IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, v. UNITED STATES ARMY CORPS OF ENGINEERS and UNITED STATES FISH AND WILDLIFE SERVICE, Defendants, and DAKOTA ACCESS, LLC, Defendant-Intervenor and Cross-Claimant	Case No. 1:16-cv-01534 (JEB) [Consolidated with 1:16-cv-1796 and 1:17-cv-267]

FEDERAL DEFENDANTS' OPPOSITION TO YANKTON SIOUX TRIBE AND ROBERT FLYING HAWK'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

The Corps' decision to grant an easement to Dakota Access represented the culmination of over two years of detailed environmental analysis and extensive consultation efforts with numerous stakeholders, including the Yankton Sioux Tribe. The Corps' analysis of potential impacts on seven water crossings for portions of the Dakota Access Pipeline included site-specific analysis under NEPA by three Corps District Offices. In addition, various other crossings were approved via a previously issued Nationwide Permit for filling of wetlands with minimal individual and cumulative adverse effect to the aquatic environment. Through multiple motions for partial summary judgment, this Court has largely upheld the Corps' decision-making under NEPA.

In addition to the Corps' administered water crossings, the Pipeline also crossed land over which the United States Fish and Wildlife Service ("FWS") holds wetland and grassland easements. Those crossings temporarily impact 71.8 acres of the 1,100 mile Pipeline route (less than 0.5 % of the entire Pipeline) and are over 60 miles from the site-specific water crossings the Corps reviewed. The Fish and Wildlife Service studied the easement crossings by preparing its own Environmental Analysis, which concluded that allowing construction on privately owned lands encumbered by wetland and grassland easements under the Service's management would not significantly affect the quality of the crossed wetland and grassland easements and would not constitute a major federal action. Accordingly, the FWS properly concluded that no EIS was necessary.

The Yankton Sioux Tribe and Chairman Flying Hawk ("Plaintiffs") seek summary judgment on the theory that the Corps and FWS were required to create a single NEPA document for the entire Pipeline. This contention is devoid of any legal support—neither the Corps nor FWS, alone or combined, have jurisdiction over the entire Pipeline, more than 96% of which is not on federally managed land. Both agencies fully complied with NEPA by limiting their respective environmental reviews to areas within their jurisdiction and in which potential environmental

impacts may occur. Despite Plaintiffs' unsupportable efforts to distinguish their claims, the D.C. Circuit has ruled squarely on this issue, finding that agencies in another oil pipeline case "were not obligated also to analyze the impact of the construction and operation of the entire pipeline." *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 48–49 (D.C. Cir. 2015). So too here.

Plaintiffs' treaty related claims fare no better. Plaintiffs' argument that the Corps has not considered Yankton's alleged usufructuary treaty rights relating to 38-miles of land abutting Lake Oahe should be denied because, as the Supreme Court found, the 1858 Treaty of Washington ceded Yankton's rights in the land at issue. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 334 (1998). Simply put, Yankton fails to meet its burden of establishing that it possesses relevant usufructuary rights, much less that the Corps has breached a trust duty relating to those rights.

Finally, the Court should grant summary judgment to the United States on Plaintiffs' claims alleging that the Corps violated the National Historic Preservation Act and that "clearing, grading, excavation, and construction that would occur along the duration of the Pipeline route would destroy any historic or culturally significant sites encountered." Compl. *Yankton Sioux Tribe v. United States*, No. 16-1796 (D.D.C. Sept. 8, 2016), ECF No.1 at ¶ 139. The Pipeline is now fully constructed. Plaintiffs' own allegations therefore make clear that its Claims 2 through 5 are moot.

II. FACTUAL BACKGROUND

A. Agency Decisionmaking

The Dakota Access Pipeline will connect the Bakken and Three Forks production region of North Dakota to Patoka, Illinois with an approximately 1,100 mile-long pipeline. Environmental Assessment, Omaha District (July 2016) (Ex. A) ("Omaha EA") (USACE_71220-382). Certain discrete sections of the Pipeline fall under the Corps' jurisdiction and require some form of Corps approval or rights of way over Corps-managed land. *Id.* In addition to the Corps' Omaha District's Environmental Assessment that has been the subject of several rounds of briefing in this case, the

Corps completed two other NEPA processes. The Corps' St. Louis District issued an Environmental Assessment and Mitigated Finding of No Significant Impact for permission to cross four federal projects or flowage easements in Illinois under Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 408 ("Section 408"). St. Louis District Final Environmental Assessment and FONSI (Aug. 3, 2016) (Ex. B) ("St. Louis EA") (USACE_9823-958). The St. Louis EA addressed four crossings – three of which span less than 700 feet and one of which crosses federal flowage easements for approximately 2.42 miles. *Id*. at 10, 16. And the Corps' Rock Island District issued a Section 408 permission for a portion of the Pipeline to cross the Mississippi River after determining that the Section 408 permission met the terms of the Corps' NEPA categorical exclusion. Memorandum for Record (July 19, 2016) (Ex. C) ("Rock Island Memorandum") (USACE_3-91). The Rock Island Memorandum addressed a single river crossing of 4,600 feet. *Id*. at USACE_3.

Other sections of the Pipeline traverse privately-owned lands in North and South Dakota encumbered by easements managed by the Fish and Wildlife Service. The FWS issued an Environmental Assessment and Mitigated Finding of No Significant Impact on June 22, 2016. FWS Environmental Assessment: Grassland and Wetland Easement Crossings (May 2016) (Ex. D) ("FWS EA") (USFWS_2449-92); FWS Finding of No Significant Impact (June 22, 2016) (Ex. E) (USFWS_2416-18). These documents address the FWS's recommendations to avoid its easements entirely through rerouting and avoiding impacts to its easements through directional drilling. *Id*. FWS determined that "[a]ll surface impacts to grassland easements in North Dakota and South Dakota have been avoided by route modifications or construction methods" and that the "total temporary impacts to the wetland basins (71.8 acres) would be less than 0.6 percent of the entire" Pipeline in North and South Dakota. FWS EA at 18. The EA also addresses the FWS's efforts to consult with tribes, including Yankton. *Id*. at 38.

B. Yankton Sioux Tribe Treaties

On September 17, 1851, the United States entered into the Treaty of Fort Laramie with the Sioux and other tribes. Treaty of Ft. Laramie, 11 Stat. 749 (Sept. 17, 1851). That treaty provided that "the aforesaid Indian nations . . . do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." *Id.* at Art. 5.

On April 19, 1858, the United States and the Yankton Sioux Tribe concluded the Treaty with Yancton Tribe of Sioux.[1] 11 Stat. 743. Article I of the Treaty of 1858 provided that Yankton "relinquish[ed] and abandon[ed] all claims and complaints about or growing out of any and all treaties heretofore made by them or other Indians, except their annuity rights under the" 1851 Treaty. *Id*. at Art. I. The 1858 Treaty further provided that Yankton "fully acquit[s] and release[s] the United States from all demands against them on the part of said tribe . . . except the before mentioned right of the Yanctons to receive an annuity under said treaty of Laramie, and except, also, such as are herein stipulated and provided for." . at Art. XIV. The 1858 Treaty explicitly protected usufructuary rights to quarry stone, preserving "the free and unrestricted use of the red pipe-stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes." *Id*. at Art. VIII. The 1858 Treaty reserved for Yankton approximately 400,000 acres of land "located in what is now the southeastern part of Charles Mix County, South Dakota." *Yankton Sioux*, 522 U.S. at 334.

In 1894, Congress passed an act that incorporated the United States and the Yankton Sioux Tribe's agreement, providing for the allotment and sale of the approximately 400,000-acres reserved by the 1858 Treaty. The Supreme Court addressed the extent to which the 1894 Treaty

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[1] "Yancton" was the "1858 spelling" of "Yankton." *United States v. Dion*, 476 U.S. 734, 737 (1986)

preserved rights protected by the 1858 Treaty, finding that "apart from the pledge to pay annuities, it is hard to identify any provision in the 1858 Treaty that the Tribe might have sought to preserve, other than those plainly inconsistent with or expressly included in the 1894 Act." *Yankton Sioux*, 522 U.S. at 348. Yankton's current lands are located approximately four-hundred river miles from the Lake Oahe Pipeline crossing. Map (Ex. F).

C. Yankton Sioux Tribe Consultation

The Corps made multiple efforts to consult with Yankton between November 3, 2014 and the dates of the challenged agency decisions in June and July 2016. These consultation efforts sought to address Yankton's concerns relating to, among other things, its alleged treaty rights.

Yankton's response to the Corps' initial consultation effort was to defer commenting on drilling test bore holes near Lake Oahe to the Standing Rock and Cheyenne River Sioux Tribes. Email from L. Gravatt, Yankton, to R. Harnois, Corps (Nov. 3, 2014) (Ex. G) (USACE_67125); Map. The Corps subsequently conducted a field visit on April 2, 2015 to traditional cultural property sites with Tribal Historic Preservation Officer ("THPO") Perry Little. Tribal Consultation Spreadsheet at 5 (Ex. H) (USACE_5630).

Yankton did not attend two subsequent meetings attended by other tribes. Tr. of meeting in Sioux Falls, S.D. (Jan. 25, 2016) (Ex. I) (USACE_66575-77); Dakota Access Tribal Consultation Meeting sign in sheet (Dec. 8, 2015) (Ex. J) (USACE_66810).

On March 17, 2016, Yankton requested a consultation meeting with the Corps on March 31, 2016. Letter from Chairman Flying Hawk to Col. Henderson (Mar. 17, 2016) (Ex. K) (USACE_64260). On April 13, 2016, Yankton transmitted a letter to the Corps that generally referenced unspecified treaty rights, but otherwise focused on the National Historic Preservation Act and Native American Graves Protection and Repatriation Act. Letter from Chairman Flying Hawk to Col. Henderson (Apr. 13, 2016) (Ex. L) (USACE_65507). Yankton sent a third letter to the Corps

on April 29, 2016 that generally addressed consultation without referencing specific treaty rights. Letter from Chairman Flying Hawk to Col. Henderson (Apr. 29, 2016) (Ex. M) (USACE_64400).

Between March 17, 2016 and May 10, 2016, the Corps made numerous efforts to meet with Yankton. Yankton canceled the March 31, 2016 meeting and did not respond to numerous phone calls, emails, and text messages. Letter from Col. Henderson to Chairman Flying Hawk (May 10, 2016) (Ex. N) (USACE_64286); Letter from Col. Henderson to Chairman Flying Hawk (May 6, 2016) (Ex. O) (USACE_64293-94); Corps email chain (May 2, 2016) (Ex. P) (USACE_64320-23); Corps email chain (Apr. 22, 2016) (Ex. Q) (USACE_65413-15).

On May 18, 2016, Colonel Henderson flew to Fort Randall, South Dakota and met with Yankton Chairman Flying Hawk, THPO Little, and members of Yankton's Business and Claims Committee, Treaty Steering Committee, and attorneys. On June 17, 2016 Yankton informed the Corps that it was "finalizing its Consultation Protocols" and that "several burials" were located at unspecified pre-construction notification sites in South Dakota. Letter from Chairman Flying Hawk to Col. Henderson (June 17, 2016) (Ex. R) (USACE_64074). On July 8 and 15, the Corps responded by providing Yankton with information regarding monitoring PCN sites. Letter from Col. Henderson to Chairman Flying Hawk (July 15, 2016) (Ex. S) (USACE_63979).

The FWS also sent Yankton two letters in October, 2015. Letter from Reg'l Dir. Hogan to Chairman Flying Hawk (Oct. 23, 2015) (Ex. T) (USFWS_1016-18); Letter from Reg'l Dir. Hogan to THPO Little (Oct. 23, 2015) (Ex. U) (USFWS_1019-21); FWS EA at 38. Yankton did not respond to those letters. Yankton was also invited to participate in a meeting with FWS and the Corps on February 18 and 19. List of tribes invited to Feb. 18-19, 2016 meeting in Niobrara, Neb. (Ex. V) (USFWS_1977-78). Yankton did not attend the meeting. Ponca Tribe of Nebraska Dakota Access Pipe Line Meeting Sign in Sheet (Feb. 18, 2016) (Ex. W) (USFWS_1974-76).

On October 20, 2017, following the Court's remand, the Corps requested information relating to hunting and fishing, including "studies or reports on game species . . . and the designated hunting grounds for such game in relation to Lake Oahe", and "[d]ocumentation of distinct cultural practices of the Tribe that are connected to Lake Oahe." Email with letter from Col. Hudson to Chairman Flying Hawk (Oct. 20, 2017) (Ex. X). The transmittal email was flagged as "high importance." *Id*. Yankton has not yet substantively responded to the Corps' request. *See* Resp. to U.S. Army Corps of Eng'rs' Status Report Regarding Remand (Dec. 6, 2017), ECF No. 305; Surreply to the Army Corps' Reply to the Yankton Sioux Tribe and Robert Flying Hawk's Resp. to the Army Corps' Status Report Regarding Remand (Dec. 19, 2017), ECF No. 309.

III. ARGUMENT

A. The Federal Defendants Fully Complied With NEPA.[2]

Plaintiffs' argue that the Corps and FWS were required to prepare a single omnibus document and having not done so have illegally "segmented" their analysis. This argument relies upon the incorrect premise that either the Corps or FWS have authority to approve the entire Pipeline. Neither agency has such authority, and this dooms Plaintiffs' argument.

1. The Corps and FWS acted reasonably in limiting the scope of their environmental review to their respective jurisdictions.

Plaintiffs argue that the Corps and FWS acted arbitrarily and capriciously by limiting the scope of their environmental review to the areas within their jurisdiction and not discussing the allegedly "related" actions undertaken elsewhere. Pls. Yankton Sioux Tribe and Robert Flying Hawk's Mem. in Supp. Of Their Mot. For Partial Summ. J. (Nov. 10, 2017) 9, ECF No. 292 ("Pls.

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[2] Defendants note that Plaintiffs' arguments challenging the Lake Oahe easement issued months after they filed their Complaint in this case are improper. Plaintiffs' Mot. for Partial Summ. J. (Nov. 10, 2017) ECF No. 292. Among other things, Plaintiffs do not and could not reference the Lake Oahe Easement in their Complaint.

Br."). This argument has no merit, as an agency's scoping decision is entitled to deference, and the Corps and FWS were correct in limiting their review to the areas within their jurisdiction.

Determining the scope of an NEPA review involves many line drawing exercises that implicate agency expertise. In particular, the "determination of the size and location of the relevant geographic area 'requires a high level of technical expertise,' and thus 'is a task assigned to the special competency of' the" agency. *Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 36, 49 (D.C. Cir. 2016) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412, 414 (1976)); *Oceana, Inc. v. Evans*, No. Civ.A.04-0811(ESH), 2005 WL 555416, at *7 (D.D.C. Mar. 9, 2005) ("Courts accord 'considerable deference to the agency's expertise and policy-making role' that defined the scope of the action in the first place.") (citing *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C.Cir.1999)).

Here the Corps and FWS reasonably exercised their expert judgment to determine the relevant geographic area their reviews would analyze. Rather than analyze the entire Pipeline, each agency analyzed the discrete environmental impacts associated with the specific crossings they authorized. Omaha EA (Ex. A); St. Louis EA (Ex. B); Rock Island Mem. (Ex. C); FWS EA (Ex. D). They reasonably did not analyze portions of the Pipeline outside of each respective agency's jurisdiction, or outside of federal jurisdiction altogether. However, the agencies considered connected actions and cumulative impacts. *See* Omaha EA at 15-16, 98-107; St. Louis EA at 17, 83-94; Rock Island Mem. at USACE_55-56, USACE_86; FWS EA at 33-34.

NEPA does not require that the environmental review obligations of those agencies "go beyond the scope of [their] permitting authority to review the area over which [they have] no jurisdiction." *Weiss v. Kempthorne*, 580 F. Supp. 2d 184, 189 (D.D.C. 2008). Thus, the FWS was not required under NEPA to include the activities of the Corps in their environmental

reviews, or vice-versa. And neither agency needed to analyze the impacts associated with the Pipeline in general that were outside of either agency's jurisdiction.

This approach has been repeatedly affirmed. In *Sierra Club*, the plaintiff argued "the federal government was obligated to scope a NEPA analysis to the entire pipeline." 803 F.3d at 48. That is functionally the same argument Plaintiffs advance here, by arguing the Federal Defendants were required to "evaluate the direct, indirect, and cumulative impacts of the Pipeline in a single NEPA document," regardless of whether these impacts were within the jurisdiction of the agency preparing the environmental review. Pls. Br. at 6.

This Circuit has expressly rejected this argument, holding "that the federal government was not required to conduct NEPA analysis of the entirety of the [pipeline], including portions not subject to federal control or permitting." *Sierra Club*, 803 F.3d at 34. As in this case,

> [t]he agencies' respective regulatory actions—in the form of easements, Clean Water Act verifications, [etc]…were limited to discrete geographic segments…. [T]he agencies were required to conduct NEPA analysis of the foreseeable direct and indirect effects of those regulatory actions. However… the agencies were not obligated also to analyze the impact of the construction and operation of the entire pipeline.

Id. This decision is consistent with the weight of authority that holds that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions . . . the agency need not consider these effects in its EA." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004); *see also Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1051 (10th Cir. 2015) (rejecting argument Corps was required to undertake NEPA analysis for the entire Gulf Coast Pipeline before issuing discrete the verification letters).

The Corps does not have authority or jurisdiction over FWS easements, and the FWS does not have jurisdiction over the federal property managed by the Corps. And neither the Corps' nor FWS's jurisdiction extends to approval of the entire Pipeline. These basic facts refute

Plaintiffs' argument that the agencies were required to analyze actions and impacts generally associated with the Pipeline in a single NEPA document, rather than conducting appropriately scoped individual NEPA analysis commensurate with the activity each agency was undertaking.

2. Plaintiffs' segmentation argument cannot succeed because there is no larger agency action to be segmented in this case.

Plaintiffs' argument is that the Corps and FWS's approvals to allow discrete crossings of federal land or federal interests in private land are in fact a "single course of action," namely, approval of the Pipeline, and the agencies impermissibly divided this larger action approval into smaller actions. *See, e.g.*, Pls. Br. at 3, 7, 9. However, as demonstrated above, there was no single "proposal" for the Pipeline submitted to the Corps and FWS and they did not undertake a "single course of action" of approving the Pipeline.

40 C.F.R. § 1502.4(a) applies where there is a single federal action—such as approval of a new federal highway or FERC-regulated natural gas pipeline. There is no such action in this case. *Sierra Club* recognized this distinction, describing impermissible segmentation as possible for "projects that are 'connected, contemporaneous, closely related, and interdependent,' *when the entire project at issue is subject to federal review."* 803 F.3d at 50 (citing *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1308 (D.C. Cir. 2014) (emphasis added)).[3]

[3] Plaintiffs claim their argument is not controlled by *Sierra Club*, Pls. Br. at 16-17, as that case did not rule on the argument that the various federal approvals were connected and should have been considered together rather than "segmented." *See Sierra Club*, 803 F.3d at 48, 51 (finding plaintiff had failed to preserve argument that connected action regulation applied and required that federal actions related to the pipeline "should have been analyzed together."). Plaintiffs seek to make this argument here, arguing that the Corps and FWS "artificially segmented the linear Pipeline project[.]" Pls. Br. at 9. Plaintiffs' argument, however, rests on a flawed premise that the challenged actions represent federal approval of the "Pipeline project" rather than discrete crossings of federal land or federal interests in private land, as well as a flawed reading of *Sierra Club* and the Council on Environmental Quality ("CEQ") regulations.

As discussed above, each permission granted by the Corps or FWS was a discrete agency action with a scope limited to the respective agencies' jurisdiction. *See* Section III.A.1, above. Thus, the primary rationale for the prohibition on segmentation is entirely absent here, as this is not a case where a single larger agency action was divided into multiple actions, each of which had an insignificant environmental impact. Plaintiffs' arguments to the contrary erroneously refer to the pipeline as a "project" or "action" that the federal defendants allegedly approved but provide no support for the claim that the Pipeline is a federal project or one that a federal agency has approval authority over. *Cf.* Pls. Br. at 19 (alleging agencies "hid the ball" by "approving this massive Pipeline through a piecemeal segmented approach . . . ."), *id*. at 13 (refers to "agency's decision on the larger project").

Nor does Plaintiffs' claim find support in caselaw. The primary cases Plaintiffs rely on to support their argument are distinguishable from this case because they concern situations where either an agency had jurisdiction and control of an entire project—such as FERC, which approves natural gas pipelines—or where an agency had de facto approval over the entire project, for example, due to its location on primarily federal land or because of federal funding to the project. *See Del. Riverkeeper Network*, 753 F.3d at 1307 (suit against FERC which approved natural gas pipeline); *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 296 (D.C. Cir. 1987) (suit against Urban Mass Transportation Administration, which funded construction of a rail

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CEQ regulations provide that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. § 1502.4(a). The purpose of this requirement is to "prevent agencies from dividing one project into multiple individual actions 'each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'" *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 297-98 (D.C. Cir. 1988) (citation omitted).

system); *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 62 (D.C. Cir. 1987) (suit against Federal Highway Administration which funded entire highway).

For instance, in *Delaware Riverkeeper*, four projects were reviewed and approved separately by FERC, even though FERC had jurisdiction over the entire natural gas pipeline. 753 F.3d at 1318. As the court recognized, "FERC was responsible for the environmental review of [the gas pipeline projects] because, under the Natural Gas Act, any party seeking to construct a facility for the transportation of natural gas in interstate commerce must first obtain a certificate of public convenience and necessity from [FERC]." *Id.* at 1307 (citing 15 U.S.C. § 717f(c)(1)(A)). FERC therefore violated NEPA by reviewing each segment of the larger federal action separately, rather than incorporating the entire federal action into one NEPA review.

Similarly, *Hammond v. Norton*, 370 F. Supp. 2d 226 (D.D.C. 2005), is distinguishable because there, BLM had effective approval over the pipeline route as "96.95 miles of [the 260-mile pipeline] would traverse federal lands" and require a permit from BLM, *id*. at 233, and, more importantly, the parties did not dispute that the project proponents "deliberately sought to segment the environmental analysis…so as to circumvent NEPA requirements." *Id.* at 244.

In contrast, in this case neither the Corps nor FWS has authority to "approve" or "permit" the location or construction of the Pipeline project as a whole, or even any substantial portion of it. Instead, each agency had jurisdiction over discrete and small crossings of federal land or federal interests in private land which totaled less than 4% of the entire Pipeline. This case is therefore controlled by the long line of binding cases that hold that an agency need only analyze

the environmental impacts within its jurisdiction. *See Sierra Club*, 803 F.3d 31 (environmental review limited to Corps' jurisdiction); *Weiss*, 580 F. Supp. 2d at 189 (citing cases).[4]

3. The challenged actions are not "connected" or "similar" and the agencies reasonably decided not to analyze them in the same document.[5]

Plaintiffs mistakenly rely on 40 C.F.R. § 1508.25, which defines the "scope" of an EIS[6] as "the range of actions, alternatives, and impacts to be considered in an environmental impact statement." 40 C.F.R. § 1508.25. This regulation requires an agency to evaluate three types of "actions" in an EIS, in addition to the action being proposed: "Connected actions," "Cumulative actions," and "Similar actions." *Id.* § 1508.25(a)(1)-(3).

Even if this regulation applied to EAs and FONSIs, the challenged actions here do not meet the regulatory definition of "connected" actions, which are actions that: "(i) Automatically trigger other actions which may require environmental impact statements; (ii) Cannot or will not

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[4] *See also Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 710 (6th Cir. 2014) ("agencies may reasonably limit their NEPA review to only those effects proximately caused by the actions over which they have regulatory responsibility"); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 197 (4th Cir. 2009); and *Wetlands Action Network v. U.S. Corps of Eng'rs*, 222 F.3d 1105, 1115-18 (9th Cir. 2000) (scope of Corps' NEPA analysis properly limited by its jurisdiction over waters).

[5] Neither Plaintiff nor any other commenter raised the argument that FWS and the Corps' actions should be considered together as "similar actions." *Dep't of Transp.*, 541 U.S. at 764-65 (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978)). This argument is therefore waived.

[6] The regulation by its own terms applies not to the EAs and FONSI at issue here but to an EIS. *See Grand Canyon Trust v. FAA*, 290 F.3d 339 (D.C. Cir. 2002) (40 C.F.R. § 1508.25 "address[es] the proper scope of an EIS, not an EA"); *Sierra Club v. U.S. Army Corps of Eng'rs*, 64 F. Supp. 3d 128, 154 n.16 (D.D.C. 2014) ("[T]he plain language of the regulation appears to apply only to an EIS"). *But see Del. Riverkeeper Network*, 753 F.3d at 1314 ("[W]hen determining the contents of an EA or an EIS, an agency must consider all 'connected actions,' 'cumulative actions,' and 'similar actions.'") (citing 40 C.F.R. § 1508.25(a))).

proceed unless other actions are taken previously or simultaneously;" or "(iii) Are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(i)-(iii).

The first category of "connected" actions does not apply—because neither the Corps' nor FWS's permissions "trigger other actions." Plaintiffs cite to no such triggered action in the record. With regard to the second category, there is likewise no record to support the claim that any of the permissions "cannot or will not proceed" without the other. Plaintiffs argue that because each permission or permit facilitates the same ultimate Pipeline, they "cannot or will not proceed" without each other. This is incorrect. The Corps and FWS have no control over the ultimate Pipeline's route, but in the event they denied a permit to cross Corps or FWS land in one location, the Pipeline could still exist—if on a slightly different route—and indeed would still benefit from all other permissions. *See, e.g.*, *Taxpayers Watchdog, Inc*., 819 F.2d at 300 (finding no improper segmentation because, even if the project is the first part of a larger system, the specific project had "utility independent of any further construction," did "not foreclose future options"). At best, "each would benefit from the other's presence," but nonetheless each permission "could exist without the other." *Nw. Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir. 1995). Thus, the Corps and FWS's actions have "independent utility" and need not be addressed together in a single EIS or EA.[7]

Finally, there is no evidence that each permission and permit constitute "parts of a larger *action* and depend on the larger *action* for their justification." 40 C.F.R. § 1508.25(a)(1)(i)-(iii) .

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[7] As previously noted, the Pipeline was rerouted several times. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F.Supp.3d 4, 12-14 (D.D.C. 2016). *See also*, Letter from J. Rodgers, Osage Nation to B. Vollman, Corps (Mar. 8, 2016) (Ex. Y).

(emphasis added). Plaintiffs argue that the permissions are part of a larger "Pipeline project" but crucially, the Pipeline project is not a federal *action.* As explained above, neither agency is approving or constructing the Pipeline; they are merely approving several discrete crossings of federal property or federal interests in private land. The word "action" in the regulation is read to mean the "major federal action" for which NEPA requires environmental review as discussed elsewhere in the regulations. *See* 40 C.F.R. § 1508.18(a) ("Actions include new and continuing activities, including projects and programs entirely or partly . . . approved by federal agencies."). Reading this regulation to require environmental review over an entire "larger action"—whether a federal action or not—would directly contradict the NEPA regulations as a whole as well as *Sierra Club. See* Section III.A.1-2, above.

Plaintiffs also argue the discrete agency actions should have been considered in a single document because they were "similar." The regulation does not require that result. Defining "similar actions," CEQ regulations provide that an agency "*may* wish to analyze [similar] actions in the same impact statement," and "*should* do so when [it is] the best way to assess adequately the combined impacts of similar actions or reasonable alternatives." 40 C.F.R. § 1508.25(a)(3) (emphasis added). First, this regulation is clearly discretionary and the agencies were reasonable to limit the scope of their reviews. *See* Section III.A.1., above. Moreover, even if the permissions and permits all related to the same non-federal project, that would not be a sufficient reason to determine they are so similar as to necessarily be analyzed in the same statement. *See Grunewald v. Jarvis*, 776 F.3d 893, 905-06 (D.C. Cir. 2015) ("similar goals…does not make the plans sufficiently intertwined to require concurrent NEPA analysis." (citing *Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 231 (1991)) .

Indeed, the significant differences in geographical location, impacts, and type of federal action among the challenged actions indicate that it was not arbitrary and capricious to consider each permission separately. Crucially, the Corps and FWS permissions are not physically connected actions next to each other; rather they are spread over hundreds of miles across multiple states. For instance, the Lake Oahe crossing is approximately 250 miles from the Lake Sakakawea crossing. The Mississippi River crossing is more than 500 miles from either, in a different state and on a different river. The FWS jurisdictional areas in for wetlands in both North and South Dakota are over 60 miles from Lake Oahe. Map (Ex. F).

Similarly, each challenged action has primarily local effects limited to the specific area of federal action. *Compare, e.g.*, FWS EA at 7 (impacts of Pipeline beneath FWS easements) *with* Omaha EA at 23-107 (impacts of Pipeline at Lake Oahe). Plaintiff has not demonstrated how the environmental impacts associated with, for example, constructing a Pipeline underneath a wetland easement in North Dakota has impacts that are related to a Pipeline crossing the Mississippi river hundreds of miles away. Nor has Plaintiff offered a means that the geographically disconnected actions they challenge have some "inter-regional" impact such that analyzing their impacts individually was arbitrary. *Cf. Nat. Res. Def. Council, Inc.*, 865 F.2d at 299 (FEIS for oil development on the outer continental shelf must address cumulative effects of connected drilling proposals in multiple geographic areas on migratory species such as whales).

As this Circuit has recognized, CEQ's connected actions regulation advises an agency to consider the "picture as a whole rather than conduct separate NEPA reviews on pieces of an agency-action jigsaw puzzle; it does not add a multitude of private pieces to the puzzle and so require review of a much larger picture." *Sierra Club*, 803 F.3d at 50. Here, as in *Sierra Club*, there is no overall "agency-action puzzle" – no larger federal approval or action that was

allegedly segmented. That there were several smaller actions does not require them to be considered together. The agencies acted reasonably in limiting their review to the areas within their jurisdiction.

4. Compiling the environmental reviews into a single document would have no practical effect.

Notably, Plaintiffs identified no concrete environmental impact that was missed by the alleged "segmenting" of the discrete permissions in this case. Plaintiffs hint that analyzing the permissions together would lead to a consideration of larger impacts of the Pipeline as a whole. Pls. Br. at 8-19. But in doing so, Plaintiffs have placed themselves in a catch-22. If they argue that combining the EA and FONSIs into a single document would cause consideration of a wider range of effects of the Pipeline more broadly, then it necessarily runs afoul of *Sierra Club*. But if placing the discrete environmental reviews under a single document heading would not change the analysis, then it is at best a technical error that will have no practical effect and provide Plaintiffs with no real relief. Thus, even if there were an APA violation, it would be nonprejudicial or harmless error and the agency action need not be set aside.

The APA provides that, in reviewing agency action, the court "shall" take account of "the rule of prejudicial error," 5 U.S.C. § 706, that is, whether the error caused prejudice. Courts have applied the prejudicial error rule in the NEPA context where the proposing agency engaged in significant environmental analysis before reaching a decision but failed to comply precisely with NEPA procedures. *See Ill. Commerce Comm'n v. ICC*, 848 F.2d 1246, 1257 (D.C. Cir. 1988); *see Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006); *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.").

NEPA's goal of ensuring that relevant information is available to those participating in agency decision-making was not frustrated in this case by conducting different environmental reviews in different documents. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."). The many comments submitted in response to the documents as a whole manifest that the public had sufficient information to comment on the permissions and permits and no benefit would accrue from analyzing them under a single document header. *See Nevada*, 457 F.3d at 90. Plaintiffs have not identified how precisely considering all discrete agency actions together would have led to any different outcome. As such, even if failing to compile all the environmental reviews into one document was error, it was not prejudicial and is not a basis to find the agencies' actions arbitrary or capricious.

B. The Corps Did Not Violate Specific Trust Responsibilities Identified by Statute, Regulation, or Treaty by analyzing the portions of the Dakota Access Pipeline within its jurisdiction.

While there is a general trust relationship between the United States and Tribe, that relationship does not impose a duty on the federal government beyond complying with applicable statutes and regulations. "The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). Thus, in order to bring a claim for breach of trust, Plaintiffs "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003); *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 895 (D.C. Cir. 2014). This "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.* Thus, unless Plaintiffs identify a discrete

statute, regulation, or treaty that creates a specific duty and shows the United States has breached that duty, there can be no claim for breach of trust. Plaintiffs failed to identify a specific fiduciary duty and show its violation, thus any claim premised on a breach of trust fails. Nor do Plaintiffs offer any compelling reason why this Court should reconsider the portions of its June 14, 2017 opinion that address treaty rights or overrule the D.C. Circuit's *El Paso Natural Gas* decision. *See* Pls. Br. at 30 n.4, 31 n.5. The Court should therefore grant summary judgment in favor of the United States on Plaintiffs' First Claim.[8]

1. Plaintiffs have failed to identify any treaty rights to ceded lands located several hundred miles from its current lands.

Plaintiffs fall far short of establishing that (1) any usufructuary rights granted in the 1851 treaty of Ft. Laramie survived the 1858 Treaty of Washington; (2) that the Corps' actions relating to the Lake Oahe crossing located hundreds of miles from Yankton's current lands—the only federal action within the 38-mile stretch of Pipeline that Plaintiffs contends crosses Yankton's 1851 treaty lands—harms Yankton's usufructuary rights in any manner; and (3) that the Corps failed to reasonably consult, or attempt to consult, with Yankton.

Plaintiffs' focus on the 1851 Treaty of Ft. Laramie and other treaties to which Yankton is not a signatory is misplaced. Plaintiffs' arguments focus almost exclusively on the 1851 Treaty and fail to cite, much less address, numerous opinions interpreting the 1858 Treaty. Pls. Br. at

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[8] While Plaintiffs' motion does not appear to rely upon the United Nations Declaration on the Rights of Indigenous Peoples, its First Claim for Relief does. Regardless of whether Plaintiffs waived this argument, any claim based upon the UNDRIP should be dismissed. "The United Nations Declaration on the Rights of Indigenous Peoples, which—apart from not being a federal law—is not even a legally binding instrument for those countries that voted in favor of its adoption." *Florida v. Walker*, 2015 U.S. Dist. LEXIS 96771 (M.D. Fla. May 14, 2015); *Ins v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) ("The U. N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts.")

19-23. The 1858 Treaty abrogated Yankton's usufructuary rights over lands that it ceded in that treaty. This was in keeping with federal Indian policy, which "by the time of the 1858 Treaty, '. . . had shifted fully from removal to concentration on fixed reservations.'" *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 998-99 (8th Cir. 2010) (citation omitted).

The interpretation of a treaty, like the interpretation of a statute, begins with its text. *Medellín v. Texas*, 552 U.S. 491, 506 (2008). Plaintiffs devote one paragraph to discussing a single sentence from Article I of the 1858 treaty. Plaintiffs are simply incorrect that the 1858 Treaty ceded only land to the United States "but was silent as to usufructuary rights." Pls. Br. at 24. The 1858 Treaty's language makes clear that Yankton ceded certain usufructuary rights in the 11,000,000 acres of ceded land.[9]

First, Article I provided that Yankton "hereby relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or other Indians, except their annuity rights under the" 1851 Treaty. 1858 Treaty, Art. I. As the Court of Claims found in analyzing Yankton's claims to the 1851 treaty lands, "[i]t is plain, and plaintiff concedes, that the language of Article I, standing alone, would have relinquished plaintiff's here asserted undivided interest in the large tract which was the subject of the treaty of 1851." *Yankton Sioux v. United States*, 97 Ct. Cl. 56, 64 (1942). Moreover, the 1858 Treaty provided that Yankton "fully acquit[s] and release[s] the United States from all demands against them on the part of said tribe . . . except the before mentioned right of the Yanctons to receive an annuity under said treaty of Laramie, and except, also, such as are herein stipulated and provided for." 1858 Treaty, Art. XIV. "[T]he specific reference to the treaty of 1851, saving [Yankton's]

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[9] To be clear, the 1858 Treaty did not cede usufructuary rights in the approximately 400,000 acres of land in southeast South Dakota it reserved to Plaintiff.

annuity rights under that treaty, was an indication that it had in mind, when making the treaty of 1858, its rights under the treaty of 1851, and was expressly saving such of those rights as it did not intend to release." , 97 Ct. Cl. at 64. Yankton's explicit reservation of certain rights in the same sentence in which it explicitly waived other rights guaranteed by the 1851 treaty is a clear statement that the 1858 Treaty waived certain usufructuary rights in the ceded lands.

Second, Plaintiffs are simply incorrect that the 1858 Treaty was "silent as to usufructuary rights." Pls. Br. at 24. The 1858 Treaty explicitly protected usufructuary rights to quarry stone in Minnesota. It preserved for Yankton "the free and unrestricted use of the red pipe-stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes." 1858 Treaty, Art. VIII. The 1858 Treaty's explicit reservation of usufructuary rights other than hunting and fishing rights renders the cases Plaintiffs rely upon, Pls. Br. at 23-24, inapposite. *Minnesota v. Mille Lacs Band of Chippewa Indians* found that a treaty did not abrogate usufructuary rights because the entire treaty, unlike the 1858 Treaty, was "devoid of any language expressly mentioning—much less abrogating—usufructuary rights." 526 U.S. 172, 195 (1999).[10] And *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420 (W.D. Wis. 1987), does not assist Plaintiffs because the 1858 Treaty makes clear that (1) Yankton waived its 1851 Treaty rights with the exception of its right to annuities and (2) preserved limited usufructuary rights to quarry pipestone.

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[10] *Mille Lacs* also rested on the fact that an 1855 Treaty "contains no language providing money for the abrogation of previously held rights." *Id.* The 1858 Treaty at issue, in contrast, provided over $1,650,000 in consideration of Yankton's "cession, relinquishment, and agreements." 1858 Treaty, Art. IV. Similarly, the Committee on Indian Affairs' Chairman stated during Senate debate on the Act authorizing the 1855 Treaty negotiations that the treaty would reserve to the Chippewa rights secured by former treaties. *Mille Lacs*, 526 U.S. at 197. Plaintiffs' point to no similar language here.

In 1998, the Supreme Court explicitly addressed the rights preserved in the 1858 treaty, finding that "apart from the pledge to pay annuities, it is hard to identify any provision in the 1858 Treaty that [Yankton] might have sought to preserve, other than those plainly inconsistent with or expressly included in the 1894 Act." *Yankton Sioux*, 522 U.S. at 348. The 1894 Act notably does not address hunting and fishing rights.

Plaintiffs simply fail to identify a retained usufructuary right in lands or waters that lie hundreds of miles from its current lands. For example, whereas Cheyenne River retains the "right to hunt and fish in and on" Lake Oahe's shoreline, Yankton points to no treaty or statute providing it with any such rights. *Compare* Oahe Takings Act, Pub. L. No. 83-776, 68 Stat. 1191 with Pls. Br. at 20-22. Nor have Federal Defendants diminished any vested water rights Yankton possesses. Plaintiffs fail to even suggest how the Lake Oahe crossing located four hundred river-miles from its reservation undermines the purpose of its reservation. *See* Pls. Br. at 22. Regardless, vested water rights "gives the United States the power to exclude others from subsequently diverting waters that feed the reservation." *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015). They do not give Yankton ownership of any particular molecules of water, either on the reservation or up- or downstream of the reservation, and are not implicated here. *See Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 202 F.2d 190, 198 (D.C. Cir. 1952), *aff'd*, 347 U.S. 239 (1954); *Arizona v. California*, 373 U.S. 546, 600 (1963). Plaintiffs have not demonstrated that the Corps was wrong to conclude "there are no anticipated impacts to water rights" as the Pipeline's construction or operation would not require water from Lake Oahe. Omaha EA, App. J Summ. of Comments Received (Ex. Z) (USACE_71720-26).

Plaintiffs' reliance on the Indian canon of construction is misplaced because Plaintiffs identify no ambiguity in the 1858 Treaty. "The principle according to which ambiguities are

resolved to the benefit of Indian tribes is not . . . 'a license to disregard clear expressions of tribal and congressional intent.'" *Yankton Sioux*, 522 U.S. at 349 (citation omitted). *See also, United States v. Anderson*, 625 F.2d 910, 915 (9th Cir. 1980) (applying canon of *inclusio unius est exclusio alterius* to Section 5 of Indian Reorganization Act).

And Plaintiffs' reliance on surrounding circumstances and subsequent interpretation of the 1858 Treaty, Pls. Br. at 24, cannot overcome the treaty's clear language. Yankton falls far short of establishing that it has maintained and continues to maintain and exercise usufructuary rights derived from the 1851 Treaty. To the contrary, "South Dakota 'has quite consistently exercised . . . governmental authority over the opened lands'" *Yankton Sioux*, 522 U.S. at 357. And "the Yankton Constitution . . . defines the Tribe's territory to include only those tribal lands within the 1858 boundaries 'now owned' by the Tribe." *Id*. Finally, the common sense interpretation of the 1858 Treaty's plain language to waive all usufructuary rights other than the right to pipestone is confirmed by Yankton's own interpretation of that language. In Indian Claims Commission Docket No. 332, Yankton alleged that it was damaged "by the loss of its lands, [and] the loss of the use of its lands." Petition, *Yankton Sioux Tribe v. United States*, ICC Docket No. 332 at ¶ 18 (Ex. AA).[11] The 1851 and 1858 Treaties therefore provide no basis for granting summary judgment to Plaintiffs.

2. Plaintiffs' claims regarding usufructuary rights allegedly derived from an 1851 treaty are, at best, unripe.

Because the Corps has not completed its remand analysis, any challenge based upon alleged treaty rights that might by analyzed in that process is not ripe for review. The ripeness doctrine limits the power of federal courts in adjudicating disputes. Its roots are found in both

[11] Plaintiff also alleged that the Court of Claims held "that petitioner ceded all its interest in any land not expressly reserved in the treaty of April 19, 1858." *Id.* at ¶ 5(c).

the Article III requirement of "case or controversy" and prudential considerations favoring the orderly conduct of the administrative and judicial processes. *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 479 (D.C. Cir. 1986). The ripeness doctrine has two purposes. "First, it is intended 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies.' Second, the doctrine is intended 'to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Id.* (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). Courts consider three factors in determining whether an agency decision is ripe for review: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). Judicial review of Yankton's alleged treaty rights prior to the Corps completing its remand process would, at a minimum, inappropriately interfere with administrative action and deprive the court, in the event that any future review is appropriate, of potentially useful factual development.

Plaintiffs base their treaty rights claims on allegation that the "pipeline traverses approximately 38 miles of territory . . . that was set aside for the Sioux by the 1851 Treaty." Pls. Br. at 19. The land at issue abuts the Lake Oahe crossing, which is hundreds of miles from Yankton's current lands. Yankton Sioux Statement of Material Facts (Nov. 10, 2017) ¶ 44, ECF No. 292.

This Court found that the Corps "failed to adequately consider the impacts of an oil spill on Standing Rock's fishing and hunting rights" in evaluating the Lake Oahe crossing and remanded to the Corps for further analysis. *Standing Rock Sioux Tribe v. United States Army*

Corps of Eng'rs, 255 F. Supp. 3d 101, 147 (D.D.C. 2017). As the Court put it, "the Corps' assessment of the impacts of a spill, although largely adequate, fell short as to fishing rights, hunting rights, and environmental justice. Because the Corps must submit its assessment of those impacts upon remand,. . . the Court will await receipt of such information to decide whether the agency's conclusion that DAPL will not be injurious to the public interest was arbitrary and capricious. *Id*. at 150. This "task on remand is a narrow one" and requires only that the Corps "take a 'hard look' at the impact of DAPL on only the resources themselves." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 2017 U.S. Dist. LEXIS 167569, at *18-19 (D.D.C. Oct. 11, 2017). And while the Court's remand instructions focused only on Standing Rock and Cheyenne River—the two tribes that brought motions for summary judgment prior to the Pipeline commencing operations—the Corps provided Yankton with an opportunity to provide information relating to its use of fishing and hunting resources.

Yankton's failure to allow the remand process to reach its conclusion prior to filing for summary judgment, renders its challenge to an alleged failure to analyze Yankton's treaty rights unripe. To be clear, the Corps explicitly requested that Yankton "participate in the remand analysis" by providing information on hunting and fishing issues, including "studies or reports on game species (aquatic life, birds, and mammals), estimated population, habitat, and the designated hunting grounds for such game in relation to Lake Oahe." *See* Letter from Col. Hudson to Chairman Flying Hawk (Oct. 20, 2017) (Ex. X). If Yankton provides such information, it may resolve the dispute and avoid the need for judicial intervention in this dispute altogether. *See James v. U.S. Dep't of Health & Human Servs.,* 824 F.2d 1132, 1138 (D.C. Cir. 1987) ("in the event that the dispute is resolved at the administrative level, judicial economy will be served"); *Ohio Forestry*, 523 U.S. at 736 ("depending upon the agency's future actions . . .

review now may turn out to have been unnecessary"). And if Yankton provides no new information, this too may assist the Court in resolving Yankton's claims relating to allegedly inadequate NEPA analysis.

Simply put, the Corps has already asked Yankton for facts relating to the Yankton's hunting and fishing activities in order to analyze the very issues on which Plaintiffs seek summary judgment. *See Ohio Forestry Ass'n*, 523 U.S. at 733. And Plaintiffs' claims relating to an alleged failure to analyze issues that the Corps is currently seeking to analyze on remand will ripen when that remand process concludes. *See Safari Club Int'l v. Jewell*, 960 F. Supp. 2d 17, 60 (D.D.C. 2013) ("Since the FWS has recently completed its 12-month findings on the SCI plaintiff's delisting petition, . . . this matter is ripe for review."). Plaintiffs' premature motion for summary judgment should be denied.

3. Federal Defendants' actions did not endanger Yankton's treaty rights.

Next, Plaintiffs argue that the Pipeline endangers Yankton's treaty rights. But Plaintiffs identify no "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo Nation*, 537 U.S. at 506. And even if Yankton established that it possessed treaty hunting and fishing rights in an area located near any challenged federal action, Plaintiffs have fallen far short of establishing that those rights have been adversely impacted by any federal action.

Plaintiffs rely exclusively on extra-record evidence to establish that their alleged rights are endangered. Pls. Br. at 25-26. This extra-record evidence consists of newspaper articles, a November 10, 2017 declaration attached to Plaintiffs' motion, and a February 22, 2017 declaration attached to Cheyenne River's motion for summary judgment. The Court should strike Plaintiffs' extra-record evidence. "The APA limits judicial review to the administrative record 'except when there has been a strong showing of bad faith or improper behavior' or when the record is so bare

that it prevents effective judicial review.'" *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (quoting *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998)). The extra record evidence Plaintiffs offer was created after the actions that are the subject of their September 8, 2016 complaint. *See Standing Rock*, 255 F. Supp. 3d at 123-124. Plaintiffs' failure to cite to the administrative record in support of their argument that the Pipeline endangers Yankton's treaty rights is fatal to that argument.

Plaintiffs' argument that the Corps' Omaha District was required to analyze the Pipeline's impact on Yankton's treaty rights in its EA fails for several reasons. As set forth above, this argument should be rejected either as unripe or because Yankton has no usufructuary rights near the crossings addressed in the Omaha District's EA. Regardless, Plaintiffs are incorrect, Pls. Br. at 27, that the Corps did not analyze relevant tribal treaty rights. The Corps analyzed the Standing Rock Sioux Tribe's use of water, hunting, and fishing. *Standing Rock*, 255 F. Supp. 3d at 131. Relatedly, the Corps found that, with the exception of Standing Rock, "[o]ther Tribal lands are not within reasonable proximity to the proposed action areas or its potential effects." Omaha EA, App. J Summ. of Comments Received at 14 (Ex. Z). As the Court noted, Standing Rock's reservation is located less than a mile from the Lake Oahe crossing. Yankton's lands are located 230 miles away. The Corps' determination to focus on Standing Rock due to its proximity to the Lake Oahe crossing was reasonable.

And while the Corps is conducting additional review on remand, Plaintiffs fall far short of establishing that the Corps' original conclusion in the North Dakota EA that "[n]o impacts to treaty fishing and hunting rights are anticipated," was arbitrary or capricious with respect to Yankton. Omaha EA at 58. The Corps determined in the EA that a spill at Lake Oahe was extremely unlikely given "the engineering design, proposed installation methodology, quality of

material selected, operations measures and response plans." *Id.* at 87. While the Corps is reviewing on remand "the degree to which the project's effects are likely to be highly controversial" Yankton has not identified any possibility that a low-possibility spill at Lake Oahe would impact Yankton's lands. *See Standing Rock*, 255 F. Supp. 3d at 129, 147.

Plaintiffs' reliance to *No Oilport! v. Carter* is misplaced for three reasons. First, *No Oilport!* addressed adjudicated rights of different tribes under different treaties. 520 F. Supp. 334, 371-73 (W.D. Wash. 1981). Second, *No Oilport!* makes clear that it is a Tribe's responsibility to engage and provide the Corps with information once "the public received adequate notice of the NEPA review process." 520 F. Supp. 334, 353 (W.D. Wash. 1981). Yankton cannot seriously contest that it received notice of the NEPA process by November 3, 2014, when it deferred commenting on test bores at Lake Oahe to Cheyenne River and Standing Rock. Email from L. Gravatt, Yankton, to R. Harnois, Corps (Nov. 3, 2014) (Ex. G). And any deficiency in the Corps' analysis of Yankton's alleged treaty rights cannot be held against the Corps because the administrative record establishes a good faith effort to consult with Yankton and other tribes. *See* Section II.C., above. Third, *No Oilport!* focused its discussion of treaty rights on two of the eight plaintiff tribes-Lower Elwha and Tulalip, in part due to their interest in a potentially effected salmon fishery near the proposed action. 520 F. Supp. at 356. Similarly, the Corps focused its EA on the Standing Rock Sioux Tribe, who submitted comments regarding their interests in hunting and fishing in the area downstream of the crossing, and whose lands are much closer to the Lake Oahe crossing than Yankton's. Omaha EA at 1, 14, 38, 75, 85-87, 107. Regardless, the Corps is further analyzing hunting and fishing issues on remand and provided Yankton with another opportunity to provide information.

Plaintiffs' citation to *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers* is similarly unavailing. 931 F. Supp. 1515 (W.D. Wash. 1996). There, the Corps declined to grant a permit to operate a fish farm to a company on the basis that such an activity would interfere with adjudicated Tribal fishing rights under distinct treaties. *Id*. at 1521. *Sea Farms* is also distinguishable because in *Sea Farms* there was not a "risk" that the permitted activity would reduce a Tribe's right to fish—the proposed action would necessarily have this result by blocking Tribal members from accessing a "usual and accustomed" fishing spot. *Id*. at 1518. Plaintiffs have fallen far short of establishing that the Corps' actions here reduced any tribal right.

And Plaintiffs' suggestion that the Corps' failure to consider information Yankton never provided to the Corps is "especially egregious" in light of trust duties, Pls. Br. at 29-31, fails because Plaintiffs identified no such duties. Plaintiffs' reliance on *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942), Pls. Br. at 29, highlights their misinterpretation of the trust relationship. The Supreme Court has made clear that the general trust relationship identified in *Seminole Nation* imposes no enforceable trust duties. *Jicarilla Apache Nation*, 564 U.S. at 165. Yankton must instead identify a substantive source of law in a treaty that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties. *Id*.; *Navajo Nation*, 537 U.S. at 506. Because Plaintiffs identified no specific duty, much less demonstrated its breach, their trust claims fail.

4. Plaintiffs' lack standing to challenge government actions relating to lands hundreds of miles from their lands.

Plaintiffs relatedly fall short of establishing that they have standing. Their alleged "informational harm," Pls. Br. at 2, 5, does not confer standing because it is a generalized grievance. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). A party seeking review must also show that it faces "actual or imminent injury." *Id.* at 496 (quotations and citation

omitted); *see also Californians for Renewable Energy v. U.S. Dep't of Energy*, 860 F. Supp. 2d 44, 50-51 (D.D.C. 2012). "[A]lleging a procedural violation does not excuse a plaintiff from having to identify a related, substantive government action that actually does (or imminently will) cause him concrete injury in order to establish standing to sue." *Nucor Steel-Ark. v. Pruitt*, 246 F. Supp. 3d 288, 301 (D.D.C. 2017). For environmental plaintiffs, "[a] 'vague desire to return [to the affected land] is insufficient to satisfy the requirement of imminent injury.'" *Californians for Renewable Energy*, 860 F. Supp. 2d at 52 (quoting *Summers*, 555 U.S. at 496).

Plaintiffs' brief and supporting declarations from do not provide a specific and concrete plan to return or use Lake Oahe specifically or identify how any federal action causes them harm. Instead, the declarations mention past visits to Lake Oahe (Decl. of F. Spotted Eagle ¶¶ 12, 22, ECF No. 292-1) and that unnamed tribal members "hunt, gather, and perform ceremony with water including the Missouri River in present-day North and South Dakota." (Decl. of K. Spotted Eagle ¶¶ 11-12, ECF No. 292-3; Decl. of F. Spotted Eagle ¶¶ 12-20; Decl. of G. Drapeau ¶ 3, ECF No. 292-2). In contrast to Standing Rock, Plaintiffs' declarations do not establish current or future use of the areas around Lake Oahe. Plaintiff's generalized declarations and failure to show concrete plans or intent to use an area such as the area of Lake Oahe located near the Pipeline means that Plaintiffs lack standing. *See Summers*, 555 U.S. at 495-96.

C. Plaintiffs' National Historic Preservation Act claims relating to Counts 2, 3, 4, and 5 of its Complaint should be dismissed as moot.

Plaintiffs' claims based upon the NHPA should be dismissed as moot. Counts 2, 3, 4, and 5 of Plaintiffs' Complaint, Compl. at 15-25, are based upon its allegation that "clearing, grading, excavation, and construction that would occur along the duration of the Pipeline route would destroy any historic or culturally significant sites encountered." Compl. ¶ 139. The Pipeline is now fully-constructed. Plaintiffs' own allegations therefore make clear that its NHPA claims are moot.

"Article III confines federal courts to the resolution of actual cases or controversies, and thus prevents their passing on moot questions—ones where intervening events make it impossible to grant the prevailing party effective relief." *Burlington N. R.R. v. Surface Transp. Bd.*, 75 F.3d 685, 688 (D.C. Cir. 1996). There is therefore a "long line of cases in the courts of appeal holding environmental challenges to completed construction projects to be moot." *Finca Santa Elena, Inc. v. U.S. Army Corps of Eng'rs*, 62 F. Supp. 3d 1, 5 (D.D.C. 2014) (citing *Weiss v. Sec'y of Dep't of Interior*, 459 F. App'x 497, 500-01 (6th Cir. 2012) (holding NEPA and NHPA claims moot because construction had been completed). Plaintiffs' complaint makes clear that there is no relief left for the Court to grant under the NHPA because grading, excavation, and construction have been completed. Plaintiffs' NHPA claims are therefore moot. *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001).[12]

IV. CONCLUSION

Federal Defendants fully complied with NEPA focusing their respective environmental reviews to the areas in which they have jurisdiction and in which the environmental impacts of their actions would be felt. Plaintiffs have identified no arbitrary and capricious action, nor have Plaintiffs identified any breach of a trust duty arising from a substantive Treaty, statute, or regulation. And Plaintiffs' NHPA-related claims are moot because the construction work that Plaintiffs claimed would destroy any historic or culturally significant sites has been completed.

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[12] Standing Rock acknowledged this possibility, admitting that relief would "no longer be meaningful in those areas" where Dakota Access could "demonstrate that construction (including clearing and grading) has been completed." Tribe's Reply in Supp. of Mot. for Prelim. Inj., (Aug. 22, 2016) 23-24, ECF No. 24; *see also id*. at 19–20 ("Should DAPL be permitted to continue construction in upland areas outside of Corps jurisdiction, then the § 106 consultation process sought by the Tribe would be rendered moot.").

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment should be denied and Federal Defendants' Motion for Partial Summary Judgment should be granted.

Dated: January 10, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 10th day of January, 2018, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

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