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
(and Consolidated Case Nos. 16-cv-1796 and 17-cv-267)

PLAINTIFF STANDING ROCK SIOUX TRIBE'S OPPOSITION TO CORPS AND DAPL MOTIONS FOR PARTIAL SUMMARY JUDGMENT; REPLY IN SUPPORT OF TRIBE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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

TABLE OF CONTENTS

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

TABLE OF AUTHORITIES

CASES

Earthjustice
705 Second Ave., Suite 203
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

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

REGULATIONS

STATUTES

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

INTRODUCTION

This case challenges several authorizations issued by the U.S. Army Corps of Engineers ("Corps'") allowing Dakota Access Pipeline, LLC ("DAPL") to build a crude oil pipeline with a capacity of over half a million barrels a day under the Missouri River just upstream of the Standing Rock Sioux Tribe's Reservation. The core question before the Court is whether the Corps can authorize the Lake Oahe crossing without adequately considering both the risk of an oil spill into Lake Oahe, as well as the harm of such a spill to the Tribe and its Treaty rights to water, fishing, and hunting that sustain its people.

Under the National Environmental Policy Act ("NEPA"), the Corps must prepare a full environmental impact statement ("EIS") to assess all reasonably foreseeable significant environmental impacts. A pipeline oil spill is reasonably foreseeable, as a litany of recent incidents demonstrates, and would unquestionably have significant environmental impacts on the Tribe. Similarly, under the United States' trust responsibility, the Corps must fully evaluate and prevent the impairment of tribal rights that the U.S. bound itself to protect in Treaties. An oil spill at Lake Oahe would not just impair those rights; it would constitute an existential threat to the Tribe's identity and culture itself.

The Corps did not satisfy either of these duties here. Despite the harm an oil spill would cause, the Corps signed off on an environmental assessment ("EA") prepared by DAPL that brushes off the risks of spills as negligible, and thus never examined the impacts of spills on the Tribe and its Treaty rights. But its dismissal of the risk is based on an extraordinarily cursory discussion that ignores a number of pivotal risk factors, like landslide potential, underground leaks, and winter conditions, and gravely overstates the capacity to detect and respond to spills. It is further based on documents that were not shared with the Tribe or that are absent from the record altogether. Deepening these errors, the EA rejects an alternative location for the crossing

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

in a wealthier and predominantly non-minority community, in ,part because of the impacts an oil spill would have on the people and resources downstream, while simultaneously refusing to examine the harm to the Tribe.

The Corps started down the path of righting these wrongs when it committed to prepare an EIS to analyze the impacts of an oil spill on the Tribe and its Treaty rights and alternative routes that would avoid harming the Tribe. Within days, the new administration jettisoned that process and granted the easement without further NEPA review. The Corps now defends that reversal with the astonishing claim that it has no duty to consider oil spills at all, and that it has no trust responsibility to the Tribe beyond simply complying with other laws. Both arguments must be rejected. The Corps argues, in the alternative, that its consideration of spill risks and consequences was sufficient. In so arguing, it repeats the EA's summary dismissal of oil spill risks without ever addressing a host of critical errors and omissions in the EA. But simply stating that there are "no direct or indirect impacts on the Tribe"—as the EA does with slight variations no fewer than seven times—falls short of the "hard look" that NEPA requires.

Lake Oahe is inextricably connected to the vitality of the Tribe's homeland and the identity and future of its people. Its waters are protected by Treaties that the Corps is bound to uphold. Given how devastating an oil spill would be to the Tribe, and the many unanswered questions about the risks and consequences of a spill, the Corps has a legal obligation to prepare an EIS fully considering the impacts of an oil spill on the Tribe and to conduct an analysis that ensures it is protecting the Tribe's Treaty rights from what could be devastating harm.

ARGUMENT

I. THE RECORD FOR THIS COURT'S REVIEW

Review of agency action under the Administrative Procedure Act ("APA") focuses on the administrative record before the agency at the time the challenged decision was made. *Envtl.*

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

Def. Fund, Inc. v. Costle, 657 F.2d 275, 284 (D.C. Cir. 1981). This case challenges authorizations made at two different times. The Corps issued the § 408 authorization and Clean Water Act Nationwide Permit ("NWP") 12 verification on July 25, 2016, based on the EA and FONSI issued on that date. The administrative record for those decisions runs through July 25, 2016. The Corps granted the Mineral Leasing Act ("MLA") easement on February 8, 2017, and hence the record for the Tribe's challenge to the easement, and the Corps' violations of its NEPA and trust obligations in connection with the easement, runs through February 8, 2017.[1]

The Tribe has cited to limited extra-record evidence, including some uncontroversial background materials (e.g., maps) and declarations from its expert.[2] A court may consider extra-record evidence: "(1) when the agency failed to examine all relevant factors; (2) when the agency failed to explain adequately its grounds for its decision; (3) when the agency acted in bad faith; or (4) when the agency engaged in improper behavior." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997). The expert declarations meet this standard. First, the declarations primarily respond to the confidential spill model and response plans, which had been withheld from the Tribes and public, and were only recently made available under a confidentiality agreement. By withholding the documents from the Tribe, including spill response plans that plainly affect the Tribe and its resources, *see infra* § II.A.7, the Corps deprived the Tribe of the opportunity to review and critique these documents to protect its interests. This "improper

[1] DAPL objects to consideration of some expert reports in the record, claiming it has not had a chance to dispute them, DAPL Opp. at 21 n. 4, but offering no support for its disagreements. The objection is puzzling, as the documents have been available for months and DAPL has had more than ample opportunity to make its case. ESMT 1005 ("Analysis of Kuprewicz Report").

[2] The Tribe incorporates in this reply brief the declarations of Hakan Bekar and Steve Martin, which were filed in support of the Cheyenne River Sioux Tribe's summary judgment motion. (ECF 135) The Tribe also is submitting a second declaration from its expert, which responds to arguments made by the Corps and DAPL in their briefs and to the administrative record, which was provided after the Tribe filed its summary judgment motion.

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

behavior" opens the door to consideration of the extra-record declarations addressing this newly available material.

Second, the declarations supplemented the expert's earlier reviews of the EA that are included in the record. ESMT 1073 ("Accufacts Rep."); Ex. 21 ("ENVY Rep."); ESMT 624 ("EarthFax Rep.").[3] The experts explain that the withheld documents do not address the weighty concerns expressed in their reports, and identify misleading and unsupported assumptions that upend the EA's risk conclusions. The declarations satisfy the first two *Alvarez* criteria as they describe how the Corps fails to examine all relevant factors and provide adequate grounds for its decision. *Alvarez*, 129 F.3d at 624. The declarations do not seek to supplant the Corps' analysis, but rather "only endeavor to point out gaps in the agency's explanation and analysis." *Oceana, Inc. v. Pritzker*, 126 F. Supp.3d 110, 114 (D.D.C. 2015). The declarations can be considered.

II. THE CORPS VIOLATED NEPA BY AUTHORIZING THE OAHE CROSSING WITHOUT AN EIS SCRUTINIZING THE RISK OF OIL SPILLS AND WITHOUT CONSIDERING THE IMPACTS OF A SPILL ON THE TRIBE

A. The Corps Did Not Properly Analyze the Risk of an Oil Spill Affecting Lake Oahe

1. Spills and Leaks from Crude Oil Pipelines are Reasonably Foreseeable

The record is replete with evidence that pipelines leak and spill with regularity, and that the consequences of such incidents—even relatively small ones—can be severe. *See, e.g.*, AR 69152 at 9-11 (discussing high number of spills; inadequate discussion of risks in draft EA; and ongoing pipeline safety rulemaking); AR 74021 (EPA critiquing lack of spill risk analysis); ESMT 1276 (documenting numerous crude oil spills in the last few years, most of which were not detected by remote sensing systems); AR 5750; ESMT 1255-59; ESMT 2904; ESMT 1067 at

[3] It is unclear why only two of the three reports are included in the administrative record, as all of them were unquestionably before the Corps at the time of the easement decision.

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

4 (documenting 1.5 spills per year from single pipeline); ENVY Rep. at 50-54. Sonoco Logistics, the company that will operate DAPL, has the worst record for spills in the nation, with over 200 documented incidents since 2010. ESMT 1278. The Congressional Research Service explained that incidents "can result from a variety of causes, including third-party excavation, corrosion, mechanical failure, control system failure, and operator error" and that pipelines are vulnerable to "cyber-attacks" on remote sensing systems. ESMT 2265-68. The worst of these remains the 2010 Marshall, Michigan spill, in which a 30-inch crude pipeline operated for 17 hours after a major rupture, releasing over 1.2 million gallons of oil and contaminating 35 miles of river downstream. ESMT 1274. However, there are hundreds of leaks, spills, and ruptures from the nation's crude oil pipeline network every year, a number that is trending upward as that network expands. ESMT 2266.

Even during the time that this controversy has been pending, major incidents have again confirmed these risks. In December 2016, a crude oil pipeline ruptured less than 150 miles from Lake Oahe, spilling 529,000 gallons of crude oil into a tributary of the Little Missouri River, where it travelled 4.5 miles downstream.[4] 2nd Hasselman Decl., Ex. 24. The failed pipeline segment used horizontal directional drilling ("HDD") like DAPL, and was installed in 2013, buried 45 feet deep, and operating at half of normal pressure. *Id*. at 2. Like many such incidents, the failure was not detected by the pipeline's "state of the art" remote sensing system, but by a nearby rancher. While the cause of the failure remains under investigation, the Pipeline and Hazardous Materials Safety Administration's ("PHMSA") initial review points to landslides. *Id*. at 3. Its corrective action order also documented the challenges of responding to the spill in a remote location in temperatures as low as minus 30 degrees F. *Id*.; *see also* ESMT 1271

[4] The original estimate of the spill was 175,000 gallons, but was later revised upwards. <http://www.eenews.net/greenwire/2017/03/24/stories/1060052035>

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

(documenting 336,000 gallon pipeline spill on Sept. 9, 2016, which was not detected by leak detection system).

As this incident confirms, pipeline incidents continue to happen even under modern technologies and current regulations. Another brand new pipeline, which promised "world class safety and environmental standards," suffered 35 leaks during its first year of operation alone, including a 20,000 gallon spill discovered by a rancher, who came across a 60-foot geyser of oil. AR 65394; ESMT 1273. The U.S. lags behind other nations in regulation of crude oil pipelines. ENVY Rep. at 26. The National Transportation Safety Board ("NTSB") has described PHMSA's regulatory oversight of pipelines as "weak" and "inadequate," AR 73877-78, and its review of the Marshall disaster highlighted PHMSA's "weak regulation," "ineffective" and "limited oversight," and "inefficient staffing." Ex. 25 at xii-xiii, 113; ESMT 1276 (PHMSA has 1.5 FTEs overseeing 450 response plans); ESMT 2273 (NTSB 2013 "Most Wanted" list "called for enhanced pipeline safety through improved oversight of the pipeline industry"). In 2015, PHMSA proposed to overhaul its pipeline safety regulations, citing the NTSB's recommendations. 80 Fed. Reg. 61610 (Oct. 13, 2015). That proposal was recently withdrawn.

2. The Corps Cannot Ignore Oil Spills When Authorizing a Pipeline

The Corps first makes the astonishing argument that it has no duty to consider impacts of spills at all because it is permitting a pipeline—not authorizing oil spills. Corps Opp. at 12, 30, 46 ("The Tribe's arguments presume oil leaves the Pipeline, but that is not the 'activity' being permitted."). That is obviously not the law.[5] As the D.C. Circuit held in *New York v. Nuclear*

[5] The Corps miscites *Metropolitan Edison Co v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983), for the proposition that NEPA does not require consideration of increased risk of environmental harm. The case involved the question of whether an agency that had explicitly considered the risk of a nuclear accident also needed to evaluate potential psychological injuries from the *fear* of a nuclear accident. The Court found the causal chain between the risks and the claimed psychological harm too attenuated.

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

Regulatory Comm'n, 681 F.3d 471, 481-82 (D.C. Cir. 2012), an agency must consider the consequences of "catastrophic" risks under NEPA even if the chances are low. *See also Gov't Province of Manitoba v. Norton*, 398 F. Supp.2d 31, 64 (D.D.C. 2005) ("*Manitoba I*") (rejecting EA for drinking water pipeline for not considering low-risk mishap); *Sierra Club v. Watkins*, 808 F. Supp. 852, 868 (D.D.C. 1991) (rejecting EA for failing to consider accidents that are "possible" even if "extremely unlikely")*; Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 871 (9th Cir. 2005) (Corps violated NEPA in approving an oil dock expansion without considering increased risk of oil spills resulting from increased tanker traffic).[6]

While the Corps later pivots away from this position, this flawed mindset influenced the Corps' approach throughout the process. The draft EA has no substantive discussion about spill risk at Lake Oahe. The Corps frequently asserted that since oil spill risks were not within its regulatory purview, they were not something it needed to consider. AR 6424 ("Analysis of oil spills during operation and maintenance of a pipeline falls outside of USACE authorities under the Clean Water Act."). The vast majority of the EA addresses issues attendant to constructing the HDD, rather than the core issues of leaks and spills arising from operations. Even in its brief, it continues to incorrectly claim that key issue is the effects of "pipeline construction." Corps Opp. at 30. This Court should reject the notion that the Corps has no duty to consider the risks and consequences of spills from pipeline operations.

3. Spills are Not so "Remote and Speculative" that an EIS Can Be Avoided

"Under NEPA, an agency must look at both the probabilities of potentially harmful

[6] The Keystone XL EIS took a considerably more robust approach to oil spill risk and consequences, although it was criticized for understating risks. AR 64451. Similarly, the Department of State recently issued a comprehensive EIS for a crude oil pipeline expansion near DAPL that included an entire chapter on the impact of oil spills, and devoted a section to impacts to tribal and cultural resources. Hasselman Decl., Ex. 26 at Ch. 5.

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

events and the consequences if those events come to pass." *New York*, 681 F.3d at 482; *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 340 (D.C. Cir. 2002) (action significant if "any significant environmental impact *might result* from the proposed agency action"). "Only if the harm in question is so 'remote and speculative' as to reduce the effective probability of its occurrence to zero may the agency dispense with the consequences portion of the analysis." *New York*, 681 F.3d at 482. NEPA regulations explicitly require consideration of "reasonably foreseeable" impacts "which have catastrophic consequences even if their probability of occurrence is low." 40 C.F.R. §§ 1508.8; 1502.22(b)(4); 46 Fed. Reg. 18026, 18032 (Mar. 17, 1981) (NEPA requires disclosure of "all known possible environmental consequences of agency action," including a "worst case scenario" and "an analysis of a low probability/catastrophic impact event" if it is "essential to a reasoned choice among alternatives").

In the EA, however, the Corps applied a different standard.[7] It briefly identifies the possibility of oil spills, and even passingly acknowledges that consequences would be significant. But it dismisses the risk as "very low," "unlikely," or "negligible," relying on a "risk analysis" performed by DAPL that is not in the record. EA at 48 ("While a release of crude oil into groundwater or a surface waterbody has the potential to cause environmental impacts, the likelihood of such an event is very low."). The EA summarily concludes that the risks are low for nine industry "threat categories," but there is no support for these summary conclusions except reference to a "risk analysis" that is not in record. EA at 92; Accufacts Rep. at 2.[8]

These conclusory assertions fall short of NEPA's requirements. *Gov't of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 48 (D.D.C. 2010) ("*Manitoba II*") ("Such 'conclusory

[7] Courts must accord deference to CEQ NEPA regulations, *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979), but not the Corps' interpretation of NEPA. *Grand Canyon*, 290 F.3d at 342.

[8] For three of the categories, the EA states that the risk for the Lake Sakakawea crossing is low, but is silent about the Oahe crossing. EA at 92-93. No explanation is provided for this anomaly.

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

remarks' are insufficient to discharge the agency's NEPA obligations."); *Watkins*, 808 F. Supp. at 867-69 (while EA need not consider "freakish" accidents like a "meteor strike" on a truck, it cannot ignore high-consequence, low-risk events); *Sierra Club v. Sigler*, 695 F.2d 957, 974 (5th Cir. 1983) ("[T]he fact that the possibility of a total cargo loss by a supertanker is remote does not obviate the requirement of a worst case analysis."). As discussed above, abundant record information demonstrates that oil spill risks are not "remote and speculative." Indeed, the Solicitor of Interior cited an average of 283 pipeline incidents per year qualifying as "significant" under federal law, and concluded that such incidents are "reasonably foreseeable" and require close analysis under NEPA. Solicitor Op. (Ex. 4) at 28; ESMT 105 (easement term is thirty years).[9] Moreover, the EA relies on generic, undefined terms to characterize spill risks as "low," without providing any definition of what that characterization actually means. Courts have refused to accept such undefined terms in an EA. *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (rejecting conclusory claim of "no impact" in NEPA case); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 101 (D.D.C. 2006) ("An unbounded term cannot suffice to support an agency's decision because it provides no objective standard for determining

[9] DAPL asserts that this Court cannot rely on the Solicitor's Opinion as "its withdrawal by the Acting Secretary deprives it of legal effect." DAPL Opp. at 27 n.5. The Solicitor's Opinion was not withdrawn, but temporarily "suspended" pending an internal review that has produced no superseding opinion. ESMT 167. The decision to "suspend" the Solicitor's Opinion does not diminish its persuasive value, nor can it erase the weight given by the Assistant Secretary to the Solicitor's analysis in the Dec. 4 determination to conduct further review of Treaty rights. DAPL further argues that the Solicitor's Opinion simply lays out options for exercising discretionary authority without reaching conclusions about the Corps' compliance with law, but the Opinion belies this characterization. Solicitor Op. at 4 (easement "should not be made" pending full EIS, "independent" risk analysis, and close review of Treaty rights); 19 (general statements about Treaty rights "require a more robust analysis"); 22 n. 168 ("the trust relationship requires a deeper level of consideration of tribal issues"); 27 (analysis "does not constitute adequate consideration and protection of treaty rights and trust assets"); 28 ("additional analysis is necessary"… Corps "has not considered relevant issues as required by NEPA"); 32 ("The lack of a particularized analysis of tribal rights requires correction…"); 34 (analysis "fails to consider" relevant factors).

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

what kind of differential makes one impact more or less significant than another.").

The EA further dismisses risks by claiming that the pipeline will "meet or exceed" all regulatory standards. EA at 88. Even if true, it is irrelevant to the question of significance under NEPA. The NTSB has explicitly found that the current pipeline regulatory system is inadequate to prevent both major and minor incidents, and as the December spill in North Dakota demonstrates, spills remain a fact of life despite modern technology and current regulations. *See supra* § II.A.1. In any event, NEPA cannot be avoided by assuring compliance with other regulatory standards—if it could, it would be "superfluous" and "wither away in disuse, applied only to those environmental issues wholly unregulated by any other federal, state or regional body." *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm.*, 449 F.2d. 1109, 1123 (D.C. Cir. 1971); *see also New York*, 681 F.3d at 481 (refusing to accept future compliance efforts to avoid finding "significant" impacts).

Finally, while the Corps asks this Court to defer to its expertise, deference is unwarranted where the agency merely parrots the proponent's conclusory statements without any exercise of expertise. *Mainella*, 459 F. Supp. 2d at 103 (Court "will not defer to the agency's conclusory or unsupported assertions."). In *New York*, the D.C. Circuit refused to defer to the agency's technical expertise when it did not conduct a "thorough and comprehensive . . . enough analysis to merit our deference." 681 F.3d at 481. Simply repeating that risks are low without a "thorough and comprehensive" analysis does not entitle the Corps to deference. Because oil spills are not "remote and speculative," risks and consequences must be carefully studied. *Id.* at 471; *Delaware Riverkeeper*, 753 F.3d at 1313 ("Simple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA").

4. The EA Fails to Address Critical Issues

As the Tribe explained in its opening brief, federal agencies and multiple technical

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

experts criticized the Corps' methodology, omissions, and flat-out errors in assessing oil spill risks in the EA. Tribe's Mem. in Support of Summary Judgment ("Tribe Mem.") at 19.[10] The Solicitor cited these critiques in her findings that additional study was needed, Solicitor Op. at 31, and the Assistant Secretary directed the Corps to perform such a study in a full EIS. But in resurrecting the EA and issuing the easement, the Corps ignored these critical concerns, all of which would need to be addressed to conduct a credible assessment of spill risks.[11]

Landslide Risks: The EA acknowledges that lands around the borehole site are "highly susceptible" to landslides. EA at 27, 94 (ranking Oahe location as "high" for landslide risk). The North Dakota Geological Survey commented that that "High concentrations of landslides have been mapped in many regions along the proposed route centerline…," including slides as large as 200 acres. AR 71743.[12] Similarly, DAPL's application to the state utility commission identified many acres of land that were "highly" and "moderately" susceptible to landslides adjacent the Oahe crossing. ESMT 3593. Landslides are a major source of pipeline failures and a critical factor in route selection. Ex. 24; Accufacts Rep. at 3; Kuprewicz Decl. ¶ 21 (information on landslide risk is "absolutely critical given the propensity of massive landslides to

[10] The Corps makes the false and insulting accusation that the Tribe brought this lawsuit despite "limited participation" in the NEPA process. Corps Opp. at 1-2. The Tribe's efforts to get the Corps to address its concerns have been nothing short of extraordinary. Its efforts preceded the draft EA (which nonetheless failed even to acknowledge the existence of the Tribe), and extended to multiple sets of detailed comments, thousands of pages of technical material, independent expert reviews, and participation in countless meetings. Archambault Decl. ¶ 19 (ECF 6-1).

[11] DAPL points to the length of the EA, but length is irrelevant to the question of significance or the quality of the Corps' review. *TOMAC v. Norton*, 433 F.3d 852, 862 (D.C. Cir. 2006) ("the length of an EA has no bearing on the necessity of an EIS"). Despite their length, the EA and appendices are remarkably thin on content when it comes to the critical issues in this case.

[12] The map that shows the Oahe area has a high landslide risk also shows that the area around the Bismarck crossing site has low landslide risk. Hasselman Decl., Ex. 27. This difference is not reflected in the EA.

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

produce an oil pipeline rupture"). Even so, the EA never analyzes information about landslide risks in pipeline segments around Oahe. Rather, the EA simply asserts that the "strength and ductility" of pipelines "effectively mitigates" the risk of geologic hazards like landslides. Nothing in the record supports this statement, and credible record evidence contradicts it. Accufacts, 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.").[13]

Inadequate Spill Detection Systems: The EA repeatedly cites DAPL's remote leak detection system to support its conclusion that risks are low. However, it fails to acknowledge undisputed evidence that the most effective remote sensing systems available are blind to leaks of as much as 2% of pipeline volume. ESMT 1279. Even a 1% leak in pipeline volume from DAPL, undetectable by any system available, would constitute a loss of 5,700 barrels of crude oil, or 249,400 gallons, every day. Moreover, there have been repeated instances of remote systems failing even for major spills. ESMT 2277 (remote systems have failed "to quickly and effectively identify uncontrolled releases in a number of recent pipeline accidents"). By one estimate, only 17% of pipeline spills are discovered by remote sensing systems, Accufacts Rep. at 5, although other estimates put that percentage substantially lower. ESMT 1279.

Underground Leaks: The EA acknowledges that an underground leak could either migrate to surface water, or contaminate groundwater. EA at 45. Even though groundwater underneath the easements is six feet deep, and the pipeline would be installed in "saturated" soil, the EA dismisses the risks as "very low." *Id*. at 49. But the EA fails to acknowledge that with a

[13] A November 2016 document provides additional information regarding landslide risks in the vicinity of Oahe, ESMT 938, but the Corps has not relied on it in its post-EA reviews or its opposition. Moreover, it is limited to the HDD component, excluding surface pipeline segments that are more vulnerable to landslides. 2nd Kuprewicz Decl., at ¶ 16-17. That issue is discussed below.

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

pipeline 90 feet underground, there is no way to discover a slow leak until the oil sheen appears on the surface of the water, at which point a massive release will have occurred that would be nearly impossible to clean up. ENVY Rep. at 13-14 (both detection and cleanup of leak in HDD would be "impossible" and would have "significant impacts" to ground and surface waters); ESMT 1071 (documenting difficulty finding source of underground leak in pipeline).

Inaccurate Response Times: The EA and supporting documents offer startlingly optimistic times for responding to a spill after it has been detected. *See, e.g.,* AR 74100 (claiming that pumps will be shut down within 1 minute of leak detection, and valves closed within 3 minutes). These claims have been the subject of withering criticism. Accufacts Rep. at 5-6 (response times unsupported and "highly unlikely"); EarthFax Rep. at 9 (faulting EA for implying that "valves will close immediately"); Kuprewicz Decl. ¶ 15-17; ENVY Rep., at 27. As EPA observed, DAPL's capacity is 16,600 gallons of crude oil *per minute.* ESMT 1321. Minutes will matter in the event of an oil spill. Overstating the speed at which the system can respond to failures "understates the risk" of harm. Accufacts Rep. at 6.

Understatement of spill volumes: Many recent pipeline failures spilled far more than their claimed "worst case discharges." Accufacts Rep. at 6-7. Even if response times were as fast as claimed, the EA makes a number of unsupported assumptions about the amount of oil that would be spilled in a breach situation. *Id.*; *see also* Kuprewicz Decl. ¶ 16 (model incorrectly assumes that oil would spill at the same rate as pumping). The EA also misrepresented the anticipated size of a spill by relying on average spill volumes from all pipelines, which includes pipelines that are far smaller than DAPL. EarthFax Rep. at 3.

Flawed Water Quality Analysis: One expert review found numerous flaws in the Corps' analysis of water quality impacts of a spill, including a failure to identify key pollutants;

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

overstatement of flows that dilute likely pollutant impacts; use of an inappropriate standard to determine toxicity; and reliance on the wrong drinking water standard. EarthFax Rep. at 5-7.

Winter Conditions: Extreme winter conditions in the Oahe area raise critical issues relating to spill response. EarthFax Rep. at 7-8. In the 2015 Yellowstone spill, ice on the river delayed an assessment of the severity of the spill for months. ESMT 1071. The EA acknowledges one of many challenges posed by winter weather conditions, but summarily concludes that the presence of ice would lead to "lesser impacts" relative to non-winter conditions. EA at 39. An expert explained the numerous ways that winter weather conditions can delay and complicate remediation. EarthFax Rep., at 8. Relatedly, the geographical response plan for Lake Oahe contains no information for dealing with extreme winter weather or ice on the river. Ward Decl. ¶ 12; AR 74733.

The Corps' bald assertion that the record does not "show" any substantial scientific debate is belied by this record.[14] Corps Opp. at 15. It is "arbitrary and capricious" to fail to deal with these critical issues and credible criticism. *Motor Vehicle Mfrs' Ass'n v. State Farm Mut. Auto. Ins. Co,*, 463 U.S. 29, 42 (1983). Indeed, the existence of "scientific or other evidence that reveals flaws in the methods or data relied upon by agency" constitutes sufficient "controversy" to trigger an EIS. *Nat'l Parks Conserv. Ass'n v. United States*, 177 F. Supp. 3d 1, 33 (D.D.C. 2016). An EA should be rejected where impacts are "couched in very general and vague terms"

[14] In its opening brief, the Tribe also explained how the cumulative effects analysis suffered from the same flaws as the rest of the oil spill analysis: by concluding that risks were low, a "hard look" at the cumulative risk of spills from multiple pipelines that could affect Lake Oahe was never provided. DAPL responds that the EA mentions other pipelines, but the EA falls short because it never assesses the cumulative risks they present. *Manitoba II*, 691 F. Supp.2d at 47 (cumulative effects analysis invalid where agency "provided no data regarding other existing Missouri River water withdrawal projects and conducted no analysis of other reasonably foreseeable projects expected to withdraw Missouri River water"); *Friends of the Earth v. U.S. Army Corps*, 109 F. Supp. 2d 30, 42 (D.D.C. 2000) (even though EA dedicated 9-10 pages to cumulative impacts, "the discussion provides no analysis at all").

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

that do not analyze the actual action, *American Oceans Campaign v. Daley*, 183 F. Supp. 3d 1, 20 (D.D.C. 2000), or where possible impacts are "detailed" but where "no analysis of their significance" is provided. *Friends of the Earth*, 109 F. Supp. 2d at 41. The Corps' failure to address the weighty scientific deficiencies raised about its risk analysis and its failure to grapple with core elements of oil spill risk render its decision arbitrary and capricious.

5. The Corps Unlawfully Narrowed the Scope of its NEPA Review

The Corps also sidestepped close analysis of risk by focusing exclusively on the segment of the pipeline between the HDD boreholes, i.e., the segment under the river, and ignoring the pipeline entering and exiting the boreholes where an incident could affect Lake Oahe. AR 71366 (map showing action area reviewed by EA). Thus, for instance, even though landslide risk around the site is significant, the EA dismissed impacts as unlikely "as the pipe is at a depth below that which would be affected by land movement." EA at 94.[15] Multiple commenters observed that ignoring portions of the pipeline where a spill or rupture could affect Corps-managed lands was both unlawful and unwise. AR 66289 (EPA recommending broader scope since "the proposed pipeline crosses many creeks and rivers that could quickly convey a spill into the Missouri River"); Accufacts Rep. at 5 ("Additional information on those DAPL segments not on the easement, but that could affect the easement in the event of pipeline failure, needs to be included in any prudent risk analysis."); Kuprewicz Decl. ¶ 20-21 ("Information about the areas where there is landslide risk should not be limited to the HDD borehole and the stringing area as was done in the EA…").

The Corps has never offered any explanation or response. This narrow scope of review

[15] The "geotechnical report" appended to the EA addresses the risk of releases of drilling fluid during the HDD process. It does not deal with the operation of the pipeline, nor does it address any part of the pipeline other than the portion underground. AR 71392.

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

violates NEPA. While the "action" here is authorization to cross Corps lands and Lake Oahe, binding CEQ regulations require the Corps to consider both direct and indirect effects "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b); *see* 33 C.F.R. § Pt. 325 App. B(7)(b)(2)(ii) (Corps NEPA regulations require consideration of "aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity"). The Corps must consider indirect impacts of its permit decisions even if they fall outside its direct regulatory jurisdiction. *Ocean Advocates*, 402 F.3d at 869; *accord White Tanks Concerned Citizens v. Strock*, 563 F.3d 1033, 1042 (9th Cir. 2009) (Corps violated NEPA by ignoring impacts of housing development outside its jurisdiction inextricably tied to areas within its jurisdiction). The Corps cannot blind itself to the risk of spills immediately adjacent to the boreholes where spills would affect Lake Oahe and Corps lands.[16]

6. The Corps Neither Subjected DAPL's Self-Serving Conclusions to Independent Review Nor Shared Relevant Documents with the Tribe

The draft and final EAs were written by DAPL, not the Corps. While not by itself impermissible, the Corps never subjected DAPL's conclusions on the key issues to independent or expert review, even after they were credibly challenged. For example, a list of Corps reviewers of the EA does not include any expert on oil spill risk and response, nor any experts from agencies like PHMSA. EA at 126-27. EPA, which has more oil spill response authority and expertise than the Corps, submitted highly critical comments. Moreover, while the EA refers to a spill "risk analysis" performed by DAPL consultants, no such risk analysis can be

[16] While the Tribe is not arguing that the Corps must evaluate the risks from the entire pipeline, it must consider the indirect effects of the Lake Oahe crossing, which include at a minimum the risk of spills that could affect the Corps-owned lands and Lake Oahe from pipeline segments adjacent to the borehole.

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

found in the record.[17] EA at 92; *see also* ESMT 943 (referencing third party spill risk analysis not in the record). In short, the record reveals that the Corps did little more than unquestioningly accept whatever DAPL said about risks.

The absence of any such independent input was highlighted by the Solicitor, who concluded that the easement could not be issued without "a catastrophic spill analysis prepared by an independent expert." Solicitor Op. at 4. The need for independent review of DAPL's claims was even greater, the Solicitor found, in light of the Tribe's "detailed technical review." *Id*. at 21. The Solicitor accurately presents the requirements of the law: NEPA imposes a duty *on the Corps* to fully consider and disclose environmental impacts, not private party applicants, and it has an independent duty to ensure the quality of its NEPA analysis. As this Court has found, "[t]he Corps may rely on reports prepared by outsiders or applicants, but … when such information is specifically and credibly challenged as inaccurate, the Corps has an independent duty to investigate." *Hammond v. Norton*, 370 F. Supp. 2d 226, 252 (D.D.C. 2005), *citing Van Abbema v. Fornell*, 807 F.2d 633, 642 (7th Cir. 1986); *Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978) (EPA's determination that the EIS was unsatisfactory "did give rise to a heightened obligation on [agency's] part to explain clearly and in detail its reasons for proceeding."); *Nat'l Wildlife Fed'n v. Norton*, 332 F. Supp. 2d 170, 185 (D.D.C. 2004) (EIS required "when the Corps is presented with scientific evidence specifically evaluating the environmental effects of the proposed project or calling into question the adequacy of the EA"). When the Corps kicked off the EIS process, it emphasized that the Corps "will independently review and verify all information presented on the potential risk of an oil spill and potential

[17] While a "spill model" was part of the withheld record, DAPL argues it was not used to evaluate risk. DAPL Opp. at 22-23. If true, there is absolutely *no* risk analysis in the record at all—just the EA's unsupported conclusions as to risk.

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

impacts to potential crossings." ESMT 535. That effort of course was later abandoned.

Further corrupting the NEPA process, the Corps failed to share critical documents relating to oil spill risk and response with the Tribe. Although the failure to disclose these documents was a key feature in the Solicitor's Opinion, the December 4 decision, and the Tribe's opening brief, the Corps' opposition has nothing to say about this issue. DAPL, in contrast, responds with the startling statement that these key documents need not be shared with the Tribe because NEPA "is not a disclosure statute." NEPA itself and decades of NEPA jurisprudence indicate otherwise. *Watkins*, 808 F. Supp. at 869 n.28 ("NEPA is fundamentally about disclosure"); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (NEPA seeks to ensure that agency will "inform the public that it has indeed considered environmental concerns"); *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 36–37 (D.C. Cir. 2015) (key purpose of NEPA is informing public). The *entire purpose* of NEPA is disclosure—by transparently and fairly accounting for the risks and impacts of projects, and allowing the public to participate, NEPA promotes informed decisionmaking and incentives to protect the environment. As the Solicitor and Assistant Secretary concluded, the Corps' failure to share key documents with the Tribe was a major failing that required rectification. The Corps' post-election reversal says not a word about the excessive secrecy that infected the process.

7. Easement Conditions and Spill Response Plans Do not Reduce Risk to "Remote and Speculative" Level

In a last attempt to salvage the flawed NEPA process, the Corps asserts that any shortcomings in the EA have been rectified through the addition of 36 "conditions" on the easement. Corps Opp. at 19.[18] But an agency cannot cure an invalid EA with *post-hoc* changes.

[18] The Corps implies that the Tribe participated in creating these conditions or even that it endorsed them, but this is not true. While some tribal staff attended a meeting at which conditions were discussed, the Tribe did not agree that these or any other conditions would be

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

See infra § II.D. Many of the final easement conditions were already part of the EA and FONSI, and hence cannot address deficiencies in the EA. 2nd Kuprewicz Decl. ¶ 7. Some can't actually be implemented in this location. *Id*. ¶ 9. In other cases, the easement conditions address matters already required by existing regulation, adapted to this pipeline. *Id*. ¶ 8-9. Moreover, PHMSA recommended additional conditions that were not included in the final easement, at DAPL's request. *Id*. ¶ 11-12; ESMT 86-87.[19]

More fundamentally, the conditions do nothing to address the possibility that the Corps approved a route through a high-risk landslide area, the shortcomings of the leak detection systems, and the other risk factors presented to, but not addressed by, the Corps. 2nd Kuprewicz Decl. ¶ 13-14 (easement conditions do not "materially alter the risks or address the flaws in the Corps analysis of spill risk and response, which continue to suffer from a number of grave flaws that render its continual disregard for spill impacts invalid").

The Corps also puts significant weight on the spill response plans, suggesting that it can ignore harm from an oil spill because spills will be cleaned up. Experience reveals that avoiding major environmental and economic impacts from oil spills is all but impossible. The Marshall, Michigan spill cleanup is still going on, six years later, at a running cost of $ 1.2 billion. ESMT 1274. Only some of the oil spilled in these incidents is actually recovered—the rest remains in the environment. ESMT 1257. Moreover, the response plans developed here amplify many of the same problems that plagued the entire process. For example, a geographical response plan ("GRP") was prepared for the Lake Oahe crossing, but withheld from the Tribe and public.[20]

---

sufficient.

[19] Another category of conditions, including "double walled pipes" and "fiber-optic pipeline monitoring" claimed by DAPL in its brief, appear to be entirely fictional. DAPL Opp. at 5.

[20] DAPL appears to claim that the Tribe did have access to these documents, but badly mischaracterizes a year-old interaction with the Tribe's counsel in which it offered to provide

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

The Tribe's emergency preparedness office was unaware of its existence until it was recently shared under the confidentiality agreement. Decl. of Elliott Ward, at ¶ 4 (filed under seal). The GRP, which discusses how DAPL would respond to an oil spill at the Lake Oahe crossing, raises grave concerns for the Tribe, whose lands, waters, Treaty rights and religious interests are implicated in direct ways by the manner in which DAPL proposes to handle an oil spill.[21] *Id.* [redacted] *id.* ¶ 6, 9; AR 74738[redacted] [redacted] Ward Decl. ¶ 9. [redacted] *See, e.g.,* 74739; 74744; Ward Decl. ¶¶ 10-12. [redacted] Corps Opp. at 27. [redacted] Ward Decl. ¶¶ 6-14 *see also* Kelly Decl. ¶ 13 (Oahe wildlife would be affected both by spill and response operations). The spill response plan does not mitigate oil spill risk for the Tribe, but compounds it. At a minimum, the plans address what happens *after* a disaster has occurred and, by definition, cannot excuse the Corps' failure to

---

access to the Facility Response Plan, but did not disclose, much less offer to share, the spill risk documents or GRPs that are the subject of the protective order motion. *See* Decl. of William Perry, ECF 166.

[21] The Tribe and the Corps have opposed DAPL's motion for a protective order covering the GRPs. Pending a ruling on that motion, the Tribe is constrained by the confidentiality agreement not to disclose certain contents in the GRP and redacts them accordingly.

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

evaluate the impacts of risks of that disaster.

B. The Corps Did Not Properly Analyze the Consequences of a Spill on the Tribe

The D.C. Circuit has held that NEPA requires consideration of both the *probability* of harmful events, as well as the *consequences* if those events come to pass. *New York*, 681 F.3d at 478. Unless an agency can establish that a particular risk is so "remote and speculative" as to be effectively zero, the consequences thereof must be fully analyzed. *Id.* at 481-82; *Manitoba II*, 691 F. Supp. 2d at 50 ("when the *degree* of potential harm could be great, *i.e.*, catastrophic, the *degree* of analysis and mitigation should also be great") (emphasis in original). As discussed above, pipeline spills are far from "remote and speculative," and the record is replete with evidence that the consequences of oil spills are very grave. AR 66289 (EPA) ("our experience in spill response indicates that a break or leak in oil pipelines can result in significant impacts to water resources"); ENVY Rep. at 9 (discussing "potential catastrophic impact").

However, the EA never evaluated the consequences to the Tribe and its Treaty rights to water, hunting, fishing, and gathering. Tribe Mem. at 24-27. While the Corps mentions the Tribe and uses the word "Treaty" in a handful of places, the EA and subsequent documents lack any discussion or analysis of the impacts of a spill on the Tribe and the health and welfare of its members. *See, e.g.*, AR 71774 ("the history of the SRST and treaty rights is beyond the scope of the EA"). First, the EA asserts the Tribe will not be impacted because the pipeline will not cross and will be a half mile from Reservation land, impermissibly ignoring indirect effects on Treaty rights to water and fishing in Lake Oahe. Second, the EA dismisses the potential for harm because, it claims, the risks are low—virtually every statement about potential impacts pivots back to this asserted low risk. This is insufficient. *See, e.g., Manitoba I*, 398 F. Supp. 2d at 64 (D.D.C. 2005) (EA for water pipeline invalid for failing to look at "catastrophic consequences" if pipeline leaked, despite claimed low risk).

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

Third, if there are spills or leaks, the EA asserts response plans will be implemented. EA at 38, 43 (discussing implementation of emergency response procedures); *id*. at 89 (plan for groundwater remediation would be developed with state); 69 (implementation of response plans would "minimize" impacts to fish and wildlife). Of course, by the time a response plan is triggered, the harm is underway. Providing bottled water to tribal members when the Tribe's drinking water has been contaminated, as the EA proposes, is a manifestation of the harm from a spill, not a basis for dispensing with any analysis of that harm. *Id*. at 38-39. Suggesting that drinking water contamination can be addressed in this way fails even to scratch the surface of exploring the impacts on the Tribe, which relies so heavily on the waters of Lake Oahe for subsistence hunting, fishing, gathering, irrigation, and spiritual and ceremonial purposes. The Tribe provided the Corps with extensive information about how oil spills would impact the Tribe, such as the sources of drinking water for tribal members, and a discussion of the catastrophic impacts of a shut-down of the municipal water supply system several years prior. This information is not reflected in the EA or subsequent documentation.[22]

In their oppositions, the Corps and DAPL argue that the Corps' duties to consider the potential impacts to the Tribe and its Treaty rights start and end with the risk analysis—reasoning that since the impacts to the Tribe's Treaty rights arise from the risk of spills, then the only salient question is what those risks are. Corps Opp. at 20-21; DAPL Opp. at 26. But the consequences of an unlikely but harmful event can only be omitted from a NEPA document if "the effective probability of its occurrence [is] zero." *New York*, 681 F.3d at 482. As discussed above, the risks plainly are not effectively zero. And the *consequences* of an incident are

[22] The EA promises that DAPL will conduct emergency response/drills at the Oahe crossing, and encourages "stakeholder" participation. Oil is now in the pipeline under Oahe, and yet the Tribe—the primary "stakeholder" for the Oahe crossing—has yet to hear of, let alone participate in, any emergency response drills. Ward Decl. ¶ 4.

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

affected by its specific location half a mile upstream of a Reservation that the U.S. government has a duty to protect. What may be an acceptable risk in one location may not be acceptable in another. By way of example, oil and gas drilling activities may present minimal impacts warranting close review in already degraded lands, but would require close scrutiny if proposed in a national park. An analysis that simply focuses on the risk, without considering how those risks would uniquely impact the Tribe, is not sufficient.

Even the EA acknowledges that the consequences of a release are "high" due to the location of the crossing. EA at 94. The Tribe is a sovereign nation whose members faced a history of government-sponsored dispossession and whose well-being depends on the waters of Oahe in ways that are unique and that would be affected by a spill in a way that is different from the public. Solicitors' Op. at 30. The Tribe has a legal right to those waters that requires special consideration. But the EA dismisses the Tribe's Treaty rights, saying that they would be unaffected because the pipeline does not cross Reservation land and the risks are low.

The Corps next contends that an EA that considers impacts to water, fish, and game has adequately considered the impacts on the Tribe's Treaty rights and need not assess impacts "through the lens of the Tribe's rights." Corps Opp. at 23. This assertion misunderstands the Tribe's Treaty rights. Treaty rights embody the fundamental rights of a people tied to a place since time immemorial, where ancestors dwelt and descendants will follow. The exercise of Treaty rights forges the identity, legacy, and essence of a people. Harm to Treaty rights is existential, upending the Tribe's subsistence, community, economy, ceremonies, and very identity. Simply looking at the impact of an oil spill on aquatic resources (which the Corps did not do adequately in any event) says nothing about impacts *to the Tribe* if those resources are destroyed. Ecological impacts to fish and game habitat and populations present one dimension.

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

The impact to Tribal members of losing the right to fish and hunt, which provides both much-needed subsistence food to people facing extensive poverty as well as a connection to cultural practices that Tribal members have engaged in since time immemorial, is a separate issue. *See* Archambault Decl. ¶ 5 (ECF 6-1). While recreational fishers may be inconvenienced by an incident which shuts down the fishery for a season or two, the Tribe would be directly and fundamentally affected by the loss of the fish and game resources needed to sustain its people and culture. If reduced fishing and hunting opportunities persist for any significant period of time, as has happened in other oil spill scenarios, the injuries to the Tribe are compounded.

The Corps cannot discharge its duty under NEPA to consider the consequences of spill events on the Tribe and its Treaty rights with conclusory assurances that risks are low. The Lake Oahe crossing involves unique and highly consequential risks that, as the Solicitor found, warrant close scrutiny.

C. The Corps' Environmental Justice Analysis Is Fatally Flawed

The EA embodies a remarkably gerrymandered environmental justice analysis that compares the overwhelmingly non-minority census districts upstream of the boreholes to a downstream "baseline" that includes the Standing Rock Reservation to arrive at the senseless conclusion that routing the pipeline just yards upstream of the Tribe did not implicate environmental justice concerns. Tribe Mem. at 27; EA at 85 (because "the minority population in the averaged census tract of the Proposed Action Area at Lake Oahe is much lower than surrounding county geographical area…there is no concern regarding environmental justice"). The Corps further relied on an indefensible half-mile "buffer" to conclude that the Tribe would not be affected, yet nonetheless considered oil spill impacts downstream for ten miles in reviewing the Bismarck crossing. *Id*. In the Corps Oct. 20 review ("Cooper Memo"), ESMT 1213, the Corps grudgingly acknowledges some of these concerns. Cooper Memo at 25 ("The

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

Corps' determination of the affected environment…can be questioned.").

The Corps expends many pages defending this analysis but only digs the hole deeper. It first argues that since it is permitting a pipeline, not oil spills, it has no obligation to look downstream at all. Corps Opp. at 30. As noted above, it could not be more wrong. *See supra* at § II.A.2. It then seeks to defend the use of a half-mile buffer, brazenly asserting that any risks from the pipeline would be limited to this area and hence such a buffer is "certainly appropriate" here. Such a buffer may or may not make sense for a highway, bridge, or natural gas pipeline, EA at 84, but it makes no sense for a major crude oil pipeline on a major river system where a spill could travel far beyond a half mile.[23] Cooper Memo at 26. There is not one iota of support in the record for using a half-mile "buffer" for a crude oil pipeline, and abundant support for a far broader scope. *See, e.g.*, ESMT 1304 (explaining why buffer for transportation projects is inapplicable to oil pipelines); Hasselman Decl., Ex. 28 (pipeline spill damaged 85 miles of Yellowstone River). Indeed, a response plan for the Oahe crossing [redacted]. AR 74733; Ward Decl. ¶ 6. Moreover, while observing that the CEQ guidance encourages use of "census tracts" in environmental justice analyses, the Corps does not explain why the Corps used census tracts that were mostly *upstream* of the crossing site, rather than the downstream census tracts that would actually be affected. ESMT 1325 (census district map); ESMT 1306 (district immediately downstream of crossing is 86% minority and 36% below poverty line). CEQ guidance does not encourage using the wrong census tracts to mask environmental justice concerns.

[23] Other NEPA analyses for pipelines provide a far broader look at downstream spills. Ex. 20 at 3.10-3 (environmental justice analysis for Keystone looks 14 miles downstream); Ex. 26 at 3.0-2 (pipeline EIS looks at spill impacts 40 miles downstream). The Corps tries to distinguish the Keystone EIS but points to factors that have nothing to do with the scope of its analysis.

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

Next, the Corps seeks to pivot away from the obvious flaws in this analysis by declaring that any error was harmless since a separate portion of the EA discussed the Tribe. Corps Opp. at 28 (*citing* EA at 85). But that discussion simply repeats and amplifies the errors found elsewhere. It claims that the fact that the pipeline will not cross Reservation land, coupled with the half mile "buffer," are "sufficient" to ensure that there will be no "direct or indirect effects" to the Tribe. This conclusion is obviously wrong, no matter how often repeated, for an oil spill that can flow for tens of miles. Cooper Memo at 26. An oil spill at the Lake Oahe crossing would unquestionably have "direct and indirect" effects of the greatest magnitude on the Tribe, which is indisputably an environmental justice concern. An environmental justice analysis must compare the populations that would be in harm's way if catastrophic effects occur. *Compare* Ex. 26 at 5-84 (EIS for pipeline discussing unique impacts to Tribes' culture, health, and economy if crude oil spill occurred).

Finally, any defense of the environmental justice assessment falls apart in light of the double standard employed when comparing the Bismarck and Oahe alternatives. For the Bismarck crossing, the analysis considers downstream impacts of a spill ten miles away. For the Lake Oahe crossing, the analysis ignores the impacts of a spill on the Reservation because it is more than a half mile away. Tribe Mem. at 30-31. In defense, the Corps asserts that the Bismarck alternative was rejected for other reasons, but its primary reasons grew out of the risks of an oil spill, which the Corps refused to meaningfully consider when it comes to the Tribe. Corps Opp. at 31. The choice between the Bismarck crossing (upstream of the overwhelmingly non-minority state capital) and the Oahe crossing (upstream of the Reservation, one of the nation's poorest communities) plainly implicates environmental justice concerns. The Corps blithely concludes that "there is no concern regarding environmental justice" at the Oahe

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

crossing only by ignoring the impacts of an oil spill on the Tribe. Since an environmental justice assessment is at its core all about who will be disproportionately exposed to risks and degradation, it is indefensible to ignore the impacts of a spill on the Tribe in the assessment.

D. The Corps' Post-EA Analyses and Memos Do Not Cure the Failings of the EA.

The statutory command in NEPA is simple: agencies must prepare an EIS for any agency action with "significant" environmental impacts. 42 U.S.C. § 4332(2)(C). The question before this Court is whether the Corps' position that the effects of the Oahe crossing were insignificant is supported by the EA, not by *post-hoc* rationalizations prepared by the Corps after this lawsuit was filed. *See* Tribe Mem. at 31-35.

Critical information must be included in the NEPA document itself, not buried in the administrative record. *Nat'l Wildlife Fed'n v. Marsh*, 568 F. Supp. 985, 996–97 (D.D.C. 1983); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980); *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1141 (D. Alaska 1983) (neither administrative record nor any other evidence may be used to remedy deficiencies in NEPA document). This rule is as true of an EA as it is for an EIS. *Nat'l Parks & Conserv. Ass'n v. Babbit*, 241 F.3d 722, 732 (9th Cir. 2001) ("The lack of data regarding the practical effect of increased traffic … undermines the [Parks Service's] EA ... [which] is where the [agency's] defense of its position must be found.") (internal citations omitted). "A federal agency's defense of its positions must be found in its EA" because "accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. Zielinski*, 187 F. Supp. 2d 1263, 1270-71 (D. Or. 2002); *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1204–05 (N.D. Cal. 2004) (rejecting EA that relied on scientific documents not available to the public).

Even if it were permissible to rely on these *post hoc*, nonpublic documents, such

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

documents do not help the Corps here. The Cooper Memo obviously does not address the expert critiques that came after it. While the Cooper Memo acknowledges the existence of Treaty rights, it defends the EA's failure to address the impacts of an oil spill on the Tribe and its Treaty rights and therefore takes no steps to fill that void. And the February 3 analysis ("Feb. 3 Review") (ESMT 224), prepared in response to the Presidential directive, largely reverts back to the Cooper Memo without mentioning either the scientific controversy or the withheld documents underlying oil spill risks and response. In terms of Treaty rights, the Feb. 3 Review simply states that unspecified questions have been raised about the validity of the Solicitor's Opinion, without providing any further explanation. This Circuit has not relied on such flimsy rationalizations of agency conduct, particularly where it is no more than a conclusory affirmation of a prior decision. *Gerber v. Norton*, 294 F.3d 173, 183 (D.C. Cir. 2002) (post-complaint letter "does not respond to or even mention the substantive concerns" raised by plaintiffs: "It is therefore insufficient to sustain the agency's decision.").

The Corps and DAPL also place great reliance on a set of 36 permit conditions added at the end of the process. But such reliance is misplaced. Most of the conditions characterized as "new" were already required under the FONSI or existing rules. *See supra* at § II.A.7. Moreover, adding conditions to reduce the risk or impacts of an oil spill cannot avoid a finding of "significance" where the risk was never properly analyzed in the first place. For example, no easement condition can compensate for the Corps' failure to consider landslide risks, underground leaks, or the risks of spills in Lake Oahe from areas outside of the easement, or its overly optimistic view of the capabilities of detection and response systems. By failing to analyze the impacts of an oil spill on the Tribe, and never addressing the serious omissions identified by federal agencies and experts, the EA never confronted the significant environmental

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

impacts of the Lake Oahe crossing. As such, the Corps had an inadequate record to craft conditions that might reduce and mitigate the risks and harm.

In the EA and subsequent reviews, the Corps recited the words "oil spill" and "Treaty" a handful of times, but only to defend its utter failure to evaluate the impacts of an oil spill on the Tribe and its Treaty rights. Without a meaningful analysis of the risk of an oil spill, or close examination of how a spill would affect the Tribe as a sovereign with responsibility for protecting its Treaty rights, its people, and future generations, the Corps failed to produce a lawful NEPA analysis to guide and inform its permit decisions. As in many other cases in this Circuit, this EA falls short of what NEPA demands. *Delaware Riverkeeper*, 753 F.3d at 1313 (EA for gas pipeline upgrade inadequate because of "conclusory" reasoning); *Sierra Club v. Mainella*, 459 F. Supp. 2d at 91 (EA for authorization to conduct oil and gas drilling took only a "general" rather than a "hard look" and glossed over impacts). This Court has found EAs legally insufficient for agency actions like permitting riverboat casinos, *Friends of the Earth v. U.S. Army Corps*, 109 F. Supp. 2d 30, 41 (D.D.C. 2000), managing swan populations, *Fund For Animals v. Norton*, 281 F. Supp. 2d 209 (D.D.C. 2003), and authorizing jet skis use. *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7 (D.D.C. 2010). Indeed, this Court invalidated an EA for a *drinking water* pipeline where it failed to consider the low-risk, high consequence possibility of bacteria transfer. *Manitoba I*, 398 F. Supp. 2d at 64. The Corps' failure to meaningfully address oil spill risks and impacts on Treaty rights for a crude oil pipeline under one of the nation's largest reservoirs merits the same judicial response.

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

III. ISSUANCE OF THE EASEMENT AND OTHER AUTHORIZATIONS WAS ARBITRARY AND CAPRICIOUS

A. The Corps Failed to Provide a Reasoned Justification for Reversing Itself.

On December 4, the Assistant Secretary decided that the Corps would not grant the easement on the current record, and directed the Corps to conduct an EIS to analyze spill risks and impacts, including independent expert review, detailed discussion of Treaty rights, and consideration of route alternatives. ESMT 604. Less than a week after taking office, however, a new President instructed the Corps to approve the easement and abandon the EIS process. ESMT 463. In executing that direction, the Corps ignored the facts and circumstances that underlay the Assistant Secretary's Dec. 4 decision. While a new administration has some leeway to change direction, such changes need to be adequately reasoned and explained. The Corps' failure to do so renders the easement decision arbitrary and capricious under either the heightened standard of *Fox Television* or conventional APA review.

1. The Corps Has a Duty to Address the Factors and Circumstances Underlying the December 4 Decision.

The Corps and DAPL first seek to avoid heightened scrutiny by asserting that the Corps' reversal was not actually a reversal, because it never "denied" the easement. DAPL Opp. at 33. The argument should be summarily rejected. The Corps determined that it "*will not grant an easement* to cross Lake Oahe at the proposed location on the current record," and that a robust consideration of alternatives, oil spills risks, and treaty rights would precede and inform any decision on the easement. ESMT 604. In February, the Corps leadership withdrew that decision, terminated the EIS process, and granted the easement without further consideration of those factors. It defies credulity to depict that decision as anything other than a "reversal."[24]

[24] The Corps and DAPL also contend that withdrawal of the scoping notice is not "final agency action" subject to judicial review. Corps Opp. at 37-39. This argument is a straw man, as this

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

Neither the Corps nor DAPL seriously contend that the Corps' grant of the easement is immune from review under the APA's arbitrary and capricious standard. In its desire to avoid heightened scrutiny under *FCC v. Fox Television*, 556 U.S. 502 (2009), however, the Corps contorts the record when it asserts that the December 4 decision rested on no material facts or circumstances that differed from the EA or other prior Corps memoranda. Corps Opp. at 35. Similarly, DAPL makes the absurd claim that the Corps acted on a "blank slate" when it granted the easement. DAPL Opp. at 33. But it is undisputed that the Assistant Secretary made a decision on December 4 to perform a "more rigorous exploration and evaluation" including "robust consideration" of reasonable alternatives, oil spill risks and impacts, and treaty rights. The decision was informed by the Solicitor's Opinion, as well as an acknowledgement of key procedural failings, like the withheld documents. The December decision identifies material facts and circumstances that needed to be considered before the easement could be granted.

The Corps claims that all it has to do is "display awareness" that it is reversing course, Corps at 35, but *Fox* requires more.[25] While *Fox* held that an agency need not explain why one permissible outcome would better achieve the statutory purpose than the previous outcome, an agency must still provide "a more detailed justification" and "reasoned explanation" when its new action rests on factual findings or circumstances that contradict those that underlay or were engendered by the prior approach. *Fox*, 556 U.S. at 515-16. It cannot disregard, ignore, or countermand those factual findings without a reasoned explanation. *Id*. The reversal at issue

---

case challenges the granting of the easement, not the withdrawal of the scoping notice.

[25] The Corps incorrectly contends that heightened scrutiny under *Fox* applies only to a change in a policy, not to a grant of an easement. Corps Opp. at 35. *Fox* drew no such distinction and speaks not only in terms of changes in policy, but also of "agency change," "subsequent agency action undoing or revising [an initial] action," and "changing position." *Fox*, 556 U.S. at 515. The D.C. Circuit has applied *Fox* to a revocation of a discharge permit. *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 726-27 (D.C. Cir. 2016).

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

epitomizes the circumstances *Fox* described as warranting heightened scrutiny. However, even under ordinary arbitrary and capricious review, the Corps cannot lawfully reverse course without addressing the factors that led to the December 4 decision. The December 4 decision, and the findings and circumstances underlying it, are unquestionably relevant factors that must be considered and are due a reasoned explanation. Under *Motor Vehicle*, 463 U.S. at 42, an agency action is unlawful if the agency has "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." An action fails under this test when the agency fails to consider the relevant factors or to articulate a rational connection between the facts found and the choices made. *Baltimore Gas*, 462 U.S. at 105. The easement decision fails this test.

2. The Corps Failed to Offer a Reasoned Explanation for Ignoring and Countermanding the Circumstances Underlying the December 4 Decision.

The December 4 decision determined that the easement would not be issued without conducting a more rigorous analysis of oil spill risks, the Tribe's Treaty rights, and alternative routes that avoid harming trust resources.[26] The February 7 decision reversed this decision and declared such review unnecessary, citing the EA and a February 3 review by the Corps. ESMT 100 ("Feb. 7 Memo"). But the Feb. 3 Review never closely reviewed the critical facts and circumstances that underlay the December 4 decision; rather, it simply turned back the clock to embrace documents that *preceded* the December 4 decision. The Assistant Secretary had

[26] The December 4 decision relied, in part, on 42 U.S.C. § 4332(2)(E), which requires that agencies "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988) ("the consideration of alternatives requirement is of wider scope than the EIS requirement. The former applies whenever an action involves conflicts, while the latter does not come into play unless the action will have significant environmental effects.). Neither the Cooper Memo nor the Feb. 3 Review says a word about § 4332(2)(E).

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

documents like the EA, the Cooper Memo, and the December 3 recommendation in front of her, and still decided that an EIS was necessary in light of the particular facts and circumstances. In arguing that that the easement decision was based on the same record as the December 3 recommendation, Corps Opp. at 35, the Corps essentially concedes that the Corps ignored the findings in the December 4 decision that came to a contrary conclusion.

The Corps failed to provide an explanation that satisfies APA review for departing from the December 4 decision. As to the withheld risk and response documents, the easement decision and Feb. 3 Review are utterly silent. As to spill risks, the Corps acknowledges that the Tribe and others submitted extensive expert evidence addressing these risks. Cooper Memo at 12. Inexplicably, though, the Corps waves off these criticisms by saying that the EA addressed these concerns – even though they came after the EA. *Id*. These failings alone warrant reversal.

As to Treaty rights, the Corps does nothing more than reaffirm the EA's cursory dismissal of Treaty rights and the Cooper Memo's conclusion that the Corps had met its trust responsibility. *Id*. Those documents concluded that there would be no effects on the Tribe, but were based on that fact that the pipeline would not cross the Reservation, the non-existent risk analysis, and the indefensible environmental justice assessment. EA at 85-86; Cooper Memo at 34-35. Moreover, in reversing the Assistant Secretary's December 4 decision, the Corps dismisses the Solicitor's Opinion in the most perfunctory manner, claiming without explanation the Corps had addressed the concerns it identified, and that unspecified "questions were raised" as to some of it. Feb. 3 Review at 9. But the Solicitor's authoritative Opinion changed the playing field dramatically, and cannot be so casually dismissed. The Feb. 3 Review also states that the Solicitor's Opinion does not address the easement conditions. *Id*. at 13. But the Assistant Secretary was privy to the proposed easement conditions, which had been presented to

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

her in the December 3 recommendation, and decided nonetheless to withhold the easement.[27]

B. The Corps Acted Contrary to its Trust Responsibility in Granting the Easement and Other Authorizations Without Considering Impacts on Treaty Rights.

The impact of the Lake Oahe crossing, and of an oil spill in particular, on the Tribe and its Treaty rights is at the heart of this case. The Tribe's opening brief reviews how the United States pledged to protect the Tribe's reserved rights and how those rights would be jeopardized by an oil spill, and how its perspective was validated by the Interior Solicitor. Remarkably, in its opposition, the Corps claims that it has no duty at all to consider the impacts of oil spills on the Tribe and its Treaty rights. It then claims that its generalized and cursory dismissal of oil spill risks, and its compliance with general environmental statutes, was adequate to discharge any trust duty, if it has one. Both arguments lack merit.

1. The Corps' Has a Trust Duty to Closely Examine the Impacts of its Actions on the Tribe and its Treaty Rights.

Three uncontested facts confirm the Corps' trust responsibility obligations and doom the Corps' contrary arguments. First, in the 1851 and 1868 Treaties, the Great Sioux Nation reserved rights to land and water to the east bank of the Missouri River. In the Treaties, the United States guaranteed the Tribe's reserved lands as a homeland for the Sioux Nation forever. The Standing Rock Sioux Tribe, as a successor to the Great Sioux Nation that was party to these Treaties, has sovereign rights not only to its Reservation lands, but also to fish, hunt, and gather in and around Lake Oahe. *South Dakota v. Bourland,* 508 U.S. 679 (1993); Solicitor Op. at 6-7. The Tribe also has *Winters* rights to a sufficient quantity and quality of water for irrigation,

[27] Both the Corps and DAPL, like the Cooper Memo and Feb. 3 Review, focus on the wrong legal question—whether "new information or circumstances" necessitate preparation of a "supplemental" NEPA document. Corps Opp. at 36. But here, the Tribe contends that the initial EA was legally inadequate and that it was arbitrary for the Corps to reverse its decision to conduct a full EIS, which would have corrected those inadequacies. Tribe Mem. at 33.

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

drinking, industry, and other needs of the Tribe. *Winters v. United States*, 207 U.S. 564, 576-578 (1908); *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015) ("by holding reserved water rights in trust, Congress accepted a fiduciary duty to exercise those rights and exclude others from diverting or contaminating water that feeds the reservation."). No one disputes the existence of these rights or that oil spills at Lake Oahe could impede the exercise of such rights.[28]

Second, this Court has jurisdiction to hear this case under the APA, as the Corps' issuance of permits and granting of an easement are "final agency actions" subject to review under 5 U.S.C. § 706. Despite the lack of any dispute over this Court's jurisdiction, the Corps and DAPL mistakenly rely on a line of precedent developed under the Indian Tucker Act, a statute that waives sovereign immunity for claims brought by a Tribe against the United States for damages resulting from a breach of fiduciary obligations to protect trust resources for a Tribe. *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009). Such cases have required a statutory showing that the government owes a specific duty to the Tribe before being held to a "fiduciary" standard for the management of those resources. Under these cases, while Congress waived sovereign immunity for damages via the Indian Tucker Act, the *substantive right* entitling a Tribe to damages must arise elsewhere. *Id*. ("Neither the Tucker Act nor the Indian Tucker Act creates substantive rights; they are simply jurisdictional provisions that operate to waive

[28] The Corps argument that the Tribe does not own "molecules" of water is completely beside the point. No one disputes that the Tribe possesses a *Winters* Treaty right to use water to sustain the purposes for which the reservation is formed, which includes water of both adequate quantity and quality. Cooper Memo at 14 (acknowledging Tribe's *Winters* rights); 55 Fed. Reg. 9223 (March 12, 1990) ("Indian water rights are vested property rights for which the United States has a trust responsibility"). "Ownership" of "molecules" of water has nothing to do with such a right. *Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 202 F.2d 190 (D.C. Cir. 1952), cited by the Corps, involved riparian water rights arising under state law, and provides no basis for construing reserved water rights under federal law.

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

sovereign immunity for claims premised on other sources of law."); *United States v. Mitchell*, 463 U.S. 206, 216 (1983). The Tucker Act line of cases has no bearing on the existence of a claim here, where the Tribe is challenging final agency action and the APA establishes both the cause of action and waiver of sovereign immunity. *See* Amicus Brief of Assoc. of American Indian Affairs (ECF 125-1) at 17 ("Trust enforcement under the APA is much broader than under the Tucker Acts because there is no requirement under the APA to base a claim on a statute or some other source of express law.").[29]

Third, under the APA, 5 U.S.C. § 706(2)(A), final agency actions like the granting of permits and easements, must be set aside if arbitrary, capricious or not in accordance with law. This standard requires a reasoned analysis, but does not require a court "to identify and apply a substantive underlying statute;" instead the APA supplies a generic cause of action to persons aggrieved by agency action. *Ark Initiative v. Tidwell*, 64 F. Supp. 3d 81, 101-02 (D.D.C. 2014), *aff'd*, 816 F.3d 119 (D.C. Cir. 2016). In any event, not only does the MLA require the Corps to consider impacts of granting an easement on subsistence users, 30 U.S.C. § 185(h)(2)(D), but it also is beyond question that Treaties are the law of the land under the Supremacy Clause, and

[29] *El Paso Natural Gas Co v. United States*, 750 F.3d 863 (D.C. Cir. 2014), is not to the contrary. There, the Court considered a claim that the government failed to take certain actions, and conflated the Indian Tucker Act line of cases with a claim seeking to compel agency action under a separate APA cause of action. To compel action "unlawfully withheld" under the APA, the courts require a mandatory, nondiscretionary obligation, a standard that overlaps with the Tucker Act standard. *See id*. at 892 (*citing Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004)). Here, in contrast, the Tribe has challenged final agency action, which is reviewed under different standards. *Fox*, 556 U.S. at 514-15 (noting different standards applicable under 5 U.S.C. §§ 706(1) and 706(2)(A)). Similarly, the Corps' citation to *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569 (9th Cir. 1998) is unavailing. There, a Tribe raised NEPA claims, not Treaty claims, against a federal agency for failing to consider the impacts of the action (specifically, noise) on its reservation. In *dicta*, the Ninth Circuit erroneously drew from an Indian Tucker Act case claim. Likewise, *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), involved breach of trust and mandamus claims, rather than a challenge to final agency action.

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

that as a party to these Treaties, the United States has "moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (government has fiduciary duty to ensure that treaty rights are given full effect); *Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001) (citing *Seminole*). Indeed, the Army Corps and Defense Department acknowledge their trust obligations and have adopted policies to ensure compliance with such duties. Hasselman PI Decl., Ex. 60 at 3 (ECF 24-7) (Corps "will ensure that it addresses Tribal concerns regarding protected tribal resources, tribal rights (including treaty rights) and Indian lands,"); *id*. at 9 (DOD "recognizes the importance of understanding and addressing the concerns of Federally-recognized Tribes prior to reaching decisions on matters that may have the potential to significantly affect tribal rights, tribal lands, or protected tribal resources."); Solicitor Op. at 15 (citing Corps recognition of trust obligations); *see also Town of Barnstable, Mass. v. FAA*, 659 F.3d 38, 34-36 (D.C. Cir. 2011) (agency must explain departures from internal guidelines). And the Corps has denied permits when the permitted activity would harm Treaty rights. *Nw. Sea Farms, Inc. v. U.S. Army Corps*, 931 F. Supp. 1515, 1519-22 (W.D. Wash. 1996) (upholding Corps decision to deny permit due to potential harm to Treaty rights); Ex. 5 at 20 (ECF 117-7) (citing case affirming "the Corps' fiduciary duty to take treaty rights into consideration when making permit decisions").[30]

The courts have, likewise, concluded that federal agencies, like the Corps, cannot exercise their regulatory or other authorities in a way that deprives a tribe of treaty rights. This limitation has been recognized in numerous cases. *See, e.g.*, *No Oilport! v. Carter*, 520 F. Supp. 334, 371-

[30] The Treaties and the United States' trust responsibility provide law to apply in this APA case. While unnecessary to obligate the Corps to abide by its trust responsibility, the MLA requirement to take action to "protect the individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife and biotic resources of the area for subsistence purposes," 30 U.S.C. § 185(h)(2)(D), specifically obligates the Corps to give special consideration to the Tribe's Treaty rights to fish and hunt.

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

72 (W.D. Wash. 1981) (finding placement of pipeline may implicate Treaty rights due to harm to fisheries: "unquestionably, the treaties involved place substantial duties upon the United States"). For example, in *Klamath Water Users Prot. Ass'n v. Patterson*, 204 F.3d 1206, 1213-14 (9th Cir. 1999), a case involving the management of a federal dam and irrigation project, the Ninth Circuit held that the Bureau of Reclamation must operate the project in a way that protects Tribe's fishing and water treaty rights. Because the Bureau operated the project, the Court held, "it has a responsibility to divert the water and resources needed to fulfill the Tribe's rights," which "take precedence" over any rights of the irrigators who use that project. Similarly, in *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981), a case involving application of air quality standards in ways that would affect nearby industry, the Court observed that "[i]t is fairly clear that *any* federal action is subject to the United States' fiduciary responsibilities toward the Indian Tribes." *See also Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988) (enjoining Corps from issuing permit that would harm Treaty fishing rights); *Klamath Tribes v. United States*, No. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996) ("the federal government has a substantive duty to protect 'to the fullest extent possible' the Tribes' treaty rights and the resources on which those rights depend"). In each of these cases, the federal activity took place outside of reservation lands, but the trust responsibility still obligated the agency to ensure the activity would not impair treaty rights. *See also* Solicitor Op. at 13 ("activity even on off-reservation portions of the Lake may still implicate treaty hunting and fishing rights"). No one could seriously dispute that the Corps would be violating its trust responsibility if it issued a permit allowing a company to discharge large quantities of toxic wastes into the River that would render water used by the Tribe unsuitable for drinking, irrigation, or fisheries. *United States v. Dion*, 476 U.S. 734, 738 (1986) (no federal agency has authority to abrogate treaties).

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

Accordingly, in order to ensure that its actions will not impair treaty rights, an agency must consider the scope and extent of the Treaty right, and any potential impacts to that right of its action. *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 255-56 (D.D.C. 1973) (setting aside regulation affecting flows of water into tribal Reservation because record does not explain how agency arrived at decision); *Northern Cheyenne Tribe v. Hodel*, 12 Ind. L. Rptr. 3065, 3071 (D. Mont. 1985) (agency official must "investigate and consider the impacts of his action upon a potentially affected Indian tribe"). In the hypothetical above, the Corps surely would need to consider the impact of discharging toxic wastes on the Tribe's Treaty rights so that it could minimize impacts to Treaty rights or, if necessary, reject the permit outright. It is axiomatic that the failure to consider the effects of its actions on Treaty rights would constitute action that is arbitrary, capricious, and contrary to law under the APA. *See Motor Vehicle*, 463 U.S. at 42.

2. The Corps Never Meaningfully Evaluated the Impact of an Oil Spill on the Tribe's Treaty Rights.

Examining these principles in detail, the Solicitor—the nation's premier legal authority on Treaty and trust obligations—concluded that a more searching examination of Treaty rights was "required" and that the dismissive and conclusory snippets in the EA regarding Treaty rights were insufficient. Solicitor Op. at 16-20. The Solicitor was right—under the Treaties, the trust responsibility, and the MLA, the Corps was required to consider the impact an oil spill would have on the Tribe, its people, and its Reservation before deciding whether to approve the pipeline. Since the Corps never undertook any meaningful analysis of how an oil spill would affect the Treaty rights of the Tribe, its approval of the pipeline was unlawful under the APA.

The Corps makes a feeble attempt to argue that it did assess the impacts of an oil spill on the Tribe, but that attempt falls far short. For example, it points to an acknowledgement in the

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

EA that the Reservation is close to the crossing, and that it uses the word "Treaty." EA 85-87. That discussion, however, simply states that the pipeline will have "no direct or indirect effects" on the Tribe, including water quality or quantity, treaty hunting and fishing rights, and socio-economic impacts, and on that basis never actually assesses the impacts of an oil spill on Treaty rights. The EA offers three reasons for believing the pipeline will have "no" effects on the Tribe. First, the pipeline does not cross Reservation lands, but this fact, while true, is irrelevant since an off-reservation oil spill could devastate both the Reservation and the Tribe's Treaty rights in Lake Oahe. Second, the EA boldly asserts there are no disproportionate impacts or environmental justice concerns based on the EA's indefensible environmental justice analysis. Third, the EA asserts that the risks of an oil spill reaching Lake Oahe is "extremely low," based on its flawed assessment of oil spill risks. *See supra* at § II.A. None of these flawed reasons justifies the Corps' failure to examine impacts to the Tribe.

Similarly, it is not enough for the Corps to consider general impacts of an oil spill to "water," when these specific waters at Lake Oahe provide the economic, cultural, and environmental lifeblood for the Tribe. If an oil spill occurs in Lake Oahe, what would happen to the Tribal economy? How would a spill impact families whose livelihoods may be impaired? How would it impact Tribal youth, whose schools will be closed, as happened the last time the water intake system was shut down? Archambault Decl. ¶ 13; Eagle Decl. ¶ 10 (ECF 6-2) ("It won't be my generation that will have to deal with the manmade disaster when it occurs, it will be my children or my grandchildren. They are the future of our people…"); ESMT 1303 (documenting "tremendous hardship" from 2003 water crisis). How would it impact Tribal elders, when the Indian Health Service hospital in Fort Yates must close? Archambault Decl. ¶ 13. How would such injuries affect the Tribe's identity, cohesiveness, and well-being? *Id.*

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

("Water also has a spirit and nourishes all life…. Contaminating the water would contaminate the spirit."). What would it mean for cultural practices like the Sundance performed on the banks of the river? *Id*. ¶ 12.

These are among the questions that should have been addressed. Solicitor Op. at 19. The Tribe is not just another stakeholder. The Tribe has federally protected rights in its lands, waters, fish, and wildlife that the federal government has a special obligation to protect. And the Tribe has nowhere to go if its Reservation homeland is fouled – the Reservation is not replaceable. A trustee (or indeed, any reasonable decisionmaker), would not approve a pipeline without understanding how an oil spill would affect the Tribe and its homeland.

The Corps also fell short of its trust obligations by withholding information about oil spill risks and response, a critical failing given its heavy reliance on documents in its NEPA analysis. The Solicitor highlighted this issue. Solicitor Op. at 21 n. 120 ("As trustee, the Corps has an obligation to ensure that any risks to treaty rights are eliminated through an open and independent process."). The Corps further relies on spill response planning, but the GRP highlights how withholding information from the Tribe harms the Tribe. [redacted] *Supra* at § II.A.7. In its trust responsibility policies, the Corps promises to share key information with Tribes, a promise it failed to fulfill here. Hasselman PI Decl., Ex. 60 at 3. The Corps took steps to correct this shortcoming in its December 4 decision to proceed with an EIS that would have made the withheld spill risk and response information available and exposed DAPL's assumptions to greater scrutiny. But when it terminated the EIS process, the Corps never addressed its failure to be open and transparent with the Tribe.

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

Finally, the Corps argues that it has no duty to consider the impact of a major crude oil pipeline on the Tribe's Treaty-protected homeland and attendant water rights apart from complying with general environmental laws, like NEPA and the MLA. The MLA, of course, explicitly requires consideration of impacts on subsistence fishing and hunting, as well as "sudden ruptures and slow degradation of pipelines" so offers little shelter. 30 U.S.C. § 185(g), (h). And the Corps' reliance on NEPA brings this case full circle. It points to a case in which the agency fulfilled its trust obligation by considering the action's impacts on the tribe in an EIS. *Okanagan Highlands Alliance v. Williams*, 236 F.3d 468 (9th Cir. 2000). Here, in contrast, the EA is deficient. While the Corps could have satisfied its obligation to consider the Tribe's Treaty rights through the NEPA process, it did not do so.[31]

IV. THE OAHE CROSSING SHOULD NOT HAVE BEEN VERIFIED UNDER NWP 12

The NWP 12 verifications for the Oahe crossing are invalid because the Corps issued them despite the project's inconsistency with General Conditions ("GC") 7 (drinking water supplies) and 17 (tribal rights). Tribe Mem. at 43. The Corps responds with two arguments. First, it claims yet again that since the Corps is authorizing a pipeline, not an not oil spill, it has no obligation to even consider the issue at all. Corps Opp. at 46. It goes on to argue that a contrary view would "allow it to deny a permit" where oil spills would harm drinking water or tribal rights. Of course, it not only has the authority to deny permits that would harm drinking water or tribal rights, it has an affirmative duty to do so under both the CWA as well as its trust obligation. 33 C.F.R. §§ 320.1, 320.4 (Corps balances "full public interest" in deciding permits); § 330.1(d). GC 17 explicitly prohibits NWP usage where "the activity *or its operation* may

[31] There is a significant caveat: if the NEPA process revealed significant adverse impacts to Treaty resources, NEPA itself would not necessarily require denial of the requested permit. However, if granting the permit would harm Treaty rights, it would have to be denied. *See supra* at § III.B.

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

impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights." 77 Fed. Reg. 10184, 10283 (Feb. 21, 2012). The Corps' attempt to disavow its obligation here is troubling as well as inconsistent with its own policies and actions in other situations. *See supra* at § III.B.

Second, the Corps disclaims any responsibility to consider whether an applicant is in compliance with the GCs, citing cases that conclude that a "full and thorough analysis of each general condition," based on evidence that the Corps may or may not have, would be inconsistent with the streamlined approach of the NWPs. Corps Opp. at 45. But these cases don't stand for the proposition that the Corps has *no* responsibility when it verifies NWPs. 77 Fed. Reg. at 10272, ECF 6-4 at 23. It is undisputed that as a condition of qualifying for a NWP, a permittee must comply with the GCs. 77 Fed. Reg. at 10282. The Corps must review an applicant's pre-construction notification and verify the project's compliance with the NWP, and can impose conditions, modifications, or even deny verification and require an individual permit. 33 C.F.R. § 330.6(a)(2); § 330.3(b) (Corps has authority "to determine if an activity complies with the terms and conditions of an NWP"); ECF 6-4 at 11. "Authorization means that specific activities that qualify for an NWP may proceed, *provided that the terms and conditions of the NWP are met*." 33 C.F.R. § 330.2(c) (emphasis added). Indeed, the regulations explicitly require the Corps to deny NWP verification where a project would have adverse effects or be contrary to the public interest. *Id*. § 330.1(d). The Corps was presented with abundant information that the Oahe crossing threatened drinking water supplies and tribal rights. While it need not necessarily conduct a "full and thorough" analysis of each and every GC, it must deal with the information in front of it. Verifying NWP 12 compliance despite clear evidence that the project is inconsistent with GC 7 and 17 was arbitrary, capricious, and contrary to law.

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

V. THIS COURT SHOULD VACATE THE CORPS' UNLAWFUL ACTIONS

For the foregoing reasons, the easement, verification, and § 408 authorization must be vacated. In this Circuit, vacatur is the appropriate remedy when an agency decision violates the law, and there is no reason for this Court to undertake further analysis of the benefits and risks of such remedy. *Allina Health Services v. Sibelius*, 746 F.3d 1102, 1110-11 (D.C. Cir. 2014) (finding vacatur is normal remedy and declining to exercise discretion to remand without vacatur). A review of NEPA cases in this district bears out the primacy of vacatur to remedy NEPA violations. *Reed v. Salazar*, 744 F. Supp. 2d 98, 118-20 (D.D.C. 2010) (finding NEPA violation and ordering vacatur); *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 204-05, 210 (D.D.C. 2008); *Humane Soc'y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37-38 (D.D.C. 2007); *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 163-64 (D.D.C. 2002). The Corps offers no disagreement.

DAPL, in contrast, incorrectly asserts that the default remedy in APA cases is remand without vacatur, and then invites the Court to entertain a discretionary balancing of the equities to avoid vacatur. Even if this Court chooses to consider the equities, which it should not, vacatur is warranted. First, contrary to DAPL's argument, the legal deficiencies are serious. The failure to consider the impacts of spills on the Tribe's Treaty rights is not some minor paperwork transgression, but an egregious omission. Should the appropriate analysis take place, and the Corps find that the pipeline has more than a minimal impact on the Tribe's Treaty right, the Corps would be required by law to modify or reject it. *See supra* at § III.B. Keeping the unlawful authorizations in place while an EIS is underway could expose the Tribe to the very risks that an EIS is meant to evaluate. *Sierra Club v. Van Antwerp*, 719 F. Supp.2d 77, 79-80 (D.D.C. 2010) ("Because intervenors intend on continuing development pursuant to the permit, vacatur is appropriate in order to prevent significant harm resulting from keeping the agency's

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

decision in place.").

Moreover, any "disruptive consequences" that would follow from vacatur—specifically, discontinuing the operation of the pipeline while the EIS is underway—are entirely of DAPL's own making. Tribe Mem. at 10 n. 3. DAPL made a risky gamble to start construction before it had received any federal permits, and continued building a 1200-mile pipeline up to either side of Lake Oahe despite this litigation and the unprecedented conflict over the Oahe crossing. It doubled down on that gamble by continuing construction even after the Corps refused to grant the easement and called for consideration of alternative routes in an EIS. The near-completion of a project does not excuse the agency from following NEPA. *Manitoba II*, 691 F. Supp. 2d at 51 ("The Court is acutely aware that Reclamation and North Dakota have built miles of pipeline and that the citizens of the area want the Project completed. These facts do not excuse Reclamation's failure to follow the law. This case demonstrates the adage that it is better to do something right the first time."). Accordingly, the Court should vacate the authorizations.

CONCLUSION

For the foregoing reasons, the Tribe's motion for summary judgment should be GRANTED, the cross motions for summary judgment by the Corps and DAPL should be DENIED, and the Corps' authorizations should be vacated.

Dated: March 28, 2017

Respectfully submitted,

/s/ Jan E. Hasselman

Patti A. Goldman, DCB # 398565
Jan E. Hasselman, WSBA # 29107
(*Admitted Pro Hac Vice*)
Stephanie Tsosie, WSBA # 49840
(*Admitted Pro Hac Vice*)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Telephone: (206) 343-7340

pgoldman@earthjustice.org
jhasselman@earthjustice.org
stsosie@earthjustice.org

Attorneys for Plaintiff

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

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2017, I electronically filed the foregoing *Plaintiff Standing Rock Sioux Tribe's Opposition To Corps and Dapl Motions for Partial Summary Judgment; Reply In Support of Tribe's 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.

/s/ Jan E. Hasselman
Jan E. Hasselman

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