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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

TIN CUP, LLC, an Alaska limited liability company,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant.

No. 4:16-cv-00016-TMB

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Argument

I

The Corps Is Required To Use Its 1987 Wetlands Delineation Manual

The Energy and Water Development Appropriations Act of 1993, Pub. L. No. 102-377, 106 Stat. 1315 (1992) (1993 Budget Act or 1993 Act), provides that "the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual . . . until a final wetlands delineation manual is adopted." Title I, 106 Stat. at 1324. Plaintiff Tin Cup, LLC, contends that this provision requires Defendant United States Army Corps of Engineers to use the growing season standards contained within the agency's 1987 Wetlands Delineation Manual, rather than the contradictory standards contained within the Alaska Supplement.[1] *See* Pl.'s Mot. Summ. J. at 16. The Corps responds that this provision of the 1993 Budget Act no longer binds it. *See* Def.'s Mot. Summ. J. at 17-19. The Corps is wrong.

First, there are no "magic words" that Congress must use to ensure that provisions within an appropriations bill will remain in effect after the appropriations year expires. Rather, what typically suffices are words of "futurity." *See Natural Resources Defense Council v. U.S. Forest Serv.*, 421 F.3d 797, 806 n.19 (9th Cir. 2005) (noting the requirement of "a clear statement of 'futurity,' *such as* 'hereafter'") (emphasis added). *See also United States v. Vulte*, 233 U.S. 509, 514 (1914) (requiring "words of prospective extension" rather than "temporary operation"). It is hard to

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[1] The text and legislative history of the Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104, 105 Stat. 510 (1991) (1992 Budget Act or 1992 Act), are relevant to determining the effect of the 1993 Budget Act. Nevertheless, it is the 1993 Act, not the 1992 Act, which continues to bind the Corps. Hence, the Corps' arguments as to why the 1992 Act does not itself mandate the continuing use of the 1987 Manual are beside the point.

understand how the Corps can find no such words of "futurity" in the pertinent provision of the 1993 Budget Act, given that the provision actually uses *the future tense*.

For related reasons, the Corps' emphasis on the absence of the term "hereafter" from the pertinent provision of the 1993 Budget Act is misplaced. Even the Corps recognizes that an appropriations provision can be binding beyond the appropriations year without using "hereafter." *See* Def.'s Mot. Summ. J. at 16. *Cf*. U.S. Gov't Accountability Office, Office of the Gen. Counsel, Principles of Federal Appropriations Law 2-87 (4th ed. 2016) (Redbook) ("Words of futurity other than 'hereafter' have also been deemed sufficient."). And the reason for why the word was omitted from the relevant provision of the 1993 Act is plain on the provision's face: Congress did not intend to *permanently* require the Corps to use the 1987 Manual, but rather only until such time as "a final wetlands delineation manual is adopted."[2] 106 Stat. at 1324. Demanding use of the word "hereafter" would therefore impermissibly restrict Congress's legislative power to "indefinite" provisions, instead of allowing Congress also to enact provisions that sunset based on as-yet undated conditions subsequent. *Cf. Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 304 (9th Cir. 1991) ("Had Congress intended to keep the restrictions of section 314 in place more than a year at a time, it could have so provided . . . ."); Redbook, *supra*, at 2-87 ("[A]n appropriations provision requiring an agency action 'not later than one year' after enactment of the appropriations act, which would occur after the end of the fiscal year, is permanent because that prospective language indicates an intention that the provision survive past the end of the fiscal year.").

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[2] Thus, the Corps' comparative example of the 1993 Budget Act's provisions that *permanently* bar certain uses of funds by the Bureau of Reclamation, Def.'s Mot. Summ. J. at 19, is not probative.

Third, the Corps' attempt to tie the pertinent provision of the 1993 Budget Act to its immediately preceding, appropriations-dependent provision, is unconvincing. To begin with, the relevant provision appears as a separate paragraph from the preceding, appropriations-dependent provision, *see* 106 Stat. at 1324, thereby suggesting that the former should not be tied to the latter. Such an intent is supported by the 1993 Act's drafting custom: when Congress wished just to restrict the use of funds, it typically used the formula "*Provided*" or "*Provided further*" with no paragraph break. *See, e.g.*, *id*. at 1323-24. More importantly, the Corps' attempt to connect the 1993 Act's funding provision with the Act's direction to use the 1987 Manual impermissibly renders the latter surplusage. *Cf. Corley v. United States*, 556 U.S. 303, 314 (2009) (a statute should be construed to avoid superfluity). To see how that is so requires a comparison of the 1993 Act to the Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104, 105 Stat. 510 (1991) (1992 Budget Act or 1992 Act). *See Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 227 (1st Cir. 2003) ("[I]n the course of interpreting appropriations bills, courts may compare enactments in one year to corresponding enactments in other years in order to discern congressional intent."). The 1992 Budget Act simply prohibited *the use of its funds* for the 1989 Manual or any other manual not adopted with notice and comment. *See* 105 Stat. at 518. In contrast, the 1993 Budget Act on its face *both* prohibits the use of its funds for the 1989 Manual or any other manual not adopted with notice and comment, *and* directs that the 1987 Manual be used until a final wetlands delineation manual is adopted. *See* 106 Stat. at 1324. Hence, the Corps' reading of the 1993 Act would make its effect indistinguishable from that of the 1992 Act—*i.e.*, no limitation beyond the expenditure

of the appropriated funds—thereby rendering idle the 1993 Act's additional limiting paragraph.[3]

Fourth, the Corps impermissibly conflates two distinct types of appropriations provisions: those directly related to a given appropriation, and those independent of any appropriation. *Cf*. Redbook, *supra*, at 2-86. The distinction is critical because the "words of futurity" requirement typically is relaxed with respect to a general provision not attached to any particular appropriation. *See id*. ("The presumption [that a provision contained within an appropriations bill lasts only for the fiscal year] can be overcome if the provision uses language indicating futurity *or* if the provision is of a general character bearing no relation to the object of the appropriation.") (emphasis added). *See also id*. at 2-92 (noting that general provisions may be construed as permanent even without words of futurity if such a result is also supported, for example, by legislative history). So, for instance, the Corps cites 31 U.S.C. § 1301(c)(2), but that statute governs when an *appropriation* may extend beyond a fiscal year. Similarly, the Corps quotes the oft-cited holding from *Minis v. United States*, 40 U.S. 423 (1841), that Congress is not presumed in yearly appropriations bills to enact "any provision [having] a general and permanent application *to all future appropriations*," *id*. at 445 (emphasis added), but again the italicized portion makes clear that the Court was addressing appropriations-dependent provisions. Appropriations-dependent provisions also were at issue in *Atlantic Fish Spotters Association*, 321 F.3d at 223 ("None of the funds . . . ."), *Auburn Housing Authority v. Martinez*, 277 F.3d 138, 141

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[3] That Congress has not annually reenacted the 1993 Budget Act's direction to use the 1987 Manual supports the conclusion that Congress intended the requirement to extend beyond the 1993 fiscal year. *Cf. Atlantic Fish Spotters Ass'n*, 321 F.3d at 227 ("After all, if Congress annually reenacts a provision, common sense suggests—and courts are free to presume—that Congress did not consider the language as creating permanent law.").

(2d Cir. 2002) ("[N]o funds in this Act or any other Act . . . ."), *Building & Construction Trades Department, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir. 1992) ("[N]o funds shall be expended . . . ."), *United States v. IBM*, 892 F.2d 1006, 1009 (Fed. Cir. 1989) ("*Provided further, That funds available . . . may be expended* . . . ."), *Whatley v. District of Columbia*, 447 F.3d 814, 819-20 (D.C. Cir. 2006) ("[N]one of the funds appropriated . . . ."), and *Chiles v. Thornburgh*, 865 F.2d 1197, 1203-04 (11th Cir. 1989) (discussing Pub. L. No. 97-92, § 128, 95 Stat. 1198 (1981)) ("[N]one of the funds appropriated . . . ."), all called upon by the Corps. Yet none of these cases focuses on appropriations provisions that operate as the relevant provision of the 1993 Budget Act does—namely, to require future action *independent of* any particular appropriation. Therefore, these authorities cannot help the Corps' cause.

Finally, the Corps' position that the 1993 Budget Act does not require it to use the 1987 Manual is remarkably inconsistent with the agency's prior public position, duly reflected in the case law. *See* Pl.'s Mot. Summ. J. at 16. *See also* James S. Wakeley, Eng'r Research & Dev. Ctr., U.S. Army Corps of Eng'rs, *Developing a "Regionalized" Version of the Corps of Engineers Wetlands Delineation Manual: Issues and Recommendations* 3 (Aug. 2002), MJN Exh. 8, Page 9 ("Since [August of 1991], use of the 1987 Corps manual has been mandatory in the Section 404 permitting program."); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 590 (9th Cir. 2008) ("To identify wetlands . . . , the Corps uses its 1987 Wetlands Delineation Manual . . . .") (citing the 1993 Budget Act). Such a patently litigation-driven switch underscores that the Corps' opportunistic construction should not be credited. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (deference is not warranted when an agency interpretation is principally a litigation position or post hoc rationalization).

II

The Challenged Corps Permitting Decision Is Not Consistent with the 1993 Budget Act or the 1987 Manual

Tin Cup contends that the Corps' decision to assert Clean Water Act jurisdiction over some 200 acres of permafrost on Tin Cup's property is inconsistent with the 1987 Manual and therefore violates the 1993 Budget Act. Pl.'s Mot. Summ. J. at 20-22. In response to this contention, the Corps first asserts that its permitting decision *is* consistent with the 1993 Act because the agency did not use any money appropriated by the Act to assert jurisdiction over Tin Cup's permafrost. Def.'s Mot. Summ. J. at 19-20. The Corps' argument is unavailing because, as noted in the preceding section, it collapses two distinct limitations from the 1993 Act: one tied to a yearly appropriation, and one *independent of* any appropriation. *See* 106 Stat. at 1324.

Next, the Corps contends that there is nothing intrinsically wrong with supplementation of a guidance manual, and that agencies regularly supplement manuals without Congressional authorization. Def.'s Mot. Summ. J. at 21-22. Tin Cup agrees. But the trouble for the Corps is that the Alaska Supplement's growing season provisions are *not* supplementary to the 1987 Manual; they are in fact *contradictory* to that Manual. Pl.'s Mot. Summ. J. at 20-21. Indeed, the Alaska Supplement itself concedes as much. *See* Eng'r Research & Dev. Ctr., U.S. Army Corps of Engr's, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0)*, at 2 (Sept. 2007) (AK Suppl.), MJN Exh. 2, Page 14 ("Where differences in the two documents occur, this Regional Supplement takes precedence over the Corps Manual for applications in the Alaska Region.").

Perhaps sensing the difficulty with this "supplementation" defense, the Corps protests that *revision* of agency manuals is commonplace as well, and that the agency should not be denied the ability to amend the 1987 Manual consistent with

developments in wetland science. Def.'s Mot. Summ. J. at 22-23. Again, Tin Cup agrees.[4] But again, the trouble for the Corps is that it has not revised its 1987 Manual in the manner that the 1993 Budget Act requires. The Corps must, per that Act, abide by the 1987 Manual unless and until the agency produces "*a* final wetlands delineation *manual*." 106 Stat. at 1324 (emphases added). According to the plain meaning of the italicized text, the Corps' obligation to use the 1987 Manual continues until the promulgation of *a single* (revised or entirely new) delineation manual. Yet the Corps has not promulgated a single manual—instead, it has promulgated effectively *ten manuals* (each regional manual + the uncontradicted portions of the 1987 Manual). Such a multiplicity of mutually inconsistent "manuals" cannot satisfy the 1993 Act's mandate, especially given Congress' concern over national consistency in wetland delineation which led to that mandate's adoption. *See* Pl.'s Mot. Summ. J. at 18-19, 21. Otherwise, the Corps would be free to "revise" the 1987 Manual into the 1989 Manual, a result that even the Corps has eschewed. *See id*. at 22.

The Corps also objects that there is nothing untoward with a regional "supplement" that fleshes out how national criteria will apply to regional circumstances. Def.'s Mot. Summ. J. at 21 n.6. Yet again, Tin Cup agrees. But yet again, the trouble for the Corps is that its regional supplements do not merely flesh out

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[4] That being said, the regulation of wetlands is determined by politics as much as by science. Hence, merely because an interpretation of the Clean Water Act and its implementing authorities may not produce the most scientifically up-to-date result is no reason to reject the interpretation. *See Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F. Supp. 278, 288 (W.D. La. 1981) ("'Wetlands' is a jurisdictional term, the product of the legislative process, of political pressure groups. . . . Thus, the 'wetlands' definition does not answer a scientific need, it satisfies a practical, a social, a political need . . . . The definition may be scientifically incorrect, but that should not affect its validity as a jurisdictional definition. A 'wetlands' is what Congress (as reflected by the regulations) says it is."), *rev'd in part on other grounds sub nom. Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

national criteria. They in fact *reject* the national standard and in its place impose regionally inconsistent standards. *See* AK Suppl. at 2, MJN Exh. 2, Page 14; Pl.'s Mot. Summ. J. at 17. Accepting as legitimate the Alaska Supplement entails more than the unexceptional acknowledgment of the inevitable variation in how a national standard will apply to varying regional circumstances. It also demands acceptance of the illogical proposition that substantially varying regional standards may be employed to reach situations that unquestionably would not satisfy the national standard which the regional standards purportedly are construing.

Finally, the Corps pleads "no harm, no foul" because the 1987 Manual contemplates "additional research to refine methods for . . . delineation" of "[c]ertain wetland types" which "may not always meet all the wetland criteria defined in the manual" under "the extremes of normal circumstances," 1987 Manual at 5, MJN Exh. 1, Page 16. Def.'s Mot. Summ. J. at 23-24. The Corps' reliance on this provision of the 1987 Manual is unavailing, for two reasons. First, the provision provides as examples of such wetland types "prairie potholes" and "seasonal wetlands," not permafrost. 1987 Manual at 5, MJN Exh. 1, Page 16. The provision then directs the reader to Part IV, Section G, of the Manual, entitled "Problem Areas." *Id.* That section states that it "*is not intended to bring nonwetland areas having wetland indicators of two, but not all three, parameters into Section 404 jurisdiction*." *Id.* at 84, MJN Exh. 1, Page 95. Thus, what the Manual is contemplating are certain wetlands that do not *always* satisfy the three-parameter test under normal circumstances—*not* areas such as permafrost that can *never* satisfy that test under normal circumstances. Second, the Corps' permitting decision was based on the Alaska Supplement's standards and their having superseded those contained within the 1987 Manual. Pl.'s Mot. Summ. J. at 19-20. The Corps cannot now substitute a new rationale to support its decision. *See Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1027 n.4 (9th Cir. 2011).

III

Because the Corps Used the Wrong Legal Standard as Part of Its Permitting Decision, the Decision Must Be Vacated and Remanded for Further Analysis

Tin Cup contends that the Corps' permitting decision must be set aside because it is based on a jurisdictional assessment that uses a legally inadequate delineation standard. *See* Pl.'s Mot. Summ. J. at 23. The Corps answers that Tin Cup's complaint is academic, citing the agency's 2010 jurisdictional determination for the proposition that few if any areas of the property actually constitute permafrost. Def.'s Mot. Summ. J. at 24 (citing AR92:721). But the Corps does not explain how its 2010 conclusion remains in force given its *later* determination that a good portion of Tin Cup's property *is* permafrost. In November, 2011, Tin Cup provided the Corps with bore logs showing "ice rich permafrost layers." AR83:599. Greg Mazer, the Corps' project manager for Tin Cup's permit application, initially was unimpressed, AR82:598, but subsequently sought a second opinion within the agency. In April, 2012, Marcus Palmer, chief of the geotechnical and materials section of the Corps' Alaska district, responded to Mazer's inquiry with the conclusion that, of the 21 bore logs he reviewed, 11 were permafrost, five likely were permafrost, and five were seasonal frost. AR60:491. The Corps' subsequently revised jurisdictional determination acknowledged the presence of permafrost on Tin Cup's property. *See* AR58:449-450 (confirming that areas on and near Tin Cup's property contain "both seasonal frost and permafrost"). Hence, the record contains ample evidence supporting the conclusion that the Corps' permitting decision asserts jurisdiction over Tin Cup's permafrost.

To be sure, the decision also asserts jurisdiction over non-permafrost areas. But that fact should not preclude a remand to allow the Corps to re-analyze the permafrost

data using a legally correct standard.[5] That is especially so given that a remand likely would result in a substantial reduction in the project's impacts to jurisdictional wetlands, thereby substantially reducing Tin Cup's compensatory mitigation obligation. *Cf.* 40 C.F.R. § 230.93(a)(1) ("Compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular [Corps] permit."). A remand also likely would result in the Corps' acknowledgment that no permit is needed for discharges into Tin Cup's permafrost.

CONCLUSION

Unless and until the Corps acts in accord with Congress' judgment, or Congress changes its judgment, the Corps is bound by the wetland delineation standards contained within its 1987 Manual. The Corps impermissibly failed to use those standards in its permitting decision, resulting in substantial harm to Tin Cup. Accordingly, that decision should be set aside and remanded to the Corps to allow the agency to employ the legally mandated standards.

DATED: January 12, 2017.

Respectfully submitted,

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s/ Damien M. Schiff
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[5] That is, in fact, the precise course that Tin Cup anticipates in its standing declaration. *See* Schok Decl. ¶ 7.

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2017, I electronically filed the foregoing REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was served electronically on Amanda Shafer Berman through CM/ECF for the United States District Court for the District of Alaska.

s/ Damien M. Schiff
DAMIEN M. SCHIFF