EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, v. U.S. ARMY CORPS OF ENGINEERS, Defendant-Cross-Defendant and DAKOTA ACCESS, LLP, Defendant-Intervenor-Cross-Claimant.	Civil No: 1:16-cv-01534-JEB (Consolidated with 1:16-cv-01796 and 1:17-cv-00267)

BRIEF OF *AMICUS CURIAE* NORTH DAKOTA PETROLEUM COUNCIL IN OPPOSITION TO VACATUR ON REMAND

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[1] Authorities on which *Amicus Curiae* chiefly rely are marked with an asterisk.

STATEMENT OF INTEREST AND INTRODUCTION

Amicus Curiae, North Dakota Petroleum Council ("NDPC"), is a trade association representing more than 500 companies involved in all aspects of the oil and gas industry in North Dakota, South Dakota, and the Rocky Mountain Region.[2] North Dakota ranks second nationally in oil production, and NDPC members produce approximately 98 percent of the oil in North Dakota. Established in 1952, the NDPC's mission includes promoting and enhancing the discovery, development, production, transportation, refining, conservation, and marketing of oil and gas; promoting opportunities for open discussion, lawful interchange of information, and education concerning the petroleum industry; and accumulating and disseminating information concerning the petroleum industry to foster the best interests of the public and industry.

This brief was authored in whole by counsel for the NDPC and is filed pursuant to LCvR 7(o). No other party, party's counsel, or any person other than the NDPC contributed money to fund the preparation or submission of this brief.

The Court ordered litigants in this matter to submit briefing on the appropriateness of remanding the U.S. Army Corps of Engineers' ("U.S. Army Corps'") Environmental Assessment ("EA") with or without vacatur pursuant to the factors contained in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-151 (D.C. Cir. 1993). *See* ECF No. 238, Order; ECF No. 239, Mem. Op. at 67. "The 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.'" *Allied-Signal*, 988 F.2d 146, at 150-151 (citing *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)); *see* Mem. Op., *supra* at 67.

[2] Energy Transfer Partners, L.P. is a member of the NDPC, but was not involved in the drafting of this brief or any associated pleadings.

This Court recognizes that vacatur of the U.S. Army Corps' EA "would carry serious consequences that a court should not lightly impose." Mem. Op. *supra* at 66. The NDPC submits this brief as *Amicus Curiae* to specifically address the second *Allied-Signal* factor, and to provide the Court with additional information on the disruptive consequences that will directly impact North Dakota oil producers should the Court order vacatur and require the shutdown of the Dakota Access Pipeline ("DAPL").

ARGUMENT

I. Vacatur is not appropriate because of the disruptive consequences that will result from shutting down DAPL even temporarily.

The Executive Director of the North Dakota Pipeline Authority articulated DAPL's significance to North Dakota in a July 6, 2017 radio interview, noting that "the Bakken has always been transportation-challenged and since 2008 we have had inadequate pipeline capacity, meaning the oil production levels were higher than the state's pipeline infrastructure was able to carry." *What's on Your Mind?* Interview by Scott Hennen with Justin Kringstad, Executive Director, North Dakota Pipeline Authority (KFYR radio broadcast July 6, 2017) (hereinafter "Kringstad Interview"), *available at* http://cdn1.gcnlive.com/cache/gcn_archives/handoff.php?1=WhatsOnYourMind&2=2017/jul17/WhatsOnYourMind/0706172.mp3&3=WhatsOnYourMindJul062017Hour2.mp3&4=0&4code=0&4hour=0&4date=0. As a result, North Dakota experienced "very steep price discounts in the past, sometimes [a] twenty-plus dollar discount for North Dakota oil compared to other benchmarks around the U.S." *Id*. The completion of DAPL marked the first time that North Dakota and this region have enjoyed adequate pipeline capacity. *Id*.

In a public statement released on his first day in office, North Dakota's newly elected Governor likewise emphasized DAPL's importance to North Dakota:

> I support the legal completion of this pipeline. Make no mistake, this infrastructure is good for our economy. And it's the safest way to transport North Dakota products. Failure to finish it would send a chilling signal to those in any industry who wish to invest in our state and play by the rules.

Governor Doug Burgum, Address on First Day in Office, YouTube (December 15, 2016), https://www.youtube.com/watch?v=MfYO9eYaGt4. Although this message was released before the completion of the line, it underscores the line's importance to the state.

Even a temporary shutdown of DAPL would visit enormous disruptive consequences upon North Dakota's oil and gas industry, including the NDPC's membership, and the state as a whole. The harms to oil producers fall into three primary categories: 1) the sudden shift in crude oil logistics would likely cause a temporary loss of production volumes; 2) producers would bear significant costs in mobilizing alternative transportation by rail; and 3) a shutdown would harm North Dakota's crude oil market, which would, in turn, harm NDPC members, untold thousands of royalty owners, and North Dakota citizens.

A. Shutting down DAPL would likely cause a temporary loss of production volumes that could threaten damage to affected wells.

Shutting down the pipeline would disrupt the delivery and transportation of crude oil in the state. It would necessitate a sudden shift in crude oil logistics, requiring the immediate mobilization of dozens of unit trains[3] to accommodate production currently committed to DAPL. Based on their knowledge of crude oil logistics in North Dakota, NDPC members estimate that 75 unit trains would need to be mobilized to cope with a DAPL shutdown. After DAPL went into service, many producers and the purchasers of their oil ceased transporting via rail, which

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[3] "Unit trains" are long trains consisting of a single commodity, which often use dedicated equipment and generally follow direct shipping routes to and from facilities designed to load and unload them efficiently. Association of American Railroads, *U.S. Rail Crude Oil Traffic*, https://www.aar.org/BackgroundPapers/US%20Rail%20Crude%20Oil%20Traffic.pdf. Oil commonly travels in shipments of approximately 60,000 barrels on unit trains of 100 cars.

reduced the demand for rail service in North Dakota. The excess train cars are now either servicing other states or stored in rail storage locations, most of which are outside North Dakota. Any disruption in service to DAPL would therefore require a large-scale rail mobilization consisting of rail cars, engines, crews, and associated administrative support.

This mobilization of trains would carry with it the likelihood of lost production as producers scrambled to find alternative transportation sources. NDPC members believe it would take at least several weeks to mobilize the rail cars and staff the personnel necessary to accommodate the volume currently carried by DAPL, and there is no guarantee that sufficient rail resources would be available in the near term. While this shift to rail transportation occurred, producers facing transportation constraints would have no choice but to choke back production. In addition, the sudden shift in rail volumes would likely cause rail congestion within the state. NDPC members expect they would be required to defer some production due to train back-up and bunching.

To defer production, producers could be forced to shut in or curtail Bakken wells. Operators avoid shut-ins as much as possible because a shut-in carries some risk of damaging the affected wells and may require expensive "reworking operations" to bring the shut-in wells back into production at the same levels experienced before the shut-in. Due to the density of the Bakken formation, all wells in the Bakken shale are completed by the hydraulic fracture technique. The Society of Petroleum Engineers has concluded in several studies that repeated stress cycles caused by shut-ins may cause reservoir damage.[4] For instance, a 2013 study of 280

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[4] *See e.g.,* S. A. Holdltch & D. M. Blakeley, *Flow Characteristics of Hydraulic Fracture Proppants Subjected to Repeated Production Cycles*, SPE 1909l, Feb. 1992; J. Terracina, *Effects of Proppant Selection on Shale Fracture Treatments*, JPT Update, May 2011; J. W. Crafton & S. L. Noe, *Impact of Delays and Shut-Ins on Well Productivity*, SPE 165705, 2013 (on file with counsel for the NDPC).

wells in multiple basins concluded, among other things, that: (1) delay from the end of [hydraulic fracture] stimulation until first production is detrimental; (2) once on production, the longer that production period can be sustained, the greater the benefit to the reservoir/wellbore connectivity; (3) shut-in related damage continues to accrue during subsequent shut-in events; (4) the duration of the shut-in has no obvious correlation to the severity of the damage arising from the shut-in; and (5) excessively rapid reduction of the wellhead flowing pressure is detrimental to maintaining good reservoir/well connectivity.[5]

To be clear, the NDPC is not suggesting that a temporary shutdown of DAPL would risk damage to the entire Bakken reservoir within the State. Importantly, however, it is well-established practice for operators to shut in wells only for necessary operational requirements, to reduce the risks of reservoir damage and unnecessary reworking costs. In short, a DAPL shutdown would threaten both temporary losses of production and the potential of damage or reworking expenses for affected wells.

B. Shutting down DAPL would impose significant costs for mobilizing alternative rail transportation.

In addition to the likelihood of lost production, North Dakota oil companies would face the substantial costs of a large-scale rail mobilization. Mobilizing parked trains would entail inspection fees, maintenance updates, and switching out of (and eventually back into) the rail yards currently storing out-of-use train cars. For example, estimating $100.00 per car per switch and $2,500.00 per car for transportation, mobilizing 75 unit trains of 100 cars each would cost North Dakota producers approximately $20 million, before accounting for variable maintenance updates and inspection fees. This is not to mention the untold burden to be borne by employees

[5] Crafton & Noe, *supra* at note 3.

of North Dakota producers who would be asked to manage the logistical nightmare that would ensue.

Moving from pipeline back to rail would also impose heightened transportation fees on North Dakota producers for the duration of the DAPL shutdown. Conservatively, NDPC members believe this shift would cost at least an additional $3.00 per barrel in transportation fees for oil shifted from DAPL to rail, comparing recent rail costs to load, transport, and unload crude oil to the same Gulf of Mexico markets accessible by DAPL. And the differential could be much higher, especially if producers are forced to compete for inadequate rail resources following a shutdown. Even applying the $3.00 per barrel figure and assuming it were necessary to shift just 250,000 barrels of oil per day from DAPL to rail, these increased transportation costs would total approximately $23 million per month for North Dakota producers.

Finally, the initial shut-down of DAPL would likely leave some producers unable to deliver promised volumes to refinery customers in DAPL-serviced markets. As the refiners scramble to replace the volumes from alternative, non-North Dakota sources, North Dakota producers would need to re-market these volumes to alternative buyers. Based on their experience in re-marketing crude oil following logistical failures, NDPC members would expect an additional loss of $.50 to $1.00 per barrel in sales prices for these "distressed" crude sales.

C. Shutting down DAPL would harm North Dakota's crude oil market.

Lastly, and most broadly, shutting down DAPL would harm North Dakota's crude oil market, immediately and for the duration of the shut-down. Both industry members and North Dakota officials familiar with North Dakota's crude oil market agree that the reduction in costs and increase in competition resulting from DAPL will buoy the market price for all North Dakota crude oil, both that shipped on DAPL and that shipped by other means. The North Dakota Pipeline Authority, for example, estimates this impact at $1.00 to $2.00 per barrel. S*ee*

Kringstad Interview, *supra*. This estimate, given that North Dakota produces approximately 1 million barrels of crude oil per day, translates to $30 million to $60 million per month in gross value. *See* North Dakota Industrial Commission, Monthly Production Report Index, https://www.dmr.nd.gov/oilgas/mprindex.asp. Producers would also lose a great deal of operational flexibility if DAPL were subtracted from their transportation options, a burden which is difficult to quantify but nonetheless harmful to the industry and the market for North Dakota oil. If North Dakota loses the transportation certainty provided by DAPL, it will revert to a transportation-challenged market.

North Dakota's producers enjoy the benefits of DAPL, but so do untold thousands of royalty owners, including individuals, non-profits, small communities, and the state's school trust—all of whom own mineral rights in North Dakota—as well as North Dakota citizens, all of whom benefit from government programs funded by state royalties and oil taxes. North Dakota's tax commissioner has estimated that DAPL's impact on tax revenues alone may boost North Dakota's tax revenues up to $100 million per year, or over $8 million per month, while The Associated Press puts the number at $110 million per year, estimating $100 million in oil taxes from higher crude prices and $10 million in North Dakota property taxes. *See* Amy Dalrymple, *ND Could Gain Up To $100M A Year From Dakota Access*, Oil Patch Dispatch, Mar. 3, 2017, https://oilpatchdispatch.areavoices.com/2017/03/03/nd-could-gain-up-to-100m-a-year-from-dakota-access/; *Taxes Could Flow with Dakota Access Pipeline*, Associated Press, Mar. 2, 2017, https://apnews.com/7a3f5295e638414fb637e180133226c8/ap-exclusive-taxes-could-flow-dakota-access-pipeline.

Indeed, North Dakota officials have echoed the NDPC's concerns regarding a DAPL shutdown. In the recent interview cited above, the Executive Director of the North Dakota

Pipeline Authority acknowledged the proceedings currently before this Court and warned that a DAPL shut-down "would [have] a very significant impact on the region." Kringstad Interview, *supra*. He explained that "it's not something [where] they can just flip the switch and say we are going to move from this system to rail network" because the crews and railcars necessary to carry the production "may not be readily available." *Id*. He concluded that "there definitely would be an operational impact, there definitely would be a financial impact to the State in the event that the system was shut down." *Id*.

CONCLUSION

Shutting down DAPL during the remand in this case would pull the rug out from under the North Dakota oil industry and also would harm the state's royalty owners and all of its citizens. The NDPC therefore urges the Court to avoid the highly disruptive effects of a DAPL shutdown, and respectfully requests that the Court order that the remand proceed without vacatur.

Dated this 17th day of July, 2017.

Respectfully Submitted,

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