IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERVENOR-PLAINTIFF CHEYENNE RIVER SIOUX TRIBE'S
MOTION TO AMEND COMPLAINT

COMES NOW Intervenor-Plaintiff Cheyenne River Sioux Tribe for its Motion to Amend its Amended Complaint pursuant to Fed.R.Civ.Pro. 15(A)(2) and asks this Court for leave to file its Second Amended Complaint as attached hereto as **Exhibit 1**. This Motion is supported by the following Memorandum of Points and Authorities.

Dated: February 9, 2017

CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff,

By: /s/ Nicole E. Ducheneaux

Nicole E. Ducheneaux
Joseph V. Messineo, *Pro Hac Vice*
Fredericks Peebles & Morgan LLP
3610 North 163rd Plaza
Omaha, NE 68116
Telephone: (402) 333-4053
Facsimile: (402) 333-4761
Email: nducheneaux@ndnlaw.com
jmessineo@ndnlaw.com

Conly J. Schulte
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9839
Email: cschulte@ndnlaw.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERVENOR-PLAINTIFF CHEYENNE RIVER SIOUX TRIBE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO AMEND COMPLAINT

Intervenor-Plaintiff files this Motion for Leave to File a Second Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(2). Federal Rule of Civil Procedure 15(a)(2) provides that, "the court should freely give leave when justice so requires." The Proposed Second Amended Complaint is included with this Motion as required by local Rule 15.1. The Amendments proposed include the addition of a Religious Freedom Restoration Act claim and related requests for relief; the addition of facts and claims related to the Corps' actions since the First Amended Complaint was filed; and technical amendments intended to clarify the claims originally presented in the interests of judicial economy.

Many facts giving rise to the Second Amended Complaint have arisen since the First Amended Complaint was filed on October 19, 2016 by Order of the Court. ECF 48. The Corps has reversed its position since the Complaint was filed, with its latest reversal done without notice, explanation, or compliance with applicable statutes and regulations. This gives rise to additional claims that were previously not ripe for consideration, and that should be considered by the Court under the Administrative Procedures Act and the applicable statutes in the interests of justice. Additionally, other claims must be allowed in the interest of justice given the gravity of the issues involved and the government's complete lack of consultation and consideration of how its actions as trustee with control over the trust property it is responsible for the effect on the rights and property interests of federally-recognized Indian tribes. Intervenor-Plaintiff must be allowed in the interest of justice to file its Second Amended Complaint.

The standard for allowing leave to amend is liberal and this liberality is a "mandate to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by plaintiff may be a proper subject for relief, [plaintiff] ought to be afforded an opportunity to test [plaintiff's] claim on the merits."). Leave to amend should be granted in the

absence of any apparent or declared reason, such as undue delay or prejudice to opposing parties. *Id.* In this case, an Answer to the First Amended Complaint by the Corps was held in abeyance as a result of the Joint Motion of the Plaintiffs and the Defendant in the interests of judicial economy. ECF 71; ECF 72. Given that not all responsive pleadings have even been filed, the amendment to the complaint will not result in substantial delay or prejudice to the parties. Additionally, the Corps' own actions led Intervenor-Plaintiff to believe that no further claims need be prosecuted in this matter. This accounts for any delay in filing additional claims.

Most importantly, leave must be granted "when justice so requires." *Id*; Fed.R.Civ.Pro. 15(a)(2). The justice in allowing Intervenor-Plaintiff to file its Second Amended Complaint in this matter is self-evident. The speed at which Intervenor-Plaintiff's rights are being destroyed is shocking and offensive to any sense of justice.

That this matter has become a political issue is undeniable. But those politics do not change the law, and they do not change Intervenor-Plaintiff's rights under the law. On January 18, 2017, the Army Corps of Engineers ("Corps") filed an official notice in the Federal Register setting forth notice that it was undertaking an Environmental Impact Statement pursuant to the National Environmental Policy Act ("EIS notice") on granting a right-of-way under the Mineral Leasing Act for the pipeline crossing at Lake Oahe. The EIS notice was the culmination of a months-long process whereby the Corps made it absolutely clear that it intended to give due consideration to this matter pursuant to the law. The EIS notice invited persons to submit information as part of the EIS process. Intervenor-Plaintiff, assuming the good and honest intentions of the government, submitted information as part of that process.

On January 24, 2017, President Trump issued a Presidential Memorandum entitled Construction of the Dakota Access Pipeline ("Trump memo"). The Trump memo orders the Corps

to expedite this matter. However, the Trump memo is also specifically restrained by the language "to the extent permitted by law." Then on February 7, 2017, without any indication that the Corps considered information provided to it pursuant to the EIS notice or that it made any reasoned decision at all, the Corps stopped the entire process and noticed Congress of its intent to grant the right-of-way. ECF 95-1; ECF 95-2. Furthermore, the Corps waived its own policy of giving Congress 14 days' notice prior to the grant of the easement at issue. On February 8, 2017 the easement was granted. ECF 96-1. This decision must be tested in this Court to determine if such a sudden and naked repudiation of agency policies, without any discernable change in facts, is permitted by law. Plaintiff-Intervenor has moved quickly to Amend in the interests of not creating any prejudice or delay to any of the parties.

The Second Amended Complaint also adds a claim pursuant to the Religious Freedom Restoration Act ("RFRA"). Justice also requires this amendment to be allowed. It is clear from the record in this matter that the Corps gave no consideration at all as to the substantial impact of this project on tribal members' free exercise of their religion. Intervenor-Plaintiff was informed by the Corps that the EIS process would be the vehicle by which they could express their concerns and press their rights with the government. However, the Corps suddenly, and without notice, terminated this process and with it, any chance to be heard on these Constitutionally and statutorily protected religious rights outside of this litigation. It was the Tribe's belief that it would be heard at the administrative level on these issues that led it to not seek amendment sooner.

The Corps notified the Tribes and other interested parties that they were going to be heard at the administrative level on their property rights and statutorily-protected religious rights, only to have that opportunity literally disappear overnight without notice to them. The politics of this matter cannot overcome Intervenor-Plaintiff's legal rights to present their claims and to be heard.

The Trump memo recognizes this, setting forth specifically that it is only operative "to the extent permitted by law." While it is appropriate for the President to specify that he may act only within the bounds of the law, such specific reference was unnecessary as it is axiomatic that the executive may only act within the bounds of the law. This Court must weigh the actions of the Corps and the executive to ensure that they comport with the law. Justice mandates that Intervenor-Plaintiff be allowed leave to file its Second Amended Complaint. This Court is the only forum available to the Intervenor-Plaintiff to protect the rights to religious freedom, proper review of government actions under NEPA and protection of its trust resources from damage and destruction.

Given the exigent circumstances of an easement granted after business hours, the Tribe has not consulted with counsel for the other parties to this suit, and the undersigned cannot represent to this Court that they support, oppose or on neutral on this Motion.

Dated: February 9, 2017

CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff,

By: /s/ Nicole E. Ducheneaux

Nicole E. Ducheneaux
Joseph V. Messineo, *Pro Hac Vice*
Fredericks Peebles & Morgan LLP
3610 North 163rd Plaza
Omaha, NE 68116
Telephone: (402) 333-4053
Facsimile: (402) 333-4761
Email: nducheneaux@ndnlaw.com
jmessineo@ndnlaw.com

Conly J. Schulte
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9839
Email: cschulte@ndnlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2017, a copy of the foregoing was filed electronically with the Clerk of the Court. The electronic filing prompted automatic service of the filing to all counsel of record in this case who have obtained CM/ECF passwords.

/s/ Nicole E. Ducheneaux

Case No. 1:16-cv-1534-JEB

CHEYENNE RIVER SIOUX TRIBE

EXHIBIT 1

Case No. 1:16-cv-1534-JEB

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERVENOR-PLAINTIFF CHEYENNE RIVER SIOUX TRIBE'S SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Intervenor-Plaintiff Cheyenne River Sioux Tribe seeks declaratory and injunctive relief against Defendant and, in support thereof, states as follows:

INTRODUCTION

1. This is a complaint for declaratory and injunctive relief. The Cheyenne River Sioux Tribe ("Tribe") brings this action in connection with federal actions relating to the Dakota Access Pipeline ("DAPL"), a 1,168-mile-long crude oil pipeline running from North Dakota to Illinois owned by the oil company, Dakota Access LLP ("Dakota Access"). The Tribe, a federally-recognized Indian Tribe with a reservation in South Dakota (25 U.S.C. § 479a; 81 Fed. Reg. 5020 (Jan. 29, 2016), brings this case against Defendant U.S. Army Corps of Engineers ("Corps"),

whose authorization of DAPL violates the United States' trust and protectorate relationship with the Tribe, as embodied in the United States Constitution, multiple treaties with the Tribe, federal statutes, executive orders, and regulations, in addition to violating multiple federal statutes that govern pipeline construction and operation. Additionally, the disturbance of the Earth under the Missouri River and Lake Oahe creates a substantial burden on the practice of the Lakota religion. The sanctity of these waters is a central tenet of their religion and the placement of the pipeline itself, apart from any rupture and oil spill, is a desecration of these waters. The Tribe brings this claim on behalf of itself and its members. The construction and operation of the pipeline, as authorized by the Corps, represents an existential threat to the Tribe's permanent homeland and trust resources, and a tangible and real threat to the environmental and economic well-being of the Tribe, and will damage and destroy sites of great historic, religious, and cultural significance to the Tribe.

2. Specifically, the DAPL crude oil pipeline approved by the Corps is planned to transect the heart of the Tribe's ancestral and treaty lands and will run directly under the Missouri River at the site of the Oahe Reservoir, which is the primary source of water for the Cheyenne River Sioux Reservation. The waters of the Missouri River or *Mni Šoše* are sacred to the Lakota people of the Cheyenne River Sioux Tribe and constitute the lifeblood of our religion and traditions. Further, the Tribe's treaties and the federal statutes that govern the Tribe's rights with regard to the Missouri River establish that the Tribe enjoys a clear property right in the waters of the Missouri and enjoys a right to waters that are clean and suitable for drinking, agricultural use, hunting, fishing, and other rights. This property right is subject to the special trust relationship between the United States and the Cheyenne River Sioux Tribe.

3. Should this oil pipeline fail, like so many before it have, it will contaminate this

essential resource and deprive the Tribe of the right guaranteed to us by the United States to rely on the Missouri River to sustain our homeland. These public health and safety concerns caused Dakota Access to abandon an early proposal to run the pipeline under the Missouri River near the city of Bismarck, North Dakota, which relies upon these waters for its municipal waters. Nevertheless, when the Environmental Protection Agency, the Department of Interior, and the Tribe communicated their grave concerns about the environmental impact of siting the DAPL under Tribally-owned waters, the Corps improperly relied upon an Environmental Assessment ("EA") that failed to analyze the significant environmental effects of the oil pipeline on the Tribe's water. Unlike all the other pipelines that have failed, this 30 inch diameter pipeline running more than a mile underground under a freshwater lake, is the only one of its kind in the entire world. Nowhere in the entire world, has a government approved a pipeline this large, running this long of a distance, under a freshwater lake that is the exclusive source of available drinking water for thousands upon thousands of citizens. The Corps' issuance of the permits that allow Dakota Access to run its pipeline through the Tribe's waters was arbitrary and capricious and should be set aside because it violated the National Environmental Policy Act ("NEPA"), Department of Defense policies and regulations, and because it breached the United States' trust responsibility to the Cheyenne River Sioux Tribe.

4. The Tribe also brings an as-applied challenge to Nationwide Permit 12 ("NWP 12"), issued by the Corps in 2012 pursuant to the federal Clean Water Act ("CWA") and Rivers and Harbors Act ("RHA"). DAPL crosses hundreds if not thousands of federally-regulated rivers, streams, and wetlands along its route. The discharge of any fill material in such waters is prohibited absent authorization from the Corps. Federal authorization under these statutes, in turn, triggers requirements under the National Historic Preservation Act ("NHPA"), intended to protect

sites of historic and cultural significance to Tribes like Cheyenne River. In issuing NWP 12, however, the Corps authorized discharges into federal waters without ensuring compliance with the NHPA. In essence, in enacting NWP 12, the Corps pre-authorized construction of DAPL in all but a handful of places requiring federal authorization without any oversight from the Corps. In so doing, the Corps abdicated its statutory responsibility to ensure that such undertakings do not harm historically and culturally significant sites.

5. In addition, on July 25, 2016, the Corps issued multiple federal authorizations needed to construct the pipeline in certain designated areas along the pipeline route. One such authorization allows Dakota Access to construct the pipeline underneath Lake Oahe, approximately seventy miles upstream of the Tribe's reservation. Others authorize the DAPL to discharge into waters of the United States at multiple locations throughout the Tribe's ancestral lands. The Tribe brings this challenge because these authorizations were made in violation of the CWA and its governing regulations and without compliance with NHPA, and the NEPA. These authorizations also violate the Corps' responsibility to manage the waters of Lake Oahe, which are owned by the Cheyenne River Sioux Tribe, for the exclusive purposes set forth in the Flood Control Act of 1944, 33 U.S.C. §701-1(b), Pub. L. 83-776, ch. 665, 58 Stat. 887 (Dec. 22, 1944) (codified at 16 U.S.C. § 460d, and various sections of Titles 33 and 43 of the United States Code), and in accordance with the requirements of the Missouri River Mainstem Reservoir System Master Water Control Manual, Missouri River Basin, U.S. Army Corps of Engineers, Northwestern Division – Missouri River Basin (March 2006) and Department of Defense policies and regulations including Department of Defense Instruction 4710.02, "DoD Interactions with Federally Recognized Tribes" (Sept. 14, 2006) and the Department of Department of Defense American Indian and Alaska Native Policy (Oct. 24, 2012)and they violate the Corps' trust and fiduciary

responsibility to the Tribe set forth in statute and Treaty.

6. The Tribe seeks a declaration that the Corps violated the NHPA in issuing NWP 12, and an injunction preventing the Corps from using NWP 12 as applied to DAPL and directing the Corps to ensure full compliance with § 106 of the NHPA at all sites involving discharges into waters of the United States. The Tribe also seeks a declaration that the July 25, 2016 authorizations were made in violation of the CWA, NEPA, and NHPA, and an order vacating all existing authorizations and verifications pending full compliance with the CWA, NEPA, and NHPA. The Tribe finally seeks a declaration that the Corps' authorization of the DAPL crossing under the Missouri River violated the United States' trust responsibility to the Tribe, and an order vacating all existing authorizations and verifications.

7. On December 4, 2016 the Corps issued a Memorandum subject: *Proposed Dakota Access Pipeline Crossing At Lake Oahe, North Dakota*. ("December 4 Memo") The December 4 Memo highlighted the important points: (1) no right-of-way had yet been granted pursuant to 30 U.S.C. § 185 for any water crossing at Lake Oahe; (2) the Corps needed to engage in further considerations of reasonable alternatives to any right-of-way under NEPA; and 3) the Corps EA had failed to take into consideration essential information which included at a minimum: 1a) more detailed information on the alternative crossing that was considered roughly ten miles north of Bismarck; b) Detailed discussion of potential risk of an oil spill, and potential impacts to Lake Oahe, the standing Rock Sioux Tribe's water intakes, and the Tribe's water rights as well as treaty fishing and hunting rights; and 3) Additional information on the extent and location of the Tribe's treaty rights in Lake Oahe."

8. On January 18, 2017 the Corps caused to be published in the Federal Register *Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access,*

LLC's Request for an Easement To Cross Lake Oahe, North Dakota. 82 *Fed. Reg*. 5543. ("EIS Notice") The EIS Notice invited interested parties to submit information to the Corps relevant to its inquiry under NEPA and set forth that public scoping meetings and notices thereof would be forthcoming. The Corps informed the Tribe that it should submit its comments on the process for government to government consultation and concerns through the EIS Notice.

9. In accordance with this EIS Notice and the Corps instructions, the Tribe submitted Preliminary Comments including its own preliminary Expert Reports outlining serious concerns with the risk posed by the proposed location of the pipeline. The Tribe also filed a request to be designated as a Cooperating Agency in the EIS process. The Tribe also requested full disclosure of the Administrative Record and all documents considered by the Corps as set forth in the Corps December 4, 2016 Memorandum so that the Tribe could actually engage in government-to-government consultation with the Corps, which required access to the information upon which the Corps is basing its decisions. The Tribe noted that without access to this information, it could not engage in the required meaningful, pre-decisional consultation required whenever a tribal trust resource under the Corps management had the potential to be substantially affected.

10. On January 24, 2017 the newly-inaugurated President Trump issued a Presidential Memorandum that in essence directed the Secretary of the Army to instruct the Assistant Secretary of the Army for Civil Works and the Corps to expeditiously review and approve the pending easement across Lake Oahe for the DAPL project, and directed the Corps to proceed with its legal obligations expeditiously, and to consider withdrawing the EIS Notice.

11. On January 27, 2017 the Tribe requested in writing government-to-government consultation with the Army and Corps of Engineers prior to any decision to withdraw the EIS Notice or to take any other actions set forth in the Executive Memorandum as required under the

Corps policy and regulations. The Tribe specifically renewed its request for all documents and analyses conducted without consulting with the Tribe in the decision making process in order to permit the Tribe to engage in government to government consultation, noting that the Corps still had not disclosed key documents set forth in the December 4, 2016 Corps Memorandum. The Tribe received no response.

12. On February 1, 2017 the Tribe sent a second letter to Colonel Henderson of the Omaha District with a copy to the Corps Headquarters and the Secretary of the Army reiterating its request for government to government consultation, disclosure of the documents still being withheld, and enforcement of the 14 day Congressional notification requirement set forth in Corps policy regarding issuance of easements under the MLA.

13. On February 3, 2017 the Corps finally disclosed 19 documents relevant to and in fact critical to its decisions regarding the permits and the easement to the Tribe, of which three were only in redacted form.

14. On February 6, 2017 the Department of Justice informed this Court the Corps had completed its decision making process and the Secretary of the Army was now in the decision making process on the easement.

15. On February 7, 2017 the Corps notified Congress of its intent to grant an easement, and its intent not to comply with the 14 day waiting period and instead to issue the easement 24 hours after the notice was delivered to Congress, or on February 8, 2017. ECF: 95-1. The Corps' filed with this Court a Congressional Notice of Intent to Issue an Easement, the Army's Memorandum regarding Compliance with the January 23, 2017 Presidential Memorandum; and the Army's proposed Federal Register Notice of Termination of the Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC's Request for an

Easement to Cross Lake Oahe, North Dakota all dated February 7, 2017, repudiating its already stated position that an EIS is required for the Corps to discharge its duties under NEPA in regard to the right-of-way. ECF: 95, 95-1, 95-2 and 95-3. The Corps' provides no justification for this reversal, other than stating, "I have considered prior reviews and determinations and found that all applicable requirements of NEPA and any other provision of law that requires executive agency consultation or review were satisfied by the EA/FONSI and the entire administrative record."

16. On February 8, 2017 the Corps granted the easement.

17. The Corps did not consider the information provided by the Tribe in response to its request for information pursuant to the EIS Notice. Its reversal and refusal to consider the Tribe's information, and to provide the Tribe with all of the documents upon which it relied as is required by Corps Policy and Department of Defense Instructions on tribal consultation is simply without basis in law or fact; it constitutes an arbitrary and capricious decision.

18. The Administrative Record does not include any evaluation of or discussion of any impacts on the Cheyenne River Sioux Tribe, its trust resources, its water supply or any interests of the Cheyenne River Sioux Tribe.

19. The Administrative Record does not include any response to the Tribe's requests to engage in government-to-government consultation regarding the impact of the Corps permitting and easement decisions on the Tribe's trust resources under the fiduciary control of the Corps.

20. The Corps never engaged in any required government-to-government consultation with the Tribe prior to making any of its decision regarding the impact of its decisions on the trust resources of the Tribe.

21. The Mineral Leasing Act ("MLA") imposes a clear duty on the Corps to promulgate

regulations associated with grants or renewals of rights-of-way or permits it issues pursuant to the MLA.

22. Corps has failed to promulgate any regulations or final rule.

23. Corps has failed to provide notice to the public and opportunity to comment on any proposed rules.

24. The Tribe seeks a declaration the Corps violated the Mineral Leasing Act ("MLA") and the Administrative Procedures in its failure to promulgate regulations in accordance with the MLA. The Tribe also seeks a declaration that any right-of-way issued by the Corps was made in violation of the MLA, and an order vacating the issues of any right-of-way on lands with the Corps exercises jurisdiction.

JURISDICTION AND VENUE

25. This case arises under the Constitution and laws of the United States, including the Supremacy Clause, U.S. Const., Art. 6; the Treaty of Fort Laramie, 11 Stat. 749 (Sep. 17, 1851); and the 1868 Sioux Nation Treaty, 15 Stat. 635 (Apr. 29, 1868), and the Flood Control Act of 1944, 33 U.S.C. §701-1(b). This case also states a claim under the Administrative Procedures Act, 5 U.S.C. § 701 et seq. ("APA"), which authorizes a federal court to find unlawful and set aside any final agency action that is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. at § 706. This case also states a claim under the U.S. Constitution First Amendment Right to Free Exercise of Religion and the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et. seq*. ("RFRA") for declaratory and injunctive relief. The Tribe brings these claims on its own behalf and on behalf of its members.

26. Jurisdiction arises under 28 U.S.C. § 1362 ("district courts shall have original jurisdiction of all civil actions, brought by any Indian Tribe or band with a governing body duly

recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States"); § 2201 (declaratory relief); § 2202 (injunctive relief).

27. Venue in this district is appropriate under 28 U.S.C. § 1391(e) because it is the district in which the Defendant resides and in which "a substantial part of the events or omissions giving rise to the claim occurred."

PARTIES

28. The Cheyenne River Sioux Tribe is a federally-recognized Indian tribe with a governing body recognized by the Secretary of the Interior. The Tribe is a member of the *Oceti* Šakowiŋ ("Seven Council Fires," also known as the Great Sioux Nation), which includes the Lakota, Dakota, and Nakota people. The Tribe is comprised of four of the seven bands of Lakota (*Itazipco*, *Minnicoujou*, *Oohenumpa*, and *Siha Sapa*) and is a party to the 1851 Fort Laramie Treaty and the 1868 Sioux Nation Treaty. In those Treaties, the United States made solemn promises to the Tribe, including the explicit guarantee of "protection" and the reservation of lands and appurtenant waters intended to provide a homeland and subsistence for the Tribe "set apart for [their] absolute and undisturbed use and occupation." In consideration for those promises, the Tribe ceded their rights to exclusive use and occupancy in a large portion of their aboriginal territory in the northern Great Plains, but retained their rights to hunting and fishing in those expansive territories.

29. The original territory set aside by the United States for the exclusive use and occupancy of the Sioux Nation was further divided amongst the bands of the Sioux Nation by unilateral acts of Congress in violation of the 1868 Treaty to create nine much smaller Sioux reservations, including the Cheyenne River Sioux Reservation set aside for the exclusive use and occupancy of the Itazipco, Minnicoujou, Oohenumpa, and Siha Sapa bands of Lakota Sioux. Act

of March 2, 1889, ch. 206, 25 Stat. 88, §2. The present Cheyenne River Sioux Reservation is bordered on the north by the Standing Rock Sioux Reservation and includes within its eastern exterior boundary portions of Lake Oahe, upon which the Tribe relies for its very existence—its drinking water, its agricultural water, its industrial water, and the waters that support subsistence and sport hunting, fishing, and boating. Lake Oahe is the same reservoir of the Missouri that the proposed pipeline is intended to cross. The Cheyenne River Sioux Reservation is approximately seventy miles downstream of that proposed crossing.

30. The Tribe is native to this land and the river; they have lived here since time immemorial. The waters of the Missouri River are sacred pursuant to the Tribe's ancient religion and play a central role in the practice of the religion. The present day Cheyenne River Sioux Reservation, which includes a portion of Lake Oahe to the mid-channel of the Missouri River, has been set aside for the exclusive use and occupancy of the Tribe by the 1851 and 1868 Fort Laramie Treaties and by the Act of March 2, 1889. No enactment of Congress since the 1889 Act became effective by Presidential Proclamation on February 10, 1890 has altered the treaty based rights of the Tribe in the Missouri River lying within the Reservation, the mineral rights in the riverbed and lands bordering Lake Oahe within the Reservation, or its members rights to hunt and fish on and along Lake Oahe within the Reservation.

28. Intervenor-Defendant Dakota Access, LLC is a limited liability company formed to construct and own Dakota Access Pipeline. Energy Transfer Partners, L.P., Sunoco Logistics Partners, L.P. and Phillips 66 are the beneficial owners of Dakota Access, LLC. The U.S. Army Corps of Engineers is an agency of the United States government and a division of the U.S. Army, part of the U.S. Department of Defense. It is charged with regulating any dredging and filling of the waters of the United States under § 404 of the CWA and § 10 of the RHA. The Corps is

empowered by statute to exercise comprehensive control over the waters of Lake Oahe. 33 U.S.C. § 707.

29. By filing this action, the Tribe does not waive its sovereign immunity and does not consent to suit as to any claim, demand, offset, or cause of action of the United States, its agencies, officers, agents, or any other person or entity in this or any other court.

PERTINENT LAWS

I. TREATIES, STATUTES, AND REGULATIONS, RELATED TO THE CORPS' OBLIGATIONS TO MANAGE WATERS OF LAKE OAHE

A. THE FORT LARAMIE TREATY OF 1851 AND 1868 SIOUX NATION TREATY

30. At the close of the War of 1812, the United States settled with Great Britain in the Treaty of Ghent, promising that Indian nations and tribes would enjoy the same status with the United States as they had prior to the War. Accordingly, the United States sent out treaty delegations to Indian country. In 1851, the United States entered into a treaty with the Great Sioux Nation, including the four bands of the Lakota who comprise the Cheyenne River Sioux Tribe. *Treaty of Fort Laramie with Sioux, Etc.*, Sept. 17, 1851, 11 Stat. 749 (Sep. 17, 1851). (hereinafter the "1851 Fort Laramie Treaty"). In this peacetime treaty, a vast territory encompassing all of the Dakotas west of the Missouri River and large swaths of Montana, Wyoming, and Nebraska was reserved to the Sioux, Cheyenne, Arapahoe, Crow, Assiniboine, Mandan, and Arikara Nations. *Id.* at art. 5. The United States bound itself to "protect" the Great Sioux Nation "against the commission of all depredations by the people of the said United States, after the ratification of this treaty." *Id.* at art. 4. The Tribe and its members retained the right to access clean, pure water in numerous bodies of water throughout this territory reserved for their exclusive, including streams and creeks in the Black Hills and the sacred Missouri River, which was included within the eastern

external boundary of the territory. *Id.* at art. 5. In addition to this exclusive territory, the Sioux Nation did not "abandon or prejudice any rights or claims they may have to other lands," and did not "surrender the privilege of hunting, fishing, or passing over any of the tracts of country" described in the Treaty. *Id.* at art. 6.

31. From 1867 to 1868, the Great Sioux Nation fought the Powder River War, a series of military engagements in which the Sioux Tribes were force to fight to protect the integrity of the Treaty lands recognized by the United States in 1851 from the incursion of white settlers. The United States, acting under the auspices of the Indian Peace Commission, sought a treaty to end the war. The Treaty Commission travelled up the Missouri River to meet with the leaders of the Great Sioux Nation where they negotiated the 1868 Sioux Nation Treaty. *Treaty with the Sioux – Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee – And Arapahoe,* 15 Stat. 635 (Apr. 29, 1868) (hereinafter "1868 Fort Laramie Treaty"). In the Treaty of 1868, the Sioux Nation reserved all of the lands west of the low water mark of the Missouri River between the forty-sixth parallel north and the northern boundary of the state of Nebraska for "the undisturbed absolute use and occupation" by the Sioux Nation, including the Missouri River which was fully within this territory. *Id.* at art. 2. This included South Dakota and adjacent lands in North Dakota as the Tribe's permanent homeland, including without limitation appurtenant waters, natural resources, grazing, timber, mineral rights, hunting and fishing rights, usufructary rights, and absolute and undisturbed use, occupancy, ownership, self-government and treaty rights protected by the United States' honor. The 1868 Treaty of Fort Laramie also recognized the continued hunting rights of the Great Sioux Nation in lands north of North Platte, and on the Republican Fork of the Smoky River. *Id.* at art. 11. Further, the 1868 Fort Laramie Treaty recognized that the lands north of North Platte and east of the Bighorn Mountains remained

unceded Indian territory in which it and non-Indian settlers had not rights to occupancy. *Id.* at art. 16.

B. ACTS OF MARCH 2, 1889, 25 Stat. 888

32. In 1874, however, gold was discovered in the Black Hills. The United States responded by repeatedly violating the "solemn" promises it had made in the Sioux Nation Treaty just six years earlier, until finally, the United States unlawfully enacted the Act of February 28, 1877, which purported to remove the Black Hills from the absolute and exclusive occupation of the Sioux Nation. 19 Stat. 254 (1877). Many years later, the United States Supreme Court held that the taking of the Black Hills in the Act of February 28, 1877, which was obtained in violation of the Treaty, constituted an unlawful taking. *See, United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). The Supreme Court famously observed that "a more ripe and rank case of dishonorable dealings will never, in all probability be found in our history." *Id.* at 388. When the United States denied the Sioux Nation access and undisturbed use of the Black Hills in this ignoble Act, they also lost access to the streams and creeks in the sacred Black Hills for use in their sacred rites. But, the Great Sioux Reservation continued to include the sacred Missouri River within its boundaries. The continued property ownership of the Missouri River by the Sioux Nation was confirmed in Article 2 of the Act of February 28, 1877, which included a grant to the United States of "free navigation of the Missouri River." 19 Stat. 254 at art. 2.

33. In 1889, after a prior illegal abrogation of the 1868 Treaty in 1877, the United States "set aside a permanent reservation" of the present-day Cheyenne River Sioux Reservation as the permanent home for the four Lakota bands that comprise the Cheyenne River Sioux Tribe today. Act of March 2, 1889, ch. 206, 25 Stat. 888, §2. The Act states:

> That the following tract of land, being a part of the said Great Reservation of the Sioux Nation, in the Territory of Dakota, is hereby set apart for a

> permanent reservation for the Indians receiving rations and annuities at the Cheyenne River Agency, in the said Territory of Dakota, namely: Beginning at a point in the center of the main channel of the Missouri River, ten miles north of the mouth of the Moreau River, said point being the southeastern corner of the Standing Rock Reservation; thence down said center of the main channel of the Missouri River, including also entirely within said reservation all islands, if any, in said river, to a point opposite the mouth of the Cheyenne River; thence west to said Cheyenne River, and up the same to its intersection with the one hundred and second meridian of longitude; thence north along said meridian to its intersection with a line due west from a point in the Missouri River ten miles north of the mouth of the Moreau River; thence due east to the place of beginning.

Id. at §4. The reservation includes treaty lands, appurtenant waters, natural resources, grazing, timber, mineral rights, hunting and fishing rights, usufructary rights, and absolute and undisturbed use, occupancy and ownership rights, self-government and treaty rights. This reservation of territory included a reservation of water rights in the Missouri River. The Tribe enjoys reserved water rights to the waters flowing through the reservation, including the Missouri River and its tributaries, including sufficient water to fulfill the purpose of the reservation to provide for the Tribe's self-sufficiency. The Tribe enjoys a clear property right in the waters of Lake Oahe and the Missouri River originally recognized by the United States in the 1851 Treaty of Fort Laramie, continuing through the 1868 Treaty of Fort Laramie, and recognized throughout the unilateral acts of Congress over the subsequent years including the Acts of Act of February 28, 1877 and March 2, 1889. This *Winters* right includes the right to clean, safe water that is consistent with the purpose of the reservation. *Id.*

II. FLOOD CONTROL ACT OF 1944, PUBLIC LAW 83-776, RIVERS AND HARBORS ACT OF MARCH 2, 1945, PUBLIC LAW 79-14, AND THE ACT OF SEPTEMBER 3, 1954 (OAHE TAKING ACT), PUBLIC LAW 83-776.

34. In the Flood Control Act of 1944, the United States authorized the Defendant Army Corps of Engineers to construct dams on the Missouri River, including the Oahe Dam to provide for federal flood control, navigation, and for other purposes, including purposes for

Americans living downstream of the Cheyenne River Sioux Tribe, so long as such uses did not conflict with present and future beneficial consumptive uses of waters for "domestic, municipal, stock water, irrigation, mining, or industrial purposes." 33 U.S.C. §701-1(b); *Flood Control Act of 1944*, Pub. L. 78-54, ch. 665, 58 Stat. 887 (Dec. 22, 1944) (codified at 16 U.S.C. § 460d, and various sections of Titles 33 and 43 of the United States Code).

35. Shortly thereafter, Congress passed the Act of March 2, 1945 (hereinafter the "Rivers and Harbors Act of 1945), which confirmed the same purposes and limitations set forth in the Flood Control Act of 1944. Pub. L. 79-14, ch. 19, 59 Stat. 10. Based on this authorization, the Corps of Engineers proceeded to develop its plan for building dams on the Missouri River. The Corps was authorized by Congress to create the Oahe Reservoir, and to take title to tribal lands along the Missouri River for that purpose in the Act of September 3, 1954 (hereinafter the "Oahe Taking Act"). Pub. L. 83-776, ch. 1260, 68 Stat. 1191. The Oahe Taking Act permitted a taking of Tribal lands that resulted in the inundation 104,420 acres of the Tribe's very best lands. The Oahe Taking Act did not, however, alter the external boundaries of the Cheyenne River Sioux Reservation., or the rights of the Tribe and its members to use of the waters of the Missouri River, the Tribe's natural resources, rights to grazing livestock down to the low water mark of the river, timber, mineral rights in the taken area including the bed of the Missouri River, hunting and fishing rights, usufructary rights, of the absolute and undisturbed use occupancy and ownership, self-government and treaty rights not inconsistent with the Act. 68 Stat. 1191, 1192-1193, §VI, §10.

36. The Flood Control Act granted to the Army Corps of Engineers comprehensive power over federally-owned reservoirs such as Lake Oahe, including authority over water use, leases, construction, recreation, storage, flood control and navigation, and regulations related to the same. *See* 16 U.S.C. §§ 460d, 825s (1946 Ed.); 33 U.S.C. §§ 708, 709 (1946 Ed.). The Corps'

control over federally-owned reservoirs is pervasive, excluding even its sister agencies. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988).

37. The Corps, in exercising that control, is governed in its decision making, by the requirements to use the Mainstem Reservoir in accordance with the requirements of the Flood Control Act of 1944, including the limitations set forth in 33 U.S.C. 701-1(b) that's its management and approved actions do not conflict with present and future beneficial consumptive uses of waters for "domestic, municipal, stock water, irrigation, mining, or industrial purposes;" and do not conflict with the program of operations set forth in the Missouri River Mainstem Reservoir System Master Water Control Manual, including its obligation under Section 7-11.2 of the Manual to guarantee water supply sufficient to meet project purposes of domestic water supply. 33 U.S.C. §701-1(b); *Missouri River Mainstem Reservoir System Master Water Control Manual, Missouri River Basin*, U.S. Army Corps of Engineers, Northwestern Division – Missouri River Basin (March 2006), Section 7-11.2. The Court has held that the Corps actions and whether those actions comport with its obligations under the Flood Control Act of 1944 and the Master Manual are reviewable.

38. The Flood Control Act explicitly prohibits the Corps from taking any action in its management of Lake Oahe that conflicts with present and future beneficial consumptive uses of the waters in Lake Oahe for domestic, municipal, stock water, irrigation, mining, or industrial purposes. 33 U.S.C. §701-1(b), Act of December 22, 1944, 58 Stat. 887, §1(b).

III. THE CORPS' TRUST RESPONSIBILITY TO THE TRIBE AND THE CORPS' DUTY TO ENGAGE IN PRE-DECISIONAL GOVERNMENT-TO-GOVERNMENT CONSULTATION.

39. The Cheyenne River Sioux Tribe owns reserved water rights guaranteed by its Treaties in the waters of Lake Oahe. "Indian reserved water rights are vested property rights for

which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians." *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims,* 55 Fed. Reg. 9223 (Mar. 12, 1990). Under the federal trust responsibility, the United States has a duty to conserve Indian lands, waters, and natural resources, and appropriately manage tribal natural resources. 25 U.S.C. § 162(a)-(d). It is also "the policy of the United States, that all Indian communities . . . be provided with safe and adequate water supply. . . ." 25 U.S.C § 1632(a) (5). Among the United States' core obligations is their duty to prevent upstream users from impairing a tribes' reserved right. *See, Winters*, 207 U.S. at 577-78.

40. The Corps and the Department of Defense exercise their trust responsibility to protect tribes' and tribal trust resources in part by engaging in government-to-government consultation with tribes "on matters that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands in accordance with Reference (d), Enclosure 2, and the measures of merit in Enclosure 3." *Department of Defense Instruction 4710.02* (Sept. 14, 2006), §5.3.4;§6.3; *see also*

41. The Corps *is* bound to its trust responsibility in the Master Manual it issued. The Corps has stated that Tribes along the Missouri River, "are entitled to water rights in streams running through and along their Reservations under the Winters Doctrine….These water rights are not forfeited by non-use." *Missouri River Mainstem Reservoir System Master Water Control Manual, Missouri River Basin,* U.S. Army Corps of Engineers, Northwestern Division – Missouri River Basin (March 2006), at Section E-06. The Corps of Engineers further recognizes that it is bound to modify system operations to accommodate these reserved water rights, stating,

> Native American reserved water rights are rights to divert water for a stream for beneficial use. When a Tribe exercise its water rights, these

> consumptive uses will then be incorporated as an existing depletion. …Further modifications to System operation, in accordance with pertinent legal requirements, will be considered as Tribal Water rights are exercised in accordance with applicable law.

Id. at Section E-06.3.

42. While the courts and the Corps itself recognize that the Corps owes a trust duty to Tribes, particularly with regard to ensuring that Treaty rights are given full effect, the Corps also owes a specific trust responsibility to the Tribe to protect its reserved water emanating from its comprehensive statutory control over the Tribe's trust property under the Flood Control Act of 1944 and the Master Manual.

43. The Corps' duty to the Tribe is a moral obligation of the highest responsibility and trust that should be judged by the most exacting fiduciary standards. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 207 (2011).

IV. THE CLEAN WATER ACT

44. Congress enacted the CWA in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish this goal, the CWA prohibits the discharge of any pollutant, including dredged soil or other fill material, into waters of the United States unless authorized by a permit. *Id*. at § 1311(a). Unless statutorily exempt, all discharges of dredged or fill material into waters of the United States must be authorized under a permit issued by the Corps. *Id*. at §§ 1344(a)–(e).

45. The Corps is authorized to issue two types of permits under § 404: individual permits and general permits. *Id*. The Corps issues individual permits under § 404(a) on a case-by-case basis. *Id*. at § 1344(a). Such permits are issued after a review involving, among other things, site specific documentation and analysis, public notice and opportunity for a hearing, public interest analysis, and formal determination. 33 C.F.R. § 322.3, Parts 323, 325.

46. The CWA also authorizes the Corps to issue "general" permits on a state, regional, or nationwide basis. 33 U.S.C. § 1344(e). Such general permits may be issued for any category of similar activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." *Id.* "No general permit . . . shall be for a period of more than five years after the date of its issuance." 33 U.S.C. § 1344(e) (2). The purpose of this approach to permitting is to "regulate with little, if any, delay or paperwork certain activities that have minimal impacts." 33 C.F.R. § 330.1(b).

47. The Corps issued the current set of 48 nationwide permits ("NWPs") in February of 2012. 77 Fed. Reg. 10184 (Feb. 21, 2012). The 2012 NWPs in "most cases" authorize discharge into regulated waters without any further process involving the Corps. In effect, the NWP pre-authorizes certain categories of discharge, without any additional approval from, or even notification to, the Corps. 33 C.F.R. § 330.1(e) (1). In other instances, discharges cannot occur until the proponent of the action files a "pre-construction notification" ("PCN") to the Corps, and receives verification that the proposed action is consistent with the terms of the NWP. *Id*. at § 330.6(a). The specifics of whether or not a PCN is required are spelled out in each individual NWP as well as a series of "general conditions" accompanying the NWP. 77 Fed. Reg. at 10282 (listing 31 general conditions)

V. THE RIVERS AND HARBORS ACT

48. The Rivers and Harbors Act of 1899 is the nation's oldest environmental law. The statute prohibits a number of activities that impair ports, channels, and other navigable waters. Unlike the CWA, which applies in all waters of the United States, the RHA applies only in "navigable" waters, defined as waters subject to the ebb and flow of the tides, or waters that are "presently used, or have been used in the past, or may be susceptible for use to transport interstate

or foreign commerce." 33 C.F.R. § 329.4.

49. Section 10 of the RHA, 33 U.S.C. § 403, among other things, makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of" any navigable water without a permit from the Corps. Like § 404 permits, § 10 permits may be issued as individual permits or pursuant to the NWP program and are generally subject to many of the same regulations.

50. Tunneling under a navigable water requires a § 10 permit from the Corps, even without any discharge into navigable waters. 33 C.F.R. § 322.3(a) ("For purposes of a Section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody.").52. A separate provision of the RHA, known as "Section 408," makes it unlawful to "build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States" without a permit from the Corps. 33 U.S.C. § 408. Unlike § 10 permits, § 408 permits cannot be issued pursuant to the NWP program but are only issued as individual permits. Prior to issuance of a § 408 permit, the Corps must determine whether the use or occupation will be injurious to the public interest or impair the usefulness of the project.

VI. THE NATIONAL HISTORIC PRESERVATION ACT

51. Section 106 of the National Historic Preservation Act requires that, prior to issuance of a federal permit or license, federal agencies shall take into consideration the effects of that "undertaking" on historic properties. 54 U.S.C. § 306108. Agencies "must complete the Section 106 process prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." 36 C.F.R. § 800.1.

52. The NHPA defines undertaking as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including (1) those carried out by or on behalf of the Federal agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y).

53. Early in the NHPA process, an agency must determine the area of potential effects ("APE") of a federal undertaking. 36 C.F.R. § 800.4(1)(1). The APE is defined by regulation to include the area "within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties. The [APE] is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." *Id*. at § 800.16(d).

54. The § 106 process requires consultation with Indian tribes on federal undertakings that potentially affect sites that are culturally significant to Indian tribes. 36 C.F.R. § 800.2(c)(2); 54 U.S.C. § 302707 (properties "of traditional religious and cultural importance to" a Tribe may be included on the National Register, and federal agencies "shall consult with any Indian Tribe . . . that attaches religious or cultural significance" to such properties). Consultation must occur regarding sites with "religious and cultural significance" even if they occur on ancestral or ceded land. *Id*. at § 800.2(c)(2)(II)(D).

55. Under the consultation regulations, an agency official must "ensure" that the process provides Tribes with "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects."

Id. at § 800.2(c)(ii)(A). This requirement imposes on agencies a "reasonable and good faith effort" to consult with tribes in a "manner respectful of tribal sovereignty." *Id*. at § 800.2(c)(2)(II)(B).

56. Acting "in consultation with . . . any Indian tribe . . . that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take steps necessary to identify historic properties within the area of potential effects." *Id*. at § 800.4(b). The agency must evaluate the historic significance of such sites and determine whether they are potentially eligible for listing under the National Register. *Id*. at § 800.4(c).

57. If the agency determines that no historic properties will be affected by the undertaking, it must provide notice of such finding to the state and tribal historic preservation offices, and the Advisory Council on Historic Preservation ("ACHP"), which administers the NHPA. *Id*. at § 800.4(d). The regulations give those parties the opportunity to object to such a finding, which elevates the consultation process further. *Id*.

58. If the agency finds that historic properties are affected, it must provide notification to all consulting parties and invite their views to assess adverse effects. *Id*. Any adverse effects to historic properties must be resolved, involving all consulting parties and the public. *Id*. at § 800.6. If adverse effects cannot be resolved, the process is elevated again to the ACHP and the head of the agency undertaking the action. *Id*. at § 800.7. Until this process is complete, the action in question cannot go forward.

59. The ACHP authorizes agencies to adopt their own regulations for implementing its § 106 obligations. Such regulations must be reviewed and approved by the ACHP in order to be valid. *Id*. at § 800.14.

60. The Corps has adopted procedures intended to satisfy its § 106 obligations. *See* App. C to 33 C.F.R. Part 325. Those procedures, which predate amendments to the NHPA that

significantly broaden the role of tribes in the § 106 process, have never been approved by the ACHP. Several courts have concluded that the Corps' NHPA procedures are legally invalid. However, the Corps continues to follow these procedures for purposes of § 106 consultation, including in the process surrounding DAPL.

61. Section 106 regulations also provide an alternative compliance mechanism under which agencies can negotiate a "programmatic agreement" with the ACHP to resolve "complex project situations or multiple undertakings." 36 C.F.R. § 800.14(b). Such agreements are suitable for "when effects on historic properties are similar and repetitive or are multi-State or regional in scope;" "when effects on historic properties cannot be fully determined prior to approval of an undertaking;" or when "nonfederal parties are delegated major decision making responsibilities," among other situations. *Id*. at § 800.14(b)(1). Programmatic agreements require consultation with Tribes, among others, as well as public participation.

62. The Corps has never adopted a programmatic agreement with the ACHP regarding its CWA/RHA permits or any other activity.

VII. THE NATIONAL ENVIRONMENTAL POLICY ACT

63. NEPA, 42 U.S.C. §§ 4321–4370f, is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It makes environmental protection a part of the mandate of every federal agency. 42 U.S.C. § 4332(1).

64. NEPA seeks to ensure that federal agencies take a "hard look" at environmental concerns. One of NEPA's primary purposes is to ensure that an agency, '"in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.'" NEPA also "guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience," including the public, "that

may also play a role in the decisionmaking process and the implementation of the decision." *Id.*

65. NEPA requires agencies to fully disclose all of the potential adverse environmental impacts of its decisions before deciding to proceed. 42 U.S.C. § 4332(C). NEPA also requires agencies to use high quality, accurate scientific information and to ensure the scientific integrity of the analysis. 40 C.F.R. §§ 1500.1(b), 1502.24.

66. If an agency action has adverse effects that are "significant," they need to be analyzed in an environmental impact statement ("EIS"). 40 C.F.R. § 1501.4. If it is unclear whether impacts are significant enough to warrant an EIS, it may prepare an "environmental assessment" ("EA") to assist in making that determination. *Id*. If the agency determines that no EIS is required, it must document that finding in a "finding of no significant impact" ("FONSI").

67. NEPA's governing regulations define what "range of actions, alternatives, and impacts [must] be considered in an environmental impact statement." 40 C.F.R. § 1508.25. This is in part what is known as the "scope" of the EIS. The EIS must consider direct and indirect effects. The direct effects of an action are those effects "which are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). The indirect effects of an action are those effects "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b).

68. An agency must also analyze and address the cumulative impacts of a proposed project. 40 C.F.R. § 1508.25(c)(3). Cumulative impacts are the result of any past, present, or future actions that are reasonably certain to occur. Such effects "can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

VIII. THE MINERAL LEASING ACT

69. The Mineral and Leasing Act imposes a mandatory duty that rights-of-way or

permits granted or renewed pursuant to 30 U.S.C. § 185 shall be subject to promulgated regulations.

70. The relevant section is set forth in 30 U.S.C. §185(f).

71. The section is intended to ensure that permits and rights-of-way granted or renewed pursuant to the Mineral Leasing Act are promulgated in accordance with the provisions of section 185. In addition to the mandatory requirement of regulations being promulgated in accordance with the provisions of section 185, the Secretary of the Interior or agency head may prescribe additional terms and conditions regarding the extent, duration, survey, location, construction, operation, maintenance, use and termination of such permits and grants.

72. The Corps has not promulgated any regulations or final rule regarding the grant of rights-of-way or permits granted or renewed pursuant to the Mineral Leasing Act.

73. The APA requires promulgated rulemaking by agencies after the public receives notice and an opportunity to comment.

74. It is incumbent upon an agency to follow is own procedures. *Morton v. Ruiz*, 415 U.S. 199 (1974).

IX. THE FIRST AMENDMENT FREE EXERCISE AND RELIGIOUS FREEDOM RESTORATION ACT

75. The First Amendment to the United States Constitution prevents the government from burdening the free exercise of religion.

76. Under RFRA any government action that creates a substantial burden on the free exercise of religion must serve a compelling government interest and the action must be the least restrictive means for meeting the compelling government interest.

77. To fall under RFRA's protection, a religious belief must be sincerely held by the adherent; courts are not to second guess the reasonableness of an adherent's beliefs so long as they

are sincere.

78. Once a party makes a prima facie case that the government action creates a substantial burden on the free exercise of religion, the burden shifts to the government to prove that its action is necessary to meet a compelling government interest and the action is the least restrictive way to meet the interest.

79. The least restrictive means standard is exceptionally demanding and it requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.

FACTUAL ALLEGATIONS

I. INTERESTS OF THE CHEYENNE RIVER SIOUX TRIBE

80. Since time immemorial, the Tribe's ancestors—the *Oceti* Šakowiŋ, also known as the Great Sioux Nation—used and occupied a broad area throughout the northern Great Plains, including much of the area that Dakota Access proposes to cross with its pipeline. Although the Tribe followed migrating buffalo herds without limitation across the North American landscape (including present-day Iowa and Illinois), the Tribe's aboriginal territory prior to the 1851 Fort Laramie Treaty has been understood to include all of the Dakotas and large parts of Montana, Wyoming, Nebraska, and Minnesota. The Tribe's traditional territories recognized in several treaties has been judicially established to include all of the Dakotas west of the Missouri River and large parts of Montana, Wyoming, and Nebraska. This broad territory embraces a landscape filled with cultural and historical significance central to the Tribe's identity.

81. The Tribe's traditional and ancestral territory extends well beyond the current Reservation's exterior boundaries, encompassing lands that are the subject of this action, but especially those lands that have been judicially established as treaty territories of the Sioux Nation, of which the Tribe is a member. *Id.* The Corps and other federal agencies have repeatedly

acknowledged the traditional use of lands within and around the DAPL route by the Tribe's ancestors.

82. The Tribe's cultural resources are historically and culturally interrelated over the entirety of the land within the Tribe's traditional territory, within and outside of the exterior boundaries of the present day Cheyenne River Sioux Reservation. Protection of the Tribe's cultural heritage is of significant importance to the Tribe. Destruction or damage to any one cultural resource, site, or landscape contributes to destruction of the Tribe's culture, history, and religion. Injury to the Tribe's cultural resources causes injury to the Tribe and its people.

83. Cultural resources of significance to the Tribe are located on the lands that are the subject of this action and adjacent lands. In addition to specific archaeological sites that have been identified to date, there are numerous significant culturally important sites that have not been identified. The lands within the pipeline route are culturally and spiritually significant.

84. The waters of the Missouri River moreover are sacred to the Tribe and essential to the Tribe's practice of our religion. The waters of the Missouri River are themselves a Tribal cultural and spiritual resource.

85. The Tribe and its members also have a cultural interest in preserving the quality of the land, water, air, fauna, and flora within the Tribe's traditional territory, within and outside the Reservation. For example, the Tribe is concerned with impacts to the habitat of wildlife species such as piping plovers, least tern, Dakota skipper, the black-footed ferret, and pallid sturgeon, among others. The Tribe has a particular concern for bald eagles, which remain federally protected and play a significant role in the Tribe's culture, and which would be adversely affected by the proposed pipeline. The Tribe is greatly concerned with the possibility of oil spills and leaks from the pipeline should it be constructed and operated, particularly into waters that are of considerable

economic, religious, and cultural importance to the Tribe.

86. The Tribe has a clear legally recognized property right in the waters of Lake Oahe. When the United States set aside the territory that comprise the Cheyenne River Sioux Reservation for the exclusive use and occupation of the, it impliedly reserved waters both sufficient to sustain the Reservation and of a quality to serve that purpose. *Id.* Although the Tribe has never quantified those rights, the Tribe relies upon the waters of Lake Oahe for nearly all of its drinking water, agricultural and industrial water, as well as water to support subsistence and sport hunting and fishing. The Cheyenne River Sioux Tribe relies upon the waters of Lake Oahe for its health, safety, and economy. In light of the Tribe's total reliance upon Lake Oahe for its water, contamination of those waters by toxic discharge or by a failure of the proposed pipeline would devastate the Cheyenne River Sioux Reservation, impair our property rights, and threaten the Tribe's very existence.

87. Over 9,900 individual residents of the Cheyenne River Sioux Reservation rely exclusively on water from Lake Oahe for their water supply. The Corps is fully aware there is no alternative water source available for the Cheyenne River Sioux Reservation, because it acted in 2005 to construct a new water intake on Lake Oahe for the Tribe based on its own findings that there is no alternative source of water available the Tribe because there are no other uncontaminated surface waters available, and there is no access to aquifers because they are so deep underground they are not potable, and because the Corps' operation of Lake Oahe was likely to cause an imminent shut down of the only water intake available to the Tribe.

II. THE CORPS' ISSUANCE OF NWP 12

88. The Corps issued the current suite of 48 NWPs, covering a wide array of potential activities involving discharges into regulated waters, in February of 2012. 77 Fed. Reg. 10184

(Feb. 21, 2012). Of relevance here, NWP 12 governs "utility line activities." *Id*. at 10271. NWP 12 authorizes the "construction, maintenance, repair and removal of utility lines and associated facilities" in waters of the United States, providing that the activity does not result in the loss of greater than a ½ acre of waters "for each single and complete project." Counterintuitively, a "single and complete project" in the case of linear projects like utility lines is any crossing of a separate waterbody. 33 C.F.R. § 330.2(i). Under this definition, a pipeline like DAPL is made up of hundreds if not thousands of "single and complete projects."

89. The NWP defines "utility line" to include "any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose." 77 Fed. Reg. at 10271. The Corps considers pipelines carrying crude oil to be covered by NWP 12.

90. Under NWP 12, preconstruction notification ("PCN") to the Corps by a non-federal project proponent, and a verification from the Corps, is required if any one of several criteria is met. *Id*. at 10272. If none of the criteria are met, the proponent is authorized by NWP 12 to proceed with the work in regulated waters without additional notification to, or approval from, the Corps. None of the NWP 12-specific criteria relates to historic or cultural preservation.

91. The NWP program also includes a set of general conditions that are applicable to all NWPs, including NWP 12. General Condition 20 ("GC 20") addresses historic properties. Under GC 20, a non-federal permittee must submit a PCN "if the authorized activity may have the potential to cause effects to any historic priorities listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties." *Id*. at 10284. If a PCN is provided, the Corps purports to comply with § 106 of the NHPA prior to verifying that the NWP is applicable, and work may not commence until such verification is provided. 33 C.F.R. § 330.5(g)(2). Conversely, if no PCN is

provided, no § 106 process occurs.

92. GC 20 puts the responsibility on the proponent, not the Corps, to determine whether historic or culturally significant properties are present, and requires Corps' verification only if the proponent finds such sites and reports them to the Corps via a PCN.

93. NWP 12 was formally adopted by the Corps in a "Decision Document" signed by Major General Michael J. Walsh on Feb. 13, 2012. In responding to public comment regarding potential impacts to tribal sites, the Decision Document states that compliance with NHPA on NWP implementation is carried out via GC 20.

III. FACTS RELEVANT TO CHALLENGE TO NWP 12

94. The proponent of DAPL proposes to construct a major crude oil pipeline across 1,168 miles through North Dakota, South Dakota, Iowa, and Illinois. The pipeline will have a capacity of 570,000 barrels of crude oil per day, making it one of the largest crude oil pipelines in the nation, carrying over half of the current capacity of North Dakota's oil production.

95. DAPL is one of several pipelines that have been proposed for the North Dakota oil production area, some of which have been moving on a slower timeline due to environmental review requirements. DAPL has moved aggressively to get the pipeline constructed as quickly as possible.

96. The pipeline's route passes through the Tribe's ancestral lands, and areas of great cultural, religious, and spiritual significance to the Tribe. Construction of the pipeline includes clearing and grading a 100-150 foot access pathway nearly 1,200 miles long, digging a trench as deep as 10 feet, and building and burying the pipeline. Such work would destroy burial grounds, sacred sites, and historically significant areas in its path. These sites carry enormous cultural importance to the Tribe and its members.

97. DAPL claims to have completed cultural resource surveys along the entire pipeline length. However, the out-of-state, non-Tribal consultants hired by DAPL to do cultural surveys are unable to assess the potential cultural significance of sites in this area to the affected Tribes. Only Tribally-trained and approved consultants have the ability to assess such sites. The Tribe has never had the opportunity to discuss protocols for cultural surveys, or participate in the surveys that were conducted. Instead, it was provided copies of partial surveys after they were completed.

98. Compared to other pipelines, DAPL has taken a highly unusual approach to Corps permitting for activities involving discharges into regulated waters. Rather than seek Corps' verifications on all waters of the U.S. in which pipeline construction would cause a discharge, as has been typical, DAPL has only sought Corps' verification for a tiny minority of the impacts to federally-regulated waters.

99. For example, DAPL's route through North Dakota is 359 miles. A 2015 "Wetlands and Waterbodies Delineation Report" provided to the state Public Service Commission identifies 263 waterbodies and 509 wetlands that would be impacted by the pipeline. However, this information was never provided to the Corps. Instead, DAPL submitted PCNs for only two of these sites, at crossings of the Missouri River. Neither of these PCNs was submitted based on potential impacts to historic sites.

100. In South Dakota, DAPL would cross 273 miles. DAPL's state Public Utilities Commission filings reveal 288 waterbody crossings and 102 acres of wetlands impacts. However, DAPL only provided the Corps with PCNs for 10 of these sites. None of the PCNs in South Dakota was triggered by impacts to historic sites.

101. In both states, this delineation of waterbody impacts was only partially complete, as DAPL did not have landowner access to all sites along the pipeline route. Accordingly, some

of the features were estimated through desktop analysis. The ultimate number of waterbody and wetland impacts remains unknown.

102. One of the places in South Dakota where Corps' authorization is required is at Lake Oahe, where the pipeline would cross underneath the Lake (a dammed section of the Missouri River) immediately upstream of the Tribe's reservation.

103. Due to its concerns about the configuration of the pipeline and inadequacies in the regulatory process, the Tribe has participated in the public meeting process associated with the permits, including joining Standing Rock Sioux's formal technical comments on the Lake Oahe crossing. The Tribe has repeatedly attempted to interact with the Corps to facilitate in person government-to-government consultation with the Tribal Council. The Tribe is greatly concerned about the risks to the Tribe that would occur if the pipeline was to move forward in its current configuration. The Tribe has in particular highlighted the inadequacies of the Corps' § 106 consultation process with regard to historic and cultural impacts at the Lake Oahe site.

104. On July 25, 2016, the Corps issued the NWP 12 verification and other authorizations required at the roughly 204 sites in the four states for which verification has been requested along the pipeline's entire length. However, prior to that time, construction started along the remainder of the route, including construction involving discharges into the hundreds if not thousands of sites where pipeline construction involves discharges into waters of the United States, but for which no PCN is required.

105. The Tribe has repeatedly expressed concerns to the Corps regarding construction in waters of the United States pursuant to NWP 12 without any § 106 consultation on historic impacts. On May 19, 2016, the Cheyenne River Sioux Tribal Historic Preservation Officer, Steve Vance, wrote to the Corps Omaha District Engineer regarding the extensive work proceeding on

the DAPL Project without any § 106 consultation. This letter explained that non-Tribal archaeologists were unable to appreciate the cultural significance of Tribal historic sites, and that his office had found the DAPL cultural surveys, conducted by out-of-state archaeologists with no training in the cultural practices of the Oceti Šakowiŋ to be "gravely deficient."

106. The letter requested that other federal agencies, such as the United States Environmental Protection Agency, the Department of Energy, and the Federal Energy Regulatory Commission, take part in the § 106 consultation. The letter also stated that the DAPL Project impacts to waters of the United States beyond those identified by the Corps and has numerous potential historic impacts.

107. The Corps did not respond to Mr. Vance's raised concerns.

108. The Tribe's concerns were highlighted in June of 2016 when archaeologists working on behalf of the Upper Sioux Tribe discovered a site of great religious and cultural significance to Oceti Šakowiŋ in the pipeline's route in Iowa. The site was not discovered by DAPL during its cultural resource surveys, even though it lay directly in the pipeline's route.

109. The pipeline will also impact historic and culturally significant sites in uplands along the pipeline's route in between areas of Corps' jurisdiction. The Corps views any impacts to such uplands sites as outside of its responsibility under § 106, as the Corps interprets § 106 to apply only within the immediate area of CWA jurisdiction.

110. The ACHP regulations take a different approach. In a May 6, 2016 letter to the Corps regarding DAPL, the ACHP explained that its regulations "define the undertaking as the entire project, portions of which may require federal authorization or assistance." Even where the jurisdiction is limited to particular portions of a project, the ACHP explained, "the federal agency remains responsible for taking into account the effects of the undertaking on historic properties."

The letter concluded that given the close relationship between the project and multiple federal approvals, "a greater effort to identify and evaluate historic properties" was required.

111. In a May 19, 2016, letter, the ACHP formally objected to the Corps' finding of "no effect" at the site of the Lake Oahe crossing, one of only two sites in the entire state of North Dakota for which the Corps even purported to engage in § 106 consultation. The ACHP asserted that the Corps misapplied § 106 by considering only historic properties within its areas of jurisdiction, when it should consider indirect impacts to historic sites in uplands that could not occur but for the Corps' authorization to discharge into waters of the United States.

112. At the time of filing this Complaint, DAPL has not executed agreements with all landowners, and eminent domain proceedings are underway in several states. Additionally, several lawsuits have been filed against DAPL and state regulatory agencies which challenge the legality of DAPL approvals, and seeking the remedy of vacating such approvals, which would require DAPL to stop work. However, DAPL has chosen to move ahead with construction in places where regulatory approval is secured and where landowner consent has been obtained.

113. DAPL has been repeatedly told by state regulatory agencies that any construction prior to the completion of the regulatory and eminent domain process is at its own risk. DAPL has repeatedly acknowledged that it bears the risk of starting construction prior to the completion of the regulatory and legal process.

IV. GENERAL FACTS REGARDING THE CORPS' ISSUANCE OF THE § 408 PERMITS AND CWA VERIFICATIONS

114. On July 25, 2016, the Corps issued authorizations pursuant to § 408 of the RHA for DAPL to cross federally-managed or owned lands on the Missouri River in two places, at Lake Sakakawea and Lake Oahe, roughly 230 miles apart. Accompanying this authorization, the Corps released a final environmental assessment ("EA") and "finding of no significant impact"

("FONSI") with respect to two components of the DAPL in North Dakota. The EA and FONSI concluded that these two small segments of the pipeline did not have sufficient adverse environmental impact to warrant preparation of an environmental impact statement ("EIS"), which would have triggered substantially broader environmental review, a closer comparison of alternatives, and greater public engagement.

115. Also on that date, the Corps issued verifications pursuant to the CWA and RHA finding that 204 crossings of jurisdictional waters of the United States, for which PCNs had been filed, met the terms of NWP 12. The verifications include federally-protected waters in four states: North Dakota (2 verifications), South Dakota (10 verifications), Iowa (61 verifications), and Illinois (45 verifications). The verifications authorize DAPL proponents to begin construction of the pipeline through federally-regulated streams, rivers, and wetlands, and operate the pipeline to transport crude oil in the Tribe's culturally significant ancestral lands, and adjacent to its reservation. DAPL notified tribes that construction was set to begin at many of these sites on or before August 1, 2016. Permits have been granted at the Lake Oahe site and construction is ongoing at this time.

116. On January 5, 2016, the St. Louis District of the Corps released a public notice announcing that it intended to authorize another segment of the pipeline under § 408 of the RHA. That segment crossed federal flowage easements and federally-managed levees on the Illinois River. To date, no permit or even draft environmental review document has been issued for this segment of the pipeline.

117. On or about December 17, 2015, the U.S. Fish and Wildlife Service ("FWS") released a draft EA for yet another segment of the pipeline. That EA reviewed potential impacts of the pipeline over grassland easements held by FWS and managed for wildlife values. A final

EA and FONSI were issued by the FWS on June 22, 2016.

118. The current proposed route crosses Lake Oahe about 70 miles upstream of the Tribe's reservation boundary, where any leak or spill from the pipeline would flow directly into the reservation. The Tribe and its members have been deeply concerned about the potential impacts of the Lake Oahe crossing since its inception, for two primary reasons. First, the Tribe relies on the waters of Lake Oahe for drinking water, irrigation, fishing, and recreation, and to carry out cultural and religious practices. 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. Additionally, the cultural and religious significance of these waters cannot be overstated. An oil spill from the pipeline into Lake Oahe would cause an economic, public health and welfare, and cultural crisis of the greatest magnitude.

119. In addition to a spill, the mere presence of the oil flowing under the sacred waters of the Missouri River and Lake Oahe is a desecration of these waters. These waters must remain sacred in order for the Lakota to enjoy free exercise of their religion. Placement of the pipeline as proposed constitutes a substantial burden on their ability to exercise their religion.

120. Pipeline leaks and spills are routine in both new and old pipelines. A segment of the Keystone pipeline built in 2010 recorded 35 leaks in its first year of operations. A study of North Dakota's pipelines revealed over 300 leaks in two years, most of which were unreported to the public. Major spills from crude oil pipelines have occurred recently on the Kalamazoo and Yellowstone Rivers, with devastating economic and environmental impacts. The Corps does not require, and DAPL does not propose, any technology or mitigation approaches that reduce risk relative to other recent pipelines that have been the source of major and minor spills and leaks in recent years.

121. Second, the Lake Oahe crossing will take place in an area of great cultural, religious and spiritual significance to the Tribe. Construction of the pipeline, which includes clearing and grading a 100-150 foot access pathway nearly 1,200-miles long, digging a trench as deep as 10 feet, and building and burying the pipeline, would destroy burial grounds, sacred sites, and historically significant areas on either side of Lake Oahe. These sites carry enormous cultural importance to the Tribe and its members.

122. Construction of pipelines involves other significant environmental impacts, including massive amounts of water required for hydrostatic testing and permanent maintenance of a 50-foot right-of-way above the pipeline.

123. The confluence of the Cannonball and Missouri Rivers, where the crossing would take place, is a sacred place to the Tribe. It is a place of great historical significance, serving as a place of peace, prayer, and trade where traditional enemies could meet without risk of violence. There are numerous sacred stones and historically important sites in the immediate landscape of the Lake Oahe Crossing, few of which have been fully evaluated by Tribal archaeologists.

124. The Corps operates Oahe dam, downstream of the Lake Oahe crossing, for flood control and other purposes. The result of its management is that water levels fluctuate greatly in the reservoir, with attendant erosion, scouring, and deposition of sediments. The geomorphology of the segment of Lake Oahe to be crossed by the pipeline is highly dynamic.

125. Due to its concerns about the configuration of the pipeline and inadequacies in the regulatory process, the Tribe has participated in the public process associated with the permits, including filing formal preliminary technical and legal comments on the Lake Oahe crossing. The Tribe's attempts to secure from the Corps the technical information upon which the Corps relied, for the purpose of fully analyzing whether the Tribe's trust resources and impacts thereon were

included in the Corps' decision making, were rejected until the Corps finally released the engineering and technical documents in redacted form to the Tribe on February 3, 2017. The Tribe has attempted numerous times to engage in government-to-government consultation with the Corps to express its concerns, but no avail, and in violation of § 106. The Tribe has repeatedly conveyed to the Corps and other government officials the significance of its concerns and the risks to the Tribe about moving ahead with the pipeline in its current configuration without considering any impacts to the Cheyenne River Sioux Tribe and its water intake. On February 3, 2017, the Tribe's review of the entire set of technical documents relied upon by the Corps confirms that no analysis was done by the Corps of any potential impacts on the Tribe or its trust resources. Further, the Tribe filed an independent Preliminary Engineering Report filed with the Corps on January 18, 2017 that concluded the Corps underestimated substantially the risk of an oil spill, the size of an oil spill, and incorrectly calculated the risk of two other alternatives to the current siting. This Report was completely ignored and not included in the Corps' basis for decision to grant the right-of-way on February 7, 2017. ECF 95-2. Because the Corps completely refused to release any documents upon which it was assessing the project prior to November 2016, the Tribe could not engage in government-to-government consultation prior to the decision on the EA, because it had no information upon which to base its opinions and concerns for its trust resources and cultural sites.

V. SPECIFIC FACTS RELATED TO NHPA COMPLIANCE FOR JULY 25, 2016 AUTHORIZATIONS

126. The confluence of the Cannonball and Missouri Rivers is sacred ground to the Cheyenne River Sioux people. It is rich in history, and it is rich in cultural and religious significance. Industrial development of that site for the crude oil pipeline has a high potential to destroy sites eligible for listing in the National Register.

127. The Corps undertook a process to consider the impacts of the Missouri River crossing on historic and culturally significant sites that was flawed in multiple respects. It defined the "area of potential effects" ("APE") for the Lake Oahe crossing exceptionally narrowly to include only a tiny parcel immediately surrounding the horizontal directional drilling ("HDD") pits on each side of the river and a narrow strip for an access road and "stringing area" on the west side of the crossing. On the east side of the river, the APE is difficult to determine because in some of the Corps' figures, the "project workspace" includes both the access road and stringing area, while in others only the HDD pit is included.

128. The Corps' attempts at § 106 consultation omit the actual pipeline route that will be entering and existing the HDD borehole. The pipeline itself will involve a 100-150 yard swath of industrial development—clearing, grading, excavation of a 6 to 10 foot trench, and construction work to shape and place the pipeline.

129. It is likely that such development would destroy any historic or culturally significant sites in its path. There are already known but unevaluated historic sites—in other words, sites that may be eligible for protection under the National Historic Preservation Act ("NHPA")—in the direct path of the pipeline immediately in the area of the HDD crossing. For example, according to the draft EA, several sites are directly in the pipeline's path in the first mile outside of the HDD site.

130. Consultation with the Tribal Historic Preservation Office ("THPO") on the DAPL, which would be routed on historic ancestral land with great cultural and religious importance to the Cheyenne River Sioux Tribe, has been profoundly inadequate. The Tribe has never been able to participate meaningfully in assessing the significance of sites that are potentially affected by the project.

131. The non-Tribal consultants hired by DAPL to do cultural surveys are not equipped to suitably assess the potential cultural significance of sites in this area. The Tribe has never had the opportunity to discuss protocols for cultural surveys or participate in the surveys that were conducted.

132. The Tribe's first record of correspondence from the Corps related to the DAPL is dated October 29, 2014, when a Corps representative contacted the THPO addressing proposed soil boring in Section 10 and 11, Township 134N, Range 79 W, Morton and Emmons Counties, North Dakota.

133. The Cheyenne River Sioux THPO, Steve Vance, joined Standing Rock Sioux THPO's formal Complaint, which objected to the Corps' conclusion that no historic properties would be affected by the bore hole drilling, documenting numerous specific important sites that could be affected as well as the cultural significance of the area generally, and requesting a full Class III survey with tribal archaeologists before any work was done.

134. No response to this urgent correspondence was ever provided, despite several follow up requests from the Cheyenne River Sioux and Standing Rock Sioux THPOs, and the work was done without any additional tribal consultation or process.

135. On February 17, 2015, the Corps sent the THPO a generic form letter seeking to initiate consultation under § 106 on the DAPL. The Tribe has attempted numerous times to initiate such government-to-government contact, with no meaningful response from the Corps.

136. In the months that followed, both the THPO and the Chairman of the Tribe followed up with numerous additional letters and several in-person requests to the Corps outlining concerns about cultural impacts, and seeking to engage the Corps in a good-faith consultation process as required by § 106 regulations.

137. The Tribe has indicated its significant concerns with properties on the site, and its ongoing exclusion from the § 106 process. Due to the lack of interaction and meaningful response by the Corps, it became clear to the Tribe that the Corps was attempting to circumvent the § 106 process. The THPO urged the Corps to include other federal agencies in the § 106 process and broaden its review to include affected areas outside the Corps' jurisdiction, as required by governing regulations.

138. Instead, the Corps' next action was to publish a draft environmental assessment ("EA") that included not a single mention of the potential impacts of the pipeline project on the Cheyenne River Sioux or areas of historic and cultural significance to the Tribe.

139. Additionally, the Corps received critical letters from the U.S. Environmental Protection Agency, the U.S. Department of Interior, and the ACHP, all of whom questioned the Corps' approach to consultation with the Standing Rock Sioux Tribe. The ACHP observed that it had "not been provided evidence that the Corps has met" the requirements of § 106, observing that "there is likely to be significant tribal interest" and that "[t]he Corps' approach to meeting its government- to-government consultation is extremely important." It later asked to be formally made a party to consultation on the project.

140. Around the time of the draft EA, the Tribe also learned that the proponent had conducted cultural surveys at the Lake Oahe site and along the pipeline route during 2014 and 2015. Neither the proponent nor the Corps ever consulted with the Tribe about the protocols for those assessments or the area of potential affects, or had invited their participation as the Tribe had repeatedly requested. Instead, the proponent provided the Tribe with a massive quantity of its survey data, after it was complete, and provided an opportunity to comment.

141. During this same time frame, i.e., late 2015 and early 2016, the proponent stated

repeatedly in public and private meetings that construction was slated to start in mid-May of 2016, regardless of any additional process requirements or needs.

142. The THPO and Chairman Frazier continued attempts to facilitate government-to-government consultation with the Corps through the commander of the Omaha District, Col. John Henderson. As the Corps had not met its consultation requirement vis-a-vis the Cheyenne River Sioux Tribe, the Tribe did not participate in the informal multi-tribe informational meetings and site visits conducted by the Corps.

143. To date there has been no formal government-to-government meeting between the Corps and the Cheyenne River Sioux Tribe.

144. The Tribe has repeatedly advised the Corps that the site generally is rich in unassessed sites of historic and cultural significance. Representatives of the Standing Rock Sioux Tribe have specifically identified evidence of such sites and notified the Corps of the same. The Corps has refused to acknowledge the Tribes' identification of its own culturally and historically significant material on the sites at issue.

145. On April 22, 2016, the Corps made a formal finding that no historic properties were affected by the Lake Oahe decision.

146. On May 19, 2016, the ACHP sent a letter responding to the Corps in response to its April 22, 2016 determination. The letter laid out a number of significant criticisms of the Corps' compliance with § 106 and made recommendations for additional steps that Corps should take.

147. The Cheyenne River Sioux Tribe's THPO sent a letter to the Corps formally objecting to the "no historic properties effected" on May 19, 2016. No response was received to these formal objections besides additional general information from the Corps on their permitting process.

148. On May 19, 2016, the ACHP formally objected to the effects determinations made by the Corps for DAPL. The ACHP outlined several fundamental flaws with the Corps § 106 compliance, including a failure to properly define the undertaking and area of potential effects; inadequate Tribal consultation and incomplete identification efforts; and numerous procedural flaws.

149. The April 22, 2016 finding pertains only to the Lake Oahe crossing site. It does not apply to any the other hundreds of NWP 12 verifications along the pipeline's route.

150. Section 106 consultation is required for the Corps' verifications as well. But the Corps has not consulted with the Tribe to evaluate the impacts of PCN verifications on historic sites within its ancestral lands, including sites in South Dakota, Iowa, and Illinois. Instead, in issuing the verifications, it provided for tribal monitoring during construction.

VI. SPECIFIC FACTS RELATED TO NEPA COMPLIANCE FOR JULY 25, 2016 AUTHORIZATIONS

151. The Corps is evaluating different components of DAPL in multiple separate segments, each following an independent process and on its own timeline. The Corps' documents for each segment fail to acknowledge the existence or impacts of the other segments.

152. One segment is made up of two crossings of Corps-managed or Corps-owned lands in North Dakota, at Lake Sakakawea and at Lake Oahe, roughly 230 miles apart from one another. Another segment is the crossing of Corps-managed and operated land and levees towards the other end of the pipeline, on the Illinois River. Finally, the Corps issued 204 verifications in four states that DAPL can proceed under NWP 12 where they cross jurisdictional waters.

153. In yet another NEPA process, the FWS reviewed the impacts of providing authorization to cross easements on private land intended to protect wildlife. In June of 2016, FWS released a final EA covering authorization to cross miles of grasslands and wetlands

easements in North and South Dakota.

154. The Corps and FWS have pursued a NEPA process for each of these components independently of the other components. For the North Dakota crossings, the Omaha District of the Corps released a draft EA in December 2015 and a final EA and FONSI on July 25, 2016. For the Illinois River crossings, the St. Louis District of the Corps released an EA and FONSI on July 25, 2016, but without having provided a draft EA and any opportunity for public comment. For the FWS easements, an EA was issued in June of 2016. For the CWA NWP 12 verifications, the Corps has not taken any action to comply with NEPA, asserting that verifications are not federal actions subject to NEPA.

155. The North Dakota EA looks narrowly at the impacts of pipeline construction at the HDD crossing site only. It does not look at the indirect effect of facilitating pipeline construction to, from, and through the two HDD crossings. Accordingly, the EA is silent on the impacts to the environment associated with pipeline construction outside the immediate confines of the HDD crossing site, including oil spill risks to waters or lands of cultural significance to the Tribe.

156. The North Dakota EA also does not analyze the environmental impacts of the North Dakota crossings in the context of either the CWA verifications for the pipeline, the Illinois River § 408.

157. The North Dakota EA also does not analyze the environmental impacts of the North Dakota crossings in the context of either the CWA verifications for the pipeline, the Illinois River § 408 permit, or the FWS easement crossings, all of which are integrally related to a single pipeline project.

158. In multiple sets of legal comments, the Tribe expressed its concerns regarding these and many other issues associated with the NEPA process.

159. On January 8, 2016, the U.S. Environmental Protection Agency ("EPA") sent comments to the Corps on the draft EA saying that the document lacked "sufficient analysis of direct and indirect impacts to water resources," lacks information related to the operation of the pipeline, and that the document is "limited to small portions of the complete project and does not identify the related effects of the entire project segment."

160. EPA sent additional comments on March 11, 2016, highlighting the proximity of tribal drinking water intake to the pipeline crossing. The letter highlighted multiple risks to water resources from the project, recommended additional analysis of emergency preparedness measures, and urged consideration of additional alternatives that reduced potential conflicts with drinking water supplies.

161. On March 29, 2016, the U.S. Department of the Interior sent a comment letter to the Corps urging preparation of a full Environmental Impact Statement ("EIS"). DOI highlighted the risks to the tribal lands and drinking water resources. The letter also observed that the Corps' NEPA analysis should consider more of the pipeline route as a connected action under NEPA.

162. The Corps did not prepare a full EIS. Instead, it released its final EA on July 25, 2016. The final EA provided only cursory responses to the agency and tribal comments regarding drinking water and downstream impact.

VII. SPECIFIC FACTS RELATED TO CWA/RHA COMPLIANCE FOR JULY 25, 2016 AUTHORIZATIONS

163. Construction of the DAPL will involve dredge and/or fill in waters of the United States in hundreds if not thousands of locations. Construction of DAPL will also involve obstructions to the capacity of navigable waters of the United States.

164. The Corps is only issuing individual permits at three locations on the entire length of the pipeline: at the two North Dakota reservoir crossings, and at the Illinois River crossing.

Those components of the pipeline require a permit under § 408 of the Rivers and Harbors Act and real estate actions because the pipeline will cross federally-owned or managed land.

165. The remainder of the pipeline's impacts on jurisdictional waters is being processed under NWP 12, which authorizes certain actions without an individual permit.

166. With respect to PCNs and verifications, the final verifications identify 2 locations in North Dakota, 10 locations in South Dakota, 61 locations in Iowa, and 45 locations in Illinois, for a total of 204 crossings in 1,168 miles of pipeline.

167. Since the purpose of the pipeline is to carry crude oil developed in western North Dakota to sites in Illinois, no component of the pipeline is useful without all of the other components of the pipeline in place.

168. The Lake Oahe pipeline crossing will take place in to the Tribe's public water supply, as well as a number of private water supplies, and irrigation intakes. The crossing will also impair tribal treaty rights on the Cheyenne River Sioux Reservation, including reserved water rights.

VIII. SPECIFIC FACTS RELATED TO CORPS' FAILURE TO COMPLETE THE EIS PROCESS PURSUANT TO THE EIS NOTICE

169. As set forth, *supra*, the Corps has recognized that the 408 permitting process did not include in its scope the granting of a right-of-way.

170. The EIS Notice clearly contemplates that the Corps will engage in a full review of the right-of-way under NEPA.

171. In response to the EIS Notice, on January 19, 2017, the Tribe provided preliminary information and analysis to the Corps regarding how the right-of-way will impact the physical environment, the economic feasibility of the pipeline project, the comparative advantages of two separate reasonable alternatives, and the impact on the right-of-way on the Tribe's treaty rights.

The Tribe specifically requested that technical documents relied upon by the Corps be released to the Tribe in accordance with the directive of the Corps December 4, 2016 Memorandum. In order to fully evaluate the potential impacts to trust resources, the Tribe explained that access to these documents was essential.

172. The Tribe's attempts to secure from the Corps the technical information upon which it was relying, for the purpose of fully analyzing whether the Tribe's trust resources and impacts thereon were included in the Corps' decision making, were rejected despite repeated requests made in writing on January 27, 2017 and February 1, 2017, until the Corps finally released the engineering and technical documents in redacted form to the Tribe on February 3, 2017. The Tribe has attempted numerous times to engage in government-to-government consultation with the Corps to express its concerns, but no avail, and in violation of § 106.

173. The Tribe has repeatedly conveyed to the Corps and other government officials the significance of its concerns and the risks to the Tribe about moving ahead with the pipeline in its current configuration without considering any impacts to the Cheyenne River Sioux Tribe and its water intake. On February 3, 2017, the Tribe's review of the entire set of technical documents relied upon by the Corps confirms that no analysis was done by the Corps of any potential impacts on the Tribe or its trust resources.

174. Further, the Tribe filed an independent Preliminary Engineering Report filed with the Corps on January 19, 2017 that concluded the Corps underestimated substantially the risk of an oil spill, the size of an oil spill, and incorrectly calculated the risk of two other alternatives to the current siting. This Report was completely ignored and not included in the Corps' basis for decision to grant the right-of-way on February 7, 2017. ECF 95-2. Because the Corps completely refused to release any documents upon which it was assessing the project prior to November 2016,

the Tribe could not engage in government-to-government consultation prior to the decision on the EA, because it had no information upon which to base its opinions and concerns for its trust resources and cultural sites.

175. The Corps' proposed Federal Register Notice of Termination of the Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe, North Dakota; The Army's Memorandum regarding Compliance with the January 23, 2017 Presidential Memorandum; and the Congressional Notice of Intent to Issue an Easement, all dated February 7, 2017, repudiate its already stated position that an EIS is required for the Corps to discharge its duties under NEPA in regard to the right-of-way. ECF 95-1; 95-2; 95-3. The Corps' only justification for this complete reversal is "I have considered prior reviews and determinations and found that all applicable requirements of NEPA and any other provision of law that requires executive agency consultation or review were satisfied by the EA/FONSI and the entire administrative record." *Compliance with Presidential Memorandum*, ECF 95-2.

176. The Corps did not consider the information provided by the Tribe in response to its request for information pursuant to NEPA. Its reversal and refusal to consider the Tribe's, and any other material's submitted pursuant to the EIS Notice is simply without basis in law or fact; it constitutes an arbitrary and capricious decision.

IX. SPECIFIC FACTS RELATED TO THE FIRST AMENDMENT FREE EXERCISE AND RELIGION FREEDOM RESTORATION ACT CLAIMS

177. Since time immemorial the Lakota people have considered the waters or the Missouri River to be sacred.

178. The waters of the Missouri River are integral to the Tribe's practice of its religion. They are part of numerous ceremonies and sacraments in the Tribe's religion. The sacred nature

of the water is an absolute necessity for the Lakota religion. Any lessening of the sanctity of these waters will make it impossible for the Lakota to effectively practice the Lakota religion.

179. Sincerely held religious beliefs of the Lakota dictate that oil flowing under the Earth at the Missouri River or Lake Oahe will render the waters of the river and lake unsacred leaving them unfit to use in their religious ceremonies.

180. As the geography and source of these sacred waters are unique, once sullied and rendered unsacred, there is no substitute for Lakota religious practices. They will simply be unable to engage in their sacred and ancient religious practices.

181. The current placement of the pipeline is not the least restrictive means of completing the pipeline. The Corps considered numerous different locations for the pipeline and, in fact, the pipeline can be built without crossing the Missouri River or Lake Oahe.

182. The Lakota religion, and in particular, its most sacred ceremony, the inipi ceremony is centered upon the use of sacred water from the Missouri River and Lake Oahe.

183. The inipi ceremony is the most widely practiced amongst Tribal members.

X. SPECIFIC FACTS RELATING TO CORPS' FAILURE TO MEET TRUST RESPONSIBILITY TO TRIBE AND THE CORPS' VIOLATION OF FLOOD CONTROL ACT AND FAILURE TO CONSULT WITH THE TRIBE

184. The Corps has authorized Dakota Access to discharge into Lake Oahe and to construct a crude oil pipeline under this body of water.

185. The Tribe has a clear property right in the waters of Lake Oahe under federal law and applicable treaties, those water rights are reserved water rights of the Tribe under the *Winters* doctrine. The Tribe is also the beneficial owner of property interests in lands and natural resources along Lake Oahe that are potentially impacted by the Corps' federal action to authorize the construction of an oil pipeline under Lake Oahe.

186. The Corps is fully aware of the advisement it received from the Department of Interior on December 4, 2016 that the Tribes on the Missouri River do in fact have treaty rights including reserved water rights, protected by the fiduciary trust responsibility owed by the Corps, that have the potential to be substantially affected by the construction of Dakota Access Pipeline on Lake Oahe. December 4, 2016 Memorandum from the Department of Interior Office of the Solicitor to the Secretary of the Army, "Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline" (December 4, 2016). Yet the Corps, without explanation, and without any consultation with the Tribe, has proceeded to issue notice of its intent to grant an easement to Dakota Access, LLC.

187. The Tribe draws all of its drinking water from a water intake that pumps water directly from the Lake Oahe. The Tribe has no alternative source of water available for the entire Reservation because other tributaries are contaminated, lack sufficient water to supply the water system, and groundwater aquifers are too deep to produce potable water.

188. The Corps has never consulted with the Tribe concerning any discharges into or onto this trust property nor the effects of the construction and operation of this oil pipeline on the trust property, despite the Tribe's repeated requests to the Corps to produce the necessary information to consult, and to engage in consultation including recent written requests filed on January 27, 2017 and February 1, 2017.

189. The Tribe filed specific requests with the Secretary of the Army, the Corps Office if Civil Works, and Omaha District Commander Henderson on January 27, 2017 and February 1, 2017 to engage in government to government consultation with the Corps on the impact of an easement on the Tribe's treaty rights, and trust resources when it first became aware of the President's Executive Memorandum directing the Corps to issue an easement without further

consideration.

190. The Tribe has specifically requested the information necessary to evaluate the potential impacts from the Corps, but the Corps refused to produce the relevant information it relied upon until February 3, 2017 when it produced redacted documents. A review of all of the documents relied upon by the Corps that have produced demonstrates the Corps never considered any potential impacts on the Tribe or its trust resources. The Corps further ignored the Preliminary Engineering Report filed by the Tribe on January 18, 2017 that concludes, even without access to all of the technical information the Corps relied upon, that the pipeline location poses an extreme risk to the water supply and resources of the Tribe, and that less risky reasonable alternatives are readily available.

191. The Corps failed to include any consideration of the effects of the discharges into the trust property and effects of the construction and operation of this oil pipeline on the trust property on the Cheyenne River Sioux Tribe in its EA.

192. The Corps failed to include any analysis in its Decision on how any risk of an oil spill is consistent with the project purposes set forth in the Flood Control Act of 1944, or the requirement in 33 U.S.C. §701-1(b) not to engage in actions that conflict with "present and future beneficial consumptive uses of waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes." 33 U.S.C. §701-1(b).

193. The Corps violated Department of Defense Instruction 4710.02 and its legal duty to engage in pre-decisional consultation with the Tribe. Specifically, the following duties:

a) The Heads of DoD Components are required to "[c]onsult with federally-recognized tribal governments on a government-to-government basis on matters

that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian Lands…" DoD Instruction 4710.02 Section 5.3.4.

b) DoD Components are required to "involve tribal governments early in the planning process for proposed actions… Early involvement means that a tribal government is given an opportunity to comment on a proposed action in time for the tribal government to provide meaningful comments that may affect the decision." DoD Instruction 4710.02 Section 6.6.

c) The administrative record for decision must "show that the Department of Defense has given careful consideration to all the available evidence and points of view before making a final decision." DoD Instruction 4710.02 Enclosure 2, Section E2.9.

d) The obligation, "If there is an urgent need for expeditious consultation, the component must make this fact known to tribal contacts and negotiate an expedited timetable." DoD Instruction 4710.02, Enclosure 2, Section E.5.

e) The obligation to treat culturally specific information obtained from Tribes as "expert testimony." DoD Instruction 4710.02, Enclosure 2, Section E.6.

194. The Corps violated its own Consultation Policy requirement that the Corps "share information that is not otherwise controlled or classified information" as part of the tribal consultation process when it refused to disclose 19 documents forming the basis of decision for the pipeline until February 3, 2017. U.S. Army Corps of Engineers Consultation Policy, Section 5.b.(5) (October 4, 2012).

195. The Corps failed to include any analysis of how the issuance of permits and an easement for construction of an oil pipeline comports with its obligations to manage the Mainstem

Missouri River System in accordance with the Master Manual, and the Corps violated its actual obligations; specifically its obligation to guarantee sufficient water supply for domestic use, and its obligations to protect tribal reserved water rights. *Missouri River Mainstem Reservoir System Master Water Control Manual, Missouri River Basin,* U.S. Army Corps of Engineers, Northwestern Division – Missouri River Basin (March 2006), Section 7-11.2; E-06.

196. The Corps Tribal Consultation Policy and Instruction 4710.02 are binding on the Corps to the same extent as statutes and regulations. Where an agency has established a policy requiring prior consultation with a tribe, and therefore created a justifiable expectation that the tribe will receive a meaningful opportunity to express its views before a policy is made, that opportunity must be given. 197. The Corps withholding of information relevant to what the proposed impact of its action would be on the Tribe was a violation of the requirement to meaningfully consult with the Tribe.

XI. SPECIFIC FACTS RELATED TO THE CORPS FAILURE TO PROMULGATE REGULATIONS UNDER THE MINERAL LEASING ACT

198. Dakota Access requires a right-of-way across lands owned by the Corp in order to engage in HDD boring under Lake Oahe.

199. The Corps indicated on February 7, 2017 that it has granted this right-of-way and will be issuing an easement as soon as 24 hours following its Congressional notification issued at 2:00 p.m. on February 7, 2017.

200. The Mineral Leasing Act imposed a clear duty on the Corps to promulgate regulations associated with grants or renewals of rights-of-way or permits it issues pursuant to the MLA.

201. Corps has failed to promulgate any regulations or final rule.

202. Corps failure to provide notice to the public and opportunity to comment on any

proposed rules.

CLAIMS FOR RELIEF

I. FIRST CLAIM FOR RELIEF

FAILURE TO CONSULT UNDER § 106 OF THE NHPA

203. Plaintiff reincorporates the allegations in all preceding paragraphs.

204. Issuance of an individual or general § 404 permit is an "undertaking" as defined in the NHPA. As such, § 106 consultation is required to determine the effect of such undertaking on historic properties.

205. The Corps failed to consider the impacts of NWP 12 on historic or culturally significant properties, or otherwise engage in the § 106 process, prior to issuance of NWP 12 in 2012.

206. The Corps has never developed a programmatic agreement with the ACHP with respect to the NWP program.

207. Issuance of NWP 12 is a "final agency action" within the meaning of the APA.

208. The Corps' failure to comply with the requirements of the NHPA and its implementing regulations is arbitrary, capricious, and contrary to law in violation of the APA, 5 U.S.C. § 706.

II. SECOND CLAIM FOR RELIEF

UNLAWFUL ABDICATION OF § 106 RESPONSIBILITIES

209. Plaintiff reincorporates the allegations in all preceding paragraphs.

210. Section 106 of the NHPA directs federal agency heads to take into account the effect of any undertaking on historic properties, and provide the ACHP and affected parties a reasonable opportunity to comment on such undertaking.

211. Under ACHP regulations, "it is the statutory obligation *of the Federal agency* to

fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance . . . ." 36 C.F.R. § 800.2(a).

212. In issuing NWP 12, however, the Corps does not fulfill the requirements of § 106 or "take legal and financial responsibility" for compliance. Rather, it provided up-front CWA/RHA authorization to discharge fill into waters of the United States, effectively ending its involvement in most situations. In so doing, it improperly abdicated its § 106 responsibility, and delegated to the proponent its NHPA duty to determine whether there would be any potential impact to historic properties. If the proponent determines for itself that no historic properties are affected, the Corps is not notified of the action and provides no verification of NWP 12 authorization. In such circumstances, the Corps does not consider, and does not give the ACHP or interested parties a reasonable opportunity to comment on, the potential impacts to historic sites. In so doing, the Corps abdicated its § 106 duties and/or improperly delegated them to private parties.

213. ACHP regulations direct that agencies "shall involve" consulting parties in findings and determinations made during the § 106 process. 36 C.F.R. § 800.2(a)(4). Consulting parties must include Indian Tribes "that attach religious and cultural significance to historic properties that may be affected by an undertaking." *Id*. § 800.2(c)(2). The agency "shall ensure" that the § 106 process provides such Tribe " a reasonable opportunity" to "identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." *Id*. § 800.2(c)(2)(ii)(A). Further, it is the "responsibility of the agency official to make a reasonable and good faith effort

to identify Indian Tribes" to be consulted in the § 106 process. *Id*. § 800.2(c)(4).

214. Applicants for federal permits are "entitled to participate" as consulting parties in § 106 consultation, and the responsible official may "authorize an applicant . . . to initiate consultation with" consulting parties, but "remains legally responsible for all findings and determinations charged to the agency official." *Id*. Such authorization requires notice to all state and tribal historic preservation offices, and federal agencies "remain responsible for their government-to-government relationships with Indian Tribes." *Id*. Moreover "the views of the public are essential" to the § 106 process and agencies "shall seek and consider the views of the public" in carrying out its responsibilities. *Id*. § 800.2(d).

215. Additionally, ACHP regulations require Federal agencies to "ensure" that all actions taken by employees or contractors "shall meet professional standards under regulations developed by" the ACHP. However, in issuing NWP 12 and GC 20, the Corps did not "ensure" that any standards at all would be used by private parties delegated to make their own § 106 threshold determinations.

216. In enacting NWP 12 and GC 20, the Corps authorized discharges into waters of the United States in a way that sidesteps virtually all of the requirements of the ACHP § 106 regulations. Under NWP 12 and GC 20, private project proponents can make their own determinations as to the effects on tribally-significant sites without any involvement of the Tribes. Under NWP 12 and GC 20, Tribes are not provided any opportunity, let alone a reasonable one, to identify their concerns or assist in the identification of historic sites. Under NWP 12 and GC 20, the Corps is not responsible for the findings and determinations regarding adverse effects. Under NWP 12 and GC 20, private project proponents can be made in a vacuum, with no input, no notice, no accountability, and no oversight. Moreover NWP 12 and GC 20 do not establish

definitions or standards to be used by private project proponents on how to make determinations of historic impacts, leaving it up to the proponents' unfettered discretion to determine whether a PCN is required or not.

217. NWP 12 and CG 20 are being applied to DAPL to authorize discharges into waters of the United States with no verification or oversight by the Corps, and no accompanying § 106 process. Through NWP 12 and GC 20, the Corps is violating non-delegable duties: there is no consultation process, there are no standards governing determinations made by private parties, and the Corps has no mechanism to "ensure" compliance with its legal responsibilities.

218. The Tribe is harmed by NWP 12 and GC 20 because they have led and will continue to lead to the destruction of culturally significant sites. Following NWP 12 and GC 20, DAPL proponents have conducted gravely deficient cultural surveys, with no involvement by the Tribes. DAPL proponents have not found historic properties that would be affected by pipeline construction in Corps' jurisdictional areas. Accordingly, they have not filed PCNs and sought verification at the vast majority of sites at which they will be discharging into waters of the United States.

219. The ACHP wrote to the Corps on May 6, 2016 to share the concern that Tribes like the Cheyenne River Sioux Tribe have not had the opportunity to share relevant information "in the vicinity of water crossings and within the project [right-of-way] that the applicant assumes will not require PCNs under General Conditions 20 and 31 [standards for PCNs] of the NWP protocols."

220. Issuance of NWP 12 is a "final agency action" within the meaning of the APA.

221. The Corps' delegation of its § 106 responsibilities to private parties in NWP 12 and GC 20 is arbitrary, capricious, and contrary to law in violation of the APA, 5 U.S.C. § 706.

III. THIRD CLAIM FOR RELIEF

FAILURE TO REQUIRE CONSIDERATION OF INDIRECT EFFECTS UNDER § 106

222. Plaintiff reincorporates the allegations in all preceding paragraphs.

223. Under NHPA, federal agencies must consult on the effects of "undertakings" to historic properties. An undertaking is defined by rule to mean "a project, activity, or program funded in whole or in part under the direct *or indirect jurisdiction of a Federal agency*, including those carried out by or on behalf of a federal agency, those carried out with Federal financial assistance, and those requiring a federal permit, license or approval." 36 C.F.R. § 800.16(y) (emphasis added).

224. The entirety of a private pipeline project that requires Corps' authorization for hundreds if not thousands of discharges into waters of the United States is an "undertaking" for purposes of § 106 because it requires federal approval in order to occur and because it is under the "indirect jurisdiction" of the Corps.

225. GC 20 directs permittees to file a PCN with the Corps if the authorized activity will have the potential to cause effects to historic properties. However, the Corps directs permittees to only consider the direct effects of activities in jurisdictional waters, and not indirect impacts such as construction impacts in uplands.

226. ACHP regulations require consideration of indirect effects of agency undertakings, including areas in uplands outside of Corps jurisdiction. With respect to DAPL, in a May 19, 2016 letter, the ACHP confirmed that the entire 1,168-mile crude oil pipeline is the "undertaking" for purposes of § 106 consultation, and accused the Corps of "not differentiating appropriately between federal action and the undertaking . . . ." The ACHP concluded that "the Corps' effects determinations, thus far, fail to consider the potential for effects from the larger undertaking on

historic properties including those of cultural and religious significance to Indian Tribes."

227. Issuance of NWP 12 is a "final agency action" within the meaning of the APA.

228. As applied to DAPL, the authorization to discharge into waters of the United States, without consideration of indirect impacts on historic sites as required by § 106, is arbitrary, capricious, and contrary to law in violation of the APA, 5 U.S.C. § 706.

IV. FOURTH CLAIM FOR RELIEF

VIOLATIONS OF NATIONAL HISTORIC PRESERVATION ACT WITH RESPECT TO JULY 25, 2016 VERIFICATIONS AND § 408 PERMITS

229. Plaintiff reincorporates the allegations in all preceding paragraphs.

A. Incorrect Definition of "Area of Potential Effects"

230. Section 106 of the National Historic Preservation Act ("NHPA") requires that, prior to issuance of a federal permit or license, that federal agencies shall take into consideration the effects of that "undertaking" on historic properties. 54 U.S.C. § 306108. Issuance of § 408 permits and CWA/RHA verifications under NWP 12 are federal undertakings within the meaning of the NHPA.

231. Early in the NHPA process, an agency, in consultation with the THPO, must determine the area of potential effects ("APE") of a federal undertaking. 36 C.F.R. § 800.4(1)(1). The APE is defined by regulation to include the area "within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties . . . . The [APE] is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." *Id*. § 800.16(d).

232. The Corps defined the APE for the Lake Oahe crossing unlawfully narrowly, and inconsistently with both the ACHP regulations and its own guidance.

233. The APE for the crossing includes only a tiny parcel immediately surrounding the

HDD pits on each side of the river and a narrow strip for an access road and "stringing area" on the west side of the crossing. On the east side of the river, the APE is difficult to determine because in some of the Corps' figures, the "project workspace" includes both the access road and stringing area, while in others only the HDD pit is included.

234. The Corps unlawfully omits the actual pipeline route that will be entering and exiting the HDD borehole from the APE. Pipeline construction would involve a 100-150 yard swath of industrial development—clearing, grading, excavation of a 6 to 10 foot trench, and construction work to shape and place the pipeline. Such development would destroy any historic or culturally significant sites in its path. But because these sites are outside the APE, the Corps' conclusion does not consider them.

235. The pipeline path should be in the APE because, even where the Corps lacks direct permitting jurisdiction over segments in between regulatory areas, pipeline construction in such areas is an indirect effect of the HDD process. *Id*. § 800.16(d).

236. The Corps' failure to consider the impacts to historic and sacred sites outside of the immediate and narrow confines of the HDD drilling sites was arbitrary, capricious, and not in accordance with law in violation of the APA and the NHPA.

B. Inadequate § 106 Consultation

237. The Section 106 process requires consultation with Indian Tribes on federal undertakings that potentially affect sites that are sacred or culturally significant to Indian tribes. 36 C.F.R. § 800.2(c)(2). Consultation must occur regarding sites with "religious and cultural significance" even if they occur on ancestral or ceded land. *Id*. § 800.2(c)(2)(II)(D); 54 U.S.C. § 302707.

238. Under the consultation regulations, an agency official must "ensure" that the

process provides Tribes with "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." *Id*. § 800.2(c)(ii)(A). This requirement imposes a "reasonable and good faith effort" by agencies to consult with Tribes in a "manner respectful of tribal sovereignty." *Id*. § 800.2(c)(2)(II)(B).

239. The Corps' final permit decision is the product of a fundamentally flawed consultation process that does not meet the requirements of the ACHP regulations.

240. Consultation never occurred at all on the bore hole testing. The Tribe was notified and the work was done before the Tribe's serious concerns were even received by the Corps.

241. Consultation did not start at the earliest phases of the process. Consultation did not occur on the "area of potential affects." Consultation did not occur on participation in the surveys or protocols for how they should be conducted. 36 C.F.R. § 800(c)(2)(II)(A).

242. Instead, the THPO was given a brief window to "comment" on the proponents' deeply flawed and completed surveys long after the route had been selected, construction scheduled, and without disclosing to the THPO any of the technical or other information upon which it relied.

243. The Corps' April 22, 2016 "no effect" determination contains citations to documents, like "Landt & McCord, 2016," that have never been provided to the Tribe.

244. The Tribe acted promptly and repeatedly to draw the Corps' attention to its serious concerns.

245. Information was not sought from the Tribe in determining the scope of its identification efforts, as required by 36 C.F.R. § 800.4(a), nor was the Tribe given a meaningful

opportunity to assist the Corps in the identification of this culturally rich but largely unassessed site. *Id*. § 800.4(b).

246. The Cheyenne River THPO formally objected to the Corps' finding of no historic properties affected on May 19, 2016. Although the regulations required the Corps to either consult with the objecting party to resolve the disagreement, or request action by the ACHP, neither of those things have ever happened. 36 C.F.R. § 800.4(d)(1)(ii).

247. The ACHP formally objected to the Corps' findings of no historic properties affected on May 19, 2016. Under ACHP regulations, such an objection must be taken into account by the Corps prior to reaching a final decision, and the Corps must prepare a summary of the decision and its rationale, along with evidence of consideration of the ACHP's objection. 36 C.F.R. § 800.4(d)(1)(iv).

248. There are significant unevaluated properties in and near the Lake Oahe crossing work site, as well as the broader pipeline route. Some sites deemed "ineligible" by DAPL's private surveys may in fact be eligible. Some sites deemed unevaluated have in fact been evaluated and are potentially eligible.

249. The Corps' decision on the Lake Oahe crossing was arbitrary, capricious, and not in accordance with law in violation of the APA and the NHPA.

C. <u>No § 106 Consultation for Verifications</u>

250. The Corps' NWP general conditions require completion of the § 106 process for NWP permit verifications and before work can begin. The proponent must present a PCN to the Corps wherever an activity "may have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing" on the National Register. 77 Fed. Reg. 10184, 10284 (Feb, 21, 2012).

251. The Corps has never consulted with the Tribe on issuance of verifications in its ancestral lands, which span the length of the pipeline. The Tribe is unaware of any formal § 106 findings for verifications outside of the two sites in North Dakota.

252. The Corps' decision that § 106 consultation had been completed on the 204 CWA verifications was arbitrary, capricious, and not in accordance with law in violation of the APA and the NHPA.

V. FIFTH CLAIM FOR RELIEF

VIOLATIONS OF NEPA WITH RESPECT TO JULY 25, 2016 VERIFICATIONS AND § 408 PERMITS

253. Plaintiff hereby alleges and incorporates and restates all previous paragraphs of this complaint.

A. Failure to Consider Indirect Effects of Missouri River Crossings

254. NEPA requires consideration of indirect effects of agency decision. The Corps misapplied these legal standards in the final North Dakota EA. It looked narrowly at the impacts of the river crossings themselves, and did not disclose or consider the impacts of other components of the pipeline, either related to its construction or its operation to transport 570,000 barrels a day of crude oil over nearly 1,200 miles.

255. Pipeline construction is an indirect impact of the Corps § 408 permits because it is proximately caused by the Corps' decision. Without the ability to cross the Missouri River, the pipeline could not be built. Pipeline construction is a reasonably foreseeable outcome of the Corps' decision.

256. Alternatively, pipeline construction could be considered an indirect effect of the Corps' § 408 permit because it is a future action that is reasonably certain to occur as long as DAPL receives Corps' authorization at the Missouri River crossings.

257. The Corps failed to disclose to the Tribe, and failed to consider any impacts of the operation of the pipeline on the Tribe.

258. The Corps failure to consider and disclose the impacts of the pipeline's construction and operation is arbitrary and capricious and not in accordance with law in violation of the APA and NEPA.

B. Unlawful Segmentation of Project Components

259. NEPA requires consideration of separate components of a single project in a single NEPA review. 40 C.F.R. § 1508.25. NEPA regulations state that connected actions should be considered in a single EIS, defining them as action that "cannot or will not proceed unless other actions are taken previously or simultaneously," and "are interdependent parts of a larger action and depend on the larger action for their justification." *Id.*

260. The Corps' permitting regulations also require it to reject applications that seek to segment a single project into multiple permits. 33 C.F.R. § 325.1(c)(2) ("All activities which the applicant plans to undertake which are reasonable related to the same project and for which a DA permit would be required should be included in the same permit application.").

261. The Corps has not adhered to these requirements, despite having them pointed out to them by the Tribe, multiple federal agencies, and others. Rather, it unlawfully segmented its NEPA review into separate components in North Dakota and in Illinois, each of which is proceeding independent of the other.

262. Moreover, the FWS issued its own EA and FONSI for a component of this pipeline project. That EA and FONSI did not evaluate the impacts of the FWS decision in the context of the Corps permits or the larger project which it was a part of.

263. The Illinois § 408 permit, the North Dakota § 408 permit, and the FWS grassland

easements, are connected actions because they meet the criteria in 40 C.F.R. § 1508.25. NEPA requires them to be considered in a single NEPA document. They were not.

264. By unlawfully segmenting multiple components of the same pipeline project, the Corps has acted in a manner that is arbitrary, capricious, and not in accordance with law, in violation of NEPA and the APA.

C. Arbitrary Economic Analysis

265. NEPA and its implementing regulations require the Corps to produce environmental review documents that are factually accurate, well supported, and that fully discloses the impacts of an action to the public. 40 C.F.R. § 1502.

266. These standards apply equally to an agency's treatment of economic data. 40 C.F.R. §§ 1502.23 (cost benefit analysis), 1508.8 (EIS must evaluate economic effects). An agency's failure to include and analyze information that is important, significant, or essential renders an EA and FONSI inadequate. 40 C.F.R. § 1500.1. These fundamental NEPA principles apply to both economic and environmental analyses in an EIS. 40 C.F.R. §§ 1502.24, 1508.8 ("effects" in an EIS must evaluate include economic impacts.).

267. In reaching its decision on the North Dakota crossings, the Corps looked very narrowly at only two tiny segments of the pipeline, ignoring the environmental and economic risks and harms of the pipeline as a whole.

268. The Corps also excluded from consideration any effects of the pipeline operation on the Tribe, its water intake, or any of its trust resources without any explanation or reasoning.

269. However, it balanced these narrow risks and harms against the full economic benefit of the pipeline as a whole. For example, the EA cites the full $3.78 billion investment "directly impacting the local, regional, and national labor force by creating nearly 12,000

construction jobs." Final EA, at 80. It repeats DAPL's public talking points about providing "considerable labor income and state income tax revenue—including the generation of more than $13.4 million in ad valorem taxes." *Id.*

270. The Corps' decision to balance the full economic benefits of building and operating the entire pipeline against the economic risks of constructing tiny segments of that pipeline is arbitrary and capricious and not in accordance with law, in violation of NEPA and the APA.

VI. SIXTH CLAIM FOR RELIEF

VIOLATION OF NEPA WITH RESPECT TO THE WITHDRAWAL OF THE RIGHT-OF-WAY EIS NOTICE

271. Plaintiff incorporates by reference all preceding paragraphs.

272. The EIS Notice was withdrawn by the Corps' on February 7, 2017. ECF 95-3.

273. The EIS Notice clearly set forth the Corps' position that a full EIS review of the Lake Oahe right-of-way was required under NEPA.

274. The Tribe submitted preliminary facts and analysis pursuant to the EIS Notice for the Corps' consideration under NEPA.

275. The Corps' offers no justification for the withdrawal, and only cites it's general authorities under sections 1503.1 and 1506.6 of the CEQ's Regulations (40 CFR parts 1500-1508) implementing the procedural requirements of NEPA, as amended; (42 USC 4321 et seq.), and the Army and Corps' NEPA implementation policies (32 CFR part 651 and 33 CFR part 230); and the authority delegated to the Assistant Secretary of the Army (Civil Works) by General Orders No. 2017-1, January 5, 2017." ECF 95-3.

276. After recognizing that the EIS was required to grant the right-of-way and inviting persons to provide information, it is clear that no information was considered or analysis performed.

277. The Corps' decision to withdraw the EIS Notice is without any basis in fact or law and constitutes an arbitrary and capricious decision by the Corps.

VII. SEVENTH CLAIM FOR RELIEF

VIOLATIONS OF THE CLEAN WATER ACT AND RIVERS AND HARBORS ACT WITH RESPECT TO JULY 25, 2016 VERIFICATIONS AND § 408 PERMITS

278. Plaintiff incorporates by reference all preceding paragraphs.

A. Arbitrary and Inadequate Public Interest Review for North Dakota Permits

279. Prior to issuance of a § 408 permit, or any other CWA/RHA permit, the Corps is required to conduct a "public interest" review consistent with its governing regulations, 33 C.F.R. § 320.4(a).

280. In conducting a public interest review, the Corps must consider the probable impacts of the proposed action, and weigh "all those factors which become relevant." *Id*. The Corps must balance the benefits "which reasonably may be expected to accrue" from the action against the "reasonably foreseeable detriments." *Id*. "All factors" which may be relevant to the proposal must be considered, including the extent of the public and private need for the proposal, and the existence of unresolved conflicts around resource use. The District Engineer is authorized to make an "independent review of the need for the project from the perspective of the overall public interest." *Id*. § 320.4(q).

281. The Corps' did not conduct a valid public interest review of the § 408 authorizations in North Dakota. To the extent it conducted any public interest review at all, it suffered from all of the same flaws as the NEPA review identified above. Specifically, the Corps conducted an arbitrary and segmented approach that ignored virtually all of the indirect effects of its decision, specifically, the construction and operation of the pipeline itself; and it conducted an arbitrary and

one-sided economic balance in which the benefits of the entire $4 billion pipeline were weighed against the impacts of tiny segments of the pipeline.

282. By failing to undertake a lawful and adequate public interest review of the actions proposed in its § 408 decision, the Corps has acted in a manner that is arbitrary, capricious, and not in accordance with law, in violation of the CWA and the APA.

B. Unlawful Verification For Lake Oahe Crossing

283. In addition to a § 408 permit, the portion of the pipeline that crosses under Lake Oahe requires a Rivers and Harbors Act § 10 permit. 33 C.F.R. § 322.3(a).

284. On July 25, 2016, the Corps issued verification that the Lake Oahe pipeline crossing complied with the conditions of NWP 12, and hence was authorized under § 10 of the Rivers and Harbors Act.

285. In order to "qualify" for NWP authorization, proposals must meet a number of general conditions. 77 Fed. Reg. 10184, 10282 (Feb. 21, 2012).

286. The Lake Oahe crossing does not comply with these conditions and, accordingly, does not "qualify" for NWP 12. *See also* 33 C.F.R. § 330.6(a)(2) ("If the [Army Corps] decides that an activity does not comply with the terms or conditions of an NWP, he will notify the person desiring to do the work and instruct him on the procedures to seek authorization under a regional general permit or individual permit.").

287. General Condition 7 states that no activity may be authorized under a NWP that is in "proximity" to public water supplies. 77 Fed. Reg. at 10283. The Lake Oahe crossing is in close proximity to the Tribe's source of drinking water for a significant portion of the reservation community.

288. The potential impact on drinking water for the Cheyenne River and many other

tribes and communities has also been emphasized by the Environmental Protection Agency and the U.S. Department of Interior, as well as the Tribal government and many of its members.

289. Further, General Condition 17 states that no activity authorized by a NWP may "impair tribal rights" including "reserved water rights." 77 Fed. Reg. at 10283. DAPL is routed just upstream of the Tribe's reservation boundary, where any oil spill would have devastating effects within the reservation. The Reservation necessarily includes the protection of adequate water quality. The Lake Oahe crossing does not "qualify" for a NWP 12 because of the risks to Tribal resources protected by treaty.

290. The Corps' decision to verify that the Lake Oahe crossing was consistent with NWP 12 was arbitrary, capricious and not in accordance with law, in violation of the APA.

C. Issuance of Verifications for 204 Jurisdictional Waters

291. Under the Corps' regulations, a single project can only proceed under both an NWP and an individual permit where the "portions qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project." 33 C.F.R. § 330.6(d).

292. For the reasons discussed immediately above, the Lake Oahe crossing requires an individual permit. Moreover, § 408 authorizations are individual "permits" within the meaning of this regulation. *See id.*, § 320.2(e); § 320.4 (general policies applicable to "all" Army permits).

293. No component of DAPL has "independent utility" or the "ability to function" without the other components of the pipeline. As a result of this, the Corps cannot authorize some portions of DAPL under NWP 12, and other portions as individual permits.

294. Because the Lake Oahe crossing requires an individual permit, no other component of the pipeline can be authorized under NWP 12.

295. Issuance of a verification by the Corps constitutes a final agency action within the meaning of the APA.

296. The Corps' verification of 204 additional crossings of jurisdictional waters was arbitrary and capricious and not in accordance with law, in violation of the APA and the CWA.

VIII. EIGHTH CLAIM FOR RELIEF

BREACH OF TRUST RESPONSIBILITY

297. Plaintiff-Intervenor reincorporates the allegations in all preceding paragraphs.

298. The Tribe has a vested property right in the waters of Lake Oahe, which is held in trust for the Tribe by the United States. Indian reserved water rights are "vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians." *55 Fed. Reg. 9223* (Mar. 12, 1990). Under the federal trust responsibility, the United States has a duty to conserve Indian lands, waters, and natural resources, and appropriately manage tribal natural resources. It is also "the policy of the United States[] that all Indian communities . . . be provided with safe and adequate water supply. . . ." 25 U.S.C. § 1632. Among the United States' core obligations is its duty to prevent upstream users from impairing a tribe's reserved right. *See Winters*, 207 U.S. at 577-78. This obligation includes the obligation to prevent upstream users from engaging in practices that reduce the quality of water that feeds the reservation. *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015) (*citing United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1454-55 (D. Ariz. 1996)).

299. The Tribe has vested property rights in the trust lands located on the Cheyenne River Sioux Reservation that are potentially substantially affected by the Corps decisions to authorize the construction of the Dakota Access Pipeline.

300. The Tribe has protected treaty rights to hunt and fish on Lake Oahe and in the Missouri River within the Cheyenne River Sioux Reservation, and mineral rights in the riverbed and adjacent lands that potentially substantially affected by the Corps decisions to authorize the construction of the Dakota Access Pipeline.

301. The 1851 and 1868 Fort Laramie Treaties reserved a territory that included the present day Cheyenne River Sioux Reservation and the entire Missouri River to the Great Sioux Nation.

302. The Act of March 2, 1889 reserved to the Tribe its right in the waters of Lake Oahe, and its continued rights to the exclusive use and occupation of the Reservation including the Missouri River to the mid-channel. Those rights were not abrogated by the Oahe Taking Act, but rather, were affirmed including treaty rights to hunt and fish, to graze livestock, rights in the mineral estate underlying the River, and in the River's waters which remained within the exterior boundaries of the Cheyenne River Sioux Reservation.

303. The United States and the Army Corps of Engineers have a specific fiduciary trust responsibility to manage and protect the trust property on behalf of the Tribe based generally in the Treaties and statutes governing the Tribe and its reservation, the general federal trust doctrine, the Flood Control Act of 1944including 33 U.S.C. §701-1(b), the *Missouri River Mainstem Reservoir System Master Water Control Manual, Missouri River Basin*, U.S. Army Corps of Engineers, Northwestern Division – Missouri River Basin (March 2006), Sections 6-04.1.7, 7-11.2, E-06, and E-06.3, Department of Defense Instruction 4710.02, and the pervasive control over the Missouri River exercised by the Corps under the Flood Control Act of 1944. *See*,16 U.S.C. §§ 460d, 825s (1946 ed.); 33 U.S.C. §§ 708, 709 (1946 ed.); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 505 (1988).

304. The United States' and the Corps' trust responsibility to protect and manage the trust property includes an obligation to engage in pre-decisional government-to-government consultation with tribes on actions that could impair tribal trust resources or tribal rights. Department of Defense Instruction 4710.02, Sections 5.3.4, 6.6, and Enclosure 2, Section E.2.9 and E.2.5 (Sept. 14, 2006); U.S. Army Corps of Engineers Consultation Policy, Section 5.b.(5) (October 4, 2012).

305. The Corps' duty to the Tribe to protect the trust property from upstream contamination by third-parties is a moral obligation of the highest responsibility and trust that should be judged by the most exacting fiduciary standards. *United States v. Jicarilla Apache Nation*, 465 U.S. 162, 207 (2011).

306. The authorizations and verifications the Corps issued to Dakota Access on July 25, 2016 pursuant to § 408 of the CWA and § 10 of the RHA, authorizing construction of the oil pipeline under Lake Oahe was a final agency action for purposes of the APA.

307. The Corps' issuance authorizations and verifications to Dakota Access on July 25, 2016 pursuant to § 408 of the CWA and § 10 of the RHA, without any consultation with the Cheyenne River Sioux Tribe regarding the impact on the trust property and without a full EIS to address concerns about the safety of the Tribe's water was arbitrary and capricious as it breached the Corps' trust responsibility to the Tribe.

308. The Corps' February 7, 2017 decision to issue a right of way under the MLA without consulting with the Tribe on the potential impacts of the issuance on the Tribes' trust and treaty resources and rights was arbitrary and capricious under the APA, and a violation of the Corps' Tribal Consultation Policy, Department of Defense Instruction 4710.02, *Missouri River Mainstem Reservoir System Master Water Control Manual, Missouri River Basin* obligations,

obligations under the Flood Control Act of 1944, 33 U.S.C. §701-1(b) and its trust responsibility.

309. The Corps' February 7, 2017 decision to terminate the EIS Notice without consulting with the Tribe, and without considering the Tribe's preliminary comments including its technical reports on the potential impact of the construction of the pipeline on the Tribe's trust and treaty resources and rights was arbitrary and capricious under the APA, and a violation of the Corps' Tribal Consultation Policy, Department of Defense Instruction 4710.02, *Missouri River Mainstem Reservoir System Master Water Control Manual, Missouri River Basin* obligations, obligations under the Flood Control Act of 1944, 33 U.S.C. §701-1(b) and its trust responsibility.

310. The Corps' refusal to release information to the Tribe necessary for the Tribe to engage in pre-decisional meaningful consultation until February 3, 2017, and its failure to disclose to the Tribe the February 3, 2017 U.S. Army Corps of Engineers Memorandum for ASA(CW), Subject: Dakota Access Pipeline; USAGE Technical and Legal Review for the Department of the Army, February 3, 2017 ("Corps Memorandum") prior to making its decision on the issuance of the Easement on February 7, 2017, and the Corps' failure to consider the Preliminary Comments of the Tribe on the EIS Notice including its independent technical engineering review and other Expert reviews was arbitrary and capricious and not in accordance with law, and violated the Corps' Tribal Consultation Policy, Department of Defense Instruction 4710.02, *Missouri River Mainstem Reservoir System Master Water Control Manual, Missouri River Basin* obligations, obligations under the Flood Control Act of 1944, 33 U.S.C. §701-1(b) and its trust responsibility.

IX. NINTH CLAIM FOR RELIEF

VIOLATION OF FLOOD CONTROL ACT

311. Plaintiff-Intervenor reincorporates the allegations in all preceding paragraphs.

312. The authorizations and verifications the Corps issued to Dakota Access on July 25,

2016 pursuant to § 408 of the CWA and § 10 of the RHA, authorizing construction of the oil pipeline under Lake Oahe was a final agency action for purposes of the APA.

313. The Corps' issuance authorizations and verifications to Dakota Access on July 25, 2016 pursuant to § 408 of the CWA and § 10 of the RHA was arbitrary and capricious and violates § 1(b) of the Flood Control Act of 1944, P.L. 83-777 by prioritizing discharges into Lake Oahe and construction and operation of the oil pipeline over the present and future beneficial consumptive uses enumerated in the Act. 33 U.S.C. §701-1(b). The Corps' issuance authorizations and verifications to Dakota Access on July 25, 2016 pursuant to § 408 of the CWA and § 10 of the RHA are incompatible with the authorized purposes the Corps' is permitted to operate the Missouri River Mainstem System for and is a violation of 33 U.S. C. §701-1(b), and its obligations under *Missouri River Mainstem Reservoir System Master Water Control Manual, Missouri River Basin* to protect and prioritize tribal reserved water rights, and to guarantee its federal actions do not jeopardize sufficient quantity and quality of water to meet project purposes.

314. The Corps' February 7, 2017 decision to issue of a right of way to Dakota Access LLC was arbitrary and capricious and violates § 1(b) of the Flood Control Act of 1944, P.L. 83-777, by prioritizing discharges into Lake Oahe and construction and operation of the oil pipeline over the present and future beneficial consumptive uses enumerated in the Act. 33 U.S.C. §701-1(b). The Corps' decision to issue a right of way to Dakota Access, LLC is incompatible with the authorized purposes the Corps' is permitted to operate the Missouri River Mainstem System for and is a violation of 33 U.S. C. §701-1(b), and its obligations under *Missouri River Mainstem Reservoir System Master Water Control Manual, Missouri River Basin* to protect and prioritize tribal reserved water rights, and to guarantee its federal actions do not jeopardize sufficient quantity and quality of water to meet project purposes.

X. TENTH CLAIM FOR RELIEF

MINERAL LEASING ACT VIOLATIONS

A. Failure To Promulgate Regulations Under MLA

315. Plaintiff-Intervenor reincorporates the allegations in all preceding paragraphs.

316. The Mineral and Leasing Act imposes a mandatory duty that rights-of-way or permits granted or renewed pursuant to 30 U.S.C. § 185 shall be subject to promulgated regulations.

317. The relevant section is set forth in 30 U.S.C. §185(f).

318. The Corps has not promulgated any regulations or final rule regarding the grant of rights-of-way or permits granted or renewed pursuant to the Mineral Leasing Act.

319. The APA requires promulgated rulemaking by agencies after the public receives notice and an opportunity to comment.

320. The Corps' failure to promulgate was arbitrary and capricious.

B. Issuing Easement In Absence Of Promulgated Regulations

321. Plaintiff-Intervenor reincorporates the allegations in all preceding paragraphs.

322. The Mineral and Leasing Act imposes a mandatory duty that rights-of-way or permits granted or renewed pursuant to 30 U.S.C. § 185 shall be subject to promulgated regulations.

323. The relevant section is set forth in 30 U.S.C. §185(f).

324. The Corps has not promulgated any regulations or final rule regarding the grant of rights-of-way or permits granted or renewed pursuant to the Mineral Leasing Act.

325. The APA requires promulgated rulemaking by agencies after the public receives notice and an opportunity to comment.

326. An easement was approved by the Corps on February 7, 2017, despite the absence of any regulations being promulgated pursuant to the MLA.

327. An easement is considered final agency action pursuant to the APA.

328. The Corps' approval of easement prior to promulgating regulations under the MLA was arbitrary and capricious.

C. Issuing Easement Prior To Meaningful Consultation

329. Plaintiff-Intervenor reincorporates the allegations in all preceding paragraphs.

330. The Mineral and Leasing Act imposes a mandatory duty that rights-of-way or permits granted or renewed pursuant to 30 U.S.C. § 185 shall be subject to promulgated regulations.

331. The relevant section is set forth in 30 U.S.C. §185(f).

332. The approval of an easement is a federal undertaking requiring pre-decisional, meaningful government-to-government consultation.

333. The APA requires promulgated rulemaking by agencies after the public receives notice and an opportunity to comment.

334. An easement was approved by the Corps pursuant to the MLA on February 7, 2017, despite the absence of any regulations being promulgated pursuant to the MLA.

335. An easement is considered final agency action pursuant to the APA.

336. There was no pre-decisional, meaningful government-to-government consultation between the Cheyenne River Sioux Tribe and the Corps on the issuance of the easement prior to its approval on February 7, 2017.

337. The Corps' failure to consult with the Cheyenne River Sioux Tribe prior to the approval of the easement was arbitrary and capricious.

D. Issuing Easement Prior To Completion Of EIS

338. Plaintiff-Intervenor reincorporates the allegations in all preceding paragraphs.

339. The Mineral and Leasing Act imposes a mandatory duty that rights-of-way or permits granted or renewed pursuant to 30 U.S.C. § 185 shall be subject to promulgated regulations.

340. The relevant section is set forth in 30 U.S.C. §185(f).

341. On January 18, 2017, the US Army Corps of Engineers published a Notice of Intent to undertake an EIS on the Dakota Access Pipeline Project so that it could engage in a full review of the right-of-way under NEPA.

342. The CRST had begun engaging in the EIS process as described in the January 28, 2017, Federal Register Notice.

343. An EIS was needed because as described, supra, the EA was critically insufficient as to the impacts of the proposed pipeline on the CRST.

344. On February 7, 2017, the Notice of Intent for the EIS was withdrawn by the Corps.

345. An easement was approved by the Corps pursuant to the MLA on February 7, 2017, despite the fact that the Corps had already declared that an EIS was needed to engage in a full review of the MLA-sanctioned easement.

346. An easement is considered final agency action pursuant to the APA.

347. The Corps' issuance of an easement prior to the completion of the EIS process was arbitrary and capricious.

XI. ELEVENTH CLAIM FOR RELIEF

VIOLATION OF THE RELIGIOUS FREEDOM RESTORATION ACT

348. Plaintiff-Intervenor reincorporates the allegations in all preceding paragraphs.

349. Under RFRA any government action that creates a substantial burden on the free exercise of religion must serve a compelling government interest and the action must be the least restrictive means for meeting the compelling government interest. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).

350. To fall under RFRA's protection, a religious belief must be sincerely held by the adherent; courts are not to second guess the reasonableness of an adherent's beliefs so long as they are sincere.

351. The least restrictive means standard is exceptionally demanding and it requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.

352. Lakota religious adherents sincerely believe that the waters of the Missouri River and Lake Oahe are sacred and that disturbing the earth under those waters will disrupt their sacred nature and render them unsuited for use in their religions practice. This would substantially burden their ability to practice their religion.

353. The Defendant does not have a compelling government interest in granting the right-of-way to Dakota Access to complete the pipeline.

354. Should the Defendant prove that it has a compelling government interest in granting Dakota Access a right of way to complete the pipeline, granting the right-of-way at the current proposed location is not the least restrictive means of achieving this interest.

XII. TWELFTH CLAIM FOR RELIEF CLAIM FOR RELIEF

VIOLATION OF THE FIRST AMENDMENT FREE EXERCISE CLAUSE

355. Plaintiff-Intervenor reincorporates the allegations in all preceding paragraphs.

356. The First Amendment to the United States Constitution prevents the government

from interfering with persons' free exercise of religion.

357. Lakota religious adherents sincerely believe that the waters of the Missouri River and Lake Oahe are sacred and that disturbing the earth under those waters will disrupt their sacred nature and render them unsuited for use in their religions practice. This would substantially burden their ability to practice their religion.

358. The granting of the easement is not a government act of general applicability. The Tribe's land is on the Missouri River. It is this river that is sacred to the Tribe. There is no replacing these waters once sullied. The granting of the easement is a specific act substantially burdening the free exercise of the Lakota religion.

XIII. THIRTEENTH CLAIM FOR RELIEF

FAILURE TO ENGAGE IN PRE-DECISIONAL TRIBAL GOVERNMENT CONSULTATION WITH THE CHEYENNE RIVER SIOUX TRIBE

359. Plaintiff-Intervenor reincorporates the allegations in all preceding paragraphs.

360. The Cheyenne River Sioux Tribe's repeated requests for access to information necessary to engage in meaningful pre-decisional consultation with the Corps were ignored and denied throughout the Corps decision making processes on all of the permits, authorizations and the granting of the right of way on February 7, 2017. The Corps did not release to the Tribe essential information including the HDD Spill Model Analysis, the Environmental Justice Considerations Memorandum, and an additional 17 relevant technical documents until February 3, 2017 and has still not released its February 3, 2017 Memorandum to the Tribe.

361. The Tribe's repeated requests for the Corps to engage in meaningful pre-decisional consultation throughout the Corps decision making, including its most recent requests to the Corps and the Secretary of the Army on January 27, 2017 and February 1, 2017 were ignored.

362. The Corps of Engineers has obligations to engage the Tribe in meaningful pre—decisional consultation under Section 106 of the NHPA and 36 C.F.R. § 800.2(c)(2); 54 U.S.C. § 302707; NEPA and 40 C.F.R. §1501.2(d)(2) (obligation to consult with Indian Tribes early in the NEPA process); Department of Defense Instruction 4710.02; "Department of Defense Memorandum for Principal Official of Headquarters, Department of the Army, "American Indian and Alaska Native Policy (October 24, 2012), §4; "Department of Defense American Indian and Alaska Native Policy," (Oct. 20, 1998), §III; Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (Nov. 6, 2000); and *Presidential Memorandum on Tribal Consultation* (Nov. 6, 2009). *See also,* Army Corps of Engineers, *Memorandum for Record, Gateway Pacific Terminal Project & Lummi Nation's Usual & Accustomed Treaty Fishing Rights at Cherry Point, Whatcom Cnty*., (May 9, 2016), http://www.nws.usace.army.mil/Portals/27/docs /regulatory/ NewsUpdates/160509MFRUADeMinimisDetermination.pdf (last accessed Jan. 16, 2017)(denying authorization to activities under its jurisdiction that have more than a *de minimis* impact on tribal treaty rights).

363. The Corps Tribal Consultation Policy and Instruction 4710.02 are binding on the Corps to the same extent as statutes and regulations. *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 774, 784 (2006)(where an agency, "has established a policy requiring prior consultation with a tribe, and therefore created a justifiable expectation that the tribe will receive a meaningful opportunity to express its views before a policy is made, that opportunity must be given.").

364. The Corps withholding of information relevant to what the proposed impact of its action would be on the Tribe was a violation of the requirement to meaningfully consult with the Tribe. *Id.* at 785. This requirement was recently affirmed, in *Cheyenne River Sioux Tribe v. Jewell*, when the District of South Dakota Court found that the agency failed to engage in

government-to-government consultation by failing to provide the Tribe with information necessary for the Tribe to assess the impact of the federal action. *2016 WL 4625672*; 3:15-CV-03018-KES (D.S.D. Sept. 6, 2016).

365. NEPA requires an agency to supplement the Record of Action under 42 USC §4321 and 40 CFR §1502.9(c)(1)(ii) if "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Klamath-Siskiyou Wildlands Center v. U.S. Forest Service,* 2007 WL 2068667 (D. OR. 2007). The Corps failed to consider the significant new information relevant to environmental concerns presented by the Tribe in its January 18, 2017 Preliminary Comments, and the Department of Interior Solicitor's Memorandum issued on December 4, 2016 concerning tribal treaty rights, and property interests and the potential environmental impact of the construction of the pipeline on those rights and interests, prior to terminating the EIS process it initiated on December 4, 2016 and it's EIS Notice issued on January 18, 2017.

366. Judicial review is ripe "at the time the procedural failure takes place." *Cottonwood Environmental Law Center v. U.S. Forest Service,* 789 F.3d 1075, 1084 (9th Cir. 2015), *cert. denied* 137 S. Ct. 293 (Oct. 11 2016). "When a party…suffers a procedural injury, it 'may complain of that failure at the time the failure takes place, for the claim can never get riper.'" *Id.,* citing *Ohio Forestry Ass'n. v. Sierra Club/,* 523 U.S. 726, 737 (1998). The Tribe has suffered a procedural injury in the loss of the right to consult and to have the potential impacts to its reserved water rights, reserved hunting and fishing rights in Lake Oahe, its and its' members religious rights under RFRA in Lake Oahe, its water supply for drinking water and all other water uses, and its tribal cultural and historic properties fully considered prior to the Corps' decision to terminate the EIS Process and its decision to issue an easement to Dakota Access, LLC. Further the Tribe's right to

be consulted on the process for drafting regulations under the MLA prior to the issuance of an easement under the MLA was violated, as well as its rights under NEPA to be consulted early in the process on the undertaking of an EIS prior to issuance of an easement under the MLA.

PRAYER FOR RELIEF

WHEREFORE, Intervenor-Plaintiff respectfully requests that this Court grant the following relief:

1. Declare that NWP 12 is invalid as applied to DAPL because the Corps failed to comply with § 106 at the time of its issuance, in violation of the NHPA.

2. Declare that NWP 12 is invalid as applied to DAPL because the Corps unlawfully delegated its responsibility to comply with § 106 to private parties, effectively allowing discharge into waters of the United States without any consideration of impacts to historic properties, in violation of the NHPA.

3. Declare that NWP 12 is invalid as applied to DAPL because the Corps authorized discharge into waters of the United States without consideration of indirect impacts on historic sites, in violation of the NHPA.

4. Declare that the July 25, 2016 authorizations and verifications are arbitrary, capricious, in violation of the NHPA, NEPA, CWA and RHA, and implementing regulations, and in violation of the Corps' trust responsibility to the Tribe.

5. Declare that rescinding the Notice of EIS on February 7, 2017, was arbitrary and capricious in violation of NEPA, NHPA and implementing regulations, and in violation of the Corps' obligation to meaningfully and pre-decisionally consult with the Tribe.

6. Declare that issuing permits under NWP 12 and Section 408 of RHA and approving an easement under MLA without consultation or without undertaking EIS was arbitrary and capricious because it breached the Corps' trust responsibility to protect tribal trust assets.

7. Declare that the installation of a crude oil pipeline under Lake Oahe violates the Flood Control Act of 1944 because it conflicts with the present and future beneficial consumptive uses of the waters in Lake Oahe for domestic, municipal, stock water, irrigation, mining or industrial purposes.

8. Declare that the failure to promulgate regulations as required by the Mineral Leasing Act, 30 USC §185 et seq. was arbitrary and capricious.

9. Declare that the issuance of an easement pursuant the Mineral Leasing Act without having first promulgated regulations related thereto, without engaging in meaningful, pre-decisional government-to-government consultation with CRST, and without first completing an EIS was arbitrary and capricious.

10. Declare that the Corps does not have a compelling interest in granting the DAPL easement, or in the alternative, that doing so at the present location is not the least restrictive means as required by the Religious Freedom Restoration Act.

11. Declare that pursuant to the NHPA Sections 106 and 110, NEPA and its implementing regulations, DoD Instruction 4710.02, and DoD American Indian / Alaskan Native Policy, the issuance of NWP 12 verifications, §408 permits, and easements was arbitrary and capricious because such actions were done without meaningful, pre-decisional, government-to-government consultation with the CRST.

12. Vacate NWP 12 as applied to DAPL.

13. Compel the Corps to direct DAPL to seek either an individual permit covering all discharges along the entire pipeline route, or submit PCNs for all impacts to waters of the United States, and fully comply with § 106 prior to finalizing such permit or verifications.

14. Vacate the final EA and FONSI.

15. Vacate the easement issued on February 8, 2017 granting the right-of-way under Lake Oahe and rescinding the EIS Notice as being arbitrary and capricious, and further ordering the Corps to complete the EIS process as set forth in the EIS Notice pursuant to NEPA.

16. Enjoin the Corps and direct it to withdraw its permits as improvidently granted, to require an EIS, and to assess the protection of the Cheyenne River Sioux Tribe's treaty and trust protected property that is the Tribe's water rights in Lake Oahe, a Reservoir of the Missouri River.

17. Enjoin the Corps and direct it to vacate any rights-of-way on lands with the Corps' jurisdiction granted in violation of the MLA.

18. Enjoin the Corps from granting the right-of-way under Lake Oahe as a violation of the Tribe and Tribal members' rights to free exercise of religion under both the First Amendment to the U.S. Constitution and the Religious Freedom Restoration Act.

19. Compel the Corps to re-institute the EIS process for the Dakota Access Pipeline Project and engage in meaningful, pre-decisional government-to-government consultation with the Cheyenne River Sioux Tribe.

20. Retain jurisdiction over this matter to ensure that the Corps complies with the law.

21. Award Intervenor Plaintiff its reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation; and

22. Grant Intervenor-Plaintiff such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 9th day of February, 2017.

CHEYENNE RIVER SIOUX TRIBE,
Intervenor-Plaintiff,

By: /s/ Nicole E. Ducheneaux

Nicole E. Ducheneaux
Joseph V. Messineo, *Pro Hac Vice*
Fredericks Peebles & Morgan LLP
3610 North 163rd Plaza
Omaha, NE 68116
Telephone: (402) 333-4053
Facsimile: (402) 333-4761
Email: nducheneaux@ndnlaw.com

Conly J. Schulte
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, CO 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9839
Email: cschulte@ndnlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September, 2016, a copy of the foregoing was filed electronically with the Clerk of the Court. The electronic filing prompted automatic service of the filing to all counsel of record in this case who have obtained CM/ECF passwords.

/s/ Nicole E. Ducheneaux