RED LAKE BAND OF CHIPPEWA INDIANS

FAX/SCANNER TRANSMITTAL SHEET

LEGAL DEPARTMENT
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NUMBER OF PAGES: 18 (includes cover page)

DATE: 12/2/16

TO: Office of Assistant Secretary Indian Affairs

FROM: Charles Dotson

COMPANY: _____

FAXED BY: _____

FAX NO.: _____

☐ Urgent ☐ Please Comment

E-MAIL ADDRESS: Consultation@bia.gov

☒ For Review ☐ As Requested

Cc: _____

☐ Please Call upon Receipt

RE: Tribal Consultation Comments

COMMENTS: ATTN: Office Regulatory Affairs + Collaboration Action

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RED LAKE BAND
of CHIPPEWA INDIANS
RED LAKE NATION HEADQUARTERS

PO Box 550, Red Lake, MN 56671 Phone 218-679-3341 • Fax 218-679-3378

December 2, 2016

Office of the Assistant Secretary-Indian Affairs
Attn.: Office of Regulatory Affairs & Collaborative Action
1849 C Street, NW, MS 3071
Washington, DC 20240

RE: Comments on Tribal Consultation for Army Corp of Engineers

Dear Assistant Secretary:

Enclosed please find comments respectfully submitted on behalf of the Red Lake Band of Chippewa Indians concerning Tribal Consultation for the Army Corp of Engineers (ACE). In a duly convened Special Meeting, the Tribal Council passed the attached Resolution stating our concerns and needs for robust consultation with ACE to protect our tribal cultural and natural resources.

Please contract Darrell G. Seki, Sr, Chairman at 218-679-3341 or myself, Charles Dolson, Executive Administrator at 218-679-1402 to discuss our comments and requests.

Very truly yours,

Charles Dolson

C: file
Attachment

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of CHIPPEWA INDIANS
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PO Box 550, Red Lake, MN 56671 Phone 218-679-3341 · Fax 218-679-3378

RESOLUTION NO. 257-16

Upon a motion by Treasurer Johnson and second by Representative Reynolds, the following was enacted:

WHEREAS, the Red Lake Tribal Council is the governing body of the Red Lake Band of Chippewa Indians, a federally recognized Indian Tribe; and

WHEREAS, pursuant to the Constitution and Bylaws of the Red Lake Band the Red Lake Tribal Council is entrusted with the responsibility to protect the human and natural environment throughout the diminished Reservation and the ceded territories; and

WHEREAS, chief among the Tribal Council's responsibility is the protection of water, which sustains all life, and the protection of clean water is our sacred responsibility as Anishinabe people; and

WHEREAS, manoomin, or wild rice, is also sacred to Anishinabe people, and because all waters are interconnected, even subtle changes in water quality or levels can profoundly harm the health of manoomin, which is a trust resource with federal protections; and

WHEREAS, private companies, including Enbridge are proposing and planning multiple oil and gas pipeline and other large infrastructure projects that would cross lands and waters where Tribal members gather wild rice and other natural resources, and where Tribal cultural resources are located; and

WHEREAS, construction of such large infrastructure poses a threat to waters, natural resources and cultural resources from disturbance during construction and permanent destruction by project activities; and

WHEREAS, oil pipelines in particular pose a unique threat to the Red Lake Nation where those pipelines cross over, under or through waters, wetlands and ecosystems on which tribal members depend for wild rice, fish, game, and other culturally-important natural resources; and

WHEREAS, impacts to natural and cultural resources from large-diameter pipeline construction include streambank degradation, increased sedimentation of waters, long-term wetland disruption, and destruction of fish and wildlife habitat corridors through permanent vegetation removal; and

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WHEREAS, wild rice is particularly sensitive to changes in water levels, water quality, increased sedimentation, and pollutants; and

WHEREAS, pipeline proponents deliberately select new pipeline routes with the intent of avoiding all possible environmental review of pipeline projects; and

WHEREAS, as a result, routes for pipelines and other large infrastructure projects frequently avoid passing through Indian reservations and Tribal trust lands but still pass through treaty-ceded territories and tribal aboriginal lands where Tribal members hunt, fish, and gather, and where Tribal cultural resources are located; and

WHEREAS, Enbridge's proposed Line 3 Replacement Project will, if constructed, carry Canadian tar sands oil through a 36-inch diameter pipeline through pristine wild rice lakes, waters, rivers and interconnected aquifers located in the Red Lake Nation's ceded territory, as well as the headwaters of the Mississippi and two other major North American watersheds;

WHEREAS, many of those wild rice waters, rivers, lakes and aquifers are interconnected downstream and upstream with ecosystems which are the primary sources of natural resources important to Tribal members; and

WHEREAS, many of those interconnected waters flow through Red Lake treaty-ceded territories and aboriginal lands where Tribal members exercise reserved hunting, fishing and gathering rights and where cultural resources are located, or through Tribal trust lands, as well as the diminished Red Lake Reservation; and

WHEREAS, the Line 3 Replacement Project proposed route fastidiously avoids actually crossing any Indian Reservations or Tribal trust lands, yet will still impact important natural and cultural resources ; and

WHEREAS, the significance of treaty rights and treaty resources in Minnesota has been acknowledged in judicial decisions that have addressed those rights both on and off reservations; and

WHEREAS, current federal law and state law pertaining to the permitting of oil pipelines places greater emphasis on meeting the needs of the pipeline proponent than ensuring that natural resources, cultural resources, and Tribal rights, interests and resources are considered and protected; and

WHEREAS, current Army Corps of Engineers tribal consultation policy requires consultation with tribes on activities that occur within a tribe's aboriginal lands, regardless of land status; and

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RED LAKE NATION HEADQUARTERS

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WHEREAS, the Army Corps of Engineers has looked to guidelines drafted in 1997 (Attached as Exhibit A) when ascertaining its trust responsibilities to Indian tribes and since that time there have been developments in the law both generally and specifically with respect to treaties with Minnesota tribes; and

NOW THEREFORE BE IT RESOLVED that the Tribal Council hereby requests that the U.S. Army Corps of Engineers initiate early and robust tribal consultation for any infrastructure projects proposed to be located within Red Lake aboriginal lands, regardless of land status or reservation status;

BE IT FURTHER RESOLVED that the Tribal Council hereby requests that such tribal consultations be initiated at the earliest stages of project proposal to allow tribes to identify tribal natural and cultural resources that may be impacted;

BE IT FURTHER RESOLVED that the Tribal Council hereby requests that the U.S. Army Corps of Engineers work with the Red Lake Nation and other Ojibwe tribes in Minnesota and Wisconsin to develop new Clean Water Act Section 404 permitting processes for wild rice waters in recognition of the special impacts created to wild resources by activities covered under Section 404;

BE IT FURTHER RESOLVED that the Tribal Council hereby requests that the U.S. Army Corps of Engineers seek all necessary authority to condition Section 404 permit approval over infrastructure projects occurring within tribal aboriginal lands with serious potential impacts to tribal cultural and natural resources on receipt of the informed consent of the impacted tribes; and

BE IT FINALLY RESOLVED that the Tribal Council hereby requests that the U.S. Army Corps of Engineers: (1) consult with the Red Lake Nation to update the guidelines (Exhibit A); (2) make a firm, unequivocal commitment that it will follow those guidelines and fulfill its trust obligations to Indian tribes; and (3) enter into an agreement with the Red Lake Nation to establish protocols for tribal input and consultation on proposed actions impacting tribal cultural and natural resources.

FOR : 9
AGAINST: 0

We do hereby certify that the foregoing resolution was duly presented and enacted upon at a Special Meeting of the Tribal Council held on November 30, 2016, with a quorum present, at the Red Lake Nation Headquarters, Red Lake.

DARRELL G. SEKI, SR., CHAIRMAN DONALD R. COOK, SR., SECRETARY

SEP 29 1997

Construction-Operations
Regulatory (94-01298-IP-DLB)

Mr. James Schlender
Executive Administrator
Great Lakes Indian Fish & Wildlife Commission
P.O. Box 9
Odanah, Wisconsin 54861

Dear Mr. Schlender:

As a result of issues that have arisen during our evaluation of a permit application by Crandon Mining Company to establish a mining operation near Crandon, Wisconsin, the St. Paul District has been asked by several Native American tribes to address the nature and extent of the Corps trust responsibilities toward Indian tribes in the Corps regulatory permitting process. I have indicated at past consultation meetings that I had requested guidance from Corps Headquarters to address this question.

Enclosed is an issue paper that provides the guidelines that the District will follow to insure that it fulfills its trust obligations. This paper, while very useful for illustrative purposes, may not resolve issues that are specific to any individual treaty or pending permit action.

I propose that we hold a consultation meeting in approximately 60 days. This will provide you time to review the paper and to develop any questions or concerns that you may have regarding these guidelines, as well as to how they will be applied in our review of the Crandon Mining Company permit application. I suggest that the consultation meeting be held in early December in Eau Claire, Wisconsin. Mr. Dave Ballman, of my staff, will coordinate with your staff in scheduling the meeting.

Please contact me at (612) 290-5300 if you have any questions.

Sincerely,

/S/

J. M. Ponsik
Colonel, Corps of Engineers
District Engineer

Identical Letters:

Arlyn Ackley, Sokaogon Chippewa Community
Philip Shopodock, Forest County Potawatomi Community
Apesanahkwat, Menominee Indian Tribe of Wisconsin
James Schlender, Great Lakes Indian Fish & Wildlife Commission

Ballman	CO-R DB 9/17
Ahlness	CO-R 9/18/97
Hauger	CO-R
Wopat	CO-R 9/24/97
Haumersen	CO
Adamski	OC
Crump	PP-PM
Breyfogle	DDE 9/29

ISSUE PAPER
AND
DISTRICT RECOMMENDATION

THE AGENCY'S TRUST RESPONSIBILITIES TOWARD INDIAN TRIBES IN THE REGULATORY PERMITTING PROCESS

1. ISSUE. Work activities performed pursuant to permits issued under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act have the potential to impact Indian treaty rights[1] and to impact resources owned or used by Indian Tribes. Because of this, questions have arisen about the Corps' trust obligations to Indian tribes with respect to the Corps' permitting processes. This paper shall attempt to delineate trust issues related to the permitting process and will attempt to set forth guidelines with respect to those issues[2]. A question and answer format will be used to accomplish this purpose.

2. **May the Corps issue a permit that will impinge on or abrogate treaty rights?**

No, treaty rights[3], absent consent of Congress, may not be impinged or abrogated[4]. As the

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[1]The term "treaty rights", as used in this paper, includes not only rights derived from treaties, per se, but also rights derived from federal statutes, agreements executive orders and the like. The terms "Tribal resources" or "Treaty resources", as used in this paper, refers to resources that the Tribe, pursuant to a treaty, has a right to exploit and includes resources that they own and resources that they have a right to gather. The term "trust resources" refers to resources held in trust by the United States (the title is held by the United States) for the benefit of the Tribe.

[2]The paper, other than as may be useful for illustrative purposes, will not attempt to resolve issues that are specific to any individual treaty or pending permit action, but will attempt to formulate guidelines which will insure that the agency fulfils all of its trust obligations.

[3]It should be noted that the terms "treaty rights" and "treaty resources" are not synonymous. For example, a treaty that guarantees a tribe the right to hunt and fish on its reservation, the "treaty right" is the right to take the resource (game or fish), the "treaty resource" .

Court held in *Northwest Sea Farms, Inc., v. U.S. Army Corps of Engineers*, 931 F. Supp. 1555 (W.D. Wash. 1996) 1519-1520:

> The Supreme Court has recognized "the undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225, 103 S.Ct. 2961, 2972, 77 L.Ed.2d 580 (1983). This obligation has been interpreted to impose a fiduciary duty owed in conducting "any Federal Government action"[5] which relates to Indian Tribes. *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir.), *cert. Denied*, 454 U.S. 1081, 102 S.Ct. 635, 70 L.Ed.2d 615 (1981), ... In previous cases, this Court has tacitly recognized that the duty extends to the Corps in the exercise of its permit decisions. *See e.g. Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1523 (W.D.Wash.1988) (granting an injunction against the construction of a marina in consideration of the effect upon Indian treaty rights).
>
> In carrying out its fiduciary duty, it is the government's and subsequently the Corps', responsibility to ensure that Indian treaty rights are given full effect. *See e.g. Seminole Nation v. United States*, 316 U.S. 286, 296-297, 62 S. Ct. 1049, 1054-55, 86 L.Ed. 1480, 86 L.Ed.1777 (1942) (finding that the United States owes the highest fiduciary duty to protect Indian contract rights as embodied by treaties). Indeed, it is well established that only Congress has the authority to modify or abrogate the terms of Indian treaties. *United States v. Eberhardt*, 789 F.2d 1354, 1361 (9th Cir.1986). 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.

3. How are treaty rights determined?

Treaty rights are determined on a case by case (treaty by treaty) basis. Each individual treaty or series of treaties must be examined to determine the specific rights provided by those treaties.

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is the game or fish. Although courts have, almost universally held that treaty rights may not be impinged, they have not held that the resource may not be negatively impacted. See also question 6.

[4]Note, however, that the same Court that decided *Northwest Sea Farms, Inc.* issued an order in *Lummi Indian Nation v. Cunningham*, case No. C92-1023C on September 1, 1992, to the effect that before a claim that treaty rights have been impinged or abrogated is cognizable "the interference with the treaty right must reach a level of legal significance".

[5]A permit is a Federal Government action"

4. How are Indian treaties to be interpreted?

There are three basic rules of treaty construction. They are: (1) Ambiguities in treaties must be resolved in favor of the Indians, (2) Indian treaties must be interpreted as the Indians would have understood them at the time they consented to the treaty, and (3) Indian treaties must be construed liberally in favor of the Indians. This does not mean, however, that the treaties are to be construed in any manner that the Indians wish them to be construed. The rules of construction do not permit the clear intent of the treaties to be disregarded.

The Court in *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F.Supp. 184, (198-199), (W.D. Wis. 1996) described the rules of construction as follows:

> It is well known that Indian treaties must be interpreted as the Indians understood them, that doubtful expressions are to be resolved in favor of the Indians and that treaties must be construed liberally in favor of the signatory tribes. ... treaties are not to be construed by "the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Id.*
>
> Determining the Indians' understanding may require expert testimony to explain the historical and cultural context in which the Indians viewed the treaty provisions. *See, e.g. McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973) ... ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."); *Winters v. United States*, 207 U.S. 564, 576-77, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908) ("ambiguities occurring [in treaties] will be resolved from the standpoint of the Indians").
>
> It is true that "[t]he cannon of construction regarding the resolution of ambiguities ... does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506, 106 S.Ct. 2039, 2044, 90 L.Ed.2d 490 (1986). See also *Amoco Production Co. V. Gambell*, 480 U.S. 531, 555, 107 S.Ct. 1396, 1409, 94 L.Ed.2d 542 (1987) (citing *Catawba Indian Tribe*); *Choctaw Nation*, 318 U.S. at 432, 63 S.Ct. At 678 ("even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties").

Moreover, many of the issues of treaty construction that are likely to arise in the permitting process, have already been determined by the Courts[6]. Thus, the first step in

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[6]Even if the case law is not dispositive of the specific issue, it may provide rationale or additional information which will aid in the decision process. Additionally, it is recommend that Office of Counsel (or similar resource) be consulted before making a determination, in questionable cases, whether a treaty right exists or does not exist and whether the proposed

construing a treaty should be to review any Court decision that may be relevant.

5. How can we determine if treaty rights may be an issue with respect to a specific permit application?

The geographic extent[7] of all treaty rights and Tribal resources should be known to the regulatory staff. If the proposed activity could have any effect within that geographic area the treaties should be reviewed to determine if treaty rights may be affected. A determination should also be made as to whether the proposed activity may affect Tribal resources. Most importantly, the Indian Tribes that may be affected by the permitted activity should be apprised of the permit application and be given the opportunity to comment or consult with the Corps. If any Tribe asserts that the proposed permit activity would impinge on or abrogate its treaty rights or would negatively impact its resources, it should be requested[8] to provide all substantiating information it has available as to: (1) the existence of treaties, (2) claimed treaty rights, (3) any Court cases relevant to the Tribe's assertions, (4) an explanation of how the proposed activity would violate treaty rights, (5) identification of any Tribal resources that may be impacted, (6) an explanation of how the proposed activity would impact Tribal resources, and (7) a description of how the proposed activity would impact the Tribe[9]. BIA should also be informed of any proposed activity (needing a Corps permit) that might impact Tribal resources and should be requested to identify any treaty rights or Tribal resources that may be impacted by the proposed permit.

6. Does the Corps have a trust responsibility to protect Tribal resources from environmental degradation that may result from the proposed permit activity?

The Corps must consider the effect that the activity needing a Corps permit would have on the Tribe's resources, however, the fact that the Tribe's resource may be degraded, or reduced in value or utility, does not necessarily compel denial of the permit. This principle was explained by the Court in *Nez Perce Tribe v Idaho Power Co.*, 847 F.Supp. 791 807-813 (D.Idaho 1994) in a

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permit will or will not violate those rights.

[7]Including the area within the external boundaries of any Indian reservation and the geographic area in which usufructuary rights, if any, may be exercised.

[8]The Tribes are not required to respond.

[9]This request would be made to afford the Tribes every practicable opportunity to present their views. Neither the failure of the Tribes to respond nor a response from the Tribes relieves the Corps of its obligation to consider all impacts the proposed activity would have on any treaty rights or any impacts to Tribal resources that Corps is aware of, or reasonably should have been aware of. See also *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

case concerning permanent usufructuary rights[10], as follows:

> ... In other words, the Tribe argues that developments such as dams which damage, reduce or destroy the fish runs violate their 1855 Stevens treaty fishing rights and entitles them to an award of monetary damages.
>
> b) *Treaty Rights to Preservation of Fish Runs*
>
> The ultimate issue presented is whether the treaty provides the Tribe with an absolute right to preservation of the fish runs in the condition existing in 1855, free from environmental damage caused by a changing and developing society. Only if such a right exists is the Tribe entitled to an award of monetary damages.
>
> The parties have cited, and the Court's own independent research has disclosed only three cases which directly address this ultimate issue. *United States v. Washington* (hereinafter *"Washington 1982"*), 694 F.2d 1374 (9th Cir. 1982); *Muckleshoot Tribe v Puget Sound Power and Light*, CV No. 472-72C2V (W.D. Wash.1986); and *Nisqually Tribe v. City of Centralia*, No. C75-31 (W.D. Wash.1981). However, *Washington 1982* was vacated by the Ninth Circuit on other grounds in a subsequent en banc decision. *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985). *Muckleshoot Tribe v. Puget Sound* expressly relied on the *Washington 1982* opinion which was not vacated until after the decision in *Muckleshoot* was issued. Therefore, it appears that this Court is required to address and determine an issue of first impression without the benefit of any binding guidance and direction. ...
>
> ... State regulation cannot discriminate against the Indian fishery. *Puyallup II*, 414 U.S. [44] at 48, 94 S.Ct. [330] at 333 [38 L.Ed.2d 254 [(1973)]. This principle is broad enough to encompass discriminatory granting of permits for projects with potentially adverse environmental effects.
>
> *Id.* At 1382.
>
> In addition, the Ninth Circuit rejected the trial court's conclusion that other previous cases implied a general right to environmental protection of the fish: ...
>
> Thus, according to the Ninth Circuit's persuasive reasoning in *Washington 1982*, the states may allow or even authorize development which reduces the number of fish in the annual runs as long as such action does not discriminate against treaty fishermen in determining what development will be authorized. Although the opinion was vacated on other grounds, the Court agrees with the

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[10]The treaty at issue in the case has been interpreted as creating permanent usufructuary rights (non-exclusive) to fish in all of the Tribes usual and customary places. Not all usufructuary rights are permanent as some are subject to termination upon the occurrence of a defined event. For example, Chippewa usufructary rights with respect to territory ceded by them to the United States are terminated or extinguished whenever the land is owned by private entities rather than the public. The (trust) duty to mitigate for damage to resources that may be harvestable pursuant to permanent usufructuary rights discussed by the Court in *Nez Perce* may not be applicable to usufructuary rights that can be terminated or extinguished in their entirety.

legal analysis in *Washington 1982*. In the Court's view, the Stevens treaties do not protect the Indians from degradation of the fish runs caused by development which is not part of a pattern of discrimination against Indian treaty fish runs.

... In the Court's view, the 1855 treaty does not provide a guarantee that there will be no decline in the amount of fish available to take. The only method that would guarantee such protection would be to prevent all types of development, whether or not it is discrimatory of Indian treaty rights. The Stevens treaties simply do not provide the Tribe with such assurance or protection.

... Stevens treaties require that any development authorized by the states which injure the fish runs be non-discrimatory in nature *see Fishing vessel*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 but does not, however, guarantee that subsequent development will not diminish or eventually, and unfortunately, destroy the fish runs.

7. Does the Corps trust responsibility to Indian tribes require mitigation for impacts to off reservation resources that the Tribes have a right to harvest (usufructuary rights)?

The answer to this question depends on the nature of the usufructuary rights reserved or held by the Tribes. All usufructuary rights are not alike. For example, courts have held that a number of Tribes in the Pacific Northwest have usufructuary rights that are permanent in nature and are not subject to termination[11]. Those rights were held to have both a geographic component[12] and a component that entitled the Tribes to take a share of the available fish. Those courts have also held that while the Tribes were not entitled to be protected against off reservation activity that would result in a reduction of available fish, they were entitled to reasonable steps to mitigate adverse impacts from the activity.[13] The theoretical basis for the holding that reasonable mitigation is required was explained in *United States v. State of Washington*, 506 F.Supp. 187, 203 (1980)[14] as follows:

> At the outset the Court holds that implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made

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[11]Other than by an Act of Congress.

[12]The right to fish forever in certain locations defined in the Treaty.

[13]"We do not find such an obligation in the treaty. Where the decision to allow development is not tinged with any discrimatory animus, the treaty fishing clause, as we read it, does not require compensation of the Indians on a make whole basis if reasonable steps, in view of the available resources and technology, are incapable of avoiding a reduction in the amount of available fish." *U.S. v. State of Washington*, 694 F.2d 1374, 1386 (1983)

[14]The Court's decision was vacated by the Ninth Circuit on other grounds in "*U.S. v. State of Washington*, 694 F.2d 1374. See also question 6.

> despoilation. Virtually every case construing this fishing clause has recognized it to be the cornerstone of the treaties and has emphasized its overriding importance to the tribes. ... The Indians understood, and were led by Governor Stevens to believe, that the treaties entitled them to continue fishing in perpetuity and that the settlers would not qualify, restrict, or interfere with their right to take fish. ...

In contrast to the Pacific Northwest cases, the Chippewa in Wisconsin and Minnesota have been found to have usufructuary rights to hunt, fish and gather that are extinguished upon the land passing to private ownership[15]. Thus the underlying rationale in the Pacific Northwest cases - perpetual usufructuary rights - for requiring mitigation, as a trust responsibility, is not present with respect to the Chippewa's usufructuary rights. Moreover, a determination that the United States' trust obligations would require it to ensure that mitigation would be performed would be logically inconsistent with case law which has held that the usufructuary rights were extinguished when the land over which they originally could have been exercised passed to private ownership. Under the relevant case law no compensation would be due the Tribes, even if all of the land passed to private ownership, as it was understood that usufructuary rights "were subject to and limited by the demands of the settlers." *Lac Courte Oreilles Band v. State of Wisconsin*, 760 F.2d 177, 183 (1985)

Therefore, the specific usufructuary right in question should be examined to determine if mitigation would be required as a trust obligation. However, even if it is determined that mitigation would be required, it is not unlikely that mitigation that is or would be required in conjunction with the permit, even absent a trust responsibility,[16] would be sufficient to satisfy any Government trust obligation to mitigate.[17]

8. Does the Corps trust responsibility to Indian Tribes require mitigation for adverse impacts to Tribal resources on reservations?

Each treaty at issue must be reviewed to determine what is or is not required under that treaty. Under the rationale of the Pacific Northwest cases it would appear that mitigation, to the extent reasonable and practicable is owed. However, those cases do not indicate that there is an environmental servitude owed the Tribes such that mitigation must ensure that there is no net adverse effect resulting from the federal action. In fact, the Court in *United States v. State of*

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[15] *Lac Courte Oreilles Band, Etc. v Voigt*, 700 F.2d 341 (1983) and *Lac Courte Oreilles Band v. State of Wisconsin*, 760 F.2d 177.

[16] Mitigation that would be required of the applicant even if there were no usufructuary rights or trust obligation to mitigate.

[17] See *Pyramid Lake Paiute Tribe v. U.S. Department of Navy*, 898 F.2d 1410 (9th Cir. 1990); *Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990); and *Nance v. Environmental Protection Agency*, 645 F.2d 701 (1981)

Washington, 694 F.2d 1374 (1982) has indicated that a resource may be rendered valueless without abrogation of treaty rights or trust responsibilities[11]. As stated by that Court at page 1381 "Any right may be subject to contingencies which would render it valueless." and at page 1382:

> The spectre the district court raises of tribal fishermen unprotected by the environmental right dipping their nets into the water and bringing them out empty, 506 F.Supp. at 203, cannot alter the scope of *Fishing Vessel*. Only the extension of the servitude to ban even non-discriminatory development occurring both within and without treaty fishing areas assure against any decline in the amount of fish taken. The treaty does not grant such assurance.

It is also not unlikely that any trust obligation owed to require mitigation would be satisfied by mitigation that would be required in conjunction with the 404 permit process, absent a trust obligation.

Accordingly, mitigation, to the extent it is reasonable and practicable, for impacts to Tribal resources sited on reservations should be required.

9. May an activity whose impact to a reservation's resources be such that it would defeat the purpose for which the reservation was established be permitted?

Before one can begin to address this question, in practice, the terms of the treaty in question must be examined to determine if the Treaty specifically contemplates the activity to be permitted and if that activity, under the terms of the treaty takes precedence over or is subservient to the interests of the Tribe[19] Assuming the treaty is not dispositive, the following is applicable.

I am not aware of a line of cases directly addressing this issue; however, *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (1973) gives us guidance as to how one court decided the issue and may be illustrative of how such issues would be decided in the future. The case concerned the Department of Interior's regulation, which the Tribe contended delivered "more water to the District than required by applicable court decrees and statutes, and improperly diverts water that otherwise would flow into nearby Pyramid Lake located on the Tribe's

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[18]This discussion is not applicable to impacts which would defeat the purpose for which the reservation was established.

[19]See *Sokaogon Chippewa Community v. Exxon Corp.*, 805 F.Supp. 680, 706 (E.D.Wis, 1992) "If the Sokoagon were to prevent Exxon from mining on the subject territory, it would be in contravention of the very considerations prompting the two treaties. Even assuming that the Sokaogon have rights in the land, the language and intent of the 1842 and 1854 Treaties demand that mineral development should take precedence over those rights.

reservation." Although the Court could have analyzed the case under the Winters doctrine[20] It chose not to do so. The Court noted, at pages 254-255, that:

> This Lake has been the Tribe's principal source of livelihood. Members of the Tribe have always lived on its shore and have fished its waters for food. ...
>
> Recently, the United States, by original petition in the Supreme Court of the United States, filed September, 1972 claims the right to use sufficient water of the Truckee River for the benefit of the Tribe to fulfill the purposes for which the Indian Reservation was created, "including the maintenance and preservation of Pyramid Lake and the maintenance of the lower reaches of the Truckee as a natural spawning ground for fish and other purposes beneficial to and satisfying the needs of the Tribe. ...

The Court then determined (page 256) that:

> ... The Secretary's duty was not to determine a basis for allocating water between the District and the Tribe in a manner that hopefully everyone could live with for the year ahead. This suit was pending and the Tribe had asserted well-founded rights. The burden rested on the Secretary to justify any diversion of water from the Tribe with precision. It was not his function to attempt an accommodation.
>
> In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power that, that all water not obligated by court decree or contract with the District goes to Pyramid Lake.

Accordingly, should the Corps determine that an activity needing a Corps permit would impact the reservation's resources to an extent that they would defeat the purpose for which the reservation was established the permit should be denied.[21]

10. What is the Winter's doctrine and is it applicable to permit decisions?

Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition, pages 575 to 576 offers a good explanation of the doctrine:

> The Supreme Court first articulated this doctrine in *Winters v. United States* in 1908 and reaffirmed it in 1963 in *Arizona v. California. Cappaert v.*

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[20] *Winters v. United States, 207 US 564, (1908)*

[21] It is likely that if the impacts were so great as to defeat the purpose of the reservation that, even without considering the Corps' trust obligations, the permit would be denied as not being in the public interest. (A permit whose impact would deprive any community of the ability to maintain a moderate living standard is not likely to be in the public interest.)

United States contains the Court's most succinct and lucid statement of the governing principles of reserved water rights:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of reservation and is superior to the rights of future appropriators. ... The doctrine applies to Indian reservations and other Federal enclaves, encompassing water rights in navigable and nonnavigable streams.
>
> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purpose for which the reservation was created.

This doctrine arose and has been applied extensively in appropriative water law states (generally western states that have limited supplies of water). The doctrine has not been applied to riparian water law states and may not be applicable to them.

11. When, in the permitting process sequence, should the Corps trust obligations be considered?

Since the Tribal trust issues, alone, may be determinative[22] of the outcome of the permit decision, those issues should be considered immediately after or in conjunction with consideration of the avoidance issue.

12. If the Tribal trust issues are not dispositive of the permitting decision, do we need to consider the Tribe's concerns further?

Yes. The Tribal concerns and the impacts of the proposed activity on Tribal resources should be considered in the public interest review just as any other similarly sized community would be. Such consideration should not be evaluated based on Tribal trust responsibility considerations[23] but should take into account the relative impact the proposed activity would have

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[22]For example, if the permitted activity would violate a treaty provision, the permit application would be denied.

[23]These considerations should have been addressed previously.

on the community[24]. The same impact to natural resources may have a greater effect on individual Indians than it would on non-Indians, not only because of greater dependence on those resources, but also because the individual Indian may be more closely tied to the defined land area than his non-Indian counterpart. Additionally, any spiritual or cultural impact to the Tribe that would result from the proposed permit activity should be evaluated in the public interest review.

13. Should the Corps apply different criteria to permit applications for activities within a reservation's exterior boundaries than would be applied to a permit application for activities outside a reservation's exterior boundaries?

No. The criteria applied should be the same. However, it is very likely that an activity that is sited within the reservation's exterior boundaries would have a greater impact on Tribal resources than would an activity that is sited off reservation. Moreover, the applicant would still have to comply with all applicable local regulations, thus the Tribe may be able to impose its requirements[25] on the applicant. Such requirements would be independent of and in addition to any Corps' permit requirement or condition. Further, if the Tribe has jurisdiction over the activity and exercises its jurisdiction to prohibit the activity[26] the permit application to the Corps should be denied without prejudice.

14. Who is the Federal Trust Obligation owed to?

The Trust obligation is owed to Federally Recognized Indian Tribes.

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District Counsel

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[24]For example, an activity that would diminish the supply of game may affect Indian communities to a greater degree than non-Indian communities, because the Indian community may be more dependent on game than the non-Indian community. This greater importance to the Indian community should be factored into the evaluation.

[25]Including preventing the activity if the Tribe has sufficient authority to do so.

[26]Such as denying a required Tribal permit.