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UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

VILLAGE OF DOT LAKE, a federally recognized Indian tribe, Plaintiff, vs. UNITED STATES ARMY CORPS OF ENGINEERS; and LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as Chief of Engineers and Commanding General, United States Army Corps of Engineers, Defendants.	Case No. 3:24-cv-00137--SLG

DOT LAKE VILLAGE'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO PARTIALLY DISMISS

Plaintiff Village of Dot Lake (the "Tribe") opposes the motion of the Defendants seeking the dismissal of Claims 2, 3 and 4 of its Complaint. The Defendants' motion should be denied because the Tribe has satisfied its obligation for each of these claims to state a

claim upon which relief can be granted, and alleged "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

I. ARGUMENT

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is proper only where the pleadings fail to state a claim upon which relief can be granted. Under Rule 12(b)(6), the Court's "inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). A plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S.662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (*citing Twombly*, 550 U.S. at 556).

If the allegations in a complaint as pled are insufficient to state a claim, a court should grant leave to amend the complaint, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc.*

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v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 246-47 (9th Cir. 1990).

A. The Tribe has Alleged a Viable Claim Arising Under ANILCA

Claim 2 of the Tribe's Complaint alleges violations of ANILCA. When Congress enacted the Alaska National Interest Lands Conservation Act ("ANILCA") in 1980, 16 U.S.C. §§ 3111-3126 (Title VIII - Subsistence Management and Use), it declared a policy of protecting the opportunity for rural Alaskans to continue a subsistence way of life: "[Fifty] percent of the food for three-quarters of the Native families in Alaska's small and medium villages is acquired through subsistence uses, and 40 percent of such families spend an average of 6 to 7 months of the year in subsistence activities." H.R. Rep. No. 1045, 95th Cong., 2d Sess., at 181 (1978).

Congress recognized that "Alaska is unique in that, in most cases, no practical alternative means are available to replace the . . . fish and wildlife which supply rural residents dependent on subsistence uses[.]" 16 U.S.C. § 3111(2). Congress also recognized that the subsistence way of life is under increasing attack. *Native Village of Quinhagak v. United States*, 35 F.3d 388, 390 (9th Cir. 1994).

> Continuation of the opportunity for subsistence uses of resources . . . in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management[.]

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16 U.S.C. § 3111(3).

For that reason, Congress provided through ANILCA that the taking of fish and wildlife on public lands for nonwasteful subsistence uses takes priority over the taking of fish and wildlife for other purposes. *Id*. § 3114. 1 See id. § 3113 (subsistence uses means the customary and traditional uses by rural Alaskans); *id*. § 3112(1) ("The utilization of the public lands in Alaska is to cause the *least adverse impact possible* on rural residents who depend upon subsistence uses of the resources of such lands . . . .") (Emphasis added.) Congress recognized that the continuation of subsistence uses is "essential" for Alaska Native "physical, economic, traditional, and cultural existence." 16 U.S.C. § 3111(1); *id.* § 3111(2).

The term "subsistence uses" means "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade." 16 U.S.C. § 3113.

ANILCA Section 3114 mandates that the taking of fish and wildlife for subsistence uses shall be given priority over other consumptive uses. This priority applies to all federal actions that involve federal public lands, including navigable waters within or adjacent to

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federal lands. *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) (emphasis added). This describes lands that may be affected by the Project, including the Tanana River, The Tetlin National Wildlife Refuge, and the Bureau of Land Management (BLM)-owned land on the western edge of the project lease Boundary.

ANILCA is specifically triggered by the Corps' decision to issue CWA § 404 for the Project, which was a determination 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). The Corps was required to "evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs." *Id*. That includes the effects of the use authorized by the Corps on lands over which it had primary jurisdiction (the wetlands to be filled) on downstream navigable waters, *John v. United States*, 720 F.3d 1214, 1222 (9th Cir. 2013), as well as the subsistence uses and needs of the Tetlin National Wildlife Refuge (TNWR) and BLM-owned land on the edge of the Site.

Both of the mining pits at the Project site sit atop a ridgeline in the Tetlin Hills and shed surface and ground waters via runoff and perennial streams to both the Tok River watershed to the west and the Tetlin Lake watershed to the east. Complaint, ¶ 22. Waste rock includes portions of material that is PAG and metal leaching (ML). PAG rock, when oxidized by weathering, may form acid which can be harmful to aquatic life. ML rock can leach metal ions which can be harmful to aquatic life. The applicant's own analysis of 96

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waste rock samples showed that 83% of all oxide materials are classified as PAG and there is a potential for rapid onset of acidification of PAG in 35% of the QMS oxides and 68% of the skarn oxides. There is the potential for adverse impacts to downgradient waters of the United States (WOTUS) from pit seepage and groundwater altered by contact with PAG waste rock. Complaint, ¶ 24.

Proposed waste rock piling is likely to result in weathering and leeching of harmful compounds into WOTUS. These toxic chemicals may pose a risk to human health by cumulatively biomagnifying throughout the food web and eventually affecting humans through consumption of subsistence foods. Complaint, ¶ 27. The Corps did not adequately assess the potential for impacts to groundwater and surface streams, and from there potentially into Tetlin Lake and Tok River. Complaint, ¶ 25.

The TNWR was established in 1980 to conserve fish and wildlife populations and habitats in their natural diversity to provide subsistence hunting opportunities. Complaint, ¶35. TNWR is located about 20 miles east of the project site in the Tetlin River/Manh Choh Lake watershed. *Id.* (b) The ANILCA regulations apply in the TNWR, including all non-navigable waters located on these lands, on all navigable and non-navigable water within the exterior boundaries of the TNWR, and on inland waters adjacent to the exterior boundaries of the TNWR. 64 FR 1276, 1286-1287 (1999 ANILCA Rule).

It is undisputed that the Corps did not conduct the thorough analysis of subsistence

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issues required by Section 810 of ANILCA. The Corps did not engage in the ANILCA process to fully address the mine's potential effects on subsistence uses of navigable waters downstream of the Site and subsistence uses in the TNWR and its adjacent waters. This violates the procedural requirements of ANILCA designed to protect subsistence uses. By permitting the Manh Cho mine project without taking the required steps, the Corps prioritized commercial mining interests over subsistence uses. This contravenes ANILCA's mandate that subsistence uses have priority over other consumptive uses on public lands.

The Tribe has stated a claim upon which relief can be granted. The Court's inquiry under Rule 12(b)(6) "is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch* 546 F.3d at 588. The Tribe has alleged "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Defendants' Motion to Partially Dismiss Claim 2 should be denied.

B. The Corps' 2023 Consultation Policy Update is Not the Sole Basis of the Tribe's Failure to Consult Claim

Defendants' Motion to Partially Dismiss Claim 3 should be denied, because, as alleged in the Complaint, the Corps' 2023 Consultation Policy Update is not the sole basis of the Tribe's failure to consult claim. The relationship between the United States and Indian tribes is based on and built around the doctrine of trust responsibility. The trust

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doctrine is both a fundamental concept in federal Indian law and a motivating force: virtually every law enacted by Congress during the past 40 years involving Indians and tribes has cited to, and found its support in, the federal government's trust obligations. The trust obligation creates a fiduciary duty owed by the federal government to tribes to protect or enhance tribal assets (economic, natural, human or cultural). It imposes fiduciary standards on the conduct of the Executive, carried out through executive agencies, to act with care and loyalty, make trust property income productive, enforce reasonable claims on behalf of Indians, and take affirmative actions to preserve trust property.

In the Federally Recognized Indian Tribe List Act of 1994, P.L. 103-45, Congress declared that the trust responsibility owed to federally recognized Indian tribes, and the government-to-government relationship between federally recognized tribes and the United States, includes federally recognized tribes in Alaska. 25 U.S.C. § 5130.

The trust obligation to tribes has been codified in a number of statutes to impose a duty on federal agencies to coordinate and consult with tribes when tribal resources are or may be impacted. Additional coordination and consultation obligations have been created by Presidential Memoranda, Executive Orders, and agency policies. The Tribe's Complaint cites no fewer than twenty of such memoranda, orders, and policies applicable to the Corps here, all of which pre-date the 2022 permits. Complaint, ¶¶ 112-115.

In addition to orders, policies and memoranda applicable to all Executive agencies,

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the Corps is bound by its own policies, memoranda and instructions, of which the 2023 *Tribal Consultation Policy Update* ("2023 Update") referenced in the Tribe's Complaint is simply the most recent. The 2023 Update is not the sole source of the Corps' consultation obligation. Indeed, more than two decades ago the Corps published its 1998 *Tribal Policy Principles*, CECW-AG 18 Feb 1998, which provides that when undertaking any action which may impact tribal rights or interests, the Corps is required to (1) recognize tribal sovereignty; (2) fulfill the federal trust responsibility; (3) interact on a government-to-government basis; (4) conduct pre-decisional, open, and honest consultation; (5) support tribal self-reliance, capacity building, and growth; and (6) preserve and protect natural and cultural resources. The Corps' conduct in issuing the permits for the Project violated all of those principals.

The Corps is also subject to the *Department of Defense Instruction number 4710.02: DoD Interactions with Federally Recognized Tribes*, adopted in 1998 and updated in 2018, which establish policies and procedures for early and meaningful consultation with tribes on a government-to-government basis for any proposed actions that will or may affect tribal natural, cultural, or treaty-protected resources; and its *Alaska Implementation Guidance for DoD Alaska Native Related Policies and Instructions*, 13 April 2020.

Courts have made it clear that in order to satisfy its obligations, any agency's consultation must be meaningful: it must occur early enough in the process that the tribe

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has the ability to influence the outcome of the permitting decision. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 720 (8th Cir. S.D. 1979) (decisions made by the Bureau of Indian Affairs regarding appointments to BIA supervisory positions set aside); *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774 (D. S.D. 2006) (changes in education funding); *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (D. S.D. 1995) (employment reductions). In each case, the courts found that the BIA had violated consultation requirements clearly established by federal law or **by specific BIA policy**.

The **Corps policies** cited in the Complaint are not the sole legal basis for the Tribe's failure to consult claim. Failure to meaningfully consult may violate both the general principles governing administrative decision-making, and also the agency's trust responsibility. *Oglala Sioux*, 603 F.2d at 721; *Wyoming v. United States DOI*, 136 F. Supp. 3d 1317, 1344 (Dist. Wyo. 2015) ("The Court also finds merit in the Ute Indian Tribe's argument that the BLM failed to consult with the Tribe on a government-to-government basis in accordance with its own policies and procedures.").

In evaluating whether an agency has acted arbitrarily or capriciously, courts must inquire whether the agency followed the necessary procedural requirements. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). During the course of this inquiry, the reviewing court must be satisfied that the agency not only employed procedures which conform to the procedural requirements of

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the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*., and § 701 *et seq*., but which also conform to the agency's own internal procedures. *Morton v. Ruiz*, 415 U.S. 199, 234-35, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974). In *Morton*, during its inquiry, the court relied on the *Bureau of Indian Affairs Manual*, which governed the internal operations of the Bureau and do not relate to the public, to evaluate whether the agency followed its own procedures. *Id*., at 234. This is true "even where the internal procedures are possibly more rigorous than otherwise would be required." *Id*. at 235; *see, also, Oglala Sioux*, 603 F.2d at 713 (BIA's conduct was arbitrary and capricious and procedurally defective because it was not made in accordance with BIA's procedure requiring prior consultation with the tribe); *United States v. Caceres*, 440 U.S. 741, 751 n. 14, 99 S. Ct. 1465, 1471 n. 14, 59 L. Ed. 2d 733, 743 n. 14 (1979) *and cases cited therein*.

Because the 2023 Update is not the sole source of the Corps' consultation obligations, the reference to the 2023 Update in the Tribe's Complaint should not result in dismissal of the claim. Instead, the court should allow an amendment or correction of the complaint because the November 1, 2012 Consultation Policy ("2012 Policy") is substantially similar to the parts of the 2023 Update cited in the complaint, which leaves the basis of the Tribe's claims intact, and would not prejudice the Corps in any way.

The Corps has expressed its commitment to engaging in government-to-government consultation with federally recognized tribes from its earliest policies and instructions in

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1998 through both the 2012 and 2023 Tribal Consultation Policies. 2012 Policy, at 3; 2023 update 2. While the 2023 policy reflects updates in language and a handful of procedural nuances, the core principles and triggers for consultation remain substantially similar.

Both policies stipulate that consultation is triggered when there are potential impacts to tribal rights, cultural resources, or lands, particularly when issuing permits. 2012 Policy, at 5(d)(2); 2023 Update, at 4(e) and 6(d)(ii). Both policies reaffirm the government's trust responsibility to tribes and recognize the need for meaningful consultation when decisions may affect tribal interests by adhering to the six Tribal policy principles. 2012 Policy, at 9; 2023 Update at 6. The scope of consultation under both the 2012 and 2023 policies remains largely consistent, requiring that the Corps incorporate these Policy planning, management, budgetary, operational, regulatory, and legislative initiatives, management accountability systems and ongoing policy and regulation development processes. *Id*. The 2023 policy offers expanded guidance on the consultation process, emphasizing more transparency and collaboration, but the fundamental criteria for initiating consultation have not changed in substance.

Given that the consultation triggers outlined in the 2023 policy are substantially similar to those in the 2012 policy, the reliance on the updated 2023 policy does not materially alter the legal basis for the claim and should not result in its dismissal. Under FRCP 15(a)(2), courts are instructed to "freely give leave" to amend complaints "when

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justice so requires."

Additionally, under Rule 8(e), courts are required to construe pleadings "so as to do justice." The use of the 2023 policy, when the 2012 policy was in effect at the time of the permit's issuance, does not constitute a substantive legal error or injustice to the Corps, but rather a minor procedural oversight that can be corrected without prejudice to either party. As the triggering mechanisms and consultation obligations are substantially similar, the factual and legal framework supporting the claim remains intact, and the inclusion of the 2023 policy does not mislead or improperly prejudice the Corps. The reference to the 2023 policy rather than the substantially similar 2012 policy is not fatal to the Complaint because it does not alter the core allegations that the Corps failed to engage in meaningful consultation.

The primary issue is whether the Corps failed to adhere to its consultation obligations, not which version of the policy was cited. Therefore, dismissal of the failure to consult claim on these grounds would be an overly harsh outcome, inconsistent with the liberal amendment principles established by federal procedural rules. Rather, under federal procedural rules, the court should allow the Tribe to amend the Complaint to reference the correct policy year, ensuring that the case can proceed on its merits rather than being dismissed on procedural technicalities.

The Tribe more than satisfied its obligations under Rule 8 and *Twombly* to state a

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short and plain statement of the claim arising from the Corps' failure to consult. *See* Complaint, ¶¶ 67 – 77 (describing Corps' acts and omissions before and after issuing permit that give rise to failure to consult claim, including wholly insufficient Tribal Consultation notice at ¶68); ¶¶ 110 – 123 (describing procedural rules and policies with which the Corps was required to comply to satisfy its consultation obligations and trust responsibility, and did not, including specific deficiencies in its consultation notice at ¶¶ 118-119 and ineffective after-the-fact meeting at ¶123); ¶¶ 136 – 140 (failure to consult in accordance with Corps' own policy was arbitrary, capricious and not in accordance with law in violation of the APA).

The Tribe's Complaint contain sufficient allegations of underlying facts to give fair notice to the United States and to enable it to defend itself effectively. The factual allegations that are taken as true plausibly suggest an entitlement to relief, and satisfy Rule 8, *Twombly*, and *Iqbal*. *See Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (describing common principles of pleading derived from *Iqbal* and *Twombly* and applying them to civil rights complaint).

C. The Tribe Can Seek Prevailing Party Fees and Costs Under the Equal Access to Justice Act for any of its Claims Against the United States

Congress enacted the Equal Access to Justice Act ("EAJA") to "eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority." *Ardestani v. INS*,

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502 U.S. 129, 138, 112 S. Ct. 515, 116 L. Ed. 2d 496 (1991). The EAJA partially waives the United States' sovereign immunity and allows prevailing parties to seek attorneys' fees and nontaxable costs if (a) the government's position was not "substantially justified" or (b) the government acted in bad faith. 28 U.S.C. § 2412(b), (d)(1)(A), (d)(2)(A). The EAJA also empowers a court to award taxable costs. 28 U.S.C. § 2412(a).

The EAJA applies to "any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity", 28 USCS § 2412, and therefore even if the Court dismissed claims 2, 3 and 4, the Tribe still has a claim against the United States, Claim 1, for which it would be entitled to prevailing party fees and costs, regardless of whether or not the Complaint specifically alleged that the Tribe was entitled to fees under the EAJA for the Corps' NEPA and APA violations.

A party seeking fees and costs under the EAJA does not need to affirmatively assert a claim for relief in a pleading before filing its fee application. *See, e.g., United States v. $12,248 U.S. Currency*, 957 F.2d 1513 (9th Cir. 1992) (awarding fees under EAJA to successful defendant in suit seeking forfeiture of currency seized from defendant's residence via post-judgment fee application).

In order to establish eligibility for an award of attorneys' fees, the EAJA requires only:

> (1) that the claimant be a "prevailing party"; (2) that the government position was not "substantially justified"; (3) that no "special circumstances make an

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> award unjust"; and, (4) that the fee application be submitted to the court within 30 days of final judgment and be supported by an itemized statement.

Crawford v. Sullivan, 935 F.2d 655, 656 (4th Cir. 1991) (quoting 28 U.S.C. § 2412).

In the event the Tribe prevails on any of the claims asserted against the United States in this civil action, it has the right to seek an award of fees and costs pursuant to the EAJA. Defendants' motion to dismiss Claim 4 should be denied.

III. CONCLUSION

Defendants' motion should be denied, because the Tribe has sufficiently alleged facts and law to state a claim upon which relief can be granted, and complied with the standards articulated in Rule 8, *Twombly*, and *Iqbal* for each of the claims asserted.

In the alternative, if the Court determines that partial dismissal of any of its claims is warranted, the Tribe should be granted leave to amend its complaint to address any deficiencies. *Reddy*, 912 F.2d at 296; *Cook, Perkiss & Liehe, Inc.*, 911 F.2d 246-47.

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Signed at Seattle, Washington this 24th day of September, 2024.

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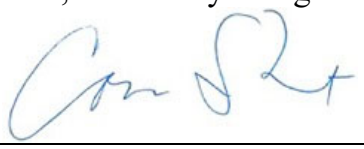

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2024, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in Case No. 3:24-cv-00137 who are registered CM/ECF users will be served by the CM/ECF system

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