAPL; Bakken production due to the transport

economics of DAPL; royalty revenue to mineral owners, including the U.S. from lost production and lower market prices for Bakken supply absent DAPL; and, greater environmental health and safety risk due to increased reliance on rail and truck transport. These costs cannot be recovered. In addition to the impacts to the beneficial owners and users of DAPL, a workforce of approximately 10,000 people will face layoffs and associated adverse impacts. *See, e.g.*, Ex. D to Dakota Access LLC's Opposition to Plaintiff's Motion for Preliminary Injunction ("Opposition"), Decl. of Tom D. Gross on behalf of the United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of the United States and Canada; Ex. E to Opposition, Decl. of Mark Maher on behalf of the International Union of Operating Engineers; Ex. F to Opposition, Decl. of Robert Poteete on behalf of Precision Pipeline, LLC; Ex. G to Opposition, Decl. of Perry Schuldhaus on behalf of Enbridge Energy Partners, L.P. and Enbridge Holdings (DakTex) L.L.C.; Ex. H to Opposition, Decl. of Ross Eisenberg on behalf of the National Association of Manufacturers; Ex. I to Opposition, Decl. of Gregory Davis on behalf of the Laborers International Union of North America; Ex. J to Opposition, Aff. of Marion Davis on behalf of the International Brotherhood of Teamsters. These are highly paid construction jobs where laborers, equipment operators, welders, and environmental inspectors earn fully loaded wages of between \$53 and \$105 per hour and expect significant overtime hours during the six day/week - ten hour/day work schedule for much of the construction period. Many workers also qualify for a per diem for lodging and food. While it is feasible some of these workers could be hired to work construction jobs in other areas on other jobs that is not always possible because the pipeline workforce is so specialized and there are few large infrastructure or building projects that would absorb this many workers. Once forgone, income to these families is lost forever.

Thus, many would need to travel far from home to find work and many likely would face unemployment. Moreover, these jobs offer lucrative benefits, unlike most trade jobs in the current economy.

72) The construction process occurs in an assembly line fashion to minimize the time from grading to reclamation, which in turn minimizes the potential for environmental impacts. With the clearing, grading, trenching, pipe laying and welding portions of the construction sequence well underway, there already is significant mileage that has exposed soils and open excavations, and an injunction ordering work cessation would pose significant additional cost and incremental risk to the environment. For example, rain events during a shut down without proper man power and equipment to maintain those areas similar to conditions during construction could result in unnecessary sedimentation to wetlands and streams and impacts to wildlife and other environmental resources. This could mean impacts to off right-of-way cultural features that were specifically avoided by routing but could be impacted by the unsecured erosion and sedimentation resulting from a work stoppage.

73) Should this Court impose an injunction, there are also incremental impacts to landowners beyond those included in construction planning, mitigation and landowner damage settlements. Specifically, delay could defer construction to the peak of harvest in some areas and an injunction would significantly prolong the time that landowners, tenant farmers and the community need to be inconvenienced in having to work around construction in their communities that already has begun. Dakota Access has assured or established access points to fields and detours around construction prolong these temporary effects, especially to farmers.



Delays would impact these people which would ultimately delay or impact their ability to grow, harvest and sell their crop commodities.

74) Landowner and land use practices vary greatly across the 3,686 tracts of private land, and in many cases, special landowner accommodations have been made based on the current local construction schedule. For example, we are contractually obligated to complete construction by a certain date to accommodate agricultural practices for specialized seed in Illinois. If construction is delayed and reclamation is not completed this fall, next year's planting is likely to be delayed, which would jeopardize existing contracts. These damages would total \$4.5 million in damages for specialty seed contracts in Illinois alone. In another example, Dakota Access agreed to adjust its construction schedule to accommodate duck hunting in Illinois by agreeing to complete construction by a certain date to facilitate flooding the fields. If this obligation is not met, DAPL would be exposed to a \$3 million penalty. In addition to Illinois individual landowner damages, DAPL has multiple site-specific or individual provisions located across the remaining three states. For example in North Dakota, there are many tracts that have "completed-by" requirements that if DAPL is not completed with construction by the end of 2017, DAPL would suffer approximately \$4.3 million in damage payments to the landowners. Numerous other site-specific examples are factored into the current construction and tract-specific timing schedules now underway and a delay would result in missed commitments, lost revenue and substantial financial damages in the millions of dollars. A delay in construction now would make it impossible to meet the January 1, 2017 in-service date and risk inordinate, non-recompensable financial harm to the beneficial owners of DAPL and downstream industry participants, which directly, negatively impacts the American public

75) There also would be significant economic impacts to the communities and the public. DAPL represents a significant new asset that will be subject to property tax revenues in four states and potentially on certain prospective tribal trust lands. Specifically, annual property tax revenues in the four states are estimated, following consultation with respective taxing authorities, to be approximately \$55 million dollars. In addition to property tax, the mobilization of workers already has resulted in sales tax benefits to local and state governments as supplies, fuel, supplies, lodging, food, expendables and services are purchased from local business owners. While Dakota Access cannot speak for the states, I am aware, based on my discussions with elected officials over the last three years that the incremental property and sales/use tax revenues are welcome. The local spending from the project construction also contributes to the ongoing economic recovery. A delay in construction of DAPL has an immediate, direct and negative impact on the local economies of the states through which pipeline passes. In addition to consumption related taxes, each state and local community would suffer from the loss of income tax on the pipeline as it would not go into operation and therefore the states and local jurisdictions would only be able to assess a pro-rata amount of property tax on the pipeline based upon the depreciated value of the material instead of the actual revenue tax methodologies often utilized by the states to determine property tax on pipelines. This would be an irreparable harm to the states and local communities that could not be recovered.

76) In some cases, an injunction will cause workers from out-of-town to vacate their temporary housing and return home. Thus, local communities now experiencing the economic benefits of housing, feeding, and supplying workers, their families, and suppliers will be

adversely impacted. While Dakota Access was not required to complete an economic impact analysis for DAPL as a whole, during the proceedings before the state utility commissions, it engaged with economists to use commonly accepted economic input-output models. These models predicted the trickle down of local investments such as new workers hired by the hotel and hospitality industry or other jobs indirectly created as workers spend earnings and landowners spend payments received for acquisition of an easement. These economics suggest that for every dollar spent on the project roughly \$5 is generated across the U.S. and for each \$1 million invested in DAPL, there would be 2.6 new direct and indirect jobs created. These jobs and benefits would be lost and could be lost forever if DAPL were suspended and potentially terminated over the suspension.

77) Additional injunction-induced damages would result from the cost to crude producers and shippers and to society due to lower royalty income, reduced tax revenue and related to higher costs for interim shipping options and the attendant environmental and spill risks. Based upon the statistics of pipeline to rail or truck transportation methods, the incremental safety hazards of the alternate methods of transportation would increase 3.4 to 4.5 times with rail and 34 times with trucking, significantly increasing the potential harm, damage and safety to the public. This impact can simply be avoided by the construction and operation of this pipeline by removing the 5 to 7 unit trains of crude oil per day or the 200 plus trucks that would be removed from the roads each day.

**DUE PROCESS AND THE RULE OF LAW**

78) Throughout project development, which includes permitting the pipeline, Dakota Access has relied upon the current laws and regulations that govern the siting, routing and construction requirements of crude oil pipelines. Dakota Access made good faith decisions based upon the law to deploy precious capital and invest over \$3.8 billion dollars on a project that connects domestic crude oil supplies to domestic refineries for public consumption.

79) In all respects, DAPL has followed the laws and has relied upon the agencies with permitting authority to insure that the permits they have issued are valid and have been issued in accordance with governing regulations and laws. In this particular matter, DAPL relied upon the USACE and the Nationwide Permit program to make informed decisions. Any applicant should have the confidence that once a permit is issued it would remain valid unless the applicant violated the conditions or terms of the permit. For example, Dakota Access worked closely with the USACE to identify the preconstruction notification locations as well as to clearly identify the extent of the action area for which the nationwide permit preconstruction notification area would cover. Based upon those planning steps, Dakota Access made significant and substantial business decisions to deploy the resources to begin construction of the pipeline after 18 months of permitting with the USACE as well as spending more than 24 months (since June of 2014) working with all the various interested parties. Construction in lawful, duly authorized areas in accordance with the terms of the various permits that have issued is not wrong-doing in any sense, as DAPL has been accused of, but rather consistent with the law, due process and good economic stewardship of investor financial resources deployed in permitting this project. Billions of dollars have been invested into a U.S. energy infrastructure project that all Americans, even

the opponents of this project, materially benefit from once it is placed into service. Anything to the contrary would result in a flight of capital from deserving projects in the U.S. and invalidation of the USACE and U.S. regulatory processes.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate.

Executed on this 18<sup>th</sup> day of August, 2016.

  
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Joey Mahmoud