

■ Summary of Letter Requesting Further Review of the Dakota Access Pipeline (DAPL) and Memorandum Opinion Regarding Vacatur

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Author: Sierra Club, Honor the Earth, and the Indigenous Environmental Network;
Judge James E. Boasburg

Genre: formal document, court memorandum

Summary Overview

In this document, a coalition of Native American and environmental activists petitioned the U.S. Army Corps of Engineers to reevaluate the potential environmental risks and impact of the Dakota Access Pipeline (DAPL), a multi-state petroleum pipeline controversially passing under the Missouri River just upstream of the Lake Oahe at the border of South and North Dakota. Further, the letter alleges that the company responsible for construction of the pipeline purposefully destroyed recent archaeological discoveries suggesting a Native American burial ground in the area set aside for construction of the pipeline.

Defining Moment

The Dakota Access Pipeline (DAPL) controversy, also called the Standing Rock Sioux protest, was a combined Indigenous rights/environmental protest in opposition to the DAPL construction project near lands occupied by the Standing Rock Sioux tribe. From a conservation/environmentalist perspective, the protest movement could be seen as part of a broader effort to limit petroleum development in general and fracking or oil shale harvesting in particular. Further, environmental and human rights activists were concerned that the proposed path for the pipeline posed a danger to the drinking water used by the Standing Rock Sioux population. Finally, the Standing Rock Sioux and other indigenous rights activists accused the Army Corps of Engineers of violating treaties between the United States and the Standing Rock Sioux, which can be seen as part of a much older debate regarding governmental exploitation of Native Americans.

Depending on one's perspective, the 2010s could be seen as a pivotal time in the history of U.S. environmental policy and the future of the petroleum industry. The DAPL project involves "fracking," or

"hydraulic fracturing," which is a controversial method used to extract oil from sandstone, limestone, and shale. Opponents of fracking have argued that the process is more expensive, produces more waste, and poses a unique health threat to communities around areas where fracking occurs because of the increased potential for water and soil pollution. In addition, opponents of fracking argue that further land development to support petroleum exploration of any kind will deepen the climate change problem and potentially divert resources and attention that might otherwise go to developing renewable energy projects such as wind, solar, geothermal, and wave/tidal energy. Supporters of fracking are typically motivated by the potential profits from continued oil development and argue that fracking leads to less greenhouse gas emissions than traditional coal mining and is therefore a cleaner alternative.

While the Obama administration, responding to environmental and economic studies and public sentiment, abandoned another pipeline project, Keystone XL, in 2015, the DAPL project controversy peaked during the 2016 election. Electoral vote winner Donald Trump, during his campaign, pledged to



August 31, 2016, North Dakota: The #NoDAPL water protectors who came to stand with Standing Rock Sioux Tribe took non-violent direct action by locking themselves to construction equipment. Photo by Desiree Kane, via Wikimedia Commons.

support petroleum exploration, including revitalizing abandoned projects like the Keystone XL pipeline, and to revitalize the coal industry. The Standing Rock Sioux protests therefore also drew in support from individuals concerned about the Trump administration's overall stance on environmental politics. Trump, for instance, has refuted the findings of climate change scientists, and has personal investments in two of the companies involved in the DAPL project, Energy Transfer Partners and Sunoco.

The most complicated issue surrounding DAPL involves the federal government's claim of "eminent domain," in which a government can claim privately owned land for public as long as the government

provides fair compensation to the original land owners. Part of the land set aside for DAPL falls into the Black Hills of North Dakota, a sacred site to the Sioux of the region. Much of the territory was given to the Sioux by the 1868 Treaty of Fort Laramie. However, after the Sioux Wars, the government forced the Sioux to accept a new agreement in which much of their original land returned to government control. In 1980, after a long legal battle, the courts ruled that the land had been taken unjustly and ordered the government to compensate the Sioux. The government offered payment, but the Sioux tribe declined and continues to lobby for the return of the sacred Black Hills land. The Standing Rock Sioux claim that the

government has no right to grant the corporations use of their ancestral land, and this is part of a much older debate regarding the ownership of land that once belonged to Native American tribes. During an emergency archaeological survey of land within the construction area, conducted by Sioux archaeologist Tim Mentz, archeological artifacts indicating a potential Sioux burial site were allegedly discovered. However, the Standing Rock Sioux alleges that the company purposefully destroyed the alleged artifacts before they could be studied in an effort to remove evidence of archaeological significance that would likely have necessitated postponing construction.

Author Biography

The Sierra Club is one of the oldest environmental organizations in the United States, having been founded in 1892 by pioneer conservationist John Muir. The Sierra Club has been instrumental in passing key U.S. environmental legislation, including the Clean Air Act, the Clean Water Act, and the Endangered Species Act. In the 21st century, the Sierra Club has gravitated towards environmental lobbying for green energy and opposition to petroleum industry expansion. In 2017, three of the organization's major campaigns were the Beyond Coal, Beyond Natural Gas, and Beyond Oil campaigns, which seek to educate the public about the economic and environmental benefits of alternative energy and about the dangers of fossil fuel consumption, including climate change, pollution, and related effects on public health.

Honor the Earth is a Minneapolis, Minnesota based activist organization that focuses on environmental

issues facing indigenous populations. The organization was founded in 1993 by musicians Amy Ray and Emily Saliers and activist Winona LaDuke of the Ojibwe Nation. LaDuke, who serves as the organization's executive director, was a two-time vice-presidential candidate with Green Party candidate Ralph Nader in 1996 and 2000 and received an electoral college vote for vice president in 2016, become the first Native American woman to receive a vice presidential electoral vote. Among other issues, Honor the Earth supports Native American voting efforts and has been involved in campaigns to protect indigenous sacred and archaeological sites, as well as getting involved in campaigns to promote renewable energy and other anti-petroleum power initiatives.

The Indigenous Environmental Network (IEN) is an alliance of indigenous individuals and groups dedicated to protecting indigenous culture and rights and working towards renewable energy and environmental conservation. The organization was founded in 1990, and is currently led by executive director Tom Goldtooth, a U.S. Army veteran and member of the Navajo nation who was a prominent organization for Native American rights after the Vietnam Conflict. The IEN is one of the organization that spearheaded the fight against the proposed Keystone XL Pipeline, a project initiated by a Canadian company extending from the Canadian Oil Sands to the Gulf Coast of the United States. In November 2016, the Obama administration rejected the pipeline project, citing climate change concern in addition to analyses indicating that the project would not benefit U.S. consumers, create meaningful job growth, or increase U.S. energy security.



Historical Document

Summary of Letter Requesting Further Review of the Dakota Access Pipeline (DAPL) and Memorandum Opinion re. Vacatur

Summary of Letter Requesting Further Review of the Dakota Access Pipeline (DAPL)

October 10, 2016

Sierra Club, Honor the Earth, and Indigenous Environmental Network requested that the Corps take the following actions with respect to the DAPL:

1. Investigate whether DAPL intentionally destroyed sacred and culturally-significant sites as prohibited by the National Historic Preservation Act (NHPA).

Section 110(k) of the NHPA prohibits the U.S. Army Corps of Engineers (Corps) from granting any additional permits to DAPL if it has if it has intentionally destroyed historic-eligible sites. 54 U.S.C. § 306113 (“Anticipatory Demolition”). The Corps is evaluating whether to grant a permit and easement for DAPL to cross Corps jurisdictional areas under and adjacent to Lake Oahe in North Dakota. The Corps must investigate whether DAPL intentionally destroyed historic-eligible sites and deny the Lake Oahe permits if it finds in the affirmative.

On September 2, 2016, the Standing Rock Sioux Tribe (Standing Rock) submitted detailed findings of its archaeologist, Tim Mentz, describing an unusually dense collection of cultural and historic sites located on the pipeline route, including five stone features and 27 grave sites. Mentz described it as “one of the most significant archeological finds in North Dakota in many years.” The archaeologist Thomas F. King, PhD confirmed that Mentz possesses all the qualifications to inform his studies of the site and that his observations are derived from a lifelong immersion in the traditional culture of Standing Rock.

Early the next morning, DAPL arrived at the exact 2-mile location described by Standing Rock in their filing and bulldozed the sites that Standing Rock had identified. As court filings explain, many factors suggest this was intentional. For example, the work crews normally proceed in a linear fashion, but had not previously been working within 20 miles of that site. They arrived immediately after the sites were identified with security guards wielding attack dogs and pepper spray.

2. Prepare an environmental impact statement (EIS) or supplemental EIS (SEIS) for the Corps' approval of the Lake Oahe crossing (and/or an SEIS for NWP 12 as it applies to DAPL).

The National Environmental Policy Act ("NEPA") requires agencies to supplement their NEPA analyses if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §1502.9. Similarly, the Corps cannot authorize a project under Nationwide Permit 12 (NWP 12) if information shows the project would have more than "minimal adverse environmental effects." 33 U.S.C. § 1344(e)(1). If projects exceed this threshold, or if further review would serve the public interest, they must undergo an individual CWA §404 permit process and attendant NEPA analysis, even if the Corps has already approved a project under NWP 12. See, e.g., 33 C.F.R. § 330.1(d) (discussing the modification, revocation, or suspension of NWP authorizations).

The Corps has never devoted a single page of analysis to the risks of oil spills and leaks from DAPL, which is alarming considering that contamination of waterways is among the most controversial aspects of DAPL. New information on oil pipeline spills, many of which have occurred since the Corps' EA was published, demonstrate: (a) the frequency and impacts of pipeline accidents; (b) the inability of pipeline operators to detect and respond to spills; (c) the number of spills that are detected and reported by citizens; and (d) the inability of federal agencies to regulate pipelines once they are constructed. For example, in September 2016, a passerby reported a 336,000 gallon pipeline spill in Alabama; and in June of 2016, a resident of Ventura, CA reported a 30,000 gallon spill of crude oil near his home. On September 30, 2016, Reuters reported that PHMSA data shows that out of 466 pipeline spills in the last six years, more spills were detected by the public (21%) than by the monitoring system DAPL would use (19%).

Nor has the Corps ever analyzed greenhouse gas emissions associated with DAPL. On August 1, 2016, the Council on Environmental Quality (CEQ) released its Final Guidance on Greenhouse Gases and Climate Change, which instructs agencies to take a comprehensive, broad approach in analyzing the climate impacts of federal actions. The Corps' EA for Lake Oahe makes absolutely no attempt to quantify the greenhouse gas emissions associated with the operation of DAPL, which are significant. For example, an analysis published by Oil Change International on September 12, 2016 estimates that the pipeline would result in an additional 101.4 million metric tons of CO₂ emissions per year, which is equivalent to 30 coal fired power plants or over 21 million U.S. passenger vehicles. An increasing body of scientific literature, including a September 26, 2016 study in *Nature Climate Change*, indicates that expanding fossil fuel infrastructure like DAPL will jeopardize our ability to meet our climate reductions targets agreed to in the Paris climate accord.

The Corps must evaluate the environmental justice implications of DAPL as required by Executive Order 12898 and other directives, including whether the pipeline would disproportionately impact Native American communities. On August 18, 2016, the Bismarck Tribune revealed that DAPL originally considered routing the pipeline through Bismarck, but declined to do so over fears that the pipeline could contaminate the city's drinking water supply. Instead, DAPL chose a route that passes directly under Lake Oahe near Standing Rock's drinking water supply over the objections of EPA. The EA fails to address these glaring inequities, and the Corps must do so in an EIS. On September 23, 2016, the United Nations special envoy for the rights of indigenous people called on the U.S. government to halt construction due to threats to the drinking water supplies and sacred sites of Standing Rock and other indigenous nations.

3. Revoke and/or suspend approvals in federal jurisdictional areas pending the preparation of an EIS and/or an individual §404 permit

NEPA requires the Corps and other agencies to suspend all approvals in federal jurisdictional areas along DAPL while an EIS is being prepared. Otherwise, the entire 1,168-miles of the pipeline will be already constructed up to the edges of Lake Oahe, which will unduly prejudice the outcome and limit the Corps' choice among alternatives.

First, NEPA prohibits agencies from segmenting their approval of a project, as it requires all "connected" actions to be analyzed together unless they would have independent utility. See 40 C.F.R. § 1508.25 (a)(1). None of the federally-approved parts of DAPL meet the independent utility test, and thus must be considered in a single EIS. Those include, but are not limited to: the Corps' consideration of the Lake Oahe permits; the Corps' grant of §408 permits for pipeline segments in Illinois; the Fish and Wildlife Service's grant of easements across federal grasslands and wetlands in North and South Dakota; and the Corps' Omaha, Rock Island, and St. Louis districts' issuance of verifications of DAPL's water crossings under NWP 12.

Second, where more than one federal agency is "involved in the same action" or are "involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity," the agencies shall select a lead agency to "supervise the preparation of an environmental impact statement." 40 C.F.R. § 1501.5(a). The Fixing America's Surface Transportation Act further requires the selection of a lead agency to identify all federal approvals and coordinate them in a single NEPA review.

Third, NEPA prohibits agencies from approving component parts of an inter-related project before the NEPA review is complete, because piecemeal approval and construction would limit the choice among project alternatives and exert undue pressure on the final decision-maker. Until the final approval of a project, agencies cannot take any actions that would "[h]ave an adverse

environmental impact” or “[l]imit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a).

Therefore, the Corps, FWS, and other federal agencies should suspend or revoke all permits or approvals of DAPL in federal jurisdictional areas, and notify DAPL that it cannot proceed with construction in those areas until the agencies can select a lead agency and prepare an EIS that encompasses all federal aspects of the connected project.

Memorandum Opinion re. Vacatur

October 11, 2017

The dispute over the Dakota Access Pipeline has now taken nearly as many twists and turns as the 1,200-mile pipeline itself. On June 14, 2017, in its third Opinion on the case, this Court held that the U.S. Army Corps of Engineers had failed to fully follow the National Environmental Protection Act when it determined that the pipeline would not have a significant environmental impact. Although the Court found that the agency had “substantially complied” with the statute, the Opinion identified three discrete deficiencies in the Corps’ analysis and remanded the matter to the agency for further evaluation. In doing so, the Court asked the parties to submit further briefing on the question such an action raised: what is the proper remedy during this remand period? Specifically, the Court must determine whether or not to vacate the Corps’ environmental assessment, as well as the easement granted to Dakota Access in reliance on that determination. Without such an easement, the oil cannot flow through the pipeline.

The propriety of vacatur during remand is determined by a two-prong test that requires the Court to consider (1) the seriousness of the deficiencies in the agency action and (2) the disruptive consequences of vacating that prior approval. As to the first, the Court ultimately concludes that the three errors identified in the prior Opinion are not fundamental or incurable flaws in the Corps’ original analysis; rather, the agency has a significant possibility of justifying its prior determinations on remand. Although the Court finds that the equities of disruption do not tip sharply in Defendants’ favor on the second factor, prevailing on the first is enough here for them to avoid vacatur.

I. Procedural History The lengthy factual history of this case is set forth in this Court’s prior Opinion, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Standing Rock III), 2017 WL 2573994 (D.D.C. June 14, 2017), and need not be repeated here. Suffice it to say that Plaintiffs, the Standing Rock and Cheyenne River Sioux Tribes (and other intervenors and consolidated Plaintiffs), strongly oppose the current route of the Dakota Access Pipeline (DAPL), a nearly 1,200-mile domestic pipeline running from North Dakota to Illinois. In particular, the Tribes protest DAPL’s crossing at Lake Oahe, a federally regulated

body of water that borders their reservations. Created by the Corps in 1958 via a dam constructed on the Missouri River, the Case 1:16-cv-01534-JEB Document 284 Filed 10/11/17 Page 2 of 28 3 Lake is a primary source of water for the Tribes, and it is considered sacred to their spiritual practices.

* * * *

Under NEPA, an agency is “not required to select the course of action that best serves environmental justice, only to take a ‘hard look’ at environmental justice issues.” *Sierra Club*, 867 F.3d at 1368; see *Latin Americans for Soc. & Econ. Dev.*, 756 F.3d at 476 (“Just as the [agency] is not required to select an alternative with the least environmental impact under NEPA, the [agency] is not required to select an alternative with the least environmental justice impact.”). The Court finds that there is a substantial possibility that the Corps will meet this standard on remand and will substantiate its prior decision to proceed with the Lake Oahe crossing without an EIS. In reaching this decision, however, the Court does not seek to minimize the importance of the Tribes’ environmental-justice concerns. The purpose of this analysis under NEPA is to ensure that the government properly accounts for the “interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects” of agency actions. See CEQ Guidance at 9. There is no doubt that our nation’s history is replete with examples of Native American tribes bearing the brunt of government action. See ECF No. 270-1 (Brief of Amici Curiae Great Plains Tribal Chairmen’s Association, et al.) at 6-8. And Chairman Archambault is eloquent on why the Tribes believe that this pipeline embodies another transgression. See Archambault Decl., ¶¶ 12-20. Yet the Court’s role here is not to determine the wisdom of agency action or to opine on its substantive effects. See *Robertson*, 490 U.S. at 351 (holding that “NEPA merely prohibits uninformed - rather than unwise - agency action”). Instead, it must consider only the Corps’ likelihood on remand of fulfilling NEPA’s procedural environmental-justice requirements and justifying its prior decision.

* * * *

What is clear is that accidents and spills, however they may occur, have the potential to wreak havoc on nearby communities and ecosystems. The effects that concern the Court today are not general environmental ones throughout the Midwest, but those that may result from this pipeline in this location at Lake Oahe. Those are the impacts that the Court found were insufficiently addressed by the Corps, and those are the impacts that Plaintiffs fear during the remand period. For this reason, and because the Court does not find that alternative modes of transport required by vacatur, if any, will necessarily increase the risk of an oil spill, it rejects this argument against vacatur.

* * * *

IV. Conclusion In light of the “serious possibility” that the Corps will be able to substantiate its prior conclusions, the Court finds that vacatur is not the appropriate remedy in this case. That determination does not, however, excuse Defendants from giving serious consideration to the errors identified in this Court’s prior Opinion. Compliance with NEPA cannot be reduced to a bureaucratic formality, and the Court expects the Corps not to treat remand as an exercise in filling out the proper paperwork post hoc. After the agency’s further work on remand, the parties may well disagree over the sufficiency of its conclusion. If and when such a dispute arises, they will again have the opportunity to address whether Defendants have in fact fulfilled their statutory obligations.

/s/James E. Boasberg

JAMES E. BOASBERG

United States District Judge

Date: October 11, 2017



Glossary

CORPS: United States Army Corps of Engineers, U.S. federal agency under the Department of Defense responsible public engineering and land management

DAPL: Dakota Access Pipeline, or Bakken pipeline, an underground oil pipeline project connecting shale oil fields in North Dakota to an oil tank farm in Patoka, Illinois

easement: the right to cross over or use land belonging to another person or entity for a specific purpose

EIS: Environmental Impact Statement, a legal document required by NEPA for describing the positive and negative environmental impacts of various actions

eminent domain: the right of a government to claim land that is part of private property for public use, with compensation

Lake Oahe: large reservoir of the Missouri River in portions of North and South Dakota

NEPA: the National Environmental Policy Act established in 1970 that requires federal agencies to assess the environmental effects of proposed actions

pepper spray: chemical agents that irritates the eyes and causes pain and temporary blindness

Standing Rock: Native American reservation located in North Dakota occupied by members of the Sioux ethnolinguistic group

Document Analysis

In October of 2016, members of the Sierra Club, Honor the Earth and the Indigenous Environmental Network drafted a letter to the U.S. Army Corps of Engineers outlining the concerns of all three organizations regarding the DAPL project and asking the Corps of Engineers to investigate misconduct on the part of the companies involved, to commit to a comprehensive environmental study of the potential impacts of the project, and to either revoke or suspect the Corps approval for use of the lands petitioned by the companies involved in the project. While many journalistic and popular accounts of the DAPL debate were written in the fall and winter of 2016, the Sierra Club, Honor the Earth, and Indigenous Environmental Network letter is a legal response to actions taken by DAPL and the Corps of Engineers that allegedly violated environmental and historical preservation laws.

The first part of the letter concerns the rights of Native American peoples and accuses the companies leading the DAPL of violating the National Historic Preservation Act (NHPA), a 1966 public law that protects areas with historical or archaeological significance. According to the official statement, the Standing Rock Sioux Tribe submitted detailed findings regarding the discovery of an “unusually dense collection of cultural and historic sites,” located along the planned route of the pipeline, including at least 27 grave sites and five stone features. The findings had been discovered by Sioux archaeologist Tim Mentz and became part of the U.S. District Court case *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*. According to official court documents, Mentz submitted details of his findings to the courts on and the State Historic Preservation Office on September 2, 2016. Among other findings, Mentz described a large stone chiseled with a representation of the constellation Big Dipper, known to the Sioux as *Iyokaptan Tanka*, which Mentz argued indicated that the site might contain the remains of a former chief. Mentz and the Standing Rock Sioux argued DAPL’s survey of the area, which found no evidence of archaeological remains, was based on a 1985 survey of the area, which had failed to uncover the remains that

Mentz discovered. The tribe further argued that, according to North Dakota Tribal Reinternment Committee law, the tribe would have the right to excavate and rebury any remains in the area. Mentz further declared his belief that the bodies would have been buried in shallow graves covered in rock cairns and that the burial sites would therefore be vulnerable to even superficial disturbance.

According to the contributors to the letter, on the morning of September 3rd, DAPL arrived at the 2-mile location where Mentz found archaeological remains and bulldozed the exact sites that had been mentioned in the tribe’s official statement to the Historic Preservation Office. Standing Rock and allies officially filed a court complaint accusing DAPL of purposefully destroying the site to destroy evidence of archaeological findings that might have led to a legal challenge against DAPL. As evidence, the letter claims that the work crews that arrived at the site the following day had moved more than 20 miles from where the crews had been working the day before. Further, the letter alleges that, just after the historical sites had been discovered, DAPL security arrived with dogs and pepper spray to chase protestors away from the contested, potential historical sites.

In the second section of the official request, the Standing Rock Sioux tribe and allies formally request that the Army Corps of Engineers conduct an immediate study to produce an environmental impact statement (EIS). Specifically, the authors want the Corps of Engineers to study potential effects of a pipeline rupture or spill under the Missouri River and how this might affect the waters of Lake Oahe that provides a water supply for the Standing Rock Sioux. The letter asserts that the National Environmental Policy Act (NEPA) requires an analysis if new circumstances arise indicating additional environmental concerns, and the authors argue further that federal laws prohibit the continuation of the project until an official EIS finds that the project would have “minimal adverse environmental effects.”

In their letter, the coalition argues that the Corps of Engineers never published or submitted any information specifically addressing the risks of oil spills and leaks and argued that past projects managed by Energy Transfer Partners resulted in leaks with

significant environmental consequences. To justify this claim, the letter specifies that new information had been revealed since the Corps released their initial environmental analysis indicating that oil spills and accidents were more common than previously believed, that current safety systems were inadequate to detect leaks, and that federal agencies could not effectively manage pipelines once constructed. The letter cites a September 2016 discovery of a pipeline spill reported by a citizen in Alabama, which reportedly released more than 336,000 gallons into the surrounding area. Further, the letter cites a *Reuters* news study indicating that there had been 466 pipeline spills in the six years prior to 2016 and that more than 21 percent had been detected by members of the public, versus only 19 percent detected by the safety system that would be used to monitor the DAPL. The authors further claim that another company involved in the project, Sunoco Logistics, has been responsible for more oil spills than any other oil exploration firm. Data collected from the national disaster management system by *Reuters* estimated that Sunoco was responsible for 203 leaks since 2010, while information from the U.S. National Response Data on projects managed by Energy Transfer Partners revealed at least 69 accidents in 2 years polluting water supplies in 4 states, with more than half of the accidents resulting from ruptures in a petroleum pipeline.

Further, the authors argued that the Corps of Engineers failed to analyze the potential greenhouse gas emissions that would result from the DAPL project, and cited a September 2016 report from Oil Change International indicating that DAPL may result in as much as 101.4 million metric tons of CO₂ emissions annually, which the authors note is the equivalent of 21 million passenger vehicles and 30 coal-based power plants. The authors then go on to cite a widely publicized discovery that the project had been moved from its original course, traveling closer to Bismarck, North Dakota, due to concerns that the pipeline might threaten water supplies in the region. The evidence behind this claim became part of a widely-circulated fake news item asserting that DAPL had decided to move the pipeline project away from Bismarck because the plan had been rejected by white

property owners in the area. The fake news version of the story then suggested that the decision to move the pipeline closer to Native American settlements represented racism on the part of the executives involved. Later evidence showed that DAPL abandoned an initial plan to pass close to Bismarck because it would have extended the pipeline length and because construction would have been close to residential areas. The white citizens of Bismarck did not reject the project, however, as the news item claimed.

Lastly, the authors of the letter ask the Corps of Engineers to suspend any easements granting DAPL the right to construct on the disputed territory until an environmental analysis was completed. The third argument draws heavily on provisions of NEPA that prohibit construction on any part of a planned project until the impact of the entire project has been assessed. In essence, the third part of the letter reframes the environmental arguments made earlier, drawing on existing NEPA regulations, and asks that the Corps of Engineers postpone construction and establish a lead agency, of the various agencies involved, to coordinate efforts for a full environmental impact study.

Essential Themes

Much like the effort to defeat the Keystone XL pipeline project in 2015, the opposition to the DAPL project drew support from both indigenous rights activists and environmental activists. Like the Keystone XL project, the anti-DAPL movement demonstrated how the goals of indigenous peoples and environmental activists overlap on issues of conservation and environmental protection. While some supporters of DAPL criticized environmentalists for “using” the Native Americans at Standing Rock to promote their agenda, both groups shared legitimate interests. The effort to preserve aspects of Native American culture from erosion, necessarily involves, and has long involved, the need to preserve remnants of American biospheres. This occurs because indigenous culture, by its nature, is linked to the environment in ways that imported European-American culture is not. Teaching traditional skills and passing on information about the

history and cultural legacy of indigenous people is dependent on the ability to preserve areas with cultural/spiritual significance.

The timing of the DAPL protests, occurring in the midst of the 2016 presidential election, played a major role in how the protest movement developed. Given Donald Trump's personal investments in petroleum and statements pledging to expand petroleum development, participants on both sides recognized that the outcome of the election would likely have a dramatic influence on the future of DAPL specifically, and potentially, oil exploration in general. As reported by numerous news agencies, Donald Trump was a personal stockholder in the Texas-based Energy Transfer Partners, owning between \$15,000 and \$50,000 in stock according to federal disclosure forms, as well as between \$100,000 and \$250,000 in Phillips 66, a petroleum distribution chain with a one-quarter share of the project. This personal financial stake, coupled with Trump's stance on climate change and environmental legislation, helped garner unprecedented levels of support for the Standing Rock Sioux and the DAPL Project.

The fight against DAPL took place simultaneously in the courts and on the ground, in the area around the construction site, where thousands gathered in makeshift camps to protest the project. Actress Shailene Woodley and Green Party Presidential Candidate Jill Stein were among the celebrities and public figures who took part in the protests. In a turning point, a group of Armed Forces Veterans, led by Native American veterans, visited the Standing Rock camps where they intended to shield civilian protestors from security guards who had reportedly been using water cannons, pepper spray, and other violent means to disperse the protestors. While the protests continued, garnering more and more public interest, legal representatives took the case to court to obtain a legal remedy. On September 9th, 2016 U.S. District Court Judge James Boasberg denied the Standing Rock Sioux request to halt construction, thus dealing a major blow to the effort. However, the Department of Justice and Department of the Interior announced that construction under Lake Oahe would not proceed until a further evaluation could be completed.

On November 21st, law enforcement agents at the Standing Rock camp used tear gas and fire hose to disperse protestors, despite the fact that the temperature had dropped below freezing, leading to higher levels of public outrage over the issue. The Army Corps of engineers ordered protestors to leave the campsites due to concerns over the weather, but hundreds remained. Then on December 4th, a temporary victory for the DAPL opponents as the Army Corps of Engineers issued a statement saying that it would halt construction of the pipeline pending a full EIS before approving construction of the section crossing Lake Oahe. Despite what many felt was a victory, on January 24th, Trump signed an executive memorandum instructing the Corps of Engineers to expedite the approval process. Trump also expressed his intention to revive the defunct Keystone XL project. The Army Corps of Engineers granted a land-use easement on February 7th and rescinded earlier statements that they would invite public comment and prepare an environmental impact assessment. Despite a Feb 9th, legal challenge by the Cheyenne River Sioux and the Standing Rock Sioux, requests for an injunction were denied by District Judge Boasberg.

As of March 2017, the effort to stop DAPL still seemed a failure. While the environmental implications of the pipeline remain unknown, due to the Army Corps refusal to prepare an environmental impact study, the controversy also had important implications for Native American rights. Sioux tribes have long contested government ownership of the Black Hills of North Dakota, which has been considered a sacred site by the Sioux people for thousands of years. Despite government efforts to compensate tribal members for what the courts determined had been an unlawful seizure, members of the Sioux nations have refused to accept the payment and, instead, want the land that was seized from them unlawfully through eminent domain. Supporters of the pipeline and conservative media attempted to frame the situation as one in which a group of environmentalists were attempting to oppose energy infrastructure expansion and, in doing so, obfuscated one of the most important issues of the controversy, government treatment of Native Americans and the

continuing effort of Native American people to control essential part of the land that long belonged to their ancestors.

In June 2017, however, a 91-page memorandum from U.S. District Judge James E. Boasberg found that, while the U.S. Army Corps of Engineers had “largely complied with the National Environmental Policy Act,” he further wrote that the Corps “failed to adequately consider the impacts of an oil spill on Standing Rock’s fishing and hunting rights and on environmental justice, and in February 2017, it did not sufficiently weigh the degree to which the project’s effects are likely to be highly controversial in light of critiques of its scientific methods and data.” While this ruling is not in itself a halt to pipeline operations, it does open the door for a ruling of that nature. Standing Rock Sioux Chairman David Archambault II has hailed this as a “major victory” for the tribe and said “We applaud the courts for protecting our laws and regulations from undue political influence and will ask the Court to shut down pipeline operations immediately.”

On October 11, 2017, Boasberg wrote another opinion stating that the Dakota Access pipeline can continue operating pending an environmental review by the U.S. Army Corps of Engineers. In the ruling, the Court found that shutting down the pipeline would not cause major economic disruption, as DAPL claimed. However, the Court found a possibility that the Army Corps would be able to justify its decision not to do a full environmental review, and hence refused to shut down the pipeline while that process was underway. The Corps estimated that the new environmental review would be completed by April 2018.

In response, Jan Hasselman, Earthjustice Attorney representing the Standing Rock Sioux Tribe said, “Today’s decision is a disappointing continuation of a historic pattern: other people get all the profits, and the Tribes get all the risk and harm. The court already found that the Corps violated the law when it issued the permits without thoroughly considering the impact on the people of Standing Rock. The company

should not be allowed to continue operating while the Corps studies that threat.”

Standing Rock Sioux Chairman Mike Faith said, “This pipeline represents a threat to the livelihoods and health of our Nation every day it is operational. It only makes sense to shut down the pipeline while the Army Corps addresses the risks that this court found it did not adequately study. From the very beginning of our lawsuit, what we have wanted is for the threat this pipeline poses to the people of Standing Rock Indian reservation to be acknowledged. Today, our concerns have not been heard and the threat persists.”

—Micah Issitt

Bibliography and Additional Reading

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