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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

DEFENDANTS' REPLY IN SUPPORT OF ITS MOTION TO PARTIALLY DISMISS PLAINTIFF'S COMPLAINT

Defendants, the United States Amy Corps of Engineers and Lieutenant General Scott A. Spellmon, in his official capacity as Chief of Engineers and Commanding General,[1] United States Army Corps of Engineers, respectfully submit the following Reply in Support of their Motion to Partially Dismiss Plaintiff's Complaint.

ARGUMENT

The Village of Dot Lake (Tribe) contests the Corps' compliance with the National Environmental Policy Act (NEPA), the Alaska National Interest Lands Conservation Act (ANILCA), and the Corps' Tribal Consultation Policy in issuing a Section 404 permit authorizing the filling of 5.2 acres of wetlands at a gold mine operating on private lands owned by the Upper Tanana Athabascan Village of Tetlin. Defendants moved to dismiss Claims 2, 3, and 4 for failure to state a claim. On September 24, 2024, the Tribe filed a response in opposition to the Defendants' Motion to Partially Dismiss. But in doing so, the Tribe failed to rebut Defendants' arguments that ANILCA does not apply to the Corps' permitting of activities on private land. Additionally, the Tribe did not grapple with the Ninth Circuit's case law prohibiting claims against federal agencies based on internal policies that lack the force and effect of law. And the Tribe failed to address the Defendants' arguments that the Equal Access to Justice Act (EAJA) does not create an independent cause of action.

[1] William H. "Butch" Graham, Jr. assumed duties as the 56th Chief of Engineers and Commanding General, United States Army Corps of Engineers on 13 September 2024.

Thus, Claim 2 should be dismissed because, in issuing the Section 404 permit, the Corps did not act as a *land management agency* determining the disposition of *public lands* under its primary jurisdiction. Likewise, Claim 3 should be dismissed because the Corps' Tribal Consultation Policy and other policy documents referenced by the Tribe in its Response do not have the force and effect of law and are therefore not enforceable 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. The Tribe's Response Ignores the Text of ANILCA and Ninth Circuit Case Law, Both of Which Require Claim 2 Be Dismissed.

The Tribe's Claim 2 should be dismissed because the plain language of ANILCA does not require the Corps to complete a subsistence evaluation, and the Tribe's appeals to policy considerations cannot change ANILCA's plain meaning or Ninth Circuit case law.

Defendants have no dispute with the Tribe about the purpose of ANILCA or Congress's intent in passing the statute. But the Tribe cannot ignore the plain text of the statute. As we explained in our opening brief, Section 810(a) of ANILCA only applies to agency decisions "to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of *public lands* . . . ." 16 U.S.C. § 3120(a) (emphasis added). And only the agency with "*primary jurisdiction* over such lands" is required to conduct the Section 810(a) subsistence evaluation. *Id.* (emphasis added).

Although the Tribe claims the Corps' issuance of a Section 404 permit "was a determination whether to 'withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands . . .'," Pl.'s Opp'n to Mot. to Dismiss at 5, such claims are false.

Under ANILCA, "the term 'public lands' means land situated in Alaska which . . . are Federal lands." 16 U.S.C. § 3102(3). "The term 'Federal land' means lands the title to which is in the United States." *Id.* § 3102(2). Additionally, the Ninth Circuit has 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." *Alaska v. Babbit*, 72 F.3d 698, 703–04 (9th Cir. 1995). This permit authorizes the filling of 5.2 acres of *non-navigable wetlands* on *private* land, and title to this land is owned by the Upper Tanana Athabascan Village of Tetlin, not the United States. Compl. ¶¶ 2, 13, 21. Thus, the Corps made no decision about the disposition of public lands when it issued this Section 404 permit. Indeed, the Tribe has not alleged that the private land in this case qualifies as public land under ANILCA. Instead, it asserts that the Corps' actions on private lands "may" have downstream effects on other public lands and that this possibility is sufficient to require the Corps to conduct an ANILCA subsistence analysis. Pl.'s Opp'n to Mot. to Dismiss at 5. To support this assertion, the Tribe cites *John v. United States*, 720 F.3d 1214 (9th Cir. 2013). But this case stands for the opposite proposition.

John v. United States involved consolidated challenges to the Secretary of Interior's and Secretary of Agriculture's ANILCA regulations. 720 F.3d 1214, 1218 (9th Cir. 2013). The challenge most relevant here was brought by tribal members and contests the Secretaries' decision to exclude navigable waters upstream and downstream of federal reservations from the definition of public lands. *See id*. at 1223, 34, 39–40. The tribal plaintiffs in *John* sought to "extend the rural subsistence priority to all waters upstream and downstream from, and not only adjacent to, federal reservations, on the theory that what happens elsewhere may affect what happens within a reservation." *Id*. at 1239–40. But the Ninth Circuit rejected this theory finding it was "unsupported by ANILCA's text and conflicts with [Circuit precedent]." *Id*. at 1240. The Ninth Circuit explained that "for the rural subsistence priority to apply to navigable waters outside federal reservations, the waters have to be 'appurtenant to' the reservations and so 'necessary to accomplish the purposes for which the land was reserved' that 'without the water the purposes of the reservation would be entirely defeated.'" *Id*. (quoting *Babbit*, 72 F.3d at 703). The Tribe has not alleged that the 5.2 acres of wetland filled by Peak Gold are "necessary to accomplish the purposes" of either federal reservation ostensibly at issue in this case—the Tetlin National Wildlife Refuge (TNWR) and the Bureau of Land Management (BLM)-owned land west of the project site. Instead, the Tribe advances the same theory rejected by the Ninth Circuit in *John*.

But even if we accept the Tribe's premise, which we do not, the claim should be dismissed because the Corps is not the federal land management agency with primary jurisdiction over the public lands allegedly impacted by the mining activity: The TNWR is managed by U.S. Fish and Wildlife Service and the BLM-owned land is managed by BLM.

The Ninth Circuit has already disallowed claims like those presented by the Tribe. For example, in *City of Angoon v. Hodel*, the plaintiffs challenged, among other things, the issuance of Clean Water Act permits by EPA and the Corps for a log transfer facility located on privately held lands *situated within the boundaries of 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's "public lands." *Id.* at 1027. Despite connections to the public lands that were significantly less attenuated than the connections alleged in this case, the Ninth Circuit rejected the plaintiffs' argument on several grounds, the most relevant being 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; *see also Akiak Native Cmty. v. E.P.A.*, 625 F.3d 1162, 1173 (9th Cir. 2010) (holding that because EPA did not have "primary jurisdiction" over "public lands" in Alaska it was not required to complete ANILCA subsistence evaluations).

The Tribe's response provides no contrary authority and fails to otherwise grapple with the blackletter law of ANILCA. In issuing this permit the Corps made no decisions about the management or disposition of public lands. *See* 16 U.S.C. § 3120(a). And the Corps does not have "primary jurisdiction" over the various "public lands" alleged to be affected in this case. *See Akiak Native Cmty.*, 625 F.3d at 1173; *City of Angoon*, 803 F.2d at 1028. Thus, the Tribe fails to state a claim upon which relief can be granted and Claim 2 must be dismissed.

II. No Matter if the Tribe's Claim Is Based on the Army Corps of Engineers' 2012 or 2023 Tribal Consultation Policy, Claim 3 Must Be Dismissed Because Neither Policy Can Sustain a Claim Against the Corps.

In response to our Motion to Partially Dismiss, the Tribe now disavows its reliance on the Corps' 2023 Tribal Consultation Policy and asks the Court to "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." Pl.'s Opp'n to Mot. to Dismiss at 11. Allowing such an amendment would be futile, however, because the Corps' 2012 Policy constitutes an internal agency guidance document that lacks the force and effect of law.

Ninth Circuit precedent is unambiguous: 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)). Thus, "allegations of noncompliance with an agency statement that is not binding on the agency" are not subject to review. *Id*. (quoting *W. Radio*, 79 F.3d at 900).

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).

As with the 2023 Policy, the Corps' 2012 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. *W. Radio*, 79 F.3d at 901. First, the 2012 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, *Tribal Consultation Policy* § 10 n.2 (2012).[2] 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 comply with portions of the 2001 Policies . . . ."); *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 2012 Policy was "not promulgated in accordance with the procedural requirements of the [APA]." *W. Radio*, 79 F.3d at 901. Failure to comply with the APA's procedural requirements is dispositive. *See id*.

The case law cited by the Tribe in their response does not contradict the conclusion that the 2012 Policy lacks the force and effect of law. First, the Tribe's statement that in *Morton v. Ruiz*, "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," Pl.'s Opp'n to Mot.

[2] 2012 Tribal Consultation Policy can be found at https://www.spa.usace.army.mil/Portals/16/docs/civilworks/tribal/USACE%20Consultation%20Policy%20pdf.pdf

to Dismiss at 11, is misguided. *Morton* involved a challenge to BIA's denial of benefits to Native Americans who did not reside on a reservation. *Morton v. Ruiz*, 415 U.S. 199, 201 (1974). The basis of this denial was the *Bureau of Indian Affairs Manual*. *Id*. at 234–35. The Court necessarily considered the Manual but ultimately concluded that it lacked the force of law because it was not promulgated in compliance with the APA. *Id*. at 235–36.

The Tribe's reliance on *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979), is similarly misplaced. In *Oglala Sioux*, a tribe challenged the removal of the Superintendent of the Pine Ridge Agency without prior consultation. *Id*. at 709–11. The Eighth Circuit concluded that the removal of the superintendent was arbitrary, capricious and otherwise not in accordance with law because it was based on general Civil Service regulations that violated section 12 of the Indian Reorganization Act of 1934. *Id*. at 714. Although the Court also considered if the Bureau Indian Affair's consultation guidelines had been violated, it did not address whether the guidelines had the force and effect of law because BIA only argued that the consultation requirements set forth in the guidelines did not apply to the removal of an agency superintendent. *Id*. at 718.

Hoopa Valley Tribe v. Christie is more directly on point with regards to the circumstances of this case. *See* 812 F.2d 1097, 1103 (9th Cir. 1986). In *Hoopa Valley*, the Ninth Circuit clarified that BIA's tribal consultation guidelines did not establish legal standards that could be enforced against the agency because the guidelines were not "the same as regulations that must be applied because 'the rights of individuals are affected.'"

Id. (quoting *Morton*, 415 U.S. at 235–36). Like the Corps' 2012 Tribal Consultation Policy, the guidelines were merely unpublished directions, in letter form. *See id*.

Finally, the Tribe's generalized appeal to the Federal Government's tribal trust responsibility does not salvage Claim 3. *See Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (holding that the "obligation of trust incumbent upon the Government in its dealings with Indian tribes . . . does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations." (quotations and citations omitted)). As the Supreme Court has explained, "[t]he Federal Government owes judicially enforceable duties to a tribe only to the extent it expressly accepts those responsibilities. . . . Whether the Government has expressly accepted such obligations must train on specific rights-creating or duty-imposing language in a treaty, statute, or regulation." *Arizona v. Navajo Nation*, 599 U.S. 555, 564 (2023) (quotations and citations omitted). The Tribe's complaint fails to specify how the Corps has breached any duty-imposing treaty, statute, or regulation. And although the Complaint does contain a litany of what the Tribe describes as over twenty "Presidential Memoranda, Executive Orders, and agency policies," these memoranda, orders, and policies are not rights-creating treaties, statutes, or regulations and it is unclear how they apply to the Corps other than that they reference the Federal Government's tribal trust responsibility. Compl. ¶ 112; *see id*.; *cf*. *Ute Indian Tribe of the Uintah & Ouray Indian Rsrv. v. United States*, 145 Fed. Cl. 609, 624 (2019) (holding that the Tribe failed to meet

its burden because it did not identify "a specific-rights creating duty that mandates compensation" and offered conclusions without any statutory analysis).

Thus, Claim 3 must be dismissed because allegations of noncompliance with the Corps' Tribal Consultation Policy are not subject to judicial review.

III. EAJA Cannot Serve as the Basis for a Standalone Claim Against the Federal Government and Therefore Claim 4 Must Be Dismissed.

In our Motion to Partially Dismiss, the Federal Defendants asked this Court to dismiss Claim 4 because 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). The Tribe, in its response, does not provide any authority to the contrary. And, in fact, acknowledges that a "party seeking fees and costs under the EAJA does not need to affirmatively assert a claim for relief in a pleading . . . ." Pl.'s Opp'n to Mot. to Dismiss at 15. Indeed, because EAJA merely "authorizes the payment of fees to the prevailing party in an action against the United States" and does not contain a right of action, the Tribe cannot assert EAJA as an independent claim at the pleading stage. *Paulson*, 507 F. Supp. 2d at 62 n.2 (quoting *Scarborough v. Principi*, 541 U.S. 401, 405 (2004)); *see Pham v. Jaddou*, No. 23-cv-1058-W-KSC, 2024 WL 436351, at *7 (S.D. Cal. Feb. 5, 2024). If the Tribe prevails on the merits, then at the remedy stage of the proceeding it may move to recover fees under EAJA. 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.

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: October 8, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 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.

s/ *Joseph M. Manning*

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this brief contains 2935 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: October 8, 2024. s/ *Joseph M. Manning*