IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff–Intervenor, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant–Cross Defendant, and DAKOTA ACCESS, LLC, Defendant–Intervenor–Cross Claimant.	Case Number: 16-cv-1534 (JEB)

DAKOTA ACCESS, LLC'S MOTION FOR A PROTECTIVE ORDER

Defendant-Intervenor and Cross-Claimant, Dakota Access LLC ("Dakota Access") respectfully moves this Court to enter a Protective Order in the above-captioned litigation (the "Litigation") to protect confidential portions of the Administrative Record. The motion seeks to prevent broad public dissemination of sensitive information that (i) pinpoints locations where intentional damage to an oil pipeline would generate the greatest harm, and (ii) reveals in great detail the manner in which the authorities would try to respond to that damage. Anyone who harbors a malicious intent to damage the pipeline could use such information to wreak the greatest possible harm from those unlawful acts. Protection of these details would not hinder any

party litigating this case, nor do any countervailing interests outweigh the benefits of keeping these limited details from being released.

BACKGROUND

On November 10, 2016, Defendant and Cross-Defendant, the United States Army Corps of Engineers (the "Corps") filed a certified index of the Administrative Record (ECF No. 55-2) in the Litigation. The Corps has provided the Administrative Record to Plaintiff, the Standing Rock Sioux Tribe ("SRST"), Plaintiff–Intervenor, the Cheyenne River Sioux Tribe ("CRST"), and Dakota Access.

Dakota Access has identified 11 documents (attached with proposed redactions as Exhibit A) that contain confidential information warranting protection under various individual sources of authority, including 49 U.S.C. § 114(r), 49 C.F.R. § 1520.5, 42 U.S.C. § 5195c, and Fed. R. Civ. P. 26(c). The 11 documents were provided to all parties on a confidential attorneys'-eyes-only basis, with the understanding that information from the documents would not be disclosed until the parties could come to an agreement on how to treat the documents.[1]

The parties have since conferred regarding the documents. They disagree about two different but related categories of information: (1) geographic information that specifically details pipeline infrastructure routes through private land ("Geographic Information"), and (2) spill response information that specifically details pipeline features, capacity, flow rate, transportation and related emergency response information, safeguards, and plans in certain sensitive locations along the Dakota Access Pipeline ("DAPL") route ("Spill Response

[1] A total of 31 documents were originally at issue. Dakota Access has narrowed its request to 11 documents that contain information needing protection. Those 11 documents are found at the following pages of the Administrative Record: 12398–418; 12419–39; 12440–61; 12462–76; 12477–93; 12494–511; 67857–94; 74092–110; 74713–29; 74733–46; & 74747–60.

Information").[2] For example, AR 12398–418 shows differences in spill volumes based on the location of a rupture. AR 12406. These volumes are based on a so-called "guillotine" pipeline break, which means a full-diameter cut of the pipeline. AR 12404 & 12414. *Any* rupture of a particular pipeline segment is exceedingly unlikely. In fact, historical data for pipelines generally shows that for a given pipeline segment the predicted occurrence interval for a release is between once every 392 years and once every 3,451,544 years, with a likely total volume for any release of 4 barrels or less. AR 12395–97 (St. Louis district). Moreover, the documents explain that guillotine breaks simply do not occur accidentally in larger-diameter pipelines such as DAPL. AR 12414. Thus, the information at issue could *only* be useful, if at all, to terrorists or others with the malicious intent to damage the pipeline in a way that maximizes harm to the environment.[3]

Dakota Access has no objection to the release of these documents if these details are redacted in any public version. Under Dakota Access's proposal, SRST and CRST would be free to include these protected details in sealed versions of their pleadings. SRST and CRST nonetheless insist on being able to release the documents without redaction. Unable to reach an agreement, Dakota Access respectfully requests that this Court protect the confidential information contained in the documents. Specifically, Dakota Access asks this Court to enter a

[2] Dakota Access provides these brief descriptions in this Motion in order to maintain the confidential nature of the information it seeks to protect. In the submission of these documents under seal as Exhibit A, proposed redactions are noted in red boxes for the Court's in camera review.

[3] The risk modeling in this and other documents is also based on factors that simply are not present with DAPL. For example, the models assume a pipeline lying directly on the ground or directly on the surface of the water—locations where the greatest harm could occur. *E.g.*, AR 12410. The Dakota Access pipeline is being built below ground and well beneath the bottom of any body of water that it passes beneath. Thus, the risks—including that of a guillotine break—are greatly overstated by these models. *Id.*

Protective Order prohibiting the public dissemination of the documents in unredacted form and prohibiting the dissemination of the redacted information that they contain.

ARGUMENT

Under Rule 26(c), "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). Rule 26(c) specifically protects "trade secret or other confidential research, development, or commercial information" and allows the Court to dictate the manner—if any—in which protected information is disclosed. *Id.* The Supreme Court has explained that Rule 26 "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 14 (D.D.C. 2001) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)). Here, a Protective Order preventing the public release of the unredacted documents is appropriate because the documents contain information that could be used by terrorists or others intending to cause harm. And since Dakota Access only seeks to prevent the public dissemination of the unredacted documents—as opposed to the Parties' access to the documents—a Protective Order will in no way affect the Parties' abilities to conduct this Litigation.

I. Federal Law Recognizes the Need to Treat Information for Projects Such as This One with Special Care.

A. Oil Pipelines Like This One Trigger the Need to Protect Sensitive Security Information.

Certain details found in the 11 documents should be protected from public disclosure for the same reason courts do not allow disclosure of Sensitive Security Information ("SSI"). As defined by statute and regulation, SSI includes (but is not limited to) "information obtained or developed in the conduct of security activities, including research and development, the

disclosure of which the Secretary of DOT has determined would . . . [b]e detrimental to transportation safety." 49 C.F.R. § 15.5(a); *see also* 49 U.S.C. § 40119(b)(1). Oil pipelines are a transportation activity and subject to this protection. The regulations regarding SSI provide a long but not exhaustive list of different categories of "information, and records containing such information, [that] constitute SSI." 49 C.F.R. § 15.5(b). This list includes:

- "***Security programs and contingency plans.*** Any security program[4] or security contingency plan[5] issued, established, required, received, or approved by DOT or DHS"; and
- "***Vulnerability assessments.*** Any vulnerability assessment[6] directed, created, held, funded, or approved by the DOT, DHS, or that will be provided to DOT or DHS in support of a Federal security program."

Id. §§ 15.5(b)(1), (5).

---

[4] "Security program means a program or plan and any amendments developed for the security of the following, including any comments, instructions, or implementing guidance: (1) An airport, aircraft, or aviation cargo operation; (2) A maritime facility, vessel, or port area; or (3) A transportation-related automated system or network for information processing, control, and communications." 49 C.F.R. § 15.3. In turn, "[m]aritime facility means any facility as defined in 33 CFR part 101." *Id.* 33 CFR part 101 defines facility as "any structure or facility of any kind located in, on, under, or adjacent to any waters subject to the jurisdiction of the U.S. and used, operated, or maintained by a public or private entity, including any contiguous or adjoining property under common ownership or operation." 33 C.F.R. § 101.105. Since DAPL crosses waters subject to the jurisdiction of the United States (U.S.), the portions where it crosses those waters are considered maritime facilities for the purposes of SSI regulations. Thus, security programs regarding DAPL's jurisdictional crossings are protectable SSI.

[5] "Security contingency plan means a plan detailing response procedures to address a transportation security incident, threat assessment, or specific threat against transportation, including details of preparation, response, mitigation, recovery, and reconstitution procedures, continuity of government, continuity of transportation operations, and crisis management." 49 C.F.R. § 15.3.

[6] "Vulnerability assessment means any review, audit, or other examination of the security of a transportation infrastructure asset; airport; maritime facility, port area, vessel, aircraft, train, commercial motor vehicle, or **pipeline**, or a transportation-related automated system or network, to determine its vulnerability to unlawful interference, whether during the conception, planning, design, construction, operation, or decommissioning phase. A vulnerability assessment may include proposed, recommended, or directed actions or countermeasures to address security concerns." 49 C.F.R. § 15.3 (emphasis added).

Certain of the documents—geographic response plans, spill models, and related emergency operations and maintenance documents—contain Spill Response Information. That Spill Response Information was developed for purposes of meeting and exceeding the requirements and regulations of the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), a DOT agency. *See, e.g.*, 49 C.F.R. § 194 Subpart B (requirements regarding Facility Response Plans); 49 C.F.R. § 194.105 (requiring pipeline companies to determine the impacts of a hypothetical worst-case release in each of its emergency response zones). Indeed, these documents merit additional protection because they contain information that could assist potential terrorist activity in circumventing pipeline security and response procedures designed to protect public health and the environment. *See, e.g.*, *United States v. Moussaoui*, CRIM.01-455-A, 2002 WL 1311736, at *1 (E.D. Va. June 11, 2002) (protecting the disclosure of documents in the criminal context under parallel aviation SSI provisions). The documents containing Geographic Information likewise contain information which would assist potential terrorists in selecting targets, *i.e*., potentially vulnerable route locations.

The Corps has represented that it does not believe the information at issue meets the definition of SSI. It believes that information already redacted by other agencies is enough. Dakota Access disagrees. The following categories are implicated: (1) security programs, (2) security contingency plans, (3) vulnerability assessments, or (4) information detailing or related to DAPL security programs, security contingency plans, and/or vulnerability assessments. *See* 49 C.F.R. §§ 15.5(a)–(b). While SSI regulations contain specific restrictions on the disclosure of SSI, 49 C.F.R. § 15.9, courts regularly issue orders protecting the public disclosure of these same types of information. *See, e.g.*, *Robinson v. Napolitano*, 689 F.3d 888, 889 (8th Cir. 2012) (finding that the Transportation Security Administration's determination that

documents regarding the agency's screening procedures and security training materials were SSI was not arbitrary and capricious). This Court need not resolve the disagreement over applicability of the SSI label, because it can see by reviewing the proposed redactions that Dakota Access is seeking to protect details that would pose a threat to the public for the same reasons SSI is protected from public release. Among other things, these documents contain details on how authorities would respond to a release of oil if, for example, someone wanted to do harm to the pipeline. A person with ill intent should not be able to plan his unlawful actions based on how authorities will respond to those actions. The risk of terrorist actions aimed at the oil industry should not be taken lightly. *See* Exhibit B, Blake Sobczak, *Rail executives feared terrorists would disrupt "virtual pipeline*,*"* E&E NEWS (Jan. 24, 2017), http://www.eenews.net/energywire/2017/01/24/stories/1060048837 (describing concerns in recent years that foreign terrorists and environmental extremists might make use of detailed routing information to target rail shipments of oil). Given the intense amount of public attention this pipeline has received, and the unlawful activity already experienced, there is a greater than typical risk that this information would be misused to harm the public.

B. Oil Pipelines Like This One Trigger the Need to Protect Critical Infrastructure Information.

Certain details in the documents also constitute Critical Infrastructure Information ("CII") and should therefore be protected from public disclosure. In the Critical Infrastructures Protection Act (the "Act"), Congress made several findings and articulated national policies to protect critical infrastructure, which is defined as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health

or safety, or any combination of those matters." 42 U.S.C. § 5195c(e). The Act specifically established national policy, stating in part:

> (1) that any physical or virtual disruption of the operation of the critical infrastructures of the United States be rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States;
>
> (2) that actions necessary to achieve the policy stated in paragraph (1) be carried out in a public-private partnership involving corporate and non-governmental organizations; and
>
> (3) to have in place a comprehensive and effective program to ensure the continuity of essential Federal Government functions under all circumstances.

Id. § 5195c(c).

Under the Act, DAPL is part of the national critical physical infrastructure. *See id.* § 5195c(b)(2) ("Private business, government, and the national security apparatus increasingly depend on an interdependent network of critical physical and information infrastructures, including telecommunications, **energy**, financial services, water, and transportation sectors." (emphasis added)). And as discussed above, the documents contain details that, if publicly released, might compromise and/or undermine DAPL security protections and procedures. Allowing the public disclosure of unredacted documents would risk disrupting energy sector infrastructure in subversion of the Act's purpose. This Court should therefore use the broad discretion afforded by Rule 26 to protect such details from public disclosure in conformance with the Act and national policy. *See Amfac Resorts*, 143 F. Supp. 2d at 14.

II. Regardless of SSI or CII Classification, Rule 26(c) Supports a Protective Order.

The D.C. Circuit employs a balancing test in applying Rule 26(c):

> The decision to limit or deny discovery by means of a Rule 26 protective order rests on a balancing of various factors: the requester's need for the information from this particular source, its relevance to the litigation at hand, the burden of producing the sought-after material; and the harm which disclosure would cause to the party seeking to protect the information.

Burka v. U.S. Dep't of Health & Human Servs., 87 F.3d 508, 517 (D.C. Cir. 1996) (citations omitted). Here, the balancing test clearly disfavors the public release of the Geographic Information and Spill Response Information: (1) SRST and CRST already have access to the that information and can use any part of it to litigate the claims in this case, (2) the details subject to the proposed protective order have no relevance to the Litigation in any event, and (3) there are real risks of harm if the information at issue is publicly released.

A. There Is No Need for SRST and CRST to Publicly Release the Documents in Unredacted Form.

The first factor to consider is whether SRST and CRST have a need to publicly release the documents in unredacted form. *Burka*, 87 F.3d at 517. They do not. The attorneys for both SRST and CRST already have access to the documents, including the details that Dakota Access proposes to redact. Dakota Access has offered Plaintiffs the option of a public release of the documents with only the sensitive details redacted. Dakota Access has further agreed to allow use of unredacted documents by designated individuals within, and associated with, SRST and CRST subject to a Protective Order. If, for some reason, Plaintiffs need to rely on the precise location of certain pipeline features, they will be free to include them in any argument they make to the Court, and they will be able to share those details with experts assisting them.[7]

Dakota Access has also sought through the meet-and-confer process to limit its motion to items in need of protection. For example, after the January 30 status conference Plaintiffs asked

[7] Plaintiffs have noted during the meet-and-confer process that some maps, schematics and other items at issue can be found in documents that are publicly available, including in the district court record in some instances. But an item that poses no particular danger while standing alone may nonetheless be valuable to wrongdoers when available to them in conjunction with other information, such as details on how a spill response will be conducted at that location. With a protective order in place, Plaintiffs could still use the public version of a map, schematic, or other information in a public filing.

Dakota Access for the opportunity to review updated proposed redactions before the filing of this motion. Plaintiffs followed up later that day by expressing general concerns over the type of information to be protected. Dakota Access asked Plaintiffs to identify particular information that it objected to including within the protective order. *See* Exhibit C (emails between Jan Hasselman and David Debold). The purpose of that request was to allow information to be released to the extent possible without giving persons who might want to damage the pipeline the tools to maximize intended harm. Dakota Access remained open to publication of spill-related data, including that for the area near Lake Oahe, if revealed in a manner that prevents persons with malicious intent from being able to figure out where and how it would be best to strike. Apart from providing some examples of items already in the record and agreeing to redact telephone numbers contained in response plans, Plaintiffs declined to work with Dakota Access on a different method for redacting that would satisfy Dakota Access's safety objective. *Id.*

B. The Details that Would Be Subject to a Protective Order Are Irrelevant to the Litigation.

The next factor to consider is the relevance of the information to the litigation at hand. *Burka*, 87 F.3d at 517. The Court can see for itself by examining the proposed redactions that none of those details is relevant to the issues in the Litigation. In fact, Plaintiffs could make whatever argument they wish about risks peculiar to a location without including in a public filing specific details allowing wrongdoers to pinpoint that location. And, as noted above, the Court would have that detail anyway.

C. Public Disclosure of the Documents Would Cause Harm.

The final factor to consider is the harm if unredacted documents are publicly disclosed. *Burka*, 87 F.3d at 517. If the documents are disclosed in unredacted form, persons with the malicious intent to damage the pipeline will be better able to maximize the harm that they hope

to inflict. These details include such things as differences in response times or flow rates of oil dependent upon the location at which a wrongdoer tries to damage the pipeline. They also include details on how a response to such actions would be carried out. A person seeking to maximize harm from his intentional attack on the pipeline would find great value in knowing how to disrupt plans for responding to that attack. The Court should not allow this Litigation to create that opportunity.

CONCLUSION

The public disclosure of unredacted versions of the documents will create unnecessary risks to the public at large. For the reasons stated above, the Court should issue a Protective Order prohibiting the public release of the documents in unredacted form and the public release of the redacted information that the documents contain.

Dated: February 1, 2017

/s/ *William S. Scherman*
William S. Scherman
David Debold
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
(202) 530-9557 (fax)
wscherman@gibsondunn.com

Kimberly H. Caine
William J. Leone (*Pro Hac Vice* granted)
Robert D. Comer (*Pro Hac Vice* granted)
Norton Rose Fulbright US LLP
799 9th St. NW, Suite 1000
Washington, D.C. 20001-4501
(202) 662-0200

Counsel for Defendant–Intervenor–Cross Claimant Dakota Access, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2017, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court for the District of Columbia using the CM/ECF system. Service was accomplished by the CM/ECF system on the following counsel:

Patti A. Goldman
Jan E. Hasselman
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
pgoldman@earthjustice.org
jhasselman@earthjustice.org

Counsel for Plaintiff Standing Rock Sioux Tribe

Nicole E. Ducheneaux,
Fredericks Peebles & Morgan, LLP
3610 North 163rd Plaza
Omaha, NE 68116
(402) 333-4053
nducheneaux@ndnlaw.com

Conly J. Schulte
Fredericks Peebles & Morgan, LLP
1900 Plaza Drive
Louisville, CO 80027
(303) 673-9600
cshulte@ndnlaw.com

Counsel for Plaintiff–Intervenor Cheyenne River Sioux Tribe

Matthew M. Marinelli
Erica M. Zilioli
U.S. Dep't of Justice
Environment & Natural Resources Division
P.O. Box 7415
Washington, D.C. 20044
(202) 514-2000
Matthew.Marinelli@usdoj.gov
Erica.zilioli@usdoj.gov

Counsel for Defendant–Cross Defendant U.S. Army Corps of Engineers

/s/ *William S. Scherman*
William S. Scherman
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
(202) 530-9557 (fax)
wscherman@gibsondunn.com

Counsel for Defendant–Intervenor–Cross Claimant Dakota Access, LLC