ORAL ARGUMENT SCHEDULED FOR NOV. 4, 2020

No. 20-5197

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE ROBERT FLYING HAWK; OGLALA SIOUX TRIBE,

Plaintiffs-Appellees,

CHEYENNE RIVER SIOUX TRIBE; STEVE VANCE,

Intervenors for Plaintiff-Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *ET AL.*

Defendants Appellants,

DAKOTA ACCESS LLC,

Intervenor for Defendants-Appellants.

On Appeal from United States District Court for the District of Columbia
Case No. 1-16-cv-01534-JEB (Hon. James E. Boasberg)

BRIEF OF MEMBERS OF CONGRESS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Counsel for *amici* certifies the following:

A. Parties and Amici. All parties and *amici* appearing before this Court are listed in Brief of Appellees Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Oglala Sioux Tribe, and Yankton Sioux Tribe, et al., ECF No. 186195 (Sep. 16, 2020).

B. Ruling under Review. The rulings under review are Second Remand Order, ECF No. 495 (Mar. 25, 2020), Memorandum Opinion on Second Remand Order, ECF No. 496 (Mar. 25, 2020), Order Granting Vacatur, ECF No. 545 (July 6, 2020), and Memorandum Opinion on Order Granting Vacatur, ECF No. 546 (July 6, 2020), Judge Boasberg presiding.

C. Related Cases. This case has been consolidated with case No. 20-5201.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to Fed. R. App. P. 29(a) and D.C. Cir. R. 29(b), *amici* certify that it has filed an Unopposed Motion for Leave to Participate as Amici Curiae concurrently with this motion. *Amici* further certify that it has consulted with the parties and none oppose the filing of this brief.

Pursuant to D.C. Cir. R. 29(d), *amici* certify that this amici brief is necessary because it reflects the perspective of members of Congress that are not present in the parties' briefs. As set forth in their Unopposed Motion for Leave to Participate as *Amici Curiae*, *amici* are members of Congress who have a strong interest in preserving the integrity of the National Environmental Policy Act (NEPA), including those aspects of the statute that protect and respect the sovereign rights of federally recognized tribes, including Appellees.

GLOSSARY

APA	Administrative Procedure Act
Corps	U.S. Army Corps of Engineers
DAPL	Dakota Access Pipeline
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
PHMSA	Pipeline and Hazardous Materials Safety Administration

IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici curiae are members of Congress with a strong interest in preserving the integrity of the National Environmental Policy Act (NEPA), including those aspects of the statute that protect and respect the sovereign rights of federally recognized tribes, including Appellees. Congress passed NEPA 50 years ago to ensure federal agencies "look before they leap" into approving a project with possible consequences for the human environment. As members of Congress who wish to preserve the integrity of this historic act, *amici* are concerned with the Trump administration's efforts to roll back NEPA's strict procedural requirements through executive orders and by forging ahead with projects (including the Dakota Access Pipeline) without *first* taking the necessary "hard look" at the environmental consequences in full view of the public. In this case, *amici* are particularly concerned that allowing the Lake Oahe easement to remain in place on remand after the district court found serious flaws in the U.S. Army Corps of Engineers' (Corps) analysis will embolden federal agencies (and applicants) to avoid NEPA's procedural requirements by strategically using the judiciary's

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[1] *Amici* state that no party or party's counsel authored this brief in whole or in part, and no party or entity other than *amici* and its counsel contributed money intended to fund preparation or submission of this brief.

equitable powers. *Amici's* concerns are especially acute here because the district court forgave the Corps' transgressions once without vacating the Lake Oahe easement. If this Court overturns the district court's careful factual findings in multiple reviews of the Corps' NEPA process and analysis and allows the Corps again to act first and comply later while leaving its three-year-old easement decision in place (for an indeterminate time), *amici* fear the precedent will cause incalculable harm to NEPA and the values Congress intended the statute to protect. *Amici* are similarly concerned that the Corps' failures to adequately analyze Appellees' environmental justice concerns and treaty rights during its NEPA process, as well as the full impacts of the pipeline on its communities and treaty rights, will impair Appellees' sovereignty and self-determination.

INTRODUCTION & SUMMARY OF ARGUMENT

The undersigned members of Congress offer this brief in support of Appellees who request that this Court affirm the district court's decision to vacate the U.S. Army Corps of Engineers' (Corps) Lake Oahe easement for the Dakota Access Pipeline (DAPL) and shut down the pipeline on remand. The Lake Oahe easement should never have been approved without the Corps first fully complying with the National Environmental Policy Act (NEPA). Despite the clear NEPA flaws, it was approved, and the pipeline became fully operational on June 1, 2017.

Within two weeks, the district court held that the Corps' easement decision violated NEPA, though it later decided to leave the easement in place on remand. Almost three years later, the district court again held that the Corps' decision to grant the easement violated NEPA. That time, though, the district court vacated the easement and ordered the pipeline shut down. Given this Court's acknowledgement that Appellants have "failed to make a strong showing of likely success on their [NEPA] claims," ECF No. 1855206, the undersigned Members address whether this Court should allow the Corps' unlawfully granted easement to remain in place and authorize the pipeline's continued operation while the Corps (again) is asked to comply with the law. With respect, it should not.

NEPA requires federal agencies to "look before they leap." The statute accomplishes this goal by establishing strict procedural requirements that agencies must comply with before acting—procedural requirements that are designed to inform the agencies' substantive evaluations of environmental impacts. This charge, however, is only as strong as the judiciary's willingness to vacate agency actions made in violation of the statute's strict procedural requirements. If binding precedent from this Court authorizes agencies to violate NEPA *twice* without significant consequences, the statute will be rendered meaningless and the values Congress sought to protect will suffer.

These values include protecting Appellees' treaty rights in the Missouri River, Lake Oahe, and the surrounding off-reservation lands. The Corps' failure to comply with NEPA has threatened the Appellees' treaty rights and undermined the decades-long efforts of the undersigned members, and previous Congress's attempts to reverse the nation's destructive past practice of diminishing tribal sovereignty, breaking treaties with indigenous nations, and undermining tribal self-determination. By allowing the pipeline to continue operating without first complying with NEPA, the momentary interests of a non-native corporation will be elevated above the long-term interests of the tribes—independent sovereign nations—in the sanctity of the resources they rely on and that are protected by treaty.

In order to safeguard NEPA's integrity and ensure the Corps takes seriously the issues raised by the Tribes in the primary pleadings and briefs, as well as to protect the Tribes' treaty rights, we respectfully ask this Court to affirm the district court's decision to vacate the Lake Oahe easement pending the Corps' completion of an adequate environmental impact statement (EIS).

ARGUMENT

I. This Court Should Affirm The District Court's Decision To Protect The Integrity Of NEPA.

When Congress passed NEPA 50 years ago, it recognized the "critical importance" of the environment to our nation and declared the "federal government's responsibility to preserve important historic, cultural, and natural aspects of our national heritage." 42 U.S.C. § 4331; *see also Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 529 (D.C. Cir. 2018) (recognizing that "the environmental values protected by NEPA are of a high order."). The statute protects these important values by instructing federal agencies to prepare an EIS *before* taking any major actions significantly affecting the quality of the human environment. *Oglala Sioux*, 896 F.3d at 523. By requiring an EIS first, NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). It also "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Id.* Otherwise, NEPA's procedural requirements become a "paper tiger"—exactly what Congress did not intend. *Calvert Cliffs' Coordinating*

Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

Nothing in the statute's text authorizes agency actions to continue in force when taken in violation of NEPA's carefully delineated procedural requirements. Without a textual basis in the statute for allowing actions (like the Lake Oahe easement) to remain in force pending NEPA compliance, agencies have turned to the judiciary's equitable powers to avoid vacatur. Under this Court's framework for vacatur, "[t]he decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal v. NRC*, 988 F.2d 146, 151 (D.C. Cir. 1993) (internal quotations omitted). Vacatur is the default remedy in cases where the plaintiffs have demonstrated an APA violation and the burden is on the defendants to "prove that vacatur is not necessary." *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F.Supp.3d 92, 99 (D.D.C. 2019). When analyzing the appropriateness of vacatur, this Court has ruled that the *Allied Signal* factors are not dispositive and that vacatur is appropriate based on a court's assessment of the "overall equities and practicality of the alternatives." *Id.*; *see Wood v. Burwell*, 837 F.3d 969, 976 (9th Cir. 2016) (noting that remand without vacatur is remedy that should be "used

sparingly.”). Forgiving NEPA violations by remanding uninformed agency decisions without vacatur (or the functional equivalent) means “there will be nothing left to the protections that Congress intended [NEPA] to provide.” *Oglala Sioux*, 896 F.3d at 534. If the judiciary is going to strip NEPA of these protections on equitable grounds, it should do so only in the rarest circumstances, which are not present here.

A. Leaving the Lake Oahe easement in place will encourage the Corps and other agencies to act first and comply with NEPA later (if at all).

More than two years ago, the district court held that remand without vacatur was an appropriate remedy for the Corps' NEPA violations. The district court was satisfied the first *Allied-Signal* factor were met having found there was a “serious possibility” the Corps “[would] be able to substantiate the prior [environmental assessment].” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F.Supp.3d 91, 99 (D.D.C. 2017) (“*Standing Rock IV*”). But in hindsight, the district court's faith in the Corps was undeserved—the Corps was unable to substantiate its decision to forego an EIS because there were “serious gaps in crucial parts of the Corps' analysis” of pipeline safety issues and the Corps was “not able to fill *any* of them.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 440 F.Supp.3d 1, 26 (D.D.C. 2020) (“*Standing Rock V*”) (emphasis added).

These gaps tainted the Corps' evaluation of critical issues including: (1) DAPL's leak detection system; (2) how quickly that system can catch spills; (3) the impact of "harsh North Dakota winters on spill response efforts"; (4) the operator's safety record; (5) potential human or machine error; and (6) the Corps' related evaluation of potential worse case discharges from the pipeline. *Id.* at *9–16. Thus, oil has continued to flow for almost three years through an unlawfully approved pipeline despite Congress's "manifest concern with preventing uninformed action." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 371 (1989). Given this history, the Court should not put its faith in the Corps again.

The Corps' failure to comply with NEPA on the first remand is not surprising, in that courts have warned against bureaucratic momentum upending NEPA for decades. In 1983, then Judge Breyer described the problem in *Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983), noting that "once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide.'" *Id*. at 952–53. But bureaucratic momentum is only part of the story here. The Corps is also facing pressure from the President who on his fourth day in office instructed the Secretary of the Army to "review and *approve* [the Dakota Access pipeline] in an expedited manner …." 82 Fed. Reg.

8661 (Jan. 24, 2017) (emphasis added). With the White House and the Corps committed to approving the pipeline, there was and is little incentive for the Corps to approach the easement question with an open mind and the rigor demanded by NEPA's procedural requirements. The Corps' actions during remand suggest it is more concerned with keeping the oil flowing than complying with NEPA. *See, e.g., Standing Rock V*, 440 F.Supp.3d at 19 (finding the pipeline operator's history "did not inspire confidence" yet on remand the Corps "focused its response on defending the operator's performance record"). This is precisely the kind of executive branch momentum and uninformed agency action that NEPA was meant to protect against and that has led courts to halt projects authorized in violation of NEPA. *See, e.g., Montana Wilderness Ass'n v. Fry*, 408 F.Supp.2d 1032, 1037–38 (D. Mont. 2006) (enjoining an operational natural gas pipeline); *Marsh*, 490 U.S. at 371.

When the judiciary permits uninformed agency actions to remain in effect on remand, it undermines NEPA's command that agencies look before they leap. *Oglala Sioux*, 896 F.3d at 523. As the district court recognized, allowing (or indeed encouraging) agencies to justify their actions in the face of NEPA violations *a second time* creates "undesirable incentives for future agency actions." *See Standing Rock IV*, 282 F.Supp.3d at 106. Just as "agencies and third parties

may choose to devote as many resources as early as possible to a challenged project—and then claim disruption in light of such investments," so too may agencies choose to approve projects without the rigor NEPA demands if courts are unwilling to vacate that approval. *Id.* Strategic maneuverings like these are "contrary to the purpose of NEPA, which seeks to ensure that the government looks before it leaps," *id.*, and allows for meaningful public involvement in the decisionmaking process, especially by members of the public likely to be impacted. *Robertson,* 490 U.S. at 349.

This Court has admonished another agency for "disparaging" NEPA violations as "merely procedural" and leaving a federal license in place while the agency sought to cure it. *See Oglala Sioux*, 896 F.3d at 534 (internal quotations omitted). But agencies are left to believe NEPA's requirements are "merely procedural" when their actions remain undisturbed despite repeated violations. If this Court reverses the district court's decision to vacate the Lake Oahe easement, it is unlikely that the Corps will fully and fairly evaluate the environmental impacts of operating the DAPL under Lake Oahe and seriously consider reasonable alternatives. Remanding without vacatur again—and leaving the pipeline operational—would further signal to the Corps and other agencies that acting first and complying with NEPA later (if at all) is a risk worth taking.

B. Congress did not authorize federal agencies to avoid NEPA review under the guise of enforcement discretion.

It is well-settled that NEPA's procedural requirements are not discretionary. They "must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance." *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 494 F.2d 1109, 1115 (D.C. Cir. 1971) (emphasis in original). Yet Appellants ask this Court to render NEPA discretionary by treating the Lake Oahe easement on remand as a matter of unreviewable agency enforcement discretion. *See* Corps Br. at 49 (arguing that on remand following vacatur, "the district court should have left any further steps … to the Corps"); DAPL Br. at 16, 42–43. If this Court agrees with Appellants, the precedent will authorize all federal agencies to skirt NEPA despite Congress's command that agencies "shall comply" with the statute. *Calvert Cliffs'*, 494 F.2d at 1115 (quoting the Act's legislative history). The decision would grant federal agencies what amounts to veto power over Congress and eliminate NEPA's "judicially enforceable duties." *Id.*; DAPL Br. at 42-43 ("the Corps' decision whether to enforce its rights … is entirely 'unreviewable'"). The Court should reject Appellants' effort to manufacture an enforcement exception because Congress has spoken repeatedly on the issues present here. First, the

Mineral Leasing Act requires a right-of-way for pipelines to cross federal land. 30 U.S.C. § 185. Second, NEPA requires the Corps to take a hard look at the environmental consequences, including operational consequences, *before* granting a pipeline easement. 42 U.S.C. § 4332(2)(C); 30 U.S.C. § 185(h)(1) (making clear that NEPA applies). And third, the Administrative Procedure Act requires the courts to set aside and hold unlawful arbitrary and capricious agency actions. 5 U.S.C. § 702(2)(A). This Court should heed Congress's clear instructions and affirm the district court's decision to vacate the Lake Oahe Easement.

II. Vacatur is warranted under this Court's *Allied-Signal* test.

A. The Corps' failure to prepare an EIS was a "serious deficiency."

The first *Allied-Signal* factor is satisfied here because the Corps' failure to prepare an EIS was a "serious deficiency." *Oglala Sioux*, 896 F.3d at 536. The seriousness is "particularly clear … because the point of NEPA is to require an adequate EIS before a project goes forward …." *Id.* Asking whether the Corps can justify its decision to forego an EIS a second time is squarely at odds with "the EIS requirement [that] inhibits *post hoc* rationalizations of inadequate environmental decisionmaking." *Friends of the River v. Fed. Energy Reg. Comm'n*, 720 F.2d 93, 106 (D.C. Cir. 1983); *see also Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (noting that "[p]roper timing is one of NEPA's central

themes. An assessment must be 'prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.'") (quoting 40 C.F.R. § 1502.5). Courts should not remand without vacatur when doing so risks the very harm Congress sought to protect against in NEPA—uninformed agency action. *See Cal. Cmtys. Against Toxics v. Envtl. Prot. Agency*, 688 F.3d 989, 994 (9th Cir. 2012) (remanding without vacatur where vacatur could increase air pollution and undermine the Clean Air Act's goals).

B. The second *Allied-Signal* factor does not favor remand without vacatur.

In 2017, the district court held—and the parties did not challenge on appeal—that the disruptive effect of remand "does not counsel strongly in favor of remand without vacatur" and "tip[ped] only narrowly in favor of [the Corps]." *Standing Rock IV*, 282 F.Supp.3d at 108. Since 2017, the price and demand for oil has plummeted due to factors well beyond the operation of this pipeline. Those factors include international oil production wars between Russia and Saudi Arabia and the ongoing Covid-19 pandemic. At one point this year, U.S. oil prices fell to

less than zero dollars per barrel.[2] As of May 4, 2020, economic conditions have resulted in 6,800 shut-in wells and a 450,000 barrels per day drop in production.[3] Factoring into this new market reality is the fact that Bakken oil is among the costliest to produce and must be transported longer distances to refineries when compared to other regions.[4] As in other producing regions of the U.S., oil producers in the Bakken region that ship oil through the DAPL are curtailing investment in new production, shutting in oil wells, and investing in storing oil rather than shipping it to refineries.[5] The reality is that these economic conditions are likely to continue for some time. For example, North Dakota state regulators

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[2] Derek Brower, *Bakken pain reflects long road back for US shale*, FINANCIAL TIMES (May 7, 2020), https://www.ft.com/content/f62ba8aa-4304-4a66-b5ec-26b66b7e2a2b.

[3] North Dakota Department of Mineral Resources, Bakken Restart Task Force 2 (May 4, 2020), https://www.dmr.nd.gov/oilgas/Bakken_Restart_Task_Force_Action_Report.pdf.

[4] Brower, *supra* note 2 ("The average break-even price needed for a Bakken producer is about $45 a barrel … well above $26, where [one of the benchmarks] is now trading.").

[5] Amy Sisk, *Bakken regulator talks latest pandemic developments: 4,600 oil wells idled, new tank farms on horizon* (Apr. 14, 2020), BISMARCK TRIBUNE, https://bismarcktribune.com/bakken/bakken-regulator-talks-latest-pandemic-developments-4-600-oil-wells-idled-new-tank-farms-on/article_c9d06c8e-36ae-50fd-b34d-1b0f5b7b8561.html.

are allowing companies to seek waivers so they can halt production from wells for longer than a year without deciding whether to permanently plug a well or start operating again. *Id.* Given the significantly reduced demand for Bakken oil, vacating the Lake Oahe easement during remand would likely have fewer and less severe disruptive impacts on oil markets than in 2017.

Without vacatur, the Tribes have borne the risk of the Corps' unlawful decision to approve the Lake Oahe easement and will continue to bear those risks until the Corps prepares an adequate EIS and makes a fully informed decision about spill risks. While the Tribes' resources have not yet been affected by a spill, it may be only a matter of time. Within six months of operation, the DAPL leaked at least five times.[6] As past pipeline spills have shown, the consequences of inadequate pipeline safety measures can be long-standing and severe. As noted above, the 2010 pipeline rupture in Marshall, Michigan cost approximately $1 billion to clean up over many years.

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[6] Alleen Brown, *Five Spills, Six Months in Operation: Dakota Access Track Record Highlights Unavoidable Reality–Pipelines Leak*, THE INTERCEPT (Jan. 9, 2018), https://theintercept.com/2018/01/09/dakota-access-pipeline-leak-energy-transfer-partners/.

Here, the district court found that the "operator's history did not inspire confidence" on pipeline safety. *Standing Rock V*, 440 F.Supp.3d at 19. More recent events in Pennsylvania confirm the district court's negative views. On August 10, 2020, Sunoco spilled over 8,000 gallons of drilling fluid into wetlands, two tributaries to Marsh Lake, and the lake itself.[7] The spill forced the closure of 33 acres of the lake.[8] On August 20, 2020, Pennsylvania officials fined Sunoco over $355,000 for violations in eight counties between August 2018 and April 2019.[9] Then on September 11, 2020, state officials ordered Sunoco to reroute portions of its Mariner East 2 pipeline in light of the August spill and Sunoco's history of violations.[10] The Secretary of Pennsylvania's Department of

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[7] Pennsylvania Dep't of Envtl. Prot., *DEP Orders Sunoco to Reroute Pipeline, Further Assess, Investigate Chester County Marsh Lake Spill, Restore Impacted Resources* (Sep. 11, 2020), https://www.ahs.dep.pa.gov/NewsRoomPublic/articleviewer.aspx?id=21863&typeid=1.

[8] *Id.*

[9] Pennsylvania Dep't of Envtl. Prot., *DEP Assesses $355,000 Penalty to Sunoco for 2018, 2019 Mariner East 2 Violations* (Aug. 20, 2020), https://www.ahs.dep.pa.gov/NewsRoomPublic/articleviewer.aspx?id=21854&typeid=1.

[10] Frank Kummer, *Pennsylvania DEP orders Sunoco to reroute Mariner East 2 pipeline after spill into Marsh Creek Lake*, THE PHILADELPHIA INQUIRER (Sep. 11,

Environmental Protection characterized these incidents as yet "another instance" where the company "blatantly disregarded the citizens and resources" in the state.[11] As confirmed by these events, the district court correctly found the scales tip towards vacatur, rather than against.

III. Federal pipeline safety regulations offer no shelter for "serious gaps in crucial parts" of the Corps' flawed analysis.

The existence of federal pipeline safety regulations does not render the Corps' NEPA violations any less serious. The regulations are simply not very stringent. For example, the Department of Transportation, Pipeline and Hazardous Materials Safety Administration's (PHMSA) leak detection regulations merely require that an operator "have a *means* to detect leaks on its pipeline system." 49 C.F.R. § 195.452(i)(3) (emphasis added). The regulations do not set any particular standard that the leak detection system must meet. It is merely up to the operator to "evaluate the capability of its leak detection means." *Id.*

Congress set out to improve pipeline safety regulations roughly 10 years ago after two major pipeline incidents. The first incident involved a crude oil pipeline

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2020), https://www.inquirer.com/science/climate/mariner-east-pipeline-sunoco-energy-transfer-pennsylvania-dep-chester-county-20200911.html.

[11] Pennsylvania Dep't of Envtl. Prot., *supra* note 7.

rupture near Marshall, Michigan, which spilled approximately 800,000 gallons of crude oil into the Kalamazoo River causing $1 billion in damages. The second incident involved a natural gas pipeline rupture in San Bruno, California that killed 8 people, sent 51 people to the hospital, destroyed 38 homes, damaged 70 other homes, and required 300 households to evacuate. *See* Pipeline Safety: Valve Installation and Minimum Rupture Detection Standards, 85 Fed. Reg. 7162, 7163 (Feb. 6, 2020) (notice of proposed rulemaking). Congress responded by passing the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011. Pub. L. No. 112-90, 125 Stat. 1904. Section 4 of this statute requires PHMSA to issue regulations, if appropriate, requiring the use of automatic or remote-controlled shutoff valves, or equivalent technology to improve safety. 49 U.S.C. § 60102(n). Yet nine years after its passage, PHMSA has only recently given notice of a proposed rulemaking and soliciting comments on its proposals. 85 Fed. Reg. 7162 (Feb. 6, 2020). These rules, based on Congress's 2011 statute, have not gone into effect.

The proposed rulemaking references significant shortcomings in PHMSA's existing regulations that were identified by the Government Accountability Office. *Id.* at 7166. For example, current safety regulations for incident response are too general, requiring merely that operators respond in a "prompt and effective

manner." *Id.* at 7167. Regulations requiring operators to install automatic shutoff valves and remote-controlled valves are similarly vague. These valves are required only "if the *operator* determines, through risk analysis, such valves are *necessary* to protect [High Consequence Areas]." *Id.* (citing 49 C.F.R. § 192.935(c)) (emphasis added). Thus, PHMSA's pipeline safety regulations do not make the "serious gaps in crucial parts of the Corps' analysis" relating to pipeline leaks and spills any less serious for purposes of crafting an appropriate remedy on remand.

IV. Inadequate NEPA Analysis Erodes Tribal Sovereignty And Tribal Self-Determination And Potentially Violates Appellees' Treaty Rights, So Vacatur Is The Only Appropriate Remedy In This Case.

The Court should view the district court's interpretation using this Court's *Allied-Signal/Semonite* framework through the lens of the significant sovereign rights of the Appellees, which may be potentially lost if the Court does not affirm the lower court's decision to vacate this easement issued by the Corps. The seriousness of the Corps' above-referenced deficiencies cannot be overstated against the foundational backdrop of Appellees' treaty rights. Moreover, treaty abrogation is not to be inferred or undertaken lightly, and in the unlikely event that this drastic result is to occur, the Supreme Court has held that Congress is the only branch holding the power to abrogate, eliminate, or alter treaty rights, which guards against accidental or incidental treaty abrogation. This Supreme Court rule

also ensures that the undesirable act of treaty abrogation only happens after careful consideration by hundreds of members of Congress.

A. Failure to vacate the easement may result in abrogation of Appellees' treaty rights without an act of Congress, which is impermissible under *Minnesota v. Mille Lacs Band of Chippewa Indians*.

This Court's *Allied-Signal* decision, as interpreted by *Semonite*, instructs the district court to evaluate "the seriousness" of an agency decision's "deficiencies" in light of the "overall equities" involved. *Semonite*, 422 F.Supp.3d at 99 (citing *Allied-Signal,* 988 F.2d at 150–51). When federal and tribal interests are in tension, the lens through which courts resolve that tension is different from that involved in a federal-state conflict, or a conflict between a private individual and an agency. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (noting "certain broad considerations" that guide Court's analysis of federal and tribal interests). The Supreme Court has held that courts should analyze statutory conflicts involving tribes using "traditional notions of Indian sovereignty [as] a crucial 'backdrop.'" *Id.* (quoting *White Mtn. Apache Tribe v. Bracker,* 448 U.S. 136,143 (1980)). Moreover, courts should analyze conflicts arising from federal statutes in a manner that respects the federal government's commitment "to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *Id.* at 335. The Supreme Court has "stressed that Congress' objective of

furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging 'tribal self-sufficiency.'" *Id.* (quoting *Bracker,* 448 U.S. at 143).

Altering or abrogating treaty rights is a serious act that is not undertaken lightly, especially in the modern era. *See Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019) (holding that Crow Treaty rights had not been abrogated by implication by Wyoming Enabling Act or act creating Bighorn National Forest). Moreover, the Supreme Court has long held that only an express act of Congress can abrogate tribal treaty rights, and that the Executive branch lacks the authority to abrogate treaties unless it has been clearly delegated that authority by Congress. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188 (1999) (holding that President Taylor's 1850 Executive Order could not terminate tribal hunting, fishing and gathering rights protected by 1837 Treaty). For a congressional abrogation to occur, there must be clearly expressed contemplation of the treaty right, combined with demonstrated intent to eliminate it; or, in the words of the Supreme Court, "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Herrera*, 139 S. Ct. at 1698. The strength of treaty rights cannot be overstated—they survive

statehood acts, establishment of protected public lands by Congress, and they do not "expire" with time or by implication. *Id.*

It is also well settled that tribal treaty rights are to be construed in a manner that is most beneficial to tribes, not the federal government. *Washington v. Wash. St. Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979), *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979) (noting that "treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians"). When governmental actions threaten treaty rights, the actions must be paused, or vacated entirely, until the treaty rights can be fully defined, and in some cases, quantified. *Id.* at 695 (holding that district court may assume "direct supervision of the [Columbia River] fisheries if state recalcitrance or state-law barriers should be continued."). Similarly, courts must take precautions to ensure that treaties impacted by government agency decisions are not violated, or worse yet, abrogated, without an express act of Congress. *See id.*

The undersigned members have the utmost respect for tribal treaty rights as an essential function of tribal self-government and tribal self-determination. In the case of NEPA, it is the undersigned members' view that the statute requires an agency to thoroughly consider and respect treaty rights as part of the NEPA "hard

look" analysis and applying NEPA in any other manner diminishes the respect for tribal sovereignty, tribal self-determination, and treaty rights that Congress and the Supreme Court have demonstrated since the beginning of the self-determination era. The undersigned are of the view that NEPA in no way impliedly abrogates treaty rights, nor does it delegate the authority to the executive branch to abrogate or alter treaty rights. Allowing the easement to stand, and a *post hoc* NEPA analysis to be conducted while oil flows through the Dakota Access pipeline, risks violation and potential abrogation of the Appellees' treaty rights at the hands of a federal agency, which would contravene the Supreme Court's rules from *Mille Lacs* and *Fishing Vessel*. 526 U.S. at 188; 443 U.S. at 676.

Without knowing the full scope and extent of Appellees' treaty rights in Lake Oahe and the surrounding unceded lands subject to the 1851 Treaty, neither the Corps, the district court, nor this Court, can be sure that they are adequately protected. It is entirely possible that the pipeline is currently interfering with Appellees' treaty rights in a way that only Appellees truly understand, and it is impossible for the Corps to fully and meaningfully evaluate those treaty rights, their exercise in the modern context, and potential alternatives, while *the pipeline is in situ and operating*. The purpose and intent of NEPA is for agencies like the Corps to fully evaluate all facts and information about a proposed project *before*

authorizing the project, not after, and this analysis necessarily an examination of any relevant treaty rights. The doctrine of treaty abrogation holds that only Congress can abrogate or alter treaty rights, to ensure that this extreme act is not lightly or accidentally undertaken. *Mille Lacs*, 526 U.S. at 188. Only a complete evaluation of Appellees' treaty rights will ensure that they are not violated, abrogated, or altered, especially by implication due to the Corps' NEPA decision on the pipeline easement. Those are the overall equities at stake in this case and reversing the district court's decision risks ongoing and perhaps even further and more permanent treaty violations.

B. Vacatur is proper because the Trump Administration's disregard for treaty rights and tribal sovereignty has eroded the laws and policies that Congress and the executive branch have carefully constructed since the early 1960s, undermining Congress's efforts at maintaining a government-to-government relationship with sovereign Indian tribes.

In its review of the district court's decision, this Court should consider how the Corps' decision to proceed with an environmental assessment and not complete a full EIS, including an analysis of Appellees' treaty rights and the impacts of the pipeline and related infrastructure on their communities, contravenes the current policy of the federal government towards sovereign indigenous nations and threatens to repeat tragic events of the past. The current United States policy with respect to sovereign tribal nations is grounded in a government-to-government

relationship, in which the United States recognizes and respects tribal sovereignty, tribal self-determination, and tribal treaty rights. This policy began with the election of President John F. Kennedy, who declared that, as of 1962, there would be "no change in treaty or contractual relationships without the consent of the tribes concerned. No steps … taken to impair the cultural heritage of any group … and [there] would be protection for the Indian land base." Goldberg, Carol E., *et al*, American Indian Law: Native Nations and the Federal System, p. 35 (7th ed. 2015). In the 58 years since Kennedy's promise, the Executive branch and Congress have taken tremendous strides to respect and further the government-to-government relationship envisioned by tribes and the Founders in the earliest treaties signed with Indian nations. *See* Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a; Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1903; American Indian Religious Freedom Act, 42 U.S.C. §§ 1996–1996a; Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013; Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (authorizing tribes to open and run high-stakes gaming on tribal lands); Clean Water Act, 33 U.S.C. § 1377 (authorizing tribes to obtain primacy over water quality standards, permitting, and other regulatory functions that states may perform); Clean Air Act, 42 U.S.C. §

7601(d)(2)(B) (authorizing tribes to regulate air quality in Indian Country). Congress has also begun to codify the requirement of tribal consultation into some federal environmental statutes, in part to ensure that treaty rights are adequately safeguarded during federal agency decision making processes. *E.g.*, National Historic Preservation Act, 42 U.S.C. § 470(a)(d)(6) (requiring federal agencies to identify properties of religious and cultural significance to tribes and consult with tribes prior to authorizing activities that will impact such properties). Presidents from Kennedy to Obama echoed Congress's support for tribal self-determination, tribal sovereignty, and treaty rights, forming a consistent and predictable governmental relationship with federally recognized tribes over nearly half a century. Goldberg, American Indian Law, p. 35. Courts have also recognized an affirmative obligation on the part of federal agencies administering statutes that affect tribal interests, holding that the "[a]pplication of federal statutes to Indian tribes must be viewed in light of the federal policies which promote tribal self-government, self-sufficiency, and economic development." *Nat'l Labor Relations Bd. v. Pueblo of San Juan*, 280 F.3d 1278, 1284 (10th Cir. 2000), *reh'g en banc*, 276 F.3d 1186 (10th Cir. 2002).

Despite the uniform application of this federal policy by the legislative, judicial, and Executive branches in recent decades, the Trump Administration has

taken a dramatically different tack. In the past three years, the Administration has undertaken an outright assault on tribal sovereignty, tribal treaty rights, and tribal self-determination, particularly when large corporate interests are involved. In his first year in office, President Trump attempted to reverse President Obama's protection of the submerged lands of the continental shelf from mineral leasing, over the objections of indigenous Alaskans, to increase the pace of offshore oil and gas drilling in the Arctic and North Atlantic Oceans. *League of Conservation Voters v. Trump*, 363 F.Supp.3d 1013, 1024 (D. Alaska 2019) (invalidating Trump Executive Order attempting to modify Obama withdrawal under Outer Continental Shelf Lands Act). This effort was invalidated by a federal district court in Alaska as an unlawful *ultra vires* act, and the President's appeal is currently before the Ninth Circuit Court of Appeals. *League of Conservation Voters v. Trump*, Case No. 19-35461 (9th Cir. May 29, 2019).

The President also issued a Proclamation reducing the Bears Ears National Monument in 2017, breaching the terms of the agreement President Obama had negotiated with the Hopi, Navajo, Ute and Zuni nations to establish and protect the Bears Ears region from development, including uranium mining and oil and gas leasing. Pres. Procl. Modifying the Bears Ears National Monument, 82 Fed. Reg. 58081 (Dec. 5, 2017) (reducing Bears Ears National Monument to allow mineral

development). The tribes have filed suit against the President to invalidate the Bears Ears Proclamation as well. *See* Amended Complaint, *Hopi Tribe v. Trump*, 2019 WL 7943150, ¶ 29 (D.D.C., filed Nov. 7, 2019) (challenging Trump reduction of Bears Ears National Monument). The effects of diminishing the first tribally proposed national monument were compounded by President Trump's decisions to re-name part of the new national monument using only the Navajo Nation's term for Bears Ears (Shash Jaa'), rather than the tribal Coalition's agreed upon English name, Bears Ears National Monument, and his attempt to dilute the indigenous representation on the tribal advisory commission by changing the structure of the commission to include a (presumptively non-indigenous) local county commissioner. 82 Fed. Reg. 58081. The Trump Administration took these actions despite the strenuous objections of the affected tribes, leading many to conclude that the Administration was directly attacking their sovereignty and self-determination.[12]

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[12] *See* Bears Ears Coalition, Press Release - Tribal Leaders Extremely Disappointed Over Action by President Trump to Revoke and Replace Bears Ears National Monument (Dec. 4, 2017), https://bearsearscoalition.org/tribal-leaders-extremely-disappointed-over-action-by-president-trump-to-revoke-and-replace-bears-ears-national-monument/.

More recently, the Department of Interior has advanced several proposals that threaten tribal communities, including increased drilling for natural gas near Chaco Canyon National Historic Park, over the objection of neighboring tribal communities. *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 842 (10th Cir. 2019), *reh'g denied* (June 24, 2019). In March 2020, the Department announced that it will remove the land-into-trust decision for the Mashpee Wampanoag tribe, effectively disestablishing its reservation, in the midst of the Covid-19 global health pandemic, which has devastated several tribal communities. This is despite Congress's ongoing process of formally recognizing the Mashpee reservation. The House of Representatives passed the Mashpee Wampanoag Reservation Reaffirmation Act (H.R. 312) on May 15, 2019 and the bill is currently under consideration in the Senate.

More recently, in May 2020, Interior Solicitor Daniel Jorjani issued an opinion ostensibly divesting the Mandan, Hidatsa, and Arikara Nation of its mineral rights (without a NEPA analysis) through administrative fiat, which would transfer mineral wealth of over $100M to the State of North Dakota. U.S. Dept. of Interior, Office of Solicitor, Mem. Opinion M-37056 (May 26, 2020). This action violated treaties signed between the tribes and the federal government in connection with the flooding of the Missouri River upstream of Lake Oahe, to

create Lake Sakakawea, and the MHA Nation has filed suit against the Department of Interior to invalidate it. *Mandan, Hidatsa and Arikara Nation v. U.S. Dept. of Interior*, Case l:20-cv-00859 (Ct. Cl. July 15, 2020) (these rights were recognized in the 1851 Treaty of Fort Laramie, which is the same treaty that established Appellees' rights in the Missouri River).

Collectively, these actions demonstrate unilateral and purposeful acts of an Executive branch set on diminishing tribal sovereignty and tribal self-determination, reversing the course of decades of federal Indian policy and undermining the efforts of co-equal branches of government, Congress and the judiciary. The overall equities in this case require the Court to affirm the district court's decision vacating the easement to ensure that the Trump Administration does not further diminish the Appellees' sovereign rights or their treaty rights, without the in-depth analysis that NEPA requires.

CONCLUSION

For the foregoing reasons, the undersigned members of Congress request that this Court affirm the district court's decision to vacate the Lake Oahe easement.

Respectfully Submitted,

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Dated: September 23, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6493 words, excluding the parts of the brief excluded by Circuit Rule 32(e)(1) and Fed. R. App. P. 32(f).

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APPENDIX

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Earl Blumenauer
Representative of Oregon

Bonnie Watson Coleman
Representative of New Jersey

Gerald E. Connolly
Representative of Virginia

Adriano Espaillat
Representative of New York

Ruben Gallego
Representative of Arizona

Jesús G. “Chuy” García
Representative of Illinois

Jimmy Gomez
Representative of California

Deb Haaland
Representative of New Mexico

Jared Huffman
Representative of California

LIST OF *AMICI* – cont'd

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Representative of California

Alan Lowenthal
Representative of California

Gwen Moore
Representative of Wisconsin

Grace Napolitano
Representative of California

Joe Neguse
Representative of Colorado

Eleanor Holmes Norton
District of Columbia Delegate

Alexandria Ocasio-Cortez
Representative of New York

Chellie Pingree
Representative of Maine

Raul Ruiz, MD
Representative of California

Darren Soto
Representative of Florida

Jackie Speier
Representative of California

Nydia M. Velázquez
Representative of New York

LIST OF *AMICI* – cont'd

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Senator of Oregon

Tom Carper
Senator of Delaware

Elizabeth Warren
Senator of Massachusetts

Ron Wyden
Senator of Oregon