No. 16-4283

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE REGION; and DAVE FLUTE, Chairman,

Plaintiffs-Appellants

v.

U.S. ARMY CORPS OF ENGINEERS; COLONEL JOHN W. HENDERSON, in his official capacity as District Commander; and STEPHEN E. NAYLOR, in his official capacity as Regulatory Program Manager,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA (HON. ROBERTO ANTONIO LANGE)

ANSWERING BRIEF FOR THE FEDERAL APPELLEES

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APA	Administrative Procedure Act
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CWA	Clean Water Act
FTCA	Federal Tort Claims Act
NHPA	National Historic Preservation Act

SUMMARY OF THE CASE

This case concerns three decisions by the U.S. Army Corps of Engineers on projects proposed by a private land owner, Merlyn Drake, adjacent to Enemy Swim Lake in South Dakota. In 2003 and 2006, the Corps decided that a road and bridge were statutorily exempt from the Clean Water Act ("CWA") permit requirement because they served Mr. Drake's existing agricultural operations. Subsequently, in 2009, the Corps verified that CWA Nationwide Permit 14 covers two gully crossings that Mr. Drake proposed to install so that he could build a home on the north shore of the Lake. The Tribe filed suit in November 2011.

The district court held that the six-year statute of limitations had expired on the Tribe's claims concerning the 2003 farm-road exemption decision and the Tribe was not entitled to equitable tolling. The court then ruled in favor of the Corps on the Tribe's claims concerning the 2006 farm-road exemption decision and remanded the 2009 nationwide-permit verification to the Corps. The court also held that a 2010 letter to the Tribe did not constitute final agency action under the Administrative Procedure Act ("APA") because the letter merely explained why the Corps believed that its previous decisions were correct.

This Court should affirm the district court's judgment. The Corps respectfully requests oral argument, but defers to the Court concerning the appropriate amount of time to allocate for argument in this case.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and entered final judgment on September 29, 2016. Appellants timely noticed their appeal on November 21, 2016. *See* Fed. R. App. P. 4(a)(1)(B). With one exception discussed *infra* Part III.B., this Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the Corps' 2010 letter to the Tribe constitute final agency action subject to review under the APA? *See Bennett v. Spear*, 520 U.S. 154, 178 (1997); *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006); *AT&T Co. v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001).

2. Did the district court clearly err in finding, as a matter of fact, that the Tribe (1) knew or should have known of its claims concerning the 2003 farm-road exemption decision by January 2005; and (2) did not diligently pursue those claims because it waited to file suit until November 2011, well after the six-year statute of limitations had expired? *See* 28 U.S.C. § 2401(a); *Izaak Walton League of Am. v. Kimbell*, 558 F.3d 751, 758 (8th Cir. 2009); *Smithrud v. City of St. Paul*, 746 F.3d 391, 396 (8th Cir. 2014); *Jenkins v. Mabus*, 646 F.3d 1023, 1027–29 (8th Cir. 2011).

3. Did the district court correctly hold that the 2006 farm-road exemption decision was not an "undertaking" under the National Historic Preservation Act? *See* 33 U.S.C. § 1344(f)(1)(E); 36 C.F.R. § 800.16(y).

4. Does this Court have appellate jurisdiction to review the remanded 2009 nationwide-permit verification and, if so, do the gully crossings constitute a "single and complete project" for purposes of Nationwide Permit 14? *See Izaak Walton League*, 558 F.3d at 762; 72 Fed. Reg. 11,092, 11,109, 11,197 (Mar. 12, 2007).

LEGAL BACKGROUND

A. Clean Water Act

The CWA prohibits the discharge of any pollutant into the navigable waters of the United States without a permit. 33 U.S.C. § 1311(a). The definition of "pollutant" includes "dredged spoil … rock, sand, cellar dirt" and other waste discharged into water. *Id.* § 1362(6). The statute exempts from the permit requirement six activities related to dredged or fill material. *Id.* § 1344(f)(1). One such statutory exemption covers discharges "for the purpose of construction or maintenance of farm roads … where such roads are constructed and maintained[] in accordance with best management practices." *Id.* § 1344(f)(1)(E). Another statutory provision, commonly called the "recapture" provision, functions as an exception to the exemptions. Under the recapture provision, an otherwise exempt discharge requires a permit if (1) the discharge is "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject"; and (2) "the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." *Id.* § 1344(f)(2).

The Corps has authority to issue individual and general permits for the discharge of dredged or fill material. *Id.* § 1344(a), (e).[1] Individual permits require site-specific documentation and public notice. *See* 33 C.F.R. Pts. 323, 325. General permits cover categories of activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1). A "nationwide permit" is a type of general permit that the Corps uses to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b). The Corps follows public notice-and-comment procedures and analyzes potential environmental effects before issuing nationwide permits. *See id.* § 330.5.

Once the Corps has issued a nationwide permit, a party whose discharge meets the terms of that permit may "operate under the nationwide permit without informing the Corps in advance unless the nationwide permit in question required advance approval[.]" *New Hanover Twp. v. U.S. Army Corps of Eng'rs*, 992 F.2d 470, 471 (3d Cir. 1993). *See* 33 C.F.R. §§ 320.1(c), 325.5(c)(2), 330.1(c) & (e), 330.2(c), 330.4(a). Activities conducted under nationwide permits also must meet specified general conditions. *Id.* §§ 330.2(h), 330.4. For example, a nationwide permit may authorize only a "single and complete project," *see* 72 Fed. Reg. 11,092, 11,196 (Mar. 12, 2007),

[1] The Environmental Protection Agency has authority to issue permits for the discharge of other pollutants. 33 U.S.C. § 1342.

and no activity that may affect historic properties may begin until the requirements of the National Historic Preservation Act ("NHPA") have been satisfied, *id.* at 11,192.

At issue here is Nationwide Permit 14, which authorizes linear transportation projects, such as road crossings. To qualify for Nationwide Permit 14, a road crossing must be in non-tidal waters and may not cause the loss of greater than one-half acre of waters of the United States. 72 Fed. Reg. at 11,183-84.[2]

B. National Historic Preservation Act

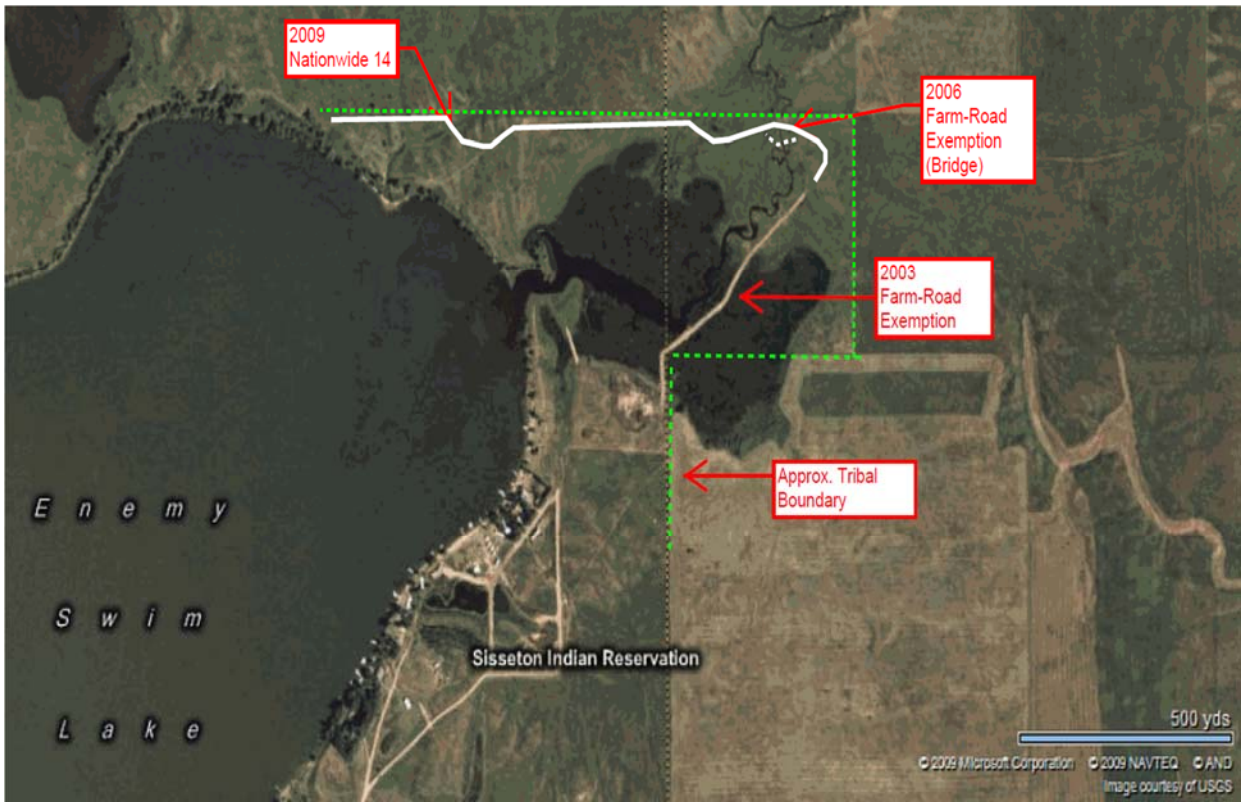
A federal agency may not approve the expenditure of funds or issue a license for an "undertaking" until it considers the "effect of the undertaking on any historic property." 54 U.S.C. § 306108. The term "undertaking" includes any activity that requires "a Federal permit, license, or approval." *Id.* § 300320(3). Under the Advisory Council on Historic Preservation's regulations, an agency first must determine whether an undertaking is the "type of activity that has the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). If so, the agency must contact the State or Tribal Historic Preservation Officer, *id.* § 800.3(c), identify any historic properties within the area of potential effects, assess any adverse effects to those properties, and develop or evaluate alternatives that could avoid, minimize, or mitigate the adverse effects. *Id.* § 800.4 to 800.6; *see also* 33 C.F.R. Pt. 325, App. C (Corps regulations).

[2] Nationwide permits are effective for five years. 33 U.S.C. § 1344(e)(2). The Corps reissued Nationwide Permit 14 in 2012, 77 Fed. Reg. 10,184, 10,273 (Feb. 21, 2012), and the permit was effective at all times relevant to this case.

STATEMENT OF THE CASE

A. The Corps determined that each of Mr. Drake's activities was exempt from or complied with the CWA and NHPA.

Over the span of a decade, Mr. Drake filed six CWA permit applications to conduct dredge and fill activities adjacent to Enemy Swim Lake. In its opening brief on appeal, the Tribe admits that three of those permit applications are not at issue. (Opening Br. 4-5.) The map below[3] shows the approximate project locations and Corps decision dates for the three permit applications that are at issue: (1) a 2003 farm-road exemption decision; (2) a 2006 farm-road exemption decision; and (3) a 2009 nationwide-permit verification for two gully crossings.



[3] This is a simplified version of a map filed in the district court. (*See* Add. 51.)

First, in 2003, Mr. Drake requested permission to build a culverted farm road across a wetland so that cattle could access his pasture land northeast of Enemy Swim Lake. (App. 17-21.) In response, the Corps sent a letter stating that the farm road was exempt from the permit requirement and therefore did not require Corps approval. (App. 23-24.)

Second, about two years later, Mr. Drake requested permission to build a bridge over Enemy Swim Creek so that cattle could access his pasture land west of the Creek. (App. 30-34.) Corps personnel had observed cattle grazing in Mr. Drake's pasture land, the Corps had photographs of cattle grazing on the land, and Mr. Drake's neighbor reported that cattle had been grazing on the land for many years. (Aplee. SA 94, 96, 103, 107, 115.) In 2006, the Corps responded with a letter stating that the bridge was eligible for the farm-road exemption and therefore did not require Corps approval. (App. 43-45.)

Third, another two years later, Mr. Drake requested permission to construct a culverted road across two gullies west of the bridge, near property that Mr. Drake owns on the north shore of the Lake. (App. 48-51.) Because Mr. Drake intended to build a residence on his north shore property, the purpose of the gully crossings was not agriculture and the crossings did not qualify for the farm-road exemption. (App.

56, 148, 156.)[4] Instead, in 2009, the Corps determined that the gully crossings met the terms of Nationwide Permit 14. (App. 81-82.) The Corps also determined that the gully crossings had no potential to affect historic properties within or outside of the permit area. (App. 56, 69, 80; Aplee. SA 124-25.)[5]

B. The Corps confirmed its legal position in a letter to the Tribe.

In 2010, the Tribe sent the Corps a letter alleging that Mr. Drake had been conducting development activities. The letter also asserted that the Corps had violated the CWA and the NHPA. (*See* Opening Br. 10-11.) The Corps responded by thanking the Tribe for the "further opportunity to explain the decisions we have made and the actions we have taken over the course of our twelve-year involvement in this matter." (Add. 1.) The Corps stated its continuing "view" that Mr. Drake's farm road and bridge "supported ongoing, established agricultural activities." (Add. 2.) The Corps explained that it had previously found that the farm road and bridge comply with best management practices and it did not believe the CWA's recapture provision applied. (Add. 3.) The Corps further explained that it already had determined that the gully crossings were covered by Nationwide Permit 14, were "single and complete

[4] In other words, the Corps decided that the 2009 gully crossings did not involve an exempt agricultural activity. The Corps did *not* decide that the 2009 gully crossings were for an exempt agricultural activity but nevertheless required a permit under the recapture provision.

[5] The Corps understands that Mr. Drake has completed construction of each of the three projects.

projects" separate from the farm road and bridge, and did not have the potential to affect historic properties. (Add. 4-5.) The letter closed by reaffirming the Corps' commitment to continue to monitor Mr. Drake's activities and to stay engaged with the Tribe. (Add. 6.)

C. The district court held, with one exception, that the Tribe's claims were untimely or lacked merit.

In November 2011, the Tribe filed a complaint asserting ten claims for relief under the APA. (Aplee. SA 1.) The Tribe later filed an amended complaint asserting essentially the same claims. (Add. 95.) The district court issued four separate orders disposing of the Tribe's claims. First, the court issued two orders granting the Corps' motion to dismiss many of the claims in the complaint. (Add. 8, 18.) Second, the court denied the Tribe's motion to reconsider whether the statute of limitations had expired. (Add. 26.) Third, and finally, the court ruled in the Corps' favor on the merits of all but one of the remaining CWA and NHPA claims. (Add. 37.)

1. The court dismissed all claims concerning the 2003 farm-road exemption decision, the 2010 letter, the recapture provision, and best management practices.

The Corps moved to dismiss most of the Tribe's claims because (1) the six-year statute of limitations on APA claims had expired; (2) the Corps' 2010 letter to the Tribe did not constitute final agency action under the APA; and (3) many of the Tribe's claims were not justiciable under the APA because they attacked the Corps' exercise of its enforcement discretion. (Aplee. SA 48.)

The district court agreed with all three arguments. First, the Court held that, at a January 2005 community meeting concerning Mr. Drake's activities, the Tribe had "received information about the Corps' permits and exemptions sufficient to start the running of the statute of limitations." (Add. 13.) However, the court could not yet determine "exactly which permits and exemptions were discussed" at the January 2005 meeting. (Add. 13.) The court subsequently held two evidentiary hearings. (Add. 16-17.) After hearing witness testimony and reviewing evidence presented at the hearings, the court found that the "Tribe did receive information where it either knew or in the exercise of reasonable diligence should have known about" the 2003 farm-road exemption decision. (Add. 23.)[6] Because the Tribe filed its complaint more than six years later, *see* 28 U.S.C. § 2401(a), the court granted the Corps' motion to dismiss all claims concerning the 2003 farm-road exemption decision. (Add. 24.)

Second, the court agreed that the Corps' 2010 letter did not constitute "final agency action" subject to review under the APA, 5 U.S.C. § 704. Rather, each permit or exemption "constituted final agency action at the time of issuance," and the 2010 letter had merely "made clear that the prior Corps determinations were firm." (Add. 14.) The district court therefore granted the Corps' motion to dismiss "all claims the

[6] Again, the Tribe now admits (Opening Br. 4-5) that the three other pre-2005 decisions mentioned in the court's order are not at issue in this case (Add. 23).

viability of which hinges on considering the August 30, 2010 letter to be a final agency action." (Add. 16.)

Third, the court agreed that some of the Tribe's claims essentially demanded that the Corps revoke Mr. Drake's permits or exemptions based on his alleged subsequent conduct. (Add. 15-16.) Those claims included (1) the Tribe's claim that an alleged change in use caused the farm road and bridge to be "recaptured" under the CWA; and (2) the Tribe's claim that the Corps had failed to enforce its best management practices. (*See* Add. 28-29, 47.) The court held that those claims were not justiciable under the APA because they implicated the Corps' enforcement discretion. (Add. 16.) The court therefore dismissed any claims seeking to force the Corps to "modify, suspend, or revoke" the previously verified exemptions or permit. (Add. 16.)

2. The district court denied the Tribe's motion to reconsider whether the statute of limitations had expired.

The Tribe subsequently asked the court to reconsider whether the statute of limitations had expired on its claims attacking the 2003 farm-road exemption decision. Citing *United States v. Wong*, 135 S. Ct. 1625 (2015), the Tribe argued that the six-year statute of limitations in 28 U.S.C. § 2401(a) is not jurisdictional and therefore is subject to equitable tolling. (Add. 32.) The district court declined to reconsider its previous ruling because "two Eighth Circuit cases support … [the] conclusion that § 2401(a) is jurisdictional," and *Wong* analyzed a different limitations period found in

§ 2401(b). (Add. 33-34.) The court further held that, even if equitable tolling were available, the Tribe would not be entitled to relief because it had not "met its burden of showing that it pursued its claims diligently." (Add. 34-35.) The court therefore denied the motion to reconsider. (Add. 36.)

3. The court ruled in favor of the Corps on the remaining claims concerning the 2006 farm-road exemption decision and remanded the 2009 nationwide-permit verification.

The Court subsequently entered judgment in favor of the Corps on the merits of all but one of the remaining CWA and NHPA claims. With respect to the 2006 farm-road exemption decision, the court held that no federal "undertaking" occurred under the NHPA when the Corps confirmed that Mr. Drake's bridge project qualified for the farm-road exemption. (Add. 42-43.) The court also held that the record supported the Corps' determination that Mr. Drake intended to use the bridge for agricultural purposes. (Add. 47.)

With respect to the 2009 nationwide-permit verification, the court held that the Corps reasonably concluded that the gully crossings were a "single and complete project" for purposes of Nationwide Permit 14. (Add. 48.) The court agreed with the Tribe, however, that the Corps had committed a procedural error in its NHPA analysis. (Add. 43-44.) The court therefore remanded to the Corps for further

analysis of the 2009 gully crossings under the NHPA and denied all other relief. (Add. 49.)[7]

SUMMARY OF ARGUMENT

This case involves three separate decisions by the Corps, as well as a letter that the Corps sent to the Tribe concerning those previous decisions. In 2003 and 2006, the Corps confirmed that the CWA statutorily exempts Mr. Drake's discharges of dredged or fill material to build a farm road and bridge across wetlands adjacent to Enemy Swim Lake. In 2009, the Corps decided that Mr. Drake's discharges to build gully crossings at a different part of the Lake were not statutorily exempt, but were authorized by an existing nationwide permit. Finally, in 2010, in response to the Tribe's inquiry, the Corps sent a letter explaining the decisions it had made and the reasons why it continued to believe those decisions were correct.

The district court correctly held that the 2010 letter to the Tribe was not a final agency action subject to review under the APA. After the Corps' 2003, 2006, and 2009 decisions, Mr. Drake was able to proceed with his projects with no further need for approval from the Corps. The 2010 letter, on the other hand, merely responded to the Tribe's questions and explained why the Corps believed its previous decisions

[7] The merits order rejects numerous other arguments that the Tribe had raised in the district court. The Tribe has waived those additional arguments by not raising them in its opening brief on appeal. *See Fair v. Norris*, 480 F.3d 865, 869 (8th Cir. 2007).

were correct. Because the 2010 letter did not determine Mr. Drake's or the Tribe's rights or obligations, it did not constitute final agency action under the APA.

The district court therefore properly addressed the Corps' 2003, 2006, and 2009 decisions. The record and case law amply support the district court's decision that the Tribe's challenge to the 2003 farm-road exemption decision was barred by the statute of limitations. After examining the witness testimony and exhibits presented at two evidentiary hearings, the district court found that, by January 2005, the Tribe knew or should have known of its claims concerning the 2003 farm-road exemption decision. The Tribe has not shown that factual finding to be clearly erroneous. *See* Fed. R. Civ. P. 52(a)(6). The record evidence supports the court's finding, and the Tribe's arguments do not create a "definite and firm conviction that a mistake has been committed." *Schaub v. VonWald*, 638 F.3d 905, 915 (8th Cir. 2011).

The district court also correctly held that the Tribe is not entitled to equitable tolling. The six-year limitations period applicable to APA claims may be tolled only if a person is "under legal disability or beyond the seas at the time the claim accrues." 28 U.S.C. § 2401(a). The Tribe has not attempted to show that it meets either of those conditions. Moreover, even if equitable tolling were available, the district court found that the Tribe had not diligently pursued its claims and therefore was not entitled to equitable relief. Again, the Tribe has demonstrated no clear error in that finding, which is supported by the record evidence. Because the Tribe would not be entitled to equitable tolling even if it were available, this Court need not reconsider

whether § 2401(a) is jurisdictional in nature. However, if this Court were to address that question, it should follow its prior holdings that § 2401(a) imposes a jurisdictional statute of limitations and therefore is not subject to equitable tolling.

On the merits of the claims that the Tribe did file within the limitations period, the district court correctly held that the 2006 farm-road exemption decision did not meet the definition of an "undertaking" under the Advisory Council's regulations. The Tribe's opening brief does not attack that holding, but rather debates alleged inconsistencies between the Corps' regulations and the Advisory Council's regulations. Because the district court held that the 2006 farm-road exemption decision was not an "undertaking" even under the Advisory Council's regulations, and because the Tribe does not attack that holding on appeal, this Court should affirm the district court's judgment.

The Tribe's only other merits argument is that the 2009 gully crossings did not qualify for Nationwide Permit 14 because the Corps "stacked" those crossings on top of the 2003 and 2006 farm-road exemption decisions. This Court lacks appellate jurisdiction to consider that argument because the district court remanded the 2009 nationwide-permit verification to the Corps for further analysis. But if the Court does consider that argument, it should hold that the Corps reasonably concluded that the 2009 gully crossings constitute a "single and complete project" for purposes of Nationwide Permit 14. Nothing in the Corps' regulations suggests that a road crossing cannot qualify for Nationwide Permit 14 if it is connected, at a separate

location, to another project that is statutorily exempt from the CWA permit requirement, like a farm road. The district court's judgment therefore should be affirmed.

STANDARD OF REVIEW

For purposes of the standard of review, the district court's orders fall into three categories. First, the Court reviews *de novo* whether the 2010 letter to the Tribe constitutes a final agency action under the APA. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 813 (8th Cir. 2006).

Second, this Court reviews *de novo* the meaning of a statute-of-limitations provision. *McDonough v. Anoka Cty.*, 799 F.3d 931, 939 (8th Cir. 2015). However, in the statute-of-limitations context, the district court's evidentiary findings concerning matters such as "fraudulent concealment and a plaintiff's due diligence are questions of fact" to be reviewed for clear error. *Hines v. A.O. Smith Harvestore Prods.*, 880 F.2d 995, 999 (8th Cir. 1989); *see also Konecny v. United States*, 388 F.2d 59, 63-66 (8th Cir. 1967); Fed. R. Civ. P. 52(a)(6).[8] Similarly, this Court reviews *de novo* the denial of equitable tolling, but reviews for clear error the district court's underlying fact findings. *English v. United States*, 840 F.3d 957, 958 (8th Cir. 2016).

[8] *See also Plaza Speedway v. United States*, 311 F.3d 1262, 1266 (10th Cir. 2002); *Bartleson v. United States*, 96 F.3d 1270, 1274 (9th Cir. 1996).

Third, the APA's deferential arbitrary-and-capricious standard of review applies to the merits. *See* 5 U.S.C. § 706(2)(A); *Sierra Club v. EPA*, 252 F.3d 943, 946 (8th Cir. 2001). The standard is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A decision is arbitrary and capricious only 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." *Id.*; *see also Voyagers Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004) ("If an agency's determination is supportable on any rational basis, [the Court] must uphold it.").

ARGUMENT

The district court correctly held that the 2010 letter to the Tribe was not a final agency action and instead reviewed the Corps' 2003, 2006, and 2009 decisions. The district court properly dismissed all claims concerning the 2003 farm-road exemption decision because the six-year statute of limitations had expired. The court then correctly held that the 2006 farm-road exemption decision was not an NHPA "undertaking" and the 2009 gully crossings did qualify for Nationwide Permit 14. The Tribe's opening brief identifies no error in the district court's analysis, and for the reasons explained below, this Court should affirm the district court's judgment.

I. The Corps' 2010 letter to the Tribe was not a final agency action subject to review under the APA.

The APA subjects "final agency action" to judicial review. 5 U.S.C. § 704. An agency action is "final" only if it (1) marks the consummation of the agency's decision-making process; and (2) determines a party's rights or obligations, or imposes legal consequences. *Bennett v. Spear*, 520 U.S. 154, 178 (1997); *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d at 813. The 2010 letter to the Tribe does not meet that test. The 2010 letter merely explained the Corps' legal position concerning the 2003, 2006, and 2009 decisions it had already made.

"[T]he case law is clear that [courts] lack authority to review claims under the APA 'where an agency merely expresses its view of what the law requires.'" *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006) (quoting *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004)). To constitute a final agency action, an agency's taking of a "legal position" must "itself inflict[] injury or force[] a party to change its behavior." *AT&T Co. v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001); *see also Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1000 (8th Cir. 2015) (summarizing cases), *aff'd,* 136 S. Ct. 1807 (2016). Where an agency merely restates its previous legal position, leaving the "world just as it found it," no final agency action has occurred. *Indep. Equip. Dealers*, 372 F.3d at 428.

Under that authority, the 2010 letter does not constitute a final agency action. The very first paragraph of the letter expressly states that the Corps wished to

"explain the decisions we have made and the actions we have taken." (Add. 1.) The letter then summarized those previous decisions and provided the Corps' "view" or "position" on the Tribe's legal arguments. (Add. 2.) Thus, contrary to the Tribe's contention, the letter did not "address[] and determine[] specific claims raised by the Tribe." (Opening Br. 38.) The letter merely explained why the Corps believed its 2003, 2006, and 2009 decisions were correct and conveyed that the Corps "take[s] the concerns of the Sisseton-Wahpeton Oyate very seriously." (Add. 6.)

To be sure, the 2010 letter addressed each of the Tribe's legal arguments concerning recapture, best management practices, stacking of permit applications, and NHPA compliance. (Opening Br. 40-42.) But again, the Corps did not inflict any injury "merely by expressing its view of the law" on those topics, "a view that has force only to the extent the agency can persuade a court to the same conclusion." *AT&T Co.*, 270 F.3d at 976. To constitute final agency action, a determination must "be one that determines rights or obligations or from which legal consequences will flow." *Sierra Club*, 446 F.3d at 814. The 2010 letter merely stated the Corps' legal position concerning decisions it had already made; the letter did not itself determine Mr. Drake's or the Tribe's rights or obligations.

Nor did the letter "authorize" Mr. Drake to "maintain or place fill in Enemy Swim Lake." (Opening Br. 39.) As the district court correctly recognized, after the Corps' 2003, 2006, and 2009 decisions, Mr. Drake was able to "move forward with the projects subject to the permits and exemptions." (Add. 14.) Once the Corps

issued those decisions, there was "no higher level of review within the agency and the legal rights of each side were clear." (Add. 14.) The 2010 letter did not constitute an "adverse application" of the Corps' previous decisions to the Tribe. (Opening Br. 39-40.) The letter merely answered the Tribe's questions, addressed its arguments, and explained why the Corps believed that its previous decisions were correct. Courts have routinely held that similar advice letters do not constitute final agency action. *See Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944-45 & n.6 (D.C. Cir. 2012).

Consequently, the 2010 letter did not constitute a final agency action subject to review under the APA. The district court therefore correctly held that the 2010 letter was not a final agency action and instead reviewed the Corps' 2003, 2006, and 2009 decisions.

II. The statute of limitations bars the Tribe's claims concerning the 2003 farm-road exemption decision.

The six-year statute of limitations found at 28 U.S.C. § 2401(a) applies to APA claims. *Izaak Walton League of Am. v. Kimbell*, 558 F.3d 751, 758 (8th Cir. 2009). The district court held that the Tribe's claims concerning the 2003 farm-road exemption decision accrued no later than January 2005. (Add. 23.) Because the tribe filed its complaint more than six years later, in November 2011, the district court dismissed as untimely the Tribe's claims concerning the 2003 farm-road exemption decision. (Add. 24.)

The Tribe challenges the district court's determination for two reasons. First, the Tribe asserts that its claims did not accrue in January 2005 because, at that time, "there were not enough facts on the ground for the Tribe to conclude that the road being constructed was not a farm road." (Opening Br. 26.) The Tribe instead contends that only in late 2008 did Mr. Drake change his activities "from a purported farm road to a road utilized solely for excavation, construction, and development." (Opening Br. 24; *see also id.* at 32.) Second, the Tribe argues that the limitations period should be tolled because, in 2009, the Corps "misrepresented and failed to inform the Tribe of critical facts, which prevented the Tribe from filing six years after the January 25, 2005 meeting." (Opening Br. 33.) The district court correctly rejected both of those arguments.

A. The district court correctly found that the Tribe's claims concerning the 2003 farm-road exemption decision accrued in 2005.

"[A] plaintiff's claim 'accrues' for purposes of § 2401(a) when the plaintiff 'either knew, or in the exercise of reasonable diligence should have known, that [he or she] had a claim.'" *Izaak Walton League*, 558 F.3d at 759 (quoting *Loudner v. United States*, 108 F.3d 896, 900 (8th Cir. 1997)). After reviewing the witness testimony and exhibits presented at two evidentiary hearings, the district court found that, by January 2005, the Tribe "was already concerned about Drake's activities" and was "not only … aware of the injury (the challenged adverse decisions), but the possibility that the Corps' decisions were wrong." (Add. 35; *see also* Add. 19-23.)

A district court's fact finding "must not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a)(6).[9] The Tribe has not met its burden to show that the district court clearly erred here. The Tribe spends three paragraphs asserting that, as a matter of fact, it was not aware in January 2005 of the potential incorrectness of the 2003 farm-road exemption decision. (Opening Br. 26-27.) Those three paragraphs do not attempt to show that the district court misconstrued the witness testimony or evidence, nor do they create a "definite and firm conviction that a mistake has been committed." *Schaub*, 638 F.3d at 915.

To the contrary, the witness testimony shows that, even before the January 2005 meeting, a Tribal official, Alvah Quinn,[10] thought that Mr. Drake was trying to "get access and develop lots along the lake." (Aplee. SA 87 (discussing notes of 2004 phone call between Tribal official and the Corps).) Then, at the January 2005 meeting attended by Mr. Quinn, a neighbor raised concerns that Mr. Drake was using the farm-road exemption as a "pretense for using it for a development of … the other side of the lake." (Aplee. SA 91.) The district court therefore did not clearly err in finding that, by January 2005, the Tribe actually knew or should have known of its claim that the 2003 farm-road exemption decision was arbitrary or capricious.

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[9] *See also Konecny*, 388 F.2d at 63-66; *Plaza Speedway*, 311 F.3d at 1266; *Bartleson*, 96 F.3d at 1274.

[10] The district court held that Mr. Quinn attended the meeting as a representative of the Tribe, and the Tribe has not contested that holding on appeal. (Add. 23-24.)

The Tribe alternatively contends that, in late 2008, Mr. Drake changed the purpose of the road, thus triggering the CWA's recapture provision and causing the Tribe's claim concerning the 2003 farm-road exemption decision to accrue for the first time. (Opening Br. 24-26.)[11] That argument assumes that the Corps' decision was correct when the Corps made it in 2003. Indeed, the district court held that the record supports the Corps' determination that Mr. Drake had, in fact, been conducting agricultural operations near the 2006 bridge project, which is in the same general area as the 2003 farm road. (Add. 47; *see also* Statement of the Case Part A.) The Tribe's opening brief on appeal does not attack that holding. The Tribe's theory therefore appears to be that, despite the initial validity of the 2003 farm-road exemption decision, the recapture provision mandated that the Corps require a permit from Mr. Drake in 2008, when he allegedly changed how he was using the road.

The Tribe's alternative theory fails because the district court dismissed the recapture claim as non-justiciable, and the Tribe has not challenged that holding on appeal. Specifically, the court held that the Tribe's recapture claim implicated the

[11] The tribe asserts that this "same rationale" applies to its other claims, but does not explain why. (Opening Br. 26.) Assertions "made in passing that [are] not supported 'with any argument or legal authority' [are] waived and need not be addressed." *Patterson v. City of Omaha*, 779 F.3d 795, 803 (8th Cir. 2015) (quoting *Milligan v. City of Red Oak, Iowa*, 230 F.3d 355, 360 (8th Cir. 2000)). The same is true for the Tribe's perfunctory assertion that the Corps had a duty to consult with the Tribe. (Opening Br. 37.)

Corps' enforcement discretion and therefore was not cognizable under the APA. (*See* Add. 15-16, 28-29, 47.) As the court explained, the Corps has the authority to "investigate allegations of non-exempt discharges" and to order the discharger to "acquire or comply with a permit," but the Corps' exercise of that authority is "considered to be discretionary." (Add. 28-29 (citing *Dubois v. Thomas*, 820 F.2d 943, 950-51 (8th Cir. 1987)).[12] The district court therefore dismissed any claims, including the recapture claim, that sought to force the Corps to "modify, suspend, or revoke" the previously verified exemptions. (Add. 15-16.) The Tribe has waived any challenge to that holding by not addressing it in the opening brief. *See Fair*, 480 F.3d at 869.

In any event, the district court was correct that the recapture provision does not impose a mandatory duty on the Corps to revoke its 2003 farm-road exemption decision. Under the recapture provision, an otherwise exempt activity requires a permit if any "discharge" is "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2).[13] The recapture provision therefore focuses on whether a proposed discharge, despite being for an *exempt* activity like a farm road, would

[12] *See also Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Mo. Coal. for the Env't v. Corps of Eng'rs*, 866 F.2d 1025, 1032 n.10 (8th Cir. 1989), *abrogated on other grounds*, *Goos v. I.C.C.*, 911 F.2d 1283 (8th Cir. 1990)).

[13] The discharge also must cause the "flow or circulation of navigable waters [to] be impaired or the reach of such waters [to] be reduced." *Id.* § 1344(f)(2).

subject an area of the navigable waters to a new use. For example, a discharge used to convert a wetland to farm land where no farm previously existed would require a permit. *See Coon v. Willet Dairy*, 536 F.3d 171, 174 (2d Cir. 2008).

Thus, the text of the recapture provision addresses whether a discharge for an otherwise exempt activity will change the use of an area of the navigable waters. The text does not address changes from *exempt* to *non-exempt* activities after the discharges have already occurred, as the Tribe implies. (Opening Br. 26.) In other words, the provision provides that a farm road requires a permit if the area of navigable waters previously has not been subject to agricultural activities. The provision's text simply does not address the circumstance where a farm road is fully exempt when the discharges occur,[14] but many years later the project sponsor allegedly begins using the road for a different, non-exempt purpose.

The Tribe therefore is incorrect that, under the recapture provision, the Corps had a mandatory duty to require a CWA permit in 2008, when Mr. Drake allegedly changed his purpose from a farm road to a road used "solely for excavation, construction, and development." (Opening Br. 24.) That type of claim simply is not

[14] It bears repeating that the Tribe's recapture theory assumes that the Corps' decision was correct when the Corps made it in 2003 (Opening Br. 24-26), and the Tribe's opening brief does not challenge the district court's holding that Mr. Drake was, in fact, conducting agricultural operations near the 2006 bridge project, which is in the same area as the 2003 farm road. (Add. 47; *see also* Statement of the Case Part A).

cognizable under the APA, 5 U.S.C. § 706(1), because the recapture provision imposes no such mandatory duty. *See Coos Cty. Bd. of Cty. Comm'rs v. Kempthorne*, 531 F.3d 792, 802 (9th Cir. 2008) (examining statutory text and holding that agency did not fail to take a "discrete" action that it was "required" to take (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)).[15] The Tribe essentially is arguing that the Corps must revoke an already confirmed statutory exemption based on the project proponent's subsequent alleged activities. But again, the Tribe's opening brief does not attack the district court's holding that the Corps has "absolute discretion" to decide, as an enforcement matter, whether to "modify, suspend, or revoke" a permit exemption. (*See* Add. 15-16, 28-29, 47.) The Tribe's so-called recapture claim therefore cannot restart the clock on challenges to the 2003 farm-road exemption decision.

B. The district court correctly refused to toll the limitations period.

The Tribe alternatively argues that, if its claims concerning the 2003 farm-road exemption decision did accrue in January 2005, the limitations period should be tolled because the Corps "misrepresented and failed to inform the Tribe of critical facts, which prevented the Tribe from filing" within the limitations period. (Opening Br.

[15] *See also Huron Mountain Club v. U.S. Army Corps of Eng'rs*, 545 F. App'x 390, 393 (6th Cir. 2013) (examining statutory text and holding that Corps had no mandatory duty to "seek out individuals who might be violating" the statute and order them to file a permit application) (unpublished decision).

33.) For three independent reasons, this Court should affirm the district court's order refusing to toll the limitations period. *See Robbins v. Becker*, 794 F.3d 988, 992 (8th Cir. 2015) (court of appeals may affirm judgment for any reason supported by the record).

First, § 2401(a) expressly states the limited circumstances under which courts may toll the limitations period. This Court is not free to add equitable tolling principles to the circumstances enumerated in the statute, and the Tribe has not shown that it falls within those enumerated circumstances. Second, even if equitable tolling were available, the district court found that the Tribe had not "met its burden of showing that it pursued its claims diligently." (Add. 34-35.) Third, this Court has held that 28 U.S.C. § 2401(a) imposes a jurisdictional statute of limitations, *see Loudner*, 108 F.3d at 900 & n.1; *Konecny*, 388 F.2d at 62, and such a limitations period may not be tolled for equitable reasons, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008).

1. The Tribe does not meet the express requirements to toll the limitations period under § 2401(a).

"Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States v. Beggerly*, 524 U.S. 38, 48 (1998). For example, in *United States v. Brockamp*, the Supreme Court held that a statute did not permit equitable tolling because it contained "explicit exceptions to its basic time limits . . . [that] do not include 'equitable tolling.'" 519 U.S. 347, 351-52 (1997). Similarly, in *Bowles v. Russell*, the Supreme Court refused to read more general equitable exemptions

into a time limit where Congress had expressly provided limited grounds for an extension. 551 U.S. 205, 214 (2007).

The same is true here. Section 2401(a) expressly provides that the "action of any person under legal disability[16] or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." 28 U.S.C. § 2401(a). The inclusion of those express exceptions to the limitations period indicates that Congress "did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute." *Brockamp*, 519 U.S. at 352. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Sierra Club v. EPA*, 551 F.3d 1019, 1028 (D.C. Cir. 2008).

Indeed, § 2401(a)'s predecessor provision expressly stated that "no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively." 28 U.S.C. § 41(20) (1946). When Congress moved that provision to § 2401(a) in 1948, Congress "omitted" the aforementioned sentence "as superfluous." H.R. Rep. No. 80-308, § 2401, at A185 (1947). The legislative history therefore shows that Congress did not intend courts to

[16] The term "legal disability" refers to a mental condition that "impair[s] the claimant's access to the court" and prevents the claimant "from comprehending his or her legal rights." *Shinogee v. Fanning*, __ F. Supp. 3d __, 2017 WL 149953, at *4 (D.D.C. Jan. 13, 2017) (quoting *Hyde v. United States*, 85 Fed. Cl. 354, 358 (2008)).

toll § 2401(a) for circumstances other than those specified in the statute. For that reason alone, the Tribe's equitable tolling argument fails.

2. The district court did not clearly err in finding that the Tribe had not diligently pursued its claims.

Even if equitable tolling were available, the district court correctly held that the Tribe had not met its burden to toll the limitations period in this case. (Add. 34-35.) Equitable tolling is a "limited and infrequent form of relief [that] requires a litigant to establish (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Smithrud v. City of St. Paul*, 746 F.3d 391, 396 (8th Cir. 2014) (internal quotation marks omitted). Equitable tolling "does not apply to 'garden variety' claims of excusable neglect, and should be invoked only in exceptional circumstances truly beyond the plaintiff's control." *Jenkins v. Mabus*, 646 F.3d 1023, 1028–29 (8th Cir. 2011).

Here, the district court reviewed the evidence and correctly found that the Tribe had not "met its burden of showing that it pursued its claims diligently." (Add. 34-35.) The record evidence entirely supports the court's finding. For example, in 2007, the same Tribal official previously mentioned, Mr. Quinn, called the Corps and asserted that Mr. Drake intended to use the road to build cabins, not to engage in agricultural activities. (Aplee. SA 118; *see also* Aplee. SA 122.) Similarly, in a June 2009 letter to the Corps, the Tribe asserted that "Mr. Drake's actions under the COE's exemption decisions and nationwide permits demonstrate that his purpose is real

estate development, not a mere farm road." (Aplee. SA 36.) The letter goes on to outline the same legal claims that the Tribe ultimately asserted in its district court complaint. (Aplee. SA 39-47.) The Tribe therefore actually knew of its claims well before the limitations period expired in January 2011.

Moreover, in August 2010—five months before the limitations period expired—the Corps sent the Tribe a letter standing by its previous decisions and explaining that only the gully crossings did not qualify for the farm-road exemption. (Add. 1-6.) The Tribe nevertheless waited another fourteen months, until November 2011, to file its complaint in this case. (Aplee. SA 1.) The Tribe's extended delay in filing its complaint supports the district court's finding that the Tribe did not diligently pursue its claims. *See Smithrud*, 746 F.3d at 396 (one-year delay in filing complaint showed that plaintiff did not "diligently pursue his rights").

The Tribe contends that the Corps "misrepresented and failed to inform the Tribe of critical facts, which prevent the Tribe from filing" within the limitations period. (Opening Br. 33-35.) Specifically, the Tribe asserts that, at a July 2009 meeting, the Corps hid the fact that Mr. Drake intended to develop some of his property. (Opening Br. 33.) But even the transcript cited by the Tribe (Opening Br. 35) does not support that assertion.[17] The transcript shows that the Corps openly

[17] The Tribe did not provide the Corps with an opportunity to review the transcript after the meeting, so the Corps cannot confirm and does not concede the accuracy of the transcript.

discussed whether the farm-road exemption still applied despite Mr. Drake's "land clearing" and the potential that he would "put some cabins up there." (App. 138-40, 144-45.) The Corps also explained that it processed the 2009 gully crossings under a nationwide permit because the purpose of those crossings was "not agriculture." (App. 148, 156).[18]

Moreover, even before that meeting, the Tribe had been asserting for years that Mr. Drake intended to develop his property. (Aplee. SA 36, 87, 118, 122.) The Tribe therefore was well aware of its claim that the 2003 farm-road exemption decision was wrong. As the district court held, nothing the Corps did "prevented the tribe, had it been diligently pursuing its rights, from filing a claim on time." (Add. 35.) A plaintiff is not entitled to be "*certain* his rights [have] been violated" before the statute of limitations begins to run. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990).

The Tribe's only other reason for having waited so long to file its complaint is that the Corps allegedly "requested that the Tribe pursue administrative remedies with

[18] The Corps decided that the 2009 gully crossings did not qualify for the farm-road exemption because Mr. Drake intended to build a home on the north shore of Enemy Swim Lake. (App. 56, 81-82.) But just because Mr. Drake intended to build a home west of the 2009 gully crossings does not mean that the Corps' 2003 and 2006 farm-road exemption decisions were incorrect. The farm road and bridge at issue in those decisions were in a different location than the gully crossings (*see supra* Statement of the Case Part A), and the Tribe's opening brief on appeal does not challenge the district court's holding that Mr. Drake had been using land near 2003 and 2006 projects for agricultural purposes (Add. 47; *see also* Statement of the Case Part A).

the Corps." (Opening Br. 36-37.) Technically, that argument is more akin to a claim of equitable estoppel than equitable tolling. "Equitable estoppel applies if a defendant actively prevents a plaintiff from suing on time; equitable tolling applies if the plaintiff, despite due diligence, cannot obtain vital information about the existence of her claim." *Jenkins*, 646 F.3d at 1027-28. To qualify for equitable estoppel, the plaintiff must show that the defendant had a "deliberate design" to lull or trick the plaintiff into letting the filing deadline pass. *Id.* at 1028. Additionally, because the Tribe seeks equitable estoppel against a government agency, the Tribe bears the "heavy burden" of showing that the agency engaged in "affirmative misconduct." *Bartlett v. U.S. Dep't of Agric.*, 716 F.3d 464, 475 (8th Cir. 2013).

The Tribe cites only to a Corps official's statement at the 2009 meeting that he would "do some homework" and "be in touch" because "[i]t's not like it stops here." (App. 158.) That statement does not ask the Tribe to exhaust its administrative remedies.[19] Nor does it evidence "affirmative misconduct," a "deliberate design" to trick the Tribe, or an "unmistakable understanding" that the Tribe would not file suit within the limitations period. *Bartlett*, 716 F.3d at 475; *Jenkins*, 646 F.3d at 1028.

[19] No statutory or regulatory provision required the Tribe to exhaust its administrative remedies under the circumstances here. *See* 33 C.F.R. § 320.1(a)(6) (district-engineer determination concerning applicability of general permit or statutory exemption is "final agency action"); *Darby v. Cisneros*, 509 U.S. 137, 154 (1993) (under APA, administrative exhaustion is prerequisite to judicial review only when required by statute or regulation). The Corps' regulations do not provide the Tribe any administrative remedies, let alone require that the Tribe exhaust any such remedies.

Moreover, the Corps did, in fact, subsequently send the Tribe a letter explaining its legal position. (Add. 1-6.) The Corps sent that letter in August 2010—five months before the statute of limitations expired—and the Tribe has offered no reason for waiting another fourteen months to file suit. This Court therefore should affirm the district court's judgment that the Tribe did not meet its "burden of showing that it pursued its claims diligently." (Add. 35.)

3. If this Court were to reach the question, it should hold that § 2401(a) is jurisdictional and therefore is not subject to equitable tolling.

For the reasons explained above, this Court need not revisit whether § 2401(a) is jurisdictional. *See, e.g.*, *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007) (refusing to address whether § 2401(a) is jurisdictional because the facts did not warrant tolling the limitations period).[20] However, if this Court were to reach the issue, it should hold that the district court did not abuse its discretion in denying the Tribe's motion to reconsider. (Add. 32-34.) *See Broadway v. Norris*, 193 F.3d 987, 989 (8th Cir. 1999) (standard of review). The district court correctly held that it had

[20] *See also Jackson v. United States*, 751 F.3d 712, 719 (6th Cir. 2014); *Wild Horse Observers Ass'n v. Jewell*, 550 F. App'x 638, 641 (10th Cir. 2013). The Tribe cites *Andersen v. U.S. Department of Housing & Urban Development*, 678 F.3d 626, 629 (8th Cir. 2012). (Opening Br. 31.) In that case, this Court merely concluded that the facts did not warrant equitable tolling. 678 F.3d at 629. The Court therefore did not need to revisit whether § 2401(a) is jurisdictional. For the reasons explained above, this Court may follow the same route to affirm the district court's judgment here.

committed no "manifest error of law" in concluding that § 2401(a) is jurisdictional. (Add. 34.)

This Court has held that filing within the limitations period defined by 28 U.S.C. § 2401(a) is a "condition precedent to the government's waiver of sovereign immunity, and cases in which the government has not waived its immunity are outside the subject-matter jurisdiction of the district courts." *Loudner*, 108 F.3d at 900 & n.1; *see also Konecny*, 388 F.2d at 62 (same). A jurisdictional statute of limitations may not be tolled for equitable reasons. *John R. Sand*, 552 U.S. at 133. Binding precedent therefore forecloses the Tribe's request for equitable tolling here.

Under the prior-panel rule, "[o]ne panel of this Court is not at liberty to disregard a precedent handed down by another panel." *Drake v. Scott*, 812 F.2d 395, 400 (8th Cir. 1987), *modified on reh'g on other grounds*, 823 F.2d 239 (8th Cir. 1987). A "limited exception" to that rule permits a panel to "revisit an opinion of a prior panel if an intervening Supreme Court decision is inconsistent with the prior opinion." *McCullough v. AEGON USA*, 585 F.3d 1082, 1085 (8th Cir. 2009). The Tribe invokes that exception, asking this Court to revisit whether § 2401(a) is jurisdictional due to the Supreme Court's recent decision in *Wong*, 135 S. Ct. at 1629.

Wong, however, is not directly on point and therefore does not overrule this Court's precedent holding that § 2401(a) is jurisdictional. *See Garrett v. Univ. of Ala.*, 344 F.3d 1288, 1292 (11th Cir .2003) ("While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court

decision must be clearly on point.").[21] *Wong* addressed the "text," "context," and "legislative history" of § 2401(b), which provides the limitations period for the Federal Tort Claims Act ("FTCA"). 135 S. Ct. at 1632. This case, on the other hand, involves the separate limitations period in § 2401(a). As the district court correctly explained, § 2401(a) originated with the Tucker Act and does not share a common origin with § 2401(b). (Add. 33.)

Furthermore, the Court's analysis in *Wong* emphasized that the FTCA treats the government like a private party. *Wong*, 135 S. Ct. at 1637. Section 2401(a), on the other hand, applies to uniquely governmental types of claims, including APA claims, 5 U.S.C. § 702, claims concerning tax collection, 28 U.S.C. § 1346(a), and claims for less than $10,000 that do not sound in tort, *id.* at § 1346(a)(2). Section 2401(a) therefore is fundamentally different than § 2401(b), and the Supreme Court's holding in *Wong* does not overrule this Court's prior precedent that § 2401(a) is jurisdictional. *See Horvath v. Dodaro*, 160 F. Supp. 3d 32, 43 n.9 (D.D.C. 2015) (D.C. Circuit precedent

[21] *See also United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013) ("Such an intervening change in the law must be unequivocal, not a mere 'hint' of how the Court might rule in the future."); *Nat'l Inst. of Military Justice v. U.S. Dep't of Def.*, 512 F.3d 677, 682 n.7 (D.C. Cir. 2008) (noting Supreme Court precedent must "eviscerate" prior circuit precedent before a panel will reconsider it).

that § 2401(a) is jurisdictional remains binding because *Wong* addressed only § 2401(b)).[22]

Moreover, the history of § 2401(a) shows that Congress intended it to operate as a jurisdictional bar. *See Wong*, 135 S. Ct. at 1633 (a limitations period is jurisdictional if Congress "conditions [a] jurisdictional grant on [a] limitations period[] or otherwise links those separate provisions"). Before 1855, there was no general statute waiving sovereign immunity for damages claims against the federal government. In 1855, Congress established the Court of Claims and gave it authority to hear claims, report its findings to Congress, and submit draft private bills for favorable decisions. Act of Feb. 24, 1855, ch. 122, §§ 1, 7, 10 Stat. 612, 612-13; *United States v. Mitchell*, 463 U.S. 206, 212-13 (1983).

Congress later gave the Court of Claims authority to enter binding judgments appealable to the Supreme Court. *See* Act of March 3, 1863, ch. 92, §§ 3, 5, 12 Stat. 765, 765-66; *Mitchell*, 463 U.S. at 213. In doing so, Congress enacted the first version of the six-year time bar for non-tort suits against the United States. *See* ch. 92, § 10, 12 Stat. at 767. Two early Supreme Court cases construed that statute of limitations to be jurisdictional in character and thus not subject to equitable tolling. *See Kendall v.*

[22] *See also In re: Chaplaincy*, No. 1:07-MC-269 (GK), 2016 WL 541126, at *3 (D.D.C. Feb. 9, 2016); *Poarch Band v. Moore*, No. CA 15-00277-CG-C, 2016 WL 4778788, at *8 (S.D. Ala. Aug. 10, 2016) (same for Eleventh Circuit).

United States, 107 U.S. 123, 125-26 (1883); *Finn v. United States*, 123 U.S. 227, 232 (1887).

Then, in 1887, Congress enacted the Tucker Act, which broadened the Court of Claims' jurisdiction (the "Big Tucker Act") and granted district courts concurrent jurisdiction over low-value, non-tort claims against the government (the "Little Tucker Act"). Act of Mar. 3, 1887, ch. 359, §§ 1, 2, 24 Stat. 505. The Tucker Act provides that the "jurisdiction of the respective courts of the United States proceeding under this act, … shall be governed by the law now in force, insofar as the same is applicable and not inconsistent with the provisions of this act." *Id.* § 4, 24 Stat. at 506. The Tucker Act therefore incorporates the Supreme Court's previous holdings that the six-year statute of limitations on non-tort claims against the government is jurisdictional. Indeed, the Supreme Court subsequently held that the Tucker Act's time bar is jurisdictional. *See United States v. Wardwell*, 172 U.S. 48, 52 (1898).

In 1911, Congress codified, revised, and amended laws relating to the judiciary. *See* Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087. To rectify any ambiguity concerning the statute of limitations, Congress enacted separate statutes of limitations for Big Tucker Act and Little Tucker Act claims. Both of those provisions provided that a claim against the United States "shall be forever barred" unless brought within six years after the claim "first accrues." *Id.* § 156, 36 Stat. at 1139; *Id.* § 24(20), 36 Stat. at 1093; *see also Saffron v. Dep't of the Navy*, 561 F.2d 938, 944 n.49 (D.C. Cir. 1977). In 1948, Congress moved the limitations period for Big Tucker Act claims to 28 U.S.C.

§ 2501, and moved the limitations period for Little Tucker Act claims to 28 U.S.C. § 2401(a). Act of June 25, 1948, ch. 646, 62 Stat. 869, 971, 976.

The history of § 2401(a) is significant for two reasons. First, it shows that § 2401(a) is strongly linked to § 2501, which the Supreme Court has held is "'jurisdiction[al]' and not susceptible to equitable tolling." *John R. Sand*, 552 U.S. at 136. Not only do the two provisions share common historical roots and similar text, the Supreme Court has recognized that Congress intended district court jurisdiction under the Little Tucker Act to be "as restricted as is that of the Court of Claims." *United States v. Sherwood*, 312 U.S. 584, 591 (1941); *see also Saffron*, 561 F.2d at 944 ("Save only for a district-court ceiling in terms of amount involved, jurisdiction is the same, and the six-year limitation on district-court suits coincides exactly with the limitation statutorily imposed upon litigation instituted in the Court of Claims.").

Because the district courts and the Court of Federal Claims have concurrent jurisdiction over substantively similar claims, the limitations period in § 2401(a) and § 2501 must operate in identical fashion. There is no evidence that Congress intended different rules to apply to the same substantive claims depending on venue. Indeed, the Supreme Court already has rejected that result as unworkable. *Sherwood*, 312 U.S. at 591 (acknowledging "the embarrassments which would attend the defense of suits brought against the Government if the jurisdiction of district courts were not deemed to be as restricted as is that of the Court of Claims"); *see also Saffron*, 561 F.2d at 946

(refusing to "upset the congruity" between the two courts "for which Congress ever so recently has striven").

Congress enacted § 2401(a) and § 2501 simultaneously to govern similar claims and using similar text derived from the same historical antecedents. There is no reason to construe the limitations periods in those provisions differently with respect to equitable tolling. Thus, *stare decisis* has a role to play here. *Wong*, 135 S. Ct. at 1636. When a long line of precedent "left undisturbed by Congress has treated a similar requirement as jurisdictional," the Supreme Court "will presume" that Congress intended to enact a jurisdictional time limit that cannot be tolled. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (internal quotation marks and citation omitted). This Court's rule that § 2401(a) is jurisdictional is entirely consistent with the Supreme Court's holding in *John R. Sand* that § 2501 is jurisdictional. 552 U.S. at 136.

Second, when enacting the limitations period that ultimately became § 2401(a), Congress placed that limitations period within a section governing the district courts' jurisdiction. *Cf. Wong*, 135 S. Ct. at 1633 ("[S]eparation of a filing deadline from jurisdictional grant indicates that the time bar is not jurisdictional."). Section 24 of the Act of March 3, 1911, simultaneously stated the terms on which "[t]he district courts shall have original jurisdiction" and provided for a six-year limitations period. *See* 36 Stat. at 1091, 1139. Furthermore, § 24 appeared in Chapter Two of the Judicial Code, labeled "District Courts—Jurisdiction." 36 Stat. at 1091. Upon the first publication of the United States Code in 1926, the grant of jurisdiction and six-year statute of

limitations for the Little Tucker Act similarly appeared in Chapter 2 ("District Courts; Jurisdiction"), § 41 ("Original Jurisdiction"), Part 20 ("Suits against United States"). 28 U.S.C. § 41(20) (1926). The same was true for the 1934, 1940, and 1946 editions of the Code. 28 U.S.C. § 41(20) (1934); 28 U.S.C. § 41(20) (1940); 28 U.S.C. § 41(20) (1946).

In 1948, Congress again revised the Judicial Code, this time placing the Tucker Act's general grant of jurisdiction in § 1346(a) (within Part IV—Jurisdiction and Venue; Chapter 85—District Courts; Jurisdiction) and placing the six-year statute of limitations in § 2401(a) (Part IV—Particular Proceedings; Chapter 161—United States as Party Generally). Act of June 25, 1948, ch. 646, 62 Stat. 869, 933, 971. However, Congress and the Supreme Court stated that the 1948 recodification was not intended to substantively change the law. *See id.* § 33 at 991 ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, in which any section is placed, nor by reason of the catchlines used in such title."); *John R. Sand*, 552 U.S. at 136 ("This Court does not 'presume' that the 1948 revision 'worked a change in the underlying substantive law unless an intent to make such a change is clearly expressed.'") (citations omitted). Thus, the 1948 recodification did not deprive section 2401(a) of its jurisdictional character.

In sum, this Court need not revisit whether § 2401(a) is jurisdictional. The district court's judgment should be affirmed because the express terms of § 2401(a)

foreclose equitable tolling, and the district court did not abuse its discretion in holding that the facts of this case would not warrant equitable tolling even if it were available. However, if this Court does address the issue, it should hold that the district court also did not abuse its discretion in denying the Tribe's motion to reconsider whether § 2401(a) is jurisdictional. *Wong* does not overrule this Court's precedent that § 2401(a) is jurisdictional, and traditional tools of statutory construction show that, unlike § 2401(b), Congress did intend § 2401(a) to constitute a jurisdictional bar on non-tort suits against the government. For all those reasons, this Court should affirm the district court's judgment that the Tribe's claims concerning the 2003 farm-road exemption decision were untimely.

III. The 2006 farm-road exemption decision and the 2009 nationwide-permit verification were not arbitrary or capricious.

The district court did not hold that the Tribe's challenges to the 2006 farm-road exemption decision or the 2009 nationwide-permit verification were untimely. Rather, the district court considered the merits of the Tribe's claims concerning those decisions, entered judgment in favor of the Corps on all claims concerning the 2006 farm-road exemption decision, and remanded for the Corps to conduct further analysis of the 2009 gully crossings under the NHPA. (Add. 42-49.) The Tribe raises only two arguments concerning the district court's judgment on the merits, and neither of those arguments is correct.

A. The 2006 farm-road exemption decision was not an NHPA "undertaking."

The Tribe first contends that the Corps should have conducted an NHPA analysis "from the very beginning, at least by 2003." (Opening Br. 48.) Any claim that the Corps should have performed an NHPA analysis as part of the 2003 farm-road exemption decision is barred by the statute of limitations for all the reasons explained above.[23] However, generously construed, the Tribe's brief may be asserting that the Corps should have conducted an NHPA analysis as part of the 2006 farm-road exemption decision.

The district court correctly rejected that argument. The Corps' decision that the 2006 bridge project qualified for the farm-road exemption was not a "federal undertaking under either the Corps' narrow or the Advisory Council's broad definitions." (Add. 42-43.) The court explained that, under the Advisory Council's definition, the term "undertaking" includes projects "requiring a Federal permit, license or approval." (Add. 42 (quoting 36 C.F.R. § 800.16(y).) And the court held that, because the Corps merely had confirmed "an exemption from the necessity of federal approval under the CWA," the Corps had not engaged in an undertaking under the NHPA. (Add. 42.)

[23] If the Tribe's NHPA claim concerning the 2003 farm-road exemption were not barred by the statute of limitations, it would fail on the merits for the same reasons stated above with respect to the 2006 farm-road exemption. This Court may affirm the district court's judgment on that alternate ground. *Robbins*, 794 F.3d at 992.

The Tribe's brief does not engage the district court's analysis. Instead, the Tribe devotes its entire NHPA argument to debating the validity of the Corps' regulations as compared to the Advisory Council's regulations. (Opening Br. 49-53.) Because the district court held that the Tribe's claim fails under the Advisory Council's regulations, and because the Tribe has not challenged that holding on appeal, this Court should affirm the district court's judgment. *See Fair*, 480 F.3d at 869; *Patterson*, 779 F.3d at 803; *Robbins*, 794 F.3d at 992.

The district court's decision also is correct. The Corps did not grant a "permit." 36 C.F.R. § 800.16(y). The Corps merely confirmed that a permit was *not* required due to a statutory exemption. *See* 33 U.S.C. § 1344(f)(1)(E); 33 C.F.R. § 323.4(a)(6).[24] Nor did the Corps grant a "license" or give its "approval." 36 C.F.R. § 800.16(y). Mr. Drake's activity fell within a statutory exemption to the CWA permit requirement, so he could have proceeded with that activity without notifying the Corps at all. The mere fact that Mr. Drake applied for a permit and the Corps confirmed that no permit was required does not create an NHPA "undertaking." If it did, the NHPA would apply to "every project involving the navigable waters of the United States," and "[l]ogically, there must be some governmental action under the

[24] For the same reason, the 2006 farm-road exemption decision did not qualify as an "undertaking" under the Corps' regulations. *See* 33 C.F.R. Pt. 325, App. C at 1(f) (defining "undertaking" to mean the "work, structure or discharge that requires a Department of the Army *permit*" (emphasis added)).

NHPA that is not an undertaking." (Add. 42-43.) The district court therefore correctly held that the 2006 farm-road exemption decision was not an NHPA undertaking.

B. This Court lacks appellate jurisdiction to review the remanded 2009 nationwide-permit verification, and that verification was not arbitrary or capricious in any event.

The Tribe also argues that the district court erred in holding that the Corps had not "stacked" authorizations to avoid the CWA permitting process. (Opening Br. 42.) To support its argument, the Tribe cites General Condition 28, which provides that nationwide permits may authorize only "single and complete projects." (Opening Br. 42 (quoting 72 Fed. Reg. at 11,100). General Condition 28 aims to avoid the "piecemealing of activities that require Department of Army permits." 72 Fed. Reg. at 11,171. In the Tribe's view, the 2009 gully crossings did not qualify for a nationwide permit because the Corps stacked those crossings on top of the previous farm-road exemption decisions. (*See* Opening Br. 46 ("Despite the candid admissions by Drake, the Corps approved a [Nationwide Permit]."); *id.* at 18 ("The district court determined that the Corps' 2009 [Nationwide Permit] did not involve stacking of permits ….").)

This Court presently lacks appellate jurisdiction to review that argument. Under 28 U.S.C. § 1291, this Court has appellate jurisdiction only over a "final decision" of the district court. *Izaak Walton League*, 558 F.3d at 762. "[N]umerous cases have held that an order remanding to a federal agency for further proceedings is

not a final order within the meaning of § 1291." *Id.*[25] Where a district court has remanded a decision to a federal agency for further analysis, this Court has held that it lacks "jurisdiction over [an] appeal of the remand order." *Id.*

The district court remanded the 2009 nationwide-permit verification to the Corps for further NHPA analysis. (Add. 49.) This Court consequently lacks appellate jurisdiction to review the remanded decision. If the Corps' decision on remand is favorable to the Tribe, then this Court ultimately may not need to address the Tribe's arguments. And if the Corps' decision on remand is adverse to the Tribe, the Tribe will be able to argue that the 2009 gully crossings do not qualify for a nationwide permit. At that time, the Tribe will be able to raise any arguments they have properly preserved and that are relevant to the Corps' decision, including their stacking argument. Presently, however, the Court lacks appellate jurisdiction to review the Corps decision concerning the 2009 gully crossings because there is no final appealable order concerning that agency action. *See Izaak Walton League*, 558 F.3d at 762.

In the alternative, the Corps reasonably concluded that the gully crossings qualified as a "single and complete project" for purposes of Nationwide Permit 14, which authorizes linear transportation projects. 72 Fed. Reg. at 11,183-84. The Tribe

[25] *See, e.g.*, *Giordano v. Roudebush*, 565 F.2d 1015, 1017 (8th Cir. 1977); *Bohms v. Gardner*, 381 F.2d 283, 285 (8th Cir. 1967).

disagrees because, in its view, the gully crossings actually were part of a larger road system that includes the 2003 and 2006 farm-road projects. (Opening Br. 46.) The Tribe's argument fails for two independent reasons. First, nothing in the Corps' regulations suggests that Nationwide Permit 14 may not apply to a road crossing that is connected to an exempt project, like a farm road, at a different location. The "single and complete project" condition avoids the piecemealing of activities that require CWA "permits." 72 Fed. Reg. at 11,171. The condition simply does not apply to farm roads that the statute *exempts* from the permit requirement.[26]

To illustrate, Nationwide Permit 14 applies only if a road crossing causes the loss of no more than one-half acre of wetlands. *Id.* at 11,183-84. The "single and complete project" condition ensures that a project does not skirt the individual permit requirement by involving two crossings "at the same location" that cumulatively exceed the one-half acre limit. *Id.* at 11,109. The condition does not apply, however, where another crossing qualifies for the farm-road exemption. Because such a farm-road crossing is statutorily exempt from the permit requirement, it cannot count towards Nationwide Permit 14's one-half acre limitation. Nor does the text of the

[26] Again, the district court held, and the Tribe has not contested, that the record supports the Corps' conclusion that Mr. Drake had been using land near the 2003 and 2006 farm-road projects for agricultural purposes. (Add. 47; *see also* Statement of the Case Part A.)

farm-road exemption itself specify any acreage limitation. *See* 33 U.S.C. § 1344(f)(1)(E); 33 C.F.R. § 323.4(a)(6).

Second, even if the 2003 and 2006 farm-road projects had not been exempt, the 2009 gully crossings still would have qualified as a "single and complete project" under the Corps' definition of that term for purposes of Nationwide Permit 14. The Corps has explained that, with respect to linear transportation projects, a "single and complete project" consists of a "single crossing of a water of the United States, or more than one crossing *at the same location*." 72 Fed. Reg. at 11,109 (emphasis added). The Corps' definition of "single and complete project" specifically states that when a linear transportation project crosses a "single waterbody several times at separate and distant locations, each crossing is considered a single and complete project." *Id.* at 11,197. Those standards control here because this Court accords "substantial deference to an agency's interpretation of its own regulation ... unless the interpretation is plainly erroneous or inconsistent with the regulation." *Mages v. Johanns*, 431 F.3d 1132, 1139 (8th Cir. 2005).

The district court correctly held that, under the standards applicable to Nationwide Permit 14, the 2009 gully crossings qualified as a single and complete project separate from the 2003 and 2006 farm-road projects. (Add. 48 (citing 72 Fed.

Reg. at 11,109).)[27] The 2009 gully crossings were not "at the same location" as the 2003 and 2006 farm-road projects; they were at a "separate and distant location[]" from the 2003 and 2006 farm-road crossings. 72 Fed. Reg. at 11,109, 11,197. (*See supra* Statement of the Case Part A.) For that reason alone, the Corps' regulations show that the 2009 gully crossings were a single and complete project separate from the 2003 and 2006 farm-road projects. The district court's judgment therefore should be affirmed.[28]

CONCLUSION

The Tribe's brief incorrectly frames the issues and analysis on appeal. The Court may review only a final agency action, not a letter expressing the Corps' legal

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[27] Contrary to the Tribe's assertion (Opening Br. 42-43), the district court did not decide this question under standards applicable to Nationwide Permit 29. Although the district court did quote the Corps' discussion of the "independent utility" standard as applied to Nationwide Permit 29, the court recognized that that standard "is not in specific reference to [Nationwide Permit] 14." (Add. 48 (citing 72 Fed. Reg. at 11,125, 11,196).) Moreover, the district court correctly cited the Corps' more specific definition and discussion of the "single and complete project" standard as applied to linear transportation projects under Nationwide Permit 14. (Add. 48 (citing 72 Fed. Reg. at 11,109-10).)

[28] The Tribe's brief obliquely suggests that the 2009 nationwide-permit verification is arbitrary and capricious because the Corps improperly delegated its NHPA compliance duties to Mr. Drake. (Opening Br. 54.) Again, this Court presently lacks jurisdiction to review the propriety of the Corps' 2009 decision, which the district court remanded to the Corps. In the alternative, the district court rejected the Tribe's contention because the Corps "did its own investigations into the locations of historic properties." (Add. 45.) The Tribe has not engaged the district court's analysis or directly attacked the court's holding, so the judgment should be affirmed. *See Fair*, 480 F.3d at 869; *Patterson*, 779 F.3d at 803; *Robbins*, 794 F.3d at 992.

position concerning decisions the Corps already had made. The district court correctly held that the statute of limitations had expired on the Tribe's claims concerning the Corps' 2003 farm-road exemption decision. The court also correctly held that the Corps' 2006 farm-road exemption decision did not constitute an NHPA "undertaking." Because the district court remanded the 2009 nationwide-permit verification to the Corps, that action is not properly before this Court. But if the Court were to review that action, it should hold that the 2009 gully crossings qualified for Nationwide Permit 14. The district court's judgment therefore should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,552 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

I further certify that this brief has been scanned with a commercial virus-scanning program and is free from viruses.

s/ *Nicholas A. DiMascio*
NICHOLAS A. DIMASCIO

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system.

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