IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DAKOTA ACCESS, LLC'S CONSOLIDATED (1) RESPONSE IN OPPOSITION TO PLAINTIFF CHEYENNE RIVER SIOUX TRIBE'S MOTION FOR SUMMARY JUDGMENT AND (2) CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Statutes

Regulations

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Rules

Administrative Materials

Other Authorities

INTRODUCTION

Cheyenne River Sioux Tribe's summary judgment motion should be denied for all the reasons that the Standing Rock Sioux Tribe's motion falls short, and then some. Cheyenne River, like Standing Rock, objects to the outcome of a process, but the statutes on which its claims are based give it a right to no more than the very procedures that the agency here faithfully implemented. Both Tribes also chose to file these early summary judgment motions on claims for which the administrative record had not yet been compiled. And both rely on reports they procured from consultants who merely disagree with the U.S. Army Corps of Engineers' conclusions, even though the law is clear that disagreement with the outcome (or even a quarrel with the agency's analysis) does not make out an Administrative Procedure Act violation, especially when the reports were exceedingly tardy and are riddled with mistakes.

Cheyenne River's motion introduces new arguments that suffer from these same flaws and more. For example, the Tribe accuses the Corps of failing to follow laws that govern conduct unrelated to the approval at issue here. This pipeline—buried more than 90 feet below Lake Oahe in North Dakota—is not a use of that lake for "navigation;" it does not alter the water level of either the lake or the Missouri River; and it does not amount to a "consumptive use" of any waters. Yet the Tribe stakes its arguments on statutes, regulations, and manuals that govern navigational uses, water level management, and consumptive uses.

Cheyenne River also accuses the Corps of failing to engage in consultation, but that argument rests on a materially incomplete and even false description of the interactions between the Corps and the Tribe. The Corps made many efforts to consult with the Tribe—only to have the Tribe ignore or refuse those opportunities. Cheyenne River cannot be heard to complain that it eventually failed in its political maneuver to reverse decisions that the Corps had made months

earlier, when the Tribe deliberately passed up many chances at consultation *before* the Corps made the decisions about which the Tribe complains.

The Tribe's accusations that the Corps did not consider treaty and trust obligations are wrong for two reasons. First, Cheyenne River did not submit any timely comments to the draft Environmental Assessment (and, even so, the Corps did consider and directly respond to its untimely submissions). Second, when the Corps considered and addressed comparable trust and treaty concerns that Standing Rock raised, it satisfied whatever duty it may have had to consider the same for a tribe that is 70 miles *further* from the crossing.

Finally, Cheyenne River raises objections to the easement itself, but its arguments ignore all of the ways in which the Corps's earlier determinations under Section 408 of the Rivers and Harbors Act apply equally to the easement decision. As for those Mineral Leasing Act requirements that do not overlap with the determinations the Corps made in July 2016, Cheyenne River ignores the wording of the Act and mischaracterizes the determinations that the Corps made and the stipulations it added to the easement—including stipulations resulting from the recent extra tribal consultation that the law did not even require the Corps to conduct.

The Corps has advised that it will be filing a cross-motion for partial summary judgment against Cheyenne River, as the Corps did with respect to Standing Rock. Dakota Access joins in that motion for the reasons articulated by the Corps as well as those set forth in this pleading.

BACKGROUND

Dakota Access's opposition to Standing Rock's motion for summary judgment sets forth the relevant factual and background information. To avoid unnecessary repetition of the background and the facts, Dakota Access refers the Court to that opposition brief. Additional facts necessary to respond to Cheyenne River's motion for summary judgment are set forth in the relevant argument section below.

Local Rule 7(h)(2) states that no separate statement of material facts is required for a "cas[e] in which judicial review is based solely on the administrative record." Cheyenne River filed such a statement anyway, in an unsuccessful effort to avoid the impropriety of seeking summary judgment on claims for which the administrative record was not yet available. Dakota Access objects to the Tribe's tendentious 50-page, 205-paragraph statement. It is not a "statement of material facts as to which the moving party contends there is no genuine issue." Local Rule 7(h)(1). Instead, it focuses on legal arguments; it contains immaterial facts; it is far from limited to undisputed facts; and it is often inaccurate, incomplete, or misleading.

INCORPORATION OF OPPOSITION TO STANDING ROCK'S SUMMARY JUDGMENT MOTION

Cheyenne River has joined in Standing Rock's Partial Motion for Summary Judgment. Mot. 8. Dakota Access incorporates by reference its brief opposing the Standing Rock motion.

ARGUMENT

Cheyenne River concedes that this challenge to agency action under the Administrative Procedure Act is subject to the deferential arbitrary-and-capricious standard. *See* Mot. 6. Accordingly, the Corps's action must be upheld so long as it "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). This standard is "[h]ighly deferential" and "presumes the validity of agency action." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000). It is easily satisfied here.

I. The Corps's Decision To Grant A Section 408 Permit Was Well-Reasoned And Amply Supported By The Record.

Section 14 of the Rivers and Harbors Act ("RHA"), codified at 33 U.S.C. § 408 (and thus often referred to as Section 408), provides the statutory framework under which the Corps may allow persons to occupy, alter, or use a public work of the United States. Under Section 408, the Secretary of the Army may, "on the recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation or use of" such public works "when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work." 33 U.S.C. § 408(a). This authority has been delegated to District Engineers (also called District Commanders). *See*, *e.g.*, *Policy and Procedural Guidance for Processing Requests to Alter U.S. Army Corps of Engineers Civil Works Projects Purs[u]ant to 33 USC 408*, Engineering Circular 1165-2-216 § 6(t), 7(c)(8)(b) (Sept. 30, 2015).

Cheyenne River contends that the Corps acted arbitrarily and capriciously in determining, after a multiyear review process and extensive written analysis, that the Dakota Access pipeline "will not be injurious to the public interest and will not impair the usefulness of" the Lake Oahe project. 33 U.S.C. § 408(a); *see* Mot. 8-21. The Tribe even goes so far as to assert that this extensive "approval process" was "breathtakingly fast." Mot. 2-3. Cheyenne River's position is manifestly incorrect.

A. Given the overlap between the Section 408 and NEPA analysis, the Corps rationally conducted a single environmental assessment that ensured compliance with both statutes—a practice Congress has since mandated by amending Section 408. *See* 33 U.S.C. § 408(b)(1)(A).

As Dakota Access explained in its opposition to Standing Rock's motion for summary judgment, this extensive, multiyear process fully discharged the Corps's duties under both NEPA and the RHA. More than a year after Dakota Access began the process of obtaining regulatory

approvals to place an oil pipeline deep below the bed of Lake Oahe, *see* AR OAHE34 (Ex. A), the Corps published and sought public comment on a draft Environmental Assessment ("draft EA") that provisionally found no significant environmental impact. *See* D.E. 6-19 (Ex. B), at 1.[1] The Corps specifically requested comments from Cheyenne River on the draft EA, *see* D.E. 21-20 (Ex. VV) ¶ 8 (notice of draft EA sent to Cheyenne River with comments due January 8, 2016), but the Tribe did not comment within the established period; instead, it submitted letters months later, *see* AR 68220 (May 2, 2016 letter) (Ex. II); AR 67923 (May 19, 2016 letter) (Ex. HH). Notwithstanding the Tribe's disregard of the administrative process, the Corps considered and responded to these letters. *See* AR 64062 (Ex. JJ); AR 64120 (Ex. KK).

On July 25, 2016, after reviewing all comments, the Corps published a Final EA, a finding of no significant impact (also known as a FONSI), and permission under Section 408 (also called a Section 408 permit). *See* AR 71220 (Ex. L); AR 71174 (Ex. M) (finding of no significant impact); AR 71180 (Ex. LL) (Section 408 permit). The main body of the EA is 163 pages long and supported by hundreds of pages of appendices.

As Dakota Access has explained, the EA addresses the potential effects of the pipeline on mineral resources, water resources, vegetation, agriculture, wildlife, aquatic life, cultural and historic resources, and numerous other topics. *See* D.E. 159, at 6. The EA contains the Corps's determination that the risk of an "inadvertent release" was "extremely low" given "the engineering design, proposed installation methodology, quality of material selected, operations measures and response plans." AR 71311 (Ex. L).

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[1] Due to the overlap in plaintiffs' summary judgment motions, Dakota Access is using one set of exhibits for both motions. Thus, Exhibits A through CC are the same exhibits found at D.E. 159-1 (Dakota Access's exhibits supporting opposition to SRST Motion for Summary Judgment). Exhibits DD through VV are newly cited in this brief. All exhibits cited in this Response Brief are included in the attachment filed with the brief: *i.e.*, Exhibits A, B, L, M, S, Y and DD-VV.

The EA further addresses comments about spill risks by detailing the numerous steps that Dakota Access took to "minimize the risk of a pipeline leak," such as "[p]ipe specifications that meet or exceed applicable regulations," "[u]se of the highest quality external pipe coatings," "inspection and testing programs," "continuous . . . pipeline monitoring that remotely measures changes in pressure and volume on a continual basis," a "Leak Detection System" that "monitor[s] the pipeline for leaks via computational algorithms performed on a continual basis," and routine "[a]erial surveillance inspections . . . to detect leaks and spills as early as possible, and to identify potential third-party activities that could damage the pipeline." AR 71266-67 (Ex. L). And the EA explains that, "in the unlikely event of a pipeline leak, response measures to protect the users of downstream intakes will be implemented to minimize risks to water supplies." AR 71262-63 (Ex. L); *see* D.E. 159, at 7-8 (describing the inclusion of a facility response plan and site-specific resources and response measures).

This analysis fully supports the legality of the Corps's decision to grant the Section 408 permit, which the Corps reached after finding that the pipeline will neither harm the public interest nor impair the usefulness of the federal project. It defies reality for the Tribe to assert that the "basis for the permit is woefully insufficient," containing "only conclusory statements" with "no rationale," and "conclusory and unsupported suppositions." Mot. 9-10. And the Tribe is flat-out wrong when it states that Section 408's language was only "reference[d]" in a single "cursory . . . paragraph" in "the EA FONSI" that "lack[ed] any analysis." *Id.* at 10. The hundreds of pages that make up the main body of the EA and its supporting appendices are more than sufficient to justify the Section 408 permit. *See* AR 71220-997.

The extensive support for the Corps's conclusion easily distinguishes this case from *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670 (D.D.C. 1997) (cited at Mot. 10),[2] where the acting director of the Fish and Wildlife Service *rejected* a "50-page recommendation" prepared by the agency's own experts in "a 5-page memorandum that cited no scientific study" and "merely stated a number of conclusions that directly contradicted the conclusions of the" experts. *Defenders of Wildlife v. Jewell*, 68 F. Supp. 3d 193, 211 (D.D.C. 2014) (citing and distinguishing *Babbitt*), *rev'd on other grounds sub nom. Defenders of Wildlife v. Zinke*, — F.3d —, 2017 WL 836089 (D.C. Cir. Mar. 3, 2017). The extensive support in the administrative record here also distinguishes this case from *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2004) (cited at Mot. 18), where the agency "ignored record evidence" relevant to the inquiry. *Id.* at 867. Cheyenne River did not timely submit comments, and it does not even point to anything in those untimely comments or anywhere else in the record leading up to the Section 408 determination that the Corps ignored.

This case contrasts with *Ocean Advocates* in two other important ways. This is not a case where the effects of the type of project (an oil pipeline installed beneath the ground) were "highly uncertain" or "involve unique or unknown risks." Mot. 18-19. Nor is it one where the agency improperly relied on only "self-serving claims" by the applicant that overall industry activity will remain the same after agency approval. Mot. 18. Instead, the Corps concluded that "approval of the Proposed Action is not anticipated to have a cumulative impact of increasing production or reliance upon non-renewable resources" because another agency—the North Dakota Industrial

[2] The Tribe mistakenly calls *Babbitt* a "D.C. Circuit" decision. Mot. 10.

Commission's Department of Mineral Resources Oil and Gas Division—had previously determined that "the critical factors limiting the rate at which the industry grows within North Dakota is the availability of drill rigs and hydrofracing crews." AR 71322 (Ex. L).

B. The Tribe raises five categories of other objections specific to the Corps's Section 408 permitting decision here. None has merit.

1. The Tribe argues that by approving the Section 408 permit the Corps violated the Flood Control Act of 1944, the RHA, and other provisions of law related to uses of the Missouri River and waters generally. *See* Mot. 11-19. According to the Tribe, these statutes set out a number of "consumptive uses of water" that serve as the "exclusive purposes" for which "Congress granted the Corps authority to operate the" Missouri River "Mainstem System."[3] Mot. 11; *see id.* (listing flood control, navigation, domestic water supply, municipal water supply, stock water, irrigation, mining, industrial purposes, and public park and recreational uses). The Tribe cites 33 U.S.C. §§ 701-1(b), 708, to argue that "any adverse impact from the pipeline's construction or operation on lawful existing uses of the waters of the Missouri River . . . is not an authorized use," and that the Corps must "affirmatively determine that the use being contemplated 'will not affect then existing lawful uses.'" Mot. 12 (citing 33 U.S.C. § 708).[4]

These statutory provisions apply to *navigational* and *consumptive* uses of water. As relevant here, 33 U.S.C. § 701-1 simply provides that federal policy is to "limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the

[3] A "mainstem" or "main stem" is simply "the main course of a river or stream." *Main stem*, Webster's Third New International Dictionary 1362 (2002).

[4] Dakota Access cites the current, codified version of the statutes. The Tribe cites the 1944 Statutes at Large, but those have since been amended.

waters of such rivers by other users." 33 U.S.C. § 701-1. In conformity with this policy, subsection (b) of the statute provides that the "use for navigation . . . of waters" in western states may "not conflict with any beneficial consumptive use" of the water "for domestic, municipal, stock water, irrigation, mining, or industrial purposes." *Id.* § 701-1(b). Thus, by way of example, "irrigation ditches will never be closed to supply water to float barges." *Turner v. Kings River Conservation Dist.*, 360 F.2d 184, 192 (9th Cir. 1966) (quotation marks omitted). Similarly, Section 708 prevents the Secretary of the Army from entering into contracts for "domestic and industrial uses for surplus water . . . under the control of the Department of the Army" insofar as the contracts will "adversely affect then existing lawful uses of such water." 33 U.S.C. § 708.

Neither type of water use is remotely relevant here. A pipeline that transports oil more than 90 feet *below* the bed of Lake Oahe is not a "use for navigation" of any "waters." 33 U.S.C. § 701-1(b); *see Turner*, 360 F.2d at 193 (noting that the statute is not implicated when the proposed use is not "in aid of navigation"). Nor is it a "domestic [or] industrial us[e]" of any "water." 33 U.S.C. § 708. Indeed, the point of using horizontal directional drilling to construct the pipeline is to *avoid* touching the water. It therefore comes as no surprise that *the other* plaintiff's summary judgment motion makes no mention of these inapplicable statutes.

In any event, even if these statutes had been applicable, they would have posed no obstacle to the Corps approving the Lake Oahe crossing. As an initial matter, the Tribe's arguments under these statutes largely boil down to speculative concerns about the possibility of an oil spill—that is the only threat to the beneficial consumptive use of Lake Oahe's waters that the Tribe identifies. But in addition to the Corps considering the effect of the Lake Oahe crossing on the consumptive water uses mentioned in the statute, *see* AR 71259-73 (Ex. L), the agency determined in the EA that the risk of an oil spill was very low, and that Dakota Access had in place response measures

sufficient to allow the project to proceed. *See supra* at 4-6. Moreover, Cheyenne River's objection is not that granting the Section 408 permit actually *will* interfere with any consumptive use of the water in the Missouri River. Instead, it simply claims (incorrectly) that the Corps failed to consider possible interference with consumptive uses. As explained above, that is doubly wrong: The statutes on which Cheyenne River relies do not require such consideration; and the Corps gave consideration to these effects when it conducted its review under Section 408 and other statutes that *do* apply.

For similar reasons, the Tribe's argument that the Corps impermissibly considered the economic benefits of the pipeline fails too. Mot. 20-21. This argument rests on the premise that the Flood Control Act "defines the public interest" when, as just explained, that is not the case. The Tribe's argument also finds no support in EC 1165-2-216. *See* Mot. 21. The Tribe relies on the part of this Army Policy and Procedural Guidance that merely restates Section 408's directive that the alteration must not impair the usefulness of the federal project. EC 1165-2-216 § 6(k) (at p. 4) (permit shall not be granted if it would "deauthoriz[e] a project or eliminat[e]" a project purpose); *see also id.* § 7(c)(4)(b)(i) (at p. 14) (alteration shall not "negatively impac[t]" the usefulness of the public project). The Tribe ignores the part of the Guidance that *is* relevant to the range of benefits that the Corps may consider. In the section with the words "Public Interest" in its heading, the Guidance expressly requires a "careful weighing of *all* those factors that are relevant" to "determin[ing]" probable impacts "on the public interest," including the "benefits that reasonably may be expected to accrue from the proposal," such as "*economic development*." *Id.* § 7(c)(4)(b)(ii) (at p. 14) (emphases added).

The Tribe also says that regulations "prohibit[ing] the Corps from accepting any funds from oil pipeline developers" mean that the development of a pipeline "is not a public purpose."

Mot. 21. The Tribe's argument appears to be that because this pipeline is not a public *utility* (gas pipelines are public utilities; oil pipelines are not), it cannot qualify as an infrastructure project that produces a public *benefit*. There is no support for that non sequitur. In fact, this Court has previously recognized a strong public interest in the development of domestic energy generally, without regard to public utility status. *Nat. Res. Def. Council v. Kempthorne*, 525 F. Supp. 2d 115, 127 (D.D.C. 2007) ("The development of domestic energy resources is of paramount public interest and will be harmed (at least to some extent) if that development is delayed.").

The Tribe also relies on 25 U.S.C. § 1632(a)(5), which generally states that "it is the policy of the United States, that all Indian communities . . . be provided with safe and adequate water supply systems." But the Tribe offers no explanation for how this statute limits the meaning of the public interest under Section 408, and the Corps adequately considered this putative aspect of the public interest in the EA anyway, when it concluded that the risk of a spill was so low as not to threaten any water supply.

2. The Tribe attempts to recast the Corps's process for controlling water levels of the various reservoirs along the Missouri River as some sort of sweeping master plan to bar all development near the river that may not be environmentally pristine. Mot. 12-15. For this argument it relies on the Missouri River Mainstem Reservoir System Master Water Control Manual ("Master Water Control Manual"). But the Corps had no need to address the Master Water Control Manual in approving the Dakota Access pipeline because that document has no bearing on the pipeline project.

The Master Water Control Manual is, as its name suggests, concerned with controlling the river's water levels, rather than construction along, over, or under the river. *E.g.*, Master Water Control Manual § 1-02 ("The Master Manual serves as a guide to the [Reservoir Control Center]

in meeting the operational objectives of the System when regulating the six System reservoirs."), § 1-02.3 ("The plan consists of the water control criteria for the management of the System for the full spectrum of anticipated runoff conditions that could be expected to occur."), § 7-01.2 (the plan "will ensure the maintenance of minimum power heads, minimum irrigation diversion levels, and minimum reservoir elevations for the water supply, recreation, and fish and wildlife purposes").[5] The Eighth Circuit case on which the Tribe relies to argue that this manual "is binding on the Corps" was itself a dispute about flow regulation and water level management. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003) (dispute over which lake should be lowered to supply water needed for downstream uses); *see also In re Operation of Missouri River System Litigation*, 421 F.3d 618, 628 (8th Cir. 2005) (assessing the legality of actions contemplated in the Master Water Control Manual in the context of managing the river's flow and water level).

The Tribe identifies no opinion applying the Master Water Control Manual to approval decisions about infrastructure construction traversing the river, let alone projects like this one that do not touch the river. That is no surprise, since nowhere in the document's 400-plus pages does it address construction over, under, or near the river of oil pipelines or anything like them. Indeed, the word "pipeline" appears only twice, both times in reference to irrigation pipelines carrying water from the river. Master Water Control Manual, §§ 4-04.3.5, E-04. Simply put, the Master Water Control Manual imposed no duties on the Corps that would affect its decisions on the Dakota Access pipeline project. That may explain why neither the Tribes nor other commenters addressed the Master Water Control Manual during the comment and review process for this pipeline, and why Standing Rock's motion for summary judgment never mentions it.

[5] Giving it a shorthand name of "Master Manual," as the Tribe does, cannnot change the fact that "Water Control" is central to the purpose—and, indeed, central to the title—of this document.

The Tribe relies on the fact that the Master Water Control Manual includes water quality as one of its explicit concerns. *See* Mot. 13. But the document does so in the context of (i) ensuring that water released by upstream dams "exceed[s] the minimum release levels necessary to meet minimum downstream water quality requirements," Master Water Control Manual, § 7-09.1, and (ii) "managing the hydrologic regimes that store or transport pollutants downstream," given that "[w]ater quality impairments and problems may . . . arise when the Corps is regulating the System to meet the Congressionally authorized System project purposes." *Id.* § C-01.2. In other words, the Master Water Control Manual contemplates managing the flow of water through the river to ensure that the water quality downstream does not deteriorate due to either low water levels or the spread of pollutants. *See, e.g.*, *id.* § 7-09.2 ("Water quality" has "more than enough flow during all periods of the year in all of the Missouri River reaches," because "[d]ownstream flow support from the System for the authorized purposes other than water quality more than meets the minimum flow requirements for Missouri River water quality."); *id.* § 7-11.1 ("During drought, downstream water supply and water quality (thermal effects) will be a major consideration if the service level is dropped below minimum service[.]"); *id.* § C-01.1 (identifying "temperature changes in the reaches downstream from several of the dams, low concentrations of suspended solids in the releases, and temperature and dissolved oxygen problems when the upper three reservoirs are drawn down during droughts" as the primary water quality concerns of the Master Water Control Manual, and recognizing that these water quality concerns "are more physical in nature, involving the management of streamflow and water storage in the System").

The Master Water Control Manual thus does no more than govern Corps decisions to retain or release water in connection with its management of the Missouri River's reservoir system. It does not impose any requirements that govern the potential *introduction* of pollutants into the river

by other activities. That function is served by the environmental statutes and regulations that the Corps exhaustively addressed in its EA. The Master Water Control Manual thus provides no support for any of the Tribe's claims.

3. The Tribe next asserts that the Corps did not rely on "a single independent engineer, or oil pipeline engineer, or geologist specializing in pipeline construction" in its review of the Lake Oahe crossing's various potential impacts. Mot. 2. According to the Tribe, the Corps "did not even employ its own experts," and instead "relied exclusively upon the applicant, Dakota Access, to render the self-serving and conclusory analyses on which the permitting was based." Mot. 10.

Cheyenne River paints a grossly inaccurate picture in suggesting that expert staff members at the Corps were not involved in preparing the EA. The EA lists staff from 17 offices within the Corps who collaborated on the document, including "Geotechnical Engineers," an "Omaha District Project Engineer," "Omaha District Operations Staff" specializing in "Natural Resource[s]" and "Environmental Stewardship," the "Omaha District Operations Branch Chief," several "Archaeologist[s]," staff from "Omaha District Cultural Resources," "Regulatory Staff," and "Oahe Project Staff." AR 71350 (Ex. L). The specialties of the Corps personnel who reviewed the Lake Oahe crossing include "Environmental Compliance," "Environmental Stewardship," "Water Quality," "Geotechnical Engineering," "River and Reservoir Engineering," "Geology," "Mechanical," "408 Review," "NEPA," and others. AR 71180 (Ex. LL).

Although the EA "was prepared by Dakota Access on behalf of the Corps," NEPA regulations *expressly authorize* this cost-saving practice so long as the agency verifies the EA. 40 C.F.R. § 1506.5(a)-(b). Here, the Corps "independently evaluated and verified the information and analysis undertaken in the EA and takes full responsibility for the scope and content contained herein."

AR 71174 (Ex. M); *accord* AR 71225 (Ex. L). In following this well-established and fully authorized process, the Corps ensured that its conclusions were amply informed by agency expertise.

4. The Tribe contends that the Section 408 decision "did not include any analysis of the impact on tribal treaty rights and trust resources." Mot. 19. That is demonstrably false: The Corps concluded that, in light of the extremely low risk of a spill, there would be "a lack of impact" to "treaty hunting and fishing rights." AR 71310 (Ex. L). The Tribe moreover argues that "the Corps completely ignored the existence of the Cheyenne River Sioux Tribe's treaty rights" and "does not even mention the existence of the Cheyenne River Sioux Tribe even once." Mot. 19, 20. But the Tribe has only itself to blame for not being mentioned in the EA; Cheyenne River disregarded the Corps's administrative process by failing to timely comment on the draft EA. The Corps still considered the Tribe's concerns—and did so directly—when it separately responded to the "numerous letters sent by the Tribe." *Id.* at 20. Moreover, the Corps's consideration of Standing Rock's treaty rights necessarily encompassed consideration of Cheyenne River's treaty rights given that Cheyenne River's connection to the crossing is literally much more distant (greater than 70 miles to be specific). The Tribe offers no argument to the contrary. In fact, it proves the point by relying on Standing Rock's motion for summary judgment for this argument. Mot. 19.

5. Finally, Cheyenne River raises a number of miscellaneous points about supposed shortcomings in the EA. *See* Mot. 15-19. Cheyenne River relies on a report from a consultant in Turkey to claim that this crossing is "the longest freshwater lake crossing of an oil pipeline of this circumference ever to be permitted by any government in the world." Mot. 1. That is wrong. The contractor that Dakota Access is using for this pipeline has itself installed three *longer* oil pipelines for freshwater crossings in North America alone that have the same or greater circumference.

Ex. UU. And the same contractor has installed a total of two dozen longer pipelines (*i.e.*, all circumferences for oil, gas and other purposes). *Id.* In any event, the EA more than sufficiently addresses the considerations relevant to this particular pipeline.

The Tribe also quarrels with the EA's conclusions about the risk of landslides and potential harm to groundwater, vegetation, or recreation. Mot. 17-18. All of these issues are addressed extensively in the EA, *see*, *e.g.*, AR 71251-52 (Ex. L) (landslides); AR 71276-80 (vegetation); AR 71297-99 (recreation); AR 71312-18 (reliability and safety of pipeline regarding spills), and the Tribe's "flyspecking" of these determinations is improper, *see Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014) (quotation marks omitted). Worse than flyspecking, the Tribe resorts to selectively quoting the EA to create a false narrative. Cheyenne River's motion contains this sentence: "Further, the EA itself concludes, 'landslides can present a significant geologic hazard during construction and operation of the pipeline….', and that areas on the east and west sides of Lake Oahe on the HDD drill site have a high incidence of landslides." Mot. 16 (alteration in original) (quoting AR 71251). Cheyenne River's next sentence states that the Corps "conducted no analysis of what the actual risk is after mitigation, or the impacts of a landslide that damages the pipeline during operations[.]" *Id.* But the rest of the sentence that the Tribe selectively quotes from the EA proves the Tribe wrong. Here is the full sentence from the EA (with the part that the Tribe quoted in bold font):

> Although **landslides can represent a significant geologic hazard during construction and operation of the pipeline**, the pipeline would be installed via the HDD to significantly reduce ground disturbing activities in areas with steep slopes (greater than 25%), effectively mitigating the risk.

AR 71251 (Ex. L). The Corps *did* analyze "what the actual risk is after mitigation," Mot. 16, and concluded that mitigation would be effective. It is one thing for the Tribe to disagree with the Corps's analysis, but quite another to falsely proclaim that the Corps conducted none.

The mere fact that "[t]he Tribe's expert disagrees" with the Corps's conclusions (Mot. 17) is of no consequence, particularly since the Tribe did not raise these issues until well after the comment period and even after the July 25, 2016 determinations themselves. Even when the views of outside experts are timely, the Corps's "'evaluati[on]'" of "'scientific data within its technical expertise'" is entitled to an "'*extreme* degree of deference.'" *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting *B&J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004)) (emphasis added). So insofar as this case presents "disputing expert witnesses," it is "'a classic example of a factual dispute the resolution of which implicates substantial agency expertise.'" *Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 746-47 (D.C. Cir. 2001) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376 (1989)). The Court must therefore "defer to the informed discretion of the responsible federal agenc[y]." *Id.* at 747 (quoting *Marsh*, 490 U.S. at 377).

II. The Corps Adequately Consulted With The Tribe.

The record makes clear that the Corps went to great lengths to consult with the Tribe and that any limitations in consultation were the result of the Tribe's own failures to respond to the Corps's outreach. The Corps's efforts satisfied every putative obligation to consult that the Tribe identifies. *See* Mot. 22-24.

As an initial matter, the Tribe uses its Statement of Material Facts to falsely assert that even though the Corps learned of the project in 2014, D.E. 131-1 ¶ 88 ("as early as September 23, 2014"), "[n]o letter was sent to CRST until February 17, 2015," *id.* ¶ 13 (letter seeking consultation under NHPA "in relation to Section 10 and Section 404 permitting—not Section 408 permitting"). But as this Court explained in its opinion denying the Tribe's recent request for a preliminary injunction, the Corps sent a letter to Cheyenne River on October 24, 2014, with information about

the proposed Dakota Access pipeline project and maps illustrating its location and nearby cultural sites. D.E. 158, at 10 (citing Richard Harnois Declaration); *see* AR 67130 (Ex. MM) (form letter); AR 69815 (Ex. NN) (acknowledging that the Tribe had received the letter on October 29, 2014). Tellingly, Cheyenne River's Statement of Material Facts omits *this* material fact.

The Corps also gave Cheyenne River more materials about the project and another notice of consultation on September 3, 2015. AR 69758 (Ex. OO) (NHPA Section 106 letter). Yet again, Cheyenne River's Statement of Material Facts omits that important fact. This is symptomatic of the overall way in which the Tribe's summary judgment filings report on the facts relevant to consultation, including statements by the Tribe that are obviously wrong.[6]

As for the real facts, the Corps went on to hold multiple consultation meetings with Cheyenne River and other tribes between December 2015 and February 2016. D.E. 21-18 (Ex. DD) (Decl. of Martha Chieply) ¶¶ 17-18, 21-22. The Corps also tried—repeatedly—to arrange a direct meeting between Cheyenne River's Chairman, Harold Frazier, and the District Commander of the Corps's Omaha District. But the Tribe was unresponsive to the Corps's repeated efforts to initiate government-to-government consultation. *See* D.E. 21-17 (Ex. EE) (Decl. of Joel Ames) ¶¶ 23-24,

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[6] For example, paragraph 13 of the Tribe's Statement of Material Facts reads:

> As early as December 2013, a draft letter seeking "Tribal and public comment" was being vetted within the Corps offices in Omaha. AR0067166-0067168. Dakota Access did not send the letter to any Indian tribe. Final EA, Appendix J, AR0071720-0071776. Joel Ames, Tribal Liaison for the Corps' Omaha District, did not send the letter to any Indian tribe. ECF No. 21-17. No letter was sent to CRST until February 17, 2015 [referencing the NHPA consultation letter noted above].

The Tribe's point here—that the Corps waited a year and a half to reach out to it about the pipeline—is simply false. The "December 2013" "draft letter" that the Tribe references, AR 67166-68 (Ex. RR), was plainly a template created in December *2015*, since the content of the template corresponds to the timing for circulation of the draft EA that month, and it asks for comments by January 7, 2016. Yet Cheyenne River uses an obvious error in the date field of this letter template (it reads December 4, 2013) to seriously misstate the timing for consultation.

26 (stating that Chairman Frazier failed to return several calls from the Corps's Tribal Liaison, Joel Ames, in February 2016); AR 66310 (Ex. PP) (chain of unanswered emails in February and March 2016 from Corps Tribal Liaison Ames to Chairman Frazier trying to set up a call); AR 64289 (Ex. QQ) (May 9, 2016 email from Corps Tribal Liaison Ames stating that he had recently met with the Tribe's Vice Chairman, Ryman Le Beau, and asked him to reach out to Chairman Frazier to arrange a meeting); AR 64300 (Ex. FF) (May 6, 2016 letter from Colonel Henderson to Chairman Frazier again attempting to arrange a meeting).[7] The Corps also put no limit on the scope of this proposed consultation; in fact, Colonel Henderson's May 6, 2016 letter explicitly invited the Tribe to "discuss not only the DAPL project, but any other topics you may want to discuss." AR 64300 (Ex. FF).

In addition to these many consultation efforts, the Corps requested comments from Cheyenne River and other tribes on the draft EA. D.E. 39, at 26. Yet, as noted earlier, the only comments that the Tribe submitted were untimely. The Corps still went out of its way to respond to these letters, regardless of what appears in an index to the EA. *See* Mot. 29; AR 64062 (Ex. JJ); AR 64120 (Ex. KK).

[7] The Tribe's response to the Corps's careful documentation of these many efforts is feeble and disingenous. It seeks to excuse Chairman Frazier's repeated failures to respond to Ames's outreach by focusing on a single month (February 2016) and complaining that "Ames did not indicate in these communications why he was attempting to contact Chairman Frazier." D.E. 131-1 ¶ 104. Cheyenne River does not suggest a single reason other than the pipeline that might have prompted outreach by the Corps's Tribal Liaison Officer. And no other reason is plausible given that Ames was repeatedly trying to have the conversation that Frazier *himself*—the one who supposedly wanted consultation—called to initiate. D.E. 21-17 (Ex. EE) ¶¶ 23-25 (Ames states that his repeated calls were an effort to return a call from Frazier). Nor does the Tribe mention that when Ames saw Steven Vance, Cheyenne River's Tribal Historic Preservation Officer, that *same* month, Ames responded to Vance's request for consultation by "explain[ing] to him that [Ames] had been attempting to make that arrangement with the Chairman but needed some assistance in getting a timeframe." *Id.* ¶ 26. Vance "agreed to help make it happen," *id.*, but even the Tribe's own THPO could not get Chairman Frazier to the table.

In sum, the record demonstrates that the Corps repeatedly sought to consult with the Tribe on any concerns it might have about the pipeline. The Tribe, in turn, repeatedly ignored or outright spurned those efforts. Whatever the source of consultation obligations here, the Corps more than satisfied them. The Tribe's reliance on *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Department of Interior*, 755 F. Supp. 2d 1104, 1119 (S.D. Cal. 2010) actually proves that point. There, the government (a different agency) was largely unresponsive to a tribe's requests. *Id.* ("[T]he Tribe's government's requests for information and meetings were frequently rebuffed or responses were extremely delayed as BLM-imposed deadlines loomed or passed."). Here, because the roles are reversed, so should be the outcome.

The Tribe's assertions that the Corps "cancelled meetings that the Tribe tried to schedule, and did not respond to the Tribe's written requests" also miss the mark—by a full year. The Tribe is citing to events that occurred in February 2017, D.E. 131-1 ¶¶ 116-129, long after the Section 408 permit and EA had been issued, and long after the Tribe had turned away repeated attempts by the Corps to consult. In sum, Cheyenne River's effort to describe a "tortured history of the Tribe's efforts to chase down the Corps" is itself tortured. Mot. 27.

The Tribe makes several efforts to deflect from its own failure to engage with the Corps. Each is meritless.

First, the Tribe argues that the Corps already had made its decision on the Section 408 permit and FONSI before it tried to consult with the Tribe. Mot. 24-25. That is demonstrably wrong. Both documents were issued on July 25, 2016. AR 71182 (Ex. LL). As noted above, the Corps had repeatedly sought Tribal input long before this date. Moreover, the entire purpose of the draft EA was to seek comments to inform a final EA. *See* AR 71778 (Ex. M) (notice of availability of Draft EA for comment, stating that "[t]he public is encouraged to provide comments on

the draft EA"). The draft EA set forth the Corps's tentative conclusions and invited others to point out ways in which those conclusions—and the reasoning on which they are based—might be in need of supplementation or correction. (The Tribe, as noted earlier, failed to timely comment.) The Corps followed the proper procedure.

The Tribe tries to support its version of events by asserting that the Corps "signed off" on the Section 408 permit on December 20, 2015. Mot. 24 (citing AR 71201-02 (Ex. LL)). That too is false. The memorandum the Tribe cites—from the Corps's geotechnical engineering and sciences branch—merely states that 13 geotechnical comments "generated during the technical review" were "closed out" only after being "satisfactorily addressed." AR 71201 (Ex. LL). Directly contrary to the Tribe's characterization, the document goes on to say: "The comments herein pertain only to the geotechnical and flowable easement issues" and "do not constitute USACE approval of any permits that may be required." *Id.* The other documents on which the Tribe bases its assertion—*i.e.*, that the Section 408 permit was approved before July 25, 2016—similarly show the internal reviews and recommendations expected for a project of this size, not final approval. *E.g.*, AR 71181 (Ex. LL) ("The modification has undergone an agency review . . . and is recommended for approval.").

Second, the Tribe argues that the Corps failed to provide adequate *notice* of consultation. Mot. 25-28. Specifically, the Tribe asserts that "[t]he Corps did not invite any tribal consultation on the EA or the Section 408 permit impacts on trust and treaty resources . . . until . . . November 14, 2016." Mot. 25. But when the Corps circulates a draft EA, as it did here in December 2015, it invites just such a dialogue. *See, e.g.,* AR 67166 (Ex. RR) (template letter "seeking Tribal and public comments on the environmental assessment"). The Corps followed up by hosting several multi-tribe consultation meetings and repeatedly reaching out to the Tribe, as late as May

2016, to try to arrange a one-on-one consultation meeting to discuss "any . . . topics [the Tribe] may want to discuss." AR 64300 (Ex. FF). The Tribe received ample notice.

Cheyenne River responds that the Corps failed to send it a "scoping" notice under NEPA. The Tribe says that this failure violates 40 C.F.R. § 1501.2(d)(2), but all that regulation says is that the relevant federal agency should "consul[t] early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable." Contrary to the Tribe's assertions, Mot. 27, this regulation has nothing to do with scoping. And the Tribe points to no other statute or regulation that requires the Corps to include the Tribe in a scoping notice, especially when the Corps includes the Tribe in other similar letters. D.E. 21-20 (Ex. VV) ¶ 7 (scoping letters went to numerous agencies and "[s]imilar letters were sent to over 20 tribes" under a Programmatic Agreement).

The regulations relevant to scoping are tied to a "decision to prepare an environmental impact statement." 40 C.F.R. § 1501.7; *see also* 33 C.F.R. § 230.12 (Corps regulation requiring scoping notice "[a]s soon as practicable after a decision is made to prepare an EIS"). The Tribe's own motion supports this when it states that the Army's January 18, 2017 Federal Register publication seeking to initiate an EIS was a "Scoping Notice." Mot. 4. Here, as explained above, the Corps satisfied any consultation obligation imposed by NEPA through the extensive consultation described above. *E.g.*, AR 70664 (Ex. SS); AR 70574 (Ex. TT). In any event, the Tribe would not be able to show prejudice from any notice violation, because its comments on the EA, even though belated, "were received and considered" by the Corps. *Nw. Coal. for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 595 (9th Cir. 1988); *id.* at 596 (subsequent participation rendered "violation of the scoping provisions" harmless).

Third, the Tribe contends that the Corps "hi[d]" information needed for meaningful consultation. Mot. 28-30. But as Dakota Access has explained, NEPA is not a disclosure statute. D.E. 159, at 23; *see id.* at 22-25 (addressing Standing Rock's complaints about the availability of certain documents). The Corps had no obligation to give the Tribe every document that it received when carrying out its NEPA review—such as the response plans, the spill models, an environmental-justice considerations memorandum, or the scoping documents that the Tribe mentions. Mot. 28. Confidentiality applied to some of these documents for reasons that have been briefed in Dakota Access's motion for a protective order. *See* D.E. 92, at 4-9; D.E. 161, at 3-14; *see also* D.E. 159, at 23-24. And even more to the point, the Tribe does not explain how lack of access to a handful of documents impaired its ability to consult with the Corps. The Tribe spurned consultation altogether.

In the course of making this argument, the Tribe adds in its view that the Corps was incorrect to disclaim "authority or responsibility to regulate pipelines." Mot. 29. But the Tribe does not explain how the nature of Corps authority vis-à-vis pipeline regulation has any bearing on whether consultation with the Tribe needed to include these documents. In any event, the Tribe has the law wrong. No statute or regulation empowers the Corps to "regulate pipelines" as such; instead, consistent with the law, the Corps assessed the impacts of placing the pipeline beneath federal land—including the risks of a pipeline spill or leak—when determining whether to grant a Section 408 permit for activity within its jurisdiction. AR 71225-27 (Ex. L). The Corps concluded that the risk was "extremely low" given "the engineering design, proposed installation methodology, quality of material selected, operations measures and response plans." AR 71311 (Ex. L). The Corps properly exercised the authority it has in this area.

Fourth, the Tribe argues that consultation under the NHPA does not satisfy an obligation to consult on treaty and trust issues. This argument misses the point: Although the NHPA is concerned with cultural and historic resources, the Corps's process here was designed to encompass *any* additional concerns the Tribe might have—including trust responsibilities and treaty concerns. The Corps explicitly made the consultation invitation open-ended. AR 64300 (Ex. FF) ("not only the DAPL project, but any other topics you may want to discuss"). Finally, the Tribe's ample opportunity to comment on, and consult regarding, the EA gave it meaningful input on issues far beyond Section 106, because the EA was much broader in scope than just cultural or historic resources. *See* AR 71304-11 (Ex. L).

The Tribe's consultation arguments are meritless.

III. The Corps Did Not Violate The Tribe's Treaty Rights Or Any Trust Duties.

The Tribe argues that the easement and Section 408 permit violated its treaty rights and the Corps's trust obligations. Dakota Access's response to Standing Rock's similar argument resolves this allegation. D.E. 159, at 40-44. Cheyenne River adds nothing that could change the outcome.

As an initial matter, Cheyenne River repeats Standing Rock's contention that the Corps must satisfy the standards that apply to a private fiduciary. Mot. 33. As Dakota Access has already explained, though, the Corps's trust obligation is fully discharged by the agency's compliance with applicable statutes and regulations. D.E. 159, at 42 (citing *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011)). Here, the Tribe fails to identify any statute or regulation that imposes an independent obligation on the Corps to consider the Tribe's treaty rights when reviewing a pipeline-related application.

Even if there could be such an obligation, the Corps more than satisfied it here. The Corps reasonably concluded that the pipeline would not impact Tribal hunting, fishing, and consumption

rights in Lake Oahe given the extremely low risk of a spill—which remains the only threat to those rights that Cheyenne River identifies. AR 71179 (Ex. M); AR 71331 (Ex. L). The Tribe's reliance (at Mot. 33) on *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996), is misplaced. There, to grant the relevant permit would be to physically "obstruc[t] . . . tribal members attempting to use nets and other gear," thereby impeding their fishing rights. *Id.* at 1522. The easement and Section 408 permission do nothing of the sort here.

The Tribe responds that the Corps breached its fiduciary obligations by relying on Dakota Access to help draft the EA. But, as noted earlier, the Corps's NEPA regulations expressly allow the Corps to have an applicant assist as long as the Corps takes responsibility for the final product. *See* 40 C.F.R. § 1506.5(a)-(b). The Tribe does not refute this, nor does the case that it cites suggest otherwise. In *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil & Gas Conservation*, 792 F.2d 782, 794 (9th Cir. 1986), the Indian Mineral Leasing Act—unlike any of the applicable statutes here—imposed certain "responsibilities on the government" that could not be shared with private parties.

Next, the Tribe accuses the Corps of failing to specifically analyze Cheyenne River's treaty rights even though the Tribe had "raise[d] concerns about treaty resources." Mot. 34-35. But a party that fails to submit comments on a draft EA within the deadlines set by the agency has no basis to complain that the EA did not address its specific comments. Moreover, "[a]n agency need not respond to or explicitly discuss every comment received," even timely ones, so long as it "explains [its action] in a way that implicitly rejects" those comments. *Caritas Med. Ctr. v. Johnson*, 603 F. Supp. 2d 81, 92 (D.D.C. 2009) (citation omitted). Besides, the Corps did consider Cheyenne River's concerns. When the Corps rejected the assertion that the pipeline would impact Standing Rock's treaty rights, it necessarily rejected Cheyenne River's assertion that the pipeline

would impact *its* treaty rights—the comparable rights of a Tribe whose reservation is further down-river. Both Tribes assert the same risks (*e.g.*, of a spill) to the same treaty rights (hunting, fishing, and consumption) in the same river. To consider one argument is to consider the other.

The Tribe's other quibbles with the EA are unaccompanied by any explanation as to how they could give rise to a treaty-rights violation. In the end, these are mere disagreements with the EA's analysis of information that the Corps indisputably reviewed. That is insufficient to set aside any of the Corps's decisions, particularly given the "extreme degree of deference" that this Court owes the Corps. *Nat'l Comm. for the New River*, 373 F.3d at 1327 (citation omitted). For instance, Cheyenne River says that the EA fails to address impacts on wildlife, recreation, and trust lands owned by the Tribe adjacent to Lake Oahe. Mot. 35. Given that the EA contains entire sections on "Wildlife Resources," "Land Use and Recreation," and "Native American Consultations," AR 71281-92 (Ex. L); AR 71294-99; AR 71303-04; the Tribe's real complaint here is that the Corps (in the Tribe's view) failed to "accurately asses[s]" the risk of a spill (and hence the threat to those interests and resources). That is, the Corps reached one conclusion from its review of the record, and the Tribe would have reached a different one. Again, that type of disagreement does not a violation make.

The Tribe also faults the EA for including bottled water as a mitigation measure in the unlikely event that a spill renders water intake sources unusable. Mot. 35. The nature of the Tribe's complaint is not clear—are the mitigation measures too costly, *id.* ("it would cost 19.5 million dollars a year"), are they insufficient, *id.* ("the effects . . . would be devastating to the Tribe"), or is it something else? In any event, the agency's expert assessment of a low risk of a spill, along with its proper consideration of various options for responding to one, is a complete answer to this argument.

Finally, the Tribe argues that the Corps breached its trust obligations in "decid[ing] not to follow the requirements of 30 U.S.C. § 185(x)(1) and to impose strict liability on Dakota Access commensurate with 'the foreseeable risks and commensurate losses.'" Mot. 35. The Tribe is mistaken. Under 30 U.S.C. § 185(x), the Corps "may impose stipulations specifying the extent to which holders of rights-of-way . . . 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" and also "may, by regulation or stipulation, impose a standard of strict liability to govern activities taking place on a right-of-way or permit." Both of these liability stipulations (*i.e.*, conditions allowed in an easement) are discretionary—the Corps "may" specify the extent of Dakota Access's liability to the United States and "may" impose strict liability. And here the Corps drafted an easement that includes what the Act says it may (but need not) include. The easement states that Dakota Access (the Grantee) will be "strictly liable to the United States for damage or injury which may arise from or be incident to the activities of the Grantee under this Easement." D.E. 96-1 (Ex. Y) ¶ 12(a). This "[l]iability without fault" is "limited to" $10 million "for any one incident," and it does not apply in the case of an "an act of war or force majeure." D.E. 96-1 (Ex. Y) ¶ 12(b). Liability for damages greater than $10 million "shall be in accord with ordinary rules of negligence." *Id.*

The Tribe complains that this was not enough in that the Corps "imposed no strict liability or even any liability to third parties beyond that afford[ed] under 'applicable state or federal law.'" Mot. 36 (quoting easement). But, as noted above, Section 185(x)(1) does not require the Corps to impose strict liability for harm to the United States, let alone for harm to others. Regardless, under the terms of the easement, Dakota Access expressly "accept[ed] 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." D.E. 96-1 (Ex. Y) ¶ 12(c). The Tribe does not explain how state or

federal law is inadequate in any respect for a liability claim that the Tribe might later bring, nor does it specify how modest limits on *strict* liability *to the United States* could impair its rights. The argument is therefore meritless and waived. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008).

IV. The Easement Was Lawful.

Numerous documents—the EA, the Section 408 permit, the December 3 Memorandum, the February 3 Memorandum, the February 8 Memorandum, and the easement itself—demonstrate that the easement fully complied with the Mineral Leasing Act. Indeed, the December 3 Memorandum walked through each relevant Mineral Leasing Act provision, plus the Corps's own policies for easements, to conclude that issuance of the easement "would be consistent with the statutory requirements at 30 U.S.C. § 185." D.E. 73-14 (Ex. S), at 8. The Tribe has failed to show any error here.

A. The Corps Had No Duty To Repeat Its Prior Work Where Mineral Leasing Act Requirements Overlapped With Requirements Previously Satisfied.

As an initial matter, the Tribe suggests that the Corps improperly relied on the Section 408 permit and the EA in granting the right-of-way because the Corps had previously asserted (in the context of Dakota Access's cross-claim) that the Section 408 permit and EA alone did not automatically result in compliance with all of the Mineral Leasing Act's requirements. *E.g.*, Mot. 38. But the additional Mineral Leasing Act requirements that the Corps invoked concern matters like "the statutorily mandated quantification and collection of construction and leasing costs" and congressional notice. D.E. 73-1, at 22; *see id.* at 21-23 (citing 30 U.S.C. § 185(f), (w)(2)).

The Tribe does not assert noncompliance with most of *those* requirements. (The few exceptions are addressed below.) Instead, the Tribe principally asserts noncompliance with the MLA provisions that significantly overlap with those relevant to the Section 408 permit and the EA.

These overlapping provisions address, for example, potential environmental impacts from a pipeline project. Indeed, the Corps explained in the same cross-claim briefing that it "closely coordinated" the Section 408 permit and the easement, and that the determinations "may overlap." D.E. 73-1, at 16-17. For *these* overlapping factors, it was entirely permissible for the Corps to rely on the Section 408 permit and the EA.

In any event, the Tribe ignores the Corps documents that expressly address every MLA factor and requirement—even those that overlap—in concluding that the grant of the easement complied with the law. The Corps followed the law when it came to these overlapping factors.

B. The Easement Satisfies Mineral Leasing Act Section 185(b)(1).

Cheyenne River argues that the easement violated 30 U.S.C. § 185(b)(1), which refers to "Federal reservation[s]," because the easement allegedly is not consistent with "the purposes of the reservation." Mot. 38-39 (quoting statute). But the Tribe only generally references a "reservation" without specifying how this Court should identify that reservation's purposes. Under any construction, however, the Corps did not violate this provision because it affirmatively determined that the right-of-way would not have an adverse effect on the ability of the Lake Oahe project to generate the benefits that Congress intended.

The MLA gives federal agencies the authority to grant pipeline "[r]ights-of-way through any Federal lands." 30 U.S.C. § 185(a). Section 185(b)(1) defines "Federal lands" as "all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf." Cheyenne River focuses on the next sentence: "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." *Id.*

Cheyenne River must therefore show two things: (1) the Corps "determine[d] that" a right-of-way for this pipeline would be "inconsistent with the purposes of" the "Federal reservation" "through" which Dakota Access's right-of-way passes; and (2) the Corps granted the right-of-way in spite of making that determination. But the Tribe tries to establish something different: that the Corps *failed* to make a determination that the right-of-way would *not* be inconsistent with the reservation's purpose. Mot. 40 (arguing that the MLA "requires a finding that DAPL is not 'inconsistent with the purposes of the reservation'" (emphases omitted)). And even that argument fails, because the Corps did more than the statute required by affirmatively making the very determination that the Tribe says was missing.

The "reservation" to which the Tribe's motion speaks is the one that resulted in the creation of Lake Oahe.[8] Cheyenne River spends little time trying to establish what "the purposes of the reservation" are in this case, preferring to dwell on examples of purposes that would not suffice. Mot. 40 (arguing that the MLA inquiry is "stricter" than the NEPA and Section 408 inquiries, but without identifying a source for "this more stringent requirement"). To the extent the Tribe attempts to articulate an inconsistency with the purpose of the creation of Lake Oahe, it still comes back to the possibility of oil reaching the lake. The Corps addressed that consideration in the EA, *see supra* at 4-6, and it did so again when it applied an internal policy stating that an easement "must not adversely impact the capability of the project to generate the benefits for which the project was congressionally authorized, constructed, and is operated." D.E. 73-14 (Ex. S), at 3 (quoting ER 1130-2-550). In December 2016 the Corps expressly "adopted" the "analysis supporting the grant of permission under 33 U.S.C. 408" "in support of the Corps finding that granting

[8] Cheyenne River does not appear to be including an Indian reservation in this argument. Because the right-of-way here does not pass "through" that type of reservation, Section 185(b)(1) would not apply if that were the Tribe's position.

an easement for the pipeline to cross Lake Oahe will not adversely impact the capability of the project to generate the benefits for which the project was Congressionally authorized." *Id.*

That determination satisfies any reading of Section 185(b)(1), because the "purposes" of Lake Oahe and its intended "benefits" are one and the same. In the same discussion containing the Corps's determination that the right-of-way "will not adversely impact the capability of the project to generate the benefits for which the project was Congressionally authorized," the Corps explained that the "Congressionally-authorized purposes" of Lake Oahe "include flood control, navigation, hydropower, recreation, water supply, and water quality." *Id.*

Bringing its attacks on the Corps's determinations full circle, the Tribe responds that the Corps nonetheless failed to address the purposes of Lake Oahe as supposedly set forth in the Flood Control Act of 1944, 33 U.S.C. § 701-1(b), which, again, applies to a "use for navigation." *See* Mot. 40 (using statute to argue a supposedly exclusive list of "authorized purposes" for Lake Oahe). As already explained, a pipeline more than 90 feet below the bed of a lake is not a "use for navigation." Nor does the Tribe explain its assertion that the statute imposes any "strict limitations" on the Corps's authority. Mot. 39. It is therefore irrelevant whether the EA "articulate[d] any rationale" regarding, or "examine[d] impacts" in relation to, this particular provision. Mot. 40. Moreover, all the putative threats to consumptive uses derive again from the risk of a spill, which the Corps undeniably addressed in considerable detail on numerous occasions.

The Tribe's response is that the mere "risk of an oil spill"—however low—means that the easement "is not consistent with the authorized purposes of present and future beneficial consumptive uses." Mot. 40 (emphasis omitted); *see also id.* ("a project that *could* have a high impact on any of the project purposes") (emphasis added); *id.* (the EA concluded "that there was a risk"). But it was entirely reasonable for the Corps to conclude that, because the risk was extremely low,

the easement was consistent with the purposes of Lake Oahe. The Tribe offers no support for its extreme interpretation of the Mineral Leasing Act, which would effectively require the Corps to say no to any right-of-way because it is impossible to eliminate risk altogether. Under the Tribe's view, the existing natural-gas pipeline under Lake Oahe violates the statute since it too carries some risk of a leak. The Tribe's only remaining retort is to yet again say that the Corps "underestimates and ignores the actual risks" of a spill, Mot. 40—which is insufficient to set aside the grant of the easement given the deference that this Court owes the Corps. *Wis. Valley Improvement*, 236 F.3d at 746-47.

C. The Easement Satisfies Section 185(h)(2).

The Tribe next contends that the easement violates 30 U.S.C. § 185(h)(2), which says that the Corps "shall issue regulations or impose stipulations which shall include, but shall not be limited to" requirements "designed to control or prevent" "damage to the environment" and "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," among a number of other ends. The easement contains 36 special conditions (what the statute calls "stipulations") that "further mitigate any risks . . . from any oil spill" and fully satisfy the Mineral Leasing Act. D.E. 117-25 (SRST Ex. 23), at 13. For example, the conditions require Dakota Access to patrol the pipeline, conduct emergency response drills, prevent internal corrosion of the pipeline, conduct corrosion surveys, test the pipeline for cracks, install cathodic protection, implement segment overpressure protection as confirmed by a mandatory surge analysis, install protective coating, test all girth welds, and keep records of pipeline condition and spill response plans. D.E. 96-1 (Ex. Y), at 36-42. The Corps imposed 27 additional conditions as part of its extra review specifically to accommodate Tribal concerns about the risk of a spill. D.E. 117-25 (SRST Ex. 23), at 13.

Nevertheless, the Tribe contends that the Corps "ignore[d] the requirement to protect the 'interests of individuals living in the general area . . . who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes.'" Mot. 42 (quoting 30 U.S.C. § 185(h)(2)(D)). In Colonel Henderson's December 3 Memorandum, however, the Corps explained that "[t]he proposed easement requires mitigation and has added special conditions to the easement to mitigate any impacts to the environment." D.E. 73-14 (Ex. S), at 7. In mitigating the risk of a spill, these conditions necessarily protect the "interests of individuals . . . who rely on the fish, wildlife, and biotic resources of the area" because the putative threat to those interests is a spill. 30 U.S.C. § 185(h)(2). The Tribe does not offer any explanation for how these subsistence uses are threatened by anything other than a potential spill. So all of the conditions designed to mitigate the risk of a spill satisfy Section 185(h)(2). For example, Dakota Access is required to "patrol the pipeline segment right-of-way . . . to inspect for excavation activities, ground movement, unstable soil, wash outs, leakage, or other activities or conditions affecting the safe operation of the pipeline segment." D.E. 96-1 (Ex. Y), at 41. This condition mitigates the risk of a spill and thus protects the interests of individuals relying on the fish, wildlife, and biotic resources of Lake Oahe.

The Tribe is wrong when it asserts that only one of the 36 conditions "even remotely relates" to Section 185(h)(2). Mot. 43. (Here, it points to the comprehensive condition rendering Dakota Access "generally responsible for commitments made and mitigation measures in the Final Environmental Assessment . . . even if they are not specifically made as a condition to this easement." Mot. 43 (quoting D.E. 96-1 (Ex. Y), at 41).) The Tribe does not even acknowledge the ways in which all the other conditions serve to mitigate the risk of a spill, which means they are, as Section 185(h)(2) puts it, "designed" 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." Just because each easement condition does not, to borrow a phrase, repeat the magic word "subsistence" to describe the many benefits that come with lowering both the possibility and the effects of a leak does not mean the Corps failed to comply with this provision.

The Tribe raises a number of other assertions related to these conditions that are ultimately both beside the point and incorrect as far as they go.

The Tribe says that, "[o]utrageously," these special conditions "do nothing more than cross-reference the Section 408 materials." Mot. 42-43. That is demonstrably false. Here are just three of the special conditions:

- **Pressure Test Level:** The pre-in-service hydrostatic test for mainline pipe must be to a pressure producing a hoop stress of either: a minimum 100% specified minimum yield strength (SMYS) or a minimum of 1.25 times maximum operating pressure (MOP) for eight (8) continuous hours for pipeline segments using a design factor of 0.50 or less.

- **Cathodic Protection:** The initial Cathodic Protection system must be operational within six (6) months of placing a pipeline segment in service. Cathodic Protection will be operated and maintained per applicable codes and the Grantee's "Operations and Maintenance Manual." Wall thickness testing will be performed in-lieu of periodic hydro tests. The Grantee shall send the inspection reports to the Operations Project Manager at the Oahe Project Office (hereinafter the Oahe OPM).

- Within 1 month following the pipeline becoming operational, the Grantee shall provide for an all-weather access and collection point downstream of the HDD crossing at Lake Oahe. The Grantee shall provide an equipment storage facility on non-federal lands that includes a fenced permanent storage area for winter and open water spill response equipment. The storage facility should be placed in a strategic location and near existing facilities that would support access to the water. The Grantee will coordinate with the USACE and any other applicable stakeholders to obtain all necessary permits and approvals prior to construction for any ground disturbing activities associated with these facilities. The storage facility should contain sufficient response equipment at a minimum to mitigate an unintended worst case release for this Lake crossing.

D.E. 96-1 (Ex. Y), at 37, 39, 41. These conditions do much "more" than "cross-reference the Section 408 materials," as the Tribe claims. Mot. 43.

Next, the Tribe thinks it "[n]otabl[e]" that the Corps "has promulgated no regulations governing MLA permitting." Mot. 42. But Section 185(h)(2) allows the Corps to "issue regulations *or* impose stipulations." (Emphasis added). As noted, the Corps fulfilled its duties with stipulations specific to this easement. Section 185(f) is not to the contrary. That provision merely says that "[r]ights-of-way or permits granted or renewed pursuant to this section shall be subject to regulations promulgated in accordance with the provisions of this section." That language does not obligate the Corps to promulgate regulations. *Compare*, *e.g.*, 15 U.S.C. § 2643(a) ("[T]he Administrator shall promulgate regulations[.]"). Rather, it merely says that any right-of-way must be written to incorporate the requirements of any regulations that may be applicable under the Act.

The Tribe also says that the condition rendering Dakota Access "generally responsible for commitments made and mitigation measures in the Final Environmental Assessment . . . even if they are not specifically made as a condition to this easement" is "illusory" because "[t]he EA contains no stipulation or condition" that provides the protections specified in Section 185(h)(2). Mot. 43 (quoting D.E. 96-1 (Ex. Y), at 41). Again, the Tribe ignores all the commitments in the original EA and Section 408 permit, which serve to mitigate the risk of a spill. For example, the EA commits Dakota Access to "inspect, exercise, and deploy Company-owned protective and response equipment in accordance with the National Preparedness for Response Exercise Program (PREP) guidelines" and identifies Dakota Access as the "responsible party for implementing the response actions" with "financial responsibility for the duration of the response actions." AR 71262 (Ex. L); AR 71263. Table 8-2 of the EA list 94 different precautions and mitigation commitments that Dakota Access made to protect the environment, including 36 precautions to protect water resources, 10 precautions to protect aquatic resources, and 7 precautions to protect land use and recreation. AR 71341-49 (Ex. L).

Finally, the Tribe says that the easement "limit[s] Dakota Access' liability for damage to the resources necessary for subsistence." Mot. 43. As noted earlier, the Tribe misconstrues the easement when it comes to potential liability to third parties. *See supra* at 27-28. Hence the easement does not in any way undermine the rights of individuals engaged in subsistence uses.

D. The Easement Satisfies Any Treaty And Consultation Requirements.

The Tribe's remaining attacks on the easement are reruns of arguments that Dakota Access has already rebutted in this brief and in its response to Standing Rock's motion for summary judgment—namely that the easement runs afoul of the Corps's consultation and treaty obligations. As explained above, however, the Corps fully satisfied its obligations to consult with the Tribe. The Tribe also asserts a violation of its treaty rights because the easement fails to "attach any liability or responsibility to DAPL for remediating or mitigating the catastrophic impacts in the event of a spill." Mot. 44. But the EA notes that any spill would be "governed [by] the Oil Pollution Act." AR 71315 (Ex. L). And under that statute, Dakota Access is a "responsible party" as the person "owning or operating the pipeline," 33 U.S.C. § 2701(32)(E), and would be liable for damages and removal costs—including specifically "[d]amages for loss of subsistence use of natural resources" and "removal costs incurred by . . . an Indian tribe," *id.* § 2702(b)(1)(A), (b)(2)(C).

* * *

The Corps devoted substantial attention to determining that this easement fully satisfied statutory requirements, and it correctly implemented those requirements.

CONCLUSION

This Court should deny Cheyenne River's motion for summary judgment and grant the cross-motions by Dakota Access and the Corps for partial summary judgment in their favor on the claims that the Tribe advances in its motion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2017, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

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