IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, v. U.S. ARMY CORPS OF ENGINEERS, Defendant-Cross-Defendant, and DAKOTA ACCESS, LLC, Defendant-Intervenor-Cross-Claimant.	Case No. 1:16-cv-1534-JEB

PLAINTIFF STANDING ROCK SIOUX TRIBE'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

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Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

TABLE OF AUTHORITIES

CASES

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Seattle, WA 98104
(206) 343-7340

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

STATUTES

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

OTHER AUTHORITIES

REGULATIONS

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Seattle, WA 98104
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Seattle, WA 98104
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INTRODUCTION

This case challenges actions by the U.S. Army Corps of Engineers ("Corps") that authorize the Dakota Access Pipeline ("DAPL"), a 1,172-mile, 570,000 barrel-per-day crude oil pipeline originating in North Dakota and ending in Illinois. The Standing Rock Sioux Tribe ("Tribe") brought this case because of the potentially disastrous impacts of the pipeline on its Treaty lands and waters, especially at the proposed Lake Oahe crossing site just upstream of the Tribe's Reservation on the Missouri River. An oil spill affecting Lake Oahe would pose an existential threat to the Tribe's rights, culture, and welfare, and would fundamentally undermine its Treaty-protected rights to the integrity of its homelands and the waters that sustain the Tribe.

After the Tribe brought suit against the Corps over an initial set of permit decisions in late July 2016, the Corps properly decided it needed to do more to recognize and ensure protection of the Tribe's Treaty rights impacted by the pipeline. The Corps withheld the final authorization—an easement under the Mineral Leasing Act ("MLA")—for DAPL to cross the Missouri River pending consideration and protection of the Tribe's Treaty rights. In December of 2016, after extensive analysis and input from the Tribe and others, the Corps committed to prepare a full environmental impact statement ("EIS") to address the Tribe's rights, alternative pipeline routings outside of the Tribe's Treaty areas, and oil spill risks. The decision relied on a comprehensive legal opinion by the Department of the Interior Solicitor, confirming that the Tribe retains expansive Treaty rights in and around Lake Oahe that must be assessed and protected before a decision is issued. The Corps formally initiated this process on January 18, 2017.

Within a few days of his inauguration, the new President abandoned this commitment—perpetuating our nation's pattern of broken promises to the Tribe—and directed the Army to "review and approve" pipeline permits on an expedited basis. The Corps obeyed this direction,

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(206) 343-7340

and on February 8, 2017, issued the easement and summarily terminated the EIS process. Construction is now underway. The Tribe now seeks expedited summary judgment on claims that this easement decision, as well as the Corps' July regulatory actions and accompanying NEPA analysis, are arbitrary, capricious, and contrary to law.

BACKGROUND

I. THE STANDING ROCK SIOUX TRIBE AND THE OAHE SITE

A. The Fort Laramie Treaties and Subsequent Statutes

This motion arises in the context of a long and troubling history of the United States government failing to honor the Tribe's Treaty rights. The Standing Rock Sioux Tribe ("Tribe") is a federally recognized Tribe and successor to the Great Sioux Nation, or *Oceti Sakowin*. In the 1851 Fort Laramie Treaty, Sept. 17, 1851, 11 Stat. 749, several tribes of the northern Great Plains, including the Sioux, agreed to establish peace and recognize the territory of each tribe, and the United States recognized an expansive territory for the Great Sioux Nation, including large portions of North and South Dakota, and other states. *Id.* Art. 5; Ex. 1 (map of 1851 Sioux reservation). The United States bound itself to "protect" the Great Sioux Nation "against the commission of all depredations by the people of the said United States..." 11 Stat. 749, Art. 3. However, soon after the Treaty was signed, the discovery of gold led to an influx of immigrants into the Sioux's reserved territory. The United States did not stop these incursions or their destruction of the buffalo on which the Sioux relied, and conflicts ensued. *See United States v. Sioux Nation*, 448 U.S. 371, 376-382 (1980).

The Fort Laramie Treaty of 1868, April 29, 1868, 15 Stat. 635, was an effort to restore peace. In that Treaty, the Sioux reserved the Great Sioux Reservation for the "absolute and undisturbed use and occupation" of the Sioux Nation. *Id.* Art. 2; *see* Ex. 2 (map of 1868 reservation). The Treaty secured for the Sioux an additional area of land, defined as "unceded

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Indian territory," and the United States promised that "no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained, to pass through the same." 15 Stat. 635, Art. 16. The Treaty also recognized that the Sioux retained rights to hunt over an extensive additional territory. *Id.* Art. 11. The United States further promised that no cession of lands by the Tribe would be valid "unless executed by at least three-fourths of all the adult male Indians." *Id.* Art. 12.

The United States soon violated the promises it made in these treaties by allowing gold miners and others to trespass on the reserved and unceded Sioux lands, and telling the Sioux they could no longer hunt where they had reserved rights to hunt. *Sioux Nation*, 448 U.S. at 383. Not only did the United States destroy the buffalo and order the Sioux to leave their hunting grounds, but it also refused to provide the promised subsistence rations. An 1877 statute took large portions of lands reserved for the Sioux, without the Tribe's consent and in violation of Treaty terms. *See* Act of Feb. 28, 1877, 19 Stat. 254; *Sioux Nation*, 448 U.S at 388 ("a more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history…"). Subsequently, in 1889, Congress enacted another statute that stripped vast portions of the Treaty lands, leaving several smaller Sioux Reservations, including the modern-day Standing Rock Sioux Reservation. Act of Mar. 2, 1889, 25 Stat. 888; *see* Ex. 3 (map of current reservation).

In 1944, Congress enacted the Flood Control Act, Pub. L. 78-534, 58 Stat. 887, which authorized the Army Corps of Engineers to construct five dams along the Missouri, including the Oahe Dam. Congress subsequently passed a law taking 56,000 acres of the Tribe's Reservation lands along the Missouri River. Act of Sept. 2, 1958, Pub. L. No. 85-915, 72 Stat. 1762. The taken lands were the best remaining Reservation lands, supplying 90% of the Reservation's timber, as well as wild berries and other plants essential the Tribe's diet and religious purposes,

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(206) 343-7340

habitat for animals hunted for subsistence, and fertile lands where families grew their food. S. Rep. No. 102-267, at 188 (1992). The United States forced hundreds of Standing Rock families out of their homes and away from the rich, sheltered lands along the Missouri River to windswept uplands. *Id.* at 188-89. These losses devastated the Tribal economy and culture. AR 66166 at 14-15 ("The Oahe flooding of 56,000 acres in particular was a devastating event in the life of the Tribe, which caused extensive physical, economic, and social dislocation").

B. The Federal Government's Treaty and Trust Obligations to the Tribe

Today, the Standing Rock Sioux Reservation encompasses roughly 3,500 square miles of North and South Dakota, with Lake Oahe running along the Reservation's eastern boundary. The Tribe holds paramount water rights in the Missouri River. *Winters v. United States*, 207 U.S. 564, 577 (1908) ; *Arizona v. California*, 460 U.S. 605, 616 (1983); *see also* AR 5750; Ex. 4 (Interior Solicitor Legal Opinion, Dec. 4, 2016) ("Solicitor Op."). This *Winters* right is a property right that entails both a sufficient quantity and quality of water to meet these beneficial purposes. *See, e.g., United States v. Gila River Valley Irrigation Dist.*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996), *aff'd* 117 F.3d 425 (9th Cir. 1997). The Tribe relies upon the waters of Lake Oahe for homes, a hospital, clinics, schools, businesses and government buildings throughout the Reservation, for agriculture (both farming and grazing), and for industrial purposes. The waters of the Missouri are also sacred to the Tribe and are central to the Tribe's practice of religion. Archambault PI Decl. (ECF 6-1) at ¶¶8, 12; Eagle PI Decl. (ECF 6-2) at ¶¶11, 25, 30. The Tribe's ability to protect the health, welfare and economy of its people depends on a safe supply of water from Lake Oahe. The Tribe and its members also retain rights to hunt, fish and gather on the Reservation, including in and around Lake Oahe. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. Dion*, 476 U.S. 734, 738 (1986) ("Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them . . . [and] [t]hese rights need not be

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expressly mentioned in the treaty"). These rights were explicitly preserved when Congress authorized the Oahe project, Pub. L. 85-915, § 10, 72 Stat. 1762, 1764, and impose on the United States a duty to refrain from degrading the habitat on which those rights depend. *No Oilport! v. Carter*, 520 F. Supp. 334, 371–72 (W.D. Wash. 1981); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation. Dist.*, 763 F.2d 1032 (9th Cir.); *see also United States v. Washington*, 827 F.3d 836, 852 (9th Cir. 2016). Tribal water rights under the *Winters* doctrine include a sufficient source of water necessary to support hunting and fishing rights. *United States v. Adair*, 723 F.2d 1394, 1409, 1411 (9th Cir. 1983).

The Tribe's rights to hunt, fish and gather were a critical element of the 1868 Treaty of Fort Laramie, were expressly preserved in law authorizing the Lake Oahe project, and continue to provide an essential source of subsistence for the Standing Rock people. *See* Ex. 15. Lake Oahe offers a diverse subsistence fishery for the Tribe. *Id.* at ¶ 5 ("On the Reservation, jobs are scarce and poverty levels are high, so for many Tribal members, fishing is necessary to provide enough to eat for their families."). The Lake Oahe shoreline on the Reservation is also essential habitat for game. *Id*. at ¶¶ 6-7.

> Subsistence hunting on the Reservation is an activity that is rooted in Tribal tradition—as hunting was how our people lived from time immemorial. Today subsistence hunting remains a central feature of life on the Reservation. Hunting provides an important component of the diet of a large number of Tribal members. Both because of Tribal traditions and the high poverty levels on the Reservation, many Tribal families rely heavily on game to feed their families, especially in the winter months.

Id. at ¶ 7. Hunting is also central to the Tribe's cultural and religious practices. *Id*. at ¶11.

By virtue of the Treaties, its taking and control over Lake Oahe, and federal statutes, including the MLA, 30 U.S.C. § 185(h), the United States has assumed a trust responsibility to the tribes. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003). The U.S. Supreme Court has long recognized the "undisputed existence of a general trust relationship

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between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The trust duty commits the federal government to protect Indian tribes' rights, resources, and interests as a guardian would protect those of his or her ward. *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 2 (1831). In discharging this responsibility, federal agencies must observe "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). Executive Orders and agency directives have consistently re-affirmed the federal government's trust responsibility. *See* Exec. Order 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000); AR 66767. Both the Department of Defense and the Army Corps have memorialized their trust obligations in policies that are binding on the Corps. *See, e.g.*, Hasselman PI Decl., Ex. 60 (ECF 24-7) at 3, 9; *Nw. Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003) (manual binding on Corps).

In sum, the Tribe retains water, fishing, and hunting rights at Oahe that are fundamental to the Tribe's survival and well-being, and the Corps has a trust obligation to protect the Tribe's rights when it issues permits that affect them. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999), as amended, 203 F.3d 1175 (9th Cir. 2000). *See also Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972). The Corps "owes a fiduciary duty to ensure that the [Indian] Nation's treaty rights are not abrogated or impinged… [The trust responsibility] mandates that the Corps take treaty rights into consideration" when it issues permits. *Nw. Sea Farms, Inc.*, 931 F. Supp. at 1520.

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II. THE DAKOTA ACCESS PIPELINE AND THE LAKE OAHE CROSSING POSE SERIOUS THREATS TO THE TRIBE'S TREATY RIGHTS.

A. The Tribe Immediately and Repeatedly Raised Concerns About the Impacts of the Lake Oahe Crossing on its Treaty Rights.

The proposal to build the Dakota Access pipeline across the Tribes' historic Treaty lands, and across the Missouri River one-half mile upstream of the Reservation, continued a historic pattern of failing to respect the Tribe's Treaty rights. The Tribe conveyed its concerns about the routing of this pipeline in such a sensitive location at the earliest opportunity, even before DAPL applied for permits. AR 67148 ("This pipeline project is extremely important to the SRST because of its proximity to our homelands. It is proposed to cross our boundaries under the 1851 and 1868 Fort Laramie treaties.")[1]; AR 67157; 67368. The Tribe also communicated its concerns directly to DAPL. Chairman Archambault explained to DAPL that the pipeline would cross the Tribe's Treaty boundaries, Ex. 6 at 4, and Tribal officials described the historic and cultural importance of the area. *Id.* at 16 ("And for us to officially endorse or accept a proposal that would negatively impact our cultural sites, our prayer sites, our duties and responsibilities as stewards of the land, it would be unacceptable and goes against the very intent of our office in fighting and protecting and preserving what we have here, what we have left for our people and our children."). The site proposed for the Oahe crossing is adjacent to the community of Cannonball, where roughly a thousand people live at the Reservation's northern border.

Undeterred, DAPL went forward, and applied for the three Army Corps authorizations needed for the controversial Oahe crossing site: (1) "verification" that the Oahe crossing was authorized under Clean Water Act ("CWA") Nationwide Permit ("NWP") 12; (2) a Rivers and

[1] This email, in which the Tribal Historical Preservation Office reached out to the Corps to express deep concern about the project, was not provided in the record for the preliminary injunction proceedings, and was logged in a "tribal consultation spreadsheet" as follows: "SRST-attempts to arrange a meeting." *See* ECF 21-9.

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(206) 343-7340

Harbors Act ("RHA") § 408 permit to impact the federally managed reservoir; and (3) a real estate easement, required by the MLA, to cross federal land on either side of the river. As the permit process unfolded, the Tribe reaffirmed its strong objections to the pipeline's route in numerous letters and meetings. *See, e.g.*, AR 67023 ("We still consider the taken lands to be our lands."); AR 66988 (Tribe is "extremely concerned" about sacred sites); AR 66811 (documenting risk to cultural resources and oil spills); AR 66811 at P-1 (documenting lack of consultation with Tribe on project in ancestral lands).[2]

B. The Corps' Environmental Assessment Ignored the Tribe's Concerns.

In December 2015, the Corps released a deeply flawed draft environmental assessment ("EA"), prepared by DAPL, that made no mention of the pipeline's implications for the Tribe's Treaty rights, the taken Treaty lands, the waters that sustain the Tribe, or its subsistence hunting, fishing and gathering rights. ECF 6-19. Nor does it assess the risks of oil spills. The Draft EA's maps even failed to identify the Reservation. *Id*. at 126. The Draft EA also revealed that DAPL had originally proposed routing the pipeline across the Missouri River ten miles north of Bismarck, North Dakota, but abandoned that route because of the risks of an oil spill to downstream municipal water supplies, people, and the environment. *Id.* at 6.

The Tribe submitted several lengthy sets of technical and legal comments on the Draft EA documenting the cultural importance of the proposed crossing site, as well as its proximity to water intakes and fish and wildlife relied on by Tribal members for "subsistence, cultural, and religious practices." AR 69152 at 8-9; *id* at 9 ("the draft EA is completely silent on the close

[2] In its preliminary injunction order, this Court found that the Tribe had not taken opportunities to consult with the Corps about the project, but this finding was based on an incomplete record and pertained only to consultation under the National Historic Preservation Act, which is not at issue in this motion. The administrative record shows that the Tribe actively presented its position to the Corps and DAPL and engaged fully in the NEPA process from the beginning.

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(206) 343-7340

proximity of the Pipeline to the Reservation boundary… [and] does not provide a sufficient analysis of the risk of pipeline leaks or spills"); AR 66166 at 6 (discussing government's treaty and trust obligations to protect Tribe's significant interests in Lake Oahe); AR 84802 at 4 (laying out evidence of oil spill risks). The Tribe urged the Corps to prepare an EIS to assess alternative routes that did not cross the Missouri at a place with such deep cultural significance and where the Tribe had Treaty rights. *See, e.g.*, AR 67074 at 2; AR 67025; AR 4777.

Several federal agencies urged the Corps to give greater consideration to the Tribe's interests. The U.S. Department of the Interior, the agency with extensive responsibility for ensuring fulfillment of the U.S. trust responsibility, asserted that the "potential impact on trust resources" required a full EIS. AR 5750. Similarly, the U.S. Environmental Protection Agency sought more robust review, particularly of risks to water and to Tribal resources. AR 74021 ("the document lacks sufficient analysis of direct and indirect impacts to water resources [and] lacks information on the measures that will be required to assure that impacts from construction and operation of the pipeline are not significant"); AR 66288 (recommending additional analysis of water impacts and environmental justice); AR 68891 ("Tribal interests have not been addressed sufficiently."). Other Tribes raised similar concerns. *See*, *e.g.*, AR 65507; AR 6056.

Despite these objections, DAPL pursued an "aggressive" approach, "pushing for early approvals." AR 72442; *see A*R 80016 (pipeline "moving on a regulatory fast track with no other purpose than to accommodate the applicant's construction schedule"). Corps staff complained of DAPL's "blatantly racist attitudes" towards Indians. AR 64200 ("Someone needs to tell Joey [Mahmoud] that the next RACIST comment will shut down the entire project."). Despite the interagency disputes and the formidable Tribal concerns, DAPL started building the pipeline outside of Corps jurisdictional areas in May 2016, before it had obtained any federal permits.

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On July 25, 2016, the Corps released two of the required permits–a verification that DAPL was in compliance with NWP 12, and a § 408 determination, AR 67342; AR 71180, along with a final environmental assessment ("Final EA") and finding of no significant impact ("FONSI"). AR 71220; 71174. The Final EA acknowledged the Tribe's existence, but only in conclusory statements dismissing the risks to the Tribe. It EA barely mentions, and makes no attempt to analyze, the Tribe's Treaty rights or how the project would affect them, and it contains errors of fact regarding the Tribe's reliance on the waters of Lake Oahe. Despite these fundamental failings, the Corps relied on the Final EA to justify forgoing a full EIS, as Interior and the Tribe had demanded. The Tribe immediately filed this lawsuit and sought a preliminary injunction under its historic preservation claims, which this Court denied on September 9, 2016.

III. THE CORPS SUBSEQUENTLY DECIDED THAT THE TRIBE'S TREATY RIGHTS AND OIL SPILL RISKS WARRANT FURTHER CONSIDERATION.

That same day, the Corps, along with the Justice and Interior Departments, announced it would not issue the easement until it addressed "important issues" raised by the Tribe and reviewed the EA supporting its previous decisions. ECF 66-3 at 215. The agencies asked DAPL to cease construction within 20 miles of Lake Oahe, a request that the company rejected. DAPL continued towards the banks of Lake Oahe through the fall of 2016, leading to multiple confrontations between overly aggressive police and water protectors.[3] Ex. 7; Ex. 8.

A. Evidence of Expansive Treaty Rights Impacted by the Pipeline and Expert Reports Documenting Flaws in the EA's Oil Spill Risk Assessment

The Tribe engaged fully in the Corps process. *See*, *e.g.*, Ex. 9 (framing fundamental

[3] DAPL knowingly proceeded with construction at its own risk. *See* Hasselman PI Decl., Ex. 47 (ECF 6-60) at 5; Ex. 48 (ECF 6-61) at 9 ("Any such activities [*i.e.*, construction prior to receiving Corps permits] will be conducted at the company's own risk."); PI Order at 52; AR 5729 ("Talked to Joey [Mahmoud]– he is aware that any work in [federally regulated waters] is taken at his own risk…").

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issues around pipeline); Ex. 10 (further documenting oil spill risk); Ex. 11; Ex. 12. The Tribe documented extensive use of Lake Oahe and its shorelines for subsistence hunting and fishing, Ex. 14, and explained how the pipeline would impact these and other Treaty rights. Ex. 15. A key focus of the Tribe's comments was DAPL's oil spill risk analysis and spill response planning. The Tribe's comments on the Draft EA had provided the Corps extensive information highlighting the risks and impacts of oil spills, including documentation that pipeline leaks and spills—from small to catastrophic—are commonplace. AR66765 at 10-13; AR 66166 at 16-23; AR 84802 at 4-8 (including multiple attachments). For example, the Tribe and others highlighted the fact that the most effective leak detection systems are effectively blind to leaks of below 2-3% of pipeline volume. AR 84802 at 6. The Tribe submitted an expert review of the Final EA that found it "seriously deficient." Ex. 13 at 1 ("Accufacts Report") ("EA … cannot support the finding of no significant impact, even with the proposed mitigations."). The Accufacts report noted the prevalence of high risk landslide areas that was not evaluated in the EA. *Id*. at 3 ("Statements/inferences in the EA that pipe design/steel/weld properties can mitigate the risks of landslide threat are very misleading, if not downright false."). The report also faulted the EA's failure to include "additional information on those DAPL segments not on the easement, but that could affect the easements in the event of pipeline failure," *id*. at 4, and found that the EA had overstated the effectiveness of remote sensing technology. *Id*. at 4-6.

The Oglala Sioux submitted an expert report finding that the EA had misrepresented the average spill volumes. Ex. 16 ("EarthFax Report") at 2-3 ("the EA should have considered spill volumes well in excess of 100 bbl as a reasonable incident scenario rather than implying that a 4 bbl spill is the norm"). The report identified errors in the Missouri River discharge rates, inappropriate use of screening criteria to determine impacts, and a failure to adequately consider

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spill response in dangerous winter conditions. *Id*. For example, the report noted that the EA used a drinking water contaminant limit twice that set under the applicable North Dakota water quality standards. *Id*. at 5. Another expert report later submitted by the Cheyenne River Sioux Tribe observed that the Lake Oahe crossing would constitute the longest horizontal directional drilling ("HDD") bore for crude oil under freshwater anywhere in the world. Ex. 21 at 8 ("Envy Report"). The report found it both "unconscionable" and "mystifying" that a full environmental review had not been prepared. *Id*. at 16, 9 ("It is our experience that most other applicable permitting agencies around the World would have rejected this FONSI and required an [EIS]").[4]

B. Phase 1 of the Corps' Review, Focusing on the EA

Meanwhile, the Corps conducted its own internal review of the EA. On October 20, 2016, the Army's Chief Counsel issued an internal memorandum stating his opinion that the Final EA satisfied NEPA's "hard look" standard under governing caselaw. Ex. 22 ("Cooper Memo"). The Cooper Memo conceded shortcomings in the EA, including its failure to assess the extent and meaning of the Tribe's Treaty rights, its skewed environmental justice analysis, and its cursory discussion of the Bismarck crossing and the Corps' rejection of it. It tried to fill some of the void by briefly discussing the Treaties, admitting factual errors, and providing additional information. However, it never explored where Tribal members hunt, fish, or use the shores of Lake Oahe for religious ceremonies, the Tribe's dependence on Lake Oahe for water and subsistence, or how an oil spill would impact these rights and the Tribe. Indeed, the Memo went so far as to say that if the EA had addressed these issues, it "would not have added anything" and "would not have resulted in additional disclosures of potential environmental

[4] As the report demonstrated, a 1% leak in DAPL's 570,000 barrel a day capacity, which would be invisible to the most sophisticated remote sensing systems available, would constitute a discharge of 239,400 gallons of oil per day. *See id*. at 47.

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(206) 343-7340

impacts," because the oil spill risks are low. *Id*. at 13, 15. Moreover, even though the Tribe and EPA had found major flaws in the EA's assessment of oil spill risks, the Cooper Memo did not address those critiques. At the same time, it repeatedly asserted that the low risk of an oil spill, as presented in the EA, justified the absence of any meaningful review of the Tribe's Treaty rights and use of Lake Oahe. The Assistant Secretary accepted the Cooper Memo's conclusion that the EA comported with legal requirements, but that did not end the Corps' review.

C. Phase 2 of the Corps' Review, Delving into Treaty Rights and Oil Spill Risks

On November 14, the Assistant Secretary decided that the Tribe's Treaty rights in Lake Oahe called for "caution, respect, and particular care" before the easement could be issued. "[M]indful of the history of the Great Sioux Nation's repeated dispossessions, including those to support water-resource projects," she opened a second phase of review. ECF 56-1. The Corps obtained an opinion on the extent of the Tribe's Treaty rights and trust responsibility obligations from the Department of the Interior, given its expertise. The Solicitor of the Interior provided a lengthy, formal legal opinion confirming the Tribe's Treaty rights at Lake Oahe, and finding that the Corps had failed to fully consider, let alone protect, those rights during the permitting process. Ex. 4 ("Solicitor Op.").[5] The Solicitor concluded that the easement decision "should not be made" until the Corps took a number of actions, including: (1) engage in government-to-government consultation "in order to determine whether the location or any other aspect of the pipeline project would infringe upon the Tribe's rights"; (2) "Conduct additional NEPA analysis that adequately evaluates the existence of and potential impacts to tribal rights and interests" through an EIS that considers alternative pipeline routes as well as a "catastrophic spill analysis

[5] The Department of the Interior is charged with managing Indian affairs and trust resources. 25 U.S.C. § 2; 25 U.S.C. §§ 2701. An "M-Opinion" issued by the Solicitor states the Department's formal legal opinion on a matter. *Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri*, 802 F.3d 267, 277 (2d Cir. 2015).

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(206) 343-7340

prepared by an independent expert"; and (3) assess the pipeline's impacts on "tribal rights, lands, and resources" in a more comprehensive manner. *Id*. at 4. After reviewing the history and basis of the Tribe's Treaty rights in Lake Oahe (hunting, fishing, and water rights), the authoritative opinion concluded that the trust responsibility imposes a duty to examine more closely and guard against the impacts of an oil spill on the Tribe, than what the Corps to date had done.

In the face of the expert critiques of the EA's oil spill assessment and the strong recommendations of the Solicitor, neither of which were addressed in the Cooper Memo, the Assistant Secretary rendered a final decision. On December 4, 2016, she instructed the Corps not to issue the easement at Lake Oahe until it fully considered "the extent and location of the Tribe's treaty rights in Lake Oahe," assessed "alternative locations" for the crossing that would avoid impinging on those rights, and "more fully explored risks and impacts of an oil spill on the Tribe." ECF 65-1, at 3. The decision cited the "totality of the circumstances," including the MLA's requirement to protect subsistence fishing, hunting, and gathering, the impact on the Tribe's historic homelands, the proximity to the Reservation, and risks to Treaty water, hunting, and fishing rights. *Id.* at 4. The decision also noted that critical information regarding oil spill risks and response plans had been withheld from the Tribe.[6] The review would occur via an EIS process, which the Corps initiated on January 18, 2017, by publishing a notice of intent to prepare an EIS and opening public comment. 82 Fed. Reg. 5543 (Jan. 18, 2017).

[6] The Tribe was unaware of the existence of these documents until the Corps provided the administrative record for this case, but withheld them. The documents were finally received, subject to a confidentiality agreement restricting them to counsel, on December 23, 2016. The Tribe reached an agreement on February 8 allowing the documents to be shared pursuant to the protective order with its experts, and is submitting an expert declaration with this motion highlighting flaws in those documents. Additional documents have still never been shared with the Tribe. *See* Solicitor Op. at 31 (referring to Nov. 30 DAPL response that "was not shared with either the Tribes or the public" even though it "contained clearly relevant information.").

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D. The Presidential Memorandum Directing the Corps to Issue the Easement and the Corps' Final Decision

Less than a week later, on January 24, 2017, the new President signed a memorandum directing the Secretary of the Army to "instruct" the Assistant Secretary "to take all actions necessary and appropriate to…review and approve, in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary or appropriate" all requests for approvals to construct and operate the pipeline. ECF 89-1. The Memorandum directed the Army to consider withdrawing the December 4 memorandum and the notice of intent to prepare the EIS; to determine whether the Final EA satisfied NEPA and other legal requirements; and to consider waiving the requirement to provide advance notice to congressional committees before granting an easement. Following this direction, on February 7, the Corps sent notification to Congress of its intent to grant the DAPL easement. ECF 95.

The Corps also released a February 7 decision memorandum that documented the steps taken to follow the President's direction, ECF 95-2 ("Feb. 7 Memo"), which referenced a February 3, 2017 "Technical and Legal Review" of the project. Ex. 23 ("Feb. 3 Review"). The Feb. 3 Review relied on the Cooper Memo to find that the Final EA and FONSI did not need "supplementation" under NEPA standards. It fell back on the Corps' earlier assertion that the risk of an oil spill is "low" to justify conducting no additional consideration of the impacts of an oil spill on the Tribe and its Treaty rights. *Id*. at 13, 15. It stated that the Corps disagreed with the Solicitor's Opinion without explaining any basis for the disagreement, and it conducted no analysis of the expert critiques of the Corps' oil spill risk assessment. *Id*. at 9. After reducing the normal 14-day waiting period after congressional notification to 24 hours, the Corps issued the easement on February 8, 2017. ECF 96-1. This motion followed.

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STANDARD OF REVIEW

The challenges presented in this motion are reviewed pursuant to the Administrative Procedure Act ("APA"). Under the APA, a reviewing court "shall hold unlawful and set aside agency actions" that it determines are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious where an agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs'. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). A decision can be upheld only where the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council*, 462 U.S. 87, 105 (1983).[7]

In *FCC v. Fox Television Stations, Inc*., 556 U.S. 502 (2009), the U.S. Supreme Court addressed the standard of review where an agency reverses its own prior decision, holding that "the agency must show that there are good reasons for the new policy." *Id*. at 515. The agency must provide additional explanation, and the courts apply heightened scrutiny, when the "new policy rests upon factual findings that contradict those which underlay its prior policy." *Id*. ("In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."). As Justice Kennedy stated in a concurring opinion that provided the fifth vote for the outcome:

The question in each case is whether the agency's reasons for the

[7] Claims that an agency has violated its trust responsibility to an Indian Tribe are subject to a higher standard of review. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942); *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (agency actions impacting treaty rights must satisfy stricter fiduciary standards in addition to the APA standard of review).

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> change….suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency's proper understanding of its authority…. [A]n agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.

Id. at 536-47 (Kennedy, J, concurring in part and concurring the judgment).

ARGUMENT

I. THE CORPS VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT BY FAILING TO PREPARE AN EIS ON THE LAKE OAHE CROSSING.

The Presidential Memorandum did nothing to change the legal standards applicable to the Corps' NEPA review of the pipeline, nor could it. Indeed, the memorandum acknowledges that the permits can be granted only to the extent "permitted by law," including NEPA. Presidential Mem. § 2(a)(i), ECF 89-1. Although obligated to comply with NEPA, the Corps abandoned the EIS process designed to address Treaty rights and the risks of oil spills. Even though it had decided to prepare a full EIS, it issued the easement based on the Final EA, without any additional process or reasoned justification. The Corps' conclusion that the Oahe crossing was not significant enough to warrant an EIS is arbitrary, capricious, and contrary to law.

A full EIS would have allowed the Corps' untested assumptions about spill risk, response, and impacts to the Tribe to be subjected to public and agency scrutiny. It would have put the company's secretive and self-interested risk analyses and response plans in front of other agencies, the Tribe, and the public, where they could be properly critiqued. It would have required a full and transparent comparison of alternative routes with less impact on the Tribe, and it would have required close analysis of the scope and extent of the Tribe's Treaty rights and how they could be harmed by the pipeline. By sidestepping the EIS, the Corps deprived the Tribe and the public of these opportunities, and made a critical decision based on the applicant's

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untested assurances that the risks and impacts were low.

A. NEPA Requires Both Accurate Disclosure and Meaningful Public Engagement.

NEPA, 42 U.S.C. §§ 4321–4370f, is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It makes environmental protection a part of the mandate of every federal agency. 42 U.S.C. § 4332(1). NEPA requires that federal agencies "take a 'hard look' at the environmental consequences before taking action." *Baltimore Gas & Elec.*, 462 U.S at 97. One of NEPA's purposes is to ensure that an agency, '"in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.'" *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA requires agencies to disclose all potential adverse environmental impacts of its decisions before deciding to proceed, 42 U.S.C. § 4332(2)(C), and requires agencies to use accurate information and to ensure the integrity of the analysis. 40 C.F.R. §§ 1500.1(b), 1502.24.

Full and effective public participation in agency decision-making is a cornerstone of NEPA. 42 U.S.C. § 4332(2)(C); *Robertson*, 490 U.S. at 349 (NEPA "guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience," including the public, "that may also play a role in the decisionmaking process and the implementation of the decision."); 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."). "Federal agencies shall to the fullest extent possible: . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." *Id.* § 1500.2(d); *see also id.* § 1506.6(a) ("Agencies shall . . . [m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.").

If an agency action has adverse effects that are "significant," they need to be analyzed in an EIS. 40 C.F.R. § 1501.4; *Grand Canyon Trust v. FAA*, 290 F.3d 339, 34 (D.C. Cir. 2002) ("If

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any significant environmental impacts might result from the proposed agency action then an EIS must be prepared *before* an agency action is taken"). If the agency determines that no EIS is required, it must document that finding in a FONSI. In *Town of Cave Creek v. FAA*, 325 F.3d 320, 327 (D.C. Cir. 2003), the D.C. Circuit laid out four factors to consider when evaluating a FONSI. A court must inquire whether the agency: (1) has "accurately identified the relevant environmental concern"; (2) has taken a "hard look" at those problems in preparing its EA; (3) is "able to make a convincing case for its finding" of no significant impact; and (4) has shown that even if there is an impact of true significance, an EIS is unnecessary because "changes or safeguards in the project sufficiently reduce the impact to a minimum." *Id.*; *Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006) (court's role in reviewing an agency's decision not to issue an EIS is "to ensure that no arguably significant consequences have been ignored").[8] The EA for the pipeline runs afoul of these standards.

B. The Corps Failed to Make a "Convincing Case" that the Lake Oahe Crossing Will Have No Significant Impacts.

Under NEPA, federal agencies are required to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1153 (D.C. Cir. 2011). "If *any* 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared *before* the action is taken." *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphasis added). CEQ's binding regulations lay out criteria for determining when impacts are "significant" and warrant a full EIS. 40 C.F.R. § 1508.27. Agencies must evaluate "the degree to which the proposed action affects public health or safety": "unique characteristics

[8] "CEQ's interpretation of NEPA is entitled to "substantial deference" because it is tasked with issuing binding NEPA interpretations. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

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of the geographic area such as proximity to historic or cultural resources…"; the degree to which the effects on the environment "are likely to be highly controversial," are "highly uncertain" or "involve unique or unknown risks"; "whether the action is related to other actions with individually insignificant but cumulatively significant impacts"; "the degree to which the action may adversely affect [sites] listed in or eligible for listing on the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources"; and "the degree to which the action may adversely affect" species listed under the Endangered Species Act. *Id.* Agencies should also consider whether the action could establish a "precedent for future actions," and whether the action risks a violation of other laws. *Id.*

In making its July 25 § 408 decision, and again when it issued the easement, the Corps concluded that the Oahe crossing did not involve "significant" environmental impacts, but that conclusion cannot withstand scrutiny.[9] Indeed, CEQ's "significance" criteria read like a list of factors that describe the Oahe crossing. For example, an oil spill could devastate the health and welfare of Standing Rock members and poses "unique" risks due to the proximity of the crossing to the Tribe and in light the Corps' trust and Treaty obligations. The same is true for the project's impacts on unique cultural and religious resources, including the River itself, and endangered species. *See, e.g.*, AR 5570; AR 66902. Moreover, to say that the effects are "uncertain" or "highly controversial," in light of the multiple critiques of the Corps' unexamined

[9] DAPL, not the Corps, wrote the EA and supporting documents. Final EA, at 1. While this is not by itself impermissible, "courts have recognized the danger of agencies merely accepting the self-serving statements or assumptions of interested parties in the preparation" of NEPA documents. *Hammond v. Norton*, 370 F. Supp. 2d 226, 251 (D.D.C. 2005). The submission of expert evidence challenging the EA's assumptions about oil spill risk triggered a duty by the Corps to do more than simply rubber-stamp DAPL's documents. *Id.* at 252 ("when information is specifically and credibly challenged as inaccurate, the Corps has an independent duty to investigate."); *see also* Envy Rep. at 9 (it is a "fatal flaw that [Corps] has simply accepted the claim of DAPL of 'no significant impact'.").

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conclusions, expert evidence indicating greater risks, and critical comment from other federal agencies, would be an exercise in understatement. *See, e.g., Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 44 (D.D.C. 2010). Similarly, the Corps' compliance with its legal duties under the trust responsibility has been seriously questioned in this lawsuit and by the Interior Solicitor.

Perhaps most critically, expert reports critiquing the Final EA after the Corps reopened the dialogue on the Oahe crossing raise significant, serious questions about the quality of the analysis that DAPL prepared and that the Corps unquestioningly adopted. *See supra* at 10-12. As these expert reviewers explained, the EA's analysis is rife with misstatements, faulty assumptions, and unsupported conclusions. Indeed, one described it as "unconscionable" that a more robust environmental review would not have been prepared for an extraordinarily long HDD bore at such a critical waterway. Envy Rep. at 16. Experts pointed out that the Corps had never addressed slow leaks in the HDD bore, which would be "complicated if not impossible to clean up and likely would have significant impacts on soils" and underlying aquifers. Envy Rep. at 14. The Corps addressed none of these expert critiques (which came after the Cooper memo) in the Army's Feb. 3 Review or Feb. 7 Memo. Nonetheless, with respect to every issue of concern, the Corps falls back on a rote mantra that the risk of oil spills is low.

Alarmingly, in its February decisions, the Corps never acknowledged that critical analyses—prepared by DAPL and relied upon by the Corps to justify its decision without any independent review—were never made available to the public or the Tribes. Solicitor Op. at 28 (decrying keeping spill analysis confidential and noting "the Tribes were not afforded the opportunity to consider and independently analyze any of the information" leading to the Corps' conclusion that risks were low). These documents are currently the subject of DAPL's motion for a protective order, and have only been made available to the Tribes and their experts within

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the last few days. ECF 93. As a declaration prepared by one of the Tribe's experts explains, these documents are deeply flawed and do not support the conclusion that risks are very low. *See* Decl. of Richard Kuprewicz (filed under seal). As the Solicitor's Opinion concluded: "These failings provide an adequate foundation to conduct additional NEPA review—both because the *Corps has not considered relevant issues as required by NEPA*, and because of the United States' obligation to engage in government-to-government consultations with the Tribes." *Id*. at 28 (emphasis added). Indeed, pipeline leaks occur with greater frequency than the EA acknowledges, with an average of 283 "significant pipeline incidents" as classified under federal law per year. *Id*. (characterizing such leaks as "reasonably foreseeable" and hence requiring more thorough consideration under NEPA). Such information had been presented to the agency many times, but never addressed either prior to, or when granting the final easement. *See, e.g.*, AR 84802; 66240; 66166; 66765.[10]

The EA also fails to consider the cumulative risk imposed by the pipeline.[11] A significant environmental effect, sufficient to trigger an EIS, "exists if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. § 1508.27(b)(7); *Grand Canyon Trust*, 290 F.3d at 342 ("the agency's EA must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum"); *Delaware Riverkeeper Network, et al., v. FERC*, 753 F.3d 1304, 1320 (D.C. Cir. 2014) (conclusory cumulative effects analysis for gas pipeline fails *Grand Canyon* test). As DAPL pointed out,

[10] With respect to oil spill response, the Corps simply directs that within a year, DAPL will have put oil spill response equipment near the river. FONSI at 5. Within a year, of course, the pipeline would have transported literally billions of gallons of crude oil.

[11] Cumulative effects are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

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other pipelines already cross underneath the Missouri River. However, neither the EA nor any of the supporting documentation contains any analysis of how an additional 30-inch pipeline, carrying 570,000 barrels of crude oil per day, adds to the existing risk of pipeline spills in the Missouri River that cumulatively could harm the Tribe or others. The EA does not identify where these other pipelines are, their safety and history of leaks and spills, or how the existence of multiple pipelines increases the overall chances of an oil spill. Nor does it analyze the cumulative risk to Tribal resources from the rest of the pipeline outside Lake Oahe. Instead, it falls back on its assertion that risks of spills are low, relying yet again on documents that were kept from the public and that remain secret. The EA suffered from these shortcomings even though this issue was brought to the Corps' attention during the comment process. *See, e.g.*, AR 66249. The failure to adequately consider such risks is fatal to an agency's NEPA documentation. *Grand Canyon Trust*, 290 F.3d at 342 (setting aside EA for failing to consider cumulative impacts of increased airport noise on top of existing noise); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 107 (D.D.C. 2006) (EA/FONSI had inadequate cumulative effects analysis).[12]

This Court has not hesitated to set aside an EA that fails to take a "hard look" at critical environmental problems. *See, e.g., id.; Bluewater Network*, 721 F. Supp. 2d at 40-44 (EA was

[12] The EA's flaws are compounded by the government's unlawful "segmentation" of three portions of a single pipeline into totally independent NEPA processes. 40 C.F.R. § 1508.25; 33 C.F.R. § 325.1(c)(2) ("All activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA permit would be required should be included in the same permit application."); *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298-99 (D.C. Cir. 1987). The federal government violated these regulations by unlawfully segmenting its NEPA review of one pipeline into separate components in North Dakota and in Illinois, AR 71220 and AR 9823, and yet another one for an authorization to cross federal easements in North and South Dakota managed by the Fish and Wildlife Service that is not included in the record. This flaw was repeatedly pointed out during the comment period, but never addressed. AR 000160; AR 66240; AR 84802.

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"conclusory, internally inconsistent, and failed to adequately explain the connection between the objective facts and conclusions reached"). An agency cannot rely on "conclusory" statements about lack of risk, without explanation and detailed justification. *See Delaware Riverkeeper*, 753 F.3d at 1313 ("we have made it clear that simple conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA"); *Mainella*, 459 F. Supp. 2d at 108 (setting aside EA/FONSI for oil and gas drilling, finding that agency unlawfully characterized impacts as minor or insignificant without explanation). The EA's findings with respect to spill risks based on conclusory and self-interested statements are at odds with both the administrative record and the Corps' December 4 findings. The EA fell far short at the time it was issued. Its flaws and unlawfulness are even more undeniable now.

C. The EA Fails to Take a "Hard Look" at the Pipeline's Impacts on the Tribe's Treaty Rights.

NEPA requires the Army Corps to disclose and assess the suite of risks from the Lake Oahe crossing to the full range of the Tribe's Treaty rights, in the context of the Corps' heightened trust responsibilities. Standing Rock, other Tribes, the Department of the Interior, the Solicitor, and EPA have been steadfast in urging the Corps to comply with this obligation. The Corps validated these concerns when it decided to prepare a full EIS to review oil spill risks, impacts on the Tribe's Treaty rights, and alternatives that would avoid such harm. The Corps' post-election reversal does not, and cannot, overcome the weight of the record demonstrating that NEPA requires closer scrutiny of the Tribe's Treaty rights.

As the Solicitor observed, the Final EA barely acknowledged the Tribe's Treaty rights, let alone made any attempt to understand them and the potential impacts of the project on those rights. Instead, the Final EA simply offered a conclusory assertion that the Tribes' Treaty rights will not be harmed due to the low risk of a major spill. As the Solicitor explained:

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> These general statements about treaty rights require a more robust analysis in light of the settled, geographically relevant nature of the Tribes' rights with regard to Lake Oahe. For example, the existing record does not: identify on-reservation lands where the Tribes may retain hunting and fishing rights or where reservation boundaries exist within Lake Oahe; analyze whether tribal members consume a higher amount of treaty-guaranteed fish or game that might be affected by pipeline construction or a potential spill; identify relevant statutes, treaties, or court cases; discuss proactive mitigation efforts that could protect tribal lands (specifically, and as opposed to any relevant non-treaty protected lands); compare the Tribes' on and off reservation rights, etc.

Id. at 19. The Solicitor faulted the failure of the NEPA process to address hunting, fishing and gathering—rights that are specifically addressed in the MLA. 30 U.S.C. § 185(h)(2)(D).

> Similarly, the current record consists of a physical description of the Standing Rock Sioux Reservation and the general assurances quotes above that the DAPL project will not affect tribal rights. In fact, the Tribes and their members use Corps lands, tribal lands, and allotted lands abutting Lake Oahe for hunting, fishing and gathering. The Tribes rely on the waters of Lake Oahe to provide habitat for fish, wildlife and plants that the Tribe depends on for subsistence and cultural and religious practices.

Id. The Solicitor also highlighted the unique circumstances that the risk of a spill poses in light of the Tribe's Treaty rights.

> The Standing Rock and Cheyenne River Sioux Reservations are the permanent and irreplaceable homelands for the Tribes. Their core identity and livelihood depend upon their relationship to the land and environment – unlike a resident of Bismarck, who could simply relocate if the DAPL pipeline fouled the municipal water supply, Tribal members do not have the luxury of moving away from an environmental disaster without also leaving their ancestral territory. This underscores the far-reaching effects of a DAPL spill's potential environmental impacts on the Tribes' historic, cultural, social, and economic interests.

Id. The Solicitor's critique of the Final EA also raised questions about the limited nature of the oil spill risk analysis, spill response plans, and the failure of the Corps to consider slow underground leaks.[13] *Id*. at 30 (no analysis "of response actions to address ground water

[13]The Solicitor pointed out that the EA contains factual inaccuracies on issues of critical importance to the Tribe, such as incorrectly asserting that most Tribal members do not obtain drinking water from the river, even after comments pointed out this was inaccurate. *Id*. at 25; *see, also,* Ex. 11 at 3-5.

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contamination or a slow leak underground"); *see also* Envy Rep. at 48 ("No explanation in the EA describing how that part of the soil will be cleaned or removed at a depth of 92 ft underneath the lake.").

The Corps' treatment of alternatives also should have been viewed through a prism of how different options impact Treaty rights. NEPA requires consideration of "alternatives to the proposed action," 42 U.S.C. 4332(2)(C)(iii). The discussion of alternatives forms "the heart" of the environmental impact statement. 40 C.F.R. § 1502.14; *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 69 (D.C. Cir. 2011); *Center for Food Safety v. Salazar*, 898 F. Supp. 2d 130, 147 (D.D.C. 2012) ("An agency's consideration of alternatives must be more than a *pro forma* ritual. Considering environmental costs means seriously considering alternative actions to avoid them."). But the EA failed to give the same consideration to oil spill impacts to the Tribe as it gave to the oil spill impacts from the alternative crossing ten miles upstream of Bismarck. EA at 8. The Bismarck alternative was rejected in part because of its proximity to homes, several water intakes, and wildlife and recreational areas further south.[14] The Solicitor critiqued the EA's alternative analysis, observing factual errors, one-sided comparisons that gave greater weight to non-Tribal concerns, and reliance on "representations from the applicant with no input from the Tribes." Solicitor's Op. at 25-28. The Solicitor concluded that "additional analysis is necessary to address the fact that the reasons for rejecting the Bismarck route are equally (if not more) applicable to the Lake Oahe Route." *Id*. at 28; *see also* Envy Rep., at Ch. 4 (discussing alternatives, including option of avoiding Missouri River altogether).

Following a comprehensive review, the Assistant Secretary made a decision to prepare a full EIS that looked at oil spill impacts on the Tribe's treaty rights and route alternatives.

[14] The Bismarck alternative would also be considerably more expensive than the Oahe crossing. EA at 11 ($23 million difference between alternatives).

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Abandoning that review cannot withstand scrutiny.

D. The EA Fails to Take a "Hard Look" at Environmental Justice Considerations.

An Executive Order adopted in 1994 directs that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States…" Exec. Order 12,898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 8113 (Feb. 16, 1994) ("EO 12,898"), § 1-101. EO 12,898 directs that Federal agencies shall use population data "to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations." *Id*. at § 3-302.

CEQ has issued guidance on considering environmental justice impacts under NEPA, directing that "[a]gencies should consider the composition of the affected area, to determine whether minority populations, low-income populations, or Indian tribes are present in the area affected by the proposed action, and if so whether there may be disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or Indian tribes." Ex. 17, at 9. The analysis requires examination of both quantitative as well as qualitative factors.

> Agencies should recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action. These factors should include the physical sensitivity of the community or population to particular impacts; the effect of any disruption on the community structure associated with the proposed action; and the nature and degree of impact on the physical and social structure of the community.

Id. at 6. The CEQ guidance calls for special consideration to be given to Indian tribes: "Agencies should recognize that the impacts within . . . Indian tribes may be different from

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(206) 343-7340

impacts on the general population due to a community's distinct cultural practices. For example, data on different patterns of living, such as subsistence fish, vegetation, or wildlife consumption and the use of well water in rural communities may be relevant to the analysis." *Id.* at 14; *id*. at 8 (observing that environmental justice is "highly sensitive to the history or circumstances of a particular community"). Courts review environmental justice analyses in an EA or EIS under the APA arbitrary and capricious standard. *See Cmty. Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 689 (D.C. Cir. 2004); *Allen v. Nat'l Inst. of Health*, 974 F. Supp. 2d 18, 47 (D. Mass. 2013). The environmental justice analysis in the Final EA fails that test.

Given the proximity of the Oahe crossing to an Indian reservation that is overwhelmingly minority and low-income, environmental justice considerations should have been at the forefront of this controversy from the start, when they were raised by the Tribe. AR 66166 at 12; AR66765 at 13-17. These considerations came into particularly sharp view when the Final EA rejected a crossing site ten miles upstream of Bismarck, North Dakota, the overwhelmingly non-Indian state capitol, and sited the crossing instead at Lake Oahe, with no mention of the environmental justice implications of that choice.[15] The Corps blindly relied on a deeply flawed environmental justice analysis prepared by DAPL, without ever subjecting it to outside scrutiny or public comment. Its efforts to deal with the Oahe crossing's unmistakable environmental justice implications are arbitrary, capricious, and contrary to law for at least three reasons.

First, the Corps gerrymandered its geographic focus to mask environmental justice impacts. To define an "affected area" of the project, the Final EA focused on the census tracts where the bore pits would be located. However, those census tracts are entirely outside the

[15] The Draft EA dismissed environmental justice concerns altogether. *See* Draft EA at 61. The Tribe's comments include extensive discussion of the environmental justice issues. AR 66166 at 12; AR 66765 at 13-17.

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reservation, with a population that is 98% white, and are mostly *upstream* of the crossing site. Ex. 11 at Att. 4; Final EA at 83. To determine environmental justice impacts, the EA compared this putative "affected area" to a larger "baseline" area. That baseline included Sioux County, which constitutes the entire North Dakota segment of the Standing Rock Reservation, and is 82% Native American. Final EA at 82-83. In other words, the Final EA addressed environmental justice by comparing an area that will be almost entirely unaffected by a spill from the pipeline, and where few Tribal members live, against a baseline that included a significant portion of the Reservation. *Id*. at 84. Unsurprisingly, this gerrymandered "affected area" did not have a higher population of minority and low-income people than the claimed baseline, allowing the Corps to dismiss environmental justice concerns. Left unsaid was the fact that it would be communities downstream—entirely within the Reservation—that would bear the impact from oil spills.

EPA specifically called out the Corps' inappropriate focus on the immediate area of the HDD drilling, and not minority communities downstream. AR 66288. EPA stated:

> The areas of analysis to assess potential impacts to EJ communities should correspond to the impacts of the proposed project instead of only the area of construction disturbance. For oil pipeline projects, potential impacts to EJ communities would include the effects of leaks and spills to downstream water supplies (both drinking water quality, agricultural uses, and costs) and aquatic resources such as fish and riparian vegetation used by EJ populations.

Id. EPA recommended a "more thorough" analysis, as did the Interior Department. AR 5750.

Second, the EA limited its environmental justice impacts analysis to a 0.5 mile radius from the HDD site, calling it a "buffer" area. EA at 84, 87 ("There are no low-income, minority or tribal lands within 0.5 mile of the Proposed Action."). The Corps selected this radius without acknowledging that the reservation boundary was *0.55 mile* downstream, a mere 80 yards beyond the EA's analytical boundary. There was no principled basis to suggest that the Tribe would somehow be protected from an oil spill by this half-mile buffer zone, especially when

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other documents discuss the impacts of spills further downstream.[16]

Finally, the Corps based its conclusions on a one-sided analysis that considered downstream impacts for the Bismarck alternative, but not for the Oahe crossing. The Final EA relies on a memo prepared by DAPL consultants providing additional comparison of the Bismarck and preferred route alternatives. AR 73033.[17] In that analysis, the Corps did not limit its consideration to a 0.5 mile radius of the pipeline, but it considered and rejected the route based on impacts to Bismarck 10 miles downstream. At the outset, the DAPL memo insisted that oil spills warrant no consideration at all. AR 73036 ("As a matter of practice, pipeline operators and specifically DAPL designed the pipeline to not leak or have a spill…The notion, as articulated by the SRST, that a spill is going to happen, is simply not the case."). Despite this conclusion, the memo analyzes the oil spill risk to downstream communities and water intakes for the Bismarck route, but not for downstream communities for the Oahe crossing. AR 73037. [18] The memo relies on the same arbitrary census tract data to reach the indefensible conclusion that the Bismarck alternative "would actually lead to more impacts or in fact a disproportionate impact to minorities from a spill or the routing." *Id*.; AR 73034 ("the preferred

[16] In the environmental justice analysis for the EIS for the Keystone XL project, by way of comparison, the agency took a far broader approach, assessing environmental justice impacts a full 14 miles downstream of areas wherever the pipeline crossed water. Ex. 20 at 3.10-3.

[17] Although prepared in April 2016, the DAPL environmental justice analysis was never made available to the public, was not subject to any external agency review, and was initially withheld—for reasons that were never apparent—from the administrative record

[18] The memo (like the Final EA) says nothing about qualitative impacts on the Tribe, *e.g.*, the "physical sensitivity of the community" or the "disruption on the community structure" from a potential oil spill. CEQ Guidance at 6. It contains no discussion of what resources the Tribe has to respond to a spill, whether there are alternative water sources when a spill contaminates of Lake Oahe, how lack of water would impact medical and emergency care on the Reservation, or how the destruction of natural resources would deprive a community, struggling with extensive poverty, of fish and game critical to meeting basic subsistence needs.

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(206) 343-7340

and proposed crossing of Lake Oahe would impact a population of fewer minorities").[19]

The EA's analysis of environmental justice impacts is fatally flawed. *See Cmty. Against Runway Expansion*, 355 F.3d at 689. Only by ignoring the Tribe's proximity to and use of Lake Oahe downstream of the crossing could the Corps make such indefensible statements as the siting of the pipeline so close to the reservation and water intakes "is not considered an environmental justice issue," EA at 86 & 87, and there would "be no direct or indirect effects to Tribal lands, members, or protected cultural resources." *Id*. at 86. The Corps' approach of comparing the tiny area where the bore pits would be dug against a baseline that includes those who would be harmed by a leak or spill directly violates the CEQ Guidance, which states that "[t]he selection of the appropriate unit of geographical analysis…is to be chosen so as not to artificially dilute or inflate the affected minority population." CEQ Guidance at 26. Its use of a fictional 0.5 mile "buffer area" when a sovereign nation of low-income and minority people is found 0.55 mile downstream masks an important aspect of the problem, particularly when the Corps has elsewhere assessed downstream risks of oil spills. Its consideration of downstream impacts for the Bismarck crossing, while dismissing them for the Oahe crossing, is neither explained nor explicable. In short, the Corps did not take a "hard look" at environmental justice considerations, in violation of NEPA and the APA.

E. The Corps' Post-EA Analyses Do Not Cure the NEPA Violations.

In its Feb. 8 reversal and decision to grant the easement, the Corps determined that the Final EA satisfied NEPA. This determination was based on the EA itself, the February 3, 2017 memorandum, and the Corps' October 20, 2016 technical and legal analysis. But these

[19] The Tribe provided an additional detailed critique of the Final EA in a comment letter in October 2016, including discussion of environmental justice problems. Ex. 11. In making its final decision on the easement, the Corps did not respond to any of these criticisms.

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documents do not cure the NEPA violations discussed above. Rather, they offer *post hoc* rationalizations and legal defenses, not full and objective disclosures.

1. Post-Hoc Technical and Legal Reviews Cannot Insulate a Deficient EA.

Both the February 3 and the October 20 reviews read like legal briefs to support the Corps' arguments in this case. These post-EA reviews cannot insulate the EA from review by this Court, or substitute for preparation of a new EIS in accordance with NEPA's requirements, for several reasons. First, NEPA requires that the agency's assessment of environmental impacts be disclosed to the public and subjected to public comment in an EA or EIS. 40 C.F.R. § 1508.9(a) (EA is a public document and must provide sufficient evidence and analysis for determining if EIS is required); *id*. § 1500.1(b) ("public scrutiny [is] essential to implementing NEPA"); *see Robertson*, 490 U.S. at 349 (1989) (publication of the environmental analysis in draft form serves to inform the public and provide a springboard for public comment). If the environmental impacts are significant, then the agency must prepare an EIS, not an internal memo seeking to paper over its own misstatements and omissions. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 385 (1989); *Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000) (supplemental agency analysis cannot obviate need to prepare EIS). Courts have consistently turned away agency attempts to provide the analysis required under NEPA, not in the EA or EIS, but elsewhere in the administrative record. *See, e.g.*, *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980); *Nat'l Wildlife Fed'n v. Marsh*, 568 F. Supp. 985, 996–97 (D.D.C. 1983) (pertinent analysis must be in the NEPA documents because "other parts of the administrative record do not receive the same wide circulation and consequent comment").

Second, both the February and October reviews simply pronounce the Corps' conclusions on the very legal question before this Court; they contend that the EA and FONSI were legally

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adequate. Feb. 3 Review at 10-13; Cooper Memo. at 10, 13, *see also* at 36 (asserting Corps' EA is not arbitrary or capricious, citing cases). But it is the province of this Court, not the agency that is charged with violating NEPA, to determine whether the EA meets the requirements of NEPA. In determining the adequacy of the EA, the Court owes no deference to the Corps' legal arguments and after-the-fact rationalizations, whether they come in the form of a legal brief or a *post hoc* analysis in the administrative record. *Marsh*, 490 U.S. at 377.

Third, these analyses frame the legal question as whether new information necessitates preparation of a supplemental EA or EIS. Feb. 3 Review, at 10-13; Cooper Memo, at 11-15, 20-21, 28, 36. But that is the wrong question. A supplemental EA or EIS is required to address a change in circumstances or new information *after* a legally adequate NEPA analysis has been prepared. 40 C.F.R. § 1502.9(c). The obligation to supplement an EA or EIS is predicated on the assumption that the original NEPA analysis comported with NEPA. The Corps' February and October reviews point to no new technical reports, like the surveys and expert report at issue in *Marsh*, 490 U.S. at 374-78. Instead, the reviews try to correct deficiencies in the EA, which can only be done through adherence to NEPA's procedures. *See Great Basin Resource Watch v. Bureau of Land Management*, 844 F.3d 1095, 1104 (9th Cir. 2016) ("a post-EIS analysis–conducted without any input from the public–cannot cure deficiencies in an EIS"); *Idaho Sporting Congress*, 222 F.3d at 567 ("[i]t is inconsistent with NEPA for an agency to use [a supplemental review] rather than a supplemental EA or EIS, to correct this type of lapse"). The question is not whether the Corps was legally required to "supplement" its EA; the question is whether the EA was adequate in the first instance. The answer to that question is no.

2. The Post-EA Reviews Reinforce the Corps' NEPA Violations.

The post-EA reviews confirm and, in some instances, compound the Corps' violations of NEPA. First, as to the new information that is most relevant – the expert critiques of the EA's

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oil spill assessment and spill response plans – the post-EA reviews are completely silent. The Cooper Memo came before submission of the expert reports and therefore does not address them. The Feb. 3 Review acknowledges only that the Tribe submitted an expert report on oil spill risks, but does so in a parenthetical to a citation, with no analysis. And neither Corps' review mentions the DAPL oil spill documents kept secret during the public EA process, even though these withheld documents were a critical component of the December 4 decision. Even so, both reviews repeatedly contend the Corps can avoid considering how an oil spill would impact the Tribe because the risks of an oil spill are low. This conclusion, of course, is based exclusively on DAPL's self-interested and undisclosed analysis that was never subject to any independent expert review.

Second, the Cooper Memo essentially concedes numerous errors in the EA's environmental justice analysis. It admits that the EA's analysis "can be questioned" for excluding Sioux County in the affected area, while including two counties upstream of the crossing. Cooper Memo at 25-26. It also admits that the EA's environmental justice discussion excluded the Tribe when it asserted that "no appreciable minority or low-income populations exist" in the affected area. *Id*. at 26. The Cooper Memo concedes that the EA also did not, as the CEQ Guidance instructs, compare the demographics of what it now admits are the affected communities and a larger geographic area. *Id*. Instead, the Cooper Memo points to a different section of the EA discussing the Tribe, even though that section also dismisses any environmental justice concerns. The Cooper Memo also perpetuates its disparate treatment of the Bismarck and Oahe crossings. It acknowledges that the EA's discussion of the Bismarck route was "succinct" and "brief," Cooper Memo at 4, 7, but goes onto to defend rejection of that alternative because of the impacts an oil spill would have on people and environment. *Id*. at 7-

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10. When it comes to any impact on the Tribe, the Feb. 3 Review and Cooper Memo justify ignoring the Treaties, misstating the Tribe's dependence on the river for drinking water, and giving short shrift to the Tribe's Treaty water, hunting, and fishing rights by minimizing the likelihood that an oil spill will occur—begging a key question at the heart of this case.

Third, the Cooper Memo acknowledges that the EA is silent as to the Treaties and statutes that confirm the Tribe's reservation of water, fishing, and hunting rights. It offers a cursory description of the Treaties that pales in comparison to the analysis in the Solicitor's Opinion, *id*. at 12, 31-34, and contends that discussing Treaty rights "would not have added anything" and "would not have resulted in additional disclosures of potential environmental impacts." *Id*. at 13, 15; *see also id*. at 34 (no implications from acknowledging inclusion of Lake Oahe in Reservation because of low risks of spills); *see also* Feb. 3 Review at 11-13 (asserting that Corps addressed all concerns raised by the Tribe post-EA). The Feb. 3 Review dismisses the subsequent Solicitor's Opinion in the most cursory fashion. It states, without any explanation at all, that the Corps addressed the concerns raised in the Opinion and that "concerns were raised" about whether some of the Opinion might be legally supportable. Feb. 3 Review at 9. Given that the Department of the Interior is charged with managing Indian affairs, construing Treaties, and managing trust resources, a Solicitor Opinion assessing the scope and extent of Treaty rights carries great weight and cannot be so flippantly dismissed.

II. THE GRANTING OF THE EASEMENT AND OTHER CORPS AUTHORIZATIONS IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW

A. The Corps Failed to Provide a Reasoned Justification for Disregarding the Findings and Circumstances Underlying the December 4 Decision.

Immediately after the election and at the direction of the new President, the Corps made an abrupt about-face, issued the easement, and terminated the EIS process. This reversal runs afoul of the reasoned decision-making required by the APA under both *Fox Television* and

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Motor Vehicles. Under *Fox Television*, heightened judicial review is required because the Corps disregarded the "facts and circumstances that underlay" the prior policy. 556 U.S. at 515. Juxtaposing the two decisions reveals that, in granting the easement, the Corps failed to address, let alone provide a reasoned explanation for, abandoning the determinations undergirding its December 4 decision to require an EIS.

The December 4 decision grew out of the Corps' recognition that the Tribe had presented important issues, and hinged on two pivotal determinations. First, key documents regarding oil spill risk, response, and environmental justice had been withheld from the Tribe and others. ECF 65-1, at 1-2, 3. Second, the decision emphasized the need for greater consideration of the Tribe's interests in light of the history of the Sioux Nation's dispossession, the U.S. trust responsibility, and the MLA's direction to protect subsistence fishing and hunting. *Id*. at 2. The Solicitor's Opinion provided extensive support for this decision. To rectify these shortcomings, the Assistant Secretary directed the Corps to prepare an EIS. The decision pointed to NEPA's direction to consider alternatives in the face of unresolved conflicts and CEQ's guidance indicating agencies "should heighten agency attention to alternatives," mitigation, and preferences expressed by the affected community when tribal resources are at stake. *Id*. at 3.

Heeding the new President's direction after the election, the Corps countermanded that determination without providing a reasoned explanation for disregarding these pivotal reasons. Neither the Feb. 3 Review nor the Cooper Memo ever mentioned the withheld documents, or the agency's prior determination that the Tribe and other agencies should have an opportunity to review and respond to them. Nor does either review address the expert reports critiquing the EA for underestimating oil spill risks and ignoring critical issues like groundwater contamination. Instead, these reviews justify paying scant attention to the Tribe's interests by asserting that oil

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(206) 343-7340

spill risks are low, based on the heavily criticized DAPL spill assessment. The February 3 Review also dismisses the Solicitor's Opinion in the most cursory fashion, without providing any basis or even identifying where the Corps parted company with the Solicitor.

The Corps' treatment of the withheld documents and the Solicitor's Opinion falls short under *Fox Television*. As to the withheld documents, the Corps ignores them altogether. It offers no mechanism for correcting its past corruption of the NEPA process as a result of withholding key information from the Tribe and the public. *See Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150-52 (9th Cir. 1998) (NEPA documents must disclose to the public high-quality scientific analysis and expert comments because public scrutiny is essential to NEPA implementation). As to the Solicitor's Opinion, the Feb. 3 Review simply announced that it disagrees, yet all the Corps has done is produce a brief pro forma summary of the Treaties and statutes in the Cooper memo. The Feb. 3 Review did not address any of the Solicitor's findings or conclusions or the well-supported analysis underlying them. Such a conclusory statement is indefensible in light of the Solicitor's expertise and role in construing treaties and fulfilling the government's trust responsibility.

Moreover, the Cooper Memo, which contains the Corps' short yet only discussion of the Tribe's Treaty rights, preceded the Solicitor's Opinion. While the Assistant Secretary deferred to the Cooper Memo's conclusion that the Final EA comported with legal requirements, that did not end the review, but kicked off the second phase. To inform that phase, the Assistant Secretary obtained the Department of the Interior's views on Treaty issues. And the Solicitor produced a thorough legal opinion finding that: (1) the land along and part of Lake Oahe remains within the Reservation, *id*. at 5-10; (2) the Tribe has fishing and hunting rights in Lake Oahe and the fish and wildlife subject to those rights could be affected by the crossing, *id*. at 10-

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(206) 343-7340

14, 19; (3) the Tribe uses Lake Oahe for religious and ceremonial purposes, *id*. at 19, 32; (4) the Tribe has reserved water rights with Lake Oahe providing storage for waters used by the Tribe, *id*. at 14-16; (5) the Corps assessed the impacts of an oil spill for the Bismarck route, but assumed an oil spill would not happen and impact the Tribe, despite the impacts on the Tribe's homeland and existence, *id*. at 4, 25-28, 30; and (6) the Corps fell short of meeting its consultation obligations by keeping key oil spill assessments, spill plans, and other DAPL documents secret, and failing to address the expert evidence submitted by the Tribe and others, *id*. at 18 n.95, 26, 28, 34. But in the Feb. 3 Review justifying the Corps' reversal, the Corps simply refers back to the Cooper Memo and dismisses the Solicitor's far more considered views.

As the Court in *Fox* observed, "it would be arbitrary and capricious to ignore these matters," as a "reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." 556 U.S. at 516; *Organized Village of Kake v. U.S. Dep't of Agriculture*, 795 F.3d 956, 968 (9th Cir. 2015) ("even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation"). The Corps' hasty reversal in position does not meet this higher standard. *Compare Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 727 (D.C. Cir. 2016) (upholding agency change in position after closely scrutinizing agency justification for change in position).

Even if the Corps' easement decision is not subject to "heightened" scrutiny, it is arbitrary and capricious because the Corps failed to provide a reasoned justification for the change. *Fox Television*, 556 U.S. at 515; *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016) ("Where an agency changes a policy or practice it is 'obligated to supply a reasoned analysis for the change'"); *see Bluewater Network v. Salazar*, 721 F. Supp. 2d at 22 (in reviewing an agency reversal of a ban on jet-skis in national parks, the agency's earlier decisions

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were relevant as "the Court must compare those former decisions to the [new ones] in deciding whether the agency has adequately explained its change in policy."). In failing to address the critical withheld oil spill documents, the Corps "entirely failed to consider an important aspect of the problem," which is quintessential "arbitrary and capricious" decision-making under *Motor Vehicle*, 463 U.S. at 43. And the Corps' cryptic dismissal of the Solicitor's opinion, devoid of content, lacks any "reasoned basis." *National Cable & Telecom Ass'n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009) ("it is axiomatic that agency action must either be consistent with prior action or offer a reasoned basis for its departure from precedent"). It is as if Justice Kennedy was describing this case when he wrote that an agency "cannot simply disregard contrary or inconvenient factual determinations that it made in the past." *Fox Television*, 556 U.S. at 536-47 (Kennedy, J, concurring). The Corps' 180-degree turnaround to grant the easement is arbitrary and capricious under either heightened or ordinary APA scrutiny.

B. The Easement Decision and Other Authorizations Violate the Corps' Trust Responsibility to Fully Understand and Protect The Tribes' Treaty Rights.

The federal government has a duty, arising from the Treaties and the federal trust responsibility, and reinforced in the MLA and other statutes, to protect treaty rights and resources. *See supra* § I.B. As the Solicitor noted, the burden imposed by the trust responsibility is even *higher* than the one imposed by NEPA. Solicitor Op. at 20 ("Courts have held that even if an agency complies with NEPA, a permitting action may still be impermissible if it unduly burdens tribal treaty rights in violation of the trust responsibility," citing *No Oilport! v. Carter*, 520 F. Supp. at 371). In *Cobell v. Norton*, the D.C. Circuit explained that, where the trust responsibility applies, the agency action "must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." 240 F.3d at 1099 (citation omitted). As the court explained, this means that:

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> When faced with several policy choices, an administrator is generally allowed to select any reasonable option. Yet this is not the case when acting as a fiduciary for Indian beneficiaries as 'stricter standards apply to federal agencies when administering Indian programs.'

Id. (citation omitted).

Not only do Army and Corps policies commit the Corps to meet its trust obligations, but the Corps has fulfilled its trust responsibility by denying permits for other projects that adversely affect treaty-protected rights. *See, e.g., Nw. Sea Farms, Inc.*, 931 F. Supp. at 1519-22 (upholding Corps denial of permit based on trust responsibility to Indian Tribe); Ex. 5 (denying permit for coal terminal due to greater than *de minimus* impact on off-reservation fishing rights). In order to determine whether a project will impair treaty rights so that it cannot be permitted consistent with the Corps' duties as trustee, the Corps must have before it a full and comprehensive understanding of how the project impacts treaty rights and tribes. The Corps fell far short here when it assumed oil spills will never happen and on that basis refused to consider the impacts of an oil spill on the Tribe's Treaty rights and resources.

It is beyond question that the Tribe's Treaty rights could be severely harmed by an oil spill. For example, the Tribe depends on its fishing rights in Lake Oahe and hunting and gathering rights along its shores "for subsistence and cultural and religious practices." Solicitor Op. at 19. The Tribe has housing developments in low-lying areas that could be contaminated by oil residues. Ex. 15 (Dec. 2 letter). The Tribe and its members, in a remote location with limited resources, could face higher burdens from a spill than other populations. As an example, the Corps' mismanagement of Oahe reservoir elevations in the drought conditions of 2003 disabled the Tribe's Fort Yates water treatment plant for multiple days over Thanksgiving weekend. The event caused extraordinary hardship, including the shutdown of the Indian Health Service Clinic, requiring numerous elderly dialysis patients who normally received treatment on the Reservation

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to be transported off the Reservation to Bismarck, to their considerable detriment. Ex. 11 at 4. Similarly, many Tribal members fish, hunt, and gather for their subsistence and cannot move elsewhere if a spill destroys trust resources without losing their homeland, culture, and way of life, much deeper harm than that from cancelling a recreational fishing trip.

The Final EA barely mentions these rights, let alone tries to quantify them or analyze the risks and impacts. The Solicitor addressed in great detail the history, source, and nature of the Tribe's Treaty rights that were considered by the Corps to be "beyond the scope" of the EA. Solicitor Op. at 5-16; *see* Final EA, App. J at 17. After reviewing the Corps' July 25 decisions and accompanying analysis, the Solicitor found that they offered only conclusory statements that the Tribe's Treaty rights would not be affected, *id*. at 19 ("These general statements about treaty rights require a more robust analysis"), and demanded "more searching consideration" of the effects of the project on treaty rights. *Id*. at 20. The Solicitor concluded "the United States' fulfillment of the exacting standard of a fiduciary requires more than conclusory statements that there will be no impact on tribal rights, a dismissive note that a project is situated off-reservation or citation to general pipeline safety technology." *Id*. at 22.[20]

As part of its fiduciary obligations, the Corps has an obligation to be forthright and to share information about the project at issue. Indeed, the Corps' trust responsibility policy promises that the Corps "will share information that is not otherwise controlled or classified information." Ex. 60 at 3. Yet the Corps kept DAPL's spill assessment, spill response plans,

[20]Two former Chairs of the Senate Indian Affairs Committee, and the current ranking member, told President Trump: "By 'expediting' this process and proceeding without appropriate consultation, the United States would be turning its back on its most solemn trust responsibility to the Tribe….We are deeply concerned and believe the United States must uphold its trust and treaty obligations to the Tribe and respect the self-determination and wishes of all tribal nations." *See* Ex. 18. Several other Members of Congress decried the easement decision as "a total disregard for tribal rights, the rule of law, separation of powers, and transparency." Ex. 19.

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and environmental justice and route analysis secret, denying the Tribe the opportunity to scrutinize these analyses that led the Corps to assert that it could authorize the pipeline without fully considering the impacts of an oil spill on the Tribe's Treaty rights. A fiduciary must meet higher standards of candor and disclosure to its trustees. As the Solicitor stated: "As trustee, the Corps has an obligation to ensure that any risks to treaty rights are eliminated through an open and independent process." Solicitor Op. at 21 n.120.

After reviewing the record and the Solicitor's Opinion, the Assistant Secretary embraced these responsibilities and directed the Corps to perform an EIS with the focus on the scope and extent of the Tribe's Treaty rights and examining the potential impacts of spills on those rights, including by involving the Tribe in scrutinizing secret DAPL reviews. Dec. 4 Memo. ¶ 13. The new administration summarily reversed that decision, claiming that Treaty rights had previously been considered. As found by the Solicitor and Assistant Secretary, however, they had not. The Corps' February 3 "technical and legal review" dismissed the Solicitor's Opinion without explanation and failed to describe how it had fulfilled its trust responsibility. It ignored entirely the secret DAPL documents and the extensive additional technical information questioning the Corps' spill risk assessment and response materials, including material (like the comprehensive Envy Report) that the Corps had begun collecting through the EIS process. The Corps has fallen back on its belief—unsupported by *any* independent expert analysis—that oil spill risks are low, making further analysis unnecessary. Feb. 3 Review at 13.

The Corps has never addressed the Tribe's water rights or Treaty hunting and fishing rights, as required by its trust responsibility apart from its conclusory and entirely unsupported claim that the risk of spills is low. The Solicitor's Opinion applies well-settled legal parameters of the trust responsibility to this situation, and it serves as a model for reasoned agency decision-

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(206) 343-7340

making. The easement and other agency decisions of July 25 are supported by no comparable analysis. Such an approach to the government's trust obligations cannot withstand review.

Courts have stopped federal actions taken in derogation of the trust responsibility. *See, e.g.*, *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988) (preliminary injunction against Corps permit authorizing marina that interfered with treaty rights). For example, in *Northern Cheyenne Tribe v. Hodel*, 12 Ind. L. Rptr. 3065, 3071 (D. Mont. 1985), the court enjoined federal coal leases issued without consideration of an affected Tribe's rights:

> Ignoring the special needs of the tribe and treating the Northern Cheyenne Tribe like merely citizens of the affected area and reservation land like any other real estate in the decisional process leading to the sale of the Montana tracts violated this trust responsibility. Once a trust relationship is established, the Secretary is obligated, at the very least, to investigate and consider the impacts of his action upon a potentially affected Indian tribe. If the result of this analysis forecasts deleterious impacts, the Secretary must consider and implement measures to mitigate these impacts if possible. To conclude that the Secretary's obligations are any less than this would be to render the trust responsibility a *pro forma* concept absolutely lacking in substance.

Id.; Klamath Tribes v. United States, No. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996) (enjoining logging on former Reservation because federal agency failed to protect Treaty resources). So, too, this Court should set aside the Corps' easement and authorizations for violations of the trust responsibility.

III. THE OAHE CROSSING DOES NOT QUALIFY FOR STREAMLINED NATIONWIDE PERMIT STATUS

In addition to the § 408 authorization and the MLA easement, the Lake Oahe crossing requires a RHA § 10 permit because it traverses underneath a navigable water. 33 C.F.R. § 322.3(a). Such a permit can be granted pursuant to NWP 12, but only if consistent with the terms of that NWP and all General Conditions. 77 Fed. Reg. 10184, 10282 (Feb. 21, 2012); 33 C.F.R. § 330.6(a)(2). A project that doesn't meet the requirements for NWP cannot proceed without an individual permit, which includes a much more thorough analysis and NEPA review.

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The Oahe crossing does not comply with these standards and hence does not "qualify" for NWP coverage. Specifically, General Condition 17 states that no activity authorized by an NWP may "impair tribal rights" including "reserved water rights." 77 Fed. Reg. at 10283. As discussed above, treaty rights concerns have been at the heart of this matter from the beginning. DAPL is routed just outside of the Tribe's reservation, where any oil spill would have a devastating impact on its reserved rights to water, as well as its hunting, fishing and gathering rights. AR 5750 (Interior letter) ("When establishing the Standing Rock Sioux Tribe's (Tribe) permanent homeland, the U.S. reserved waters of sufficient quantity and quality to serve the purposes of the Reservation. The Department holds more than 800,000 acres of land in trust for the Tribe that could be impacted by a leak or spill."). The impacts to the Tribe's Treaty rights were the subject of extensive analysis in the Solicitor's memo. The Oahe crossing does not "qualify" for a nationwide permit because of the risks to Tribal Treaty-protected resources.[21]

IV. THIS COURT SHOULD VACATE THE EASEMENT AND PERMIT DECISIONS.

The APA directs that federal agencies shall "hold unlawful and set aside" agency action found to be arbitrary, capricious, or contrary to law. 5 U.S.C. § 706; *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 300 (2003) ("The Administrative Procedure Act *requires* federal courts to set aside federal agency action that is 'not in accordance with law'") (emphasis added); *Public Employees for Environmental Responsibility v. U.S. Fish and Wildlife*, 189 F.

[21] Moreover, General Condition 7 states that no activity may be authorized under an NWP that is in "proximity" to public water supplies. *Id*. at 10283. The crossing is in close proximity to the Tribe's primary source of drinking water for a significant portion of the reservation community. The potential impact on drinking water for the Standing Rock and other Tribes and communities has also been emphasized by EPA and Interior. AR 66288 (EPA) (seeking additional analysis of "potential impacts to drinking water and the Standing Rock Sioux Tribe"); AR 5750 (Interior) ("spill could impact the MLA waters that the Tribe and individual tribal members residing in that area rely upon for drinking and other purposes"). Remarkably, the Corps continued in the Final EA to misstate basic facts about the use of Lake Oahe for drinking water, erroneously observing that most Tribal members get water from wells. Ex 11 at 3.

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Supp. 3d 1, 2 (D.D.C. 2016) (vacating and remanding two Fish and Wildlife orders for violating NEPA). After finding an agency action unlawful pursuant to APA review, the D.C. Circuit has found that "[i]f an appellant has standing – which is undeniable here – and prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency's order." *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). Vacating permits is the standard remedy in environmental claims brought pursuant to the APA. *See Greater Yellowstone Coalition v. Bosworth*, 209 F. Supp. 2d 156 (D.D.C. 2002) (vacating a Forest Service grazing permit until NEPA process is complete because "[a]s a general matter, an agency action that violates the APA must be set aside."); *Humane Society of U.S. v. Dep't of Commerce*, 432 F. Supp. 2d 4, 23 (D.D.C. 2006) (vacating an incidental take permit and remanding to agency for completion of an EIS).

Vacatur is the appropriate remedy in this instance. This is particularly so as the unlawful agency decision-making process led to an easement and approvals that are resulting in immediate on-the-ground harm to the Tribe's interests. In a similar situation, this Court vacated a Corps permit, stating that "[b]ecause intervenors intend on continuing development pursuant to the permit, vacatur is appropriate in order to prevent significant harm resulting from keeping the agency's decision in place." *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 80 (D.D.C. 2010) (partially vacating Corps permits in order to preserve relief). Vacating the underlying agency actions, as directed by the APA, will remove any authorizations for DAPL to proceed with construction pending correction of the legal flaws in the agency's decision-making.

CONCLUSION

For the foregoing reasons, plaintiff Standing Rock Sioux Tribe respectfully requests that this Court grant its motion for partial summary judgment and vacate the Corps' easement, authorizations, EA and FONSI.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2017, I electronically filed the foregoing *Plaintiff Standing Rock Sioux Tribe's Memorandum In Support of Its Motion for Partial Summary Judgment* with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

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