

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 program⁴ or security contingency plan⁵ issued, established, required, received, or approved by DOT or DHS”; and
- “**Vulnerability assessments.** Any vulnerability assessment⁶ 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

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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:

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DECLARATION OF WILLIAM S. SCHERMAN

I, William S. Scherman, declare as follows:

1. I am a partner with the law firm of Gibson, Dunn & Crutcher LLP, counsel of record for Defendant–Intervenor–Cross Claimant Dakota Access, LLC. I am a member in good standing of the Bar of this Court.
2. Attached hereto are true and accurate copies of the following documents:

Ex. A	Documents for Protection
Ex. B	Blake Sobczak, <i>Rail executives feared terrorists would disrupt 'virtual pipeline,'</i> E & E NEWS REP., Jan. 24, 2017
Ex. C	E-mail from Jan Hasselman to David Debold (Jan. 30, 2017)

Executed February 1, 2017

/s/ William S. Scherman
William S. Scherman

Exhibit B

OIL

Rail executives feared terrorists would disrupt 'virtual pipeline'

[Blake Sobczak](#), E&E News reporter

Published: Tuesday, January 24, 2017



A train bearing oil rolls through Essex, Mont. Photo by Roy Luck, courtesy of Flickr.

Terrorists and "environmental extremists" fed rail executives' fears over trains carrying millions of gallons of flammable crude oil, according to confidential filings in 2014.

The documents, obtained through a Freedom of Information Act request, offer an unvarnished look at the anxieties surrounding the rail industry's role as a "virtual pipeline" for hauling crude out of North Dakota during the heyday of the shale drilling boom.

"It is not just environmental extremists who pose a threat to the transportation of crude oil by rail. Foreign terrorists are also a risk," said the Association of American Railroads and the American Short Line and Regional Railroad Association, two leading freight rail trade organizations, in Aug. 29 comments to the Federal Railroad Administration marked "confidential."

The warnings came in response to a May 2014 federal emergency order requiring railroads to share data about oil train routes and volumes with state emergency response commissions ([Energywire](#), May 8, 2014). Since then, the Department of Transportation has proposed expanding the temporary order to include information about trains carrying any hazardous material in bulk, not just crude from North Dakota's Bakken Shale play.

In their comments, the AAR and the ASLRRRA claimed the order ran "antithetical" to safety and business concerns, noting that any information provided to state agencies risked seeing wider exposure via freedom of information requests.

"Making crude oil routing information publicly available is completely inconsistent with the assessment of the FBI and the [Transportation Security Administration] that crude oil trains might be targets," the groups said, attaching two government [documents](#) marked "for official use only" to their comments. "A person aspiring to commit harm needs an opportunity to execute. Providing more specific information than the person would otherwise have on crude oil routes would help provide that opportunity."

Environmentalists and many local leaders have countered that the public's right to know should trump security concerns about hazardous shipments. A series of oil train derailments and fires dating back to 2013 set off widespread worry that small towns were being kept uninformed about the potential dangers posed by rail lines running through them. A July 6, 2013, oil train explosion in Lac-Mégantic, Quebec, killed 47 people and underscored the risk to other North American communities along crude delivery routes.

AAR spokeswoman Kristin Clarkson said last week that the group stands by its position that the publication of "sensitive information on critical infrastructure and railroad operations substantially and needlessly exposes railroads to security and public safety risks."

She pointed out in an email that major railroads have for decades shared data on hazmat transport with emergency management officials and first responders. Clarkson also mentioned the industry's development of the "AskRail" mobile app, which is designed to make it easier for firefighters to quickly obtain data on the contents of rail cars in the event of an incident.

Before the May 2014 emergency order, such information was shared with first responders only upon request. The order required railroads to disclose more detailed data on movements of Bakken crude trains to state homeland security authorities, who were in turn expected to pass it along to local officials.

Al-Qaida — and enviros?

The rail industry groups cited two government advisories in their comments to the FRA — [one](#) from the FBI assessing the threat from green groups, and [another](#) from the TSA describing overseas plots to attach magnetic improvised explosive devices, or "sticky bombs," to the sides of freight rail cars.

The FBI's assessment, dated July 18, 2014, concluded that "increased use of railways to transport crude oil may lead to acts of environmental extremism." The intelligence document was prepared on the heels of a series of fiery oil train derailments, including one in Lynchburg, Va., in April, and a Dec. 30, 2013, crash and explosion in Casselton, N.D. Neither incident brought any casualties, but they galvanized environmental groups into staging protests and demanding tougher tank car standards.

The FBI's Counterterrorism Division claimed that green groups would be more likely to seek to "delay or disrupt" rail traffic rather than "directly sabotage" a rail line and cause a fuel spill. The agency's advisory also listed several "possible indicators" of criminal actions to expect from such "extremists," including "cyber attacks or attempted cyber attacks against businesses associated with the oil industry" or "the use of social media platforms like Twitter or Facebook to track routes or share targeted rails or facilities."

The TSA document, meanwhile, described a foiled plot to blow up freight rail cars via magnetic "sticky bombs" in India. The goal of Indian Mujahideen co-founder Yasin Bhatkal was believed to be to turn "freight trains to giant firestorms," the TSA noted, citing Indian press reports. Bhatkal, who had been captured by the time the March 31 TSA intelligence note was published, has since been sentenced to death for his involvement in other deadly bombings.

The TSA said that "although extremist media outlets provide an extensive amount of information on producing magnetic IEDs inexpensively, TSA-[Office of Intelligence and Analysis] is not aware of any plots involving the use of these devices within the Homeland."

In an emailed response to questions last week, TSA spokeswoman Lisa Farbstein said the agency is still unaware of any attempts to place magnetic IEDs on crude oil trains or other tank cars in the U.S. She nevertheless encouraged railroads to closely inspect rail cars moving hazardous materials, as laid out in federal regulations.

"TSA has and continues to assess the threats, vulnerabilities and potential consequences of a myriad of surface transportation operations, including the rail transportation of flammable liquids and other hazardous materials," she said, adding that "these assessments are security sensitive and are shared only with those persons with a need to know."

Despite the lack of specific plots in North America, the AAR and ASLRRRA noted in their comments that two publications shared by al-Qaida in the Arabian Peninsula included general threats against oil trains. "Furthermore, information from Osama Bin Laden's compound indicates that Al-Qaeda has contemplated attacks on trains," the groups said.

Fred Millar, a hazardous materials consultant who has worked with environmentalist organizations such as Friends of the Earth, said the "security threat is quite real" for freight railroads. But he criticized what he called the "dangerous" juxtaposition of al-Qaida and environmentalist threats in the rail groups' comments.

"This is conflating actual terrorism with very low-level kinds of nonviolent political activity, like blocking the train tracks," he said.

Millar has pushed for railroads to consider rerouting hazardous trains away from urban areas where they can pose a bigger threat to public safety. While railroads already weigh population density when selecting routes for certain high-hazard contents, in practice, oil trains, ethanol trains and specialized tank cars containing poisonous gases such as chlorine and ammonia pass through cities every day.

"If [terrorists] were to show that they can successfully attack a crude oil train as it is lumbering through a major city, that is going to be a huge blow to the fossil fuel industry in their ability to just ship this stuff wherever they feel like it," Millar said, noting that tougher regulations on oil train routing would likely soon follow.

Asked whether there were legitimate security reasons to keep such threat discussions behind closed doors, Millar dismissed the argument that they could be "giving terrorists ideas." He likened hazmat trains, which by law must be clearly labeled as they move throughout the U.S., to "elephants tiptoeing through the tulips."

"Who would think that the American citizens, who have to make the decisions about this, should be kept in the dark about the risk?" he said.

Twitter: [@BlakeSobczak](#) Email: bsobczak@eenews.net

Exhibit C

From: [Jan Hasselman](#)
To: [Debold, David](#); [Nicole Ducheneaux](#); "[Marinelli, Matthew \(ENRD\)](#)"
Cc: [Zilioli, Erica \(ENRD\)](#); [Brar, Amarveer \(ENRD\)](#); [Leone, Bill \(william.leone@nortonrosefulbright.com\)](#); [Comer, Bob \(bob.comer@nortonrosefulbright.com\)](#); [Scherman, William S.](#); [Fleischer, Jason J.](#)
Subject: RE: protective order
Date: Monday, January 30, 2017 6:25:34 PM

David:

Many of the schematics, for example those in 71720 that you propose for redaction I've seen many times in the record. Take a look at appendices D and H of the final EA – all of the proposed redactions, and far more, are included in there. AR 68414 was submitted as an exhibit in the PI proceedings. (#46 to our motion).

With respect to the spill response plans: our perspective is that the information proposed for redaction has nothing to do with preventing malicious harm - - its information like flow rates and time to shut down, and where modeled spill plumes could reach the River, which is important information for the public to review. There is in my view no legal basis for treatment of this material as SSI and I don't believe further discussions would be productive.

Jan

From: Debold, David [mailto:DDebold@gibsondunn.com]
Sent: Monday, January 30, 2017 2:51 PM
To: Nicole Ducheneaux; 'Marinelli, Matthew (ENRD)'; Jan Hasselman
Cc: Zilioli, Erica (ENRD); Brar, Amarveer (ENRD); Leone, Bill (william.leone@nortonrosefulbright.com); Comer, Bob (bob.comer@nortonrosefulbright.com); Scherman, William S.; Fleischer, Jason J.
Subject: RE: protective order

Thanks for the feedback, Jan and Nicole.

For what you call locational information (2), if you can point us to versions of particular maps, schematics, etc., that are already in the record, we are happy to go back and reconsider whether they need protection. Sometimes the proposed protection is driven by the context (which explains the phone numbers, e.g.), but not always. We're eager to avoid unnecessary disputes.

For the spill response plans (3), can you point us to something specific that you think we are over-protecting? As we've said, our goal is to avoid making it easier for someone with a malicious intent to cause harm to the pipeline in a way that aggravates the impact. If you see a different way to get there, let us know. Also, our proposed protective order would not prevent your experts or other

agencies from reviewing the materials if the purpose is to assist the Court in deciding issues in the case.

We will hold off filing in the meantime.

David

David Debold

GIBSON DUNN

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Tel +1 202.955.8551 • Fax +1 202.530.9682
DDebold@gibsondunn.com • www.gibsondunn.com

From: Nicole Ducheneaux [<mailto:NDucheneaux@ndnlaw.com>]
Sent: Monday, January 30, 2017 5:46 PM
To: 'Marinelli, Matthew (ENRD)' <Matthew.Marinelli@usdoj.gov>; Jan Hasselman <jhasselman@earthjustice.org>; Debold, David <DDebold@gibsondunn.com>
Cc: Zilioli, Erica (ENRD) <Erica.Zilioli@usdoj.gov>; Brar, Amarveer (ENRD) <Amarveer.Brar@usdoj.gov>
Subject: RE: protective order

David,

CRST does not oppose your motion to file docs under seal for purposes of the motion for protective order. Also, CRST agrees with 1-3 of Jan's email below.

Thanks,

Nikki

	<p>Nicole Ducheneaux Phone: 402.763-2717 Fax: 402-333-4761 nducheneaux@ndnlaw.com www.ndnlaw.com 3610 N. 163rd Plz. Omaha, NE 68116</p>
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The information contained in this e-mail transmission (including any accompanying attachment (s) is intended solely for its authorized recipient (s) and may be confidential and /or legally privileged. If you are not an intended recipient, or responsible for delivering some or all of this transmission to an intended recipient, you have received this transmission in error and are hereby notified that you are strictly prohibited from reading, copying, printing, distributing, or disclosing any of the information contained in it. In that event, please contact us immediately by telephone at 402.333.4053 or by email at nducheneaux@ndnlaw.com and delete the original and all copies of this transmission including any attachments without reading or saving in any manner. If you are a client of our firm, this confirms that communication to you by e-mail is an acceptable way to transmit attorney-client information. Thank you.

From: Marinelli, Matthew (ENRD) [<mailto:Matthew.Marinelli@usdoj.gov>]
Sent: Monday, January 30, 2017 4:23 PM
To: Jan Hasselman <jhasselman@earthjustice.org>; 'Debold, David' <DDebold@gibsondunn.com>
Cc: Nicole Ducheneaux <NDucheneaux@ndnlaw.com>; Zilioli, Erica (ENRD) <Erica.Zilioli@usdoj.gov>; Brar, Amarveer (ENRD) <Amarveer.Brar@usdoj.gov>
Subject: RE: protective order

David,

I echo Jan's thanks for trying to work through these issues.

We do not oppose your motion to file the nineteen documents under seal.

We oppose the motion for a protective order.

Best regards,

Matt

From: Jan Hasselman [<mailto:jhasselman@earthjustice.org>]
Sent: Monday, January 30, 2017 4:45 PM
To: 'Debold, David' <DDebold@gibsondunn.com>
Cc: NDucheneaux@ndnlaw.com; Marinelli, Matthew (ENRD) <MMarinelli@ENRD.USDOJ.GOV>
Subject: RE: protective order

David, thank you for taking the time to work through the issues around the documents and going back for another look. I've reviewed them and it seems to me that the proposed redactions can be put into three categories.

1. Personal information – I'm a little puzzled why DAPL wants to redact the phone numbers of the local sheriff and first responders but if its something you feel strongly about, we don't have any objection to redacting phone numbers. If you're going to move ahead with a protective order, I would propose you go ahead and redact the phone numbers so we don't distract the Court with that issue.
2. Locational information: Again, we're puzzled by many of these redactions since the same information appears in other places in the record, e.g., route maps, schematic diagrams, and so on. We also don't see what the purpose is of redacting broad scale information like "Missouri River" when its obvious from the document's contents what is being discussed. We don't agree to the redaction of any of the locational information but urge you to reconsider seeking a motion on that material.
3. Operational information: The broadest proposed redactions are in the spill response plans. We believe that this is important information for our experts, the public, and other agencies to review and comment on. So we can't agree that this should remain redacted.

We won't oppose a motion to file the documents under seal so the Court can look at the same redactions that you've sent us.

Call me if you want to discuss further. Thanks,

Jan

From: Debold, David [<mailto:DDebold@gibsondunn.com>]
Sent: Monday, January 30, 2017 9:22 AM
To: Jan Hasselman
Cc: NDucheneaux@ndnlaw.com
Subject: Re: protective order

Jan

I'll wait to hear an update from you later today. We plan to file a public motion for protective order and a second motion asking for permission to submit under seal the documents showing the parts we want to protect. So I'll also need to know if you have a position on the motion to submit the docs at issue under seal. Copying Nicole.

David Debold
Gibson Dunn
(202) 955-8551

On Jan 30, 2017, at 11:48 AM, Jan Hasselman <jhasselman@earthjustice.org> wrote:

David –

With all the moving parts I have not looked at the protective order documents you emailed last week. I will do that today, maybe hold off on the motion til I can do that.

Take care,
Jan

Jan Hasselman
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Ph: 206-343-7340 x.1025
Fx: 206-343-1526
www.earthjustice.org

This message may contain confidential and privileged information. If it has been sent to you in error, please reply to advise the sender of the error and then immediately delete this message.

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)

PROTECTIVE ORDER

On November 10, 2016, Defendant–Cross Defendant, the United States Army Corps of Engineers (the “Corps”) filed in the above-captioned litigation (the “Litigation”), a certified index of the Administrative Record (ECF No. 55-2). The Corps has provided the Administrative Record to Plaintiff, the Standing Rock Sioux Tribe (“SRST”); Plaintiff–Intervenor, the Cheyenne River Sioux Tribe (“CRST”); and Defendant Intervenor–Cross Claimant, Dakota Access LLC (“Dakota Access”) (the Corps, the SRST, the CRST, and Dakota Access are each, individually, a “Party” and are, collectively, the “Parties”). The Administrative Record contains an additional eleven (11) documents (the “Protected Information”) that Dakota Access believes in good faith

should be treated in part as confidential.¹ These documents have been shared with all parties. Having considered Dakota Access's motion for a protective order and the briefs filed by the other parties, it is hereby ORDERED, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, that this Protective Order shall govern the handling of all Protected Information.

TERMS AND CONDITIONS

1. This Protective Order shall govern the use of all Protected Information in the Litigation. This Protective Order is binding upon the Parties; their respective corporate, organizational, and governmental parents, subsidiaries and affiliates, including all other Federal agencies; and their respective attorneys, agents, representatives, officers, members and employees.

2. All Protected Information in the Litigation may be used only to evaluate, prosecute or defend a claim in this Litigation and for no other purpose.

3. Each Party shall maintain the Protected Information in a manner sufficient to protect such material against unauthorized disclosure.

4. Protected Information may be disclosed by a Party only (a) to attorneys for the Parties, and persons regularly employed in such attorneys' offices, (b) to the Court and any members of its staff assisting the Court in this Litigation; and (c) to other Qualified Persons as defined in paragraph six (6) below.

5. With the exception of attorneys for the Parties, persons regularly employed in such attorneys' offices, and the Court and any members of its staff assisting the Court in this Litigation, any Qualified Persons to whom Protected Information is to be disclosed shall be provided with a copy of this Protective Order, which he or she shall read, or shall otherwise be informed of the

¹ The eleven (11) documents constituting the Protected Information 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.

status of the Protected Information and the limitations on its use, and such persons shall sign an acknowledgment of their understanding of these limitations in the form attached as Exhibit A. A file of all such acknowledgements shall be maintained by counsel of record of the Party securing the acknowledgement and, upon request, such file shall be made available to any other Party or the Court.

6. “Qualified Persons,” as used herein, are limited to: (a) those persons directly employed by, or affiliated with, a Party who need to view the Protected Information in order to make a material contribution to that Party’s likelihood of success in this Litigation; (b) those experts or consultants hired by a Party who need to view the Protected Information for the same purpose, provided, however, that any documents created by such third-parties that rely on or incorporate the Protected Information in whole or in part shall be maintained as Protected Information by those third-parties and by the Party responsible for the Protected Information’s creation in accordance with the provisions of this Protective Order; and (c) other persons designated as a “Qualified Person” by future written agreement of the Parties or by order of the Court. No person who is, and no person who has been, the subject of a criminal charge arising out of the Dakota Access Pipeline Project is eligible to be a Qualified Person.

7. Except as agreed in writing by counsel of record, and to the extent that any Protected Information is, in whole or in part, contained in, incorporated in, disclosed in, or attached to any pleading, motion, memorandum, appendix, or other judicial filing, the Parties shall file under seal that portion of the submission containing the Protected Information and that portion filed under seal shall be designated and treated as a “Sealed Document.” The remainder of any such pleading, motion, memorandum, appendix, or other judicial filing shall be publicly filed with the Court with appropriate redactions. All Sealed Documents, filed under seal pursuant to this

Protective Order, shall be filed in a sealed envelope and shall remain under seal until such time as this Court orders otherwise. Such Sealed Documents shall be identified with the caption of this action, contain a general description of the sealed contents, and bear the following legend (or one substantially similar to it) which also must appear on the sealed envelope:

CONFIDENTIAL

Contents hereof are confidential and are subject to a court-ordered protective order governing the use and dissemination of such contents.

The Clerk of the Court shall maintain such Sealed Documents separate from the public records in this action, intact and unopened except as otherwise directed by the Court. Such Sealed Documents shall be released by the Clerk of the Court only upon further order of the Court.

Filings containing Protected Information shall be served upon counsel for the Parties by email.

8. In the event that it is known reasonably in advance of oral argument or any other public hearing that Protected Information may be disclosed, counsel shall so advise the Court and counsel for the other Parties. If such information is expected to be referenced or discussed, the Court may consider measures to ensure the preservation of its confidentiality.

9. Nothing contained in this Protective Order shall restrict counsel for any Party from rendering advice to its clients with respect to the Litigation and, in the course thereof, relying upon Protected Information, provided that in rendering such advice, counsel shall not disclose any Protected Information other than in a manner provided for in this Protective Order.

10. Nothing contained in this Protective Order shall preclude any Party from using its own Protected Information in any manner it sees fit, without the prior consent of any Party or the Court.

11. Any Party that receives a subpoena or other legal process that may require the disclosure of Protected Information, or is otherwise subject to any other legal obligation to disclose Protected Information, shall promptly notify the other Parties of such request, subpoena, or other

obligation. Unless a shorter time is mandated by a court order, and to the extent permitted by law, the Party receiving such a request shall not produce any Protected Information for at least ten (10) days after notice of the request, subpoena, or other obligation is provided in writing to the other Parties in order to provide the other Parties a reasonable period of time in which to seek to quash, limit, or object to the request, subpoena, or other obligation before the date designated for production. If the Party to which the request, subpoena, or other obligation is directed or compelled by applicable law or a court order to respond to the request, subpoena, or other obligation in less than ten (10) days, that Party shall, to the extent permitted by law, notify the other Parties of this fact. In the event that Protected Information under this Protective Order is produced in response to a request, subpoena, or other obligation, the producing Party shall take reasonable steps to ensure that the protections afforded under this Protective Order shall continue to apply to such Protected Information. Nothing herein shall be construed as requiring the Parties or anyone else covered by this Protective Order to seek a court order to avoid production, to appeal any order requiring production of Protected Information, to subject itself to any penalties for non-compliance with any such request or order, or to seek any relief from the Court.

12. By written agreement of the Parties, or upon motion and order of the Court, the Court may amend, modify, or vacate terms of this Protective Order. This Protective Order shall continue in full force and effect until amended or superseded by express order of the Court, and shall survive any final judgment or settlement in this action.

SO ORDERED this ____ day of February, 2017

The Honorable James E. Boasberg
United States District Judge

EXHIBIT A

DECLARATION OF _____

I reside at _____ in the City of _____, county of _____.
My present employer is _____. My present occupation is _____.

I understand that I will have access to and be examining documents that are confidential. I have read and understand the Protective Order covering these documents and pledge to comply with the provisions of that Protective Order. Furthermore, I certify that I am eligible to have access to the Protected Information under Paragraph (6) of the Protective Order.

I will hold all Protected Information and any duplicates, notes, abstracts, or summaries thereof in confidence, will not disclose such information to anyone not specifically entitled to access under the Protective Order, and will use the information solely for purposes of this Litigation, except as provided by the Protective Order. At the conclusion of this Litigation, I will return all originals of all Protected Information and any duplicates, notes, abstracts, or summaries thereof in my possession, whether prepared by me or anyone else, to counsel for the party by whom I am employed or retained.

Signed: _____

Date: _____