IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, *Plaintiff*, *v.* **U.S. ARMY CORPS OF ENGINEERS; MICHAEL L. CONNOR; ROBERT NEWBAUER; GEOFF VAN EPPS**, *Defendants,* **STATE OF NORTH DAKOTA** *Intervenor-Defendant,* **STATE OF IOWA, STATE OF GEORGIA, STATE OF INDIANA, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, STATE OF MISSOURI, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TEXAS, and STATE OF WEST VIRGINIA,** *Proposed Intervenors-Defendants.*	§	**Case No. 1:24-cv-02905-JEB**

STATE OF IOWA, STATE OF GEORGIA, STATE OF INDIANA, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, STATE OF MISSOURI, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TEXAS, AND STATE OF WEST VIRGINIA'S MOTION TO INTERVENE AS INTERVENORS-DEFENDANTS

Pursuant to Federal Rule of Civil Procedure 24 and D.D.C. Local Rule 7(j), the States of Iowa, Georgia, Indiana, Kentucky, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, and West Virginia submit this Motion to Intervene as Intervenors-Defendants.

The States ask the Court to grant their motion to intervene as of right under Fed. R. Civ. P. 24(a)(2), or alternatively grant permissive intervention under Fed. R. Civ. P. 24(b)(1)(B).

In accordance with Local Rule 7(m), undersigned counsel has conferred with Counsel for Plaintiff, Counsel for Defendants, and Counsel for Intervenor-Defendant. Plaintiff takes no position on the filing until the intervention is reviewed after filing, Defendants take no position on the filing until the intervention is reviewed after filing, and Intervenor-Defendant does not oppose.

The States will answer or otherwise respond to Plaintiff's complaint on the same schedule as Defendants and Intervenor-Defendant.

As shown in the attached Memorandum, the States seek to participate in this matter to protect significant sovereign, environmental, and economic interests that are threatened by Plaintiff's lawsuit seeking to enjoin operation of the Dakota Access Pipeline.

Date: December 16, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of December 2024, a true and correct copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ Eric H. Wessan

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MEMORANDUM IN SUPPORT OF STATE OF IOWA, STATE OF GEORGIA, STATE OF INDIANA, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, STATE OF MISSOURI, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TEXAS, AND STATE OF WEST VIRGINIA'S MOTION TO INTERVENE AS INTERVENORS-DEFENDANTS

INTRODUCTION

Iowa and many of the undersigned States care about providing reasonably priced, healthy food to all Americans. And Iowa, like many of those States, plays an integral role in the national energy economy. Both the availability of safe and healthy food as well as national energy prices are at risk due to Plaintiff Standing Rock Sioux Tribe's ("SRST") unprecedented attack on the Dakota Access Pipeline ("DAPL") that has safely operated for almost a decade.

DAPL plays a vital role in ensuring the nation's crops can come to market—not because DAPL itself transports agricultural products, but because every barrel of oil that DAPL transports is a barrel that does not take space in a truck or a train that does. Whether it is corn, soy, hogs, eggs, or all manner of other safe and healthy food for Americans across the country, before DAPL entered operation transporting those foods to the supermarket was under increasing pressure. North Dakota oil, which itself is a vital good and necessary component to American energy independence and to keeping energy prices low, was flowing across the country. But without DAPL, it was competing with agriculture for space on the long-standing transportation networks. Now, crops, livestock, and oil can flow to where they need to go so that Americans can live with cheap energy and healthy food.

Now the States of Iowa, Georgia, Indiana, Kentucky, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, and West Virginia ("States") move to intervene to ensure that this lawsuit does not unduly interfere with the States' vital sovereign or economic interests related to DAPL and its continued operation.

Before DAPL, competition between oil flowing from the Bakken fields and agricultural products needed to feed—and fuel—the country had reached a crisis point. Rail rates reached highs that were not sustainable for crop production. There were few trucks available to move products. This agricultural crisis in the lead up to DAPL's opening created hard times for vital industries across the country—and raised costs for Americans seeking to enjoy the healthy food grown in the American

heartland. DAPL relieved that pricing pressure by ensuring that the oil from North Dakota could travel safely from North Dakota through South Dakota and Iowa to Illinois, and then on throughout the country and the Gulf Coast. Since then, DAPL has operated safely with no health or safety issues—and has paid millions of dollars in property taxes to municipalities in the States it traverses.

That is why the States now move to intervene as Intervenors-Defendants under Federal Rule of Civil Procedure 24 and D.D.C. Local Rule 7(j). The States have a vital interest in this lawsuit that attempts to stop DAPL's continued safe operation.

The States ask this Court to grant its motion to intervene as of right under Fed. R. Civ. P. 24(a)(2), or alternatively seek permissive intervention under Fed. R. Civ. P. 24(b)(1)(B).[1] By participating in this case, Iowa and the other States can protect their sovereign, environmental, and economic interests, which will be harmed if the Court grants Plaintiff Standing Rock Sioux Tribe's requested relief.

Plaintiff alleges in its Complaint that the U.S. Army Corps of Engineers ("Corps") has violated federal statutes and treaties by allowing Dakota Access to operate DAPL without an easement to cross the Missouri River at Lake Oahe in North Dakota. Among other requests, SRST seeks immediate and permanent injunctive relief to shut DAPL down, which traverses nearly 1,200 miles across four Midwestern states. Many of the Tribe's arguments closely track claims that it already pursued—and lost—to shut down DAPL in a lawsuit filed in this same Court in 2016. *See* Compl., *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-cv-1534 (July 27, 2016).

[1] In accordance with Local Rule 7(m), Iowa conferred with counsel for Plaintiff and Defendants (including intervenors) and regarding Iowa's motion to intervene as of right and Iowa's request for permissive intervention. Plaintiff reserves taking a position on the filing until the intervention motion is reviewed after filing, Defendants similarly reserve taking a position until they review after filing, and Intervenor Defendant does not oppose.

The States are entitled to intervene in this lawsuit as of right because: (1) such motion is timely; (2) the States has legally protectible interests (sovereign, environmental, and economic) relating to the property that is subject to the action; (3) the disposition of the case could impair the -States' ability to protect their interests; and (4) the States interests are not adequately represented by any other party to this proceeding, including the federal defendants or the State of North Dakota. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). And as explained in more detail below, the States can show Article III supporting both intervention as a right and permissive intervention.

Alternatively, the States seeks permissive intervention under Federal Rule of Civil Procedure 24(b). Permissive Intervention is allowed when the movant makes a timely motion and has a claim or defense that shares common questions of law or fact with the questions at issue in the action.

BACKGROUND

1. DAPL is 1,172-miles long and carries Bakken crude from North Dakota, through 274 miles in South Dakota, and through 345 miles in Iowa, delivers the oil to a storage terminal in Patoka, Illinois.

2. Since it commenced operation in June 2017, DAPL has afforded the States significant economic benefits in the form of tax revenue, cheaper prices for agricultural commodities, and greater profits for Iowan farmers and agricultural producers.

3. DAPL has also made Iowa's highways safer, its air cleaner, and industries stronger. The open draft environmental impact statement and DAPL's vacated easement both are vitally important to the States.

4. At issue in the Tribe's complaint is a not-quite-two-mile stretch of DAPL that goes underneath the Missouri River.

5. If DAPL is shut down, the effect will reverberate across the States DAPL traverses and the rest of the country.

6. The Tribe seeks to halt and reverse these benefits by seeking permanent injunctive relief and an order from the court shutting down DAPL. This is not the first time SRST has tried to shut DAPL down—indeed, this Court rejected SRST's earlier attempts. *See, e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 540 F. Supp. 3d 45, 64-65 (D.D.C. 2021).

7. In the earlier case before this Court, the Court denied SRST two preliminary injunctions and a permanent injunction and did not order DAPL to cease operating while the Corps conducted a full environmental analysis under NEPA. *Id.*

8. The Corps continues to engage in that analysis and nothing since the Court's orders in those cases has materially changed the factual landscape regarding DAPL's operations. *See Recent Project Update*, US ARMY CORPS OF ENG'RS, http://bit.ly/4dTHSka (last visited Nov. 20, 2024).

9. On September 8, 2023, the Corps issued the most recent draft environmental impact statement. Iowa provided the Corps with comments on the draft EIS. *See* Brenna Bird, et al., *Re: Dakota Access Pipeline Draft EIS Comments*, EIS No. 20230113 https://perma.cc/9NBV-EHYG (accessed Dec. 3, 2024) (attached hereto as Exhibit A).

10. Representatives of Iowa's—and the States'—robust agricultural industry also filed comments to the EIS. Those comments informed the Corps of the various harms, burdens, and costs the States and its farmers would face should the Corps decline to reissue DAPL's easement.

11. The Corps has not yet issued a final decision or environmental analysis.

12. Yet Plaintiff sued on October 14, 2024, seeking to enjoin the continued operation of DAPL pending the issuance of the Corps' final EIS and decision on DAPL's easement for its crossing at Lake Oahe, North Dakota. *See* Compl. at 1.

ARGUMENT

13. Rule 24 of the Federal Rules of Civil Procedure allows parties, upon timely application, to intervene as of right or permissively. For the below reasons, the States should be allowed to intervene under Rule 24 as of right, or, alternatively, permissively.

14. The States' interests in this litigation are substantial and encompass their sovereign, environmental, and economic interests.

I. THE STATES HAVE STANDING TO INTERVENE.

15. The States have Article III standing because they can show (1) that they will suffer an injury in fact that is concrete and particularized and actual and imminent, (2) there is a causal connection between the injury and the conduct being challenged, and (3) the injury will likely be redressed by a favorable decision. *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 640 F. Supp. 3d 59, 65 (D.D.C. 2022) (citing *Lujan v. Def's of Wildlife*, 504 U.S. 555, 560–61 (1992)).

16. Proposed Intervenor-Defendant State of Iowa is a sovereign State of the United States of America. Iowa brings this suit through its Attorney General, Brenna Bird. She is the chief legal officer of the State of Iowa and ahs the authority to represent the State in federal court. *See* Iowa Code § 13.2

17. Proposed Intervenor-Defendant State of Georgia is a sovereign State of the United States of America. Georgia brings this suit through its Attorney General, Christopher Carr. He is the chief legal officer of the State of Georgia and has the authority to represent the State in federal court.

18. Proposed Intervenor-Defendant State of Indiana is a sovereign State of the United States of America. The Attorney General of Indiana has authority to bring suit on behalf of the State of Indiana. Ind. Code §§ 4-6-2-1, 4-6-3-2(a).

19. Proposed Intervenor-Defendant Commonwealth of Kentucky is a sovereign State of the United States of America. Russell Coleman is the duly-elected Attorney General of the

Commonwealth. He has constitutional, statutory, and common-law authority to bring suit on behalf of the Commonwealth and its citizens. *See* Ky. Rev. Stat. §§ 15.020, 15.255(a), 15.260; *see also Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016).

20. Proposed Intervenor-Defendant State of Louisiana is a sovereign State of the United States of America. Plaintiff Elizabeth B. Murrill is the Attorney General of the State of Louisiana. She is authorized by Louisiana law to sue on the State's behalf. La. Const. art. IV, § 8. Her offices are located at 1885 North Third Street, Baton Rouge, Louisiana 70802.

21. Proposed Intervenor-Defendant Missouri is a sovereign State of the United States of America. Missouri intervenes in this suit through its Attorney General, Andrew Bailey. He is the chief legal officer of the State of Missouri and has the authority to represent Missouri in federal court. Mo. Rev. Stat. § 27.060.

22. Proposed Intervenor-Defendant Montana is a sovereign State of the United States of America. It seeks to vindicate its sovereign, quasi-sovereign, and proprietary interests. Austin Knudsen is the Attorney General of the State of Montana, and he is authorized to bring legal actions to protect the interests of the State of Montana and its citizens. *See* Mont. Const. art VI, §4(4); Mont. Code Ann. §2-15-501.

23. Proposed Intervenor-Defendant Nebraska is a sovereign State of the United States of America. It moves to intervene through its Attorney General, Michael T. Hilgers. The Attorney General of Nebraska is authorized to bring legal actions on behalf of the State and its citizens. Neb. Rev. Stat. § 84-203.

24. Proposed Intervenor-Defendant Oklahoma is a sovereign State of the United States of America. Gentner Drummond is the duly elected Attorney General for the State of Oklahoma. Being "the chief law officer of the state," OKLA. STAT. tit. 74, § 18, General Drummond is

empowered "[to] appear for the state and prosecute and defend all actions and proceedings in any of the federal courts in which the state is interested as a party." Id. at § 18b(A)(2).

25. Proposed Intervenor-Defendant South Carolina is a sovereign State of the United States of America. It sues to vindicate its sovereign, quasi-sovereign, and proprietary interests. South Carolina brings this suit through its attorney general, Alan Wilson. He is the chief legal officer of the state of South Carolina and has the authority to represent South Carolina in federal court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 239-40, 562 S.E.2d 623, 627 (2002) (the South Carolina Attorney General "may institute, conduct and maintain all such suits and *proceedings as he deems* necessary for *the enforcement of the laws of the State*, the *preservation of order*, and the *protection of public rights*.") (quoting *State ex rel. Daniel v. Broad River Power Co.*, 157 S.C. 1, 68, 153 S.E. 537, 569 (1929), *aff'd* 282 U.S. 187 (1930)).

26. Proposed Intervenor-Defendant State of South Dakota is a sovereign State of the United States of America. South Dakota seeks to intervene in this suit through its Attorney General, Marty Jackley. He is the chief legal officer of the State of South Dakota and has the authority to represent the State in federal court.

27. Proposed Intervenor-Defendant State of Texas is a sovereign State of the United States of America. Texas brings this suit through its attorney general Ken Paxton. He is the chief legal officer of the State of Texas and has the authority to represent Texas in civil litigation. Perry v. Del Rio, 67 S.W.3d 85, 92 (Tex. 2011).

28. Proposed Intervenor-Defendant State of West Virginia is a sovereign State of the United States of America. Patrick Morrisey is the Attorney General of the State of West Virginia. The Attorney General "is the State's chief legal officer," *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 107 (W. Va. 2002), and his express statutory duties include "appear[ing] as counsel for the state in all causes pending . . . in any federal court[] in which the state is interested," W. Va. Code § 5-3-2.

29. That said, the States need not separately satisfy Article III's standing requirement; the D.C. Circuit has long held that "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003).

30. As shown below, the States satisfy both the requirements for Article III standing and Rule 24(a).

31. The States will suffer an injury in fact should SRST prevail. Injury in fact results when "a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads Grassroots Pol'y Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 317 (D.C. Cir. 2015).

32. States with significant property, regulatory, and economic interests at stake have standing to intervene. *Ctr. for Biological Diversity*, 640 F. Supp. 3d at 67.

33. The States benefit from the Corps' permission for DAPL to operate, and a decision for Plaintiff would shut down DAPL and impair Iowa's ability to realize important economic and noneconomic benefits.

34. Particular economic and noneconomic benefits are explained in greater detail below.

35. The States can also show that there is a causal connection between the injury and the conduct being challenged, and that the injury will likely be redressed by a favorable decision. The potential harms to the States are fairly traceable to judicial intervention and a decision in the States' favor would prevent them from incurring these harms. *See Red Lake Band Chippewa Indians v. U.S. Army Corps of Eng'rs*, 338 F.R.D. 1, 5 (D.D.C. Jan. 9, 2021).

36. DAPL runs through some of the States, including Iowa and South Dakota. If Plaintiff prevails in enjoining or otherwise prohibiting DAPL's Missouri River crossing those States will have spent significant resources in vain.

37. The Iowa Utilities Board (now Iowa Utilities Commission) approved DAPL's route through the State. That entity is responsible for permitting entities like DAPL seeking to build across Iowa. *See generally* Iowa Code ch. 479B; Iowa Code ch. 476. The Iowa Utilities Commission was the primary permitting authority for DAPL's construction in Iowa. The permitting process was very involved and included significant public involvement. Iowa followed its Iowa Administrative Procedure Act, *see generally* Iowa Code ch. 17A, in approving the necessary permits for DAPL. Now that the pipeline has been in operation, forcing it to shut down, relocate, or otherwise find a new path would require significant reinvestment of resources by Iowa and other affected States.

38. The South Dakota Public Utilities Commission was the primary permitting authority for DAPL's construction in South Dakota. The South Dakota Public Utilities Commission approved DAPL's route through South Dakota, in accordance with its responsibilities under South Dakota Codified Law ch. 49-41B. The permitting process was very involved and included significant public involvement. *See* https://puc.sd.gov/dockets/HydrocarbonPipeline/2014/hp14-002.aspx (last accessed Dec. 9, 2024). Now that the pipeline has been in operation, forcing it to shut down, relocate, or otherwise find a new path would require significant reinvestment of resources by South Dakota.

39. Accordingly, Iowa has standing under Article III.

II. THE STATES ARE ENTITLED TO INTERVENE AS OF RIGHT.

40. Iowa is entitled to intervene as of right because it stands to suffer significant economic consequences if DAPL is forced to shut down. Rule 24(a)(2) provides that "[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Entitlement to intervention as of right:

> depends on the following four factors: (1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or

> transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties.

Fund for Animals, 322 F.3d at 731 (internal quotation marks and citations omitted). Iowa satisfies all four of these requirements.

A. Timeliness.

41. The States' motion is timely.

42. There is no specific deadline for what makes a motion timely. Courts determine timeliness by weighing (1) the time elapsed since the complaint, (2) the purpose for which intervention is sought, (3) the need for intervention as a means for preserving the applicant's rights, and (4) the prejudice to those already in the case. *See Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008).

43. "Whether a motion to intervene is timely made is to be determined from all the circumstances, including the purpose for which intervention is sought . . . and the improbability of prejudice to those already in the case." *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (internal quotation marks omitted).

44. Generally, a motion to intervene is found to be timely when, as is the case here, it is brought at the early stages of the litigation. *See Fund for Animals*, 322 F.3d at 735 (motion timely when made "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer"); *Navistar, Inc. v. Jackson*, 840 F. Supp. 2d 357, 361 (D.D.C. 2012) (motion timely when filed "less than two weeks after Defendants filed their responsive pleadings, and before any discovery or substantive process had been made in the case").

45. Here, SRST filed their most recent Complaint on October 14, 2024, and Iowa's motion comes shortly before the Corps has filed its answer.

46. At present, only the State of North Dakota has moved to intervene, and the court has granted that motion.

47. No briefing has been scheduled nor would there be any prejudice to any existing party should the States promptly intervene at this early stage.

48. Therefore, the States' motion is timely.

B. The States Have Legally Protected Interests at Stake.

49. Iowa is entitled to intervention as of right because of its economic, sovereign, and environmental interests at stake in the outcome of this action. The second requirement for intervention as of right is that the intervenor must demonstrate "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2).

50. To show a cognizable "interest" in the litigation, prospective intervenors must show a "direct and concrete interest that is accorded some degree of legal protection." *Diamond v. Charles*, 476 U.S. 54, 75 (1986) (O'Connor, J., concurring).

51. Courts apply a "liberal approach" in evaluating a proposed intervenor's interest under Rule 24(a). *S. Utah Wilderness v. Norton*, 2002 WL 32617198, *5 (D.D.C. June 28, 2002); *Foster*, 655 F.2d at 1324 ("An intervenor's interest is obvious when he asserts a claim to property that is the subject matter of the suit."); *see also Fund for Animals*, 322 F.3d at 735 (recognizing intervenor's interest in the property that was the subject of the action). "[T]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

52. Where Article III standing can be shown, as here, that is enough to show a legally protectable interest. *Ctr. for Biological Diversity*, 640 F. Supp. 3d at 68. The States can show economic, sovereign, and environmental interests at stake.

1. The Proposed Intervenor States' Direct Economic Interests in DAPL

53. DAPL traverses eighteen counties and 345 miles in Iowa. *See* Army Corps Draft Environmental Impact Statement, September 8, 2023 https://perma.cc/2TYU-595U. DAPL has paid Iowan counties over $100 million in property tax revenue since commencing operation—revenue that is at risk should there be a disruption in service to DAPL.

54. The revenue is used to support schools, road construction and maintenance, emergency services such as fire and police, and other essential ongoing needs of the counties. *See Fund for Animals*, 322 F.3d at 733–35 (finding interest factors were met where intervenor would lose revenue if federal agency was unsuccessful in defending appeal); *Dimond v. Dist. of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986) (recognizing prospective intervenor's "financial interest" in the litigation); *Navistar*, 840 F. Supp. at 361-62 (recognizing intervenor's interest as the manufacturer and seller of engines plaintiff sought to have government agency recall).

55. Similarly, DAPL traverses thirteen counties and 274 miles in South Dakota. Iowa. *See* https://puc.sd.gov/commission/dockets/Civil/2016/civ16/admin/1085-1106.pdf (last accessed Dec. 9, 2024). DAPL has paid South Dakota counties over $33 million in property tax revenue since commencing operation—revenue that is at risk should there be a disruption in service to DAPL. See https://daplpipelinefacts.com/about.html (last accessed Dec. 9, 2024).

56. Other States also receive direct economic benefits from DAPL's operation.

2. Other Economic Interests in DAPL

57. Iowa also has a significant economic interest in maintaining a thriving agricultural economy, which is directly tied to DAPL's continued operations. *See Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 19 (D.D.C. 2010) (explaining that States have financial and socioeconomic interest in the development of particular industries within its borders).

58. Iowa is the nation's largest producer of corn and ethanol, and the second-largest producer of soybeans. *See, e.g.,* Elaine Kub July 2023 Report *https://elainekub.com/freight-congestion/* ("Kub Report").

59. Agricultural products are grown in remote, highly distributed fields, requiring farmers and dealers to aggregate grain from multiple sources for shipping to far-away food-processing purchasers. Truck and rail are the only viable methods, but trucks require far more labor than rail, leaving rail as the preferred method. For example, Iowa corn growers produce 2.5 billion bushels of corn annually, a substantial portion of which is transported by rail. Altogether, agricultural products represent 42% of rail loadings.

60. In the years immediately before DAPL commenced operation, domestic crude oil production outpaced pipeline capacity, resulting in an unprecedented volume of crude oil tankers on the Midwest rail lines. *See* Kub Report.

61. The result was less rail capacity for grain, higher rates along oil-shipment corridors for shippers of grain and other agricultural products, and high prices in the secondary grain railcar market. *Id.* In fact, across the Corn Belt in the midwestern United States, local corn base prices dropped by a factor of eight in 2014. *Id.* Those market dynamics resulted in congestion and delayed rail service, leading to higher food prices for all Americans and lower profits for farmers.

62. Other agricultural States face similar headwinds when related to rail. There are significant knock-on effects from rail when one area becomes congested that could increase prices across the region and decrease access to farmers from across the country.

63. Livestock may be transported by rail, but is often transported across the State, region, and country by truck. That includes hogs and cattle, among other animals that serve as necessary parts of a healthy balanced American diet.

64. To accommodate a temporary shut down of DAPL, the Corps estimates that it could take 15,000 tanker trucks, "with 5,000 trucks filling, 5,000 returning, and 5,000 carrying the product." Army Corps Draft Environmental Impact Statement, September 8, 2023, 2-4–5 https://perma.cc/2TYU-595U. Indeed, some of those trucks would travel more than 1,500 miles. In addition to the increased risk of oil spill compared to DAPL's longstanding safety record, that is 15,000 trucks that would not be available to transport livestock or agricultural commodities. That is also 15,000 trucks of additional traffic ranging from the top of the country all the way down to the Gulf Coast.

65. And just like Intervenor Defendant North Dakota, shutting DAPL down will shift to less efficient rail and truck shipping, alternative methods that come with increased spill and safety risks. Dkt. 10-1 at ¶ 29.

66. When DAPL opened in 2017, it relieved that transportation crisis as the volume of crude oil shipped by rail declined to the benefit of the agricultural industry and to farmers. DAPL currently transports more than half of the crude oil produced in North Dakota, and if it is forced to shut down, much of that oil must be diverted to other modes of transport. *See* Army Corps Draft Environmental Impact Statement, September 8, 2023 https://perma.cc/2TYU-595U. Rail presents the only potentially viable alternative, meaning that Bakken crude oil will compete again with the agricultural sector for railcar usage.

67. Intervenor Defendant North Dakota outlined the potential serious effects that DAPL shutting down would have on the agriculture in that State. It concluded that the shift to rail and trucks would force "significant volumes of oil previously transported by pipeline to rail" and that in turn would "result in the congestion of rail transport and significantly increase agricultural transport costs." Dkt. 10-1 ¶ 31. Worse, it would "destabilize regional agricultural supply chains, stress short-term and

long-term agricultural storage capacity" and lead to even more difficulties for farmers and ranchers. *Id.*

3. The States' Sovereign and Environmental Interests in DAPL

68. The States have sovereign interests in protecting its citizens and ensuring that industrial activities are conducted in a safe and environmental manner. Accordingly, DAPL protects those interests by making States' highways and railways safer and its air cleaner. Crude oil shipments by rail or truck pose greater safety hazards than shipments by pipeline. Data shows that pipeline transport of crude has yielded fewer accidents, injuries, and deaths than truck and rail shipments, such that pipeline transport is both cheaper and less likely to cause widespread destruction—such as the rail accident that incinerated much of Lac-Mégantic, Quebec, with Bakken crude.

69. Indeed, a 2016 DOT comparison of freight-related fatalities showed that rail transportation fatality rates were nearly 35 times higher than pipeline transportation on a per-billion, ton-miles basis. *See* U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., FREIGHT QUICK FACTS REPORT 32 Table 35 (2016). Rail transport of crude oil has been shown to be 4.5 times more likely to result in an accident than pipeline transport. *See* MEGAN E. HANSEN & ETHAN DURSTELER, STRATA, PIPELINES, RAIL & TRUCKS 6 (2021). And yet with all these risks faced by States, because railroad regulations are set by federal law, State and local governments have very little recourse to protect their citizens against such accidents.

70. Trucks are even less safe. Crude oil transportation by truck kills an average of 10.2 people per year and rail transportation results in 2.4 fatalities per year, while pipeline transportation results in 1.7 fatalities per year. *See* HANSEN DURSTELER, PIPELINES, RAIL & TRUCKS, at 4–5. Rail transport of crude oil has been shown to be 4.5 more times likely to result in an accident than pipeline transport. Moreover, shipment by rail or by truck (in comparison with shipment by pipeline) has greater harmful environmental effects due to the increased emissions of trains and trucks when

compared to pipelines. As well, rail cars transporting crude oil means hazardous cargo near or through rivers, national parks, and other environmentally sensitive areas.

71. Grain displaced by oil in rail transport will have to be stored temporarily until it gets to market. The temporary storage eventually leads to grain rot, which emits CO_2 among other things, and contributes to food shortages and inflation, while attracting disease-carrying insects and rodents.

4. Impacts of DAPL Shutd Dwn on States' Agricultural Economy.

72. Iowa and many States' agricultural economies would be affected if DAPL's operations stop or are curtailed. The large amounts of grain that are currently shipped by rail in Iowa will suffer displacement, given competition with higher-revenue oil for access rail transport, if DAPL is shut down. Such competition is likely to revisit the market conditions that obtained before the pipeline became operational in 2017, namely intractable railroad congestion, rotting grain, higher food prices and, ultimately, a potential for food shortages.

73. Basic economic principles dictate that commodities flow from low value areas to high value areas so long as the cost of transportation is less than the price difference. That principle explains why North Dakota oil—which carries a much higher value than grain—will manage to move either east or west by pipeline or rail to find a market, at the expense of stranding grain at its production origins.

74. In that environment, transportation competition from the oil industry makes the cost of procuring grain greater than the resale value—greater than the price difference between origin and destination. Agriculture inputs, agriculture producers, and agriculture outputs—just in Iowa—could suffer losses of over $532 million annually should DAPL be shut down, causing oil transportation to displace grain transportation by truck and rail. *See* Elaine Kub July 2023 Report. And faced with a DAPL shut down, Iowa grain producers alone will suffer up to approximately $100 million in losses annually as shippers pass back freight costs to farmers via lower bid prices, and as freight costs increase

for fertilizers and other agricultural chemicals shipped by rail. *Id.* Also, the ethanol industry in Iowa stands to lose nearly $433 million in one year alone from increased freight costs and lost profit opportunities from production shut downs. *Id.* These annual losses for grain producers and ethanol manufacturers would be compounded each year that a DAPL shut down persists.

C. States' Interests Will Be Impaired if Plaintiff's Request to Shut Down DAPL Is Granted.

75. The next element to be considered is whether all of Iowa's interests identified above will be necessarily impaired if the Court grants Plaintiff's requested relief and that ended up shutting down DAPL. Under this factor, the Court looks to whether the applicant is "so situated that the disposition of the action may as a practical matter impeded or impair its ability to protect its interest." *Fund for Animals*, 322 F.3d at 735 (quoting Fed. R. Civ. P. 24(a)(2)).

76. The court considers the "practical consequences" of denying intervention, which may include economic consequences such as an intervenor's loss of revenues or lost earnings. *Red Lake Band Chippewa Indians*, 338 F.R.D. at 6. Here, if Plaintiff prevails and DAPL ends up being shut down, States will collect fewer tax dollars, translating to decreased funding for public safety, emergency services, public health, waste management, and other critical services. *See Cty. of San Miguel v. MacDonald*, 244 F.R.D. 36, 47 (D.D.C. 2007) (showing an "imminent threat of lost earnings" in actions challenging agency determination is sufficient to show a threat of impairment); *see also Fund for Animals*, 322 F.3d at 735 (finding impairment because the intervenor's "loss of revenues during any interim period would be substantial and likely irreparable").

77. And, as noted above, Iowa's farmers alone could suffer losses of over $500 million annually. *See Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 15 (D.D.C. 2010) (finding impairment where the "action may have the practical consequence of threatening [intervenor's] ability to remain competitive in the national coal market" (internal quotations omitted)).

78. More, shutting down DAPL would return Iowa to pre-DAPL levels of railroad congestion by forcing oil producers to find alternative ways of transporting crude, threaten Iowa with more traffic accidents, and divert Bakken crude oil to transportation pathways through environmentally sensitive areas. *See id.* at 18 (describing state interest in regulating environmental quality and ensuring coal mining operations continues "in a safe and environmentally responsible manner").

79. Those will also likely increase the number of fatalities on Iowa's roads and highways. Accordingly, Iowa's interests would be impaired if the court grants Plaintiff's requested relief.

D. No Other Party Adequately Represents Iowa's Interests.

80. No other party adequately represents the States' interests. This final element for intervention "requires that the [applicants] show that their interests are not adequately represented by the existing parties." *Foster*, 655 F.2d at 1325. "This burden is minimal and is met if [applicants] show that representation of their interests 'may' be inadequate." *Id.*; *see Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) ("The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal."). And a prospective intervenor's "interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Nuesse*, 385 F.2d at 703.

81. The federal government's status as a defendant does not change this analysis. Even if an intervenor and federal defendant share an interest in upholding a government action, that does not mean that the federal defendant shares the movant's interests. *See Red Lake Band Chippewa Indians*, 338 F.R.D. at 6.

82. Indeed, the D.C. Circuit has concluded that governmental entities do not adequately represent the interests of aspiring intervenors. *See Crossroads*, 788 F.3d at 321. And the federal

government represents the public interest of its citizens and will focus on defending its own permitting actions—not on the interests of sovereign states. *See Red Lake Band Chippewa Indians*, 338 F.R.D. at 6; *Forest Cnty. Potawatomi Cmty.*, 317 F.R.D. at 15. Here, the Corps cannot adequately represent the States' interests because it necessarily pursues a broader set of interests than each State's unique interests.

83. The States' burden to demonstrate inadequate representation by another state intervenor is *de minimis* and is readily met. Indeed, Iowa and the other Statesneed only "show[] that there is a possibility that [its] interests may not be adequately represented absent intervention," and the court is likely to find that North Dakota cannot adequately represent the particularized interests of Iowa and the other States. *W. Org. of Res. Councils v. Jewell*, No. CV 14-1993 (RBW), 2015 WL 13711094, at *6 (D.D.C. July 15, 2015). And it is not unusual for multiple states to intervene where a challenge to federal government action, or inaction, implicates the interests of those states. *Id.*

84. Thus, neither the federal defendants nor any other State participating in this litigation can adequately represent Iowa's sovereign and unique interests.

III. ALTERNATIVELY, STATES ARE ENTITLED TO PERMISSIVE INTERVENTION UNDER RULE 24(B)(1)(B).

85. Alternatively, Iowa is entitled to permissive intervention, which allows the court to permit intervention if a movant has "a claim or defense that shares with the main action a common question of law or fact." Federal Rule of Civil Procedure 24(b)(1)(B). "[P]ermissive intervention is an inherently discretionary enterprise." *Aristotle Int'l, Inc. v. NGP Software, Inc.*, 714 F. Supp. 2d 1, 18 (D.C. Cir. 2010) (quoting *E.E.O.C. v. Nat'l Child.'s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998)). Rule 24(b) is construed "liberally" in favor of potential intervenors. *In re Vitamins Antitrust Litig.*, No. MDL 1285, 2001 WL 34088808, at *3 (D.D.C. Mar. 19, 2001).

86. The States' intervention will share common questions of law and fact with Plaintiff's action. Here, as explained above, Iowa has a direct and substantial interest in defending against

Plaintiff's legal claims. If Plaintiff's requested relief is granted, the States will suffer significant harm to its sovereign, environmental, and economic interests.

87. The court should exercise its discretion and grant Iowa permissive intervention, because the States will submit a timely motion and will address common questions of law and fact—the legality of DAPL's continued operation pending the Corps' decision on a Final EIS. Nor is there any undue delay or prejudice to the original parties should the Court grant intervention. *See* Fed. R. Civ. P. 24(b)(2). Considering Rule 24(b)'s low threshold, these potential harms to Iowa's interests establish grounds for intervention.

IV. CONCLUSION

For the above reasons, the States' motion to intervene should be granted.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of December 2024, a true and correct copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ Eric H. Wessan

EXHIBIT A

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IOWA DEPARTMENT OF JUSTICE
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December 13, 2023

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RE: *Dakota Access Pipeline Draft EIS Comments*

Dear Mr. Cossette:

The undersigned Attorneys General of the States of Iowa, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming ("States") urge the U.S. Army Corps of Engineers ("Corps") to reissue the easement allowing Dakota Access Pipeline ("DAPL") to cross Corps-owned lands at Lake Oahe, North Dakota. The Draft Environmental Impact Statement ("DEIS")[1] does not account for the harms certain options will impose on States. The Corps should reject the DEIS alternatives that result in its denying the easement, a denial that would have significant, negative effects on the States. The States urge the Corps to fully consider our comment in the Corps' Final Environmental Impact Statement ("FEIS").

DAPL has operated safely since 2017.[2] Most Environmental Impact Statements issue before a project's completion and operation. But here, DAPL has been operating safely for over six years. The three proposed alternatives involve (Alternative 1) digging up already laid pipe—creating potential for chaos and increasing the risk of an accident; (Alternative 2) abandoning the

[1] U.S. Army Corps of Eng'rs (Omaha District), *Dakota Access Pipeline Oahe Crossing Project Draft Environmental Statement*, *available at* https://perma.cc/K2GL-WZ2J (September 2023).

[2] *Id.*, Section 1.1.3; *Id.*, Section ES.3.1.8.

pipe in the ground—erasing all prior, safe, work on building DAPL and potentially causing its own environmental risks; or (Alternative 5) building a new DAPL along a new path to do the same job elsewhere—despite DAPL currently doing the job safely.

Despite more than 1,500 pages of comments, there is a dearth of analysis for potential economic impacts should DAPL cease operating. As explained later in this Comment, if the oil currently transported by DAPL is instead transported by rail or truck, there will be significant economic harm to many industries throughout the Midwest—and the rest of the country. In 2014, North Dakota railroads transported up to 800,000 barrels of oil a day.[3] In its extremely limited assessment of the direct effects of managing the oil flow (limited to the time it would take to construct an alternate route), the DEIS suggests that it might take 100 car-long trains and 15,000 tanker trucks "driving around the clock,"—both of which could lead to an increase of accidents or fatalities.[4] None of that accounts for the crowding out effect of, for example, agricultural producers and farmers who will be priced out of competition. This lacuna in the economic analysis should be addressed.

The States recommend that the Corps reissue the requested easement under Alternatives 3 or 4. Those alternatives allow DAPL to continue to operate safely without onerous additional conditions. The States conversely recommend that the Corps reject proposed Alternatives 1, 2, and 5. Those alternatives involve digging up, abandoning, or rebuilding hundreds of miles of pipeline. Each of those alternatives will cause significant, adverse impacts to the States, our citizens, and our regions.

The States include both States that DAPL crosses and those that it does not. But all the States, even those that DAPL does not cross, will suffer if the Corps does not reissue DAPL's easement. The DEIS inadequately addresses the significant, adverse consequences each state will suffer if the Corps chooses Alternatives 1, 2, or 5. We provide these comments for the Corps to consider and address in the FEIS.

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[3] *Id.*, Section 3.9.3.5.254–55.

[4] *Id.*

I. Federalism and States' Authority

A. The Corps should be mindful of the existing limitations on the States' ability to protect themselves from the risks associated with increased transportation of crude oil via truck and rail transportation. Alternatives 1, 2, or 5 do not reasonably reflect these risks or how not reissuing easement will exacerbate those risks.

State and local governments have few options to protect themselves from the risks associated with increased transportation of crude oil via non-DAPL alternatives. The Interstate Commerce Commission Termination Act[5] preempts states and localities from imposing many safety regulations on rail transportation. For example, courts have held that States may not: regulate train-created air pollution;[6] prohibit railroad switching activities;[7] set train speed limits;[8] prohibit idling;[9] set train negligence standards;[10] or regulate the use of sidings.[11] Nor may States enact many common-sense regulations as to truck safety. The Federal Motor Carrier Safety Regulations preempt certain State laws on commercial motor-vehicle safety.[12] That one-size-fits-all approach leads to potential harm to the human environment, including significant public health and safety risks. The FEIS should acknowledge that Alternatives 1, 2, or 5 will each result in increases in such adverse impacts, and the Corps should consider those impacts in its ultimate decision. The DEIS does not adequately do so.

That preemption blocks States from protecting their citizens' health and safety—but that can be ameliorated through permanent and safe pipelines. For example, courts have held that States and localities may not even prohibit trains from blocking intersections.[13] When trains block intersections, they impose significant burdens on the economies and quality of life of rural (and

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[5] 49 U.S.C. § 10501(b).

[6] *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010).

[7] *City of Seattle v. Burlington N. R.R. Co.*, 41 P.3d 1169 (Wash. 2002).

[8] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

[9] *Delaware v. Surface Transp. Bd.*, 859 F.3d 16 (D.C. Cir. 2017).

[10] *Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796 (5th Cir. 2011).

[11] *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836 (E.D. Ky. 2004).

[12] *See* 49 U.S.C. § 31141(a) (2018) ("A State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced.").

[13] *See State v. Norfolk S. Ry. Co.*, 107 N.E.3d 468 (Ind. 2018); *but see Ohio v. CSX Transportation, Inc.*, 143 S. Ct. 1018 (2023) (No. 22-459).

sometimes urban) communities. Such blockages can impair public safety—police and fire departments may be delayed or unable to reach emergency sites or hospitals in the many communities where rail crossings intersect main roads, which are often the only viable routes in smaller or older towns. Towns in upper midwestern states suffered increased instances of blocked intersections during the 2014 peak congestion—peak congestion likely to reoccur if the Corps were to select Alternatives 1, 2, or 5. Those alternatives entail permanently or temporarily stopping DAPL's operation and diverting crude to be transported by rail. The Corps in the FEIS should consider and discuss the States' inability to mitigate these impacts of increased truck and rail transport. The DEIS does not adequately do so.

B. Alternative 5 exceeds the Corps' jurisdiction and infringes on States' jurisdiction over land use.

Alternative 5, which requires building 111 miles of additional pipeline and a new Missouri River crossing, impedes State sovereignty by violating North Dakota's sovereign control over the locations of crude oil pipelines within its borders. Moreover, the DEIS does so with only the barest acknowledgment that the North Bismarck Route "presents a conflict with the state's past analysis."[14] The Corps lacks authority or jurisdiction to force a State to accept the Corps' determination of what is and is not the best route for a hazardous liquids pipeline that crosses that State's lands. Despite that, and despite the Corps and the North Dakota Public Service Commission ("Commission") both having previously rejected the proxy route used to underpin Alternative 5, the Corps continues to consider this rejected route.[15] That is an obvious legal error that the Corps cannot ignore.

The current route is the environmentally preferable route. The DEIS does not address the Commission's choice of the current DAPL route over the North Bismarck Route because the current route "would best minimize adverse human and environmental impacts."[16] The FEIS should fully acknowledge, consider, and incorporate the Corps' and the Commission's previous analysis in DAPL's original permitting proceeding and 2016 Environmental

[14] DEIS, Section 3.6.1.3.

[15] DEIS, Section 3.6.1.3.173.

[16] U.S. Army Corps of Eng'rs, *Environmental Assessment: Dakota Access Pipeline Project*, at 8 (July 25, 2016), https://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/2801.

Assessment of the North Bismarck Alternative's impacts—the route on which Alternative 5's proxy North Bismarck Reroute is based.

II. Socioeconomic Impacts to the States

A. The FEIS should fully consider the negative economic impacts of Alternatives 1, 2, and 5 on States' agriculture industries.

The Corps should consider in the FEIS the environmental and socioeconomic harms that would result under each of Alternatives 1, 2, and 5 because of their adverse effects on our States' agriculture industries. Many of our States produce large amounts of grain currently shipped by rail. That grain will be displaced due to competition with higher-revenue oil for access to rail transport if volumes currently flowing on DAPL shift to rail.

This shift will lead to higher prices and, ultimately, a potential for food shortages. For example, grain producers in Iowa—the nation's largest producer of corn and the second-largest producer of soybeans—will suffer up to $100 million in annual losses as shippers pass back freight costs to farmers via lower bid prices. And that process means that freight costs will also increase for fertilizers and other agricultural chemicals shipped by rail.[17] Further, the DEIS estimates that under Alternative 5, impacts could last up to four years—meaning $400 million in total losses.[18] The Corps provides no estimate of the costs accompanying Alternatives 1 or 2, which involve DAPL's permanent shuttering. The FEIS must update the DEIS analysis of Alternatives 1, 2, and 5 to properly account for the resulting damage should the Corps not reissue DAPL's easement. Estimates for damages to the agriculture industry could exceed $10 billion in the timeframe analyzed by the EIS.[19] That would be catastrophic.

B. The FEIS should further detail and analyze the tax losses that States will suffer under Alternatives 1, 2, or 5.

The DEIS mentions in passing that certain States will suffer a combined $45 to $65 million in property-tax losses as a result of well shut-ins associated with removing DAPL from service.[20] It also briefly ponders that Alternatives 1

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[17] Elaine Kub, *Freight Congestion: Ag Impacts*, at 3 (July 2023), https://elainekub.com/freight-congestion.

[18] *See id.*; DEIS, Section 2.6.3.23.

[19] *See id.*

[20] DEIS, Section 3.8.1.3.

and 2 will result in "millions of dollars of property tax losses in several states."[21] These two fleeting mentions comprise the DEIS's entire analysis of State or municipal tax losses associated with Alternatives 1, 2, or 5 and do not constitute the consideration required of the foreseeable harms to the human and physical environment for those taxpayers.

The FEIS should further detail the tax losses that States would suffer under Alternatives 1, 2, and 5 and should consider those losses and associated harms in the body of its analyses in Chapter 3. Now, the DEIS mentions those losses only in the Chapter 5 impact summaries. The DEIS's treatment of tax losses associated with Alternative 1, 2, and 5 is inadequate and lacks reason.

The FEIS should recognize and consider that States through which DAPL passes will lose *ad valorem* and other State taxes assessed on Dakota Access. In Iowa alone, Dakota Access has paid to the counties DAPL traverses over $100 million in property tax revenue since commencing operation—revenue that is at risk for those counties should there be a disruption in service to DAPL. The counties use that revenue for many benefits to the public, including supporting schools, road construction and maintenance, emergency services such as fire and police, and other essential ongoing needs of the counties. The FEIS must consider those permanent socioeconomic losses under Alternatives 1 and 2 and long-term to permanent losses under Alternative 5. The DEIS does not do so.

The FEIS should also acknowledge and analyze the tax losses that will accrue for States that are not on DAPL's route but will nonetheless suffer related tax consequences under Alternatives 1, 2, and 5. For example, DAPL is the primary supply source for the Energy Transfer Crude Oil Pipeline ("ETCOP"), which begins in Patoka, Illinois, where DAPL terminates, and runs south from Patoka across Illinois, Kentucky, Tennessee, Mississippi, Arkansas, and Louisiana and terminates on the Gulf Coast near the Louisiana/Texas border. ETCOP thus connects the Bakken region with the large refining industry and supporting infrastructure in the Gulf Coast region. Disrupting service on DAPL under Alternatives 1, 2, or 5 will impact ETCOP and disrupt feedstock to refineries in southern Illinois near Patoka (which does not have a train offloading facility) and the Gulf Coast. Many of our States collect *ad valorem* taxes from ETCOP. Although ETCOP itself will not be shut down under Alternatives 1, 2, or 5, if ETCOP does not receive oil from DAPL,

[21] DEIS, Sections 5.2.7, 5.3.

then tax revenues in the States through which ETCOP passes could decline, too.[22] The FEIS should discuss these impacts in its socioeconomic impacts analyses.

The FEIS should acknowledge that both states along DAPL's route and states not along DAPL's route will suffer tax losses under Alternatives 1, 2, and 5. These consequences will lead to a decline in the availability and quality of government services like public safety, emergency services, public health, waste management, and education.

C. Impacts to our States' agriculture industries will cause harm to the human environment.

Competition for freight capacity is likely to resurrect the market conditions that existed before DAPL became operational in 2017—intractable railroad congestion, rotting grain, higher food prices and, ultimately, a potential for food shortages. The FEIS should better consider these foreseeable socioeconomic harms that would result from such competition under Alternatives 1, 2, or 5.

The FEIS should analyze each of these harms caused by economic losses to our States' farmers:

a. Grain displaced by oil in rail transportation will have to be stored for longer periods until it could get to market. When elevators run out of storage, some grain must be stashed in temporary storage bunkers or open grain piles rather than sealed elevators. Such temporary storage—especially open-pile storage—eventually leads to grain rot, which, among other consequences, emits CO_2, contributes to food shortages and inflation, and attracts disease-carrying insects and rodents.

b. Losses to corn, soybean, barley, and wheat growers could likewise result in shortages of critical manufactured goods and foods. We saw that exact phenomenon result from the 2013–2014 oil-induced rail shortages, which caused production delays and shortages for several important food processors like General Mills.

[22] Second Declaration of Glenn Emery at P 25, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-cv-1534 (June 11, 2020), Dkt. 542-3.

c. An inability to move products to markets could also result in ethanol shortages. Domestic ethanol shortages could foreseeably increase the importation of foreign-produced ethanol or of foreign-grown grain to boost ethanol production. Such imports will have obvious negative environmental effects like the associated greenhouse gas ("GHG") and air emissions.

The DEIS fails to meaningfully address rail congestion, which is itself also a public safety concern for rural communities and small towns in our States. Railroads often cross the main thoroughfares in small towns and rural communities. Trains can block crossings for a long time, and the nearest alternative route may be dozens of miles away. Additional congestion at those rail crossings may prevent first responders from responding to emergencies in our communities in a timely manner. As discussed above, courts have held that our States' authority to protect our citizens from those issues is largely preempted by the ICCTA. Thus, the FEIS should explore the effects of rail congestion on public safety. The DEIS does not do so.

As the DEIS recognizes, pipeline releases are much rarer than releases on either rail or truck.[23] Transportation by pipeline is 4.5 times less likely to result in a spill than transport by rail.[24] Trucks spill more oil and gas than both rail and pipeline, averaging around 326 barrels per million tons moved every mile. By contrast, Alternatives 3 and 4 allow DAPL's safe operation to continue and vastly reduce the risks of spills or leaks. Yet the Corps downplays the risk of a release under truck or rail, concluding that because truck and rail would likely result in "more frequent, lower volume crude oil releases," the effects of Alternatives 1 and 5 or Alternatives 2 and 5 would not be significant.[25] That is factually incorrect and not supported by the record. The FEIS should better emphasize that crude oil pipelines are more environmentally friendly than truck or rail.

D. The FEIS improperly considers "environmental justice."

The Corps' consideration of "environmental justice" in determining which alternative to pursue is improper. There is no statutory authority to consider disparate impacts or race-based social engineering within the DEIS

[23] DEIS, Sections ES.3.9, 5.5.1, 5.5.3.

[24] Kenneth P., T. Jackson Green, *Safety in the Transport of Oil and Gas: Pipelines or Rail?*, The Fraser Institute (Aug. 2015).

[25] DEIS, Sections 3.3.1.3, 3.9.3.5.

framework. Executive Order 14096's attempt to redefine "environmental justice" does not override the statutory requirements of the National Environmental Policy Act ("NEPA").[26]

In other contexts, "environmental justice" has led to inappropriate consideration of prohibited factors in decision-making. To the extent the Corps considered race or other constitutionally suspect categories—particularly as a "central consideration"—the DEIS violates the constitutional command of Equal Protection. *See, e.g.*, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023); *Ricci v. DeStefano*, 129 S. Ct. 2658, 2683 (2009) (Scalia, J., concurring).

E. Alternative 5 is not a standalone alternative; it results from Alternative 1 or 2 and leads to the same impacts as Alternative 3 or 4.

The FEIS must also address that Alternatives 1, 2, and 5 suffer not only their own significant adverse impacts but also will result in whatever adverse impacts the Corps concludes will result from Alternatives 3 and 4. For example, if DAPL were relocated 35 miles north of its current location under Alternative 5, the adverse impacts would include all of the impacts needed to remove the existing pipeline and relocate it (Alternatives 1, 2, and 5), which would also necessarily result in adverse impacts from DAPL's operation (Alternatives 3 or 4). Moreover, opponents of DAPL claim, without evidence, that any release could impact water intakes between 75 and 200 miles downstream of the crossing. Thus, assuming that their claims are correct, moving DAPL 35 miles north will not reduce the risks and potential impacts associated with Alternatives 3 or 4. The FEIS must make clearer that Alternative 5 subsumes not only the effects of Alternative 1 or 2, but would also have the same impacts as Alternatives 3 and 4.

III. Misuse of the Social Cost of GHGs

A. The DEIS misuses the Social Cost of GHGs in its assessment of greenhouse gas impacts.

The DEIS uses the Social Cost of GHGs ("SCG") to assess GHG impacts of the five alternatives. NEPA neither mandates nor permits the Corps to use the SCG in this way. NEPA's hard-look requirement and proximate-cause

[26] *See* E.O. 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*, 88 Fed. Reg. 25251 (April 21, 2023).

standard do not permit agencies to rely on speculative conclusions or conclusions that the agency knows reflect substandard and outdated science. The SCG contains both. Many of our States raised concerns when other agencies attempted to use SCG in their pipeline permitting reviews.[27] The FEIS should not rely on that flawed SCG analysis in its impact determinations.

Indeed, the Biden Administration has embraced a "whole-of-government approach" that is fairly characterized as a hostility to fossil fuels and purported GHG emissions. *See* Pipeline Safety: Gas Pipeline Leak Detection and Repair, 88 Fed. Reg. 31,890, 31923 (May 18, 2023). Under that approach, EPA and other federal regulatory bodies have proposed multiple rules that adversely impact fossil fuel development and the attendant cost of electric generation. *See*, *e.g.*, Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63,110 (Nov. 15, 2021); *see also* Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654 (June 5, 2023). Suffice it to say, the Biden Administration's SCG approach has been called into question as violating the major questions doctrine, contrary to law to the extent it considers global effects, and likely arbitrary and capricious on multiple grounds. *See Louisiana v. Biden*, 585 F. Supp. 3d 840 (W.D. La. 2022), *vacated for lack of standing*, *Louisiana by and through Landry v. Biden*, 64 F. 4th 674 (5th Cir. 2023).

The DEIS admits that "it is currently not possible to determine localized or regional impacts from GHG emissions from the Project" and "[t]here is currently no basis for choosing a particular discount rate or for designating a particular monetized value as significant."[28] The FEIS should go a step further by declining to determine the monetary cost of GHG emissions from DAPL. At a minimum, the FEIS should explain why the Corps insists on using the outdated, unreliable SCG analysis, especially when the Corps ultimately properly finds that the EIS cannot determine the significance of DAPL's alleged contribution to climate change.

Given the stakes to quality of life and human health, the Corps should show its work, and demonstrate that the DEIS–particularly its cumulative

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[27] For example, on April 16, 2021, the Attorneys General of 22 States submitted comments in a rulemaking docket wherein the Federal Energy Regulatory Commission ("FERC") requested comments on whether the Natural Gas Act or NEPA authorize or mandate the use of SCG when FERC considers pipeline certificate applications. See FERC Docket No. PL18-1-000.

[28] DEIS, Section 3.12.4.

impact given EPA and other agencies' rulemaking in the same space–can be successfully implemented without leaving Americans subject to rolling blackouts, skyrocketing heating and electricity prices, and a decreased standard of living.

IV. Conclusion

The DEIS analysis ignores the true nature and extent of harm to our States should the Corps select Alternatives 1, 2, or 5. Our comments, if implemented in the FEIS, at a minimum will help address these faults in the DEIS analysis. We thank you for your consideration of our comments and look forward to seeing them addressed in the FEIS.

The States urge the Corps to reissue the easement allowing DAPL to cross Lake Oahe.

Respectfully Submitted,

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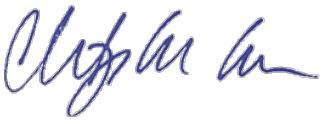

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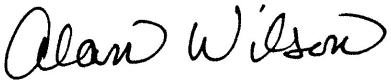

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, *Plaintiff*, *v.* **U.S. ARMY CORPS OF ENGINEERS; MICHAEL L. CONNOR; ROBERT NEWBAUER; GEOFF VAN EPPS**, *Defendants,* **STATE OF NORTH DAKOTA** *Intervenor-Defendant,* **STATE OF IOWA, STATE OF GEORGIA, STATE OF INDIANA, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, STATE OF MISSOURI, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TEXAS, and STATE OF WEST VIRGINIA,** *Proposed Intervenors-Defendants.*	§	**Case No. 1:24-cv-02905-JEB**

[PROPOSED] ORDER GRANTING THE STATES' MOTION TO INTERVENE AS INTERVENORS-DEFENDANTS

Having considered the States of Iowa, Georgia, Indiana, Kentucky, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, and West Virginia's Motion to Intervene as intervenors-defendants in this action, and finding good cause for the States' intervention as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2):

The Court hereby GRANTS the motion and ORDERS that:

The States of Iowa, Georgia, Indiana, Kentucky, Louisiana, Missouri, Montana, Nebraska,

Oklahoma, South Carolina, South Dakota, Texas, and West Virginia shall be admitted as Intervenors-Defendants in this action as a matter of right under Federal Rule of Civil Procedure 24(a)(2). The States must answer or otherwise respond to Plaintiff's complaint on the same schedule as Defendants and Defendant-Intervenor.

SO ORDERED.

Dated this __ day of _____ 2024.

_____

James E. Boasberg
U.S. District Court Chief Judge