IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Intervenor Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant,

and

DAKOTA ACCESS, LLC,

Intervenor Defendant.

Civil Action No. 16-1534-JEB
(consolidated with Case Nos. 16-1796 & 17-267)

CONSOLIDATED BRIEF OF DAKOTA ACCESS, LLC (i) OPPOSING YANKTON SIOUX TRIBE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND (ii) SUPPORTING CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT IN FAVOR OF FEDERAL DEFENDANTS

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INTRODUCTION

Yankton Sioux Tribe's motion for partial summary judgment largely repeats arguments this Court already considered and ruled on in June 2017. Because Yankton has failed to offer any reason for a different outcome under its versions of these arguments, the Court should deny Yankton's motion and grant partial summary judgment in favor of defendants instead.

Yankton makes two arguments. First, it contends that the U.S. Army Corps of Engineers ("the Corps") and the U.S. Fish and Wildlife Service ("Fish and Wildlife" or "FWS") were required to analyze separate agency actions related to the Dakota Access Pipeline ("DAPL") Project in a single National Environmental Policy Act (or "NEPA") document. The Corps prepared two separate environmental assessments (or "EAs") for two sets of water and flowage easement crossings. These sets of crossings are separated by two states and more than five hundred miles. The Fish and Wildlife Service prepared another environmental assessment for other crossings of discrete and distant stretches of private land encumbered by wetland and grassland easements. Yankton fails to acknowledge that the Standing Rock Sioux Tribe made—and lost—the same argument for a single, comprehensive NEPA analysis in *its* summary judgment motion. Moreover, Yankton never explains how separate analyses of separate approvals of actions involving separate, distinct, and distant portions of a 1,200-mile pipeline somehow "conceals from the public the gravity of the environmental impacts of the combined federal actions." D.E. 290-3 at 5. Apart from the discrete and separate nature of each crossing, all three NEPA documents expressly address cumulative impacts and inform the reader that the approval at issue is part of a larger pipeline project. The agencies did not abuse their broad discretion when they prepared separate documents.

Yankton's second argument is that the Corps inadequately analyzed effects that the Pipeline might have on treaty rights. This time Yankton *does* acknowledge that the Court already

considered its argument in earlier briefing in this consolidated litigation. And Yankton further recognizes that the Court has rejected that argument's two central premises—*i.e.*, that an agency must discuss the treaty rights themselves, as opposed to considering effects on resources implicated by those rights, and that fiduciary duties can arise absent express reference in a statute, regulation, or treaty. Despite these concessions, Yankton fails to explain how or why the Court should rule differently this time around, especially when Yankton's reservation is hundreds of miles more distant from any potential alleged effects than are the parties that initially raised those arguments.

The Court should deny Yankton's motion and enter summary judgment for defendants on the relevant claims.

BACKGROUND

The Court is well familiar with this case's "many twists and turns." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs* (*SRST IV*), No. 16-cv-1534, 2017 WL 4564714, at *1 (D.D.C. Oct. 11, 2017). This Background section therefore focuses on items directly relevant to Yankton's motion for partial summary judgment.

1. Limited federal jurisdiction over the Dakota Access Pipeline.

As the Court has previously noted, the Dakota Access Pipeline is nearly 1,200 miles long and crosses four states: North Dakota, South Dakota, Iowa, and Illinois. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs* (*SRST I*), 205 F. Supp. 3d 4, 7 (D.D.C. 2016). The vast majority of the route falls outside of federal jurisdiction. *Id.* ("DAPL needs almost no federal permitting of any kind because 99% of its route traverses private land."). This Court has already determined that, as a result, the Corps was not required to analyze potential impacts of the Pipeline as a whole—only those for the limited portions over which federal jurisdiction exists. *Id.* at 32 (National Historic Preservation Act context); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*

(*SRST III*), 255 F. Supp. 3d 101, 129-30 (D.D.C. 2017) (NEPA context). Thus, this Court found it to be well within the Corps's broad discretion to limit its analysis to the impacts of the discrete crossings or permissions over which that agency exercises jurisdiction. *SRST I*, 205 F. Supp. 3d at 32; *SRST III*, 255 F. Supp. 3d at 130.

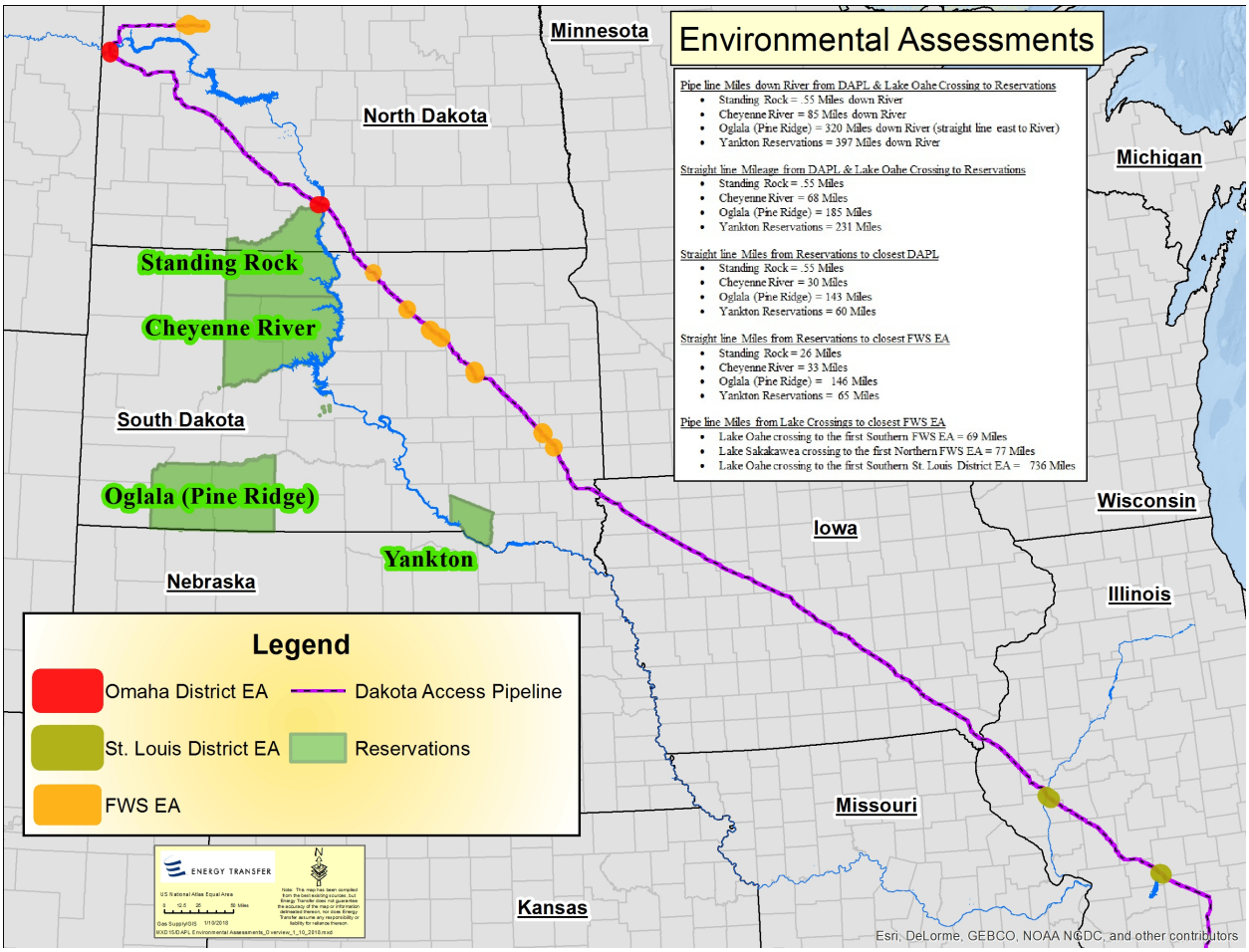
2. The Three Environmental Assessments.

The Court's previous rulings on motions filed in this litigation have focused almost exclusively on the Pipeline's crossing of federally managed land at Lake Oahe in North Dakota, including the sufficiency of the EA that the Corps prepared for that crossing. *See* AR 71220 *et seq.* (Ex. 7) (Omaha District EA). Yankton now raises challenges about two other EAs: one prepared by the Corps's St. Louis District and another by the Fish and Wildlife Service. AR 9823 *et seq*. (Ex. 8) (St. Louis District EA), AR FWS 2449 *et seq*. (Ex. 9) (FWS EA).

In the EA litigated in the earlier summary judgment motions, the Corps's Omaha District analyzed the Pipeline's potential impacts on crossings of Lake Oahe and federal flowage easements at Lake Sakakawea, both in North Dakota. AR 71227, 71382 (Ex. 7) (showing federal lands and flowage easements in North Dakota). The second EA, issued by the Corps's St. Louis District, analyzed the Pipeline's potential impacts on crossings of the Illinois River and two associated levees, plus flowage easements at Carlyle Lake. Both sets of crossings are in Illinois. AR 9832, 9961 (Ex. 8) (showing federal projects and flowage easements in Illinois). The third EA, issued by the FWS, analyzed the potential impacts of the Pipeline on federal wetland and grassland easements "encompass[ing] less than 1% of the total North Dakota and South Dakota Project area." AR FWS 2455 (Ex. 9). In North Dakota the Pipeline crosses a single FWS grassland easement and just five wetland easements. All six are located at the northernmost point of the Pipeline. AR FWS 2466 (Ex. 9). As just noted, all other FWS grassland and wetland easements are in South

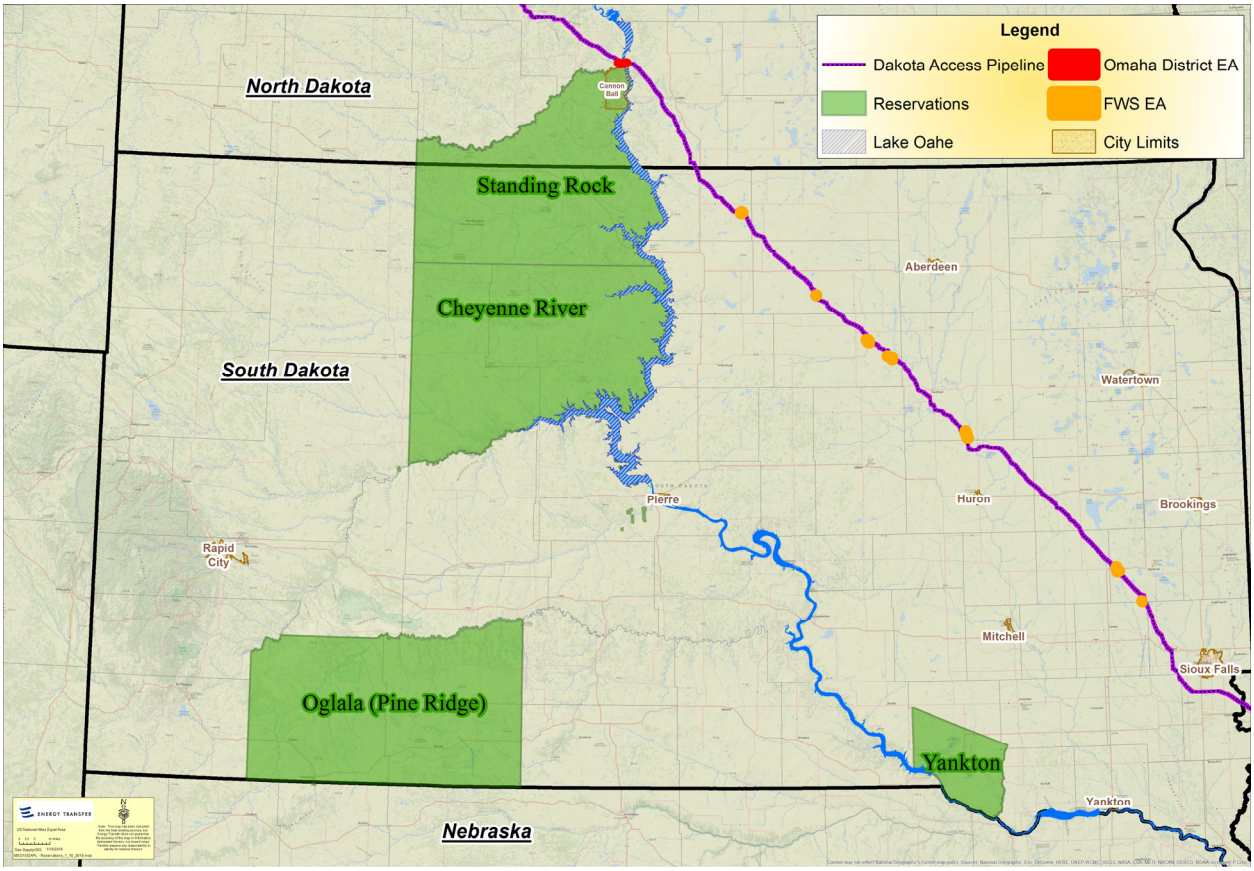
Dakota. AR FWS 2466 (Ex. 9). The locations of these various crossings are depicted on the following two maps.[1]

Map 1



[1] Map 1 shows the entirety of the Pipeline, from its northernmost point in the North Dakota gathering areas to its eventual end at Patoka, Illinois. Map 2 focuses on the areas that contain the Standing Rock, Cheyenne River, Pine Ridge and Yankton reservations. The maps were prepared using commercially available mapping software and databases, including National Geographic, ESRI, DeLorme, HERE, UNEP-WCMC, USGS, NASA, ESA, METI, NRCAN, GEBCO, NOAA, and P Corp. Locations for crossings or easements covered by each EA were determined based on their coordinates and are depicted by colored notations along the pipeline route.

Map 2



As the maps show, the federal-jurisdiction crossings in each EA are geographically discrete from the crossings approved in the other two EAs. First, the crossings addressed in the two Corps EAs are hundreds of miles apart—indeed, they are separated by the entire states of Iowa and South Dakota. *See* Map 1. Likewise, more than 60 miles of pipeline separate the Lake Oahe crossing from the nearest FWS easement, which is found in South Dakota. *See* Map 2. In turn, the FWS easements in South Dakota are separated from the crossings in Illinois by the entire state of Iowa. *See* Map 1.[2]

[2] The second of the two crossings addressed in the Omaha District EA (*i.e.*, the flowage easement at Lake Sakakawea) is also more than 75 miles from the nearest FWS easement. *See* Map 1. As for the Yankton Reservation itself, vast distances separate it from every crossing in each EA. *See* Map 2. That Reservation, which sits adjacent to the Nebraska state line in southeastern South Dakota, is approximately 400 miles downriver from the Lake Oahe crossing. *Id.* And no part of

Even though vast distances separate the three groups of crossings, the Corps and FWS nonetheless coordinated with each other and were well aware of the various approvals at issue in the other EAs. *See, e.g.*, AR FWS 2483-85 (Ex. 9) (providing a "comprehensive list of ongoing federal and state coordination/consultation"). Each EA also acknowledged that the relevant approvals were for a pipeline extending nearly 1,200 miles, and each devoted an entire section to cumulative effects. *See* AR 9905-16 (Ex. 8); AR 71322-31 (Ex. 7); AR FWS 2481-83 (Ex. 9). Each EA also analyzed several alternatives to the Pipeline as a whole, including a no-action alternative and other transportation alternatives such as rail or truck. AR 71229-31, 71237 (Ex. 7); AR FWS 2463-65 (Ex. 9); AR 9834-37 (Ex. 8).

The Corps determined that the crossings addressed in the separate EAs were not "connected" actions. *See* AR 71237-39 (Ex. 7). In the relevant section of the Omaha District EA, the Corps first noted that the locations "for collecting product into the proposed system"—*i.e.,* where a pipeline begins—"were largely fixed based on the location of existing terminals." AR 71237 (Ex. 7). "Connecting the input locations was largely a matter of minimizing length and maximizing the avoidance of sensitive features, developments, public lands, and constructability issues," all of which meant that "crossing the Missouri River (Lake Sakakawea) was unavoidable." *Id*; *see also id.* at 71237-38 (Ex. 7) (explaining that the selected crossing location "avoids federally-owned lands to the extent practical, is at a narrow width of the river upstream of the wider Lake Sakakawea, and minimizes impacts on sensitive resources"). The Corps went on to explain that "[t]he only Connected Actions at each individual crossing location associated with the Proposed Action are those that relate to the HDD workspace at the Missouri River crossing and the HDD

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the Pipeline as a whole (let alone any part that crosses federal jurisdiction) is within sixty miles of the Reservation. *Id.* Moreover, even at that closest point the Pipeline and the reservation are separated by land—not water. *Id.*

workspace, HDD stringing area, and the permanent easement on private lands in the vicinity of the Lake Oahe crossing." *Id.* at 71239 (Ex. 7). The Corps concluded that even these two crossings (Lake Sakakawea and Lake Oahe) "are not connected actions because the locations of each crossing are independent of one another and the location of the first does not dictate the location of the second." *Id*; *see also* AR 9839 (Ex. 8) (St. Louis EA defines connected actions similarly) & 9942 (St. Louis FONSI).

3. **Yankton's limited and untimely participation in the administrative phase**.

The Corps and FWS offered the public, including Yankton, ample opportunity to comment on all three EAs. *See* Omaha District Draft Environmental Assessment Posting, *available at* http://www.nwo.usace.army.mil/Media/News-Releases/Article/633504/public-comment-sought-on-proposed-crude-oil-pipeline-project-in-north-dakota/ (Dec. 9, 2015 Notice from Corps's Omaha District inviting comments on Draft EA no later than Jan. 8, 2016); AR 71777 (Ex. 10) (same); AR 74057 (Ex. 11) (Dec. 11, 2015 email from Corps's Omaha District stating that Draft EA is "out for public/tribal notice right now"); AR 11139 (Ex. 12) (Jan. 5, 2016 Notice from Corps's St. Louis District inviting comments on Draft EA no later than Feb. 5, 2016); AR FWS 1438 (Ex. 13) (Dec. 17, 2015 Notice from FWS inviting comments on Draft EA no later than Jan. 18, 2016). Yankton submitted nothing during any of these comment periods. Instead, two months after the comment period for the Omaha District EA closed, Yankton wrote to that District's Commander (Col. John W. Henderson) to confirm a telephonic "government to government request" for a "'Consultation meeting regarding the Dakota Access Pipeline.'" AR 64260 (Ex. 5).

A month later, Yankton wrote another letter to Col. Henderson. AR 65507 (Ex. 1). Rather than raise objections to the preparation of multiple NEPA documents (as the Tribe does now), Yankton invoked the National Historic Preservation Act (referencing the need to protect "sacred

sites, burials, and ceremony areas"), treaty rights and trust responsibilities, the need to consider cumulative environmental impacts in an environmental analysis, and environmental justice. AR 65507-13 (Ex. 1). Yankton also repeated its request for "government to government consultation." AR 65507 (Ex. 1).

At no time in these or other communications about the Pipeline, *see* AR 64074 (Ex. 2); AR 64236 (Ex. 3); AR 64320 (Ex. 4); AR 64400 (Ex. 6), did Yankton contact the FWS or the St. Louis Corps District. Nor did the Tribe's communications with the Omaha District mention the approvals being considered in the other two EAs, much less did Yankton claim that all approvals must be considered in a single NEPA document.

4. Yankton's Motion for Partial Summary Judgment.

Yankton's Complaint asserts a number of claims that largely overlap with those already alleged by the Standing Rock and Cheyenne River Sioux Tribes, including that the Government violated tribal trust and treaty rights, NEPA, the Clean Water Act, and Section 106 of the National Historic Preservation Act. Yankton's motion is limited, though, to only two of the seven claims in its Complaint. First, Yankton argues that the Government unlawfully segmented its NEPA analysis by issuing three separate Environmental Assessments for discrete and independent groups of jurisdictional crossings. *See* Mot. at 5-19; Yankton Compl. at 25-29 (Claim 6). Second, Yankton argues that the Government failed to adequately consider the Pipeline's impacts on tribal trust and treaty rights. *See* Mot. at 19-31; Yankton Compl. at 13-15 (Claim 1).[3]

Yankton is not writing on a blank slate as to either argument. Standing Rock and Cheyenne

[3] Yankton's papers (its Motion, Memorandum of Law, and Proposed Order) do not specify which of its seven claims are the subject of this motion. It appears from the wording of the Complaint, though, that Yankton's motion is directed at its first and sixth claims.

River have each already filed motions for preliminary injunctions and for partial summary judgment, and this Court has adjudicated all of them. D.E. 5 (SRST Motion for Preliminary Injunction); D.E. 38 (Order denying SRST's Motion for Preliminary Injunction); D.E. 98 (CRST Motion for Preliminary Injunction); D.E. 117 (SRST Expedited Motion for Partial Summary Judgment); D.E. 131 (CRST Motion for Partial Summary Judgment); D.E. 157 (Order denying CRST's Motion for Preliminary Injunction); D.E. 238 (Order regarding SRST's and CRST's Motions for Partial Summary Judgment). Yankton's motion is largely repetitive of arguments that the Court already decided when it ruled on these earlier motions. Yankton argues, for example, that its trust and treaty rights were violated. But this Court has already held that the Government's trust relationship with Indian tribes imposes no obligations beyond those set forth in statutes or treaties. *SRST III*, 255 F. Supp. 3d at 143-45. The Court also held that the Government has largely fulfilled its obligations to consider the impacts of Pipeline construction and operation on tribal resources. *Id.* at 132-33. Finally, the Court ordered a limited remand—a process that is not expected to be completed until April 2018—so that the Corps can complete those obligations. *Id.* at 133-34.

In a footnote Yankton "objects to this Court's holding in its June 14, 2017 Memorandum Opinion" that D.C. Circuit case law rejects the great bulk of its trust-rights claim. Mot. at 30 n.4. Apart from this objection, though, the Tribe does not address whether (or how) the result could be different when Yankton—rather than Standing Rock or Cheyenne River—pursues the same claim. As for the segmentation claim, Yankton makes no mention of the part of this Court's June 14 Opinion rejecting Standing Rock's argument that the Corps failed to "consider the cumulative risk to Tribal resources from the rest of the pipeline outside Lake Oahe." *SRST III*, 255 F. Supp. 3d at 129-30 (quotation marks omitted). As the Opinion made clear, Standing Rock's argument faulted the Corps for doing the same thing Yankton challenges here: "unlawfully segmenting its NEPA

review of one pipeline into [three] separate components." *Id.* at 130 (quoting SRST brief; alteration in Opinion).

ARGUMENT

I. The Corps and the Fish and Wildlife Service Did Not Act Arbitrarily or Capriciously in Preparing Separate Environmental Assessments for Discrete and Independent Groups of Jurisdictional Crossings.

Yankton argues that the Corps and FWS were obligated to draft one EA instead of three, but the Tribe fails to identify any supposed "informational harm" from not having "the Pipeline's environmental impacts" evaluated "in a single NEPA document." *See* Mot. at 2. In fact, the Tribe never expressed a bit of interest in the outcome of two of those three EAs—*i.e.*, the FWS EA for specific wetland and grassland crossings in the Dakotas, and the EA that the Corps's St. Louis District prepared for isolated river crossings in Illinois. All of these locations are far from the Yankton reservation. Instead, when Yankton communicated its views about the Pipeline—in letters that came after the EA comment periods had closed—it directed them solely to the Corps's Omaha District Commander, asserting: "we consider any pipeline construction through our territory to be a violation" of Yankton's rights. AR 65507-08 (Ex. 1). That, of course, was a reference to land near Lake Oahe—the subject of Yankton's second argument in this summary judgment motion. Yankton's concerns had nothing to do with any of the crossings approved in the two other EAs.

Yankton's pre-litigation silence about a supposed interconnectedness of the three separate approvals says quite a bit about why its current argument fails. Yankton's brief acknowledges that the primary way this segmentation argument "was repeatedly raised during the comment period" was in the form of a complaint that the Corps "did not adequately explain why it was not analyzing impacts and disclosing consequences of spills *along the length of the Pipeline outside of those areas for which it is making a decision.*" Mot. at 2 (quoting Interior Department comment as an

example) (emphasis by Tribe). And Yankton still complains in its Motion that the Corps did not "assess 'the entirety of the proposed [P]ipeline,' and 'the [environmental] impacts from start to finish'" *Id.* at 3 (quoting AR 72518-873). But the Court correctly rejected this view that the Corps needed to consider effects of the pipeline as a whole. *SRST I*, 205 F. Supp. 3d at 32; *SRST III*, 255 F. Supp. 3d at 130.[4]

What is left for Yankton to challenge is the use of separate NEPA documents for discrete groups of different water crossings hundreds of miles apart, plus a set of wetland and grassland crossings, none of which is within 60 miles of any crossing addressed by either of the two Corps EAs. Rather than address *that* set of facts, Yankton relies on cases where a single NEPA document was needed because the whole of a potential environmental impact was greater than the sum of the separate parts—*i.e.*, where two or more projects had a synergistic or cumulative effect that separate NEPA documents did not capture. As explained below, that concern is not present here. In any event, Yankton's references to a need to consider cumulative effects are unavailing for the separate reason that the EAs here *did* discuss cumulative effects. Yankton's claim challenging the use of multiple EAs should be dismissed.

A. The crux of Yankton's argument is that "three separate EAs for the Pipeline, rather than one comprehensive NEPA document," somehow "concealed the cumulative environmental impacts of the project." Mot. at 2; *id.* at 19 (arguing that this "effectively 'hid the ball' from the Tribe and the public"). In support of that argument, Yankton relies on a regulation stating that "[t]o determine the scope of environmental impact statements, agencies shall consider 3 types of

[4] Yankton itself was silent even as to this "whole pipeline" version of the segmentation comments. In fact, at no time during the administrative process did Yankton ever contend that the Corps and FWS needed to use a single NEPA document to address the potential impacts of the pipeline—whether for the pipeline a whole or just the isolated segments requiring federal approval.

actions[.]" 40 C.F.R. § 1508.25. The Tribe contends that two of the three types of action are at issue here. It quotes language stating that an agency: (i) should consider "[c]onnected actions, which means that they are closely related and therefore should be discussed in the same impact statement," and (ii) "may wish to analyze" "[s]imilar actions" "in the same impact statement," and "should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement." *Id.* § 1508.25(a)(1) & (a)(3). To prevail, Yankton must show that the agencies "acted arbitrarily in refusing to prepare one comprehensive statement on this entire region," and this deferential standard also applies to "[t]he determination of the region, if any, with respect to which a comprehensive statement is necessary." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) (explaining that the determination is "properly left to the informed discretion of the responsible federal agencies"). Yankton cannot meet that burden.

It is true that in *some* circumstances an agency risks overlooking a potential environmental impact if it elects to consider multiple actions in separate documents. But Yankton's own citations show why this is not such a case. The Tribe relies on a Supreme Court decision instructing that multiple pending proposals for related actions that will have "cumulative or synergistic environmental impact upon a region" "must be considered together." Mot. at 18 (quoting *Kleppe*, 427 U.S. at 410 (emphasis omitted)). A "synergistic" impact, the D.C. Circuit has explained, is one in which "the cumulative impact of simultaneous development will be greater than the sum of development in each area considered separately." *NRDC v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988) (citing and later crediting the petitioner's position).

The facts in *Hodel* illustrate what "synergistic" includes under NEPA and why a whole-is-greater-than-the-sum-of-the-parts concern is not present here. In that case, the Interior Secretary

had separately considered requests for offshore drilling leases in two locations (the Pacific and Alaskan regions). The problem with separate documents was that the disruptions due to oil drilling in one region would cause migratory species (whales and salmon) to relocate to the other. Thus, separate consideration of drilling in each region would give the appearance of a minor impact on these species in that they simply could migrate to the other region. Only consideration of drilling in *both* locations at the *same* time revealed that these migratory species would have "no respite from the harmful effects of . . . development." 865 F.2d at 297; *id.* ("Our examination of the [Final EIS] satisfies us that the Secretary did *not* consider the effect of simultaneous *inter*-regional development on migratory species.").

Yankton does not even try to identify a synergistic impact here. Each EA addresses its own discrete set of crossings. And each discrete set of crossings is geographically isolated from the others. The Omaha District EA analyzes potential environmental impacts from the crossing of Lake Oahe and of federal flowage easements at Lake Sakakawea—both in North Dakota. AR 71220 *et seq*. (Ex. 7). The St. Louis District EA covers the crossings of waterways and flowage easements at two discrete locations in Illinois—hundreds of miles and two states away from Lake Oahe. AR 9823 *et seq*. (Ex. 8). Finally, the FWS EA addresses crossings of federal grassland and wetland easements in North Dakota and South Dakota. AR FWS 2449 *et seq*. (Ex. 9). The FWS crossings are distant from the crossings considered in the other two EAs—indeed, the Lake Oahe crossing is more than 60 miles from the nearest FWS easement (one of the easements in South Dakota), and the entire State of Iowa separates the South Dakota easements from the Illinois crossings. *See* AR FWS 2454 & 2458 (Ex. 9).

That significant degree of physical separation is dispositive in a case like this. The origin of a potential environmental impact from pipeline construction or operation will be localized and

discrete. Thus, when the Omaha District considered the potential environmental impact in the Lake Oahe area it properly focused on the likelihood and effects of a *localized* event, such as construction equipment disturbing a particular burial site within the area of potential effects or a leak of oil originating from the segment of the pipeline that crosses beneath federal land at Lake Oahe.

To be sure, it is conceivable for a localized event such as a leak into a body of water to have environmental impacts downstream. But that does not trigger the need for a single NEPA document because, among other things, Yankton does not point to anything in the EAs showing an overlap of environmental impact—*i.e*., a non-negligible potential for environmental harm in two different EAs for the *same* location—much less one where the whole (the harm from both approvals) is greater than the sum of the harm identified in each part. For example, no commenter suggested the possibility that a leak at Lake Oahe might cause harm to the same location as would a leak in Illinois or even in a grassland or wetland area along the pipeline path in North or South Dakota. Indeed, the crossings covered by the Omaha District EA are for the Missouri River and Lake Oahe, while the St. Louis District's EA addresses crossings of the Illinois River (and associated levees) and flowage easements at Lake Carlyle—completely separate waterways and waterbodies. And the sheer distance between the FWS easements and the crossings addressed in the other two EAs is so great that it is not possible for a leak or spill at any crossing to affect one of those easements. Further, unlike in *Hodel*, where the agency knew that the impact (disturbance of species caused by the drilling process) was certain to happen in both locations, nobody has so much as posited a scenario in which there might be *simultaneous* leaks in two distant parts of the pipeline—each of which just so happens to fall within the less than 1% of pipeline segments where

there is federal jurisdiction. *See SRST I*, 205 F. Supp. 3d at 7 ("DAPL needs almost no federal permitting of any kind because 99% of its route traverses private land.").

In sum, nothing about the use of separate EAs "hid the ball" (Mot. at 19) on potential environmental impacts from the various approvals. Anyone wishing to understand the combined potential impact for crossings that fall within the jurisdiction of the Corps and FWS need only review the three documents, all of which were available for comment well before the first of them (the FWS EA) became final in May 2016. Each lays out all of the potential impacts at each particular crossing that falls under federal jurisdiction—that is, the likelihood of an adverse event at *that* location, the impact from an adverse event at *that* location, and the ways in which both likelihood and impacts have been mitigated for *that* location. Each EA further explains why the impacts of construction or a hypothetical spill "would be localized." AR 71292 (Ex. 7); *see also* AR 71271 (Ex. 7) (Omaha District EA explaining that any spills under Lake Oahe when it is frozen could "potentially caus[e] very localized impacts to organisms in prolonged contact with the near-surface water"); AR 71327 (Ex. 7) (Omaha District EA noting that impacts of a spill on pallid sturgeon "would be localized"); AR 9912 (Ex. 8) (St. Louis District EA explaining that "in the unlikely event of a spill or leak, impacts would be localized"); AR 9843-44 (Ex. 8) (discussing risk of local scour conditions due to Pipeline crossings of Illinois River and Kaskaskia River); AR 9856 (Ex. 8), 71265 (Ex. 7) (explaining that impacts from trenching and dewatering during construction "are expected to be localized and temporary, since the contours and vegetation would be returned as closely as practical to pre-construction conditions"); AR 9858 (Ex. 8), 71269 (Ex. 7) (explaining that well pointing impacts during construction would be "temporary . . . and highly localized"); AR 9908 (Ex. 8), 71323-24 (Ex. 7) (explaining that construction impacts would be "localized and limited primarily to the period of construction"). It was neither arbitrary nor capricious for the

agencies to treat these different areas of federal jurisdiction as unconnected within the meaning of the relevant regulations.

B. In an effort to avoid that conclusion, Yankton relies on cases involving the very type of "whole pipeline" analysis that the Tribe admits was not required here. *See* Mot. at 17-18 (distinguishing *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 44 (D.C. Cir. 2015), because the case rejected the need for a whole-pipeline assessment without deciding whether agencies must analyze just the federal actions—"less than a whole-pipeline review"—in a single NEPA document).

For example, Yankton cites *Delaware Riverkeeper Network v. Federal Energy Regulatory Commission*, 753 F.3d 1304 (D.C. Cir. 2014), to argue that "[a]n agency unlawfully segments NEPA review when it 'divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.'" Mot. at 7. But *Delaware Riverkeeper* involved a natural gas pipeline. Those are different because, in contrast to oil pipelines, the Federal Energy Regulatory Commission ("FERC") has jurisdiction over the entire length of natural gas pipelines. Thus, FERC was tasked with analyzing the impacts of construction and operation over the entire length of the pipeline at issue in *Delaware Riverkeeper*. That is why there were no "logical termini" or "rational end points" for dividing the pipeline into discrete segments with independent and non-overlapping environmental impacts. *Del. Riverkeeper*, 753 F.3d at 1315. In trying to apply that case here, Yankton expressly resurrects the same "whole of the Pipeline" argument, Mot. at 14, that it readily concedes is not available under D.C. Circuit case law and this Court's earlier rulings. That is, Yankton contends that "the only logical termini for the Pipeline are where the project begins, near Stanley, North Dakota, and where the project ends, approximately 1,172 miles away in Patoka,

Illinois." *Id.* But because no segment of the pipeline under federal jurisdiction in any EA is at Stanley or Patoka, the Tribe has no legal basis for complaining that the "Federal Defendants' NEPA documents . . . did not use these termini in their review." *Id.*[5]

This is not to say that oil pipelines *never* require a single NEPA document. The Corps's own regulations—which Yankton's brief does not even mention—contemplate circumstances in which jurisdiction by federal agencies over different parts of the route is so extensive that the entire pipeline's effects must be considered together under NEPA. *See* 33 C.F.R. Pt. 325, App. B ¶ 7(b)(3) ("NEPA review would be extended to the entire project, including portions outside waters of the United States, only if sufficient Federal control and responsibility over the entire project is determined to exist; that is, if the regulated activities, and those activities involving regulation, funding, etc. by other Federal agencies, comprise a substantial portion of the overall project.").

That is similar to what happened in another of the Tribe's cases: *Hammond v. Norton*, 370 F. Supp. 2d 226, 244 (D.D.C. 2005). *See* Mot. at 7 (citing *Hammond* for the proposition that "an agency may not 'segment' its analysis to conceal the environmental significance of a project"). In *Hammond* developers formed a joint venture to build two connected oil pipelines simultaneously. Unlike here, that construction covered vast and continuous swaths of federal land over which the Bureau of Land Management ("BLM") exercised jurisdiction. 370 F. Supp. 2d at 233 (more than

[5] Another important difference between this case and *Delaware Riverkeeper* further illustrates why the "one document" requirement does not apply here. The capacity of the pipeline in *Delaware Riverkeeper* increased with each new approval. 753 F.3d at 1310 ("As the overall system structure expands, each additional length of 30-inch pipe or compression horsepower results in increasing returns to the pipeline's capacity.") For example, the first upgrade "added 350,000 dekatherms per day to the pipeline's capacity," while a later upgrade—even though less than 1/3 the length of the first upgrade—"added 636,000 dekatherms per day to the system." *Id.* That problem did not occur here. All three EAs recognized the pipeline's *full* capacity of 570,000 barrels per day. *See* AR 71229 (Ex. 7) (Omaha District EA); AR 9831 (Ex. 8) (St. Louis District EA); AR FWS 2453 (Ex. 9) (FWS EA).

1/3 of the newly constructed pipe "would traverse federal lands"). Also, "[a]s a direct consequence of BLM's decision to prepare a single EIS" for the entire pipeline "as a single project," the proponents "decided to terminate [their] joint venture and construct separately" the two segments. *Id.* at 234. The proponents believed that "if the segments were considered separately, there would be a finding of no significant impact with respect to the southern segment, allowing only an environmental assessment to be performed for that portion of the pipeline." *Id.* at 244.

After considering "the history" of the project "as a single connected pipeline, and the proponents' manifest intention to circumvent the NEPA review process by segmenting the project," *id.* at 252, the court held that "BLM acted arbitrarily and capriciously in concluding" that they were not connected actions, *id.* at 253 (yet still allowing BLM "to conclude that they are not connected actions" if it makes "a more thorough and factually supportable finding of independent utility" on remand). Here, by contrast, there has been no effort to circumvent an agency determination that an EIS would be required if the various discrete crossings are addressed in a single NEPA document. As already explained, a single document would not have made the difference between an EA or an EIS.

C. Yankton has a fallback argument. In addition to contending that the federal actions in the three EAs are "connected," Yankton argues they are "similar." Mot. at 15. But in contrast to the "connected" actions point, *no* commenter took the position that the approvals were "similar" actions. *Cf.* AR0066247-49 (Sierra Club raises the only contention in the record that the federally-approved parts of the pipeline are "connected actions," but it *does not* additionally claim the actions are "similar" despite quoting the relevant part of the regulation). Because the Agencies were not put on notice of the supposed need to treat the approvals as "similar actions," Yankton cannot raise it now. *See Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001). In any

event, the lack of a synergistic or cumulative effect (as explained above) means the Agencies acted neither arbitrarily nor capriciously in preparing separate EA documents.

D. Yankton does not invoke the subsection of the relevant regulation applicable to "[c]umulative actions." *See* 40 C.F.R. § 1508.25(a)(2); Mot. at 11 & 14 (argument headings contending only that the approvals were "connected" and "similar" actions). Nonetheless, the Tribe repeatedly complains that separate NEPA documents somehow hid the "cumulative" effects of the various approvals. *See, e.g.*, Mot. at 2, 5, 6, 7 & 19. That criticism ignores the many ways in which each EA considered potential cumulative effects—not just of the federal actions, but also from the whole Pipeline and activities beyond it. Cumulative effects were not concealed.

Each EA contains, for example, a section devoted to alternatives to the federal action, with discussion that extends well beyond each individual crossing. This discussion includes alternatives to the entire pipeline itself, explaining why rail, truck, and "no action" are not viable as replacements for the Pipeline. AR 71229-31, 71237 (Ex. 7) (Omaha District EA analyzing a no-action alternative and truck and rail alternatives); AR FWS 2463 (Ex. 9) (FWS EA analyzing a no-action alternative); AR 9834-37 (Ex. 8) (St. Louis District EA analyzing a no-action alternative and truck and rail alternatives). Using a single document would have added nothing to this analysis.

The Tribe nonetheless argues that each separate approval "sufficiently constrained the consideration of alternatives for the other portions of the Pipeline to mandate consideration of all approvals in a single NEPA document," and that "the approval of one segment of the Pipeline at a specific location decreased route options for other segments of the Pipeline." Mot. at 13. The Tribe errs on both the law and the facts. Its contention is legally flawed for the reasons this Court articulated when it addressed similar challenges under the National Historic Preservation Act. The

Agencies had no duty to consider how the Pipeline got to a particular water body because the route it took through private lands to get there was driven by factors having little to do with the discrete activities that the Agencies needed to permit:

> The Corps here ultimately determined that the route taken by the pipeline through private lands, up to a certain point approaching a federally regulated waterway, is driven by factors that have little to do with the discrete activities that the Corps needs to permit. The Court cannot conclude otherwise on this record. As such, it cannot hold the Corps' decision arbitrary, capricious, or otherwise unlawful.

SRST I, 205 F. Supp. 3d at 32.

Even if that were not the law, the argument would still fail because it gets the facts wrong. For each crossing, the Agencies were able to—and, in fact, did—consider a number of routing alternatives. *See* AR 71231-41 (Ex. 7); AR FWS 2461-65 (Ex. 9); AR 9834-41 (Ex. 8). The approval for any one crossing—as many as hundreds of miles apart from other crossings—did not constrict the consideration of different route options at those other proposed crossings. For example, the precise location chosen from among the alternatives for the Pipeline's water crossing near Carlyle Lake in Illinois did not affect whether or where to approve the two Missouri River crossings in North Dakota. *See* 33 C.F.R. Pt. 325, App. B ¶ 7(b)(3) (providing that the Corps's analysis of "a link in a transportation or utility transmission project" is properly limited to "the specific . . . crossing" when "[n]either the origin and destination of the [pipeline] nor its route to and from the navigable water, except as the route applies to the location and configuration of the crossing, are within the control or responsibility of the Corps[.]").

Additionally, each EA contains an entire section on the cumulative impacts of the crossings being considered in that EA. AR 71322-31 (Ex. 7) (Omaha District EA); AR FWS 2481-83 (Ex. 9) (FWS EA); AR 9905-16 (Ex. 8) (St. Louis District EA); *see also SRST III*, 255 F. Supp. 3d at 130 (explaining the Corps' analysis of the cumulative effects of the Lake Oahe crossing). And the impacts considered in those EAs go well beyond the impacts of the discrete approvals at issue.

See, e.g., AR 71327 (Ex. 7) (considering the cumulative impacts of multiple pipeline releases (including from pipelines other than DAPL) on pallid sturgeon). This is not a case of "individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." Mot. at 18 (quoting *Hodel*, 865 F.2d at 297). Recall that the question here is whether there will be a cumulative or synergistic environmental impact "upon a region." *Kleppe*, 427 U.S. at 410. Unlike where, for example, three factories are close enough to add air pollutants to the same community, the Agencies here did not act arbitrarily or capriciously in viewing the potential environmental impacts from geographically distant pipeline segments as isolated from each other and therefore separate.

The Agencies did not acted arbitrarily or capriciously in preparing separate EAs for the separate approvals.

II. The Government Did Not Violate Any Of The Yankton Sioux Tribe's Trust Or Treaty Rights.

When all is said and done, Yankton's arguments based on treaty and trust obligations are indistinguishable from those that this Court already considered and resolved in its June 2017 Opinion as well as its earlier rulings rejecting preliminary injunctive relief. Yankton ultimately seems to recognize as much by adopting Standing Rock's arguments and disagreeing with this Court's decision to reject them. Mot. at 29-31 nn.3-5. Because Yankton does not raise anything new that might warrant a different outcome, this claim must also be rejected.

A. It is not until the very end of its brief—in three footnotes—that Yankton gets around to acknowledging the earlier summary judgment briefing in the companion lawsuit initiated by Standing Rock. *See id.* Given that Yankton seeks summary judgment on treaty- and trust-based claims that other parties have already extensively litigated, and given that Yankton's argument relies on facts and law already invoked by the other plaintiffs, one would have expected Yankton

to start—not end—with the earlier briefing and the June 2017 Opinion. Indeed, Yankton could have simply started *and* ended this part of its brief by adopting Standing Rock's arguments, because even a cursory comparison to the earlier filings shows that Yankton raises nothing novel.

Not until page 30 of its brief does Yankton acknowledge that it filed this motion because it "objects to this Court's holding in its June 14, 2017 Memorandum Opinion" that D.C. Circuit precedent requires the Tribe to "'identify a substantive source of law that establishes specific fiduciary or other duties' when it brings an APA claim." Mot. at 30 n.4. Rather than offer a reason for this Court to reconsider its holding, the Tribe merely "adopts the Standing Rock Sioux Tribe's . . . argument regarding an agency's enhanced responsibility to consider a tribe's treaty rights prior to taking an action that could affect those rights" and "incorporates the SRST's arguments included on pages 34 through 39 of its Motion for Summary Judgment." Mot. at 29 n.3, 30 n.4; *see also id.* at 31 n.5 ("The Tribe adopts SRST's argument on why the APA does not require a party to identify a specific statute that imposes a duty on the United States, and why the Indian Tucker Act line of precedent is inapplicable.").

Although Yankton does not expressly say so, the entirety of its second argument—not just part E—is a rehash of points already advanced and decided in the earlier summary judgment and preliminary injunction briefing. Yankton argues, for example, that it possesses "usufructuary rights from the 1851 Treaty." Mot. at 20. Cheyenne River argued the same thing: The "Tribe's and other tribes' reserved water rights and hunting and fishing rights in the Missouri River and on their reservation lands is beyond dispute." D.E. 131 at 30. Yankton argues that it "retains its usufructuary rights in the 1851 Treaty territory because those rights have never been abrogated by Congress." Mot. at 23. That is not new either; this Court acknowledged that Cheyenne River made the same argument based on the same treaty. *Standing Rock Sioux Tribe v. U.S. Army Corps*

of Eng'rs (*SRST II*), 239 F. Supp. 3d 77, 99 (D.D.C. 2017) ("Cheyenne River asserts that the purpose of its Reservation, as set out in the 1851 and 1868 Fort Laramie Treaties . . . is 'to provide for self-sufficiency.'").[6]

Yankton then argues that the operation and maintenance of the pipeline will "threaten the Tribe's treaty rights" because of potential harm to "fish and wildlife." Mot. at 25. But Standing Rock and Cheyenne River made the same arguments, which is why this Court expressly recognized that "the relevant Treaty rights are those implicating water, hunting, and fishing." *SRST III*, 255 F. Supp. 3d at 130. Moreover, after this Court rejected Standing Rock's position that the Corps was obligated to address "Treaty rights qua Treaty rights" (*id.* at 131)—rather than consider the effects on the water, fish, and game resources implicated by the Treaty rights (*id.* at 131-32)—the Court went on to conclude that the Corps adequately considered effects of construction and operation on all relevant resources with the exception of the effects of a spill on hunting and fishing. *Id.* at 132-34.[7] Again, Yankton's brief mentions none of this.

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[6] As for Yankton's broader assertion that "Congress has never abrogated the Tribe's treaty rights," (Mot. at 23 (argument heading; capitalization altered)), this Court has also resolved the extent to which Congress did and did not abrogate tribal rights found in the same treaty. *See, e.g.*, *SRST II*, 239 F. Supp. 3d at 98 ("Congress 'clearly abrogated the Tribe's "absolute and undisturbed use and occupation" of these tribal lands.'"); *id.* at 99 (rejecting the proposition that the objective of self-sufficiency on the reservation "requires the federal government to refrain from permitting infrastructure projects on its own land").

[7] The Court also addressed the same *specifics* that Yankton now raises. For example, Yankton asserts that "an oil spill into the Missouri River at Lake Oahe is especially likely and potentially more damaging because the portion of the Pipeline running under Lake Oahe was inserted via a horizontal directional drilling." Mot. at 25. But this Court held that "[t]he EA addressed each factor for which the Tribe marshals extra-record evidence," including the "Corps' failure to address 'slow leaks in the HDD bore,' which . . . would be 'complicated if not impossible to clean up and likely would have significant impacts.'" *SRST III*, 255 F. Supp. 3d at 124. Yankton also faults the Corps for failing to recognize that "[a]n oil spill would add dangerous carcinogens such as benzene to the water." Mot. at 26. But this Court concluded that the EA "presented a model estimating the concentration of benzene . . . that could be released during a . . . spill at the Oahe crossing, and discussed how those results might vary during winter months." *SRST III*, 255 F. Supp. 3d at 133.

Yankton's second argument thus boils down to a disagreement with this Court's earlier rulings. But "[c]hallenges to rulings made during the course of judicial proceedings should be made by appeal in those cases." *Lewis v. Green*, 629 F. Supp. 546, 553 (D.D.C. 1986). That is reason alone to grant summary judgment to defendants.

B. The one thing that does distinguish Yankton's arguments from those that the Court already considered is decidedly unhelpful to the Tribe. Regardless of whether other plaintiffs could show error from failure to consider effects on *their* resources, Yankton cannot show error from failure to consider effects on *its* resources because Yankton's interests are literally much more remote than those of other tribes.

As an initial matter, Yankton made no effort to put the Corps on notice of a supposed need to consider Yankton's resources or interests separately. What little communication the Tribe had with the Corps focused mainly on the Corps's scoping and consultation requirements under the National Historic Preservation Act. *See, e.g.*, AR 64074 (Ex. 2); AR 64236 (Ex. 3); AR 64320 (Ex. 4); AR 64260 (Ex. 5); AR 64400 (Ex. 6). These letters make no more than cursory mention of the Tribe's treaty rights to hunt, fish, gather, or use water. *See, e.g.*, AR 65508 (Ex. 1) (stating only that "Congress has recognized treaty rights through the concept of 'trust responsibility' which was established after the signing of treaties" and that the Corps "has violated our treaty tenets by not fulfilling its trust responsibility to protect our land and waters from harm."). And, as explained above, even these cursory assertions came months after the EA comment period had closed. Because "issues not raised in comments before the agency are waived," *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002), the Tribe is limited to the generalized assertion of treaty rights that the Court already addressed in its June 2017 Opinion.

Because of its failure to respect the deadline for commenting on the draft EA, Yankton is forced to use new extra-record declarations to support its argument. This Court has already rejected efforts by other plaintiffs to supplement the record with materials that could have been presented to the agency before it took final action. *SRST III*, 255 F. Supp. 3d at 124-25. Here, again, Yankton's brief ignores that earlier ruling and makes no effort to explain why its new materials should be treated any differently.

Putting aside whether these post-hoc statements can even be considered, the Tribe still has not stated with any specificity how its interests are on par with—let alone weightier than—those of the other plaintiffs who have litigated these issues. Because, as shown earlier, the northern boundary of the Yankton reservation is approximately 400 miles downstream from the Lake Oahe crossing, Yankton is not relying on potential harm to resources on or near its reservation.[8] Instead, Yankton invokes usufructuary rights to "approximately 38 miles of territory located in present day North Dakota that was set aside for the Sioux by the 1851 Treaty"—a stretch of land that the Pipeline "traverses." Mot. at 19. Because *that* territory is so distant from Yankton's reservation, it was incumbent on Yankton to specify to the Corps *where*, in relation to the Pipeline route, the Tribe's members exercise their hunting, fishing, or spiritual rights.

Yankton still has not done so. Although the declarations mention Lake Oahe, *see, e.g.*, D.E. 290-4 ¶¶ 18, 22; D.E. 290-5 ¶ 9, they do not say how frequent that usage is, where along the 230-mile length of the Lake the different levels of such usage take place, how that usage compares

[8] The Yankton reservation is located in Charles Mix County, South Dakota. Bureau of Indian Affairs, *Yankton Agency*, *available at* https://www.bia.gov/regional-offices/great-plains/south-dakota/yankton-agency; *see also* S.D. Dep't of Tribal Relations, *Nine Tribes in South Dakota*, *available at* http://www.sdtribalrelations.com/tribes/yankton.aspx (displaying the Yankton Sioux Reservation on a map of South Dakota).

to actual or potential usage of territory that would not be affected by the Pipeline, or how it compares to usages at or near the portion of the Missouri River that borders the reservation. Instead, the declarations speak in generalities. *See, e.g.*, D.E. 290-6 ¶ 6 ("Our tribal nations have always held the Missouri River with the highest of reverence and for that reason, the Missouri River Basin has one of the largest concentrations of Tribal Cultural Properties."); *id.* ¶ 9 ("[T]ribal members would go into present-day North and South Dakota to hunt."); D.E. 290-4 ¶ 18 (Noting generically that the Tribe partakes in "hunting, fishing, gathering of food and medicines, and other usufructuary rights on the 1851 Treaty lands, such as in the area near the Lake Oahe crossing, and on our Reservation."); D.E. 290-5 ¶ 9 ("We also depend on a number of plants that grow in our treaty territory near and within the pipeline corridor, including the Lake Oahe crossing area."). The few specifics provided relate only to the site where the Pipeline crosses Lake Oahe. D.E. 290-4 ¶ 22 ("I have performed ceremony and prayer at Lake Oahe and near the proposed Missouri River crossing site."); D.E. 290-6 ¶ 12 ("I, myself, have been invited to hunt and fish [near the pipeline] by members of the Standing Rock Sioux Tribe."). These declarations do not identify interests distinct from, or more likely to be affected than, those fully litigated in this Court's prior rulings.

Had the Tribe wished to engage meaningfully in the federal government's decisionmaking process, it needed to make any special concerns known during the comment period. Rather than identify interests specific and unique to it or its members, Yankton made only generalized complaints that are indistinguishable from those of other commenters. Yankton cannot now complain of failure to address other concerns that the Tribe failed to raise before the Corps completed its EA. *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1519 (D.C. Cir. 1988) ("[B]y neglecting timely to put the [agency] on proper notice of its objections, [the plaintiff] has forfeited its right to have this court examine those objections on the merits.").

C. Yankton's final point is that the trust relationship between the Government and the Tribe imposes particular fiduciary obligations on the Government. Mot. at 28-31. But "[t]he 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). The Tribe cannot bring a fiduciary duty claim without "identify[ing] a substantive source of law that establishes specific fiduciary or other duties, and alleg[ing] that the Government has failed to perform those duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). This Court has already held that this rule defeats Yankton's trust-rights claim. *SRST III*, 255 F. Supp. 3d at 143-45.

Undeterred, Yankton relies on the same out-of-circuit cases cited by Standing Rock and Cheyenne River, *see* Mot. at 29-30, but in this Circuit "a cause of action will be inferred from a fiduciary relationship only where a plaintiff can identify specific trust duties in a statute, regulation, or treaty." *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014). Yankton proposes to distinguish *El Paso*, arguing that it was a "failure to act" case, Mot. at 30 n.4 (emphasis omitted), but Standing Rock made the same argument in *its* motion, D.E. 195 at 36 n.29. It continues to be a distinction without a difference. *See SRST III*, 255 F. Supp. 3d at 145 (quoting *El Paso*, which references the rule for "trust claims brought under the APA"—not trust claims brought solely for failure-to-act APA claims). The only obligations cited by Yankton are those found in specified treaties. Mot. at 19-28. Because Yankton (like Standing Rock) "has not identified a specific provision creating fiduciary or trust duties that the Corps violated, its breach-of-trust argument—whether considered a separate count or part of its larger APA cause of action—cannot survive." *SRST III*, 255 F. Supp. 3d at 145.

CONCLUSION

For the reasons stated above, the Court should deny Yankton's motion for partial summary judgment and grant summary judgment to defendants.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2018, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

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