UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION, ROBERT SHEPHERD, CHAIRMAN, Plaintiffs, v. UNITED STATES CORPS OF ENGINEERS, ROBERT J. RUCH, IN HIS OFFICIAL CAPACITY AS DISTRICT COMMANDER, AND STEVEN E. NAYLOR, IN HIS OFFICIAL CAPACITY AS REGULATORY PROGRAM MANAGER, Defendants.	Civ. No. 11-3026-RAL Judge Roberto A. Lange

PLAINTIFFS' BRIEF ON THE MERITS THAT DEFENDANTS' DECISIONS VIOLATED THE ADMINISTRATIVE PROCEDURE ACT

INTRODUCTION

The Corps has authorized Merlyn Drake (ñDrakeò) to construct a road ñin the vicinity of Enemy Swim Lakeò that ñis approximately one mile in length.ò Amended Answer, ¶ 14, ECF No. 14. Overall, the Corps issued three decisions to Drake that his applications involved a farm road and has issued three decisions to Drake approving applications for a nationwide permit (ñNWPò). Id. at ¶ 8. The three most recent approvals ï two farm road decisions and then one NWPï authorized the majority of this one-mile road to be constructed in waters of the United States. Despite hundreds of tons of fill placed in Enemy Swim Lake to construct this two-lane road, the Corps has never issued an individual permit to Mr. Drake in accordance with the Clean Water Act (ñCWAò). Id. at ¶ 12. Nor has the Corps consulted the Tribal Historic Preservation Officer (ñTHPOò), or followed the National Historic Preservation Act (ñNHPAò) when issuing its decisions.

With the Corpsô approval and assistance, Drake has been building roads in the waters of the United States for the past 15 years. RA 0478. Drake owns an enormous machine building (clearly visible on Google maps) to store and maintain over a dozen pieces of heavy construction and excavation equipment. Drakeôs machine building is located a few hundred yards from Drakeôs opulent, new, lakeshore home, which began construction in 2000. RA 0483. Today, the culmination of the Corpsô decisions to not regulate this road enable Drake to purportedly build a second new lakeshore home, RA 2958, or, as Drake has more recently admitted to the Tribe, to develop 18 lots of lakeshore property. ECF No. 77-1.

The Sisseton-Wahpeton Oyate of the Lake Traverse Reservation (ñSWOò or ñTribeò) contacted the Corps in 2009, which included a joint site visit and a meeting at the Tribal headquarters. Then-Chairman, Michael I. Selvage, Sr., was invited by the COE to seek a decision on the Drake project, specifically asking him to submit the Tribeôs arguments and evidence to the COE and that the COE would then consider the Tribeôs arguments and evidence and issue the Tribe a decision. Joel Ames, the Corpsô Tribal Liaison officer represented to the Tribal Council that ñ[w]e understand everybodyôs frustration and Iôm, thatôs why weôre here to you know (sic). Clearly, we understand our responsibility to the Tribe and move on and make a good faith effort in trying to address these issues and make sure we clearly understand what the concerns are. Now we can take it back and do some homework here. We will certainly be in touch. Itôs not like it stops here.ò[1]

The Tribe ñin 2009 and 2010 challenged several United States Army Corps of Engineersô decisions allowing unregulated fill of Enemy Swim Lake within the Lake Traverse Reservation in South Dakota, which violate the Clean Water Act.ò Amended Complaint, ¶ 1, ECF No. 16.

[1] Tribal Council transcript of July 31, 2009, meeting with Corps, p. 26, ECF No. 18-49.

The Corps issued letters to the Tribe in 2009 and 2010, which disagreed with the Tribeôs requests and arguments. The Tribe filed this lawsuit.

While it is clear that the Corps has been duped by a developer feigning to be a farmer, the Corps has been successful in having most of the Tribeôs lawsuit dismissed based upon: (1) the statute of limitations in 28 U.S.C. § 2401(a); (2) that the Corpsôdecisions issued to the Tribe in 2009 and 2010 do not constitute final agency action; and (3) that the Corpsôrejection of the Tribeôs 2009 and 2010 demands for various types of regulation are subject to the Corpsô exclusive discretion. Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. U.S. Army Corps of Engineers, 2015 WL 4931152, * 3, (D.S.D. 2015). What remains is a fraction of the Tribeôs original lawsuit:

> The Tribe's remaining claims challenge the two final decisions made by the Corps within the statute of limitations verifying that Drake need not apply for individual discharge permits, the decisions by the Corps that the proposed projects that were the subject of the 2006 and 2009 verifications were not federal undertakings subject to the NHPA, and the Corps' alleged coaching of Drake on how to avoid CWA issues.

Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. United States Corps of Engineers, 2015 WL 4931152, at *4 (D.S.D. 2015).[2]

[2] Four projects are no longer a part of this lawsuit. First, Drakeôs past effort to access his shoreline to the north of the inlet by a bridge near the lake that was also treated as a farm road by the Corps, however, Drake changed his mind. ñBut due to local concern with the bridge, I have not followed through with the project. Having researched the project and noting the potential liability of a bridge over the water, and future maintenance. I have decided to pursue this proposed option which would not interfere with usage of the creek.ò RA 0369. Second, on June 6, 2000, the Corps issued Drake a NWP 26 in order to construct an access road to Drakeôs ñhouse site being built.ò RA 0483. Third, the Corps issued Drake a NWP 14 on December 4, 2003, RA 0450, in order for Drake ñto accomplish a road system (organized) and to unify residents to a single road complete with recorded easements.ò RA 0461. This December 4, 2003 NWP 14 is the only Corps decision related to the access issue litigated in the South Dakota Supreme Court. RA 0468. Fourth, and finally, on December 2, 2003, the Corps treated the main road through the inlet as a farm road, RA 0358, for access to the north side of the inlet for

ADMINISTRATIVE RECORD

The Administrative Record is a one-sided story consisting primarily of Corps records because (1) the Corps never issued notice or sought public comment after Drake filed several Applications for Department of the Army Permits, (2) the Corps stipulated in Court that its Tribal Liaison officer never consulted with the Tribe until after the Corps had issued its decisions,[3] (3) the evidence, photos, videos, and arguments provided by the Tribe in 2009 and 2010 have been excluded as records submitted after the Corps issued its decisions to Drake, and (4) Drakeôs most egregious conduct occurred after the Corpsô farm road and NWP decisions were issued.

A. Drake's 2006 Application for Department of the Army Permit to finalize the road across the Enemy Swim Lake inlet and construct a bridge across Enemy Swim Creek.

The Administrative Record demonstrates that the Corpsô 2006 decision was based entirely on Drakeôs applications, as supplemented by Drake. On September 9, 2005, Drake filed an ñApplication for Department of the Army Permitò to place additional fill for a bridge and road in Enemy Swim Lake. RA 1456. Drake described the purpose of this project as an extension of his most recent ñfarm road.ò; ñ[t]o access lot 5ò ñfrom lot 2ò ño f which that access was gained from permit application no. 200330442.ò RA 1457. Surprisingly, notes of Corps official Mr. Naylor do not show any concern that Drake described this bridge and road project as a continuation of the main road still being built across the inlet. See Amended Answer, ¶ 29, ECF No. 28 (ñDefendants admit that during a site visit in 2009, Merlyn Drake informed the Corps and Tribal officials that his road was not then complete.ò).

ñequipment for fence construction and maintenance and cattle management,ò although Drake neither constructed fences, nor managed cattle. RA 0369.

[3] August 15, 2003, Transcript, p. 249, lines 5-12.

Drake supplemented his application on November 4, 2005, and informed the Corps a second time that the proposed bridge and road would be an extension of his previous work:

> Yes ï the road + bridge is a continuation of my efforts to connect my farm land and pasture to allow for cattle movement and grazing and also for myself to access the area for fence construction and maintenance and farm management. With the bridge and continuation of the road to Government lot 5 section 12 Day County, it will be possible to isolate the wetland + creek area with fencing to minimize the adverse effect of overgrazing . . . .

RA 1545. On December 13, 2005, Mr. Oehlerking indicated in his notes that the Corps would ñissue NWP 14 or exemption.ò RA 1553.

Drake indicated that the proposed bridge needed to cross a creek, which was ñno more than 10ò feet wide, RA 1459, and 6 inches deep. RA 1547. Yet Drake proposed to construct a bridge that was 21 feet wide, RA 1549, and over 20 feet in length at the top, RA 1459. The sides of the bridge would contain a 2 foot square concrete foundation with 15 inch steel I-beams, RA 1549, and the top is also built with 15 inch steel I-beams, RA 1459, and capped off with steel decking, RA 1548.

On September 20, 2005, Mr. Naylor noted that ñ[g]iven past problems with Drake applications, all requested additional information must be provided in writing!ò RA 1507. Yet seven days later, the Corps informed Mr. Block that the ñCorps assumes that applicants provide information in their application that is accurate and truthfulò and that there was ñno proof to date that the applicant has been deceptive in the data provided in his applications.ò RA 1510.

Despite receiving an Application for a Department of the Army Permit, the Corps never issued notice to the public. Based solely upon information supplied by Drake, the Corps determined on May 1, 2006, that Drakeôs ñproposed project, as presently designed, would be exempt from requiring a Department of the Army permit.ò RA 1566. The Corpsô May 1, 2006,

decision came conditioned with the standard statutory and regulatory requirements. ñIn order for the exemption to remain valid, the enclosed conditions must be adhered to,ò RA 1566, which are commonly referred to as Best Management Practices (ñBMPôsò), 33 U.S.C. § 1344(f)(1)(E); 33 C.F.R. § 323.4(a)(6). See Amended Complaint at ¶¶ 112-135.

B. Drake's 2008 Application for a Department of the Army Permit to complete the residential road project.

On October 2, 2008, Drake filed another ñApplication for Department of the Army Permit (33 CFR 325)ò to complete the final phase of his road construction project. RA 2987. For a third time, Drake informed the Corps that the proposed road was a continuation of prior road work. Drake titled the project, ñAccess Road (final completion).ò RA 2987. Drake indicated that ñthis road is necessary to totally access my land.ò RA 2988. Prior to filing this application, Drake informed the Corps on September 22, 2008, that the proposed extension of the road was necessary for a future residence. RA 2958. But Drake omitted any reference to such residential development in his application. RA 2987-2993. Drake indicated that the prior road work tied directly into his proposed extension; ñthe access road to this new construction area has been completed.ò RA 2988. Further, Drake attached a copy of his application to the South Dakota Department of Environmental and Natural Resources for ñstorm water discharges associated with industrial or construction activities.ò RA 2991. Drake informed Mr. Oehlerking of the Corps that his application to the State ñincludes access road and resloping of north shore above HWMò (high water mark). Id.

Drake called the Corps on October 30, 2008, to inform the Corps that he was already ñcompleting site grading in area + borrow and would like to get them installed this fall.ò RA

3034.[4] Mr. Oehlerking discussed the purpose and need with Drake because it was unclear in the application. RA 3034. Drake informed the Corps that ñhe intends to be ag. for now.ò RA 3034. For a fourth time, Drake stressed to the Corps that the proposed road ñis extension of previous Ag. exempt crossings.ò RA 3034.

Mr. Oehlerking consulted with his supervisor, Mr. LaGrone, who indicated that ñwe have knowledge by verbal conv. of potential for residence and we should consider under NWP vs. exemption.ò RA 3035. Mr. Oehlerking also consulted with Mr. Naylor who likewise indicated that the application is ñabove/beyond ag. exemptionò because of the significant amount ñof site grading un-related to ag, that is not ag. exemption.ò RA 3036. On November 11, 2008, Mr. Oehlerking called Drake and advised that ñbased upon the site grading occurring + small óag areaô to serve w/ proposed crossing + purpose + need, we are going to apply NWP 14 in lieu of exemption.ò RA 3037.

On November 19, 2008, Mr. LaGrone received a phone call from U.S. Senator Thuneôs office. When asked ñin a nut shell what is this about,ò Mr. LaGrone responded that it was ña feud between two landowners for many years that has resulted in one case in the SD Supreme Court.ò RA 3057. Mr. LaGroneôs fabrication to Thuneôs office is contradicted by Drake, who personally informed the Corps that only the road south of the inlet, specifically Corps file 200330441 NWP 14, was related to the easement dispute litigated in the South Dakota Supreme Court. RA 0468. Mr. LaGrone further explained to Senator Thuneôs office that years ago the Corps made a call on a road believing it to be for agriculture, yet admitted that ñ[t]oday we know

[4] On November 14, 2008, Mr. Block submitted photos of additional excavation and construction on Drakeôs north shoreline, including one photo that indicates that Drakeôs excavation for the latest extension of the one-mile access road was indeed far along, as Drake represented to the Corps. RA 3041.

he is building a home for himself on the land. Even if that were to be considered not an agricultural purpose the causeway is in and a change in purpose would not require him to pull it out.ò RA 3057. As the Corps has explained to the Court, such a change in purpose is subject to the CWAôs recapture provision. See Corps Memorandum in Support of Partial Dismissal, p. 6, ECF No. 27 (ñUnder CWA section 404(f)(2), an otherwise exempt discharge may still be subject to regulation, or órecapturedô if it is óincidental to any activity having as its purpose bringing an area of the navigable waters into a use which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.ôò) (citations omitted).

On December 8, 2008, Corps personnel circulated internally a newspaper article about Drakeôs development and the lack of Corpsô regulation and attributed the article to Mr. Block contacting ñthe media as he has threatened to do in the past.ò RA 3081. The Watertown Public Opinion story represented that ñ[a]ccording to some residents, landowner Merlyn Drake is using a road officially constructed for moving cattle and farm equipment to, instead, transport passenger vehicles and heavy equipment over the lakeôs only inlet to his property north of the inlet.ò RA 3082. Mr. Naylor was quoted as saying that the Corps looked into the allegations that ñthere were plans for a housing developmentò but Drake ñtold us he did not intend to do that.ò RA 3083.

On January 21, 2009, Mr. Oehlerking informed LaGrone that their office would coordinate the issuance of an ñNWP 14 verificationò for Drakeôs extension, which ñwill likely be in the very near future.ò RA 3490. LaGrone replied, ñIs there any 404 issue on the NW14 crossing? If not letôs try to stay out of it.ò RA 3499. Oehlerking replied that ñwe are already nearly done processing. Sorry, weôre not able to avoid.ò RA 3503.

As late as February 27, 2009, in a ñCover Sheetò to letters to U.S. Senators Johnson and Thune and Representative Herseth Sandlin, the Corps misrepresented that the road across the inlet was completed four years earlier. RA 3578. The Corps now admits that the road was not complete as late as July 31, 2009. Amended Answer, ¶ 29, ECF No. 28.

The Corps also misrepresented to the South Dakota Congressional delegation that the complaints over Drakeôs excavation and construction arose only because ñ[s]ome of the work was subject to a lawsuit between the parties that was resolved in the South Dakota Supreme Court. Since Mr. Block was only partially successful in court he has sought the assistance of numerous State and Federal agencies to curtail Mr. Drakeôs activities.ò RA 3578. But Drake informed the Corps that the only project pertaining to the State court dispute was the December 4, 2003, NWP 14, which was a road serving more than one residence. RA 0468.

The Corps further represented, in early 2009, to the Congressional delegation that, ñwe have only seen the land being used for agricultural and related purposes.ò RA 3578. Yet, the Corps further noted that Drake was conducting ñsite grading for a potential future residence on the northern part of his land that is accessed by the [exempt] causeway. This additional road will likely require a Section 404 permit.ò RA 3578. The road in question was not an ñadditionalò road, it was an extension of Drakeôs existing road project. The Corpsô letters to the Congressional delegation state that ñMr. Drake has conducted site grading for a potential future residence on the northern part of his land that is accessed by the crossing. We have indicated to him that any upgrade to the road to serve his new residence will not qualify for an agricultural exemption and he will need to process any of this additional road work through the Regulatory permit process.ò RA 3423; RA 3462; 3524. This additional regulation never occurred despite

Drake informing the Corps that he was still working on the road throughout the summer of 2009. Amended Answer, ¶ 29, ECF No. 28.

In the same Cover Sheet, the Corps also stated that ñ[w]e currently have no information indicating non-compliance with direction we have given Mr. Drake.ò RA 3578. Yet, less than two months later, on April 17, 2009, Mr. Naylor is quoted in the Watertown Public Opinion that ñI donôt think thereôs any question the road is being used for things other than ag-related activity.ò RA 3616.

On March 12, 2009, Drake provided the Corps with additional information ñrelative to my permit application,ò and for a fifth time described the project as a continuation of the same road; ñfor the final access road to the north side of Enemy Swim.ò RA 3601.

On April 23, 2009, Mr. LaGrone responded to an internal question about whether Drakeôs latest plans for road development was a farm road:

> We have said the first segment was a farm road exemption. However, the new ½ mile or so of road is specifically for his new house and therefore a different purpose and needs two nwp crossings.

RA 3670. Mr. LaGrone made no mention of the second segment of the road, that which included the bridge, also being treated as a farm road. When further asked whether the first portion of the road is farming related and the new segment is strictly for access to his new house, RA 3670, Mr. LaGrone explained that the ñresidential is the last part of the road at the end. The road is being extended only to service the home.ò RA 3672.

Despite receiving an application for a permit, the Corps, once again, never sought information from the public through the notice and comment procedures mandated by Corpsô regulations. 33 C.F.R. Part 325; 33 C.F.R. § 320.4. On May 4, 2009, the Corps approved

Drakeôs work under NWP 14 for ñthe installation of two culverted road crossings in two linear wetlands to provide access to private property.ò RA 3703.

STANDARD OF REVIEW

Under the Administrative Procedure Act, ñthe reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.ò 5 U.S.C. § 706(s)(A). ñAn agency decision is arbitrary or capricious if: the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.ò McClung v. Paul, 788 F.3d 822, 828 (8th Cir. 2015), *quoting*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). ñThe reviewing court should not attempt itself to make up for such deficiencies: We may not supply a reasoned basis for the agency's action that the agency itself has not given.ò Motor Vehicle Mfrs. Ass'n of U.S., Inc., 463 U.S. at 43. ñNot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.ò Allentown Mack Sales and Service, Inc. v. N.L.R.B., 522 U.S. 359, 374 (1998).

ARGUMENT

I. Contrary to law, the Corps committed multiple violations of the NHPA.

Based upon the Corpsô pleadings, the Corps did not contact the State Historic Preservation Officer (ñSHPOò), nor did the Corps contact the Tribal Historic Preservation Officer (ñTHPOò), prior to any of its approvals of NWPôs or farm road determinations. Defendants Partial Answer to Amended Complaint, ¶¶ 159-160, ECF No. 28. The Corps has never treated the THPO or SHPO as a consulting party for any of their decisions involving

Drake. Id. Instead, the Corps denies ñthat the alleged activities constitute undertakings,ò subject to the NHPA. Id. Despite its Amended Answer, the Corps later conceded that the NHPA does apply to a NWP determination. Corps Memorandum in Support of Partial Dismissal, p. 5, ECF No. 27 (ñA person proceeding under an NWP must notify the Corps if an authorized activity may adversely affect historic properties listed on or eligible for listing on the National Register of Historic Places.ò).

A. The Corps' 2006 approval of Drake's bridge is an undertaking under the NHPA.

The primary issue is whether the Corpsô May 1, 2006 farm road decision constitutes an undertaking subject to the NHPA. The Corps has previously conceded that its farm road letters marked the consummation of the Corpsô decision making and ñdetermined Drakeôs right and obligations with respect to the matters covered in each letter.ò Corps Memorandum in Support of Partial Dismissal, p. 23, ECF No. 27. Despite determining Drakeôs legal rights and obligations, the Corps also determined incorrectly that its farm road letters do not constitute an undertaking. The only time that the Corps addressed the NHPA for this portion of Drakeôs road was in 2010:

> As stated above, within the context of the Corps Regulatory Program, a federal *undertaking* means a project activity that falls under the permitting jurisdiction of the Corps. Section 106 of the National Historic Preservation Act (NHPA) requires a federal agency to take into account the effects of their undertakings on historic properties included on, or eligible for inclusion on, the National Register of Historic Places. Since some of Mr. Drakeôs activities were exempt from the Corpsô regulatory authority, under Section 404(f) of the Clean Water Act there was no federal undertaking. Accordingly, the NHPA did not apply.
>
> Conversely, we applied the requirements of Section 106 of the NHPA to each of our evaluations of the three Nationwide Permit verifications, which are federal undertakings, and found that the activities proposed by Mr. Drake did not have a potential to affect properties included on or eligible for inclusion on the National Register of Historic Places.

ECF Doc. 18-9, at p. 5. Section 106, however, requires that the ñhead of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking . . . shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the [Advisory] Council [on Historic Preservation (ñACHPò)]a reasonable opportunity to comment with regard to the undertaking.ò 54 USCA § 306108. The record reveals that the ACHP was never allowed an opportunity to comment on any of the Corpsô approval of Drakeôs road project.

1. **The Corps' 2006 determination that its authorization of Drake's proposed bridge and road is not an undertaking under the NHPA is arbitrary and capricious because the Corps relied on factors which Congress has not intended it to consider.**

The NHPA defines the term ñundertakingò as:

> . . . a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including--
> **(1)** those carried out by or on behalf of the Federal agency;
> **(2)** those carried out with Federal financial assistance;
> **(3)** those requiring a Federal permit, license, or approval; and
> **(4)** those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

54 USCA § 300320; 36 C.F.R. § 800.16(y). Here, the Corpsô decision to treat Drakeôs bridge and road as a farm road project ensured that Drake was not required to obtain a permit. Regardless, however, the Corpsô farm road decision was still subject to several other legal requirements of the CWA, and the Corpsô decision to treat Drakeôs bridge and road as a farm road constitutes an undertaking under the NHPA.

The CWA imposes several legal requirements on Drakeôs bridge project, which required and received the Corpsô approval. First, Drakeôs proposed discharge must be for a purpose or an activity listed in 33 U.S.C. § 1344(f)(1). Second, as a so-called farm road, Drakeôs road must

comply with the CWAôs statutorily mandated BMPs. 33 U.S.C. § 1344(f)(1)(E). There are 15 mandatory BMPôs, which, according to the Corpsô regulations, ñmust be applied to satisfy this [farm road] provision.ò 33 C.F.R. § 323.4(a)(6). Third, the Corpsô decision on Drakeôs bridge and road is subject to recapture, which requires a farm road to ñhave a permitò if the fill is ñincidental to any activity having as its purpose bringing an area of the navigable waters into a use which it was not previously subjectò and either the flow or circulation is impaired or the reach of the waters is reduced. 33 U.S.C. § 1344(f)(2); 33 C.F.R. § 323.4(c). Fourth, the discharge ñshall require a section 404 permitò if it contains a toxic pollutant. 33 C.F.R. § 323.4(b). Thus, the Corpsô approval and regulation of Drakeôs bridge in accordance with the CWAôs statutory conditions constitutes an undertaking subject to the NHPA.

The Corps maintains a very different definition of the term ñundertaking.ò According to the Corpsô limited definition, an undertaking only ñmeans the work, structure or discharge that requires a Department of Army permit pursuant to the Corps regulation at 33 C.F.R. 320-334.ò 33 C.F.R. Part 325, Appendix C, § 1(f) (ñAppendix Cò). The Corpsô NHPA practice is guided by Appendix C. RA 3413.

Appendix C has been held to be without legal force because it is not consistent with the NHPA or the ACHPôs regulations. Appendix C cannot be relied upon by the Corps to only consider the permit area, as opposed to the ACHP's Area of Potential Effects. Colorado River Indian Tribes v. Marsh, 605 F.Supp. 1425, 1437 (1985). More broadly, ñthe Corps cannot rely on its own regulations to determine compliance with the NHPA.ò Comm. to Save Cleveland's Huletts v. U.S. Army Corps of Eng., 163 F.Supp.2d 776, 792 (N.D.Ohio 2001). Accordingly, the Corps cannot rely on Appendix C to evade its legal obligations under the NHPA.

The Corps itself has acknowledged that Appendix C no longer complies with the NHPA and issued interim guidance in 2005[5] and 2007.[6] The Corps has never fixed the many defects in Appendix C.

The ACHP has informed the Corps that Appendix C is legally insufficient and, still, the Corps has done nothing. On October 9, 2008, the ACHP informed the Corps that it sees ñmajor problems with the Corpsô concept proposal: the definition of undertaking; the definition of Area of Potential Effects; and the nature of consultation required in the Section 106 process.ò[7] On November 7, 2008, the Corps responded to the ACHP that ñI have instructed the Army Corps of Engineers to stand down it efforts to revise Appendix C, *Historic Properties*, the regulation currently in force for complying with section 106.ò[8]

Congress mandates that the Corpsô NHPA regulations must be consistent with those adopted by the ACHP. 54 U.S.C. 306102. Further, Appendix C and the Interim Guidance have not been approved by the ACHP as required by 36 C.F.R. 800.14.

Here, instead of following the ACHPôs regulations, as it was required to do, the Corps followed its own regulations, which both the ACHP and the Corps have acknowledged to be legally deficient. This Court ñmay properly be skeptical . . . if the responsible agency has

[5] http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/InterimGuidance_25apr05.pdf
[6] http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/inter_guide2007.pdf

[7] October 9, 2008, correspondence to Assistant Secretary of the Army for Civil Works, Paul Woodley, from Chairman John Nau, Advisory Council on Historic Preservation, Exhibit 1, Paulson Affidavit. This document was submitted by the Tribe to the Corps in 2010, and used to be publicly available on the Corpsô website.
[8] November 7, 2008, correspondence to Chairman John Nau, Advisory Council on Historic Preservation, from Assistant Secretary Woodley, Exhibit 2, Paulson Affidavit. This document was also submitted by the Tribe to the Corps in 2010, and also used to be publicly available on the Corpsô website.

apparently ignored the conflicting view of other agencies having pertinent expertise.ò Sierra Club v. U.S. Army Corps of Engôrs, 701 F.2d 1011, 1030 (2nd Cir. 1983).

The correct process, as the ACHP has explained, is that the Corps "should examine the nature of its Federal involvement taking into consideration factors such as the degree of Federal agency control or discretion; the type of Federal involvement or link to the action; and whether or not the action could move forward without Federal involvement. An agency should seek the advice of the Council when uncertain about whether or not its action falls within the definition of an undertaking." 76 FR 77698, 77712. The Corps failed to consider the ACHPôs regulations or any of these factors identified by the ACHP. ñ[S]pecific alternatives and exemptions should be decided after the appropriate § 800.14 process is followed and not through rulemaking itself. The Council encourages Federal agencies to submit proposed exemptions and other alternatives.ò Id. The Corps has also failed to present its proposed exemptions to the Council for approval under § 800.14.

Therefore, the Corpsôreliance on Appendix C in determining that Drakeôs bridge is not an undertaking under the NHPA was arbitrary and capricious because the Corps relied on factors which Congress has not intended it to consider.

2. The Corps' 2006 determination that its authorization of Drake's proposed bridge and road is not an undertaking under the NHPA is arbitrary and capricious because the Corps entirely failed to consider an important aspect of the problem.

The CorpsôMay 1, 2006 decision required Drake to comply with BMPs when building the bridge and road. RA 1568. Such compliance is required by the CWA, 33 U.S.C. § 1344(f)(1)(E), and the Corpsôregulations, 33 C.F.R. § 323.4(a)(6). One of the mandatory, baseline, BMPs require that ñ[b]orrow materials shall be taken from upland sources whenever feasible.ò RA 1568; 33 C.F.R. § 323.4(a)(6)(viii). Here, the Administrative Record establishes

that the Corps expected and understood that Drakeôs bridge project would result in Drake taking borrow material from nearby upland sources. The Corpsô ongoing duty to oversee this BMP also results in the approval of Drakeôs bridge and road being an ñundertakingò for purposes of the NHPA.

Attached to Drakeôs Application for a Department of the Army Permit was a South Dakota form where Drake described that the ñ[b]orrow pit [is] for materials for access road. Upon reclamation, banks and hillside will be relieved to reduce future siltation + erosion that has been going on for centuries.ò RA 2992.

In addition to the Corpsô knowledge of this BMP requirement and Drakeôs 2008 application, the Corps knew, prior to its May 1, 2006, decision, that Drake would take fill from an upland source. For example, when inspecting the previous section of road through the inlet on August 23, 2005, the Corps noted that Drakeôs ñ[b]orrow material shall be taken from upland sources whenever feasible.ò RA 1515. ñIt appears that this condition is being met.ò Id.

As expected, after the Corps issued its decision authorizing Drakeôs plans for a bridge and road, on October 31, 2006, a neighbor informed the Corps that ñdirtwork [is] occurring on the N. shoreline of the Lake.ò RA 2145. On October 26, 2007, the Corps inspected the north shore and noticed ñan active borrow area [in accordance] w/ BMP on N. shore.ò RA 2901, see also, RA 3558 (ñSite visit by Jim O + Dave L (10-26-07). Earth disturbance on north side of inlet confirmed. Drake says disturbance is for borrow for approach berms for 2nd Ag exemption.ò). Drake also informed the Corps on September 22, 2008, that he was ñ[l]owering hilltops @ N. side, to get down to level above lake + address shoreline erosion, using for borrow.ò RA 2958.

When issuing its decision on May 1, 2006, the Corps knew that Drake would be required to take substantial amounts of fill from an upland source on the north side of the inlet to build the bridge and road. For reasons not explained, the Corps entirely failed to consider this important aspect of the problem ï the Corps ongoing regulation of Drakeôs borrow material from upland sources as required by the BMPôs -- and therefore Corpsô determination that Drakeôs proposed bridge and road is not an undertaking subject to the NHPA is arbitrary and capricious.

B. The Corps' determination that the SWO THPO need not be consulted when issuing Drake the NWP 14 permit on May 4, 2009, was arbitrary and capricious and unlawful for at least four separate reasons.

There should be no dispute that the Corps views the NWP 14 as an undertaking. Corps Memorandum in Support of Partial Dismissal, p. 8, ECF No. 27 (ñ[P]rospective permittees must notify the Corps prior to undertaking any activity that may affect historic resources listed or eligible for listing on the National Register of Historic Places.ò). The following portions of the Administrative Record show that the Corps, in accordance with Appendix C, had no intention of complying with the NHPA and consulting with the THPO when determining that Drakeôs 2009 bridge and road extension qualified for NWP 14.

On October 2, 2008, Drake informed the Corps that the ñfill material would be the gravel hill adjacent to the fill area.ò RA 2988. Drake also informed the Corps that the ñ[b]orrow pit [is] for materials for access road. Upon reclamation, banks and hillside will be relieved to reduce future siltation + erosion that has been going on for centuries.ò RA 2992. Drake called the Corps on October 22, 2008, to inquire about his application and informed the Corps that he ñwould like to do [the work] this fall.ò RA 3004. On October 22, 2008, the Corps received pictures showing a significant amount of shoreline, within a few feet of the lake, cleared entirely

of all vegetation and trees. RA 3005-3013. On October 27, 2008, the Corps received additional pictures showing a large swath of shoreline totally denuded and excavated. RA 3027-3033.

On November 3, 2008, the Corpsô notes indicate that there was some internal discussion about the NHPA and Drakeôs 2008 application. RA 3036. Mr. Naylor informed Mr. Oehlerking that ñSec. 106 ï we have no clearance, but no sites listed or eligible in APE of 2 crossings.ò RA 3036.

On January 7, 2009, the SWO THPO, Dianne Desrosiers, called Mr. Naylor to ñinquire about subject road crossing.ò RA 3291. Ms. Desrosiers informed Mr. Naylor that the ñTribe has issues w/ the crossingò and requested the application and the Corpsô response. Id.

One day later, on January 8, 2009, Mr. Naylor directed Corps employee Mr. Harnois to conduct an archeological review for the Drake NWP. RA 3413. Mr. Naylor explained that ñ[o]ur current guidance is to follow appendix C, and its interim guidance, for a NWP.ò Mr. Harnois was directed to explain the ñ[c]urrent extent of Corps of Engineers knowledge of historic properties,ò which was to be provided ñwithin 5 days of this memo.ò Mr. Harnois was also directed to provide an ñeffect determination for Section 106 compliance,ò which was to be provided ñwithin 21 days.ò RA 3413. Mr. Harnois replied on January 23, 2009:

> I now have the maps for survey/site coverage regarding this NW app. There are no sites or surveys recorded in the permit area. There is a large site area (39DA0002) containing burial mounds recorded across the lake, approx. 1 mile to the South. Since this site is well outside the bounds of the permit area, I recommend we proceed with issuing this permit.

RA 3522.

During a conference call among Corps officials on March 9, 2009, including Corps Tribal Liaison officer Joel Ames, the topic of contacting the Tribe was discussed. Mr. Naylor ñclarifiedò that the Corps does ñnot have requirement or authority to coord. w/ tribe on

exemptionsò and the ñapplicant [is] responsible for compliance with cultural.ò RA 3597. Despite the THPOôs phone call to the Corps on January 7, 2009, Mr. Ames ñadvised we have not been notified of issue w/ exempt x-ing by tribe and have fulfilled our responsibility, if we made aware of concerns, then we should consult/coord.ò RA 3597. One Corps official, ñMartha,ò suggested ñproviding Tribe notice of pending project + evaluating their response; if no response then O.K. to go.ò RA 3598. But on March 19, 2009, in another conference call, which included Mr. Harnois, it was decided that the Corps would not consult the Tribe and the application would be processed in accordance with Appendix C. ñJoel and Dave concur w/ Rick H that [it] is acceptable to finalize processing and further coordination [with the Tribe] is not necessary,ò because ñall requirements have been met.ò RA 3612.

1. The Corps failure to assume "historic properties were present" is arbitrary and capricious because the Corps entirely failed to consider an important aspect of the problem.

After determining that the proposed federal action is an undertaking, the next question is ñwhether it is a type of activity that has the potential to cause effects on historic properties.ò 36 C.F.R. § 800.3(a). ñThere is no consultation requirement for this decision.ò 65 FR 77698, 77718. When making this decision the Corps must assume the presence of historic properties:

> If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, *assuming such historic properties were present*, the agency official has no further obligations under section 106 or this part.

36 C.F.R. § 800.3(a)(1) (emphasis added). Section 106 ñis a stop, look, and listen provision; it requires federal agencies to take into account the effect of their actions on structures eligible for inclusion in the National Register of Historic Places.ò Illinois Commerce Com'n v. I.C.C., 848 F.2d 1246, 1260-61 (D.C. Cir. 1988). Here, the Corps never assumed the presence of historic

properties when determining whether the undertaking is the type of activity that has the potential to cause effect on historic properties, triggering the obligation to consult with the THPO.

At this early stage, the federal agency is required to assume that historic properties are present. 36 C.F.R. § 800.3(a)(1). ñThe language in § 800.3(a) was amended to state that the determination as to whether the undertaking is a ótypeô of activity that has the potential to cause effects on historic properties, *assuming such properties would be present*.ò 65 FR 77698, 77703 (Dec. 12, 2000) (emphasis added). ñAn agency must look at the nature of the undertaking when judging whether it has potential to affect historic properties, and not at whether the specific undertaking has effects on specific historic properties. The presence of historic properties must be assumed at this stage.ò[9]

Here, the Corps failed to assume ñsuch historic properties were presentò when considering whether Drakeôs road extension has ñthe potential to cause effects on historic properties.ò 36 C.F.R. § 800.3(a)(1). Clearly, the Corps knew ï both in fact and law ï that Drakeôs proposed road would involve substantial fill taken from the north shoreline area on Enemy Swim Lake and was required to assume that historic properties were present in this area. The Corps complete failure to do so is arbitrary and capricious because the Corps entirely failed to consider an important aspect of the problem, and acted in a manner contrary to the governing regulations.

[9] Section 106 Regulations, Section-by-Section Questions and Answers, Advisory Council on Historic Preservation, http://www.achp.gov/106q&a.html

2. The Corps' determination to not consult with the SWO THPO was arbitrary and capricious because the Corps offered an explanation that runs counter to the evidence before the agency.

The Corpsô determination not to consult with the SWO THPO violates the Corpsô own interpretation of even its deficient NHPA regulations. On March 9, 2009, Mr. Ames, the Corpsô Tribal Liaison officer, explained to Mr. Naylor and Mr. Oehlerking that if the Corps were made aware of concerns from the Tribe, then the Corps should consult. RA 3597. As the record provides, the Corps was previously made aware of concerns from the SWO THPO, Ms. Desrosiers, on January 8, 2009. RA 3291. Accordingly, the Corpsô decision to not consult with the SWO THPO was arbitrary and capricious because the Corps offered an explanation for its decision that runs counter to the evidence before the agency, and acted in a manner contrary to its interpretation of its own NHPA regulations.

3. The Corps' determination not to consult with the SWO THPO to identify historic properties is arbitrary and capricious because the Corps entirely failed to consider an important part of the problem.

Because the Corps was required to assume that historic properties were present,[10] and because Drakeôs proposed activity had the potential to cause effects on historic properties, the Corps was legally required to consult with the SWO THPO to gather the Tribeôs input and to identify historic properties.

The NHPA ñrequires each federal agency to take responsibility for the impact that its activities may have upon historic resources, and establishes the Advisory Council on Historic Preservation (ACHP) to administer the Act.ò City of Grapevine, Tex. v. Department of Transp.,

[10] ñIt is simply impossible for an agency to take into account the effects of its undertaking on historic properties if it does not even know what those historic properties are in the first place.ò 65 FR 77698, 77715 (Dec. 12, 2000).

17 F.3d 1502, 1508 (D.C. Cir. 1994). The ACHPôs regulations require the Corps to consult with the SWO THPO when determining and documenting the area of potential effects. 36 C.F.R. § 800.4(a)(1). The Corps is required to gather ñinformation from any Indian tribe . . . identified pursuant to § 800.3(f),ò 36 C.F.R. § 800.4(a)(4), which requires the Corps to ñmake a reasonable and good faith effort to identify any Indian tribe . . . that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties,ò 36 C.F.R. § 800.3(f)(2). Here, the Corps appears to contemplate the area of potential effects, RA 3036, but never consulted the THPO as required by 36 C.F.R. §§ 800.4(a)(1); 800.4(a)(4); and 800.3(f)(2).

The Corps does not even comply with its own deficient regulations. The 2007 Interim Guidance to Appendix C instructs that districts must "afford the State or Tribal Historic Preservation Officer (SHPO/THPO) an opportunity to comment on no effect determinations."[11] If ña district determines that a proposed activity, that otherwise qualifies for a NWP or RGP, has no effect or no adverse effect on an historic property, the district must adequately document that determination and coordinate this determination with the SHPO/THPO.ò Id. The Corpsô failure to consult the SWO THPO and provide the Tribe an opportunity to comment on the Corps area of potential effects and no effect determination is arbitrary and capricious, and contrary to the Corpsô own regulations.

[11] http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/inter_guide2007.pdf

Accordingly, the Corpsô decision to not consult with the SWO THPO was arbitrary and capricious because of the Corpsô failure to obtain and consider the THPOôs input, which would have provided valuable information on an important aspect of the problem.[12]

4. The Corps' determination that Drake may oversee his own compliance with the NHPA is arbitrary and capricious because the Corps relied on factors which Congress has not intended it to consider and is so implausible that it cannot be considered agency expertise.

The Corpsô May 4, 2009, NWP 14 determination allowed Mr. Drake to oversee his own compliance with the NHPA. The Corpsô notice explained that Drake must adhere to the attached General Conditions ñfor this authorization to remain valid.ò RA 3703. The General Conditions address ñHistoric Propertiesò and provide that Drake may seek assistance from the THPO in order to determine the ñpotential for the presence of historic resources:ò

> **Historic Properties**. . . .
>
> (c) Non-federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 33.04(g)). The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include

[12] Ms. Desrosiers filed an affidavit with this Court, attachment 42, ¶ 12, ECF No. 18, which, in relevant part, informed the Court that, as of February 8, 2012, the Corps ñhas never contacted me or my office with regard to the NHPA. There are numerous burial sites and stone features located within close proximity of the area of potential effect (APE). It has not yet been determined how many sites may have been impacted/destroyed by this single individual. The road Mr. Drake built is impacting a traditional gathering site which our people have utilized for hundreds of years.ò The Corps failed to consult with the THPO and failed to consider even this summary of important information.

> background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activities has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.
>
> (d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR §800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed.

RA 3703-3716 (emphasis added).[13] The language is clear that Drake ñcanò seek assistance from the THPO, but is not required to do so. The NHPA requires the Corps to consult with the THPO, not the applicant.

When re-issuing its NWPs in 2007, the Corps explained that ñ[i]n cases where the permittee has determined there are no historic properties for which the activity has the potential to cause effects, and has thus not notified the Corps of such properties (but only in such cases) the permittee does not have to wait for further confirmation of NHPA compliance from the Corps.ò Department of the Army, Corps of Engineers, Reissuance of Nationwide Permits; Notice, 77 FR 11092, 11161 (Mar. 12, 2007). The Corpsô pleadings have also conceded that the

[13] Not all of this document was included in the Administrative Record. The original document utilized the front and back of the paper. The version in the Administrative Record only contains the front pages. Thus, portions pertaining to the NHPA were omitted. Accordingly, the Tribe cites to this same document, which was filed earlier, in its entirety. See ECF Doc. 21-41.

Corps looked to Drake, rather than the Corps, to carry the burden of complying with the NHPA. See Corps Memorandum in Support of Partial Dismissal, p. 5, ECF No. 27 (ñA person proceeding under an NWP must notify the Corps if an authorized activity may adversely affect historic properties listed on or eligible for listing on the National Register of Historic Places.ò); Id. at p. 8 (ñprospective permittees must notify the Corps prior to undertaking any activity that may affect historic resources listed or eligible for listing on the National Register of Historic Places.ò).

The Corpsô determination to allow Drake to carry out compliance with the NHPA is arbitrary and capricious because compliance with the NHPA is a federal agency responsibility, which cannot be delegated to a permit holder, such as Drake, and Congress did not intend for the agency to delegate compliance to the permit applicant, and this determination is not a plausible exercise of agency expertise.

II. Both the Corps' 2006 and 2009 decisions violated the Clean Water Act and the Corps' regulations.

The Tribe is limited to challenging the 2006 and 2009 decisions made by the Corps ñwithin the statute of limitations verifying that Drake need not apply for individual discharge permits.ò Sisseton-Wahpeton Oyate, 2015 WL 4931152, at *4.

A. The Corps' determination in 2006 and 2009 to not subject Drake's Applications for a Permit to notice and public comment was arbitrary and capricious and unlawful.

The Administrative Record demonstrates that in both 2006 and 2009 Drake filled out an ñApplication for Department of the Army Permit (33 CFR 325).ò RA 1456 & 2987. That fact has legal consequences for the Corps and for Drake. While the CWA speaks to issuing permits ñafter notice and opportunity for public hearing,ò 33 U.S.C. §§ 1344(a)&(e)(1), the Corps maintains regulations specifically addressing the processing of applications, 33 C.F.R. Part 325.

It is not clear if the decision to fill out a permit application was Drakeôs or the Corpsô; however, once the Corps had received a completed Application for a Permit from Drake, the Corps was legally required to issue a public notice and to seek public comments. 33 C.F.R. § 325.2(a)(2), see, National Wildlife Federation v. Whistler, 27 F.3d 1341, 1343 (8th Cir. 1994) (ñAs required by 33 C.F.R. § 325.2ï .3, the Corps gave public notice of the application and solicited comments.ò); Hurst v. U.S., 739 F.Supp. 1377, 1380 (D.S.D. 1990) (ñ[U]nder 33 C.F.R. § 325.3(c), all adjoining property owners are to be given public notice of a permit application.ò). The Corps did not issue notice or seek public comment, which is undisputed.

Projects receiving a conditional exemption to the permit requirement, such as Drakeôs, 33 C.F.R. § 323.4(a), are still processed by application, as was the case with all of Drakeôs projects. See 33 C.F.R. § 323.1 (ñThis regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for DA permits.ò), see also 33 C.F.R. § 323.6 (ñThe district engineer will review applications for permits for the discharge of dredged or fill material into waters of the United States in accordance with guidelines promulgated by the Administrator, EPA, under authority of section 404(b)(1) of the CWA (see 40 C.F.R. Part 230).ò The Corps maintains a public interest review that is ñapplicable to the review of all applications for DA permits.ò 33 C.F.R. 320.4. Again, Drake has always completed and filed an application for a Department of the Army permit for his many road and bridge building activities.

The public notice contemplated by 33 C.F.R. § 325.2(a)(2) and 33 C.F.R. § 320.4 is different than a public hearing. Upon receipt of an application, the Corps must ñevaluate the application to determine the need for a public hearing pursuant to 33 C.F.R. Part 327.ò 33 C.F.R.

§ 325.2(a)(5). The notice to the public should include a ñstatement that any person may request, in writing . . . that a public hearing be held to consider the application.ò 33 C.F.R. § 325.3(a)(15), see also 33 C.F.R. § 327.4(b) (ñ[A]ny person may request, in writing, within the comment period specified in the public notice on a DA permit application . . . that a public hearing be held to consider the material matters at issue in the permit application.ò). Under the Corpsô regulations a public hearing is discretionary, but issuing public notice and soliciting comment is not.

ñThe district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application.ò 33 C.F.R. § 325.2(a)(3). The publicôs comments become ña part of the administrative record of the application,ò they are then shared with the applicant, and, ñwhere appropriate,ò the applicant and objectors may meet ñto mediate differences, or to gather information to aid in the decision process.ò Id.

Here, the Corps repeatedly received Applications for a Department of the Army Permit from Drake, but failed to ever issue public notice required by its own regulations, thus also failing to solicit public comments and consider those comments in its decision making, all of which is arbitrary and capricious and contrary to law.

B. The Corps' 2006 decision that Drake's proposed bridge and road were a farm road was arbitrary and capricious.

As discussed above, Drakeôs 2006 Application for a Department of the Army Permit was not subject to notice and public comment. The Corps also failed to consult and coordinate with the Tribe about the proposed bridge as required by Executive order 13175 and the Corpsô own Tribal Consultation Policy.[14] Executive Order 13175 requires the Corps to consult with the

[14] http://www.usace.army.mil/Portals/2/docs/civilworks/tribal/CoP/2013_nap_brochure.pdf

SWO ñwhen formulating and implementing policies that have tribal implicationsò to respect tribal self-government, and honor treaty and other rights. Exec. Order No. 13175. The Corpsô failure to notify the public and consult the Tribe, standing alone, makes the Corpsô 2006 farm road determination arbitrary and capricious and unlawful.

There were multiple other indications that demonstrate that the Corpsô treatment of Drakeôs proposed bridge and road as a farm road was arbitrary and capricious.

The Corps had received a number of complaints about Drakeôs non-agricultural development activities prior to issuing its May 1, 2006 decision, although not nearly as many complaints as were received in 2009 and thereafter. For example:

- Day County Conservation Officer, Robert Losco, informed the Corps in 2004, that he ñbelievedò Drakeôs intent was to develop the north side of the inlet. RA 0023.
- Alvah Quinn informed the Corps in 2004 that he ñthinksò Drakeôs intent is develop the north side of the inlet. RA 0053 & 2373.
- On November 22, 2004, Mr. Block believed Drakeôs application contained lies and was filed under false pretenses. RA 0166.
- Drake himself informed the U.S. Department of Agriculture, Natural Resources Conservation Service (ñNRCSò), that his wetland was ñunusable pasture.ò RA 0161.
- Mr. Don Daly informed the Corps on December 1, 2004, that ñDrake is lieing to us about intent and need.ò RA 0207.
- Senator Tim Johnson wrote a letter to the Corps on December 3, 2004, seeking assistance. Although Senator Johnson was under the impression that Drake is ñbuilding a bridge across one of the lakeôs inlets that Mr. Daly says will prevent some boat travel,ò he still asks the Corps what are the options ñto curtail the unacceptable development of this property?ò RA 0215.
- Attorney Drew Johnson informed the Corps on January 29, 2005, that ñthe intent is to develop that property and the road is the access to that development.ò RA 0575.
- The Corps informed Senator Johnson on April 16, 2005, that the Corps was under the impression that the NRCS ñverified that the land was going to be used for agricultural purposes,ò RA 0939, but then received a copy of a June 2, 2005, letter from the NRCS that it had no files relating to a grazing plan for Drake, RA 1093.

Given these unsolicited concerns, the Corps should have taken a harder look at whether Drakeôs 2006 bridge and road were actually a farm road.

Additionally, the size of Drakeôs proposed bridge was an easy red flag signaling to the Corps that the proposed bridge and road were not merely for farming purposes. Drake proposed to build a bridge that was 21 feet wide, RA 1549, 20 feet in length, RA 1459, built with 15 inch steel I-beams, RA 1549, and capped off with steel decking, RA 1548. Yet Drake also represented that the creek is only 6 inches deep and 10 feet wide. RA 1547. Recall that the Corps had been previously informed by Drake that his cattle (heôs never had any) had to ñswim the creek inlet at the mouth of the lake,ò RA 0004, but now informs the Corps that his crossing is in 6 inches of water. Despite the mere 6 inches of water, Drake proposed to construct a mammoth bridge tantamount to a bridge on a state road.

Drake previously represented to the Corps that he would fence off the entire wetland, which would force cattle to use his proposed road across the inlet. RA 0004-0005. Drake, of course, has never built this fence (he has never needed a fence), nor had he taken any steps to build the fence in 2005 or 2006. Thus, the Corps could not reasonably be under the impression that cattle would voluntarily utilize the bridge instead of crossing six inches of water.

Perhaps most important, the Corpsô 2006 farm road decision was required to narrowly construe the exceptions to a permit contained at 33 U.S.C. § 1344(f), but the Corps failed to do so. Greenfield Mills, Inc. v. Macklin, 361 F.3d 934, 949 (7th Cir. 2004); June v. Town of Westfield, N.Y., 370 F.3d 255, 258 (2nd Cir. 2004); United States v. Brace, 41 F.3d 117, 124 (3rd Cir. 1994); United States v. Akers, 785 F.2d 814, 819 (9th Cir. 1986); United States v. Huebner, 752 F.2d 1235, 1240-41 (7th Cir. 1985); Avoyelles Sportsmenôs League, Inc. v. Marsh, 715 F.2d 897, 925 n. 44 (5th Cir. 1983). See Remarks of primary sponser, Senator Muskie, Akers, 785 F.2d at 819 (ñthe exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.ò).

For all of these reasons, the Corps 2006 determination that Drakeôs proposed bridge and road were a farm road was arbitrary and capricious.[15]

C. The Corps' 2009 decision to issue Drake a NWP 14 was arbitrary and capricious because the Corps knew Drake was "piecemealing" a single project and because the Corps failed to consult with the Tribe.

In 2007 the Corps reissued its NWPs and adopted a new General Condition pertaining to single and complete projects:

> The requirement that NWPs authorize single and complete projects applies to all NWPôs. Limiting the NWPôs to authorize only single and complete projects is a long-standing practice, and we are adding a new general condition (GC 28) to clarify that the NWPôs only authorize single and complete projects.

72 FR 11092, 11100 (Mar. 12, 2007). This new General Condition was applicable to the NWP issued to Drake by the Corps in 2009. ñThe new general condition will help improve environmental protection by clarifying that piecemealing of activities that require Department of Army permits is prohibited.ò 72 FR at 11171.

As early as January 26, 2005, Drake was quoted in the newspaper that ñI just want to connect four pieces of property I own.ò RA 0556. Drake also informed the Corps on at least 5 occasions that he was building a single road. RA 1457, 1545, 2958, 2987-88, 3034, and 3601.

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[15] The Court dismissed the Tribeôs BMP and recapture claims. 2015 WL 4931152 at * 5. The Corps must ensure that Drakeôs construction and maintenance of a farm road under 33 U.S.C. § 1344(f) complies with the BMPôs in order to be exempt from the permit requirement. 33 C.F.R. § 323.4(a)(6). The Eighth Circuit Court of Appeals has reviewed timely BMP claims. Newton Country Wildlife Assôn v. Rogers, 141 F.3d 803, 810 (8th Cir. 1998). Here, the Administrative Record does not reveal that the Corps considered the BMPs or recapture in connection with its 2006 farm road decision. Further, the Record demonstrates that the bridge and road were definitely not ñheld to the minimum feasible number, width, and total length,ò 33 C.F.R. § 323.4(a)(6)(i); accordingly, Drakeôs bridge and road should have been subject to a permit. Drakeôs activities were recaptured, 33 C.F.R. § 323(c), because Drakeôs bridge, for his personal residence, brought an area of the navigable waters into a use to which it was not previously subject. Further, the Corps has no discretion not to subject a development road to the permitting process, despite receiving a farm road determination at an earlier date.

The Corps cannot create a new exception of a mixed use of agricultural use and serving a new residence. Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980) (ñWhere Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied.ò). Further, the notion that Drake was merely building a new lakeshore home as his residence was highly unlikely because the Corps had previously issued a NWP 26 to access his new lakeshore home on the south side of the inlet. RA 0478-0491. The 2000 road was to be built ñfrom established road to house site being built,ò RA 0483, this ñfill provides the only access to the house site,ò RA 0484.

An additional General Condition of all NWPs, GC 16, is that ñ[n]o activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.ò 72 FR at 11192. When reissuing its NWPs in 2007, the Corps received a question, ñhow the Corps will determine whether tribal rights are impacted, and if a tribal right is impaired.ò 72 FR at 11158. The Corps responded that ñ[w]e cannot define a specific threshold to be used to determine compliance with this general condition. District engineers make these determinations on a case-by-case basis, through appropriate consultations with Indian tribes.ò Id. Here, the Corps did not consult the Tribe even though Mr. Quinn informed the Corps that ñhe + tribe concerned ï they spear northern in are of x-ing, they denied/object to bridge x-ing,ò RA 0053, and the SWO THPO specifically asked for consultation.

Further, on September 22, 2008, the Corps acknowledged to Drake that the Tribe may have potential jurisdiction of CWA Section 401 water certification. RA 2958. On November 5, 2008, Corps personnel discussed among themselves the Tribeôs potential jurisdiction, but only decided to contact the ñState + EPA.ò RA 3036. The Tribeôs potential jurisdiction was also

explained to Drake, but the Corps informed Drake that ñwe are to verify that EPA cert. on behalf of the tribe applies.ò RA 3037. The Corps then wrote a letter to the EPA on November 25, 2008, asking whether the NWP to Drake required ñapplication of Section 401 WQC [water quality certification] from the State of South Dakota or from the US EPA?ò RA 3059. The question was posed to the EPA because the project is on ñdeeded land privately ownedò but ñlocated within the exterior boundaries of the Sisseton Indian Reservation.ò RA 3059. The EPA responded that it had jurisdiction, while South Dakota responded to the Corps that it had jurisdiction. Thus, the Corps sought additional clarification from the EPA. RA 3133. The EPA replied, ñ[d]oes the tribe care one way or the other? What about the applicant? The state always does a good job with 401 certs, so I wouldnôt mind deferring to the state.ò RA 3136. Despite General Condition 16, the Corps never consulted the Tribe before issuing the 2009 NWP to Drake.

The Corps also failed to comply with General Condition 20, Mitigation, because compensatory mitigation is required ñfor all wetland losses that exceed 1/10 acre and require pre-construction notification.ò ECF Doc. 21-41. Drake describes one crossing as 70 feet wide and filling in ña very deep gully,ò and the second crossing is 40 feet wide in ña deep draw.ò RA 2989. Yet the Corps preliminary jurisdictional determination form estimates that the amount of .09 acres, RA 3138, just below the General Condition threshold. But Drake called the Corps and advised that he needed to modify the crossing to make them ten feet wider. RA 3192. Drake the followed up in writing and informed the Corps that the 70 foot long culvert under the road needed to be increased to 80 feet in order to ñallow for more gradual slopes on the road . . . and also minimize potential erosion.ò RA 3601. Drake further indicated that he needed to increase the second crossing by 20 feet: ñincrease the 40ô long culvert with a 60ô x 2ô culvert [for] the

very same reasons as in location 1.ò RA 3602. Despite this additional information from Drake, the Corps final jurisdiction determination remained at a total of .09 acres as before. RA 3706. Drakeôs final road was much wider than Drakeôs modification. There is no doubt that the Corps violated its own General Condition 20.

The Corps knew Drakeôs entire road was not being used for agriculture purposes. In additional to the concerns the Corps knew about prior to issuing its farm road determination in 2006, see pp. 29-30 above, additional information was provided to the Corps, prior to issuing its 2009 NWP. Drake informed the Corps on September 22, 2008, that a biologist from ñS.D.S.U. says is lot of growth in lake.ò RA 2958. Drake ñwants to making x-ing to west, for future house of own.ò Id. Later, Mr. Naylor informed the Watertown Public Opinion that the Corps was first ñinformed by Drake that he is doing site grading for home access (by telephone on 9-22-08).ò RA 3557. The Corps still refused to take a hard look at Drakeôs project and tried to avoid regulation altogether. For example, for a 2007 site visit, Mr. LaGrone replies to development concerns with a head-in-the-sand attitude by saying that he is ñonly interested in looking at what SD wants me to look at.ò RA 2867. Pictures of Drakeôs land clearing were provided to the Corps on October 5, 2008, by Doug Block, which showed massive excavation inconsistent with farming (in fact, the excavation made farming impossible). RA 2965-2969. Mr. LaGrone called Mr. Oehlerking to see if he should stop by, but they agreed that the complaint ñdid not appear to be new 404 related issuesò and that they had ñdealt w/ all last time we were there. He concurs, will not stop.ò RA 2985.

For all of these reasons, the Corps 2009 determination that Drakeôs road and crossings were only subject to NWP 14 was arbitrary and capricious.

CONCLUSION

For all of the foregoing reasons, Plaintiffs request that the Court enter judgment vacating the Corpsô determinations in 2006 to exempt Drakeôs bridge and road as agricultural uses, and its 2009 NWP 14 permit determination, and declaring that the Corps failed to comply with the National Historic Preservation Act, the Clean Water Act, and these statuteôs implementing regulations in connection with these decisions. Plaintiffs also request injunctive relief directing the Corps to issue and enforce a cease and desist order to Drake to cease any use of the road and bridge constructed without lawful compliance with the Clean Water Act and the National Historic Preservation Act.

Respectfully submitted,

/s/ Debra Flute

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