UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-4283

Sisseton-Wahpeton Oyate of the Lake Traverse Reservation;
Dave Flute, Chairman,

Plaintiffs - Appellants,

vs.

United States Corps of Engineers; Colonel John W. Henderson, in his official capacity as District Commander; Steven 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, THE HONORABLE ROBERTO A. LANGE

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SUMMARY OF THE CASE

From 2000 to 2009 the U. S. Army Corps of Engineers ("Corps") stacked a series of five letters verifying Clean Water Act farm road exemptions and nationwide permits authorizing Merlyn Drake ("Drake") to build a one-mile road-and-bridge system in and near Enemy Swim Lake. By 2009, Drake was still constructing this system but had changed his intent from purported farming to the development of one or more lakeshore residences. Drake's activity also changed as he bulldozed 2,000 feet of shoreline, likely including burial mounds of the Sisseton-Wahpeton Oyate ("SWO or Tribe"). The Tribe raised environmental and legal concerns with the road, which the Corps agreed to address, and did so in a decision letter to the Tribe in 2010. Despite the Tribe presenting new statutory claims and despite Drake's change in activity, the Corps rejected the Tribe's claims and determined that Drake's project could continue. The Tribe filed suit.

The district court ultimately dismissed most of the Tribe's claims, finding: (1) the Corps' 2010 letter to the Tribe was not final agency action; (2) the Tribe's claims accrued on January 25, 2005, when a Tribal employee attended a public meeting discussing the Corps' initial three letters to Drake; (3) the statute of limitations, 28 U.S.C. § 2401(a), was jurisdictional; and (4) the Tribe's challenges to the two most-recent Corps decisions did not merit injunctive relief. The Tribe requests 20 minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT

The Sisseton-Wahpeton Oyate of the Lake Traverse Reservation ("SWO" or "Tribe") is a federally recognized Indian tribe and is not a corporation.

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Lorentz, Melissa (2014) "Engineering Exceptions to Historic Preservation Law: Why the Army Corps of Engineers' Section 106 Regulations Are Invalid," William Mitchell Law Review: Vol. 40: Iss. 4, Article 11. 54

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337, and 5 U.S.C. § 702. Amended Complaint ("Am. Compl."), p. 2, ¶ 5, Appellants' App. 96. The district court issued three interlocutory orders and a final order on September 29, 2016. ECF 93. The Tribe timely filed its notice of appeal on November 21, 2016. ECF 95. This Court has jurisdiction to review the district court's orders pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the Tribe's claims accrued at the time of a public meeting on January 25, 2005, discussing the Corps' verification of farm road exemptions and nationwide permits to Drake, or at a later date when the misrepresented activities at issue deviated from the previous farm road verifications and caused injury to the Tribe?

   Izaak Walton League of Am., Inc. v. Kimbell, 558 F.3d 751 (8th Cir. 2009).

   Herr v. U.S. Forest Serv., 803 F.3d 809 (6th Cir. 2015).

2. Whether the statute of limitations, 28 U.S.C. § 2401(a), is jurisdictional and not subject to equitable tolling, or should be tolled under the circumstances presented?

   United States v. Kwai Fun Wong, 135 S. Ct. 1625 (2015).

   B.B. Anderson v. U.S. Dept. of Housing and Urban Dev., 678 F.3d 626 (8th Cir. 2012).

   Loudner v. United States, 108 F.3d 896 (8th Cir. 1997).

   Herr v. U.S. Forest Serv., 803 F.3d 809 (6th Cir. 2015).

3. Whether the Corps of Engineers' 2010 decision letter addressing the Tribe's Clean Water Act claims, including new arguments on recapture, stacking permits, and violations of the National Historic Preservation Act, 54 U.S.C. § 300101, *et*

seg., constitutes final agency action under the Administrative Procedure Act, 5 U.S.C. §§ 551-559 and 701-706?

Bennett v. Spear, 520 U.S. 154 (1997).

4. Whether the Corps stacked a series of farm road exemption and nationwide permit verifications in violation of Section 404 of the Clean Water Act, 33 U.S.C. § 1344?

Reissuance of Nationwide Permits, 72 Fed. Reg. 11092, 11100 (Mar. 12, 2007).

Issuance of Nationwide Permits, 67 Fed. Reg. 2020, 2063 (Jan. 15, 2002).

5. Whether the Corps violated the National Historic Preservation Act by failing to treat Drake's road as a single undertaking and failing to consult with the Tribe on any portion of Drake's road-and-bridge system?

Comm. to Save Cleveland's Huletts v. U.S. Army Corps of Eng'rs, 163 F. Supp. 2d 776 (N.D. Ohio 2001).

Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985).

STATEMENT OF THE CASE

A. Factual Background

Merlyn Drake ("Drake") has filed six Applications for a Permit with the U.S. Army Corps of Engineers (the "Corps") under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344. In response, the Corps issued three verification letters to Drake to place fill in Enemy Swim Lake under the CWA's farm road exemption. The Corps has also issued three verification letters to Mr. Drake to place fill in Enemy Swim Lake pursuant to various Corps nationwide permits ("NWP"). All of the Corps' verifications pertain to the eastern portion of Enemy Swim Lake and its creek, inlet, and wetland that serves as a filter for a drainage basin emptying into the lake. Drake's land is surrounded by Tribal and Indian trust land.

First, in 1998, Drake initially proposed to access his shoreline on the north side of the inlet by installing a 70-foot bridge over the inlet, which the Corps treated as an exempt farm road. Appellants' App. 21. Drake abandoned this proposal.

Second, on June 6, 2000, the Corps issued Drake a NWP 26 in order to construct an access road to Drake's "house site being built" on the south side of the inlet. Appellants' App. 6.

Third, the Corps issued Drake a NWP 14 on December 4, 2003, in order for Drake "to accomplish a road system and to unify residents to a single road complete with recorded easements." Appellants' App. 25. *See also* Appellants' App. 11-14 (map and drawing).

Three additional approvals – two farm road exemptions and another NWP – authorized Drake to construct the majority of a continuous one-mile, two-lane, road-and-bridge system to cross the inlet, wetland, and creek on the east side of Enemy Swim Lake. These are the Corps' approvals that the Tribe is challenging in its Amended Complaint. They should be treated as a single project.

Fourth, on December 2, 2003, the Corps verified a farm road exemption for a significant road through the heart of the lake's eastern inlet and wetland. Appellants' App. 23. This is the first Corps' authorization for Drake to build a road to the north shoreline.

Fifth, on May 1, 2006, the Corps granted a second farm road exemption for Drake to place additional fill in Enemy Swim Lake for a bridge across the creek and a road on each side to connect to the 2003 farm road. Appellants' App. 43.

Sixth, and finally, on May 4, 2009, the Corps approved Drake's work under NWP 14 for "the installation of two culverted road crossings in two linear wetlands to provide access to private property" to complete the final phase of his road system. Appellants' App. 81.

In short, this road is perfectly suited to develop 2,000 feet of shoreline that Drake owns on the north side of the inlet.

Enemy Swim Lake is of tremendous historical, cultural, and religious significance to the Tribe. Appellants' App. 81, ¶2. The Tribe's most recent Treaty, 15 Stat. 505, was negotiated on its shores and the lake is named in memory of a historic Dakota battle. It is located entirely within the exterior boundaries of the Tribe's reservation, and is approximately 2,100 acres in size. Appellants' App. 134-135. There are many burial grounds on or near the lake, ceremonies are still conducted at the lake, and members spear and catch fish for sustenance. *Id.* Today, approximately 88% of the shoreline is still owned by the Tribe and its members and held in trust by the United States. Appellants' App. 143.

The Tribe contacted the Corps in 2009 when Drake entirely denuded 2,000 feet of the lake's shoreline and Drake's purported farm road, which was still under construction, was being used to excavate the very farm land it was supposed to access. Drake's activities resulted in quantifiable damage to Enemy Swim Lake. In 2009 the Corps admitted to the press that, "I don't think there's any question the road is being used for things other than ag-related activity." *See* Am. Partial Answer, ECF 28, ¶48. On July 31, 2009, the Corps and the Tribe first participated in a joint site visit and then met at the Tribal offices to discuss. Drake's drastic

change from the asserted farming activity to excavation and development was obvious, RA 2968, RA 3007 (Oct. 2008):

Despite issuing farm road exemptions and NWP verifications several years earlier, the Corps admits that during the July 31, 2009 site visit "Merlyn Drake informed the Corps and Tribal officials that his road was not then complete." Am. Partial Answer, ECF 28, ¶29. Drake was building the one-mile road system himself with dozens of pieces of heavy equipment that he owns. At a meeting on July 31, 2009, the Corps invited the Tribal Council to present their concerns to the Corps about the change in Drake's project. Appellants' App. 131, ¶19, 145. Joel Ames, the Corps' Tribal liaison officer represented to the Tribal Council that, "[w]e understand everybody's frustration …. 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. It's not like it stops here." Appellants' App. 158. [1]

The Corps had not kept the Tribe as informed about the Corps' knowledge of Drake's non-farm activities as it had other stakeholders. Appellants' App. 130-131, ¶¶11-21. Drake had verbally informed the Corps on September 22, 2008, that another extension of the road was necessary, not for farming, but for a second, future residence, Appellants' App. 46, which was odd given that Drake had just built a lakeshore home in 2000, Appellants' App. 1. Yet Drake omitted any reference to such residential development when filing his 2008 Application For Department Of The Army Permit. Appellants' App. 48-54.

The Corps was upfront with Senator Thune, then-Senator Tim Johnson, and then-Representative Herseth, informing each in early 2009 that Drake's road was needed to access a new residential site. Appellants' App. 59, 61, 65. In contrast, when the Tribal Council directly asked the Corps if Drake was using his land for

[1] Then-Chairman Michael Selvage explained to the Corps during this meeting: "So when this incident with Mr. Drake started, we are only talking about ourselves, we are not talking about anybody else. We are talking from our cultural historical perspective. And that's what our concern is now you guys have been up there and you seen what it looks like now. We understand that permits issued were for agricultural purposes. That's not what's going on. I mean you could take a look at those photographs that I've seen. I have been around here all my life. I understand agriculture, that's not what's happening. I think those permits were given for one purpose, and they're being misused or being abused…. We want that lake preserved by all means for future generations." Appellants' App. 134-135 .

something other than farming, the Corps concealed the known facts and failed to disclose Drake's admitted intent for residential development. Appellants' App. 145. It wasn't until the Tribe received the Corps' response to a Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), request on October 26, 2009, that the Tribe received Corps documents confirming that Drake was no longer using his land for purported farming activities. This is also the first time the Tribe received Drake's many applications and the Corps' repeated verifications. More recently, Drake himself admitted to the Tribe that he is developing 18 lots of lakeshore property. ECF No. 77-1.

In response to Drake's new activities, the Tribe submitted new evidence and new CWA and National Historic Preservation Act, 35 U.S.C. § 300101, *et seq.* ("NHPA"), arguments never addressed previously by the Corps. As the opening paragraph in the Tribe's Amended Complaint alleges, the Tribe, "in 2009 and 2010 challenged several United States Army Corps of Engineers' decisions allowing unregulated fill of Enemy Swim Lake within the Lake Traverse Reservation in South Dakota, which violate the Clean Water Act." Am. Compl., ¶1, Appellants' App. 95.

For example, the Tribe submitted new evidence to the Corps: water quality studies from a South Dakota State University professor showing a significant deterioration that resulted from Drake's new unregulated activities; sworn

statements from dozens of Drake's neighbors that Drake does not conduct any agricultural activities; and Drake's recent mortgages on the so-called farm land in excess of $1.625 million dollars. ECF 18-30. The Tribe also submitted new arguments: Drake's new development activity was recaptured under the Clean Water Act and now required full permitting; the Corps' issuance of piecemeal verification letters had resulted in unlawful stacking, precluding comprehensive review of impacts from Drake's activities; Drake's so-called "farm" road violated mandatory Corps' best management practices ("BMPs"); and that the Corps had violated the NHPA by repeatedly failing to consult with the Tribe or its Tribal Historic Preservation Officer ("THPO") about Drake's activities in an area surrounded by Tribal and individual trust land with known cultural significance to the Tribe. ECF 18-8.

In response, the Corps issued a decision rejecting each of the Tribe's arguments in 2010. Appellants' Addendum ("Add.") 1. According to the Corps' 2010 decision, the new road system would continue to be constructed in Enemy Swim Lake under the ruse of the Corps' prior letters verifying farm road exemptions and NWPs, despite Drake's admitted change in use and drastic change in activity. The result of the Corps' 2010 decision was that Drake could proceed with his large-scale excavation project effectively unregulated and the Corps would ignore Drake's demonstrated harm to Enemy Swim Lake. The Tribe filed

this lawsuit to challenge the Corps' 2010 decision as well as the lawfulness of the underlying string of Corps exemptions and nationwide permits.[2]

B. The District Court's Decisions

The Corps moved to dismiss the Tribe's Amended Complaint arguing that the statute of limitations had run, the 2010 letter was not final agency action, and that the only final agency actions are the verifications the Corps issued to Drake, which come with no public notice or comment period. The district court granted the Corps' motion to dismiss in part, but did not state which of the Tribe's claims were dismissed and which remained. The district court dismissed: (1) "any and all Counts and claims challenging Corps' exemptions and Nationwide Permit determinations that were discussed during the January 25, 2005, meeting as having been granted, authorized, or determined;" (2) "claims the viability of which hinges on considering the August 30, 2010, letter to be a final agency action;" and (3)

[2] The Tribe's Amended Complaint sets forth 10 Counts: Count 1 challenges the initial farm road exemption determination of Dec. 2, 2003; Count 2 is an agency inaction claim; Count 3 seeks regulation of Drake's ongoing activities; Count 4 challenges the Corps' "Determination that Drake's Activities Have Not Been Recaptured"; Count 5 challenges the Corps' "Determination that Drake's Road Complies With Its Best Management Practices"; Count 6 challenges the Corps' "Determination That Drake's Fill Of A Spring Feeding Enemy Swim Lake Need Not Be Regulated"; Count 7 challenges the Corps' "Determination To Permit Drake To Stack Permit Applications, Exemptions, and Nationwide Permits"; Count 8 alleges that the Corps "violated the National Historic Preservation Act"; Count 9 challenges the Corps' failure to mitigate any of Drake's projects; and Count 10 is the "Intentional Violation of the Clean Water Act." (The Tribe has determined not to pursue Count 10.) *See* Appellants' App. 95.

those claims challenging, "the Corps' decisions not to modify, suspend, or revoke" its exemptions and NWPs. *SWO v. Corps of Engineers*, 918 F.Supp.2d 962, 975 (D.S.D. 2013) ("*SWO I*"), Appellants' Add. 8. Thus, the district court determined to hold an "evidentiary hearing to determine what exemptions and Nationwide Permit determinations were in fact discussed at the January 25, 2005 meeting." *Id.*

After a two-day evidentiary hearing, the district court issued a second Order, which confirmed its first Order and granted the Corps' motion to dismiss with respect to the Corps' verifications to Drake in 1998, 2000, and 2003. "This is not to say that all of the Plaintiffs' claims against the Corps are time barred. Some, but fewer than all, of the Plaintiffs' claims were filed within the statute of limitations period." *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. United States Corps of Eng'rs*, 2014 U.S. Dist. LEXIS 130732, *26 (D.S.D. Sept. 18, 2014) ("*SWO II*"), Appellants' Add. 24. Unlike the first Order, the district court expressly preserved "those remaining claims, for permit determinations and other matters that occurred within six years of the Complaint being filed [that] are not otherwise dismissed." *Id.* Still, the court did not state which of the Tribe's claims were preserved and which were dismissed.

The Tribe understood the district court's preservation of "permit determinations and other matters" to pertain to its recapture (Am. Compl. Count 4), best management practices (Count 5), and stacking claims (Count 7) because each

would require a "permit determination" regarding Mr. Drake's activities. Further, each of these claims, as well as the Tribe's NHPA claim (Count 8), occurred within six years of the initial filing of the Complaint in this action. All involved the Corps' determination not to regulate or permit Drake's activities under the CWA and NHPA.

After the district court's second Order, the Corps produced the Administrative Record and it excluded every document submitted to the Corps by the Tribe. The Tribe moved to compel production of the entire Administrative Record held by the Corps, especially the Tribe's new evidence and arguments pertaining to recapture, BMPs, stacking, and the NHPA, because these claims involved the Tribe's request for a "permit determination" and occurred within six years of filing of the action. In denying the Tribe's motion to compel, the district court determined that the Tribe "has re-characterized most of its claims as failure-to-act claims not restricted to a single point in time. In essence, the Tribe now is arguing that the Corps was required to make a new regulatory determination with regard to all of Drake's previous projects when it received information that could lead to the conclusion that Drake was engaged in non-farming activities." *SWO v.*

Corps of Eng'rs, 124 F.Supp.3d 958, 963 (D.S.D. 2015) ("*SWO III*"), Appellants' Add. 28.[3]

The Tribe's Amended Complaint contains numerous references to the Corps' agency inaction or failure to act for not making a new regulatory determination in regard to Drake's change in intent and change in activity. *See* Am. Compl., Appellants' App. 95 at ¶¶ 1, 11-12, 18, 32, 51, 63, 66, 92, 98-99, 113-115, 122, 126, 128, 132, 136, 138-142, 153-155, 175-176, 190, 199, 201, 209, 228, 229, 233, and 234. But the district court disagreed and stated that the Tribe "has not sought leave to file a second amended complaint, and this Court will not allow the Tribe to amend its claims through a motion to compel or a motion to supplement the record." *SWO III* at 963, Appellants' Add. 28.

Consequently, the district court's third Order determined that the claims dismissed "fell within three categories": (1) "final determinations on which the statute of limitations has run"; (2) claims pertaining to the Corps' decision issued to the Tribe in 2010 did not pertain to final agency action; and (3) the Tribe could not challenge "non-justiciable enforcement decisions not to modify, suspend or revoke a Section 404 permit." *Id.* at 962, Appellants' Add. 27.

[3] Prior to the first evidentiary hearing date, the Tribe specified that, "Count 2 is an agency inaction claim. The Corps has no discretion to issue a farm road exemption to a developer building a road in the waters of the United States." ECF 39, p.10.

The district court then specified that what remained for decision was a small fraction of the Tribe's 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.

Id. 964, Appellants' Add. 29.[4] Even the Tribe's NHPA and CWA claims were count was diluted due to being limited to the Corps' 2006 farm road exemption decision for a bridge and 2009 NWP for two additional wetland crossings.

Finally, the district court ruled against the tribe on the merits of those portions of claims that remained, save for determining that the Corps did not follow the NHPA when issuing a NWP to Drake in 2009, for which it ordered a limited remand. *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. United States Corps of Eng'rs*, 2016 U.S. Dist. LEXIS 134399, *45-46 (D.S.D. Sept. 29, 2016), *SWO IV*, Appellants' Add. 49. This appeal followed.

[4] The Tribe determined not to pursue the "coaching" claim (Am. Compl. Count 10).

C. The Administrative Record

The Administrative Record is a one-sided story, omitting any of the Tribe's evidence and argument to the Corps. [5] The Administrative Record is deficient because the Corps stipulated that it never consulted with the Tribe until after the Corps' piecemeal authorizations.[6] Consequently, the evidence, photos, videos, and arguments provided by the Tribe in 2009 and 2010 have been excluded as outside of the Administrative Record. Yet, Drake's most egregious conduct occurred after the Corps issued its verifications, but before the Corps decided against the Tribe's arguments in 2010. Consequently, the Administrative Record is at odds with the real problems on the ground that created the Tribe's legal injury.

SUMMARY OF THE ARGUMENT

The district court's statute of limitations analysis was legally deficient in three ways. First, the Tribe had yet to suffer legal injury at the time the Corps discussed its regulation of Drake at a January 25, 2005 meeting. Second, the Tribe alleged several Clean Water Act claims that accrued at different times and certainly after all the verifications issued to Drake. Third, the statute of limitations, 28

[5] The Tribe requested the Court to order the Corps to produce the Administrative Record prior to the evidentiary hearing. ECF 33, p.7; ECF 39, pp.15-16. The Administrative Record was not prepared until after the district court ruled on the statute of limitations.

[6] August 15, 2013 Hearing Transcript, p.249, lines 5-12, ECF 45.

U.S.C. § 2401(a), is not jurisdictional and is subject to equitable tolling, which is appropriate here.

The Corps' 2010 decision letter to the Tribe was final agency action under the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-706 ("APA"). The Corps' 2010 decision addressed the Tribe's recent injuries, considered new evidence, and new legal arguments, based upon Drake's change in intent and activity, all of which the Corps had previously not considered.

The district court determined that the Corps' 2009 NWP did not involve stacking of permits, which contradicted Drake's repeated representations in his applications that he is building a single road-and-bridge system in phases.

The district court determined that the Corps need not consult with the Tribe pursuant to the NHPA on Drake's projects, except for the very last phase. Consultation should have occurred all day long.

STANDARD OF REVIEW

This Court will "review de novo whether a statute of limitations bars a party's claim." *Smithrud v. City of St. Paul*, 746 F.3d 391, 395 (8th Cir. 2014), *quoting Emp'rs Reinsurance Co. v. Mass. Mut. Life Ins. Co.*, 654 F.3d 782, 791 (8th Cir. 2011).

The district court's determination that the Corps' 2010 decision letter to the Tribe did not constitute final agency action is reviewed de novo. *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 247 (3rd Cir. 2011).

This Court will also,

> review de novo a district court's decision on whether an agency action violates the APA. Under the APA, we will only set aside the [agency's] action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

Friends of the Norbeck v. U.S. Forest Serv., 661 F.3d 969, 975–76 (8th Cir. 2011) (citations omitted). The Tribe's CWA and NHPA claims are reviewed under the APA.

ARGUMENT

I. EACH OF THE TRIBE'S CLAIMS WAS TIMELY FILED

This Court has determined that, "the choice of the appropriate rule for determining when a claim accrues is a matter of law." *Sell v. U.S. Dept. of Justice*, 585 F.3d 407, 409 (8th Cir. 2009). Because the APA does not contain a statute of limitations, the general six-year limit on actions against the federal government found in 28 U.S.C. § 2401(a) applies. *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 758-59 (8th Cir. 2009).

To bring suit under the APA a plaintiff must satisfy "two separate requirements." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). First, a federal court's review applies to "final agency action for which there is no other

adequate remedy." 5 U.S.C. § 704. Second, the plaintiff must have "suffer[ed] legal wrong because of agency action" or been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

"Once the challenged agency action becomes final and invades a party's legally protected interest, the party's right to redress that injury under the APA accrues and 28 U.S.C. § 2401(a)'s six-year clock starts ticking." *Herr v. United States Forest Serv.*, 803 F.3d 809, 819 (6th Cir. 2015). A "right of action first accrues" under 28 U.S.C. § 2401(a), "when the plaintiff knows or has reason to know of the injury complained of." *Izaak Walton*, 558 F.3d at 759 (internal citations omitted). "A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Id.*[7]

[7] More recently, this Court determined that "[f]or purposes of § 2401(a) a claim accrues when the plaintiff either knew, or in the exercise of reasonable diligence should have known, that he or she had a claim." *B.B. Andersen v. U.S. Dept. of Housing and Urban Dev.*, 678 F.3d 626, 629 (8th Cir. 2012). This test is very similar to the discovery rule. "Generally, this court applies the discovery rule to determine when a claim accrues. The discovery rule provides that a plaintiff's cause of action accrues when he discovers, or with due diligence should have discovered, *the injury that is the basis of the litigation*." *Admin. Comm.of the Wal-Mart Stores, Inc. v. Soles*, 336 F.3d 780, 786 (8th Cir. 2003) (emphasis added). "Federal courts, to be sure, generally apply a discovery accrual rule when a statute is silent on the issue. But in applying a discovery accrual rule, we have been at pains to explain that discovery of the *injury*, not discovery of the other elements of a claim is what starts the clock." *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (emphasis added).

A. The District Court Erred By Ignoring The Tribe's Injury And Only Focusing On The Corps' Exemption And NWP Letters Issued To Drake

"If a party cannot plead a 'legal wrong' or an 'adverse effect,' it has no right of action. No doubt, the party must *also* plead final agency action, but that is another necessary, but not by itself a sufficient, ground for stating a claim under the APA." *Herr*, 803 F.3d at 819 (internal citations omitted). Here, the district court determined that the Tribe as an entity became aware of all the farm road exemptions and NWPs issued prior to January 25, 2005, at a meeting hosted by then-Senator Tim Johnson's office, and attended by, among others, two tribal employees, Alvah Quinn and Floyd DeCoteau. But the district court failed to determine that the Tribe had at that date suffered a legal wrong or was adversely affected or aggrieved by the Corps' exemption determinations and NWPs, sufficient to state an APA claim.

In 2005, some suspected that Drake, a retired mechanic, was going to construct the road in order to develop 2,000 feet of shoreline he owned on the north side of the inlet. But both Drake and the Corps vehemently denied that was the case. By late 2008 the Tribe had become aware of Drake's excavation, construction, and development activity. This drastic change in activity harmed the Tribe and Enemy Swim Lake's waters in 2009. Subsequently, the Corps' decision letter issued to the Tribe in 2010 – deciding not to recapture the project, to permit

the stacking of farm road exemptions and NWPs, to ignore mandatory BMP regulations, and not to consult under the NHPA – each resulted in injury to the Tribe at about the same time the physical injury occurred to Enemy Swim Lake of which the Tribe complains.

The Tribe argued, "[a]s of the January 25, 2005, public meeting with Senator Johnson's office, there was no known injury to the Tribe and no basis on which this lawsuit could have been initiated." ECF 65, p.1. This is true because "the Tribe is not challenging congressional policy here; the Tribe's primary injury is that the Corps did not regulate development activities, which started, at the earliest, in 2008." ECF 65, p.2. But the district court determined not to permit testimony pertaining to the Tribe's injuries during the evidentiary hearing.:

> **THE COURT:** This doesn't seem to bear on whether the Tribe was aware of the Nationwide Permits and exemptions in 2005. This does very – this is significant, the Court understands, to the merits of the case. But we seem to be straying again from what the focus of this evidentiary hearing is.
>
> **MR. PAULSON:** I will move on, Your Honor.
>
> **THE COURT:** All right.
>
> **MR. PAULSON:** I was only trying to establish that the Tribe had another injury – the water quality – and that the date of their discovery was 2009.

ECF 45, p.146, lines 13-23. Instead, the district court focused on what verifications were discussed at the January 25, 2005 public meeting.

B. Each Of The Tribe's Claims Should Be Analyzed Individually Because Most Pertain To Post-2005 Injury And Agency Action

The Tribe argued that the district court must analyze each of the Tribe's claims individually to ascertain whether they could accrue in 2005. ECF 29, pp.17-21. Likewise, in its Status Report prior to the evidentiary hearing, the Tribe argued that the, "facts relevant to the claims in each of these Counts should be addressed at the evidentiary hearing." ECF 33, p.2. When opposing the Corps' motion in limine to exclude such evidence, the Tribe further explained that the accrual date for each of its claims is different:

> The Court must determine when each Count subject to the Corps' motion to dismiss accrues. Until the Court determines when each Count accrues, the Tribe should be permitted to present evidence supporting each accrual date. Limiting the evidentiary hearing to the January 25, 2005, meeting would be legal error because it was not even possible for the Corps of Engineers to discuss Counts 2, 3, 4, 5, and 6 at the 2005 meeting, nor was the Tribe's agency inaction claims (Count 2) known to the Tribe in 2005.

ECF 39, pp.1-2.

At the beginning of the first evidentiary hearing, the Tribe once again argued that the date of accrual depends on the underlying claim:

> **MR. PAULSON:** . . . And so, you know, today our presentation -- we would like to, you know, bring the Court's attention to each individual claim, because they are quite diverse. And we do believe they actually would accrue at different times, not just at that January 25th, 2005, meeting or even -- they have different starting dates later on.
>
> **THE COURT:** Just to be clear, the Court -- well, as counsel well know, the Plaintiffs' Complaint in its entirety is not in jeopardy here.

> The Court's ruling in the Opinion and Order granting in part and denying in part the motion for partial dismissal probably on balance was favorable to the Tribe with regard to what can proceed. There was a much more sweeping motion to dismiss. But as to the permits and exemption decisions prior to January of 2005, those are in jeopardy, and that's what the Court wants to focus on here, rather than sort of an individual analysis of each of the claims and when they may have accrued

ECF 45, Aug. 15, 2013 Hearing Transcript, pp.8-9. In its post-evidentiary hearing brief, the Tribe argued that its injuries were not discoverable in 2005. ECF 61, pp.5, 8. Thus, the Tribe again urged the district court to "analyze each of the Tribe's claims." ECF 61, pp.2-10.

One of the Tribe's 10 claims, Count 1, challenged the Corps 2003 private letter verifying the first phase of Drake's road. The remainder of the Tribe's claims post-date the Corps' farm road exemptions and NWPs. The Tribe's recapture claim, for example, demonstrates this point.

1. The Tribe's Recapture Claim, By Law And Fact, Can Only Arise When There Is A Change In Use

In late 2008, Drake's activity of placing fill in Enemy Swim Lake changed from a purported farm road to a road utilized solely for excavation, construction, and development. The first time that the Corps acknowledged a potential recapture claim was during a meeting with the Tribal Council on July 30, 2009:

> **Norma Perko (Tribal Council member):** I have a question. What I'm hearing is as long as this man keeps telling you that this is agriculture purposes, he can continue to do this no matter what it does

> to the wetlands and the lake as long as he keeps saying it's agricultural?
>
> **Dave LaGrone:** I guess I'd like to try to answer that because I think Steve's comment kinda goes into that too . . . . The question is, ok, if he, if he acknowledges, let's just say hypothetically he acknowledges he is gonna put cabins up there, does it change this road? Does it? Do we all of a sudden now go back and recapture this road and say ok well now the whole use of the road is something other than agricultural you have to do things different on this. That's the question we were talking about. Is there a case law that would say yes they had to or is there a case law that says no they don't? The attorneys have to sit down and build their, each side of the case, you know.[8]

Later during the same 2009 meeting, the Corps informed the Tribe that "if there is a change in use, [then] that would be, that might initiate the recapture, and hey that's a 404 issue."[9]

During the district court's evidentiary hearing a Corps official testified that recapture occurs at a later date when there is a change in use:

> **THE COURT:** The Court's question is: What does it take in order to recapture an activity that has been previously deemed exempt, Mr. Naylor?
>
> **THE WITNESS:** There is a two-part test. There needs to be a change in use and a change in flow or circulation, and the other part two-part test is, again, change in use or a reduction in reach or – that is the two-part test.[10]

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[8] Appellants' App. 144-145 (emphasis added).

[9] Appellants' App. 153.

[10] Steve Naylor testimony, August 15, 2013 Hearing Transcript, ECF 45 p.202, lines 2-8.

Likewise, in its briefing to the district court, the Corps explained that recapture results from a change in use. ECF 27, p.6; ECF 91, pp.5-6.

The Tribe only became aware of Drake's change in use in late 2008 to facilitate excavation and construction (allegedly for a second residence), rather than farming. Thus, as a matter of fact and law, the Tribe's recapture claim accrued when the change in use occurred, and this lawsuit was timely filed in 2011.

The same rationale – a wholesale change in activities –applies generally to Counts 1-9 of the Amended Complaint.

2. The Tribe's Claim That The Corps' Initial Exemptions Were Arbitrary And Capricious (Count 1) Did Not Accrue Until After 2005

The Tribe argues that its claims relating to the Corps' pre-2005 exemption decisions qualify for equitable tolling, as the statute of limitations in 28 U.S.C. § 2401(a) is not jurisdictional. The facts pertaining to the Tribe's injury alleged in Count 1 were also not known to the Tribe at the time of Senator Johnson's January 25, 2005 meeting. As of that date, there were not enough facts on the ground for the Tribe to conclude that the road being constructed was not a farm road. In 2005, the Corps insisted that the road being constructed would be used as a farm road.[11]

[11] It wasn't until late summer of 2008, at the earliest, when a person exercising reasonable diligence would know that they suffered an injury and had a claim

(footnote continued)

The Corps issued a written report to Senator Johnson on April 16, 2005 (without copying the Tribe), stating that, "the Corps has no authority to speculate on a change of land use at some future date, when the purpose during the issuance of the permit is for an exempt activity." Appellants' App. 187. The Corps cannot have it both ways – if the Corps could not speculate on a change of land use on April 16, 2005, then neither must the Tribe engage in such speculation on January 25, 2005.

Only after receiving Corps records on October 26, 2009, pursuant to a FOIA request did the Tribe receive information that support its allegations in Count 1 that Drake was not acting as a farmer even prior to 2005. *See* Am. Compl., Appellants' App. 118, ¶¶177, 178.

The statute of limitations on Count 1 did not accrue in 2005.

C. Equitable Tolling Is Permitted Because 28 U.S.C. § 2401(a) Is Not Jurisdictional

The Tribe repeatedly argued that 28 U.S.C. § 2401(a) is not jurisdictional and that the statute of limitations on the Tribe's challenge to the legality of the

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(footnote continued from previous page)

against the Corps. Prior to the first evidentiary hearing 8 Tribal members and 24 non-members submitted affidavits attesting that late in 2008 Drake expanded his road system, utilized the new road to excavate the very farm land he sought to access, denuded approximately 2,000 feet of shoreline, and stripped the land of its vegetation. *See* ECF 18, 1-51. The resulting fill was then used to further construct the present-day road, which was unfinished when the Tribe filed this lawsuit.

Corps' pre-2005 exemption decisions to Drake should be equitably tolled. *See* Plaintiffs' Response to Motion to Dismiss, ECF 29, pp.21-22; Plaintiffs' Opposition to Defendants' Motion in Limine, ECF 39, pp.13-15; Plaintiffs' Evidentiary Hearing Brief, ECF 61, pp.11-12; and Plaintiffs' Evidentiary Hearing Reply Brief, ECF 65, pp.7-10. But the district court determined that 28 U.S.C. § 2401(a) is jurisdictional, *SWO I*, 918 F.Supp.2d at 972, Appellants' Add. 14, and upheld its determination after the Tribe moved for reconsideration based upon new law, the Supreme Court's 2015 decision in *United States v. Kwai Fun Wong*, 135 S.Ct. 1625 (2015). *SWO III*, 124 F.Supp.3d at 971, Appellants' Add. 29.

Under the rationale of *Kwai Fun Wong*, 135 S.Ct. at 1638, the Corps must prove that 28 U.S.C. § 2401(a) is jurisdictional, and there exists a rebuttable presumption that equitable tolling applies to suits brought against the United States. *Kwai Fun Wong*, 135 S.Ct. at 1631. S*ee* Appellants' Add. 52 (text of 28 U.S.C. § 2401).

To rebut this presumption, the "Government may therefore attempt to establish, through evidence relating to a particular statute of limitations, that Congress opted to forbid equitable tolling." *Kwai Fun Wong.* 135 S.Ct. at 1631 "One way to meet that burden . . . is to show that Congress made the time bar at issue jurisdictional." *Id.* at 1631. But the Government "must clear a high bar to establish that a statute of limitations is jurisdictional." *Id.* at 1632. The Supreme

Court adheres to a clear statement rule requiring Congress to plainly state that the statute of limitations is jurisdictional. Absent a clear statement by Congress, "courts should treat the restriction as nonjurisdictional." *Id.* "[W]e have made plain that most time bars are nonjurisdictional." *Id.*

The procedural bar must have "jurisdictional consequences." *Id.* at 1632. Most statutes of limitations,

> do not deprive a court of authority to hear a case. That is so . . . even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are); indeed, that is so however emphatically expressed those terms may be…. (Internal citations omitted.)

Id. "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." *Id.*

In determining that 28 U.S.C. § 2401(b) is not jurisdictional, the Supreme Court in *Kwai Fun Wong* determined that it was "[m]ost important" that § 2401(b) only addresses timeliness and does not pertain "to a court's power." *Id.* at 1632. Congress may utilize language that is mandatory and emphatic, such as "shall be forever barred," but that language is "of no consequence" and "not to matter." *Id.* On the other hand, "jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers." *Id.* at 1633 n.4.

There is no meaningful difference between § 2401(a) and § 2401(b) insofar as the presumption of the availability of equitable tolling is concerned. *See* Appellants' Add. 52 (28 U.S.C. § 2401(a), (b)). If anything, the language of § 2401(b) is more emphatic than §2401(a) ("shall be forever barred" versus "shall be barred"). Neither section (a), nor section (b) pertain to a court's power.

Congress has indicated that a statute of limitations is not jurisdictional when, as is the case with § 2401(a), the filing deadline is separate from the jurisdictional grant. Here, "[j]urisdiction to review agency action under the APA is found in 28 U.S.C. § 1331," *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979), but a separate statute, 28 U.S.C. § 2401(a), provides the filing deadline. "Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." *Kwai Fun Wong*, 135 S.Ct. at 1633. Further, in APA cases, the Supreme Court will "begin with the strong presumption that Congress intends judicial review of administrative action. From the beginning our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

The district court relied upon *Loudner v. United States*, 108 F.3d 896 (8th Cir. 1997), and *Konecny v. United States*, 388 F.2d 59 (8th Cir. 1967), as authority

that 28 U.S.C. § 2401(a) is not subject to equitable tolling. *SWO III*, 124 F.Supp.3d at 970, Appellants' Add. 33. But *Loudner* and *Konecny* discuss § 2401(a) in terms of conditioning the United States' waiver of sovereign immunity. "Filing within the applicable statute of limitations is treated as 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. But *Kwai Fun Wong* makes clear that the Supreme Court will decline "to count time bars as jurisdictional merely because they condition waivers of immunity." 135 S.Ct. at 1637.

More recently, the Eighth Circuit has considered a party's equitable tolling arguments under 28 U.S.C. § 2401(a). *B.B. Anderson v. U.S. Dept. of Housing and Urban Dev.*, 678 F.3d at 629. Given this lay of the land, the district court acknowledged that "[t]here is recent Eighth Circuit authority, however, that makes it difficult to be certain that the Eighth Circuit precedent . . . settles the issue in this circuit." *SWO III*, 124 F.Supp.3d at 970, Appellants' Add. 24. After the district court issued its opinion, the United States Court of Appeals for the Sixth Circuit determined in light of *Kwai Fun Wong* that 28 U.S.C. § 2401(a), "does not limit a federal court's subject-matter jurisdiction." *Herr v. U.S. Forest Serv.*, 803 F.3d at 818. This Court should also so hold.

The Court should also find that equitable tolling is justified in this case. In a unanimous opinion, the Supreme Court recently confirmed that "a litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" *Menominee Indian Tribe v. United States*, 136 S. Ct. 750, 755 (2016), quoting, *Holland v. Florida*, 560 U.S. 631, 649 (2010). The Tribe meets each element.

The Tribe diligently pursued its rights. Drake's excavation and development activities began openly in late 2008 and the Tribe timely filed the present lawsuit on November 7, 2011. The Tribe immediately disputed Drake's excavation and development activities, calling out their unlawful nature to the Corps.

The present Administrative Record confirms that Drake's Applications for a Permit never mention the large-scale excavation and development that occurred in 2009. Each of the Corps' non-public verification letters to Drake are likewise silent as to development.

Prior to Drake's development in late 2008, the activities on the ground consisted of road construction. The record also is clear that as soon as the "farm" road across the inlet allowed for heavy equipment, Drake used the road to excavate and develop approximately 2,000 feet of shoreline in 2009. This is the time when Drake's activities undeniably deviated from those in his Applications and the

Corps' verifications. This 2009 activity was not farming or agricultural in any sense and resulted in the pollution of Enemy Swim Lake.

Starting in 2009 the Tribe did all it could to monitor Drake's development and excavation to determine if the harm to Enemy Swim Lake caused by Drake could be stopped. The Tribe contacted the Corps and was instructed to provide any and all information to the Corps and that the Corps would address the Tribe's concerns and issue a decision.

The Tribe also worked with South Dakota State University Professor David German, who had conducted decades of water quality testing on the lake, to determine both the extent of the harm and the cause of the harm. Mr. German submitted an affidavit to the Corps identifying for the first time ever, a dead zone in the lake and that sediment covered nearly the entire floor of the lake on the eastern shore. German determined that Drake's activities caused both of these harms. ECF 30, Exhibit A.

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 (assuming that is the date of accrual). The misrepresentation and failure to inform occurred during the July 30, 2009 meeting with the Tribal Council. The Corps misrepresented to the Council that Drake is a farmer and that the Corps had no

knowledge of Drake's plans to develop the shoreline or build a second personal residence.

These misrepresentations prevented the Tribe from ascertaining key information that the Corps was required to disclose. The Administrative Record demonstrates that reporter Joe O'Sullivan, from the Watertown Public Opinion, called the Corps on February 25, 2009, and asked when the "Corps became aware that Mr. Drake was conducting site grading activities on his land. I told Joe I would have to review the file to answer his question + I would call him back." Appellants' App. 67. "I called Joe back and told him . . . Corps 1st informed by Drake that he is doing site grading for home access (by telephone on 9-22-2008)." Appellants' App. 67. The Corps' testimony to the Court confirmed that the first time the Corps became aware that Drake had some sort of plans to develop the shoreline was in 2008.[12]

During the July 31, 2009, meeting, the Tribe's elected leaders repeatedly asked the Corps why Drake excavated and denuded 2,000 feet of shoreline, which

[12] *See* testimony of Steve Naylor, Corps Regulatory Program Manager for South Dakota, August 15, 2013 Hearing Transcript, ECF 45, at pp.192-196 (confirming that the Corps first received information from Drake that he is building a second, personal residence on September 22, 2008, and that this information was not shared with the Tribe during the July 31, 2009 meeting with the Tribal Council).

certainly appeared to be development. The Corps acknowledged that it failed to inform the Tribe about Drake's change in intentions:

> **Q:** . . . Why didn't you provide that information to the Tribe?
> **A:** They didn't ask for any information.
> **Q:** They didn't ask you during the July 31st, 2009, Tribal Council meeting?
> **A:** Well, they did then, yeah.

August 15, 2013 Hearing Transcript, ECF 45, at p.196, lines 1-10. Then-Chairman Selvage likewise confirmed that the Corps failed to disclose Drake's change in intent:

> **A:** In the tribal council meeting there was a lot of discussion and questions of the Corps as to the purpose of that road being for construction of cabins or – other than agriculture. It was – it was our belief that the road was not just for agriculture.
> **Q:** What would the Corps tell you at that meeting?
> **A:** And they deferred to make a decision on some of that, and they said they would get back to us.
> **Q:** Did they acknowledge that they had heard from Drake and that he is doing site grading for home access?
> **A:** No.
> **Q:** They did not acknowledge that?
> **A:** No, they didn't.

Id., p.144, lines 19-25 to p.145, lines 1-3. Instead, the Corps repeatedly informed the Tribe that, "[w]e believe that his primary use out there, (the) use is agricultural," Appellants' App. 138, and that it would issue a decision addressing the Tribe's arguments. And when the Corps did respond to the Tribe in writing in 2010, the Corps still failed to disclose to the Tribe the fact that Drake was using the so-called farm road to build a second residence.

Had the Corps been honest and forthright with the Tribe and disclosed what it knew about Drake's plans to build a second residence, then the Tribe could have filed this case sooner. But the Corps did not disclose material information as to Drake's development because that information belies its obstinate position that Drake is merely a farmer. Such misleading conduct in the Corps' government-to-government relationship with the Tribe supports equitable tolling.

The Corps also requested that the Tribe pursue administrative remedies with the Corps. The Tribe made this fact known to the district court when first responding to the Corps' motion to dismiss:

> Because the COE's current litigation position – that the Tribe need not exhaust its administrative remedies – is far different than the COE prior representations to the Tribe, the COE stance on the statute of limitations should be equitably tolled. Dave LaGrone and Joel Ames, on behalf of the COE, encouraged the Tribe to present its issues and arguments directly to the COE. The Tribe relied upon Mr. LaGrone and Mr. Ames' representations and directed its concerns to the COE, which culminated in the COE addressing and deciding the very same issues contained in the Tribe's lawsuit.

ECF 29, p.17. The district court erred by determining that, "the Tribe cites no evidentiary support for this allegation, and there is none in the record." *SWO III*, 124 F.Supp.3d at 973, Appellants' Add. 35.

The Tribe informed the district court that Joel Ames, the Corps' Tribal Liaison Officer, represented to the Tribal Council that the Corps would issue a decision to the Tribe on its concerns. ECF 29, p.17. "It's not like it stops here."

Tribal Council minutes attached to M. Selvage, Sr.'s Affidavit. Appellants' App. 158. The Tribe relied upon Mr. Ames' and Mr. LaGrone's representations and proceeded to direct its concerns to the Corps. The Corps' 2010 letter to the Tribe set forth its reasons for rejecting the Tribe's evidence and arguments and ultimately determining to not take any regulatory action. The Corps addressed and decided the same issues in 2010 that are set forth in the Tribe's Amended Complaint.

The Corps also admits that it never consulted the Tribe prior to 2009; stipulating to this fact at the evidentiary hearing. ECF 45, p.249, lines 5-12. The Corps has acknowledged that there was an Executive Order, as well as a Corps Tribal Consultation Policy, throughout this time. Yet the Corps only argues that the duty to consult is not enforceable. Here, the Corps is effectively seeking to be rewarded for failing to consult the Tribe, even in the context of the NHPA, by ensuring that its failure cannot be a factor in the equitable estoppel inquiry. The Corps' failure to consult in any fashion for over eight years on any of Drake's projects certainly constitutes an extraordinary circumstance justifying equitable estoppel.

II. THE CORPS' 2010 DECISION LETTER TO THE TRIBE CONSTITUTES FINAL AGENCY ACTION

The district court determined that the 2010 letter only "communicated that exemptions and permits already had been issued to Drake, but that the Corps

would continue to monitor Drake's activities." *SWO I*, 918 F.Supp.2d at 971, Appellants' Add. 14. The standard defining final agency action is well-established: "First, the action must mark the consummation of the agency's decision making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016).

Consummation of the Corps' decision making process. The Corps' 2010 letter to the Tribe consummated the Corps' decision making as to Drake's clear change in purpose and activity. The Corps' 2010 decision was much more detailed than the Corps' verifications of farm road exemptions and NWPs to Drake. The Corps' farm road verification relied solely on Drake's application and involved no input from the public. Appellants' App. 143. By contrast, the Corps decision to the Tribe in 2010 addressed and determined specific claims raised by the Tribe. The Corps' 2010 decision involved: a site visit with the Corps, the Tribe, and Drake; additional Corps' communication with the developer; a meeting between the Corps and the Tribal Council at which the Corps represented that it was reexamining the correctness of its regulatory course with Drake and that, "It's not like it stops here," Appellants' App. 158; several months of the Corps' consideration; and a written decision to the Tribe.

Rights or obligations determined or legal consequnces. Important legal consequences flowed from the Corps' 2010 decision letter because Drake's activities were deemed not to be recaptured, purportedly were in compliance with the BMP's, did not constitute stacking, and did not violate the NHPA. Drake was now authorized to continue to maintain or place fill in Enemy Swim Lake for his development activities under the authority of the Corps' previously issued verification letters and NWPs. The Tribe owns approximately 88% of Enemy Swim Lake's shoreline and the resulting harm to the lake's water quality was not going to be regulated as required by the Clean Water Act.

Final agency action does not preclude subsequent final agency action. Just because an agency takes action at one point in time does not mean that final agency action can never occur again on the subject. The Tribe is not barred from challenging Drake's change in use and activity, which recently caused the Tribe injury and adversely affected it. The United States Court of Appeals for the Ninth Circuit Court has determined that the,

> [g]overnment should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs. If, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger. Such challenges, by their nature, will often require a more 'interested' person than generally will be found in the public at large.

Wind River Mining Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991); *N. Cty. Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 742 (9th Cir. 2009); *Nw Envtl. Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1018 (9th Cir. 2008). Here, the Tribe challenges the Corps' failure to consult with the THPO as a violation of the NHPA and the Corps' determination in 2010 not to regulate the change in Drake's intent and new activity as violating the CWA. Thus, the Tribe's lawsuit was "brought within six years of the agency's application of the disputed decision to the challenger." *Wind River Mining*, 946 F.2d at 716.

A. The Corps Addressed Recapture For The First Time In Its Letter To The Tribe In 2010

The Corps first took a hard look at recapture in its August 30, 2010 letter to the Tribe, and decided that Drake's activities were not recaptured:

> Your previous letter contends that those activities of Mr. Drake's found exempt from permitting requirements must be recaptured. We cannot agree. We have carefully considered the application of the 'recapture' clause (33 C.F.R. 323.4(c)) in this context, and we do not believe that the waters of the United States were brought into a use to which they were not otherwise subject, as a result of exempt activities.

Appellants' Add. 3. There is no mention of recapture in the Administrative Record. In a seeming paradox, the district court acknowledged that Drake's post-exemption activities could still result in recapture, noting that its decision should not "embolden . . . the Corps to disregard . . . possible recapture." *SWO IV*, 2016 U.S. Dist. LEXIS 134399 at *36, Appellants' Add. 47.

The Tribe should be allowed to challenge the Corps' decision in 2010 not to recapture Drake's change in activity, which would require a permit under the Clean Water Act. To be exempt from a permit, Drake would need to demonstrate "that [the] proposed activities both *satisfy* the requirements of Section 404(f)(1) and *avoid* the recapture provision of Section 404(f)(2)." *United States v. Brace*, 41 F.3d 117, 124 (3rd Cir. 1994); *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986). "In determining the purpose of the defendants' actions, reviewing courts have consistently looked beyond the stated or subjective intentions and determined the effect or objective purpose of the activity conducted." *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 950 (7th Cir. 2004). Thus, a proper question is whether the "actions were inconsistent with their stated purpose." *Id.* at 956. "The proper inquiry is not what could have been done but what *was* done in the past and its relationship to what [Drake] is attempting to do now." *Akers*, 785 F.2d at 822. The farm road exemption must be narrowly construed. *United States v. Huebner*, 752 F.2d 1235, 1240–41 (7th Cir.); *Akers*, 785 F.2d at 819; *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir.1983); *Brace*, 41 F.3d at 124.

B. The Tribe's Claims As To Agency Inaction, BMPs, Stacking, And The NHPA Are Likewise Timely Challenges To Final Agency Action

The Corps had never considered the following additional claims until it issued a decision to the Tribe in 2010: the Corps refused to take agency action

required by the Clean Water Act (Counts 2 and 3); the Corps' determination that Drake's two-lane, one-mile road complies with mandatory BMPs (Count 5); the Corps' determination that it did not stack multiple applications, exemptions, and nationwide permits for a unitary project (Count 7); and the Corps' determination that it never violated the NHPA for any portion of the Drake's project (Count 8).

III. THE DISTRICT COURT ERRED IN DETERMINING THAT THE CORPS HAD NOT STACKED AUTHORIZATIONS TO AVOID A PERMITTING PROCESS

In 2007 the Corps determined:

> The requirement that NWPs authorize single and complete projects applies to all NWP's. Limiting the NWP's 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 NWP's only authorize single and complete projects.

72 Fed. Reg. 11092, 11100 (Mar. 12, 2007). This new General Condition clarified "that piecemealing of activities that require Department of Army permits is prohibited." 72 Fed. Reg. at 11171. *See also* 67 Fed. Reg. 2020, 2063 (Jan. 15, 2002) (similar).

The district court noted that phased development may be authorized if "each phase is a single and complete project and has independent utility" and found that Drake's actions satisfied this test *SWO IV*, 2016 U.S. Dist. LEXIS 134399 at *41, Appellants' App. 48, *quoting*, 72 Fed. Reg. at 11125. The district court erred in three ways in its reasoning. First, the district court relied upon the Corps'

comments in the Federal Register pertaining to NWP 29, residential development. The Corps did not authorize Drake's project under NWP 29. Second, the district court never determined that Drake's final phase of the road met the single and complete project with independent utility standard. Indeed, Drake's representations and all the evidence points the other way. Third, even if the Corps approved Drake's final phase under NWP 29, the remainder of the quote pertaining to phased development explains that "[w]here the cumulative effects of phased projects would be more than minimal, these will be addressed through project-specific special conditions or by requiring an individual permit." The Tribe provided the Corps with evidence of a cumulative effect to Enemy Swim Lake from Drake's phased road project, but the Corps ignored the water quality problems (and the district court never considered the evidence because it was not included in the Administrative Record).

The district court also endorsed the Corps' authorization of Drake's final phase because "the effects of any future development activities must necessarily 'be addressed through applicable permitting requirements if and when future activities are proposed.'" *SWO IV*, 2016 U.S. Dist. LEXIS 134399 at *41, Appellants' Add. 48, *quoting* 72 Fed. Reg. at 11110. While it is true that NWP 14, "does not prohibit new projects simply because there may be future development

activities," that rationale does not apply to the final phase of Drake's road because the development activity had already occurred in late 2008 and throughout 2009.

The Administrative Record does not contain the Tribe's substantial evidence of Drake's development activities. The district court also failed to consider the full principle elicited in the 2007 NWP publication: "It would be impractical to condition use of this NWP on consideration of hypothetical effects of potential future activities." 72 Fed. Reg. at 11110. The Tribe was not concerned about potential future activities, but those excavation and development activities that had occurred. Thus, the Tribe did not urge consideration of "hypothetical effects," but real effects that have already occurred, but are excluded from the Administrative Record.

Drake's applications contradict a finding that the last phase of his road was a single and complete project. As early as January 26, 2005, Drake was quoted in the newspaper stating, "I just want to connect four pieces of property I own." Appellants' App. 28. The Tribe's stacking claim necessarily arises, at the earliest, after the Corps issues a second authorization extending the road on May 1, 2006. Appellants' App. 43. Drake's applications for a permit informed the Corps on at least five occasions that he was building a unitary, connected road-and-bridge project in phases. Appellants' App. 30, 31, 35, 46, 47-48, 55, 71.

First, is Drake's admission for the bridge he wanted to build as the second leg of his road across the inlet/lake. On September 9, 2005, Drake filed an "Application for Department of the Army Permit" to place additional fill for a bridge and road in Enemy Swim Lake. Appellants' App. 30. Drake described the purpose of this project as an extension of his most recent "farm road," "[t]o access lot 5" "from lot 2" "of which that access was gained from permit application no. 200330442." Appellants' App. 31. The first portion of the road being extended was approved by the Corps on December 2, 2003, which is the subject of the Tribe's first count in its Amended Complaint.

Second, Drake supplemented his bridge application on November 4, 2005, and again confirmed to the Corps that the proposed bridge and road would be an extension of his previous work:

> Yes – 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.

Appellants' App. 35.

Third, on October 2, 2008, Drake filed another "Application for Department of the Army Permit (33 CFR 325)" to complete the third and final phase of his road construction project. Appellants' App. 48. Drake titled the project, "Access Road (final completion)." *Id*. Drake indicated that "this road is necessary to totally

access my land," Appellants' App. 49, indicating a progressive intent to extend the road and associated water crossings across his land.

Fourth, Drake called the Corps on October 30, 2008, and stressed to the Corps that the proposed road "is extension of previous Ag. exempt crossings." Appellants' App. 55.

Fifth, on March 12, 2009, Drake provided the Corps with additional information "relative to my permit application," and described the project as a continuation of the same road; "for the final access road to the north side of Enemy Swim." Appellants' App. 71. Despite the candid admissions by Drake, the Corps approved a NWP. Although Drake repeatedly admits that his roads all tie in together and are dependent on each other to provide him with the desired access to the land he was developing, the Corps determined in 2010 that "the two roadways fit within the parameters of the Nationwide Permits, and were each single and complete projects, and not dependent on each other for functionality." Appellants' Add. 4.

The district court only addressed whether the 2009 NWP was properly authorized as a single and complete project, and never considered the entire road that serves Drake's development. The district court erred by holding that it would only review the 2009 NWP. Contradicting Drake's own words, the district court

further erred when it determined that the 2009 NWP was "a single and complete project." *SWO IV*, 2016 U.S. Dist. LEXIS 134399 at *41, Appellants' Add. 48.

IV. THE CORPS VIOLATED THE NHPA BY RELYING ON ITS OWN DEFECTIVE REGULATIONS TO DETERMINE NEVER TO CONSULT WITH THE THPO ON DRAKE'S PROJECT

Generally, a remand order is interlocutory "and thus may not be appealed immediately." *Izaak Walton*, 558 F.3d at 762. However, when the underlying order "could not be appealed after the proceedings on remand," the appeal of the remand order may be proceed. *Id.*

A central component of the Tribe's lawsuit and the present appeal is that all Drake's projects should have been subject to a single permit, as opposed to the Corps' piecemeal regulation, and that the Corps has violated, *inter alia*, the NHPA "by failing to treat some or all of Drake's applications and projects as an undertaking subject to the section 106 [consultation] process." Am. Compl. ¶ 228 (Count 8), Appellants' App. 123. If the Tribe fails to appeal the NHPA issue now, then it may be left with appealing the limited NHPA ruling on only the "2009 gully crossings." *SWO IV*, 2016 U.S. Dist. LEXIS 134399 at *46, Appellants' Add. 49. Further, the remand is not only limited, but offers no mandatory relief, because it only requires the Corps "to reevaluate its compliance with the Section 106 process and potentially consult with the THPO." *Id.* at *9.

The district court dismissed the Tribe's original NHPA claim because it hinged "upon the Corps' August 30, 2010 letter being final agency action." *SWO IV*, 2016 U.S. Dist. LEXIS 134399 at *7, Appellants' Add. 39. Instead, the district court dissected the Tribe's NHPA claim and only considered "whether the Corps violated the requirements and implementing regulations of the [NHPA] and the CWA when it issued an exemption under the CWA for Drake's 2006 bridge project, and when it determined that Drake's 2009 gully crossings qualified under a Nationwide Permit (NWP)." *Id.*

The Corps should have consulted with the THPO from the very beginning, at least by 2003, because the Corps knew or should have known that Drake wanted to build a single road system. As early as January 26, 2005, Drake was quoted in the newspaper saying, "I just want to connect four pieces of property I own." Appellants' App. 28. The Corps "shall ensure that the section 106 process is initiated early in the undertakings planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 C.F.R. § 800.1(c).

The Corps never consulted with the THPO to review any of Drake's project. Consequently, the THPO could not provide its expertise on the scope of the undertaking or the area of potential effects, nor identify historic properties potentially affected by the undertaking. 36 C.F.R. § 800.1(c). (The district court

did determine that the Corps' "process did not include tribal involvement, a significant oversight in a location ripe with tribal history." *SWO IV*, 2016 U.S. Dist. LEXIS 134399 at *27, Appellants' Add. 44.)

The Corps' failure to consult was the direct result of its reliance on its own legally deficient NHPA regulations and resulted in the likely destruction of burial mounds and other historic properties that were entitled to protection by consultation under the NHPA. The THPO has previously filed affidavits that Drake's property likely includes burial sites and stone features. ECF 18, attachment 42, ¶12. In particular, the Tribe is concerned about Drake's leveling of a mound in late 2008 (RA 3044):

The NHPA requires that the Corps' regulations regarding the NHPA process must be consistent with the regulations issued by the Advisory Council on Historic Preservation ("ACHP"). *See* 54 U.S.C. § 306102. Since 1980, the Corps has operated under its own regulations to comply with the NHPA, which are found at 33 C.F.R. § 325, App. C.[13] The Corps' NHPA regulations are therefore commonly referred to as Appendix C. 77 Fed. Reg. 10184, 10250 (Feb. 21, 2012). But the ACHP--the lead agency for NHPA compliance--has repeatedly determined that Appendix C is not consistent with the ACHP's regulations, as required by 36 C.F.R. § 800.14. Thus, Appendix C is a legal nullity and the ACHP's regulations must govern the Corps' NHPA responsibilities for the Drake project, but those regulations were ignored by the Corps and are not excluded from the district court's limited remand order.

The ACHP has informed the Corps that Appendix C does not comply with the NHPA or the ACHP's regulations and, still, the Corps applied Appendix C to the Drake project. Appellants' App. 58.

[13] Proposed counterpart regulations for Processing of Department of the Army Permits; Procedures for the Protection of Cultural Resources, 45 Fed. Reg. 22112 (April 3, 1980); Interim Final Rule, 47 Fed. Reg. 31794, 31797 (July 22, 1982); Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41236 (Nov. 13, 1986) (codified as amended at 33 C.F.R. § 325 app. C).

On October 9, 2008, the ACHP informed the Corps that it sees "major problems with the Corps' concept proposal: the definition of undertaking; the definition of Area of Potential Effects; and the nature of consultation required in the Section 106 process." ECF 90-2.[14] On November 7, 2008, the Corps responded to the ACHP that "I 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." Id.

In 2015, the ACHP once again informed the Corps that Appendix C is legally deficient:

> Developed in 1990 and known generally as Appendix C ("Procedures for the Protection of Historic Properties") of 33 C.F.R. 325 ("Processing of Department of the Army Permits"), the Corps uses this regulation to comply with Section 106. The Corps did not, as required, develop Appendix C as an alternative pursuant to 36 C.F.R § 800.14. Further, the ACHP has never approved Appendix C as a counterpart regulation for implementing Section 106, as required by Section 110(a)(2)(E) of the NHPA, because it differs from the Section 106 regulations in many ways, especially in terms of a number of essential core elements including: the definition of undertaking; the delineation of the APE; the scope of effort for identification of historic properties in the APE; and the nature of consultation during the Section 106 review.[15]

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[14] The fact that this particular piece of correspondence between the ACHP and the Corps post-dates some of Drake's exemptions and NWPs is not dispositive. As is discussed below, the legal deficiencies in Appendix C were identified by the Corps prior to the first of Drake's exemptions at issue in 2003.

[15] http://www.achp.gov/docs/fapc.pdf

Despite this knowledge, the Corps applied Appendix C when attempting to comply with the NHPA for the Drake project. Appellants' App. 58, 80.

The problems identified by the ACHP are the same problems present in the Drake project. The Corps' scope of analysis of the Drake undertaking is too narrow. *Cf.* 33 C.F.R. Part 325, Appendix C, § 1(g) (only permit area) and 36 C.F.R. § 800.16(y) (project under direct and indirect jurisdiction of the federal agency). When the Corps is uncertain about the scope of an undertaking, the Corps should consult with the ACHP, 65 Fed. Reg. 77698, 77712, but failed to do so. The Corps failed to properly delineate the Area of Potential Effects, which is "influenced by the scale and nature of the undertaking" and includes "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist." 36 C.F.R. § 800.16(d). The Corps only analyzed recorded historic properties, rather than eligible properties. Appellants' App. 64. The Corps determined not to consult with the THPO, despite the THPO, Dianne Desrosiers, calling the Corps and asking for more information on the large-scale excavation and construction project that was occurring in Enemy Swim Lake and its shoreline in early 2009. Appellants' App 57.

The Corps is acutely aware that Appendix C fails to comply with the NHPA. As far back as 2002, 2003, 2004, and 2005, the Corps published notice in the

Federal Register that Appendix C must be amended to comply with the 1992 NHPA amendments, as well as the 2000 and 2004 regulations issued by the ACHP.[16]

Federal courts have determined that Appendix C is without legal force. Because it is not consistent with the NHPA or the ACHP's regulations, "the Corps cannot rely on its own regulations to determine compliance with the NHPA." *Comm. to Save Cleveland's Huletts v. U.S. Army Corps of Eng'rs.*, 163 F.Supp.2d 776, 792 (N.D. Ohio 2001); *see also Colorado River Indian Tribes v. Marsh*, 605 F.Supp. 1425, 1437 (C.D. Cal. 1985) (Appendix C cannot be relied upon by the Corps to only consider the permit area, as opposed to the ACHP's Area of

[16] See Request for Comments, 67 Fed. Reg. 10822 (Mar. 8, 2002) ("Since the principle law and the ACHP implementing regulations have been changed, the Corps of Engineers has determined that it is necessary to address these changes."); Unified Agenda, 67 Fed. Reg. 74095, 74098 (Dec. 9, 2002) ("significant changes" to the NHPA and the ACHP regulations required changes to Appendix C); Unified Agenda, 68 Fed. Reg. 72459, 72462 (Dec. 22, 2003) (the Corps would either propose changes to Appendix C or "work with the ACHP to develop other Federal agency program alternatives, to comply with the requirements of the NHPA and other historic preservation laws."); Procedures for the Protection of Historic Properties, 69 Fed. Reg. 57662, 57622 (Sept. 27, 2004) (solicit comments on "how our permit application processing procedures should be revised as a result of the 1992 amendments to the National Historic Preservation Act and the Advisory Council on Historic Preservation's revised regulations on protection of historic property"); Unified Agenda, 70 Fed. Reg. 64132, 64134 (Oct. 31, 2005) (need to revise Appendix C due to the "substantial changes in policy" achieved by Congress's 1992 amendments to the NHPA and the ACHP's new 2000 and 2004 regulations.)

Potential Effects.). Thus, "the Corps' reliance on its own regulations exceeds its statutory and regulatory authority." Lorentz, Melissa (2014) "Engineering Exceptions to Historic Preservation Law: Why the Army Corps of Engineers' Section 106 Regulations Are Invalid," William Mitchell Law Review: Vol. 40: Iss. 4, Article 11.

The Corps' nationwide permit program is also inconsistent with the NHPA. According to the Corps, "[a] 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." ECF 27, p.5. In 2007, the Corps issued General Condition 20, which applies to NWPs, and purports to allow the permittee to carry out the Corps' section 106 responsibilities. "Non-federal permittees must submit a pre-construction notification to the district engineer <u>if</u> 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." General Condition 18(c), 72 Fed. Reg. 11092, 11192 (Mar. 12, 2007). Under General Condition 20, consultation is optional. *Id*. "It is the statutory obligation of the Federal agency to fulfill the requirements of section 106." 36 C.F.R. § 800.2(a). The Corps turns the NHPA on its head and turns a

federal responsibility, 54 U.S.C. § 306108, into a private and biased responsibility of the developer to identify historic properties.

While the district court ordered a limited remand of the Tribe's NHPA claim to the Corps, this Court should require the district court to consider the Tribe's entire NHPA claim because: (1) the NHPA law followed by the Corps, both Appendix C and General Condition 20, is deficient on its face; and (2) the Corps should have considered the two farm road exemptions and NWP as a single project under the NHPA.

CONCLUSION

The district court's judgment should be reversed and the case remanded for resolution of all of the Tribe's claims (except for Count 10, which the Tribe has elected not to pursue).

Dated: February 16, 2017

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