STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

IN RE: **DAKOTA ACCESS, LLC**	**DOCKET NO. HLP-2014-0001** **AMICUS BRIEF OF STANDING ROCK SIOUX TRIBE RE: REQUEST FOR PERMISSION TO BEGIN CONSTRUCTION**

INTRODUCTION

The Standing Rock Sioux Tribe ("Tribe") respectfully submits this *amicus* brief to the Iowa Utilities Board ("Board") in regards to the "Request to Begin Construction Outside PCN Areas" filed May 5, 2016 by pipeline proponent Dakota Access, LLC. Although the Tribe is not a party to this proceeding, it is significantly affected by the pipeline and by this specific request. The Tribe believes that it is important that the Board understand the broader context in which Dakota Access seeks to start construction. Specifically, the pipeline is currently facing regulatory delays and potential legal challenges in numerous areas along its nearly 1,200-mile length. Individually and collectively, these challenges raise the question of whether the current proposed route, and even the pipeline itself, remain viable. Starting construction in the face of this uncertainty would be harmful to landowners, who could be hosts to a segmented and unfinished pipeline or an unnecessarily prolonged period of construction, as well as the Tribe.

Dakota Access has aggressively sought accelerated regulatory approvals that sidestepped normal channels for major infrastructure projects like this. But despite Dakota Access's attempts to characterize the situation otherwise, large portions of the pipeline remain under scrutiny for multiple reasons. Final approval may not be forthcoming in the immediate future, and could potentially be conditioned in a way that alters the project significantly, including potential route

changes. Any costs of not starting work this summer are a problem of Dakota Access's own making and not relevant to the question before the Board, which is the impact to landowners. The Board should reaffirm its ruling that work cannot be started until all regulatory approvals have been received, including pre-construction notice ("PCN") verifications from the Army Corps of Engineers.

THE TRIBE'S INTERESTS IN THIS MATTER

The Standing Rock Sioux Tribe is a federally recognized sovereign Indian Nation. It is headquartered in Fort Yates, North Dakota, with a reservation of roughly 3,500 square miles encompassing parts of North and South Dakota. It is the sixth largest Indian reservation in the United States.

In routing the Dakota Access Pipeline, consideration was given to having it cross the Missouri River north of Bismarck, North Dakota. After concerns arose about the potential impact of a pipeline spill on the city's drinking water supplies, a new route was selected south of Bismarck. That new route proposes to cross the Missouri River at Lake Oahe less than a mile upstream of the Tribe's reservation boundary. A spill or leak at the crossing would disable the reservation's sole drinking water intake, and would cause extreme economic, environmental, and cultural harm to the Tribe.

The Tribe has been advocating that the review and approval process by Army Corps of Engineers has been deeply flawed, and that no permits can be granted until there has been additional tribal government-to-government consultation, additional environmental analysis under the National Environmental Policy Act ("NEPA") and Clean Water Act ("CWA"), and a significant improvement in the Corps' inadequate compliance with § 106 of the National Historic Preservation Act ("NHPA"). Many other federal agencies, Indian Tribes, and citizen groups have raised similar concerns with the federal process. Indeed, it appears that these concerns

explain why Dakota Access has not received the federal permits it had hoped for. It remains unknown whether those permits will be granted in the form preferred by Dakota Access.

ARGUMENT

I. FINAL APPROVAL BY THE FEDERAL REGULATORY AGENCIES IS NOT IMMINENT, AND COULD RESULT IN SIGNIFICANT CHANGES TO THE PIPELINE.

Dakota Access in its request presents a one-sided picture in which federal approvals for the pipeline are a mere formality, and are inevitably forthcoming in the immediate future. Its picture is inaccurate and outdated. The purpose of this *amicus* brief is to apprise the Board of the facts as they stand today.

Dakota Access took an enormous gamble by planning for construction to begin in May of 2016 without providing sufficient time for the federal regulatory process to be completed. Dakota Access now seeks to double down on that bad bet by building isolated segments of the pipeline up to and around the boundaries of at least 64 different federal jurisdictional areas in the state of Iowa. It will then presumably leverage the fact of that partial construction to push for the remaining approvals, despite the fact that the federal process remains hotly contested. The Board should not enable this kind of strong-arm approach to permitting major infrastructure.

Clean Water Act regulations allow the Corps to issue nationwide permits to provide a streamlined approach to permitting for activities "having minimal impacts." 33 C.F.R. § 330.1(b). As the Board understands, NWP 12 allows some pipelines to be authorized pursuant to nationwide permit coverage if they meet certain specific conditions. In some cases, the Corps is required to "verify" that a particular project meets the standards of the NWP. Verification cannot take place until the Corps has ensured compliance with the Endangered Species Act ("ESA"), NHPA, and numerous other standards. 33 C.F.R. § 330.4(f),(g). If the Corps concludes that a particular project doesn't meet the standards of the NWP, it must require either

modifications, or an individual permit. 33 C.F.R. § 330.1(d), § 330.6(a)(2). An individual permit in any one place on the pipeline would cause very significant problems for Dakota Access, because the Corps would not be able to mix individual permits and NWP verifications for a single project. *Id*. § 330.6(d)(1). An individual permit for the pipeline would also trigger a full environmental impact statement under NEPA. Whether or not Dakota Access gets all of its NWP verifications from the Corps, in the format and on the schedule it hopes for, is unknown.[1]

By way of illustration, a significant inter-agency legal dispute has emerged over the appropriate scope of the Corps' historic preservation obligations under the NHPA. Section 106 of that statute requires that an agency consider the impact of any federal undertaking on historic or culturally significant sites prior to taking action, and consultation with affected parties—most specifically, Indian Tribes—to afford them an opportunity to assess the existence, significance, and impacts to historic and sacred sites. 54 U.S.C. § 306108. The Corps has taken the position that its NHPA duties only extend to federal jurisdictional waters and no further. However, the Advisory Council of Historic Preservation ("ACHP"), the federal agency which implements the NHPA, has taken the explicit position that the undertaking subject to § 106 review is the "entire project," observing that because of the large number of federal waters in the pipeline's route, "water crossings enable or even determine the placement of the [right of way]…."[2] In its recent correspondence, the ACHP recommended a greater effort to identify historic properties over the entire length of the pipeline, rather than just the 209 jurisdictional areas, and criticized § 106

[1] On May 3, 2016, the Omaha District of the Corps issued a press release emphasizing that there were several additional steps required to complete the federal regulatory process. The Corps has declined to provide any sort of timeline for the completion of its review, and a senior district official is quoted in the release as saying, "This process can take time to complete." The release is available at <http://www.nwo.usace.army.mil/Media/NewsReleases/tabid/1835/Article/749902/no-decision-yet-regarding-water-crossings-for-dakota-access-pipeline.aspx>

[2] The ACHP filed this letter with this Board as a "Letter of Concern" on May 9, 2106.

consultation with tribes as "inadequate and fragmented." The Corps cannot issue CWA verifications until the § 106 process is complete. Starting the § 106 consultation process over to cover more of the pipeline route, as many Indian tribes and the ACHP have sought, would delay this project significantly and could ultimately result in changes in the pipeline route.

Another example relates to the scale and scope of the environmental review under NEPA. In a March 29, 2016 letter, the U.S. Department of the Interior ("Interior") urged the Corps to prepare a full environmental impact statement ("EIS") – a far more comprehensive analysis of impacts and alternatives than has been performed thus far – for the Dakota Access pipeline. *See* Ex. 1. Interior asserted that "the Corps did not adequately explain why it was not analyzing impacts and disclosing consequences of spills along the length of the pipeline outside of those areas for which it is making a decision, as might be required under the definition of connection actions under 40 C.F.R. § 1508.25(a)(1)(iii). Additionally, we believe that the Corps did not adequately justify or otherwise support its conclusion that there would be no significant impacts upon the surrounding environment and community." *Id*. Should the Corps heed Interior's recommendation—one that has been pursued by the Tribe and many others—the project will be set back significantly, and additional route options would have to be considered. Should the Corps choose to ignore the recommendation, the issue will likely be left to the courts to resolve.

In addition to these broad questions affecting the pipeline as a whole, Dakota Access is running into regulatory problems and delays in multiple locations along the route. A summary is provided below:

In North Dakota, Dakota Access needs Army Corps approval to cross two sections of the Missouri River, at Lake Oahe and Lake Sakakawea. The crossing at Lake Oahe is immediately adjacent the Tribe's reservation. While the Army Corps' position is that "verifications" under

Nationwide Permit 12 are not subject to the environmental review requirements of NEPA, even the Corps recognizes that the North Dakota crossings are of a different regulatory nature, and they are subject to NEPA. In December 2015, the Corps released a draft "environmental assessment" on the crossing. The Tribe and many others, including three federal agencies, have submitted highly critical comments of that document. The Tribe's most recent comment letter, which summarizes some of the flaws in the Corps' permitting process, is attached as Exhibit 2 to this *amicus* brief. The Lake Oahe permit also triggers the requirements of § 106 of the NHPA, which require extensive consultation with the Tribe due to the pipeline's impacts on ancestral and sacred lands. The Tribe is seeking a broader environmental review under NEPA, full government-to-government consultation under § 106, and a review of alternative pipeline routes that do not place all the risks on the Tribe. Changes to the pipeline's configuration in North Dakota could affect its configuration in Iowa, or even raise questions about the pipeline's viability altogether.

Also in North Dakota, construction of the pipeline is held up due to impacts of the pipeline on a federally listed endangered species, the Dakota skipper. Issuance of the NWP 12 verifications cannot take place until completion of the ESA consultation process, among other things. 77 Fed. Reg. 10184, 10284 (Feb, 21, 2012). On May 2, 2016, the U.S. Fish and Wildlife Service refused to concur with the Corps' conclusion that the effects on the skipper – a listed species of butterfly – were insignificant, and is now in the process of undergoing formal consultation, a lengthy and comprehensive process to ensure ESA compliance. *See* Ex. 3. If at the conclusion of that process the FWS finds that the pipeline would jeopardize this species, or adversely modify its critical habitat, the action cannot go forward without an ESA-compliant alternative, which could potentially result in route reconfigurations. The Corps cannot issue any

verifications in North Dakota pending completion of that process, nor is it lawful to construct the pipeline outside of the protected species habitat in a way that would foreclose potential route changes. *See* 16 U.S.C. § 1536(d) (prohibiting both agency and private party from "any irreversible or irretrievable commitment of resources...which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures…"); *see also* Ex. 3, at 18 (reminding Corps of § 7(d) limits). Moreover, potential legal challenges to that consultation—including, for example, the Corps' and FWS' failure to consider the impact of pipeline operations and accidents on listed species—could delay verification even longer. Accordingly, final federal authorization of the pipeline in North Dakota does not appear imminent, and Dakota Access's claim to this Board that it has "full authority to construct" in North Dakota is misleading at best.

Also, in both North and South Dakota, Dakota Access needs permission to cross federal grassland and wetland easements spread across extended portions of the state. Grassland easements are an agreement between landowners and the U.S. Fish and Wildlife Service "to keep their land in grass and limit the time of year for mowing, haying, and grass seed harvest." Ex. 4 at 16 (draft environmental assessment on FWS easement permits). Wetland easements are agreements between landowners and the FWS to "protect wetlands from being drained, leveled, filled, or burned." *Id*. The purpose of the easements is to "provide and protect waterfowl habitat, and other wildlife that utilize similar habitats." *Id*. In South Dakota, there are 109 wetland easements crossed, impacting 69.3 acres of wetland basins, and a small number of additional easements in North Dakota. *Id*. at 17. Dakota Access cannot commence construction in these areas pending permission from the FWS, which remains under review and NEPA

analysis. On May 11, 2016, undersigned counsel received an email from FWS staff that they are not anticipating finalizing that decision "for at least a month."

In Iowa, Dakota Access cannot begin construction in the jurisdictional areas until the Corps has authorized it. Dakota Access's May 10, 2016 filing states that the 64 PCN areas within Iowa amount to 2.5% of the total pipeline route in Iowa. This is an attempt to diminish the overall importance of PCN areas in Iowa. As the map attached as Exhibit 5 reveals, they are spread across the entire state. *See* Ex. 5. As many entities and agencies have observed, because the Dakota Access project would be "useless" without connecting through these multiple permit areas, the appropriate scope of review "is the entire pipeline." *See, e.g.*, Ex. 3 at 2 (FWS letter). Dakota Access's effort to segment the areas of federal jurisdiction from the pipeline as a whole is failing in the federal process, and it should fail here. Without the federal jurisdictional crossings, there can be no pipeline. Moreover, news reports indicate that Dakota Access still hasn't reached voluntary agreements with landowners in Iowa, meaning that there will be further delay as the company pursues eminent domain proceedings.

Although NWP 12 is a streamlined process relative to individual permitting under the Clean Water Act, it is not an empty formality. Before issuing a verification, the Corps is required to consider the direct *and indirect* impacts of its verifications—i.e., the broader ramifications of the pipeline. 77 Fed. Reg. at 10284; 33 C.F.R. § 330.6(a)(3)(i) (authorizing placement of additional conditions to ensure that the activity "will have only minimal individual and cumulative effects"). As noted above, it must also complete the § 106 historic consultation process. Dakota Access states that it is "continuing to work with the Corps in concluding the Native American consultation." May 10 Brief, at 3. From the perspective of the Standing Rock Sioux Tribe and other tribes affected by the project, however, consultation on PCN areas has

barely begun. Full § 106 consultation could result in changes to the project, including changes to the route.

Additionally in Iowa, the FWS has raised concerns about actions by Dakota Access to destroy bat habitat. Specifically, FWS observes that "all occupied northern long-eared bat roosts and suitable habitat within 150 feet of northern long-eared bat maternity trees were removed." May 2 letter, *supra*, at 17. This action was not authorized by the FWS, and it may constitute an unauthorized "take" of an ESA-listed species in violation of § 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B) (prohibiting "take" of listed species); *id.* § 1532(19) (defining take to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"); 50 C.F.R. § 17.3 (defining "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering"). FWS has also prohibited tree clearing along the route through bat habitat in some situations until after October 1, 2016, which would further alter Dakota Access's preferred timeline of the project.

Finally, in Illinois, there is particularly little reason to think that federal approvals are imminent. The pipeline will require an individual Corps permit to cross federally managed lands and easements on the Illinois River. Unlike the permit for the North Dakota crossings, for which a draft EA was released in December of 2015, the Corps has not released any draft NEPA documentation at all at this point—suggesting that approval could be a long way off. Moreover, Illinois has by far the largest number of NWP 12 verifications required, at 130. *See* Ex. 6, at 3-2. Issuance of 130 verifications in a relatively short physical span raises questions about whether the pipeline's cumulative effects are significant enough to warrant an individual permit, which would trigger additional NEPA review. As with the other states, these verifications will require

completion of numerous additional regulatory processes that do not appear to be imminent, any of which could result in changes to the pipeline.

In sum, while Dakota Access may have hoped that it would have all of its federal approvals in hand at this point, it does not. Indeed, the project faces significant regulatory challenges, and potentially litigation, before the federal process is complete. Dakota Access complains that Iowa is "roughly five months behind its neighboring states of Illinois, South Dakota, and North Dakota." May 10 Brief, at 4. However, construction does not appear to have started in any of those states either. Allowing Dakota Access to build the pipeline everywhere in Iowa outside the 66 federal jurisdictional areas would be to effectively foreclose any potential discussion of alternative approaches in jurisdictional areas, and would reward Dakota Access for its heavy-handed approach to permitting. Accordingly, the request should be denied.

II. STARTING CONSTRUCTION WITHOUT FEDERAL APPROVALS WOULD HARM LANDOWNERS AND THE TRIBE

In its May 3, 2016 order, this Board affirmed its prior ruling that no construction could begin anywhere in the state until all required permits, including Corps verifications under NWP 12, were in hand. The Board expressed a willingness to reconsider its order if Dakota Access could come forward with evidence of harm *to landowners*. Not only has Dakota Access failed to provide any such evidence, despite a second opportunity to do so, it ignores the fact that the most harmful option to landowners would be to allow construction to start when a major regulatory cloud hangs over the project. If the Board is chiefly concerned about landowner impacts, and if Dakota Access is unable to timely obtain all of its federal approvals, the correct approach is to simply require Dakota Access to defer construction until next year.

While the Board explicitly criticized Dakota Access for failing to support its claims that landowners would be harmed by having to wait, Dakota Access's May 10, 2016 filing simply

repeats the same unsupported and inflammatory rhetoric as its original filing. Notably, despite the invitation from the Board to provide "detailed explanation" of adverse impacts, Dakota Access provides no landowner statements or other specific evidence of harm to landowners at all. Instead, it simply turns up the volume of its attacks on the Board, repeating the baseless accusation that the request somehow "contravenes the federal regulatory regime" and "imposes an exceptional and arbitrary burden." May 10 Brief, at 1. For example, its accusation that asking it to wait until it has all the permits in hand before beginning construction is potentially a violation of the U.S. Constitution's Commerce Clause is neither explained, nor explicable. *Id*., at 10. The Board's interest in ensuring that all permits are in hand before beginning construction is appropriate and consistent with its authorities and obligations to landowners. Dakota Access's rising sense of panic about its miscalculation on the construction start date cannot obscure the Board's scope of authority to protect landowners affected by the project.

Indeed, Dakota Access asks this Board to bless the approach that is the *most* harmful to landowners of all the available options. First, starting construction now, when federal approvals are not in hand, would spread construction out over the longest possible timeframe, and potentially over the winter, and hence multiple growing seasons. Landowners would be maximally impacted by construction work up the edge of federal jurisdictional areas, leaving pipeline trench and infrastructure open and incomplete, and then returning at an unknown future date to complete the process.

Second, if the federal regulatory process results in significant changes to the pipeline's route, or even a decision which renders the project no longer viable, landowners will be stuck with useless infrastructure and damaged land for no purpose, and more landowners will be effected than necessary.

Finally, should construction be allowed as requested by the company, the fact of its completion would surely be leveraged in the ongoing regulatory process to advocate against any changes to the pipeline's routing. Federal courts routinely prevent private parties from taking action outside of federal jurisdiction in ways that would influence federal decisions. For example, in *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986), the court held that where a private highway project required federal approval to cross a park, no part of the highway could begin construction until the agency completed the NEPA analysis. The court explained that if the agencies allowed construction of a private highway all the way up to the border of the park prior to completion of the NEPA process, "the completed segments would stand like gun barrels pointing into the heartland of the park . . . Non-federal actors may not be permitted to evade NEPA by completing a project without an EIS and then presenting the responsible federal agency with a *fait accompli*." *Id*. at 1042 (internal quotation marks and citation omitted). Allowing construction to begin now, before the conclusion of a contested federal regulatory process, would effectively foreclose alternative options. This would harm both landowners and the Tribe, which is advocating for greater consideration of historic and environmental impacts, and alternative routes, before any construction of the pipeline begins.

CONCLUSION

For the foregoing reasons, this Board should deny Dakota Access's request for leave to begin construction until all federal approvals, including PCN verifications for all federally

regulated waters, have been received. Should the Board wish additional briefing or argument on any of these issues, the Standing Rock Sioux Tribe in its role as *amicus* stands at the ready to assist the Board.

Respectfully submitted this 11 May 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2016, I filed the foregoing document electronically with the Iowa Utilities Board using the EFS system which will electronically send notification of such filing to the appropriate people.

/s/ Jan E. Hasselman
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