

May 30, 2023

HAND DELIVERED

Mr. Steve Kahl
Executive Secretary Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

**RE: SCS Carbon Transport LLC
Midwest Carbon Express Project
Case No. PU-22-391**

Dear Mr. Kahl:

Please find enclosed herewith for filing with the North Dakota Public Service Commission, an original and five (5) copies of the following:

1. SCS Carbon Transport LLC's Response to Intervenor John Warford's Motion to Compel;
2. Bismarck Route Analysis dated May 30, 202; and
3. Certificate of Service.

Also enclosed herewith, please find a Compact Disc (CD) containing this letter and the above-referenced documents in PDF format.

Should you have any questions, please advise.

Sincerely,



LAWRENCE BENDER

LB/me
Enclosures

79279365 v1

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

IN THE MATTER OF THE APPLICATION
OF SCS CARBON TRANSPORT LLC FOR
A CERTIFICATE OF CORRIDOR
COMPATIBILITY AND ROUTE PERMIT
FOR THE MIDWEST CARBON EXPRESS
PROJECT IN BURLEIGH, CASS, DICKEY,
EMMONS, LOGAN, MCINTOSH,
MORTON, OLIVER, RICHLAND AND
SARGENT COUNTIES, NORTH DAKOTA

CASE NO. PU-22-391

SCS Carbon Transport LLC's Response to Intervenor John Warford's Motion to Compel

INTRODUCTION

Applicant SCS Carbon Transport LLC ("SCS") hereby submits this brief in response to Intervenor John Warford's motion to compel. For the reasons explained below, the North Dakota Public Service Commission should deny Warford's motion.

FACTS

Warford became a party to this case on March 6, 2023, when Administrative Law Judge Hope Hogan granted his petition for intervention. (Doc. ID# 119). In the two months following his intervention in this case, Warford did not serve SCS with a single discovery request or seek to depose SCS. Then, on May 3, 2023, Warford served SCS with a set of discovery requests. (Doc. ID# 209). Nowhere in his discovery requests did Warford explain why he waited nearly two months to serve SCS with these requests.

On May 16, 2023, Warford's counsel emailed SCS's counsel a deposition notice pursuant to N.D.R.Civ.P. 30(b)(6). (Doc. ID# 225). The notice stated that Warford intended to depose SCS just a week later, on May 23, 2023. The notice also commanded SCS to designate an officer

or officers who would attend the deposition and who would testify on the 38 topics and sub-topics that were listed in an exhibit to the notice.

SCS objected to Warford's discovery requests and his deposition notice. (Doc. ID# 227). Warford then filed a motion to compel SCS to attend a deposition and to respond to his discovery requests. (Doc. ID# 236).

In his motion, Warford explains that he seeks three categories of information. First, Warford seeks "Dispersion Analysis / Plume Modeling Information." Although he acknowledges in his motion that SCS has already provided that information to the Commission, Warford does not trust the Commission to properly use that information to determine the safety of SCS's proposed pipeline. Thus, Warford seeks to determine for himself whether SCS's pipeline is safe.

Second, Warford seeks "Summit Carbon Investor / Member Agreements and Payment Information." Warford claims that he needs that information to be able to determine if SCS is in compliance with recently passed (but not yet effective) legislation, which prohibits "[a]n individual who is not a citizen of the United States, a citizen of Canada, or a permanent resident alien of the United States" from acquiring an interest in agricultural land in North Dakota. N.D.C.C. § 47-10.1-02.¹ Warford speculates (without any evidence whatsoever) that SCS is owned by "a Chinese consortium (China Silk Road)" and the "Saudi Arabian Public Investment Fund."

Finally, Warford seeks "Summit Carbon Pipeline Utilizers (Ethanol Plants, etc.)." According to Warford, he needs that information to determine "who 'owns' the federal tax

¹ N.D.C.C. § 47-10.1-02 expressly tasks the North Dakota Attorney General—not PSC intervenors—with ensuring SCS's compliance. *See* N.D.C.C. § 47-10.1-04 ("If the attorney general has reason to believe that any person is violating section 47-10.1-02, the attorney general shall commence an action in the district court.") (emphasis added).

credits or other payment mechanisms that are implicated with this pipeline” and “whether any of these out-of-state facilities are liable for pipeline leaks, repairs, or maintenance.”

ARGUMENT

This case is an adjudicative proceeding. *See* N.D.C.C. § 28-32-01(1). “In an adjudicative proceeding, discovery may be obtained in accordance with the North Dakota Rules of Civil Procedure.” *Id.* Those Rules are modeled after the Federal Rules of Civil Procedure. *See McKenzie Cnty. Soc. Serv. Bd. v. C.G.*, 2001 ND 151, ¶ 20, 633 N.W.2d 157. Thus, federal courts’ interpretations of the Federal Rules of Civil Procedure are highly persuasive authority when interpreting the North Dakota Rules of Civil Procedure. *Id.* (“In interpreting our procedural rules, federal courts’ interpretations of corresponding federal rules are highly persuasive.”).

The discovery Warford seeks is improper under the North Dakota Rules of Civil Procedure and regulations of the North Dakota Public Service Commission. The Commission should deny Warford’s motion to compel.

I. Warford is not entitled to depose SCS.

Warford requests that the Commission compel SCS to sit for a deposition. The Commission should deny that request for two reasons. First, the Commission’s regulations do not allow Warford to depose SCS. Second, even assuming that Warford were allowed to depose SCS, Warford did not serve SCS with “reasonable written notice” of the deposition as Rule 30(b)(1) requires.

A. The Commission’s regulations do not allow Warford to depose SCS.

Warford’s motion to compel a deposition fails at the threshold because the Commission’s regulations do not allow for depositions. Before 1998, the Commission had a regulation that stated that “[t]he deposition of a witness required in any proceeding before the commission may

be taken in accordance with the North Dakota Rules of Civil Procedure.” N.D.A.C. § 69-02-05-04(2) (1998).² That regulation, however, was repealed, and there are no longer any regulations of the Commission that allow for depositions. As a result, Warford is not allowed to depose SCS, and the Commission should deny his request to compel SCS to attend a deposition. *See Burke v. Scharf*, 19 N.D. 227, 245–46, 124 N.W. 79, 88 (1909) (“The express repeal of a law indicates an intent to abrogate the rule thereby established or recognized.”).

B. Warford did not serve SCS with reasonable written notice of his deposition.

Even if the Commission’s regulations allowed for depositions (they do not), the Commission should deny the deposition that Warford seeks because it was not noticed in accordance with the North Dakota Rules of Civil Procedure. *See* N.D.C.C. § 28-32-33(1). Rule 30(b)(1) states that any “party who wants to depose a person by oral questions must give reasonable written notice to every other party.” N.D.R.Civ.P. 30(b)(1) (emphasis added). Warford did not give reasonable notice to SCS here.

Federal courts interpreting Fed.R.Civ.P. 30(b)(1) have explained that whether a notice of a deposition is “reasonable” depends on the “time between the notice and the deposition, with an eye toward preparation and travel.” *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 327 (N.D. Ill. 2005). Courts have further explained that the amount of time necessary to prepare for a deposition depends on the number of topics that will be discussed at the deposition. *See Nieman v. Grange Mut. Ins. Co.*, No. 11-CV-3404, 2012 WL 5471949, at *2-3 (C.D. Ill. Nov. 9, 2012) (holding that seven business days was not reasonable notice where the deposition witness was called to testify on “fourteen topics and thirteen sub-topics”).

² A copy of the text of N.D.A.C. § 69-02-05-04(2) before it was repealed can be found at: <https://www.ndlegis.gov/admcode/arc199805227v1.pdf>.

The amount of time to prepare for a deposition also depends on the type of deposition. A non-Rule 30(b)(6) deposition typically requires less time to prepare because the witness is testifying based on personal knowledge. In contrast, a Rule 30(b)(6) deposition “often requires additional preparation because the witness is not testifying as to his personal knowledge, but is testifying on behalf of the corporation as to matters known or reasonably available to the corporation.” *Id.*

Here, Warford emailed SCS his deposition notice at 3:49 p.m. Central Time on May 16, 2023. The notice stated that Warford would “take the deposition of [SCS], on May 23, 2023 at 9:00 a.m. Central Time, or such other time and date as is mutually agreeable.” Ex. C. The notice further commanded that SCS designate one or more officers to attend the deposition for the purpose of testifying on the following 38 topics and sub-topics:

1. The governing documents of Summit Carbon Solutions, LLC
2. The governing documents of SCS Carbon Transport LLC
3. The governing documents of SCS Carbon Removal LLC
4. The governing documents of SCS Permanent Carbon Storage LLC
5. The members and investors and respective investments in and ownership share in each of the foregoing SCS entities
6. The name and contact information of each investor, whether a natural or corporate person or other entity, and the identity of the SCS entity each such person or entity is invested in
7. The place of residence or domicile of each such investor
8. The nationality, nation of residence, or nation of domicile of each such investor

9. The amount invested by each such investor, including the dollars or other consideration paid or invested, and including any amounts or consideration promised but not paid to date
10. The date(s) of each such investment or promise to invest in SCS
11. The percentage ownership in each SCS entity held by each such investor
12. The formula, calculation method, or other agreement setting forth the amount and timing of past or future payments, consideration, compensation, or other remuneration to each investor arising out of the operation of the pipeline and the source of and/or entity making such payments
13. The formula, calculation method, or other agreement setting forth the amount and timing of future payments, consideration, compensation, or other remuneration to each investor should the pipeline be constructed and is in operation
14. SCS's due diligence or other processes or protocols in place to ensure no foreign adversary or foreign government is allowed to invest in and/or take a member share in SCS that includes real property ownership in North Dakota
15. The federal or state tax program, statute, regulation, or other like or similar program, incentive, or credit SCS anticipates applying for, taking advantage of, or requesting for the operation of the pipeline and/or permanent storage of carbon dioxide
16. The rates or other consideration payable by ethanol plants, utilities, other industry, political subdivisions, and/or states to utilize, rent, or purchase

pipeline space and/or to reserve the rights to utilize, rent, or purchase pipeline space

17. The rate or other consideration payable by SCS to any ethanol plant, utilities, other industry, political subdivision, and/or state to utilize, rent, or purchase pipeline space and/or to reserve the rights to utilize, rent, or purchase pipeline space
18. The names, contact information of each utilizer of pipeline space, the amounts paid to SCS to date by each utilizer of pipeline space, and any amounts paid to SCS to date for any reservation of the right for utilization of the pipeline in the future
19. The duration of SCS's liability for the pipeline in North Dakota
20. Any defense and indemnity or similar hold-harmless agreement requiring any person, entity, political subdivision or state to assume liability or responsibility for the pipeline, abandonment of the pipeline, damages due to failure or leaks in the pipeline, or cessation of use of the pipeline for any reason
21. The identities of all ethanol plants or other industry that has signed on with SCS to utilize the pipeline
22. The name, address, and contact information of the person or entity that owns each such ethanol plant or other industry
23. The date each such person or entity signed on with SCS
24. The terms of each such entity's agreement with SCS, including but not limited to payment and consideration and the term or duration of the agreement

25. The identities of all ethanol plans or other industry that SCS has approached in an effort to sign them on with SCS to utilize the pipeline
26. The name, address, and contact information of the person or entity that owns each such ethanol plant or other industry
27. The date(s) each such person or entity was approached to sign on with SCS
28. The terms of any proposed agreement with SCS, including but not limited to payment and consideration and the term or duration of the agreement
29. Any and all plume studies conducted by or on behalf of SCS
30. The name, address, and contact information of all persons or entities that performed a plume study at any time
31. The education, training, and experience of each such person or entity
32. The total number of plume studies conducted for this pipeline
33. The total number of plume studies conducted for sections of the pipeline any part of which is located within 50 miles of the City of Bismarck
34. The assumptions and other information SCS provided to the persons or entities that performed each such plume study
35. The date(s) each such plume study was conducted
36. The legal description or other identifiable location of the portion or portions of pipeline analyzed in each such plume study
37. The methodology utilized for each such plume study
38. The findings and conclusions of each such plume study, as such findings and conclusions relate to negative consequences to or adverse impacts on human life, health and safety

Warford's notice effectively gave SCS four business days to prepare corporate representatives to testify on 38 topics and sub-topics. That is patently unreasonable given the complexity of the topics; never mind that SCS would have to prepare multiple corporate designees to cover their unreasonably broad scope. *See In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. at 327 (motion to compel denied where "it was obvious—or at least probable—that the schedules of the deponents and a number of lawyers would be unable to accommodate the belatedly filed notices."). It would take significant time for SCS to prepare multiple corporate designees to testify on Warford's topics. It is unreasonable to ask SCS's officers to travel from Iowa to North Dakota and then conduct the extensive research necessary to be prepared to testify on these topics in what is effectively four days.

Throughout his motion, Warford states that he "needed to obtain Summit Carbon's deposition . . . prior to the June 2nd PSC hearing in Bismarck." But that does not excuse his failure to give SCS more than four business days' worth of notice. The Commission should follow the lead of several other courts and reject any argument to the contrary. *See, e.g., In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. at 327; *Nieman*, 2012 WL 5471949, at *3. Warford could have served SCS with his deposition notice as early as March 6th—the day he became a party to this action. Instead, he waited until two weeks before the final hearing. He cannot now use the hearing date to excuse his dilatory notice. *See R.H. Stearns Co. of Boston, Mass., v. United States*, 291 U.S. 54, 61 (1934) ("He who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned, for the law says to him, in effect: 'This is your own act, and therefore you are not damnified.'").

Warford effectively gave SCS four business days' worth of notice to prepare for a deposition that would require several corporate designees to testify on 38 topics and sub-topics.

That is not the “reasonable written notice” that Rule 30(b)(1) requires. Accordingly, Warford is not entitled to depose SCS.

II. Warford is not entitled to have SCS respond to his discovery requests.

Warford also asks the Commission to compel SCS to respond to his discovery requests. The Commission should deny his request because the responses are not yet due Warford’s discovery requests were untimely, and the information sought is irrelevant and unreasonably duplicative.

A. Warford’s motion to compel is premature.

The Commission should deny Warford’s motion to compel discovery requests because it is premature. The North Dakota Rules of Civil Procedure give a party served with discovery requests 30 days to respond. *See* N.D.R.Civ.P. 33(b)(2); N.D.R.Civ.P. 34(b)(2)(A).³ And if the party serving the discovery requests files a motion to compel before those 30 days have elapsed, the motion is premature and must be denied. *See Grech v. Ford Motor Co.*, No. 08-10729, 2008 WL 5381870, at *1 (E.D. Mich. Dec. 22, 2008) (denying a plaintiff’s motion to compel because “when [the] plaintiff filed her motion . . . , it was premature, given that [the defendant’s] responses were not yet due”).

³ Warford is likely to note that N.D.A.C. § 69-02-05-12 only gives SCS ten business days to respond to interrogatories. That regulation, however, is invalid.

The North Dakota Supreme Court has explained that “if an administrative regulation ... conflicts with the statute it implements, ... such a regulation is void or invalid.” *Sloan v. North Dakota Workforce Safety & Ins.*, 2011 ND 194, ¶ 10, 804 N.W.2d 184.

The statute that authorizes discovery in adjudicative proceedings is N.D.C.C. § 28-32-33. That statute states that “[i]n an adjudicative proceeding, discovery may be obtained in accordance with the North Dakota Rules of Civil Procedure.” N.D.C.C. § 28-32-33. And the North Dakota Rules of Civil Procedure give a party 30 days to respond to interrogatories. *See* N.D.R.Civ.P. 33(b)(2). Accordingly, N.D.A.C. § 69-02-05-12 giving SCS only ten business days to respond to interrogatories is inconsistent with N.D.C.C. § 28-32-33. The regulation is therefore invalid.

Warford served SCS with his discovery requests on May 3, 2023. SCS therefore has until June 2, 2023 to respond. When Warford filed his motion on May 22, 2023, it was premature. The Commission should deny it.

B. Warford's discovery requests were untimely.

Warford's discovery requests are also untimely. SCS's deadline to respond to the discovery requests is June 2, 2023. By then, all hearings in this case will have been completed. Under the Commission's regulations, evidence can be submitted after a hearing only if a party has filed a petition to reopen the proceeding for the purpose of taking additional evidence. *See* N.D.A.C. § 69-02-06-01. And Warford has not submitted such a petition.

Accordingly, by the time that SCS's responses to Warford's discovery requests are due, the taking of evidence in these proceedings will have concluded and no further additions to the evidentiary record will be allowed. Discovery of evidence at that point can no longer serve any legitimate purpose. As a result, Warford's discovery requests are untimely, and the Commission should not compel SCS to respond to them.

C. The information that Warford's discovery requests seek is irrelevant and/or unreasonably duplicative.

Even if Warford's requests did not suffer from fatal procedural defects, the Commission should not compel SCS to respond because they exclusively seek irrelevant and unreasonably duplicative information.

The North Dakota Rules of Civil Procedure only allow Warford to use discovery requests to obtain information that is relevant and not unreasonably cumulative or duplicative. *See* N.D.R.Civ.P. 26(b)(1)(A) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant."); N.D.R.Civ.P. 26(b)(1)(B)(i) ("[T]he court must limit the frequency or extent

of discovery otherwise allowed by these rules if it determines that . . . [the] discovery sought is unreasonably cumulative or duplicative.”).

Here, Warford states in his motion that he seeks three categories of information through his discovery requests: (1) “Dispersion Analysis / Plume Modeling Information,” (2) “Summit Carbon Investor / Member Agreements and Payment Information,” and (3) “Summit Carbon Pipeline Utilizers (Ethanol Plants, etc.).” Each category is irrelevant and unreasonably duplicative.

1. Information relating to dispersion analysis and plume modeling is unreasonably duplicative.

Warford is not entitled to obtain any information from SCS relating to dispersion analysis or plume modeling because such information is unreasonably duplicative and irrelevant. *See* N.D.R.Civ.P. 26(b)(1)(B)(i); *Smith v. Smith*, 538 N.W.2d 222, 230 (N.D. 1995) (“Under N.D.R.Civ.P. 26(b)(1), the court may limit discovery that is unreasonably cumulative or obtainable from other sources.”).

Warford presumably wants to use that information to argue that the Commission should deny SCS’s application. As Warford acknowledges in his motion, however, SCS has already provided the Commission with that information. Given that the Commission—the ultimate decisionmaker in this case—already has the information, giving the same information to Warford would serve no useful purpose. Accordingly, the information relating to dispersion analysis and plume modeling that Warford seeks is irrelevant and unreasonably duplicative.

2. Information relating to SCS’s investors is irrelevant.

Warford is also not entitled to information relating to SCS’s investors because such information is irrelevant for purposes of this case. *See* N.D.R.Civ.P. 26(b)(1)(A).

Warford claims that such information is “relevant to the pipeline’s benefit to the citizens of ND; relevant to potential foreign citizen / foreign country / foreign adversary ownership of real property interests in ND.” In particular, Warford claims that he needs that information to ensure that SCS is in compliance with recently passed (but not yet effective) legislation, which prohibits “[a]n individual who is not a citizen of the United States, a citizen of Canada, or a permanent resident alien of the United States” from acquiring an interest in agricultural land in North Dakota. N.D.C.C. § 47-10.1-02. Warford speculates (without any evidence) that SCS is owned by “a Chinese consortium (China Silk Road)” and the “Saudi Arabian Public Investment Fund.”

The information that Warford seeks is not relevant to this case. This case is based on SCS’s application for a certificate of corridor compatibility and route permit pursuant to N.D.C.C. ch. 49-22.1. Section 9 of that chapter lists the factors that the Commission must consider when evaluating SCS’s application. *See* N.D.C.C. § 49-22.1-09. Nowhere in that statute is there any mention of SCS’s pipeline’s “benefit to the citizens of ND” or “potential foreign citizen / foreign country / foreign adversary ownership of real property interests in ND.” The undersigned is not aware of any proceeding brought under N.D.C.C. ch. 29-22.1, in which the Commission has required disclosure of an applicant’s investors to determine how the proposed pipeline would benefit the citizens of North Dakota. Accordingly, information relating to these topics is not relevant to this case.⁴

Warford’s stated purposes for obtaining investor information is facially irrelevant. He purports to seek the information to determine SCS’s pipeline’s benefit to the citizens of North Dakota and whether SCS is in compliance with N.D.C.C. § 47-10.1-02. But the Commission is

⁴ To be sure, SCS’s pipeline will benefit the citizens of North Dakota and SCS is not in violation of N.D.C.C. § 47-10.1-02. That said, such information is irrelevant.

not instructed to consider either of those factors when determining whether to grant SCS's application. *See* N.D.C.C. § 49-22.1-02. As a result, information relating to SCS's investors is irrelevant.⁵

3. Information relating to SCS's pipeline's utilizers is irrelevant.

Finally, information relating to the ethanol plants that will utilize SCS's pipeline is irrelevant. *See* N.D.R.Civ.P. 26(b)(1)(B)(i); *Smith*, 538 N.W.2d at 230.

Warford claims that such information is "relevant to the pipeline's benefit to the people of ND." As explained above, "the pipeline's benefit to the people of ND" is not a factor listed in N.D.C.C. § 49-22.1-09 that the Commission is instructed to consider. It therefore has no relevance to this proceeding. Indeed, Warford acknowledges that SCS has already disclosed that its customers currently include one ethanol plant in North Dakota and thirty-two ethanol facilities located in other states. Warford asserts that various pieces of additional information about those customers (beyond their location) are "directly relevant to the benefit of the pipeline for ND." But Warford does not (and cannot explain how that information would be relevant, even if the Commission were tasked with assessing this factor. Rather, Warford's discovery requests appear to be simply a fishing expedition for which he offers vague justifications unrelated to the issues before the Commission.

⁵ Warford asks the following rhetorical question in his motion: "How can Intervenor like Warford, the public and the Commission itself, determine if Summit Carbon is actually owned / owned in part / controlled by a foreign citizen or country or foreign adversary, when Summit refuses to disclose its owners and investors, as well as its governing documents that will shed light on this critical statutory [N.D.C.C. § 47-10.1-02] issue?"

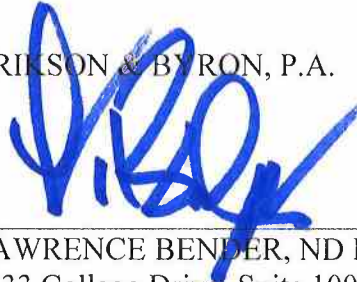
The answer to Warford's question is that intervenors like him, the public, and the Commission are not supposed to determine for themselves if SCS is in compliance with N.D.C.C. § 47-10.1-02. The Commission has not been tasked with investigating these matters; ensuring SCS's compliance is the job of the North Dakota Attorney General. *See* N.D.C.C. § 47-10.1-04. Using the Commission's hearings on pipeline routing as a theatre for such inquiry will only result in the waste of time and resources by the Commission and its staff.

CONCLUSION

For the foregoing reasons, the Commission should deny Warford's motion to compel.

Dated this 30th day of May, 2023.

FREDRIKSON & BYRON, P.A.



By: _____

LAWRENCE BENDER, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501
(701) 221-8700
lbender@fredlaw.com

Attorneys for SCS Carbon Transport LLC



Bismarck Route Analysis

5/30/2023

Table of Contents

1	Introduction.....	2
2	Geohazard Risks.....	2
3	Environmental Constraints.....	4
4	Tribal Impacts	6
5	Permitting	6
6	Conclusion	8

1 Introduction

In connection with the Consolidated Application for a Certificate of Corridor Compatibility and Route Permit (Application) submitted by SCS Carbon Transport (Summit) in Case No. PU-22-391 before the North Dakota Public Service Commission (Commission), Summit has prepared this analysis to detail for the Commission the route selection process for Summit's proposed Midwest Carbon Express Project (Project). Specifically, the Commission has requested an analysis of routing the Project to the south of the City of Bismarck.

At Project initiation, Summit identified multiple potential routes across the Project footprint in North Dakota, including the areas to the north and south of Bismarck. Regarding a potential route to the south of Bismarck, Summit reviewed a study area from the University of Mary south to the Dakota Access Pipeline crossing of the Missouri River (Southern Route Study Area). Although many factors contributed to the decision to route the Project to the north of Bismarck, the exclusion of a southern route was primarily based upon the risks, constraints, impacts, and other matters set forth herein. It should be noted the order of the discussion that follows is not presented as a hierarchy of importance in Summit's route decision-making process.

2 Geohazard Risks

Lateral migration and scour are both potential geohazard issues in the Southern Route Study Area and should be considered, like what has been done at the current crossing. The level of risk will depend on exactly where within the Southern Route Study Area the crossing of the river will occur. In general, this area of the Missouri River has a wider meander belt and floodplain compared to the currently proposed crossing, which may lead to extended lengths of recommended deeper pipeline burial or longer horizontal directional drills (HDDs) to avoid these risks. The current Missouri River crossing traverses 1.29 miles of floodplain. A route within the Southern Route Study Area would traverse the Missouri River where the floodplain can be as wide as 4.28 miles.¹ The current Missouri River crossing location and design gives the Project a negligible risk for adverse effects from river migration and scour.

There is also evidence of recent flood events within the Southern Route Study Area which have been captured by aerial imagery. See **Figure 1** and **Figure 2**. Flooding events have the potential to make construction of the Project significantly more difficult and unconventional depending on the extent of flooding and location of the Missouri River crossing.

¹ North Dakota Risk Assessment MapService (NDRAM). <https://ndram.dwr.nd.gov>.



Figure 1: Google Earth Imagery from 2021



Figure 2: Google Earth Imagery from 2011

Furthermore, the west side approach to the Southern Route Study Area has a more abrupt topography change descending down into the floodplain compared to the currently proposed Missouri River crossing location. The Southern Route Study Area has a higher density of unstable slope and landslides as identified by Google Earth imagery as well as North Dakota Mineral Resources 24K Landslide maps.² These areas would need to be avoided or site-specific engineering measures would need to be designed and implemented to mitigate those risks.

Finally, there would be added river crossings with the Southern Route Study Area compared to the current route, creating additional environmental impact risks as well as integrity risks from scour and lateral migration of the rivers, all of which would need to be mitigated.

3 Environmental Constraints

The Southern Route Study Area has numerous sensitive and historic lands that run the length of the Missouri River from the University of Mary south to the Dakota Access Pipeline crossing of the Missouri River. These lands include federal lands, shown in **Figure 3**, recreation management lands, conservation areas, wildlife management areas, Fort Abraham Lincoln State Park, North Dakota Veterans Cemetery, Huff Indian Village, and Fort Rice. The filed Project route to the north of Bismarck traverses mostly agricultural lands and less of these sensitive areas as shown in **Table 1**. Because of the presence of less environmental constraints along the currently proposed route, there are fewer potential impacts and mitigation is straightforward.

[Remainder of page intentionally left blank.]

² North Dakota Geological Survey. <https://www.dmr.nd.gov/ndgs/landslides/>.

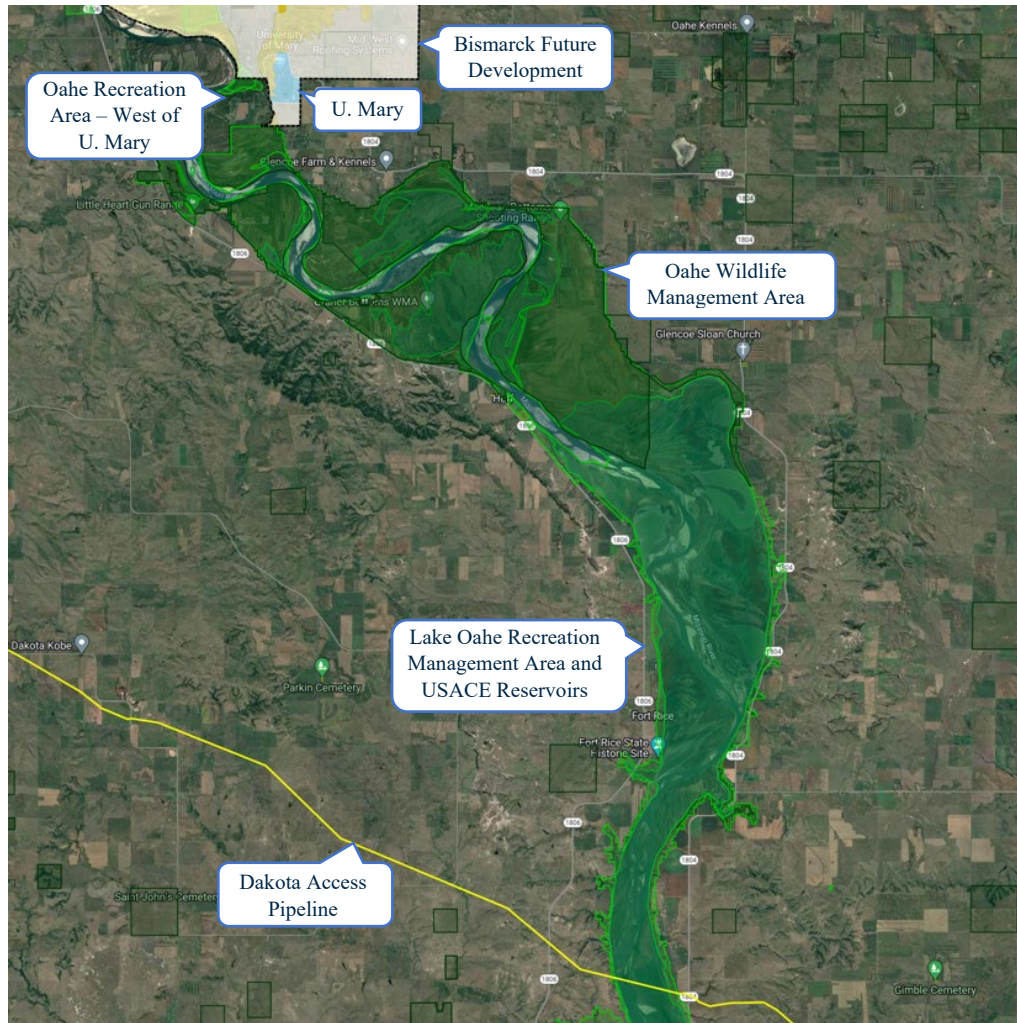


Figure 3: Lake Oahe Federal Lands

	Filed Pipeline Route	Southern Route Study Area
Recreation Management Area, Lake Oahe	Not Impacted	Will be Impacted
Lake Oahe - USACE Reservoirs	Not Impacted	Will be Impacted
Oahe Wildlife Management Area (Mandates for Protection)	Not Impacted	Likely Impacted
University of Mary	Not Impacted	Potentially Impacted
Oahe Recreation Area – West of University of Mary	Not Impacted	Potentially Impacted

Table 1: Environmental Crossing Table

4 Tribal Impacts

Relocating the Project would raise major concerns for area Tribes and their supporters regionally and nationally. The crux of this concern is the Dakota Access Pipeline, a pipeline whose final route was similarly shifted from north to south of Bismarck in response to non-Tribal related objections, which was seen by the affected Tribes' as disrespect for their continuing interests in their former treaty lands.

Damming the Missouri River nearly six decades ago to fill the Lake Oahe reservoir, which now serves as the eastern boundary of the Tribes' reservations, flooded more than 200,000 acres of Tribal lands. These were the most economically prosperous areas of both Tribes' reservations, as well as the center of the community and traditional life for most of the Tribes' citizens. The inundated area of their reservations had been reserved as Indian Country in 1851 by the original Treaty of Fort Laramie. Congress reneged on the Treaty by enacting the Pick-Sloan Flood Control Act in 1944 and imposing the Missouri Basin Program on the Tribes.³ When the U.S. Army Corps of Engineers (USACE) initiated eminent domain proceedings in 1958 to take Standing Rock Sioux Tribal lands for the Lake Oahe site, the Tribe convinced a judge to block the USACE's condemnation, only to have Congress pass legislation overturning the court's decision.⁴ Today Lake Oahe is the fourth-largest reservoir in the country by volume. It destroyed communities, farms, and wooded bottomlands for which the Tribes have been seeking compensation from Congress ever since without much success.

From the perspective of Tribal members, Dakota Access Pipeline was not just a pipeline, it was a reminder of what Native people lost when Congress dammed the Missouri – of broken promises from the federal government to which other tribes could easily relate. The Chairman of the Standing Rock Sioux Tribe, Dave Archambault II, drew this historical connection:

“When the Army Corps of Engineers dammed the Missouri River in 1958, it took our riverfront forests, fruit orchards and most fertile farmland to create Lake Oahe. Now the Corps is taking our clean water and sacred places by approving this river crossing. Whether it’s gold from the Black Hills or hydropower from the Missouri or oil pipelines that threaten our ancestral inheritance, the tribes have always paid the price for America’s prosperity.”⁵

Moving the pipeline route to the south of Bismarck and moving a pipeline project away from non-Tribal interests and lands and would likely cause significant controversy due to further impacts to this historically sensitive area.

5 Permitting

If the pipeline was routed across Lake Oahe, the following approvals would be required: (1) a Section 408 permit from the USACE under the Rivers and Harbors Act, 33 U.S.C. § 408

³ Flood Control Act of 1944, ch. 665, 5 Stat. 887.

⁴ United States v. 2,005 Acres of Land, 160 F. Supp. 193, 202 (D.S.D. 1958), vacated as moot sub nom. United States v. Sioux Indians of Standing Rock Reservation, 259 F.2d 271 (8th Cir. 1958); see Act of Sept. 2, 1958, Pub. L. No. 85-915, 72 Stat. 1762

⁵ David Archambault II, “Taking a Stand at Standing Rock,” N.Y. Times (Aug. 24, 2016).

(2012); and (2) an easement across USACE -administered lands along Lake Oahe pursuant to the Mineral Leasing Act, 30 U.S.C. § 185 (2012).

Based on the lessons learned from the Dakota Access Pipeline, Summit anticipates receipt of this easement to be improbable. Despite Energy Transfer Partners' (owner of the Dakota Access Pipeline) repeated victories in federal court, the Tribes quickly gained traction in the political arena. On September 9, 2016, Judge Boasberg issued an order denying the Standing Rock Tribe's motion for a preliminary injunction to stop the Dakota Access Pipeline construction until the USACE engaged in additional consultation with the Tribe under the National Historic Preservation Act. Later the same day, the USACE, along with the U.S. Departments of Justice and the Interior, issued a joint statement temporarily halting the project on federal land bordering and under Lake Oahe and requesting "that the pipeline company voluntarily pause all construction activity within 20 miles east or west of Lake Oahe."⁶

President Obama soon announced that he had asked the USACE to consider rerouting the Dakota Access Pipeline. "We are monitoring this closely," President Obama said. "I think as a general rule, my view is that there is a way for us to accommodate sacred lands of Native Americans. I think that right now the Army Corps is examining whether there are ways to reroute this pipeline."⁷ On November 14, 2016, the USACE issued a statement saying it had not yet determined whether to grant an easement on the USACE -administered lands at Lake Oahe "at the proposed location" and invited the Standing Rock Sioux Tribe to 'engage in additional consultation.'⁸ Three weeks later, the USACE rejected the easement.

As 2016 drew to a close, national politics were changing. Just four days after taking office, President Donald Trump issued a memorandum declaring the Dakota Access Pipeline to be in the national interest and directing federal agencies to review and approve it "in an expedited manner, to the extent permitted by law and as warranted."⁹ The USACE formally notified Congress and Judge Boasberg on February 7, 2017, of its intention to grant the easement at Lake Oahe. The Dakota Access Pipeline was finally completed and entered service in June of that year.

Notwithstanding President Trump's decision to expedite the Dakota Access Pipeline, the pipeline continued to generate federal court litigation years after it went into service. The District Court found that the USACE violated the National Environmental Policy Act (NEPA) in its issuance of an easement to the Dakota Access Pipeline across Lake Oahe. In 2020, the District Court ordered the USACE to prepare an Environmental Impact Statement (EIS) and vacated the easement. To this day, the USACE has yet to issue the draft EIS and the NEPA process is still ongoing without any defined schedule or known outcome to whether an easement will ever be granted. Beyond litigation risk, reopening the Tribes' concerns about

⁶ 5 Press Release, Office of Pub. Affairs, Dep't of Justice, Joint Statement from the Dep't of Justice, the Dep't of the Army & the Dep't of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Sept. 9, 2016).

⁷ Quoted in Christine Hauser, "Obama Says Alternative Routes Are Being Reviewed for Dakota Pipeline," N.Y. Times (Nov. 2, 2016).

⁸ Press Release, U.S. Army Corps of Eng'rs, Statement Regarding the Dakota Access Pipeline (Nov. 14, 2016).

⁹ Memorandum of January 24, 2017, 82 Fed. Reg. 11,129 (Feb. 17, 2017).

their former treaty lands, including those inundated by Lake Oahe, raises significant political dangers given the solicitude with which Summit has always shown Native American nations since the Project's inception.

6 Conclusion

In summary, a southern route presents significant unknowns and risks – including potential impacts to resources for which there may not be viable mitigation options, including the historically negative impact to Tribal lands in the area south of Bismarck. Summit understands that concerns about safety and future development are the driving forces behind the Commission's request for this analysis. Additional information concerning safety and future development can be found on Exhibit A attached hereto; however, as detailed above, a southern route presents additional and unnecessary integrity and safety risks that are not presented in the current route north of Bismarck. Summit strongly believes that it has chosen the safest, most prudent route for the Project based on a multitude of factors and to re-route the Project to the south of Bismarck at this stage of development would add unnecessary cost, schedule delay, and offset many of the impact mitigation measures that have been implemented, as shown in Exhibit B.

EXHIBIT A

1 Safety

As discussed at length during the public hearings for the Project, transportation of a commodity like carbon dioxide (CO₂) via pipeline is the safest mode of transportation when compared to truck and rail¹⁰. The safety record of pipelines in the United States as well as North Dakota is exceptional and existing pipelines transporting CO₂ are statistically the safest. There are two CO₂ pipelines in operation in North Dakota and to date, there have been no recordable injuries or significant releases. As a matter of perspective, there have been (4) fatalities in the home building industry in the Bismarck area in the last (5) years compared to (0) injuries and (0) fatalities associated with pipeline operations.

Summit has provided the Commission with a dispersion and risk analysis which indicates that in the unlikely event of a guillotine rupture, the city of Bismarck would not be a “could affect” area.¹¹ In other words, a worse-case release scenario associated with the pipeline along the current route presents minimal risk to the city of Bismarck and its residents.

Regarding the adequacy of Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations, Summit strongly believes the requirements set forth in Title 49 of the Code of Federal Regulations, Part 195 (49 CFR 195) regarding design, construction, and operation of a CO₂ pipeline in dense phase service are more than adequate. In addition, Summit has provided testimony to the Commission regarding the numerous PHMSA requirements that will be exceeded with respect to the Project as part of Summit’s ongoing efforts to further mitigate the risk associated with an already safe mode of transportation.

The presence of pipelines and the risk of operation has not deterred development, especially on the north side of Bismarck, where homes have been constructed in close proximity (many within 500 feet) to existing PHMSA regulated transmission pipelines that have been in operation for decades.

2 Economic Development

The current pipeline route at its nearest location is 1.17 miles away from the Bismarck Future Development Boundary. The Southern Route Study Area could traverse the Bismarck Future Development Boundary for as much as 0.62 miles.

There is little evidence that pipelines hinder the future development of tracts that they traverse. One methodology for evaluating impact of development in Burleigh County is density of structures around existing pipelines vs. the proposed Project, as shown in **Table 2**.¹² Based

¹⁰ <https://www.bts.gov/sites/bts.dot.gov/files/2021-12/NTS-50th-complete-11-30-2021.pdf>;
<https://www7.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/news/70826/report-congress-shipping-crude-oil-truck-rail-and-pipeline-32019.pdf>

¹¹ Summit has submitted the dispersion modeling and risk analysis to the Commission with an Application to Protect Information. The Commission has not yet ruled on the Application to Protect Information and the inclusion of this information is not intended to waive the confidentiality sought by the Application to Protect Information or otherwise subject the dispersion modeling and risk analysis to review by anyone other than the Commission and its staff.

¹² Burleigh County, North Dakota. <https://burleighco.com/maps/>.

on the existing NuStar Pipeline and WBI Pipeline, homeowners in Bismarck have not shown a tendency to avoid living or developing adjacent to existing pipelines, as shown when comparing **Figure 4** and **Figure 5**.

Of the eleven (11) structures identified within 500 feet of the filed route, only two (2) meet the definition of exclusion and avoidance areas under Chapter 49-22.1 of the North Dakota Century Code. Both tracts were signed voluntarily and are anticipated to receive waivers.

	Proposed Pipeline Route	NuStar Pipeline	WBI Pipeline
Structures within 500 feet	11	940	646
Structures within 1 mile	273	8,423	7,924

Table 2: Structures in Burleigh County

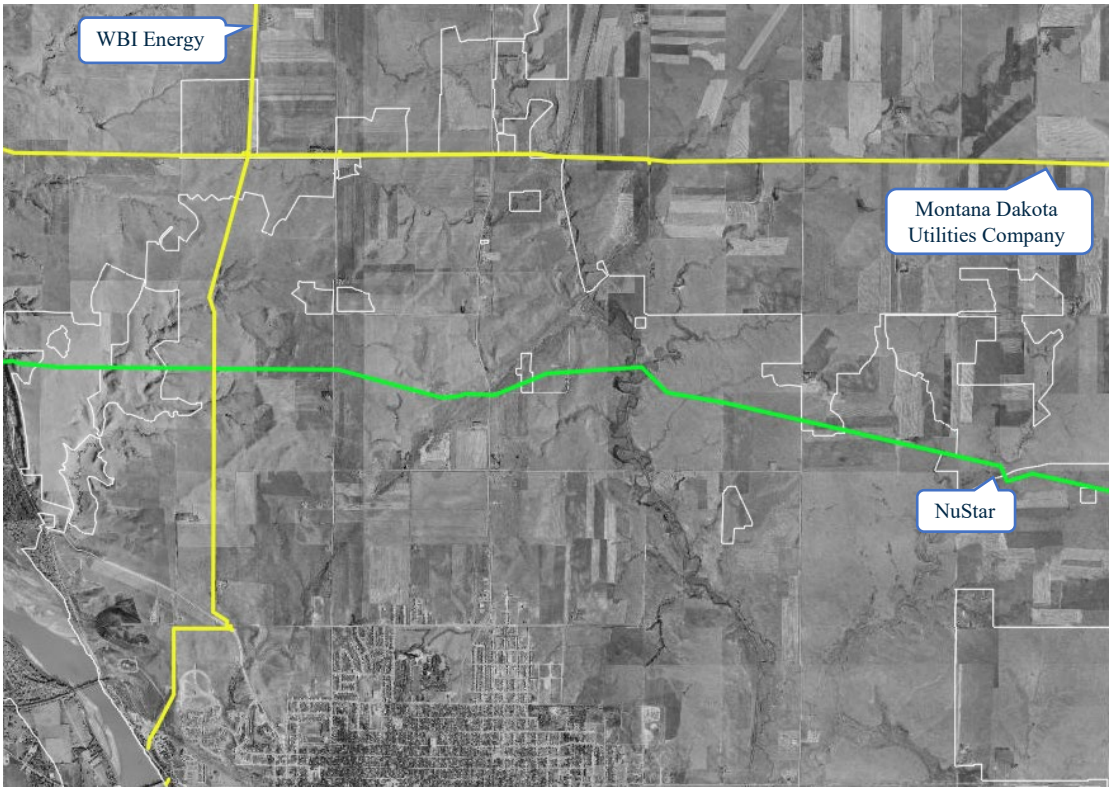


Figure 4: Existing Pipelines in Bismarck 1960s

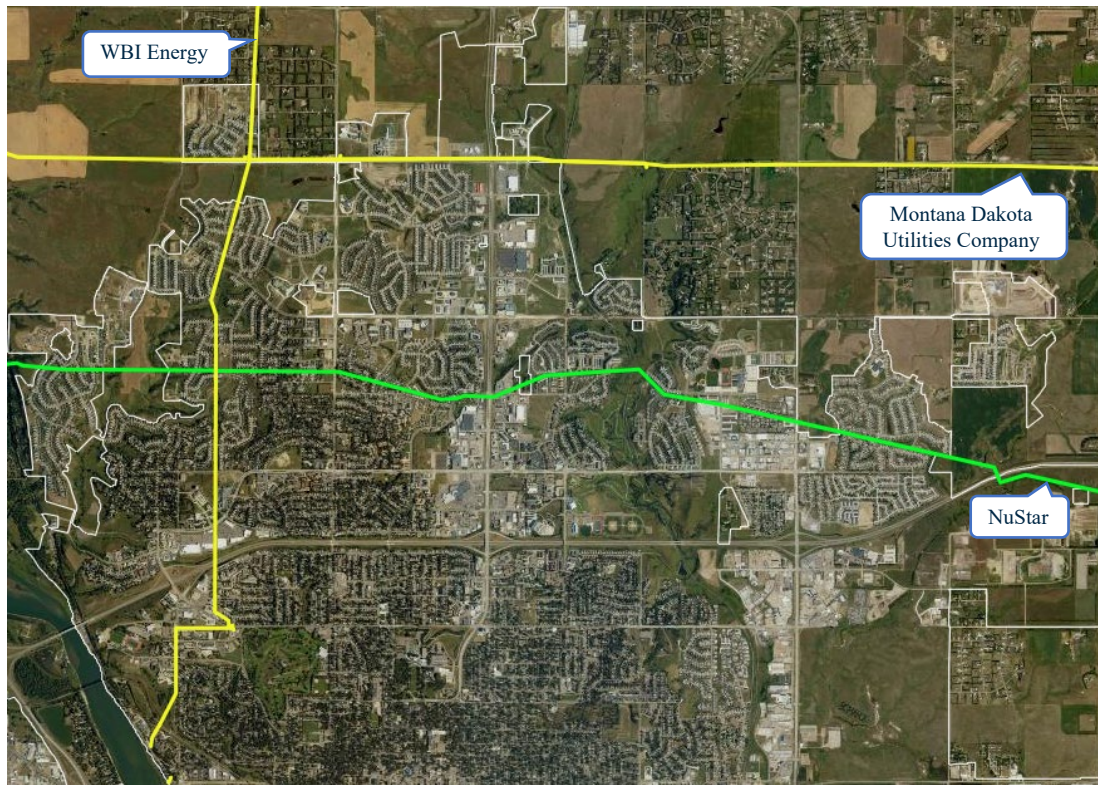


Figure 5: Existing Pipelines in Bismarck 2022

Another consideration is the growth rate of Bismarck. From 2015 to 2023, approximately 4,114 acres were subdivided and developed into residential neighborhoods.¹³¹⁴ Of which, roughly half of the developments occurred in close proximity to the existing NuStar and WBI pipelines in Burleigh County, as depicted with purple polygons in **Figure 6**. There are roughly 95,235 acres of undeveloped land between the existing Bismarck residential neighborhoods and the current proposed Project route. Based on current Bismarck development rates of roughly 515 acres per year, it would take 185 years to fully develop all land between the existing suburbs and the pipeline.

[Remainder of page intentionally left blank.]

¹³ City of Bismarck. <https://www.bismarcknd.gov/20/GIS-Maps>.

¹⁴ Burleigh County, North Dakota. <https://burleighco.com/maps/>.

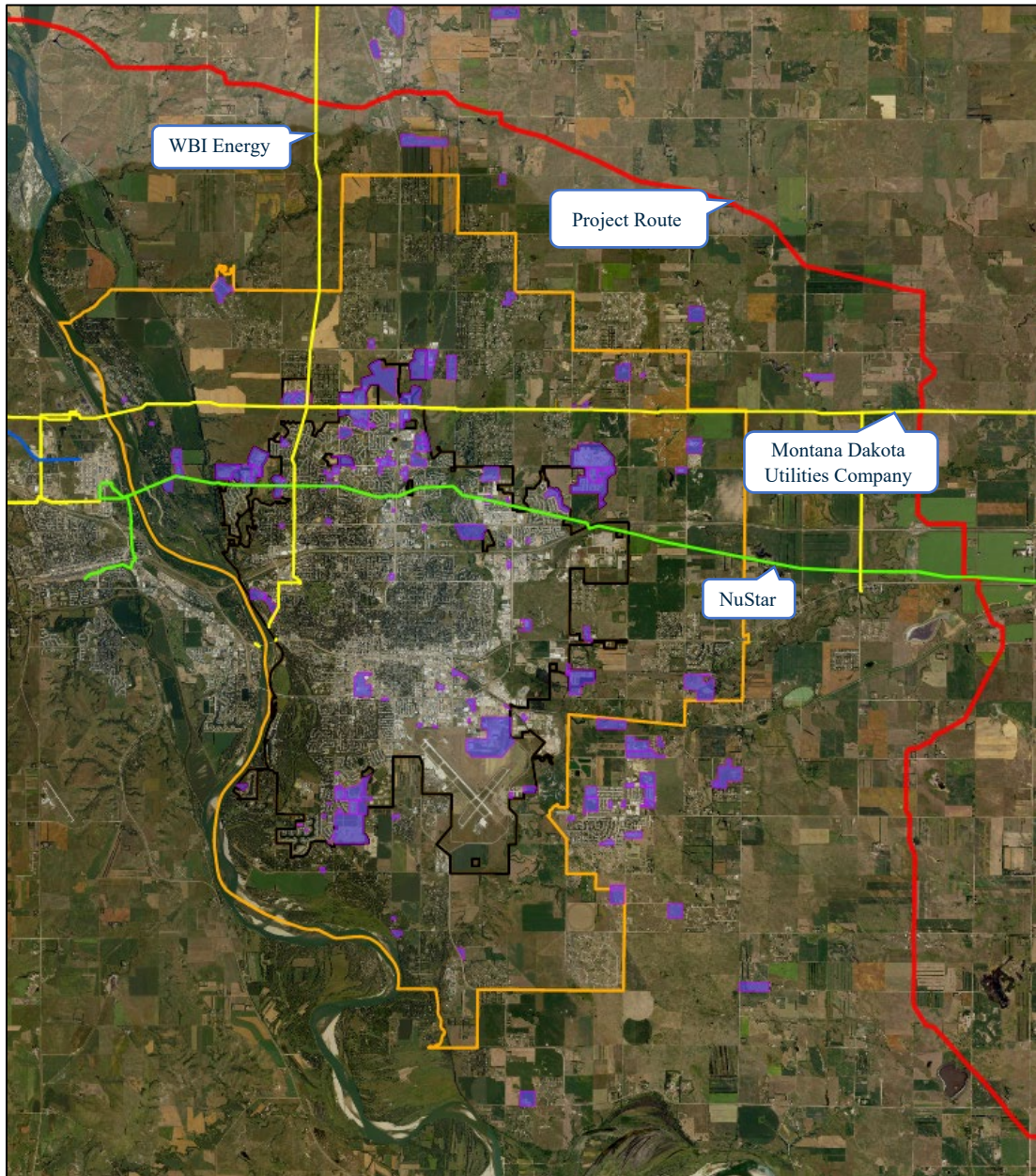


Figure 6: Bismarck 2015-2023 Development

EXHIBIT B

1 Current Project Status

Prior to easement acquisition, Summit completes exhaustive field investigations and surveys to confirm a route and/or provide information to adjust a route. These surveys include biological, threatened & endangered species, cultural, and civil. Summit has committed to mitigating any impacts to culturally sensitive areas, in which the Missouri River is rich in cultural sites. Summit has completed Class III cultural survey for 100% of tracts within 5 miles of the currently proposed Missouri River crossing and has made micro-adjustments to the route to avoid impacts to culturally sensitive areas. **Figure 7** illustrates the extent of cultural survey completed on the west side of the Missouri River. Over the span of multiple months, 2,031 acres were surveyed to identify an acceptable route. The level of effort required to avoid impacts to culturally sensitive areas can be reflected by the magnitude of surveys required which can be measured by the cost for the completion of the surveys. The survey effort on the west side of the Missouri River cost five times more than the project average, this equates to a survey cost of \$50,585.92 per mile on the west side of the Missouri River versus around \$9,000 per mile for the Midwest Carbon Express Project (Project).



Figure 7: Cultural Survey Boundary

A proposed reroute around the south side of Bismarck would be sited on new tracts throughout Emmons, Burleigh, and Morton County. None of the potentially impacted landowners south of Bismarck have been approached or contacted to determine whether they would be amenable to having a pipeline cross their property.

Summit's currently proposed route through these counties and around the north side of Bismarck crosses two hundred and eighty-one (281) tracts accounting for one hundred and two (102) miles of right-of-way. Of these, one hundred and eighty-seven (187) or 67% have executed easements. These acquired easements encompass seventy-two (72) miles of right-of-way or 71% of the current proposed route.

In addition to progress on the overall route, Summit has acquired easements for 88% of tracts within 3 miles of the existing Missouri River crossing as well as the federally mandated mainline valve sites on both sides of the Missouri River.

2 Schedule Impact

Summit has dedicated significant resources to developing, refining, permitting, and acquiring the proposed pipeline route as it exists today. A change to the proposed pipeline route would create a significant delay to the Project, potentially up to two years. It would also not guarantee a different outcome, but possibly a worse outcome with respect to survey permissions and easement acquisition. Summit would need to work through the process of selecting a preliminary route, working through right-of-way (ROW) notifications and receipt of survey permissions. Once major progress is made on notifying landowners, civil, environmental, and cultural survey crews could be deployed to begin field reconnaissance. The process from route selection to construction takes a significant amount of time to ensure all safety, environmental, and regulatory requirements are met. To illustrate the duration of this process, the schedule for the Project is shown in **Table 3**.

	Date
Preliminary Route Selected	June 2021
Start of Field Survey	August 2021
Start of ROW Acquisition	January 2022
U.S. Army Corps of Engineers Section 401 Permit Application Submitted	October 2022
Application for a Certificate of Corridor Compatibility and Route Permit Submitted to ND PSC	October 2022
Anticipated Receipt of USACE Section 404 and ND PSC Route Permit	December 2023

Table 3: Current Project Schedule

From the selection of the preliminary route to receiving the necessary permits to start construction is anticipated to be a thirty (30) month duration. It can be reasonably assumed that a greater than fifty (50) mile reroute will take at least twenty four (24) months to develop and permit.

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**SCS Carbon Transport LLC
Midwest Carbon Express CO2 Project
Sitting Application**

CASE NO. PU-22-391

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the following:

1. Letter to S. Kahl forwarding documents for filing;
2. SCS Carbon Transport LLC's Response to Intervenor John Warford's Motion to Compel; and
3. Bismarck Route Analysis dated May 30, 2023

were, on May 30, 2023, filed with the North Dakota Public Service Commission and served electronically to the following:

Hope L. Hogan
hlhogan@nd.gov

John Hamre
jghamre@nd.gov

John Schuh
jschuh@nd.gov

Zachary Pelham
zep@pearce-durick.com

Randall J. Bakke
rbakke@bgwattorneys.com

Bradley N. Wiederholt
bwiederholt@bgwattorneys.com

Steven Leibel
steve@bismarck-attorneys.com

David Knoll
david@bismarck-attorneys.com

Brian E. Jorde
bjorde@dominalaw.com

Kevin Pranis
kpranis@liunagroc.com

Dated this 30th day of May, 2023.

FREDRIKSON & BYRON, P.A.

By: 

Lawrence Bender, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501
lbender@fredlaw.com
(701) 221-8700

79279540 v1