IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COLUMBIA

STANDING ROCK SIOUX TRIBE; Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant.	Case No. 1:16-cv-1534-JEB

BRIEF OF *AMICI CURIAE* GREAT PLAINS TRIBAL CHAIRMEN'S ASSOCIATION, NATIONAL CONGRESS OF AMERICAN INDIANS, AND 18 FEDERALLY RECOGNIZED INDIAN TRIBES AND TRIBAL ORGANIZATIONS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

INTRODUCTION 2

ARGUMENT 2

I. FAILING TO VACATE WOULD VITIATE THE FEDERAL GOVERNMENT'S OBLIGATION TO PROTECT THE TRIBES' RESOURCES, REDUCE TRIBAL TREATY RIGHTS TO MERE PAPER PROMISES, AND THREATEN THE TRIBES' INVALUABLE RESOURCES WITH DEVASTATION 2

II. FAILING TO VACATE WOULD BE AN AFFRONT TO ENVIRONMENTAL JUSTICE BY CONTINUING THE HISTORIC SHIFTING OF BURDENS TO INDIAN TRIBES 5

III. VACATUR WOULD NOT RESULT IN THE DISRUPTION CONTEMPLATED BY THE *ALLIED-SIGNAL* STANDARD 9

IV. CONCLUSION 10

CORPORATE DISCLOSURE STATEMENT

Pursuant to LCvR 7(o) and Fed. R. App. P. 29(a)(4), *Amici Curiae* makes the following disclosure:

(1)For non-governmental corporate parties please list all parent corporations: None.

(2)For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

(3)If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: Counsel for *Amici* is aware of no such corporation.

/s/ Matthew Lee Campbell Dated: August 7, 2017

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TABLE OF AUTHORITIES

CASES **Page(s)**

Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1269 (9th Cir. 2017) 4

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Comcast Corp. v. F.C.C., 579 F.3d 1 (D.C. Cir. 2009) 9

Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 5

Fox Television Stations, Inc. v. F.C.C., 280 F.3d 1027 (D.C. Cir. 2002) 9

Friends of the Capital Crescent Trail v. Fed. Transit Admin., 218 F. Supp. 3d 53 (D.D.C. 2016) 10

Humane Soc'y of U.S. v. Johanns, 520 F. Supp. 2d 8 (D.D.C. 2007) 2

Humane Soc'y of U.S. v. Locke, 626 F.3d 1040 (9th Cir. 2010) 2

Humane Soc'y of U.S. v. Zinke, No. 15-5041, 2017 WL 3254932 (D.C. Cir. Aug. 1, 2017) 2

Int'l Union, UMW v. FMSHA, 920 F.2d 960 (D.C. Cir. 1990) 2, 3

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) 5

United States v. Washington, No. 13-35474, 2017 WL 2193387 (9th Cir. May 19, 2017) 10

Winters v. United States, 207 U.S. 564 (1908) 5

STATUTES, REGULATIONS, & RULES

Government-to-Government Relations with Native American Tribal Governments, 59

Fed. Reg. 22,951 (Apr. 29, 1994) 4

Treaty of Fort Laramie with the Sioux, Etc., 1851, 11 Stat. 749 (1851) 4

Treaty of Fort Laramie with the Sioux, 15 Stat. 635 (1868).....4

Fed. R. App. P. 29(4) 1

Fed. R. App. P. 29(a)(4).....iii

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Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. Rev. 278 (2005).....5

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U.S. Dep't Interior, Treaty and Environmental Statutory Implications of the Dakota Access Pipeline, Solicitor Op. Mem., M-37038 (2016) 3, 5

U.S. Dep't Interior, Withdrawal of M-37038, "Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline," Solicitor Op. Mem., M-37047 (2017).....3

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INTEREST OF *AMICI CURIAE*[1]

The Great Plains Tribal Chairmen's Association ("GPTCA"), National Congress of American Indians ("NCAI"), and 18 federally recognized Tribes and Tribal organizations[2] submit this *Amici Curiae* brief in support of the Standing Rock Sioux Tribe and Cheyenne River Sioux Tribes' (hereinafter "Tribes") Brief Regarding Remedy. The GPTCA is comprised of the sixteen federally recognized Indian tribes[3] located in the states of North Dakota, South Dakota, and Nebraska. Its primary purpose is to defend the member Tribes' inherent rights, to promote the welfare of the People, and to protect the sovereignty of each Tribe. NCAI includes more than 250 member Tribes and is the oldest and largest national organization representing Tribal governments. Its mission is to protect the rights of Tribes and to improve the welfare of Indians. The 18 named Tribal governments and organizations represent a diverse cross-section of Tribes throughout Indian country. *Amici* share an interest in maintaining the federal government's duty to protect Tribes and the natural resources necessary to sustain Tribes. *Amici* offer critical context regarding the grave consequences of disregarding Tribal treaty rights. The U.S. Army Corps of Engineers ("Corps") takes no position on the filing of this brief until it has an opportunity to review the brief, and no other party is opposed to the filing of this brief.

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[1] No party's counsel authored this brief, in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to preparation or submission of this brief. *See* LCvR 7(o); Fed. R. App. P. 29(4).

[2] Appendix A lists all *Amici Curiae*.

[3] The member tribes are: Three Affiliated Tribes of the Fort Berthold Reservation, Spirit Lake Sioux Tribe, Standing Rock Sioux Tribe, Turtle Mountain Band of Chippewa Indians, Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, Lower Brule Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Yankton Sioux Tribe, Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, Flandreau Santee Sioux Tribe of South Dakota, Omaha Tribe of Nebraska, Santee Sioux Nation, Ponca Tribe of Nebraska, and Winnebago Tribe of Nebraska.

INTRODUCTION

After ruling in favor of the Tribes, this Court requested additional briefing on whether to vacate and remand. When a matter is remanded to an agency for further consideration, "[t]he decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (quoting *Int'l Union, UMW v. FMSHA*, 920 F.2d 960, 967 (D.C. Cir. 1990)). "Pursuant to the case law in this circuit, vacating a rule or action promulgated in violation of NEPA is the standard remedy." *Humane Soc'y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) (collecting cases); *see also Humane Soc'y of U.S. v. Zinke*, No. 15-5041, 2017 WL 3254932, at *22 (D.C. Cir. Aug. 1, 2017) (noting vacatur is "[a] common remedy"). Only in "rare circumstances" is there a remand without vacatur. *See Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1053, n.7 (9th Cir. 2010).

This case does not present the "rare circumstances" counseling against vacatur. This Court identified several serious deficiencies in the Environmental Assessment ("EA"). First, the EA failed to consider the impact of an oil spill on the Tribes' treaty fishing and hunting rights. Doc. 239 at 42-43.[4] Second, the EA "did not properly consider the environmental-justice implications of the project[.]" Doc. 239 at 54. Finally, any disruption caused by vacatur is of neither the kind nor the caliber to warrant the unusual remedy of remand without vacatur. As a result, this Court should vacate the Corps decision.

ARGUMENT

I. FAILING TO VACATE WOULD VITIATE THE FEDERAL GOVERNMENT'S OBLIGATION TO PROTECT THE TRIBES' RESOURCES, REDUCE TRIBAL TREATY RIGHTS TO MERE PAPER PROMISES, AND THREATEN THE TRIBES' INVALUABLE RESOURCES WITH DEVASTATION.

[4] When citing court documents, we are citing to the ECF page number.

Generally, the purpose of the first factor – the seriousness of the order's deficiency – is to determine whether the agency chose correctly. *See Allied-Signal*, 988 F.2d at 150. This Court concluded that, despite the Tribes having raised concerns about the impact of an oil spill on fish and game, the EA failed to even acknowledge (much less adequately consider) the impact of such a spill. Doc. 239 at 40-43. This failure is a serious deficiency that creates genuine doubt as to whether the Corps chose correctly and, therefore, warrants vacatur.[5]

Failing to consider the extent of harm to treaty rights essential to the Tribes' way of life and to their permanent homelands shows the seriousness of the order's deficiencies and dictates the standard remedy of vacatur should apply here. *See Int'l Union*, 920 F.2d at 967. Given the catastrophic consequences of an oil spill, it is not sufficient for the Corps to merely say that the risk of a spill is low. A spill could devastate the fish population, unilaterally curbing the Tribes' treaty right, resulting in a breach of the federal government's obligation to the Tribes. Notably, the Solicitor of the Interior specifically urged such an analysis. U.S. Dep't Interior, Treaty and Environmental Statutory Implications of the Dakota Access Pipeline, Solicitor Op. Mem., M-37038, 28-30 (2016) [hereinafter "Solicitor Opinion M-37038"].[6] As this Court noted, this suggestion was ignored and no such analysis was conducted. *See* Doc. 239 at 59.

A fundamental role of Indian treaties is to memorialize the federal government's duty of protection vis-à-vis Indian tribes. Numerous Indian treaties, including relevant treaties with the

[5] We also agree with Standing Rock and Cheyenne River that the seriousness of the Corps' deficiencies here warrants vacatur. *See* Standing Rock and Cheyenne River Remedy Brief at 17-24.

[6] Earlier this year, the Acting Solicitor formally withdrew this opinion. U.S. Dep't Interior, Withdrawal of M-37038, "Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline," Solicitor Op. Mem., M-37047 (2017). In doing so, however, the Acting Solicitor did not disavow the reasoning of the withdrawn M-Opinion, but rather merely concluded that, since the Corps already made its decision, M-37038 was no longer necessary. *Id.* at 2.

Great Sioux Nation, contain language bringing a tribe under the "protection" of the United States. Matthew L.M. Fletcher, *Federal Indian Law* § 5.2 (2016); *see, e.g.*, Treaty of Fort Laramie with the Sioux, Etc., 1851, 11 Stat. 749, art. 3 (1851) ("In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty."). This duty of protection includes a duty to protect Tribal land and natural resources. Fletcher, *supra*, at § 5.2; *see also*, *Frequently Asked Questions*, Bureau of Indian Affairs, https://www.bia.gov/FAQs/ (last updated Aug. 2, 2017). This is achieved by, among other things, operating on a government-to-government basis with federally recognized Tribes; consulting with Tribes in an open and candid manner prior to taking actions that affect Tribes, their people, and resources; assessing the impact of Federal government plans, projects, programs, and activities on Tribal trust resources; and assuring that Tribal rights and concerns are considered during the development of such plans, projects, programs, and activities. Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994). In its own policies, the Department of Defense recognizes that its "trust duty includes a substantive duty to protect [Indian] lands and treaty rights 'to the fullest extent possible.'" U.S. Dep't of Defense, American Indian and Alaska Native Policy, at 3 (1998).

The land and hunting and fishing rights were reserved by the Great Sioux Nation as essential to their way of life – to be a permanent homeland. *See* Treaty of Fort Laramie with the Sioux, 15 Stat. 635, art. 2 (1868) (land is set apart for the "absolute and undisturbed use and occupation" of the Tribes); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1269 (9th Cir. 2017) (quoting *Winters v. United States*, 207 U.S. 564, 565

(1908)) (describing that the reservation was established as a "permanent home" for several tribes); *cf. Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968) ("The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing."); Solicitor Opinion M-37038 at 30. The Tribes and their members cannot just pick up and walk away.

Remanding without vacatur would allow the Corps to disregard its obligations entirely. It would signal to federal agencies that they can ignore Tribal treaty rights and federal trust obligations in approving projects and later simply invoke the rejoinder of "disruptive consequences" to absolve itself. This is not how great nations keep their word. *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word.").

Finally, agencies often do not give remand-only decisions high priority. Consequently, failing to vacate may delay action for lengthy periods, which would undermine the federal government's obligation to protect Tribal treaty resources before final decisions are made. *See, e.g.*, Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. Rev. 278, 302-305 (2005) (analyzing cases where agencies did not prioritize remand when there was no vacatur).

II. FAILING TO VACATE WOULD BE AN AFFRONT TO ENVIRONMENTAL JUSTICE BY CONTINUING THE HISTORIC SHIFTING OF BURDENS TO INDIAN TRIBES.

This Court also found that the EA failed to adequately address the environmental justice concerns raised by the project. Doc. 239 at 47-55. Such a failure necessarily creates "doubt whether the agency chose correctly," *Allied-Signal*, 988 F.2d at 150 (internal citations omitted), and continues the historic pattern of forcing poor and minority communities generally – and Indian tribes in particular – to bear the costs of infrastructure projects.

The Corps and the Dakota Access Pipeline ("DAPL") now assert the risk of devastating consequences of an oil spill should be borne by the Tribes because the monetary and other costs to shut down operations is just too great. *See generally* Doc. 258, 260; *see also* Doc. 259. Shifting costs, risks, and burdens onto the Tribes while others profit is a familiar and repugnant pattern. Time and again, Tribes have been promised that natural resources development and infrastructure projects would not harm them, only to suffer devastating consequences.

An earlier amicus brief filed by the GPTCA detailed devastating socio-economic effects suffered by Tribes of the Great Plains when the non-Indian thirst for land and resources – particularly gold extraction (Black Hills) and dam building (Pick-Sloan) – was quenched while Tribal rights were ignored. Doc. 109-1 at 12-14, 15-22. Even a glancing examination reveals how common this experience is throughout Indian Country. *See generally* National Congress of American Indians, *NCAI Comments on Tribal Trust Compliance and Federal Infrastructure Decision-Making* 4 (2016), https://www.bia.gov/cs/groups/xraca/documents/document/idc2-055647.pdf. A recent example is the August 5, 2015, Gold King Mine spill of at least three million gallons of acidic, mine-impacted waters. This toxic waste was first released into the Animas River in Colorado and then naturally made its way into the San Juan River, which runs through hundreds of miles of Navajo Nation land. This spill directly originated from a collapsed mine structure abandoned after it was no longer economically viable. Today the Animas River system is one of many systems where hundreds of old and abandoned mines leak throughout the region. *See* EPA, EPA/600/R-16/296, *Analysis of the Transport and Fate of Metals Released from the Gold King Mind in the Animas and San Juan Rivers* (2017); Maeve Reston, *First on CNN: Navajo Nation Sues EPA Over Toxic Mine Spill*, CNN Politics (Aug. 17, 2016), http://www.cnn.com/2016/08/16/politics/navajo-lawsuit-epa-animas-river/index.html. "In the

immediate aftermath of the Gold King Mine spill, one water sample showed that the level of lead in the Animas River was 12,000 times higher than normal." *Id*. "The river was also contaminated with high levels of arsenic, beryllium, cadmium, and mercury." *Id*. Among other economic and spiritual impacts, "[t]he health concerns [from the spill] have made it more difficult for Navajo farmers to sell their produce" and have irreparably harmed Navajo spiritual beliefs because they "harvest minerals from the banks of the river for use in religious ceremonies." *Id*.

There are numerous other examples of Indian tribes being burdened by infrastructure development that benefits others. Like the flooding from the Pick-Sloan project, in the 1960s the Corps also forced more than 600 Seneca families from 10,000 acres of ancestral land along "Ohi:yo," the Allegany River. *See NCAI Comments* at 4; Seneca Nation, *Seneca Nation Starts 50th Anniversary of Kinzua Dam Removal Today*, Indian Country Today (May 10, 2014), https://indiancountrymedianetwork.com/news/native-news/seneca-nation-starts-50th-anniversary-of-kinzua-dam-removal-today/. That dam demolished nearly one third of the Seneca territory, including much of its fertile farmland. *Id*. In Minnesota, the Corps flooded the Prairie Island Indian Community's reservation, including burial mounds and sacred sites, which threatened on-reservation economic development projects and decreased the amount of reservation land available for tribal housing and other governmental services. *NCAI Comments* at 4; *Tribes: Prairie Island*, Indian Affairs Council – State of Minnesota, https://mn.gov/indianaffairs/tribes_prairieisland.html (last visited Aug. 7, 2017). Dams built between the 1930s and the 1970s on the Columbia River in the Pacific Northwest devastated citizens of the Nez Perce, Umatilla, Warm Springs, and Yakama Tribes, displacing families, destroying communities, and upending tribal economies. *Id.* at 4-5 (also discussing 2011 flooding of Omaha Tribe of Nebraska by the Corps).

Native communities have also shouldered a heavy cost imposed by other inexpensive energy development. For example, from the 1940s-80s, 4 million tons of uranium ore was mined from Navajo lands. U.S. Gov't Accountability Office, GAO-14-323, Uranium Contamination: Overall Scope, Time Frame, and Cost Information Is Needed For Contamination Cleanup on the Navajo Nation 1 (2014). Even 30 years later, Navajos continue to live with the environmental and health effects from mining operations. *Id*. At Navajo, more than 500 abandoned mines are on the reservation, some close to homes and communities, and an unknown number of homes and drinking water sources contain radioactive elements. *Id*.; *see also* Order, In the matter of Power Tech USA, Inc., ASLBP No. 40-9075-MLA (May 20, 2014) (detailing uranium mining in the Black Hills, South Dakota, near the Oglala Sioux Tribe); Roger Clark, *Why Ban Grand Canyon Uranium Mining?*, Grand Canyon Trust (May 16, 2017), http://www.grandcanyontrust.org/blog/why-ban-grand-canyon-uranium-mining (detailing uranium mining in Grand Canyon near Havasupai Tribe).

Like the disastrous consequences suffered by other tribes, the magnitude of the harm the Tribes could suffer here is tremendous. No one disputes that DAPL could be discharging 5,700 barrels, or 239,400 gallons, of crude oil per day right now under Lake Oahe without being detected by DAPL's remote leak detection system. *See* Doc. 117-1 at 20; Doc. 131 at 45; Doc. 131-5 at 156, 161; Doc. 159-1 at 79, 297, 396; Doc. 185 at 11; Doc. 195 at 19; Doc. 201 at 11; Doc. 203 at 16; Doc. 207 at 11; Doc. 214 at 5-6; Doc. 239 at 28. Such a leak, one percent of DAPL's daily capacity, could devastate the Tribes' treaty resources as well as the ecosystem on which many of those resources rely. The National Congress of American Indians, referencing a State of Michigan Petroleum Pipeline Task Force report, detailed several significant oil pipeline incidents in recent years that further highlight these risks. *See* Doc. 130-2 at 20-21. The Tribes

should not have to bear these risky consequences while the Corps initiates an analysis it should have conducted in the first instance.

Even a small spill would cause tremendous harm to tribal natural resources – resources the government has a duty to protect. Ultimately, one fundamental role of treaties is to protect the rights of Tribal governments in land, natural resources, and subsistence rights (such as hunting and fishing). Exposing those treaty resources to harm exposes people and cultures to harm. When federal agencies fail to protect Tribal rights, it is incumbent on the courts to step in and protect them. Having concluded that the Corps has disregarded its duty to Tribes here, this Court should impose the "standard remedy" of vacatur to ensure that Tribal treaty rights are protected.

III. VACATUR WOULD NOT RESULT IN THE DISRUPTION CONTEMPLATED BY THE *ALLIED-SIGNAL* STANDARD

The proper focus of the second factor is not disruption generally, but rather "whether vacatur is likely to be unduly disruptive of the agency's regulatory program." *Comcast Corp. v. F.C.C.*, 579 F.3d 1, 9 (D.C. Cir. 2009); *see also Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, 1049 (D.C. Cir. 2002) (second *Allied-Signal* factor looks to "disruption of the agency's regulatory program"). In *Allied-Signal*, the concern was that vacatur would require the agency to refund certain fees while still continuing to regulate, without any guarantee that fees could be recovered by any other mechanism. 988 F.2d at 151. Here, there is no similar concern; vacatur of the Corps' action does not impede the Corps from fully considering those issues it should have considered in the first instance, and if the Corps reaches the same conclusion in the second go-round, the vacatur does not impede the Corps from proceeding with its reconsidered decision.

DAPL complains that it will be costly to shut down the flow of oil while the Corps analyzes the oil spill consequences on the Tribes' treaty-protected rights. This is not an unusual

argument in Indian treaty cases. Most courts see it for what it is: profiting at the expense of Indians. Many cases involving tribal treaty rights similarly require costly outlays to remedy interference with tribal treaty rights. *See, e.g.*, *United States v. Washington*, No. 13-35474, 2017 WL 2193387 (9th Cir. May 19, 2017) (denying en banc review of district court's remedy for violation of treaty rights by State where the State projected remediation would cost $1.88 billion). The solution is clear and simple: do not interfere with or imperil Tribal treaty rights in the first instance. Give treaty rights due consideration and analysis and develop mitigation measures where necessary. Engage in Tribal consultation early in the planning process, so that there is a clear understanding of an Indian tribe's rights, interests, and concerns. Looked at in this light, "stop, look, and listen" statutes such as NEPA and the National Historic Preservation Act, as well as tribal consultation procedures, protect the interests of *all* parties.

This District has considered similar concerns regarding costs to third parties before. In *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, the court was presented with "a major infrastructure project involving complex contractual relationships and intricate construction schedules." 218 F. Supp. 3d 53, 60 (D.D.C. 2016). The court acknowledged that the delay caused by vacatur of the agency's action "could impose significant financial costs and logistical difficulties on the public and private entities involved in its construction[.]" *Id.* The court refused to consider such consequences in a vacuum, however, and instead weighed them against "the disruptive consequences of allowing [the project] to proceed without the necessary NEPA analysis," when that NEPA analysis might result in significant changes to the project. *Id.* Ultimately, the court concluded that "[v]acatur ensures that the project will proceed only with the benefit of a fully fleshed out consideration of the issues required by NEPA." *Id.*

IV. CONCLUSION

Based on the foregoing, *Amici* urge this Court to vacate the Corps decision.

Respectfully submitted,

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APPENDIX A

List of *Amici Curiae* Tribes and Organizations

Federally-Recognized Indian Tribes

Assiniboine and Gros Ventre Tribes of the Fort Belknap Indian Community

Confederated Tribes and Bands of the Yakama Nation

Confederated Tribes of the Umatilla Indian Reservation

Houlton Band of Maliseet Indians

Jamestown S'Klallam Tribe

Kaibab Band of Paiute Indians

Navajo Nation

Northern Cheyenne Tribe

Paiute Indian Tribe of Utah

Ponca Tribe of Nebraska

Rincon Band of Luiseno Indians

San Carlos Apache Tribe

Sokaogon Chippewa Community – Mole Lake Band of Lake Superior Chippewa Indians

Winnebago Tribe of Nebraska

Tribal Organizations

Columbia River Inter-Tribal Fish Commission

Great Plains Tribal Chairmen's Association, Inc.

Inter Tribal Council of Arizona, Inc.

National Congress of American Indians