UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE, Plaintiff, and CHEYENNE RIVER SIOUX TRIBE, Intervenor-Plaintiff v. U.S. ARMY CORPS OF ENGINEERS, Defendant-Cross-Defendant and DAKOTA ACCESS, LLP, Intervenor-Defendant-Cross-Claimant	)	Case No. 1:16-cv-1534-JEB

OGLALA SIOUX TRIBE'S BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF STANDING ROCK SIOUX TRIBE'S MOTION FOR SUMMARY JUDGMENT

Mario Gonzalez (DDC Bar No. TX0040)
Gonzalez Law Office, Prof. LLC
522 7th St. Ste. 202
RAPID CITY, SD 57701
(605) 716-6355 (Tel.)
(605) 716- 6357 (Fax)
mario@mariogonzalezlaw.com
Of Counsel for the Oglala Sioux Tribe

Michael L. Roy (DC Bar No. 411841)
Jennifer P. Hughes (DC Bar No. 458321)
Elliott A. Milhollin (DC Bar No. 474322)
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street NW, Suite 700
Washington, DC 20037
202-822-8282 (Tel.)
202-2968834 (Fax)
mroy@hobbsstraus.com
Counsel for Amicus Curiae for the Oglala Sioux Tribe

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF AMICUS CURIAE

The Oglala Sioux Tribe ("Tribe") is a federally recognized tribe, and an Indian Nation that is part of the Oceti Sakowin (the Seven Council Fires), also known as the Great Sioux Nation. The Tribe is a party to the 1851 Fort Laramie Treaty and the 1868 Sioux Nation Treaty, which grant, among other things, the Tribe and its fellow Sioux Tribes, including Plaintiff Standing Rock Sioux Tribe ("SRST") and Plaintiff-Intervenor Cheyenne River Sioux Tribe ("CRST"), rights to the Missouri River and its waters. Pursuant to the Mni Wiconi Project Act, the Tribe operates the Oglala Sioux Rural Water Supply System, which delivers water from the Missouri River to the Tribe's Pine Ridge Reservation. The Tribe has constructed and operates the water system, which is owned and held in trust for the Tribe by the federal government.

The Tribe is positioned to help the Court understand the scope of tribal trust, treaty, and statutory rights affected by the Dakota Access Pipeline ("DAPL") project. The Tribe will discuss how its rights are affected by DAPL, how the process required by the National Environmental Protection Act ("NEPA") with regard to these rights was ignored, and how the Army Corps of Engineers' ("Corps") approval of the DAPL easement and permits was arbitrary and capricious. In brief, the rights of the Oglala Sioux Tribe to water protected in treaties and specifically addressed in the Mni Wiconi Project Act were neither considered nor addressed by the Corps in derogation of its duties to do so under NEPA and other laws. A report prepared by the Tribe's expert identified several substantial deficiencies in the Final Environmental Assessment ("EA") relied on by the Corps in its DAPL approvals.

On February 11, 2017, just three days after the Corps granted the easement to DAPL to cross Lake Oahe, the Tribe filed an action in this Court to set aside the Corps' approvals for DAPL based on, *inter alia*, violations of the Tribe's treaty and statutory rights and NEPA.

Oglala Sioux Tribe v. U.S. Army Corps of Engineers, 1:17-cv-00267-JEB. Because SRST subsequently filed its motion for partial summary judgment in this case and the Court has set an accelerated briefing schedule, the Tribe seeks to participate as an amicus in this case which may decide some of the issues involved in the Tribe's related case.

INTRODUCTION AND SUMMARY OF ARGUMENT

DAPL crosses lands and the waters of the Missouri River/Lake Oahe that are subject to rights protected by two treaties with the Great Sioux Nation, the 1851 Fort Laramie Treaty, 11 Stat. 749, and the 1868 Sioux Nation Treaty, 15 Stat. 635. As a federally recognized tribe that is a part of the Great Sioux Nation, the Oglala Sioux Tribe enjoys the land and water rights protected by these treaties. In addition, the Tribe is the beneficiary of water and a water delivery system held in trust by the federal government for the Tribe that takes water from the Missouri River downstream of Lake Oahe, as authorized in the Mni Wiconi Project Act of 1988, 102 Stat. 2566 (Oct. 24, 1988), as amended ("Mni Wiconi Act").[1] The United States, including the Corps, owes the Tribe fiduciary obligations as to the Tribe's water rights stemming from its treaties and the Mni Wiconi Act.

The Corps violated the Tribe's treaty and statutory rights and NEPA in its actions approving the DAPL permits and easements. This brief focuses on violations of NEPA, and in particular deficiencies in the EA that were the subject of an expert report prepared for the Tribe and submitted to the Corps. The report demonstrates that the Corps failed to take a "hard look" at the environmental impacts of the DAPL, particularly the impacts on water resources, as required by NEPA. As shown below, the EA (1) dramatically underestimates the total volume of oil that

[1] Pub. L. No. 103-434 (Oct. 31, 1994); Pub. L. No. 105-277 (Oct. 21, 1998); Pub. L. No. 106-53 (Aug. 17, 1999); Pub. L. No. 107-367 (Dec. 19, 2002); and Pub. L. No. 110-161 (Dec. 26, 2007).

would be released in a spill, (2) fails to consider the toxicity of crude oil and its constituents, (3) ignores the applicable water quality standards for Lake Oahe, (4) fails to adequately assess the risk a spill would pose to the Tribe and other downstream water users, (5) fails to consider the socio-economic impact a spill would have on downstream water users and water treatment plants, and (6) fails to consider the Tribe's Treaty rights or rights under the Mni Wiconi Act. Further, the proposed crossing at Lake Oahe is highly controversial, necessitating an Environmental Impact Statement ("EIS").

Finally, the Corps violated its own regulations in deciding to withdraw the Notice of Intent to prepare an EIS without addressing tribal and agency comments, instead relying on the deficient EA and finding of no significant impact ("FONSI").

ARGUMENT

I. The Oglala Sioux Tribe and Its Rights in the Waters of the Missouri River Under Treaties and Statute

A. The Tribe's Treaty Rights

Like SRST and CRST, the Tribe, as member of the Great Sioux Nation, is a party to the 1851 Treaty of Fort Laramie and the 1868 Sioux Nation Treaty. 11 Stat. 749 (Sep. 17, 1851); 15 Stat. 635 (Apr. 29, 1868). The 1851 Treaty of Fort Laramie recognized 60 million acres along the Missouri River as the territory of the Great Sioux Nation. art. 5, 11 Stat. 749. The Tribe and its members retained the right to access clean water in the several bodies of water within this territory reserved for their use, including the Missouri River and its tributaries.

After the United States violated the 1851 Treaty by allowing incursions by non-Indian settlers on Great Sioux Nation land, war broke out between the United States and the Great Sioux Nation. The United States sought to end this war by signing the 1868 Sioux Nation Treaty with several bands of the Great Sioux Nation, including the Oglala. The 1868 Treaty demarcated

a 26 million acre reservation "for the absolute and undisturbed use and occupation" of the signatory tribes. art. 2, 15 Stat. 635. That reservation was called the Great Sioux Reservation and included all of present day South Dakota west of the low water mark of the east bank of the Missouri River, and adjacent lands in North Dakota. *Id.* The 1868 Treaty affirmed a permanent homeland for the Great Sioux Nation, reserving to the Nation, without limitation, rights to water, natural resources, self-government, and all other rights necessary to make the Great Sioux Reservation a livable homeland, which the United States pledged to protect.

After failing to uphold the terms of the 1868 Treaty, the United States divided the Great Sioux Nation lands still further into separate reservations, creating the Pine Ridge Reservation for the Oglala Sioux Tribe. Act of Mar. 2, 1889, 25 Stat. 888, § 1. The creation of the Reservation also reserved, without limitation, rights to water, natural resources, and all other rights necessary to secure the reservation as a home for the Tribe. In particular, water rights are reserved to the tribes on reservations by the United States to carry out the purposes for which the lands were reserved—to serve as a livable homeland. *See Winters v. United States*, 207 U.S. 564, 576-77 (1908); *Arizona v. California*, 460 U.S. 605, 616 (1983). These tribal rights are paramount to water rights later perfected under state law. *Winters*, 207 U.S. at 576-77.

B. The Tribe's Rights Under the Mni Wiconi Act

The Tribe receives its drinking water through the Mni Wiconi Project created by Congress in 1988 to provide safe drinking water to the Oglala, Lower Brule, and Rosebud Reservations, as well as a water district that primarily serves non-Indian customers. The Mni Wiconi Act requires that the Secretary of the Interior "plan, design, construct, operate and maintain" the portion of the Mni Wiconi Project serving the Pine Ridge Reservation: the Oglala Sioux Rural Water Supply System. Mni Wiconi Project Act, § 3(a). The system was authorized

to include the full battery of infrastructure needed to operate a water system: e.g., pumping and treatment facilities located along the Missouri River where water intake occurs, pipelines extending from the Missouri River to the Pine Ridge Indian Reservation, distribution and treatment facilities to serve the needs of the Pine Ridge Indian Reservation, and such facilities as the Secretary of the Interior deems necessary or appropriate to meet the water supply, economic, public health, and environmental needs of the reservation. *Id*. In the Mni Wiconi Act, Congress found that "the best available, reliable, and safe rural and municipal water supply to serve the needs of the Pine Ridge Indian Reservation [and other users] is the Missouri River." *Id.* at § 2(a)(6).

Congress also found that the "United States has a trust responsibility to ensure that adequate and safe water supplies are available to meet the economic, environmental, water supply, and public health needs of the Pine Ridge Indian Reservation…." *Id.* § 2(a)(5). The Act provides that the "[t]itle to the Oglala Sioux Rural Water Supply System shall be held in trust for the Oglala Sioux Tribe by the United States." *Id.* § 3(e).

The Act provides that the Secretary of Interior shall enter into agreements with the appropriate non-Federal entity or entities to construct, operate, and maintain the water system. *Id.* § 3(b)(1). Currently, the system is operated by the Tribe through a cooperative agreement with the Secretary of the Interior.

C. The Federal Government's Treaty and Trust Obligations to the Tribe

Flowing from the Tribe's Treaty rights, the Tribe enjoys reserved water rights to the waters in the Missouri River and its tributaries, including sufficient water to fulfill the purpose of the reservation. *See, e.g.*, *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Winters*, 207 U.S. at 576-77. The Tribe's reserved waters rights "are vested property rights for which the

United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians." Notice, Department of the Interior, Working Group in Indian Water Settlements, Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223, 9223 (Mar. 12, 1990).

Further, as discussed above, under the Mni Wiconi Act, the Oglala Sioux Rural Water Supply System is "held in trust for the Oglala Sioux Tribe by the United States," Mni Wiconi Act, § 3(e), and the "U.S. has a trust responsibility to ensure that adequate and safe water supplies are available to meet the economic, environmental, water supply, and public health needs of the Pine Ridge Indian Reservation…." *Id*. § 2(a)(5). The Mni Wiconi Act therefore imposes an enforceable duty on the United States, including the Corps, to refrain from acting in a way to degrade these rights. *See United States v. White Mountain Apache Tribe*. 537 U.S. 465, 474-75 (2003) (law directing the Secretary of Interior to hold lands in trust for the tribe created a fiduciary duty to maintain, protect, repair, and preserve the property; while the statute did not have specific language regarding maintenance and repair, common-law trust principles independently require any trustee to preserve and maintain trust assets); *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (acknowledging "the undisputed existence of a general trust relationship between the United States and the Indian people" that informs its interpretation of more specific statutes); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (in discharging the treaty relations with Tribes, the Government must act under "obligations of the highest responsibility and trust."). As the Solicitor for the Department of Interior has noted, "the federal trust relationship counsels that the Corps' conduct will be reviewed pursuant to the 'most exacting fiduciary standards.'" U.S. Dep't of Interior, Office of the Solicitor, M-37038 ("Tribal

Treaty and Environmental Statutory Implications of the Dakota Access Pipeline")(Dec. 4, 2016) (citing *Seminole Nation*, 316 U.S. at 297) (ECF 117-4). [2]

The Army "recognizes the Army's responsibilities to federally recognized tribes derived from the federal trust doctrine, treaties, and agreements," and "the importance of understanding and addressing the concerns of federally recognized Tribes prior to reaching decision on matters that may have the potential to significantly affect tribal rights, tribal lands, or protected tribal resources." Secretary of the Army, American Indian & Alaska Native Policy (Oct. 24, 2012) (emphasis added). Courts have recognized that the Corps owes a duty under these treaty and trust responsibilities to consider treaty and trust rights before issuing permits. *See, e.g.*, *Northwest Sea Farms Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (finding it necessary for the Corps to consider tribal treaty rights in review of permits for a fish farm); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1523 (W.D. Wash. 1988) (granting an injunction against construction of a marina for lack of consideration of the effect on tribal treaty rights); *see also* Plaintiff SRST's Memorandum in Support of its Motion for Partial Summary Judgment ("SRST Mem.") at 42-43.

[2] We note that this Solicitor's Opinion was temporarily suspended on February 6, 2017, as part of facilitating the regulatory review process set forth in the President's January 24, 2017 Memorandum concerning construction of the DAPL. K. JACK HAUGRUD, ACTING SECRETARY, THE SECRETARY OF THE INTERIOR, TEMPORARY SUSPENSION OF CERTAIN SOLICITOR M-OPINIONS PENDING REVIEW (Feb. 6, 2017), https://solicitor.doi.gov/opinions/Temporary%20Suspension%20of%20Certain%20Solicitor%20M-Opinions%20Pending%20Review%2002.06.2017.pdf.

II. THE CORPS VIOLATED NEPA

A. NEPA Requires that the Agency Take a Hard Look at the Problem in Preparing its EA and Make a Convincing Case for its Finding of No Significant Impact

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It mandates that public officials "make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). NEPA requires agencies to prepare an EIS for every "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

When considering a proposed action under NEPA, an agency must first determine whether the action is one that normally requires or one that normally does not require an EIS. *Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, 109 F. Supp. 2d 30, 35 (D.D.C 2000) (citing 40 C.F.R. § 1501.4(a)). To make that determination, an agency prepares an EA. 40 C.F.R. § 1508.9. If the agency determines that no EIS is required it must report its decision in a FONSI. *Id*; 40 C.F.R. §§ 1501.4(e), 1508.13. To issue a FONSI and decline to prepare an EIS, the agency must have concluded that there would be no significant impact or have planned measures to mitigate such impacts. *Myersville Citizens for a Rural Community, Inc. v. F.E.R.C.*, 783 F.3d 1301, 1322 (D.C. Cir. 2015).

An agency's findings and decision may be overturned if arbitrary, capricious or an abuse of discretion. *Southern Utah Wilderness Alliance v. Norton*, 237 F. Supp. 2d 48, 52 (D.D.C. 2002). Specifically, when reviewing an agency decision to forego preparation of an EIS in favor of a FONSI a court must apply a four-step analysis, asking "whether the agency '(1) has accurately identified the relevant environmental concern, (2) has taken a hard look at the problem in preparing its EA, (3) is able to make a convincing case for its finding of no

significant impact, and (4) has shown that even if there is an impact of true significance, an EIS is unnecessary because changes or safeguards in the project sufficiently reduce the impact to a minimum.'" *Myersville Citizens*, 783 F.3d at 1322 (quoting *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 29 (D.C.Cir.2008)).

An agency must nonetheless undertake "'a thorough, probing, in-depth review of the agency's decision and then decide whether it was based on consideration of the relevant factors and whether there has been a clear error of judgment.'" *Friends of the Earth*, 109 F. Supp. 2d at 36 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971)). An agency determination will be upheld when the record indicates it "examine[d] the relevant data and 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. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, (1962)). On the other hand, when the record demonstrates that an agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [made a decision that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," it has acted in an arbitrary and capricious manner. *Id*.

B. The Corps Failed to Take a Hard Look at Risks Posed by the DAPL and Failed to Make a Convincing Case that the DAPL Would Pose No Significant Impact

The Corps failed to adequately take a hard look and assess or consider the impact a spill from the DAPL would have on the water quality of Lake Oahe and the costs that would be incurred by the Tribe and other water users in the event of a spill, and failed to make a convincing case that the operation of the pipeline would pose no significant impact.

Lake Oahe is classified as a Class I water by the State of North Dakota, Admin. Code § 33-16-02.1, and Lake Oahe and the Missouri River are classified as a domestic water supply by South Dakota, S. Dak. Admin. R. §§ 74:51:03:05, 74:51:03:02, and serves as a direct source of drinking water for five federally recognized tribes, including the Oglala Sioux Tribe, as well as numerous non-Indian citizens of South Dakota. Throughout the review process for the DAPL, the Corps failed to adequately consider the risk a spill from the DAPL would have on water that is used as drinking and irrigation water for both tribal and non-tribal water users. Instead, the Corps relied on an EA prepared by the proponent of the DAPL that is conclusory, fails to measure risk against the correct standard, and fails to consider impacts on downstream water users.

The Tribe engaged an expert on oil spills, Richard B. White from EarthFax Engineering Group, LLC, to review and report on the Final EA. Mr. White's report, Ex. 1 hereto, submitted to the Corps by the Tribe on December 3, 2016, Ex. 2 (and again on January 30, 2017, Ex. 3), demonstrated numerous deficiencies in the EA, and supports a finding that the Corps did not take the requisite hard look at the DAPL project, and that the FONSI is arbitrary and capricious.

1. The EA dramatically underestimates the total volume of oil that would likely be released in the event of a spill.

The EA concludes that "the most probable spill volume" is 4 bbl or less. AR 71220 at 46–47. This conclusion is not supported for a pipeline of the size proposed for the project. The pipeline proposed for the Lake Oahe crossing would be 30 inches in diameter, which is at the high end of the range. The EA reaches its conclusion that the most likely spill volume would be 4 bbl or less based on a review of a database maintained by the U.S. Pipeline and Hazardous Materials Safety Administration (PHMSA). AR 71220 at 46; Ex. 1 at 1. That database,

however, contains records of spills from pipelines of all sizes, including very small diameter pipelines.

The Tribe's expert's review of a summary published as part of the Keystone XL project indicates that average spills from mainline pipeline incidents for 16-inch and larger diameter pipes is 1,116 bbl—more than 250 times the "most probable spill" according to the EA. Ex. 1 at 2. The proposed pipeline, at 30 inches in diameter, would have a throughput of 400 bbl per minute when operational. The 4 bbl volume relied on in the EA is not an objectively realistic estimation of the "most probable spill volume" for a 30 inch pipeline with the proposed estimated throughput.[3] In his independent assessment of the EA, the Tribe's expert concluded that even under the most conservative scenario where the safety systems and block valves worked correctly, a more realistic spill volume for oil contained just in the portion of the pipe above ground near the bank of the river would be 4,620 bbl. Ex. 1 at 3.

2. The EA Fails to Consider the Toxicity of Crude Oil and its Constituents

In the EA, the Corps used benzene to measure whether a spill would exceed water quality standards, concluding that benzene "is commonly considered to pose the greatest toxicity threat from crude oil spills." AR 71220 at 46. While this is commonly considered to be the case, studies demonstrate that other constituent compounds of crude oil like ethylbenzene and p-xylene, and indeed crude oil itself, are more toxic that benzene. Ex. 1 at 4. Focusing on benzene

[3] We note the December 2016 pipeline spill at Ash Coulee Creek, a tributary of the Little Missouri River not far from the DAPL crossing. This spill, *from a six inch pipeline*, leaked 176,000 gallons (4190 bbls) of oil and contaminated six miles of the Creek before it was contained. According to the operator, the electronic monitoring equipment failed to detect the leak. *See*, http://www.mprnews.org/story/2016/12/12/pipeline-spills-176000-gallons-of-oil-in-north-dakota-creek; https://www.washingtonpost.com/news/morning-mix/wp/2016/12/13/pipeline-150-miles-from-dakota-access-protests-leaks-176000-gallons-of-oil/?utm_term=.181b12beae6b.

alone does not adequately assess the risk of a spill. The EA fails to consider the toxicity or impact of crude oil itself, or its other constituents, and provides no explanation as to why it is reasonable to rely on benzene alone as a surrogate in assessing the environmental impacts from a spill.

3. The EA ignores the applicable water quality standard for Lake Oahe.

Section 33-16-02.1 of the North Dakota Administrative Code classifies Lake Oahe as Class I water with an applicable water quality standard for benzene of 2.2 µg/L (0.0022 mg/L). Likewise, South Dakota classifies the Missouri River as a domestic water supply, S. Dak. Admin. R.. §§ 74:51:03:05, 74:51:03:02 , and sets the applicable standard for benzene for domestic water supplies at 2.2 µg/L. Id. § 74:51:01:55, 74:51:01:55 App. B. The EA/FONSI fails to mention, let alone consider, this standard.

Instead, the EA measures the risk of a spill against entirely different, inapplicable standards. First, to measure ecological effects, it states that "[t]he lowest acute toxicity threshold for aquatic organisms for benzene is 7.4 ppm based on standardized toxicity tests." AR 71220 at 46. The EA then measures that standard against hypothetical benzene concentration amounts and concludes that standard "is not exceeded under any of the hypothetical spill volume scenarios." *Id*.

This analysis is fundamentally flawed. First, the toxicity standard used appears to be based on a LC50 concentration, which is the level of a contaminant that must be present in order to be lethal to 50 percent of aquatic organisms. Ex. 1 at 5. As a result, this standard cannot reasonably be used to measure whether an impact would be significant or not, as far lower concentrations could still result in significant impacts. For example, benzene levels below this standard could still present in concentrations that would be lethal to 10, 20, 30 or even 40 percent

of aquatic organisms. The EA fails to explain why benzene concentrations approaching, but below, this standard would not pose a significant impact.

As explained in Oglala's expert's report, a more standard approach is to use a No Observed Adverse Effect Level (NOAEL) or Lowest Observed Adverse Effect Level (LOAEL) to assess ecological risk. Los Alamos National Laboratory maintains a database of screening levels used in ecological risk assessments. Ex. 1 at 6. For benzene, the "no effect" level for aquatic organisms is 46 µg/L (0.046 ppm). *Id*. This level is orders of magnitude lower than the standard used in the EA to claim no significant impact.

Similarly, the EA fails to measure benzene contamination levels against the correct standard for drinking water. The EA uses the EPA's MCL level of 0.005 mg/L (0.005 ppm), rather than the applicable legal standard of 2.2 µg/L for Lake Oahe and the Missouri River set by North and South Dakota. The EA does not even mention, let alone consider, that standard. Pursuant to 40 C.F.R. § 1508.27(b)(10), an agency must consider "whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment." The EA fails to discuss why the EPA's national water quality standard of 0.005 mg/L for benzene provides the appropriate benchmark for assessing impacts to Lake Oahe and the drinking water systems it supplies. *See Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 30 (D.D.C 2010) (overturning a National Park Service rule in part because "[t]he EA's reasoning is tethered to the national standards at every turn, from the calculation of acceptable volume thresholds to the definition of each impact level, but there is no explanation of why those uniform national standards should be applied to impacts within this park."). Here, the Corps has relied on a national water quality standard for benzene that is an order of magnitude higher than the water quality standard the States of North and South Dakota have set for the waters of Lake

Oahe and the Missouri River, and provided no explanation as to why the national water quality standard used is more appropriate than the one applicable to the water body in question. As this court has held, "to reason that an impact is not an impairment in part because it does not reach a certain standard without explaining why that standard is the right one omits a critical step in the agency's reasoning." *Id.*

4. *The EA Fails to Adequately Assess the Risk A Spill Would Pose to the Tribe and Other Downstream Water Users*

Lake Oahe is no ordinary resource. It is sacred to the Oceti Sakowin, and provides the water of life to our people. In addition, it is the source of drinking and irrigation water for water users throughout North and South Dakota. Both States have classified the waters of the Lake and the Missouri River as sources of drinking water, and have set high standards for that source. A spill from the DAPL would pose both immediate risks to human health and the environment due the acute toxicity of crude oil, as well as long term carcinogenic effects from contamination that lingers long after a cleanup. The EA fails to adequately assess risks posed by the pipeline to this resource.

When examining projects that could affect water resources, courts have required agencies to take the requisite hard look at possible impacts on the water caused by a catastrophic event such as a spill, even when risk of such an event is low. "When the *degree* of potential harm could be great, *i.e.*, catastrophic, the *degree* of analysis and mitigation should also be great." *See, e.g.*, *Gov. of Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 47–50 (D.D.C. 2010) (holding Bureau of Reclamation failed to take hard look at impacts on river water levels caused by project combined with other existing withdrawal projects and impacts of possible water contamination); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 106–08 (finding National Park Service failed to take hard look at impacts caused by project combined with adjacent surface drilling activities and

existing oil and gas operations and impacts of possible spills when determining whether to permit directional downhole drilling activities).

When assessing risks under NEPA, "an agency must look at both the probabilities of potentially harmful events and the consequences if those events come to pass. An agency may find no significant impact if the probability is so low as to be remote and speculative, or if the combination of probability and harm is sufficiently minimal." *New York v. Nuclear Regulatory Com'n*, 681 F.3d 471, 478-479 (D.C.Cir. 2010). As the District of Columbia Circuit has explained:

> [A]n EA must examine both the probability of a given harm occurring *and* the consequences of that harm if it does occur. Only if the harm in question is so 'remote and speculative' as to reduce the effective probability of its occurrence to zero may the agency dispense with the consequences portion of the analysis

Id. at 482 (internal quotations omitted).

Here, the probability of a spill is not zero as acknowledged by the EA. Furthermore and significantly, here, the consequences of a spill would be catastrophic. Even if the Corps' results presented in Table 3-7 of the EA (AR 71220 at 47) were correct, a crude oil spill of approximately 12-13 bbl could result in benzene levels that exceed the applicable legal standard of 0.0022 mg/L. Ex. 1 at 6. As discussed above, the DAPL will have a throughput of 400 bbl per minute and depending on the size of the rupture, a 12-13 bbl spill could occur in a matter of seconds. Thus, any spills that occur are likely to be much larger than supposed by the EA. According to Table 3-7 of the EA (AR 71220 at 47), a spill of 10,000 bbl would result in benzene levels in Lake Oahe of 1.7 ppm—orders of magnitude higher than the applicable legal standard in North and South Dakota, and 340 times the EPA's national water quality standard of 0.005 mg/L for benzene. The consequences from a larger spill would be even greater than suggested by the EA, rendering the waters of the Lake unfit for human consumption for months

or years to come. Given the use of the waters of the Lake and the consequences that would result from a spill, the EA should have assessed impacts and costs associated with the risk of a spill.

5. *The EA Failed to Consider the Socio-Economic Impact a Spill Would Have on Downstream Water Users and Water Treatment Plants*

The Mni Wiconi Project water treatment plant lacks the capacity to treat for benzene or other hydrocarbon contamination and adding that capacity would cost in the millions. Ex. 2 at 11. We are unaware that any other tribal water treatment plant that draws water from the Lake has this capacity either. The EA fails to consider the socio-economic impact a spill would have on the ability of these plants to continue to function in the event of a spill. Indeed, the EA fails to even mention, let alone assess, the water treatment capacities of the tribal and rural water supply systems that could be impacted by a spill, or what the cost associated with upgrading them to treat for oil contaminated water would be.

Lacking the capacity to treat water for oil contamination, the Mni Wiconi Project (and others) would be forced to shut down their intakes from the Lake in the event of a spill event. If forced to shut down, water users throughout North and South Dakota would be adversely affected. The EA fails entirely to consider the socio-economic ramifications a spill would have on the Indian and non-Indian people who rely on the waters of the Lake for drinking water, irrigation, and recreational uses. The EA states that:

> Drinking water intakes located downstream from the Missouri River and Lake Oahe crossings could be at risk if there was a release that reached these bodies of water in the vicinity of the intake structures. The Standing Rock Sioux Reservation is located south of the Lake Oahe Project Area and the majority of reservation residents depend on wells for water supply (Standing Rock Sioux Tribe, 2016).

AR 71220 at 38. But it fails to quantify that risk, or consider the costs and impacts associated with a spill from the DAPL to those intakes. "Merely describing an impact and stating a

conclusion of nonimpairment is insufficient, for this merely sets forth 'the facts found' and 'the choice made,' without revealing the 'rational connection' – the agency's rationale for finding that the impact described is not an impairment." *Sierra Club v. Mainella*, 459 F. Supp. 2d at 100.

Further, the EA does not even address the impacts to the Mni Wiconi Project—a glaring omission noted by the United States Environmental Protection Agency in its comments to the Corps on the draft EA. AR 66288 at 2.

The EA also entirely fails to consider the costs associated with providing those users with alternate sources of water. Instead, the EA simply states that:

> The potential for a spill to compromise a potable water supply intake would be continually evaluated as part of the response action. Alternative sources would be included as part of the contingency planning. Shutting down certain intakes and utilizing others or different drinking water sources or bottled water will be evaluated as part of this process.

AR 71220 at 38–39. There is no discussion of the costs associated with "shutting down certain intakes," both on farmers who rely on those intakes for irrigation water, or water users who rely on it for drinking water. Nor is there any discussion of the cost, let alone the feasibility, of using "different water sources," or "bottled water" for the tens of thousands of people who could be impacted if a large intake had to be shut down. The EA fails to identify which "different water sources" it is referring to, or whether such sources even exist.

C. The EA Fails to Take a Hard Look at the Tribe's Treaty Rights or Rights Under the Mni Wiconi Act

The EA does not discuss or address the Tribe's Treaty Rights, or its rights under the Mni Wiconi Act. It does not even mention the Oglala Sioux Tribe, or the Mni Wiconi Project, despite the Tribe's reliance on waters of the Missouri River.

The lack of any mention of the Tribe or the Mni Wiconi Project can only lead to one conclusion—that the Corps did not take the requisite hard look at impacts of the DAPL on the Tribe's water rights and water use. The omission is due to the Corps' failures to provide the Tribe, and other tribes, adequate notice and opportunity for comment on the EA in violation of NEPA and the Corps' own policies. Ex. 4 at 12; SRST Mem. at 8.

The EA includes a list entitled "Federal, Tribal, State, and Local Agency Consultation and Coordination," which is "a listing of all individuals and agencies consulted during the preparation of the EA." AR 71220 at 111 (emphasis added). No tribes are listed. *See also id*. at App. J (no tribes included on scoping letter distribution list). We agree with SRST that consultation with Tribal Historic Preservation Officers on National Historic Preservation Act issues does not constitute consultation with tribes on treaty rights, statutory rights, and NEPA issues. SRST Mem. at 8 n. 2.

D. The Proposed Crossing at Lake Oahe is Highly Controversial, Thus Necessitating an EIS

The effects on the environment from the proposed DAPL crossing at Lake Oahe are highly controversial, thus requiring an EIS. One of the characteristics of a "significant" impact is whether the proposal's effects on the environment are likely to be "highly controversial." 40 C.F.R. § 1508.27(4). "The effects of an action are 'highly controversial' when there is 'a substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use." *Friends of the Earth*, 109 F. Supp. 2d at 43 (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)).

In this case, at least four federally recognized tribes, the Department of the Interior ("DOI"), and the Environmental Protection Agency ("EPA") have disputed the Corps' assessment of potential impacts on the environment from the risk of a spill in the EA and asked

that the Corps conduct additional analysis. SRST Mem. at 9. The Corps, itself, before its recent volte face, determined that additional analysis was required and published a notice of intent to conduct an EIS. As this court has recognized in a case involving the Corps, when other federal agencies and the effected public have disputed the agency's evaluation of the environmental impacts of a proposed action, it can be said to be highly controversial and necessitate an EIS. *Friends of the Earth v. U.S. Army Corps of Engineers*, 109 F. Supp. 2d at 43. The court held that:

> In this case, three federal agencies and one state agency have all disputed the Corps evaluation of the environmental impacts of the casinos and pleaded with the Corps to prepare an EIS. The record is also replete with similar pleas from the public. Finally, the Corps' own leadership recognized that '[c]asino permits along the Mississippi Gulf coast has engendered considerable controversy and resulted in concerns from the leadership of both the [EPA] and the Department of the Interior. It is therefore clear that the permitting of these casinos is genuinely and extremely controversial.

Id. All of the same factors are presented in this case. The EPA and the DOI both disputed the Corps' evaluation of the environmental impacts of the proposed DAPL crossing at Lake Oahe and urged the Corps to conduct additional analysis as did several federally recognized tribes. Furthermore, the Corps, itself, decided additional evaluation was needed before reversing course after the Presidential Inauguration. Accordingly, the DAPL should be considered highly controversial as well, thus necessitating an EIS.

E. The Corps Violated NEPA and Corps Regulations Implementing NEPA in Withdrawing the Notice of Intent to Prepare an EIS

The Corps' notice of intent to conduct the EIS ("NOI") specifically acknowledged the need to assess impacts of the DAPL on treaty rights and water intakes. It requested input on potential risks and impacts of an oil spill, potential impacts to Lake Oahe, and impacts to the Standing Rock Sioux Tribe's water intakes, water, treaty fishing, and hunting rights, and on

alternative locations for the DAPL crossing of the Missouri River. 82 Fed. Reg. 5543-5544 (Jan.18, 2017). Furthermore, the Corps' notice cites the December 4, 2016, decision in which "the Army determined that a decision on whether to authorize the pipeline to cross Lake Oahe at the proposed location merits additional analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation and comments as contemplated in the Council on Environmental Quality's NEPA implementing regulations." *Id.* at 5544.

After publishing the NOI, the Corps released a February 7, 2017 decision which stated that "there is no cause for completing any additional environmental analysis. Therefore, I have determined that the ASA(CW)'s memorandum [of December 4, 2016, announcing the decision to prepare an EIS] must be rescinded." ECF 95-2. The Department of the Army forwarded to the Office of the Federal Register a notice rescinding the NOI on February 7, 2017 (ECF 95-3)—almost two weeks prior to the deadline for public comment on the NOI—and the Corps granted DAPL the easement on February 8, 2017.

The withdrawal of the NOI is arbitrary and capricious because it does not take into account the comments of the Tribe and its expert (which was resubmitted to the Corps in response to the NOI, Ex. 3), or other numerous comments received by the Corps subsequent to the EA. Corps regulations implementing NEPA provide: "If it is determined that an EIS is not required after a notice of intent has been published, the district engineer shall terminate the EIS preparation and withdraw the notice of intent." 33 C.F.R. Part 325, Appendix B, § 8(g).

Thus, in order to withdraw the NOI in compliance with regulation, the Corps had to make a determination that the EIS "is not required." That decision would have had to have been based on the record when the decision was made (February 7, 2017), including, for example, the

Tribe's expert report which the Tribe submitted in response to the NOI. Ex. 3. As explained by SRST, however, the Corps did not make a determination as to whether an EIS was required based on the record on that date; instead, it framed the legal question as whether new information necessitated preparation of a supplemental EA or EIS. SRST Mem. at 33 (citing SRST Mem. Exs. 23 [Feb. 3 Review] at 10-13; Ex. 22 [Cooper Memo] at 11-15, 20-21, 28, 36). Generally, an agency will determine that an EIS is not required because the proposed action that triggered the NEPA review is not going forward. *E.g*., Department of Defense, Corps of Engineers, Withdrawal of Notice of Intent for the Environmental Impact Statement Process for the Delat Wetlands Project in San Joaquin and Contra Costs Counties, California, 82 Fed. Reg. 8827 (Jan. 31, 2017) (withdrawing NOI to prepare supplemental EIS because permit application triggering NEPA had been withdrawn). However, the situation is different when, as here, the proposed action is not being withdrawn. In such an instance, like this one, there must be a finding that the EIS "is not required." As explained above, an EIS is required to comply with NEPA, unless an EA is prepared, and based on that assessment, the agency makes a finding of no significant impact. Here, the EA and FONSI cannot reasonably be relied on for that finding as of February 7, 2017, at least not without a reasoned decision addressing the post-EA comments. The absolute silence on the substance of these comments in the decision to withdraw the NOI and to rely on the EA renders the decision arbitrary and capricious.

CONCLUSION

Based on the foregoing, as well as reasons stated by the Plaintiff Standing Rock Sioux Tribe in support of its Motion for Partial Summary Judgment, the Motion for Partial Summary Judgment should be granted.

Respectfully submitted,

s/ *Michael L. Roy*
Michael L. Roy (DC Bar No. 411841)
mroy@hobbsstraus.com
Jennifer P. Hughes (DC Bar No. 458321)
jhughes@hobbsstraus.com
Elliott A. Milhollin (DC Bar No. 474322)
emilhollin@hobbsstraus.com
Hobbs, Straus, Dean & Walker, LLP
2120 L Street NW, Suite 700
Washington, DC 20037
202-822-8282 (Tel.)
202-2968834 (Fax)
Counsel for Amicus Curiae for the Oglala Sioux Tribe

Mario Gonzalez (DDC Bar No. TX0040)
Gonzalez Law Office, Prof. LLC
522 7th St. Ste.202
Rapid City, SD 57701
(605) 716-6355 (Tel.)
(605) 716-6357 (Fax)
mario@mariogonzalezlaw.com
Of Counsel for the Oglala Sioux Tribe

February 21, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OGLALA SIOUX TRIBE'S BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF STANDING ROCK SIOUX TRIBE'S MOTION FOR SUMMARY JUDGMENT was today served via the Court's CM/ECF system on all counsel of record.

/s/ *Michael L. Roy*
Michael L. Roy