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, and DAKOTA ACCESS, LLC, Defendant-Intervenor-Cross Claimant.	Case No. 1:16-cv-01534-JEB

RESPONSE OF DAKOTA ACCESS, LLC IN OPPOSITION TO PLAINTIFF STANDING ROCK SIOUX TRIBE'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Standing Rock Sioux Tribe asserts claims under statutes that impose no more than procedural requirements on agencies. Yet this summary judgment motion comes down to a disagreement over the *result* of an agency process. Here, the U.S. Army Corps of Engineers has allowed Dakota Access, LLC to install an oil pipeline—built more than 99% on private land—deep beneath two small strips of federal land on each side of the Missouri River in North Dakota. Under the statutes that the Tribe invokes—the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA")—the Tribe received all process to which it was entitled: a meaningful opportunity to comment and consult, and a decision based on reasoned consideration of a sizeable record developed over a period of two years. The Tribe's dissatisfaction with the result of that robust process is no basis for holding that the agency acted arbitrarily, capriciously, or contrary to law. And dissatisfaction certainly cannot support summary judgment when the administrative record for the agency action being challenged has yet to be compiled and the motion depends on facts that are hotly disputed.

The claims that the Tribe asserts are strictly procedural in nature, yet it is hard to imagine a case where more robust process was afforded. The Tribe was advised of the proposed pipeline in 2014. For nearly two years the Corps and Dakota Access gave the Tribe and others multiple opportunities to comment, consult, and otherwise be heard on concerns about the project, including discussion of ways to mitigate or avoid potential risks. On the few occasions when the Tribe decided to participate in the process, it got results, including safer pipeline features. The Corps also issued a draft Environmental Assessment ("EA") for comment more than half a year before making a final decision. At the end of this extensive process—on July 25, 2016—the Corps concluded that the crossing at Lake Oahe, half a mile north of the Tribe's reservation in North Dakota,

would have no significant effect on the environment. The Final EA—which fully justified foregoing a more elaborate Environmental Impact Statement ("EIS")—is nearly 1,000 pages long with its extensive appendices and is rich in detail about pipeline routing analysis, proposed alternatives, risk assessment for leaks or spills, potential effects on the Tribe and the environment, and measures adopted to enhance safety and mitigate all potential sources of harm.

Although that more than satisfied the Corps's duties under NEPA, in September 2016 the Tribe persuaded political officials in three federal Departments to delay the project for further review. Fully aware of the Tribe's criticisms of the NEPA process—the Tribe had already filed this lawsuit laying out its claims—and in recognition of the importance of respecting tribal rights and concerns, the Corps engaged in a detailed review of its earlier decisions. On that second hard look, the Corps yet again concluded that the pipeline crossing would not significantly affect the environment and that no supplementation of the NEPA process was necessary.

Political interference in the process did not end there. Over the next three months a senior political appointee in the Department of the Army made a so-called policy decision to require the Corps to engage in yet more consultation with the Tribe. The Corps did so. Dakota Access also participated when allowed. As a result, the Corps adopted a number of additional conditions to the proposed easement at Lake Oahe—conditions designed to enhance even more numerous safety features and emergency response methods, all in the name of protecting the Tribe and others in the area. The Corps once again revisited the July 25 decision, and once again concluded in a new detailed memorandum that no supplemental environmental analysis was required.

The Tribe cannot fairly object that this entire process—spanning more than two years—was somehow inadequate. So it instead attacks the outcome, relying on supposed expert analysis that the Tribe failed to offer up until months after the Corps made its finding of no significant

environmental impact. The Tribe also seeks to turn the Army's *discretionary* policy-driven grant of added process starting September 9, 2016, into a *vested entitlement* to even more. But under controlling NEPA law, the Tribe needs to show a significant change in circumstances to compel reopening of the July 25 decision. 40 C.F.R. § 1502.9(c)(1)(i). The Tribe does not even try to do so. The Corps correctly concluded as a matter of law that there was none. The Tribe had already raised the same challenges—or, at a minimum, certainly *could* have raised them—to the same project at the same location. The Corps thus correctly found in February 2017 that none of the Tribe's objections met the standard for starting over with an EIS. Given the substantial deference afforded to agencies on matters within their expertise, that conclusion is unassailable.

Not only does the totality of the record firmly refute Standing Rock's claims, the Tribe offers no explanation for how it might be entitled to *summary* judgment. The record has been completed only for the July 25 decisions, but Standing Rock does not limit its expedited motion to that. Instead, it bases its claims on actions and events in the ensuing months, for which the record has *not* yet been compiled. Summary judgment is only appropriate if no material facts are in dispute. Here, the complete facts are not even before the Court. Also, many facts on which the Tribe's arguments rely—most importantly, many errors asserted in tardy expert reports—are far from undisputed. The Court should deny summary judgment.

BACKGROUND

In October 2014, Dakota Access began the process of obtaining regulatory approvals to place an oil pipeline deep below the bed of Lake Oahe in North Dakota. AR OAHE34 (Ex. A). One part of this process was an evaluation of the project's potential environmental effects under NEPA. That statute requires an agency to prepare an environmental impact statement ("EIS") for major federal actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). But "[a]n agency is not required to prepare a full EIS if it determines—based on a

shorter environmental assessment (EA)—that the proposed action will not have a significant impact on the environment." *Winter v. NRDC*, 555 U.S. 7, 16 (2008). In that event, the agency issues a "finding of no significant impact" explaining why an EIS is unnecessary. 40 C.F.R. §§ 1501.4(e), 1508.13. Dakota Access also sought an easement under the Mineral Leasing Act to cross federal land on each shore of Lake Oahe. 30 U.S.C. § 185.

A. The Corps Finds No Significant Impact On The Environment.

The Corps has authority over the Lake Oahe crossing. It gathered information to assess the crossing's environmental impact and determine whether to grant the easement. The Corps expended substantial effort consulting—and seeking to consult—with Standing Rock, in ways that "exceeded" the government's legal obligations. D.E. 39 (Sept. 9, 2016 Opinion) at 48.

1. Standing Rock Comments On The Draft EA.

In December 2015, the Corps published and sought public comment on a draft EA finding no significant environmental impact. *See* D.E. 6-19 (Ex. B), at 1; *see also* 40 C.F.R. § 1506.5(a)-(b) (allowing applicant to prepare document for agency to verify). The Tribe submitted comments in January 2016. AR 69152 (Ex. C). Under the heading "[t]he draft EA fails to properly address the potential for environmental damage to waters which are critically important to the Tribe and its members," the Tribe asserted that the EA lacked sufficient discussion "about the potential impacts of the pipeline construction or its operations on the Tribe's federally protected Winter's doctrine water rights." AR 69159–60 (Ex. C) (emphasis omitted). The "potential impacts," according to the Tribe, lay in "the risk of pipeline leaks or spills." AR 69160 (Ex. C). The Tribe did not suggest or present evidence that *this* pipeline presents a *unique* risk of a spill or leak, only that pipelines *generally* can leak. Nor did the Tribe dispute the Corps's analysis of the risk for *this specific* pipeline. The Tribe also accused the Corps of inadequately consulting with the Tribe, *see*

AR 69163–64 (Ex. C); AR 66176 (Ex. D), inadequately addressing "environmental justice" concerns, *see* AR 69164–68 (Ex. C); AR 66176–77 (Ex. D), and ignoring the Tribe's history of dealings with the United States, *see* AR 66177–80 (Ex. D).

The Tribe supplemented its comments in March 2016, reiterating that "the Corps has obligations arising from the trust responsibility to protect tribal rights, resources, and interests on the Reservation in the face of potentially harmful actions." AR 66168–69 (Ex. D). The Tribe again described the potential threat to its rights as "the risk of oil spills to the Reservation environment." AR 66169 (Ex. D). The Tribe further contended that, "[i]n a shocking disregard of" a "federal trust responsibility," the Corps had made "no mention of the Reservation notwithstanding its proximity to the proposed pipeline crossing." AR 66168 (Ex. D).

The Tribe and the Corps exchanged more letters about the pipeline. AR 69809 (Ex. E); AR 69152 (Ex. C); AR 66548 (Ex. F); AR 66476 (Ex. G); AR 66360 (Ex. H); AR 66166 (Ex. D); AR 64280 (Ex. I); AR 64004 (Ex. J). In February and March 2016, the Corps held three on-site visits near Lake Oahe with tribal representatives. D.E. 39, at 28, 30. Responding to Standing Rock's environmental concerns, the Corps required more, such as double-walled pipes, shut-off valves on each side of the crossing, and fiber-optic pipeline monitoring. *Id.* at 28.

On April 26, 2016, the Tribe's counsel wrote to the Corps that the Tribe was "in the process of retaining experts to review the EA and other materials to better assess the safety of the HDD process and site for the pipeline, and provide that input to the Corps." AR 84808 (Ex. K). Calling this expert input "essential to an informed decision under federal law," the Tribe asked the Corps to "hold open the record until such information is available, which should be sometime in early to mid-May." *Id.* May came and went, but the Tribe provided no expert reports.

2. The Corps Issues The Final EA.

After the Corps reviewed the comments received—and after waiting two months beyond the deadline the Tribe imposed on itself to produce any expert analysis—the Corps published a Final EA and finding of no significant impact on July 25, 2016. AR 71220 (Ex. L); AR 71174 (Ex. M). Although a combined EA and Finding of No Significant Impact (FONSI) document "normally should not exceed 15 pages," 33 C.F.R. pt. 325, App. B(7), the EA is 163 pages with 700 pages of appendices. It addresses six alternatives that the Corps considered and rejected, *see* AR 71229–37 (Ex. L), and explains the relevant construction techniques, mitigation measures, and operation of the pipeline, AR 71237–45 (Ex. L). The EA also addresses possible effects on aspects of the environment ranging from mineral resources to paleontology. AR 71247–321 (Ex. L). It devotes an entire section to water resources, including surface water, groundwater, wetlands, the floodplain, and levees. AR 71259–76 (Ex. L). It addresses vegetation, agriculture, wildlife, and aquatic life, not to mention land use, hazardous waste, air quality, and noise, among many other topics. It includes entire sections on cultural and historic resources, consultation with Native American tribes, socioeconomic issues, environmental justice, and numerous other topics. AR 71304–11 (Ex. L). The Corps then separately addressed the cumulative impacts of the pipeline on each of these categories. AR 71322–31 (Ex. L). Seventeen separate Corps employees took part as preparers, reviewers, or consultants, plus one Dakota Access employee and three members of an environmental-services firm. *See* AR 71350–51 (Ex. L).

The Corps responded to the Tribe's comments on the draft EA, noting that the affected environment included "[t]he northern boundary of the Standing Rock Sioux Reservation." AR 71259 (Ex. L). Indeed, the Corps added a separate section discussing the impact on the Tribe. AR 71309 (Ex. L). There, the Corps addressed "[c]oncerns" that "an inadvertent release" could reach

Lake Oahe. AR 71311 (Ex. L). The Corps determined that the risk was "extremely low" given "the engineering design, proposed installation methodology, quality of material selected, operations measures and response plans." *Id*. The Corps recognized "there would be some effects" to the Tribe "as a low income, minority population," but determined that the Tribe "would not disproportionately or predominately bear impacts." AR 71310 (Ex L). The Corps thus concluded "there will be no direct or indirect effects to the Standing Rock Sioux tribe," including "a lack of impact to its lands, cultural artifacts, water quality or quantity, treaty hunting and fishing rights, environmental quality, or socio-economic status." *Id.*[1]

The EA also discusses spill risks more generally, noting that Dakota Access took dozens of steps "to minimize the risk of a pipeline leak," such as "[p]ipe specifications that meet or exceed applicable regulations," "[u]se of the highest quality external pipe coatings," "inspection and testing programs," "continuous . . . pipeline monitoring that remotely measures changes in pressure and volume on a continual basis," a "Leak Detection System" that "monitor[s] the pipeline for leaks via computational algorithms performed on a continual basis," and routine "[a]erial surveillance inspections . . . to detect leaks and spills as early as possible, and to identify potential third-party activities that could damage the pipeline." AR 71266–67 (Ex. L).

The EA also notes that, "in the unlikely event of a pipeline leak, response measures to protect the users of downstream intakes will be implemented to minimize risks to water supplies." AR 71262–63 (Ex. L). Included are a "Facility Response Plan" that "complies with the applicable requirements of the Oil Pollution Act of 1990," AR 71263 (Ex. L), and "site-specific resources and response measures for an immediate, safe, and effective response to a release of crude oil,"

[1] The Corps tracked each comment from the Tribe and others on a spreadsheet to help ensure that the Final EA addressed them all. AR 72463 (Ex. BB); *see*, *e.g.*, AR 72469 (documenting that the Final EA addressed Standing Rock's comments about effects on minority populations, low-income populations, and Indian tribes living near the crossing).

such as "diversionary booms at predetermined locations and oil collection/recovery activities to prevent further migration of crude oil." AR 71267 (Ex. L). "[P]ermanent storage area[s]" will house "spill response equipment." *Id.* And Dakota Access will routinely "conduct emergency response drills/exercises" including specifically "at Lake Oahe." *Id.*

All told, the EA found that the "[i]mpacts on the environment resulting from the placement of the pipeline on federal real property interests is anticipated to be temporary and not significant as a result of Dakota Access's efforts to avoid, minimize, and mitigate potential impacts." AR 71225 (Ex. L); *see also* AR 71225–26 (adding that construction and operation of the pipeline "is not expected to have any significant direct, indirect, or cumulative impacts on the environment"). The Corps thus concluded that the pipeline "is not injurious to the public interest and will not impair the usefulness of the federal projects." AR 71179 (Ex. M).

B. The Government Conducts Additional Diligence On Its Decisions.

Two days later, the Tribe filed suit. It also sought a preliminary injunction limited to whether the Corps consulted adequately with the Tribe, under the National Historic Preservation Act ("NHPA"), about alleged cultural sites. D.E. 5. This Court denied the preliminary injunction motion on September 9, 2016, concluding *inter alia* that the Tribe repeatedly refused or declined opportunities to consult about the pipeline. D.E. 39, at 15–33.[2]

The same day, the Department of Justice, the Department of the Army, and the Department of the Interior issued a joint statement that the Army "will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will

[2] In the five months since that decision, the Tribe has found only one other item relevant to that finding. It complains that a September 18, 2014 email from THPO Waste' Win Young was logged by the Corps only as "SRST attempts to arrange a meeting" when, in fact, the email also expressed "deep concern about the project." Mot. 7 n.1 But when the Corps finally was able to arrange a meeting with the Tribe in November 2014 to discuss that deep concern, "DAPL was taken off the agenda because Young did not attend." D.E. 39 at 16.

need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other federal laws." D.E. 42-1 (Ex. N). Critical to the Tribe's claims, additional review was not legally mandated; instead, the Corps conducted "good governance and due diligence, to make sure that it is in compliance with the law." *See, e.g.*, D.E. 49 (Ex. O) at 9 (government counsel); *id.* at 10 ("we're looking at all our decision making to confirm compliance"; "[t]here is really nothing unusual about that").

1. The Cooper Memorandum

This unexpected additional process culminated in a detailed 36-page memorandum from David R. Cooper, the Corps' Chief Counsel, dated October 20, 2016 (the Cooper Memorandum). SRST Ex. 22. The memorandum's express purpose was to help the Army "determine whether it will need to reconsider any of its previous decisions" under NEPA or "other federal laws." *Id.* (cover page). The Cooper Memorandum thoroughly addressed numerous issues raised during the Army's review and concluded that *all* previous decisions comported with the law. *Id.* at 36.

First, the Corps concluded that the EA justified Dakota Access's preferred route. While Standing Rock's motion continues to perpetuate a false narrative—that Dakota Access switched to a crossing close to the Tribe's reservation because the supposed first choice (a route north of Bismarck) was unsafe and more expensive, Mot. 26 n.14—the Cooper Memorandum explains that this North Bismarck route was never Dakota Access's first choice. Instead, it was a "second alternative" that Dakota Access and the Corps both ruled out for reasons other than cost or risk-shifting. SRST Ex. 22 at 4. Among other things, the chosen route was better because it "avoided tribal land" and "was co-located with an existing natural gas pipeline," which "helped to minimize impacts to sensitive environmental and cultural resources." *Id.* at 7, 8. *Second*, the Corps confirmed, with respect to water-intake structures, that the EA "acknowledged the potential harm that

may result from an oil spill in the vicinity of water intake structures," but had also "exhaustively addressed prevention and response measures that will be taken to reduce the risk that such harms could occur." *Id.* at 18. *Third*, the Corps noted that the EA "devoted an entire chapter to environmental justice impacts, including a full section on impacts on the SRST, and complied with CEQ Guidance on environmental justice analysis." *Id.* at 28. *Fourth*, the Corps recognized tribal property interests "downstream from the point at which the DAPL would cross the Missouri River," finding that "[n]ormal installation and operation of the pipeline would not have any implications for the SRST's property interests." *Id.* at 34. *Finally*, as for "potential implications" for Standing Rock "downstream from the pipeline" in the unlikely event of a rupture, the Corps noted that "the EA addressed those risks in several sections." *Id.*

At bottom, the Corps concluded that the EA "adequately considered and disclosed the environmental, cultural and other potential impacts of its actions" and "that supplementation of the EA to address any new information is not legally required at this time." *Id.* at 36.

Based on the Cooper Memorandum, the Assistant Secretary of the Army, Jo-Ellen Darcy, sent a letter to Standing Rock and Dakota Access on November 14, 2016, stating that the Army had "completed [its] review, accounting for information it has received from the Tribes and the pipeline company since September, and has concluded that its previous decisions comported with legal requirements." D.E. 56-1 (Ex. P), at 1; *see also* D.E. 56-2 (Ex. Q), at 1. Nonetheless, ASA Darcy believed that for policy reasons "additional discussion with the Standing Rock Sioux Tribe and analysis are warranted." D.E. 56-1 (Ex. P), at 2; *see also* D.E. 56-2 (Ex. Q), at 1.

2. The Department Of Interior Solicitor's Opinion

As these additional discussions were underway, the Secretary of the Interior—who did not need to approve an easement—directed her Solicitor to draft a memorandum on the Tribe's treaty

rights. SRST Ex. 4 ("Solicitor's Op."). The Solicitor's resulting opinion—which the Interior Secretary recently withdrew, D.E. 127-15 (Ex. R)—reviewed Tribal treaty rights to hunt, fish, and use Lake Oahe for agriculture and domestic water consumption. SRST Ex. 4 at 10–16. The Solicitor believed those rights gave the Army "legal justification" to conduct more environmental-impact analysis. *Id.* at 4. Notably, the Solicitor repeatedly couched her conclusions in terms of whether further review or other action could be "justified" or fell within the Corps's "discretion." *See id.* at 5 (Corps would be "justified should it choose to" do more), 17 (further action "as a matter of the exercise of the Corps' discretion" would be "consistent with" fiduciary standard), 35 ("ample legal justification" to exercise "discretion").

C. The Army Issues Notice Of An EIS Process.

On December 3, 2016, the Corps once again confirmed in an internal memorandum that it had complied with *all* applicable laws in allowing the pipeline to cross federal land near Lake Oahe. D.E. 73-14 (Ex. S) ¶ 5.a. Nonetheless, ASA Darcy announced in her own memorandum the following day that she would not yet allow the project to go forward, citing a policy preference for "more height[en]ed analysis" with "more rigorous exploration and evaluation." D.E. 65-1 (Ex. T) ¶ 12. She told the Corps to further discuss alternative pipeline locations. She added that, in her judgment, this discussion would be "best accomplished" by "preparing an Environmental Impact Statement (EIS)." *Id*. On behalf of the Army she reiterated, though, that "the Corps' prior reviews and actions have comported with legal requirements." *Id*. ¶ 15.

ASA Darcy also noted that certain documents "supporting the [EA] were marked confidential and were withheld from the public," including the Tribe. *Id.* ¶ 5. This was no surprise to anyone familiar with the Final EA, which says the Corps considered "security sensitive documents, submitted to" the Corps "as Privileged and Confidential." AR 71267 (Ex. L) (referring to "[s]ite-

specific GRPs [geographic response plans]" that "identify site-specific resources and response measures for an immediate, safe, and effective response to a release of crude oil").

On January 18, 2017, two days before the new Administration took office, the Army published a Federal Register notice of intent to prepare an EIS. 82 Fed. Reg. 5543 (Jan. 18, 2017). The stated purpose was "to consider any potential impacts to the human environment" from granting an easement. *Id.* at 5544. The notice neither articulated nor made findings needed under controlling law to satisfy the standard for reopening a Final EA.

D. The Corps Delivers The Easement After Further Analysis.

On January 24, 2017, the President issued an Executive Order to expedite environmental reviews and approvals for high priority infrastructure projects, as well as a Presidential Memorandum specific to the Dakota Access pipeline. The latter directed the Secretary of the Army to "instruct the Assistant Secretary of the Army for Civil Works" and the Corps to "take all actions necessary and appropriate" to, among other things, "review and approve in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary or appropriate, requests for approvals to construct and operate the DAPL, including easements or rights-of-way to cross Federal areas." D.E. 89-1 (Ex. U) § 2.

The review contemplated by the Presidential Memorandum is documented in a February 3, 2017 memorandum from Lieutenant General Todd Semonite to Doug Lamont, Acting Assistant Secretary of the Army for Civil Works. SRST Ex. 23 ("Feb. 3 Memo"). In his memorandum, Lieutenant General Semonite recommended notice to Congress of the Corps's intent to grant Dakota Access the easement at Lake Oahe. *Id.* at 15.

The February 3 Memorandum explained that the Corps's decision to grant an easement at Lake Oahe was "the subject of a robust administrative process." *Id.* at 1. The Corps noted it "did

not identify any new information indicating that actions by the Department of the Army will affect the quality of the human environment to a significant extent not already considered." *Id.* at 8. Rather, all relevant NEPA considerations—including treaty and trust issues—were fully addressed in the EA: "The Final EA fully informed decision makers and the public of the environmental effects of the proposed crossing and those of reasonable alternatives, including informing the decision on whether to grant an easement under the Mineral Leasing Act." *Id.* at 10.

The Corps rejected supplementation because of "no 'substantial changes in the proposed action that are relevant to environmental concerns,'" nor any "significant new circumstances or information relevant to environmental concerns." *Id.* at 11 (citing 40 C.F.R. § 1502.9(c)(l)). Indeed, even ASA Darcy had "confirmed in writing, that formal reconsideration or the preparation of supplemental NEPA document was not *required*." *Id.* (emphasis added).

The February 3 Memorandum reviewed submissions from the Tribe to the Army between September and December 2016 raising various points. *Id*. at 11–12. The Corps expressly addressed the Tribe's concerns in those letters about the EA's "analysis of alternatives" and "about risks from oil spills that could occur during pipeline operations," including "how a pipeline spill could impact treaty fishing, hunting or reserved water rights, as well as the Tribe's water intakes from Lake Oahe." *Id.* at 12. The Corps concluded that the EA had raised and addressed each concern. Thus, "the SRST ha[d] not raised significant new circumstances or presented any new information that would require supplemental NEPA documentation." SRST Ex. 23 at 13.

The Corps also explained that, after the extensive post-September 9 dialogue, it had "adopted a set of 36 special conditions for the Lake Oahe" crossing designed to reduce the risk of a spill. *Id.* at 13. Extra conditions were included to "address the concerns set forth in the DOI opinion by mitigating the already low risk of an oil spill into Lake Oahe." *Id.* The Corps also

expressed doubts whether much of the Solicitor's opinion was "legally supportable." *Id.* at 9. In fact, the Interior Department has withdrawn that opinion. D.E. 127-15 (Ex. R).

On February 7, the Army informed Congress of its intent to grant the easement to Dakota Access. D.E. 95-1 (Ex. V). The Army found its actions consistent with the Presidential Memorandum, because it had already "completed a full review of the administrative record" in 2016 and "recently completed" an additional "technical and legal review of the proposed Lake Oahe easement." D.E. 95-2 (Ex. W), at 2. And having "already prepared an EA/FONSI," it had "no cause for completing any additional environmental analysis." *Id.* The Army accordingly withdrew its plans to prepare an environmental impact statement. D.E. 95-3 (Ex. X). The Corps and Dakota Access executed the easement on February 8, 2017. D.E. 96-1 (Ex. Y), at 12.

ARGUMENT

I. The Corps Fully Complied With NEPA.

Despite a multiyear outreach effort, a lengthy public comment period, and a detailed analysis of all relevant environmental concerns, Standing Rock claims that the 163-page EA was not enough under NEPA. The statute plainly requires no *additional* analysis, for that would turn "our basic national charter for protection of the environment," 40 C.F.R. § 1500.1(a), into a senseless paper-pushing mandate, devoid of substance and untethered to its environmental goals, *see id.* § 1500.1(c) (warning that "NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action"). The NEPA claim is meritless. At a minimum, summary judgment must be denied because the record for the claim is not complete, and numerous important facts on which the Tribe relies are disputed.

A. NEPA's Procedural Nature Mandates Deferential Judicial Review.

NEPA requires federal agencies to evaluate the effects that projects falling within their purview will have on the environment. If an action will "significantly" affect the "quality of the

human environment," NEPA generally requires preparation of a detailed EIS. 42 U.S.C. § 4332(2)(C). Otherwise, the agency need only prepare an EA and finding of no significant impact. *Winter*, 555 U.S. at 16 (citing 40 C.F.R. §§ 1508.9(a), 1508.13).

NEPA does not "require agencies to elevate environmental concerns over other appropriate considerations," *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983), and does not "mandate particular results," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Rather, NEPA "imposes only procedural requirements." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57 (2004) (citing *Robertson*, 490 U.S. at 349–50). To illustrate, NEPA would not be violated if an agency determined that "the benefits to be derived from downhill skiing . . . justif[y] the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of [a] mule deer herd." *Robertson*, 490 U.S. at 350–51. NEPA "merely prohibits uninformed—rather than unwise—agency action." *Id.*; *see also Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (holding that a court may not override an agency's NEPA decision "simply because the court is unhappy with the result reached").

Given the level of discretion that NEPA gives federal agencies, judicial review is highly deferential. An agency's "decision not to prepare an EIS" and instead proceed by EA "can be set aside *only* upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Dep't of Transp.*, 541 U.S. at 763 (quoting 5 U.S.C. § 706(2)(A)) (emphasis added); *accord Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016). The Court's job is simply "to determine whether the agency: (1) has 'accurately identified the relevant environmental concern,' (2) has taken a 'hard look' at the problem in preparing its EA, (3) is able to make a convincing case for its finding of no significant impact, and (4) has shown that even if there is an impact of true significance, an EIS is unnecessary because 'changes or safeguards in

the project sufficiently reduce the impact to a minimum.'" *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006) (quoting *Town of Cave Creek v. FAA*, 325 F.3d 320, 327 (D.C. Cir. 2003)). Which is all to say that the "scope of review is in fact the usual one"—whether the decision is "arbitrary, capricious, or an abuse of discretion." *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011). The Court should thus "decline" any invitation to "flyspeck an agency's environmental analysis." *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014) (quotation marks omitted).

B. The FONSI Was Neither Arbitrary Nor Capricious.

The Tribe's characterization of the Corps's July 25, 2016 finding of no significant impact as arbitrary and capricious, Mot. 17–35, is divorced from reality. The Corps carefully considered each timely presented issue and adequately explained in meticulous detail why allowing Dakota Access to co-locate a pipeline where other utility lines already crossed Lake Oahe would not significantly impact the environment.

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

The Final EA on which the Corps's finding of no significant impact rested was the product of a multi-year collaborative process with tribes, state officials, and many other interested parties. *See supra* at 3-5. The EA addresses multiple alternatives to the Lake Oahe crossing, as well as the crossing's potential effects on geology, soils, water resources, vegetation, agriculture, range resources, wildlife resources, aquatic resources, land use and recreation, cultural and historic resources, social and economic conditions, environmental-justice concerns, reliability and safety, air quality, and noise. *See supra* at 6-8. Both the finding of no significant impact and the Final EA are well-reasoned and in no way arbitrary or capricious.

Under Council on Environmental Quality ("CEQ") regulations, several factors guide

whether federal action will "significantly" impact the environment (thus requiring an EIS). 40 C.F.R. § 1508.27. The EA addresses each. Consistent with the regulations, the EA considers the "effects" of the "site-specific action" on the "locale rather than in the world as a whole" including "[b]oth short- and long-term effects." *Id.* § 1508.27(a); *see*, *e.g.*, AR 71232–40 (Ex. L) (focusing on effects in the vicinity of Lake Oahe); AR 71256–58 (addressing "temporary" effects of construction); AR 71252, 71258, 71319, 71325 (addressing "long-term" effects of operation). The EA also considers "[i]mpacts that may be both beneficial and adverse," 40 C.F.R. § 1508.27(b)(1), by identifying the benefits of the proposed action, *see* AR 71305 (Ex. L), while devoting the bulk of the analysis to considering possible negative effects, *see* AR 71247–331.

In concluding that the proposed action will not significantly "affec[t] public health or safety," 40 C.F.R. § 1508.27(b)(2), the EA explains in great detail the reliability and safety of the pipeline, AR 71312–18 (Ex. L). In particular, the pipeline will be situated more than half a mile from the Tribe's reservation boundary and more than 1.5 miles from the nearest dwelling. AR 71310 (Ex. L). The EA considers the possibility of an oil spill and the significant consequences that would follow, but explains that the risk of oil reaching Lake Oahe is "extremely low" given "the engineering design, proposed installation methodology, quality of material selected, operations measure, and response plans." AR 71311 (Ex. L); *see also*, *e.g.*, AR 71316 ("an oil spill is considered unlikely" and "a high precaution to minimize the chances has been taken").

The EA considers the "[u]nique characteristics of the geographic area," 40 C.F.R. § 1508.27(b)(3), including geologic hazards, AR 71250–53 (Ex. L), cultural resources, AR 71299–304, proximity to the Standing Rock reservation, AR 71309–11, geologic, soil, water, vegetation, wildlife, and aquatic resources, AR 71247, 71253, 71259, 71276, 71281, 71292, land use, AR 71294, and local social and economic conditions, AR 71304.

Moreover, the Corps had no duty to give vocal objectors veto power in response to the requirement to consider the "degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). The EA adequately addresses this factor by instead setting forth the nature of the Corps's consultations with Standing Rock, AR 71303–04 (Ex. L), acknowledging the federal government's trust responsibilities, AR 71303, and responding to the comments submitted on the draft EA, AR 71225.

The EA's detailed explanation of the well-established processes for installing, operating, and monitoring a pipeline, and the risks presented by them, belies any suggestion that the pipeline's environmental effects are "highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5); *see* AR 71312–21 (Ex. L). Nor was the action here a "decision in principle about a future consideration" or a "precedent" for a future pipeline or permitting decision; the EA focuses on this particular pipeline at this particular location. The only precedent it might set is for a detailed, context-specific approach to preparing EAs. 40 C.F.R. § 1508.27(b)(6).

Finally, the EA devotes entire sections to considering (1) cumulative impacts, *see* 40 C.F.R. § 1508.27(b)(7), AR 71322 (Ex. L), (2) historic, cultural, and scientific resources, *see* 40 C.F.R. § 1508.27(b)(8), AR 71299, AR 71300, (3) endangered or threatened species, *see* 40 C.F.R. § 1508.27(b)(9), AR 71281–91, and (4) compliance with relevant legal requirements, *see* 40 C.F.R. § 1508.27(b)(10), AR 71227–28.

Given that the EA specifically addresses each CEQ factor and provides reasoned explanations for finding no significant impact on the environment, the Corps did not act arbitrarily and capriciously in issuing a finding of no significant impact. *See* AR 71179 (Ex. M). Indeed, ASA Darcy's December 4, 2016 memorandum favoring a supplemental EIS went out of its way to make

"clear" that "the Corps' prior reviews and actions"—including the final EA and finding of significant impact—"comported with legal requirements." D.E. 65-1 (Ex. T), at 4.

The Tribe's response—that the Corps did not adequately support its finding of no significant impact, *see* Mot. 20–24—is itself unsupportable. Of the 10 factors listed in 40 C.F.R. § 1508.27(b), the Tribe articulates a challenge to just one: "cumulative effects." *See* Mot. 22–23; *see also Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 70 (D.C. Cir. 1987) ("one of ten factors"). The Tribe relegates the rest to a conclusory sentence or ignores them altogether. *See* Mot. 20–21. Having set forth only "perfunctory and undeveloped arguments" that are "unsupported by pertinent authority," the Tribe has "waived" the ability to raise these arguments in reply. *See Gold Reserve v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112, 126 (D.D.C. 2015) (Boasberg, J.) (citation omitted). And by challenging only one factor, the Tribe cannot plausibly show that the overall finding of no significant impact was arbitrary and capricious.

Regardless, the Corps conducted a proper cumulative impact analysis. "A cumulative impact is that 'which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.'" *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 51 (D.C. Cir. 2015) (quoting 40 C.F.R. § 1508.7). This analysis thus examines the "'incremental impact' of a project" by "incorporating the effects of other projects into the background 'data base' of the project at issue." *Coal. on Sensible Transp.*, 826 F.2d at 70.

The Tribe flatly errs in saying the EA contains no "analysis of how" this pipeline "adds to the existing risk of pipeline spills in the Missouri River that cumulatively could harm the Tribe or others." Mot. 23. An entire section of the Final EA analyzes cumulative impacts on eleven dif-

ferent types of resources. *See* AR 71322–31 (Ex. L). It *expressly* addresses the "cumulative impacts of this pipeline" with "smaller diameter, unregulated, crude oil gathering lines that have leaked and affected soil and ground/surface water." AR 71324 (Ex. L). Because the Dakota Access pipeline will be "highly regulated and monitored," any cumulative effect of *this* pipeline with preexisting lines is "minimized by the regulatory criteria, the monitoring, protections and response implemented by Dakota Access during the operation of this pipeline." *Id*. The EA further explains that while a spill or leak could have "long-term impacts on surface and groundwater resources as well as aquatic life resources," the "potential cumulative impacts . . . resulting from spills would be minor" because the pipeline will "meet or exceed the applicable federal regulations as detailed" in the EA, with procedures adopted for monitoring the pipeline, detecting leaks, responding to spills, and risk analysis. AR 71325 (Ex. L); *see* AR 71312–18; AR 71322 (added spill risks will be "negligible or nonexistent based on past and foreseeable future actions"). Finally, due to inherent limits on the *production* of oil ("the availability of rigs and crews is the critical factor affecting the growth of the industry in the region"), the pipeline is "not anticipated to have a cumulative impact of increasing production or reliance upon nonrenewable resources." AR 71322 (Ex. L). This means that because this pipeline will indisputably be safer than other methods of shipment, including truck and rail, AR 71229-31 (Ex. L), the cumulative impact will be positive.[3]

The Tribe relies on "expert reports critiquing the Final EA." Mot. 21. These new reports

[3] The Tribe claims in a footnote that "[t]he EA's flaws are compounded by the government's unlawful 'segmentation'" of the pipeline across three Corps districts. *See* Mot. 23 & n.12. But because only a small portion of this long utility transmission line is subject to the Corps's permitting authority, the scope of the federal action is limited by the permit area rather than the entirety of the pipeline. 33 C.F.R. pt. 325, App. B(7)(b)(3). This Court relied on similar regulations to reject this same type of argument in denying interim relief under the National Historic Preservation Act. *See* D.E. 39, at 45–48; *see also Sierra Club*, 803 F.3d at 34–35, 46–52; *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1051–54 (10th Cir. 2015); *Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269, 272–73 (8th Cir. 1980).

cannot support summary judgment because APA claims must be based on the administrative record before the agency. Even if the Court were to consider these reports, it could not find an APA violation without also considering a multitude of serious flaws in them that make them unreliable for the points that the Tribe has sought to make well *after* the EA became final. Thus, even if the Court were to reject all of the reasons spelled out below for disregarding the reports, Dakota Access and the Corps have not had a chance to dispute them as factually flawed, which precludes any finding of an APA violation on account of the reports.[4]

The Court should not consider these reports at all, however, because they are exceedingly untimely. The Corps completed its environmental analysis with a final NEPA determination in July 2016. The Tribe, which immediately sued on the ground that the determination was invalid, had every opportunity to hire experts during the draft EA comment period. In fact, in April 2016 the Tribe asked the Corps to wait a few more weeks (until mid-May) before finishing the EA so the Tribe could submit expert analysis. Even under the Tribe's *own* timetable, reports dated October 28, 2016, December 2, 2016, and January 5, 2017, are long out of time. In addition, every

[4] As a brief preview of just some of the material flaws that Dakota Access can establish as to these reports: (1) Plaintiffs rely on an expert in Turkey to claim this is the "longest" HDD bore "for crude oil under freshwater anywhere in the world," Mot. 12, but it is not even the longest for *this contractor*, which has already installed three longer pipelines of that description in the United States alone, and two dozen HDD pipelines total (not just for crude oil) that are longer than the Lake Oahe crossing; (2) the references cited by the same expert come almost exclusively from Google searches (including links that are no longer active), and he cut and pasted an entire section of his report from a Wikipedia article; (3) the worst-case discharge amounts on which Plaintiffs' experts rely are much lower than those used in designing response plans for the pipeline; (4) their experts repeatedly mischaracterize documents, for example contesting the supposed claim that valves will "close immediately" when the document criticized instead states that valves "can be actuated to close as soon as a leak is detected"; (5) Plaintiffs' criticisms based on "stresses" during the pipe installation fail to mention that the highest level of metal stress for this crossing will be only 68% of the maximum allowed by industry standards; (6) their experts use faulty data to assert that landslides will pose a risk; (7) they improperly use chronic target values for benzene exposure when pipeline leaks are acute events; and (8) they fault the EA for lacking information that instead is found in design documents that they fail to address. Dakota Access is prepared to elabaorate on these and other flaws at a time when the motion at issue does not assume the record is complete.

topic raised in these reports either was addressed in the Final EA in response to timely comments or could have been raised before the EA became final. The Tribe cannot now rely on such post-hoc expert evidence to challenge the EA. *See Dep't of Transp.*, 541 U.S. at 764 (NEPA plaintiffs must "'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration").

The Tribe responds that "critical analyses" about oil spills on which the Corps relied were "never made available to the public or the Tribes." Mot. 21; *see id.* at 21–22. But that excuse has three separate flaws. *First*, the Tribe had all the information it needed to dispute the draft EA's analysis of the risk or consequences of a spill. Indeed, all three reports were completed *before* the experts had access to the supposedly critical analyses, and the experts were able to compute spill numbers without access to any confidential documents. *See* SRST Ex. 16 ("EarthFax Report") at 2–3 (discussing the "spill volume" for a "reasonable incident scenario").

Second, the Tribe mischaracterizes the purpose—and, hence, the relevance—of the spill model documents. Spill models are not used to select a route or even to predict actual volumes from spills; rather, the relevant PHMSA regulation (the Pipeline and Hazardous Materials Safety Administration of the Department of Transportation) requires operators to prepare these models to improve design features and help develop response plans for completed pipelines. 49 C.F.R. § 194.105. For example, the Lake Oahe spill model's results helped optimize valve locations. AR 74726 (Sealed exhibit to D.E. 93). In addition, the worst-case scenario used to generate the Lake Oahe spill model's volumes will not occur; the regulation required modelers to assume that the pipeline is resting on the lake's surface and will suffer a so-called guillotine break. 49 C.F.R. § 194.105. As the document explains, this vastly overstates spill effects. AR 74729 (Sealed exhibit to D.E. 93). And none of *this* is new, either. The Final EA explains that the response plans

were "[b]ased on a worst case discharge (WCD) scenario specific to Lake Sakakawea and Lake Oahe, calculated by guidance in 49 C.F.R. § 194.105," and the EA goes on to list the ways, described above, in which the model overstates the response time needed. AR 71315 (Ex. L).

Third, the Tribe is in no position to cry foul. It says it "was unaware of the existence of these documents" ("response plans" and documents on "oil spill risks") "until the Corps provided the administrative record for this case, but withheld them." Mot. 14 n.6. That is false. Months before the Corps issued its Final EA, the Tribe was offered access to documents that Dakota Access had submitted to the Corps on a confidential basis. The Tribe refused that access because it did not want to sign a confidentiality agreement. Comer Declaration (Ex. Z) at 2-3. Its assertion that it was not even *aware* of such documents is troubling, to say the least.

Regardless, nothing was improper or even unusual about the Corps's decision to protect the confidentiality of these documents. NEPA is not a disclosure statute; it requires a process for agencies to consider the environmental effects of actions within their jurisdiction. The Corps did that by considering all of the information to evaluate the risk of a spill or leak before it prepared the final EA. *See* Mot. 22. NEPA requires nothing more. Whether the Corps shared a particular report with a particular interested party is simply irrelevant to whether the Corps *itself* "took a 'hard look' at the environmental consequences . . . and adequately considered and disclosed the environmental impact of its actions" in the ultimate analysis it prepared and made publicly available. *EarthReports, Inc. v. FERC*, 828 F.3d 949, 954–55 (D.C. Cir. 2016) (internal quotation marks, brackets, and citation omitted).

These documents, in particular, did not need to be disclosed. "NEPA provides that the Freedom of Information Act (FOIA), 5 U.S.C. § 552, controls the disclosure of NEPA documents and information to the public." *Cty. of San Diego v. Babbitt*, 847 F. Supp. 768, 773 n.2 (S.D. Cal.

1994), *aff'd*, 61 F.3d 909 (9th Cir. 1995) (citing 42 U.S.C. § 4332(2)(C)). The Tribe's complaint here includes documents with sensitive information—spill response plan details and water intake locations that could be used to harm the pipeline. Where disclosure would present security risks, courts have not hesitated to deem the information "confidential" under FOIA. *See Bowen v. USDA*, 925 F.2d 1225, 1227–28 (9th Cir. 1991) ("internal security measures" information "confidential" under FOIA); *Porter Cty. Chapter of Izaak Walton League of Am., Inc. v. U.S. Atomic Energy Comm'n*, 380 F. Supp. 630, 634 (N.D. Ind. 1974) (nuclear power plant security information "confidential" under FOIA). The Corps had no basis to disclose them. *See Parker v. Bureau of Land Mgmt.*, 141 F. Supp. 2d 71, 77 n.5 (D.D.C. 2001) ("[T]he D.C. Circuit has held that the disclosure of material which is exempted under (b)(4) of FOIA is prohibited.") (citing *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151 (D.C. Cir. 1987)).

Finally, even had the Tribe's expert reports been properly before the Court, the claim would still fail. The Tribe invokes "the province of this Court" to "determine whether the EA meets the requirements of NEPA," Mot. 33, but that ignores the substantial deference due the Corps's determination. This Court need not and indeed may not weigh the persuasiveness of competing expert and lay opinions. The Corps's "'evaluati[on]'" of "'scientific data within its technical expertise'" is entitled to an "'*extreme* degree of deference.'" *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting *B&J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004)) (emphasis added). "Given the presence of disputing expert witnesses, this controversy parallels one described by the Supreme Court as 'a classic example of a factual dispute the resolution of which implicates substantial agency expertise.'" *Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 746–47 (D.C. Cir. 2001) (quoting *Marsh*, 490 U.S. at 376). Thus, just as in *Marsh*, this Court "'must defer to the informed discretion of the responsible federal agenc[y].'" *Id.* at 747.

(quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989)). The "agency's decision concerning the evidence before it 'involves primarily issues of fact,'" and because it was "not arbitrary and capricious," this Court "cannot set it aside." *Id.* (quoting *Marsh*, 490 U.S. at 377). *Summary* judgment is especially unwarranted.

2. The EA Adequately Considers Tribal Rights.

Standing Rock contends that the final EA did not adequately consider the effects the pipeline could have on the Tribe's treaty-based hunting, fishing, and water rights. *See* Mot. 39. That is demonstrably false. The final EA evidences the Corps's "hard look" at environmental impacts during the easement and permit assessment process. *TOMAC*, 433 F.3d at 861. And NEPA does not impose a separate standard for proposed actions that affect treaty-based or other tribal rights. *See id.* at 860–61 (affirming agency decision to conduct EA rather than EIS on transfers of tribal land). The EA here based its finding of no significant environmental impact on the low risk of leaks and the extensive measures in place to mitigate any that might occur. The Corps did not need to write out this "no significant impact" finding twice—once for Tribe members who enjoy these resources and a second time for non-Tribe members enjoying the same resources along the same body of water.

Moreover, the EA *did* explicitly address tribal rights and consultation in multiple places. AR 71231 (Ex. L) (discussing the pipeline route's 0.5-mile buffer avoiding tribal lands); AR 71262 (possible impacts on Standing Rock's water supplies); AR 71267 (involvement of tribal officials in response plans); AR 71282 ("No impacts to treaty fishing and hunting rights are anticipated[.]"); AR 71299 (Standing Rock's reservation and property interests); AR 71303 (consultations with tribal officials during the permit process); AR 71310 (impacts on Standing Rock's treaty rights); AR 71309 ("Direct and indirect impacts from the Proposed and Connected Actions will not affect

members of the Standing Rock Sioux Tribe or the Tribal Reservation."); AR 72435 (directly addressing Standing Rock's comments about the tribe's treaty history). This extensive analysis documented in the EA led the Corps to conclude "there will be no direct or indirect effects to the Standing Rock Sioux tribe," including "a lack of impact to its lands, cultural artifacts, water quality or quantity, treaty hunting and fishing rights, environmental quality, or socio-economic status." AR 71310 (Ex. L). This analysis plainly satisfies the "hard look" standard. *TOMAC*, 433 F.3d at 861. As noted above, NEPA does not have a separate standard for assessing effects on tribal rights. *See id.* at 860–61.

The Tribe, for its part, utterly failed to differentiate its treaty rights from its discussion of spill risks. From the Tribe's first comments to the draft EA, it asserted its treaty rights under the heading "[t]he draft EA fails to properly address the potential for environmental damage to waters which are critically important to the Tribe and its members"—that harm being "the risk of pipeline leaks or spills." AR 69160–61 (Ex. C). Nothing has changed since. *See* Mot. 25 (describing the "risk of a spill" as the threat to "the Tribe's Treaty rights"). Thus, everything the EA says on the topic of leak or spill risks—which turns out to be quite a bit, actually, AR 71312–18 (Ex. L)—is a direct answer to the Tribe's concerns about harms to its treaty rights.

The Tribe's reliance on the withdrawn Solicitor's Opinion is thoroughly misplaced. This Court reviews agency action on the basis of the record that was before the agency at the time it made its decision—that is, July 25. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("review is to be based on the full administrative record that was before the Secretary at the time he made his decision"). The Solicitor's Opinion is thus immaterial as a matter of law. In any event, as explained in greater detail below, the Corps sufficiently addressed the

opinion's concerns in the EA, the Cooper Memorandum, and the February 3 Memorandum.[5]

The Tribe also invokes Treaty rights to allege a failure to consider alternative routes. That too is wrong. The Corps devoted nearly ten pages to exploring a host of alternatives to the pipeline route. AR 71229–37 (Ex. L). It considered the environmental impacts of modifying existing infrastructure, using trucking or rail to transport oil, other ways to cross major waterbodies, taking no action, and the specifics of the proposed action. Although the Corps had no obligation to do so, it also explained the many reasons a North Bismarck option—one of two potential alternatives—was discarded early in the process: It would have meant more than eleven *additional* miles of pipeline; would have been severely restricted by state residential buffer requirements, and would have inflicted "165 *additional* acres of impact, multiple additional road crossings, waterbody and wetland crossings." AR 71232-36 (Ex. L) (emphasis added). The Tribe wrongly suggests that the

[5] For a host of other reasons the Court should give the Solicitor's Opinion no weight. Foremost, its withdrawal by the Acting Secretary deprives it of legal effect. *See Nat'l Ass'n of Home Builders v. Salazar*, 827 F. Supp. 2d 1, 2 (D.D.C. 2011) (withdrawal of challenged memorandum renders case moot). It also lacks persuasive effect, most notably because the Solicitor erroneously assumed that the Tribe lacked sufficient opportunity to consult with the Corps before July 25. SRST Ex. 4 at 5 (calling for "enhanced engagement" with the Tribes and "enhanced sensitivity to the Tribes' concerns"). The Solicitor accepted at face value the Tribe's assertions that it was inadequately consulted, *id.* at 18 (crediting the Tribe's "concerns over lack of government-to-government consultation on certain issues"), without a hint of the skepticism warranted by this Court's September 9 opinion, where it exhaustively reviewed why the Tribe was wrong to complain about a lack of NHPA consultation for the same pipeline project, D.E. 39 at 15–33. This problem is also evident in her blind acceptance of the Tribe's false narrative that North Bismarck was the original route and that the Corps allowed an "abrupt shift" to the current route without consulting the Tribe. SRST Ex. 4 at 33; *see supra* at 9. Similarly, she joins the Tribe in falsely accusing the Corps of failing to address issues that the Final EA plainly covers. *Compare* Mot. 25–26 (quoting Solicitor's Opinion accusing Corps of not analyzing "response actions to address ground water contamination or a slow leak underground") *with* AR 71272 (Ex. L) (two-page discussion of ground water remediation—under the heading "Remediation," in a section titled "Groundwater").

Apart from these and other serious factual flaws, the Solicitor fails to explain how environmental issues of peculiar concern to the Tribe could affect the Corps's conclusion. After all, a finding that spill risk is extremely low and that mitigation measures will nonetheless protect the environment does not change depending on which persons are in the area.

EA subordinates tribal interests to those of Bismarck residents; the alternative would have impacted more of nearly every environmental feature, including being "in proximity to and/or crossing . . . private tribal lands." AR 71310 (Ex. L).

3. The EA Adequately Considers Environmental Justice Concerns.

The Tribe also errs in arguing that the Corps failed to take a "hard look" at the "environmental justice impacts" of the pipeline. Mot. 27–28.

Assuming environmental justice analysis is reviewable,[6] the Tribe has not come close to showing arbitrary and capricious agency action. The Corps applied CEQ Guidance, *see Environmental Justice: Guidance Under the National Environmental Policy Act*, (1997), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf, to conclude that "[n]o appreciable minority or low-income populations exist within the Census tracts directly affected by the Proposed Action," and that "[n]o local community with appreciable minority or low-income populations exists at" the Lake Oahe crossing. AR 71309 (Ex. L). In identifying the directly affected census tracts, the Corps observed that linear construction projects "typically use a 0.5 mile buffer area to examine Environmental Justice effects" and that the two census tracts through which the pipeline crosses at Lake Oahe encompass an area greater than a 0.5-mile radius from the project. AR 71308 (Ex. L). The Corps noted that while the relative size of the minority population in the counties adjacent to the crossing was greater than in the state as a whole, the relative size of

[6] The phrase "environmental justice" does not appear in NEPA, but instead comes from a 1994 executive order. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 16. 1994) ("EO 12898"). Although the D.C. Circuit has allowed review of environmental justice claims, *see Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004), Dakota Access preserves the argument that review is unavailable because the executive order explicitly bars judicial review of agency compliance with its directives. 59 Fed. Reg. at 7633.

the minority population in the affected area was lower than both the state as a whole and the adjacent counties. AR 71309 (Ex. L). The Tribe's reservation did not change this analysis because its "boundary is over 0.5 miles south of the Lake Oahe Project Area crossing" and is therefore outside the affected area for the purposes of the environmental justice analysis. AR 71310 (Ex. L) (noting that "the closest residence on the Standing Rock Sioux Reservation is a rural residence located greater than 1.5 miles from the Lake Oahe Project Area Crossing," which is "well beyond any federal or state siting criteria").

Standing Rock's complaint is that the Corps should not have identified the affected area as the two census tracts through which the pipeline crosses Lake Oahe because that excluded the Tribe's reservation. Mot. 28–29. But the Tribe does not attempt to rebut the Corps's observation that linear construction projects typically use a 0.5-mile buffer area to examine Environmental Justice effects, SRST Ex. 22 at 22, and it ignores that the CEQ Guidance *specifically approves* using census tracts to identify affected areas, CEQ Guidance at 26. It is not arbitrary and capricious for an agency to follow the CEQ's guidance in implementing EO 12898, and in any case an agency's "choice among reasonable analytical methodologies is entitled to deference." *Communities Against Runway Expansion, Inc.*, 355 F.3d at 689 (accepting agency's choice of a smaller geographic area to evaluate environmental justice concerns). The Corps gave a reasonable explanation for its decision to exclude the downstream Tribe's Reservation from the affected area: The only possible concern would be "an inadvertent release reaching intake structures on Lake Oahe," and the Corps concluded that the "engineering design, proposed installation methodology, quality of material selected, operations measures and response plans [made] the risk of an inadvertent release in, or reaching Lake Oahe [] extremely low." AR 71311 (Ex. L). Standing Rock may disagree with this conclusion, but it was not arbitrary and capricious.

Finally, the Cooper Memorandum points to a number of specific ways the Final EA "ultimately focused on the SRST and met the policy goals for an environmental justice analysis in accordance with NEPA standards and CEQ Guidance." SRST Ex. 22 at 28. Among other things, the EA included a "separate discussion of the SRST" that "would satisfy any environmental justice requirement to consider impacts to the SRST notwithstanding the earlier environmental justice discussion in the EA that did not include the Tribe," *id*. at 26; it considered all three factors spelled out in the Executive Order as they relate to Standing Rock, *id*. at 26–27; it documented attempts at "meaningful discussions" with the Tribe, *id.* at 27; and post-EA "information about the movement of the SRST's water intake from Fort Yates to the Indian Memorial Intake downstream also provided evidence of reduced potential impacts to the SRST." *Id*. at 28 (explaining that the new water intake is more than 70 miles from the pipeline route).

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

"[I]nherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process. Where the preparation of an EIS would serve 'no purpose' in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS." *Dep't of Transp.*, 541 U.S. at 767; *Vt. Yankee*, 435 U.S. at 558 (a "single alleged oversight on a peripheral issue, urged by parties who never fully cooperated or indeed raised the issue below, must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding"). The Tribe also concedes that "even if there is an impact of true significance," an EIS may still be "unnecessary because 'changes or safeguards in the project sufficiently reduce the impact to a minimum.'" Mot. 19 (quoting *Cave Creek*, 325 F.3d at 327).

The Corps's decision not to prepare an EIS was well-reasoned and amply supported. The Corps went above and beyond by addressing numerous issues that Standing Rock raised outside the formal NEPA process. The Corps conducted additional levels of review—specifically for the Tribe's benefit—before it issued the easement. As a result, the number of conditions on the easement increased from nine to thirty-six, *see* SRST Ex. 23 at 13; D.E. 96-1 (Ex. Y) at 36–41. Those conditions—which require Dakota Access to patrol the pipeline, conduct emergency response drills, prevent internal corrosion of the pipeline, conduct corrosion surveys, test the pipeline for cracks, install cathodic protection, cap overpressure events in the pipeline, install protective coating, test all girth welds, and keep meticulous records of pipeline condition and spill response plans, D.E. 96-1 (Ex. Y) at 36–41—are more than adequate to address any putative shortcoming in the EA. Because they "sufficiently reduce the impact" of the project "to a minimum," *Cave Creek*, 325 F.3d at 327, the rule of reason renders a full EIS unnecessary here.

* * *

Ultimately, "[t]he scope of the agency's inquiries must remain manageable if NEPA's goal of 'insur[ing] a fully informed and well-considered decision' is to be accomplished." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (quoting *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 558). The Tribe's position would transform a document that simply justifies a decision not to perform an EIS into the equivalent of an EIS or even more, with no perceptible benefit that offsets the significant costs to the parties and agencies involved. This Court should reject the Tribe's position.

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

The Tribe contends that the Corps's decisions to grant the easement and withdraw the EIS notice were arbitrary and capricious and that a "heightened" standard of review, Mot. 36, applies

under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). But *Fox* has no application here, and the Corps's hundreds of pages of reasoned analysis supporting grant of the easement without an EIS would survive under any standard of review. In addition, the Corps's decision to withdraw the supplemental EIS notice was committed to agency discretion and thus unreviewable under the APA. For all of these reasons, the Tribe's challenge fails.

A. No Heightened Standard Applies Here.

In *Fox*, the Supreme Court *rejected* any requirement that an agency's change in policy be "subject[] to more searching review." 556 U.S. at 514. Instead, the agency need only "display awareness that it *is* changing position" and "show that there are good reasons for the new policy"—not that "the reasons for the new policy are *better* than the reasons for the old one." *Id.* at 515. Still, the Court recognized that this duty to "provide reasoned explanation" means that an agency may have to "provide a more detailed justification" when, for example, "its new policy rests upon factual findings that contradict those which underlay its prior policy." *Id.*

The Tribe's appeal to *Fox* fails at the starting blocks. Its argument rests on the mistaken premise that the Corps's grant of the easement and its withdrawal of the supplemental EIS notice form a single "easement decision." Mot. 38. In fact, the two are distinct—and neither triggers *Fox*'s heightened standard. The grant of the easement could trigger *Fox* only if the Corps had previously *denied* the easement. That did not happen; rather, ASA Darcy required the Corps to take additional steps before making a decision. And the decision to withdraw the supplemental EIS notice is not reviewable because that decision was committed to agency discretion rather than needing to be based on the sort of changed factual circumstances that trigger *Fox*'s heightened standard. At bottom, though, the dispute over the standard of review is irrelevant, because the Corps had more than enough justification for both decisions to satisfy any standard.

1. The Grant Of The Easement Was Not A Policy Change.

Start with the easement. A prerequisite for *Fox*'s heightened standard is an actual "policy change"—"when, for example," an agency's "*new policy* rests upon factual findings that contradict those which underlay its *prior policy*." 556 U.S. at 515 (emphasis added). But here the Corps did not change a policy when it issued the easement, because it never had *denied* the easement. In the September 9 Joint Statement, the Army said only that it "will not authorize" construction "until it can determine whether to reconsider any of its previous decisions." D.E. 42-1 (Ex. N) at 1. On November 14, the Army made clear that it "has not made a final decision on whether to grant the easement" and that "its previous decisions comported with legal requirements." D.E. 56-1 (Ex. P). The Army reiterated both of those points on December 4. D.E. 65-1 (Ex. T), at 2. Then, in the February 3 Memorandum, the Army concluded that "the issuance of the easement . . . complies with the requirements of the Mineral Leasing Act," SRST Ex. 23 at 15, and executed the easement a few days later. It did so on a "blank slate" free of any prior conclusions that the easement did not comply with the Mineral Leasing Act and Corps policy. *Fox*, 556 U.S. at 515. Hence *Fox*'s heightened standard is not in play for the easement decision.

2. The Decision To Withdraw The EIS Notice Is Unreviewable And Does Not Rely On Changed Factual Circumstances In Any Event.

As for withdrawing the EIS notice, that decision was committed to agency discretion and hence is unreviewable under the APA. And even *were* it reviewable, *Fox*'s heightened standard would have no role because the withdrawal need not be supported by changed circumstances.

a. As explained in the February 3 Memorandum, CEQ regulations "require agencies to supplement an EIS or EA when there are 'substantial changes in the proposed action that are relevant to environmental concerns,' or when 'significant new circumstances or information relevant to environmental concerns' comes to light after an EIS or EA is final." SRST Ex. 23 at 11

(quoting 40 C.F.R. § 1502.9(c)(1)). The Corps has determined that neither occurred here, *id.*; rather, ASA Darcy's decision to conduct supplemental analysis was permissible only as an "exercise of . . . policy discretion," *id.* at 14 ("not compelled by the law"). The Army thus acted within its policy discretion when it opted *out* of supplemental analysis. *Id.*

The APA bars judicial review "when the matter in dispute has been 'committed to agency discretion by law.'" *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002) (quoting 5 U.S.C. § 701(a)(2)). "In determining whether a matter has been committed solely to agency discretion, [this Court] consider[s] both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action." *Id.* The question is whether there exist "substantive legal criteria against which an agency's conduct can be seriously evaluated. If no such 'judicially manageable standards' are discernable, meaningful judicial review is impossible, and agency action is shielded from the scrutiny of the courts." *Id.* (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). These standards must stem from statutes other than the APA. *See Nat'l Fed'n of Fed. Emps. v. United States*, 905 F.2d 400, 405 (D.C. Cir. 1990) (claim that "decisions were arbitrary and capricious and thus violative of the APA" were "nonjusticiable" because they "were 'committed to agency discretion by law'").

Here, no judicially manageable standard governs the Army's *discretionary* authority to supplement NEPA documentation (*i.e.*, where no supplementation is legally required). NEPA contains no standard, nor do any other statutes or regulations. ASA Darcy "did not identify any legal reason" at any point. SRST Ex. 23 at 14. Nor has the Tribe. Because the law commits to agency discretion whether to withdraw notice of a gratuitous supplemental EIS, the decision is unreviewable under the APA.

The only escape for the Tribe would be to argue that a supplemental EIS was *required*

under CEQ regulations. As noted, that would mean showing either "substantial changes in the proposed action that are relevant to environmental concerns" or "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action." 40 C.F.R. § 1502.9(c)(1). But the Tribe affirmatively waived such an argument by arguing that it *need not* make either showing. Mot. 33 (calling it "the wrong question"). Such an argument would fail in any event. The proposed action—crossing at Lake Oahe—did not change. And no significant new information bore on the environmental effect of the pipeline. The withdrawn Solicitor's Opinion and the Tribe's belated expert reports merely "disagree with" the Corps's "conclusions and challenge the sufficiency and depth of its analyses," which is patently insufficient to trigger the need for supplementation. *Beyond Nuclear v. U.S. Dep't of Energy*, No. 16-cv-1641, 2017 WL 456422, at *7 (D.D.C. Feb. 2, 2017). Even the confidential documents are not "new information," because the Corps already had them to consider. With the CEQ regulations as the sole "substantive legal criteria," *Drake*, 291 F.3d at 70, ASA Darcy's decision to launch a supplemental EIS was *itself* unlawful. The Corps cannot be at fault for restoring compliance with the law.

b. Even if the Corps's decision to withdraw the EIS notice could be reviewable under the APA, *Fox*'s "more detailed justification" standard would not apply. To the contrary, this is exactly the sort of routine "policy change" that *Fox* squarely held is *not* subject to any heightened standard of review. 556 U.S. at 514. In fact, an agency *must* consider "the wisdom of its policy on a continuing basis, for example, in response to . . . a change in administrations." *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citation omitted).

The Tribe incorrectly frames the Corps's withdrawal of the EIS notice as a decision based on "factual findings that contradict those which underlay its prior policy." *Fox*, 556 U.S. at 515. The Corps did not disregard any earlier factual findings. Instead, it exercised its policy discretion

to conclude differently on the question whether the facts warranted supplemental analysis.

The Tribe ignores the *holding* of *Fox*, which rejected any "requirement that all agency change be subjected to more searching review." 556 U.S. at 514. And the heightened standard the Tribe invokes applies only when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy." *Id.* at 515. "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts . . . that underlay . . . the prior policy." *Id.* at 515–16. All of which is to say that when an agency bases a new policy on changed factual circumstances, it must show that circumstances have actually changed. But when the agency says that it disagrees with the prior policy—the "mere fact of policy change"—it need only show "there are good reasons for the new policy." *Id.* at 515–16. That is undeniably the case here.

B. The Corps Offered Reasoned Explanations For Both The Easement And The Withdrawal Of The EIS Notice.

As set forth above, *at most* the Corps needed to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). This standard is "[h]ighly deferential" and "presumes the validity of agency action." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000). It is more than adequately met here.

As a threshold matter, the Tribe is premature in requesting summary judgment on this issue because the record for post-July 25 events (including the February 7, 2017 decisions to issue the easement and withdraw the EIS notice) does not yet exist. Judicial review of agency actions proceeds on "the full administrative record before the agency at the time the decision was made." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). Thus, until Dakota Access has a chance to brief this motion on a complete record the Court could not grant summary judgment

on claims aimed at the lawfulness of post-July 25 agency action or inaction.

In any event, the existing record provides more than satisfactory justifications for issuing the easement and withdrawing the EIS notice.

First, as to the easement, Corps real-estate policy authorizes it to grant an easement when "there is no viable alternative" to crossing Corps land and there are no problems in terms of "compatibility with authorized project purposes, compliance with statutory and regulatory requirements, including environmental and cultural resources laws, cumulative impacts, and overall long-term public interest factors." ER 1130-2-550 ¶ 17-3. The EA offered literally hundreds of pages of rational explanation for granting the easement under these standards. On top of all that, the Corps afforded the Tribe two additional layers of process—memorialized in the Cooper Memorandum and the February 3 Memorandum—that the law did not even require.

Specifically, the Corps considered the effect of the pipeline in numerous respects—geology and soils, water resources, vegetation, wildlife, aquatic resources, recreation, cultural and historical sites, air quality, and noise, among others. *See* AR 71221–22 (Ex. L). As explained above, moreover, the Corps rationally concluded that the risk of a leak was minimal and that Dakota Access will have many independent safety measures in place to contain a leak in the unlikely event one occurs. *Supra* at 16-25. The EA was more than adequate to supply the rational explanation that the APA requires.

But that was not all. In the October 2016 Cooper Memorandum the Corps reexamined a host of issues bearing on its prior EA findings—the North Bismarck option, the Fort Laramie Treaties, the impact on water intake structures, environmental-justice concerns, and cultural resources. *See* SRST Ex. 22, at 2. The Corps provided 30 pages of additional analysis on these issues. *Id.* at 2–36. Then, in the February 3 Memorandum, the Corps again concluded that the EA

fully analyzed "the environmental effects of the proposed crossing," which "inform[ed] the decision on whether to grant an easement under the Mineral Leasing Act." Feb. 3 Memo at 10. This additional analysis—above and beyond what the law required—removes any doubts about the adequacy of the Corps's explanation for granting the easement.

Second, The Corps also offered good reason for withdrawing the EIS notice. It explained that "[t]he record of reviews, analyses, and determinations conducted and made during the last four months and summarized" in the February 3 Memorandum and the EA, "fully suppor[t] the issuing of the easement for the pipeline crossing at Lake Oahe at this time without additional study because the Corps found that the proposed action did not have a significant effect on the environment that would require the preparation of the EIS." SRST Ex. 23 at 14.

The Tribe's various attacks on these two decisions are meritless:

First, the Tribe says the Corps did not "address the expert reports critiquing the EA for underestimating oil spill risks" and ignoring issues such as groundwater contamination. Mot. 36. But these reports were all submitted *after* the Final EA and even after the Cooper Memorandum. *See* SRST Ex. 13, 16, 21. Nor did the February 3 Memorandum need to address them. As explained above, the Corps correctly concluded that neither criterion for reopening a final EA applies here. Specifically, everything in these untimely reports could have been submitted before July 25, when the Corps made its decision on environmental effects.

Separately, "[a]n agency need not respond to or explicitly discuss every comment received" if it "explains [its action] in a way that implicitly rejects" such comments. *Caritas Med. Ctr. v. Johnson*, 603 F. Supp. 2d 81, 92 (D.D.C. 2009) (citation omitted). The Tribe has not even attempted to show that the Corps's analysis in the EA failed to address the issues discussed in the reports. Nor could it. The reports quibble with Corps' analysis and conclusions without remotely

showing that the Corps failed to address any important issues. For instance, one report says that the EA "overstate[s]" the "ability to timely remotely identify oil releases." SRST Ex. 13, at 2. Another disputes the Corps's "assumptions" in conducting "spill impact analysis." SRST Ex. 16, at 4. The third disputes the Corps's analysis of alternative routes. SRST Ex. 21, at 30. But it simply is not enough under the APA to "disagree with the [a]gency's conclusions or analysis." *Envtl. Integrity Project v. McCarthy*, 139 F. Supp. 3d 25, 40 (D.D.C. 2015). That is particularly true on technical issues within the agency's expertise. *Bldg. & Constr. & Trades Dep't v. Brock*, 838 F.2d 1258, 1266 (D.C. Cir. 1988). Faced with conflicting expert opinions, the agency has "discretion to rely on the reasonable opinions of its own qualified experts." *Marsh*, 490 U.S. at 378. The Tribe's untimely reports are patently insufficient to show that the Corps's decisions were unlawful.

Second, the Tribe contends that the Corps failed to adequately address the DOI Solicitor's Opinion. Mot. 37–38. But because the Solicitor's Opinion is "rooted in the perceived risk that the DAPL would leak into Lake Oahe," it was more than sufficient that both the EA and the Cooper Memorandum explained in great detail why this "risk is low." SRST Ex. 23 at 13. The opinion does nothing more than "disagree with the [a]gency's conclusions or analysis" with respect to the risk of a leak and the effect on the Tribe's treaty rights. *Envtl. Integrity Project*, 139 F. Supp. 3d at 40. And it merely parrots points about treaty rights that the Tribe made earlier, and that the Cooper Memorandum correctly rejected. Specifically, the Cooper Memorandum notes (at 13) that the EA did not include a section on "the history of the SRST's treaty rights" because it "would not have added anything to the EA's analysis of the environmental impacts of the Lake Oahe crossing." Moreover, "[t]he acknowledgement of the SRST's treaty rights in the final EA demonstrated that they were necessary considerations in the agency's decision-making." *Id*. The memorandum

also noted how the EA "addressed the Tribe's concerns about the risk of its water resources being impaired, both specifically for the Tribe and more generally in connection with the discussion of all water resource concerns," and listed "mitigation measures to address water resource concerns." *Id.* It was therefore unnecessary to "specifically address the legal status of the SRST's reserved water rights under the *Winters* Doctrine" because "the EA addressed all foreseeable potential impacts of the proposed action on water resources and the legal status of the SRST's reserved water rights did not present any unique environmental considerations that required separate discussion." *Id.* at 14.

Not only that, after the Solicitor's Opinion the Corps added multiple "special conditions" to the easement. SRST Ex. 23 at 13. They were the result of discussions with the Tribe specifically to "address the concerns set forth in the DOI opinion by mitigating the already low risk of an oil spill into Lake Oahe." *Id.* At most, the Tribe points to different views by two government agencies on whether the EA was sufficient. This Court must defer to the Corps, because it is the agency with authority to grant the easement and decide if supplemental analysis is warranted. *Cf. New Life Evangelistic Ctr., Inc. v. Sebelius*, 753 F. Supp. 2d 103, 123 (D.D.C. 2010).

Third, the Tribe attacks the Corps's "treatment of the withheld documents," arguing the Tribe "should have an opportunity to review and respond to them." Mot. 36–37. As explained above, the Corps acted lawfully with respect to those documents. Because they were available for the Corps to consider—and because the premise of the Tribe's argument is that the Corps did consider them—the Corps's decision was not arbitrary or capricious.

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

The Tribes argue that the easement impairs treaty rights and violates the United States' trustee obligations and disqualifies the pipeline from approval under Nationwide Permit 12. These

arguments mischaracterize how either the Tribe's rights or the United States' obligations might be affected by the pipeline.[7] In the end, the Corps properly concluded that there would be impact. That was not arbitrary, capricious, or otherwise unlawful.

Although the original boundaries of the Sioux tribes' territory were drawn through treaties, more recent acts of Congress supersede the treaty boundaries. *See Head Money Cases*, 112 U.S. 580, 597 (1884); *La Albra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899). To the extent those statutes took away property, the tribes had a legal claim for just compensation. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423–24 (1980) (affirming award of $17 million plus interest for uncompensated takings). The Tribes have no power, though, to exclude others from lands outside the borders of the current reservation.[8] Thus, it was correct for the Corps to conclude that the land the pipeline crosses is private property rather than property within any reservation. *See* AR 71310 (Ex. L) ("The pipeline route [selected] expressly and intentionally does not cross the Standing Rock Sioux Reservation.").

The Tribe argues that its members nonetheless retain rights to fish, hunt, and draw water from the portion of Lake Oahe that is within the reservation. That water, however, is at least 0.5 miles south of the pipeline route, and in any event Congress took fee ownership of the riverbed and shoreline through a series of acts in the mid-twentieth century. *See, e.g.*, Flood Control Act of 1944, 58 Stat. 887 (1944); Cheyenne River Act, 68 Stat. 1191 (1954); *see also South Dakota v. Bourland*, 508 U.S. 679, 683 (1993). These acts "eliminated the Tribe's power to exclude non-

[7] The Tribe recounts a "long and troubling history of the United States government failing to honor the Tribe's Treaty rights," Mot. 2–4, but NEPA "does not create a remedial scheme for past federal actions"; it was enacted "to require agencies to assess the future effects of future actions." *Metro. Edison Co.*, 460 U.S. at 779 (considering a claim made "'in the wake of a unique and traumatic nuclear accident'").

[8] As Dakota Access previously explained, even under the earlier treaties, the United States also retained the ability to construct utility lines across the reservations. D.E. 124 at 20–21.

Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Bourland*, 508 U.S. at 689. In short, "Congress gave the Army Corps of Engineers, not the Tribe, regulatory control over the taken area." *Id.* at 691.

The rights the Tribes retain within their reservation boundaries—to hunt, fish, and consume the waters of Lake Oahe—imposed no additional obligations on the Corps in its approval of the pipeline crossing. Absent a specific congressional directive, the government's obligation as trustee to the tribes is "a limited one only." *N. Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980). Also, "Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011). Moreover "although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998).[9]

Here, the Corps complied with the Mineral Leasing Act, the National Historic Preservation Act, the Rivers and Harbors Act, the Clean Water Act, NEPA, and all relevant implementing regulations when it granted permits and easements to Dakota Access. Even ASA Darcy agreed that the Corps' actions "comported with legal requirements." D.E. 56-1 (Ex. P). Compliance with this panoply of laws—the "general regulations and statutes" governing the permit process—satisfies

[9] The wording used in these opinions makes this an appropriate place to address what the Tribe calls "DAPL's 'blatantly racist attitudes' towards Indians." Mot. 9. The supposedly racist comments to which the Tribe refers were a contractor's use of the word "Indians" in an email. See AR 64200–02 (Ex. AA) (email stating "Indians would not share what was found/felt/etc." when asking for a pipeline reroute).

the government's obligations as trustee.

Even assuming a distinct obligation as trustee to consider tribal rights, the Corps did so. The EA directly assessed the impact on the Tribe's reserved water, hunting, and fishing rights. The Corps responded to "concerns . . . expressed regarding an inadvertent release reaching intake structures on Lake Oahe" by concluding that "[g]iven the engineering design, proposed installation methodology, quality of material selected, operations measures and response plans the risk of an inadvertent release in, or reaching, Lake Oahe is extremely low." AR 71311 (Ex. L). This was not, as the withdrawn Solicitor's Opinion misleadingly offers, merely a conclusory statement. The Corps devoted considerable attention in the EA to addressing each element that led it to decide there would be no impacts to tribal water rights. *See* AR 71243–44 (Ex. L) (discussing pipeline placement under the lakebed eliminating the risk of exposure by scour); AR 71266–67 (discussing water intake mitigation measures and emergency response); AR 71293–94 (discussing engineering alterations, including increased wall thickness, remote leak detection equipment and remotely operated shut off valves); AR 71312–18 (discussing reliability and safety both generally and with specific assessment of spill prevention, leak detection and spill response measures, risk analysis for a potential spill including risk factors such as manufacturing or construction defects, incorrect operation, equipment failure, corrosion, and third party damage.).

The Corps did not reach its conclusions by ignoring tribal rights. Instead, tribal rights were included within the multitude of potential impacts the Corps ruled out when, in the exercise of its engineering expertise, the Corps concluded that the unprecedented safety measures in the design and operation of the pipeline rendered the possibility of any spill-related harm vanishingly remote. Because the Corps concluded there was no realistic risk of harm from a spill, it naturally follows that the pipeline will have no effect on tribal fishing, hunting, or water rights. And because the

pipeline would not impair tribal rights, the project also qualified for approval under Nationwide Permit 12. *See* 77 Fed. Reg. 10,184, 10,283 (Feb. 21, 2012) ("No activity or its operation [under NWP 12] may impair reserved tribal rights.").

IV. Vacatur Is Inappropriate.

Finally, even in a case where the Corps's actions did not comport with legal requirements, the appropriate remedy would be to remand the question back to the Corps without vacating the EA, FONSI, and easement. "[T]his court is not without discretion," to remand rather than vacate. *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005). This discretion extends to the NEPA context. *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 79–80 (D.D.C. 2010) (concluding that the issuance of a Corps permit violated NEPA, but remanding and only partially vacating, thereby allowing permit applicants to complete road construction and continue to manage storm water management system). This Court has long looked to two factors in determining whether vacatur is appropriate: "'the seriousness of the order's deficiency . . . and the disruptive consequences of an interim change that may itself be changed.'" *Advocates for Highway & Auto Safety*, 429 F.3d at 1151 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

Both factors weigh against vacatur. First, the deficiencies alleged here are procedural, not substantive. Standing Rock accuses the Corps of failing to follow NEPA procedures. The Tribe points to no statute or regulation that would prohibit the Corps from issuing its decisions if it follows those procedures. Any such procedural deficiency also would be relatively minor and subject to correction on remand. And "where 'there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand,'" remanding to the agency without vacatur is

appropriate. *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 20 (D.D.C. 2014) (alteration in original) (quoting *Allied-Signal, Inc.*, 988 F.2d at 151)).

Second, vacating the Corps's decision would have extremely "disruptive consequences." *Advocates for Highway & Auto Safety*, 429 F.3d at 1151 (quoting *Allied-Signal, Inc.*, 988 F.2d at 150–51). Dakota Access has already suffered tremendous costs from the repeated delays caused by litigation and political interference; further delay would promise yet more. D.E. 22-1 (Ex. CC) at 23–24. Other entities not party to this litigation would suffer too: the Corps has recognized "the tremendous secondary and sustainable economic benefits to the United States" that the pipeline would bring. AR 71305 (Ex. L). A halt in operations halts those benefits too.

On the other side of the equation, vacatur would achieve little, because the Corps would likely rectify any deficiency and reissue the challenged decisions. The device of remanding without vacatur is suited to exactly this situation.

CONCLUSION

This Court should deny Standing Rock's motion for summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2017, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

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