United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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IN REPLY REFER TO:

M-37038

Memorandum

To: Secretary

From: Solicitor

Subject: Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline

The United States Army Corps of Engineers (Corps) is conducting ongoing review of legal authorizations necessary for the Dakota Access Pipeline (DAPL) project to cross the Missouri River underneath Lake Oahe pursuant to Section 14 of the Rivers and Harbors Act of 1899 (Section 408),[1] Section 185 of the Mineral Leasing Act (MLA), and tenets of federal Indian law.[2] The Department of the Interior has special expertise concerning the government-to-government relationship between the United States and Indian tribes, the MLA's requirements for granting pipeline right-of-ways, and related environmental and land use statutes. The Corps has solicited the Department's opinion on the extent to which tribal treaty rights of the Standing Rock Sioux Tribes and Cheyenne River Sioux Tribes (Tribes) weigh in favor of or against authorizations needed for the Lake Oahe crossing, as well as any related considerations under the MLA and other applicable authorities.[3] At the request of the Secretary of the Interior to analyze federal law relevant to the Corps' determination, this Memorandum responds to that request.

I. Introduction.

DAPL is an approximately 1,100-mile long crude oil pipeline beginning near Stanley, North Dakota and ending at Patoka, Illinois.[4] In July 2016, the Corps released an Environmental

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[1] 33 U.S.C. § 408.

[2] 30 U.S.C. § 185.

[3] The MLA authorizes the Secretary of the Interior to grant or renew rights-of-way or other permits for oil and gas pipelines crossing the surface of Federal lands that are "administered by the Secretary" or "by two or more Federal agencies." 30 U.S.C. § 185(c)(2). The Secretary's authority is generally exercised by the Bureau of Land Management, which has promulgated detailed regulations relating to rights-of-way under the Mineral Leasing Act. *See* 43 C.F.R. pt. 2880.

[4] *See generally* U.S. ARMY CORPS OF ENGINEERS, ENVIRONMENTAL ASSESSMENT, DAKOTA ACCESS PIPELINE PROJECT, CROSSINGS OF FLOWAGE EASEMENTS AND FEDERAL LANDS 3 (July 2016) [hereinafter cited as "Final EA"].

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Assessment (EA) that evaluated a proposed Section 408 permit that would allow the DAPL pipeline to cross a federal flood control project.[5] In the EA, the Corps considered a pipeline route that would cross Lake Oahe, a manmade lake on the Missouri River, at a site approximately 0.55 miles upstream from the Standing Rock Sioux Reservation[6] and seventy miles upstream from the Cheyenne River Sioux Reservation.[7] The Corps ultimately issued the Section 408 permit for that crossing. In addition, in order for the pipeline to cross federal property, the Corps would have to issue a right-of-way under the MLA. To date, it has not done so.

On September 9, 2016, the Corps issued a statement in conjunction with the Department of Justice and the Department of the Interior concerning the DAPL project. The Corps stated that it would "not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other federal laws."[8]

On November 14, 2016, the Corps issued a letter to the Standing Rock Sioux Tribe, Energy Transfer Partners, L.P., and Dakota Access LLC, informing the parties that the Corps had completed the review initiated pursuant to the September 9 joint statement.[9] The Corps concluded that prior to authorizing further work on the DAPL project, and per the Corps' discretionary authority to place conditions on pipeline rights-of-ways crossing federal lands,[10] the Corps was moving to a "second phase" of DAPL review.

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[5] *See generally id.* Section 408 authorizes the Corps to permit the crossing so long as it would neither injure the public interest nor impair the usefulness of the project.

[6] *Id.* at 75.

[7] Intervenor-Plaintiff Cheyenne River Sioux Tribe's First Amended Complaint for Declaratory and Injunctive Relief, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, Case No. 1:16-cv-1534-JEB (Sept. 8, 2016) 28 [hereinafter "Cheyenne River Brief"]. Lake Oahe serves as part of the eastern border of both the Standing Rock Sioux and the Cheyenne River Sioux Reservations.

[8] Joint Statement from the Department of Justice, the Department of the Army, and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, *available at* https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing (Sept. 9, 2016).

[9] Letter from Jo-Ellen Darcy, Assistant Sec'y of the Army (Civil Works) to the Honorable Dave Archambault II, Chairman, Standing Rock Sioux Tribe, Kelcy Warren, Chairman and CEO, Energy Transfer Partners, L.P., and Joey Mahmoud, Executive Vice President, Dakota Access LLC (Nov. 14, 2016).

[10] *See generally* 30 U.S.C. § 185. When authorizing pipeline rights-of-way under the MLA, the authorizing federal agency "shall require" appropriate environmental protections, including to control or prevent "damage to the environment," *id.* § 185(h)(2)(C)(i), 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." *Id.* § 185(h)(2)(D).

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This second phase would include a closer evaluation of the risk of a spill at the Lake Oahe pipeline crossing, and would explore potential conditions on an easement for the Lake Oahe pipeline crossing that could reduce the risk of a spill or rupture, hasten detection and response to any possible spill, or otherwise enhance the protection of Lake Oahe and relevant tribal water supplies and treaty rights. The Corps would also consider whether granting an easement at the Lake Oahe crossing would be appropriate.[11] In the meantime, the Corps stated that "construction on or under Corps land bordering Lake Oahe cannot occur because the Army has not made a final decision on whether to grant an easement."[12] The Corps explained that this second round of additional analysis was "warranted in light of the history of the Great Sioux Nation's dispossessions of lands, the importance of Lake Oahe to the Tribe, the government-to-government relationship, and the statute governing easements through government property."[13]

As noted, the Secretary of Interior requested that I issue this Memorandum analyzing federal environmental statutes and federal Indian law relevant to the Corps' ongoing analysis of the DAPL project. In brief, multiple federal court cases demonstrate that: (1) the statutes that created Lake Oahe did not diminish either the Cheyenne River or Standing Rock Sioux Reservations; (2) portions of the land taken to create Lake Oahe are within the boundaries of both reservations; and (3) Congress explicitly recognized and preserved Sioux treaty hunting and fishing rights in the Lake Oahe statutes. In addition, the Tribes retain reserved water rights under federal law. Although these rights have not yet been adjudicated or quantified through a congressionally authorized settlement, on-reservation Lake Oahe is an obvious storage location for such rights. Since the Tribes retain rights associated with Lake Oahe, the Corps must consider the possible impacts of its DAPL permitting decisions on these reserved hunting, fishing, and water rights. In addition, federal laws like NEPA[14] contain separate safeguards through which agencies must evaluate impacts to tribal treaty rights and interests prior to authorizing projects like the DAPL.

The Corps enjoys broad discretion under the MLA to decline a requested use of an interest in federal land.[15] The exercise of this discretionary authority certainly can include additional analysis, beyond what was considered in the existing EA for the Section 408 decision,

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[11] United States Army Corps of Engineers, Statement Regarding the Dakota Access Pipeline, *available at* http://www.usace.army.mil/Media/News-Releases/News-Release-Article-View/Article/1003593/statement-regarding-the-dakota-access-pipeline/ (Nov. 14, 2016).
[12] *Id.*
[13] *Id.*
[14] 42 U.S.C. § 4321 *et seq.*
[15] *See, e.g.*, *Udall v. Tallman*, 380 U.S. 1, 4 (1965) (noting that the MLA "gave the Secretary of the Interior broad power to issue oil and gas leases on public lands" and "left the Secretary discretion to refuse to issue any lease at all on a given tract"); *W. Energy All. v. Salazar*, No. 10-cv-0226, 2011 U.S. Dist. LEXIS 98380, at *16 (D. Wyo. June 29, 2011) (noting the "longstanding recognition of the legal principle of broad Secretarial discretion under the MLA").

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of the DAPL's potential social, cultural, and environmental impacts on protected treaty rights and senior Indian water rights. This is especially true in light of the United States' role as trustee to the Standing Rock and Cheyenne River Sioux Tribes.

For the reasons articulated below, I believe that the Corps has ample legal justification to decline to issue the proposed Lake Oahe easement on the current record. The Corps would be equally justified in suspending or revoking the existing Section 408 permit as it relates to the Lake Oahe crossing. In the alternative, a decision to issue the easement should not be made pending the Corps taking the following actions:

(1) Engage in government-to-government consultation with the Tribes on the proposal to locate the pipeline upstream and within 0.5 miles of the Standing Rock Sioux Reservation in order to determine whether the location or any other aspect of the pipeline project would infringe upon the Tribes' rights. The Corps' November 14th letter prioritizes tribal consultation and input, and the Corps should follow through with these goals and promptly engage with the Tribes to determine a consultation schedule and to discuss the Tribes' role in the determination moving forward. Based on the Department of the Interior's experience, I do not believe that this can be effectively carried out in an artificially constrained time frame.

(2) Conduct additional NEPA analysis that adequately evaluates the existence of and potential impacts to tribal rights and interests. This should be done through an Environmental Impact Statement (EIS) that will allow for robust tribal and public engagement. As part of this analysis, the Corps should consider a broader range of alternative pipeline routes, evaluate in detail the originally-considered route ten miles north of Bismarck, North Dakota, and consider how the Corps' original rationales for rejecting that alternative route do not apply with equal force to the pipeline route that passes within a half mile from tribal lands (for example, concern for drinking water impacts, Environmental Justice concerns, protecting wildlife and wetlands, etc.). The Corps also should include in this additional NEPA review a catastrophic spill analysis prepared by an independent expert that evaluates the risk of a rupture in the underground portion of the pipeline and in close proximity thereof; and

(3) Assess the DAPL's impact on tribal rights, lands, and resources, including the socio-economic impacts to the Tribes, in a more comprehensive manner under the "public interest" evaluation required as part of the Section 408 process in light of the fact that the reservation is a permanent homeland for the Tribes, as well as other federal obligations towards the Tribes.

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Based on my review of documents to date, it appears that the permit applicant believes that the existing analysis considers all potential environmental impacts and mitigates for all risk even if that consideration is not based on express recognition of the tribal interests discussed herein. As explained below, however, these latter concerns are not a matter of mere semantics. The government-to-government relationship between the United States and the Tribes calls for enhanced engagement and sensitivity to the Tribes' concerns. The Corps is accordingly justified should it choose to deny the proposed easement, suspend or revoke the existing Section 408 permit, or both.

II. Discussion.

This Memorandum proceeds in several parts. First, I provide a detailed analysis that concludes that portions of Lake Oahe are located on both the Standing Rock and Cheyenne River Sioux Reservations, and that the Tribes retain treaty hunting, fishing, and reserved water rights in the Lake. Second, I discuss how the nature and scope of the United States' trust relationship with the Tribes warrants additional review here. Third, I evaluate additional considerations related to the DAPL's potential environmental impacts on the Tribes' guaranteed hunting, fishing, and water rights, as well as on other tribal interests, necessitated by NEPA. Fourth, I discuss ongoing public interest issues that further counsel the Corps' broader consideration of tribal rights and interests. Finally, I raise additional factual and procedural clarifications relevant to the Corps' determination.

1. Sioux treaty rights in Lake Oahe.

i. Applicable law.

The Fort Laramie Treaties of 1851[16] and 1868[17] established the original boundaries of the Great Sioux Reservation. In relevant part, these Treaties set the eastern boundary of the reservation as "commencing on the east bank of the Missouri River . . . thence along low-water mark down said east bank."[18] The Treaties also guaranteed the Sioux "the privilege of hunting, fishing, or passing over any of the tracts of country" ceded to the United States.[19]

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[16] 11 Stat. 749 (1851).
[17] 15 Stat. 635 (1868).
[18] 15 Stat. 636. *Accord* 11 Stat. 750 (delineating eastern border as "commencing the mouth of the White Earth River, on the Missouri River," and ultimately ending "thence down the Missouri River to the place of beginning").
[19] 11 Stat. 750. *Accord* 15 Stat.639 (although the signatory tribes "stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined," they nevertheless "reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River").

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Congress subsequently passed numerous statutes affecting the Great Sioux Reservation. Relevant here, the Act of March 2, 1889[20] (1889 Act) removed a substantial amount of land from the Reservation and divided the remaining territory into several smaller reservations for various Sioux bands, including Cheyenne River, Standing Rock, and Lower Brule.[21] The 1889 Act preserved all provisions of the Fort Laramie Treaties that were "not in conflict" with the newly enacted statute,[22] but did not specifically address hunting and fishing rights. The Act also set the eastern border of the Cheyenne River, Standing Rock, and Lower Brule Sioux[23] Reservations as being "the center of the main channel" of the Missouri River.[24]

In 1944, Congress enacted the Flood Control Act,[25] which, in relevant part, authorized a comprehensive flood control plan for the Missouri River called the "Missouri River Basin Project." As the United States Court of Appeals for the Eighth Circuit explained:

> The 1944 Act did not authorize the acquisition of Indian property, but seven subsequent statutes authorized limited takings of Indian lands for specific hydroelectric and flood control dams on the Missouri River in North and South Dakota. These dams created huge lake-like reservoirs to control the Missouri River's seasonal flooding and to end the periodic devastation caused downstream.[26]

Four such "takings" statutes applied to the Standing Rock, Cheyenne River, and Lower Brule Reservations.[27] Among other things, all four Acts recognize the Tribes' right to "hunt and fish in and on the aforesaid shoreline and reservoir [created by the Acts], subject, however, to regulations governing the corresponding use by other citizens of the United States,"[28] and state that payment for the lands at issue would be "in settlement of all claims, rights, and demands" of the Tribe and individual Indians associated with the Act.[29] Three of the four Acts (the Oahe Acts and Big Bend) also included variations of a clause taking "title to any interest Indians may have

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[20] 25 Stat. 888.
[21] *See South Dakota v. Bourland*, 508 U.S. 679, 682 (1993).
[22] *Id.* at 682 (citing 25 Stat. 896).
[23] While this Memorandum does not consider the interests of the Lower Brule Tribe with regard to the DAPL project, federal court decisions interpreting the Lower Brule statutes are nevertheless instructive.
[24] 25 Stat. 889.
[25] Pub. L. No. 78-534, 58 Stat. 887 (1944).
[26] *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 813 (8th Cir. 1983).
[27] *See* Big Bend Act, Pub. L. No. 87-734, 76 Stat. 698 (1962); Fort Randall Dam and Reservoir Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958); Standing Rock Oahe Act, Pub. L. No. 85-915, 72 Stat. 1762 (1958); Cheyenne River Oahe Act, Pub. L. No. 81-776, 68 Stat. 1191 (1954). For ease of reference, and where applicable, I will refer to the Standing Rock Oahe Act and Cheyenne River Oahe Act collectively as the "Oahe Acts," and to the Fort Randall and Big Bend Acts, which affected the Lower Brule Reservation, collectively as the "Lower Brule Acts."
[28] 76 Stat. 701; 72 Stat. 1774; 72 Stat. 1764; 68 Stat. 1193.
[29] 72 Stat. 1173; 68 Stat. 1191.

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in the bed of the Missouri River so far as it is within the boundaries" of the reservation at issue.[30] Three of the four Acts (the Oahe Acts and Fort Randall) further authorize the Secretary of the Interior to purchase land for displaced Indians and state that the "land selected by and purchased for individual Indians may be either inside or outside the boundaries of the [reservation] as diminished."[31]

ii. Lands taken to create Lake Oahe remain on-reservation.

As noted above, the 1889 Act set the eastern boundaries of the Standing Rock and Cheyenne River Reservations as the "center of the main channel" of the Missouri River. When adjudicating boundary disputes, the United States Supreme Court has held that statutory phrases "middle of the" river, "middle of the main channel" of the river, and "the center of the main channel of that river" all synonymously refer to the middle of the main channel of a river.[32] Numerous other courts have similarly held that boundaries demarcated as the "center" of a river extend to the center point of the main navigable channel, rather than, for example, at the riverbank or the deepest point the waterway,[33] including in a case specific to the Sioux bands covered by the 1889 Act.[34] Absent an Act of Congress adjusting the reservation boundary, and subject to a determination of the precise location of the main channel of the Missouri River in relation to Lake Oahe, these cases establish that a significant portion of Lake Oahe remains within the outer boundary of the Standing Rock and Cheyenne River Sioux Reservations.

Evaluating exactly this issue, courts have recognized that the Flood Control Act takings statutes did not diminish their associated reservations.[35] For example, in *Lower Brule*, the Eighth Circuit expressly concluded that neither of the Lower Brule Acts disestablished the boundaries of

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[30] *See* 76 Stat. 698 (taking title to "any interest the tribe or Indians may have within the bed of the Missouri River so far as it is within the boundaries of the [Lower Brule] reservation"); 72 Stat 1762 (taking title to "any interest Indians may have in the bed of the Missouri River so far as it is within the boundaries of the Standing Rock Reservation"); 68 Stat. 1191 (taking title to "the bed of the Missouri River so far as it is the eastern boundary of said Cheyenne River Reservation").

[31] 76 Stat. 698; 72 Stat. 1764; 72 Stat. 1764; 68 Stat. 1193.

[32] *Iowa v. Illinois*, 147 U.S. 1, 10-11 (1893).

[33] *See, e.g.*, *Arkansas v. Tennessee*, 246 U.S. 158, 177 (1918) (when treaty boundary was "a line drawn along the middle of the River Mississippi," boundary remained in former middle channel even if subsequently affected by avulsion); *Uhlhorn v. U.S. Gypsum Co.*, 366 F.2d 211, 217 (8th Cir. 1966) (holding that "where a navigable river is the boundary between states the true line is the middle or thread of the main channel of the river."); *State v. Wetzel*, 756 N.W.2d 775, 778 (N.D. 2008) (rejecting argument that "center" language ended reservation at riverbank).

[34] *See United States v. Big Eagle*, 684 F. Supp. 241, 243-44 (D.S.D. 1988) (holding that the "center of the main channel of the Missouri River" clause in the 1889 Act created a definable boundary for the purposes of tribal criminal jurisdiction).

[35] In addition, the United States Supreme Court held that the 1908 Cheyenne River Act, Act of May 29, 1908, ch. 218, 35 Stat. 460 *et seq.*, which opened both Reservations to homesteading, did not diminish the Cheyenne River Sioux Reservation. *Solem v. Bartlett*, 465 U.S. 463 (1984).

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the Lower Brule Reservation. Noting that Congress must "unequivocally express[] intent to disestablish a reservation's boundaries" and that such intent "can be found only if there is operative statutory language that is 'precisely suited' to the purpose of disestablishment and this purpose is confirmed by the Act's legislative history and surrounding circumstances,"[36] the court ruled that language stating that the United States was taking "the entire interest . . . [and] any interest the tribe or Indians may have within the bed of the Missouri River" and was settling "all claims, rights, and demands of the tribe" did not demonstrate congressional intent to diminish the reservation.[37] The court further held that statutory authorization for the United States to purchase and sell certain lands "either inside or outside the [reservation] boundaries as diminished" was ambiguous at best, as a reservation "may be diminished in land size by sale of portions thereof to non-Indians without changing the reservation's boundaries."[38]

In the same fashion, *Lower Brule* strongly suggests that neither of the Oahe Acts diminished the Standing Rock or Cheyenne River Reservation boundaries. Congress passed the Oahe Acts pursuant to the Flood Control Act, the same authorizing legislation as the Lower Brule Acts. As the Oahe Acts were enacted for identical purposes, and with nearly verbatim language in the relevant clauses, the *Lower Brule* court expressly rejected the State of South Dakota's argument that minor wording distinctions between the Acts were of legal significance. Rather, and citing the Standing Rock Oahe Act, the court held that variations in phrasing should be attributed to "the different format" of the Acts, "coupled with a simple difference in drafting style," rather than to congressional intent to delineate different rights for the different tribes.[39] As such, the *Lower Brule* court's analysis as to why the Lower Brule Acts did not diminish the Lower Brule Reservation is equally applicable as to why the Oahe Acts did not diminish the Standing Rock or Cheyenne River Sioux Reservations.[40] Lake Oahe accordingly remains, at least in part, within the Standing Rock and Cheyenne River Sioux Reservations.[41]

The United States Supreme Court's decision in *Bourland* affirms this reading of the Oahe Acts. In *Bourland*, the Court examined whether the Cheyenne River Oahe Act abrogated the Cheyenne River Sioux Tribe's authority to regulate non-Indian hunting and fishing in the lands

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[36] *Lower Brule*, 771 F.2d at 817.
[37] *Id.* at 816-17
[38] *Id.* at 819-20 (citing *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (8th Cir. 1973)).
[39] *Id.* at 821 n.13.
[40] *See also South Dakota v. Ducheneaux*, Civ. No. 88-3049, 1990 U.S. Dist. LEXIS 20834, at *35 (D.S.D. Aug. 21, 1990) (rejecting the State's argument that the Cheyenne River Oahe Act disestablished the reservation in part because "a conveyance to the United States of all of the Tribe's interests in the project lands is not a clear expression of disestablishment of the reservation boundaries when followed by a litany of reserved rights and privileges").
[41] *Id.* at *36 ("The [Cheyenne River Oahe] Act's legislative history does not evince a congressional intention to alter reservation boundaries.").

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taken under the Act.[42] There, the Supreme Court ultimately concluded that the Flood Control Act and the Cheyenne River Oahe Act abrogated the Tribe's right to assert such regulatory jurisdiction over non-Indians within the taken territory.[43] In doing so, the Court applied two earlier decisions, *Montana v. United States*[44] and *Brendale v. Confederated Tribes and Bands of Yakima Nation*,[45] which established rules for when Indian tribes retain regulatory jurisdiction over *on-reservation land* that is owned by non-Indians.[46] As the Court noted, "*[l]ike this case, Montana* concerned an Indian Tribe's power to regulate non-Indian hunting and fishing *on lands located within a reservation* but no longer owned by the Tribe or its members."[47]

But importantly, that passage underscores the fact that the Court did not frame *Bourland* as a dispute over whether the abrogation of tribal jurisdiction was the result of the Cheyenne River Oahe Act's diminishment of the Cheyenne River Reservation – a question that the Court has considered on multiple occasions and clearly understands how to analyze.[48] Rather, the Court acknowledged that while the Cheyenne River Oahe Act may have altered the Tribe's on-reservation *jurisdiction* over non-Indian activity, it did not alter the *boundaries* of the Cheyenne River Sioux Reservation.[49] The question was about the Tribe's authority over such on-reservation lands, thus demonstrating that the Cheyenne River Sioux territory taken to create Lake Oahe remains on-reservation.[50]

As the *Lower Brule* court noted, though, the fact that the Flood Control Act taking statutes did not disestablish their associated reservations does not necessarily mean that tribal

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[42] Specifically, the Court was considering the "104,420 acres of its trust lands, including roughly 2,000 acres of land underlying the Missouri River." *Bourland*, 508 U.S. at 683.
[43] As discussed *infra*, the Court nevertheless concluded that even if the acts had extinguished the Tribe's regulatory jurisdiction over non-Indians, it had not extinguished the Tribe's retained treaty hunting and fishing rights.
[44] 450 U.S. 544 (1981).
[45] 492 U.S. 408 (1989).
[46] *Bourland*, 508 U.S. at 688-89.
[47] *Id.* at 688 (emphasis added); *accord Ducheneaux*, 1990 U.S. Dist. LEXIS 20834 at *45-52 (determining that *Montana* was the relevant analysis for the purposes of adjudicating regulatory jurisdiction over non-member hunting and fishing in lands taken under the Cheyenne River Oahe Act).
[48] *See, e.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (reservation had not been diminished and tribe retained jurisdiction to apply liquor ordinance to on-reservation vendors); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (reservation had been diminished and state environmental regulations applied); *Hagen v. Utah*, 510 U.S. 399 (1994) (reservation had been diminished and criminal defendant was thus subject to state jurisdiction).
[49] *See also Bourland*, 508 U.S. at 698, 698 n.1 (Blackmun, J., dissenting) (noting that the lower courts had determined that the Cheyenne River Sioux Act did not diminish the Cheyenne River Reservation and that the State had not appealed that point).
[50] While *Bourland* only addressed the Cheyenne River Oahe Act, as noted *supra*, the Standing Rock Oahe Act contained nearly (if not exactly) verbatim language to the relevant clauses in the Cheyenne River Oahe Act. As the Supreme Court has held, it is implausible that the United States would treat two signatories to the same treaty differently when subsequently addressing their rights over the same territory (here, Lake Oahe). *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 199 (1999).

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treaty hunting and fishing rights survive in the taken lands.[51] But in accordance with the *Bourland* and *Lower Brule* courts, I conclude that the Standing Rock and Cheyenne River Sioux Tribes retain their preexisting on-reservation hunting and fishing rights in the land used to create Lake Oahe.

iii. The Oahe Acts recognize Standing Rock and Cheyenne River Sioux treaty hunting and fishing rights in Lake Oahe.

As a general rule, Indian tribal members enjoy on-reservation hunting and fishing rights unless such rights were clearly relinquished by treaty or act of Congress.[52] Because the Treaties of Fort Laramie explicitly guarantee on-reservation Sioux hunting and fishing rights,[53] those rights exist with regard to Lake Oahe absent "'clear evidence that Congress actually considered a conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'"[54]

As the Supreme Court held in *Bourland*, there is no evidence that Congress sought to extinguish Standing Rock and Cheyenne River on-reservation hunting and fishing rights via the Oahe Acts (or any other statute).[55] Rather, the Court explicitly held that "[t]he Cheyenne River Act reserved some of the Tribe's original treaty rights in the former trust lands (including the right to hunt and fish). . . ."[56] Specifically, the Court ruled that the clause in the Cheyenne River Oahe Act (also found verbatim in the Standing Rock Oahe Act) confirming the Tribes' right to "hunt and fish in and on the aforesaid shoreline and reservoir [of Lake Oahe]"[57] was "an explicit statutory command" that the Cheyenne River Sioux retained the treaty right to hunt and fish in the land taken under the Oahe Act.[58]

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[51] *Lower Brule*, 771 F.2d at 821.
[52] *United States v. Dion*, 476 U.S. 734, 738 (1986).
[53] *See, e.g.*, *Lower Brule*, 771 F.2d at 821 ("When Congress established the Lower Brule Reservation in the 1868 Fort Laramie Treaty, the Lower Brule Sioux acquired the right to hunt and fish on the reservation free of state law."); *Bourland*, 508 U.S. at 688.
[54] *United States v. Brown*, 777 F.3d 1025, 1034 (8th Cir. 2015) (quoting *Dion*, 476 U.S. at 750). As noted, the 1889 Act was entirely silent as to hunting and fishing and thus cannot demonstrate "clear evidence" to diminish those rights.
[55] I note that the U.S. District Court for the District of Columbia has held, and the D.C. Circuit affirmed, that the 1889 Act extinguished Sioux interests in Great Sioux Reservation lands that were not included in the six reservations created by that Act. *Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 537 F. Supp. 2d 161 (D.D.C. 2008), *aff'd*, *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs*, 570 F.3d 327 (D.C. Cir. 2009). Because this holding only applied to off-reservation rights, it is inapposite to the current analysis.
[56] *Bourland*, 508 U.S. at 697.
[57] 72 Stat. 1764; 68 Stat. 1193.
[58] *Bourland*, 508 U.S. at 690. The court contrasted the explicit retention of hunting and fishing rights to regulatory jurisdiction over non-Indian hunting and fishing, for which there was no explicit retention clause, and held that the former survived while the latter did not. *See also United States v. Aanerud*, 893 F.2d 956, 961 (8th Cir. 1990) (upholding a U.S. Fish and Wildlife Service policy allowing tribal members, but not other members of the public, to

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The *Lower Brule* court similarly ruled that the Lower Brule Acts preserved Lower Brule treaty hunting and fishing rights. The court rejected the State's contention that the statutory relinquishment of the Lower Brule Tribe's "entire interest" in the taken territory extinguished hunting and fishing rights, reasoning instead that "the Tribe's treaty hunting and fishing rights are severable from their treaty rights to exclusively own, occupy and utilize the land granted to them as a reservation."[59] The court further rejected the State's same argument concerning the statutory qualification of Lower Brule hunting and fishing rights as "subject . . . to regulations governing the corresponding use by other citizens of the United States," noting that congressional intent evidenced that that language and its associated legislative history was at best ambiguous.[60] The court accordingly concluded that the Lower Brule Acts had not "abrogated the treaty right of the Lower Brule Sioux to hunt and fish free of state regulation within the Fort Randall and Big Bend taking areas. . . ."[61]

These cases establish that neither the Oahe Acts nor the Flood Control Act extinguished Sioux tribal hunting and fishing rights over the taken territory. As the *Lower Brule* court held:

> The Fort Randall and Big Bend projects, *as well as the other dam and reservoir projects in the Missouri River Basin Project*, were developed under the general authority created by Congress in the Flood Control Act of 1944. Pub. L. No. 78-534, 58 Stat. at 887 (codified as amended at 16 U.S.C. § 460d (1976)). The Act created a general scheme of federal, not state, regulation of the flood control projects it authorized. The Act, enacted in response to national needs, contemplated that the United States would pay for the acquisition of land for the projects and would pay for construction of the dams, authorized the Army Corps of Engineers and Secretary of the Army (then Secretary of War) to operate the projects, and provided that the Secretary of the Army should enact and enforce regulations to safeguard the projects. Such a system of federal regulation is inconsistent with an abrogation of the Indians' treaty rights to hunt and fish on their reservations free of state regulation, and the 1944 Act reveals no congressional intent to abrogate those rights.[62]

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harvest natural resources on refuge lands located within the tribe's reservation based on implied tribal hunting and gathering rights).

[59] *Lower Brule*, 771 F.2d at 823. The court also distinguished a previous case in which "entire interest" statutory cessions were interpreted as a blanket termination of rights by noting that in those cases, the statutes at issue had also diminished the reservation over the land in context. *Id.* at 822-24 (citing *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980)). As discussed *supra*, the Oahe Acts did not diminish either the Standing Rock or Cheyenne River Reservations and *Red Lake Band* is equally inapposite here.

[60] *Id.* at 824.

[61] *Id.* at 827.

[62] *Id.* at 824-26 (emphasis added).

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Legislative history specific to the Oahe Acts similarly does not demonstrate any intent to abrogate treaty hunting and fishing rights. Congress noted that the financial remuneration clauses in the Standing Rock Oahe Act were intended to compensate the Tribe for the "disruption of the Indian economy and way of life, and reduction in subsistence in terms of the permanent loss of timber, wildlife, and natural products."[63] As revealed in the corresponding House Report, in order to make up for this loss of wildlife, the hunting and fishing clause in the Standing Rock Oahe Act (contained verbatim in the Cheyenne River Oahe Act) preserved the "*treaty right to hunt and fish in and on the taking area and the reservoir*."[64] While the Standing Rock Sioux, Department of the Interior, and the Corps all disagreed with one another as to the scope of that hunting and fishing right,[65] both *Bourland* and *Lower Brule* affirmed that the Standing Rock Oahe Act preserved the tribal right to hunt and fish free of state jurisdiction on the lands used to create Lake Oahe.

Similarly, the Cheyenne River Oahe Act's legislative history notes that Congress required that the final bill "contain provisions . . . for protecting Indian treaty rights in relation to hunting, fishing, and trapping, and . . . for giving the Indians access below the actual taking line of the Oahe Reservoir," and further provide for the "preservation of any treaty rights of the tribe in regard to fishing, hunting, and trapping. . . ."[66] At best, and particularly interpreted in light of *Bourland* and *Lower Brule*, this legislative history demonstrates congressional intent to maintain tribal treaty hunting and fishing rights in the taken territory. And at worst, the legislative history is ambiguous, which, as discussed *infra*, must be interpreted in favor of the Sioux.

The lack of any specific language in the Oahe Acts that would abrogate tribal treaty hunting and fishing rights is significant, as Congress has explicitly extinguished Sioux treaty hunting rights in the past. For example, the Act of February 28, 1877,[67] which ceded over seven million acres of territory in the western Great Sioux Reservation to the United States, provided that the Sioux "do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, *including all privileges of hunting*. . . ."[68]

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[63] 85 CONG. REC. 15,019 (1958) (statement of Rep. Berry).

[64] H.R. REP. NO. 85-1888, at 12 (1958) (emphasis added). While the House Report noted that the Corps opposed the Indians' "free and exclusive access" to the shoreline and recommended that the State have jurisdiction over treaty hunting and fishing in the taken territory, *id.* at 20, the *Lower Brule* court considered identical language in the legislative history of the Lower Brule Acts as at best ambiguous and rejected its use as evidence of the extinguishment of tribal hunting and fishing rights. *Lower Brule*, 771 F.2d at 824 n.20.

[65] H.R. REP. NO. 85-1888 at 29-32.

[66] H.R. REP. NO. 81-1047, at 2, 6, 8 (1949).

[67] 19 Stat. 254.

[68] 19 Stat. 255 (emphasis added). *See also generally United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (describing detailed congressional policies and intent to abrogate Sioux treaty hunting rights through this legislation).

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But Congress did not include any comparable language in either of the Oahe Acts or the Lower Brule Acts, instead recognizing that Sioux treaty hunting rights survived in the taken territory. All four Acts include the same hunting and fishing clauses that the Supreme Court and Eighth Circuit found to have preserved tribal treaty rights. As was the case with the reservation diminishment inquiry, the *Bourland* and *Lower Brule* courts' reasoning with regard to the Cheyenne River Oahe Act and Lower Brule Acts applies equally to both Oahe Acts. Standing Rock and Cheyenne River Sioux treaty hunting and fishing rights survive in Lake Oahe.

And finally, while the eastern boundary of the Standing Rock and Cheyenne River Sioux Reservations may end at "the center of the main channel" of the Missouri River within Lake Oahe, activity even on off-reservation portions of the Lake may still implicate treaty hunting and fishing rights. For example, in *United States v. Washington*,[69] the Ninth Circuit Court of Appeals held that the State of Washington could not maintain certain culverts over off-reservation waterways that diminished salmon runs to the point that Washington tribes could not exercise their treaty fishing rights.[70] Further, the United States District Court for the District of Oregon ruled that the Corps could not proceed with construction of a dam on a tributary to the Columbia River without specific congressional authority because it would impede off-reservation treaty fishing rights.[71] Based on this analysis, activities even in the off-reservation portions of Lake Oahe may infringe upon Sioux treaty rights if the activities negatively impact on-reservation hunting and fishing.[72]

iv. The Indian canons of construction require ambiguities in the Oahe Acts to be resolved in favor of the Tribes.

The cases and legislative history discussed above settle that the Oahe Acts (1) did not diminish either the Standing Rock or Cheyenne River Reservations; and (2) preserved tribal treaty hunting and fishing rights in the land taken to create Lake Oahe.[73] To the extent one would argue that the Treaties of Fort Laramie or the Oahe Acts remain ambiguous on either point (again, premises rejected by both *Bourland* and *Lower Brule*), the Indian canons of construction require interpreting the Acts in the light most favorable to the Tribes.

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[69] 827 F.3d 836 (9th Cir. 2016). The State's petition for rehearing en banc is currently pending.
[70] *Id.* at 851-53.
[71] *Confederated Tribes of the Umatilla Indian Reservation v. Sec'y of the Army*, 440 F. Supp. 553, 556 (D. Or. 1977).
[72] *See, e.g.*, *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) ("The right to water to establish and maintain the Omak Lake Fishery includes the right to sufficient water to permit natural spawning of the trout."); *Minnesota v. Clark*, 282 N.W.2d 902, 909 (Minn. 1979) (noting that "it would be incongruous to construe the treaty as denying the Indians their very means of existence while purporting to grant them a home").
[73] As discussed *infra*, the Tribes also have reserved water rights in addition to (and in concert with) these treaty hunting and fishing rights.

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The Indian canons "require that treaties, agreements, statutes and executive orders be liberally construed in favor of the Indians. In addition, to the extent that federal Indian law is ambiguous, any ambiguity is construed liberally in favor of the Indians."[74] The *Lower Brule* court applied this doctrine in its examination of the Cheyenne River Oahe Act,[75] ultimately concluding that while there were ambiguities in the relevant statutory clauses and legislative history (for example, reconciling the "entire interest" cession with the "retained hunting and fishing rights" clause), this ambiguity necessitated an interpretation in favor of maintaining tribal rights.[76] Numerous other courts have similarly held that ambiguity over the existence or scope of Indian hunting and fishing rights must be read in the manner most beneficial to tribal interests.[77] This well-established doctrine should foreclose an attempt to reinterpret the Oahe Acts or otherwise challenge their preservation of tribal treaty rights.

v. The Tribes retain water usage rights in Lake Oahe.

In addition to their treaty hunting and fishing rights, the Tribes enjoy a right to water to support their reservation homeland. "For over a century, the Supreme Court has held that when the United States 'withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.'"[78] These rights are referred to as "*Winters* rights" after a foundational case, *Winters v. United States*,[79] in which the Court held that although the treaty creating the Fort Belknap Reservation was silent as to water rights, it had to be read as implicitly maintaining the Tribe's access to water sufficient to support the purpose

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[74] *White Earth Band of Chippewa Indians v. County of Mahnomen*, 605 F. Supp. 2d 1034, 1046 (D. Minn. 2009) (citations omitted); *see also, e.g.*, *Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' Montana v. Blackfeet Tribe, 471 U.S. at 766.").

[75] *Lower Brule*, 771 F.2d at 815-16.

[76] *Id.* at 824.

[77] *See, e.g.*, *Mille Lacs*, 526 U.S. at 200 ("At the very least, the historical record refutes the State's assertion that the 1855 Treaty 'unambiguously' abrogated the 1837 hunting, fishing, and gathering privileges. Given this plausible ambiguity, we cannot agree with the State that the 1855 Treaty abrogated Chippewa usufructuary rights."); *Washington v. Wash. St. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 677-79 (1979) (treaty giving tribes right to take fish "in common with" state citizens interpreted to give priority to tribal take); *People v. Le Blanc*, 248 N.W.2d 199, 211 (Mich. 1976) ("There is not the slightest indication in this portion of the negotiations, or in the minutes of the negotiations in their entirety, that the Treaty of 1855 would affect hunting or fishing rights reserved under the Treaty of 1836.").

[78] *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV 13-883-JGB, 2015 U.S. Dist. LEXIS 49998, at *12 (C.D. Cal. Mar. 20, 2015) (quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976)). This case was appealed and oral arguments were held before the Ninth Circuit Court of Appeals on October 18, 2016.

[79] 207 U.S. 564 (1908).

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of the reservation (in that case, farming).[80] Courts applying the *Winters* doctrine recognize that absent such implied rights, tribes would lose their water via upstream appropriation or degradation by non-Indians under state law.[81]

The Corps has recognized that it must operate its facilities in the Missouri River Basin in a way that is consistent with tribal *Winters* rights.[82] For example, as the Corps has noted with regard to the Sioux Tribes:

> The message of the Winters Doctrine is that we have an obligation to ensure that tribal reservations have water rights from a given source, in this particular case, the Missouri. So when you take a look at that, we, the Federal Government, have trust responsibilities for tribal reservations. So we take this very seriously, to make sure that whatever document we have includes that particular doctrine.[83]

Here, the Tribes' federal reserved water rights have not been specifically adjudicated or otherwise quantified through a congressionally authorized Indian water settlement. However, Lake Oahe, which was created out of the Missouri River that the Treaties of Fort Laramie established as the eastern border of the Standing Rock and Cheyenne River Sioux Reservations, is an obvious source.[84] Congress has authorized the construction of a rural water system to serve the Standing Rock Sioux Reservation under the authority of the Garrison Diversion Unit Reformulation Act of 1986.[85] The system, which was built through P.L. 93-638 contracts between the U.S. Bureau of Reclamation and the Standing Rock Sioux Tribe, includes several water intakes on Lake Oahe, which the Tribe uses for drinking water and irrigation purposes.

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[80] *Id.* at 577. In addition, in recognition of the fact that specific purposes of an Indian reservation were often unarticulated in treaty, statute, or executive order, a "general purpose, to provide a home for the Indians, is a broad one and must be liberally construed." *Colville Confederated Tribes*, 647 F.2d at 46; *Agua Caliente*, 2015 U.S. Dist. LEXIS 49998 at *18.

[81] *Colville Confederated Tribes*, 647 F.2d at 46.

[82] *See Impact Suffered by the Tribes in the Upper Basin of the Missouri River: Hearing Before the Comm. on Indian Affairs of the United States Senate*, 108th Cong. 53 (2003) (statement of George Dunlop, Deputy Assistant Sec'y of the Army on Civil Works) ("I would like to emphasize that the Corps fully recognizes the principles of Tribal sovereignty and the Federal Government's trust responsibility to the Tribes. The Corps will continue to engage in Government-to-Government consultation in order to take into account the quantified water rights of the Tribes in the operation of the Mainstem Reservoir System."); *accord id.* (noting that even when tribal water rights are not quantified, the "Corps recognizes . . . that the Tribes have claims to reserved water rights, and will, to the extent permissible by law, continue to operate the Mainstem Reservoir System in a way that does not preclude such claims").

[83] *Id.* at 9 (statement of Brig. Gen. William T. Grisoli, U.S. Army, Commander, Nw. Div., U.S. Army Corps of Eng'rs).

[84] It is further possible that other sources for the Tribes' federal reserved water rights would be identified through an anticipated process to eventually get a decree for these water rights. This Memorandum does not suggest that the Tribes lack any other treaty or *Winters* guaranteed rights.

[85] Pub. L. No. 106-554, App. D. Title IV, *reprinted in* 114 Stat. 2763A-282.

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Furthermore, water is reserved to protect tribal treaty rights to hunt and fish, so one aspect of an eventual water rights decree would almost certainly be water in Lake Oahe to support the Tribes' retained hunting and fishing rights discussed above.[86] As discussed below, these water rights require equal consideration as part of the DAPL permitting process as the Tribes' hunting and fishing rights.

2. Further consideration of the potential impacts to treaty-protected hunting, fishing, and water rights is warranted.

The Supreme Court has repeatedly recognized and emphasized the "'distinctive obligation of trust incumbent upon the Government in its dealings'" with Indian tribes.[87] Here, the applicable statutory framework under the MLA and Section 408 requires consideration of the public interest, which necessarily includes impacts on tribal nations and tribal trust resources. Even assuming that the Corps' Section 408 permit decision meets NEPA's minimum requirements,[88] the federal government's trust relationship counsels that the Corps' conduct will be reviewed pursuant to "the most exacting fiduciary standards."[89] In this regard, the courts have recognized that "special regard be given to the procedural rights of Indians by federal administrative agencies."[90]

Under this standard, before the Corps makes a decision on the right-of-way under the MLA, it should conduct additional government-to-government consultation and analyze in detail how the right-of-way will potentially affect the Tribes' treaty-protected hunting, fishing, and water rights.[91] Even if the Corps ultimately determines that it is appropriate for the DAPL to proceed, the additional consultation and analysis might help the Corps and the project proponent

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[86] *United States v. Adair*, 723 F.2d 1394, 1409-11 (9th Cir. 1983).

[87] *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).

[88] Courts have held that even if an agency complies with NEPA, a permitting action may still be impermissible if it unduly burdens tribal treaty rights in violation of the trust responsibility. *See, e.g.*, *No Oilport! v. Carter*, 520 F. Supp. 334, 371 (W.D. Wash. 1981) (even when a federal agency had satisfied NEPA, there was still a genuine issue of material fact sufficient to defeat summary judgment as to whether agency had violated trust responsibility by failing "to use the highest degree of care to ensure that Indian interests are fully protected").

[89] *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)).

[90] *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 225 (1982 ed.)).

[91] *See* Letter from the Honorable Dave Archambault II, Chairman, Standing Rock Sioux Tribe, to the Honorable Jo-Ellen Darcy, Assistant Sec'y of the Army (Civil Works) 3 (Dec. 2, 2016) ("An oil spill in Lake Oahe also threatens trust lands. The vast majority of the lands that lie immediately adjacent to those held by the Corps for the Oahe Project are held by the United States in trust for the benefit of the Tribe and tribal members. For example, near to Fort Yates there are low-lying trust lands that are susceptible to floods. An oil spill could contaminate trust lands in the Fort Yates area including an Indian housing development known locally as Sioux Village.") [hereinafter "December 2 Letter"].

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to identify appropriate mitigation measures to protect important resources and ensure tribal treaty and water rights are not adversely impacted. Regardless of the Corps' eventual decision, further consideration the DAPL's potential impact on tribal rights and interests would help ensure that the applicable fiduciary standard has been met.[92]

To illustrate, the Corps itself has denied permit applications that would have a more than *de minimis* interference with tribal access to a usual and accustomed fishery.[93] Given the potential magnitude associated with oil pipeline spills into a waterway with treaty-protected hunting, fishing, and water rights, a closer examination of Sioux rights potentially affected by the DAPL project as a matter of the exercise of the Corps' discretion is consistent with the fiduciary standards. If the agency develops information pursuant to this review that "forecasts deleterious impacts, the [agency] must consider and implement measures to mitigate these impacts if possible."[94] This approach has been put into practice by many executive agencies.[95]

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[92] The Corps has repeatedly reaffirmed this responsibility. For example, the Corps' Tribal Consultation Policy states that there are "responsibilities to Tribes resulting from the Federal Trust Doctrine, as well as from Treaties, statutes, regulations, Executive Orders, and agreements between the United States government and tribal governments." U.S. ARMY CORPS OF ENGINEERS, TRIBAL CONSULTATION POLICY AND RELATED DOCUMENTS 2 (2013). And in 2004, the Corps entered into a *Final Programmatic Agreement for the Operation and Management of the Missouri River Main Stem System for Compliance with the National Historic Preservation Act* (FPA) with numerous tribal signatories, including both the Standing Rock and Cheyenne River Sioux Tribes. The FPA establishes Corps policy concerning the National Historic Preservation Act in terms of tribal consultation, managing tribal trust resources, maintaining the trust responsibility, and other issues, and notes that Corps actions "in the Missouri River Basin, directly or indirectly affect trust land, and some of the lands managed by the Corps are within reservation boundaries established by treaties where the Tribes and their members continue to have treaty-based rights even though lands have been taken out of trust status." *Id.* at P-3.

[93] *See, e.g.*, *Northwest Sea Farms*, 931 F. Supp. at 1519-22 (rejecting Administrative Procedure Act challenge to Corps' citation to *de minimis* impacts test in rejecting a permit); U.S. Army Corps of Eng'rs, Administrative Appeal Decision, *Osterman Appeal* 11 (Seattle Div. Dec. 3, 2013) (upholding District Engineer's rationale for permit denial that the "proposed structures would have more than a de minimis impact to the Suquamish Tribe's access to its U&A fishing grounds for shellfish and finfish harvesting"); U.S. ARMY CORPS OF ENG'RS, MEMORANDUM FOR RECORD APPLICATION: NWS-2008-260 PACIFIC INTERNATIONAL HOLDINGS LLC: GATEWAY PACIFIC TERMINAL PROJECT AND LUMMI NATION'S USUAL AND ACCUSTOMED TREATY FISHING RIGHTS AT CHERRY POINT, WHATCOM COUNTY 1 (May 9, 2016) (rejecting marine terminal permit that would interfere with tribal treaty fishing); *United States v. Washington (In re: Shellfish)*, Case No.: C70-9213, Stipulation and Order Amending Shellfish Implementation Plan (Apr. 8, 2002) (acknowledging Department of Justice instruction applying the *de minimis* impacts test).

[94] *Okanogan Highlands All. v. Williams*, Civil No. 97-806-JE, 1999 U.S. Dist. LEXIS 4068, at *47 (D. Or. Jan. 12, 1999) (citation omitted) [hereinafter "*Okanogan I*"].

[95] For example, the Department of Defense is a recent signatory to a federal Memorandum of Understanding that affirms agency "commitment to protect tribal treaty rights and similar tribal rights relating to natural resources through consideration of such rights in agency decision-making processes and enhanced interagency coordination and collaboration." MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY RIGHTS 1 (Nov. 9, 2016). With that in mind, this discussion is not to suggest that the trust responsibility requires a full analysis of tribal rights prior to virtually any federal action in which a tribe might take an interest for whatever reason, or that any NEPA review involving a tribe

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Pursuant to this framework, it is critical to recognize that the Tribes retain hunting, fishing, and water rights in and around Lake Oahe. And as the Corps notes in the EA, the Standing Rock Sioux Tribe raised numerous concerns about potential degradation to tribal rights, as well as concerns over the lack of government-to-government consultation on certain issues.[96] But while the EA acknowledges the Standing Rock Sioux Reservation's geographical location in relation to the pipeline,[97] the Corps ultimately concludes that:

- "No impacts to treaty fishing and hunting rights are anticipated due to construction within the Project Area or Connected Actions."[98]

- "Direct and Indirect impacts from the Proposed and Connected Actions will not affect members of the Standing Rock Sioux Tribe or the Tribal reservation."[99]

- "[T]here will be no direct or indirect effects to the Standing Rock Sioux tribe. This includes a lack of impact to its lands, cultural artifacts, water quality or quantity, treaty hunting and fishing rights, environmental quality, or socio-economic status."[100]

- "Although the history of the [Standing Rock Sioux Tribe] and treaty rights is beyond the scope of the EA, no impact to tribal treaty rights are anticipated due to construction or operation of the pipeline within the Project Area or

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automatically requires an EIS or a tribal-specific EA. Nor does it purport to proffer a bright line standard concerning when tribal interests are significant enough such that the trust responsibility mandates additional federal review, or the depth or nature of any such review. And it also does not address those cases where tribes claim protectable off-reservation interests that are not guaranteed by statute or treaty. Rather, I only address the unique facts at hand: a pipeline crossing beneath a waterway (1) that serves as the boundary of multiple Indian reservations; (2) in which several tribes unquestionably retain some level of treaty-guaranteed hunting, fishing, and water rights; (3) when the proposed crossing is close enough to the reservations so as to amplify the potential impacts of an oil spill on reserved treaty rights; and (4) where, as I believe is the case here, the agency relied on the applicant's assessment of risk without direct consideration of the Tribes' treaty rights.

[96] *See* Summary of Comments Received Environmental Assessment Dakota Access Pipeline Project Crossings of Flowage Easements and Federal Lands at 4, 7-10, 12-19 [hereinafter "Comments Summary"]; *see also* Letter from Dave Archambault II, Chairman, Standing Rock Sioux Tribe of Indians, to The Honorably Jo-Ellen Darcy, Assistant Sec. of the Army (Civil Works) (Sept. 22, 2016) (chronicling Standing Rock concerns with the DAPL project) [hereinafter "September 22 Letter"].

[97] Final EA at 2, 38, 75. Nevertheless, the draft EA failed to even identify the reservation on its maps and incorrectly said the Standing Rock Sioux Tribe had no issue with the project.

[98] *Id.* at 58.

[99] *Id.* at 85.

[100] *Id.* at 86.

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Connected Actions."[101]

- "No treaty rights have been identified that would be adversely affected by project permitting, construction or operation."[102]

These general statements about treaty rights require a more robust analysis in light of the settled, geographically relevant nature of the Tribes' rights with regard to Lake Oahe. For example, the existing record does not: identify on-reservation lands where the Tribes may retain hunting and fishing rights or where reservation boundaries exist within Lake Oahe; analyze whether tribal members consume a higher amount of treaty-guaranteed fish or game that might be affected by pipeline construction or a potential spill; identify relevant statutes, treaties, or court cases; discuss proactive mitigation efforts that could protect tribal lands (specifically, and as opposed to any relevant non-treaty protected lands); compare the Tribes' on and off-reservation rights, etc. Similarly, the current record consists of a physical description of the Standing Rock Sioux Reservation and the general assurances quotes above that the DAPL project will not affect tribal rights.[103] In fact, the Tribes and their members use Corps lands, tribal lands, and allotted lands abutting Lake Oahe for hunting, fishing and gathering. The Tribes rely on the waters of Lake Oahe to provide habitat for fish, wildlife and plants that the Tribe depends on for subsistence and cultural and religious practices.[104] And as the Standing Rock Sioux further explained, "[t]he entire Reservation shoreline along the Missouri is a vital habitat for fish and wildlife – upon which Tribal members rely for subsistence as well as cultural and religious practices."[105]

Nor does anything in the current record recognize that the Standing Rock Oahe Act reserved the Tribe's "title to the . . . interest in oil, gas, and all other minerals of any nature whatsoever" in the taken territory.[106] Given the *Bourland* Court's emphasis on the fact that the Cheyenne River Oahe Act's explicit reservation of tribal hunting and fishing rights preserved such rights on the taken territory, this language in the Standing Rock Oahe Act should equally

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[101] Comments Summary at 17.
[102] *Id.*
[103] *Id.* at 8; *accord* Final EA at 58, 75. There is no mention of the potentially similar rights of the Cheyenne River Sioux Tribe, discussed *inter alia* in this Memorandum.
[104] *See* Letter from the Honorable Dave Archambault II, Chairman, Standing Rock Sioux Tribe, to Lowry Crook, Principal Assistant Deputy Sec'y of the Army (Civil Works) (Mar. 24, 2016); *accord* December 2 Letter at 3 ("On the Reservation, jobs are scarce and poverty levels are high, so for many Tribal members, fishing is necessary to provide enough to eat for their families. For many other Tribal members, fishing provides an important supplemental source of food and nutrition.") (citations and internal quotations omitted).
[105] Letter from the Honorable Dave Archambault II, Chairman, Standing Rock Sioux Tribe, to the Honorable Sally Jewell, Sec'y, U.S. Dep't of the Interior (Feb. 9, 2016). *See also* attached map (location of tribal and allotted lands relative to pipeline crossing).
[106] 72 Stat. 1762.

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preserve Standing Rock Sioux treaty mineral rights in Lake Oahe.[107] Instead, the EA generally concludes that the pipeline will include technology designed to prevent leaks,[108] notes that the DAPL route "expressly and intentionally does not cross the Standing Rock Sioux Reservation,"[109] and says that the pipeline is co-located with existing infrastructure.[110]

These circumstances warrant a more searching consideration of the effect of a federal project on tribal treaty rights.[111] For example, the Interior Board of Land Appeals (IBLA) found that the Bureau of Land Management (BLM) had not satisfied the trust responsibility precisely because BLM's discussion of treaty rights in an EIS were limited to "asserting that [the trust responsibility] was not implicated because Tribal lands are not part of the permitted area and in concluding that its trust responsibility was satisfied by complying with Federal laws and regulations."[112] The IBLA held that BLM's unsupported statement that there would be "no impacts to trust resources" due to the BLM having analyzed "the potential impacts that will occur to all aspects of the human environment both on and off the Fort Belknap Reservation"[113] did not itself demonstrate that BLM had validated the United States' "trust responsibility to consider and protect Tribal resources."[114] The IBLA remanded the EIS with instructions for BLM "to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety in making its . . . decisions."[115]

Similarly, in *No Oilport!*, the U.S. District Court for the Western District of Washington denied the federal defendants' motion to dismiss tribal plaintiffs' claim that authorizing an oil pipeline undermined tribal treaty rights in violation of the trust responsibility (even after finding that the United States had satisfied all applicable NEPA requirements). Notably, the court relied on affidavits from the tribes arguing that pipeline sedimentation could adversely affect spawning beds for treaty-protected fish,[116] as well as a federal finding that although "it is unlikely that any reduction (in fish) would be noticed in . . . Indian fisheries . . . *if impacts are substantial*,

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[107] While my analysis focuses on the discussion of hunting and fishing rights given the comparatively more robust case law about Sioux rights in these areas, as well as the more direct threat that the DAPL project poses to those rights as compared to mineral rights, the Corps' lack of any consideration of tribal mineral rights itself warrants further analysis here.
[108] Final EA at 85-86.
[109] *Id.* at 86.
[110] *Id.*
[111] I further note that the EA focuses primarily on the risks associated with the drilling area itself rather than associated risks to tribal treaty rights.
[112] *Island Mountain Protectors, National Wildlife Federation, Assiniboine and Gros Ventre Tribes, and Fort Belknap Community Council*, 144 IBLA 168, 183 (1998).
[113] *Id.* at 185.
[114] *Id.* at 184.
[115] *Id.* at 185.
[116] *No Oilport*, 520 F. Supp. at 372.

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reductions *might* be detected. . . ."[117] Because the demonstrated possibility of such impacts on tribal treaty rights was enough to defeat the defendants' summary judgment motion, the court held that the trust responsibility "unquestionably . . . place[s] substantial duties upon the United States" to protect treaty fishing rights.[118] Here, as the Standing Rock Sioux Tribe has provided the Corps with a detailed technical review of the risks and potentially significant consequences of a DAPL leak,[119] there is a similarly demonstrated possibility of impacts on tribal treaty rights that warrant additional review. In this regard, the Corps has a valid rationale to expand its NEPA review and authorize independent experts to opine on the potential for a catastrophic spill at the proposed location.[120]

By comparison, in the *Okanogan* cases,[121] the courts rejected the Confederated Tribes of the Colville Reservation's (CCT's) claim that the United States Forest Service (USFS) had failed to adequately consider CCT treaty hunting and fishing rights prior to authorizing a gold mine.[122] Both courts found that the USFS specifically identified CCT hunting, fishing, and tribal cultural properties,[123] discussed the scope of those specific rights as well as CCT's water rights, made specific findings as to potential impacts on tribal treaty rights and potential reclamation and mitigation alternatives, and ultimately concluded based on a full evaluation of the evidence that the mine would not unduly affect those rights.[124] The *Okanogan I* court further set out how the USFS had "attempted to obtain information from the [Tribes] about cultural, historic and religious concerns for determining how potential impacts--including those to fish, wildlife and water--would affect tribal members,"[125] identified specific sites for mitigating wetland habitats needed to protect tribal rights, and conditioned the permit on guarantees that the mine would maintain minimum water flow necessary to preserve tribal water rights.[126]

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[117] *Id.* at 373 (emphasis added).
[118] *Id.*
[119] *See* Letter from the Honorable Dave Archambault II, Chairman, Standing Rock Sioux Tribe, to the Honorable Jo-Ellen Darcy, Assistant Sec'y of the Army (Civil Works) (Oct. 28, 2016); Memorandum from Richard B. Kuprewicz, President, Accufacts Inc., to Jan Hasselman, Staff Attorney, Earthjustice, Inc. (Oct. 28, 2016).
[120] While the applicant prepared a non-public spill analysis, the analysis has not been subject to public review, consultation with the Tribes, and independent review by federal experts. As trustee, the Corps has an obligation to ensure that any risks to treaty rights are eliminated through an open and independent process. Furthermore, that spill analysis does not examine the environmental impacts of a catastrophic event.
[121] *Okanogan I*, discussed *infra*, was subsequently affirmed in *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468 (9th Cir. 2000) ("*Okanogan II*").
[122] While the CCT alleged violations of both the procedural trust responsibility and NEPA in the context of an EIS, both the district and circuit courts evaluated these allegations as distinct causes of action. Thus, although the courts were examining an EIS, they did so in the context of considering the USFS's compliance with the trust responsibility as well as with NEPA.
[123] *See, e.g.*, *Okanogan II*, 236 F.3d at 479 (finding that "a key issue addressed in the EIS is the Project's 'potential to affect cultural resources, reserved rights, trust issues, and responsibilities'").
[124] *Id.* at 478-80; *accord Okanogan I*, 1999 U.S. Dist. LEXIS 4068 at *56-57.
[125] *Okanogan I*, 1999 U.S. Dist. LEXIS 4068 at *57.
[126] *Id.* at *60-62.

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Although adjudicated on a case-by-case basis, the common theme of these decisions is that the United States' fulfillment of the exacting standard of a fiduciary requires more than conclusory statements that there will be no impact on tribal rights, a dismissive note that a project is situated off-reservation, argument that a private corporation complied with environmental laws, or citation to general pipeline safety technology. Particularly in light of the Tribes' settled treaty rights in Lake Oahe and the close proximity between the proposed Lake Oahe crossing and the Tribes' reservations, the trust relationship requires a deeper consideration of tribal issues.

i. Off-reservation activity must not impair the Tribes' senior water rights.

The EA notes that the "Standing Rock Sioux Reservation boundary is over 0.5 miles south of the Lake Oahe Project Area crossing,"[127] the "pipeline route expressly and intentionally does not cross the Standing Rock Sioux Reservation,"[128] and that "linear projects typically use a 0.5 mile buffer area." The Corps concludes that because the "pipeline will be located under Lake Oahe, and Dakota Access has developed response and action plans, and will include several monitoring systems, shut-off valves and other safety features to minimize the risk of spills and reduce or remediate any potential damages,"[129] "[n]o impacts to SRST reserved water rights are anticipated."[130]

But the DAPL project requires a more thorough discussion as to how these off-reservation authorizations will not impact the Tribes' reserved water rights and usage of Lake Oahe discussed *supra*.[131] It is well established that "Indian reserved water rights are vested property rights for which the United States ...[holds] legal title... in trust for the benefit of the Indians."[132] For example, courts (including *Winters* itself) have held that the *Winters* doctrine may impact off-reservation actions that affect water quality and quantity in order to preserve on-reservation reserved tribal rights.[133] In *United States v. Gila Valley Irrigation District*,[134] farmers with a more junior right whose properties were located upstream from a reservation were

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[127] Final EA at 86.
[128] *Id.*
[129] *Id.* at 2.
[130] Comments Summary at 8.
[131] Final EA at 87.
[132] *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. Reg. 9,223, 9,223 (Mar. 12, 1990).
[133] *See, e.g.*, *Winters*, 207 U.S. at 577; *Gila River Pima-Maricopa Indian Cmty. v. United States*, No. 236-C, 1981 U.S. Ct. Cl. LEXIS 1314 (Ct. Cl. Jan. 7, 1981) (United States was required to take reasonable action to end the loss of the water or to provide an equivalent supply once upstream diversions began to restrict the tribe's on-reservation agriculture).
[134] 920 F. Supp. 1444 (D. Ariz. 1996), *aff'd*, 117 F.3d 425 (9th Cir. 1997).

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required to take steps to decrease the salinity of the Gila River Indian Community's water so that "the Tribe receives water sufficient for cultivating moderately salt-sensitive crops."[135] Similarly, in *United States v. Anderson*,[136] the court determined that the Spokane Tribe of Indians was entitled to sufficient water flow to maintain an appropriate temperature for the tribe's fishery.[137] Other courts have held that guaranteed treaty hunting and fishing rights (which, as discussed *supra*, the Tribes retain in Lake Oahe) could be a basis for decreeing a water right to benefit a tribe.[138] And still others have noted that in some situations, protecting water quality is fundamental to the tribal right of self-determination.[139] These cases establish that there is a legal basis for the Corps to consider potential effects to tribal water rights (as well as water quality issues affecting the Tribes' treaty hunting and fishing rights) as part of its environmental review. The Corps has sufficient grounds to reevaluate any specific threats to tribal water rights and consider the implication for the DAPL project moving forward.

3. Under NEPA, the Corps should further evaluate the DAPL's potential impacts on tribal rights and interests.

The MLA provides the Corps with the discretion as to whether or not it should grant the DAPL applicant a right-of-way across federal lands. In addition, the MLA expressly contemplates an applicant's NEPA compliance prior to such a decision. But in this case, the Corps' existing EA pertains only to the Section 408 permit. And as explained below, the Corps should consider a number of NEPA requirements prior to granting an easement under the MLA. This recommendation is supported by case law in addition to that concerning the tribal interests discussed above, and is consistent with the Department of Interior's own approach to MLA decisions.

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[135] *Id.* at 1454-56.

[136] 591 F. Supp. 1 (E.D. Wash. 1982), *aff'd in part and rev'd in part on other grounds*, 736 F.2d 1358 (9th Cir. 1984).

[137] *Id.* at 5-6; *accord Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir. 1985) (tribe's fishing right could be protected by enjoining water withdrawals that would destroy salmon eggs before they could hatch).

[138] *Adair*, 723 F.2d at 1409-11 (tribe's treaty hunting and fishing rights implicitly reserved sufficient waters to "secure to the Tribe a continuation of its traditional hunting and fishing lifestyle").

[139] *See Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1222 (9th Cir. 2000) ("[I]t is difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government."); *City of Albuquerque v. Browner*, 97 F.3d. 415, 423 (10th Cir. 1996) (upholding tribal water quality standards that were more stringent than federal standards and observing that the authority to establish such high standards "is in accord with powers inherent in Indian tribal sovereignty").

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i. NEPA standards.

NEPA, the "basic national charter for the protection of the environment,"[140] requires federal agencies to consider "every significant aspect of the environmental impact of a proposed action and inform the public that it has indeed considered environmental concerns in its decisionmaking process."[141] The agency must take a "'hard look' at the environmental consequences' of a major federal action before taking that action,"[142] which ensures that in making its decision, the agency "will have available, and will carefully consider, detailed information concerning significant environmental impacts."[143] "Effects" or "impacts" to be considered include "ecological . . . aesthetic, historic, cultural, economic, social or health, whether direct, indirect, or cumulative."[144] Cumulative impacts result from "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[145] "Accordingly, the administrative record must disclose 'a reasonably thorough discussion of the significant aspects of the probable environmental consequences.'"[146]

In addition, "NEPA requires that federal agencies include a detailed statement of 'alternatives to the proposed action' in any recommendation or report on actions significantly affecting the quality of the human environment."[147] The agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."[148] "The consideration of alternatives requirement . . . guarantee[s] that agency decisionmakers have before them and take into proper account all possible approaches to a particular project

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[140] 40 C.F.R. § 1055.1(a).
[141] *Baltimore Gas & Elec. Co. v. NRDC, Inc.*, 462 U.S. 87, 97 (1983); *accord Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153-54 (9th Cir. 2006) (internal quotation marks and citation omitted); *Friends of the Norbeck v. U.S. Forest Serv.*, 780 F. Supp. 2d 975, 982-83 (D.S.D. 2011).
[142] *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 533 (8th Cir. 2003) (quoting *Baltimore Gas & Electric*, 462 U.S. at 97).
[143] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *see also* 42 U.S.C. § 4370m; 40 C.F.R. §§ 1500.3, 1500.4(q), 1500.5(*l*), 1508.9, 1508.11, 1508.13.
[144] 40 C.F.R. § 1508.8.
[145] *Sierra Club v. U.S. Army Corps of Eng'rs*, 494 F. Supp. 2d 1090, 1095 (W.D. Mo. 2007) (citing 40 C.F.R. § 1508.7 and 33 C.F.R. § 320.4(a)(1), and collecting cases).
[146] *Sierra Club v. Bosworth*, 352 F. Supp. 2d 909, 925 (D. Minn. 2005) (quoting *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343-44 (9th Cir. 1996)).
[147] *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006), *remanded and rev'd in part on other grounds, Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1073 (9th Cir. 2010) (quoting 42 U.S.C. § 4332(2)(C)(iii)).
[148] 42 U.S.C. § 4332(2)(E).

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(*including total abandonment of the project*) which would alter the environmental impact and the cost-benefit balance."[149]

This environmental review can include consideration of tribal treaty rights as well as impacts on tribal interests.[150] The Corps therefore should analyze tribal treaty and water rights, and impacts to tribal interests, not only with regard to the contours of the trust responsibility as set out by case law, but as independently required by NEPA.[151]

ii. Further analysis of route alternatives.

NEPA requires federal agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives" to its preferred course of action.[152] Reasonable alternatives include those "'that are technically and economically practical or feasible and meet the purpose and need of the proposed action.'"[153] Although NEPA "does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or impractical or ineffective, it does require the development of information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned."[154]

Here, the Corps considered two potential routes for the DAPL pipeline. The first passed approximately ten miles north of Bismarck, North Dakota (Bismarck route). The second, which the Corps ultimately approved, runs 0.55 miles from the border of the Standing Rock Sioux Reservation (Lake Oahe route).[155] But the Corps' reasons for rejecting the Bismarck route also largely apply to concerns regarding tribal treaty rights associated with the Lake Oahe route. As

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[149] *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (emphasis in original).
[150] *See, e.g.*, *Humane Soc'y of the United States v. Bryson*, 924 F. Supp. 2d 1228, 1240 (D. Or. 2013) (noting that an EA concerning fishing activities "considered both Treaty Indian fishing, which refers to the fishing rights of Indian tribes that are reserved in treaties between the tribes and the federal government, and non-Indian fishing, which encompasses both commercial and sport fishing"); *Okanogan I*, 1999 U.S. Dist. LEXIS 4068 at *63-64; *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1507 (W.D. Wash. 1988) (ultimately enjoining project that infringed upon treaty rights even though the "permit included special permit conditions ('SPCs') to mitigate some impacts of the Marina on the Tribes' treaty fishing rights" based on information developed during the EIS process).
[151] Although compliance with NEPA will not guarantee compliance with the trust responsibility, courts have also held that violations of environmental statutes such as NEPA result in a per se violation of the fiduciary duty associated with the trust responsibility. *See, e.g.*, *Pit River Tribe*, 469 F.3d at 788; *Island Mountain Protectors*, 144 IBLA at 185.
[152] 40 C.F.R. § 1502.14(a)).
[153] *Union Neighbors United, Inc. v. Jewell*, No. 15-5147, 2016 U.S. App. LEXIS 14377, at *20-21 (D.C. Cir. Aug. 5, 2016) (quoting 43 C.F.R. § 46.420(b)).
[154] *Richardson*, 565 F.3d at 703 (citation omitted).
[155] Final EA at 8-9. The EA mentions that the Corps also considered a "cursory route evaluation to attempt crossing the Missouri River at a location that does not contain flowage easements" but ultimately rejected it early in the evaluation process. *Id.* at 8.

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such, if the Bismarck route is impermissible, the Lake Oahe route should be equally impermissible. This merits consideration of a reasonable alternative to both routes.

In the EA, the Corps ultimately rejected the Bismarck route due in large part to its proximity to a central municipality and to "multiple conservation easements, habitat management areas, National Wildlife Refuges, state trust lands, waterfowl production areas, and private tribal lands."[156] The Corps also noted that the Bismarck route crossed or was in close proximity to "several wellhead source water protection areas," and thus determined that the agency should avoid that route so as "to protect areas that contribute water to municipal water supply wells."[157] The Corps further sought to "minimize[] impacts on sensitive resources (e.g., piping plover critical habitat, eagle nests, etc.),"[158] as well as to completely avoid "high risk features" such as national parks.[159] But while the Corps determined that these concerns rendered the Bismarck alternative non-viable, and thus chose not to analyze their decision in detail in the EA, the EA minimizes identical considerations with respect to the Lake Oahe route's threat to on-reservation tribal hunting, fishing, and water rights.

First, although the Corps cited concerns over the safety of the Bismarck water supply as partial justification for its decision not to analyze the Bismarck route in detail, the rationale for putting the pipeline at Lake Oahe is based on representations from the applicant with no input from the Tribes. The Corps reasoned that because of "the engineering design, proposed installation methodology, quality of material selected, operations measures and response plans the risk of an inadvertent release in, or reaching, Lake Oahe is extremely low."[160] The Corps further concludes that because the "siting and construction of oil pipelines upstream of drinking water intakes is not uncommon throughout the United States," in the "unlikely event of a release, sufficient time exists to close the nearest intake valve to avoid human impact."[161] This appears to be based on the belief that "tribal drinking water supplies are obtained from a combination of wells and surface water."[162] This is inaccurate – the majority of the approximately 4,300 Standing Rock Sioux Reservation residents are served by a Municipal, Rural, and Industrial water system with its intake on Lake Oahe.[163] A pipeline spill would thus pose the same risk[164]

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[156] *Id.*
[157] *Id.*
[158] *Id.* at 14.
[159] *Id.* at 7.
[160] *Id.* at 87.
[161] *Id.*
[162] *Id.*
[163] September 22 Letter at 5. *See also* Cheyenne River Brief at 28 ("The public water supply for the Tribe, which provides drinking water for thousands of people, is located directly downstream of the proposed pipeline crossing route.").
[164] In fact, a spill in Lake Oahe would likely pose a greater threat to tribal water, as the Lake Oahe route passes only 0.5 miles from the Standing Rock Sioux Reservation, as opposed to the ten-mile distance from Bismarck under the Bismarck route.

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to tribal water (which, unlike Bismarck water, carries associated treaty and *Winters* rights) that the Corps found to be impermissible for Bismarck water, and yet the threat to tribal water was considered mitigated by the same pipeline technology that the Corps found would not protect Bismarck residents.[165] The EA does not explain why, if existing safeguards are inadequate to mitigate spill risk from a pipeline running ten miles from a city, they nevertheless protect federally reserved tribal waters less than one mile from an Indian reservation.[166] Focusing solely on the distance between the intake structures and pipeline crossing also fails to consider the presence of treaty protected rights and reservation land immediately adjacent and within Lake Oahe.

Second, while the risks to wetlands and sensitive wildlife resources in the Bismarck area are relevant, the Corps must afford comparable weight to the risks the DAPL poses to the federally-guaranteed rights of tribal members, treaty protected rights, and reservation lands and resources. As set out above, the United States has guaranteed the Tribes hunting and fishing rights on their reservations, rights which the Supreme Court has held to apply to the land taken to create Lake Oahe. If the protection of wildlife counsels against the Bismarck route, treaty hunting and fishing rights also should counsel against the Lake Oahe route. Additional review is warranted to address these inconsistencies.

Third, although the Corps designated certain areas as high-risk in order that they be avoided altogether on the pipeline route, there was no comparable deference given to federally-designated Indian reservations. Rather, the only protection for tribal lands was a 0.5-mile buffer between the pipeline and the Standing Rock Sioux Reservation boundary. The EA did not explain why the Reservation was not equally considered an area of high risk considering the pipeline's proximity to and potential effects on downstream reservations, treaty rights, or water supplies.[167]

Fourth, the dataset modeling provided by the applicant used to evaluate options for different routes was not tailored to address areas in close proximity to an Indian reservation with its associated rights and trust responsibilities.[168] While preference was given for development in areas that had existing infrastructure, that presumption did not factor in whether such a location exposed treaty rights, reservation lands, tribal cultural, historic, societal interests, and trust assets to risk. Similarly, the Corps places weight on the 500-foot residential buffer requirement and the

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[165] The EA also does not discuss the project's potential impact to the Tribes' irrigation intake valve, which is situated seven miles south of the pipeline. September 22 Letter at 5.
[166] The EA further fails to recognize that unlike Bismarck, the Standing Rock and Cheyenne River Sioux Reservations have been guaranteed to the Tribes as a permanent homeland within their ancestral territory via treaty and Act of Congress.
[167] Final EA at 84-87.
[168] As noted above, the mere exclusion of tribal lands alone does not constitute adequate consideration and protection of treaty rights and trust assets. *Island Mountain*, 144 IBLA at 183.

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Pipeline and Hazardous Materials Safety Administration (PHMSA)[169] high consequence areas as bases to reject the Bismarck route, but approved the Lake Oahe route based on an inaccurate conclusion that the area immediately south of the Lake Oahe crossing is not heavily inhabited.[170]

In sum, additional analysis is necessary to address the fact that the reasons for rejecting the Bismarck route are equally (if not more) applicable to the Lake Oahe route. If the Corps cannot distinguish between the existence and gravity of environmental threats to the two routes, while also weighing the unique tribal property interests at issue here, the Lake Oahe route should not be deemed a reasonable alternative to the Bismarck route. The Corps must develop enough information to permit a reasoned choice of alternatives given the current unanalyzed issues with the Lake Oahe location.

iii. Consideration of catastrophic consequences of low risk spills is warranted.

While I understand that the applicant conducted spill modeling for the DAPL project, it appears to have been summarized in a confidential evaluation that was not shared with the Tribes or the public. But review of the spill model indicates that it does not correlate with the majority of actual releases that occur during operation of an oil pipeline. Further, the spill model assumes that the pipeline is aboveground rather than considering the actual pathway of a buried pipeline and its potential catastrophic release. Similarly, and perhaps most importantly, the Tribes were not afforded the opportunity to consider and independently analyze any of the information that led to the Corps' conclusion as part of its 408 permitting evaluation that the DAPL project poses almost no risk to water. These failings provide an adequate foundation conduct additional NEPA review – both because the Corps has not considered relevant issues as required by NEPA, and because of the United States' obligation to engage in government-to-government consultations with the Tribes.

NEPA requires the consideration of "reasonably foreseeable impacts" of the proposed action, but does not require consideration of "remote and speculative impacts." In this instance, potential leaks and spills from the pipeline are "reasonably foreseeable." PHMSA tracks incidents of "significant pipeline incidents," which is defined as those resulting in (1) fatality or injury requiring in-patient hospitalization; (2) $50,000 or more in total costs, measured in 1984 dollars; (3) highly volatile liquid releases of five barrels or more or other liquid releases of fifty barrels or more; or (4) liquid releases resulting in an unintentional fire or explosion. Their data indicates that since 1996, there has been an average of over 283 such incidents per year, with

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[169] PHMSA is responsible for developing and enforcing regulations for the safe, reliable, and environmentally sound operation of pipelines in the United States. *See* Norman Y. Mineta Research and Special Programs Improvement Act, Pub. L. No. 108-426, 118 Stat. 2423 (2004).
[170] Final EA at 84-87.

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total annual incidents trending upward since 2013.[171] With hundreds of "significant" pipeline incidents per year, and with even comparatively "insignificant" spills still able to affect tribal treaty rights, it is difficult to assume that the risk of such incidents in the DAPL context would not be reasonably foreseeable.

And yet, the EA concludes that the pipeline's detection and emergency measures make any potential leak so unlikely that analysis of impacts is unwarranted.[172] But Council on Environmental Quality (CEQ) guidance,[173] PHMSA guidance, case law, and current events support a more thorough consideration of the potential impacts of a spill or leak, even if low probability. The fact that a spill is perhaps unlikely does not relieve the Corps of the obligation to consider impacts in detail, particularly in the context of known treaty and tribal rights. For example, after the Deepwater Horizon oil spill, CEQ directed the Department of Interior to consider impacts of a catastrophic spill even if such an event is unlikely in any given circumstance. CEQ said that the agency must attempt to identify and analyze foreseeable consequences even if mitigation ultimately can address the risk. If information related to consequences is unknown, the NEPA regulations dictate how to assess the issues of inadequate information.[174] While CEQ articulated this guidance specifically in response to Deepwater Horizon, CEQ expressly noted more generally that agencies "retain[] the duty to describe the consequences of a remote, but potentially severe impact, but grounds the duty in evaluation of scientific opinion rather than the framework of a conjectural worst case analysis. . . ." The CEQ bases its analysis on regulations and case law that apply equally in this situation.[175]

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[171] U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, "Pipeline Incident 20 Year Trends," *available at* http://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends (last visited Dec. 2, 2016). These statistics do not differentiate between incidents involving gas, oil, or other specific types of pipeline.

[172] Final EA at 12, 64, 66-69, 94, 101 (generally acknowledging that spill could be problematic in various contexts but asserting with little evidence that a spill would be so unlikely as to mitigate the risk of such impacts); *see also* UNITED STATES ARMY CORPS OF ENGINEERS, MITIGATED FINDING OF NO SIGNIFICANT IMPACT, ENVIRONMENTAL ASSESSMENT, DAKOTA ACCESS PIPELINE PROJECT, WILLIAMS, MORTON, AND EMMONS COUNTIES, NORTH DAKOTA 2 (July 25, 2016) (arguing against the potential for significant impact because "the pipeline will be located under Lake Oahe, and Dakota Access has developed response and action plans, and will include several monitoring systems, shut-off valves and other safety features to minimize the risk of spills and reduce or remediate any potential damages") [hereinafter "FONSI"].

[173] CEQ was established as part of NEPA and coordinates federal efforts in the development of environmental policies and initiatives. *See* 40 C.F.R. § 1500.3.

[174] *See* 40 C.F.R. § 1502.22.

[175] *See generally* COUNCIL ON ENVIRONMENTAL QUALITY, REPORT REGARDING THE MINERALS MANAGEMENT SERVICE'S NATIONAL ENVIRONMENTAL POLICY ACT POLICIES, PRACTICES, AND PROCEDURES AS THEY RELATE TO OUTER CONTINENTAL SHELF OIL AND GAS EXPLORATION AND DEVELOPMENT (Aug. 16, 2010), *available at* https://ceq.doe.gov/current_developments/docs/CEQ_Report_Reviewing_MMS_OCS_NEPA_Implementation.pdf; *see also Sierra Club v. Sigler*, 695 F.2d 957, 975 (5th Cir. 1983) (holding that the probable remoteness of an impact does not excuse an agency from an evaluation of those impacts when there is a body of data with which an evaluation can be made which is not unreasonably speculative); *accord San Luis Obispo Mothers for Peace v. NRC*,

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Further, PHMSA requires operators to "determine which segments of their pipeline could affect HCAs in the event of a release. This determination must be made *assuming that a release could occur at any point, even though the likelihood of a release at any point is very small.*"[176] In other words, PHMSA does not excuse operators from considering a worst-case scenario.[177] Pipelines across the country routinely leak and rupture,[178] further underscoring the importance of preemptive preparation for these types of scenarios. This experience should inform the Corps' obligation to consider what actually would happen if (if not when) the DAPL pipeline leaks or spills into Lake Oahe or the immediately surrounding area.

The Standing Rock and Cheyenne River Sioux Reservations are the permanent and irreplaceable homelands for the Tribes. Their core identity and livelihood depend upon their relationship to the land and environment – unlike a resident of Bismarck, who could simply relocate if the DAPL pipeline fouled the municipal water supply, Tribal members do not have the luxury of moving away from an environmental disaster without also leaving their ancestral territory. This underscores the far-reaching effects of a DAPL spill's potential environmental impacts on the Tribes' historic, cultural, social, and economic interests. Further, the planned emergency response actions appear to assume that oil will be present in Lake Oahe. There does not appear to be any comparable consideration of response actions to address ground water contamination or a slow leak underground. Absent that information, the Corps, the Tribes, and the public simply cannot make an informed assessment as to the adequacy of the applicant's proposed response plans and other mitigation measures, particularly in light of the need to protect tribal treaty and trust assets. Thus, I believe that an analysis of the impact of a catastrophic event is warranted, despite its allegedly low probability.[179] This determination supports a more exacting analysis through additional NEPA review.

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449 F.3d 1016, 1031 (9th Cir. 2006) ("[C]onsidering the policy goals of NEPA and the rule of reasonableness that governs its application, the possibility of terrorist attack is not so "remote and highly speculative" as to be beyond NEPA's requirements.").

[176] United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Fact Sheet: High Consequence Areas (HCA) (Dec. 1, 2011), *available at* https://primis.phmsa.dot.gov/comm/FactSheets/FSHCA.htm (emphasis added).

[177] *See also* 49 C.F.R. § 194.103 (significant and substantial harm; operator's statement); 49 C.F.R. § 194.105 (worst case discharge).

[178] *See, e.g.*, Reuters, *UPDATE 2-Sunoco pipeline spills gasoline near Pennsylvania river*, THE INQUIRER DAILY NEWS, Oct 21, 2016, *available at* http://www.philly.com/philly/business/energy/20161021_Reuters_L1N1CR1QD_UPDATE_2_Sunoco_pipeline_spills_gasoline_near_Pennsylvania_river.html.

[179] For an example of an EA that includes this more robust analysis involving another pipeline in North Dakota, *see* UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, BAKKENLINK DRY CREEK TO BEAVER LODGE PIPELINE PROJECT ENVIRONMENTAL ASSESSMENT (Jan. 2015), *available at* https://www.blm.gov/style/medialib/blm/mt/field_offices/north_dakota/bakkenlink_drycreek.Par.63202.File.dat/EA%20Text.pdf. Its appendix provides a spill risk assessment. *See* UNITED STATES DEPARTMENT OF THE INTERIOR,

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iv. The Tribe's expert report and the company's response warrant careful review.

On October 28, 2016, the Standing Rock Sioux Tribe submitted a "Review of the U.S. Army Corps of Engineers (USACE) Environmental Assessment (EA) for the Dakota Access Pipeline" (the AccuFacts Report), which raised a number of concerns regarding potential impacts from the DAPL project. On November 30, 2016, the applicant provided a response to the Corps that, while it was not shared with either the Tribes or the public, contained clearly relevant information such as a memo entitled "Route Comparison and Environmental Justice Considerations." The government-to-government relationship between the United States and the Tribes warrants provision of this type of information to the Tribes so that they can fully assess the potential implications of the proposed government action and engage meaningfully in consultation.

4. The Corps' "public interest" determination under Section 408 did not specifically address tribal treaty rights and interests.

While the FONSI for the Section 408 decision indicates that the Corps found the project to be in the "public interest," there is no separate written explanation for that conclusion. Before making a decision to issue a right-of-way under Lake Oahe, we recommend that the Corps expressly conduct this analysis in such a way so as to maximize transparency and underscore the issues raised above.[180]

BUREAU OF LAND MANAGEMENT, APPENDIX A BAKKENLINK RISK ASSESSMENT AND ENVIRONMENTAL CONSEQUENCES ANALYSIS (May 2016), *available at* https://www.blm.gov/style/medialib/blm/mt/field_offices/north_dakota/bakkenlink_drycreek.Par.55619.File.dat/BakkenLink-FINAL_EA_Appendices.pdf.

[180] Prior to issuing a permit under Section 408 (required here), the Corps must ensure that the proposed action is not "injurious to the public interest. . . ." 33 U.S.C. § 408 (authorizing the Corps to grant permission for the alteration or permanent occupation of a federal project only when "such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work"). Corps regulations similarly require a "public interest" review for projects in which the proponent seeks to discharge dredged or fill material into navigable waters of the United States. 33 C.F.R. § 320.4(a); *accord* 36 C.F.R. § 327.1 (setting out Corps policy with respect to water resource development projects as being "[t]o manage the natural, cultural, and developed resources of each project in the public interest, providing the public with safe and healthful recreational opportunities while protecting and enhancing those resources"). While the Corps references a recent Circular that attempts to distinguish this regulatory determination from the statutory determination for Section 408 permits, it is questionable that a Circular can supersede a regulation that expressly applies to all Department of the Army permits, including Section 408 in its list of permits. EC 1165-2-216 (September 30, 2105). As part of this review, the Corps must consider the probable impacts of its proposal, weigh "all those factors which become relevant," and balance the benefits "which reasonably may be expected to accrue" from the project against any "reasonably foreseeable detriments." 33 C.F.R. § 320.4(a)(1).

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In doing so, relevant factors may include the public and private interests in and need for the proposal, as well as, among other things, "conservation, economic development, historic properties, cultural resources, environmental impacts, water supply, water quality, flood hazards, floodplains, residual risk, induced damages, navigation, shore erosion or accretion, and recreation. This evaluation should consider information received from the interested parties, including tribes, agencies, and the public," as well as unresolved conflicts concerning resource use.[181] And, implementing regulations specifically require that "[a]ction on permit applications should, insofar as possible, be consistent with, and avoid significant adverse effects on the values or purposes for which [certain] classifications, controls, or policies were established."[182] This list specifically includes "Indian religious or cultural sites, and such other areas as may be established under federal or state law for similar and related purposes."[183]

These requirements focus on an individualized agency consideration of the public interest, including subsistence taking (such as tribal treaty hunting and fishing) and environmental concerns associated with water quality and environmental protection, including Indian religious and cultural sites. In this case, the DAPL public interest adjudication certainly should include an evaluation of the myriad tribal interests and rights directly and indirectly threatened by the pipeline, as well as an explanation why dismissal of these concerns would the public interest. For example, given that the Lake Oahe pipeline route passes adjacent to the Tribes' Reservations rather than Bismarck, the Tribes and their treaty-protected rights and assets will bear the brunt of a spill. The "public interest analysis" should consider the undisputed facts that the Tribes lost aboriginal territory in the area in question to homesteading and other uses, followed by flooding and alteration of their environment for a massive federal reservoir and flood control project, followed by placement of infrastructure in close proximity to their permanent homelands, and concluding with the most recent proposal to install the DAPL pipeline in their midst.

As courts have held, "the enforcement of rights that are reserved by treaty to the Tribes is an important public interest, and it is vital that the courts honor those rights."[184] The current record does not indicate that the Corps has weighed these issues.[185] The lack of a particularized

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[181] U.S. ARMY CORPS OF ENGINEERS, WATER RESOURCES POLICIES AND AUTHORITIES, POLICY AND PROCEDURAL GUIDANCE FOR PROCESSING REQUESTS TO ALTER ARMY CORPS OF ENGINEERS CIVIL WORKS PROJECTS PURSUANT TO 33 U.S.C. 408 14 (July 31, 2014).

[182] 33 C.F.R. § 320.4(e).

[183] *Id.* Relatedly, the MLA mandates consideration of potential impacts and the imposition of stipulations for any permit that "protect the interests of individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes." 30 U.S.C. § 185(h)(2).

[184] *Muckleshoot Indian Tribe*, 698 F. Supp. at 1516.

[185] UNITED STATES ARMY CORPS OF ENGINEERS, MITIGATED FINDING OF NO SIGNIFICANT IMPACT, ENVIRONMENTAL ASSESSMENT, DAKOTA ACCESS PIPELINE PROJECT, WILLIAMS, MORTON, AND EMMONS COUNTIES, NORTH DAKOTA 6 (July 25, 2016). For the same reasons discussed *infra* in this subsection, the same considerations counsel

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analysis of tribal rights under a public interest lens requires correction to ensure there is an adequate record to support the Corps' decision making. For this reason, as well as the need for supplemental NEPA review discussed above, there is legal justification to suspend the Section 408 permit to allow for a more thorough public interest review.

5. Additional considerations concerning tribal rights.

Finally, I note several other considerations that support additional review.

First, it appears from the record that the Corps did not specifically consult with the Tribes when it changed the proposed pipeline location from the original Bismarck route to the Lake Oahe route, which, as discussed above, could potentially impact tribal treaty and water rights. This abrupt shift did not comply with either the Corps' own tribal consultation policy or that of the United States Department of Defense.[186] Consistent with the trust relationship, proactive tribal consultation is important to, among other things, allowing tribes to raise the types of concerns addressed in this Memorandum prior to the commencement of federal action, thus avoiding the need to reconsider issues or halt ongoing projects and ultimately conserving federal, state, tribal, and private resources.[187]

Second, the EA relied on census data that used county-based demographic assessments that compared general population averages[188] and ultimately concluded that if it was "determined

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reconsideration under the Environmental Justice analysis required under Executive Order 12898, which mandates that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." 59 Fed. Reg. 7,629, 7,629 (Feb. 11, 1994). The Corps discusses Environmental Justice at pages 84-87 of the EA, but there are additional tribal-specific concerns that must be addressed.

[186] U.S. DEPARTMENT OF DEFENSE, AMERICAN INDIAN AND ALASKA NATIVE POLICY 1, 1 n.3 (Oct. 20, 1998) (requiring that "tribal concerns, past, present, and future . . . should be addressed prior to reaching decisions on matters that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands," including, but not limited to, "natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources" and "[t]hose rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies").

[187] Notably, neither the Standing Rock Sioux, nor any other tribe or tribal organization, was on the extensive list of state, federal, and private entities that received a scoping letter from Dakota Access, LLC, informing them of the DAPL proposal and soliciting comment. *See* DAKOTA ACCESS, LLC, SOLICITED COMMENTS ON DAKOTA ACCESS PIPELINE PROJECT PROPOSED CROSSING OF FLOWAGE EASEMENTS NEAR UPPER END OF LAKE SAKAKAWEA AND FEDERAL LANDS AT LAKE OAHE IN NORTH DAKOTA (May 2015). *Cf. Navajo Nation v. United States Forest Serv.*, 408 F. Supp. 2d 866, 885 (D. Ariz. 2006) (USFS NEPA scoping notice sent "to hundreds of community residents, interested individuals, *Indian tribes*, public agencies, and other organizations") (emphasis added).

[188] Final EA at 80-87.

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that there would be some effects to the Standing Rock Sioux Tribe as a low income, minority population, it would not disproportionately or predominantly bear impacts from the Proposed Actions (the impacts will actually disproportionately affect private lands, non-low income populations and non-minority populations)."[189] This conclusion fails to consider impacts specific to the Tribes' population as a whole (as opposed to mixing them in as part of an overall population average), which faces serious threats to tribal hunting and fishing and water rights not shared by the general population among whom they were considered.

Third, the EA provides an incomplete view of the impacts to the reservation community based solely on an evaluation of the population located in the small federal footprint at the Lake Oahe crossing, and not downstream.[190] This approach excludes impacts of a spill on tribal members, as well as other citizens living in the Reservation area.

Fourth, the applicant appears to have prepared a memorandum entitled "DAPL – Route Comparison and Environmental Justice Considerations" in response to the AccuFacts Report. However, that report was considered "confidential" and was not provided to the Tribes. The United States cannot fulfill its trust responsibility if it makes decisions with such potentially significant impacts on tribal treaty rights based on confidential, adversarial analysis that the opposing tribe cannot independently review.

III. Conclusion.

Both the Standing Rock and Cheyenne River Sioux Tribes have treaty hunting and fishing rights in Lake Oahe, which is located (at least in part) within the boundaries of both Reservations. The Tribes additionally retain some proportion of water rights in Lake Oahe. And both Tribes maintain a meaningful historic and cultural connection to the land that was flooded to create the federal floodplains project.

The Corps' EA as currently completed for the Section 408 permit decision acknowledges the Standing Rock Sioux's concerns with the DAPL pipeline (although not those of Cheyenne River Sioux). However, the EA concludes that it is unlikely that a pipeline running underneath the main source of Reservation water will have any effect on either Tribe's Reservation or their residents. This fails to consider the government-to-government relationship with the Tribes and other issues raised above concerning the various environmental statutes applicable to this project. Nor did the Corps' conclusion take into account the Tribes' full assessment of the risks since at least two of the key analyses, the spill analysis and the Environmental Justice analysis, were considered confidential by the applicant and were never provided to the Tribes for review.

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[189] *Id.* at 86.
[190] *Id.* at 85-87.

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In light of these considerations, I do not believe that the DAPL is one of "those obvious circumstances where no effect on the environment is possible,"[191] or that the Corps' determination that there are minimal threats to tribal rights is "close to self-evident and would not require an extended document incorporating other studies."[192] Instead, there is ample legal justification for the Corps to exercise its discretion to suspend or revoke the existing Section 408 permit and/or postpone a decision on the proposed easement conditional on additional analysis and government-to-government consultation concerning the tribal-specific issues discussed in this Memorandum, and to ultimately issue an EIS addressing these topics. If the Corps ultimately does decide to authorize the easement, additional tribal consultation is necessary to develop conditions for the authorization that will protect the Tribes' rights and interests in and around Lake Oahe.

Hilary C. Tompkins

[191] *Duvall*, 777 F. Supp. at 1538.
[192] *Id.*

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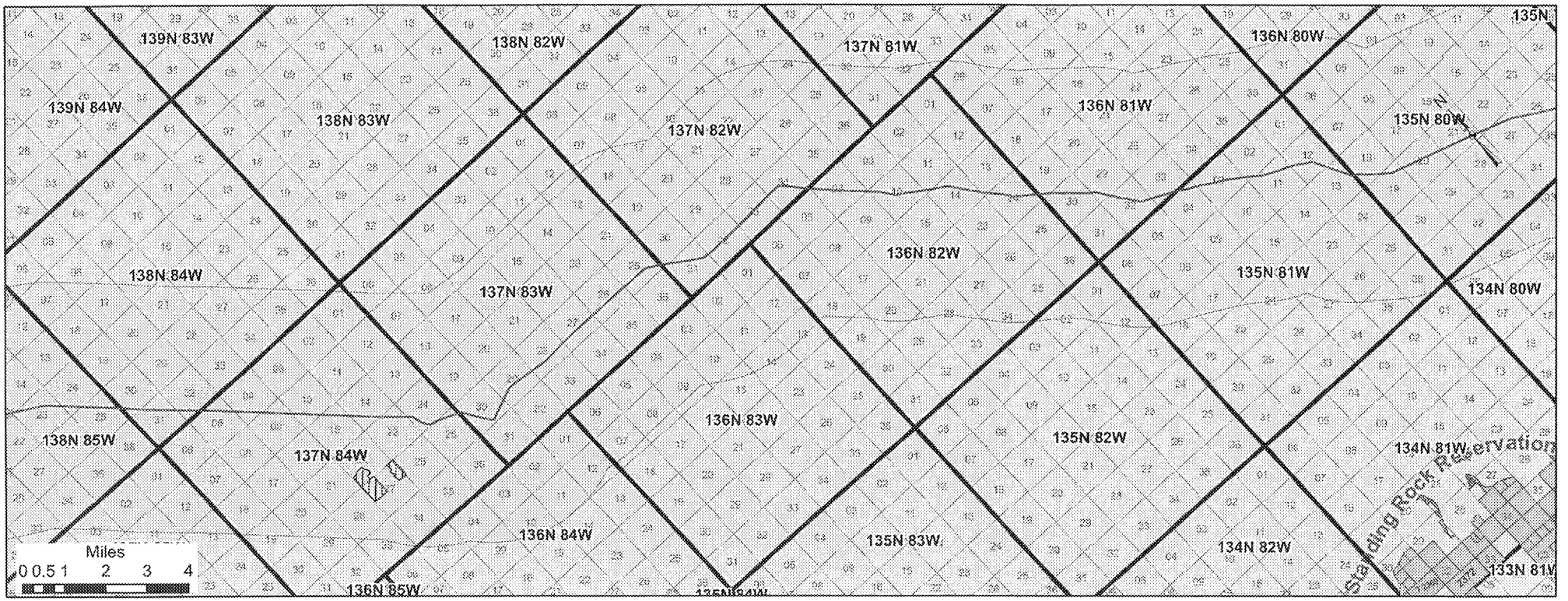
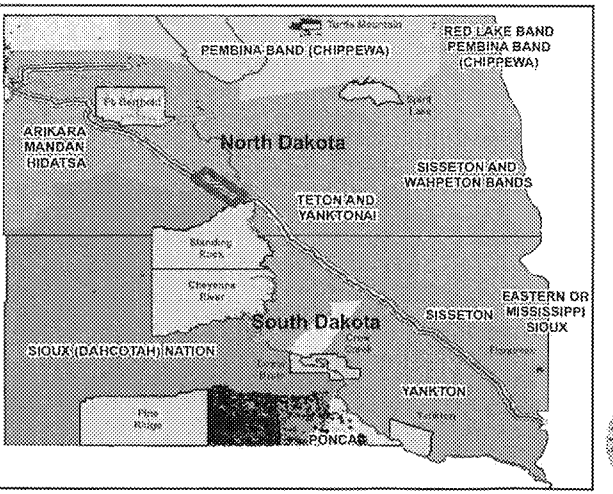


Legend

- Tribally Owned
- Allotted Owned
- Government Owned
- Pipeline
- FHA Easement
- Grassland Easement
- Refuge Easement
- Wetlands Easement
- 6 Mile Buffer



Lands in Trust and Fish & Wildlife Easements In Relation To DAPL

Prepared by Great Plains Region, Land Titles & Records Office, 9/23/2016

Legend

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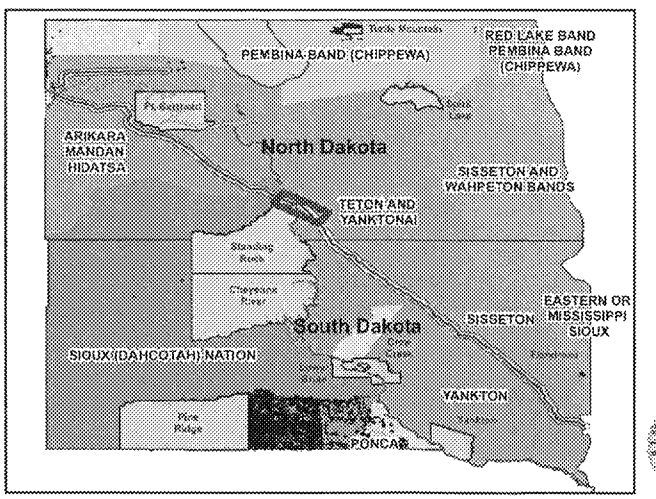
Lands in Trust and Fish & Wildlife Easements In Relation To DAPL

Prepared by Great Plains Region, Land Titles & Records Office, 9/23/2016