IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, **Plaintiff,** **and** **CHEYENNE RIVER SIOUX TRIBE,** **Intervenor-Plaintiff,** **v.** **U.S. ARMY CORPS OF ENGINEERS,** **Defendant – Cross-Defendant.** **and** **DAKOTA ACCESS, LLP,** **Intervenor-Defendant Cross-Claimant.**	**Case No. 1:16-cv-1534-JEB (and Consolidated Case Nos. 16-cv-1796 and 17-cv-267)**

PLAINTIFF-INTERVENOR CHEYENNE RIVER SIOUX TRIBE'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO UNITED STATES ARMY CORPS OF ENGINEERS AND DAKOTA ACCESS' CROSS MOTIONS FOR SUMMARY JUDGMENT

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

This Brief is a combined Reply in Support of the Cheyenne River Sioux Tribe's ("Tribe") Motion for Partial Summary Judgment, ECF 131, and Opposition to the Cross-Motions for Summary Judgment filed by the U.S. Army Corps of Engineers ("Corps"), ECF 183, and Dakota Access, LLC ("Dakota Access") ECF 185, (collectively "Defendants") on these claims.

II. MATERIAL FACTS[1]

This Section sets forth the Issues of Fact Defendants recite in their Cross-Motions for Summary Judgment that the Tribe disputes.

1. *Dakota Access prepared the Environmental Assessment with "significant direction and input from the Corps on both process and content."* ECF 183 at 13. The Tribe disputes that the Corps provided "significant" input. The only Corps comments relative to oil spill risk analysis, impact on aquatic species, or risk of landslide during operation of the pipeline were submitted by Jonathan Shelman (Environmental Science B.S.); Amee Rief (discipline is listed as "General"); Brent Cossette (Real Estate Division); and Waylon Harlon (discipline is listed as "Environmental," "Risk Assessment," and "General"). **AR0072162–AR0072270,** ECF 183-6. The Corps conducted no independent analysis and relied exclusively on information provided by Dakota Access. *See*, *e.g.* **AR0072202**, ECF 183-6 at 43, Comment 6141370 and Response 1-0; **AR0072208**, ECF 183-6 at 49, Comment 6141619 and Response 2-0.

[1] Both Defendants argue that this Court's review should exclude the Tribe's Statement of Material Facts. ECF 183 at 11-12, fn.2; ECF 185 at 3. As set forth in the Tribe's Motion for Summary Judgment and Section III,A.2, *infra*, and in light of the fact that such many claims at the time of filing were not the subject of an administrative record, the Statement of Material Facts ("SUMF") fully complied with Local Rule 7(h)(1). ECF 131 at 11, n.1. The Tribe's footnote on this issue in the motion itself, Motion n. 1, is worded incorrectly and should be disregarded.

2. *The Corps "independently evaluated and verified the information and analysis" in the EA prior to July 2016 and took "full responsibility for its scope and content."* ECF 183 at 14. The Tribe disputes. *See, e.g.* **AR0072248**, ECF 183-6 at 89, Comment 6356954 and Response 1 (documenting the Corps recommended in-house risk assessment, noting the EA does not include the Spill Model discussion or Response Plan, and response documenting it was not performed); **AR0072185**, Comment 6139320-7-1, ECF 183-6 at 26 (confirming water intake locations were not considered until after April 12, 2016, and "the current risk analysis only pertained to design factors…I would ask that DAPL also provide a risk analysis for the O & M life of the pipeline at each River crossing); *Id.* at Comment 6139320-10-0 (documenting that Dakota Access did not conduct an O & M risk analysis because "the input parameters are not even available yet, it is not possible to provide a meaningful IMP document at this time," and that PHMSA does not require the risk analysis for one year after construction of the pipeline.); *Id.* at 0072186 Comment 6139320-10-1; *Id.* at Comment 6139347-1-1; **AR0072202**, ECF 183-6 at 43, Comment 6141370 and Response 1-0; *Id.* at Comment 6141389 and Response 1-0; **AR0072208**, ECF 183-6 at 49, Comment 6141619 and Response 2-0; **AR0072220**, ECF 183-6 at 61, Comment 6141685 and Response 2-0 and 2-1; **AR0072236**, ECF 183-6 at 78, Comment 6141805 and Response 1-1 and 2-0; **AR0072243**, ECF 183-6 at 84, Comment 142072 and Response 1-0; **AR0072249**, ECF 183-6 at 90, Comment 6356954, Responses 1-1, 2-0 and 2-1; *Id.* at Comment 6356955, Response 1-1; **AR0072252-53**, ECF 183-6 at 93-94, Comment 635963; **AR0072253-54**, ECF 183-6 at 94,95, Comment 6356966; **AR0072257-58**, ECF 183-6 at 110-111, Comment 6400949 and Responses thereto; **AR0072266-67**, ECF 183-6 at 107-108, Comment 6400959; **AR0072269,** ECF 183-6 at 110, Comment 6400963 and Responses thereto; **AR0072511**, ECF 183-12 at 2.

3. *Omaha District personnel in a wide range of specialties independently reviewed the proposal and supporting information.* ECF 183 at 14; *See also* ECF 185 at 19-20. The Tribe disputes this. *See*, ¶2, *infra*. The Corps performed no independent analysis and relied exclusively on Dakota Access information; information on spill risk was not even available until May 2016. **AR0072248**, ECF 183-6 at 89, Comment 6356954 and Response 1; **AR0072511**, ECF 183-12 at 2. There is no dispute that Corps' personnel lacked any specialized experience in HDD drilling, oil pipeline risk analysis, or impact analysis. **AR0071180,** SUMF ¶15, ECF 183-9 at 2; **AR0071180,** SUMF ¶16; **AR0071180,** SUMF ¶45. *See also*, **AR0072511**, ECF 183-12 at 2. The 408 Permit Certification Checklist for Lake Oahe shows that Recreation, Navigation, and Hydropower were marked as "Not Applicable." **AR0071183**, ECF 183-9 at 5. Engineering signed off for the purpose of flood risk reduction only. *Id.* Most Section 408 Memos relate exclusively to the Lake Sakakawea crossing and not the Lake Oahe Crossing. *See*, **AR0071189-AR0071200**, ECF 183-9 at 12-22; **AR0071203–AR1204**, ECF 183-9 at 25-26; **AR0071206–AR0071214**, ECF 183-9 at 28-36. The December 10, 2015 Engineering Division Memo only included "geotechnical and flowable easement issues related to HDD and geotechnical investigations…." **AR0071201**, ECF 183-9 at 23; the November 4, 2015 Water Quality Team Memo states they "have no comments…." **AR0071205**, ECF 183-9 at 27. Both Memos were issued before the Corps even had looked at a spill model risk analysis and before any water intake information was available in May 2016. *See*, **AR0071180**, ECF 183-9 at 2; **AR0072511**, ECF 183-12 at 2.

4. *The Corps considered extensive technical documentation to evaluate whether the pipeline crossing would limit the functionality of the Lake Oahe Project ("Project").* ECF 183 at 14. The Tribe disputes this. *See*, Section II.2 and II.3, *infra*. The Memo referenced refers to 13 comments on geotechnical issues by the Engineering Division, which did not extensively review

documents. **AR0072161**, Comment 6116831, ECF 183-6 at 2; **AR0072162**, Comment 6116834, ECF 183-6 at 3 (blast plan); *Id.* at Comment 6121653; **AR0075304-0075307**, ECF 183-10 at 14016.

5. *The Corps also considered the EA to evaluate whether the pipeline crossing would compromise or change other purposes of the Lake Oahe Project.* ECF No. 183 at 15. The Tribe disputes this. *See* Sections II.2 -4, 6, *infra.* ECF 172-1.

6. *The EA evaluated the potential impacts of the pipeline crossing on wildlife, vegetation, aquatic resources, and recreation.* ECF 183 at 15, 17; *see also* ECF 185 at 10. The Tribe disputes this. The EA contained no evaluation of the impact of an **oil spill** on wildlife, vegetation, or recreation. **AR0071274-0071293;** SUMF ¶67; *see also* Section II.2 -3, *infra*. The EA concludes that "[i]ncreased levels of sedimentation and turbidity from an inadvertent release could adversely affect fish eggs, juvenile fish survival, benthic community diversity and health, and spawning habitat." **AR0071293;** SUMF ¶68 (explaining how the Facility Response Plans "minimize" this risk). **AR0071293;** SUMF ¶69. The Tribe's expert disagrees. ECF 131-5 at 180-194 (Bowser Report) SUMF ¶70**.** The 408 Permit Certification Checklist for Recreation, Navigation, and Hydropower were marked "Not Applicable." **AR0071183**, ECF 183-9 at 5.

7. *The EA included a detailed analysis of the potential for the pipeline to rupture and for oil to reach Lake Oahe.* ECF 183 at 15. The Tribe disputes the EA included a "detailed" analysis. The EA relies solely on Dakota Access for the conclusion that "[w]hile the potential risk for a WCD scenario is low, such a spill would result in high consequences." **AR0071315**, ECF 172-1 at 97; **AR0071316**, ECF 172-1 at 98. The EA gives no assessment of external and internal corrosion risk or construction related defects for Lake Oahe, and includes only Lake Sakakawea. *Id.;* **AR0071317**, ECF 172-1 at 99. The only independent experts were retained by Tribes and

they did not concur that the risk is low. *See*, Section II.*8, infra;* SUMF ¶77. *See* also, ECF 117-5 (Accufacts Review); ECF 117-18 (Earthfax Report); ECF 131-5; ECF 132, Ex. 1 Declarations of Steve Martin (filed under seal) ("Martin Decl.") and ECF 132, Ex. 2 Hakan Bekar (filed under seal) ("Bekar Decl."); SUMF ¶43. Many federal agencies raised concerns that the Corps had not adequately assessed and evaluated impacts on tribal trust resources. **SUMF ¶19; AR0068891; AR0072159**; **AR0073187–0073190; AR007402174024; AR0082926**.

8. *The Corps evaluated and ultimately imposed numerous mitigation measures to further reduce already low risks*. ECF 183 at 15. The Tribe disputes that MLA mitigation measures reduced oil spill risks to authorized purposes and characterization of the risk as "low." The EA and easement only include general mitigation measures to address construction disturbance, not impacts from an actual spill. **A0071176**, ECF 172-2 at 4. The EA also confirms that no actual Risk Assessment has yet been done, as the Risk Assessment is listed as a document not yet submitted to the Corps. **AR0071177**, ECF 172-2 at 5. The Tribe's experts have explained how easement conditions fail to reduce the risk of an oil spill. ECF 132, Ex. 1 Martin Decl. and ECF 132, Ex. 2 Bekar Decl. The Envy Preliminary Report explains several underestimated risks: (a) inadequacy of supervisory control and detection systems in place (ECF 131-5 at 156-161); (b) maximum number of barrels of oil that would be discharged is underestimated (*Id.* at 142-143); (c) methodology for ranking risk in best alternative calculation (*Id.* at 144-151); (d) factors relating to specific construction risks at Oahe site (*Id.* at 125-126); (e) failure to evaluate special concerns in remediation of oil spill in freshwater lake (*Id.* at 141, 151, 161-163, 171); (f) failure to account for long term leak risks related to HDD bore (*Id.* at 141; SUMF ¶77).

9. *The Corps particularly considered potential impacts on water supply and intakes.* ECF 183 at 16. The Tribe disputes that the Corps performed any independent analysis or that the

Corps considered any impacts to the Cheyenne River Cap Point water intake. *See* Section II 2, *infra. See also* ECF 131 at 26-27.

10. *The Corps considered environmental, economic, cultural, social, and environmental justice effects, and cumulative effects of the proposed crossing.* ECF 183 at 16. The Tribe disputes this. The EA briefly mentions the Standing Rock Sioux Reservation, but as set forth in Standing Rock's Motion for Summary Judgment and Reply, this does not include any impact analysis. ECF 195 at 28-31. The Cheyenne River Sioux Tribe and Reservation are not even mentioned in the EA. *See also* Section II.6, *infra.*

11**.** *The Corps compared the risk of alternative methods of transporting crude oil with the proposed Lake Oahe crossing*. ECF 183 at 17. The Tribe disputes that the Corps itself compared the risk. **AR0071229-0071230**, ECF 172-1 at 10-11. Further, this does not explain why the alternative of one Missouri River crossing rather than two crossings at Lake Sakakawea and at Lake Oahe was not analyzed as a reasonable alternative. ECF 131 at 12. **AR0075290-0075292**.

12. *After almost two years of study and consideration, on July 25, 2016, the Corps granted Dakota Access permission under Section 408 for the pipeline to cross under Lake Oahe*. ECF 183 at 17. *See also* ECF 185 at 9. The Tribe disputes that the Corps conducted two years of study or any independent or internal assessment of the risk of oil spill. *See* Section II.B.2-3, *infra*. The Spill Models and risk analysis done by Dakota Access were not available to all Corps' personnel until May 4, 2016, and as of that date, Dakota Access had not submitted its analysis of potential impacts to water intakes. **AR0072511**, ECF 183-12 at 2.

13. *During September and October 2016, the Corps met with tribes to consider any new information relevant to its review of the NEPA analysis and Lake Oahe crossing among other issues.* ECF 183 at 18. The Tribe disputes that the Corps met with the Tribe or that the Corps

provided any of the information on oil spill risk or mitigation measures. ECF 172-9 at 9. ESMT000231 asserts that in September and October 2016, "the Corps met with Dakota Access, the Standing Rock, and other tribes, and addressed the information provided in those meetings…" The Corps mischaracterizes those meetings. ECF 195 at 25, n. 18. Neither Defendant refutes that the Corps did not invite the Tribe to discuss easement conditions until November 14, 2016, that it informed the Tribe that the process available was to comment to the EIS Notice, or that the Corps failed to respond all requests to consult on the easement. ECF 131 at 54; Tribe's SUMF ¶106-¶127 (ECF 131-1); AR 0000282; AR 0066390; ESMT000999**;**ESMT000432-458; ESMT000848; ESMT000362-364; ESMT000419-421; ECF 131-4 at 6-8 , ¶16 - ¶24.

III. ARGUMENT

A. STANDARD OF REVIEW

1. The Corps' Section 408 Permit and MLA Easement Decision Are Not Due the Highest Level of Deference

Both Defendants argue that the Corps is due the highest level of deference because it relied on agency expertise to grant the Section 408 Permit and the MLA Easement and because it "has decades of expertise in managing civil works projects and evaluating risks to such projects." ECF 183 at 12-13; ECF 185 at 8; ECF 183 at 24. However, the Corps had no personnel with expertise in HDD drilling, oil pipeline operation, or risk assessment review these decisions; (*see* Section II.2, *infra*) also, the Corps did no independent analysis of an oil spill risk or impacts from an oil spill, and instead relied exclusively on documents and a draft EA prepared by Dakota Access. *See* Section II.2 & 3, *infra; see also* **AR 0075101-0075191** (EA May 2015 version)**; AR0074119-0074226** (Sept. 2015 version), ECF 185-1; **AR0071220-AR0071382 (**Final EA), ECF 172-1; SUMF ¶8 & ¶9**;** ECF 183 at 13**. AR0074087; AR0074119-AR0074226;** ECF 185-1; SUMF ¶92; **AR071774, AR0071730,** ECF 172-4 at 12**; AR0073186;** SUMF ¶11**.** The Corps ignored its own

personnel who recommended an "independent risk analysis." **AR0072248**, ECF 183-6 at 89, Comment 6356954 and Response 1. The Corps performed no analysis of how an oil spill would impact any authorized purpose of the Mainstem Reservoir System and only provided some water intake locations to Dakota Access for its Facility Response Plans and Oil Spill modeling, neither of which was part of the EA. **AR0072248-2249**, Comment 6356954 and Responses, ECF 183-6 at 88-89. The Corps cites to no expertise it relied on to conclude that the pipeline would not "impair the usefulness of" the Project.

The Corps Omaha District has never before considered the risk or impact of an oil pipeline on Lake Oahe because an oil pipeline has never crossed any portion of the Missouri Mainstem System managed by the Omaha District Office and, in this case, the Corps relied exclusively on Dakota Access rather than an independent expert. ECF 131 at 20; **AR 0012846-0012915; SUMF ¶44;** EC 1165-2-216(7)(c)(3)(f), ECF 73-15 at 18.; EC 1165-2-216(7)(c)(4)(a) & (b); ECF 73-15 at 19. Numerous federal agencies also raised concerns that the Corps had not adequately evaluated the risks and impacts. **SUMF ¶19; AR0068891; AR0072159**; **AR0073187–0073190; AR007402174024; AR0082926.**

The Corps' citation to *Building & Construction Trades Department, AFL-CIO v. Brock*, 838 F.2d 1258, 1266 (D.C. Cir. 1988) is inapposite. ECF 183 at 12. The Corps has no "special expertise" related to oil pipelines; and unlike OSHA, it did not rely upon actual scientific studies and experts concerning impact of spills on project purposes. *See* Section II.2-4, *infra.* It relied solely on Dakota Access assertions that pipeline construction methods were low risk and that mitigation measures lowered the risk further. *See* Section II.2, *infra.*

Even under the most deferential standard, the Court's "primary duty" is to "scrutinize the record to ensure that the [agency] has made [its] findings of fact on the basis of substantial evidence

and has provided a reasoned explanation for [its] policy assumptions and conclusions." *Id.* Agency action is arbitrary and capricious where an agency "failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mnfrs.' Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S.29, 42 (1983); *see also*, ECF 19-20. Courts "do not defer to the agency's conclusory or unsupported positions." *United Techs. Corp. v. U.S. Dep't. of Defense*, 601 F.3d 557, 562 (D. D.C. 2010).

Significantly, the 408 Permit and the MLA easement involve application of statutory mandates, which are not entitled to *Chevron* deference, but "respect, only to the extent they have the power to persuade." *Fox v. Clinton*, 684 F. 3d 67, 76 (2012). ECF 131 at 16. With respect to trust obligation claims, the duty to protect treaty and trust resources is subject to "the most exacting fiduciary standards." *Cobell v. Babbitt*, 91 F.Supp.2d 1, 29 (D.C. Cir. 1999). ECF 131 at 17.

2. Reference to Extra-Record Materials in This Case Is Appropriate

The Corps asserts this Court should not review administrative record documents dated after July 25, 2016. ECF 183 at 15, n. 8. The record relating to the MLA easement was not filed until after the Tribe filed its Motion for Summary Judgment. Every document cited by the Tribe in its SUMF is now part of the Administrative Record, except for public information regarding the Cheyenne River Sioux Tribe (SUMF ¶1-3), the size and location of the Cheyenne River Sioux Reservation (SUMF ¶¶5, 6 7, 46, 47, 49, 57-65, 116-120; 124-126); and publicly available statutes and regulations cited by other parties relevant to this case. (SUMF ¶¶24-31, 33-41, 138, 140, 151, 159-163, 66, 199-205.)[2]

[2] Additionally, the Tribe and Corps are currently consulting on further additions to the Administrative Record in this case. The Tribe anticipates that documents at ECF No 131-4, Attachments B and E; ECF No. 131-5, Attachment A with all sub-attachments and ECF No. 131-

B. THE SECTION 408 PERMIT DID NOT COMPLY WITH APPLICABLE LAW

1. The Corps Did Not Properly Analyze the Risks or Impacts of an Oil Spill

For the reasons set forth in Section II, *infra*, as well as in prior briefing, the Corps did not properly consider the risk and impact of an oil spill. ECF 11-41; ECF 117-1 at 28-48; ECF 131 at 18-20, 25-29. At best, the Corps relied exclusively on the EA, which concluded, "[w]hile the potential risk for a [worst case discharge] scenario is low, such a spill would result in high consequences." **AR0071315**, ECF 159-1 at 397. The EA asserts that while precautions may minimize risk of a spill, "it is still considered a low risk/high consequence event." **AR0071316**, ECF 159-1 at 398. The EA states, "the worst case scenario is ranked high because of several drinking water intake High Consequence Areas (HCAs) and multiple ecologically sensitive HCAs could be impacted." **AR0071318**, ECF 159-1 at 400.

As set forth herein, notwithstanding any disputes between the parties concerning risk, in light of this finding, granting a Section 408 permit without an EIS was not in accordance with the law. The Corps asserts that it "considered both the functionality of the Oahe Dam and Lake as well as the wide range of purposes served by the project in its Section 408 analysis." ECF 183 at 24. But it fails to reconcile the "high consequence" determination in the EA with this assertion. Further, as set forth in the Tribe's Opening Brief, the record does not support the assertion that anyone in the Recreation, Irrigation, and Hydropower divisions made any determination, because those divisions are marked as "Not Applicable." **AR0071183**, ECF 183-9 at 5; The Water Quality Division signed off in November 2015-before the Corps even had any information on oil spill risk, facility response plans, or even the locations of water intakes. **AR0071205**, ECF 183-9; **AR**

2, Attachments B and C will be added to the Administrative Record after consultations. Should consultations on this issue fail, the Tribe will move to supplement.

0072511, ECF 183-12 at 2. Unlike the Lake Sakakawea crossing, the Corps issued no memos for the Lake Oahe Crossing from its Natural Resources, Engineering, or Flood Risk sections. **AR 0071195-97** ECF 183-9 at 17-19; **AR 0071203-04**, ECF 183-9 at 25-26; **AR 0071205-06**, ECF 183-9 at 29-30.

The Corps fails to explain how a high consequence to water supply does not violate the Corps' statutory mandate to "not impair the usefulness" of the Project. The Summary of Findings for the Section 408 Decision states that Section 408 Review team "consists of subject matter experts in the following offices: operations, real estate, regulatory, office counsel, engineering, planning, and emergency management." **AR0071184**, ECF 183-9 at 6. No experts in oil pipelines, oil spill risk, environmental, or in any of the authorized purposes made the Section 408 determination. This alone is a fatal deficiency in the Section 408 determination.

2. **The Corps' decision that the DAPL Crossing of Oahe Would Not Impair the Project Purposes is Arbitrary and Capricious and Unsupported by the Record**

Neither Defendant disputes that there are only seven authorized purposes for operation of the Mainstem Reservoir System, and none are uses for oil pipelines to cross Lake Oahe. ECF 131 at 21-22, 33 U.S.C. § 701-1(b). Neither Defendant disputes that the Corps must operate the Mainstem Reservoir System in a manner that protects those seven authorized purposes, nor that the Corps is responsible for guaranteeing that "the supply of water in the Missouri River is adequate to meet this project purpose [water supply]." ECF 131 at 23, 131-3 at 139. Neither Defendant disputes that water quality is one of the Corps' purposes. ECF 131 at 23; ECF 131-3 at 135.

Rather, the Corps argues that it is entitled to "deference" in interpreting "impair the usefulness" to mean "will not limit the ability of the project to function as authorized and will not compromise or change any authorized project conditions, purposes or outputs." EC 1165020216

¶7.c.(4)(b)I, ECF 73-15 at 14; ECF 183 at 24. The Corps is not entitled to deference in interpreting statutory language. *Fox*, 684 F 3d. at 76. The Corps fails to explicate any ambiguity in "impair the usefulness." Further, read *in pari materia*, the Rivers and Harbors Act ("RHA") and the Flood Control Act ("FCA"), including 33 U.S.C. §701-1(b) (which is identical to the RHA language), make clear that beneficial consumptive uses of water on the Missouri River take precedence, and that the Corps has no authority to give priority to an oil pipeline over water supply or other consumptive uses. As the Supreme Court has explained,

> [e]ven under Chevron 's deferential framework, agencies must operate 'within the bounds of reasonable interpretation.' And reasonable statutory interpretation must account for both 'the specific context in which ... language is used' and 'the broader context of the statute as a whole.' A statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.' Thus, an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' does not merit deference.

Util. Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427, 2442 (2014)(internal citations omitted).

The Corps' decision to authorize an oil pipeline that includes a risk of oil spill with high consequences, including loss of use of water supply and undefined impacts on aquatic species for an indeterminate period of time, based on the pipeline owner's biased risk evaluation, does not comport with the Corps' duty to protect the seven authorized purposes of the Mainstem system, nor does it comport with the requirement not to impair the usefulness of the Project for those purposes. Dakota Access argues that because 33 U.S.C. §701-1(b) focuses on beneficial consumptive uses of water, it does not limit the Corps' authority to permit oil pipelines that are not a beneficial consumptive use of water. ECF 185 at 14. In so doing, Dakota Access concedes the point being made: the ***only*** authorized uses of this Mainstem Reservoir System are these consumptive uses of water and they must receive preference over any other uses of this Project.

To give permission to this private company to occupy and alter the Project when such permit entails a risk of high consequences to project purposes that are preferenced to have statutory priority, including water supply, flies in the face of 33 U.S.C. §701-1(b) and 30 U.S.C. §408.

Further, neither Defendant explains how the Corps can authorize a project with a risk of a high consequence to these Project purposes under EC 1165-2-16 ¶7 any more than it can under 30 U.S.C. §408. The language of the regulation does not support the Corps' authority to authorize even a low risk with a high consequence to project purposes. The Corps does not explain how this is consistent with its regulatory duty not to permit projects that "limit the ability of either the Garrison or Oahe projects to function as authorized" and not to "compromise or change any authorized *project conditions, purposes or outputs*…" ECF 183 at 25. While water would still flow with an oil spill, the water itself would be in a different condition, which would not meet project purposes for water supply, water quality, or recreation.

With no support in the statute, regulations, or legislative history, the Corps asserts boldly that the statutes "do not require denial of all requests for oil pipelines (or any other projects) simply because there is a chance, even if exceedingly low, of some negative consequence." ECF 183 at 26. First, nothing in the EA concluded that risk of an oil spill was "exceedingly low." The EA found the risk was "low." **AR0071316**, ECF 159-1 at 398. Second, the EA did not find "some negative consequences," it found "high consequence" and specifically found "the worst case scenario is ranked high because of several drinking water intake High Consequence Areas (HCAs) and multiple ecologically sensitive HCAs could be impacted." **A R0071318**, ECF 159-1 at 400. Citation to the Master Manual does not help the Corps here. ECF 183 at 26. Section 1.02-4 of the Master Manual discusses flexibility in balancing the ***authorized purposes of the Project***—all of which are beneficial consumptive uses of water, and none of which are oil pipelines. It states,

"[n]ew information on the needs of the project purposes, such as the requirements of endangered species enhancement, may also require revision of the water control plan…" ECF 131-3 at 26; Master Manual §1-02.4.

The Corps asserts that no linear infrastructure projects could be built if the Court accepts that the statute means what it says—that no project that could "impair the usefulness of project purposes" could be authorized; and that the existence of other pipelines and utility lines is proof that "utility projects and water supply" can "coexist." ECF 183 at 26. Oil pipelines, this one in particular, are markedly different than utility and natural gas pipelines. Neither cause loss of water supply use or long term impacts to ecologically sensitive areas. ECF 131-5 at 122.

The prohibition of impairing any project purpose in 30 U.S.C. §408 is also supported by Corps' regulations which define "alteration" as "any action by any entity other than USACE that builds upon, alters, improves, moves, occupies, or otherwise affects the usefulness, or the structural ***or ecological integrity***, of a USACE project." EC 1165-2-216(6)(a) (emphasis added); ECF 73-15 at 8. The regulation requires that "[i]f at any time it is concluded that the usefulness of the authorized project will be ***negatively impacted***, any further evaluation under 33 U.S.C. §408 should be terminated." EC 1165-2-216 (7)(h)(b)(i). ECF 73-15 at 19 (emphasis added). It defies the plain language of 30 U.S.C. §408, the FCA, and the RHA, which prioritize the beneficial consumptive uses set forth in 30 U.S.C. §701-1(b), to allow the Corps to authorize a project that risks a high consequence to beneficial consumptive uses when the Project is not for an authorized purpose.[3]

[3] The Corps points out that 30 U.S.C. §408 was authorized under the Rivers and Harbors Act of 1889 instead of the FCA or the RHA of 1945. ECF 183 at 18. It makes no difference. The prioritization of beneficial consumptive uses is located in both the FCA and the 1945 RHA and supersedes the 1899 Act. ECF 131 at 21; 58 Stat. 889; 59 stat. 10-11.

The Corps alleges that it is only authorizing construction of the pipeline and not an oil spill. ECF 183 at 27. But the Corps concedes, "a rupture and resulting spill are potential impacts of any pipeline…" ECF 183 at 27. Citation to *Defenders of Wildlife v. Bureau of Ocean Energy Management* is unhelpful. 684 F.3d 1242, 1250 (11th Cir. 2012). In that case, the EA included a detailed oil spill risk and impact analysis based upon two prior spills in the Gulf of Mexico. *Id.* at 1249. The instant EA failed to analyze what the actual impacts would be, how long they would last, and did not include any detailed risk analysis. In *Defenders of Wildlife* the determination that an EA was sufficient was specific to the facts in that EA and does not speak to the standard applicable under 30 U.S.C. §408 for determining whether a project under Section 408 will impair the usefulness of the Corps' Project. The Corps cites to the EA's environmental justice analysis, in which Dakota Access used the words "extremely low" to characterize the risk of oil spill. **AR0071308**, ECF 172-1 at 91. There is no rationale why the word "extremely" in relation to environmental justice impacts is based in any scientific study of actual risk. The EA concludes in other places the risk is "low." **AR0071316**, ECF 159-1 at 398. These are all words used by Dakota Access that are disputed, as the Corps indisputably failed to look at numerous risk factors specific to this particular pipeline. *See,* Section II.6-8, *infra*. *See also* ECF 195 at 17-22.

In *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, (9th Cir. 2005), the Court required an EIS because the Corps failed to examine the actual impacts of an increased risk of oil spill. *Id.*at 868. As the court explained, "the ***obvious severity of the impact*** that increased tanker traffic poses ***is enough to warrant reversal*** on OA's NEPA claim" and an increased risk of an oil spill required an EIS due to the ecologically sensitive nature of the Puget Sound. *Id.* (emphasis added). An oil pipeline under Lake Oahe creates a risk of an oil spill. That risk, even if low (which the Tribe disputes) would have a high consequence "because of several drinking water intake High

Consequence Areas (HCAs) and multiple ecologically sensitive HCAs could be impacted." **AR0071318**, ECF 159-1 at 400.

Increasing the risk of an oil spill with high consequences on an ecologically sensitive area without any explanation of how that is not a significant impact and without any "critical evaluation" of risks or impacts, is arbitrary and capricious. *Ocean Advocates*, 402 F.3d at 867. As in *Ocean Advocates*, the Corps erred by permitting a project that carries a risk of high consequence to Project purposes with no independent analysis, and relying wholly on the assertions of Dakota Access that impacts are "unlikely due to proper design, construction, and operation of the system." *See Id.;* **AR0072208**, ECF 183-6 at 49; **AR0072202**, ECF 183-6 at 43; **AR0072215**, ECF 183-6 at 56. There is no evidence that the use of the terms "extremely low risk" or even "low risk" is based on anything more than the biased assertions of Dakota Access.

Dakota Access claims that the Tribe did not comment on the EA, the EA is 163 pages long, and that it was a two year process are false and irrelevant, ECF 185 at 10. The Tribe made numerous comments attempting to initiate consultation on Section 408 and the MLA. *Id*. Whether the Tribe commented does not alter the Corps' statutory obligations under 30 U.S.C. §408 and 33 U.S.C. §701-1(b), and the length of the EA is immaterial to whether the Corps met its obligations under NEPA and 30 U.S.C. §408, and 33 U.S.C. §701-1(b) to provide reasoned analysis and adequate basis for its no impairment decision in light of its determination that a high consequence at stake.

Dakota Access' attempt to distinguish *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670 (D. D.C. 1997) based solely on the size of the administrative record also fails. ECF 185 at 7. Just as in *Defenders of Wildlife v. Jewell*, where reliance on a state's assurances about future actions was not a rational basis to delist an endangered species, here reliance on Dakota Access' assurances

that its construction methods, future operation of the pipeline, and spill response plans will be adequate to protect water intakes is arbitrary and capricious. 68 F. Supp. 3d 193, 209 (D. D.C. 2014), *aff'd in part, rev'd in part sub nom. Defenders of Wildlife v. Zinke*, 849 F.3d 1077 (D.C. Cir. 2017).

3. The Corps Improperly Determined That the DAPL Oahe Crossing Was in the Public Interest

The Corps incorrectly defines the public interest because it does not properly weigh the Project purposes and the impact on those purposes. The Corps concedes that EC 1165-2-216¶7.c.(4)(b)(ii) applies in this case, ECF 183 at 28, ECF 73-15 at 14, which requires the Corps to determine "whether the benefits are commensurate with risks." *Id.* The regulation makes clear this is not the same as the "contrary to the public interest" determination required for Section 10/404/103 permits. *Id.* "Factors that may be relevant to the public interest ***depend on the type of USACE project being altered***…" *Id.* (emphasis added). In this case, the Corps did not explain why a risk of "high consequence" to project purposes was outweighed by the asserted general benefits to the public from using pipeline transportation of oil. Nothing in the record explains how the Corps weighed the risks against the claimed benefit. **AR71181-71185**, ECF 183-9 at 3-7. EC 1165-2-216¶7.c.(4)(b)(ii), ECF 73-15 at 14. EC 1165-2-216¶7.c.(4)(b)(ii), read in light of 33 U.S.C. §701-1(b) makes it clear that assessment of public purposes depends on the Corps' project being altered and that the Corps' obligation is first to protect the beneficial consumptive uses of Lake Oahe. ECF 131 at 31.

The Corps' citations to *Wilderness Workshop v. U.S. Bureau of Land Management*, 531 F.3d 1220, 594 (D.C. Cir. 2008) and *North Slope Borough v. Andrus*, 642 F.2d 589, 594 (D.C. Cir. 1980) are inapposite for this very reason. *Wilderness Workshop* was about the balance of the harm to the plaintiff against the public interest under the test for granting a preliminary injunction. 531

F.3d at 1224, 1231. Likewise, the Court in *North Slope Borough* weighed the impacts against the benefits in general under other applicable laws—not 30 U.S.C. §408. 642 F.2d at 594 (D.C. Cir. 1980). Also, unlike the laws at issue in *North Slope Borough*, which "require continuing review of all activity growing out of these leases," and authorize "the Secretary to order a cessation to such activities if environmental safety cannot be ensured," the Section 408 Permit is permanent and permits no continuing oversight or revocation of the Section 408 permit in the event that environmental safety cannot be assured. *Id.* This oil pipeline permanently alters the project purposes and permanently prioritizes vaguely-stated interests in oil production over the project's authorized purposes.

The Master Manual further supports the conclusion that the language of Section 408 and the Corps' own regulation are intended to be specific to the Project's purposes and to give priority to those purposes, stating the Corps' purpose is "regulating the System for the congressionally authorized purposes, with recognition that other ***incidental*** benefits are also achieved." SUMF ¶32, ECF 131-1 at 11; Master Manual Section 4-02, ECF 131-3 at 31 (emphasis added). Read in light of the statute and the binding Master Manual, EC 1165-2-216¶7.c.(4)(b)(ii) clearly requires the Corps focus to remain on the impact of a Section 408 permit on Project purposes. Finally, the Corps completely ignores the congressionally expressed public interest served by ensuring that all Indian communities "be provided with safe and adequate drinking water supply." 25 U.S.C. § 1632. ECF 131 at 31.

The Corps' only answer to the fact that the Record of Decision and EA do not address the impact on the Tribe and its water supply, is that the analysis of Standing Rock's water intakes "would also apply to Cheyenne River, whose reservation is approximately 70 miles downstream." ECF 183 at 21, n. 10. The Corps thus concedes that it never considered any impacts on the Tribe

or its water intake. In 2005, the Corps concluded that Cheyenne River Sioux Reservation has no access to wells, has only one water intake on Lake Oahe available to supply the entire reservation, that bottled water as of 2005 would cost at least $19.5 million dollars a year to supply, and that the loss of water supply for agriculture, livestock, dialysis patients, fire suppression, sanitation for 14,000 people would be catastrophic. ECF 131-2 at 11-38. None of this information is in the EA. Instead the Corps ignored its prior determinations and falsely stated in the EA that the options it presents are adequate and available mitigation options. This alone was arbitrary and capricious.

The Corps ignores the "high consequences" to Project purposes resulting from an oil spill and thereby ignores its obligations to weigh the risk to Project purposes in determining public interest under 33 U.S.C. §408. Strangely, Dakota Access asserts the Master Manual has no bearing on the Corps' obligations. ECF 185 at 12. A Section 408 permit, by its very nature, is a permit seeking to "alter" purposes of a Project operated by the Corps. It is no surprise that the Master Manual is focused on operating the Mainstem System to control flow of water and project purposes, since the only purposes for which the Corps was granted authority over the Mainstem System are water-use purposes. 33 U.S.C. §701-1(b); ECF 11; *see also* 58 Stat. 889 -890. The Corps was never given pervasive control over the Missouri River for any other purposes, including permitting construction of oil pipelines. *Id.* The Corps is bound to comply with the requirements set forth in the Master Manual. ECF 131 at 15; *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1027-1029 (8th Cir. 2003), *cert. denied*, *North Dakota v. Ubbelohde*, 541 U.S. 987 (2004).

Dakota Access is wrong when it asserts "other environmental statutes and regulations" impose the requirements "that govern the potential introduction of pollutants into the river." ECF 185 at 18-19. 30 U.S.C. §408 governs that issue. 30 U.S.C. §408 requires that any alteration not impair the usefulness of the Corps Project, and that it be in the public interest. This is informed

by the FCA and the Master Manual, both of which define the Corps' responsibilities to protect project purposes. Further, raising major flaws in the EA is not "flyspecking." ECF 185 at 16. Rather, the Tribe points out major problems that the Corps failed to consider, explanations for its decision that run counter to the evidence, and how the Corps' decision violates statutory mandates applicable to the operation of Lake Oahe, all of which are grounds for finding that the Corps' decision was arbitrary and capricious. *See, Motor Vehicle Mfrs.' Assn.,* 463 U.S. at 42; *Fox,* 684 F 3d at 76.

The Tribe correctly stated that there is no evidence in the Record that the ***Corps*** analyzed landslide risk. Rather, the Corps accepted Dakota Access' bald statement that it mitigated the risk by drilling under any area with more than a 25% slope. **AR0071251**, ECF 172-1 at 33. The EA does not explain how this eliminates risks from earthquake and landslides in the Corps project area and all around Lake Oahe. ECF 195 at 18-19. The shut off valves for this pipeline segment are outside the Corps' lands, and there was no analysis of whether they (or any other portion of the pipeline) are susceptible to a high landslide risk. *Id. See also* ECF 195-1 at 8, ¶13; ECF 195 at 18-19. Further, the Tribe correctly stated that neither the EA nor the Record of Decision on the 408 Permit show any analysis of impacts of an ***oil spill*** on vegetation or recreation. **AR0071279-80**, ECF 172-1 at 61, 62; **AR0071299**, ECF 172-1 at 81. These are not instances of the Tribe's experts merely "disagreeing" with the EA: they are areas where the EA *did not assess the impact of an oil spill on significant resources at all*. Further, as the Tribe argues herein, the Corps is not entitled to deference because it did not rely on any of its own or any independent expertise regarding oil pipeline risk, impacts, construction, or operation.

C. THE GRANTING OF THE MLA EASEMENT DOES NOT MEET THE REQUIREMENTS OF 30 U.S.C. §185 AND WAS ARBITRARY AND CAPRICIOUS.

1. Exclusive Reliance on the Section 408 Record Was Not Appropriate

The Corps is required to analyze and provide reasoned determinations for *all* of the factors set forth in the MLA. Yet the Corps now argues that it does not have to make reasoned decisions on the 12 requirements within the MLA under §§185(d); (g); (h)(2); (i); (j); (l); (n); (p); (v); (x); (w)(2). This is contrary to what it previously represented to this Court. *Cf*, ECF 73-1 at 26-27 and ECF 183 at 24. To the extent the Section 408 Permit Record of Decision and the EA do not analyze those twelve factors, the Corps has failed to meet its obligations under the MLA. ECF 96-1. The Corps failed its duties under the MLA to analyze specific requirements not analyzed in the section 408 and EA records: the 30 U.S.C §185(b)(1) requirement for a determination that the easement will not be inconsistent with the purposes of the reservation, and 30 U.S.C. §185(h)(2) and (h)(2)(D). ECF 131 at 48-49. To the extent that the Corps Section 408 Permit decision or its EA FONSI is not upheld by this Court, the MLA decision is also fatally flawed, because it relies upon those two decisions.

2. The Corps Easement Conditions Do Not Comply with 30 USC §185(h)(2)

The Corps attempts to assert that easement Condition 36, which requires Dakota Access to "be responsible for commitments made and mitigation measures in the Final Environmental Assessment" addresses the requirement under 30 U.S.C. §185(h)(2). ECF 183 at 35. Nothing in the EA addresses protecting the interests of persons "who rely upon the fish, wildlife and biotic resources of the area for subsistence." The EA does not even assess impacts of an oil spill on vegetation, or recreation including fishing. **AR0071274-0071293;** SUMF ¶67. Further, it concludes there is a risk of high consequence to aquatic wildlife, but is silent about impacts on land based wildlife from an oil spill. *Id.* Because the EA is silent on these impacts, it fails to require mitigation measures to protect these resources or the people who rely upon them.

The Corps now asserts that 20 of its easement conditions are "designed to quickly detect and remediate any spill before it has a chance to impact fish, wildlife, or other resources on which the Tribe relies." ECF 183 at 34. To believe that any of the easement conditions will allow Dakota Access or the Corps to clean all oil from Lake Oahe before they impact resources is magical thinking, and it certainly is not supported by the EA or Section 408 Record of Decision. *See* n.8, *infra.* Defendants do not cite a single instance in the history of oil spills in freshwater over the past 50 years in which cleanup was accomplished before an impact on resources. Likewise, nothing in the MLA easement record explains the decision to limit strict liability to $10 million, or how it is consistent with the requirement of 30 U.S.C. §185(x)(6) to include a stipulation "the Secretary or agency head shall promulgate regulations specifying the extent to which holders shall be liable to third parties for injuries incurred in connection with the right-of-way or permit," or the requirement of 30 U.S.C. §185(x)(6) which requires that a "stipulation imposing liability without fault ***shall include a maximum limitation on damages commensurate with the foreseeable risk or hazard***" (emphasis added). ECF 131 at 43; ECF 96-1 at 7. Further, Dakota Access' statistics on the cost of cleanup of oil spills in the Environmental Justice Considerations Memo to the Corps demonstrates that $10 million will not begin to cover the cost of a cleanup. ECF 203-1 at 184, ESMT001257.

3. The Easement Violates the Corps' Trust Responsibilities to Tribes

For the reasons set forth in Section D., *infra*, the MLA easement violated the Corps' trust responsibilities to the Tribe.

D. THE CORPS BREACHED ITS TRUST RESPONSIBILITIES TO THE TRIBE.

1. The Corps Owes the Tribe a Specific Trust Duty to Manage the Waters of Lake Oahe for the Benefit of the Tribe, Emanating from Binding Treaties, Statutes, and Regulations

The Corps uses this controversy to wholly renounce any specific trust responsibility to the Tribe in its management of the waters of Lake Oahe. It claims, with the support of the oil company, that the relationship between the Tribe and the Corps as it concerns Lake Oahe is subject merely to an unenforceable general trust that, imposes no duty upon the Corps, but instead "***allows*** the government to consider and act in the Tribes' interest in taking discretionary actions. . . ," as if the United States might be prevented from acting in the Tribe's interest in the absence of a trust relationship. ECF No. 183 at p. 29 (emphasis added). The Corps contends that as a function of this relationship, it need only "comply[] with generally applicable statutes." *Id.* The Corps asks this Court to rule that the trust relationship between it and the Tribe as it concerns the waters of the Missouri River is a functional nullity—that the Corps relates to the Tribe just as it does to any water user. This is false.

Under federal law, including treaties, statutes, and regulations, the United States and the Corps together have specifically assumed a binding trust duty[4] to manage the waters of Lake Oahe in such a way that preserves the Tribe's hunting, fishing, and grazing rights, as well as the Tribe's reserved water rights, which constitute a trust resource of the Tribe. Where such a specific duty has been established, the law is clear that the Corps is bound by "moral obligations of the highest responsibility and trust" that must be fulfilled by conduct "judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). Where the United States is obligated to act as a fiduciary, its conduct "must not merely meet the minimal

[4] While a specific duty exists here, the Tribe concurs in and incorporates by reference arguments raised by the Standing Rock Sioux Tribe and the Amici Curiae Association on American Indian Affairs et al., distinguishing the line of cases that establish the contours of the United States' trust duty within the specific confines of the Tucker Act, a statute that is not at issue here (*Mitchell I* and *II* and *Navajo Nation I* and *II*—discussed in this part), and the line of cases that concern actions for injunctive relief brought under the APA. ECF No. 137 at Part II(A); ECF 195 at 34-39.

requirements of administrative law, but must also pass scrutiny under more stringent standards demanded of a fiduciary." *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583, 591 (10th Cir. 1992) *cert. denied*, 113 S. Ct. 1642 (1992). The trustee must, therefore, consider all relevant factors affecting the Tribe's interests. *Id.* The failure to do so violates its fiduciary duty and is thus arbitrary and capricious. *Id.*

a. The Waters of the Missouri River Constitute a Trust Resource of the Cheyenne River Sioux Tribe

While the Corps concedes that "[t]he Tribe has a vested water right in Lake Oahe,[5]" ECF No. 183 at p. 31, it makes the astonishing claim that authorities that govern the United States' fiduciary duty to manage trust resources of a Tribe cannot apply here because the waters of the Missouri River are not a trust resource. *Id.* at 30. This is not only false, it is a disingenuous misstatement of the fundamental status of the resource that Congress has empowered the Corps to manage. Regulations promulgated to govern Indian Affairs clearly define trust resources as "property and interests in property . . . that are held in trust by the United States for the benefit of a tribe or individual Indians," and which include specifically "water rights and off-reservation treaty rights." 25 C.F.R. §1000.352; *see also Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D. D.C. 1972). Congress explicitly has acknowledged that "the Federal Government recognizes its trust responsibilities to protect Indian water rights and assist Tribes in the wise use of these resources." Western Water Policy Act of 1992, Pub. L. 102-575, title XXX, §3002(9), *reprinted* at 43 U.S.C. §371. The agencies of the United States repeatedly have acknowledged that "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit

[5] The Corps likewise acknowledges tribal reserved water rights in the Missouri and Lake Oahe in its October 20, 2016 Memorandum. USACE_ESMT001227.

of Indians." 55 Fed. Reg. 9223 (Mar. 12, 1990).[6]

And most importantly, in a recent joint project of the Corps and the Bureau of Reclamation, authorized by Section 3109 of the 2007 Water Resources Development Act, the two agencies analyzed the potential effect of a diversion dam on the lower Yellowstone River in Montana on the existence of tribal trust resources in the Missouri River Basin, including trust resources in the Mainstem Missouri River System. Intake Diversion Dam Modification, Lower Yellowstone Project, Supplemental EA Appendix H—Indian Trust Assets Declaration of Nicole Ducheneaux ("Ducheneaux Decl.") Exhibit A. Notably, Joel Ames, the tribal liaison for the Omaha District for the Army Corps of Engineers who was a key figure in the present dispute, contributed to the analysis contained in Appendix H. *Id.* at H-5. Appendix H notes the Corps' responsibility for managing operations of the Missouri River and the Corps' recognition of tribal reserved rights in those waters, including the rights of the Cheyenne River Sioux Tribe. *Id.* at H-10. Citing *Winters v. United States*, 207 U.S. 564 (1908) and *Arizona v. California*, 373 U.S. 546, 600 (1963), the Fort Laramie Treaties of 1851 and 1868 and the Act of 1889, and acknowledging the Tribe's retained rights to hunt, fish, and irrigate, the agencies conclude that the Cheyenne River Sioux Tribe's "water rights to both surface and ground water constitute an [Indian Trust Asset]." *Id.* at H-7, H-10 - H-12. *See also*, ECF 131 at 32; Master Manual §7-01, §E-06, ECF 131-3 at 95, 174.

The Corps simply cannot avoid the fact that the waters of Lake Oahe constitute a trust

[6] *See also*, Bureau of Reclamation, *Reclamation, Managing Water in the West, Native American Affairs*, https://www.usbr.gov/native/water (last accessed Apr. 8, 2017) ("Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of Indians."); Dep't of Interior letter to Tribal Leader regarding consultation on water rights settlement, Sep. 9, 2016, available at https://www.bia.gov/cs/groups/public/documents/text/idc2-046009.pdf (last accessed Apr. 8, 2017) ("Water rights are one of the most important trust resources held by federally recognized Indian tribes . . . and the United States as trustees.").

resource for which the United States and the Corps are trustees. The Corps' unreasoned and bare proclamation at page 30 of its Opposition brief that the Missouri River is not a trust resource fails to distinguish the authorities cited by the Tribe that require the United States to act as a private fiduciary in the management of trust resources.[7] ECF No. 131 at pp. 32-33.

b. The United States and the Corps Specifically Assumed a Trust Duty to Manage Lake Oahe by Treaty, Statute, and Regulation

The Corps and Dakota Access rely heavily on the Supreme Court's decision in *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) and the D.C. Circuit's decision in *El Paso Natural Gas Co. v. United States*, 774 F. Supp. 2d 40 (D.C. Cir. 2011) to retreat from the Corps' trust duty to manage Lake Oahe as a fiduciary of the Tribe, but those cases do not defeat the trust duty. Instead, both cases support the existence of a fiduciary duty that requires the Corps to manage the waters as the Tribe's trustee. The defendants principally rely on *Jicarilla* for its holding that "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Jicarilla*, 564 U.S. at 177[8]. Both *Jicarilla* and *El Paso Gas* reiterate the principle set forth in *United States v. Navajo Nation*, 537 U.S. 488 (2003) that tribes alleging breach of a fiduciary duty must "'identify a substantive source of law that establishes a specific fiduciary duty'" and that "[t]he analysis must train on specific rights-creating or duty imposing statutory or regulatory prescriptions." *El Paso*, 774 F. Supp. 2d at 51 (quoting

[7] In its Opposition Brief (ECF No. 483 at p. 30), the Corps also cross-references its Opposition to the Standing Rock Sioux Tribe's summary judgment motion at p. 40 (ECF No. 172), where it cites *Inter Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199, 203, 225 (9th Cir. 1995), for the proposition that "Lake Oahe is not a trust property or trust res." In fact, *Inter Tribal Council* says no such thing and does not have a page 225. *Inter Tribal Council* concerned the status of a piece of property in which the Tribe had no interest whatsoever and has no application here. *Id.* at 203.

[8] As set forth above, the Tribe concurs in the Standing Rock Sioux Tribe's and Amici's argument that Courts that have conflated the analysis of the United States trust duty as forth in the Tucker Act cases are in error.

Navajo Nation, 537 U.S. at 506); *see also Jicarilla*, 564 U.S. at 177.

The Corps and Dakota Access point to this language and contend that no specific trust duty exists because, they allege, there is no specific rights-creating or duty imposing statutory or regulatory prescriptions as to Lake Oahe, and neither the United States nor the Corps has assumed any responsibility; but they are wrong. As set forth above, the Corps cannot disclaim the clear fact that the very waters of Lake Oahe consist of reserved water rights that constitute a trust resource of the Tribe for which the United States is the trustee. Further, the United States repeatedly and specifically has confirmed and re-confirmed the hunting, fishing, and grazing rights of the Tribe by treaty, statute, and regulation beginning in 1851 and persisting through the present. Both the Corps and Dakota Access concede that this is true—that the Tribe has enforceable rights with respect to the Missouri River to fish, hunt, graze, and reserved rights in the water. *See* ECF Nos. 183 at p. 30 & 185 at pp. 24-25; *see also Treaty of Fort Laramie with the Sioux, Etc.*, 11 Stat. 749 (Sep. 17, 1851); *Treaty with the Sioux – Brule, Oglala, Mniconjou, Yantonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee*, 15 Stat. 635 (Apr. 29, 1868); Act of September 3, 1954, Pub. L. 83-776, 68 Stat. 1191 ("Cheyenne River Taking Act"). Consistent with *Navajo Nation* and its progeny, neither defendant can plausibly deny that specific rights-creating language exists.

But, most importantly, Congress by statute and the Corps by negotiation and agreement later embodied in statute, has ***assumed*** a specific trust duty to protect the Tribe's hunting and fishing rights in Lake Oahe, the reservoir that the Corps controls and manages. As discussed at length in prior briefing, Congress authorized the Corps to construct and operate a series of dams on the Missouri River to control downstream flooding near St. Louis by enactment of the Flood Control Act of 1944, 58 Stat. 887 (1944). The construction of Lake Oahe would ultimately

inundate 104,492 acres of the Cheyenne River Sioux Reservation, including the Tribe's very best lands. *See* Pub. L. 83-776. However, when it enacted the Flood Control Act, Congress neglected to consider the fact that inundation would constitute a taking that would require just compensation and, moreover, that the United States owed the Tribe a trust duty that would require the government to do much more than merely provide the Tribe and its members with the fair market value for their land.

Consequently, the Corps and the Department of Interior jointly recommended a bill to Congress to require the two agencies to enter into negotiations with the Tribe to compensate the Tribe for the taken lands and to provide other protections and compensation consistent with the United States' trust responsibility. *See* Act of September 30, 1950, 64 Stat. 1093 ("1950 Authorizing Act"). In a letter to the Chairman of the Senate Subcommittee on Interior and Insular Affairs supporting the bill, Secretary of the Army Gordon Gray advised that the proposed legislation was intended to provide for both fair market value of the taken land, but also additional provisions for the Tribe not typically available to compensate for a taking "***because of the special trustee relationship between the Government and the Indians***," and to which the Army did not object. Ducheneaux Decl. Ex. B at 17 (emphasis added). In his testimony to the Committee that same day, J. W. Kembel, Special Counsel for the Corps, reiterated that such additional provisions were consistent with the "***special trustee relationship of the Government to the Indians***." *Id.* at p. 61. Kembel advised that relocation costs should be required by the bill, but other provisions in this category, including "***provision for the fulfillment of treaty obligations***" should be included only after investigation by the Department of Interior. *Id.* (emphasis added).

The Department of Interior, on the other hand, advocated that the negotiations should be required to result in provisions for these additional concerns, including "[t]o adjust the Indians'

fishing, hunting, and trapping rights, established by treaty, to the new conditions which will be created after the flooding of Oahe Reservoir," (*Id.* at p. 26), with a goal to "protect[] Indian treaty rights in relation to hunting, trapping, and fishing." *Id.* at p. 29.

When Congress ultimately enacted the 1950 Authorizing Act, it agreed with the Corps. The Act "authorize[d] the negotiation and ratification of separate settlement contracts with the Sioux Indians of Cheyenne River Reservation and of Standing Rock Reservation in South Dakota and North Dakota for Indian lands and rights acquired by the United States for the Oahe Dam and Reservoir, Missouri River development, and for other related purposes." *Id.* The legislation authorized and directed the Corps' Chief of Engineers and the Secretary of the Interior, "to negotiate contracts" separately with the two Tribes containing just a few specified substantive provisions. *Id.* at § 1. These provisions included conveyance of the necessary land to the United States, just compensation for the lands, and the costs of relocation and reestablishment. *Id.* at §§ 2&3. If the parties wished to negotiate for and include other terms outside of those specified, however, they were permitted to do so. *Id.* at § 4 (noting that the explicit specification of "certain provisions to be included in each contract shall not operate to preclude the inclusion in such contracts of other provisions beneficial to the Indians who are parties to such contracts"). No contract would take effect until it had been ratified by Act of Congress as well as "ratified in writing by three-quarters of the adult members of the two respective tribes. . . ," a provision required by Article XII of the 1868 Fort Laramie Treaty. *Id.* at § 5. In form and procedure, the agreements were created very much like the Treaties that had characterized the United States' relationship with the Tribes through the 19th century. *See Blackfeet, Blood, Piegan, and Gros Ventre Nations or Tribes of Indians, et al. v. United States*, 81 Ct. Cl. 101, 130 (Ct. Cl. 1935)

(describing pre-1871 treaties as "binding contracts creating mutual rights and duties" ratified by special acts of Congress).

Over a period of several years, the Corps, Interior, and the Tribe negotiated the terms of the settlement as required by the 1950 Authorizing Act and finally agreed upon a contract that was submitted to Congress and ratified on September 3, 1954. Pub. L. 83-776. The Cheyenne River Taking Act included all of the terms required by the authorizing legislation concerning conveyance of the land, just compensation, and costs of relocation. *Id.* at §§ 1-4. The 1950 Authorizing Act also included other "provisions beneficial to the Indians," additional terms over and above direct taking damages and consistent with the ***special trustee relationship***, specifically negotiated between the Corps and the Tribe, including funding for rehabilitation, reservation of mineral rights, timber rights, livestock protection, grazing rights, and hunting and fishing rights in the reservoir itself. *Id.* at §§ 5-10. As to hunting and fishing, the Act states that "[t]he said Tribal Council and the members of said Indian Tribe shall have . . . ***the right to hunt and fish in and on the aforesaid shoreline and reservoir***, subject, however, to regulations governing the corresponding use by other citizens of the United States.[9]" *Id.* at § 10 (emphasis added).

The Corps denies that the Cheyenne River Taking Act sets forth specific rights in the Tribe. ECF No. 183 at p. 37 ("The Tribe alludes to hunting, fishing and water rights but does not identify a specific duty or breach. . . .). Yet the statute plainly confirms an explicit right in the reservoir—"a substantive source of law . . ." in the form of a specific statutory right, which standing alone

[9] By its plain terms, the final clause of this sentence concerning "regulations governing the corresponding use by other citizens of the United States" means that the Tribe may be subject to hunting and fishing regulations applicable to other citizens. To the extent that any doubt may arise from this clause. Further, to the extent that there is any doubt about the existence of the duty in the Cheyenne River Taking Act, it is fundamental that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citations omitted).

should establish a specific fiduciary duty pursuant to *Navajo Nation*, 537 U.S. at 506. *See also El Paso*, 774 F Supp. 2d at 51. Importantly, the Cheyenne River Taking Act does not merely confirm a right, but contains the Corps' express assumption of a duty to protect those rights in its management of Lake Oahe in a manner that is statutorily prescribed consistent with *Jicarilla*. *Jicarilla*, 564 U.S. at 177 ("The Government assumes trust responsibility only to the extent that it expressly accepts those responsibilities by statute.") This was an expressly negotiated term of an agreement entered into between the Corps and the Tribe. It was a right that was so important to the Tribe that it insisted upon. As the Tribe's attorney advised Congress, the Tribe understood the right to hunt and fish to be a tribal right arising from the treaties. "Our right to continue hunting and fishing is to us an extremely valid and valuable right. It is an ancient right. It is all that is left of our lives as they existed a hundred years ago." Ducheneaux Decl. Ex C at 289. The Corps' expressly ***accepted***, its inclusion in this duly negotiated contract that it entered with the Corps to govern its rights going forward after the creation of the reservoir at issue here. Pub. L. 81-1120, 64 Stat. 1093.

By its very terms, the Cheyenne River Taking Act was a contract entered into between the Corps and the Cheyenne River Sioux Tribe. *Id.* As even the Defendants acknowledge, the governing Treaties already entitled the Tribe to hunting and fishing rights in the Missouri River,[10]

[10] The Tribe concurs in and incorporates by reference arguments set forth by Amici Curiae National Congress of American Indians, et al., that treaty obligations by themselves are sufficient to establish a specific fiduciary duty. ECF No. 134 at pp. 3-7. The Supreme Court has stated that "[i]n carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party." Instead, "it has charged itself with moral obligations of the highest responsibility and trust." *Id.* The Tribe further reasserts these same arguments in its prior briefing. ECF No. 131 at pp. 32-22 (citing *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515, 1520 (W.D. Wa. 1996); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1523 (W.D. Wa. 1988). These express treaty rights moreover distinguish these facts from those set forth in *El Paso Natural Gas Co.*, in which did not incorporate a specific right, but rather a general duty to act to preserve the Navajo Tribe's "prosperity and happiness." 774 F. Supp. 2d at 44, 52.

see generally ECF No. 114-1, and nothing in the Flood Control Act purported to abrogate those rights. *See South Dakota v. Bourland,* 508 U.S. 679 (1993) (holding that Flood Control Act abrogated Tribe's right to *regulate non-Indian* hunting and fishing).[11] Hence had the negotiating parties remained silent as to this term, the Tribe still would have retained its hunting and fishing rights in the newly created reservoir. Therefore, its inclusion in the contract that later became a statute does more than simply confirm an existing right, as courts must "construe . . . contract[s] as a whole so as to give meaning to all of the express terms." *E.g., Wash. Metro. Area Transit Auth. v. Mergentime,* 626 F.2d 959, 961 (D.C. Cir. 1980); *see also Flynn v. Southern Seamless Floors, Inc.*, 460 F. Supp. 2d 46, 50 (D. D.C. 2006) ("[Courts should assume that the parties intended for every part of an agreement to have meaning and should give preference to interpretations that do not render any portion of the agreement ineffective or mere surplusage." (internal citation omitted).

As this was not a right granted to the Tribe, it was necessarily a promise or a duty assumed by the Corps to honor and protect the Tribe's rights in the management of the reservoir. *See Blackfeet, Blood, Piegan, and Gros Ventre Nations or Tribes, et al.*, 81 Ct. Cl. at 130. The legislative history supports this interpretation. Congress was clear that any provision in the Cheyenne River Taking Act concerning hunting and fishing would not be a grant of rights, but would exist to "provide for the preservation" of those rights and to adjust them to the "new conditions which will be created after the flooding of the Oahe Reservoir," which Congress had empowered to the Corps to manage. Ducheneaux Decl. Ex. B at 13, 26. It is not significant that the trust duty is not spelled out in the statute, as "the failure to specify the precise nature of the

[11] *See also*, Ducheneaux Decl. Ex. D at 69. In that hearing, Congressman E.Y. Berry advised Corps Special Counsel that the Tribe's hunting and fishing rights were properly included in the legislation to preserve their existing treaty rights.

fiduciary obligation or to enumerate the trustee's duties [does not] absolve[] the government of its responsibilities." *Cobell v.* Norton, 240 F.3d 1081, 1098 (D.C. Cir. 2001) (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983)). The duty is also consistent with the legislative history cited above, that demonstrates that Congress considered such contract terms not required by the authorizing legislation and for the benefit of the Indians to be a function of the United States' and the Corps' trust duty to the Tribe. *See* Ducheneaux Decl. Ex. B at 17, 61; *see also* Ducheneaux Decl. Ex. C at 140, Interior Solicitor referring to other additional provisions in the Cheyenne River Taking Act as in service of "the continuing Federal responsibility for providing services to Indians," *Id.* 160-161, Interior Solicitor explaining additional provisions to Committee member as consistent with Indians being "not in the same status as the non-Indian in the Community." Further, to the extent that there is any doubt about the existence of the duty in the Cheyenne River Taking Act, it is fundamental that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citations omitted) [12]. The D.C. Circuit has held that this canon of construction has special strength owing to the "unique trust relationship between the United States and the Indians." *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) (quoting *Blackfeet Tribe*, 471 U.S. at 766).

The existence of the trust duty is confirmed by several other factors. First, the Corps

[12] *See also United States v. 2,005.32 Acres of Land, more or Less, Situate in Corson County, South Dakota*, 160 F. Supp. 193, 200 (D. S.D. 1958), in which the court considered the contract between the Corps and the Standing Rock Sioux Tribe concerning taking and compensation related to Lake Oahe and applied both the Indian canon of construction and the rule that "any statute allegedly authorizing eminent domain is to be strictly construed against the taking party." *Id.* (citing *Delaware, Lackawanna & W.R. Co. v. Town of Morristown*, 276 U.S. 182 (1928). The court held, "where the taking party is the guardian and the party subject to the power of eminent domain is the ward, [strict construction against the taking party] would have all the more application." *Id.*

exercises pervasive control over the water that is the source of the Tribe's hunting and fishing rights and the water that itself constitutes a trust resource. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 505 (1988) (holding that the Corps' control over Lake Oahe is pervasive and exclusive of any other federal agency). The Supreme Court has held the existence of such elaborate control by the government over property belonging to Indians is evidence of the existence of a fiduciary relationship. *Mitchell*, 463 U.S. at 225. The Court's further comment in *Navajo Nation* that "the Federal government's liability cannot be premised on control *alone*,[13]" does not preclude the Court from considering control along with other factors. *See Navajo Nation.* 556 U.S. at 301 (emphasis added). Second, the Corps has explicitly acknowledged and assumed such a duty in the Master Manual in which it outlines its four objectives in the operation of the Missouri River Basin, the fourth of which is "to fulfill the Corps' responsibilities to Federal recognized Tribes." ECF 131 at 32; Master Manual §7-01, §E-06, ECF 131-3 at 95, 174. The Master Manual is binding on the Corps. *South Dakota v. Ubbelohde*, 330 F.3d at 1027-1029.

The waters of Lake Oahe constitute a trust resource of the Cheyenne River Sioux Tribe for which the Corps and the United States are the trustee, in which the Tribe has acknowledged treaty rights, and further, the Corps has by negotiated agreement and statute assumed the duty to manage those waters to protect the Tribe's rights to hunt and fish in those waters. As a consequence, both express rights and duties exist that impose upon the Corps a fiduciary duty to the Tribe. *See El Paso*, 774 F. Supp. 2d at 51 (quoting *Navajo Nation*, 537 U.S. at 506); *see also United States v. White Mountain Apache*, 537 U.S. 465, 473 (2003) (noting that a conventional fiduciary relationship exists where there is both a trust resource and a duty imposed, again in the Tucker Act

[13] *See* fn. 10 *supra* for reasons why this line of cases should not be construed to limit the broader trust responsibility outside of the Tucker Act context.

context). Where such a duty exists, common-law trust principles apply, which require the Corps to act in accordance with the same standards as private fiduciary. *Jicarilla*, 564 U.S. at 184; *see also Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of State of Mont.*, 792 F.2d 782, 794 (9th Cir. 1986) ("Courts judging the actions of federal officials taken pursuant to their trust relationships with the Indians therefore should apply the same trust principles that govern the conduct of private fiduciaries.")

To hold otherwise would endorse the notion advanced by the Corps that, notwithstanding its impoundment and pervasive control of the Tribe's trust resource, the existence of *Winters* rights and treaty hunting and fishing rights, the Corps' express, negotiated statutory assumption of a duty to protect hunting and fishing rights in the reservoir, and the Corps' binding commitment to operate the reservoir to meet its obligations to the Tribe, the only relationship between the Corps and the Tribe is one that "***allows*** the government to consider and act in the Tribes' interest in taking discretionary actions" and that it need only "comply[] with generally applicable statutes." ECF No. 183 at p. 29 (emphasis added). Such a result would be absurd, offensive to the United States' solemn obligations to the Tribe, and wholly inconsistent with the law.

2. The Corps Violated Its Trust Responsibility When It Granted the Section 408 Permit and the MLA Easement

Defendants' entire defense of the Corps' violation of its duty to the Tribe in granting the 408 permit and the MLA easement flows from their erroneous conclusion that the Corps has functionally no duty to the Tribe in its management of Lake Oahe, other than its duty to "comply[] with generally applicable statutes." ECF No. 183 at p. 29. They argue that the original analysis contained in the EA, which considered general impacts to the water and environment, was sufficient to address any rights of the Tribe in Lake Oahe. ECF Nos. 183 at pp. 30-31 & 185 at pp. 24-26. They argue that the Dakota Access' conclusion that the risk of a spill was extremely

low and that mitigation measures were sufficient was sufficient to satisfy consideration of Tribal rights. *Id.* And Dakota Access argues that NEPA permits the Corps to rely solely on Dakota's Access' biased analysis, provided the Corps takes responsibility for the final project. ECF No. 185 at p. 25.

None of these things are consistent with the Corps' fiduciary duty, which requires much more than the minimum set forth in laws of general applicability. When an agency is obligated to act as a fiduciary, then "[its] actions must not merely meet the minimal requirements of administrative law, but also must pass scrutiny under stringent standards demanded of a fiduciary." *Cheyenne Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583, 590-91 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1642 (1992). The stringent standard is met by considering "all factors" that would implicate a Tribe's interests, and to fail to consider those factors is arbitrary and capricious and an abuse of discretion as a breach of the government's fiduciary duty. *Id.* at 591. Courts have further articulated that to meet this duty agencies must "consider carefully the potential impacts to the Tribe. . ." including any special needs of the Tribe. *Northern Cheyenne v. Hodel*, 12 Indian L. Rep. 3074 (D. Mont. 1985) *rev'd on other grounds*, 851 F.2d 1152, 3066 (9th Cir. 1988). Agencies fail their trust duty when they treat tribes "like merely citizens of the affected area and reservation land like any other real estate in the decisional process." *Id.* In particular, where tribal reserved water rights are at stake, agencies must "assert [their] statutory and contractual authority to the fullest extent possible. . ." to preserve the Tribe's water rights, and failure to do so violates the fiduciary duty. *Pyramid Lake Paiute Tribe of Indians*, 354 F. Supp. at 256.

The sum total of what the Corps has done to consider the Tribe's rights was to blindly adopt the analysis prepared by Dakota Access as its basis to find that no treaty rights had been impacted

because that analysis asserted a low risk of a spill, and the oil company had planned mitigation measures that would ostensibly minimize harm. *See* Part II(B)(1) *infra*. Such an arrangement plainly violates the Corps' fiduciary responsibility. It is axiomatic that an agency exercising its fiduciary responsibility to a Tribe must conduct its own "*independent* review," and may not delegate that duty to a third party. *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation*, 792 F.2d at 794 (citing *In re Johnson*, 518 F.2d 246) (10th Cir.), *cert. denied*, 423 U.S. 893 (1975); *see also Stern v. Lucy Webb Hayes Nat. Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003, 1013 (D. D.C. 1974); Restatement (Second) of Trusts, § 171 (1959) ("The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required to personally perform."). In particular, as the Ninth Circuit held in *Assiniboine and Sioux Tribes*, "rote approval" of a third party's analysis of impacts of tribal rights is insufficient to meet "the strict standard of conduct expected of a trustee." 792 F.2d at 795. The Corps cannot properly discharge its fiduciary duty to protect the Tribe's hunting, fishing, and reserved water rights by delegating its environmental review duties to a third-party with a more than $3 billion interest in an outcome that protects its investment.

As set forth herein, the insufficiency of the oil company's review is plain on its face. It states that "while the risk [of a spill] is low, the consequences of such an event are high and could impact water resources downstream. . . ," **AR0071315**, ECF 172-1 at 97, and "drinking water could be at risk if there was a release that reached those bodies of water in the vicinity of the intake structures." AR0071262, ECF 171-2 at 44. Yet despite the existence of a risk with high consequences, it concludes (referring to Standing Rock only) that "*Winters*-based reserved water rights are not implicated by the construction of the pipeline." USACE_ESMT001227. Notwithstanding any bias inherent in the oil company's assessment, this is not true. *Winters*-based

reserved water rights are plainly implicated by the pipeline if they are subject to a high-consequence risk created by the pipeline. Simply identifying the risk and saying *don't worry about it, it's a low risk,* cannot meet the Corp's fiduciary duty. The Corps must consider ***all relevant factors*** related to the substantive Tribal rights that for which the Corps is a trustee. *Cheyenne Arapaho Tribes of Oklahoma*, 966 F.2d 591. And as noted, the EA made no reference whatsoever to Cheyenne River. SUMF § 165; AR0071220-0084368, ECF 171-2. A very basic, non-inclusive list of factors that should have been considered include: What are the consequences to the Tribe's fishing rights if a spill occurs? What are the consequences to the Tribe's hunting rights if the spill occurs? What are the consequences to the Tribe's water rights of the spill occurs, including effects on drinking water, medical uses, recreation, grazing of cattle,[14] plants, soils, anything the water touches? How long will those consequences persist? How will the Tribe's resources recover? None of those questions were even remotely addressed.

In its briefing, Dakota Access disrespectfully mocks the Tribe's very real concern that the EA's only plan to address drinking water contamination is shipping in bottled water, calling the nature of the Tribe's complaint unclear. ECF No. 185 at p. 31. It muses, is it the cost, the devastating effects on the Tribe, "or is it something else?" *Id.* It is all of the above and more. The Cheyenne River Sioux Reservation is the Tribe's permanent homeland. Lake Oahe is its only source of drinking water and its most important source of water for other purposes. ECF No. 99-7 at 9-13. In 2005, the Corps itself concluded that losing the use of that water would devastate the Tribe. *Id.* Dakota Access's arrogant and callous attitude toward the Tribe's concern about a wholesale loss of its only source of usable water underscores why the Corps grossly violated its

[14] Grazing of cattle to the water's edge is also a right guaranteed by the Cheyenne River Taking Act. Pub. L. 83-776, §X, 68 Stat. 1191, 1193.

fiduciary obligations when it outsourced its duties to ***an oil company that owes only a duty to its investors, not Indian tribes***.

E. THE CORPS VIOLATED ITS FIDUCIARY DUTY WHEN IT FAILED TO CONSULT WITH THE TRIBE REGARDING THE IMPACT OF THE PIPELINE ON ITS HUNTING, FISHING, AND RESERVED WATER RIGHTS

The failed fiduciary duty discussed above was a substantive fiduciary duty. A procedural duty exists as well. Department of Defense Instruction 4710.02, Executive Order 13175, and 40 C.F.R. § 1501.2(d)(2) all require agencies to consult with Tribes on actions that affect tribal rights and trust resources. ECF 131 at 32-34. These principles derive directly from the basic trust duty itself, which mandates that agencies "consult with Indian tribes in the decision-making process to avoid adverse effects on treaty resources." *Klamath Tribes v. United States*, No. 10-2130, 1996 WL 924509 (D. Or. 1996), *quoting Lac Courte Oreille Band of Indians v. Wisconsin*, 668 F. Supp. 133, 1240 (W.D. WIs. 1987) *Ctr. For Biological Diversity v. Salazar*, No. 10-2130, 2011 WL 6000497, at *11 (D. Ariz. Nov. 30, 2011). It is not a discretionary duty. *Ctr. For Biological Diversity*, at *11. As a consequence, the Corps was required to consult on the impacts to the Tribe's clearly established hunting, fishing, and reserved water rights in Lake Oahe, including subsistence uses, prior to issuing the July 25, 2016 FONSI, the EA, and the Section 408 permit, and prior to issuing the MLA Easement on February 7, 2017. ECF 131 at 32-33, 54.

The duty to consult is binding on an agency when the agency has an announced consultation policy and the Tribes have come to rely on that policy. *Yankton Sioux Tribe v. Kempthorne*, 442 F.Supp.2d 774, 784 (D.S.D.2006)*; see also, Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir.1979); *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (D.S.D.1995); *Albuquerque Indian Rights*, 930 F.2d at 58; *Indian Educators Fed'n Local 4524 of Am. Fed'n of Teachers, AFL-CIO v. Kempthorne*, 541 F. Supp.2d at 257 at 264–65 (D. D.C. 2008). At a

minimum, this requires that the agency give fair notice of its intentions, which requires, "telling the truth and keeping promises." *Yankton Sioux Tribe,* 442 F.Supp.2d at 784, *citing Lower Brule Sioux Tribe,* 911 F. Supp. at 399. An agency's failure to provide tribes with accurate information necessary to meaningfully consult *before* a decision is made, is agency failure to meet its consultation obligation. *Id.* at 785. *See also, Cheyenne River Sioux Tribe v. Jewell,* No. 3:15-03072, 2016 WL 4625672 (D. S.D. Sept. 6, 2016). *See also,* ECF 131 at 38-39.

The Corps makes the outrageous claim that it engaged in robust consultation with the Tribe over a two-year period, "consisting of correspondence, meetings, and explicit consideration of Cheyenne River's comments on the draft EA, and to the extent it agreed to participate in the NHPA process." ECF No. 183 at 40. It then goes on to list a series of contacts that it believes satisfied the duty. ECF No. 183 at pp. 40-43. The fundamental problem with this deceptive claim is that it refers only to consultation on historic and sacred sites required by Section 106 of the NHPA.[15] The Corps points to nothing in the record before November 2016 that demonstrates that it consulted with the Tribe concerning its reserved rights in the water, its hunting rights, or its fishing rights. Literally, every contact cited by the Corps on pages 40-42 ***from the Corps to the Cheyenne River Sioux Tribe*** concerns NHPA consultation and Section 404 permits. ECF 183-12, 183-13, 183-15 -18. Those letters did not invite consultation on the EA and admit that the EA process is separate and distinct from the Section 106 process and the Section 10/404/12 permit process. ECF 183-17, AR0066830-0066831 (stating the the EA process "is also ongoing" and the "comments" will be sought in December 2016).

The December 8, 2015 meeting was a Section 106 meeting on historic site locations only.

[15] Likewise, the transcript of the January 2016 meeting the Corps faults the Tribe for not attending, ECF 183 at 44, was a Section 106 one-day meeting held by Dakota Access at which no discussion of trust resources occurred. SUMF ¶96, AR0069092-093; AR0066575-0066720.

ECF 183-18. *See* also, SUMF ¶95 - ¶96; AR0066820' AR 0066830-0066831; AR0003354-3357; AR003193-94. The meeting was with Energy Transfer Partners—not the Corps decision makers. *Id.* The January and February 2016 meetings were also Section 106 meetings only. SUMF ¶96-98; AR0069092-93; AR0066575-66720; AR0066390; AR0068777-0068783. The concerns raised by the Tribe prior to the publication of the EA regarding trust resources including oil spill risks were not included in the draft EA or the final EA. ECF 183-19; ECF 183-19; SUMF ¶103; AR07054; AR007056; AR0066996; AR0066801-806 (Tribal Resolution); AR0068777-0069783; AR0000283 (March 2016 Fact Sheet documenting that CRST requested to consult on trust resources); AR00064357-359; AR0064221; AR0064137.[16] These letters asking to consult on trust resources, and documenting concerns upon which the Tribe requested to consult, started in March 2015 and continued for the span of the Corps decision making process. *Every concern raised on trust resources went unanswered by the Corps*. Further, the Corps itself states on May 6, 2016 "we have been unable to identify any potential meeting dates." ECF183-21. The Tribe responded on May 19, 2016 and June 3, 2016 reiterating its concerns and request to consult. ECF 183-19; ECF 183-20. The only response was a generic letter from the Corps stating its response to generic concerns raised by "tribes" on June 2, 2016 relating only to Section 10 and 404 permits. ECF 183-23. It did not invite consultation.[17] The Record, cited herein, demonstrates that the only

[16] The assertion that Joel Ames called the Chairman to set up consultation by phone calls in February and March consists of 3 emails saying he asked the Chairman to call him, do not identify the purpose for the requested call. ECF 183-22. *Cf.* ECF 185at 23-24. The Corps and Dakota Access conveniently leave out an email from February 22, 2016 documenting the Tribal Chairman initiated the calls, and Joel Ames stated he was not sure if it was about consultation or another matter pending before the Corps, and he was trying to return those calls. AR0066411. *See also*, AR066391 (Feb. 23, 2016 email from Col. Henderson requesting follow up to set up CRST consultation.)

[17] Dakota Access falsely accuses the Tribe of lying. ECF 185 at 23-24. The Tribe's Opening Brief, SUMF, and this Brief, along with the Administrative Record address this accusation. Each citation by Dakota Access is about the NHPA Section 106 process—not the EA or Section 408 permits on

communications concerning effects of the pipeline on the tribe's rights to the water in Lake Oahe were ***from the Cheyenne River Sioux Tribe to the Corps*.**

Although the Corps dresses these NHPA communications up to look like something more than NHPA consultations by referring only to invitations to "consult about the Pipeline" or to "weigh in on the Pipeline," ECF No. 183 at pp. 40-41, even when the notices themselves reveal they were not on the EA or the Section 408 permit, it is, likewise, not shy about disclaiming its duty to do anything other than consult on the NHPA.[18] *Id.* at p. 33 ("[T]he only substantive consultation requirement that applies to this case is the NHPA section 106 process."). It is not clear, therefore, what the point of this charade is. If the Corps' point is to demonstrate that it merely complied with NEPA's requirements, then this must be considered a concession that it failed its consultation duty on the Tribe's treaty and trust resources. Neither the Corps or Dakota Access respond to the undisputed fact that no tribe, and that includes this Tribe, was sent a scoping/consultation notice prior to drafting of the EA, *the EA itself lists no Tribe* as a party that consulted on the EA. ECF 131 at 36-37; SUMF ¶12, ¶13, ¶90; AR 0075274; AR0071720-0071776; AR0075287-AR0075289; AR0075281-AR0075283. The Corps simply ignored 40 C.F.R. § 1501.2(d)(2) by not sending a scoping/consultation notice to any Tribe, and not consulting any

trust resources. This repeats the way Dakota Access treated Tribes during the process. AR00666390 (Corps email documenting Joey Mahmoud refused to disclose Response Plans to Tribes in February 2016, told Tribes the pipeline would be built whether they were consulted or not, and documenting "the bombshell" dropped by ETP employee Monica Howard that Tribes would not be permitted to do on site surveys unless they waived their rights to be consulted and told the Corps that consultation was complete).

[18] This was not always the Corps' position. Internal emails demonstrate that the Corps understood that it had a duty to consult with the Tribe on environmental impacts and that NHPA consultation was separate from that consultation and had not even begun as of November 6, 2015 and January 12, 2016. ECF 131 at 40, AR 0069197, AR004383 (noting consultation on Section 408 was distinct from 106 process and asking for direction on starting this consultation process).

Tribe on the EA. Accepting "comments" is not the same as consulting with a government. Only State governments and state government agencies, and the Sierra Club were consulted. *Id.*

Consultation consistent with an agency's fiduciary duty cannot be of a kind that "merely meet[s] the minimal requirements of administrative law, but must also pass scrutiny under more stringent standards demanded of a fiduciary." *Cheyenne-Arapaho Tribes of Oklahoma*, 966 F.2d at 591. NEPA merely requires that agencies request comments from Indian tribes. 40 C.F.R. § 1503.1. But of course anyone may submit comments on an EA and an agency fails its fiduciary duty when it treats tribes "like merely citizens of the affected area. . . ." *Northern Cheyenne*, 12 Indian L. at 3074. The Corps' claim, therefore, that it considered tribal comments in the EA, does not meet its consultation duty.[19] Ironically, even when it had a real opportunity to receive tribal comments, during the brief period when it appeared willing to consult on the easement (consultation was never consummated), it failed to acknowledge the existence of the extensive written, technical comments provided by the Tribe on January 19, 2017. ECF 131-5. These comments are not considered anywhere in the easement decision and, despite the fact that the Tribe submitted them by hand delivery to the Pentagon in precise compliance with the Federal Register Notice inviting those comments and with a signed delivery receipt from the appropriate office, the Corps now cannot find these the comments in its own records—the clear implication being that the Corps did not bother to review the Tribe's comments at all in making its decision. Ducheneaux Decl. Ex. E. It is unclear why the Tribe could not rely upon the Corps' own procedures to put its

[19] The Corps' further claim that it accepted and incorporated the Tribe's comments into the EA is false. The Corps' reference in footnote 17 to EA App. J, ECF No. 172-4 at AR0071757 and AR0071766, in which it claims that "Appendix J explicitly states Cheyenne River provided comment and also states those comments," refers to the ***Northern Cheyenne Tribe*** a different tribe located in Montana. ECF 183 at 42; *Id.* Cheyenne River Sioux Tribe's comments and Tribal resolution, AR0066801-806, were never considered in the EA.

comments in front of a decision-maker. This incident unfortunately typifies the Corps' utter disregard for the Tribe's concerns.

Further, the Corps and Dakota Access take conflicting positions on this issue, with the Corps claiming that the Tribe did comment on the EA and that the Corps considered the Tribe's comments, while Dakota Access claims that the Tribe made no effort to engage in the EA process. ECF 183 at 42; ECF 185 at 24. Blaming the Tribe for the Corps failure to consult on trust resources, and failure to include any of the concerns raised in tribal comments in the EA is unacceptable. The duty to consult rests with the Corps—not the Tribe. *See, e.g.*, DoD Instruction 4710.02. Further, Defendants fail to respond to the Tribe's Opening Brief analysis that the Corps had an obligation to consult early on the EA that it breached, and that any communications with the Tribe do not meet the Corps own policy, which requires providing factually true information, and sufficient information to permit the Tribe to engage in consultation. ECF 131 at 35-39. In waiting until after the Draft EA had been published, instead of including the Tribes in the scoping/consultation letters sent out in March 2015, the Corps violated the requirements of Corps Policy, DoD Instruction 4710.02, 40 C.F.R. § 1501.2(d)(2), and its trust responsibility, to consult early in the process.[20]

Finally, the Corps violated its obligation to provide information early in the process, and to provide accurate information. ECF 38-39. In response to the Tribe's concerns about oil spills on February 18, 2016, the Corps stated that it had no authority to regulate oil spills, and repeatedly stated, **"we can't tell an applicant how to build their pipeline. COL Henderson supported this statement.**" AR0066415, ECF 183-26 at 4; *see also* ECF 131 at 38-40. The Corps

[20] Dakota Access wrongly asserts the Tribe received consultation notice under 40 C.F.R. §1501.2(d)(2). ECF 185 at 27. The Tribes only received NHPA Section 106 notices, and not until well after March 2015 EA consultation notices were sent (which were never sent to tribes).

documented in internal emails the refusal to provide Tribes with the Response Plan at the February 2016 meeting, directly contradicting its assertion it discussed those plans with tribes at the meeting. AR0066390[21]; *see also* AR 00664, AR 0068358 (ACPH Corps letters telling ACPH Corps could not regulate operations conditions of oil pipeline). *Cf.* ECF 183 at 44. The Spill Model has never been publicly disclosed, and the Response Plan was held confidential until this Court's recent Order. Further, the Assistant Secretary of the Army confirmed in a December 4, 2016 memo that key documents including Appendix J, the Spill Model Discussion Report, HDD Risk Analysis Report, and Environmental Justice Considerations Memorandum were not disclosed as of December 4, 2016—all well after the Section 408 permit, and the EA FONSI were issued. ECF 65-1.

At best, the Defendants have raised disputed facts on what the Corps did to meet its obligations to consult on trust resources. But a careful review of the record demonstrates that the Corps only made efforts to consult on NHPA Section 106 cultural resources, and only requested "comments" from Tribes on the EA. The comments of the Cheyenne River Sioux Tribe, which the Corps concedes it received, ECF 183 at 42, were completely unaddressed in the EA, because they were excluded. Likewise, the Tribe's efforts to consult on the MLA easement after the Corps invited consultation on November 14, 2016 by letter, were never answered. ECF 131 at 54. Requesting "comments," and then ignoring them, does not meet the obligation to consult.

IV. CONCLUSION

For the reasons set forth herein, the Defendants Motions for Summary Judgment should be denied, and the Tribe's Motion for Summary Judgment should be granted.

[21] Once again the Corps confuses which Tribe it talked to: it made efforts to disclose documents to the Standing Rock Sioux Tribe and their attorney Mr. Perry—not CRST. ECF 183 at 44.

Dated: April 13, 2017

CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff,

By: /s/ Nicole E. Ducheneaux

Nicole E. Ducheneaux, *Pro Hac Vice*
Fredericks Peebles & Morgan LLP
3610 North 163rd Plaza
Omaha, NE 68116
Telephone: (402) 333-4053
Facsimile: (402) 333-4761
Email: nducheneaux@ndnlaw.com

Conly J. Schulte
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9839
Email: cschulte@ndnlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 2017, a copy of the foregoing was filed electronically with the Clerk of the Court. The electronic filing prompted automatic service of the filing to all counsel of record in this case who have obtained CM/ECF passwords.

/s/ Nicole E. Ducheneaux