IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE; ROBERT FLYING HAWK; OGLALA SIOUX TRIBE, Plaintiffs, and CHEYENNE RIVER SIOUX TRIBE, Intervenor Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Intervenor Defendant.	Case No. 1:16-cv-01534-JEB

DAKOTA ACCESS, LLC'S REPLY IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST CHEYENNE RIVER SIOUX TRIBE

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INTRODUCTION

The Cheyenne River Sioux Tribe cannot make up its mind on what to accuse the Corps of doing wrong here. The Tribe's main line of attack is that the Corps "did not properly consider the risk and impact of an oil spill." CRST Opp. 10. Yet the Tribe concedes in the next breath that the Corps *did* consider both risk and impact. *Id.* In particular, the Tribe quotes the Environmental Assessment for the point that "while precautions may minimize risk of a spill, 'it is still considered a low risk/high consequence event.'" *Id.* This concession is fatal to the Tribe's principal claim, because when an agency "considers" potential environmental impacts before it approves a proposed action it has complied with the relevant statutes. The only way this Court could rule otherwise is if it holds that the Corps is barred, *as a matter of law*, from approving actions that entail low risk/high consequence events. That is not—nor should it be—the law.

Cheyenne River also continues to reach beyond the close of the relevant record to attack the Corps's July 25, 2016 grant of permission under Section 408 of the Rivers and Harbors Act. But even if this Court could consider reports that the Tribe and others failed to commission until months after-the-fact, those reports would still make no difference to the outcome of this case. Agencies have wide berth in how they apply their expertise to the consideration and assessment of available information. Courts also routinely afford substantial deference to an agency's final decision (*i.e.*, the outcome of agency consideration and assessment), especially where underlying statutes, such as the National Environmental Policy Act, dictate only what the agency must consider before reaching its decision, not what the decision must be. The Tribe ignores all of this in the hope that this Court will substitute its judgment for that which is properly reserved to the agency. That is not how APA review operates.

For the reasons argued in Defendants' cross-motions against both Cheyenne River and the Standing Rock Sioux Tribe, the Court should grant summary judgment for Defendants on counts

5 (NEPA claim for July 25, 2016 verifications and § 408 permits); 6 (NEPA claim for withdrawal of right-of-way EIS notice); 7 (Clean Water Act and Rivers and Harbors Act claim for July 25 verifications and § 408 permits); 8 (Breach of Trust Responsibility); 9 (Flood Control Act); 10 (Mineral Leasing Act); and 13 (Pre-decisional consultation) of Cheyenne River's proposed amended complaint. *See* D.E. 97-1.

ARGUMENT

I. Cheyenne River Misconstrues The Role Of Factual Disputes In The Judicial Review Of Agency Action Under The Administrative Procedure Act.

Cheyenne River starts its opposition to summary judgment by pointing to various "Issues of Fact" in Defendants' cross-motions that "the Tribe Disputes." CRST Opp. 1. None of these supposed disputes, though, stands in the way of summary judgment for Defendants. For one thing, most are not even disputes about *facts*; instead, the Tribe questions either the legal significance or proper characterization of facts that themselves are not disputed. Moreover, even if there were a true dispute over the facts, Administrative Procedure Act review operates much differently than adjudication of private civil claims. The Court's role in reviewing agency action under the APA is not to decide whether the agency reached the "correct" conclusion based on the totality of the record. Instead, the Court must decide whether *an agency* properly went about *its* job of weighing and considering competing views of the facts. The Tribe's own brief ultimately confirms that the Corps's decisions here were the end-result of careful analysis of a wide range of information from different commenters with different views about the wisdom of the proposed action. That is the bread and butter of agency action on a project like this. A continued disagreement with either the agency's decision or how it weighed record material in reaching that decision does not get a plaintiff past summary judgment on an APA claim.

Cheyenne River's first supposedly "disputed fact" well illustrates the errors in its assertion that factual disputes stand in the way of summary judgment for Defendants. The Tribe disputes that the Environmental Assessment was prepared with "significant direction and input from the Corps on both process and content." CRST Opp. 1 (quoting Corps Brief, D.E. 183 at 13). The Tribe's quarrel here is with the word "significant." But the record speaks for itself on the accuracy of that characterization from the Corps's brief. The Tribe's disagreement with an adjective used to argue the facts is no basis for concluding that a dispute over a material fact forecloses summary judgment.

In any event, the record amply shows that the Environmental Assessment *was* prepared with "significant direction and input from the Corps on both process and content." Some context is in order. In its opening brief, Cheyenne River complained that the whole approval process was "breathtakingly fast," CRST Br. 2, and called it "unconscionable" for the Corps to "simply allow an oil company to draft the EA and the responses to comments on the EA," *id*. at 36. The Tribe can no longer press that position, because the record instead shows—in considerable detail—how deeply the Corps involved itself in the substance of the Environmental Assessment, beginning months *before* it released the December 2015 draft EA for comment. Exhibit F of the Corps's opening brief (D.E. 183-6, starting at AR 72161) contains the history (through June 2, 2016) of comments and questions that the Corps submitted to Dakota Access about the EA's content. Each Corps comment and question—178 in all—is followed by a written dialogue between one or more Corps representatives and Dakota Access. And each dialogue concludes with the Corps's resolution of the issue. This document—more than 100 pages long and covering comments and questions that span nearly a year (from June 2015 through May 2016)—fully refutes the Tribe's suggestion that the Corps merely gave a hasty rubber-stamp to a private company's request.

Several specific items that the Corps resolved through this iterative process also directly refute Cheyenne River's version of the key facts in this part of its opposition brief. *See* CRST Opp. 1-7. For example, the Tribe characterizes Response 1 to Corps Comment 6356954 as showing that although "the Corps recommended in-house risk assessment," the EA "does not include the Spill Model discussion or Response Plan," and the "response document[s]" that the recommended assessment "was not performed." CRST Opp. 2 (citing AR 72248). Not only does the Tribe misstate the content of the initial Response, the remaining dialogue on the topic proves just the opposite: the risk assessment that the Corps required *was* done, and the Corps reviewed and approved that assessment. D.E. 183-6 at AR 72186; see also AR 71316-318 (EA's risk analysis section).[1] The final Response closing out the related Comment also provides extensive detail on

[1] The Comment that the Tribe mentions was not closed out until April 7, 2016—four months *after* the Response that the Tribe describes. The final entry for the Comment shows that the requested risk analysis *was* performed (the opposite of what the Tribe asserts):

> This comment was entered essentially as a follow up to #6139320, where the lack of risk analysis was mentioned. This particular comment essentially requested that the risk analysis be incorporated into the EA. Since then, DAPL has indicated that some of the information is Privileged and Confidential, but has provided all of the information to the Corps and allowed redacted versions to be included in the EA. This comment is being closed due to the material being included in the EA. However, 6139320 is left open because of data gaps in the spill modeling, risk analysis, and EA.

AR 72249.

The Corps did not stop with Dakota Access's agreement to add a risk analysis. Comment 6139320—the one in which the Corps directed Dakota Access to fill out relevant datasets—was not closed out until another month and a half later, after even more written dialogue, a discussion at an "Open Comments" meeting in March 2016, and a telephone call to review the timing that the Pipeline and Hazardous Materials Safety Administration ("PHMSA") employs for conducting the "O&M" (operations and maintenance) testing that the Corps had requested. Because the PHMSA Integrity Management Plan (or IMP) that results from O&M testing cannot be prepared in a meaningful way until after a pipeline is in operation, Dakota Access agreed to "make the IMP available to the USACE (or applicable pipeline segments under Corps jurisdiction as appropriate)" after completion of that testing and to "also make available the bi-annual risk review and IMP updates as appropriate." AR 72185. Only with that additional condition did the Corps close this item out. AR 72186. The Tribe does not explain how it could be arbitrary or capricious for the Corps to

the "mitigation measures" that Dakota Access agreed to put in place "to reduce this unavoidable risk and impacts if a spill were to occur in the Missouri River." D.E. 183-6 at AR 72186.

Other alleged "disputes" that Cheyenne River lists in Part II of its brief similarly offer no basis for denying summary judgment on Defendants' cross-motions. These, too, suffer from the problems noted above: (i) the disputes are not over the *facts* in the record, *see*, *e.g.*, CRST Opp. 2-7 (disputing the Corps's characterizations of the nature of its review process in the Argument section of the Corps's brief); (ii) the Tribe purports to dispute statements that are indisputable, *see*, *e.g.*, CRST Opp. 2 (trying to dispute the Corps's statement in the Final EA that it takes "full responsibility for its scope and content"), or (iii) the record shows the Tribe's version of a fact is wrong, irrelevant, or both. As an example of the third flaw, the Tribe states that "the November 4, 2015 Water Quality Team Memo states they 'have no comments ….'" CRST Opp. 3 (ellipses in CRST Opp.). That, however, is irrelevant to the statement the Tribe purports to dispute—that "Omaha District personnel in a wide range of specialties independently reviewed the proposal and supporting information"—especially when the full line from the November 4 Memo is that the Team "has reviewed" the draft EA and "has no comments at this time." Corps Ex. I at AR 71205.

Another example is this bald statement: "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." CRST Opp. 5. That is wrong. As explained in footnote 1, *supra*, the Corps worked with Dakota Access to ensure that a risk assessment *was* part of the EA. A separate section of the EA, titled "risk analysis," reviews the nine categories of "pipeline integrity threat" that the Corps analyzed in accordance with PHMSA regulations and industry standards. AR 71316-318 (Ex. L).

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follow PHMSA's established timeline for the *additional* testing at issue here—*i.e.*, how it could be wrong to let an applicant *begin* pipeline operations before requiring it to *test* pipeline operations. *Cf.* CRST Opp. 2.

The Tribe ignores that part of the EA. The "Risk Assessment" that had not yet been conducted was the separate test of pipeline operations that takes place after the pipeline begins operations. *See* note 1, *supra*.

The Tribe has not identified a single factual dispute that could stand in the way of summary judgment for Defendants.

II. The Corps's Decision To Grant Section 408 Permission For The Lake Oahe Crossing Was Lawful.

Cheyenne River continues to take issue with how the Corps analyzed the potential impairment of the Lake Oahe Project, and it disputes the finding that the crossing will be consistent with the public interest. At each turn, though, the Tribe misconstrues the nature of this Court's review, misstates what the Corps concluded (including mischaracterizations of the agency's underlying reasoning), and fails to respond to Defendants' arguments undermining its position. There was no error in the Corps's decision to permit the pipeline crossing of Lake Oahe under Section 408 of the Rivers and Harbors Act.

A. The Tribe Grounds Its Argument In The Wrong Review Standards.

The Tribe begins by misstating the standard of review. It misconceives basic principles of administrative law when it asserts that "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.'" CRST Opp. 9 (citing *Fox v. Clinton*, 684 F.3d 67, 76 (D.C. Cir. 2012) (discussing deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))). Contrary to the Tribe's view, *Chevron* and *Skidmore* apply to agency rules that "interpre[t]" a "statute." *See Fox*, 684 F.3d at 75. At issue here are the Corps's predictive judgments about technical matters and ultimate decisions grounded in those judgments. The Corps's application of its technical expertise is entitled to "an extreme degree of deference." *City of Waukesha v. EPA*, 320 F.3d

228, 247 (D.C. Cir. 2003) (per curiam). And its ultimate decisions are similarly subject to deferential arbitrary-and-capricious review. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004).

As Cheyenne River elsewhere concedes, the question under this deferential review standard is whether the Corps made its "findings of fact on the basis of substantial evidence and has provided a reasoned explanation for [its] policy assumptions and conclusions." CRST Opp. 8-9 (quoting *Bldg. & Constr. Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258, 1266 (D.C. Cir. 1988)). The Tribe's burden is heavy. It must show one of three things: (1) the Corps "failed to consider an important aspect of the problem"; (2) the Corps "offered an explanation for its decision that runs counter to the evidence before" it; or (3) its explanation "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As explained below, the Tribe does not come close to meeting its burden.

B. The Corps Acted Well Within Its Discretion When It Determined That The Pipeline Crossing Will Not Impair The Usefulness Of The Federal Project Or Be Injurious To The Public Interest.

The relevant question is whether the Corps acted arbitrarily or capriciously when it determined—after a multi-year process of review, comment, and consideration—that the Lake Oahe crossing "will not impair the usefulness" of the Lake Oahe Project and "will not be injurious to the public interest." 33 U.S.C. § 408(a). Section 408 expressly reserves those twin determinations to "the judgment of" the Corps. *Id.* The Corps, in turn, reasonably and correctly concluded that the low risk of adverse events for pipelines in general, when combined with numerous mitigation measures specific to this pipeline, will avoid both impairment to the Lake Oahe Project's usefulness and injury to the public interest.

1. Cheyenne River cannot fairly dispute that the Corps "consider[ed] an important aspect of the problem" here, *State Farm*, 463 U.S. at 43; after all, the Corps concluded that the potential risk for a worst-case oil discharge was "low" and that the "consequences" of such an event would be "high." CRST Opp. 10 (quoting EA). Nor does the Tribe contend that the Corps's low risk/high consequence conclusion "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm* 463 U.S. at 43.[2] Instead, the Tribe uses that conclusion to argue that "granting a Section 408 permit without an EIS" "in light of this finding" of low risk/high consequence was "not in accordance with the law." CRST Opp. 10; *see also id.* at 11 ("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 Tribe's position here directly conflicts with clearly established case law. As for whether an environmental impact statement was required, the Tribe has its statutes mixed up. NEPA—not Section 408—governs when an EIS is needed. As Dakota Access explained in its brief supporting summary judgment against Standing Rock, NEPA does not require an EIS every time an agency concludes that the consequences of a negative event would be significant. D.E. 203 at 5-6. Rather, the D.C. Circuit has held that an agency still "may find no significant impact … if *the combination* of probability and harm is sufficiently minimal," because the entire "concept of overall risk incorporates the significance of possible adverse consequences discounted by the

[2] The closest the Tribe comes is when it says that experts "retained by Tribes . . . did not concur that the risk is low." CRST Opp. 4-5. But even these extra-record reports do not refute what public PHMSA data referenced in the EA (at AR 71270 (Ex. L)) plainly establishes: (i) the chance of a leak from a one-mile segment of *any* crude oil pipeline is 1 in 474 years; (ii) even that low level of risk is overstated for this pipeline because it includes pipelines built decades ago; and (iii) even if such a leak occurs it is as likely as not to be limited to 4 barrels of oil. AR 73038 (Ex. AAA); AR 71271 (Ex. L). Nor does the Tribe dispute that several features of this project—required by the Corps—will make it even less likely either to leak or to cause damage if it does leak. D.E. 96-1, at 35-39 (Ex. Y).

improbability of their occurrence." *New York v. Nuclear Reg. Comm'n*, 681 F.3d 471, 478-79 (D.C. Cir. 2012) (citation omitted; emphasis added); *id.* at 482 (expressly rejecting the argument that if "the probability of a given harm is nonzero," it "mandate[s] an EIS"; rather, if "the agency examines the consequences of the harm in proportion to the likelihood of its occurrence" and nonetheless concludes that "the overall expected harm" is "insignificant," that finding will "support a FONSI"). The Corps faithfully followed this controlling authority by "coordinat[ing] closely with Dakota Access to avoid, mitigate and minimize potential impacts of the Proposed Action so that the pipeline would not impair the usefulness of the projects and the impacts to the environment would be temporary and not significant." AR 71176 (Ex. M).

The Tribe cannot prevail on its argument unless this Court becomes the first to interpret Section 408 to compel the Corps to find impairment of the usefulness of a federal project, injury to the public interest, or both, whenever it finds a remote possibility of a high-consequence oil spill or leak. But if that were the law, the Corps could never approve any number of linear crossings of waters that are part of a Corps project. Under Cheyenne River's reasoning, every energy pipeline, every highway, and every railroad track comes with some risk—however remote—of a high-consequence environmental impact. The Tribe cites to no authority for the proposition that Congress wrote Section 408 to effect such a sweeping ban on essential improvements to our Nation's infrastructure.

2. The Tribe also fails to confront the many flaws in its reliance on statutes and manuals that address projects unlike an oil pipeline that will run more than 90 feet beneath the body of water created by the Lake Oahe Dam. For example, the Tribe continues to erect strawmen by contending that the Corps may not "give priority to an oil pipeline over water supply or other

consumptive uses," and by further insisting that "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." CRST Opp. 12 (emphasis by CRST). Dakota Access's brief explained (at 8-14) that these other statutory and agency provisions did not limit the Corps's discretion here. This is not a case in which the Corps needed to choose between competing consumptive uses of the same water, such as a private company's request to divert lake waters to an industrial facility. Nor did the Corps face a proposal to construct a structure in the Lake that would benefit navigation in a manner that requires diverting water from the Tribe's drinking water or irrigation intakes. *Cf.* 33 U.S.C. § 701-1(b) (the "use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use" of those waters for specified purposes).[3]

For similar reasons, the Corps had no need to justify its decision by referring to the Missouri River Mainstem Reservoir System Master Water Control Manual, which deals with control of water levels throughout that Reservoir System. If this Corps manual or Section 701-1(b) somehow imposed unique limits on the Corps's power to permit a pipeline that will have no contact with the waters of the Lake Oahe Project (and, hence, no effect on the System's water levels), one would expect the Tribe to have expressed that view in at least one of its letters to the Corps. The Tribe simply ignores this argument, as well as two broader points (all found at page 12 of Dakota Access's opening brief): *no* commenter thought to invoke these provisions, nor has any court suggested that the Master Water Control Manual limits the permitting of pipeline projects. Instead

[3] This also explains why "[t]he 408 Permit Certification Checklist for Recreation, Navigation, and Hydropower were marked 'Not Applicable.'" CRST Opp. 4 (quoting AR 71183); *see id*. at 3 & 10. The pipeline is not in competition with recreational, navigational, or hydropower uses of the Lake Oahe Project.

of explaining how any of this could be squared with the Tribe's position, Cheyenne River merely repeats its view that the Corps "is bound to comply with the requirements set forth in the Master Manual," and once again the Tribe proves Dakota Access's point by backing that view up with citation to a case that had nothing to do with a pipeline project such as this. CRST Opp. 19 (citing *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1027-29 (8th Cir. 2003), which, as Dakota Access's opening brief noted at page 12, involved a dispute over lowering water levels within the Mainstem Reservoir System to satisfy the consumptive needs of downstream users).[4]

3. The Tribe's challenge to the second half of the Corps's Section 408 determination—that the pipeline will not be injurious to the public interest—comes down to its disagreement with the Corps's bottom-line finding of no significant impact. As noted above, the Corps took care to impose conditions that will "avoid, mitigate and minimize potential impacts of the Proposed Action" before it went on to conclude "that the pipeline would not impair the usefulness of the projects and the impacts to the environment would be temporary and not significant." AR 71176 (Ex. M). For all of its parsing of an array of other statutes, regulatory provisions, and Corps manuals, the Tribe does not seriously contend that any of these laws, regulations, or manuals bar the Corps from approving a pipeline after the agency finds that potential impacts to the environment have been mitigated and minimized to the point of being "temporary and not significant." *See id.*

[4] Cheyenne River also cites both the Master Water Control Manual and Section 701-1(b) for the proposition that none of the "seven authorized purposes for operation of the Mainstream Reservoir System" includes "uses for oil pipelines to cross Lake Oahe." CRST Opp. 11; *see also id*. at 13 ("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." (Emphasis by CRST)). The Tribe has it backwards. A project that crosses deep beneath a water of the Mainstem Reservoir System need not be expressly (or even implicitly) authorized by either the Master Water Control Manual and Section 701-1(b). The question, instead, is whether that manual or that statute prohibits private projects that do not implicate those other purposes. As explained above, they plainly do not bar such a project.

The real question, then, is whether the Corps acted arbitrarily or capriciously in reaching *that* conclusion. It did not.

The Tribe makes no serious effort to refute that the Corps reached that determination only after first considering the wide array of comments submitted by Cheyenne River, Standing Rock, additional tribes, environmental groups, federal and state agencies, and others. The Tribe also does not dispute that the Corps acknowledged the potentially high consequences of a worst-case discharge, or that it imposed a number of conditions both to reduce the possibility of a leak and to mitigate any impacts should one occur. *See* D.E. 185 (Dakota Access Br.) at 5-6. And Cheyenne River abandons its allegation that the Corps relied exclusively on Dakota Access to put the EA together, *see id*. at 14, retreating instead to the narrower (and unsupported) assertion that the Corps was obligated to hire persons with "specialized experience" in such things as the particular drilling technique that Dakota Access used here to *reduce* environmental impacts, CRST Opp. 3. (The Tribe does not seek to reconcile this criticism of insufficiently specialized expertise with the fact that its own supposed expert wrongly believed this will be the world's longest horizontal directional drill of its kind. D.E. 185 at 15-16.)

Rather than defend any of these points from its own opening brief, Cheyenne River returns to a complaint about possible landslides. Dakota Access's opening brief already showed how the Tribe selectively quoted the EA to assert incorrectly that the Corps failed to analyze landslide risk *after* mitigation. D.E. 185 at 16. The Tribe's retort now is that "there is no evidence in the Record that the ***Corps*** analyzed landslide risk." CRST Opp. 20 (emphasis by CRST). That too is wrong. The Corps itself expressly raised this topic—the need to analyze landslides—in one of its comments on the pre-draft-EA a full year before the Corps made its finding of no significant impact. AR 72194-195 (Corps Ex. F). And the Corps did not close this item out until Dakota Access

addressed the point the Tribe raises now about possible landslides "outside the Corps lands." CRST Opp. 20; *see* AR 72195 (Corps points out in Response 1-1 to Comment 6141197 that several acres of workspace and stringing areas west of the Lake are designated as having a high incidence of landslides and that this "needs to be analyzed for effects"; Dakota Access then addresses the Comment in Response 2-0 with a lengthy revision to the draft EA); *see also* D.E. 203, at 10-11 (refuting post-July 25, 2016 landslide comments). There was no error in how the Corps addressed the landslide issue.

Finally, the Tribe repeats its complaint that the Corps conducted its analysis of possible water supply impacts without specifically mentioning water intakes for Cheyenne River's reservation—located more than 70 miles from the pipeline crossing. It remains undisputed, though, that the Corps had no duty to address each and every comment in the EA, especially comments that were not timely submitted. As Dakota Access showed in its opening brief, the Corps made the EA available to the Tribe and the rest of the public on December 8, 2015 and requested comments no later than January 8, 2016. Ex. VV ¶ 8. But the Tribe ignored the deadline, waiting until May 2016 to send a letter that mainly addressed consultation obligations under Section 106 of the National Historic Preservation Act. AR 68220 (Ex. II). To the extent that letter even discussed concerns about oil spills and water quality, it merely asked about the status of responses to "comments from SRST." *Id.* at AR 68220-21. Not surprisingly, the EA therefore addressed Standing Rock's comments about water impacts.

Even if Cheyenne River had submitted timely comments, and even if it had documented possible harm to its particular water intakes in those comments, the Corps still would have satisfied any conceivable obligation. That is because the Corps concluded that, even with a worst-case-scenario spill (a scenario that would never come to pass because PHMSA's required worst-case

assumptions do not apply here), oil would be contained in time to avoid harm to Standing Rock's much closer water intakes. AR 71311 & 71315 (Ex. L). That part of the Corps's analysis necessarily resolves concerns about Cheyenne River's more distant water intakes. Additionally, the Tribe ignores that the pipeline will *reduce* the much higher risk to its water supply from a railroad crossing that carries 300,000 barrels of oil per day across Lake Oahe at a point that is 70 miles closer to the reservation than the pipeline crossing. D.E. 203 (Dakota Access Reply to SRST) at 8 (citing record materials).

None of Cheyenne River's arguments establish that the Corps acted arbitrarily or capriciously when it determined that this pipeline will not impair the usefulness of the Lake Oahe Project or be injurious to the public interest.

III. The Grant Of The Easement Was Lawful.

Cheyenne River makes two arguments challenging the easement. It complains that the Corps did not repeat the work already completed when the Corps made its July 25, 2016 Finding of No Significant Impact. And the Tribe questions why the Corps did not impose easement conditions that the Mineral Leasing Act does not require. Both arguments lack merit.

A. The Corps Properly Declined To Repeat The Same Analyses And Determinations It Already Conducted Under Section 408.

The parties appear to be in agreement on the general point that the Corps need not conduct a do-over under the Mineral Leasing Act of work already done for its Section 408 findings. *See* CRST Opp. 21 (arguing that the Corps failed to meet its MLA obligations "[t]o the extent the Section 408 Permit Record of Decision and the EA do not analyze [the MLA's] twelve factors" for approving a right-of-way); *see also id.* (argument heading states that "Exclusive" reliance on the Section 408 record was not appropriate). Cheyenne River instead disagrees that two particular

MLA provisions overlap. Because the Tribe has focused its argument on MLA provisions that undeniably *do* overlap with Section 408, this argument fails.

As noted above, Section 408 required the Corps to conclude that the proposed action will not impair the usefulness of the Lake Oahe Project and will not be injurious to the public interest. Under Section 185(b)(1) of the MLA, the Corps likewise could not have granted the right-of-way had it determined that one "would be inconsistent with the purposes of the reservation." The Corps did not determine that the right-of-way would be inconsistent with the purposes of the Lake Oahe Project. In fact, the Corps determined just the opposite, concluding under Section 408 that the pipeline crossing would not impair the usefulness of the federal project (*i.e.*, "the reservation"). And the Corps expressly adopted that Section 408 finding to satisfy MLA § 185(b)(1): "The analysis supporting the grant of permission under 33 U.S.C. 408 is adopted in support of the Corps finding that granting an easement for the pipeline to cross Lake Oahe will not adversely impact the capability of the project to generate the benefits for which the project was Congressionally authorized." Ex. S at AR ESMT 654 (¶ 5.a. of Dec. 3, 2016 Corps Memo); *see also id.* at AR ESMT 657 ("The Corps must determine that the proposed easement will not be inconsistent with the authorized purposes of the federal project. 30 U.S.C. § 185(b)(1). As discussed above, at para. 5.a., pp. 2-3, the proposed easement would not be inconsistent with the authorized purposes of the Lake Oahe project."). That was sufficient to satisfy MLA § 185(b)(1).

The same is true for Section 185(h)(2), which is entitled "Environmental protection." As explained in the opening briefs, it requires the same thing that the EA already fully addressed: plans for "construction, operation, and rehabilitation for such right-of-way or permit" if the new project "may have a significant impact on the environment." In particular, and putting aside that the Corps concluded there will *not* be a significant impact on the environment, that subsection is

satisfied by the EA if the Corps has already imposed "stipulations" in the right-of-way to "control or prevent" "damage to the environment (including damage to fish and wildlife habitat)" and "to protect the interests of individuals living in the general area" who "rely on the fish, wildlife, and biotic resources of the area for subsistence purposes." 30 U.S.C. § 185(h)(2)(C)(i) & (D). To be sure, the Tribe has challenged whether the Corps did *enough* on these topics when it carried out its Section 408 obligations, but there can be no question that the EA and the FONSI already addressed them. Moreover, when the Corps considered subsection (h)(2) in December 2016, it went beyond the EA's original requirements to develop a "proposed easement" that "requires mitigation" and it "added special conditions to the easement to mitigate any impacts to the environment." Ex. S at AR ESMT 658. Thus, even if the MLA required the Corps to do more than place "exclusive" reliance on its Section 408 record, the Corps complied.

The Tribe nevertheless insists that "nothing in the EA addresses protecting the interests of persons 'who rely upon the fish, wildlife and biotic resources of the area for subsistence.'" CRST Opp. 21 (quoting statute). And, so this argument goes, "[b]ecause the EA is silent on these impacts, it fails to require mitigation measures to protect these resources or the people who rely upon them." *Id.* But Dakota Access and the Corps have already shown that this argument fully rests on the Tribe's erroneous belief that only one easement condition "even remotely relates to the protections required by Section 185(h)(2)." CRST Br. 43. Faced with the truth that nearly two dozen different conditions will reduce the risks or mitigate the effects of spills, the Tribe does not address a single one of them. Instead, it baldly refutes that such conditions could "clean all oil from Lake Oahe" before resources are affected. CRST Opp. 22 (also calling it "magical thinking"). But the Tribe's only purported support for this line of attack is its reference to a footnote that did not even make it into the filed version of its brief. *Id.* (referencing non-existent "n.8, *infra*"). As with

Cheyenne River's other challenges to the Corps's determinations under MLA § 185(h)(2), the Court need only read the record to see why the Tribe's position fails.

B. The Tribe's Remaining Challenges To The Easement Grant Are Also Meritless.

As for those MLA provisions that do not overlap with the Corps's earlier Section 408 determinations, the Tribe limits itself to the liability provisions found in 30 U.S.C. § 185(x). Specifically, the Tribe contends that a limit on Dakota Access's strict liability to the government—$10 million "for any one incident," Ex. Y ¶ 12(b)—violates Section 185(x)(6). CRST Opp. 22. The statutory language the Tribe quotes for this argument—involving "the extent to which holders shall be liable to third parties for injuries," and "a maximum limitation on damages" for "liability without fault" that is "commensurate with the foreseeable risk or hazard"—does not even appear in Section 185(x)(6). And the provisions from which the Tribe appears to be quoting provide no support for its arguments either.

The "maximum limitation on damages" language for strict liability claims is found in subsection (x)(4)—not (x)(6). (The Tribe's opening brief incorrectly placed it in yet a third subsection: (x)(1). *See* CRST Br. 35.) It states that *if* the Corps "impos[es] liability without fault" through either a "regulation or stipulation," the Corps "shall include a maximum limitation on damages commensurate with the foreseeable risks or hazards presented." § 185(x)(4). As Dakota Access explained in its opening brief, the Corps imposed strict liability on Dakota Access of up to $10 million per incident. By operation of that provision, even greater liability is possible, the only difference being that "liability for damage or injury in excess of this amount shall be determined by ordinary rules of negligence." *Id.*

The stipulation the Corps imposed in the easement fully comports with the statute. It "specif[ies] the extent to which" Dakota Access is "liable to the United States for damage or injury," 30 U.S.C. § 185(x)(1), (4), by imposing strict liability with a limit of $10 million "for any one incident," with any additional damages "to be in accord with the ordinary rules of negligence," D.E. 96-1 (Ex. Y) ¶ 12(b). Given that the Corps found no significant impact on the environment, that amount is perfectly "commensurate with the foreseeable risks or hazards presented." 30 U.S.C. § 185(x)(4). The Tribe's response is that "Dakota Access's statistics on the cost of cleanup of oil spills" in a memo it sent to the Corps "demonstrat[e] that $10 million will not begin to cover the cost of a cleanup." CRST Opp. 22 (citing AR ESMT 1257 (Ex. BBB)). Those statistics show nothing of the sort. They are *totals* for all cleanup costs of *all* incidents in a given year. On a per-incident basis, the average cleanup cost is well below the $10 million strict-liability cap. *See* AR ESMT 1257 (Ex. BBB).[5]

The Tribe is also mistaken when it argues that "nothing in the MLA easement record explains" how "the decision to limit strict liability to $10 million" 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.'" CRST Opp. 22. (The citation to (x)(6) is wrong here, too. This time the quoted language is in subsection (x)(1).) Similar to Plaintiffs' effort to convert NEPA into a right to a particular result, Cheyenne River fails to acknowledge that the easement does all that the statute calls for: *i.e.*, "specif[y] the extent to which" Dakota Access

[5] The table at issue provides 3-year, 5-year, 10-year, and 20-year annual averages, including the average number of incidents per year and average total clean-up costs per year. The average clean-up cost for the most recent 20 years is $2.2 million per incident. For the most recent 10 years it is $3.4 million. For the most recent 5 years and the most recent 3 years it is below $2 million. *See* AR ESMT 1257 (Ex. BBB) (calculated by dividing total annual average clean-up cost by total annual average of incidents).

"shall be liable to third parties" for injuries that result from the grant of the right-of-way. In particular, the easement states that Dakota Access will be liable to the extent "imposed by Federal and state statutes to third parties for injuries incurred in connection with the use and occupancy of the pipeline right-of-way." D.E. 96-1 (Ex. Y) ¶ 12(c). Cheyenne River may not like the level that is specified, but the MLA requires nothing more.

IV. The Corps Did Not Violate Tribal Rights Or Trust Duties.

Cheyenne River accuses the Corps of violating "moral obligations of the highest responsibility and trust that must be fulfilled by conduct judged by the most exacting fiduciary standards." CRST Opp. 23 (citation and internal quotation marks omitted). Yet after ninety pages of briefing it still cannot identify a statutory or regulatory provision that sets forth a particular fiduciary duty that the Corps owed to the Tribe, much less one that it violated. That failure is reason alone to reject its sweeping invocation of the law of fiduciaries. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-74 (2011) ("Though the relevant statutes denominate the relationship between the Government and the Indians a 'trust,' that trust is defined and governed by statutes rather than the common law."); Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 169 (1942) (full range of common-law trust duties and rights "does not exist between the United States and the Indians"); *see also* D.E. 185, at 24-28; D.E. 159, at 40-44.[6]

[6] The Tribe argues that three cases defining the scope of United States trust obligations—*United States v. Mitchell*, 463 U.S. 206 (1983), *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *Jicarilla Apache Nation*, 564 U.S. 162—do not apply to this case because the Tribe seeks injunctive relief under the APA. CRST Opp. 23 n.4. The Tribe, which is content to cite these very cases to establish the *existence* of its rights, *see*, *e.g.*, D.E. 208, at 34-35, is incorrect. Courts regularly apply these cases when interpreting the scope of U.S. trust obligations in suits seeking equitable relief. *See, e.g.*, *Cobell v. Norton*, 392 F.3d 461, 470-71 (D.C. Cir. 2004) (applying *Mitchell* and *Navajo Nation* to determine whether Tribal plaintiffs had a "statutory basis" for their trust claim seeking injunctive relief); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 29 (D.D.C. 1999) (applying *Mitchell* and observing that tribes seeking relief for breach of trust duties under the APA "must show some independent statutory right to which they are entitled"), *aff'd* 240 F.3d 1081 (D.C. Cir. 2001).

In an effort to identify some statutory basis for its claim, the Tribe now cites—for the first time—the Cheyenne River Taking Act. C*ompare* CRST Opp. 27 & 30, *with* D.E. 97-1 (proposed amended complaint) ¶¶ 30-38 & 297-310. But that 1950 statute created no Tribal rights; instead, it simply tasked the Departments of the Army and the Interior with negotiating contracts with Plaintiffs to compensate for lands flooded by the creation of Lake Oahe, and it outlined the process for negotiating and finalizing those contracts. Cheyenne River Taking Act, 64 Stat. 1093 (1950). As a result of the process established by that 1950 law, the Tribe transferred its property interests in those lands in a contract that Congress ratified in 1954. *South Dakota v. Bourland*, 508 U.S. 679, 691 (1993) (holding that the 1944 Flood Control Act and the 1954 Cheyenne River Act "affirmatively abrogate the Tribe's authority to regulate entry onto or use of these lands"). None of these statutes imposes a *fiduciary* duty on the Corps to preserve unimpeded hunting and fishing by the Tribe. Instead, when the 1954 Act provides that the Tribe's members "shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir," it adds that this is "subject, however, to regulations governing the corresponding use by other citizens of the United States." 68 Stat. 1191, 1193 § X (1954). Any other right that the Tribe asserts based on earlier treaties or statutes is unavailing, because the express reservation of certain rights in the 1954 Act "does not operate as an implicit reservation of all former rights." *Bourland*, 508 U.S. at 693.

These provisions contrast markedly with statutory schemes under which the Supreme Court has found fiduciary duties. *See, e.g., Mitchell*, 463 at 222 (series of acts passed over several decades "establish the 'comprehensive' responsibilities of the Federal Government in managing the

harvesting of Indian [resources]," and the Department of the Interior "exercises literally daily supervision over the harvesting and management of tribal timber," leaving "[v]irtually every stage of the process . . . under federal control").[7]

In the end, it would not matter if the Tribe could point to a fiduciary duty separate from the Corps's other regulatory obligations, because the Corps's findings and determinations would satisfy any such duty. The Corps conducted a thorough technical review of the impacts of the crossing at Lake Oahe. After applying its substantial engineering and water-management expertise, the Corps concluded the pipeline would have "no impac[t]" on "treaty fishing and hunting rights." AR 71282 (Ex. L). The Corps also concluded that construction and operation of the pipeline would have "no direct or indirect impact" on the Standing Rock Sioux, including "a lack of impact to its lands, cultural artifacts, water quality or quantity, treaty hunting and fishing rights, environmental quality, or socio-economic status." AR 71310 (Ex. L). The additional precautionary review the Corps conducted before issuing the easement reaffirmed these conclusions. AR ESMT 1227 (D.E. 172-5) ("The Lake Oahe crossing does not pose a direct risk of impairment of the SRST's reserved *Winters* water rights."); *id.* (discussing mitigation factors that minimized impacts from any potential spill, however unlikely). These conclusions, which apply equally to Cheyenne River's reservation more than 70 miles further downstream, defeat a claim grounded in breach of trust.

V. The Tribe's Attacks On The Corps's Repeated Efforts To Consult Are Frivolous.

Cheyenne River's final argument is that the Corps had a non-discretionary obligation to consult with it about the pipeline project. Cheyenne River further insists that "[t]he duty to consult

[7] *Cheyenne-Arapaho Tribes of Okla. v. United States*, 966 F.2d 583, 584 & 586 (10th Cir. 1992), the other case the Tribe relies on to support its assertion of fiduciary duties, similarly involved federal management of tribal property and the federal government's negotiation of contracts with private developers *on behalf of the tribe* pursuant to a comprehensive statutory and regulatory scheme governing federal management of tribal mineral rights.

rests with the Corps—not the Tribe." CRST Opp. 44. But the Corps cannot go it alone here. Consultation requires at least two participants. And the record shows, without a doubt, that Cheyenne River declined to be one.

Dakota Access and the Corps both documented in their briefs the many efforts the Corps made to meet with Cheyenne River to consult about the pipeline "or any other topics" the Tribe might choose. D.E. 183 (Corps), at 35-36; D.E. 185 (Dakota Access), at 19 & 24. This process of informing the Tribe, seeking its input, and arranging for possible consultation began in October 2014—a fact the Tribe omitted from its summary judgment filings. *See* D.E. 185 at 17-18. The Corps met with Cheyenne River and other tribes in late 2015 and early 2016; and during the months after the draft EA was released, the Corps tried repeatedly—without success—to get Cheyenne River's Chairman to arrange a time to consult further. *Id*. at 18-19.

The Tribe's principal response to all of this is that the Corps only offered to consult about cultural resource issues under Section 106 of the NHPA. CRST Opp. 40. But the Corps did not refuse to discuss other issues or concerns with Cheyenne River, and the Tribe cannot point to a single instance in which the Corps rejected its request to consult on such things as environmental effects, potential harm to trust resources, or the like. The problem here was not a supposed inability to agree on the scope of a meeting agenda. It was much more basic: The Tribe simply did not respond to efforts to *have* a meeting in the first place.

Dakota Access explained how Corps Tribal Liaison Joel Ames repeatedly tried to reach Chairman Harold Frazier in the months following release of the draft EA to set up a meeting, including multiple emails in response to a call that Frazier initiated to Ames. D.E. 185 at 18-19 & n.7. Cheyenne River responds by repeating its assertion that Frazier should be forgiven for ignoring these efforts because Ames did "not identify the purpose for the requested call." CRST Opp.

41 n.16. Dakota Access already explained that this is no excuse because "Ames was repeatedly trying to have the conversation that Frazier *himself*—the one who supposedly wanted consultation—called to initiate." D.E. 185 at 19 n.7 (referencing Ames's declaration that he was returning Frazier's call). Worse than ignoring Dakota Access's argument here, the Tribe falsely asserts that the Corps and "Dakota Access conveniently leave out an email" documenting that Frazier "initiated the calls." CRST Opp. 41 n.16. The fact that Frazier initiated the calls was precisely Dakota Access's point: If Frazier was trying to initiate consultation beyond Section 106 issues, he has no excuse for ignoring Ames's many efforts to make it happen. *See* D.E. 185 at 19 n.7. Cheyenne River also ignores the added fact that Ames even asked Tribal Historic Preservation Officer Steven Vance to help schedule the consultation, but that too failed. *See* D.E. 185 at 19 n.7.[8]

Cheyenne River's insistence that the Corps refused to consult on non-NHPA topics is also contradicted by the experience of those tribes that did choose to participate. Cheyenne River complains that it merely got a "generic letter" in June 2016 "relating only to Section 10 and 404 permits," and that the letter "did not invite consultation." CRST Opp. 41 (referencing Corps Ex. W). But the reason it got the letter is other tribes *had* taken up the opportunity to consult, resulting in a series of questions on an array of topics, some of which the Corps decided to answer in written form. This extra effort by the Corps shows that it did not prevent tribes from consulting on non-

[8] Dakota Access's opening brief (at 17-18 & n.6) pointed out that Cheyenne River has misrepresented the record on consultation. The Tribe has two responses to being accused of "lying." CRST Opp. 41 n.17. First, it assures the Court that these accusations are "address[ed]" somewhere in its "Opening Brief, SUMF, and [its Opposition] Brief, along with the Administrative Record." *Id.* Where or how they are addressed among these tens of thousands of pages, however, is anybody's guess. Second, it says that "[e]ach citation by Dakota Access" documenting these misrepresentations "is about the NHPA Section 106 process—not the EA or Section 408 permits on trust resources." *Id.* But the citations come from paragraphs 13 and 88 of CRST's "Statement of Material Facts" for *this* summary judgment briefing. *See* D.E. 131-1. Thus—in its hope that two wrongs can make a right—Cheyenne River asks the Court to ignore that it made misrepresentations in its statement of material facts because, as it turns out, the Tribe misrepresented that the facts were material in the first place.

NHPA issues, including those under NEPA and Section 408. *See*, *e.g.*, Corps Ex. W at AR 67703 (question and answer summary resulted "from the Consultation meetings that have been held over the past months" with various tribes), 67706 (stating that all comments received from the tribes and others will be considered "to assist in making a determination under NEPA, Section 408, and Section 404/10"), 67710 (answering question about repairs of pipeline leaks below ground).

Cheyenne River has only itself to blame for its lack of involvement in consultation on issues related to trust resources.

CONCLUSION

This Court should grant the cross-motion for summary judgment by dismissing CRST's claims in counts 5, 6, 7, 8, 9, 10 and 13 of Cheyenne River's proposed amended complaint.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2017, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

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