

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Plaintiff-Intervenor,

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

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant-Cross Defendant,

and

DAKOTA ACCESS, LLP

Defendant-Intervenor-Cross-Claimant.

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**MEMORANDUM OF AMICI CURIAE NATIONAL CONGRESS OF AMERICAN  
INDIANS, AFFILIATED TRIBES OF NORTHWEST INDIANS, ALASKA INTER-  
TRIBAL COUNCIL, GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION, INTER-  
TRIBAL ASSOCIATION OF ARIZONA, NATIONAL ASSOCIATION OF TRIBAL  
HISTORIC PRESERVATION OFFICERS, NATIONAL INDIAN EDUCATION  
ASSOCIATION, NATIONAL INDIAN GAMING ASSOCIATION, UNITED SOUTH  
AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND, INC., AMERICAN  
CIVIL LIBERTIES UNION, FRED T. KOREMATSU CENTER FOR LAW AND  
EQUALITY, AND 34 FEDERALLY RECOGNIZED INDIAN TRIBES IN SUPPORT OF  
PLAINTIFF STANDING ROCK SIOUX TRIBE'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

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Affiliated Tribes of Northwest Indians  
Alaska Inter-Tribal Council  
Great Plains Tribal Chairman's Association  
Inter Tribal Association of Arizona  
National Association of Tribal Historic Preservation Officers  
National Congress of American Indians  
National Indian Education Association  
National Indian Gaming Association  
Tribal Alliance of Sovereign Indian Nations  
United South and Eastern Tribes Sovereignty Protection Fund, Inc.  
United Tribes of Michigan

### **Federally Recognized Tribes**

Big Sandy Rancheria of Western Mono Indians of California  
Confederated Salish and Kootenai Tribes  
Confederated Tribes and Bands of the Yakama Nation  
Confederated Tribes of the Colville Reservation  
Confederated Tribes of the Umatilla Indian Reservation  
Crow Creek Sioux Tribe  
Dry Creek Rancheria Band of Pomo Indians  
Eastern Shawnee Tribe of Oklahoma  
Ewiiapaayp Band of Kumeyaay Indians  
Havasupai Tribe  
Jamestown S'Klallam Tribe  
Kaibab Tribe  
Lac Courte Oreilles Band of Lake Superior Chippewa Indians  
Lac du Flambeau Band of Lake Superior Chippewa Indians  
Mashantucket Pequot Tribal Nation  
Mille Lacs Band of Ojibwe  
Navajo Nation  
Northern Cheyenne Tribe  
Oneida Nation of New York  
Pala Band of Mission Indians  
Pechanga Band of Luiseño Mission Indians  
Penobscot Nation  
Ramapough Lunaape Nation (state-recognized)  
Saint Regis Mohawk Tribe  
San Carlos Apache Tribe  
San Manuel Band of Mission Indians  
Santee Sioux Nation of Nebraska  
Sault Ste. Marie Tribe of Chippewa Indians  
Sisseton-Wahpeton Sioux Tribe  
Swinomish Indian Tribal Community

Torres Martinez Desert Cahuilla Indians  
Wampanoag Tribe of Gay Head (Aquinnah)  
Winnebago Tribe of Nebraska  
Wyandotte Nation in Oklahoma

**Civil Rights Organizations**

American Civil Liberties Union  
Fred T. Korematsu Center for Law and Equality

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## **CORPORATE DISCLOSURE CERTIFICATION**

Pursuant to Local Civil Rule 7.1 and Federal Rule of Civil Procedure 7.1, I, Riyaz A. Kanji, the undersigned counsel of record for Proposed *Amici Curiae*, certify that to the best of my knowledge and belief, Proposed *Amici Curiae* do not have parent companies, subsidiaries or affiliates with any outstanding securities in the hands of the public.

/s/ Riyaz A. Kanji

## STATEMENT OF INTEREST AND INTRODUCTION

*Amici curiae* are leading national and regional Indian organizations whose membership comprises several hundred federally recognized Indian tribes located throughout Indian country, an additional thirty-four federally recognized Tribes appearing in their own name, and two non-Indian organizations who share with the rest of *Amici* a deep-seated concern that the federal government honor its trust commitments to Tribes and Tribal members and avoid the arbitrary exercise of power.<sup>1</sup> Short statements of interest for each amicus are found in the Appendix to this Memorandum.

The *Amici* Tribes have suffered the vast loss of lands and other fundamental resources and rights reserved to them under law, often by solemn treaty obligation, when the federal government determined it was advantageous to disavow its prior commitments to them. Some of the most grievous losses are not remnants of a distant past, but as in the case of the Standing Rock Sioux Tribe and other Sioux nations, took place within living memory. The loss of tribal lands, communities, and indeed entire ways of life due to the infrastructure projects, development, and rampant pollution of the twentieth century is an all-too-familiar tale for Indian peoples, and examples of such dispossession span the breadth of the country. A number are captured in the Appendix.

The federal trust responsibility—which charges federal officials with adhering to the strictest fiduciary standards of care and loyalty when, among other things, they address the government’s treaty obligations—serves as an important bulwark against assertions of federal power that would once again deprive Tribes of what is dearest to them. *Amici* submit this brief to elaborate upon the arguments advanced by the Standing Rock Sioux Tribe as to why the

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<sup>1</sup>No counsel for any party authored this memorandum in whole or in part. No one other than *amici curiae* made a monetary contribution to fund the preparation or submission of this brief.

federal trust responsibility precludes the actions sought to be taken by the federal defendants here, and ask this Court to vindicate that responsibility in the context of this critical case.

## ARGUMENT

### **I. The Army Corps Violated Core Trust Duties In Issuing the Lake Oahe Easement.**

#### **A. Fundamental Trust Duties Attach Where the Government Has Made Treaty Commitments to a Tribe.**

“The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government–Indian relationship.” *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001). Writing for a unanimous Court, Judge Sentelle made it clear in *Cobell* that actionable trust duties on the part of the government arise in a number of ways, with the result that the “[f]ederal courts have repeatedly recognized the rights of Native Americans to seek relief for breaches of fiduciary obligations . . . .” *Id.* at 1104. Enforceable trust duties can arise in two ways that bear emphasis here.

First, “[w]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.” *Id.* at 1088 (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983)). This was the situation presented in *Cobell*, where the Court found the government subject to extensive fiduciary obligations by virtue of the control it had assumed over Indian property and trust accounts.

The federal government has likewise assumed such interests here. All agree that the 1868 Treaty of Fort Laramie, 15 Stat. 635, explicitly reserved land for the tribes. When a reservation of land is made, water rights are included. *Winters v. United States*, 207 U.S. 564,

576-77 (1908). The official federal position in these circumstances is that “Indian 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, 9223 (Mar. 12, 1990). The waters impounded in Lake Oahe include sufficient water to serve tribal needs. *See Arizona v. California*, 373 U.S. 546, 600 (1963). The legal existence of tribal water rights and the Corps’ physical impoundment of those waters constitute sufficient “control or supervision” to trigger the federal trust responsibility. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474-76 (2003).

Second, and of critical importance, trust duties attach to the government’s fulfillment of its treaty obligations. In detailing the development of the trust doctrine, the *Cobell* Court observed that “[t]he fiduciary nature of the government’s duty was [first] made explicit in *Seminole Nation v. United States*, 316 U.S. 286 (1942),” 240 F.3d at 1100 (parallel citations omitted), a case in which the plaintiff Tribe challenged whether the government had properly adhered to its treaty duties. As *Cobell* explained, “[i]n *Seminole Nation* the Court applied the ‘most exacting fiduciary standards’ of the common law in assessing the government’s discharge of [those] duties.” *Id.* (quoting *Seminole*, 316 U.S. at 297). Indeed, the *Seminole* Court could not have been more emphatic regarding the trust duties that attach to the government’s observance of tribal treaty rights:

In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. . . . [I]t has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

316 U.S. at 296-97.

As discussed in greater detail below, *see infra* at 8-9, it is undisputed that the Standing Rock Sioux Tribe retains treaty fishing, hunting, and water rights in Lake Oahe and along its shores. The government is accordingly charged with the strict duties of a fiduciary in honoring those rights.<sup>2</sup>

**B. The Full Scope of the Government’s Trust Duties Is Measured by Reference to Treaty Purposes and the Common Law.**

*Cobell* stresses that, whether the source of an actionable trust duty be a treaty, a statute, or otherwise, “the failure [of the instrument] to specify the precise nature of the fiduciary obligation or to enumerate the trustee’s duties [does not] absolve[] the government of its responsibilities. . . . It is the nature of any instrument that establishes a trust relationship that many of the duties and powers are implied therein. They arise from the nature of the relationship established.” 240 F.3d at 1099. Accordingly, “[w]hile the government’s obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional

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<sup>2</sup> A third possible source of trust duties exists. The Tenth Circuit has suggested that where a federal agency addresses statutes or regulations of general applicability in situations affecting Indian interests, the trust duty should have a substantive bearing on its actions. *See, e.g., HRI, Inc. v. EPA*, 198 F.3d 1224, 1246 (10<sup>th</sup> Cir. 2000). Certain Ninth Circuit decisions, by contrast, have held that “although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency’s compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.” *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9<sup>th</sup> Cir. 1998). *See also Gros Ventre Tribe v. United States*, 469 F.3d 801, 812 (9<sup>th</sup> Cir. 2006); *but see Nance v. EPA*, 645 F.2d 701, 711 (9<sup>th</sup> Cir. 1981). In *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980), the D.C. Circuit stated that a “trust responsibility can only arise from a statute, treaty, or executive order,” *id.* at 611 (internal quotation marks omitted), and that if, in the context of general statutes, Congress has not clearly outlined a trust responsibility, then “whatever fiduciary obligation otherwise exists . . . is a limited one only,” *id.* at 612.

Because the United States’ trust duties here arise from its property and treaty obligations to the Standing Rock Sioux Tribe and other Sioux nations, this debate regarding laws of general applicability is of no moment to the issues before this Court. *Amici* raise it for the Court’s attention only in the event that the federal defendants or defendant-intervenors attempt to invoke the case law canvassed above in this very different context.

equitable terms. . . . Much as the Supreme Court has regularly turned to the Restatement [of Trusts] and other authorities to construe trust responsibilities, it is appropriate for the district court[s] to consult similar sources.” *Id. See also id.* at 1101 (“The general ‘contours’ of the government’s obligations may be defined by statute, but the interstices *must* be filled in through reference to general trust law.” (emphasis added)); *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation*, 792 F. 2d 782, 794 (9<sup>th</sup> Cir. 1986) (“Courts judging the actions of federal officials taken pursuant to their trust relationships with the Indians therefore should apply the same trust principles that govern the conduct of private fiduciaries.”).

The courts have long adhered to these principles in the treaty context. In *Seminole Nation*, for example, the government claimed that because it had made certain treaty payments intended for the benefit of individual Seminole members to the Seminole Council, it had discharged its treaty obligations. The Supreme Court disagreed, holding that if the evidence established that governmental officials knew that the Council might not faithfully disburse the payments to tribal members, the conveyance of funds to the Council would have been “a clear breach of the Government’s fiduciary obligation,” 316 U.S. at 297, citing sources including the Restatement of Trusts, various trust law treatises, and then-Judge Cardozo’s venerable common law opinion in *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). *Id.* at 296-97 & 297 n.12.

Likewise, in a still oft-cited opinion, Judge Gesell of this Court held that the Secretary of the Interior had a fiduciary duty to ensure the maximum possible flow of unobligated water from the Truckee River into Pyramid Lake, which formed the heart of the plaintiff Tribe’s reservation. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972). Nothing in the executive order setting aside the reservation spelled out such a duty. Judge Gesell instead

relied on “[t]he vast body of case law which recognizes this trustee obligation,” *id.* at 256, including the decision in *Seminole Nation*.<sup>3</sup>

Similarly, in *Klamath Tribes v. United States*, No. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996), the court declared that “[t]here is no doubt . . . that the government’s trust responsibility extends to the protection of treaty rights,” *id.* at \*7, and that accordingly “the federal government has a substantive duty to protect ‘to the fullest extent possible’ the Tribes’ treaty rights, *and the resources on which those rights depend*. This proposition has been repeatedly confirmed by the courts,” *id.* at \*8 (quoting *Pyramid Lake*, 354 F. Supp. at 256) (emphasis added) (citation omitted). Based on the government’s fiduciary obligations, rather than any express specification of duty in the subject treaty, the court enjoined the “federal defendants from proceeding with ‘salvage’ logging that will effect wildlife resources within the Tribes’ former reservation, without ensuring, in consultation with the Klamath Tribes on a government-to-government basis, that the resources on which the Tribes’ treaty rights depend will be protected.” *Id.* at \*9. *See also Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1213 (9<sup>th</sup> Cir. 1999) (considering federal management obligations in the context of a water storage project managed by the Bureau of Reclamation and reasoning that reserved water rights must be protected because “the United States, as a trustee for the Tribes, has a responsibility to protect their rights and resources”).

The Army Corps is, of course, subject to the full panoply of trust duties that apply to the government’s honoring of tribal treaty rights, and the courts have so held. *See, e.g., Nw. Sea Farms v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (“In carrying out its fiduciary duty, it is the government’s, and subsequently the Corps’, responsibility to

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<sup>3</sup> Executive order and treaty reservations stand on the same footing. *See, e.g., Parravano v. Masten*, 70 F.3d 539, 544 (9<sup>th</sup> Cir. 1995).

ensure that Indian treaty rights are given full effect. . . . As such, the Court concludes that the Corps owes a fiduciary duty to ensure that the Lummi Nation’s treaty rights are not abrogated or impinged upon absent an act of Congress.”); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510-11 (W.D. Wash. 1988) (stating, in case involving Army Corps defendants, that “[t]he United States has a fiduciary duty and ‘moral obligations of the highest responsibility and trust’ to protect the Indians’ treaty rights” (quoting *Seminole Nation*, 316 U.S. at 297)). As explained next, however, the Corps fell woefully short of adhering to those duties when it summarily approved the Lake Oahe easement in early February of this year.

**C. In Granting the Lake Oahe Easement, the Army Corps Violated Fundamental Trust Duties.**

On December 4, 2016, the Army Corps announced that it would not grant Dakota Access an easement across Lake Oahe absent “additional review and analysis” that would include, at a minimum, a “robust consideration and discussion of alternative locations for the pipeline” and “[d]etailed discussion of [the] 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 . . . .” Declaration of Riyaz A. Kanji (“Kanji Decl.”) Ex. 1 at 3. These matters had only summarily been addressed in the Environmental Assessment (“EA”) issued by the Corps in July of 2016, *id.* at 1, and the Corps determined that its additional analysis would best be accomplished through the preparation of an Environmental Impact Statement (“EIS”), *id.* at 3.

Just two months later, with the EIS process barely underway, the Corps reversed direction. The Corps concluded that its July EA had in fact given full and proper consideration to the implications of a pipeline crossing at Lake Oahe for the treaty rights of the Standing Rock Sioux Tribe and other Sioux nations. This sharp reversal—which followed in the wake of a



Presidential Memorandum issued on January 24, 2017 suggesting the same—marked not simply a violation but an utter abdication of the Corps’ trust responsibilities.

**1. Treaty Fishing, Hunting, and Water Rights Endure in Lake Oahe.**

The starting point for the analysis is clear. The government does not dispute that the Standing Rock Sioux Tribe retains treaty fishing, hunting, and water rights in Lake Oahe. In its December 4, 2016 Memorandum, the Corps acknowledged that the “Tribe relies on Lake Oahe for drinking water and irrigation, portions of Lake Oahe downstream from the proposed crossing remain within the Tribe’s reservation boundaries, and the Tribe retains water, hunting and fishing rights in the lake.” Kanji Decl. Ex. 1 at 1. Nor did the Corps retreat from this acknowledgement in deciding to grant the easement. The easement decision was accompanied by a Technical and Legal Review dated February 3, 2017, Kanji Decl. Ex. 2, which relied heavily on an October 20, 2016 Technical and Legal Analysis prepared by the Corps’ Chief Counsel, Kanji Decl. Ex. 3. That latter analysis concedes that the statute authorizing the impoundment of Lake Oahe “reserved the SRST’s fishing and hunting rights on the shoreline and reservoir of Lake Oahe within the boundaries of the reservation and did not diminish those rights in any relevant way,” *id.* at 12, and likewise acknowledges “the SRST’s reserved water rights” in Lake Oahe, *id.* at 13. In this regard the Corps’ views accord with those of the Solicitor of the Interior, who prepared a detailed Memorandum on December 4, 2016 in which she concluded that “[b]oth the Standing Rock and Cheyenne River Sioux Tribes have treaty hunting and fishing rights in Lake Oahe, which is located (at least in part) within the boundaries of both

Reservations. The tribes additionally retain some proportion of water rights in Lake Oahe.”

Kanji Decl. Ex. 4 at 34; *see also id.* at 3, 13, 18.<sup>4</sup>

**2. The Corps’ Rote Reliance on Industry Assertions of Minimal Spill Risk to Minimize the Threat to Tribal Treaty Rights Violated Its Duties of Prudence and Loyalty.**

While the Corps acknowledged the survival of reserved tribal treaty rights in Lake Oahe, it justified its decision to engage in no further analysis of those rights based on a simple assertion. In its February 3, 2017 Technical and Legal Review, Kanji Decl. Ex. 2 at 12-13, the Corps stated that it had addressed the risks of a pipeline spill affecting Lake Oahe and adjacent groundwater in its EA, and that it had again addressed those risks in the October 20, 2016 Technical and Legal Analysis (Kanji Decl. Ex. 3) as well as a memorandum prepared on October 31, 2016 (Kanji Decl. Ex. 6). Because it had determined in each of those documents that the risks of a spill were “low,” the Corps concluded that it need not give further consideration to the implications of granting the easement for tribal treaty rights. Kanji Decl. Ex. 2 at 12-13; *see also* Kanji Decl. Ex. 3 at 12-15 (Corps’ Chief Counsel concluding that additional consideration of tribal treaty rights unnecessary given purportedly low spill risk).

This approach contravened the two core duties of a trustee—the duty of prudence and the duty of loyalty. Under the former, a trustee has a duty to act “as a prudent person would, in light of the purposes, terms, and other circumstances of the trust. . . . The duty of prudence requires the exercise of reasonable care, skill, and caution.” Restatement (Third) of Trusts § 77 (2007); *see also id.* cmt. b. (“This will ordinarily involve investigation appropriate to the particular

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<sup>4</sup> On February 6, 2017, this Solicitor’s Opinion, along with several others, was suspended and temporarily withdrawn by the Acting Secretary of the Interior to allow for review by officials of the new Administration. Kanji Decl. Ex. 5. No substantive reasons were provided for this action. *Cf. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201 n. 11 (1978) (relying on withdrawn Solicitor’s Opinion).

action under consideration . . .”). The Corps exercised no such care, skill, or caution here. Its EA relied entirely on a spill analysis prepared by Dakota Access in concluding that the risk of a spill was low. In the wake of that EA, the Standing Rock, Cheyenne River, and Oglala Sioux Tribes all submitted to the Corps their own expert reports suggesting that the risk of a spill was far higher than that suggested by the EA, *see* Standing Rock Sioux Tribe Memorandum in Support of Motion for Partial Summary Judgment, Doc. No. 117-1 at 11-12 (summarizing reports), as well as correspondence highlighting the key points made in those reports, *see, e.g.*, Kanji Decl. Ex. 7 (October 28, 2016 Letter of Standing Rock Chairman Dave Archambault).

The Corps, however, has never addressed the Tribal submissions. Neither the October 20, 2016 nor the October 31, 2016 memorandum engages the issues raised by the Tribe’s experts, and the same is true for the February 3, 2017 analysis. Nor did the Corps see fit to retain its own independent expert to evaluate the true risks of a pipeline spill at the Lake Oahe crossing. The Corps simply repeats, in rote fashion, that the risks of a spill are low, based on the analysis of Dakota Access, an entity whose financial self-interest in the approval of the pipeline is obvious. This approach—“the chickens are fine, I asked the fox”—hardly qualifies as the exercise of reasonable care. *See Assiniboine & Sioux Tribes*, 792 F.2d at 794 (“[W]e find it impossible to reconcile this alleged rote approval of State Board orders with the strict standard of conduct expected of a trustee.” (footnote omitted)); *see also Fink v. Nat’l Sav. & Trust Co.*, 772 F.2d 951, 957 (D.C. Cir. 1985) (describing the duty of “independent evaluation” of proposed action “the most basic of fiduciary duties”); *Katsaros v. Cody*, 744 F.2d 270, 275 (2d Cir. 1984) (stating that fiduciary duty of prudence was violated when trustee made decision based on information “from persons with an interest in” the outcome of the decision and with no effort to obtain “independent” analysis).

And it gets worse. As the Corps acknowledged in its December 4, 2016 memoranda, it withheld not only from the public but also from “representatives and experts of the Standing Rock Sioux Tribe” the risk spill analysis and related documents on which it has based its consideration of tribal treaty interests. Kanji Decl. Ex. 1 at 1-2. As *Amici* understand it, it was only recently that the Corps provided the documents to counsel for Standing Rock, and only very recently that it allowed those documents to be shared with the Tribe’s experts. “The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of the loyalty.” *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000); *see also* Restatement (Third) of Trusts § 78(1). But here the loyalty of the Corps appears not to have been to the Standing Rock or the other affected Sioux nations, but rather to Dakota Access, whose potentially self-serving risk analysis it relied upon all the while shielding it from the Tribes whose treaty interests it has a solemn fiduciary duty to protect.

Nor can any of this be justified on the basis that the concerns raised by the Sioux nations about pipeline spills are fanciful. Other sovereigns have expressed increasing concern about the risks of pipeline spills, particularly from those pipelines that lie underneath or adjacent to their waterways, and have demanded a rigorous and independent evaluation of such risks. In July 2015, for example, the State of Michigan’s Petroleum Pipeline Task Force issued a report that documented some significant examples of pipeline spills in recent years:

The extensive network of crude oil pipelines in the U.S. and several significant oil pipeline incidents in recent years highlight the risks and impacts associate[d] with pipeline transport of crude. Notable examples include:

- Enbridge Energy Line 6B ruptured near Marshall, Michigan, on July 25, 2010, and discharged oil until July 26, 2010, when the line was shut down. The Line 6B incident released approximately 840,000 gallons (20,000 barrels) of oil into Talmadge Creek and the Kalamazoo River, and fouled 38 miles of river, banks and floodplains downstream of the rupture site, the largest inland oil spill in U.S. history. The National Transportation Safety Board found that in spite of pressure alarms and other

signals of issues, Line 6B was restarted twice due to control room errors and failure to follow safety protocols.

- In July 2011, an ExxonMobil pipeline running under the Yellowstone River failed during flood conditions. Over 42,000 gallons (1,000 barrels) of oil were released into the Yellowstone River and adjacent fields, pastures and lawns before the pipeline was closed.
- In March 2013, another ExxonMobil pipeline ruptured in a residential area in Mayflower, Arkansas, this time releasing approximately 134,000 gallons (3,190 barrels) of Canadian heavy crude oil. The spill forced many residents to evacuate their home for an extended period of time.
- In May 2015, a pipeline operated by Plains All American Pipeline LP ruptured and discharged approximately 105,000 gallons (2,500 barrels) of heavy crude onto land, beaches, and the ocean off the coast of Santa Barbara, California, resulting in the largest coast spill in California in 25 years. Cleanup efforts are ongoing.

Each of these incidents, *and the hundreds of other pipeline ruptures that have occurred throughout the U.S. pipeline system*, have caused damage in varying degrees to the environment, as well as disruption to local residents and economies. Such widespread failures have increased public awareness of pipeline safety, and have drawn attention to the vulnerability of the Great Lakes to pipeline spills.

Kanji Decl. Ex. 8 at 12 (emphasis added) (footnotes omitted). Notably, some of these examples highlight that human error or natural forces can overwhelm the safety features purportedly rendering pipelines at low risk of rupture.<sup>5</sup>

The Michigan report goes on to reject familiar-sounding assurances made by the operator of a pipeline under the Straits of Mackinac that the risks of a spill are “low,” *id.* at 47, and instead concludes that, in the exercise of due care, an independent analysis is required to

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<sup>5</sup> Significant incidents continue to take place. For example, just last month, over 138,000 gallons of diesel fuel leaked from a Magellan pipeline, contaminating farmland in northern Iowa. *Des Moines Register*, Jan. 25, 2017, available at <http://www.desmoinesregister.com/story/news/2017/01/25/pipeline-leaks-thousands-gallons-diesel-northern-iowa/97051728/>. And in August of last year, an oil pipeline ruptured in Northern Saskatchewan, disrupting drinking water supplies for as many as 70,000 people. Radio Canada International, August 2, 2016, available at <http://www.rcinet.ca/en/2016/08/02/husky-oil-spill-saskatchewan-solutions-sought/>.

determine the continued wisdom of operating such a pipeline and that “the credibility of the analysis depends upon the use of qualified experts wholly independent from any influence by [the pipeline operator],” *id.* at 48. Such an analysis is presently ongoing in Michigan, and under its fiduciary obligations the Army Corps was required to commission nothing less in determining whether to proceed with the Lake Oahe crossing.

**3. The Corps’ Failure To Grapple with the True Consequences of the Despoliation of Lake Oahe for the Standing Rock Sioux Tribe Violated Its Duties of Prudence and Loyalty.**

In reversing its decision to prepare an EIS and reverting instead to its original EA, the Army Corps failed to satisfy its fundamental fiduciary obligations in another critical respect. As the Michigan task force report observes, “the likelihood of a [pipeline] leak is only one element of a reasonable assessment of risk; the magnitude of harm that would result from a release must also be considered.” *Id.* at 47. *Cf. New York v. NRC*, 681 F.3d 471, 482 (D.C. Cir. 2012) (stating in NEPA case that “an agency conducting an EA generally must examine both the probability of a given harm occurring *and* the consequences of that harm if it does occur. Only if the harm in question is so ‘remote and speculative’ as to reduce the effective probability of its occurrence to zero may the agency dispense with the consequences portion of the analysis”). But nowhere in the EA or in any of the documents subsequently prepared to justify that EA does the Corps demonstrate an awareness of the unique threat that the degradation of Lake Oahe by a rupture of the pipeline would pose to the Standing Rock Sioux Tribe.

In its briefing, the Tribe has described in powerful terms the history of continuing dispossession of its lands. *Amici* will not repeat that discussion here. It suffices to say that, through the actions of the United States, what was meant to be a permanent homeland for the Tribe has repeatedly been constricted and degraded over time. If Lake Oahe is contaminated,

such that the source of the Tribe's drinking and irrigation water, and the fish and game on which many of its members rely for subsistence purposes, is no longer available, there will remain no other contiguous land to which the Tribe can resort, and its ability to survive as a sovereign community within a defined territory will be placed in serious jeopardy. The Corps' evaluation of risk speaks to none of this. One could reasonably expect more of an agency that owes fiduciary duties of care and loyalty to the Tribe.

Indeed, the Solicitor of the Interior made precisely this point in her comprehensive December 4, 2016 Opinion. Kanji Decl. Ex. 4 at 30 ("The Standing Rock and Cheyenne River Sioux Reservations are the permanent and irreplaceable homelands for the Tribes. Their core identity and livelihood depend upon their relationship to the land and environment . . . . Tribal members do not have the luxury of moving away from an environmental disaster without also leaving their ancestral territory."). The Interior Department enjoys "broad power to carry out the federal government's unique responsibilities with respect to Indians." *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008). And the Corps relied on the Interior Solicitor's Memorandum in connection with the Corps' December 4 decision to require an EIS. Kanji Decl. Ex. 2 at 10. But in its February decision, rather than heeding the Solicitor's point, or addressing any of the specific factual issues that the Solicitor raised, the Corps ignored it altogether. In doing so, the Corps once again fell far short of adhering to "the most exacting fiduciary standards" demanded by the government's trust duties. *Seminole Nation*, 316 U.S. at 297.

## **II. The Contrast Between the Corps' Failure To Prepare an EIS and Federal Agency Practice Underscores the Corps' Violation of Its Trust Duties.**

Under the National Environmental Policy Act ("NEPA"), federal agencies are required to prepare an EIS for "major Federal actions significantly affecting the quality of the human

environment . . . .” 42 U.S.C. § 4332 (C). “If *any* ‘significant’ environmental impacts *might* result from the proposed agency action then an EIS *must be* prepared before the action is taken.” *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (second emphasis added). Here, despite the devastation an oil spill would cause to the Standing Rock Sioux Tribe’s treaty rights, drinking water, health, and way of life, the Army Corps concluded that the Oahe crossing did not involve “significant” environmental impacts. As a result, the Corps prepared only an EA, a decision it re-committed to in early February. The Army Corps’ conclusion stands in contrast to the many less potentially damaging actions that federal agencies have taken only after preparing an EIS, and that contrast underscores the extent to which the Army Corps has failed to honor its trust duties to the Tribe.

**A. Federal Agencies Have Regularly Required an EIS for Actions with Less Potential To Harm the Environment than the Oahe Crossing.**

Based on a Finding of No Significant Impact under the Rivers and Harbors Act, 33 U.S.C. § 408, the Corps granted an easement under the Mineral Leasing Act, 30 U.S.C. § 185, for the Dakota Access pipeline to cross under Lake Oahe. The pipeline would carry at least 570,000 barrels of oil each day under the lake. Environmental Assessment Dakota Access Pipeline Project (July 25, 2016) (“Final EA”) at 5, AR 71229. Much of the Corps’ analysis focused on the minimal surface disturbance that the Lake Oahe crossing would cause. The Corps did not assess the impacts to Lake Oahe of the proposed pipeline crossing because the lake “would be avoided via HDD [horizontal directional drilling].” Final EA at 40, AR 71264. The Corps addressed the “unlikely event of a pipeline leak” affecting Lake Oahe in five short paragraphs. Final EA at 38-39, AR 71262-63. Yet, as discussed above, pipeline leaks happen regularly.



A review of recent Environmental Impact Statements prepared by federal agencies reveals many in which the potential harm to the environment is less than that posed by the pipeline crossing here. *See* Kanji Decl. Ex. 9. For example, the National Park Service recently prepared an EIS to evaluate the appropriate manner and extent of dog use in Golden Gate National Recreation Area. National Park Service, Golden Gate National Recreation Area, *Final Dog Management Plan/Environmental Impact Statement* (December 2016), available at <https://parkplanning.nps.gov/document.cfm?parkID=303&projectID=11759&documentID=7647>

1. If dog use can present a significant impact to the environment, surely so can a pipeline crossing under a lake that Tribal members depend on for the exercise of their treaty fishing and hunting rights, for drinking and irrigation water, and for religious purposes.

In one recent EIS, the Bureau of Reclamation evaluated the environmental impacts associated with construction of a second water supply pipeline between the South Portal of the Tecolote Tunnel and the Corona Del Mar Water Treatment Plant in Santa Barbara County, California. The proposed pipeline was to be constructed parallel to existing pipeline along existing easements. Bureau of Reclamation, *South Coast Conduit Upper Reach Reliability Project EIS/EIR* (November 2010), available at [https://www.usbr.gov/mp/nepa/documentShow.cfm?Doc\\_ID=6816](https://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=6816). This Final EIS explicitly addresses the Indian Trust Assets that may be affected by the proposed project. *Id.* at 3-68. Such analysis is consistent with the Bureau of Reclamation's Departmental Manual, which states: "In the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s), the appropriate office(s) of the Bureau of Indian Affairs, the Office of the

Solicitor, and the Office of American Indian Trust.” *See*

[https://www.usbr.gov/native/policy/policy\\_trustresponsibility.html](https://www.usbr.gov/native/policy/policy_trustresponsibility.html).

The on-going review of the proposed increased flow of crude oil through a three-mile border segment of Enbridge Energy’s existing Line 67 pipeline provides another sharp contrast to the Corps’ approach here. This segment crosses the border from Canada into North Dakota near the town of Necho. Given the requirement for a Presidential Permit in this case, the Department of State is serving as the lead agency. In sharp contrast to the situation here, the Department invited the Bureau of Indian Affairs and Indian tribes in the region of the Line 67 Expansion to serve as cooperating agencies. Three Indian tribes—the Fond du Lac Band of Lake Superior Chippewa, the Leech Lake Band of Ojibwe, and the Red Cliff Band of Lake Superior Chippewa Indians—formally agreed to assist the Department as cooperating agencies. A Draft Supplemental EIS was made available for public comment on February 10, 2017. U.S. Department of State, *Draft Supplemental Environmental Impact Statement Line 67 Expansion* (January 2017) at S-9, available at <https://www.state.gov/e/enr/applicant/applicants/environmentalreview/251150.htm>. The Corps offers no reasonable justification for its failure to follow a similar process or the explicit language of its own guidance documents here.

**B. Tribes Have Had to Prepare an EIS for Actions with Less Potential To Harm the Environment than the Oahe Crossing.**

On several recent occasions, tribes have been required to prepare an EIS for projects that have less potential to harm the environment than the Lake Oahe crossing. For example, the Skokomish Indian Tribe shared the cost of restoring the Skokomish River Basin, including wetland restoration and levee removal. The tribe completed an EIS with the Corps prior to approval of the project. U.S. Army Corps of Engineers, *Skokomish River Basin Ecosystem*

*Restoration/Integrated Feasibility Report and Environmental Impact Statement* (April 2015), available at <http://www.nws.usace.army.mil/Missions/Civil-Works/Programs-and-Projects/Projects/Skokomish-River-Basin/>.

In another example, the Bureau of Indian Affairs completed an EIS before approving an increase in the harvest of non-native lake trout in Flathead Lake proposed by the Confederated Salish and Kootenai Tribes. The EIS evaluated the potential environmental effects on the biology, fishing opportunity, and economy of the area of the proposed increase. Bureau of Indian Affairs, *Proposed Strategies to Benefit Native Species by Reducing the Abundance of Lake Trout in Flathead Lake, Montana*, 79 Fed. Reg. 9916, 9916 (Feb 21, 2014), available at [http://www.mackdays.com/resources/Management-Uploads/Flathead-Lake-\\_LakeTrout-FEIS.pdf](http://www.mackdays.com/resources/Management-Uploads/Flathead-Lake-_LakeTrout-FEIS.pdf). If an increase in the harvest of non-native fish can have a significant impact on the environment, so can the Oahe crossing.

Moreover, the Bureau required completion of an EIS before approving a right-of-way for a transmission line for a solar energy project on the Moapa River Indian Reservation. The Moapa Band of Paiute Indians was a cooperating agency, as well as the Army Corps. Bureau of Indian Affairs, *Final EIS K Road Moapa Solar Facility Construction and Operation of a 350MW Solar Generation Facility Approval of Right-of-Way Applications* (March 2012), available at [https://www.blm.gov/nv/st/en/fo/lvfo/blm\\_programs/energy/k-road\\_moapa\\_solar.html](https://www.blm.gov/nv/st/en/fo/lvfo/blm_programs/energy/k-road_moapa_solar.html). Once again, it is difficult to square the conclusion that an EIS was required in that setting while one was not here. Such inconsistency would not have arisen had the Corps properly discharged its duties of prudence and loyalty with respect to the Oahe crossing.

**C. The Highly Unusual Nature of the EIS Rescission Here Underscores the Army Corps' Disregard for Its Fiduciary Duties to the Tribe.**

In December 2016, after extensive analysis and input from the Tribe and others, the Corps committed to prepare a full EIS to address the Tribe's treaty rights, alternative pipeline routings outside of the Tribe's treaty areas, and oil spill risks. On January 18, 2017, the Corps initiated the preparation of an EIS by publishing a notice of intent to prepare an EIS and opening public comment. 82 Fed. Reg. 5543, 5543 (Jan. 18, 2017). On February 7, 2017, the Corps abruptly terminated the public comment period and announced that it would grant Dakota Access the easement to cross Lake Oahe. The termination decision contained no additional analysis of the Tribe's treaty rights, alternative routes, or oil spill risks. Rather than taking steps to fulfill its fiduciary duties to the Tribe, the Corps simply dismissed them.

Such action terminating the EIS process that the Corps had initiated less than three weeks earlier stands in stark contrast to past situations in which federal agencies have ended the process. *Amici* have attempted to comprehensively study all EIS rescissions taking place in the months and years immediately following the last several changes in the presidency from one party to the other (2010, 2009, 2002, and 2001). Kanji Decl. Ex. 10. Notices to Rescind are uncommon. Between 2008 and 2012, an average of 472 Environmental Impact Statements were issued each year.<sup>6</sup> Thus far, there have been three Notices To Rescind in 2017. In 2016, there were twenty-six rescissions. In 2010, 2009, 2002, and 2001 there were an average of twenty-seven Notices To Rescind. And even during those politically charged periods, EIS rescissions took place because a project was terminated, or diminished in scope, but not for policy reasons.

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<sup>6</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-369, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 8 (Apr. 2014).

No change in the scope of the proposed action has occurred here. Instead, the Standing Rock Sioux Tribe and other Sioux nations have been singled out for negative treatment. Rather than adhering to the “most exacting fiduciary standards,” *Seminole Nation*, 316 U.S. at 297, in honoring the government’s treaty obligations to those Tribes, federal officials have dispensed with such standards altogether.

### CONCLUSION

Because the federal government has acted here in derogation of its solemn trust duties, the motion of the Standing Rock Sioux Tribe for partial summary judgment should be granted.

Dated this 21<sup>st</sup> day of February, 2017.

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# APPENDIX

## List of *Amici Curiae* Tribes and Organizations

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

### TRIBES:

The Big Sandy Rancheria of Western Mono Indians of California is a federally recognized tribe centrally located near the San Joaquin River, the second largest river in California. The Tribe is very concerned with the negative impacts of a project such as the Dakota Access Pipeline on the health, safety and welfare to tribal members. As Tribes have many projects within their own areas, that have shown to be detrimental to their communities (i.e. dams, high speed rail, mining, pipelines, sacred sites), we must support each other, as with each impact would significantly and undoubtedly will impact air quality, fisheries, riparian habitat, wildlife, cultural resources, soils, water, land use, noise, and scenery.

The Confederated Salish and Kootenai Tribes are a federally recognized tribe residing on the Flathead Reservation in northwestern Montana. The Tribes are a constitutional government established pursuant to the Indian Reorganization Act of 1934, and are governed by an elected ten member Tribal Council. The Tribes entered into the 1855 Hellgate Treaty with the United States wherein they reserved to themselves, among other things, the right to continue to hunt, fish and gather in their usual and accustomed places throughout their aboriginal territory. The Tribal Council is keenly interested in any federal actions that may impact treaty protected natural and cultural resources both on and off the Flathead Reservation, as well as maintaining meaningful consultation and analysis when actions by agencies of the United States could harm those resources.

The Confederated Tribes of the Colville Reservation (Tribes) is comprised of approximately 1.4 million acres of land, and is bound on three sides by the Columbia and Okanogan Rivers in North Central Washington state. We have approximately 10,000 enrolled citizens descended from 12 aboriginal tribes which covered an area from North West Oregon to the Cascade Range, north into the Canadian Okanagan and west to lands in the Arrow Lakes region of British Columbia. The Tribes has a long history of being affected by major infrastructure projects which have resulted in the dispossession of tribal lands and takings of our resources. Projects such as the Grand Coulee Dam, Chief Joseph Dam, Azwell Wells Dam, and other hydroelectric projects on the mainstem Columbia River and its tributaries are prime examples of this. We have ongoing litigation involving pollution in the Columbia River and are in a constant state of attempting to protect the natural and cultural resources throughout our aboriginal territories.

The Confederated Tribes of the Umatilla Indian Reservation is a federally recognized Indian tribe whose treaty reserved fishing, hunting, and gathering rights are directly impacted by off-reservation operations and permitting activities of the Army Corps of Engineers. Any precedent

established dismissing or minimizing the need for a full EIS in a case like this, despite impacts on treaty rights, will negatively affect the CTUIR.

The Confederated Tribes and Bands of the Yakama Nation has been federally recognized since 1855 under the Treaty with the Yakama (12 Stat. 951). We strongly oppose the incursions into Native lands by corporate interests of fossil fuels, which are a continuation of the domination exercised by the non-Native governments first supported by the Inter Caetera Papal Bull of 1493 and continuing into modern American government practices. The Papal Bull and so-called “Doctrine of Discovery” that has dehumanized Original Nations have continuing and extraordinary influence in Indian Country beginning with *Johnson v. M'Intosh*, and continuing to modern times in *Tee-Hit-Ton v. US* in 1955, and the Oneida line of cases, culminating in *City of Sherrill* in 2005. These provide the historic backdrop against which federal and corporate interests continue their dispossession of Native resources, and the antiseptically cleansed analysis of *Standing Rock's* rights.

The Crow Creek Sioux Tribe is a federally recognized Indian tribe located on the Missouri River 60 miles southeast of Pierre, inside Buffalo County, South Dakota.

The Dry Creek Rancheria Band of Pomo Indians (“Dry Creek”) is a federally-recognized Indian tribe composed of descendants from the Southern Pomo tribelet, Mihilakawna. Between 1974 and 1982, a formal EIS was prepared for the construction of the Warm Springs Dam, which caused the disturbance or destruction of 122 areas associated with the history of the Tribe. As a result of the EIS process and significant consultation with the Tribe, some impacts to the cultural sites were mitigated before the Mihilakawna aboriginal lands were flooded to create Lake Sonoma. The Tribe has an interest in ensuring that proper environmental review is required before a federal undertaking that could harm tribal cultural resources or rights.

The Eastern Shawnee Tribe of Oklahoma is a federally recognized tribe whose tribal headquarters are located in Wyandotte, Oklahoma.

The Ewiiapaayp Band of Kumeyaay Indians is a self-governing federally recognized Indian tribe exercising sovereign authority over the lands of the Ewiiapaayp (Cuyapaipe) Indian Reservation in Southern California. The Cuyapaipe Indian Reservation was established on February 10, 1891, following an Executive Order on January 12, 1891, and an Act of Congress.

The Havasupai Tribe is a federally recognized sovereign Indian Tribe organized on June 8, 1880, by Presidential Executive Order and subsequently by Section 16 of the 1934 Indian Reorganization Act. The Havasupai live on a portion of our aboriginal lands that are now part of the State of Arizona and is the most isolated tribe in the continental United States with 737 tribal members, with roughly 480 who live in the Village of Supai in Havasu Canyon adjacent to Grand Canyon National Park.



The Jamestown S'Klallam Tribe is a federally recognized Indian tribe located on the Olympic Peninsula in Washington State. Known as 'the Strong People' the S'Klallams created a rich culture of art, spirituality, traditional knowledge and self-reliance that continues today.

The Kaibab Tribe is a federally-recognized Indian tribe organized under the Indian Reorganization Act of June 18, 1934. The Reservation, which is located in Arizona adjacent to the Arizona-Utah border, lies within the Kaibab Tribe's vast aboriginal territory and was established by order of the Department of the Interior dated October 16, 1907, the Executive Order of June 11, 1913, and the Executive Order of July 17, 1917. The United States continues to hold the Reservation in trust for the benefit of the Kaibab Tribe and its members. The Tribe's aboriginal territory was much larger than the present-day Reservation. With respect to all of the Southern Paiute tribes and bands that were plaintiffs in the proceedings before the Indian Claims Commission, which included the Tribe, the aboriginal territory was described as vast. Findings of Fact ¶ 2, *S. Paiute Nation v. United States*, 14 Indian Cl. Comm'n 618, 619 (1965). The Tribe continues to use lands within its aboriginal territory, both within and outside its Reservation, for traditional and cultural purposes, and those lands are critically important to the Tribe and its members.

The Lac du Flambeau Band of Lake Superior Chippewa Indians resides on its Reservation, as created between the Tribe and the United States in the Treaty of 1854. It has over 3900 enrolled Tribal Members and its Reservation stretches over a three-county area in northern Wisconsin. The Tribe is a sovereign government with multiple treaties with the United States. The Tribe has experienced damage to its water resources through industry and municipal disregard in the area. The Tribe, over the course of its history since treaty-making with the United States, has worked hard to safeguard the water, plants, animals, and land within its Reservation and the entire Ceded Territory. The Tribe has a strong interest in protecting these resources through exercising its jurisdiction and holding the federal government to its trust responsibilities.

The Lac Courte Oreilles Band of Lake Superior Chippewa Indians is a federally recognized Indian tribe organized pursuant to the provisions of the Indian Reorganization Act of 1934, 25 U.S.C. § 461, et seq. The Tribe is a signatory or successor to the Treaty of 1837, 7 Stat. 536, and the Treaty of 1842, 7 Stat. 591, and Treaty of 1854, 10 Stat. 1109 in which the tribes ceded land to the United States and reserved rights to fish, hunt, and gather in the treaty territories. The Lac Courte Oreilles Indian Reservation, located in northwest Wisconsin, was established by the Treaty of 1854 and was implemented by Secretarial Order of the Department of the Interior on March 1, 1873. Band members traditionally relied upon the lakes of the Reservation as well as its treaty territories for their subsistence living, including wild rice harvest and fishing. The boundaries of the Lac Courte Oreilles Indian Reservation were uniquely configured to provide access to numerous water bodies in the region. In 1921, prior to the enactment of the NEPA and under the 1920 Federal Power Act, the United States granted a license to Northern States Power (NSP), which authorized the flooding of certain reservation lands and created the Chippewa Flowage. The license was issued to NSP over the strong objections of the Lac Courte Oreilles

Band, which objected to the creation of the flowage because it could foresee the devastation the dam would bring to wild rice habitat and tribal members' traditional lifestyle. The flooding caused the loss of an annual 25,000 pound wild rice crop traditionally harvested by band members and drastically altered the self-sufficient, subsistence lifestyle of the tribe.

The Mashantucket Pequot Tribal Nation (MPTN), a federally-recognized tribe, are a native Algonquin people who endured centuries of conflict, survival, and continuity on and around North America's oldest Indian reservation (Est. 1666) located in southeastern Connecticut. The MPTN and other tribes in the Northeast have experienced the destruction of historic properties. The MPTN has a significant interest in ensuring that tribal governments are consulted early on, during the pre-licensing phase of the permit process, to adequately identify historic properties and assess the potential impact of undertakings. The MPTN is especially interested in ensuring that applicable laws and regulations are not negated during the environmental review process.

The Mille Lacs Band of Ojibwe is a federally recognized Indian tribe residing on its ancestral homelands in north-central Minnesota. Our ancestors signed numerous treaties reserving our rights to hunt and fish on ceded lands, including the 1837 Treaty with the Chippewa, 7 Stat. 536. As Anishinaabe people, we have sacred responsibilities to safeguard natural and cultural resources; protecting water is one of our most sacred duties. The Band recently fought for full environmental impacts review of the proposed Sandpiper oil pipeline and the proposed Line 3 oil pipeline replacement in Minnesota because oil pipelines pose unique environmental impacts where those pipelines cross over, under or through waters, wetlands and ecosystems on which we depend for wild rice, fish, game, and other culturally important natural resources.

The Navajo Nation is the largest Indian nation by land holdings, and, by some measures, the number of enrolled citizens. It has over 300,000 enrolled citizens and over 17 million acres of largely contiguous land in New Mexico, Arizona, and Utah. The Nation is larger than ten of the states and is roughly the size of West Virginia and twice the size of Massachusetts. The Nation is a sovereign government with two ratified treaties with the United States, entered into in 1850 and 1868. The Nation has experienced damage to its sacred water resources through the Gold King Mine spill, where tons of pollutants washed downstream into the San Juan River, a treaty-protected water source. The Nation has sued the Environmental Protection Agency for its role in that tragedy. The Nation has a strong interest in preventing future similar incidents through enforcement of robust trust responsibilities for federal agencies.

The Northern Cheyenne Tribe is a federally-recognized tribe located in Southeast Montana. The Tribe has strong historical, religious and cultural ties as past inhabitants of the Lake Oahe area, especially because the "Great Unification" of the tribes now known as the Northern Cheyenne Tribe of Montana and the Cheyenne and Arapaho Tribes of Oklahoma occurred there approximately 300 years ago. As a result, experts believe numerous traditional cultural places, archaeological sites, sacred religious sites, towns, and villages of the Tribe are in that area.

Construction and operation of the Dakota Access pipeline will undoubtedly disturb and desecrate these important sites.

The Oneida Nation of New York is a federally recognized Indian nation. Despite numerous treaties with the United States, notably including the 1794 Treaty of Canandaigua, the Oneida Indian Nation was dispossessed through illegal takings of its homelands over the course of more than 150 years. The Oneida Indian Nation has been working to reacquire its homelands, but most of its homelands remain in the possession of third parties. The United States and the state of New York have demonstrated an inconsistent and ineffective ability to protect the Nation's homelands from environmental (and other) abuses by third-party developers. These abuses would not have occurred if third-party developers had consulted with the Oneida Indian Nation before engaging in hazardous activities, or nearby, its homelands. The Oneida Indian Nation has a strong interest in ensuring that these abuses do not recur.

The Pala Band of Mission Indians is a federally recognized Indian tribe comprised of peoples of Cupeño and Luiseño descent. Many projects requiring federal agency involvement have affected the people of Pala and the Band's ancestral lands. Most recently, sacred Gregory Mountain, known as Chokla in Luiseño, was threatened by the potential development of a solid waste landfill just outside the borders of the Pala Reservation. Furthermore, the proposed landfill was located along the banks of the San Luis Rey River and on top of a tributary creek, gravely threatening a critical source of drinking water for Pala and other downstream communities. The Pala Band fought this project for over twenty-five years, most recently by disputing the adequacy of an EIS developed by the Army Corps of Engineers. Although the Band was ultimately able to defeat the landfill through private negotiations with the developer, we fear that the Army Corps would likely have issued the permit in spite of the entreaties of Pala and many other Luiseño Tribal Nations. The parallels between our situation with the Gregory Canyon Landfill and the situation with the Dakota Access Pipeline are chilling. Full and transparent environmental review and consultation on any federal action impacting Tribal traditional lands is critically important.

The Pechanga Band of Luiseño Mission Indians ('Atáaxum) is a federally recognized Indian tribe with a long history of loss at the hands of the federal government, beginning with the failure of the Senate to ratify the Treaty of Temecula, signed by our ancestors in 1847, and our continued fights against the taking of our lands, our culture and our natural resources. In the early 2000s, we fought the Valley Rainbow Interconnect, a 31-mile 500,000-volt transmission line which threatened the Great Oak Ranch, an area that includes cultural and village sites, as well as which is home to the Great Oak, a 1,000 year old oak tree (which trees are sacred to the 'Atáaxum).

The Penobscot Nation is one of four Wabanaki tribes (people of the dawn) located in Maine. The Penobscot Nation's Reservation consists of over 200 islands and the surrounding waters of the Penobscot River. As a riverine people, we appreciate the importance of protecting the waters upon which we all rely. The survival of our people and our culture is dependent on the health of

the river in which we reside. Penobscot supports all tribes in their efforts to protect the waters impacting their lands, resources and cultures. Penobscot Nation has an interest in the federal government carrying out its trust responsibility to protect tribal lands, waters and resources.

The Ramapough Lunaape Nation, a State recognized tribe, are the descendants of the original people of Manhattan and have communities, sacred sites, and burial ground in the Ramapo Mountains of New York and New Jersey. The Ramapough Lunaape Nation has a community in Ringwood, New Jersey that contains a Superfund Site based on toxic pollution that has caused widespread illness and death in the community that is the center of ongoing efforts with the EPA and state officials regarding cleanup and mitigation. The Ramapo mountains, river and pass are a natural gateway in New York and the Northeast region and site of major infrastructure including highways, transmission lines, and pipelines. One of the proposed pipelines, the Pilgrim Pipeline, plans on transporting the Bakken crude oil which is the oil proposed to flow through the DAPL pipeline.

The Saint Regis Mohawk Tribe is a federally recognized Tribe located in northern New York. The Tribe's reservation is adjacent to two Superfund sites and has been directly involved in the environmental consultation and processes for remediation of the sites, including continually working to ensure that the life threatening pollution harming the Tribe's land and the community is adequately addressed by all parties in the remediation and that for the generations to come the Mohawk community will be protected.

The San Carlos Apache Tribe is a federally recognized tribe which is engaged in a fight to save its own sacred site, Oak Flats, located on its reservation in Arizona, from desecration and certain destruction because of actions by the United States government that prioritize the interests of poisonous extractive industries over its own citizens and tribes.

The San Manuel Band of Mission Indians is a federally recognized American Indian tribe located near the city of Highland, Calif. San Manuel is one of several clans of Serrano Indians, who are the indigenous people of the San Bernardino highlands, passes, valleys mountains and high deserts who share a common language and culture. The San Manuel reservation was established in 1891 and recognized as a sovereign nation with the right of self-government. Since time immemorial, the San Manuel tribal community has endured change and hardship. Amidst these challenges the tribe continued to maintain its unique form of governance. Like other governments it seeks to provide a better quality of life for its citizens by building infrastructure, maintaining civil services and promoting social, economic and cultural development.

The Santee Sioux Nation of Nebraska is a federally recognized Indian tribe and part of the Great Sioux Nation. The Santee Reservation is located in north central Nebraska, with its northern reservation border directly adjacent to the Missouri River. The Nation lost over a thousand acres of land as part of the devastating Pick-Sloan program when its fertile wooded bottom lands were inundated for the creation of the Gavins Point Dam. The Nation, as a downstream tribe, is deeply

concerned about the negative impact this pipeline has to its water, homeland, cultural resources, and the well-being of its members. Moreover, the Nation is directly impacted the permitting activities of the Army Corps of Engineers, as the Nation is a signatory to the 2004 Programmatic Agreement for the Operation of the Main Stem System for Compliance with the National Historic Preservation Act.

The Sault Ste. Marie Tribe of Chippewa Indians is a federally recognized Indian tribe which faces a similar threat due to an aging oil pipeline, Enbridge Line 5, that crosses the Strait of Mackinac and poses an unacceptable risk to the health and safety of our own tribal citizens and the exercise of our treaty protected rights in those waters.

The Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation is a federally recognized treaty tribe and part of the Great Sioux Nation. The Lake Traverse Reservation, which originally encompassed over 900,000 acres, is located in the northeast corner of South Dakota and southeast corner of North Dakota. The Sisseton-Wahpeton tribal government continues to promote the health and welfare of its 13,000 plus enrolled members and is deeply concerned about the negative impact this pipeline has to its water, ancestral homeland, cultural resources, and the well-being of its members.

The Swinomish Indian Tribal Community is a federally recognized Indian Tribe that occupies the Swinomish Indian Reservation on Puget Sound in Washington State. The purpose and mission of the Swinomish Indian Tribal Community is to protect and enhance the quality of the lives of all of its members by providing a combination of economic opportunities and a safety net of social services; to protect the culture and traditional practices of the Swinomish people; to respect and protect the spirit of the ancestors that have gone before and the future generations to come; to exercise the powers of self-government secured by the Treaty of Point Elliott (12 Stat. 927); to protect and preserve the Tribe's reservation homeland; to protect the Tribe's treaty rights both on and off of the Reservation; and to provide a safe and healthy environment for everyone living on and participating in the activities of the Swinomish Reservation. The Swinomish Reservation is transected by three major oil and gas pipelines serving the Shell and Tesoro Anacortes refineries. The Swinomish Tribe has a significant interest in ensuring that pipeline permitting decisions and the accompanying environmental review processes are conducted in accordance with applicable laws and regulations.

The Torres Martinez Desert Cahuilla Indians is a federally recognized tribe of Cahuilla and Chemehuevi Indians, located in Imperial and Riverside counties in California. The Tribe's vision is to create opportunities in education, economic development, social services and other aspects of life for its tribal members and employees to become productive citizens and neighbors, thus creating a more harmonious community. The Torres Martinez Desert Cahuilla Reservation was established May 15, 1876. The tribe's lands cover 24,822 acres, almost 40 square miles of checker-boarded parcels in California, approximately, 11,000 of the 24,822 acres are located under the Salton Sea. The impact of the receding Salton Sea is a direct threat to the Torres

Martinez Tribe. As a Tribal people we value the land, air and language and believe these are interconnected through our culture and traditions. As the looming crisis at the Salton Sea worsens the Tribe becomes more vulnerable to the ongoing destruction of us as a Tribe and people.

The Wampanoag Tribe of Gay Head (Aquinnah) is a federally recognized Indian tribe whose homelands are now located in the southwest portion of Martha's Vineyard Island in the town of Gay Head, Massachusetts. In accordance with 1987 Settlement Act with the federal government there are approximately 485 acres of Tribal Lands purchased (160 acres private and approximately 325 acres common lands).

The Winnebago Tribe of Nebraska is a federally recognized Indian Tribe organized pursuant to the Indian Reorganization Act of 1934. The Winnebago Reservation was established by Treaty in 1865, and is located in present day in Northeast Nebraska and now Northwest Iowa. The eastern boundary of the Winnebago Reservation was originally the Missouri River. Changes in the course of the Missouri River significantly affected the eastern boundary line of the Tribe's Reservation. The Tribe had to take legal action in the 1940's to restore Reservation lands that ended up on the Iowa side of the river. Later in the 1970's, the Army Corp of Engineers illegally condemned a portion of the Tribe's land along the Iowa side of the river. The Tribe was again forced to take legal action in an attempt to restore the lands taken by the Army Corp. After a lengthy legal battle, some of the lands were returned and the Tribe is continuing its efforts to have the remainder of the condemned land restored to it. Most recently, in 2011, the Army Corp's failure to properly manage dams along the Missouri River north of the Tribe's Reservation resulted in significant flooding on the Tribe's Reservation. The flooding caused millions of dollars in damage to the Tribe's hunting and fishing areas, timberland and farmland along the River and forced the Tribe to close its casino for nearly two months, which further resulted in millions of dollars in lost revenue for the Tribe in addition to several weeks of lost wages for hundreds of employees. The Winnebago Tribe is deeply concerned about any federal action related to condemnation of lands, protection of environmental, physical and cultural resources and, in particular, the Tribe has a significant interest in actions affecting the Missouri River.

The Wyandotte Nation is a federally recognized Indian tribe in Oklahoma who are descendants of the Wendat Confederacy and Native Americans with territory near Georgian Bay and Lake Huron. The tribe's headquarters are located in Wyandotte, OK, and it has 6,146 tribal citizens nationwide.

## ORGANIZATIONS:

The Affiliated Tribes of Northwest Indians is a regional intertribal organization comprised of federally recognized Indian tribes located in the states of Alaska, California, Idaho, Montana, Nevada, Oregon, and Washington which was established to preserve the rights secured under Indian treaties and agreements with the United States, and all other rights and benefits its member Tribes are entitled to under the laws and Constitution of the United States and the several States, to enlighten the public toward a better understanding of Indian people, to preserve Indian cultural values, and otherwise promote the welfare of Indian people.

The Alaska Inter-Tribal Council, as a statewide consortium of First Nations, which share a common bond with unique cultures, language, spirituality, and traditional values, declare our intent to proactively advocate for, protect, defend, and enhance our inherent rights, as self-determining tribal sovereigns. Through self-empowerment, we shall continue to embrace our traditional values, knowledge, and wisdom to guide our role as stewards of our homeland, our culture, language and way of life. Proactively, we commit to preserving and protecting our indigenous livelihood traditions of hunting, trapping, fishing, and gathering.

The Great Plains Tribal Chairman's Association (GPTCA) is comprised of the elected leadership of the sixteen (16) federally recognized Indian tribes located in the states of North Dakota, South Dakota and Nebraska. The primary mission of the GPTCA is to unify the Tribes to defend our inherent rights reserved under our Treaties with the United States, to promote the welfare of the People, and to protect the Sovereignty of each Tribe.

The Inter Tribal Association of Arizona ("ITAA") is an intertribal organization comprised of 21 federally recognized Indian Tribes with lands located primarily in Arizona, as well as in California, New Mexico and Nevada. The Member Tribes of the ITAA have worked together since 1952 to provide a united voice for Tribal governments on common issues and concerns. The representatives of ITAA are the highest elected Tribal officials from each Tribe, including Tribal chairpersons, presidents and governors.

The National Association of Tribal Historic Preservation Officers (NATHPO) is a national organization of Tribal government officials who implement federal and tribal preservation laws. Membership is limited to federally recognized Tribal government officials who are committed to preserving, rejuvenating, and supporting American Indian, Alaska Native, and Native Hawaiian cultures, heritage, and practices. NATHPO member tribes work with a variety of federal agencies on small and large infrastructure projects.

The National Indian Education Association (NIEA) is a non-profit organization which advocates and assures optimum educational opportunity that is based on tribal languages and cultures, enhancing tribal sovereignty, and maximizing participation in the education of American Indian, Alaska Native and Native Hawaiian people. NIEA coordinates and cooperates with tribal and other organizations to provide future directions, increased communication, and

effective leadership in education, cultural, social, and economic development for American Indians, Alaska Natives and Native Hawaiians

The National Indian Gaming Association (NIGA) is an inter-tribal association of 184 federally recognized Indian Tribes united with the mission of protecting and preserving tribal sovereignty and the ability of Tribes to attain economic self-sufficiency through gaming and other forms of economic development. The common commitment and purpose of NIGA is to advance the lives of Indian peoples economically, socially, and politically. The member tribes of NIGA have treaty protected lands and resources, some of which are impacted specifically by this lawsuit, and others who will be generally effected by the results of this lawsuit.

The Tribal Alliance of Sovereign Indian Nations (TASIN) is an intergovernmental association of nine federally recognized tribal governments throughout Southern California. TASIN's mission is to protect and promote the tribal sovereign government rights, the cultural identity and interests of federally recognized tribes within the Federal Central Judicial District within the State of California.

The United South and Eastern Tribes Sovereignty Protection Fund, Inc. (USET SPF) is a non-profit, inter-tribal organization representing 26 federally recognized Tribal Nations from Texas to Florida and up to Maine. USET SPF is dedicated to enhancing the development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people.

The United Tribes of Michigan (UTM) is made up of the 12 federally recognized tribes in Michigan. Its mission includes working to advance, protect, preserve and enhance the mutual interests, treaty rights, sovereignty, and cultural way of life of the Sovereign Indian Tribes of Michigan. In fulfilling this mission UTM engages, as a matter of mutual concern, issues that impact the health, security, safety, and general welfare of Native Americans. Honoring our ancestors and sacred sites, along with the respect for and protection of our waters and natural resources is a fundamental tenet of our collective cultural beliefs To this end UTM adopted a resolution supporting the Standing Rock Tribe in its struggle to protect its cultural and natural resources.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. ACLU National Policy 313 "supports the rights of Native American peoples to (1) A tribal land base and appurtenant natural resources, . . . and (4) Enforcement of the commitments made to them by the United States in treaties, compacts, and by other governmental actions." The ACLU therefore has an organizational interest in the outcome of this case.



The Fred T. Korematsu Center for Law and Equality (“Korematsu Center”) is a non-profit organization based at the Seattle University School of Law. The Korematsu Center works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of 110,000 Japanese Americans, the Korematsu Center works to advance social justice for all. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University. Our interest in joining is to show to the court that non-Indian civil rights organizations see this as an important issue and that we agree that the court needs to consider the historical context and the relationship between the tribes and the federal government and that this action is yet another example of a breach of the trust relationship prompted, most immediately, by a new executive who reversed course without allowing for full consideration of the impact on the tribes, its resources, and its land. The Korematsu Center has a special interest in ensuring that executive action not be done arbitrarily and capriciously.