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ALSO ADMITTED IN MINNESOTA AND MONTANA

November 12, 2019

Via hand-delivery

Public Service Commission
State of North Dakota
600 East Boulevard Ave, Dept. 408
Bismarck, ND 58505

Re: Dakota Access, LLC
Emmons County Pump Station
PSC Case No. PU-19-204
OAH File No. 20190280

Public Service Commission:

Attached for filing with the North Dakota Public Service Commission in Case No. PU-19-204 please find an original and ten copies of the following:

1. Intervenor Standing Rock Sioux Tribe's Opposition to Motion to Strike
2. Exhibit 1
3. Certificate of Service

Sincerely,

Timothy Q. Purdon

TQP/mdc
Enclosures

NORTH DAKOTA PUBLIC SERVICE COMMISSION

In the Matter of Dakota Access, LLC Consolidated Application for an Amended Certificate of Corridor Compatibility and Amended Route Permit; Dakota Access Pipeline Pump Station - Emmons County Siting Application	Case. No. PU-19-204 OAH File. No. 20190280

Intervenor Standing Rock Sioux Tribe's Opposition to Dakota Access, LLC's Motion to Strike Testimony of Donald Holmstrom, Richard Kuprewicz, and Jon Eagle, Sr.

Dakota Access, LLC's ("Dakota Access") Motion to Strike Testimony of Donald Holmstrom, Richard Kuprewicz, and Jon Eagle, Sr. ("Motion") (Dkt. 50) is a meritless attempt to derail the North Dakota Public Service Commission's ("Commission") November 13 hearing on this matter. By its Motion, Dakota Access seeks to prevent Intervenor Standing Rock Sioux Tribe (the "Tribe") and the public at large from meaningfully participating in the hearing, and Dakota Access seeks to prevent the Commission itself from fulfilling its legally mandated oversight and permitting duties with respect to the DAPL Capacity Expansion. The Motion should accordingly be denied.

I. The Holmstrom, Kuprewicz, and Eagle, Sr. Testimony is Relevant

Dakota Access argues that the Holmstrom, Kuprewicz, and Eagle testimony is irrelevant and accuses the Tribe of attempting to "confuse the issues before the Commission." Motion, Dkt. 50 at 6. In reality, it is Dakota Access that is attempting to sow confusion into the record here.

A. The Commission's Standard for Reaching a Decision Governs What Is Relevant

At the November 13 hearing, the Commission will determine whether the proposed DAPL Capacity Expansion complies with the relevant standard set forth in the North Dakota Century and Administrative Codes. That standard is clear: the Commission may only grant the DAPL Capacity Expansion if it is satisfied that doing so "will produce minimal adverse effects on the environment and the welfare of the citizens" of North Dakota, and further that any significant adverse effects imposed on, *inter alia*, human health and safety, animal health and safety, plant life, wetlands, woodlands, and wooded areas, and agriculture "will be at an acceptable minimum, or that those effects will be managed and maintained at an acceptable minimum." N.D.C.C. Sec. 49-22.1-02; N.D. Admin. Code Sec. 69-06-08-02.

Dakota Access fails to cite this standard in its Motion (or in its Pre-Hearing Brief for that matter) despite its obvious bearing on the question of relevance. Under the North Dakota Rules of Evidence, evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." N.D. R. Evid. 401. As applied to the November 13 hearing, then, evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and that fact is of consequence in determining whether the DAPL Capacity Expansion "will produce minimal adverse effects on the environment and the welfare of the citizens" of North

Dakota, and that any significant adverse effects imposed on, *inter alia*, human health and safety, animal health and safety, plant life, wetlands, woodlands, and wooded areas, and agriculture "will be at an acceptable minimum, or that those effects will be managed and maintained at an acceptable minimum." N.D.C.C. Sec. 49-22.1-02; N.D. Admin. Code Sec. 69-06-08-02.

The testimony of Holmstrom, Kuprewicz, and Eagle is plainly relevant under this standard. Each offers testimony regarding the DAPL Capacity Expansion's potential adverse effects on the environment and on the welfare of North Dakota citizens. For example, Mr. Kuprewicz testifies that the DAPL Capacity Expansion will increase the risk of spill incidents due to DAPL's higher operating pressures and greater likelihood of surge overpressures post-expansion. *See, e.g.*, Kuprewicz Testimony, Dkt. 42 at 170-242. Mr. Holmstrom testifies that the DAPL Capacity Expansion will exacerbate DAPL's "worst-case discharge" scenario and explains why that threatens the environment and welfare of North Dakotans, particularly in light of Energy Transfer's poor safety record and deficient risk management practices. *See, e.g.,* Holmstrom Testimony, Dkt. 41 at 56-422. Mr. Eagle's testimony explains how those increased risks threaten the spiritual, cultural, and economic welfare of the Tribe, for whom Lake Oahe is sacred. *See, e.g.,* Eagle Testimony, Dkt. 40 at 141-277. If Dakota Access disputes the significance of any of this testimony, it is entitled to make that clear via cross-examination and argument at the hearing. But the Holmstrom, Kuprewicz, and Eagle testimony is clearly relevant to the Commission's determination of whether the adverse effects of the DAPL Capacity Expansion constitute an "acceptable minimum."

The fact that Mr. Kuprewicz and Mr. Holmstrom refer to industry and regulatory standards, such as API best practices and PHMSA regulations, to contextualize and describe the risks posed by the DAPL Capacity Expansion hardly renders their testimony "irrelevant" to the

Commission. If a North Dakota pipeline operator fails to comply with API best practices, that is relevant to the Commission's determination of the adverse effects that pipeline may have on the environment and welfare of citizens *in North Dakota*. Likewise, if a North Dakota pipeline operator fails to explain how it will prevent surge overpressures from exceeding 110% of maximum operating pressure (MOP), as required by PHMSA, that is relevant to the Commission's determination of the adverse effects that pipeline may have on the environment and welfare of citizens *in North Dakota*. Dakota Access is effectively arguing that the Commission is precluded from considering the risks posed to North Dakotans by an operator's failure to comply with relevant industry and regulatory standards simply because the Commission itself is not responsible for promulgating or enforcing such standards. That argument, which lacks any legal basis, is an invitation for the Commission to abandon its responsibilities to the people of North Dakota. The Commission should reject it.

B. The Commission Will Not Be "Confused" By the Testimony

Dakota Access's fallback argument – that the testimony, even if is relevant, should still be stricken because it will "confuse" the Commission – is similarly unavailing. Dakota Access is suggesting that the Commission will be unable to distinguish (1) the adverse effects that the Emmons County pump station may have in its immediate vicinity in terms of noise, emissions, etc. from (2) the adverse effects that the operation of the pump station will have across greater North Dakota by doubling the amount of oil transported through DAPL. Frankly, this suggestion is insulting, but in any event Dakota Access can take comfort in the fact that multiple members of the Public Service Commission gave public interviews last week in which they demonstrated their aptitude at avoiding such confusion.

When asked in a radio interview last Thursday, November 7, "What do you most want people to know about this hearing next week?" Commissioner Fedorchak responded:

> Well really I want people to know that this is their opportunity to come and talk to us about this pipeline expansion. This is the opportunity. This is what the hearings are. . . . A lot of it is looking at the [23-acre Emmons County] site. A lot of it is focused on that.
>
> *There is however also the increase in capacity that is part of this expansion. And so the company needs to talk about how they intend to increase the expansion and keeping the impacts to minimal.* Minimal impacts, that's kind of our standard that the PSC considers in permitting. And so I expect the company to come forward and say we're doing x, y, and z, that's how we feel this project and this proposal maintains the minimum impact criteria, the minimum impact standard. And I expect any parties that are opposing it will say the opposite. And both parties will be obligated to provide facts to back up what their position is. And in the end we will get to the bottom of a decision.

See AM1100theflag.com, 11/7/19 – "DAPL 2.0 PIPELINE - JULIE FEDORCHAK, PUBLIC SERVICE COMMISSION MEMBER" *available at* https://www.am1100theflag.com/news/12218-11719-dapl-20-pipeline-julie-fedorchak-public-service-commission-member (last accessed Nov. 10, 2019) (emphasis added).

Similarly, when asked in a radio interview last week, "What is the standing of the Tribe in a pump station in Emmons County?" Commission Chairman Kroshus responded:

> Basically it means they have a seat at the table. And their concern is if the volume of oil almost doubles, are the proper safety protocols in place, the monitoring equipment – will that be able to detect a leak? Because conceivably if twice as much oil is going through the pipe twice as much oil could spill if the pipeline was ever compromised. So that would be their interest, the river crossing in particular. So they want to know from a safety standpoint what's the status of the pipeline today and can it handle it.

Following up, the interviewer asked "That would be something we'd all want to know though, right? . . . Whatever impact doubling the oil would be, that wouldn't just be a Tribe thing, that would be just typical questions the Public Service Commission would want answered by a project, right?" To which Commission Chairman Kroshus responded:

> Right, absolutely. We ask those questions during the course of any hearing. We ask about the monitoring system . . . we want to know how many block valves there are on a pipeline in particular. Where they're located, what's the response time on shutting those down, how do they coordinate with local officials, local emergency service operators. . . . It's about speed to shut it down and getting in there and getting it cleaned up. . . . There's not a perfect system in the world, but we want to get as close to perfect as we can.

See AM1100theflag.com, 11/4/19 - DAPL 2.0 PIPELINE - BRIAN KROSHUS, ND PUBLIC SERVICE COMMISSION CHAIRMAN *available at* https://www.am1100theflag.com/news/12216-11419-dapl-20-pipeline-brian-kroshus-nd-public-service-commission-chairman (last accessed Nov. 10, 2019).

As this record makes plain, it is Dakota Access, not the Tribe or the Commission, that is guilty of attempting to "confuse" matters. The Commission has a clear understanding of the issues before it at the November 13 hearing, including the question of whether doubling DAPL's throughput accords with North Dakota's "minimal adverse effects" standard. Receiving testimony that speaks directly to that question will hardly "confuse" the Commission.

C. The Commission Granted the Tribe's Motion to Intervene So the Tribe Could Be Heard on This Issue

Dakota Access's Motion is premised on its demonstrably false assumption that, at the November 13 hearing, the Commission will in no way, shape, or form consider the potential adverse effects that the near doubling of DAPL's capacity may have on the environment and on the welfare of North Dakotans. As the above quotations from Commission Chairman Kroshus and Commissioner Fedorchak make clear, that assumption is just plain wrong. In fact, the Commission granted the Tribe's Petition to Intervene precisely so the Tribe could be heard on this issue.

In its Petition to Intervene, the Tribe clearly articulated its grounds for intervention. The Standing Rock Sioux Reservation is less than one-half mile downstream from DAPL where it crosses Lake Oahe. There are a number of significant tribal cultural sites near the DAPL Lake Oahe crossing site, and the Tribe and its members rely on Lake Oahe for drinking water and irrigation for its farms and ranches, for Treaty-protected hunting, fishing and gathering rights. Dkt. 29 at 2. Intervention was necessary to ensure these interests would not be adversely affected by the proposed "nearly one hundred percent (100%) increase in the volume of crude oil transported through the Dakota Access Pipeline from 600,000 barrels today up to 1,100,000 barrels per day and siting of the new Dakota Access Pipeline Pump Station in Emmons County." *Id.* As the Tribe explained, under the criteria in N.D.A.C. Sec. 69-06-08-02 that the ND PSC will use to evaluate the Application, the Tribe and its members have substantial interests in these proceedings. Dkt. 29 at 3. Further, the Tribe explained that by its intervention the Tribe would:

> *contribute the expertise that it has developed over the course of the federal litigation* regarding the United States Army Corps of Engineers' permitting of the original DAPL pipeline and its impact on the Tribe and its legally protected interests which will assist the ND PSC in its consideration of Dakota Access LLC's petition to increase in the volume of crude oil transported through the Dakota Access Pipeline from 600,000 barrels today up to 1,100,000 barrels per day and siting of the new Dakota Access Pipeline Pump Station in Emmons County.

Dkt. 29 at 3 (emphasis supplied).

Neither Dakota Access nor anyone else opposed the Tribe's Petition,[1] and upon concluding that the Tribe "presented sufficient information to satisfy the statutory intervention requirements set forth in N.D.C.C. § 28-32-28 and the Commission's rules on intervention," the Commission granted the Tribe's Petition. Dkt. 30 at 2.

[1] Accordingly, not only is Dakota Access just wrong about the scope of the November 13 hearing – it is advancing arguments that it waived by failing to oppose the Tribe's petition.

Incredibly, Dakota Access now tries to argue that the Commission's decision to grant the Tribe's request for a hearing somehow advances Dakota Access's case for striking the entirety of the testimony the Tribe will offer at that hearing. Motion, Dkt. 50 at 3-5. This argument can be quickly disposed of. Here is the relevant procedural history, which demonstrates that Dakota Access's interpretation of the record is patently backwards:

- On July 10, the Commission issued a Notice of Opportunity for Hearing regarding Dakota Access's Application, noting "The pump station will consist of five 6,000 horsepower electrically driven motors and pumps, which will allow for pipeline transportation of up to 1,100,000 total barrels of crude oil per day" and explaining that the issues to be considered at any hearing included "Will the location and operation of the proposed facilities produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?" – i.e., the relevant standard under N.D.C.C. Sec. 49-22.1-02 and N.D. Admin. Code Sec. 69-06-08-02. (Dkt. 8 at 1.)

- On July 29, the Tribe filed a Request for Hearing, in which the Tribe explained in detail why it was concerned that doubling DAPL's throughput would have adverse effects on the environment and upon the welfare of the citizens and thus why a hearing was necessary. (Dkt. 17.) No other party filed a request for hearing.

- On August 19, Dakota Access sent a letter attempting to rebut the Tribe's request for a hearing, accusing the Tribe of various improprieties and telling the Commission that the Tribe's concerns were not "cognizable before the Commission." (Dkt. 22 at 4.) Dakota Access argued in conclusion, "For the reasons stated, a hearing before the Commission cannot be justified solely on the merits of Standing Rock's request." (*Id.* at 5.)

- Two days later, on August 21, the Commission issued a Notice of Hearing indicating that, as the Tribe requested, it would indeed hold a hearing to address, *inter alia*, "Will the location and operation of the proposed facilities produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?" per N.D.C.C. Sec. 49-22.1-02 and N.D. Admin. Code Sec. 69-06-08-02.

So, in sum: the Tribe was the sole party to request a hearing and, in its request, set forth its various concerns necessitating a hearing; Dakota Access told the Commission the Tribe's concerns were not "cognizable" and that a hearing flatly "could not be justified" based on the

Tribe's request; two days later, the Commission announced it would hold a hearing. And then a few weeks later, as explained above, the Commission took the further step of granting the Tribe's petition to intervene in the proceeding.

Somehow to Dakota Access, what the foregoing demonstrates is that the Commission – in *granting* the Tribe's Request For Hearing (in defiance of Dakota Access's August 19 proclamation that the Tribe's concerns "could not justify" one) and in *granting* the Tribe's Petition to Intervene – actually intended to *deny* the Tribe the opportunity to participate in the hearing.

The fact that Dakota Access is resorting to such preposterous arguments on the eve of the hearing should alarm the Commission. It suggests that Dakota Access is not prepared to address the Tribe's – or the Commission's – legitimate safety concerns at the hearing, and so is instead making a desperate, last-dash bid to stop the Tribe from having a voice at the hearing altogether.

D. Dakota Access Is Attempting to Silence the Tribe Rather Than Address Safety Concerns in Good-Faith

Dakota Access received copies of the pre-filed testimony of Holmstrom, Kuprewicz, and Eagle on November 1. The testimony of Holmstrom and Kuprewicz in particular highlighted several missing, critical pieces of information that Dakota Access must produce before the Commission will be in a position to conclude that the DAPL Capacity Expansion will have "minimal adverse effects" on the environmental and welfare of North Dakota citizens. *See* Pre-Hearing Brief by Intervenor Standing Rock Sioux Tribe, Dkt. 49, at 10-11. Rather than endeavor to produce some of this missing, critical information to the Commission (even under seal) in the two-week interval between the date Dakota Access received the Tribe's testimony and the start

of the hearing, Dakota Access is instead trying to sidestep the issue altogether by filing its instant Motion.

For example, the Tribe's expert Richard Kuprewicz pointed out that the increased risk of surge overpressure post-expansion is a serious safety issue that Dakota Access must address before the Commission. Mr. Kuprewicz noted that a transient surge analysis should be performed to assess surge overpressure risk and identify necessary mitigation measures. In fact, Mr. Kuprewicz noted, Dakota Access performed just such a transient surge analysis and produced it, under seal, to the Illinois Commerce Commission in a parallel proceeding in that state. *See* Kuprewicz Testimony, Dkt. 42 at 217-242. According to Dakota Access's Illinois expert, its transient surge analysis identified numerous equipment installations and safety measures that are necessary to mitigate surge overpressure risks in light of the higher flow rates resulting from the DAPL Capacity Expansion. *See* Pre-Hearing Brief by Intervenor Standing Rock Sioux Tribe, Dkt. 49, at 4-5.

Rather than produce this transient surge analysis to the Commission in this proceeding, Dakota Access is instead trying to strike Mr. Kuprewicz's testimony. Why? Why is Dakota Access reluctant to disclose this information to the Commission? The Commission should insist on access to and independent review of this transient surge analysis that has been produced to the Illinois Commerce Commission.

II. The Holmstrom Declaration Does Not Violate the Protective Order in the Federal Litigation

Dakota Access's fallback argument to its fallback argument – that, if the Tribe's testimony is not stricken on relevance grounds, it should be stricken on "confusion" grounds, and if the Tribe's testimony it is not stricken on "confusion" grounds, then the testimony of Mr. Holmstrom at least should be excluded on the grounds that it violates a federal court protective order – is equally spurious. Indeed, in advancing it, Dakota Access egregiously misrepresents the content and nature of the Protective Order in place in the federal litigation.

Dakota Access has long sought to stifle opposition to the pipeline by shrouding its technical documents in secrecy. These efforts have been consistently rejected both by federal agencies and the courts. In the federal litigation, Dakota Access sought a protective order preventing disclosure of multiple technical documents, including spill models and geographic response plans, that were in the administrative record in the Tribe's litigation. The purpose of the motion was to shield certain information in light of the company's concern that individuals "looking to damage the pipeline could use such information to inflict environmental injury." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 249 F. Supp.3d 516, 517 (D.D.C. 2017). Dakota Access's motion was opposed not only by the Tribe, but by Dakota Access's own co-defendant, the U.S. Army Corps of Engineers, with the exception of a handful of specific redactions in a few of the documents. These "targeted" redactions had been proposed by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). *Id.* at 522. The Court denied the Protective Order except insofar as it applied to the handful of redactions proposed by PHMSA.

The Parties subsequently negotiated and executed the Protective Order to ensure that the information deemed Confidential by PHMSA and the District Court was treated suitably. That Order defines the "Protected Information" to include only the redactions in the five documents addressed by the Court in its decision. *See* Protective Order, at 2 (defining "Protected Information"). *The Holmstrom testimony that Dakota Access seeks to exclude for purportedly violating the Protect Order does not even relate to one of these five documents.* While a new administrative record was compiled and prepared at the completion of the federal remand process, the Protective Order was never renegotiated or revised. Accordingly, Dakota Access's Motion fails at the gate because the Protective Order does not even apply to the 2018 spill model or any other document in the remand record.

In the federal litigation, the Tribe agreed to treat information in the new administrative record as subject to the Protective Order as long as the Corps designated it as such. Consistent with that agreement, the Corps provided two versions of certain technical documents: unredacted versions that the Corps specifically designated as subject to the Protective Order, and redacted versions which contained no such designation. The Protective Order does not apply to the redacted versions. The redacted versions only redact certain specific information, such as specific spill volumes developed in spill models. The unredacted versions are marked "subject to protective order" in their document title, while the redacted versions *contain no such designation* and are available to the public as part of the administrative record.

Mr. Holmstrom's testimony divulges none of the redacted information from the remand record. Indeed, Dakota Access's motion fails to identify what specifically its concern is. When Dakota Access previously threatened the Tribe's counsel over Mr. Holmstrom's declaration, counsel invited it to identify where specifically Mr. Holmstrom's declaration disclosed any

protected information. *See* Ex 1. Dakota Access neither responded, nor carried through with its empty threat to raise the issue with the federal court. Instead, it seeks to strike Mr. Holmstrom's entire declaration simply because Mr. Holmstrom referred to the existence of documents that arguably contain protected information. It does not violate the Protective Order for Mr. Holmstrom to be aware of the existence of protected information—it prevents only disclosure. Because nothing in his testimony remotely discloses any protected information, the Motion to Strike Mr. Holmstrom's testimony on such grounds should be denied.

III. Conclusion

At this week's hearing, the Commission has a critically important job to do in evaluating the DAPL Capacity Expansion and ensuring that, if it proceeds, it does so in a manner that imposes minimal adverse effects on the environment and on the welfare of the people of North Dakota. The Tribe is prepared for and looks forward to contributing to that effort as part of a fair, transparent hearing. Dakota Access's Motion is a baseless attempt to derail the hearing. Out of respect for the Commission, the people of North Dakota, and the law, the Motion should be denied.

Dated this 12th day of November, 2019.

ROBINS KAPLAN LLP

By: _____

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ddepountis@standingrock.org

Exhibit 1

Jan Hasselman

From: Jan Hasselman
Sent: Wednesday, November 6, 2019 12:34 PM
To: Debold, David (DDebold@gibsondunn.com)
Cc: jfleischer@gibsondunn.com; wscherman@gibsondunn.com; tpurdon@robinskaplan.com
Subject: FW: DAPL protective order violation
Attachments: Don Holmstrom.pdf

David:

The Tribe and its counsel take the obligations of the protective order seriously. While we are always happy to discuss a concern, your accusation that we have violated the order has no basis.

Don Holmstrom should be a familiar name to you – he is a member of the Tribe's technical team and has filed multiple declarations in this case. Like other members of the Tribe's technical team that have signed the declaration affirming compliance with the PO, he has access to the complete administrative record including all protected information. I believe we sent his declaration to you last year – here it is again.

The existence and the majority of the contents of the Spill Model and Downstream Receptor reports are not protected information. The only protected information in those documents is the specific redacted portions identified by the Corps pursuant to discussions with you, and agreed to by us. The purpose of those redactions was to protect claimed security-sensitive information. The *redacted* versions of these documents are non-confidential part of the administrative record and accessible to the public. Many people have seen them. We expect to file them with the Court when we prepare the index to the AR.

I reviewed Don's testimony prior to its filing, and reviewed it again now. I do not see anywhere that he discloses any redacted information from these reports or any other source. If you disagree, please tell me specifically what part of his testimony concerns you. Don's testimony expresses the same kind of general concerns included in our summary judgment briefing, and is based on his overall familiarity with the administrative record in the case. He is able to opine on issues like WCD without disclosing any of the protected information.

Finally, while we have taken considerable care to ensure that our briefs and other materials do not disclose any specific information covered by the PO, your team has not exercised the same care. Specifically, our remand summary judgment brief took pains to ensure that we did not disclose the specific WCD spill estimate revision contained in the Remand Report and Spill Model. Your brief, in contrast, cites the revised WCD estimate of 12,517 barrels. (ECF 453 at 25, citing redacted data from RAR 251). Of course, your disclosure of your own confidential information is not an issue for us, but the example hopefully assures you that we are taking our obligations under the PO seriously.

I hope that this satisfies your concerns. Please let me know if there's anything further I can provide.

Jan

From: Debold, David <ddebold@gibsondunn.com>
Sent: Wednesday, November 6, 2019 7:59 AM
To: Jan Hasselman <jhasselman@earthjustice.org>
Cc: jfleischer@gibsondunn.com; wscherman@gibsondunn.com; tpurdon@robinskaplan.com
Subject: DAPL protective order violation

Jan,

There is a serious protective order issue involving your client, Standing Rock, which we intend to bring to Judge Boasberg's attention. We would therefore appreciate any response by no later than 5 p.m. ET on Thursday, November 7.

As you are aware, documents in this case are governed by a Protective Order that provides, in part, that:

> All Protected Information in the Litigation may be used only by parties to the Litigation to: a) evaluate, prosecute, or defend a claim **in this Litigation**; and/or b); prepare comments to the Corps falling within the scope of **the court-ordered remand**, and **for no other purpose**.

D.E. 390 at P 2 (emphasis added). The Protective Order is "binding upon the Parties," including Standing Rock, as well as "their respective attorneys, agents, representatives, officers, members and employees." *Id.* at P 1. Any documents that "rely on or incorporate the Protected Information in whole or in part" are to be "maintained as Protected Information" in accordance with the Protective Order. *Id.* at P 6.

On February 4, 2019 the Corps lodged the administrative record for its August 31, 2018 Remand Decision. D.E. 398. The Parties, including Standing Rock, "agreed that certain documents . . . will be treated as protected pursuant to the Protective Order." *Id.* at 1-2. The Corps designated those documents as protected on the Remand Administrative Record Index as well as in the file names of the documents. Among the documents identified as Protected Information were the July 2018 Spill Model Report (RAR008743-008964) and the Down Stream Receptor Report (RAR002739-02944) which incorporated in part the July 2018 Spill Model Report.

It appears that Standing Rock and at least one expert employed by Standing Rock have violated the protective order. In prepared testimony filed on November 1, 2019 before the North Dakota Public Service Commission, Donald Holmstrom, a putative expert witness testifying on behalf of Standing Rock, discusses the July 2018 Spill Model Report multiple times and characterizes its contents. Mr. Holmstrom conveys through his testimony that he has reviewed and is critiquing the protected 2018 Spill Model Report. Thus, Mr. Holmstrom and Standing Rock have "used" the 2018 Spill Model Report for purposes outside of this litigation (including the remand) in violation of the Protective Order. A copy of Mr. Holmstrom's testimony retrieved from the public ND PSC website is attached for your convenience. We have copied Mr. Purdon, Standing Rock's counsel in the ND PSC proceeding.

This is a serious issue. As noted, we intend to bring this issue to Judge Boasberg's attention and would appreciate your response to the following requests by 5 p.m. ET tomorrow.

- Please confirm or deny whether Mr. Holmstrom is a "Qualified Person" within the meaning of the Protective Order in this case. If Mr. Holmstrom is a "Qualified Person," please provide a copy of his executed declaration (Exhibit A to the Protective Order).

- Please confirm or deny whether Mr. Holmstrom has been provided copies of or access to the 2018 Spill Model Report (RAR008743-008964), the Down Stream Receptor Report (RAR002739-02944), or any other Protected Information in this litigation. To the extent Mr. Holmstrom has been provided access to any such documents, please identify (i) what materials have been provided to him, (ii) when such materials were provided to him and (iii) for what purpose, and (iv) identify the Party or Parties that provided him the materials.

- If there is any basis for Mr. Holmstrom's testimony regarding the 2018 spill model other than the 2018 Spill Model Report or other Protected Information, please so state.

We appreciate your prompt reply. Please include Bill Scherman and Jason Fleischer when you reply.

Regards,

David

David Debold

GIBSON DUNN

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BEFORE THE NORTH DAKOTA PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA

In the Matter of Dakota Access, LLC Consolidated Application for an Amended Certificate of Corridor Compatibility and Amended Route Permit; Dakota Access Pipeline Pump Station - Emmons County Siting Application	Case No. PU-19-204 OAH File No. 20190280 **Certificate of Service**

Certificate of Service

I, the undersigned, hereby certify that true and correct copies of the:

1. Intervenor Standing Rock Sioux Tribe's Opposition to Motion to Strike
2. Exhibit 1
3. Certificate of Service

by Standing Rock Sioux Tribe and cover letter filed by hand-delivery with the North Dakota Public Service Commission were, on November 12, 2019, served by placing the same in the United States mail, postage paid, addressed to the following:

Lawrence Bender Fredrikson & Byron, P.A. 1133 College Drive, Suite 1000 Bismarck, ND 58501	Zachary Pelham Special Assistant Attorney General c/o Pearce Durick PLLC 314 East Thayer Avenue Bismarck, ND 58501	Timothy J. Dawson Administrative Law Judge Office of Administrative Hearings 2911 North 14th Street, Suite 303 Bismarck, ND 58503

Dated this 12th day of November, 2019.

ROBINS KAPLAN LLP

By: _____

Timothy Q. Purdon (ND 05392)
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Bismarck, ND 58501
701-255-3000
TPurdon@RobinsKaplan.com

Attorneys for Standing Rock Sioux Tribe