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

APPELLANTS' REPLY BRIEF

Greg S. Paulson (#0250478)
Brodeen & Paulson P.L.L.P.
3559 Tyler Street NE
Minneapolis, MN 55418
Telephone: (612) 226-5968
greg@brodeenpaulson.com

Richard A. Duncan (#192983)
Faegre Baker Daniels LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Telephone: (612) 766-7000
richard.duncan@faegrebd.com

Appellate Case: 16-4283 Page: 1 Date Filed: 04/20/2017 Entry ID: 4526654

Debra Flute
Sisseton-Wahpeton Oyate Legal
Department
P.O. Box 509, Veterans Memorial Drive
Agency Village, SD 57262
Telephone: (605) 698-3911
DebraF@SWO-NSN.GOV

Attorneys for Plaintiffs-Appellants Sisseton-Wahpeton Oyate of the Lake Traverse Reservation and Dave Flute Chairman

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE TRIBE'S CLAIMS WERE TIMELY FILED 1

A. The District Court Erred By Ignoring The Tribe's Injury And Only Focusing On The Corps' Exemption And NWP Letters Issued To Drake 2

B. Each Of The Tribe's Claims Should Be Analyzed Individually Because Most Pertain To Post-2005 Injury And Agency Action 5

1. The Tribe's Recapture Claim (Count 4) Arises When There Is A Change In Use 8

2. The Tribe's Claim That The Corps' 2003 Exemption Was Arbitrary And Capricious (Count 1) Did Not Accrue Until After 2005 10

C. Equitable Tolling Is Permitted Under 28 U.S.C. § 2401(a) 10

II. THE CORPS' 2010 DECISION LETTER WAS FINAL AGENCY ACTION 17

III. THE DISTRICT COURT ERRED IN DETERMINING THAT THE CORPS HAD NOT STACKED AUTHORIZATIONS TO AVOID PERMITTING 23

IV. THE CORPS VIOLATED THE NHPA THROUGHOUT THE COURSE OF DRAKE'S PROJECT 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

AT&T Co. v. E.E.O.C.,
270 F.3d 973 (D.C. Cir. 2001)..22

Auction Co. of Am. v. Federal Deposit Ins. Corp.,
132 F.3d 746 (D.C. Cir. 1997)..14

B.B. Anderson v. U.S. Dept. of Housing and Urban Dev.,
678 F.3d 626 (8th Cir. 2012) 11, 15

Bennett v. Spear,
520 U.S. 154 (1997)..18

Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,
261 F.3d 810 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002)......................................9

Bowles v. Russell,
551 U.S. 205 (2007)..11

Ex Parte Collett,
337 U.S. 55 (1949)..14

Greenfield Mills, Inc. v. Macklin,
361 F.3d 934 (7th Cir. 2004) 8

Herr v. U.S. Forest Serv.,
803 F.3d 809 (6th Cir. 2015) 2, 6

Holistic Candlers & Consumers Ass'n v. Food & Drug Admin.,
664 F.3d 940 (D.C. Cir. 2012)..22

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990)..13

Izaak Walton League of Am. v. Kimbell,
558 F.3d 751 (8th Cir. 2009) 5, 14

Lhotka v. United States,
114 F.3d 751 (8th Cir. 1997) 5

Appellate Case: 16-4283 Page: 4 Date Filed: 04/20/2017 Entry ID: 4526654

Loudner v. United States,
108 F.3d 896 (8th Cir. 1997) 11, 12

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990)...2

Menominee Indian Tribe v. United States,
136 S. Ct. 750 (2016)...16

Preferred Risk Mut. Ins. Co. v. United States,
86 F.3d 789 (8th Cir. 1996) 2

Rotella v. Wood,
528 U.S. 549 (2000)...2

Sisseton-Wahpeton Sioux Tribe v. United States,
895 F.2d 588 (9th Cir. 1990) 12

T.L. ex rel. Ingram v. United States,
443 F.3d 956 (8th Cir. 2006) 12

United States v. Akers,
785 F.2d 814 (9th Cir. 1986) 9, 20

United States v. Brockamp,
519 U.S. 347 (1997)...11

United States v. Huebner,
752 F.2d 1235 (7th Cir. 1985) 20

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

Werner v. United States,
188 F.2d 266 (9th Cir. 1951) 14

Wind River Mining Corp. v. United States,
946 F.2d 710 (9th Cir. 1991) 22

Yankton Sioux Tribe v. Kempthorne,
442 F.Supp.2d 774 (D.S.D. 2006) 15-16

Appellate Case: 16-4283 Page: 5 Date Filed: 04/20/2017 Entry ID: 4526654

FEDERAL STATUTES

Act of March 3, 1911, ch. 231 s. 24, 36 Stat. 1087 13

Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-706
In general ....passim
5 U.S.C. § 706..14

Clean Water Act § 404, 33 U.S.C. § 1344..passim
33 U.S.C. § 1344(f)(1) 8
33 U.S.C. § 1344(f)(2) 8, 9

Freedom of Information Act, 5 U.S.C. § 552 7

Little Tucker Act, 28 U.S.C. § 1346...12, 13

National Historic Preservation Act, 54 U.S.C. § 300101, *et seq.*,....................passim
54 U.S.C. § 306102(b)(5) 25

Pub. L. No. 80-773, 62 Stat. 869 (June 25, 1948) 13

Tucker Act, 28 U.S.C. § 1491...12, 13

28 U.S.C. § 1331 14

28 U.S.C. § 2401(a) ....passim

28 U.S.C. § 2501 ....12, 15

REGULATIONS

33 C.F.R. § 323.4(c)... 8-9

36 C.F.R. § 800.14(a)(2) 25

Nationwide Permits, 172 Fed. Reg. 10092 (Mar. 12, 2007)
72 Fed. Reg. 11197 ....23, 24

OTHER AUTHORITIES

Executive Order No. 13175 (2000) 15

H.R. Rep. No 80-308 (1947) 11

S. Rep. No. 80-1559 (1948) 13-14

ARGUMENT

A road-and-bridge project being constructed by Merlyn Drake ("Drake") in the waters of Enemy Swim Lake caused harm to the lake's water quality and likely destroyed Tribal cultural resources and burial mounds in late 2008 and 2009. The Army Corps of Engineers ("Corps") had not previously consulted with the Sisseton-Wahpeton Oyate ("SWO" or "Tribe") regarding Drake's project, and requested that the Tribe present its concerns with the project to the Corps. In 2010, the Corps rejected all of the Tribe's arguments under the Clean Water Act ("CWA") and the National Historic Preservation Act ("NHPA") and determined that Drake was a farmer, whose project would remain unregulated.

I. THE TRIBE'S CLAIMS WERE TIMELY FILED

The Corps states incorrectly that the Tribe challenges the district court's statute of limitations determination on only two grounds. Federal-Appellees' Brief

Appellate Case: 16-4283 Page: 8 Date Filed: 04/20/2017 Entry ID: 4526654

("Corps' Br.") p.21. The Tribe set forth three arguments pertaining to the timeliness of its claims. Appellants' Brief ("SWO Br.") pp.21-37.

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

The Tribe argued that the district court erred by not determining whether the Tribe had suffered legal injury as of the January 25, 2005 public meeting. *See* SWO Br. pp.19-22 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990), and *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 819 (6th Cir. 2015)). "[W]e 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). Final agency action and injury/legal wrong must both be present to maintain an action under the Administrative Procedure Act ("APA").

To be sure, this Court has determined that, "[t]here is no right to sue for a violation of the APA in the absence of a relevant statute whose violation forms the basis for [the] complaint." *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996) (internal citations omitted). The Tribe "must identify a substantive statute or regulation that the agency action had transgressed." *Id.* As of January 25, 2005, the Tribe could only speculate that the Corps violated the CWA by approving a farm road exemption for Drake.

To claim that the Tribe knew of its injury on January 25, 2005, the Corps points to Tribal employee Alvah Quinn's ("Quinn") phone inquiry prior to the

meeting, and the fact that a non-Tribal neighbor "raised concerns" about Drake's intentions. Corps' Br. p.22. Neither event shows that the Tribe had suffered legal injury as of January 25, 2005.

On November 9, 2004, Quinn called the Corps to learn more about a project that was just beginning, but the Corps believes the inquiry demonstrates that Quinn knew that the Tribe had suffered a legal wrong. The Corps' note documenting this phone call shows that Quinn was not calling about the road, as he was under the impression that Drake's fill activity was being undertaken for a bridge crossing, which was a different project that had been abandoned by Drake:

> I advised Mr. Quinn of the exemption under sec. 404.
> He + tribe concerned – they spear northern in area of x-ing, they denied/objected to bridge x-ing.
> He ask[ed] if [there] was any opportunity for comments – I advised no, not w/ exemption; It conveys no property rights.
> He thinks Drake will get access + develop lots along the lake.
> He thanked, he may go look @.

Appellants' Reply Addendum ("Reply Add.") 1. The project Quinn called about was the bridge proposed by Drake in 1998, Appellants' Appendix ("App.") 21, but later abandoned.

At the time of this call, Quinn's understanding that Drake was still pursuing the bridge across the inlet was reasonable; then-Senator Johnson shared the same understanding. About a month after Quinn called the Corps, Senator Johnson wrote to the Corps, saying that he understood that the "developer is also building a bridge

Appellate Case: 16-4283 Page: 10 Date Filed: 04/20/2017 Entry ID: 4526654

across one of the lake's inlets that Mr. Daly says will prevent some boat travel." Reply Add. 4. Thus, when Quinn called the Corps he had not viewed the fill activity, misunderstood the project, and is silent on any Corps' wrongdoing.

The statements of Drake's neighbor, Doug Block ("Block"), at the public meeting cannot be imputed to the Tribe.[1] Drake made no representations to the Tribe and Block testified that he "doubt[s] others would have had [the] knowledge," that he did about what occurred on his neighbor's land. ECF-45, p.87, line 4. Drake had so many fill projects occurring that "it gets very confusing, unless you have maps to look at, or if you know this property very well." *Id.,* p.89, lines 1-3. When Block was asked whether he could "prove it was a farm road" as of January 25, 2005, he said, "I certainly couldn't–I couldn't prove it was anything …." *See id.,* p.106, lines 24-25 to p.107, lines 1-4.

The Corps' argument that Quinn's phone call and Block's knowledge demonstrate that the Tribe had discovered its injury is sharply contradicted by the Corps' own representations in 2005 that Drake's change in purpose was speculation. The Corps represented to then-Senator Johnson in an April 16, 2005 report that, "the Corps has no authority to speculate on a change of land use at some future date." App. 178. The Corps' contemporaneous view of Drake's project

[1] The testimony from ECF-45 cited by the Corps, Corps' Br. p.22, to support its assertions as to Block's statements at the public meeting did not come from Block, but rather from Danny Smeins, the Day County State's Attorney.

in 2005 demonstrates that no clear claim existed on January 25, 2005, that would start the statute of limitations running against the Tribe.

Accepting the Corps' argument would require the Tribe to file merely on suspicion or speculation, a course which this Court has rejected:

> We believe that there is a strong possibility that if the Lhotkas had brought suit immediately after the work was completed, as the Fish and Wildlife Service contends they should have done, the trial court would have then dismissed the action for failure to state a claim; at that time, both the fact of injury and its cause were simply too speculative for a court to provide any remedy.

Lhotka v. United States, 114 F.3d 751, 753 (8th Cir. 1997). There must be "facts enabling one party to maintain an action against another." *Izaak Walton League of Am. v. Kimbell*, 558 F.3d 751, 759 (8th Cir. 2009) (quotation omitted). The facts enabling the Tribe to maintain this action were not known to it or did not exist on January 25, 2005. The facts visibly changed in late 2008 and 2009 when Drake abandoned any pretense of farming by beginning to excavate and denude 2,000 feet of shoreline, which made it impossible to use the road he was constructing for farming purposes.

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

Even if the Corps were correct that the Tribe had a claim in 2005 and failed to pursue it, that argument would not foreclose many of the Tribe's claims in its Amended Complaint:

Appellate Case: 16-4283 Page: 12 Date Filed: 04/20/2017 Entry ID: 4526654

> Different legal wrongs give rise to different rights of action. That is so even if the different *legal* wrongs stem from the same order. The upshot is this: Even if the Herrs had *some* right of action to remedy *some* legal wrong related to their recreational interests in 2007, they could not have had *this* right of action to remedy *this* legal wrong . . . until they obtained that property right in 2010.

Herr, 803 F.3d at 820. Most notably the claims pertaining to stacking (Count 7) and recapture (Count 4) accrued after 2005.

The Tribe's appeal, if successful, would require the district court to review the Tribe's stacking claim, which would include the 2003 farm road exemption, the 2006 farm road exemption, and the 2009 nationwide permit. These approvals pertained to a single project, as Drake explained in each application. App. 30, 31, 35, 46, 48-49, 55, 71. The stacking began in 2006, and was continued in 2009, when the Tribe discovered it. The Corps, in 2010, rejected the Tribe's stacking claim, which is part of the present appeal. The district court determined that the applications and approvals were not stacked, Appellants' Addendum ("Add.") 48, a holding the Tribe appealed. SWO Br. pp.42-47.

If indeed Drake was entitled to farm road exemptions in 2003 and 2006, by 2008-2009 his use of his road and property was not farming and subject to recapture under the CWA. The Corps argues that the Tribe's recapture claim "assumes that the Corps' decision was correct when the Corps made it in 2003." Corps' Br. p.23. The Tribe has challenged the Corps' 2003 farm road exemption (Count 1), App. 117-119, as well as the Corps' decision in 2010 that Drake's

Appellate Case: 16-4283 Page: 13 Date Filed: 04/20/2017 Entry ID: 4526654

project was not subject to recapture (Count 4), App. 120-121. The Tribe's challenge of the Corps' 2003 farm road exemption is based upon Corps documents obtained in 2009 pursuant to a Freedom of Information Act ("FOIA") request. Based upon that information, the Tribe alleged that the Corps should have originally required Drake to obtain a permit. Even if Drake's road project was initially entitled to a farm road exemption, then it was later recaptured and requires a permit. Bottom line, this project should have been subject to a permit, either at the outset or, at the latest, in 2008-09 when Drake abandoned farming yet continued to build the road to access his lakeshore lots for development.

The Corps argues that the district court dismissed the Tribe's "recapture claim as non-justiciable." Corps' Br. p.23. The district court's first order does not dismiss the Tribe's recapture claim. The court determined that the "Corps did not in fact 'modify, suspend, or revoke' a § 404 permit here," and the "Corps finding an exemption does not fit the 'very narrow' rule disallowing judicial oversight of agency decisions, particularly because the grounds for exemption were Congressionally created." Add. 16.

In its third order, the district court clarified that it had dismissed the Tribe's recapture claim for lack of final agency action:

> The Tribe's original recapture claim, Count 4, explicitly challenged what the Tribe characterized as 'the Corps' final decision in 2010 that Drake's activities have not been recaptured under the CWA' . . .

Appellate Case: 16-4283 Page: 14 Date Filed: 04/20/2017 Entry ID: 4526654

> [t]his Court rejected the argument that the August 2010 letter was the final decision . . . .

Add. 28. The Tribe has appealed that dismissal.[2]

1. The Tribe's Recapture Claim (Count 4) Arises When There Is A Change In Use

For a recapture claim to accrue, there must be a change in use. SWO Br. pp.24-26. The Corps focuses on whether the recapture provision is left to its enforcement discretion, Corps' Br. pp.24-26, but it is not.[3]

The Corps also touches upon the merits, rather than the issue of accrual, by arguing that the recapture provision does not apply to "changes from exempt to non-exempt activities after the discharges have already occurred." Corps' Br. p.25. But the Corps' argument contradicts the Corps' recapture regulation:

> A conversion of a section 404 wetland to a non-wetland is a *change in use* of an area of waters of the United States.

---

[2] To the extent that the district court's third order contained an alternative holding that the recapture claim could not be stated as an agency inaction claim, Add. 28-29, the recapture regulation, 33 C.F.R. § 323.4(c) cited by the court, is phrased in mandatory terms: "Any discharge of dredged or fill material into waters of the United States . . . must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject . . . ." Section 404(f) of the CWA is similarly phrased. *See* 33 U.S.C. § 1344(f)(2).

[3] The Clean Water Act conditions an exemption on complying with the recapture provision. *See Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 949 (7th Cir. 2004) ("In order to be exempt from the § 404 permit requirement, however, a party must show not only that it is exempt under one of the provisions in § 1344(f)(1) [Section 404(f) of the CWA], it also must show that its activities do not fall within the 'recapture' provision, § 1344(f)(2).").

33 C.F.R. § 323.4(c) (emphasis added). The Ninth Circuit Court of Appeals describes recapture as focusing on whether wetland has been converted to dry land:

> While the exemptions and regulations do not distinguish major and minor changes, the intent of Congress in enacting the Act was to prevent conversion of wetlands to dry lands.

United States v. Akers, 785 F.2d 814, 822 (9th Cir. 1986), *see Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815–16 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002) ("the intent of Congress in enacting the Act was to prevent conversion of wetlands to dry lands, and we have classified as non-exempt those activities which change a wetland's hydrological regime"). Drake's development road converted a significant portion of wetlands to dry lands. For accrual purposes, the wrongful conversion occurred in late 2008 to 2009.

Finally, the Corps' argument differs from its prior positions in this case. In 2009, the Corps represented to the Tribal Council that a "change in use" implicates the CWA's recapture provision. App. 153. In 2013, the Corps testified that "a change in use" is part of the recapture provision's two-part test. ECF 45, p.202, lines 2-8. The recapture provision pertains to "bringing an area of the navigable waters into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2). Drake's development road, still under construction in 2008 and 2009, brought a significant portion of the Enemy Swim wetland "into a use to which it was not previously subject." The Tribe's recapture claim was timely filed.

Appellate Case: 16-4283 Page: 16 Date Filed: 04/20/2017 Entry ID: 4526654

2. The Tribe's Claim That The Corps' 2003 Exemption Was Arbitrary And Capricious (Count 1) Did Not Accrue Until After 2005

The Tribe did not discover it had a claim that the Corps' initial farm road exemption violated the Clean Water Act until the Tribe received Corps documents from its FOIA request in 2009. These were the first documents that the Corps ever shared with the Tribe regarding Drake's development activities. The FOIA documents, for example, show that Rex Fletcher, a retired Environmental Protection Agency employee, had submitted several written objections to the Corps regarding its non-regulation of Drake's project in 2005. Mr. Fletcher submitted an affidavit in support of the Tribe's March 2, 2010 letter, which requested the Corps to "issue your decision" addressing eight specific requests. ECF 18-8, p.14. When the Tribe learned in 2009 that a retired EPA official thought that the Corps knew that its initial farm road exemption supported development activity, then the Tribe believed it had a claim challenging the 2003 farm road exemption.

C. Equitable Tolling Is Permitted Under 28 U.S.C. § 2401(a)

Statutory Text. The Corps argues that 28 U.S.C. § 2401(a) sets forth two limited circumstances when the six-year limitations period is extended: when a person is under legal disability or beyond the seas. Corps' Br. pp.27-29. The Corps then reasons that, based upon this language, there can be no equitable tolling of § 2401(a). No court has ever adopted this interpretation, and it is inconsistent with the Supreme Court's holding in *United States v. Wong*, 135 S.Ct. 1625 (2015).

Appellate Case: 16-4283 Page: 17 Date Filed: 04/20/2017 Entry ID: 4526654

The Corps' arguments based on legislative history do not make § 2401(a) jurisdictional. *See* Corps' Br. p.28. The language which H.R. Rep. No 80-308 (1947), cited by the Corps, [4] omits as "superfluous" was a listing of archaic nineteenth-century disabilities; *e.g.,* "claims of married women, first accrued during marriage." Its omission does not advance the Corps' arguments.

The Corps' reliance on *United States v. Brockamp* is misplaced for several reasons. Unlike § 2401(a), the statute at issue in *Brockamp* established detailed procedural and equitable considerations. 519 U.S. 347, 350-52 (1997). Further, reading equitable tolling into the statute in *Brockamp* could have resulted in "200 million tax returns each year . . . [and] more than 90 million refunds" being subject to equitable tolling. 519 U.S. at 352. The rationale of *Brockamp* does not apply to 28 U.S.C. § 2401(a).[5]

Loudner and sovereign immunity. The Corps cites *Loudner v. United States*, 108 F.3d 896 (8th Cir. 1997), as authority that 28 U.S.C. § 2401(a) is not subject to equitable tolling. Corps' Br. pp.27, 34. This Court has, however, 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 626, 629 (8th Cir. 2012).

---

[4] The page that contains the language the Corps cites is A176. *See* Reply Add. 2.

[5] *Bowles v. Russell*, cited in Corps' Br., pp.27-28, is inapposite--a routine affirmance "that the time limits for filing a notice of appeal are jurisdictional in nature." 551 U.S. 205, 206 (2007).

Appellate Case: 16-4283 Page: 18 Date Filed: 04/20/2017 Entry ID: 4526654

Loudner discussed § 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.

108 F.3d at 900.[6] But this aspect of *Loudner* is no longer good law because the Supreme Court has declined "to count time bars as jurisdictional merely because they condition waivers of immunity." *Wong*, 135 S.Ct. at 1637. Even if § 2401(a) waives sovereign immunity, equitable tolling can occur. *See T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 961 (8th Cir. 2006) ("We thus align ourselves with several other circuits in holding that considerations of equitable tolling simply make up part of the court's determination whether an action falls within the scope of the waiver of sovereign immunity granted by Congress, and thus within the jurisdiction of the federal courts.").

The Tucker Acts. The Corps argues that the Tucker Act, 28 U.S.C. § 1491, and the Little Tucker Act, 28 U.S.C. § 1346, share a common history and their corresponding statutes of limitation--28 U.S.C. § 2501 (Big Tucker Act) and 28

---

[6] *Loudner* relies heavily on *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990). *Loudner*, 108 F.3d at 900. Yet *Sisseton-Wahpeton* did consider equitable tolling of Section 2401(a)--"tolling can be based on equitable reasons"--but rejected it for factual, not legal, reasons. 895 F.2d at 597.

Appellate Case: 16-4283 Page: 19 Date Filed: 04/20/2017 Entry ID: 4526654

U.S.C. § 2401(a) (Little Tucker Act)--must be interpreted in a like manner. Neither the Little Tucker Act nor the Big Tucker Act serve as a basis for jurisdiction in this case. Further, the Corps cannot rebut the presumption of equitable tolling by relying "on what *Irwin* [*v. Dep't of Veterans* Affairs, 498 U.S. 89 (1990)] itself deemed irrelevant--that Congress passed the statute in an earlier era, when this Court often attached jurisdictional consequences to conditions on waivers of sovereign immunity." *Wong*, 135 S.Ct. at 1637.

The Senate Report accompanying the 1948 Act made resort to past federal laws unnecessary. "By enacting this bill into positive law as title 28 of the United States Code, that title will thereby become the law rather than merely presumptive evidence of the law, *and reference to prior volumes of the Statutes at Large will be rendered wholly unnecessary*." S. Rep. No. 80-1559, p.1 (1948) (emphasis added). For this reason, the 1948 Act expressly repealed section 24(20) of the 1911 Act, cited in the Corps' Br., p.37. *See* Pub. L. No. 80-773, 62 Stat. 869, § 39 at 142 (June 25, 1948) (repealing Act of March 3, 1911, ch. 231 s. 24 pars. 1-25, 36 Stat. 1087, 1090-94).

The Senate Report also explains that the 1948 legislative effort was both a codification and revision:

> No revision of these laws has been made since 1911, and the Judicial Code, enacted in that year did not include all the laws upon the subject. A tremendous amount of additional legislation in this field has been enacted since 1911 . . . It is evident, therefore, that a

> thorough *codification and revision* of the statutes relating to the judiciary and its procedure is very much in the public interest in order that the law in this important field may be clear, certain, and readily available.

S. Rep. No. 80-1559, p.1 (emphasis added). The 1948 Act "was announced to be a revision as well as a codification." *Ex Parte Collett*, 337 U.S. 55, 62 (1949); *see also Werner v. United States*, 188 F.2d 266, 268 (9th Cir. 1951) ("Section 2401(a) appeared for the first time in the 1948 edition of the Judicial Code. Title 28 is more than a mere codification. It is also a revision.").

Repeal of the 1911 Act was necessary because the 1948 Act consolidated previous statutes and, "it also created a general statute of limitations insofar as suits against the United States are concerned." *Werner,* 188 F.2d at 268. Thus, § 2401(a) is the "catch-all" statute of limitations for lawsuits against the United States. *Auction Co. of Am. v. Federal Deposit Ins. Corp.*, 132 F.3d 746, 749 (D.C. Cir. 1997); *see also Izaak Walton League*, 558 F.3d at 759. Under *Wong*, like most other statutes of limitations for actions against the United States, it is subject to equitable tolling.

<u>Grant of jurisdiction separate from the statute of limitations</u>. The grant of jurisdiction applicable to this lawsuit, which is 28 U.S.C. § 1331, is separate from the statute of limitations relied upon by the Corps, 28 U.S.C. § 2401(a). The statute of limitations is also separate from 5 U.S.C. § 706, the APA's judicial review grant, and the substantive statutes under which the Tribe brings suit, the CWA and

NHPA. Under *Wong*, "Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." 135 S.Ct. at 1633.

28 U.S.C. § 2501 and *John R. Sand*. The Supreme Court explained that the only reason that § 2501 was deemed jurisdictional "came down to two words: *stare decisis*." *Wong*, 135 S.Ct. at 1636. Thus, the Supreme Court has indicated that most statute of limitations will be construed as non-jurisdictional and the result in *John R. Sand* will remain an anomaly.

Eighth Circuit decisions. Most recently, this Court has treated § 2401(a) as subject to equitable tolling, but then rejected the underlying factual argument as a "garden variety claim of excusable neglect." *B.B. Anderson*, 678 F.3d at 629. Here, there are meritorious reasons to toll the statute of limitations.

Equitable tolling is justified. The Corps does not contest that it failed to consult with the Tribe regarding Drake's road-and-bridge project for over eight years, as required by the NHPA, Executive Order No. 13175 (2000), and the Corps' own policy. SWO Br. pp. 9-10, 32-37. The Corps' failure to consult with and inform the Tribe should not be used as a sword to deny equitable tolling to the Tribe. "Fair notice of agency intentions requires telling the truth and keeping promises," and the Corps' "failure to comply with its own consultation policy violates general principles that govern administrative decisionmaking." *Yankton*

Sioux Tribe v. Kempthorne, 442 F.Supp.2d 774, 785 (D.S.D. 2006). The Corps' violation of the NHPA, the Executive Order, and its own consultation policy, standing alone, constitutes an extraordinary circumstance that stood in the Tribe's way and prevented timely filing. *Menominee Indian Tribe v. United States*, 136 S. Ct. 750, 755 (2016).

The Corps was upfront with the South Dakota Congressional delegation in early 2009 about Drake building his road to accommodate a second, personal residence, yet refused to share this information with the Tribe during a site visit or a face-to-face meeting. This change in Drake's stated intent and activity--from the apparent pretense of farming to residential development--is key to how the Corps is required to regulate Drake's activity. As the Corps testified, it has no authority to issue a farm road exemption to a developer. ECF 45, p.189, lines 10-13.

The Corps' argument against equitable tolling is premised on the statute of limitations accruing on January 25, 2005. Corps' Br. pp. 29-33. The Corps argues that the Tribe "knew of its claims well before the limitations period expired in January 2011." The Tribe knew it had a claim by 2009 and it timely filed under 28 U.S.C. § 2401(a). For the first time, the Corps relies on a second phone call Quinn placed to the Corps in 2007, Corps' Br. p.29. Then, Quinn was calling about two separate projects. As for Drake's project, Quinn only noticed large culverts that had not been installed. Appellees' Supplemental Appendix ("SA") 122. Even if the

Appellate Case: 16-4283 Page: 23 Date Filed: 04/20/2017 Entry ID: 4526654

Tribe's claims accrued in 2007 at the time of Mr. Quinn's second phone call, all of the Tribe's claims would still be timely filed.

The Corps asserts that the Tribe's argument that the Corps requested the Tribe to pursue administrative remedies is "more akin to a claim of equitable estoppel." Corps' Br. p.32. The Tribe has not argued equitable estoppel because, at their July 31, 2009 meeting, the Corps requested that the Tribe present its claims regarding Drake's project to the Corps for review and consideration. *See* App. 158; App. 131, ¶¶19-20; ECF 18-8, pp.1-2. Such conduct pertains to the Corps preventing the Tribe from filing earlier than it did.

The running of the statute of limitations should be tolled while the Tribe was doing what the Corps instructed it to do--pursue its claims administratively. The Tribe filed its Complaint on November 7, 2011. ECF 1. Even if the Tribe had knowledge of injury and a claim against the Corps on January 25, 2005, the running of the statute should be tolled for the 13 months from the July 31, 2009 meeting until August 30, 2010, when the Corps issued its decision, which suffices to render all of the Tribe's claims timely.

II. THE CORPS' 2010 DECISION LETTER WAS FINAL AGENCY ACTION

<u>The 2010 decision marked the consummation of the Corps' decision-making process</u>. The Corps sidesteps whether the action of issuing the 2010 letter to the Tribe marked the "consummation of the agency's decision making process."

Appellate Case: 16-4283 Page: 24 Date Filed: 04/20/2017 Entry ID: 4526654

Bennett v. Spear, 520 U.S. 154, 177-78 (1997). Instead, the Corps attempts to minimize its determinations in the 2010 letter by arguing that the letter merely explained the Corps' legal position. Corps' Br. p.18. The record reveals otherwise. The Corps was not just explaining law to the Tribe, the Corps was addressing a dispute involving factual and legal issues unique to the Tribe and Enemy Swim Lake, which it had not previously addressed.

When the Corps arrived on site in 2009 to review the drastic change in Drake's activity and the denuding of 2,000 feet of shoreline, the Corps' director of enforcement, Dave LaGrone, remarked, "I frankly looked at that land from his house myself and said you know, this looks bad. I can understand why everybody is upset. This looks bad." App. 147. The consequences of Drake's new excavation were unique to the Tribe and its interest in Enemy Swim Lake and the cultural resources and burial mounds surrounding it.

Further, the 2010 letter was the culmination of a lengthy decision-making process. The Corps first received a 16-page letter from the Tribe dated June 15, 2009. ECF 18-2.[7] The Corps provided an interim response to the Tribe on July 7,

---

[7] This letter, in part, provides, "[t]o be clear, the Tribe is requesting the COE to take the following actions: (1) determine that Mr. Drake's past and current activities are not exempt from the permit requirement; (2) require Mr. Drake to obtain a permit; (3) enjoin Mr. Drake from using, improving, or constructing any portion of the so-called farm road; (4) ensure that Mr. Drake does not profit from his misrepresentations and require Mr. Drake to remove the so-called 'farm' road,

(footnote continued)

Appellate Case: 16-4283 Page: 25 Date Filed: 04/20/2017 Entry ID: 4526654

2009, explaining "[m]y staff will visit the site within the next month to review the current site conditions and determine if any violations or noncompliance conditions exist. After that visit, we will be able to more thoroughly address the concerns you expressed in your June 15, 2009 letter." ECF 18-5. The Corps provided an additional interim response on July 17, 2009, remarking that "[t]his is the *first letter* we have received from the Tribe and the *first time* concerns about potential impacts to cultural sites on private property have been mentioned." ECF 18-6 (emphasis added). The Corps conducted a site visit and met with the Tribal Council on July 31, 2009. App. 133. The Corps provided a letter on September 9, 2009, but it failed to address the Tribe's specific arguments. ECF 18-7.

Consequently, on March 2, 2010, the Tribe filed its final letter specifically requesting that the Corps issue a decision on the Tribe's claims. The Tribe reminded the Corps of its repeated representations that the Tribe seek a remedy with the Corps:

(footnote continued from previous page)

especially that portion through the lake, inlet, and wetland; (5) impose civil penalties on Mr. Drake for violations of the Clean Water Act; (6) cooperate with the Tribe in investigating whether Mr. Drake has polluted the waters of the United States and take the appropriate enforcement action; and (7) enjoin further destruction or development by Mr. Drake until full compliance with the NHPA is achieved." ECF 18-2.

Appellate Case: 16-4283 Page: 26 Date Filed: 04/20/2017 Entry ID: 4526654

> The COE has stated several times that it recognizes its government-to-government relationship with and trust responsibility to the Sisseton-Wahpeton Oyate and that the Tribe should first present any and all concerns to the COE. The Tribe has followed the COE's request, but this writing constitutes the Tribe's final attempt to convince the COE to regulate the Drake development project in accordance with Federal law.

ECF 18-8. The Tribe's 2010 submission was nearly six inches thick, containing new evidence, pictures and videos of 2,000 feet of shoreline being denuded, the dreadful results of a water quality study conducted by a professor from South Dakota State University, Drake's recent mortgages totaling $1.6 million, and dozens of affidavits from Drake's neighbors that absolutely no agriculture activity had occurred. (All of this evidence, however, has been excluded by the Corps from the Administrative Record.) Nearly six months later, on August 30, 2010, the Corps issued a decision to the Tribe, Add. 1, which addressed, as the Corps concedes, "the Tribe's legal arguments concerning recapture, best management practices, stacking of permit applications, and NHPA compliance." Corps' Br. p.19.[8]

Compared to the Corps' earlier review of Drake's applications and its verifications of farm road exemptions, which the Corps endorses as final agency

---

[8] Legal issues involving best management practices are subject to judicial review. *United States v. Huebner*, 752 F.2d 1235, 1243 (7th Cir. 1985); *United States v. Akers*, 785 F.2d at 821.

Appellate Case: 16-4283 Page: 27 Date Filed: 04/20/2017 Entry ID: 4526654

action, the 2010 decision was much more intensive and detailed. The Corps acknowledged a change of use to the press (ECF 28, ¶ 48), reviewed new evidence, exchanged several interlocutory letters, met face-to-face with the Tribal Council, conducted a joint site visit, and finally issued a letter denying all of the Tribe's claims as the consummation of the Corps' decision-making process.

Rights or obligations determined or legal consequences. The Corps claims that its 2010 decision did not "inflict any injury," nor "determine Mr. Drake's or the Tribe's rights or obligations." *Id*. There is no dispute that the Corps rejected all of the Tribe's claims and refused to regulate Drake. The Tribe owns approximately 88 percent of the shoreline and Enemy Swim Lake's water quality was harmed by Drake's unregulated conduct.

The Corps addressed multiple legal arguments presented by the Tribe regarding Drake's project, which was a departure from the Corps' representation four years earlier that any concerns about a "change in purpose" were speculative. App. 178. The Corps' claim that it "merely explained" its "2003, 2006, and 2009 decisions," Corps' Br. p.18, cannot be true because the Corps admits it also addressed four arguments in 2010 that it had never addressed before. *Id.* p.19. The Corps determined that Drake's stark change in activity and stated intention in 2009 did not carry any new legal consequences and the Tribe had no legal rights under the CWA or the NHPA, and that there would be no NHPA consultation with the

Appellate Case: 16-4283 Page: 28 Date Filed: 04/20/2017 Entry ID: 4526654

Tribal Historic Preservation Officer.[9] The Corps had "made up its mind, and its decision … inflict[ed] an actual, concrete injury upon the party seeking judicial review." *AT&T Co. v. E.E.O.C.*, 270 F.3d 973, 975 (D.C. Cir. 2001) (quotation and citation omitted).

Final agency action does not preclude subsequent final agency action addressing new circumstances. The Corps' 2010 decision letter constituted an adverse application of the Corps' previous farm road exemptions to the Tribe, which were issued "long before anyone discovered the true state of affairs." *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991).

---

[9] The 2010 decision was not an advice letter; it determined several specific issues raised by the Tribe and unique to Drake's fill in Enemy Swim Lake to build a development road. The Corps relies on *Holistic Candlers & Consumers Ass'n v. Food & Drug Admin.*, 664 F.3d 940 (D.C. Cir. 2012), to argue that the 2010 was a mere advice letter. But the agency in *Holistic Candlers* expressly stated in its letter that it had yet to make a final decision. *Id.* at 946. Here, to the contrary, the Corps informed the Tribal Council that it would consider its arguments and then issue a decision. App. 131, ¶¶ 19&20, 135, 136.

Appellate Case: 16-4283 Page: 29 Date Filed: 04/20/2017 Entry ID: 4526654

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

The district court erred in treating Drake's various applications and exemptions as not constituting being improperly "stacked" to evade review of a single project. SWO Br. pp. 42-47.[10]

The Corps selectively quotes from its 2007 definition of "single and complete project" to avoid the regulation's limitation that "individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately." 72 Fed. Reg. at 11197, cited at Corps' Br. p.47. Here, a cursory review of the map demonstrates that each crossing involves irregularly shaped wetlands or lake and does not involve separate waterbodies. SA 30-31.

Further, a single and complete project is limited to those having independent utility. 72 Fed. Reg. at 11197. Under the Corps' regulation, a "project is considered

[10] The Corps describes the district court's limited remand as instructing "the Corps to conduct further analysis of the 2009 gully crossings under the NHPA." Corps' Br. p.41. But then the Corps also claims that the remand is not limited to the NHPA because the "district court remanded the 2009 nationwide-permit verification to the Corps." *Id*. p.49. The district court specified that the Corps will only "reevaluate its compliance with the Section106 process and *potentially* consult with the THPO." Add. 44 (emphasis added). The Corps prevailed on the Tribe's stacking claim. Add. 48. Ignoring the limited nature of the remand, the Corps illogically argues that this Court lacks jurisdiction to consider the district court's rejection of the Tribe's stacking claim because the NHPA remand will somehow cover the Tribe's Clean Water Act stacking claim. Corps' Br. p.45.

Appellate Case: 16-4283 Page: 30 Date Filed: 04/20/2017 Entry ID: 4526654

to have independent utility if it would be constructed absent the construction of other projects in the area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility." *Id.* Here, Drake's applications explain that each project is dependent upon and an extension of the previous project, which the Corps does not refute. *See* SWO Br. pp.44-46. It is impossible for Drake to construct the 2009 portion alone because this final portion of the road could not be utilized or even accessed without the earlier projects having been constructed! The 2009 portion of the road is, therefore, dependent upon the previous two phases of the road project and is not a single and complete project. The district court clearly erred in dismissing the Tribe's stacking claim (Count 7).

IV. THE CORPS VIOLATED THE NHPA THROUGHOUT THE COURSE OF DRAKE'S PROJECT

The Corps ignores that the Tribe has appealed a much broader NHPA issue to this Court–dismissal of the Tribe's original NHPA claim because the district court determined that it relied "upon the Corps' August 30, 2010 letter being final agency action." Add. 39. To avoid appellate review, the Corps' argues that a favorable remand on a limited piece of the Tribe's NHPA appeal–potentially consulting under the NHPA in the context of the Corps' 2009 NWP–would somehow take the Tribe's entire NHPA appeal out of this Court's jurisdiction. Corps' Br. p.45. This is not true because a favorable decision on remand–e.g. the

Appellate Case: 16-4283 Page: 31 Date Filed: 04/20/2017 Entry ID: 4526654

Corps consults and follows the NHPA and the regulations issued by the Advisory Council on Historic Preservation in regard to the 2009 portion of the road–would not address the Tribe's broader NHPA claims. Instead, should the Court determine that the 2010 decision is final agency action or that the running of the statute of limitations did not commence in January 2005, or should be equitably tolled, then the Tribe could pursue its entire NHPA claim before the district court.

To ensure that the Tribe's NHPA claims are properly preserved, the Tribe requests that, in addition to remanding for the district court to consider all of the Tribe's NHPA claim (Count 8), that this Court determine that the Corps' outdated and unlawful regulations–commonly referred to as Appendix C–violate the NHPA because the Corps' regulations are not "consistent with regulations promulgated by the" Advisory Council on Historic Preservation, 54 U.S.C. § 306102(b)(5), and the ACHP has refused to approve the Corps' regulations as required by 36 C.F.R. § 800.14(a)(2). The Corps' response has been to ignore the ACHP's disapproval and continue to use Appendix C. Here, the Corps' adherence to Appendix C likely caused the destruction of Tribal cultural resources and burial mounds.

CONCLUSION

The district court's judgment should be reversed and the case remanded for consideration of all the Tribe's claims (except for Count 10).

Appellate Case: 16-4283 Page: 32 Date Filed: 04/20/2017 Entry ID: 4526654

Dated: April 19, 2017

s/ Richard A. Duncan
Greg S. Paulson
Brodeen & Paulson P.L.L.P.
3559 Tyler Street NE
Minneapolis, MN 55418
greg@brodeenpaulson.com
Telephone: (612) 226-5968

Richard A. Duncan
Faegre Baker Daniels LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
richard.duncan@faegrebd.com
Telephone: (612) 766-7000
Facsimile: (612) 766-1600

Debra Flute
Sisseton-Wahpeton Oyate Legal Department
P.O. Box 509, Veterans Memorial Drive
Agency Village, SD 57262
DebraF@SWO-NSN.GOV
Telephone: (605) 698-3911

Attorneys for Plaintiffs-Appellants Sisseton-Wahpeton Oyate of the Lake Traverse Reservation and Dave Flute Chairman

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

   ☒ this document contains 6,375 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

   ☒ this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman, Font Size 14.

The undersigned also certifies that this brief has been scanned for viruses and is virus-free.

Dated: April 19, 2017

s/ Richard A. Duncan

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Richard A. Duncan

US.111172923.05

Appellate Case: 16-4283 Page: 35 Date Filed: 04/20/2017 Entry ID: 4526654