TODD KIM
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

JOSEPH MANNING (MA Bar No. 709431)
Trial Attorney, Law & Policy Section
P.O. Box 7415 – Ben Franklin Station
Washington, D.C. 20044-7415
(202) 304-2636 || (202) 353-1873 (fax)
Joseph.Manning@usdoj.gov

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

VILLAGE OF DOT LAKE, Plaintiff, v. UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*, Defendants.	Case No. 3:24-cv-00137-SLG

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFF'S COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

This case is about the adequacy of the Army Corps of Engineers' review process for issuing a Clean Water Act Section 404 permit. The permit authorizes Peak Gold to fill 5.26 acres of wetlands at its Manh Choh mine project—a 1,046-acre open-pit gold mine developed on private land near Tok, Alaska. After a careful analysis of the potential environmental effects of authorizing the permit and a review of public comments, the Corps issued the permit on September 2, 2022. All authorized fill was completed by July 2023 and the mine is now operational.

Now, almost two years after the Corps' decision and one year after all fill-related activity was completed, the Village of Dot Lake (the Tribe) seeks to have the permit set aside. The Tribe challenges the Corps' decision-making processes as arbitrary and capricious under the Administrative Procedure Act (APA), alleging that the Corps did not comply with the National Environmental Policy Act (NEPA) and the Alaska National Interest Lands Conservation Act (ANILCA). The Tribe also alleges that, the Corps failed to fulfill its consultation obligations to federally recognized tribes.

The Court should dismiss Claims 2, 3, and 4 for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6). In Claim 2, the Tribe asserts a claim under the APA, 5 U.S.C. § 706, that the Corps unlawfully failed to comply with the requirements of Section 810 of ANILCA in issuing the permit. But it is well established that only the federal agency *having primary jurisdiction* over public lands must conduct a Section 810 subsistence evaluation, and only when that agency is determining the use of public lands.

Here the Corps is not a land management agency nor are any of the permitted activities occurring on public lands. Thus, Claim 2 should be dismissed for failure to state a claim.

In Claim 3, the Tribe asserts a claim for "failure to consult." The Tribe alleges that the Corps acted arbitrarily and capriciously by failing to adhere to its own tribal consultation policies with regard to the Tribe in issuing the Section 404 permit. But a court can review an agency's alleged noncompliance with an agency pronouncement only if that pronouncement has force and effect of law. Because the Corps' Tribal Consultation Policy does not prescribe substantive rules and was not promulgated in accordance with the APA, it does not have the force and effect of law and cannot give rise to a claim against the Corps. Claim 3 should therefore be dismissed.

In Claim 4, the Tribe asserts a claim for fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. But EAJA does not itself contain a right of action and cannot serve as the basis for a standalone claim against the federal government. Thus, Claim 4 should be dismissed

BACKGROUND

I. Statutory Framework

The merits of Plaintiff's claims are not at issue in this motion. But a summary of the statutes at issue is helpful for context.

A. Clean Water Act

Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251-1389, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.*

§ 1251(a). To attain this goal, the Clean Water Act prohibits the discharge of pollutants, including dredged or fill material, into waters of the United States without a permit. *Id.* § 1311(a). Clean Water Act Section 404 authorizes the Corps to issue permits for discharges of dredged and fill material into such waters. *Id.* § 1344. These are known as "Section 404 permits."

B. Alaska National Interest Lands Conservation Act

Section 810 of ANILCA provides that before permitting the use of public lands, the "Federal agency having primary jurisdiction over such lands" must "evaluate the effect of such use . . . on subsistence uses and needs[.]" 16 U.S.C. § 3120(a). If the agency determines that the action "would significantly restrict subsistence uses," the agency may not proceed until the agency holds "a hearing in the vicinity of the area involved," and makes these determinations:

> (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

Id. § 3120(a), (2), (3).

C. The Administrative Procedure Act

The APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. If a claimant identifies a final agency action subject to judicial review, 5 U.S.C. § 706(2)(A) allows a court to set aside the

agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Arbitrary and capricious review is "narrow" and deferential, a court is not permitted to "substitute its judgment for that of the agency or merely determine that it would have decided an issue differently." *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007) (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377–78 (1989)).

II. Background

Plaintiffs challenge the issuance of a Section 404 permit to Peak Gold LLC for the filling of 5.26 acres of wetlands as part of the construction of the Manh Choh gold mine. Compl. ¶¶ 13, 18, ECF No. 1.[1] The mine is constructed on 1,046 acres of private land near Tok, Alaska. Another tribe, the Upper Tanana Athabascan Village of Tetlin, leased the land to Peak Gold. Compl. ¶¶ 2, 21. The mine is in operation with the first ore delivered to the processing facility in January 2024. Compl. ¶ 19. Gold ore is not processed on site. Compl. ¶ 43. Instead, it is hauled 248 miles to the Fort Knox gold mine near Fox, Alaska. Compl. ¶ 43 The Village of Dot Lake is located near part of the transportation route. Compl. ¶ 43 The transportation route uses Alaska state highways,

[1] For purposes of this Rule 12 motion, Federal Defendants cite Plaintiff's Complaint for applicable background. However, in the event the Court denies this motion and the case proceeds, Federal Defendants reserve the right to challenge the validity of any of Plaintiff's allegations.

Compl. ¶ 43, and use of these highways for hauling ore is regulated by the Alaska Department of Transportation & Public Facilities, 17 AAC 05.010 *et seq*., not the Corps.

During its NEPA process, the Corps prepared an EA, which reviewed and considered the potential environmental impacts of issuing the Section 404 permit. After reviewing its findings, considering alternatives, taking public comments, and requiring a compensatory mitigation plan, the Corps concluded that issuing the permit would not have significant impacts on the quality of the human environment. The Corps then issued the permit on September 2, 2022. Defs.' Ex. 1 at 1 (Permit POA-2013-00286).

On July 1, 2024, the Village of Dot Lake filed a four-claim Complaint. Claim 1 is brought under the APA, 5 U.S.C. § 706, alleging that the Corps acted arbitrarily and capriciously by not considering the required scope of environmental impacts when it conducted its environmental assessment under NEPA. Compl. ¶¶ 124–28. Claim 2 is also brought under the APA, 5 U.S.C. § 706, and alleges the Corps acted arbitrarily and capriciously by not conducting a Section 810 ANILCA subsistence evaluation. 16 U.S.C. § 3120(a). Compl. ¶¶ 129–35. Claim 3 is framed as a failure to consult claim, alleging the Corps has not complied with its obligation to consult the Tribe. Compl. ¶¶ 136–40. And Claim 4 is a claim for attorney's fees and litigation costs under the Equal Access to Justice Act (EAJA). 28 U.S.C. § 2412.

The Tribe seeks both declaratory and injunctive relief. It requests that the Court declare that the federal defendants violated NEPA, ANILCA, the APA, and the Corps

2023 Tribal Consultation Policy. Additionally, the Tribe asks the Court to vacate the Section 404 permit and enjoin further activity under the permit.

The Federal Defendants move to dismiss Claims 2, 3, and 4 for failure to state a claim.

STANDARD OF REVIEW

A court may dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion, the court need not accept as true any legal conclusion set forth in a pleading. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Supreme Court addressed the proper pleading standard under Rule 12(b)(6) in *Bell Atlantic Corp. v. Twombly*: "While a complaint attacked [under] Rule 12(b)(6) . . . does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" 550 U.S. 544, 555 (2007) (citation and brackets omitted). The complaint must set forth facts supporting a *plausible*, not merely *possible*, claim for relief. *Id.* at 555–56.

ARGUMENT

The Tribe contests the Corps' compliance with NEPA, ANILCA, and the Corps' Tribal Consultation Policy. These challenges concern a discrete agency action—the Corps' Section 404 permit decision. As shown below, Claim 2 should be dismissed because the Corps was not required to conduct an ANILCA subsistence evaluation. Likewise, Claim 3 should be dismissed because the Corps' Tribal Consultation Policy

cannot establish a cognizable claim against the agency. Finally, Claim 4 should be dismissed because EAJA does not itself contain a right of action and cannot serve as the basis for a standalone claim against the federal government.

I. Claim 2 Must Be Dismissed Because The Village of Dot Lake Has Not Articulated a Cognizable Claim Under ANILCA.

The Tribe's Claim 2 should be dismissed because the plain language of ANILCA does not require the Corps to complete a subsistence evaluation. The Tribe contends that the Corps, in issuing the Section 404 permit, failed to uphold its duty under ANILCA to protect subsistence resources in Alaska. Compl. ¶¶ 129–35. The Tribe is mistaken. ANILCA does not apply to the Corps' approval of Section 404 permits on private lands. As the Ninth Circuit has made clear, only land management agencies are required to perform ANILCA subsistence evaluations, *Akiak Native Cmty. v. U.S. E.P.A.*, 625 F.3d 1162, 1173 (9th Cir. 2010), and then only when making decisions about the management of those public lands.

A. The Army Corps of Engineers is Not Required to Perform an ANILCA Subsistence Evaluation Because It is Not a "Federal Agency *Having Primary Jurisdiction* Over" Public Lands.

The Court should dismiss the Tribe's second claim because ANILCA does not apply to the Corps' issuance of this permit. The Tribe contends that the Corps must comply with Section 810(a) of ANILCA, which provides, in relevant part:

> In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition

> on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

16 U.S.C. § 3120(a). On its face, the statute only applies to agency decisions "to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands." *Id.* Only if *an activity covered by Section 810(a)* could "significantly restrict subsistence uses" would the federal agency need to follow the Section's requirements before proceeding with the activity. *Id.* Once the agency has completed the required process (if required in the first place), it "may manage or dispose of public lands under [its] primary jurisdiction for any of those uses or purposes authorized by this Act or other law." *Id.* § 3120(d).

This provision does not apply here. The Corps is not the agency with "primary jurisdiction" over any "public lands" in Alaska at issue in this litigation, as defined by ANILCA Section 810(a). ANILCA applies to federal land management agencies exercising their management responsibilities. A plain reading of the statute's language supports this understanding of ANILCA. For example, ANILCA defines "Secretary" as the Secretary of the Department of Interior or, for National Forest System areas, the Secretary of the Department of Agriculture. 16 U.S.C. § 3102(12). Likewise, ANILCA declares that it is congressional policy that "*Federal land managing agencies, in managing subsistence activities on the public lands* . . . shall cooperate with adjacent landowners and land managers[.]" 16 U.S.C. § 3112(3) (emphasis added). And Section 810 of ANILCA provides that, after completing a subsistence evaluation, "the appropriate

Federal agency may *manage or dispose* of public lands under his primary jurisdiction." 16 U.S.C. § 3120(d) (emphasis added). Indeed, this common-sense interpretation is also reflected in the regulations issued by the federal agencies responsible for implementing ANILCA's subsistence use priority — the Departments of Agriculture and the Interior. *See* 36 C.F.R. § 242.4 (Agriculture's regulation defining "agency" to mean "a subunit of a cabinet-level Department of the Federal Government *having land management authority over the public lands* including, but not limited to, the U.S. Fish & Wildlife Service, Bureau of Indian Affairs, Bureau of Land Management, National Park Service, and USDA Forest Service." (emphasis added)); 50 C.F.R. § 100.4 (Interior's regulations defining "agency" the same). The Corps has no comparable regulations.

The Corps is not a federal land management agency and, in any event, does not manage any public lands at issue in this litigation: the permit was issued for work on private property; use of the State highway is regulated by the Alaska Department of Transportation & Public Facilities; and neither the Tanana River nor the Tetlin National Wildlife Refuge (TNWR), the public lands allegedly impacted by the mining activity, are managed by the Corps. Thus, the Corps does not have "primary jurisdiction" over any public lands at issue in this permit in Alaska within the meaning of ANILCA. *Cf. Akiak Native Cmty.*, 625 F.3d at 1173 (holding that because EPA did not have "primary jurisdiction" over "public lands" in Alaska it was not required to complete ANILCA

subsistence evaluations). And the Corps is not required to perform an ANILCA subsistence evaluation.

Indeed, the Ninth Circuit has already considered and rejected similar arguments that the Corps is a land management agency with primary jurisdiction over public lands in Alaska. In *City of Angoon v. Hodel*, the plaintiffs challenged, among other things, the issuance of Clean Water Act permits by EPA and the Army Corps of Engineers for a log transfer facility located on privately held lands within a National Monument. 803 F.2d 1016, 1018–19, 1027 (9th Cir. 1986). The plaintiffs alleged that the permit issuance triggered Section 810 of ANILCA because the logging operation would affect subsistence uses of the National Monument "public lands." *Id.* at 1027. The Ninth Circuit rejected the plaintiffs' argument on several grounds. Most relevant here, it found that neither EPA nor the Corps had "primary jurisdiction" over the National Monument, which was managed by the U.S. Forest Service. *Id.* at 1028.

In accordance with *Akiak Native Community* and *City of Angoon*, the Corps does not have "primary jurisdiction" over the various "public lands" alleged to be affected in this case, such as the Tanana River and the TNWR. Thus, the Corps' issuance of Section 404 permits does not trigger Section 810 of ANILCA and Claim 2 must be dismissed.

B. The Army Corps of Engineers is Not Required to Perform an ANILCA Subsistence Evaluation Because Issuance of The Permit Does Not Involve

The Withdrawal, Reservation, Lease, Occupancy, Or Disposition of Public Lands.

Even if the barriers discussed above could somehow be set aside, Section 810 of ANILCA would still not apply to the Corps' decision to approve the Section 404 permit in this case because the permit does not involve the withdrawal, reservation, lease, occupancy, or disposition of public lands.

As the Tribe acknowledges, the Section 404 permit was for the filling of wetlands on private land. Compl. ¶¶ 2, 21. Yet the Tribe claims that because some public lands "may be affected by the Project" the Corps needed to complete a Section 810 subsistence evaluation. This, however, is not the test.

Section 810 is triggered only where a federal agency is "determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions." 16 U.S.C. § 3120(a). Under ANILCA, "the term 'public lands' means land situated in Alaska which . . . are Federal lands." *Id.* § 3102(3). "The term 'Federal land' means lands the title to which is in the United States." *Id.* § 3102(2). And "[t]he term 'land' means lands, waters, and interests therein." *Id.* § 3102(1). In *Alaska v. Babbit*, the Ninth Circuit held that "the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." 72 F.3d 698, 703–04 (9th Cir.1995). The Court held that ANILCA applies to federal navigable waters adjacent to, or within the exterior boundaries of, federal reservations in Alaska. *See id.*; 36 C.F.R. § 242.3(b).

The Section 404 permit in this case does not involve the withdrawal, reservation, lease, occupancy, or disposition of public lands. And the Tribe has not alleged that the private land in this case qualifies as "public land" under ANILCA. Instead, it relies on the idea that the Corps' actions on private lands might have downstream effects on other, non-adjacent public lands, such as the Tanana River. The impacts of the Corps' actions are allegedly due to the "additional haul traffic, potential accidents involving mine ore, fugitive dust from truck[.]" Compl. ¶ 34. But those activities (hauling) are not regulated by the Corps and occur on a pre-existing State highway. In issuing this permit the Corps made no decisions about the management or disposition of public lands. Thus, the Tribe fails to state a claim upon which relief can be granted and Claim 2 must be dismissed.

II. Claim 3 Must Be Dismissed Because the Army Corps of Engineers' Tribal Consultation Policy Cannot Form the Basis of A Claim Against the Corp.

In Claim 3, the Tribe claims that the Corps violated the APA by failing "to adhere to its own tribal consultation policies" in issuing the Section 404 permit. Compl. ¶¶ 136-40. As evidence of this, the tribe relies on the "December 5, 2023 Tribal Consultation Policy Update." Compl. ¶ 116. This claim must be dismissed because the 2023 Policy was not in effect at the time of the Corps' permitting decision and the Corps' Policy constitutes an internal agency guidance document that lacks the force and effect of law.

A. The Army Corps of Engineers Cannot Act Arbitrarily And Capriciously By Failing to Follow a Policy That Did Not Exist At The Time It Issued the Permit.

The Corps did not act arbitrarily and capriciously when it failed to consider a policy that post-dates its decision to issue the Section 404 permit. The Tribe alleges that the Corps' "failure to adhere to its own tribal consultation policies . . . violates the APA." Compl. ¶ 138. Under the APA, "[j]udicial review of an agency decision typically focuses on the administrative record in existence at the time of the decision . . ." *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). "Parties may not use post-decision information as a new rationalization either for sustaining or attacking the Agency's decision." *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) (internal quotation marks and citation omitted). The Ninth Circuit has recognized only four circumstances in which the court may consider post-decisional documents: (1) if necessary to determine whether the agency has considered all relevant factors and explained the decision; (2) when the agency has relied on documents not in the record; (3) when necessary to explain technical terms or complex subject matter; or (4) there is a showing of bad faith by the agency. *Id*.

The Corps issued the Section 404 permit on September 2, 2022. Defs.' Ex. 1 at 1. But the Tribal Consultation Policy relied on by the Tribe for this claim was not adopted until December 2023, some fifteen months later. Thus, the 2023 Tribal Consultation Policy constitutes extra-record material unavailable to the Corps at the time of its decision. None of the Circuits' exceptions apply to the 2023 Tribal Consultation Policy.

As a matter of law, therefore, the Court cannot hold that the Corps acted arbitrarily by failing to follow the policy. So, Claim 3 must be dismissed because the Tribe has failed to state a claim upon which relief can be granted.

B. The Army Corps of Engineers' Tribal Consultation Policy Does Not Have the Force and Effect of Law.

Even if the 2023 Tribal Consultation Policy could somehow be considered, the Policy still cannot form the basis of a claim because it does not have the force and effect of law. "[N]ot all agency policy pronouncements which find their way to the public can be considered regulations enforceable in federal court." *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir. 1982) (citation omitted). A court can "review an agency's alleged noncompliance with an agency pronouncement only if that pronouncement actually has the force and effect of law." *Ctr. for Cmty. Action & Env't Just. v. Fed. Aviation Admin.*, 61 F.4th 633, 641 (9th Cir. 2023) (quoting *W. Radio Servs. Co., v. Espy*, 79 F.3d 896, 900 (9th Cir. 1996)). "[A]llegations of noncompliance with an agency statement that is not binding on the agency" are not subject to review. *Id*.

To have the "force and effect of law," enforceable against an agency in federal court, "the agency pronouncement must (1) prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and (2) conform to certain procedural requirements." *W. Radio*, 79 F.3d at 901 (quoting *United States v. Fifty–Three (53) Eclectus Parrots,* 685 F.2d 1131, 1136 (9th Cir.1982)). "To satisfy the first requirement the rule must be legislative in nature,

affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." *Id*. (quoting *Fifty–Three Parrots,* 685 F.2d at 1136).

In *Western Radio*, the Ninth Circuit held that the Forest Service Manual and Handbook "do not have the independent force and effect of law" because "the Manual and Handbook are not substantive in nature" and "are not promulgated in accordance with the procedural requirements of the Administrative Procedure Act." 79 F.3d at 901. Similarly, the Corps' Tribal Consultation Policy does not satisfy either of the requirements to have the "force and effect of law." *Id*.

First, the Policy explicitly states that it does not grant any "legally enforceable rights, benefits, or trust responsibilities, substantive or procedural[.]" U.S. Army Corps of Eng'rs, Civil Works Tribal Consultation Policy § 13;[2] *see also W. Radio*, 79 F.3d at 901. As a result, it is only a general policy intended to provide guidance to the agency and not intended to create public rights. *See River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071, 1073 (9th Cir. 2010) ("The text of the 2001 Policies makes clear that they are intended only to provide guidance within the Park Service, not to establish rights in the public generally." "The Court therefore may not set aside the . . . Plan because it fails to

[2] Civil Works Tribal Consultation Policy can be found at https://api.army.mil/e2/c/downloads/2023/12/06/f10ab368/dec2023-usace-tribal-consultation-policy.pdf

comply with portions of the 2001 Policies . . . ."); *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9th Cir. 2000) (holding that an agency was not bound by a general policy statements in an agency's manual); *Farrell v. Dep't Of Interior*, 314 F.3d 584, 590 (Fed. Cir. 2002) ("[A]n agency statement . . . binds the agency only if the agency intended the statement to be binding.").

Second, the Policy was "not promulgated in accordance with the procedural requirements of the [APA]." *W. Radio*, 79 F.3d at 901. The APA requires that "publication or service of a substantive rule shall be made not less than 30 days before its effective date[.]" 5 U.S.C. § 553(d). The Policy was not published in the Federal Register or the Code of Federal Regulation. Failure to comply with the APA's procedural requirements is dispositive. *See W. Radio*, 79 F.3d at 901.

The Corps' Tribal Consultation Policy fails to satisfy both the first and second prong of the Ninth Circuit's test for determining when agency pronouncements have the force and effect of law. *Id.* Thus, allegations of noncompliance with the Policy are not subject to judicial review and Claim 3 must be dismissed.

C. If the Army Corps of Engineers' Tribal Consultation Policy Does Not Form The Basis of Claim 3, Then The Claim Fails to Comply With the Requirements of Rule 8 of the Federal Rules of Civil Procedure and Must be Dismissed.

If the Corps' internal consultation policy does not form the basis of Claim 3, then the Tribe has failed to meet the minimum requirements of Rule 8 of the Federal Rules of

Civil Procedure. For a complaint to survive dismissal, federal plaintiffs are required to set out a claim for relief. Such a claim must include:

> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8(a). If the Corps' internal consultation policy does not form the basis of Claim 3, the Tribe's third claim for relief for "failure to consult," Compl. ¶¶ 136-140, fails to set out the first two elements required by Rule 8.

The Federal Defendants acknowledge that there are a wide range of consultation requirements, and those requirements apply in a wide range of settings. Some are judicially enforceable. Some are not. Indeed, the Tribe's Complaint references a litany of executive orders, statutes, and policies. *See* Compl. ¶¶ 112, 114. But it fails to specify how any of those authorities are relevant to the current litigation or have allegedly been breached. This lack of specificity makes the Complaint little more than "a formulaic recitation" of a cause of action. *Twombly*, 550 U.S. at 555. The only discernable basis for Claim 3 is a failure to adhere to the Corps' internal tribal consultation policy. But, as we explained above, the Corps' policy cannot form the basis of a claim against the Corps. So, if the Tribe wishes to assert that Claim 3 is based on some other authority it must articulate grounds for relief that are more than "labels and conclusions[.]" *Id*.

Without knowing which legal requirement is the basis of the alleged violation, neither the Federal Defendants nor this Court can assess whether there is a cognizable legal claim. To illustrate the effect of this failure, the Tribe, in its complaint, alleges that the Corps issued public notices inviting tribal participation in the Federal decision-making process, as required by the Corps' regulations. Compl. ¶ 68; *see* 33 C.F.R. § 325.3(d)(1). And alleges that the Corps met with Dot Lake Village in December 2023 to discuss the Tribe's concerns. Compl. ¶ 69. And that the Tribe and the Corps engaged in written correspondence and subsequent online meetings where the Tribe expressed concerns. Compl. ¶¶ 71-77. Without knowing the specific legal basis for the consultation that forms the basis for the Tribe's third claim, it is difficult to assess whether the engagement acknowledged by the Tribe is sufficient to satisfy the United States' legal obligations.

The purpose of Rule 8 is to give fair notice of the Tribe's claim to permit the adverse party the opportunity to file a responsive answer, prepare an adequate defense and determine whether the doctrine of res judicata applies. 2 James WM. Moore, Federal Practice - Civil § 8.08 (3rd ed.), Lexis (database updated June 2024); 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1225 (5th ed.), Westlaw (database updated June 2024). Beyond this, Rule 8 helps sharpen the issues to be litigated. *Prezzi v. Berzak*, 57 F.R.D. 149, 151 (S.D.N.Y. 1972). A generalized claim of rights, untethered to an underlying legal obligation, serves none of these functions. This is one reason that the plain statement requirements of Rule 8 are so important. *See generally Mann v. Boatright*,

477 F.3d 1140, 1148 (10th Cir. 2007) (recognizing that the Rule 8 plain statement requirement "serves the *important* purpose of requiring plaintiffs to state their claims intelligibly so as to inform the defendants of the legal claims being asserted" (emphasis added)).

For the reasons stated above, dismissal of Claim 3 is appropriate. Should the Court disagree, however, it should, at a minimum, order Plaintiff to provide a more definite statement that clearly sets out the source of authority the Tribe relies on to support its consultation claim. That will allow Federal Defendants and the Court to understand the alleged violation and assess its adequacy.

III. Claim 4 Must Be Dismissed Because EAJA Cannot Serve As The Basis For A Standalone Claim Against The Federal Government.

In Claim 4, the Tribe seeks attorneys' fees and litigation expenses pursuant to EAJA. Compl. ¶¶ 141–45. EAJA provides that: "a court shall award to a prevailing party other than the United States fees . . . in any civil action . . . including proceedings for judicial review of agency action, . . . unless the court finds the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). But EAJA does not itself contain a right of action and cannot serve as the basis for a standalone claim against the federal government. *See Thomas v. Paulson*, 507 F. Supp. 2d 59, 62 n.2 (D.D.C. 2007). Instead, EAJA merely "authorizes the payment of fees to the prevailing party in an action against the United States." *Id.* (quoting *Scarbrough v. Principi*, 541 U.S. 401, 405 (2004)). We therefore read Claim 4 as

documenting the Tribe's plan to request attorneys' fees under EAJA should it prevail on the merits. But because the Tribe's ability to recover fees is tied to its success on the merits of the other claims in its Complaint, Claim 4 is not a properly plead independent cause of action and must be dismissed. *See, e.g., Pham v. Jaddou*, No. 23-cv-1058-W-KSC, 2024 WL 436351, at *7 (S.D. Cal. Feb. 5, 2024).

CONCLUSION

For all these reasons, the Court should dismiss Claims 2, 3 and 4 for failure to state a claim upon which relief can be granted.

DATED: August 23, 2024

Respectfully submitted,

TODD KIM
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

s/ *Joseph M. Manning*
JOSEPH MANNING (MA Bar No. 709431)
Trial Attorney, Law & Policy Section
P.O. Box 7415 – Ben Franklin Station
Washington, D.C. 20044-7415
(202) 304-2636 || (202) 353-1873 (fax)
Joseph.Manning@usdoj.gov

Attorney for Defendants

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this brief contains 5210 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limit of Local Civil Rule 7.4(a)(1).

DATE: August 23, 2024. s/ *Joseph M. Manning*