IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE; ROBERT FLYING HAWK; OGLALA SIOUX TRIBE, Plaintiffs, and CHEYENNE RIVER SIOUX TRIBE, Intervenor Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Intervenor Defendant.	Case No. 1:16-cv-01534-JEB

REPLY OF DAKOTA ACCESS, LLC IN SUPPORT OF U.S. ARMY CORPS OF ENGINEERS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Two fatal flaws permeate Standing Rock Sioux Tribe's opposition to the cross-motion for summary judgment. First, the Tribe's challenges to the July 25, 2016 final agency action rely extensively on materials—including expert reports and a Department of Interior opinion (since withdrawn)—that are far beyond the record for that action. Second, the Tribe repeatedly seeks to convert NEPA's procedural protections into a substantive right to a single outcome. Either flaw is reason alone to dismiss the Tribe's NEPA, federal permitting, and treaty-based claims in counts five through eight of its proposed amended complaint.

There is no dispute that the U.S. Army Corps of Engineers' Final Environmental Assessment ("EA") and Mitigated Finding of No Significant Impact ("FONSI") were its final actions on each issue raised in SRST's claims: *e.g.*, environmental risks, environmental justice, and treaty rights effects. And footnote 27 of SRST's Opposition Brief concedes that if those July 25, 2016 determinations were legally adequate, the Corps had nothing further to do on any of those issues. Yet the Tribe repeatedly makes the error of relying on post-July 25 materials to challenge the lawfulness of July 25 determinations. Even assuming for the sake of argument that the record could extend out as far as October 20, 2016—when the Corps's General Counsel completed the government's *sua sponte* review by determining that the Corps need not reconsider *any* prior decisions—not one of the tribal expert reports had yet been written, much less submitted to the Corps. With the record properly confined by excluding SRST's extraneous materials, the Tribe's challenges are legally barred.

The Tribe's second major error is its remarkable disregard for NEPA's requirements. SRST's brief scarcely references the statute and its implementing regulations; instead, the bulk of SRST's NEPA analysis consists of recitations to the untimely "expert" reports that merely disagree with the Corps's exhaustive analysis. The question is whether the Corps acted arbitrarily and

capriciously in its process for determining that the crossing will not significantly affect the environment. The Tribe's disagreement with the outcome is no substitute for showing that the Corps failed to stop, look, and listen before reaching its conclusions. Summary judgment is warranted.[1]

ARGUMENT

I. The Corps Fully Complied With NEPA.

NEPA does not give license to reverse agency action just because a plaintiff disagrees with the agency's analysis or conclusions. NEPA is a procedural statute, and the Corps's procedures here were robust. It solicited input over a multiyear administrative period, published a draft EA, solicited comments on the draft, and responded to each and every timely comment in a 163-page analytical document supported by hundreds of pages of appendices. Moreover, in a lengthy extra-legal review process that SRST instigated—improperly delaying implementation of the Corps's final actions—the Corps responded to numerous *untimely* comments and then imposed even more conditions on construction and operation of the pipeline. To hold that this process was insufficient to support the FONSI would be to saddle agencies with intolerable administrative burdens and destroy NEPA's "core focus" of "improving agency decisionmaking." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 769 n.2 (2004). The Tribe may disagree with the Corps's NEPA analysis, but that does not impugn the soundness of its process. Summary judgment is warranted.

A. The Finding Of No Significant Impact Was Not Arbitrary Or Capricious.

1. Standing Rock Applies The Wrong NEPA Standards.

SRST ignores the established rule that an agency need not prepare a "detailed statement" of the environmental impact of a proposed action—an environmental impact statement ("EIS")—unless the action "significantly affect[s] the quality of the human environment." 42 U.S.C.

[1] This reply supporting Defendants' cross-motion for summary judgment does not address issues, such as vacatur, that are specific to SRST's initial motion for summary judgment in its favor.

§ 4332(2)(C); *see* D.E. 159, at 14–15 ("Dakota Access Opp."). An EA need only be a "concise" and "brief" document that assesses whether the action will have a significant environmental impact. *See* 40 C.F.R. § 1508.9(a); 33 C.F.R. § 230.10(a)–(b).

In ignoring all of this, SRST fails to bear in mind that "NEPA is not a green Magna Carta," and "federal judges are not the barons at Runnymede." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991) (Thomas, J.). Because NEPA is a procedural statute, it does not bar agency action that others believe is environmentally harmful; it instead "directs agencies only to look hard at the environmental effects of their decisions." *Citizens Against Burlington*, 938 F.2d at 194; *see Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989). Courts, in turn, "enforce the statute by ensuring that agencies comply with NEPA's procedures, and not by trying to coax agency decisionmakers to reach certain results." *Citizens Against Burlington*, 938 F.2d at 194. Indeed, "the *only* role for a court is to insure that the agency has *considered* the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" *Id.* (emphases added) (quoting *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980)).

These fundamental principles are largely absent from the Tribe's response.

2. The Corps Correctly Determined The Lake Oahe Crossing Will Not "Significantly" Impact The Environment.

a. The Tribe does not dispute that the EA addressed all ten Council on Environmental Quality factors for determining whether an EIS is required, or that by challenging only one of the ten SRST has forfeited any argument that those determinations or the resulting FONSI were arbitrary and capricious. *See* Dakota Access Opp. 16–20. These implicit concessions alone suffice to uphold the Corps's NEPA analysis.

The Tribe instead doubles down on its contention that the Corps insufficiently analyzed

the risk of a spill at Lake Oahe. But its argument—that NEPA requires an EIS here because a "pipeline oil spill is reasonably foreseeable … and would unquestionably have significant environmental impacts on the Tribe," SRST Opp. 1, 4–10—misapprehends NEPA's requirements. No one disputes—and in fact the EA expressly acknowledges—that in the "extremely unlikely" event of an oil spill, AR 71291–92 (Ex. L), environmental consequences could be "high," AR 71316. The Tribe uses a 1981 regulation to contend that this alone—*i.e.*, the impact under a "worst case scenario"—compels an EIS. *See* SRST Opp. 8 (citing 46 Fed. Reg. 18,026, 18,032 (Mar. 17, 1981)). But whatever requirement that regulation may have imposed on the EA analysis (the regulation primarily applied instead to how an EIS is performed), the CEQ has long-since rescinded it. *See* 51 Fed. Reg. 15,618 (Apr. 25, 1986) (removing "worst case analysis" language). The Tribe's reliance on this obsolete regulation and the case law applying it shows just how deeply it errs in analyzing NEPA. *See* SRST Opp. 8–9.

b. The EA appropriately follows current law. First, it directly considers the *likelihood* of a spill by devoting an entire subpart of the Reliability and Safety section to a "Risk Analysis" that analyzes nine separate factors, *see* AR 71316–18 (Ex. L), before concluding that the risk of a spill is extremely low. Second, it considers the possible *effects* of that unlikely event, including measures the Corps required as conditions to approving the crossing—measures carefully designed both to mitigate the extent of all effects and remediate any consequences. AR 71318 (Ex. L). This second step helps explain why the full title of the resulting decision document is a *Mitigated* Finding of No Significant Impact. AR 71174 (Ex. M); *see also* AR 71176 (FONSI section on "Mitigation Measures" reviews steps Corps took to "avoid, mitigate, and minimize impacts" of pipeline such that "impacts to the environment would be temporary and not significant").

The D.C. Circuit expressly blessed the EA's approach in *New York v. Nuclear Regulatory*

Commission, 681 F.3d 471 (D.C. Cir. 2012). The Tribe's reliance on *New York* is misplaced, *see* SRST Opp. 7–8, because the two main errors in the agency action in *New York* did not occur here.

The petitioners in that case challenged the Nuclear Regulatory Commission's update to a "Waste Confidence Decision" or "WCD," which assessed the safety of a plan for temporarily storing spent nuclear fuel rods. The NRC first erred by proceeding as if NEPA did not apply to such a plan, even though storage "poses a dangerous, long-term health and environmental risk" for "time spans seemingly beyond human comprehension." 681 F.3d at 474, 476 (NRC principally argued that the WCD was not a "major federal action"). Second, even if the WCD could be treated as an EA, as the NRC urged, the Commission only did half its job. It was not allowed to dispense with considering the *effects* of a negative event just because it thought the event's *likelihood* was very low. *Id.* at 479 (holding that the Commission improperly "failed to examine the environmental consequences" of lacking a storage facility because it "presume[d] the existence" of one); *id.* at 482 (Commission erred in thinking "it did not need to examine the consequences of fires" just because "it found the risk of fires to be very low"). The takeaway is that "an agency conducting an EA generally must examine both the probability of a given harm occurring *and* the consequences of that harm if it does occur." *Id.* at 482.

The Corps did exactly what *New York* requires. It applied NEPA to the Lake Oahe crossing, preparing an extensive EA to support its FONSI. And it included an entire section in that EA addressing *both* the likelihood *and* impacts of an oil spill. AR 71316–18 (Ex. L). Cases like *New York* do not hold, as SRST argues, that an "EIS can be avoided" only if the likelihood of a spill is sufficiently "remote and speculative." SRST Opp. 7 (argument heading). In fact, *New York* expressly rejected the argument, also advanced in that case, that if "the probability of a given harm is nonzero," it "mandate[s] an EIS." 681 F.3d at 482. To the contrary, if "the agency examines

the consequences of the harm in proportion to the likelihood of its occurrence" and nonetheless concludes that "the overall expected harm" is "insignificant," that finding will "support a FONSI." *Id.* "An agency may find no significant impact … if the combination of probability and harm is sufficiently minimal," because the entire "concept of overall risk incorporates the significance of possible adverse consequences discounted by the improbability of their occurrence." *Id.* at 478–79 (citation omitted). Thus, when the Corps assessed both likelihood and effects of a spill, it did what *New York* requires: it "put the weights on both sides of the scale." *Id.* at 482. And because the Corps's conclusion that "an EIS" is "not … required" was based on this "weighing of the probability and the consequences," that "determination … merit[s] considerable deference." *Id.*

The cases that the Tribe cites here, including *New York*, involved a complete *failure* to consider a low-risk, high-consequence event; and none supports the Tribe's view that an EIS is required where the agency's FONSI is based on a consideration of both likelihood and effect. *See id.* (noting that the NRC "did not undertake to examine the consequences" of future potential harms "at all"); *Gov't of the Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 64 (D.D.C. 2005) (stating that the defendants "bypass[ed] the issue out of indifference, fatigue, or through administrative legerdemain"); *Sierra Club v. Watkins*, 808 F. Supp. 852, 868 (D.D.C. 1991) (agency "violated its own methodology by refusing to include certain low probability risks"); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 871 (9th Cir. 2005) (NEPA case that was unanimously reversed by the Supreme Court—*Public Citizen v. Dep't of Transp.*, 316 F.3d 1002 (9th Cir. 2003), *rev'd*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004)—"suppor[ted]" holding that identifying a "general risk" rather than examining a more specific risk was improper). The Tribe's disagreement with the Corps's well-supported conclusion does not make the action arbitrary and capricious, nor does it allow a court to "substitute its judgment for that of the agency as

to the environmental consequences of its actions." *Citizens Against Burlington*, 938 F.2d at 194 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

c. The Tribe's repeated dismissal of the EA's extensive oil-spill analysis as "conclusory," SRST Opp. 8, 9, 10, 24, 29, without engaging with that in-depth analysis, is of a piece with the Tribe's broader refusal to acknowledge any process that might end with approval of a pipeline crossing at Lake Oahe. A significant portion of the EA—a 163-page document supported by hundreds of pages of appendices—is devoted to the reliability and safety of the pipeline. *See* AR 71312–18 (Ex. L); AR 71779-983 (Appendix L to Environmental Assessment: draft facility response plans). That level of analysis is on the high end of what would be required *even for an EIS*. *See* 40 C.F.R. § 1502.7 (providing that the body of an EIS "shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages"). The level of effort the Corps devoted here is certainly appropriate for a document designed to "provid[e] sufficient information … on potential environmental effects" to "determin[e] whether to prepare an EIS or a FONSI." 33 C.F.R. § 230.10(a).

The Tribe falls back on industry history as a whole to say that oil pipelines have leaked at various times and places nationwide. *See* SRST Opp. 4–6, 9–10. This frontal assault on all pipelines ignores important details, including pipeline age, that render its prime examples inapt.[2] The

[2] For example, the Tribe omits that the Marshall, Michigan pipeline "was installed in 1969" and that "[m]ultiple alarms were immediately generated" at a control center "following the rupture." National Transportation Safety Board (NTSB), Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release, Marshall, Michigan, July 25, 2010, at 1 (2012), https://www.ntsb.gov/investigations/AccidentReports/Reports/PAR1201.pdf. Likewise, SRST writes that "[t]he failed pipeline segment" that leaked in 2016 "used horizontal directional drilling ('HDD') like DAPL, and was installed in 2013," SRST Opp. 5, but neglects to add that the pipeline was installed in 1985—HDD was used in 2013 only to *replace* part of it—or that the company there apparently "misinterpreted its own data." *See* Post-Hearing Decision Confirming Corrective Action Order, at 3–5, Belle Fourche Pipeline Co., CPF No. 5-2016-5013H (PHMSA Mar. 24, 2017).

Corps properly focused its analysis on facts about *this* section of *this* pipeline to find a very low likelihood of leaks, and further to conclude that extensive measures in place as part of the approval will mitigate harm in the unlikely event one occurs. *See* AR 71312–18 (Ex. L). Contrary to SRST's assertion, that determination was well-supported by materials "found in the record," *see* SRST Opp. 16–17, including unrefuted public data from the Pipeline and Hazardous Materials Safety Administration ("PHMSA") showing that, even using a "conservative incident frequency," the "probability" of a spill for "any 1-mile segment" of all pipelines (many of which are old or obsolete) is equivalent to "one spill every 474 years." *See* AR 73038 (Ex. AAA) (adding that 84% of those involve no more than 100 barrels of oil; fully half are 4 barrels or less); *see also*, *e.g.*, AR ESMT 1255–58 (Ex. BBB) (more incident rates).

The Tribe's "all pipelines carry risk" line of attack leaves it with an even bigger problem, however. Not even Standing Rock disputes that, mile-for-mile, pipelines are safer and more environmentally friendly than rail or truck, AR 71229–31 (Ex. L) ("a pipeline is a safer and more economical alternative than trucking"; "substantially higher number of transportation accidents" with rail; "both truck and rail modes" mean "an increase in exhaust" from "truck and locomotive combustion"). Because the pipeline will most likely result in less reliance on these other shipment modes, AR 71237 ("reasonable to assume that truck and rail traffic would increase" without the pipeline), 71322 ("the critical factors limiting" growth in the oil and gas industry are on the production side), the Tribe's risk-in-the-aggregate analysis confirms that, with this pipeline, there is a *reduced* chance of harm to SRST's water supply. AR ESMT 946 (Ex. XX) (crude oil spills are four to five times more likely with rail transportation, and the Tribe's *new* drinking water intake structure is just 1.6 miles from a rail line that transports approximately 300,000 barrels of oil each day).

d. The Tribe says that the EA "ignore[s] … critical concerns," SRST Opp. 11, but the EA itself shows it addresses each concern that the Tribe lists: landslides (AR 71250–51) (Ex. L), spill-detection (AR 71266, 71313), underground leaks (AR 71269), response times (AR 71315), potential spill volumes (AR 71270–71), water-quality analysis (AR 71298), and winter conditions (AR 71263). The Tribe's argument to the contrary conflicts with three bedrock principles of NEPA review.

First, "the presence of disputing expert witnesses" presents "'a classic example of a factual dispute the resolution of which implicates substantial agency expertise'" and mandates deference to the Corps. *Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 746–47 (D.C. Cir. 2001) (quoting *Marsh*, 490 U.S. at 376). Most of the Tribe's assertions—which it bases on untimely expert reports—present exactly this sort of dispute. *E.g.* SRST Opp. 13–14 (using "expert review" to dispute "assumptions" for Corps's spill-volume and water-quality analysis); *id.* at 13 (response times); *id.* at 14–15 (winter conditions). Thus, even were the Tribe's expert reports properly before this Court, the factual dispute they create would be plainly insufficient to set aside the EA.

Second, those reports are *not* properly before the Court. Post-July 25, 2016 materials cannot undo a FONSI completed on July 25. The Tribe now concedes that post-July 25 materials would come into play only if the July 25 EA "was legally inadequate." SRST Opp. 34 n.27 (arguing "it was arbitrary for the Corps to reverse its decision to conduct a full EIS, which would have corrected [the alleged] inadequacies" in the EA). Yet the great bulk of the Tribe's attack on the Final EA and FONSI is grounded in untimely expert reports and a December 4, 2016 Interior Solicitor's Opinion. While the Tribe (at 11 n.10) touts its efforts to raise concerns as "nothing short of extraordinary," it still does not mention its letter to the Corps saying it would submit whatever expert analysis it could procure by mid-May 2016, AR 84808 (Ex. K), or that it either

chose to skip that opportunity or could not find an expert who would endorse its specious criticisms. *Cf.* D.E. 195-1 ¶ 3 (Richard Kuprewicz states he was asked only in October 2016 to review the Final EA). Thus, short of a possible rule of reason analysis discussed *infra—i.e.*, only if the Corps erred in concluding on July 25 that it need not prepare an EIS—there is no basis in law or fact to consider materials dated after July 25 in reviewing the legality of the NEPA determinations.

Third, an agency need not prepare an EIS, *even if* significant environmental effects are possible, where it determines that safeguards "sufficiently reduce the impact to a minimum"—by reducing either the probability or the magnitude of the impact. *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006); *see also* SRST Mot. 19 (conceding that part four of the test for adequacy of an EA is "whether the agency" "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.'" (quoting *Town of Cave Creek v. FAA*, 325 F.3d 320, 327 (D.C. Cir. 2003)). The Tribe's remaining criticisms ignore these principles.

Take, for instance, landslides. The Tribe falsely states says that the EA "never analyzes information about landslide risks" near Lake Oahe. SRST Opp. 12. The EA explains that, while certain areas along the pipeline have a "high incidence of landslides," AR 71250–51 (Ex. L), the *types* of landslides that could occur do not pose a risk due to the design of the pipeline. AR 71252 ("The strength and ductility of a properly designed pipeline would allow it to span a considerable distance without compromising its integrity in the event of a landslide," and this pipeline will use "the most resistant type of [steel] piping, vulnerable only to very large and abrupt ground displacement (e.g., earthquakes, severe landslides)."). Moreover, the pipeline will be placed "at a depth below that which would be affected by land movement." AR 71318 (Ex. L).

The Tribe's only response is the untimely "Accufacts" report stating what the Corps itself plainly recognized: steel piping may be vulnerable to "massive landside movements." AR ESMT 1075 (Ex. WW). But nothing in the record for the FONSI supports the untimely assertion that the pipeline is at risk of "massive landslide forces." *See* ESMT 1076 (Ex. WW). Even the *non-record* evidence on this point fails. Accufacts relied on a set of mapping data that was much too imprecise to differentiate between areas of "massive landslide" risk and the pipeline's actual path, which *avoids* those areas. Accufacts' mapping data—at a scale of 1:4,000,000 (*i.e.*, one inch equals 63 miles)—was so highly "generalized" that it swept within its "High Susceptibility" designation the lake itself and "upland areas that are predominately flat to gently inclined." AR ESMT 938 (Ex. XX). This lack of massive landslide risk is not "limited to the HDD component." SRST Opp. 12 n.13; *see* AR ESMT 938 (Ex. XX) ("review of aerial imagery does not indicate a high incidence of landslide activity within several miles of Lake Oahe").

The Tribe's spill-detection points also rely on post-record materials that focus myopically on risks the Corps reasonably deemed unlikely to materialize, much less at the levels the Tribe asserts. Here, the Tribe notes that some remote detection systems have failed in the past, SRST Opp. 12, and that no leak-detection system alerts to 100% of leaks. SRST Opp. 12–13. But this does not mandate an EIS. The EA expressly acknowledges the current state of technology, AR 71314 (Ex. L) ("capable of detecting leaks down to 1 percent or better of the pipeline flow rate"), and the Corps was free to forego an EIS where the record showed both an exceedingly low spill risk and mitigation measures that would reduce the impact should one occur. *See supra* at 4-7.[3]

[3] The Tribe disputes whether mitigation though easement conditions is sufficient to reduce any putative impact. But its own expert admits that the conditions "are generally positive steps to help reduce risk." D.E. 195-1 ¶ 14. Any dispute about whether that reduction is sufficiently "materia[l]," *id.*, is precisely the sort of "predictive judgmen[t]" within the Corps's expertise to which

e. The Tribe also argues—for the first time—that the Corps unlawfully confined its NEPA review to the crossing itself. SRST Opp. 15–16. As Dakota Access has already explained, regulations for projects like this one properly confine the Corps's analysis to the permit area. D.E. 159, at 20 n.3; *see also* D.E. 39, at 45–48 (applying NEPA cases to conclude that the Corps appropriately scoped its NHPA review). The EA properly applies D.C. Circuit law to a privately funded pipeline built almost entirely on private land. D.E. 22-1, at 2, 11 (Ex. CC).[4] It analyzes the impacts of the crossing on both the Federal lands at Lake Oahe (the Project Area) and the exclusively private land that approaches the crossing point, including the HDD staging areas and drilling pads (the Connected Actions). AR 71239 (Ex. L) (defining each); *see also* 40 C.F.R. § 1508.25(a)(i)–(iii). That fully satisfied the Corps's NEPA obligations.

f. SRST's argument that the Corps merely acquiesced in the content of a privately drafted EA, SRST Opp. 16, is belied by even a cursory review of the record. Corps officials examined and extensively reviewed the EA and all the permit and verification decisions involving the pipeline. AR 71180 (Ex. M) (listing Corps personnel from 17 different offices involved in reviewing the Section 408 decision); AR 72161–270 (Ex. YY) (listing more than 175 comments by Corps personnel on the EA and follow up discussions); AR 73611–20 (Ex. ZZ) (listing comments on the EA). The Tribe also offers no basis for this Court to say that the Corps was untruthful when it averred that it "independently evaluated and verified the information and analysis undertaken in this EA and takes full responsibility for the scope and content contained herein." EA

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this Court "must be particularly deferential," *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821 (D.C. Cir. 1983).

[4] *See Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 49–51 (D.C. Cir. 2015) (Corps jurisdiction extends only to the project area and actions that "'[a]utomatically trigger other actions which may require environmental impact statements,' '[c]annot or will not proceed unless other actions are taken previously or simultaneously,' or … are 'interdependent parts of a larger action and depend on the larger action for their justification.'" (quoting 40 C.F.R. § 1508.25(a)(1))).

71225 (Ex. L).

g. SRST's argument that the Corps had a duty to share all documents with the Tribe during the comment process, SRST Opp. 16–17, relies on snippets from opinions that the Tribe misapplies or takes seriously out of context. When NEPA requires an agency to "inform the public that it has indeed considered environmental concerns," *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983), that means disclosure of "the environmental impact of its actions," *id.* at 98, not disclosure of all materials the agency had when reaching its determinations. NEPA does not create, nor has SRST identified, any requirement that the Corps disclose to potential commenters all original, potentially sensitive documents that will *inform* the agency's decisionmaking. In that relevant sense, NEPA definitively is *not* a disclosure statute. *See Nevada v. Department of Energy*, 457 F.3d 78, 87–88 (D.C. Cir. 2006) ("Under NEPA, the 'role of the courts is simply to ensure that the agency has adequately considered and disclosed *the environmental impact* of its actions.'" (quoting *Olmsted Falls v. FAA*, 292 F.3d 261, 269 (D.C. Cir. 2002))). This explains why even Assistant Army Secretary Jo-Ellen Darcy acknowledged that "appropriate safeguards (including redaction)" applied to her politically driven decision to recommend sharing information found in sensitive documents. AR ESMT 604 (Ex. S).

The Tribe completely ignores Dakota Access's independent reason for rejecting the argument that the undisclosed documents were somehow "critical" to "oil spill risk and response." *See* SRST Opp. 18. Spill models do not inform *whether* a spill will occur, and—be design—their worst-case assumptions greatly exaggerate any spill's *effects* beyond what is physically possible. D.E. 92, at 3; D.E. 161, at 1–2. That is why Kuprewicz and the other experts were able to draft their reports without access to spill models. D.E. 195-1, at 3. It is telling that Kuprewicz's new

declaration does not refute that his statements about spill models as tools to measure spill likelihood are just plain wrong. Moreover, the Tribe's point (at 18) that "a key feature" of the Solicitor's Opinion was non-disclosure of these same documents that the Tribe, its expert, and the Solicitor so seriously misconstrued is yet another reason to disregard her Opinion.

3. The EA Adequately Considers Tribal Rights.

The Tribe's attacks on the EA's consideration of treaty-based hunting, fishing, and water rights, SRST Opp. 21–24, ignores that the Corps had no duty to specify those treaties whenever it addressed risks to resources that the treaties may govern. In any case, the Corps specifically considered treaty right impacts, and because a spill is the only putative threat to those rights, everything the Corps said on that topic directly answers those concerns.

It is plainly false for the Tribe to state that the EA does not contain "any discussion" about the "impacts of a spill on the Tribe and the health and welfare of its members." SRST Opp. 21. In numerous places the EA expressly discusses tribal impacts. AR 71231 (Ex. L) (routing pipeline around tribal lands); AR 71262 (impact on tribal water supplies); AR 71282 (impact on tribal fishing or hunting rights); AR 71299 (impacts on tribal property interests); AR 71303–04 (tribal consultation rights); AR 71309–11 (direct and indirect effect on SRST); AR 72435 (addressing comments on Tribe's treaty history). Ultimately, the Corps concluded—correctly, as noted above—that these potential impacts were minimal given the low risk of a spill and mitigation measures.

The Tribe calls this conclusion "insufficient" given the importance of its treaty rights. SRST Opp. 21–24. But as the Tribe correctly recognizes, NEPA simply "requires consideration" of a proposed action's potential consequences and the probability that they will come to pass. *Id.* at 21. The Corps considered both by recognizing that the consequences of a spill would be "high,"

while their probability was so low that, with multiple mitigation measures in place, environmental impacts would be insignificant. AR 71309–10, 71318 (Ex. L). To get to an "existential" harm "to Treaty rights," SRST Opp. 23, the Tribe must excise the probability prong of the analysis and assume a worst-case scenario without any mitigation. That means the Tribe's treaty argument fails for the same reasons it cannot prove a NEPA violation: The Corps rationally concluded that the risk of a spill was very low and possible consequences are sufficiently mitigated.

The Tribe is wrong to dismiss the relevance of mitigation measures to its treaty rights claim. SRST Opp. 22. Mitigation measures obviate the need for an EIS when they "sufficiently reduce the impact to a minimum." *TOMAC*, 433 F.3d at 861. Here, the Corps required Dakota Access to develop and submit spill models, geographic response plans ("GRPs"), and facility response plans. AR 71261–62 (Ex. L); *see Nat'l Parks Conservation Ass'n v. Jewell*, 965 F. Supp. 2d 67, 76 (D.D.C. 2013) (agency adequately considered mitigation by requiring applicant to submit "drilling plans, spill prevention and response plan, soil and erosion control plans, vegetation management plans, etc."). To complain that response plans are triggered only after "harm is underway," SRST Opp. 22, is to ignore the meaning of the word "response." NEPA does not even *require* "'detailed unchangeable mitigation plans for long-term development projects.'" *Nat'l Parks Conservation Ass'n* , 965 F. Supp. 2d at 75 (quoting *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 517 (D.C. Cir. 2010)). So the fact that the Corps went the extra step here by requiring detailed plans here simply confirms that the Corps more than sufficiently complied with NEPA.[5]

[5] The Tribe complains that the GRP for Lake Oahe [redacted] SRST Opp. 20 (referencing August 2015 draft response plan). But after the Tribe filed its brief, Dakota Access discovered that the Corps had not included the company's updated Lake Oahe GRP in the administrative record. Dakota Access submitted this revised plan to the Corps on March 21, 2016, after the Tribe's draft EA comments complained that a leak could reach the reservation's water intakes. The correct version of the GRP addresses

And because these response plans can, and almost certainly will, be modified before being submitted for the Corps's final review, AR 71315 (Ex. L), concerns about any details (*e.g.*, use of bottled water or the deployment of oil containment booms) are no reason to set aside the finding of no significant impact. SRST Opp. 22.[6]

B. The EA Adequately Considers Environmental Justice Concerns.

To read the Tribe's Opposition one would think that only the Corps filed a brief addressing environmental justice. Because the Tribe completely ignores Dakota Access's explanations for why the environmental justice analysis comported with CEQ guidance and was otherwise lawful under the APA, this argument also fails.

Dakota Access argued, Dakota Access Opp. 29, and the Tribe itself recognizes, SRST Opp.

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those concerns by [redacted]

[6] The Tribe has not been—nor will it be—excluded from emergency-response planning. *See* SRST Opp. 22 n.22. Rather, because SRST fears that *any* effort to mitigate harm would help defeat its claims, it previously showed no interest in discussing response planning. The Tribe proves the lengths to which it has gone to avoid being linked to any safety efforts when it writes that its staff "attended a meeting at which" additional easement conditions "were discussed"—but insists that the Tribe did not "participat[e] in creating these conditions"—even though the Corps added them expressly in response to environmental concerns that *Standing Rock* raised in that *same* meeting, *see id.* at 18 n.18; AR ESMT 850 (Ex. CCC) (summarizing December 2, 2016 meeting); AR ESMT 970 (Ex. DDD) (Nov. 22, 2016 email reporting that Standing Rock "have made their position clear that they do not want to discuss any courses of action that relate to an easement being issued"). It is also hard to understand how the Tribe could have been willing to take part in planning when, according to the Tribe, until just recently its "emergency preparedness office" was not even "unaware of" the "existence" of a response plan. *See* SRST Opp. 20. After all, these plans are described in no fewer than three sections of the EA. AR 71315 (Ex. L) ("A tactical GRP specific to a response strategy for Lake Sakakawea and Lake Oahe was provided by the applicant and includes specific responses strategies and equipment for all affected water."), 71262 (section of EA discussing GRP as a way to mitigate harm to drinking water), 71267 (Dakota Access submitted the site-specific GRPs as "Privileged and Confidential" because they are "security sensitive," including information on "deployment of containment or diversionary booms at predetermined locations"). Just recently the Tribe has finally expressed a desire to participate in response planning. The company is willing to work with the Tribe on doing so in a process that, ideally, will be separate from this litigation.

25, that CEQ guidance encourages the use of census tracts, making the Corps's analysis on this topic utterly conventional. Buffer zone sizes are also a non-issue, because the Corps assessed impacts on the Tribe even though its reservation is outside that zone. That assessment concluded that impacts "are not disproportionate" to the Tribe because, even in the event of an oil spill, "private and/or non-tribal intakes" are "closer to the Lake Oahe crossing than any intakes owned by the Tribe." AR 71310–11 (Ex. L).

The Tribe also accuses the Corps of using a "double standard" by assessing downstream impacts ten miles away from the North Bismarck alternative, but supposedly "ignoring the impacts of a spill on the Tribe." SRST Opp. 26–27. But the Corps did not ignore the impact of a spill on the Tribe; a separate section in its environmental-justice analysis is devoted to addressing the impact of an oil spill on the Tribe. Moreover, the Corps's analysis here legitimately rested on a *greater* environmental impact for the lengthier North Bismarck alternative and a host of difficulties that would have plagued efforts to implement it. *See* AR 71232–36 (Ex. L).

C. The Rule Of Reason Independently Precludes The Need For An EIS.

Dakota Access devoted an entire section of its NEPA argument to explaining why the rule of reason independently defeats SRST's claim that an EIS was required. Dakota Access Opp. 30–31. It explained that when the totality of what the Corps considered is viewed within the context of "'NEPA's regulatory scheme as a whole,'" the rule of reason dictates that "preparation of an EIS would serve 'no purpose.'" *Id.* at 30 (quoting Supreme Court case law). Thus, even accepting the Tribe's criticisms, remand to prepare an EIS would be unwarranted, because the Corps's "additional levels of review" "outside the formal NEPA process" meant that the Corps took steps that are "more than adequate to address any putative shortcoming in the EA." *Id.* at 31.[7] The Tribe

[7] Standing Rock's discussion, elsewhere in its brief, of the additional review that the Corps afforded after September 9 ignores that the *legitimate* role of that added process is limited to the rule

flat out ignores this argument; in fact, the phrase "rule of reason" is nowhere to be found in its brief. That forfeiture is reason alone to grant judgment against it on the NEPA claim.

II. The Easement And Withdrawal Of The EIS Notice Were Lawful.

In granting the easement, the Corps offered more than ample justification to satisfy the APA. The arbitrary-and-capricious standard is, of course, "[h]ighly deferential" and "presumes the validity of agency action." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000). As already noted, the Tribe's challenge to the easement fails if the EA was legally adequate when issued. SRST Opp. 34 n.27. Moreover, no heightened standard of review applies here.

The Tribe's inability to show that the EA was inadequate as of July 25 dooms its challenge to the easement from the start. Rather than defend the post-July 25 process on the only grounds available for revisiting a Final EA and FONSI—*i.e.*, a significant change to the project or significant new information not previously available—the Tribe puts all of its chips on the argument that the Final EA and FONSI were invalid from the get-go. But even ASA Darcy, who needed to find some basis for putting off the easement that her own experts at the Corps tried to issue, could not bring herself to base further delay on a finding that *any* earlier decision was legally inadequate. AR ESMT 605 (Ex. T). If this Court agrees with her conclusion, that ends the matter.

The Tribe's argument independently fails because no heightened review standard could apply here under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). The Tribe concedes that it is not challenging the decision to withdraw the EIS notice, SRST Opp. 30 n. 24, which leaves only the decision whether to grant an easement. And the Tribe challenges *only* those aspects

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of reason analysis that it elected not to address. Defendants do not use the additional review for such things as "post-hoc rationalizations" of the EA. *See* SRST Opp. 27. In fact, Defendants agree that the validity of the July 25 decisions must be based solely on the record that the Corps had before it at that time. That is why the Tribe's reliance on post-hoc expert reports and the Solicitor's Opinion is improper.

of that decision which overlapped with the EA and FONSI. As both Dakota Access and the Corps have explained, issuing the easement did not reverse an earlier decision or upend any earlier findings. *See* D.E. 159, at 33; D.E. 172, at 34–37. This "defies credulity," protests the Tribe, because ASA Darcy wrote on December 4 that the Army "will not grant an easement to cross Lake Oahe at the proposed location on the current record." SRST Opp. 30 (quoting AR ESMT 604). But her same memorandum explicitly states that the Army "has not made a final decision on whether to grant the easement." AR ESMT 603 (Ex. T). *Fox* was concerned with the difference "between initial agency action and subsequent agency action undoing or revising that action," not the twists and turns leading up to a single agency action. 556 U.S. at 515. Assuming the Corps made no final right-of-way decision on July 25 (as the Tribe argues in opposing—and *must* argue in order to defeat—Dakota Access's cross-claim), the same is true for December 4. No decision—certainly no *final* decision—was reversed when the Corps issued a signed easement. The Tribe would have courts apply a heightened standard any time an agency changes its internal approach in the run-up to its final decision. Nothing in *Fox* supports that contortion of the APA.

Even treating the grant of the easement as a policy change, "heightened scrutiny" under *Fox* would still not apply. SRST Opp. 31. As a threshold matter, the Supreme Court rejected outright that "agency change be subjected to more searching review." *Fox*, 556 U.S. at 514. Rather, when an agency's policy "rests upon factual findings that contradict those which underlay its prior policy," the normal arbitrary-and-capricious standard may require the agency to offer "a reasoned explanation" for "disregarding facts … that underlay … the prior policy." *Id.* at 515–16. In an effort to shoehorn this case into that standard, the Tribe cites ASA Darcy's December 4 decision, the Solicitor's Opinion, and the supposedly withheld documents. SRST Opp. 31. But the Tribe does not identify any factual findings in any of these materials that the Corps needed to

disregard. None. ASA Darcy did not find the EA or FONSI inadequate. Just the opposite. She merely expressed her own judgment that, in these circumstances, "more robust analysis of alternatives can be done and should be done." AR ESMT 605 (Ex. T). In issuing the easement the Corps did not disagree with any prior conclusion that the easement must be denied or that it failed some requirement, because ASA Darcy reached no such conclusions.

Moreover, the type of "reasoned explanation" that the APA requires as a general matter is on full display here. *Fox*, 556 U.S. at 516; *see* D.E. 159, at 36–38; D.E. 172, at 34–37. The Tribe says that, in granting the easement "on the same record as" ASA Darcy's EIS recommendation, "the Corps essentially concedes that [it] ignored the findings" underlying that recommendation. SRST Opp. 33. In reality, the Corps looked at those record materials and, in light of the new Administration's policy and its *agreement* with ASA Darcy that the EA and FONSI comported with the law, exercised a different judgment—as it was entitled to do. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

The Tribe says that the Corps's grant of the easement is "utterly silent" on the supposedly "withheld risk and response documents." SRST Opp. 33. But the Corps had those documents when it prepared the EA; the EA supported the grant of the easement; and the Tribe disputes neither of these two points. (Also, ASA Darcy never said that those documents contradict the EA or FONSI; she merely noted that the Tribe had not seen them.)[8]

Next, SRST complains that the Corps "wave[d] off" the various tribes' exceedingly untimely expert reports. SRST Opp. 33. But the Corps explained in the February 3 Memorandum that the Tribe's new reports "raised essentially the same concerns … in its comments on the draft

[8] The Tribe does not explain how 42 U.S.C. § 4332(2)(E) adds anything. *See* SRST Opp. 32 n.26. That statute is triggered by "unresolved conflicts concerning alternative uses of available resources." *Id.* Approval of a pipeline crossing co-located with existing rights-of-way does not "conflict" with an "alternative" proposed use of Corps land or any other "resource."

EA, and the Corps addressed those concerns and comments in the Final EA." D.E. 117-25, at 12. The Tribe is in no position to refute that these were the same comments and concerns since it disavows reliance on a theory by which the post-July 25 information *could* raise something different. SRST Opp. 34 n.27. The EA is thus a full response to the reports even though the EA does not (indeed, given the reports' tardiness, could not) mention them specifically. *Cf. Caritas Med. Ctr. v. Johnson*, 603 F. Supp. 2d 81, 92 (D.D.C. 2009).

Finally, the Tribe points to its treaty rights, accusing the Corps of dismissing the Solicitor's Opinion "in the most perfunctory manner," and asserting that the "authoritative" opinion "changed the playing field dramatically." SRST Opp. 33. But the Tribe does not explain how the opinion is in any sense authoritative given that the Department of Interior has no legal authority over the Lake Oahe crossing and even *that* Department no longer stands by the opinion. Nor was the Corps required to divine how much "weight" ASA Darcy gave to an opinion that her Memorandum (issued the same day) never even mentioned. *See* SRST Opp. 9 n.9. In any event, the Corps did explain why it rejected the opinion. D.E. 117-25, at 13. As the Tribe concedes, the Corps added conditions to the easement after the opinion issued, SRST Opp. 33, and those conditions addressed the Solicitor's concerns, D.E. 117-25, at 13.[9] The fact that *ASA Darcy* "was privy" to the *possibility* of adding those conditions when she wrote *her* December 4 Memorandum, SRST Opp. 33–34, does not cure the obsolescence of, or other defects in, the separate Solicitor's Opinion.

[9] It is more than ironic for the Tribe now to say that Dakota Access would have taken the mitigation and safety steps required in these conditions regardless of whether the easement separately spelled them out. That was Dakota Access's very point in its cross-claim when it objected to ASA Darcy invoking possible "new" conditions as reason to delay delivering the easement. D.E. 86, at 29 n.18. The Army nonetheless sees added value in now spelling out the details for these requirements in an effort to ensure that all appropriate mitigation was in place, and that determination is not arbitrary or capricious.

III. The Corps Did Not Violate The Tribe's Treaty Rights.

The Tribe invokes treaty rights a second time around when it comes to the easement decision. But its argument here is based on nothing more than the same misguided criticisms already addressed above in connection with the Final EA and FONSI. Moreover, as Defendants have explained, "the general trust relationship between the federal government and Indian tribes" is not "sufficient to create a cause of action for breach of trust." *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 893 (D.C. Cir. 2014). The Tribe's effort to get around this by invoking the APA, SRST Opp. 34–37, only confirms that without a statute or regulation obligating the Corps to take some particular action on behalf of the Tribe, this claim also fails.

The APA authorizes courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As the earlier NEPA discussion shows, the APA provides a cause of action and a waiver of sovereign immunity to the extent the Corps's approval processes were "not in accordance with law," *id.*, meaning some *other* law must establish both a right held by the Tribe (or a relevant enforceable duty imposed on the Corps) and federal subject matter jurisdiction. *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011). Putative trust obligations deriving from treaties do not fit the bill because, as Dakota Access has explained, such an obligation "is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). Without a statute or regulation that imposes obligations on the Corps specific to Indian Tribes, this Court's authority under the APA is confined to other generally applicable statutes, such as NEPA or the MLA. "The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) ("When the Tribe

cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." (citation and internal quotation marks omitted; alternations in original)).

The Tribe's cases do not hold otherwise. As a threshold matter, they predate the Supreme Court's and D.C. Circuit's recent and clear pronouncements that the Tribe "must identify a substantive source of law"—that is, a statute or regulation—"that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003); *see also Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 757 (2016); *Jicarilla*, 564 U.S. at 165; *El Paso Nat. Gas*, 750 F.3d at 893–94.[10] Although SRST may wish to ignore controlling precedent in favor of its stale, out-of-circuit cases, this Court is not similarly at liberty. Indeed, that the Tribe must resort to a 1981 case from the Western District of Washington is telling. Cases like *No Oilport! v. Carter*, 520 F. Supp. 334, 371–73 (W.D. Wash. 1981), which suggest that the trust relationship alone places enforceable duties on the government, offer nothing more than dicta since rejected many times over.

In any event, and as explained above, the Tribe can only muster the speculative possibility that a spill might harm resources protected by treaty rights—speculation that the Corps, employing its expertise, rejected in concluding the pipeline would not materially impact any of the Tribe's interests, including water rights, socio-economic interests, hunting rights, and fishing rights. The trust claim based on treaty rights is meritless.

SRST's Nationwide Permit 12 challenge is also tied to treaty rights and fails for the same reasons. The tribe cites not one case in which the extremely low risk of a spill or some other

[10] Standing Rock urges this Court not to apply *El Paso Natural Gas* to it, complaining that the D.C. Circuit "conflated" lines of precedent unfavorable to the Tribe. SRST Opp. 36 n.29.

unplanned event spells failure to satisfy General Condition 17 to NWP 12. *See* 77 Fed. Reg. 10,184, 10,283 (Feb. 21, 2012) (disallowing use of NWP 12 for activities that may "impair reserved tribal rights"). The Corps also properly concluded here that construction and operation of the pipeline will not impair tribal rights. AR 71282 (Ex. L); AR 71310. General Condition 7 is no bar either. Standing Rock relegated that argument to a footnote in its opening brief, which is reason enough to reject it. Moreover, the Corps properly concluded that response measures would prevent an unanticipated release from affecting tribal water supplies. AR 71311 (Ex. L). That is all the more true now that SRST's new drinking water intake is more than 70 miles downstream of the crossing. SRST Ex. 22 at 28. Use of NWP 12 was also proper.[11]

CONCLUSION

This Court should grant the cross-motion for summary judgment by dismissing SRST's claims in counts 5 (NEPA), 6 (Clean Water Act and Rivers and Harbors Act), 7 (Trust Responsibilities), and 8 (Easement Grant and Reversal of Prior Decisions).

Dated: April 4, 2017

Respectfully submitted,

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[11] The Tribe's remaining treaty arguments—alleging inadequate discussion of the Tribe in the EA, withheld documents, and a duty to regulate pipelines generally—are re-runs of NEPA arguments that both Dakota Access and the Corps have already refuted in detail. See *supra* at 2-18.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2017, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

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