IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Plaintiff-Intervenor,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant-Cross Defendant,

and

DAKOTA ACCESS, LLC,

Defendant-Intervenor-Cross Claimant.

Case No. 1:16-cv-1534-JEB
(and Consolidated Case Nos. 16-cv-1796 and 17-cv-267)

MOTION FOR CLARIFICATION RE REMAND PROCESS AND REMAND CONDITIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Federal Regulations

INTRODUCTION

Plaintiff Standing Rock Sioux Tribe respectfully moves for clarification of the Court's June 14 remand order (ECF 238) and its Dec. 4, 2017 order imposing conditions on operations during remand (ECF 304). The Tribe brings this motion only after months of working in good faith with defendant U.S. Army Corps of Engineers ("Corps") seeking a lawful and transparent remand process, and only after it has become clear that the remand conditions are not being implemented as intended. The situation requires direction from the Court prior to the conclusion of the remand, currently anticipated on or around April 2, 2018.

The Tribe seeks limited and particularized relief. First, the Tribe seeks an order directing the Corps to provide the Tribe with technical information it has requested relative to the remand, so that the Tribe has a reasonable opportunity to participate meaningfully prior to the completion of the remand. Further, the Corps should follow government-to-government consultation protocol in this process, as its own policies require. This relief will require postponing the April 2nd anticipated date for completion of the remand process. Second, with respect to the interim remand conditions, the Tribe requests an order directing the Corps to provide information necessary to the Tribe to participate in oil spill response planning, and an order directing relief as to the independent third-party audit, discussed further below. The Tribe anticipates that these clarifications will also necessitate postponement of the deadlines contained in this Court's Dec. 4, 2017 Order.

FACTUAL BACKGROUND

A. The Remand Process

In June of last year, this Court found that the Corps' National Environmental Policy Act ("NEPA") review for the Lake Oahe crossing of the pipeline was flawed in three "significant" respects. ECF 239. The three topics on which the Court found the Corps fell short were all

issues within the special expertise of the Tribe: the input of its technical experts; the impact of an oil spill on Treaty rights; and the environmental justice implications of siting the pipeline at the Tribe's doorstep. In a contemporaneous order, this Court remanded the challenged permits back to the Corps "for further analysis." ECF 238. The Court subsequently declined to vacate the permit during the remand process, but admonished the Corps not to treat the process as a "bureaucratic formality." ECF 284 ("the Court expects the Corps not to treat remand as an exercise in filling out the proper paperwork *post hoc*"). The Corps has estimated that the remand process will be complete by April 2 of this year. ECF 326.

The Tribe has engaged fully and in good faith with the remand process. It has retained a full team of technical experts which has met regularly throughout the remand period, at considerable cost to the Tribe. The Tribe recently submitted an extensive package of technical, legal, and cultural materials for the Corps to consider during the remand. It has communicated regularly and clearly with the Corps from the start of the process, particularly with respect to its need for additional information and appropriate consultation. However, the correspondence has been overwhelmingly one-sided, with the Corps consistently ignoring the requests of the Tribe for information and meaningful consultation. The Tribe's participation in the remand has been correspondingly handicapped.

A few weeks after this Court's summary judgment decision, former Chairman Archambault wrote the Corps seeking an open and transparent process that respected the Tribe's special expertise on the issues in the remand:

> The proper path forward for the Corps is an open and transparent process that provides concrete and timely opportunity for participation by the Tribes and others. We urge the Corps not to handle the remand as a ministerial action to be taken behind closed doors. Such an approach would be an empty gesture that would again fall short of the requirements of law. No good purpose is served by failing to obtain from the best source – the Tribe – the information necessary to take the hard look that the law requires. We

> look forward to discussing this with you in more detail before any decisions are made on the process with respect to the remand.

Hasselman Decl., Ex. 1 at 2. The letter also went into considerable detail on the need to involve the Tribe and its experts on addressing oil spill risk. *Id*. at 5 ("Having relied on DAPL to no avail once on those critical issues, the Corps must not make the same mistake again. Instead, the Corps should open up the process and allow the Tribe and its experts, along with independent third party experts, to provide the Corps with the necessary information to properly address oil spill risk.") Chairman Archambault invited the Corps leadership to visit the Reservation to begin a dialogue on these important issues.

The Corps ignored this letter. Instead, in a *pro forma* letter sent to multiple Tribes many months later, on September 25, 2017, the Corps requested a specific and limited set of information (such as number of hunting and fishing licenses), and requested a response within 30 days. Ex. 2. None of the topics addressed in the Tribe's letter—such as an open and transparent process and an opportunity to involve the Tribe's technical experts—was mentioned.

Chairman Archambault responded shortly thereafter. Ex. 3. He expressed frustration that the Corps had ignored the key issues the Tribe had previously outlined, had ignored his invitation to visit the Reservation, and had said nothing about the process or sharing of information. The letter explained how the Corps' request for information was framed far too narrowly to address the important topics of the remand. It further explained that the Tribe intended to provide the relevant information, and that the initial timeline would need to be revisited as a result.

Another six weeks passed without a response, during which time a new Chairman—Mike Faith—assumed office at Standing Rock. In a brief letter dated Nov. 27, 2017, Col. Hudson at the Corps expressed a willingness to meet with the Tribe but stated that the Tribe should submit

any materials on remand first. Ex. 4. The letter set a deadline of Dec. 20, 2017 for submission of such materials.

Chairman Faith responded shortly thereafter. Ex. 5. By that point, this Court had granted the Tribe's request for interim relief, including greater Tribal participation in spill response planning and an independent third-party audit. The Chairman's letter explained, yet again, how the remand process that the Corps was pursuing was a "narrow and cursory approach, fundamentally at odds with the actual breadth and significance of the issues implicated by the remand." *Id.* at 2. The letter also provided a detailed list of specific information that the Tribe required in order to participate meaningfully in the remand, as well as any discussions around oil spill response plans. *Id.* As the Tribe's technical experts have explained, spill response planning without a proper understanding of the risk and dynamics of a spill is not possible, and the Tribe needed specific information within the Corps' possession in order to participate.

In a follow up letter dated January 4, 2018, Chairman Faith further explained the Corps' obligation to meaningfully consult with the Tribe and why "data requests" from the Corps did not constitute consultation. Ex. 6. Responding to an email from a Corps staffer demanding submission of remand materials prior to any meeting with the Colonel, Chairman Faith explained how the Corps' approach violated its own Tribal consultation processes and served only to "dismiss and disrespect" the Tribe's concerns. Yet again, Chairman signaled a willingness to "work collaboratively with the Corps of Engineers in a government-to-government process on the remand study." *Id.* On Jan. 29, Col. Hudson simply replied that he looked forward to reviewing the Tribe's submission and "further consultation." Ex. 7.

As of the date of this filing, virtually none of the requested information has been provided by the Corps. No meaningful response to any of the Tribe's letters has ever been received. No

in-person meetings between Corps leadership and Tribal leadership have occurred. Government-to-government consultation has not even begun. The Tribe furthermore remains in the dark about the exchange of information that is occurring between DAPL and the Corps. While the Tribe has finalized its initial remand submission to the Corps, it has been forced to do so with the Corps withholding all of the key information that would provide the proper foundation for comprehensive input. Unable to resolve the situation, the Tribe is turning to this Court for additional direction.

B. The Remand Conditions

The picture with respect to the interim conditions imposed by this Court in December — spill response planning and the third party audit—is regrettably no better. The Tribe continues to operate with inadequate information as a result of the Corps' secrecy, and a deep concern that the process is being subverted to avoid a meaningful outcome.

1. Spill response planning

In its Dec. 4 Order, the Court specifically directed "the *parties*" to coordinate to finalize spill response plans affecting Tribe resources. ECF 303. The language was no accident, as the Tribe's briefing emphasized the importance of *the Corps* taking an active role in spill response planning, and its legal obligations to do so. *See* ECF 293 at 7 (outlining Corps legal obligations under 33 U.S.C. § 1321(j)(4)(B) to consult with Tribal officials in preparing spill response plans). As noted above, in his Dec. 18 letter, Chairman Faith outlined a detailed list of specific information that the Tribe required in order to participate meaningfully in spill response planning. Ex. 5. The information was developed by the Tribe's technical team, which advised the Tribe that preparation of useful spill response plans in the absence of such information was impossible. Chairman Faith's letter also highlighted the Corps' role in facilitating the process: "It is incumbent upon the Corps of Engineers to assist with facilitating a collaborative oil spill

response plan for the Missouri River, by disclosing information that is necessary for the development of this plan."

The Corps has simply ignored the Tribe.[1] It never provided any of the requested information, nor even attempted to explain why it could not. It made no meaningful effort to engage with Tribal leadership to hear their concerns about spill response. While DAPL has offered to hold meetings with the Tribe, the Tribe has made clear that it needs certain information in order to do so. The process appears to be at a stalemate.[2]

2. Third Party Audit

Also in the Dec. 4, 2017 Order, the Court granted the Tribe's request for an "independent, third party" audit to address implementation of permit conditions and "other integrity threats." The Court directed DAPL to select an auditor, "in consultation with the Tribes," and to complete an audit prior to April 1, 2018. *Id*. This process also appears to be running aground and requires clarification from this Court.

Subsequent to the Court's order, the Tribe did not hear anything further on the matter until January 11, when counsel received an email from DAPL's counsel suggesting three companies that DAPL proposed to conduct the audit. Ex. 8. After consulting with its technical team, the Tribe (via email from its counsel) responded that the three companies—all with close ties to DAPL's parent company, the project itself, or the industry generally—could not act as

[1] The day before before this motion was filed, the Tribe received a letter from the Corps and a CD containing a revised spill response plan. While this represents some minor progress, it doesn't come close to the full set of detailed information that the Tribe requested in its Dec. 18, 2017, letter.

[2] For example, an important issue for the Tribe is the possibility that culturally significant sites—many of which are located in and around the shoreline of Lake Oahe—will be harmed during an oil spill response or even by planning activities like storage of equipment. In a Feb. 28 letter, Chairman Faith highlighted these concerns, and reminded DAPL representatives that they could not enter the Reservation without permission. Ex. 9.

truly independent auditors, and proposed an alternative auditor with a record of independence. The email also expressed concern about the scope of the audit, which was to include not just compliance with Permit conditions, but also "any other integrity threats" affecting the pipeline. *Id*. ("We believe that this latter phrase involves a review of the Tribe's concerns with DAPL's risk analyses and other technical information."). The email invited a dialogue between the parties to resolve the issue. *Id*.

DAPL did not respond to the Tribe's input or invitation to further discuss the scope of the audit. The Tribe did not hear anything further on the matter until February 20, when the auditor recommended by the Tribe called several Tribal representatives expressing frustration that he had been asked to review thousands of pages in a short amount of time and submit a proposal as part of an RFP process. The Tribe's counsel again contacted DAPL's counsel to relay this information and inform them that the Tribe intended to respond to the auditor's messages to clarify the process. Ex. 10. The email to DAPL's counsel again invited a conversation around the "scope and process" of the audit. *Id*. The response received from DAPL's counsel rejected that invitation to discuss the audit, stating that the Order requiring review of "integrity threats" did not include the Tribe's concerns with DAPL's risk analysis and other technical information. *Id*. On Feb. 28, 2017, the Tribe learned that DAPL had decided against hiring the Tribe's proposed independent auditor, presumably meaning that DAPL will be going ahead with one of its proposed auditors, on a highly accelerated timeline, that the Tribe has previously deemed unacceptable.

ARGUMENT

The remand process ordered by this Court in June of last year is in jeopardy of producing a deeply flawed result that fails to address this Court's summary judgment order. Similarly, the interim conditions ordered by this Court in December are gravely off track. The Tribe

respectfully requests that this Court clarify the Corps' duties under both orders in order to ensure that the outcome of both the remand and the interim conditions is meaningful.

A. The Court Should Direct The Corps To Provide Relevant Technical Information And Engage In Meaningful Government-To-Government Consultation With The Tribe

At the most basic level, this entire case arose because the Corps failed to meaningfully engage with the Tribe, listen to its legitimate concerns about the siting of the pipeline at Oahe, and make a reasoned decision in light of that information. All of the flaws in the Corps' NEPA analysis at Oahe identified by this Court were closely tied to this failure: it didn't address the Tribe's technical input on spill risk, it didn't address the impacts of spills on Treaty-protected resources, and it mishandled the environmental justice analysis of siting the pipeline at the doorstep of one of the nation's most disadvantaged communities. Despite the Court's findings, the Corps appears to be poised to make the same mistakes again. It is approaching the remand in a narrow and formalistic manner that leaves no meaningful role for the Tribe. There has been no exchange of information. There has been no substantive meeting with Corps leadership. The Tribe has been afforded the opportunity to provide additional input, but otherwise has no role in the process. That is an approach that disregards the history of this case and the Court's directives, and it needs to be corrected.

The Tribe's expectations for the remand process are reasonable. It has asked the Corps for two things. First, it has asked that the information the Corps is developing on the remand—especially new technical information received from DAPL, such as the revised spill models—be shared with the Tribe so that the Tribe can meaningfully comment on it. Without that opportunity, the Corps is simply engaging in the bureaucratic formality of papering over its previous decisions with new information from DAPL that is not exposed to scrutiny. While the Tribe has prepared extensive technical input for consideration by the Corps, it is doing so at a

distinct disadvantage because it lacks access to the most relevant and up to date information. It makes no sense for the Tribe to be evaluating outdated spill models and other information that are no longer being used, while the Corps is considering new spill models from DAPL that the Tribe has never seen. Accordingly, the Tribe asks that this Court order the Corps to share with the Tribe all the information it has received from DAPL and other technical sources during the remand process, and provide the Tribe with an opportunity to comment on it.

The Corps will surely argue, as it has in the past, that this Court has no authority to put constraints on the remand. *See* Dec. 4 Order (ECF 304), at 4-5 (citing cases). But that is not the law. While this Court may not be able to cabin the Corps' discretion as the *substance* of its ultimate decision, it is commonplace for courts to put in place *procedural* safeguards to ensure that the remand is completed in a timely, lawful, and useful manner. *See Friends of the Earth v. Environmental Protection Agency*, 446 F.3d 140, 148 (D.C. Cir. 2006) ("district court retains some remedial discretion" over remedy during remand.). For example, in *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 937-38 (9th Cir. 2008), the Ninth Circuit upheld a detailed set of conditions imposed by the District Court on a remand process, including a requirement to produce reports in particular situations and a directive to "collaborate" with states and Tribes that were parties to the litigation:

> This collaboration requirement is justified both as a reasonable means to ensure that NMFS complies with ESA's mandate that agencies 'use the best scientific and commercial data available' in their decision-making, 16 U.S.C. § 1536(a)(2), and as a reasonable procedural restriction given the history of the litigation… We hold that on this record, requiring consultation with states and tribes constitutes a permissible procedural restriction rather than an impermissible substantive restraint.

Id. The decision confirms that "[c]ourts may, at least in some circumstances, require specific actions from an agency on remand," as long as they don't actually "direct the substance" of the process. Similarly, in *American Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 242 (D.C.

Cir. 2008), the D.C. Circuit found unlawful and remanded an agency rule, and expressly directed that the agency "afford a reasonable opportunity for public comment on the unredacted studies on which it relied in promulgating the rule." And in *Anacostia Waterkeeper v. Pruitt*, Civ. No. 09-0098 (D.D.C. Sept. 15, 2017), for example, Judge Bates of this Court recently directed the EPA to do precisely what the Tribe seeks here—provide the plaintiffs with specific data and information that is developed during the remand process.

The Tribe is not asking that this Court "constrain" the Corps' analysis, nor in any way deprive the Corps of its ability to fully reconsider its decision in light of the Court's opinion. Rather, it is asking that the Court impose some modest procedural safeguards that will ensure that the remand is conducted in a lawful and transparent manner. Accordingly, this Court is well within its authority to direct the Corps to share the relevant information it has collected from DAPL and other technical sources with the Tribe, so that the Tribe has an opportunity to comment on it. Such relief is plainly within the Court's authority. *See generally Cobell v. Norton*, 240 F.3d 1081, 1108 (D.C. Cir. 2001) ("Because the agencies involved delayed performance of their legal obligations, the court was justified in fashioning equitable relief that would ensure the vindication of plaintiffs' rights.") *citing Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.")

Second, the Tribe has asked that the Corps conduct the process pursuant to appropriate consultation protocols. The Corps' duty to do so is well established under governing law. As the Tribe has reminded the Corps several times, Executive Order 13175 explicitly requires federal agencies to "honor treaty rights" and "ensure meaningful and timely input by tribal

officials." 65 Fed. Reg. 67249 (Nov. 9, 2000); *see also* 74 Fed. Reg. 57881 (Nov. 9, 2009) (Presidential Memorandum) ("History has shown that the failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results.") Indeed, the Corps has a detailed Tribal consultation policy implementing these orders. *See* ECF 24-7. This policy reads like a laundry list of actions that have *not* happened during this remand. For example, the Corps' policy states:

> USACE recognizes the sovereign status of Tribal governments *and our obligation for pre-decisional government-to-government consultation*. *Id*. at 4 (emphasis added).[3]
>
> Consultation [is defined as]: Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect, and shared responsibility. To the extent practicable and permitted by law, consultation works towards mutual consensus *and begins at the earliest planning phases*, before decisions are made and actions are taken… *Id*. at 6 (emphasis added).
>
> Consultation will be an integral, invaluable process of USACE planning and implementation. *Id*. at 7.
>
> Requests for consultation by a Tribe to USACE *will be honored*. *Id*. at 8 (emphasis added).
>
> USACE recognizes that compliance with [statutes like NHPA and other "natural resources" laws] may not comprise the full range of consultation, nor of cultural property and resource protection. *Id*.
>
> [The Corps must:] Maintain *open lines of communication* through consultation with Tribes during the decision making process for those matters that have the potential to significantly affected protected tribal resources, tribal rights (including treaty rights) and Indian lands. *Id*. at 9 (emphasis added).
>
> [The Corps] will reach out…to involve Tribes in collaborative processes designed to ensure information exchange, consideration of disparate viewpoints before and during decision making… *Id*. at 12.

The Department of Defense also has consultation policies, which explicitly call for "meaningful consultation and communication" with Tribes, using "government-to-government" protocols and

[3] Page citations are to the PDF document at ECF 24-7.

designed to engage in "good faith" throughout the decisionmaking process. *Id*. at 19; *see also* Department of Defense Instruction 4710.02[4] (consultation should "[f]ully integrate, down to staff officers and civilian officers at the installation level, the principles and practices of meaningful consultation and communication with tribes[.]")

The Corps is violating these policies in the remand process. Indeed, there has been no consultation at all. Instead, months after the Court's remand order, the Corps first tersely requested a narrow and limited set of information that mostly ignored this Court's ruling. Then, it backtracked and agreed to review whatever the Tribe submits. But it has not ever meaningfully responded to any of the Tribe's letters, it has not provided any of the requested information, and it has set up various barriers to any meaningful in-person dialogue with Tribal leadership. This approach all but guarantees another round of conflict over the Corps' new decision, and violates its own policies with respect to Tribal consultation. Accordingly, this Court should direct the Corps to comply with its policies and legal obligations with respect to government-to-government consultation in carrying out the remand. *See Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979) (Bureau of Indian Affairs failed to conduct "meaningful consultation" since it failed to comply with its own policy of consultation, which created a "justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made"); *cf. Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("it is incumbent upon agencies to follow their own procedures").

Both requests will mean that the remand takes longer than currently anticipated. While the Tribe is frustrated that so little progress has been made since the Court's June 4, 2017,

[4] Available at http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/471002p.pdf

decision remanding the decision to the Corps, the Tribe would rather the remand be done correctly even if it takes additional time.

B. The Court Should Direct The Corps To Provide Relevant Information Regarding Spill Response Planning And Allow The Tribe To Participate In The Process.

The Tribe has explained to the Corps why it needs certain information before it can meaningfully engage in oil spill response planning. The Tribe's technical team has advised the Tribe that attempting to develop spill plans without a full understanding of potential spill events, risks, and dynamics is not a useful endeavor. Additional details on why this is so were provided in the Tribe's recent remand submission. However, the Tribe's requests for information have been stonewalled. The Tribe asks that the Court: a) direct the Corps to provide the information requested in the Tribe's Dec. 18 letter, Ex. 5; and b) direct the Corps to take a convening role, consistent with its obligations under the Oil Pollution Act, to engage with Tribal staff and technical consultants on developing oil spill response plans. That consultation will necessarily include discussion of the protection of culturally significant sites alongside the river that could be affected by an oil spill.

C. The Court Should Clarify The Scope Of And Process For The Third Party Audit.

It appears that little progress has been made on the third party audit since this Court's December 4, 2017, Order. The Tribe remains deeply concerned about the lack of independence in the process, particularly given that the auditor proposed by the Tribe has been rejected and one unacceptable to the Tribe has apparently been selected. Additionally, in any conventional audit situation, protocols and standards are worked out by the involved parties in advance. The scope of the audit needs to be defined with precision, i.e., what is the question that the audit seeks to answer? Equally important, the "rules" governing the parties' participation need to be established. For example, are there rules governing *ex parte* contacts between the auditor and

the involved parties, or do all communications with the auditor need to be transparent? What are the steps the auditor will go through to collect information, and who has rights to share information at what times? Does any party have an opportunity to review a draft and provide comments?

Without a clear scope and without clear protocols, DAPL has construed this Court's Dec. 4 order to leave it entirely in charge of determining the question to be answered by the audit, and to allow it to engage freely engage with the auditor while shutting the Tribe out of the process. There are no safeguards to protect against an unfair process or to assure that any adverse findings find the light of day. The result of this could well be an audit that is not just useless for its intended purpose—to provide an independent review on whether the pipeline is as safe as DAPL claims—but one that misleads the Court and the public, in a manner that could harm the Tribe's interests.

Accordingly, the Tribe asks that this Court provide additional clarification regarding the third party audit. The Tribe's requested relief falls into three categories: selection of auditor; scope of audit; and protocols for conducting the audit.

Selection of auditor: The Court's December 4 Order states that an auditor must be selected "in consultation with" the Tribes. DAPL appears to believe that this directive allows it to seek "input" from the Tribe, and then make a selection on whatever criteria it alone deems relevant. Indeed, it appears that DAPL is moving ahead with an auditor that the Tribe has declared to be unacceptable due to conflicts of interest. Accordingly, the Tribe seeks a clarification of the Order that an auditor must be jointly selected by the Tribe and DAPL, *i.e.*, both parties must agree.

Scope of audit: The Pipeline and Hazardous Materials Safety Administration recommended an audit of compliance with Permit conditions, "and other integrity threats." To the Tribe, this language provides for an independent review of the Corps' claims that the risks of spills are low and the impacts insignificant. DAPL does not agree. Ex. 8. An audit that is limited to determining whether DAPL is "in compliance" with its permit would constitute a "check the box" exercise that contains no useful information.

Accordingly, the Tribe seeks clarification as to the scope of the audit to include an audit of the pipeline's physical integrity and safety management system, using well-established industry "best practices." For example, the American Petroleum Institute ("API"), the oil industry trade association, has established various pipeline construction and safety management protocols. For example, API-RP-1173 is a set of recommendations for pipeline safety management systems. API-RP-1174 addresses industry best practices for oil spill response planning. API RP 1175 addresses pipeline leak detection programs. The Tribe proposes that the Court clarify its order to state that the scope of the audit should include a review of DAPL's compliance with these established industry standards, within the physical scope of the pipeline where it could affect Tribal resources at Oahe.

Protocols: In the absence of agreed protocols on the process for conducting the audit, the audit will lack transparency and DAPL will be able to shape both the process and the outcome. In other audit situations, the parties reach consensus on protocols to govern the process of the audit, and standards for communicating with the auditor. The Tribe asks that the Court direct DAPL and the Tribe to develop a joint protocol for conducting the audit, and submit it to the Court within 30 days.

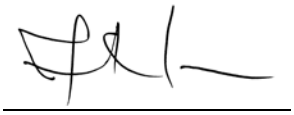
Alternatively, the Court could appoint its own technical expert under F.R.E. 706 to assist in selecting an auditor and defining audit protocols and scope. There is ample precedent for using court appointed experts in such cases. *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014) ("we can see no reasonable objection to the use of experts to explain the highly technical material in" environmental case); *Aiello v. Town of Brookhaven*, 149 F.Supp.2d 11, 15 (E.D.N.Y. 2001) (using Court-appointed expert in citizen Clean Water Act lawsuit). Such an approach has potential advantages, particularly given the challenges of negotiating mutually agreeable outcomes in an adversarial environment.

CONCLUSION

For the foregoing reasons, the Tribe respectfully asks that this Court grant its motion to clarify this Court's June 5 and Dec. 4, 2017 Orders as proposed herein.

Dated: This 2nd day of March, 2018.

Respectfully submitted,



Patti A. Goldman, DCB # 398565
Jan E. Hasselman, WSBA # 29107 *Pro Hac Vice*
Stephanie Tsosie, WSBA # 49840 *Pro Hac Vice*
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Telephone: (206) 343-7340
pgoldman@earthjustice.org
jhasselman@earthjustice.org
stsosie@earthjustice.org

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Jan E. Hasselman
Jan E. Hasselman