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.	Case No. 1:16-cv-01534 (JEB) (consolidated with Cases No. 1:16-cv-1796 & 1:17-cv-00267)

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

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I. INTRODUCTION

The Cheyenne River Sioux Tribe has failed to establish that the Corps acted arbitrarily or capriciously, or violated any law, treaty, or trust obligation when it granted Dakota Access permission under the Rivers and Harbors Act, 33 U.S.C. § 408, and an easement under the Mineral Leasing Act, 30 U.S.C. § 185, to construct a pipeline beneath Lake Oahe. Thus, the United States Army Corps of Engineers is entitled to judgment as a matter of law.

Contrary to Cheyenne River's assertions, robust technical and environmental analyses supported the Corps' Section 408 determination. The Corps reasonably found that the pipeline crossing would not impair the usefulness of Lake Oahe for any of its Congressionally-authorized purposes. The Corps concluded the risk of oil from the Pipeline impairing the Lake was extremely low due to the placement of the Pipeline more than ninety feet below the bed of the Lake; safety features such as thicker pipe walls and remotely-operated shut-off valves on either side of the Lake; and Dakota Access's response plans to contain and remediate any potential damage. When weighing this low risk of potential impacts against the benefits of transporting oil through the Pipeline instead of alternatives like trucks and trains, the Corps reasonably found that this portion of the Pipeline would not be injurious to the public interest.

The Corps violated no trust duty to the Tribe in granting the section 408 permission and easement under the Mineral Leasing Act. Indeed, the Tribe has failed to identify any specific trust duty that is owed by the Corps. Similarly, to the extent there is any specific statutory consultation requirement raised in the Tribe's brief—and it has identified none—the Corps went above and beyond what was required and engaged the Tribe over a two-year period. Summary judgment should be denied for the Tribe and granted for the Corps.

II. LEGAL AND REGULATORY BACKGROUND

A. Rivers and Harbors Act, 33 U.S.C. § 408

1. Overview of Section 408

Section 14 of the Rivers and Harbors Act, 33 U.S.C. § 408 ("Section 408") makes it unlawful for a person to:

> take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, . . . or in any manner whatever impair the usefulness of any . . . work built by the United States, . . . in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods.

33 U.S.C. § 408(a).[1]

The Corps "may" grant permission for these otherwise prohibited activities on a temporary or permanent basis. *Id*. Where a person seeks to permanently alter, occupy, or use a civil work project, the Corps may grant permission "when in the judgment of the [Corps]" the requested activity: (1) "will not impair the usefulness of such work"; and (2) "will not be injurious to the public interest." *Id*.

2. The Corps' Implementing Policy

The Corps has developed a detailed "step-by-step procedural guide" for processing requests for "alterations" (a catch-all term for Section 408 prohibited activities) to civil works projects. *See* Engineering Circular 1165-2-216 ¶¶ 1.a., 1.b., ECF No. 73-15 at 1. As to the first prong the Corps must evaluate under Section 408—whether the alteration will impair the usefulness of the civil work project—Engineering Circular 1165-2-216 provides:

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[1] The Water Infrastructure Improvements for the Nation Act, 114 Pub. L. No. 322, 130 Stat. 1628 (Dec. 16, 2016), amended Section 408 to add two subsections addressing concurrent review with other environmental laws, such as NEPA, and the timeliness of review. *See* 33 U.S.C. § 408(b)-(c). When the Corps conducted its 408 analysis and issued its permission in this case, however, Section 408 only consisted of what is now Section 408(a).

> The objective of this determination is to ensure that the proposed alteration will not limit the ability of the project to function as authorized and will not compromise or change any authorized project conditions, purposes or outputs. All appropriate technical analyses . . . must be conducted and the technical adequacy of the design must be reviewed. If at any time it is concluded that the usefulness of the authorized project will be negatively impacted, any further evaluation under 33 USC 408 should be terminated.

Id. ¶ 7.c.(4)(b)i, ECF No. 73-15 at 14. As to the second prong—whether the alteration would be injurious to the public interest—Engineering Circular 1165-2-216 provides:

> Proposed alterations will be reviewed to determine the probable impacts, including cumulative impacts, on the public interest. . . . The benefits that reasonably may be expected to accrue from the proposal must be compared against its reasonably foreseeable detriments. . . . If the potential detriments are found to outweigh the potential benefits, then it may be determined that the proposed alteration is injurious to the public interest. . . . Factors that may be relevant to the public interest depend upon the type of USACE project being altered and may include, but are not limited to, such things as conservation, economic development, historic properties, cultural resources, environmental impacts, water supply, water quality, flood hazards, floodplains, residual risk, induced damages, navigation, shore erosion or accretion, and recreation. This evaluation should consider information received from the interested parties, including tribes, agencies, and the public.

Id. ¶ 7.c.(4)(b)ii, ECF No. 73-15 at 14.

Engineering Circular 1165-2-216 also contains environmental compliance provisions under which the Corps can ask the requester to submit "all information that the [Corps] district identifies as necessary to satisfy all applicable federal laws," including NEPA. *Id*. ¶ 7.c.(3)(c)i., ECF No. 73-15 at 10. The Engineering Circular explains that the scope of analysis for the NEPA and other environmental compliance evaluations "should be limited to the area of the alteration and those adjacent areas that are directly or indirectly affected by the alteration." *Id*. ¶ 7.c.(3)(c)iv., ECF No. 73-15 at 10. The general scope of analysis for a pipeline is provided as an example:

> [A] pipeline can extend for many miles on either side of the USACE project boundary. In this example, the scope of analysis would likely be limited to the

> effects of the pipeline within the USACE project boundary, but would not address those portions of the pipeline beyond the USACE project boundary.

Id. The Corps can require special conditions on the alteration, including mitigation or other requirements, to ensure environmental compliance. *Id*. ¶ 7.c.(8)(c)iv., ECF No. 73-15 at 17.

B. Mineral Leasing Act, 30 U.S.C. § 185

The Mineral Leasing Act ("MLA"), 30 U.S.C. §§ 181-196, requires a project proponent to obtain a right-of-way or easement "before it can construct, operate, or maintain a pipeline on federal lands." *Hammond v. Norton*, 370 F. Supp. 2d 226, 233 (D.D.C. 2005). Such easements "may be granted" in accordance with 30 U.S.C. § 185(a)-(y). The MLA authorizes the "appropriate agency head" to grant "[r]ights-of-way through any Federal lands . . . for pipeline purposes," 30 U.S.C. § 185(a), "subject to regulations promulgated in accord with the provisions of this section, and shall be subject to such terms and conditions as the Secretary or agency head may prescribe regarding extent, duration, survey, location, construction, operation, maintenance, use, and termination." *Id.* § 185(f). The standard for granting rights-of-way to cross federal land within the Corps' control is whether the activity will "be in the public interest" and "compatible with the installation/ project mission." Army Reg. 405-80 ¶ 4-1(c); *see also* Engineering Regulation 405-1-12, Real Estate Handbook Chap 8-182 (1994); Engineering Regulation 1130-2-550, Recreation Operations and Maintenance Policies, Chap. 17 (2013).

III. STATEMENT OF FACTS[2]

Most facts pertaining to the Corps' July 2016 Environmental Assessment ("EA") and Mitigated Finding of No Significant Impact ("FONSI") and February 8, 2017 easement decision

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[2] For cases such as this one in which judicial review is based solely on the administrative record, local rules require that a party's fact statement be incorporated into its brief. *See* Local Rule 7(h)(2) (rule provision concerning separate material fact statement "*shall* not apply" in record

concerning the Dakota Access pipeline crossing beneath Lake Oahe are summarized in the Corps' Opposition to the Standing Rock Sioux Tribe's Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment. *See* ECF No. 172 at 3-9. The Corps hereby incorporates those facts by reference and will not restate them here. Additional facts relevant to the claims and issues raised by Cheyenne River are presented in this section.

A. The Section 408 Permission

1. Lake Oahe

Lake Oahe is a reservoir formed behind the Oahe Dam on the Missouri River in North and South Dakota. EA, ECF No. 172-1 at 71259. The Lake Oahe project was authorized by the Flood Control Act of 1944 for the following purposes: (1) flood control; (2) hydroelectric power; (3) navigation; (4) irrigation; (5) fish and wildlife; (6) municipal and industrial water supply; (7) water quality; and (8) recreation. *Id*. Lake Oahe and certain adjacent lands are federally-owned and managed by the Corps to effectuate the purposes of the Lake Oahe project. *Id*. at 71225, 71259. Thus, Corps permission is required to alter, occupy, or use any portion of the project. *See* 33 U.S.C. § 408.

2. The Corps' Involvement in the Dakota Access Pipeline EA

In June 2014, Dakota Access notified the Corps' Omaha District of its intent to construct a portion of a crude oil pipeline beneath Lake Oahe. Email from Monica Howard, Energy

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review cases; in such cases, summary judgment motions and oppositions "*shall* include a statement of facts with references to the administrative record.") (emphasis added). Contrary to this rule, Cheyenne River submitted a separate 50-page Statement of Material Facts ("SMF"), ECF No. 131-1. This Statement is improper and should be disregarded. In compliance with local rules, the Corps is incorporating its statement of facts into its brief, and will not file a separate response to Cheyenne River's SMF unless requested by the Court. However, the Corps does not concede that all of the characterizations in Cheyenne River's SMF are consistent with the administrative record.

Transfer Partners, to Jason Renschler, Corps (June 23, 2014), Ex. A at 71156-57. Beginning in September 2014, the Corps and Dakota Access engaged in extensive discussions about the analysis and documentation necessary for the Corps to be able to evaluate the Lake Oahe crossing, including the scope of an EA to support a Section 408 determination. *See, e.g.*, Telephone Log (Sept. 2, 2014), Ex. B at 75499-503; Meeting Invitation (Mar. 5, 2015), Ex. C at 75247-48 (setting up bi-weekly progress meetings between the Corps and Dakota Access).[3]

Dakota Access and its consultants prepared the EA and the supporting analyses and plans with significant direction and input from the Corps on both procedure and content. *See, e.g.*, Email from Brent Cossette, Corps to Monica Howard, Energy Transfer Partners (Apr. 24, 2015), Ex. D at 75254-55 (advising Dakota Access of importance to consider and respond to tribal and public scoping comments before submitting draft EA); Email from Brent Cossette, Corps (Sept. 18, 2015), Ex. E at 74087 (soliciting comments on revised draft EA from twenty-two Corps employees); FONSI, ECF No. 172-2 at 71176 ("The District coordinated closely with Dakota Access to avoid, mitigate and minimize potential impacts of the Proposed Action so that the pipeline would not impair the usefulness of the projects and the impacts to the environment would be temporary and not significant."). The Corps often pointed out deficiencies and requested additional information, even over Dakota Access's objections. *See, e.g.*, ProjNet: DAPL Review, Environmental Analysis Comments & Responses ("ProjNet Report"), Ex. F at 72161-270 (report tracking 178 Corps comments on drafts of the EA, responses, and follow-up confirmations that the comments were adequately addressed through revisions and/or additional

[3] Only a sample of the numerous correspondence between the Corps and Dakota Access and among Corps employees contained in the administrative record are cited in this brief and attached as exhibits to avoid unnecessarily cumulative evidence.

analysis); EA Comment Matrix, Ex. G at 73611-20 (spreadsheet of Corps comments on draft EA and Dakota Access responses); Emails to and from Brent Cossette, Corps (Mar. 16-17, 2016), Ex. H at 73341-43 (discussion of need for more explanation of rationale for the location of the proposed crossing to address Environmental Justice concerns).

During this process and before the EA was finalized in July 2016, the Corps "independently evaluated and verified the information and analysis" in the EA and took "full responsibility for its scope and content." EA, ECF No. 172-1 at 71228; *see also id*. at 71350 (list of Corps reviewers).

3. The Corps' Section 408 Analysis

In addition to overseeing the EA, the Corps followed the step-by-step procedures in Engineering Circular 1165-2-216 to evaluate whether the pipeline crossing would impair the usefulness of the Lake Oahe project or would be injurious to the public interest. *See, e.g.*, Section 408 Decision Package, Ex. I at 71181-82, 71184-85, 71188-89. Omaha District personnel in a wide range of specialties independently reviewed the proposal and supporting information. *See, e.g., id*. at 71183 (listing certifications from Operations, Engineering, Planning, Real Estate, and Counsel offices to support finding that crossing would not impair Lake Oahe project purposes or be injurious to public interest); *id*. at 71180 (further breaking down review by topic within Operations and Engineering offices); ProjNet Report, Ex. F at 72161-270 (Corps comments).

The Corps considered extensive technical documentation to evaluate whether the pipeline crossing would limit the functionality of the Lake Oahe project. *See, e.g.*, Section 408 Decision Package, Ex. I at 71201-02. The Corps requested that Dakota Access conduct a geotechnical investigation to test the feasibility of installing the pipeline deep under the bottom of Lake Oahe through horizontal directional drilling ("HDD"). *See* Responses to Questions (June 2, 2016),

ECF No. 172-3 at 64145.[4] Dakota Access made changes to its construction designs and Operations & Maintenance ("O&M") Manual based on Corps technical comments. *See, e.g.*, Geotechnical Investigation Package, Ex. J at 75304-07; Section 408 Decision Package, Ex. I at 71201. Numerous technical documents considered by the Corps are included in the appendices to the EA. *See* EA, ECF No. 172-1 at 71224. Section 2.3.2 of the EA summarizes construction design features and describes measures the Corps required to mitigate any short-term risks to soil or the Lake from the HDD drilling process, such as following a Stormwater Pollution Prevention Plan and a Spill Prevention Control and Countermeasure Plan. *Id*. at 71241-46.

The Corps also considered the EA and its supporting information and analyses to evaluate whether the pipeline crossing would compromise or change other purposes of the Lake Oahe project. *See, e.g.*, Section 408 Decision Package, Ex. I at 71183-85, 71201, 71205. As explained in more detail in the Corps' Opposition to Standing Rock's motion for summary judgment, the EA evaluated the potential impacts of the pipeline crossing on, among other things, wildlife, vegetation, aquatic resources, and recreation. ECF No. 172 at 5-6; *see also* EA §§ 3-4, ECF No. 172-1 at 71247-331. The EA also included a detailed analysis of the potential for this portion of the Pipeline to rupture and for oil to reach Lake Oahe. *Id*. at 4-5; *see also* N.D. Lake Oahe Spill Model Discussion (Aug. 7, 2015), ECF No. 148, Ex. A at 74713-29 (filed under seal). The Corps evaluated (and ultimately imposed) numerous mitigation measures to further reduce these already low risks. *See, e.g.*, FONSI, ECF No. 172-2 at 71176; EA § 6 & Table 8-2, ECF No. 172-1 at 71333-34, 71341-49.

[4] Dakota Access obtained a separate Section 408 permission and temporary easement to drill in the soil for this investigation. *See* Geotechnical Investigation Package, Ex. J at 75293-300. Neither is at issue in this case.

In the course of its analysis, the Corps particularly considered potential impacts on water supply and intakes, as explained in this email from the Corps to Dakota Access:

> We must be able to have enough information in the Spill Model and Risk Assessment to be able to ensure no negative impacts on irrigation and water supply. Primary reason for reviewing these plans is to evaluate whether or not there are impacts to intakes or any other high consequence area. Section 408 determination must show no negative impacts to any project purposes. Both irrigation and water supply are project purposes for both Garrison and Oahe.

Email from Brent Cossette, Corps, to Tom Sigauw & William Halon, Energy Transfer Partners (May 11, 2016), Ex. K at 72488.[5] The EA analyzed a variety of mitigation measures to reduce the risk of inadvertent releases of oil into the water, such as HDD installation over 90 feet below the bed of the Lake, pipe wall thickness, 24/7 monitoring, shut-off valves on either side of the Lake, and a comprehensive Geographic Spill Response Plan and Facility Response Plant. *E.g.*, EA, ECF No. 172-1 at 71260-67, 71293-94.

Finally, the Corps reviewed the substantial information available and weighed the relevant factors to determine the probable impacts—both positive and negative—of the proposed crossing on the public interest. *See, e.g.*, Section 408 Decision Package, Ex. I at 71181-85. The Corps considered anticipated environmental, economic, cultural, social, and environmental justice effects, as well as potential cumulative effects of the proposed crossing. *See generally* EA §§ 3-4, ECF No. 172-1 at 71247-331; *see also* FONSI, ECF No. 172-2 at 71179; Section 408

[5] *See also* Email from Brent Cossette, Corps, to Larry Janis, Corps (May 16, 2016), Ex. L at 72511 (explaining that EA needed more discussion of "potential impact to water intakes and what mitigation measures would be used to reduce these impacts . . . since both water supply and irrigation are project purposes under Section 408"); ProjNet Report, Ex. F at 72266-67 (Corps comments seeking more information about potential risks to drinking water supplies); FONSI, ECF No. 172-2 at 71175 (responding to tribal concerns about contamination of drinking water); EA Appendix J, ECF No. 172-4 at 71759 (responding to public comments raising concerns about impacts to drinking water and noting that additional discussion of potential impacts and mitigation measures was added to the EA).

Decision Package, Ex. I at 71181-85. The Corps considered the numerous measures that would mitigate against any risk of oil impacts to the Lake and its resources. FONSI, ECF No. 172-2 at 71175-78; EA § 6 & Table 8.2, ECF No. 172-1 at 71333-34, 71341-49. Additionally, the Corps compared the risks of alternative methods of transporting crude oil, such as by truck or rail, with the proposed Lake Oahe crossing. *See, e.g.*, EA, ECF No. 172-1 at 71229-46; FONSI, ECF No. 172-2 at 71175. The Corps also considered the fact that the Dakota Access pipeline would be co-located with an existing pipeline and other utilities. *See, e.g.*, FONSI, ECF No. 172-2 at 71174-75.

4. The July 25, 2016 Section 408 Permission

After almost two years of study and consideration, on July 25, 2016, the Corps granted Dakota Access permission under Section 408 for the pipeline to cross under Lake Oahe and adjacent federal lands. Section 408 Decision Package, Ex. I at 71180-214.[6] The 408 decision document incorporated by reference the Corps' Mitigated FONSI, issued the same day, *see* ECF No. 172-2. The Commander of the Corps' Omaha District concluded that the proposed Lake Oahe crossing, subject to numerous mitigation measures, satisfied Section 408:

> I have evaluated the anticipated environmental, economic, cultural, and social effects, and any cumulative effects of the Proposed Action and determined that the Proposed Action is not injurious to the public interest and will not impair the usefulness of the federal projects.

FONSI, ECF No. 172-2 at 71179; *see also* Section 408 Decision Package, Ex. I at 71184.

[6] Certain portions of the 408 decision package relate to Dakota Access's proposed crossing of Corps-held flowage easements at Lake Sakakawea, also known as the Garrison project.

B. The MLA Easement

Dakota Access applied for the MLA easement for the Lake Oahe crossing on October 21, 2014. Feb. 3, 2017 Memo., ECF No. 172-9 at 89. The July 25, 2016 EA and FONSI recognized that an easement would be required for the proposed Pipeline. *Id*. at 12. The EA and FONSI "are consistent with Corps policy for NEPA documentation" for an easement under the MLA. *Id*. (citing Engineering Regulation 1130-2-550, Project Operations and Maintenance, Guidance and Procedures, Chap. 17, Non-Recreation Outgrant Policy, ¶ 17-2 and Appendix F, National Environmental Policy Act Guidance, ¶ F-3).

During September and October 2016, the Army and the Corps met with Tribes to consider any new information relevant to its review of the NEPA analysis and Lake Oahe crossing among other issues. ECF No. 172-9 at 9. On October 31, 2016, the Corps issued a memorandum identifying drafts of possible conditions that could be included in the proposed Lake Oahe easement to address the Tribes' concerns and to satisfy the requirements of MLA § 185(h)(2). ECF No. 172-9 at 56 – 58. On December 3, 2016, the Omaha District Commander issued a Memorandum for Record documenting the Corps' review of the Lake Oahe easement application. ECF No. 172-6. The Omaha District Commander concluded that, with the additional conditions outlined in the October 31 memorandum, the Lake Oahe easement "would be consistent with the statutory requirements" of the MLA, and recommended "that that the Army notify Congress that the Corps intends to grant the attached easement to Dakota Access." *Id*. at 10-11.

After the Corps undertook a review of the prior NEPA analyses supporting the Pipeline crossings, the President issued a memorandum on January 24, 2017 requiring the Corps to "take all actions necessary and appropriate to . . . review and approve in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary or

appropriate, requests for approvals to construct and operate the [Pipeline]. . .” ECF No. 172-8 at 2. After completing its review, on February 3, 2017, the Corps issued a memorandum titled “Dakota Access Pipeline; USACE Technical and Legal Review for the Department of the Army.” ECF No. 172-9. In that memorandum, the Corps recommended that “the Deputy Assistant Secretary of the Army for Installations, Housing, and Partnerships, make the required notification to appropriate Congressional committees of the Corps’ intent to grant the [Lake Oahe] easement to Dakota Access, LLC.” *Id*. at 2. On February 7, 2017, the Army notified Congress of the Corps’ intent to grant the easement. ECF No. 172-10. The Corps granted the easement on February 8, 2017. ECF No. 172-11.

IV. STANDARD OF REVIEW

A. The APA and Arbitrary and Capricious Standard of Review

The APA requires 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 the 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.” *Id.* (internal quotation marks and citation omitted); *Ark Initiative v. Tidwell*, 64 F. Supp. 3d 81, 90–91 (D.D.C. 2014), *aff’d,* 816 F.3d 119 (D.C. Cir. 2016).

It is not enough, then, that the court would have come to a different conclusion from the agency. *Ark Initiative*, 64 F. Supp. 3d at 90–91. “The reviewing court ‘is not to substitute its judgment for that of the agency,’” *id.*, nor to nor to “disturb the decision of an agency that has examine[d] the relevant data and articulate[d] . . . a rational connection between the facts found

and the choice made." *Id*. (quoting *Ams. for Safe Access v. DEA*, 706 F.3d 438, 449 (D.C. Cir. 2013)). A decision that is not fully explained is to be upheld "if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974); *Ark Initiative*, 64 F. Supp. 3d at 91.

B. Each Challenged Final Agency Action Is Evaluated Based on the Record Before the Agency at the Time of That Specific Decision

It is well-settled that in APA cases judicial review is limited to the administrative record prepared by the agency for its decision. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978). Review is confined to the record that was before the agency when it made its decision, and not extra-record material that was not considered by the agency at the time that it took the challenged final action. *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976).

Each final agency action thus has an associated administrative record for that specific final agency action. *See* ECF Nos. 55, 181 (Notices of Lodging Administrative Record for Section 408 and Easement decisions, respectively). Therefore documents that post-date a given final agency action are not within the administrative record for the decision and should not be considered when reviewing that action, even if within the administrative record of a separate challenged final agency action. *See Stand Up for Cal.! v. U.S. Dep't of Interior*, 71 F. Supp. 3d 109, 120 (D.D.C. 2014).

V. ARGUMENT[7]

The Tribe's Motion for Partial Summary Judgment challenges two discrete final agency actions: first, the Corps' July 25, 2016 grant of permission under RHA section 408, and, second, the Corps February 8, 2017 grant of an easement under the MLA. Each decision is supported by its own administrative record. *See* Section IV.B, *supra*. Both records reveal that the Corps' decisions were well considered, fully consistent with applicable law, and that the Corps properly determined that the permitted portions of the Pipeline would not interfere with the Lake Oahe project's Congressionally-authorized project purposes and were in the public interest. Nor did the Corps breach any specific fiduciary duty identified in a treaty, statute, regulation, or executive order. The Corps complied with any obligations to the Tribe—including any duty to consult—by complying with generally applicable laws such as the MLA, RHA, NHPA, and NEPA.

A. The Corps' Grant of the Section 408 Permission at Lake Oahe Fully Complied with the Law

The Corps' July 25, 2016 decision to grant Dakota Access permission to construct the Pipeline beneath Lake Oahe and through adjacent federal lands was a reasonable exercise of the Corps' authority under Section 14 of the Rivers and Harbors Act, 33 U.S.C. § 408 ("Section 408"). Applying the two-part standard set forth in Section 408 and implementing Corps policies, the Corps appropriately concluded that the pipeline crossing would neither "impair the usefulness" of the Lake Oahe project nor "be injurious to the public interest." *See* Section 408 Decision Package, Ex. I at 71181; FONSI, ECF No. 172-2 at 71179. Cheyenne River's

[7] For purposes of this brief the Corps assumes the Tribe has been granted leave to amend its complaint, see ECF No. 97, but does not waive any arguments regarding the Tribe's Motion for Leave to Amend.

arguments that the Corps failed to consider the authorized purposes of Lake Oahe and improperly considered the benefits of transporting oil through the Pipeline are without merit.

Before turning to the merits, the Corps first objects to Cheyenne River's reliance on documents that are not part of the Corps' administrative record.[8] These documents were created after July 25, 2016, or otherwise were not before the Corps when it issued the Section 408 permission. Thus, they should not be considered in the Court's review of the 408 permission under the APA. *See* Section IV, *supra*.

Contrary to Cheyenne River's assertion, ECF No. 131 at 2 n.1, the *entire* administrative record for the 408 permission consists of documents pre-dating the July 25, 2016 decision. The administrative record was produced November 10, 2016, *see* ECF No. 55, giving Cheyenne River ample opportunity to review the record and move to supplement if it believed additions to the record were appropriate. Even if Cheyenne River had made such a request, any documents post-dating the July 25, 2016 decision are not appropriately part of the administrative record for the Section 408 determination.

1. The Section 408 Permission Was Supported by Substantial Analysis and Is Consistent with Corps Policy

Cheyenne River first questions the sufficiency of the analysis supporting the Corps' Section 408 permission, insinuating that the Corps rubber-stamped Dakota Access's work. Specifically, the Tribe argues that the Corps "relied exclusively upon" Dakota Access' work product and that the EA, FONSI, and related 408 decision documents contain only self-serving,

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[8] *See, e.g.*, Intervenor-Pl.'s Partial Mot. for Summ. J., ECF No. 131 at 10 (citing SMF ¶ 65 (citing Fischer Decl.; ECF No. 99-7); SMF ¶¶ 70, 72, 74-77 (citing Wilson Decl. & Attach. A); ECF No. 114-1; SMF ¶ 43 (citing ECF Nos. 117-5, 117-18, 117-23; Wilson Decl. & Attach. A; Martin Decl.); SMF ¶ 184 (citing ECF No. 65-1)); *Id*. at 16 (citing SMF ¶¶ 57-59 (citing Frazier Decl.)); *Id*. at 17 (citing SMF ¶¶ 46-56 (citing Fischer Decl.)); *Id*. at 19 (citing ECF No. 117-6).

"conclusory statements" that the proposed crossing satisfied Section 408. ECF No. 131 at 9-10. The administrative record directly contradicts these arguments. The Corps' Section 408 analysis and permission were developed consistent with Corps policy.

First, it is common practice for the project proponent to be involved in drafting NEPA documents, and in this case it was entirely appropriate for Dakota Access to draft the EA; indeed, Corps policy requires the applicant to submit all documentation necessary to satisfy NEPA. Engineering Circular 1165-2-216 § 7.c.(3)(c), ECF No. 73-15. Regardless, as explained *supra* Part II.A.2, the Corps was closely involved in the preparation, scoping, and development of the EA and conducted its own independent analysis of the information compiled and presented by Dakota Access before adopting the EA as its own. *See, e.g.*, EA, ECF No. 172-1 at 71228.

Importantly, numerous Corps personnel and offices analyzed and were involved in the preparation of the information in the EA, technical reports, and supporting documentation before reaching a conclusion that the proposed crossing would not impair any Lake Oahe project purposes or be injurious to the public interest. *See, e.g.*, Section 408 Decision Package, Ex. I at 71180, 71183. During the analysis period, the Corps frequently posed questions, pointed out deficiencies, and requested additional information, even over Dakota Access's objections, to ensure that the EA contained all of the analysis necessary to inform the Corps' decision under Section 408. The ProjNet Report, which included more than 175 comments by Corps personnel on the EA and follow-up discussions, shows the Corps' engagement on a wide range of issues. ProjNet Report, Ex. F at 72161-270; EA Comment Matrix, Ex. G at 73611-20. The Corps also routinely communicated its questions, concerns, and recommendations by email and during bi-weekly meetings. *See, e.g.*, Email from Brent Cossette, Corps, to Tom Sigauw & William Halon, Energy Transfer Partners (May 11, 2016), Ex. K at 72488; Email from Brent Cossette,

Corps, to Larry Janis, Corps (May 6, 2016), Ex. L at 72511; Meeting Invitation (Mar. 5, 2015), Ex. C at 75247-48.

2. The Corps Properly Concluded That the Lake Oahe Crossing Would Not Impair the Lake Oahe Project

The Corps diligently considered whether the pipeline crossing beneath Lake Oahe would impair the usefulness of the Lake Oahe project. Following almost two years of planning and analysis and independent reviews by multiple Corps personnel with varying expertise, the Corps reasonably concluded that the pipeline crossing, notwithstanding the remote chance of an oil release reaching the water, would not limit the ability of the Lake Oahe project to function as authorized and would not compromise or change any authorized project purposes. *See, e.g.*, Section 408 Decision Package, Ex. I at 71184; *supra* Part II.A.3.

The phrase "impair the usefulness of such work" in Section 408 is not further defined in the Rivers and Harbors Act. Under its written policy, before granting a 408 permission, the Corps must determine that the permission "will not limit the ability of the project to function as authorized and will not compromise or change *any* authorized project conditions, purposes or outputs." Engineering Circular 1165-2-216 ¶ 7.c.(4)(b)i, ECF No. 73-15 at 14 (emphasis added). The Court should defer to the Corps' interpretation of the phrase "impair the usefulness of" in Section 408 because the Corps has decades of expertise in managing civil works projects and evaluating risks to such projects. It is well-established that an agency's decision is entitled to particular deference when the agency is acting within the scope of its expertise. *Bldg. & Constr. Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258, 1266 (D.C. Cir. 1988) (citation omitted). The Corps' interpretation of Section 408 is a reasonable one.

For the Lake Oahe crossing, the Corps considered both the functionality of the Oahe Dam and Lake as well as the wide range of purposes served by the project in its Section 408 analysis.

After completing its analysis, the Corps concluded that the proposed crossing "will not limit the ability of either the Garrison or Oahe Projects to function as authorized and will not compromise or change any authorized project conditions, purposes, or outputs," including recreation, fish and wildlife, water supply, navigation, flood risk reduction, water quality, hydropower. Section 408 Decision Package, Ex. I at 71183-84. *See also* section II.A.2-3 *supra*. Given the low risk of a pipeline spill or rupture and the additional mitigation measure to avoid impacts to Lake Oahe, *see, e.g.*, FONSI, ECF No. 172-2 at 71176-77, it was reasonable for the Corps to conclude, based on nearly 200 years of experience managing navigation and other civil works projects, that the proposed crossing satisfied the first prong of Section 408.

Cheyenne River disputes the Corps' conclusion, arguing that "nothing in the EA FONSI, or the Section 408 Permit decision supports a determination that the granting of a Section 408 permit 'will not impair' the specific purposes of the [Missouri River] Mainstem System." ECF No. 131 at 15. As the preceding paragraph and citations to the record indicate, the Tribe is simply wrong. Further, the Tribe is erroneously interpreting the Flood Control Act, River and Harbor Act of 1945,[9] and Missouri River Mainstem System Master Water Control Manual ("Master Manual") as precluding the Corps from approving any alteration that could have even the slightest potential to interfere with beneficial consumptive uses of the Missouri River. *Id*. at 12-15. Congress has not so narrowly constrained the Corps' authority.

First, the Tribe misinterprets the policy section of the Flood Control Act, 33 U.S.C. § 701-1(b), and section 1(b) of the River and Harbor Act of March 2, 1945, ch. 19, 59 Stat. 10-11.

[9] The River and Harbor Act of 1945, cited by Cheyenne River, authorized the creation and improvement of various navigation projects. An earlier statute, the Rivers and Harbors Act of 1899, contained Section 408.

These Acts address prioritization of water use in general; they do not require denial of all requests for oil pipelines (or any other projects) simply because there is a chance, even if exceedingly low, of some negative consequence. In fact, the Corp's Missouri River Master Manual explicitly acknowledges that operation of a complex system like the Missouri River requires inherent flexibility. Master Manual § 1.02-4, ECF No. 131-3 at I-2. Moreover, the Tribe's interpretation would effectively prevent all linear infrastructure projects (*e.g.*, highways, railroads, pipelines, transmission lines) across the Missouri River, regardless of how small a risk those projects actually pose to the water. The existence of other pipelines and utility lines across the Missouri River, including in Lake Oahe, *see* FONSI, ECF No. 172-2 at 71174, is further evidence of the ability for utility projects and water supply to coexist within the Missouri Mainstem.

Cheyenne River also cites *United States v. Federal Barge Line, Inc.*, for the proposition that impairment of all uses of a project must be considered. ECF No. 131 at 8-9 (citing 573 F.2d 993 (8th Cir. 1978)). At issue in *Federal Barge Line* was whether a wrecked barge that obstructed (but did not physically damage) gates in a dam "impaired" the dam for purposes of Section 408. 573 F.2d at 996. The court concluded that Section 408 applied to any impairment, whether physical or not, to the usefulness of the dam. *Id*. at 997, but that conclusion does not advance the Tribe's case. The Corps' decision was not that a pipeline can never be an impairment to a Corps project. Instead, as discussed above, the Corps considered the full spectrum of ways that the Dakota Access crossing could impair the project, and concluded that it would not.

Thus, the Tribe's argument essentially amounts to a challenge of the sufficiency of the Corps' analysis of spill risks. But it is important to recognize that the proposal before the Corps

was whether to grant permission for Dakota Access to place a portion of the pipeline through 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 Corps concluded that such a spill was extremely unlikely given "the engineering design, proposed installation methodology, quality of material selected, operations measure, and response plans." EA, ECF No. 172-1 at 71311. Even so, the Corps addressed risk of "[a]ccidental releases from the pipeline system during operations," *id*. at 71269, and evaluated (and ultimately imposed) numerous mitigation measures to further reduce these already low risks, *e.g.*, FONSI, ECF No. 172-2 at 71176, EA § 6 & Table 8.2, ECF No. 172-1 at 71333-34, 71341-49, before concluding that the Lake Oahe project's purposes would not be impaired by a spill. Thus, the Corps fully considered the impairment of Lake Oahe.

3. The Corps Properly Concluded That the Lake Oahe Crossing Was Not Injurious to the Public Interest

The Corps diligently considered all relevant factors in concluding that the proposed crossing would not be injurious to the public interest. *See, e.g.*, Section 408 Decision Package, Ex. I at 71184. The Corps considered potential environmental, economic, cultural, social, and environmental justice effects of the proposed crossing, as well as potential cumulative effects. *See generally* EA §§ 3-4, ECF No. 172-1 at 71247-331; *see also* FONSI, ECF No. 172-2 at 71179; Section 408 Decision Package, Ex. I at 71181-85. Contrary to Cheyenne River's assertion, ECF No. 131 at 20, the Corps did consider the potential impacts of a spill on the Lake

as a source of drinking water. *See* EA, ECF No. 172-1 at 71262, 71311.[10] But the Corps also weighed the numerous measures that would mitigate against any risk of oil impacts to the Lake and its resources and risks of alternative methods of transporting crude oil, such as by truck or rail. *See supra* Part II.A.3. The Corps also considered the fact that the Dakota Access pipeline would be co-located with an existing pipeline and other utilities. *See, e.g.*, FONSI, ECF No. 172-2 at 71175.

Finally, Cheyenne River argues that the Corps improperly considered the benefits of the pipeline and was allowed to consider only congressionally authorized project purposes as benefits. ECF No. 20-21. Cheyenne River's argument conflates the project usefulness and public interest determinations, which are separate requirements to satisfy Section 408. Indeed, the Tribe's interpretation would render the public interest clause superfluous. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) ("[I]t is generally presumed that statutory language is not superfluous . . . ."). Under Corps policy, the public interest determination *requires* weighing "all those factors that are relevant in each particular case." Engineering Circular 1165-2-216 ¶ 7.c.(4)(b)ii, ECF No. 73-15 at 14. This includes balancing "[t]he benefits that reasonably may be expected to accrue from the proposal" against "its reasonably foreseeable detriments." *Id*. *See* ECF No. 131 at 20-21.

Thus, it was reasonable for the Corps to consider the benefits to the public of transporting crude oil through a pipeline more than 90 feet below Lake Oahe, *i.e.*, reduced risks of oil spills and more efficient transportation, when compared to the alternatives, *e.g.*, truck or rail transport.

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[10] The focus of the Corps' analysis of impacts on tribal water supply was the Standing Rock Sioux Tribe, because its reservation and water intakes were closest to the proposed crossing. EA, ECF No. 172-1 at 71262. However, this analysis would also apply to Cheyenne River, whose reservation is approximately 70 miles farther downstream.

It was also reasonable to consider the social and economic benefits of the pipeline. *See, e.g.*, *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1231 (10th Cir. 2008) (concluding that the district court did not abuse its discretion in giving greater weight to the public's interest in gas production and also certain financial interests over the threatened environmental injuries); *N. Slope Borough v. Andrus*, 642 F.2d 589, 594 (D.C. Cir. 1980) (denying injunctive relief after considering the "dual public interests of protecting the environment and enhancing oil-production capacity").

In sum, the Corps fully met the requirements of 408 and properly determined that the Lake Oahe crossing would not impair the Lake Oahe project. The Tribe has failed to demonstrative otherwise.

B. The Corps' Decision to Grant the Lake Oahe Easement Complied with the MLA

The Corps' issuance of an easement for the Pipeline's Lake Oahe crossing on February 8, 2017, fully complied with the MLA and the APA. The Tribe's arguments to the contrary misread the relevant statutes and the administrative record and must be rejected.

1. The Easement Is Fully Consistent with the Purpose of the Lake Oahe Project Pursuant to 30 U.S.C. § 185(b)(1)

Under the MLA, "[a] right-of-way through a Federal reservation shall not be granted if the Secretary or agency head determines that it would be inconsistent with the purposes of the reservation." 30 U.S.C. § 185(b)(1).[11] Under the Corps' MLA policy, the Corps is required to determine that the proposed action "must not adversely impact the capability of the project to

[11] The MLA uses the term "reservation" to refer to federally-owned or federally-managed lands subject to the MLA. Since the operative "reservation" under the MLA for purposes of Cheyenne River's motion for partial summary judgment is the Lake Oahe project, we use the term "project" or "Lake Oahe project" to avoid any confusion with discussions of the Cheyenne River or other tribal reservations.

generate the benefits for which the project was congressionally authorized, constructed, and is operated." ECF No. 172-9 at 90 (citing Engineering Regulation 1130-2-550, ¶¶ 17-3 and 17-9.b.(1) (2013)). For the Lake Oahe easement, the Corps analyzed the purposes of the Lake Oahe project and determined that the Congressionally authorized purposes included "flood control, navigation, hydropower, recreation, water supply, and water quality." *Id*. Based on the information in the Final EA and FONSI, as well as the Section 408 decision document, the Corps properly concluded that the installation of the Pipeline approximately 92 feet below the bed of the river "will not adversely impact the capability of [Lake Oahe] to generate the benefits for which the project was Congressionally authorized." *Id*. With specific reference to the MLA, in its December 3 Memorandum, the Corps stated "[a]s discussed above, at para. 5.a., pp. 2-3, the proposed easement would not be inconsistent with the authorized purposes of the Lake Oahe project." ECF No. 172-9 at 93. This straightforward finding is supported in the administrative record and fulfills the requirements of the MLA.

a) The Corps Properly Relied on Documents and Analysis from the Section 408 Determination in Conducting the MLA Analysis

The Corps sensibly used the extensive record for the 408 determination to conduct the required MLA analysis. There is no merit to the Tribe's assertion that the Corps was barred from relying on either the documents or substantive determinations from the earlier administrative process. It is common and efficient agency practice. *Portland Cement Ass'n v. E.P.A.*, 665 F.3d 177, 191 (D.C. Cir. 2011) ("Neither law nor logic requires EPA to spend its time and resources conducting a perfunctory cost analysis when doing so would duplicate information the agency already has before it."); *Colorado Wild Horse v. Jewell*, 130 F. Supp. 3d 205, 218 (D.D.C. 2015) (upholding BLM's reliance on a 2011 EA to support a 2015 project decision). The Tribe argues

that the Corps cannot rely on analyses related to the Section 408 approvals to support the issuance of the easement, but cites no authority for this proposition. ECF No. 131 at 37-38.

Moreover, the Tribe mischaracterizes the scope of the analysis the Corps completed during its Section 408 consideration. The Section 408 documents, including the EA and FONSI contain a comprehensive analysis of *all* the anticipated impacts associated with this portion of the Pipeline. *See generally* ECF Nos. 172-1; 172-2 (EA and FONSI). This is a far more searching inquiry than whether this portion of the Pipeline is in the public interest or consistent with the mission of the federal project under Section 408. Thus, the Court should reject any argument that the Corps skipped over any required part of the MLA Analysis.

b) Under the MLA, the Corps Properly Evaluated the Easement's Consistency with the Lake Oahe Project

The Corps properly defined the purposes of the project, and the Tribe's claims that the O'Mahoney Milliken Amendment restrict the purposes of the Lake Oahe project are incorrect. *See* ECF No. 131 at 40 (quoting 33 U.S.C. § 701-1 (b)). The Tribe argues that the Corps cannot satisfy MLA § 185(b)(1) because the O'Mahoney Milliken Amendment somehow restricts the purpose of the Lake Oahe project to solely "'consumptive uses' of water...'only to the extent that such activity does not conflict with present and future beneficial consumptive uses....'" *Id.* Unfortunately, the Tribe's selective quotation obscures the true meaning of that provision. The true text of the section the Tribe relies on states: "***The use for navigation***, . . . shall be only such use as does not conflict with any beneficial consumptive use, present or future . . . of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes." 33 U.S.C. § 701-1 (b) (emphasis added). By its terms, that paragraph is speaking only to navigation uses, not the purposes of the Lake Oahe project as a whole. This point is underscored by the preamble to the statute which states:

> [I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders . . . as herein authorized to preserve and protect to the fullest possible extent ***established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development*** . . . and which can be ***operated consistently with appropriate and economic use of the waters*** of such rivers by other users.

33 U.S.C. § 701-1 (emphasis added). The Tribe's reliance on 33 U.S.C. § 701-1 is misplaced, and only highlights why the Lake Oahe easement is entirely consistent with the stated Congressional policy of "comprehensive and coordinated development . . . consistent[] with appropriate and economic use of the waters . . . ." *Id.* Indeed, a Pipeline 92 feet under the bed of the river with no significant impacts to the waters of the lake fits squarely within the statute authorizing the Lake Oahe project as well as policy goals contemplated by Congress in the O'Mahoney Milliken Amendment.[12]

c) The Tribe's Remaining Arguments Are Unavailing

Finally, the Tribe's remaining protests about the Corps' MLA analysis merely restate their Section 408 arguments. The Tribe simply refers back to its analysis of the Section 408 permission documents arguing that the EA and FONSI for the Section 408 permissions did not analyze the impacts to the Congressionally authorized purposes of Lake Oahe and that the Corps failed to account for the effects of an oil spill being inconsistent with the purposes of the Lake

[12] Even if the O'Mahoney Milliken Amendment could be read as the Tribe intends, however, their argument would still fail. The Tribe has made no showing that the placement of a Pipeline well below the bed of Lake Oahe would have any impact on the described beneficial consumptive uses of water whatsoever. The EA and FONSI make clear that no impacts to water resources, including for domestic, municipal, irrigation, or industrial uses are expected. ECF No. 172-1; 172-2. Even in the extremely unlikely event of a release from the Pipeline, the Corps has identified a number of mitigation measures and easement conditions designed to minimize any potential impacts to those waters. *Id.*; *see also* ECF No. 172-11 at 38-43 (easement conditions). The Tribe has failed to carry its burden to establish that the Secretary's exercise of discretion under MLA § 185(b)(1) was somehow arbitrary or capricious.

Oahe project. ECF No. 131 at 40. As explained in more detail above, however, the Corps fully analyzed the impacts to Lake Oahe, including the remote potential of impacts from an oil spill. *See supra* Section V.A.2. The Tribe has not identified any reason to question the Corps' well-reasoned and heavily supported conclusion that the Lake Oahe easement is not inconsistent with the purposes of the project.

2. The Easement Includes Conditions That Comply with 30 U.S.C. § 185(h)(2)

The Lake Oahe easement contains all the stipulations required to comply with MLA § 185(h)(2). This provision states that "prior to granting a right-of-way . . . for a new project which may have a significant impact on the environment" the Corps must issue regulations or impose conditions regarding environmental protection. *See* 30 U.S.C. § 185(h)(2).[13] Among other requirements, the statute calls for the Corps to include easement conditions that "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." *Id.*[14] Here,

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[13] Notably, the Corps had already determined that the portion of the Pipeline requiring an easement under the MLA did not constitute a significant impact on the environment. ECF No. 172-1; 172-2. Therefore, it is doubtful that 30 U.S.C. § 185(h)(2) applies to the Lake Oahe easement. Nevertheless, the Corps imposed stipulations that satisfy 185(h)(2) in the final easement. ECF No. 172-11.

[14] The statute requires that these stipulations

> shall include, but shall not be limited to: (A) requirements for restoration, revegetation, and curtailment of erosion of the surface of the land; (B) requirements to insure that activities in connection with the right-of-way or permit will not violate applicable air and water quality standards nor related facility siting standards established by or pursuant to law; (C) requirements designed to control or prevent (i) damage to the environment (including damage to fish and wildlife habitat), (ii) damage to public or private property, and (iii) hazards to public health and safety; and (D) 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.

although the Corps had determined in July 2016 that this portion of the Pipeline would not have a significant effect on the environment (ECF No. 172-2), the Corps included specific easement conditions relating to the construction, operation, and maintenance of the pipeline to ensure that (1) the risk of a spill is minimized, and (2) in the unlikely event of a spill, that impacts from a spill are minimized. ECF No. 172-9 at 131 – 136 (listing special conditions). These conditions detail the types of construction, testing, and spill response measures that Dakota Access must implement as a condition of the easement. *Id*. For a pipeline project of this type, these are the types of conditions contemplated by the MLA (to the extent section 185(h)(2) would apply to this particular easement) to protect the interests of individuals living in the general area who rely on fish, wildlife, and biotic resources for subsistence purposes. The Pipeline is being installed well under the bed of Lake Oahe and has been determined not to have any significant impact on the environment, including fish, wildlife, or other biotic resources. ECF No. 172-2. As a result, the only potential for impacts stems from the unlikely event of a spill or leak that somehow impacts the waters of the Lake above the Pipeline. In compliance with its obligations under the MLA, the Corps included over twenty conditions designed to ensure that the risk of any spill is minimized, and that there are planned response actions designed to quickly detect and remediate any spill before it has a chance to impact fish, wildlife or other resources on which the Tribe relies.

The Tribe ignores all of these easement conditions, and argues that the Corps has violated the MLA because it has included only one condition that "even remotely relates to the

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30 U.S.C. § 185(h)(2). The Tribe does not contest the Corps' compliance with stipulations relating to categories (A), (B), and (C). *See* ECF No. 131 at 52.

protections required by Section 185(h)(2)." ECF No. 131 at 43. That easement condition is number 36, which states that Dakota Access is "responsible for commitments made and mitigation measures in the Final Environmental Assessment . . ., including all Plans include[d] within Appendices thereof, even if they are not specifically included in this easement." ECF No. 171-9 at 136. These include items such as the Environmental Construction Plan designed to ensure that Dakota Access minimizes the impacts from construction of the Pipeline. ECF No. 172-1 at 115 – 116; *see also* ECF No. 172-1 at 29 – 84 (outlining "Impacts and Mitigation" for each category of impacted resources). Far from being "remotely related" to protecting the Tribe's interests as contemplated in Section 185(h)(2), these mitigation measures are designed to protect the very resources the Tribe alleges are threatened by the grant of an easement. These direct mitigation measures, in addition to the numerous other easement conditions designed to minimize the risk of and impacts from a potential spill are exactly the types of conditions contemplated by Section 185(h)(2).

3. The Easement Does Not Violate Specific Trust Responsibilities

The Tribe's final argument under the MLA is that the easement violated certain trust duties. The Tribe's argument on this point is entirely derivative of its arguments regarding trust duties in Section III of its brief. *See* ECF No. 131 at 44. Those arguments are addressed in this brief at Section V.C, *infra*. *See also* ECF No. 172 at 39-43 (incorporated herein by reference).

In short, the Tribe has failed to carry its burden to identify any violation of the MLA. The Corps' decision to grant the Lake Oahe easement complied with Section 185(b)(1) and Section 185(h)(2), and is fully supported by the administrative record. The Tribe's motion for summary judgment on these claims should be denied, and judgment should be entered in the Corps' favor.

C. The Corps Did Not Violate Specific Trust Responsibilities Identified by Statute, Regulation, or Treaty

While there is a general trust relationship between the United States and Tribe that allows the government to consider and act in the Tribes' interests in taking discretionary actions, it does not impose a duty on the federal government beyond complying with generally applicable statutes and regulations. *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 895 (D.C. Cir. 2014); *see* ECF No. 172 at 50-51. Thus, unless the Tribe identifies a discrete "statute, treaty, or executive order" that creates a duty, *El Paso Nat. Gas Co*., 750 F.3d at 895, and shows the United States has breached it, there can be no claim for breach of trust. *Id.* The Tribe has failed to identify a specific fiduciary duty and show its violation, thus any claim premised on a breach of trust fails.

"The Government, of course, is not a private trustee." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173–74, (2011). The trust relationship with Tribes is defined and governed by statutes rather than the common law. *Id.* So the court cannot credit the Tribe's claims that the Corps has a duty to act "in accordance with the same standards as a private fiduciary" in its dealings with the Tribe. ECF No. 131 at 33. Nor has the Tribe cited any source of law that defines the trust duty it seeks to enforce. The Tribe cites the Corps' Master Manual which notes that the one of the purposes of the Manual is to "fulfill the Corps' responsibilities to Federally recognized Tribes." ECF No. 131 at 32. But the Manual does itself not *create* a new responsibility for the Corps, such as to act as a fiduciary, and the Tribe cites to no other portion of the Manual that imposes any other specific duty.

The Tribe also argues that the Corps has an unspecified general trust duty due to the Corps' "pervasive, and exclusive control over the Missouri River itself, and the entire project area." ECF No. 131 at 32. The Supreme Court has repeatedly made clear that "[t]he Federal Government's liability cannot be premised on control alone." *United States v. Navajo Nation*, 556

U.S. 287, 301 (2009); *see* ECF No. 172 at 50. Moreover, the cases Cheyenne River attempts to rely on are further distinguishable because they concerned the United States' control over a tribal trust resource, which the Missouri river is not. The Tribe has cited no case for the proposition that a trust duty can arise when the Corps exercises control over federal property and a federal project designated by Congress for multiple purposes—not solely for the benefit of a Tribe.

Next, the Tribe argues the Corps breached a duty to "ensure its actions did not violate the Treaty Rights of the Tribe," ECF No. 131 at 34. To the extent there is an explicit duty created in a Treaty, the Corps must of course comply with that duty. *El Paso Nat. Gas Co.*, 750 F.3d at 895. However the Tribe does not identify a discrete right originating in a specific treaty that the Corps has allegedly violated. The Tribe alludes to hunting, fishing and water rights but does not identify a specific duty or breach in its brief but there has been no breach of these duties.

The Corps has not abrogated the Tribe's hunting, fishing, or grazing rights on the shoreline or within Lake Oahe by permitting a pipeline beneath the Lake, or providing the necessary real estate interest associated with such permission. *See* Oahe Takings Act, Pub. L. No. 83-776, 68 Stat. 1191; Treaty of Fort Laramie, 11 Stat. 749, Sept. 17, 1851, 1851 WL 7655.[15] The Tribe argues that the EA found "there was a risk of a large impact on water quality to downstream users…but dismissed that risk." ECF No. 131 at 33. This is inaccurate. The Corps determined in the EA that a spill for this portion of the Pipeline was extremely unlikely given "the engineering design, proposed installation methodology, quality of material selected, operations measure, and response plans." ECF No. 172-1 at 71311. *See* ECF No. 172 at 22-28. Moreover, the Corps required significant emergency response measures that would mitigate the impact of any such spill. *Id.*

[15] The Tribe's factual background section cites to the 1851 Fort Laramie Treaty and 1868 Fort Laramie Treaty. ECF No. 131-1 at 38-40.

The Corps therefore did not "dismiss" the risk but studied it and required significant measures to mitigate this risk and any impacts from a spill, ultimately concluding reasonably that "[n]o impacts to treaty fishing and hunting rights are anticipated." ECF No. 172-1 at 71282.

The Pipeline, buried over 90 feet below Lake Oahe, will not reduce the Tribe's right to hunt and fish at the Lake. Only if there is an extremely rare and catastrophic rupture to the Pipeline at the crossing—that is not mitigated by the required safety and response measures—could there be potential impacts to the Tribe's hunting and fishing rights. Even in this scenario the Tribe's right to hunt and fish would not be forever abrogated, but rather temporarily impacted until cleanup could occur. Regardless, the Tribe has cited no case law that holds that it is a breach to permit an activity that, in the event it fails catastrophically, could impact a treaty right.[16]

Nor has the Corps diminished the Tribe's vested water rights under the *Winters* doctrine. ECF No. 172 at 41. The Tribe has a vested water right in Lake Oahe that "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); *see* ECF No. 158 at 35-36. This right does not give Cheyenne River 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), *aff'd*, 347 U.S. 239 (1954); *see* ECF No.

[16] The Tribe cites to *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*, a case where the Corps declined to grant a permit to operate a fish farm to a company on the basis that such an activity would interfere with Tribal fishing rights. Though not directly relevant here, the case is further distinguishable because in *Sea Farms* there was not a "risk" that the permitted activity would reduce a Tribe's right to fish—the proposed action would necessarily have this result as it would block Tribal members from accessing a "usual and accustomed" fishing spot. 931 F. Supp. 1515, 1518 (W.D. Wash. 1996).

172 at 52-54. Similarly, the Corps' Manual recognizes *Winters*-based vested water rights, *see* ECF No. 131 at 32, but does not create any additional rights. *Winters* rights are implicated when an upstream user diverts a Tribe's water such that they cannot grow food or otherwise sustain their reservation. *See Arizona v. California*, 373 U.S. 546, 600 (1963). That scenario is not present here. The Tribe has not demonstrated that the Corps was wrong to conclude "there are no anticipated impacts to water rights" as the Pipeline's construction or operation would not require water from Lake Oahe. ECF No. 172-1 at 71765. Again, the Tribe essentially argues that any risk to contamination of water is itself a reduction in the Tribe's water rights, but this is not the law. *See Hopi Tribe*, 782 F.3d at 667.

The Tribe further argues that the Corps failed to "impose strict liability" on Dakota Access and further "abdicated its responsibility under 30 U.S.C. § 185(x)(1) to impose liability on Dakota Access to the beneficiary of the Corps' trust responsibility – the Tribe." ECF No. 131 at 35-36. The Corps addressed liability to third parties—potentially including the Tribe—in condition 12c. of the Easement. ECF No. 172-11 at 0005 (stating "[t]he Grantee does hereby accept liability, if any, imposed by Federal and state statutes to third parties for injuries incurred in connection with the use and occupancy of the pipeline right-of-way"). The Tribe cites to 30 U.S.C. § 185(x)(1), but the Corps applied with the applicable portion of that subsection. *Compare* 30 U.S.C. § 185(x)(1)(The "agency head . . . may impose stipulations specifying the extent to which holders of rights-of-way and permits under this chapter shall be liable to the United States for damage or injury incurred by the United States in connection with the right-of-way or permit") *with* ECF No. 172-11 at 0005 (specifying the extent to which the grantee is liable to the United States in Easement condition 12.a.). Section 185(x)(2), does concern strict liability but it is discretionary and imposes no duty, providing "[t]he Secretary or agency head

may, by regulation or stipulation, impose a standard of strict liability." 30 U.S.C. § 185(x)(2) (emphasis added). There has been no breach of this provision.

Last, the Tribe lists six items that it argues render the Corps' actions "unconscionable" such that they must be struck down. ECF No. 131 at 36. However, above, the Corps was reasonable to rely on the applicant as well as its own personnel to evaluate the environmental impacts of the Pipeline, *see* Section II(A)(2) *supra*, and did not "hide" important information on the project. *See* Section V(D) *infra*. But even if the Corps had taken these actions, the Tribe has not identified a specific law, regulation, or treaty that they violate, *cf.* ECF No. 131 at 36, and this court is not empowered to overturn agency action on the basis that it is "unconscionable." *Cf.* 5 U.S.C. § 706(1).

D. The Corps Properly Consulted with the Tribe

The record reveals the Corps did consult with Cheyenne River throughout the multi-year administrative processes leading up to the Section 408 permission. The Corps consulted under both NHPA and NEPA and this consultation went above and beyond what was legally required. Indeed, the only substantive consultation requirement that applies to this case is the NHPA section 106 process, which the Tribe does not challenge in this brief. Instead Cheyenne River cites to guidance documents, alleged fiduciary duties and NEPA regulations. But the Tribe has not established that this authority requires additional process. The extensive consultation apparent in the record is more than sufficient to meet any duty to consult.

1. The Corps Engaged in Robust Tribal Consultation over a Two-Year Period

The record reveals a consultation process beginning in October 2014 and consisting of correspondence, meetings, and explicit consideration of Cheyenne River's comments on the draft EA and, to the extent it agreed to participate, in the NHPA process. Corps' Opp'n to Tribe's

Mot. for Prelim. Inj., ECF No. 127 at 14-15; *see* Mem. Op., ECF No. 39 (Sept. 9, 2016); Mem. Op., ECF No. 158 (Mar. 7, 2017). As this Court noted, "the Corps has documented dozens of attempts it made to consult with Standing Rock Sioux from the fall of 2014 through the spring of 2016 on the permitted [Pipeline] activities." Mem. Opinion 33, ECF No. 39 (Sept. 9, 2016). This Court also noted that "it appears that the Corps exceeded its NHPA obligations…" *Id.* at 48. As discussed below, these findings apply equally to the Corps' consultation efforts with Cheyenne River.

Cheyenne River argues incorrectly that the Corps did not invite any consultation until a November 14, 2016 Letter from the Corps. ECF No. 131 at 25. As noted in its own brief, Cheyenne River had multiple exchanges of comments and concerns with the Corps well before November 2016. *See* ECF No. 131 at 28-29 (citing 5 instances of communication regarding the Pipeline between November 2015 and February 2016). NHPA section 106 consultation began in October 2014 when the Corps sent an informational letter regarding bore testing. EA, ECF No. 172-1 at 71304. That letter requested any Tribe with comments or concerns or that wish to consult on the matter to contact the Corps. Letter from R. Harnois (Oct. 24, 2014), Ex. N at 67131.

Concurrent with NHPA consultation, the Corps' Omaha District undertook an extensive NEPA process that began with scoping, followed by publication of a draft EA on December 8, 2015 that was circulated for public comment. EA, ECF No. 172-1 at 71225. But even before publishing the draft EA, the Corps had already thoroughly consulted with Cheyenne River about the Tribe's concerns. *See* Letter from S. Vance, Cheyenne River to R. Harnois (Aug. 17, 2015), Ex. N at 69815 (comments from Cheyenne River and Standing Rock regarding the sufficiency of the EA, water quality concerns, and cultural considerations); *see also* R. Harnois Notes (Aug. 17,

2015), Ex. O at 66995 (concerns that the Corps had not gotten comments back from Cheyenne River); Letter from Col. Henderson to Chairman Frazier (Sept. 3, 2015), Ex. P at 66947-49 (noting that section 408 consultation had been initiated and that Corps would like to consult regarding the Pipeline);[17] Letter from J. Price to S. Vance (Nov. 19, 2015), Ex. Q at 66830 (stating the draft EA's availability for public comment in mid-December 2015 and providing contact information for questions regarding the draft EA). These written communications were buttressed by the Corps' invitation to Cheyenne River to "weigh in on [the Pipeline] including via site visits and meetings." Mem. Op., 10, ECF No. 158 (Mar. 7, 2017) (citing to Decl. of R. Harnois, ¶¶ 12-30, ECF No. 127-5); Letter from M. Chieply to Chairman Frazier (Nov. 20, 2016), Ex. R at 66820.

Following publication of the draft EA, the Corps continued its NEPA comment and NHPA consultation process with the Tribe. Indeed, the Corps received comments on the draft EA from multiple sources including Cheyenne River. EA App. J, ECF No. 172-4 at 71757, 71766;[18] Letter from S. Vance to Col. Henderson (May 19, 2016), Ex. S at 64221 (comments and concerns regarding the Pipeline project); Letter from Chairman Frazier (Jun. 3, 2016), Ex. T at 64137. The Corps also followed up with Cheyenne River to address its concerns. *See* Letter from Col. Henderson to Chairman Frazier (May 6, 2016), Ex. U at 64300; Phone Calls to Chairman Frazier (Feb. to Mar. 2016), Ex. V at 66310, 66394; Letter from M. Chieply to S. Vance (Jun. 13, 2016), Ex. W at 67704-13 (including full responses to questions as an

[17] This letter directly rebuts Cheyenne River's assertion that "the Corps never issued a letter to the Tribe inviting consultation on Section 408 permitting. . ." ECF No. 131 at 30.

[18] Cheyenne River incorrectly states that Appendix J "included no comments from the Tribe" and "shows the length to whichthe Corps went to exclude the Tribe from its analysis." ECF No. 131 at 29. Appendix J explicitly states Cheyenne River provided comments and also states those comments. EA App. J, ECF No. 172-4 at 71757, 71766.

attachment); Letter from M. Chieply to S. Vance (Jul. 8, 2016), Ex. X at 64038 (noting letters, emails, and phone calls regarding the Pipeline and cultural resources). The Corps and Cheyenne River also engaged in NHPA consultation in person. Cheyenne River's Tribal Historic Preservation Officer ("THPO"), Steve Vance, participated in a December 2015 meeting with the Corps. Ex. Y at 66810; *see also* Decl. of Joel Ames, ECF No. 21-17, Ex. 17. And Mr. Vance again met with the Corps on February 18 and 19 2016. Ex. Z at 66420, 66415 (providing comments on the adequacy of the EA and concerns about pipeline safety). As a result, the final EA establishes a good faith effort to consult with Cheyenne River and other tribes, incorporates tribal comments, and discusses the Corps' NHPA consultation process with the Tribes. FONSI, ECF no. 172-2 at 71175-76.

This lengthy consultation process refutes Cheyenne River's inadequate consultation claims. The only substantive sources of a duty to consult arise under the NHPA, while NEPA regulations provide an instruction to "consult early." The Tribe does not raise the NHPA in its summary judgment brief, and the Corps went above and beyond any possible NEPA instruction to "consult early" with Tribes and stakeholders. Indeed, the Corps went out of its way a number of times to seek input from Cheyenne River. *See* R. Harnois Notes, Ex. O at 66995; Letter from J. Price to S. Vance, Ex. Q (Nov. 19, 2015) at 66830.

Additionally, Cheyenne River's allegation that the Corps' NHPA consultation is deficient is unavailing. ECF No. 131 at 22. Cheyenne River's refusal to label its meetings, letters, and communications with the Corps as consultations does not change the fact that these exchanges occurred. Cheyenne River cites to a November 2015 Corps email to suggest government-to-government consultation did not occur, but fails to acknowledge that the Corps met with Mr. Vance, Cheyenne River's THPO, in December 2015 and again in February 2016. Ex. Y at

66810, Ex. Z at 66415; Decl. of M. Chieply, ECF No. 21-18 ¶¶ 18, 22-24. These consultations occurred in addition to a January 2016 consultation that Cheyenne River chose not to attend. AR66740. The parties also engaged in multiple letter exchanges to fully flesh out Cheyenne River's concerns. These exchanges continued, in good faith, for more than two years and provided more than enough time for Cheyenne River to identify areas of importance.

Cheyenne River next argues that the Corps' alleged "refusal to disclose the Oil Spill Analysis, Facility Response Plan, and Environmental Justice Memorandum ensured the Tribe could not participate meaningfully in any consultation…" ECF No. 131 at 30. The Tribe has cited no law for the proposition that each document supporting an EA must be disclosed, and it is common for agencies to provide for public comment on a draft EA rather than each document the draft relied on.

Regardless, the Corps made a good faith effort to provide the Tribe and public at large with documents needed to evaluate the proposed project. Cheyenne River alleges that the Corps "hid" key documents including EA Appendix J, the Facility Response Plan, and an uncited environmental justice memorandum, ECF No. 131 at 28, but this is not accurate. First, a draft of the Facility response plan was included in the EA. App. L, Ex. AA at 71779. Appendix J was also included with the EA and could not have been included earlier because it consists in large part of responses to comments received on the draft EA. Moreover, the Corps did not "hide" these documents but in fact discussed them with the Tribe directly, including at a December 2, 2015 meeting. Further, the Corps worked with the Tribe and Dakota Access to provide copies of these documents to the Tribe in a way that was consistent with the Dakota Access's concerns about security and the Corps' responsibilities to protect potentially sensitive security information contained within these documents. *See* Declaration of William R. Perry, ECF No. 166. That the

parties were not able to agree to the terms of a confidentiality agreement that would have allowed the Tribe to retain copies of these documents is not an indication that the Corps "hid" documents or in any way acted contrary to law. Nor has Cheyenne River identified how access to unreacted versions of these documents were required for consultation to occur.

Finally, Cheyenne River argues that the Corps' decisions were pre-determined. ECF No. 131 at 24. Not so. In an attempt to establish predetermination, the Tribe cites a number of preliminary assessments from, *inter alia*, the Corps Engineering Division and Water Control and Water Quality Branch. ECF No. 131 at 24. But just because lower level officials indicated preliminary approval does not show that the ultimate decision maker had impermissibly pre-determined the outcome of his inquiry. This is true even if individuals at the agency have a preferred outcome so long as the decision is justified by a rational view of the evidence before the agency and the agency did not irreversibly commit itself to any outcome before undertaking the required analysis. *See, e.g.*, *Comm. of 100 on the Fed. City v. Foxx*, 87 F. Supp. 3d 191, 205-06 (D.D.C.), *reconsideration denied*, 106 F. Supp. 3d 156 (D.D.C.), *and stay denied pending appea*l, No. 15-5112, 2015 WL 4072321 (D.C. Cir. May 27, 2015), *and appeal dismissed*, No. 15-5112, 2015 WL 5210462 (D.C. Cir. July 1, 2015); *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712, 714 (10th Cir. 2010). Moreover, it is black letter law that the agency's final decision, rather than preliminary internal discussions are what the court evaluates in an APA case. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658-59 (2007); *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001-02 (D.C. Cir. 1999).

The multi-year process of meetings, correspondence, and direct responses to the Tribe's concerns, *see* EA, ECF No. 172-1 at 71303-04, 71309-11, belies the argument that the Corps failed to consult with the Tribe. The Corps went above and beyond any consultation requirement

present in law, and made a good faith and sustained effort to involve the Tribe in its decisionmaking, and expressly consider and respond to the Tribe's concerns.

2. There Is No Legal Requirement for Additional Consultation

The Court should reject the Tribe's attempts to find additional, mandatory consultation requirements in Department of Defense ("DoD") Instruction 4710.02 ("Instruction"), the Corps' general fiduciary duty to the Tribe, or the Corps' NEPA's regulations. *See* ECF No. 131 at 22. None of these bases creates a duty to consult at all—but to the extent such consultation was required, the record reveals it occurred in this case.

DoD Instruction 4710.02 is a guidance document and thus is presumed non-binding unless there is evidence or practice to the contrary. *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 228 (D.C. Cir. 2007). While guidance documents may be binding if they threaten enforcement against, or create legal consequences for a third party regulated entity, neither situation is present here. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000); *see also Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d. 45, 48 (D.C. Cir. 2000). Here, the guidance only provides suggestions for DoD components. Instruction §5. Therefore this guidance cannot be the basis for the Tribe's claim that the Corps violated a duty to consult.

Section 6.3 of the Instruction provides that the Corps should undertake consultation where its actions may *significantly affect* (1) protected trust resources, (2) tribal rights, or (3) Indian lands. DoD Instruction 4710.02 at 4, Section 5.3.4 and 6.1, ECF No. 131-4 at 26.[19] But

[19] Cheyenne River also extraneously cites to the Water Resource Development Act ("WRDA"), Pub. L. No. 114-322 §, 130 Stat. 1628, § 1120(c), which requests certain reports for congressional committees and does not cite to, otherwise mention, or provide support for the DoD Instruction. The Pipeline is not a WRDA project. Therefore this statute is irrelevant to this case. Cheyenne River also cites to Instruction §6.6 which says "DoD Components shall involve tribal governments early in the planning process for proposed action…" *Id.* §6.6. As discussed

here, the Corps concluded in the FONSI that that the Corps' actions would *not* significantly affect the human environment, including tribal hunting, fishing, or water rights or tribal lands. ECF No. 172 at 33; EA, ECF No. 172-1 at 71272. This conclusion was confirmed during various follow up reviews. *See* ECF No. 172 at 17, 19. Therefore on its own terms the DoD guidance imposed no additional consultation requirement. But even assuming there were such a requirement, as discussed above, the Corps more than satisfied it in this case.

Next, Cheyenne River alleges the Corps has a general fiduciary duty—not based in a specific treaty or statute—to consult with the Tribe. ECF No. 131 at 23. As discussed in Section V.C, in the absence of specific fiduciary duties identified by law, treaty, or regulation, the government's general trust responsibilities are discharged by compliance with generally applicable regulations and statutes.[20] *See* ECF No. 172 at 50.

Third, Cheyenne River argues that an agency has a binding duty to consult "when the agency has an announced…[] consultation policy and the Tribes have come to rely on that policy." ECF No. 131 at 23. To support this statement, Cheyenne River cites to multiple cases that all refer to the internal consultation policies of the U.S. Department of Interior's Bureau of

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in Section V.D.1, *supra*, the Corps went above and beyond its guidance and consulted with Cheyenne River, beginning as early as October 2014 and throughout the process.

[20] In support of this argument, Cheyenne River cites to three unpublished opinions from the Ninth Circuit that are unrelated to the Corps and which do not demonstrate any specific duty to consult imposed on the Corps. *Id. See Ctr. for Biological Diversity v. Salazar*, No. 10-2130-PHX-DGC, 2011 WL 6000497, at *11 (D. Ariz. Nov. 30, 2011) (finding a group of Tribes did not establish consultation standards for the Bureau of Land Management under the Endangered Species Act); *Klamath Tribes v. United States*, No. 96-381-HA, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996) (where the Court relied on U.S. Forest Services' previous acknowledgement of a need to consult with an Indian Tribe regarding timber resources rather than any specific duty); *Confederated Tribes and Bands of Yakama Nation v. USDA*, No. cv-10-3050-EFS, 2010 WL 3434091, at *2 (E.D. Wash. Aug. 30, 2010) (U.S. Department of Agriculture offered that it planned to consult as required by the NHPA).

Indian Affairs ("BIA") – not the Corps. *Id.* Even if these policies were binding on BIA, BIA's internal policies are not binding on the Corps.

Moreover, to the extent that the Cheyenne River may argue that it relied on the Corps' Tribal Consultation Policy, the Corps acted in compliance with that non-binding policy.[21] The Corps' Tribal Consultation policy's definition of consultation states, in part, that to the extent possible, consultation should include an active and respectful dialogue concerning the Corps' actions. Tribal Consultation Policy § 3.b., ECF No. 131-3, Ex. C at 195. To accomplish this, consultation is conducted at the district or division level under the guidance of a person who effectively interacts with Tribes. *Id.* at § 5.d.(3). The Corps should, among other tasks, maintain open lines of communication during the decision making process, provide Tribes with points of contact for project-related issues, and encourage partnership on projects with Tribes wherever possible. *Id.* at § 6. As noted above, the Corps acted consistent with this policy and kept open lines of communication and actively and respectfully engaged in dialogue with Cheyenne River through appropriate points of contact.

Additionally, in regard to the argument that the Corps is required to turn over certain documents, Cheyenne River has identified no law that requires disclosure of the documents the Tribe references—in order to foster consultation or otherwise.[22] ECF No. 131 at 38. Indeed, in preparing an EA, an agency has significant discretion and need only involve the public, "to the

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[21] Like DoD Instruction 4710.02, the Corps' Tribal Consultation Policy is non-binding and does not, nor was it intended to, create any legally enforceable rights. *See* Tribal Consultation Policy fn. 2, ECF No. 131-3, Ex. C at 197.

[22] The cases the Tribe cites are not analogous here. *Yankton Sioux Tribe*, does not involve challenges under any of the relevant statutes at issue here. 442 F. Supp. 2d at 776. Similarly, *Pueblo of Sandia v. U.S.* and *Quechan Tribe* are NHPA cases, and the Tribe does not raise the NHPA in this brief.

extent practicable." *Biodiversity Conservation All. v. U.S. Bureau of Land Mgmt.*, 404 F. Supp. 2d 212, 220 (D.D.C. 2005) (quoting 30 C.F.R. § 1501.4(b)); *see also Taxpayers of Mich. Against Casinos (TOMAC) v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006); *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677, 698 (10th Cir. 2015) (Agencies can "[shield] from public notice and comment the documents the EA relied upon. . . .").

Finally, Cheyenne River alleges that the Corps had a duty under NEPA to consult "early" with the Tribe. *See* 40 C.F.R. § 1501.2(d)(2) (Agencies shall "[p]rovide for cases where actions are planned by private applicants . . . so that . . . [t]he Federal agency consults early with . . . Indian tribes . . . when its own involvement is reasonably foreseeable.").[23] As discussed in detail above, the Corps did engage with Cheyenne River early – approximately two years before publication of the final EA. Accordingly, Cheyenne River has not provided any basis for a violation of § 40 C.F.R. 1501.2(d)(2) or any other source of an alleged duty to consult.

VI. CONCLUSION

Extensive and expert analyses supported the Corps' Section 408 determination and decision to grant the easement. The Corps reasonably found that neither action would impair Lake Oahe, and that the Pipeline crossing was in the public interest. The Tribe has identified no arbitrary and capricious action, nor has the Tribe identified any breach of a trust duty arising from a substantive Treaty, statute, or regulation. For the foregoing reasons, Cheyenne River's Motion for Partial Summary Judgment should be denied and the Corps' Motion for Partial Summary Judgment should be granted.

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[23] Cheyenne River cites *Quechen Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior* as a supposedly analogous case to support an alleged violation of 40 C.F.R. § 1501.2(d)(2) here. 755 F. Supp. 2d 1104, 1119 (S.D. Cal. 2010). However, *Quechen* turned on defects with BLM's NHPA consultation – not NEPA. *Id.* at 1119 ("the Tribe . . . was not adequately consulted as required under NHPA . . . .").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 23rd 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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