IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Plaintiff-Intervenor, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Defendant-Intervenor and Cross-Claimant	Case No. 1:16-cv-01534 (JEB)

UNITED STATES ARMY CORPS OF ENGINEERS' OPPOSITION TO STANDING ROCK SIOUX TRIBE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

The United States Army Corps of Engineers' (the "Corps") February 8, 2017 decision to grant an easement to Dakota Access, LLC represents the culmination of over two years of detailed environmental analysis and extensive consultation with the Standing Rock Sioux Tribe ("Tribe" or "Standing Rock") and the Cheyenne River Sioux Tribe, in addition to numerous stakeholders. The easement allows Dakota Access to install nearly a mile of pipeline approximately 92 feet below the bed of Lake Oahe, a man-made lake operated by the Corps. The Corps' July 25, 2016 Environmental Assessment and Finding of No Significant Impact ("EA/FONSI") analyzed the pipeline's crossing of Corps-held flowage easements upriver from Lake Oahe, as well as the Lake Oahe crossing. The EA/FONSI properly concluded that the crossings would not have significant impacts on the quality of the human environment and therefore an Environmental Impact Statement ("EIS") was not required.

After Standing Rock filed suit, and after this Court denied the Tribe's motion for preliminary injunction in September 2016, the Corps nonetheless undertook a comprehensive legal and technical review to confirm that the EA/FONSI complied with NEPA. On October 20, 2016, the Corps completed that analysis and concluded that the July 25, 2016 decision and underlying NEPA analysis were sound, fully complied with the Corps' legal obligations, and addressed the Tribe's concerns. After performing additional analysis under the Mineral Leasing Act, 30 U.S.C. § 185, the Corps sought approval to grant the easement on December 3, 2016, but did not grant it at that time and instead the Army noticed intent to conduct additional review.

The Corps reviewed its actions one more time, in response to a Presidential Memorandum, and on February 3, 2017 concluded that no supplementation of the EA was required and that the EA would support granting the easement over Corps-managed federal land at Lake Oahe. Accordingly, the Corps granted the easement for the Lake Oahe crossing on February 8, 2017. Despite its limited

participation in the two years of environmental analysis and decisionmaking regarding the Pipeline crossings, the Tribe now challenges the July 25, 2016 decision, the February 8, 2017 easement decision and the underlying NEPA analysis supporting those decisions. The Tribe also challenges the Corps' Nationwide Permit 12 verifications for Lake Oahe. The Tribe's challenges are without merit and must be denied.

First, Standing Rock's challenge to the Corps' July 25, 2016 EA/FONSI does not substantively dispute the Corps' conclusions that the environmental impacts from the crossing at Lake Oahe would be minor. Rather, the Tribe argues that if there is an oil spill at the crossing there could be significant impacts to the environment that could impact the Tribe's water, hunting and fishing rights. The Tribe also contends that the EA's environmental justice analysis and cumulative impacts analysis were not sufficient under NEPA. The EA and administrative record—which contain a robust consideration of these very issues—prove otherwise. In fact, the Tribe's concerns were directly addressed in the EA, and the EA's analysis and conclusions were later confirmed in the technical and legal reviews conducted by the Corps Headquarters.

Additionally, the Tribe is incorrect in asserting that the Army's February 2017 withdrawal of its Notice of Intent to prepare an EIS and the Corps' grant of an easement constituted a reversal of agency policy reviewable under the standard established in *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). First, withdrawal of a notice of intent is not reviewable under the Administrative Procedure Act as it is not a final agency action. But even if it were reviewable, the Army's withdrawal was reasonable and consistent with the Corps' determinations that neither the easement nor the other challenged decisions presented significant impacts that would require preparation of an EIS. This was not a reversal, because the Corps' first and only final agency action

taken in response to Dakota Access' request for an easement at Lake Oahe was to grant the easement.

Finally, the Tribe's argument that the Lake Oahe easement violated the government's trust responsibilities to the Tribe also fails. The Tribe has not identified a cognizable trust duty that can sustain its claims. The Tribe's challenge to the application of the Corps' Nationwide Permit 12 is similarly deficient, and must also be dismissed. Granting the easements as contemplated in the July 2016 EA/FONSI—and supported by additional technical and legal analysis—was fully supported by the administrative record, wholly lawful, and the Tribe has not and cannot show otherwise.

II. BACKGROUND

A. Factual Background

The Dakota Access Pipeline ("Pipeline") will connect the Bakken and Three Forks production region of North Dakota to Patoka, Illinois with an approximately 1,100 mile-long pipeline. Environmental Assessment, attached hereto as Ex. A, at 71227. Certain discrete sections of the Pipeline fall under the jurisdiction of the Corps, and require some form of Corps approval or rights of way over Corps-managed land. *Id.* Standing Rock's Motion challenges two key decisions enabling the construction of the Pipeline beneath Lake Oahe[1]: (1) the July 25, 2016 decision granting Dakota Access permission under the Rivers and Harbors Act, 33 U.S.C. § 408; and (2) the February 8, 2017 decision granting Dakota Access an easement under the Mineral Leasing Act, 30 U.S.C. § 185, for a segment of the Pipeline underlying Lake Oahe. In support of the first decision, the Corps undertook extensive NEPA analysis that culminated in the issuance of the July 2016 EA/FONSI. Ex A; FONSI, attached hereto as Ex. B. In addition to the review under the Mineral Leasing Act, the

[1] Standing Rock also argues that the Pipeline crossing under Lake Oahe does not qualify for Nationwide Permit 12. ECF No. 117-1 at 43 to 44. This claim is addressed *infra*, Section IV.E.

Corps further considered the Tribe's concerns by undertaking a top-to-bottom legal and technical review of the EA/FONSI prior to granting the easement. Those analyses only confirmed that the EA/FONSI was sound and fully complied with the Corps' NEPA obligations.

1. The July 25, 2016 EA/FONSI

The Corps' Omaha District undertook an extensive NEPA analysis of the environmental impacts of the Pipeline's proposed crossings through Corps-managed federal land before granting Dakota Access permission under 33 U.S.C. § 408. Ex. A at 71225.

The review started with a scoping process that engaged the public at the earliest stages of the analysis. The Corps then published the draft EA online and made the document available at local public libraries. *Id.* From this public outreach, the Corps received numerous public comments, including comments from the Tribe and tribal members. *Id.* These comments ranged from questions about construction, to impacts on Tribal lands and cultural resources, and concerns about Dakota Access's plan for potential leaks. *See* Exhibit C, Responses to Questions, (June 2, 2016) at 64143-52; Ex. D, Summary of Comments Received, 71721-76. These comments did not go unheard. The Corps took the time to evaluate the comments and provide thorough and reasoned responses to them. *See* Ex. C, D.

Following circulation of the Draft EA and the Corps' consideration of and response to comments, the Corps published a final EA containing a thorough analysis of impacts of the Pipeline crossings of Corps-held flowage easements and the crossing underneath Lake Oahe. Section 3.11 of the EA included an exhaustive analysis of the potential for a pipeline rupture and oil spill. Ex. A at 71312-18 The EA analyzed the risk of failure for discrete portions of the Pipeline under Corps jurisdiction using nine industry recognized integrity threats, including (1) third party damage; (2) external corrosion; (3) internal corrosion; (4) pipe manufacturing defects; (5) construction related defects; (6) incorrect operation; (7) equipment failure; (8) stress corrosion cracking; and (9) natural

forces. Ex. A at 71316-18. The Pipeline ranked low in the potential risk of failure in all categories. *Id.* Further, the EA discussed Dakota Access's use a "state-of-the-art" Computational Pipeline Monitoring System ("monitoring system") to monitor the pipeline for leaks. Ex. A at 71314. This monitoring system updates pipeline data every six seconds and detects pipeline variations every thirty seconds. *Id.* Remotely controlled isolation valves can be closed within three minutes in the event of a leak. *Id.* This monitoring system is considered the best available technology. Ex. A at 71318. The risk of failure is further mitigated by conditions for environmental protection described in the Final EA. Each condition supports the determination that the risk of a leak and the impact from one, should it occur, is minimal. *See* Table 8-2, Summary of Environmental Impact Avoidance and Mitigation Measures, Ex. A at 71341-49. Given the detailed spill response plans, the design of the Pipeline itself, its physical location deep underground, and Dakota Access's state of the art pipeline monitoring system, the Corps determined that the risk of an oil spill is extremely low and any impacts from a possible leak would be mitigated to a point where those impacts would not be significant. Ex. B at 71175-79. The Corps approved the Pipeline's crossings over Corps-managed lands under 33 U.S.C. § 408 in light of the conclusions of the EA/FONSI.

Beyond the analysis of potential spill risks, the EA examined and discloses the potential impacts of the construction and operation of the portions of the Pipeline under Corps' jurisdiction on geology, soil, water resources, vegetation, agriculture, wildlife, aquatic resources, land use, recreation, social and economic conditions, from hazardous waste, air quality, noise, environmental justice, and cultural as well as historical resources (touching specifically on consultations with Standing Rock). Ex. A at 71247-320. The Corps concluded that "[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...[and it] is not expected to have any significant direct, indirect, or cumulative impacts on the environment." Ex. A at 71225-26. The District Commander "determined that preparation of an Environmental Impact Statement is not required" in light of this thorough analysis. Ex. B at 71179.

2. The Corps' Additional Review and Easement Decision

The Corps conducted a review of its prior environmental analyses after this Court's Order denying Standing Rock's motion for preliminary injunction in this case, ECF No. 38. These post-EA reviews support the decision to issue the February 8, 2017 easement and confirm that the Corps' July 25 NEPA analysis was fully supported, complied with the Corps' legal obligations, and that there was no requirement to conduct additional NEPA analysis before issuing the easement.

a) October 20, 2016 Memorandum

On October 20, 2016, the Corps prepared a memorandum ("October 20 Memo"), attached hereto as Ex. E, that addressed various legal and environmental concerns to determine whether to revisit any of its previous decisions regarding the portions of the Pipeline under its jurisdiction. In particular, with regard to spill risks, the October 20 Memo concluded that the EA adequately addressed potential spill impacts to the Tribe in "several sections." The October 20 Memo also evaluated the Tribe's concerns regarding the Pipeline route, noting that the chosen route was co-located with existing infrastructure and purposely avoided crossing Standing Rock's tribal lands. Ex. E at 1217-23. In addition, the Corps concluded that the EA fully addressed potential impacts to the water resources of Lake Oahe, and specifically addressed the Tribe's concerns with potential spills affecting its water intake structures on Lake Oahe. Ex. E at 1229-34. Finally, the Corps noted that the environmental justice analysis contained in the EA fully complied with CEQ guidance regarding analysis of environmental justice impacts, and had analyzed potential environmental justice impacts to the Tribe. Ex. E at 1235-41. In short, the October 20 Memo concluded that the EA "adequately

considered and disclosed the environmental, cultural and other potential impacts of its actions . . ." and no supplementation of the EA/FONSI was required. Ex. E at 1249. While the October 20 Memorandum was primarily looking back to determine whether the July 25 EA/FONSI was adequate for the Corps analysis under 33 U.S.C. § 408, it also informed the Corps' decision on whether to grant Dakota Access' application for an easement to cross Corps-managed federal lands at Lake Oahe under the Mineral Leasing Act, 30 U.S.C. § 185.

b) December 3, 2016 Recommendation to Grant Easement

The Corps continued to have discussions with the Tribe regarding its concerns, and on December 2, 2016, the Omaha District Commander met with representatives of the Tribe, Dakota Access, and Omaha District staff. Among other topics, the group discussed over 30 additional terms and conditions that could further reduce the risk of a spill or pipeline rupture.

On December 3, 2016, the Corps' Omaha District Commander prepared a memorandum, attached hereto as Ex. F, recommending that the Corps grant the Lake Oahe easement to Dakota Access. ("Dec. 3 Memo") Ex. F at 652 – 700. The District Commander evaluated the easement application and found that it was consistent with the Mineral Leasing Act, other relevant statutes, regulations, and Corps policy. Ex. F at 653 – 59. The memo detailed consultation with Tribes that had taken place since 2014, and specifically detailed additional discussions regarding the easement that had occurred after the Court's denial of Standing Rock's motion for preliminary injunction. Ex. F at 656. After finding that the application met all the necessary prerequisites, the District Commander recommended "that the Army notify Congress that the Corps intends to grant the attached easement to Dakota Access." Ex. F at 660.

c) December 4, 2016 Assistant Secretary of the Army for Civil Works Memorandum

On December 4, 2016, the Assistant Secretary for the Army (Civil Works) issued a memorandum directing the Corps to engage in additional review of Dakota Access's Lake Oahe easement application. Ex. G at 602-605. Although the December 4 Memo found no technical or legal infirmities with the July 25, 2016, EA/FONSI, or subsequent analysis, the Assistant Secretary opined that additional analysis, while not required as a legal matter, would be "best accomplished, in my judgment, by preparing an Environmental Impact Statement." Ex. G at 604. Importantly, the memorandum specifically stated "that this decision does not alter the Army's position that the Corps' prior reviews and actions have comported with legal requirements." Ex. G at 605. The Army published a Notice of Intent to prepare an EIS on January 18, 2017. 82 Fed. Reg. 5543-01.

d) The January 24, 2017 Presidential Memorandum

On January 24, 2017, the President issued a memorandum directing the Army to "review and approve in an expedited manner, to the extent permitted by law and as warranted," the Lake Oahe Easement application and "consider, to the extent permitted by law and as warranted, whether to rescind or modify" the December 4 Memo. Attached hereto as Ex. H, Presidential Memorandum Regarding Construction of the Dakota Access Pipeline § 2 (Jan. 24, 2017) ("Presidential Memorandum") at 463 - 65.

In response to the Presidential Memorandum, the Corps undertook a renewed technical and legal review. On February 3, 2017, the Corps again confirmed that the July 25, 2016, decision and underlying EA/FONSI were sound and that no additional analysis was required. Attached hereto as Ex. I, Memorandum re: Dakota Access Pipeline; USACE Technical and Legal Review for the Department of the Army (Feb. 3, 2017) at 224 – 359 ("February 3 Memo").

e) February 8, 2017 Easement

After reviewing the Corps February 3, 2017 Memo and doing additional review of the record, the Army provided Congress with notice of its intent to issue the easement on February 7, and the Corps issued the easement on February 8, 2017. Attached hereto as Ex. J, Congressional Notifications at 105 – 120. The easement contains 36 conditions that are intended to further mitigate risk of rupture at the Lake Oahe crossing and otherwise address the Tribe's concerns, including specific coatings to prevent corrosion during installation; corrosion surveys after installation; more stringent requirements for Dakota Access's Facility response plan; mainline valve and automatic shutdown requirements; and additional measures for initial and ongoing leak and crack detection. Ex. K at 37 – 42, Easement (conditions 8-9, 17-21, 28-31).

III. THE APA STANDARD AND SCOPE OF REVIEW

The APA empowers courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "narrow" standard of review—which appropriately encourages courts to defer to the agency's expertise, *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), an agency is required to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 718 (D.C. Cir. 2016) (quoting *State Farm*). This review is limited to the administrative record prepared by the agency for its decision. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978). "The administrative record includes all materials compiled by the agency that were before the agency at the time the decision was made." *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (citations and internal quotations omitted).

IV. ARGUMENT[2]

Standing Rock challenges three Corps decisions concerning the Lake Oahe crossing. First, the Tribe challenges the Corps' July 25, 2016 permission issued pursuant to the Rivers and Harbors Act (RHA), 33 U.S.C. § 408. ECF No. 117-1 at 7 to 8. Second, the Tribe challenges the Corps' July 25, 2016 verification that pipeline activities satisfied the terms and conditions of Nationwide Permit 12. *Id.* at 7. Third, the Tribe challenges the Corps' February 8, 2017 decision to grant an easement under Corps-managed land at Lake Oahe. *Id*. at 8.

In the July 25, 2016 EA/FONSI, the Corps reasonably concluded that granting permission under the RHA would not have a significant impact on the environment. Ex. B. The February 8 easement decision was made in reliance not only on the July 25, 2016 EA/FONSI but on additional review, analysis of terms and conditions for the easement, and on the Corps' decision that supplementation of the EA/FONSI was not required. Ex. I. The Corps' July 25, 2016 RHA permission and February 8, 2017 easement decision were reasonable and fully complied with NEPA. Moreover, the Corps reasonably determined that the Lake Oahe crossing would qualify for Nationwide Permit 12.

A. The Conclusion That Neither the July 25, 2016 Nor the February 8, 2017 Decisions Required an EIS Was Reasonable and Is Entitled to Deference

NEPA requires preparation of an EIS for major federal actions that significantly affect the human environment. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989). When it is uncertain whether a proposed federal action will "significantly affect" the environment so as to require an EIS, the regulations call for the agency to prepare an EA—a "concise public

[2] For purposes of this brief the Corps assumes the Tribe has been granted leave to amend its complaint, see ECF No. 106, but does not waive any arguments regarding the Tribe's Motion for Leave to Amend.

document" designed to "provide sufficient evidence and analysis for determining whether…" an EIS is needed. 40 C.F.R. §§ 1501.4(b)-(c), 1508.9; *see U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. at 752, 757–58 (2004). If, informed by the EA, the agency finds no need for an EIS, it prepares a FONSI, which briefly explains why the agency believes the action will not have a significant effect on the environment. 40 C.F.R. §§ 1501.4(e), 1508.13.

The court's role in reviewing an agency's decision not to issue an EIS is a "limited" one, designed primarily to ensure "that no arguably significant consequences have been ignored." *Pub. Citizen v. Nat'l Highway Traffic Safety Admin.*, 848 F.2d 256, 267 (D.C. Cir. 1988). The evaluation of the "'impact' of those consequences on the 'quality of the human environment,' ... is 'left to the judgment of the agency.'" *Id.* (quoting *Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d 120, 128 (D.C. Cir. 1985)). When examining a FONSI, a court's job is 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." *Town of Cave Creek v. FAA*, 325 F.3d 320, 327 (D.C. Cir. 2003) (quoting *Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d at 125); *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 860–61 (D.C. Cir. 2006). Here, the Corps has gone well beyond the required "hard look" and was reasonable to issue a FONSI.

1. The Corps took a "hard look" at spill risk

Despite Standing Rock's contrary assertions, the Corps considered the risk of an oil spill and—after accounting for the mitigation and safety measures—reasonably concluded this risk was low, and reasonably analyzed impacts accordingly.

First, it is important to recognize that the proposed action considered in the EA was whether to grant permission for Dakota Access to place a portion of the Pipeline on federal property under Lake Oahe—not whether to authorize a release of oil from the Pipeline in the Lake. *See Defs. of Wildlife v. Bureau of Ocean Energy Mgmt.*, 684 F.3d 1242, 1250 (11th Cir. 2012) ("This project concerns [drilling operations], not an expected oil spill from those operations. Thus, the *expected* operations under the [drilling operations] will not have a significant effect on the endangered species..."). While a rupture and resulting spill are potential impacts of any pipeline, here, the EA concluded that such a spill was extremely unlikely given "the engineering design, proposed installation methodology, quality of material selected, operations measure, and response plans." Ex. A at 71311. Nonetheless, the Corps addressed risk of "[a]ccidental releases from the pipeline system during operations." Ex. A at 71269.

Because the Pipeline is located well beneath the actual lakebed, and because of the chemical nature of crude oil (which is not water soluble and has limited ability to travel underground) impacts to groundwater are more likely than impacts to the surface of Lake Oahe. *Id.* Nonetheless, the EA reasonably analyzed both concerns, and discussed potential water contamination in the context of a catastrophic spill based on a number of extremely unlikely and conservative assumptions including, *inter alia*, that "the entire volume of a crude oil spill was released due to a catastrophic failure of the pipeline and reached the waterbody; complete, instantaneous mixing occurred; the entire benzene content of the crude oil was solubilized into the water column." Ex. A at 71270. Even with these assumptions, the acute toxicity threshold for aquatic organisms for benzene would not be exceeded under any spill scenario and the most probable scenario (4 barrels or less) would not yield benzene concentrations that exceed drinking water criteria. Ex. A at 71270-21.

After issuing the draft EA, Standing Rock submitted comments regarding its concern about a potential oil spill. *See* Ex. D at 71765-66, 71774. The Corps addressed those comments, again reiterating that the risk of a spill at the Lake Oahe crossing was "extremely low." The record demonstrates that this statement is reasonable given both the design, construction and operation of this portion of the Pipeline, the history of pipeline operation and crucially, the mitigation measures in place to reduce risk of a spill and mitigate any environmental impact at the Lake Oahe crossing.

The EA analyzed at length mitigation and remediation measures designed both to further reduce the risk of a catastrophic spill, but also to quickly respond to and remediate a catastrophic spill. Ex. K.[3] Consideration of such mitigation measures is reasonable, as "[e]ven if an agency determines that there would be an environmental impact of significance, an EIS will not be necessary where the agency has shown that 'safeguards in the project sufficiently reduce the impact to a minimum." *Ctr. for Food Safety v. Salazar*, 898 F. Supp. 2d 130, 150-51 (D.D.C. 2012) (quoting *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 29 (D.C. Cir. 2008)).

2. Construction and operation of a pipeline is not "highly uncertain" and does not involve "unique or unknown risks"

The Tribe incorrectly claims that the EA lacked discussion of several "intensity" factors (sometimes called "significance" factors), and then uses its erroneous claim to argue that an EIS was required. *See* ECF No. 117-1 at 19-31 (citing 40 C.F.R. § 1508.27). In particular the Tribe alleges that impacts of the Pipeline are "uncertain" and "controversial" and pose "unique risks" due to the proximity of the crossing to the Tribe and cultural and religious resources. ECF No. 117-1 at 20.[4]

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[3] As discussed *infra* at 24, after the FONSI, the Corps imposed additional mitigation measures which reduce the risk even further.

[4] CEQ regulations and guidance suggest the agency should evaluate "intensity" of environmental impacts and CEQ has identified factors that "should be *considered* in evaluating intensity." 40

Here, the Corps properly considered the "intensity" factors and reasonably concluded that intensity of environmental impacts of the proposed action did not require preparation of an EIS.

First, far from being "unknown" or "uncertain" as the Tribe claims, ECF No. 117-1 at 20, impacts from construction and operation of oil and gas pipelines are well understood. There are tens of thousands of miles of crude oil pipelines (and more than a million miles of gas pipelines) and their operation and safety is closely monitored by PHMSA.[5] Oil and gas pipelines have been constructed for decades, and PHMSA has been gathering data on these pipelines and the impacts of their operations in this time. The EA concluded, based on this data, that the risk of spills was not "unknown." And although spills occur, they are rare and most are quite small. Ex. A at 71270. *Cf. Jones v. Nat'l Marine Fisheries Serv.*, No. 11-35954, 2013 WL 6698065, at *7 (9th Cir. Dec. 20, 2013) (Although uncertainty is inherent in any environmental decision, an EIS is not required "anytime there is some uncertainty, but only [where] the effects of the project are highly uncertain.").

C.F.R. § 1508.27 (emphasis added). *See, e.g.*, *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011), *as amended* (Jan. 30, 2012) ("We first address the [intensity factors 1-3] finding the Corps's *consideration* adequate.") (emphasis added); *see also Parks Conservation Ass'n v. United States Forest Serv.*, 177 F. Supp. 3d 1, 34 (D.D.C. 2016); *Friends of the Earth v. U.S. Army Corps of Engineers*, 109 F. Supp. 2d 30, 42-43 (D.D.C. 2000). Other circuits explicitly hold that the mere "[p]resence of enumerated intensity factors does not mandate a finding of significance; rather, the agency must establish only that it addressed and evaluated the factors." *Tenn. Envtl. Council v. Tenn. Valley Auth.*, 32 F. Supp. 3d 876, 893 (E.D. Tenn. 2014) (quoting *Del. Audubon Soc'y v. Salazar*, 829 F. Supp. 2d 273, 284 (D. Del. 2011) (citing *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 233–34 (5th Cir. 2006))); *Klein v. U.S. Dep't of Energy*, 753 F.3d 576, 584 (6th Cir. 2014) ("While the ten [intensity] factors may show that the [agency] *could* have prepared an [EIS], they do not show that the [agency] acted arbitrarily and capriciously in not completing one."). *But see Fund for Animals*, 281 F.Supp.2d at 218 (quoting *Pub. Citizen v. Dept. of Transp.*, 316 F.3d 1002, 1023 (9th Cir.2003)).

[5] *See, e.g.*, http://www.phmsa.dot.gov/pipeline/library/data-stats/. In 2014 there were 160,521 miles of oil pipelines, including 56,375 miles of crude oil pipelines. http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_10.html.

The effects from operation of crude oil pipelines are nothing new, and the Corps reasonably relied upon expertise from PHMSA to consider these impacts.

Nor are the impacts of operation of an oil pipeline "controversial" as that term is used in NEPA caselaw and CEQ guidance. Similar to the "unknown" factor discussed above, "controversial," as used in the CEQ regulations, refers to a "substantial" scientific dispute "as to the size, nature, or *effect* of the major federal action rather than to the existence of opposition to a use.'" *Town of Cave Creek*, 325 F.3d at 331 (quoting *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982)). Here the record does not show such a debate. *See Fund For Animals*, 281 F.Supp.2d at 235 ("While plaintiffs have identified serious gaps in defendants' assessment of the local effects of the proposed action, they do not appear to have identified any scientific controversy *per se* as to the extent of the effects .... Therefore, the Court is not persuaded that plaintiffs have made a 'substantial case' as to the existence of this factor.").

Finally, the Tribe also mentions "unique risks" posed by the Pipeline's proximity to the reservation, as well as geographic and cultural sites, ECF No. 117-1 at 20. The Tribe does not explain or argue how the EA failed to address these issues and in fact the EA did address them. *See* Ex. A 71250-51 (geologic hazards), 71299-300 (cultural resources), 71309 ("Direct and indirect impacts from the [Pipeline] will not affect members of the [Tribe] or Tribal Reservation.").

3. The Corps Properly Considered Cumulative Impacts

As with other categories of impacts, the Corps also properly addressed cumulative impacts. "'Cumulative impacts' are impacts on the environment resulting from the 'incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . .'" *Biodiversity Conservation All. v. BLM*, 404 F. Supp. 2d 212, 217 (D.D.C. 2005);40 C.F.R. §§ 1508.7, 1508.25. "[The] determination of the extent and effect of [cumulative environmental impacts] . . . is a task assigned to the special competency of the appropriate agencies." *Kleppe v. Sierra Club*, 427 U.S.

390, 414 (1976); *San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1057 (10th Cir. 2011) (same). "[A]gencies have discretion to determine whether, and to what extent, information about the specific nature, design, or present effects of a past action is useful for the agency's analysis of the effects of a proposal for agency action." Ex. P, CEQ Guidance at 1.

Here, the EA fully considered cumulative impacts in an entire section that included a discussion of the impacts of past, present and foreseeable future actions to resources, including water and cultural and historical resources. Ex. A at 71322-23. These resources were examined in the context of continued oil and gas exploration, other construction activities in the project's vicinity, and agricultural practices. *See* Ex. A at 71322-31. Additionally, the Corps reasonably based its analysis of past impacts through consultation with the North Dakota Public Service Commission and in consideration of past oil and gas activity in the area. *Id.* at 71322. Likewise, the Corps looked to the future growth of the oil and gas industry to determine how the Pipeline could affect industry growth or production. *Id.*

Standing Rock does not challenge this analysis directly; it identifies no methodological flaw or failure to analyze cumulative impacts to a resource such as water or air. Instead, the Tribe argues that the cumulative impacts analysis was insufficient because the EA did not analyze how the Pipeline "adds to the existing *risk* of pipeline spills in the Missouri River [nor] identif[ies] where these pipelines are, their safety and history of leaks and spills…" ECF No. 117-1 at 32 (emphasis added). First, *risk* is not itself an impact on the environment and an increase in risk of an impact need not be addressed in an EA. *See Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). Second, the relevant project area is not the entire Missouri River. The Corps identified the project area as "areas within the Corps flowage easements and federal lands that are potentially impacted by construction and/or operation of the DAPL Project" and this methodological decision is

subject to deference. Ex. A at 71239; *see Prairie Band Pottawatomie Nation v. Fed. Highway Admin.*, 684 F.3d 1002, 1010 (10th Cir. 2012). [6] Within this area, the Corps identified the relevant infrastructure and took this as a baseline to analyze cumulative impacts. Ex. A at 71322 (identifying "a Oneok/TransCanada natural gas pipeline," "a natural gas pipeline" and "345 kV power line" in "the vicinity of the Proposed Action."). Standing Rock has not demonstrated this to be flawed by, for instance, identifying relevant infrastructure that was excluded, or a pending application for an additional pipeline crossing at Lake Oahe. Without identifying such a specific pending project that the Corps failed to identify, the Tribe cannot succeed on its claim that cumulative impacts were not properly analyzed.

4. The Post-EA NEPA Review Confirmed That Oil Spill Risk and Intensity Factors Were Fully Analyzed

The Corps' October 20, October 31, and February 3 Memos reviewed and further analyzed the impacts of the portions of the Pipeline under the Corps' jurisdiction and supports the conclusion that the EA correctly assessed the risk of a pipeline rupture and the "intensity factors" were evaluated properly. While post-decisional and therefore not part of the agency's record for the July 25 RHA permission, these reviews were part of the administrative record that supported the February 8 easement decision and confirm that this decision was reasonable.

The October 20 Memo determined that the EA sufficiently addressed intensity factors, and indeed contained additional discussion of topics relevant to many of these factors. The October 20

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[6] Even if the relevant area is considered "the Missouri River" Courts have found an agency's cumulative impacts analysis to be adequate when it excludes projects that were neither authorized by, nor pending before, an agency, nor related to the project at issue in the case. Standing Rock has identified no such projects. *See Nat'l Parks Conservation Ass'n*, 177 F. Supp. 3d at 27; *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 512 (D.C. Cir. 2010).

Memo determined that the EA sufficiently addressed environmental impacts and potential impacts to health, wetland impacts and considers the legal framework applicable to the decision. *See* 40 C.F.R. § 1508.27; Ex. E.

Standing Rock refers to an expert report that the Tribe provided after the EA that describes the Corps' decision not to prepare an EIS as "unconscionable." ECF No. 117-1 at 21. The report also substantively criticizes the Corps' assessment in the EA of the risk of a pipeline rupture. *Id.* (criticizing EA for not assessing possibility of a "slow leak").[7]

First, deference is due to the agency's consideration of matters within its technical expertise—in this case, the Corps has expertise regarding the management of multi-purpose projects, such as Lake Oahe. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1320 (D.C. Cir. 1998) (agency "evaluations of scientific data within its area of expertise" are "entitled to a high level of deference . . .") (internal quotations and citation omitted); *All. for Nat. Health U.S. v. Sebelius*, 714 F. Supp. 2d 48, 60 (D.D.C. 2010).

Second, expert reports that dispute the agency's conclusion are not sufficient to show that an impact is significant or that intensity factors were not considered. *See Sierra Club v. Van Antwerp*, 719 F.Supp.2d 58, 67–68 (D.D.C.2010) *aff'd in part, rev'd in part on other grounds*, 661 F.3d 1147 (D.C.Cir.2011), *as amended* (Jan. 30, 2012) (submission of declarations "from numerous experts who claim[ ] that [a project] will have significant adverse impacts on [an area] ... alone fail[s] to rise to the level of 'controversy' under NEPA."); *Nat'l Parks Conservation Ass'n*, 177 F. Supp. 3d at 33.

[7] To the extent these expert reports are offered to challenge the July 25, 2016 EA/FONSI they post date this document and therefore are outside of the record upon which this Court may review this decision. *See* Section III.

Regardless, the EA contains a robust discussion of risk of leak and rupture, and a suite of mitigation measures designed to reduce this risk and mitigate the effect of any potential rupture. *See supra* at IV(A)(1). Further, after receiving the Kuprewicz Report, the Corps AR met with representatives of the Tribe and Dakota Access and discussed the concerns in the report and possible easement conditions on December 2, 2016. Ex. I at 237. The specific topics at the meeting included "potential conditions in an easement for the pipeline crossing, which would further reduce the risk of a spill or rupture, hasten detection and response, or otherwise enhance the protection of Lake Oahe, the Tribe's water supplies, and its treaty rights…". Ex. I at 232. Although the Tribe formally refused to participate in further consultation or discussions, the Tribe met with the Corps and representatives from Dakota Access on December 2, 2016. Attached hereto as Ex. M. After considering the Kuprewicz Report, Dakota Access' response[8], and information from the December 2 meeting, the Corps imposed 36 additional conditions on the easement to address the Tribe's concerns and even further mitigate risk of a pipeline rupture at the Lake Oahe crossing.

Further, in an October 31 Memo the Corps again concluded that the "the risks of a pipeline rupture are minimal" relying on information from PHMSA indicating there were approximately .01 pipeline ruptures per mile per year, and that this data was for pipelines "constructed before modern pipeline design and construction methods and upgrades became available to a pipeline such as the one proposed to cross Lake Oahe. Thus, the PHMSA statistics likely overstate the risk of a pipeline rupture at the crossing." Attached hereto as Ex. N at 2. The Memo additionally notes that one of the leading risks of pipeline failure is third party damage, and this risk is particularly low at the Lake

[8] Dakota Access provided for the Corps consideration an analysis of the Kuprewicz Report which concluded the Report demonstrated a "lack of understanding and respect for accepted methodology… runs directly counter to best practices, does not keep with accepted norms, and should not be relied upon when discussing the Dakota Access Pipeline Project." Ex. L at 1005.

Oahe crossing because this portion of the Pipeline will be buried at least 90 feet below the lakebed. *Id.*

In sum, both the EA and subsequent analysis confirm that cumulative impacts and other "intensity factors" were properly considered, the EA and FONSI were correct to conclude that no EIS was needed, and no additional review was required before granting the easement.

5. The Corps Properly Considered Impacts on Treaty Rights and Vested Water Rights

a) The EA Considered Impacts on Treaty Rights

Standing Rock argues that the EA is deficient for lack of disclosure of impacts of the proposed action on the Tribe's treaty rights. ECF No. 117-1 at 24-25. However, the EA reflects a full consideration of impacts on wildlife, fish, water, and other environmental impacts relevant to the Tribe's treaty rights. The EA also directly addressed the Tribe's comments raising this issue. The EA took the required "hard look" at these impacts and is not arbitrary and capricious.

The specific treaty rights relevant here are "the privilege of hunting, fishing, or passing over" certain land. *See* Fort Laramie Treaty of 1851, art. 5, 11 Stat 749, 1851 WL 7655; *see also* ECF No. 117-1 at 5 to 6 (referencing "water, fishing, and hunting rights."); ECF No. 158 at 35. To the extent the Pipeline could affect these rights, it would do so only in the context of impacts to the underlying environmental resources. There is no different class of environmental impacts independent of the underlying resources to which the Tribe has a treaty right.[9] Therefore if the EA adequately considers

[9] In other words, there is no "treaty right" in the abstract—any rights that exist in the Tribe's treaties must be specific to the particular treaty's text for them to be recognizable. Courts that address impacts on treaty rights have analyzed them as impacts to the specific resource identified in the treaty, for example a right to fish. *See Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, 918 F. Supp. 2d 1132, 1153-54 (W.D. Wash. 2013), *on reconsideration in part*, No. 12-CV-1455, 2013 WL 357509 (W.D. Wash. Jan. 29, 2013) (finding the Navy's mitigation measures in EIS adequately protected fishery resources and thus did not impact Indian

impacts to water, fish, and game it has adequately discussed the impacts on the Tribe's Treaty rights to use these resources. Here, there can be no legitimate dispute that the Corps fully considered the limited treaty rights that could potentially be impacted by the Corps' decision making. *See TOMAC*, 433 F.3d at 860 (Court's role is "designed primarily to ensure 'that no arguably significant consequences have been ignored.'") (quoting *Pub. Citizen*, 848 F.2d at 267).

First, the EA explored potential impacts to water, including cumulative impacts on water and aquatic life including fish. *See* Ex. A at 71259-76, Water Resources; Ex. A at 71292, Aquatic Resources (68-70); *see also* Ex, A at 71324-25, Water and Aquatic Life Resources. The EA further elaborated, in direct response to a comment from the Tribe, that "[a]s the pipeline will be installed under the river, the installation and operation of the pipeline will not have direct impact to the waterway and there are no anticipated impacts to water rights." Ex. D at 71765. The EA also found that as the Pipeline construction and operation uses no water, there would be no anticipated impacts to the Tribe's reserved water rights. *Id.* (Responding to comment 15-14). The Corps also responded to the Tribe's specific concerns regarding potential impacts to Lake Oahe from pipeline operations, including risk of rupture. *Id.* (responding to comment 15-14 and referencing section 3.2 and 3.11). Responding to the Tribe's specific concerns demonstrates that the EA did not ignore impacts on water, or indeed, the Tribe's rights to use such water. *See supra* at IV(A).

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tribe's treaty right to fish); *No Oilport! v. Carter*, 520 F. Supp. 334, 356–57 (W.D. Wash. 1981) (finding EIS analysis of project's effect on fishery resources was adequate for evaluation of project's impact on Indian tribe's treaty right to fish); *Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1522 (W.D. Wash. 1996) ("[T]he Corps has shown that it appropriately relied upon a determination that the project would interfere with treaty fishing rights of the Lummi Nation in denying the § 10 permit.").

The EA contains a similarly robust discussion of impacts on wildlife, *see* Ex. A at 71281-92, (Wildlife resources, Ex. A at 71292-94, Aquatic Resources, and specifically discusses hunting on the reservation and the game that exist there. Ex. A at 71299 (mentioning "white tail deer, mule deer and antelope, as well as jackrabbit, cottontail, and squirrel"). The EA acknowledged that there could be temporary impacts to hunting related to construction. *Id.* Yet the EA reasonably concluded that overall "[n]o impacts to treaty fishing and hunting rights are anticipated." Ex. A at 71282.

The Tribe's specific argument that analysis of impacts on treaty rights-protected resources was nonetheless insufficient consists of several block quotes from a now rescinded Solicitor's opinion that was published after the EA/FONSI was issued and rescinded before Corps issued the easement. ECF No. 117-1 at 25. As an initial matter, as with Standing Rock's summary judgment brief, the Solicitor's Opinion did not identify any specific treaty right outside of the general rights to use water, hunt, and fish. In any event, the Tribe relies on these block quotes that fault the EA primarily for not "identifying on-reservation lands where the Tribes may retain hunting and fishing rights; analyze whether tribal members consume a higher amount of treaty-guaranteed fish or game that might be affected by pipeline construction or a potential spill; identify relevant statutes, treaties or court cases; discuss proactive mitigation efforts that could protect tribal lands (specifically, and as opposed to any relevant non-treaty protected lands)…" Notably, these are not arguments against the EA's conclusions that "there are no anticipated impacts to water rights" and "[n]o impacts to treaty fishing and hunting rights are anticipated." Ex. D at 71765, Ex. A at 71282. Rather, these are arguments that even though there is no anticipated impact to fish, game, or water, it would be beneficial to conduct additional analysis. But an EA is not rendered unlawful because an agency "*could* have considered more impacts." *S. Utah Wilderness All. v. Norton*, 326 F. Supp. 2d 102, 117 (D.D.C. 2004).

Standing Rock also argues that the discussion of alternatives is unreasonable for not being "viewed through a prism of how different options impact Treaty rights." ECF No. 117-1 at 26. The determination of whether an agency has properly considered alternatives is guided by a "rule of reason" *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 73, which governs both which alternatives the agency should consider, as well as the extent and method by which the agency considers them. *See Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C.Cir.1988).

Again, treaty rights are not abstract, but specific (in this case) to water, game, and fish. The Corps reasonably analyzed the alternatives in light of those treaty rights. *See* Ex. A at 71229-41. Particularly the EA's Table 2-1 provides a good summary of how each alternative would compare in terms of overall effects. For example, the table includes analysis regarding how much each alternative would be constructed in a floodplain, how much each would intersect both perennial and intermittent waterbodies, how much each would impact freshwater wetlands, freshwater forested wetlands, freshwater ponds, as well as areas important for drinking water.

Here the discussion of environmental impacts that implicate the Tribe's treaty rights to hunt, fish, and gather was sufficient and an additional analysis of these same environmental impacts through the lens of the Tribe's rights to access them was not necessary under NEPA. Neither the Tribe nor the Solicitor's Opinion demonstrates that any environmental impact—including those relevant to the Tribe's treaty-protected rights to hunt and fish—was not given a "hard look."

Finally, Standing Rock argues, again by quoting from the rescinded Solicitor's opinion, that "additional analysis is necessary to address the fact that the reasons for rejecting the Bismarck Route are equally (if not more) applicable to the Lake Oahe Route." ECF No. 117-1 at 35 (citing

Solicitor's Op. 25-28).[10] However, CEQ regulations instruct that "an agency need only 'briefly discuss the reasons' why rejected possibilities were not 'reasonable alternatives.'" *Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1141 (D.C.Cir.1991) (quoting 40 C.F.R. § 1502.14(a)). Courts are to defer to an agency's assessment. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991); *see also Nat'l Parks Conservation Ass'n*, 177 F. Supp. 3d at 18.

Here the EA's discussion of the Bismarck route was reasonable and certainly meets the CEQ's "brief[] discuss[ion]" standard. Indeed, the EA's analysis confirms that many factors demonstrate the drawbacks of this route compared to the preferred alternative. First, this route would have required an additional 11 miles of pipeline resulting in 165 acres of additional impacts. Ex. A at 8. Second, this longer, more environmentally-intensive route would have crossed additional waterbodies and wetlands, and come within greater proximity to more municipal water supplies and "high consequence areas" identified by the PHMSA. Ex A at 71232; *Id.* at 71235, Table 2-2, Construction Cost Comparison Between Crossing at Lake Oahe and Alternative Crossing North of Bismark. Further, the Bismarck route was not co-located with existing pipeline infrastructure. *Id.* at 9, Table 2-1, Alternatives Evaluation Matrix Between Preferred Crossing at Lake Oahe and Alternative Crossing North of Bismark.

[10] To the extent Standing Rock's argument is that the Bismarck alternative is preferable and should have been selected, such an argument "misconceives the nature of NEPA's mandate, which prescribes a process, not an outcome." *Hammond v. Norton,* 370 F.Supp.2d 226, 242 (D.D.C.2005). NEPA "does not mandate particular results, but simply prescribes the necessary process." *Robertson*, 490 U.S. at 350 (citation omitted).. So long as the EA discussed impacts to both alternatives—and it did—the alternatives analysis was reasonable and does not need to further elaborate why the preferred alternative was selected.

b) The Post-EA Review and Easement Review Confirmed Treaty Rights Were Fully Analyzed

In deciding whether to issue the easement, the Corps' review reasonably confirmed impacts to treaty rights and resources were adequately explored in the EA and would support the issuance the easement for the Lake Oahe crossing. Specifically, the Corps undertook an analysis of "the Fort Laramie Treaties of 1851 and 1868 and other federal laws, and whether the finding in the EA that there are no impacts to treaty fishing or hunting rights is supported. This evaluation would include consideration of any reserved water rights of the SRST." Ex. E at 1223.

The October 20 Memo's analysis regarding environmental impacts and resources implicated in tribal treaty rights reasonably concluded that "[t]he EA addressed the potential impacts of the proposed pipeline crossing at Lake Oahe on fishing and hunting activities within the broader discussion of potential environmental impacts and concluded that the nature of the impacts would not violate [Standing Rock's] treaty-based rights." Ex. E at 1228. The memo observed that "a separate discussion in the EA of [Standing Rock's] treaty-based hunting, fishing and reserved water rights might have provided great detail…" *id.*, but correctly concluded "the analysis of the overall environmental impacts that could affect [Standing Rock's] treaty-based hunting, fishing, and reserved water rights met NEPA's 'hard look' standard" *Id.*

The October 20 Memo also reviewed the EA's analysis of the Bismarck alternative and concluded that this discussion provided sufficient reasons to reject this option in favor of the preferred alternative that "avoided tribal land, was co-located with an existing natural gas pipeline, complied with North Dakota rural residence avoidance requirements, had fewer water crossings and avoided HCAs as identified by PHMSA." Ex. E at 1220.

Following the October 20 Memo, the Corps went above and beyond the requirements of applicable law and invited SRST to further discuss specific topics including "potential conditions in

an easement for the pipeline crossing, which would further reduce the risk of a spill or rupture, hasten detection and response, or otherwise enhance the protection of Lake Oahe, the Tribe's water supplies, and its treaty rights…". Corps officials had a five-hour-long meeting with Standing Rock and Dakota Access to discuss these issues. These further discussions resulted in the Corps adding 36 special conditions to the Lake Oahe easement to address the Tribe's concerns.

The EA and October 20 Memo document a full consideration of potential impacts to the resources that support the Tribe's treaty fishing and hunting rights. The Corps did not rest on this analysis, but instead continued to discuss with the Tribe and expanded the safety conditions of the easement to protect the Tribe's interest. In the face of this record, the Tribe cannot legitimately claim that the Corps failed to consider its treaty hunting and fishing rights.

6. The Corps Properly Considered Environmental Justice

The Corps fully complied with its NEPA obligations in analyzing the potential environmental justice impacts of the Pipeline. Congress has not enacted general legislation concerning environmental justice. Because an agency has "discretion to include the environmental justice analysis in its NEPA evaluation," such analysis is subject only to the general NEPA standard of review. *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004). An agency's analysis of environmental justice impacts therefore satisfies NEPA if it represents a hard look at the potential effects of the project. *Id.*[11] Plaintiffs raise three main challenges to the Corps' environmental justice analysis. ECF No. 117-1 at 28 to 31. None succeed.

[11] Contrary to the Tribe's suggestion (ECF No. 117-1 at 27 to 28), neither Executive Order 12898 nor CEQ's guidance titled "Environmental Justice Guidance Under the National Environmental Policy Act" (the "CEQ EJ Guidance") are privately enforceable as E.O. 12898 specifically states that it "shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order." 59 Fed. Reg. 7629, 7633 (Feb. 11, 1994) and CEQ EJ Guidance "does

a) The Corps Properly Defined the Geographic Scope of the Environmental Justice Impacts Analysis

The Corps properly defined the action area for the purposes of its environmental justice analysis. First, the Corps reasonably concluded that the direct and indirect effects of proposed action would be limited to the area within a half-mile radius. As this is the area where the direct and indirect effects would occur, it follows that this half-mile buffer was also the appropriate area for examining environmental justice effects. This is reasonable and consistent with other infrastructure projects of this type. *See* Ex. A at 71308 ("transportation projects...and natural gas pipeline projects . . . typically use a .5 mile buffer area to examine environmental justice effects."). Ex. A at 71308 (citing examples); *see also Coal. for Healthy Ports*, No. 13-CV-5347 (RA), 2015 WL 7460018, at *25 (upholding environmental justice analysis for a bridge construction project that "identified the Project's study area as the communities located within a quarter mile of the Bridge."). *See also Bitters*, No. 1:14-CV-01646, 2016 WL 159216, at *14 ("it is a matter of common sense that residents and businesses in the immediate project area would be most impacted by the air quality, noise, traffic, relocation, and economic effects of a project to reintroduce vehicular traffic to particular streets."). Analysis of a half-mile buffer, which is appropriate for bridges or other construction projects with street-level noise, traffic or other impacts, is certainly appropriate for the Lake Oahe crossing, where the construction is deep under the bed of Lake Oahe and is staged on private lands. Ex. A at 71309 – 10. The Corps' use of a half-mile buffer area to analyze environmental justice effects is supported by the case law and the record, and its analytical framework is entitled to

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not create any rights ... enforceable ... in any court." Attached hereto as Ex. O, EJ Guidance at 21. *See Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999); *see also Cmtys. Against Runway Expansion*, 355 F.3d at 689 (holding that the APA's arbitrary and capricious standard of review applies to a challenge to an agency's environmental justice analysis under NEPA).

deference.[12] *See Cmtys. Against Runway Expansion*, 355 F.3d at 689 ("The FAA's choice among reasonable analytical methodologies is entitled to deference from this court." (citation omitted)); *see also, Protect our Cmtys. Found. v. Salazar*, No. 12CV2211-GPC PCL, 2013 WL 5947137, at *15 (S.D. Cal. Nov. 6, 2013), *aff'd sub nom. Backcountry Against Dumps v. Jewell*, No. 13-57129, 2017 WL 56300 (9th Cir. Jan. 5, 2017) ("BLM's decision to limit its analysis to one-half mile of the Project was reasonable and is entitled to deference.").

Moreover, as discussed in more detail below, even though the Corps relied on a half-mile buffer to analyze impacts, the Corps actually went beyond that buffer and specifically analyzed the effects on the Standing Rock reservation. Ex. A at 71309-11. The Corps "recognized that the Standing Rock Sioux Tribe is downstream of the Lake Oahe crossing, which has a high population of minorities and low-income residents." *Id.* at 71309. The Corps then analyzed direct and indirect impacts from the construction activity and determined that based on the methods being used, "direct and indirect impacts from the Proposed and Connected Actions will not affect members of the Standing Rock Sioux Tribe or the Tribal reservation." *Id.*; *see also id.* at 71310 (noting that "the closest residence on the Standing Rock Sioux reservation is a rural residence located greater than 1.5

[12] Plaintiffs' reference to the EIS for the Keystone XL project is unavailing. ECF No. 117-1 at 30 n.16. Keystone XL involves a Presidential Permit for an international border crossing under Executive Order 13337. Additionally, Keystone XL involves "three connected actions of the proposed Project: the Bakken Marketlink Project, the Big Bend to Witten 230-kilovolt (kV) Transmission Line Project, and electrical distribution lines and substations." ECF No. 117-22 at 3.10-6 (excerpt of the Keystone XL Final Environmental Impact Statement). By contrast, the EA at issue here evaluated the Corps' decision to grant an easement and consent to cross Corps-held flowage easements for two short pipeline crossings over Corps managed-property, including for two short pipeline crossings over Corps property in areas that already have existing pipeline and utility crossings. Ex. A at 71308. Moreover, the Corps actually did analyze the potential environmental justice impacts of a potential spill much farther downstream than the half-mile buffer used to evaluate direct and indirect impacts of construction. *Id.* at 71310-11. (analyzing effects of a potential spill to the Standing Rock Sioux reservation.).

miles from the Lake Oahe Project Area Crossing."). The Corps fully discharged its duties under NEPA and conducted an analysis of environmental justice impacts that fully and accurately identified and disclosed anticipated impacts of the Project.

Further, the court must discredit Standing Rock's assertions that the Corps "gerrymandered" the geographic scope of the environmental justice analysis to mask potential impacted minority or low-income populations. ECF No. 117-1 at 28 to 29. The Corps selected two census tracts that covered the "Action Area" or area where the pipeline crossing would be built. Ex. A at 71307. The Corps then compared the demographic data for the populations within those tracts to the broader "Baseline Area" to determine if there were minority or low-income communities that would be differentially impacted in the immediate project area. *Id.* at 71308-309. As set forth in the CEQ EJ Guidance, an environmental justice population may be present "if the minority population percentage of the [Action Area] exceeds 50%, or if the minority population percentage of the [Action Area] is meaningfully greater than the minority population in the [Baseline Area]." Ex. O at 25. Employing this Guidance, the Corps concluded that the Action Area did not have a meaningfully greater minority or low-income population than the Baseline Area, so there was little potential for environmental justice impacts in the Action Area. *Id.*

Standing Rock criticizes the Corps' selection of census tracts CT204 and CT9665 as the basis for the demographic analysis, arguing that those tracts are outside the Standing Rock Sioux Reservation and unfairly dilute the population to mask potential low-income or minority communities. ECF No. 117-1 at 29. But Standing Rock admits that those two census tracts fully encompass the project area for the Dakota Access pipeline. ECF No. 117-1 at 28 (admitting that the census tracts encompass the "bore pits" or the construction area for the pipeline). As described in

more detail in Section 6.d), below, that is the area in which the direct and indirect impacts from the proposed action (i.e., construction of a pipeline 110 feet underground) are expected to occur.[13]

Plaintiffs argue that the Final EA analyzed "an area that will be almost entirely unaffected by a spill from the pipeline" instead of focusing on Standing Rock's reservation which could be affected by an oil spill that reaches the river below the dam that creates Lake Oahe. ECF No. 117-1 at 29. The Corps, however, is not granting permission under 33 U.S.C. § 408 or an easement for an oil spill into Lake Oahe. It is granting permission for the construction of a portion of the pipeline approximately 92 feet below the lake bed, for which the possibility of a spill into Lake Oahe is "extremely low." Ex. A at 71311. The population that stands to be affected by the Pipeline construction is the population in the vicinity of the Pipeline corridor. That population is accurately reflected in the census tracts chosen by the Corps.

Even if the Tribe could convince the court the environmental justice review should have considered a broader geographic area, it cannot show that the Corps failed to consider the potential impacts of a pipeline leak or spill. Whether viewed purely in the NEPA context or through the lens of environmental justice, the Corps fully analyzed the risks of spills to the Standing Rock and other downstream users of the Lake and river. *See supra* at IV(A)(1). *See also* Ex. A at 71311; *id.* 71262-68 (discussing in detail effects of a potential spill as well as response plans and mitigation measures to minimize impacts from a spill). The Tribe cannot therefore credibly argue that the Corps "gerrymandered" its way out of considering potential environmental justice impacts to the Tribe; it

[13] "The 'identification of the geographic area' within which a project's impacts on the environmental resources may occur 'is a task assigned to the special competency of the appropriate agencies.'" *Powder River Basin Res. Council v. BLM*, 37 F. Supp. 3d 59, 75 (D.D.C. 2014) (quoting *Tri–Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1127 (9th Cir. 2012).

conducted precisely the analysis that Standing Rock argues was necessary. Ex. A at 71262-72; *Id.* at 71309-18.

b) The Corps' Conclusion That There Were No Disproportionately High and Adverse Impacts to Low Income or Minority Communities Was Reasonable and Entitled to Deference

Finally, Standing Rock argue that the Corps considered downstream effects of a potential spill for a proposed alternative crossing near Bismarck, SD, but failed to do so for the Lake Oahe crossing. ECF No. 117-1 at 30. This is not true. As discussed in the EA, the Bismarck Crossing alternative was considered and rejected for a host of reasons, including the fact that it would impact over 160 more acres of land, would pass through much more densely populated areas, and would pass through wellhead source protection areas that provide water for municipal water wells. Ex. A at 71232.

In addition, the Corps exhaustively analyzed the potential impacts of a spill on the water sources for communities downstream from the Lake Oahe Crossing. Ex. A at 1262-75 (describing potential spill impacts to surface water, ground water and wetlands as well as numerous mitigation measures in the event of a spill); *Id.* at 71310-11 (discussing whether potential spill impacts would be disproportionately borne by the Standing Rock Sioux Tribe). For purposes of the environmental justice analysis, the Corps reasonably concluded that there were private non-tribal water intakes on Lake Oahe closer to the Oahe crossing than the intakes owned by the Tribe. *Id.* at 0071311. As a result, the impacts of a potential spill would not be borne disproportionately by the Tribe, as the release would affect all residents relying on Lake Oahe for water. *Id.* In fact, the Tribe's water intakes are less likely to be impacted because they are farther downstream, over seventy miles from

the Lake Oahe crossing, and would have more time to be temporarily shut off to avoid intake of water affected by a release from the Pipeline.[14] Ex. A at 71312-18.

Standing Rock would have the court ignore the analysis contained in the EA and focus instead on a memo prepared by consultants as part of the EA process. ECF No. 117-1 at 30. This argument is unavailing because the record shows that the Corps not only considered the views of this consultant, but also conducted its own review of the Bismarck alternative "as a result of public input and comment during this EA process." Ex. A at 71232. Contrary to the Tribe's arguments, the Corps was not required to dispute every contention in this memo in its final EA to demonstrate its consideration of the document. *See Myersville Citizens for a Rural Cmty., Inc. v. F.E.R.C.*, 783 F.3d 1301, 1325 (D.C. Cir. 2015) ("Though we can see how Petitioners may disagree with [the Commission's] takeaway, their disagreement does not mean that the Commission failed to consider the issue") (quoting *Minisink Residents for Envtl. Pres. & Safety v. F.E.R.C.*, 762 F.3d 97, 112 (D.C. Cir. 2014)).

c) The Corps Reasonably Considered the Nonbinding Opinions of DOI and EPA

Standing Rock's final environmental justice argument relies on recommendations by EPA and DOI that the Corps undertake further studies on environmental justice effects of potential oil spills. Br. at 29. Standing Rock confuses the Corps' obligations with respect to these comments. "Although an agency should consider the comments of other agencies, it does not necessarily have to

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[14] As stressed in the October 20 Memo, the Bureau of Reclamation had already decided to construct new water intakes for the Standing Rock Reservation. This new intake structure will be approximately 50 miles downstream from the existing intake, and will provide a treatment plant as well as a five-million gallon storage reservoir. Attached hereto as Ex. E at 1241; *Id.* at 1232 – 34. This will significantly lessen the potential for any adverse effects to the Standing Rock Sioux reservation in the event of a spill, and reinforces the EA's conclusion that there would be no disproportionate impacts.

defer to them when it disagrees." *Theodore Roosevelt Conservation P'ship v. Salazar*, 605 F. Supp. 2d 263, 276 (D.D.C. 2009) *aff'd*, 616 F.3d 497 (D.C. Cir. 2010) (quoting *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 289 (4th Cir.1999)).[15]

Furthermore, the Corps did not need to conduct additional analysis, because it had already thoroughly evaluated the environmental justice impacts of the project. As explained above, the Corps noted that given the design, response plans, and materials used in the pipeline, the risk of a spill reaching the waters of Lake Oahe is "extremely low." Ex. A at 71311. In addition, in the unlikely event of a release, the Corps concluded that sufficient time exists to close the nearest intake valve to prevent any human impact from a spill. *Id.* The Corps concluded that other private water intake points were actually closer to the pipeline. *Id.* Accordingly, the impacts of a spill would not be disproportionately borne by the Tribe, but would impact other users as well. *Id.* Finally, the Corps concluded that there were no disproportionately high and adverse impacts to minority or low income communities resulting from the Proposed Action. *Id.*[16] Standing Rock points to no information that would lead the Corps to conclude differently.

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[15] *See also Hammond v. Norton*, 370 F. Supp. 2d 226, 252 (D.D.C. 2005) (citing *Busey*, 938 F.2d at 201); *Fund for Animals v. Williams*, 246 F.Supp.2d 27, 46 (D.D.C.2003) (quoting *Sierra Club v. Watkins*, 808 F.Supp. 852, 862 (D.D.C.1991)); *Nat'l Fisheries Inst., Inc. v. Mosbacher*, 732 F. Supp. 210, 227 (D.D.C. 1990).

[16] Similarly, contrary to Plaintiffs' assertion, the Corps analyzed potential impacts to fish and riparian vegetation from a spill. Ex. A at 71293 (in part because of the placement of the Pipeline deep below Lake Oahe, and the increased strength of the pipe, "operations activities are not anticipated to impact aquatic resources or their habitat. Adherence to the Dakota Access FRP would minimize potential impacts on aquatic wildlife from potential spills during the operation of the pipeline.").

B. The Corps' Decision to Grant the Easement Was Not a Change in Policy and Was Reasonable

Based on a claim that the decision to grant the easement was a change in policy, the Tribe urges the court to require a higher level justification for the Corps' decision. The court should reject this line of argument for several reasons. First, the decision was not a change in policy. In stark contrast to *FCC v. Fox Television*, and other cases cited by the Tribe, this case does not involve an agency issuing a final rule or order that changed a policy embodied in a prior final rule or order.[17] Here, based on an extensive record, the Army issued one—and only one—final decision on the easement application. There was no prior final agency decision on the easement nor was there ever a contrary assessment of the environmental impacts. The Corps' recommendation to grant the easement in December 2016 was the same as its recommendation in February 2017, and it relied upon the same fundamental factual circumstances. Indeed, the February decision confirmed that all prior assessments, including the FONSI, were legally correct and supported. Ex. I. The decision to grant the easement was made on legally supported bases that never changed.

Second, even if the court were to view the easement decision as a change in course, this court need not alter its standard of review. In *FCC v. Fox Television Stations*, "the Supreme Court declared that there is 'no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.'" *Nat'l Ass'n of Home*

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[17] None of the cases Standing Rock cites have applied this rule to a situation like here where an agency takes an action that does not reverse a prior final agency action. For instance, in *Ark Initiative* the challenge was to an unambiguous final agency action, (a "Rule," *i.e.*, a statement of future effect designed to implement, interpret, or prescribe law or policy; *see* 5 U.S.C. § 551(4)) called the "Colorado Rule" that reversed the policy of a prior Rule. *See Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado*, 77 Fed. Reg. 39,576 (July 3, 2012); *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir.) ("*Ark Initiative II*"), *cert. denied*, 137 S. Ct. 301 (2016). Similarly, in *Mingo Logan Coal Co.*, the final agency action was withdrawal of a permit that had previously been granted. *See* 829 F.3d at 718.

Builders v. E.P.A., 682 F.3d 1032, 1036–37 (D.C. Cir. 2012) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009)). When an agency does change course, it must "display awareness that it is changing its position." *Id.* (citing *FCC v. Fox Television*, 556 U.S. at 514-15). And if a "new policy rests upon factual findings that contradict those which underlay [an agency's] prior policy," the agency "must" provide "a more detailed justification" for its action. *FCC v. Fox Television*, 556 U.S. at 515. *See also Mingo Logan Coal Co. v. Envtl. Prot. Agency*, 829 F.3d 710, 718–19 (D.C. Cir. 2016).

First, the agency "displays awareness" that the easement was issued without the EIS that was contemplated in the December 4 Memo issued by the former Assistant Secretary of the Army for Civil Works. In the February 7 Decision Memo, the Army explains it is rescinding the December 4 Memo, which called for further analysis in the EIS. Nonetheless, this change in direction is not the type requiring "a more detailed justification" that could be required by *Fox*. Importantly, to the extent this court considers the December 4 Memo a prior "policy," the court must also recognize that the December 4 Memo does not provide any material factual findings that are different than those contained in the EA, the October 20 Memo, the October 31 Memo, or the December 3 Memo. The December 4 Memo specifically found no technical or legal infirmities with the analysis that the Corps' EA or subsequent analyses, and the February 7 decision to grant the easement was based on the same underlying facts that were before the agency in July 2016 when the Corps initially recommended that the easement be granted. Ex. G. Because neither Army's withdrawal of the Notice of Intent to prepare an EIS nor the Corps' ultimate decision to grant the easement rested upon factual findings that contradicted the Army's earlier decision to publish notice of intent to prepare an EIS, *Fox* simply does not apply.

Even so, the court will find the record here more than satisfies the *Fox* "detailed justification" requirement. *See, e.g.*, *Mingo Logan*, 829 F.3d at 726–27 (declining to resolve the question of whether a 'more detailed' explanatory standard applies after finding a sufficient agency explanation of its position). The February 3 Memo incorporates the July 2016 EA and FONSI which as discussed in section III, *supra*, analyzed and disclosed the environmental impacts from the proposed crossing, including granting the easement. Ex. A at 71227 ("proposed crossings of Corps-owned lands ... would require the Corps to grant ... Section 408 permissions as well as real estate outgrants"); Ex. B at 71175 (pipeline would require "real estate actions and Section 10 permits and Section 408 permissions"). The February 7 Memo also incorporates the February 3 Memorandum, in which the Corps concluded "[a]fter reviewing the record in its entirety and giving further consideration to the input received over the past four months, including additional review and analyses of the subjects identified by the Assistant Secretary of the Army for Civil Works, other federal executive offices, and the SRST, the Corps finds that the Final EA concerning the crossing of the DAPL at Lake Oahe is sufficient and does not need further supplementation." Ex. I at 236.

The February 3 Memo confirms that the proposed action described in the EA had not changed, and that after reviewing issues identified in the September 9, 2016, Joint Statement and letters from Standing Rock, the February 3 Memo concluded Standing Rock's concerns "do not raise significant new circumstances or information that would require supplemental NEPA documentation. The issues were considered by the Corps . . ." as Standing Rock "raised essentially the same concerns about risks from oil spills in its comments on the draft EA, and the Corps addressed those concerns and comments in the Final EA." Ex. I at 237. Additionally, the February 3 Memo notes that the Corps addressed issues raised by the SRST through easement conditions, which were first outlined in the FONSI. *See* Ex. B (listing easement conditions); *see* Ex. F at 653 and Attachment 2, Proposed

Additional Draft Easement Conditions. After the FONSI, following a face-to-face meeting in Bismarck on December 2, 2016, the Corps adopted an additional set of 36 special conditions for the Lake Oahe easement that add to and clarify the original nine special conditions in the easement that were described in the FONSI.

In sum, in granting the easement, the Corps acted reasonably when it concluded that all of its prior reviews and determinations, including the EA and FONSI issued in July 2016, satisfy all applicable requirements of NEPA, and other applicable provisions of law. There was nothing arbitrary about granting this easement, and if it did represent a change in policy, it was accompanied by a "detailed discussion" that is more than sufficient to show "a rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43, 103 S. Ct. 2856.

C. Withdrawal of the Notice of Intent to Produce an EIS Is Not Final Agency Action Reviewable Under the APA

Standing Rock argues that the Army's withdrawal of its intent to prepare an EIS and Corps' granting of the easement "runs afoul of the reasoned decision-making required by the APA under both [*Fox* and *State Farm*]." ECF No. 117-1 at 45. This argument fails for a number of reasons. First, notices of intent to prepare EISs are routinely withdrawn and such a withdrawal is not a reviewable agency action under the APA.[18] But even if withdrawing a notice of intent were an "agency action," it is not "final" as no legal consequences flow from this decision, and it was not the

[18] *See, e.g.*, Withdrawal of Notice of Intent for the Environmental Impact Statement Process for the Delta Wetlands Project in San Joaquin and Contra Costa Counties, California, 82 Fed. Reg. 8827-01 (Jan. 31, 2017); Termination of Intent To Prepare a Draft Environmental Impact Statement for the Dam Safety Study, Lewisville Dam, Elm Fork Trinity River, Denton County, Texas, 81 Fed. Reg. 45,136-01 (July 12, 2016); Termination of Environmental Impact Statement for the Gray's Beach Restoration Project, Waikiki, Island of Oahu, Hawaii, 80 Fed. Reg. 26,010 (May 6, 2016).

culmination of the agency's decision-making process. As the Notice itself observed, the decision as to whether an EIS was legally required was made in the July 2016 FONSI.

The Supreme Court made clear in *Norton v. Southern Utah Wilderness Alliance* (*"SUWA"*), 542 U.S. 55, 62-63 (2004) that judicial review under Section 706 is limited to claims alleging a failure to take one of the "agency actions" defined in Section 551(13) of the APA. *See* 5 U.S.C. § 551(13) (defining "agency action"); *SUWA*, 542 U.S. at 62 ("[s]ections 702, 704, and 706(a) all insist upon an 'agency action'"). Withdrawing a notice of intent to prepare an EIS is not an "agency action" as defined by the APA. Neither the Army's Notice of Intent nor its withdrawal represents the Corps' final disposition as to NEPA— (an "order"); and they are certainly not a "license," "sanction," or type of "relief." *See* 5 U.S.C. § 551(6), (8), (10), (11). Therefore, these actions do not constitute "agency action" under the APA, and are not the type of action that the Court can review under Section 706.

Nor is such a withdrawal "final" under section 702 of the APA, which "only provides a right to judicial review of '*final* agency action . . . .'" *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 943 (D.C. Cir. 2012). To be final, (1) the action should "mark the consummation of the agency's decision-making process and" (2) the action should "be one by which rights or obligations have been determined or from which legal consequences flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation marks and citation omitted). The Supreme Court in *Bennett* made clear that *both* conditions must be satisfied for agency action to be final. *Id*. at 178.

Here, neither condition is satisfied. A notice of intent, or its withdrawal, does not mark the consummation of the agency's decision-making process. *Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv.*, 653 F. Supp. 2d 1066, 1092 (E.D. Cal. 2009) ("[T]he [Notice of Intent] and ongoing scoping activities are, by their very nature, not the agency's "last word" . . .); *Muhly v. Espy*, 877 F.

Supp. 294, 300 (W.D. Va. 1995) (no reviewable final agency action where agency published a Notice of Intent and initiated scoping process). Nor do any consequences flow from such a withdrawal of intent. It is not a final agency action and not reviewable under the APA.

D. The Corps Did Not Breach Specific Trust Duties and Compliance with Generally Applicable Statutes Satisfies the Corps' General Trust Duties

The Tribe has not identified any substantive source of law that establishes specific trust duties, and therefore any breach of trust claim fails. Further, any general considerations are satisfied by compliance with generally applicable statutes, such as NEPA and the CWA.

1. The Tribe Has Not Identified a Specific Trust Duty

"The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *United States v. Jicarilla Apache Nation,* 564 U.S. 162, 165 (2011). Thus, in order to bring a claim for breach of trust, the Tribe "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation,* 537 U.S. 488, 506 (2003) ("*Navajo Nation I*") (citation omitted); *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 757 (2016); *El Paso Nat. Gas Co. v. United States*, 774 F. Supp. 2d 40, 51–52 (D.D.C. 2011), *aff'd*, 750 F.3d 863 (D.C. Cir. 2014). This "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.*[19] Standing Rock is simply incorrect that control of a Tribe's resources alone is sufficient to establish a trust duty. *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009) ("*Navajo Nation II*") ("The Federal Government's liability cannot be premised on control alone.").

[19] Common law trust principles may then theoretically "particularize [a statutory] obligation." *Cobell v. Norton*, 392 F.3d 461, 472 (2004). But common law trust principles are, on their own, insufficient to show that the United States owes a specific trust duty.

The Tribe asserts that "[t]he federal government has a duty, arising from the Treaties and the federal trust responsibility, and reinforced in the MLA and other statutes, to protect treaty rights and resources." ECF No. 117-1 at 48 (citing section I.B). But the Tribe does not cite specific statutory or treaty provisions that (1) allegedly give rise to "specific fiduciary or other duties;" nor does the Tribe (2) allege that the Government has failed faithfully to perform those duties here. At best, the Tribe points to the portion of its brief identified as "Background" and asserts that "[b]y virtue of the Treaties, its taking and control over Lake Oahe, and federal statutes, including the MLA, 30 U.S.C. 185(h), the United States has assumed a trust responsibility to the tribes." *Id.* at 14. Control over Lake Oahe cannot create a trust duty, *Navajo II*, and Lake Oahe is not trust property or a trust res. *See Inter Tribal Council of Arizona, Inc. v. Babbitt,* 51 F.3d 199, 203, 225 (9th Cir 1995). The Tribe has not identified a specific duty and demonstrated its breach; therefore any trust claim fails.

a) The Tribe Has Identified No Specific Provision of a Treaty or Statute That Has Been Breached

First, the Tribe cites to the treaty of Fort Laramie, which allowed the Tribe the right to hunt and fish and in concert with the 1958 Act taking land for Lake Oahe confirmed that the Tribe retained "access to the shoreline of [Lake Oahe], including permission to hunt and fish in and on the aforesaid shoreline and [Lake]…" Pub. L. No. 85-915, § 10, 72 Stat. 1762, 1764; *see South Dakota v. Bourland*, 508 U.S. 679, 684 (1993). But granting a Tribe the right to hunt and fish is not the type of language that has been found to impose a fiduciary duty. *Cf. United States v. Mitchell*, 463 U.S. 206, 224 (1983) (a law gave the Federal government "full responsibility" over the harvesting of Indian timber, directed the government to pay the proceeds from those timber sales to the Indians, and required the government to manage Indian forests to obtain the greatest revenue for the Indians).

The Mineral Leasing Act, 30 U.S.C. § 185(h)(D), requires the Secretary when approving a right of way to impose "requirements to protect the interests of individuals living in the general area

of the right-of-way or permit who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes." While this Act does indeed impose a duty, it does not create a fiduciary or trust relationship, and indeed this language is far from the trust creating language present in *Mitchell.* Further, by imposing thirty six easement conditions the Corps has complied with this Act and has not breached any duties within it. Ex. K.

b) *Winters*-Derived Vested Water Rights Do Not Give Rise to a Specific Trust Duty

Last, the Tribe mentions *Winter v. United States* rights. In *Winters*, the Supreme Court held that the establishment of an Indian reservation impliedly reserved the amount of water necessary to fulfill the purposes of the reservation. 207 U.S. 564, 576-77 (1908). In *Arizona v. California*, the Supreme Court subsequently relied on *Winters* to find that water from the Colorado River was "essential to the life of the Indian people . . ." and thus the establishment of an Indian reservation included reserved water rights in the amount "necessary to make the reservation liveable." *Arizona v. California*, 373 U.S. 546, 559 (1963).

A *Winters* doctrine right "gives the United States the power to exclude others from subsequently diverting waters that feed the reservation." *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015).[20] It does not give Standing Rock ownership of any particular molecules of water, either on the reservation or up- or downstream of the reservation. *See Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 202 F.2d 190, 198 (D.C. Cir. 1952) ("[T]he water rights in question do not rest upon a claim of ownership of the running waters of the Niagara. It is a

[20] However, the United States does not have a duty to exclude others from making such diversions; indeed prosecutorial discretion of the United States is broad and generally not subject to judicial review. 28 U.S.C. § 516; *Wayte v. United States*, 470 U.S. 598, 607 (1985). That includes the prosecution of actions by the United States on behalf of Indians. *Creek Nation v. United States*, 318 U.S. 629, 639 (1943); *Heckman v. United States*, 224 U.S. 413, 446 (1912).

usufructuary property right in the waters which is asserted—a vastly different thing, which was recognized at common law and has been confirmed by judicial decisions."), *aff'd*, 347 U.S. 239, 247 n.10 (1954) (noting "[n]either sovereign nor subject can acquire anything more than a mere usufructuary right" in a body of water).[21]

A *Winters* right does not give rise to a specific fiduciary duty, and the Tribe has cited to no case to hold that it does. Indeed, the Tribe does not cite a single statute or regulation prescribing "detailed fiduciary responsibilities" involving "a comprehensive managerial role" for the federal government concerning the Tribe's exercise of its *Winters* doctrine rights, much less "expressly invest[ing the United States with] responsibility to secure the needs and best interests of the Indian owner and his heirs" in the Tribe's *Winters* doctrine rights. *Navajo I*, 537 U.S. at 507-08. There is certainly no statutory or regulatory scheme analogous to the timber statutes in *Mitchell II* requiring the United States to manage the Tribe's *Winters* doctrine rights. *See Mitchell II*, 463 U.S. at 222.

Simply put, Standing Rock has failed to plead or otherwise identify any positive law (treaty, statute, executive order, or otherwise) that imposes a specific fiduciary duty on the United States to take certain actions regarding its *Winters* doctrine rights on the Missouri River, something it must do to assert a legally cognizable claim for breach of a fiduciary duty. *Navajo II*, 556 U.S. at 302; *Navajo I*, 537 U.S. at 506. Standing Rock's failure to identify a specific, substantive source of law is fatal to its claim for breach of trust.

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[21] *See also John v. United States*, 247 F.3d 1032, 1041 (9th Cir. 2001) ("[T]he reserved rights doctrine vests in the United States only a usufructuary interest in water, not an ownership interest."); *accord Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1353-54 (Fed. Cir. 2013) (holding that "[u]nder well-established California law, 'the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use'" (citation omitted)).

2. The Corps' Compliance with Generally Applicable Laws Satisfies Its General Trust Obligation to the Tribe

In the absence of specific fiduciary duties, the government's general trust responsibilities are discharged by compliance with generally applicable regulations and statutes. *See Gros Venture Tribe v. United States*, 344 F. Supp.2d 1221, 1226 (D. Mont. 2004) (citing *Morongo Band of Mission Indians v. FAA.*, 161 F.3d 569, 574 (9th Cir. 1998)). For example, the Ninth Circuit in *Morongo Band* concluded that the FAA sufficiently discharged its general trust responsibility to the Band by complying with general regulations and statutes, such as NEPA, when the Band could not otherwise point to a specific duty placed on the government with respect to the Band that would require more. 161 F.3d at 574-82; *see also Okanogan Highlands All. v. Williams*, 236 F.3d 468, 479-80 (9th Cir. 2000) (In approving a gold mine, agency satisfied its trust obligations by compliance with NEPA).[22]

While that general trust relationship allows the federal government to consider and act in the Tribes' interests in taking discretionary actions, it does not impose a duty on the federal government to take action beyond complying with generally applicable statutes and regulations. "Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995).

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[22] *See also Pit River Tribe v. BLM*, 306 F. Supp. 2d 929, 951 (E.D. Cal. 2004) (holding that, due to agency's compliance with all applicable procedural requirements when approving a development plan, the government satisfied its fiduciary duty to tribes); *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308-09 (9th Cir. 1997) (FERC's trust obligation to the Skokomish tribe only requires that it comply with the Federal Power Act); *Okanogan Highlands All.*, 236 F.3d at 479.

Here, because there is no specific relevant duty that Congress established with respect to the Tribe, the Corps satisfied its general trust responsibility by its compliance with the CWA, NEPA, and their regulations.

E. The Lake Oahe Crossing Qualifies for Nationwide Permit 12

Standing Rock contends that the Lake Oahe crossing does not qualify for Nationwide Permit 12 and, thus, requires an individual permit. ECF No. 117-1 at 43-44. The Tribe's primary argument is that the crossing does not satisfy General Condition 17,[23] because it poses "risks to Tribal Treaty-protected resources." *Id.* In a footnote, the Tribe also argues that the crossing does not satisfy General Condition 7,[24] because it poses a risk to the Tribe's drinking water. *Id.* at 44 n.21. Standing Rock misconstrues the nature of the verification process and the role of the General Conditions.

The Corps can authorize certain activities in waters of the United States under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and/or Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, through a nationwide permit—a type of general permit "designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts." *See* 33 C.F.R. § 330.1(b). Nationwide Permit 12 authorizes "[a]ctivities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project." *See* Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184 (Feb. 21, 2012);

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[23] General Condition 17 provides that "[n]o activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights." Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184, 10,283 (Feb. 21, 2012).

[24] General Condition 7 provides that "[n]o activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization." 77 Fed. Reg. at 10,283.

Sierra Club v. U.S. Army Corps of Eng'rs, 64 F. Supp. 3d 128 (D.D.C. 2014), *aff'd* 803 F.3d 31 (D.C. Cir. 2015) (rejecting challenge to Nationwide Permit 12 as applied to oil pipeline).

When verifying that activities are covered by a Nationwide Permit, the Corps is under no obligation to evaluate whether each General Condition is satisfied, with few exceptions. As the court in *Snoqualmie Valley Preservation Alliance v. United States Army Corps of Engineers* explained,

> The nationwide permit system is designed to streamline the permitting process. We decline to impose a new requirement of a full and thorough analysis of each general condition based on documentation the Corps may or may not have.

683 F.3d 1155, 1164 (9th Cir. 2012); *see also Mobile Baykeeper, Inc. v. U.S. Army Corps of Eng'rs*, No. 14-0032-WS-M 2014, U.S. Dist. LEXIS 147568, at *51-65 (S.D. Ala. Oct. 16, 2014) (citing *Snoqualmie Valley*) (reasoning that "not investigat[ing] compliance with General Condition 7 prior to issuing verification for an activity in a pre-cleared category" would not "foreclose the potential for effective, meaningful enforcement at a later time"). Rather, *a permittee* must adhere to the General Conditions to maintain eligibility for a Nationwide Permit. 77 Fed. Reg. at 10,282.

Here, the crossing of the Pipeline beneath Lake Oahe requires a permit under Section 10 of the Rivers and Harbors Act, because the Pipeline is a "structure . . . under . . . a navigable water of the United States." 33 C.F.R. § 322.3(a). On July 25, 2016, the Corps verified that the Lake Oahe crossing would satisfy the terms and conditions of Nationwide Permit 12. Attached hereto as Ex. Q at 67342-67. As in *Snoqualmie Valley* and *Mobile Baykeeper*, the Corps' verification notice stated that Dakota Access must comply with General Conditions 7 and 17, among many others, in order to maintain its eligibility for Nationwide Permit 12. *See id*.Ex. Q at 67342, 67355. The Corps was *not* required as part of the verification process to evaluate compliance with General Conditions 7 and 17.

Even if such obligations existed, Standing Rock has not established that the actual activity authorized under RHA Section 10 and Nationwide Permit 12—the placement of a "structure . . . under" Lake Oahe—would violate General Condition 7 or 17. The Tribe's arguments presume oil

leaves the Pipeline, but that is not the "activity" being permitted. A contrary interpretation would give the Corps regulatory authority over the siting of oil pipelines by allowing it to deny a permit necessary for the construction of an oil pipeline on the premise that a spill from the pipeline could affect drinking water supplies or tribal rights. The Corps' authority under RHA Section 10, however, relates to maintaining the navigability of waters. Thus, Standing Rock has not established that an individual permit is required.

V. CONCLUSION

Standing Rock's Partial Motion for Summary Judgment should be denied and summary judgment should be entered in favor of the Corps.

Dated: March 14, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 14th day of March, 2017, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

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