The Standing Rock Sioux Tribe's Litigation Against the Dakota Access Pipeline

Sylas Horowitz

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I. Introduction and Argument

The Standing Rock Sioux Tribe has faced a long, legal battle against the Dakota Access Pipeline (DAPL), which poses threat to their primary water source, Lake Oahe, and ancestral burying grounds. The pipeline has been operational since President Trump's Executive Memorandum in 2017 despite pending an Environmental Impact Statement (EIS) since the D.C. District Court's decision in 2020. The current course of this process hinges on the efficacy of the EIS, as well as public pressure that could drive the Biden Administration to take executive action to halt operations. The Sioux Tribe has faced a long history of environmental injustice and violations to their sovereignty as a tribe, while corporate and political powers have financial interests, arguing for energy independence.

The Sioux Tribe and their litigation team used a multilateral approach. They filed a lawsuit against the U.S. Army Corps of Engineers (USACE) on the basis of failed environmental review and consideration of treaty rights, while also using extralegal strategies of blockade and international human rights law.

Legal, regulatory, and permitting processes, including flaws in Tribal consultations during environmental assessments (EAs) under the National Environmental Policy Act (NEPA) and executive power, have played a major role in determining the course of this proceeding. While the court proceeding hinged on NEPA and National Historic Preservation Act (NHPA) regulations, the executive branch greatly influenced the process through Presidential Memorandums that have the power to advance permitting, halt or allow pipeline operations during the permitting process, and compel meaningful tribal consultations. Broadly, this issue is rooted in the United States' colonialist project of *environmental federalism*. In practice, the U.S. does not treat tribes as sovereign nations. Federal statutes delegitimize treaty rights, tribal land jurisdiction, and the sovereignty of indigenous people. This has created a system where tribes are forced to fight legal battles for their most basic rights. While reforms to these processes may improve indigenous rights, true environmental justice (EJ) can only be achieved through a "repatriation of Indigenous land and life" (Tuck & Yang, 2017).

II. Summary of Issue and Series of Events

The DAPL was approved for construction in January 2016 with an EA and within it, a Finding of No Significant Impact (FONSI). The USACE failed to gain the informed consent of the Standing Rock Sioux Tribe, violating treaty rights and posing threat to sacred prayer sites and ancestral burial grounds, the Missouri and Mississippi rivers, and Lake Oahe. The DAPL is a $3.78 billion pipeline that moves approximately 40% of crude oil produced in the Bakken Formation ("Dakota Access Pipeline Facts," n.d.). It runs for 1,172-miles from North Dakota to Illinois, transporting 570,000 barrels of crude oil per day (Dakota Access, LLC & United States Army Corps of Engineers Omaha District [USACE], 2016), and passing under 22 bodies of water in total. An alternate route was rejected after opposition from a majority-white community in Bismark, North Dakota due to concerns about the pipeline's proximity to their water supply (Aisch & Lai, 2016). The route now traverses through Lakota land granted by the 1851 Fort Laramie Treaty, passing through the Missouri River multiple times upstream of the reservation and under Lake Oahe, which are both fishing grounds and the primary water source of the reservation (Figure 1).

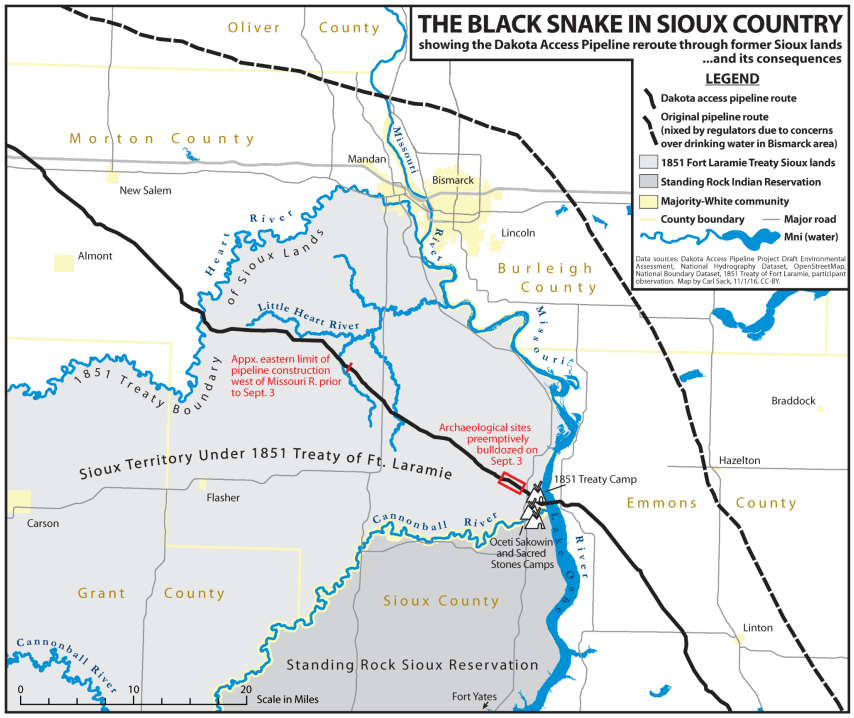

Figure 1: Map showing the DAPL re-routed through former Sioux Treaty Land
Source: Wikimedia Commons. (n.d.). Retrieved October 16, 2022, from https://commons.wikimedia.org/wiki/Commons:Upload

Directly following the FONSI, the Standing Rock Sioux Tribe (followed by the Cheyenne River Sioux Tribe) began litigation with a lawsuit in federal district court in Washington, D.C. in July 2016 assigned to District Judge James E. Boasberg. The suit was filed on the basis of NHPA, NEPA, CWA, and Rivers and Harbors Act (RHA) violations (*Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers,* 2017).

Thousands of people, including around 200 tribes, united in solidarity to protest through the fall. These *Water Protectors* set up encampments to block construction along Des Moines River crossing and near the Mississippi River crossing in late August until construction was completed (Aisch & Lai, 2016). They were met with militarized police from over 75 law enforcement agencies from around the country and National Guard troops. They used automatic rifles, sound cannons, concussion grenades, and in November, water cannons in subfreezing weather, injuring an estimated 300 protesters. The American Civil Liberties Union (ACLU) estimates that "over 140 protesters, many of whom live in poverty, face felony charges and bonds of $1,500 each" (n.d.). The clash reflected previous state violence against the Sioux Nation during the occupation of Wounded Knee in 1973.

The USACE conducted a site visit and announced in January 2017 that they were delaying an easement for construction. One month later, upon inauguration, President Donald Trump took executive action toward an approval of an easement to continue construction under Lake Oahe, overriding the need for an EIS. The USACE obliged and notified congress that they would continue construction without preparing an EIS. In May 2017, DAPL finally became active, and crude oil began flowing from the North Dakota Bakken region through South Dakota and Iowa into Illinois.

In June, Judge Boasberg ruled that some federal permits for the pipeline were illegal, but did not require operations to halt. Instead, the D.C. District Court remanded the USACE to address these flaws. In February 2019, the USACE maintained that an EIS was not required ("Court Rules," 2021). In March 2020, the court found that an EIS was required due to violations against NEPA based on experts' opinions of risk for potential oil spills, poor safety records of the DAPL operators, and underestimated Worst Case Discharge (WCD) impacts. Four months later, the court ordered a temporary halt to operations while

pending an EIS, which could take several years. In January 2021, the D.C. Circuit Court of Appeals affirmed the district court's decision requiring the USACE to conduct an EIS, but reversed the halt to operations. Oil flows through the DAPL today without a federal permit. The tribe and their supporters are currently calling on the Biden administration to direct the USACE to halt operations while it is under review, which they have announced they do not intend to do.

III. A History of Tribal Sovereignty Violations

"We came to fight a black snake until it's dead. We stand. That doesn't mean put it five miles up the river, that means kill it dead." -Nicholas Lampert

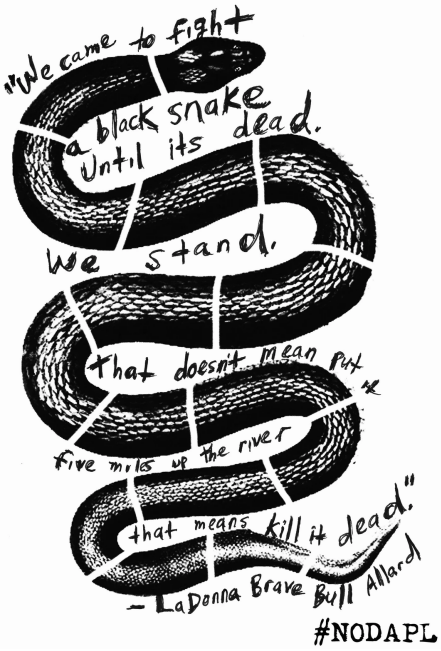

Figure 2: *We Came to Fight a Black Snake*, Nicolas Lampert (December 2016)

Generational memories of displacement and genocide shape the perspective of Standing Rock Sioux Tribe. To truly understand the case of the DAPL, Sioux cultural philosophy and colonial history must be explored.

Sioux is a French name for the Oceti Sakowin (Seven Council Fires), which consists of the Lakota, Nakota, and Dakota people who reside west of the Missouri River (Coleman, 2020). Like much of indigenous philosophy, the Oceti Sakowin have a unique dedication to environmental stewardship and a spiritual connection to the natural world that often clashes with dominant Western ideologies (Dongoske, 2015). Colonial behaviors toward their land have left the Greater Sioux Nation susceptible to significant EJ issues. Tribes in this region and elsewhere are especially vulnerable to environmental contamination exposure due to the siting of mines, dumps, and Superfund sites near reservations, greater consumption of wild foods (especially fish), and traditional practices and lifestyles. Co-risks such as poverty, unsafe jobs and housing conditions, preexisting health disparities, limited access to healthcare, greater jail time, and other injustices increase the severity of impact of projects like the DAPL (Harper, 2011).

Colonists cemented their ideology in a divine and moral superiority of white, Western culture over the "wilderness" and people inhabiting it. Sioux-settler relations were defined by settlers deeming themselves as a "Chosen people or a super race," as historian Francis Jennings called it, who are obligated to conquer others in the name of progress, civil society, rationality, morality and God. The skirmishes that erupted between settlers and indigenous people, leading to the 1851 Fort Laramie treaty. The treaty reserved 134 million acres, a fraction of their previously inhabited land, and a payment of $50,000 to tribes. Many people of Sioux tribes were displaced west.

The discovery of gold and new railroad infrastructure facilitated settlers to move west. Following the Civil War, US military presence grew, increasing the killing and displacement of native people. Violence resulted in a revised 1868 Fort Laramie Treaty, dwindling Sioux and Cheyenne territory to 25 million agres, including Black Hills and the Oregon Trail. The treaty was immediately violated when Secretary of the Interior under President Ulysses S. Grant ordered Lieutenant Colonel George Armstrong Custer on an expedition to Black Hills in 1874 in search of riches. When his cavalry discovered gold, settlers sought to seize Black Hills—the region's population rising to 10,000 by 1876 (U.S. Department of Agriculture).

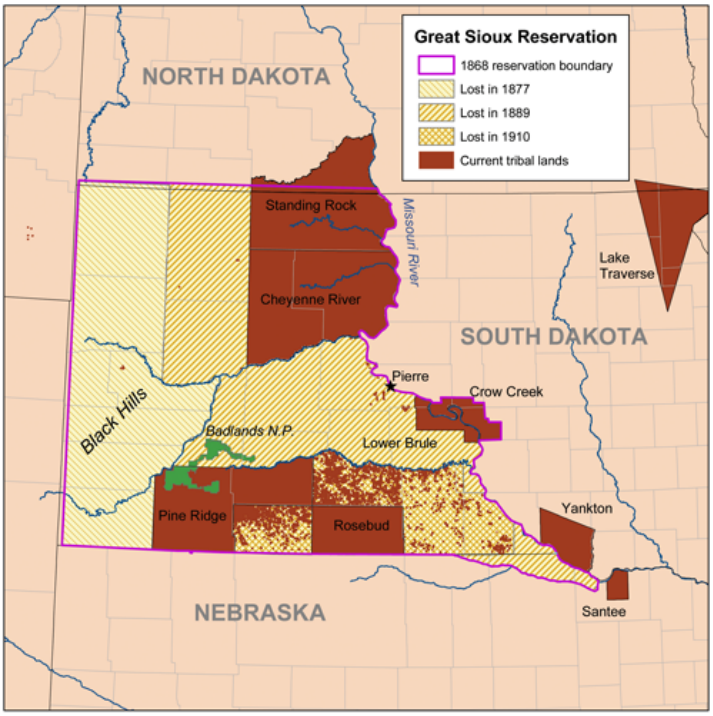

Figure 3: Land dispossession in the Greater Sioux Region since Fort Laramie Treaty of 1868
Source: Wikimedia Commons. (n.d.). Retrieved October 16, 2022, from https://commons.wikimedia.org/wiki/Commons:Upload

The following year, Custer was defeated in the Battle at Greasy Grass (Little Bighorn) but respected Lakota warrior Crazy Horse was forced to surrender and murdered in prison. The US government took Black Hills in *The Agreement of 1877*. In the supreme court case *United States v. Sioux Nation of*

Indians, 448 US 371 (1980), Justice Blackmun and seven Justices agreed with the Sioux Nation that the federal government had illegally taken the Black Hills in contravention of the 1868 Treaty. Although the Sioux Nation sought to have the Black Hills returned to it, Blackmun ordered just compensation and interest. The Sioux Tribe never accepted the money (Young, 2017).

In 1990, the US military massacred 250 Miniconjou Sioux at Wounded Knee in the Pine Ridge Reservation. Millions of acres of land dispossession continued with laws passed through congress in 1889 and 1910 (University of Oklahoma College of Law, 1895) that separated reservations and appropriated land for American farming and homesteading, with meager compensation (Figure 3). These bills were based on the judicial precedent that congress may override treaty rights.

Without indigenous knowledge, American settlers drove out bison and eroded the land, leading to the dust bowl in the 1930s. In the 1950s, 190 SRS families were evicted by the USACE due to flooding of the Oahe Dam (Lawson, 1976). Since the Fort Laramie Treaty, the Greater Sioux region is now just 400,000 acres, on which there are 500 oil wells (Young, 2017). From gold to oil, colonialism is riddled by a long history of extraction.

IV. Principle Actors and Their Positions

The three main points of contention that the corporation argues against are that DAPL (1) did not adequately consult with the tribe, (2) infringed on cultural resources and (3) infringed on treaty rights. The corporation, Dakota Access, LLC, is a subsidiary of Energy Transfer Crude Oil Company or "Energy Transfer Partners." Energy Transfer Partners presented themselves as allies to the SRST and claimed that organizations involved in the litigation, like Earthjustice, exploited the tribe for their own benefit and even "hired a consultant to fabricate the existence of sacred sites along the pipeline route." Tim Mentz, a SRST member and CRM consultant, provides testimony that the pipeline would almost certainly destroy sacred sites, including cairns, burials, and stone rings (*Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 2016). On treaty rights, Energy Transfer Partners argued that the federal government legally acquired the land based on *The Agreement of 1877* and *United States v. Sioux Nation of Indians* (1980), but this contrasts with the Lakota treaty imaginary discussed in Part V. In 2017, they filed Racketeer Influenced and Corrupt Organization Act (RICO) claims against Greenpeace and other organizations for false information, fraud, and property damage following the protests, which was dismissed by the North Dakota Federal Court.

To the public, the company boasts local job creation and property taxes that will benefit schools and hospitals. They argue the importance of the project in stimulating economic growth by lowering transportation and import costs and providing "one of the most technologically advanced and safest" options for transporting oil compared to truck and rail. They also justify crude oil production as necessary for energy security and supporting consumption patterns that American's have built a culture and physical world around, leaning into nationalistic values. Further, they argue that the pipeline "does not encroach or cross any land owned by the SRST" nor their water supply. They state that oil owned and produced by tribes currently make use of the DAPL and rail cars for transport ("Dakota Access Pipeline Facts," n.d.).

The EA in the NEPA process is prepared to evaluate the potential effects of the USACE granting permission under section 408 of the Rivers and Harbors Act of 1899. The EA states that it "follows

guidelines promulgated by the Council on Environmental Quality (CEQ) for implementing the procedural provisions of NEPA", which the USACE independently evaluates and takes full responsibility for (Dakota Access, LLC & USACE, 2016).

The USACE is responsible for preparing the EA because a portion of the DAPL passes through federal projects managed by the USACE, specifically the Garrison Dam on Lake Sakakawea and Oahe Dam on Lake Oahe. Bias that the USACE may have are a result of flaws in NEPA evaluations such as poor tribal consultations, poor data, Western-centric environmental impact assessment, and a federal disregard for tribal treaty rights. The district courts have also strictly abided by NEPA-based regulations and judicial precedents.

The Environmental Protection Agency (EPA) serves as a cooperating agency between the federal agency responsible for the proposal; in this case, USACE, but may often be the Federal Energy Regulatory Commission (FERC) for other pipeline projects. They facilitate communication between the agency and the CEQ to ensure they are following CEQ guidelines and answer EPA questions about impact.

The non-profit Earthjustice represents the SRST in their litigation from 2016 to present and echoes the tribe's chairman, Mike Faith Jr., that "this illegal and dangerous pipeline must be shut down." Moving forward, as the pipeline operates with a pending EIS permit, Earthjustice attorney Jan Hasselman states that "we call on the administration to close the pipeline until a full safety and environmental review is complete. DAPL never should have been authorized in the first place, and this administration is failing to address the persistent illegality of this pipeline" ("FAQ: Standing Rock Litigation," 2022).

V. The Litigation Process and Factors that Determined its Course

A. Indigenous Sovereignty and the Treaty Imaginary

The long history of tribal sovereignty violations have created a schism in the opposing realities held by tribal nations and the U.S. There is a federal legal process informed by settled court opinion that greatly contrasts with what Biolsi (2021) describes as the "*treaty imaginary* of Lakota people." The Fort

Laramie Treaties of 1851 and 1868 have been invalidated many times by Supreme Court Decisions. *United States v. Kagama* (1886) and *Lone Wolf v. Hitchcock* (1903) set the precedent that the court and congress can lawfully abrogate treaty rights based on racist ideas that "Indian tribes are wards of the nation…from their very weakness and helplessness" (Biolsi, 2021). During *United States v. Sioux Nation of Indians* (1980), the court held that upon violating the Fort Laramie Treaty of 1868 and taking the Black Hills, compensation would be due, but declined any opinion on whether the treaty had been breached. In negotiations over the The Mitigation Acts passed in 1998, the Courts followed that congress has had "plenary authority" to enact legislation to take tribal lands, while the tribes cited the Fort Laramie Treaty of 1868. Eventually, this act returned reservation lands (which included dams on the Missouri river) taken by the USACE to the Cheyenne River and Lower Brule Sioux Tribes. During court proceedings over the Mitigation Acts and in the case of the DAPL, the SRST government was demoted to the role of a stakeholder as opposed to a government-to-government relation with the United States.

There is much contradiction in the federal government's recognition of tribal sovereignty. Both CEQ guidance and Executive Order (E.O.) 13175 require agencies to honor the "government-to-government" relationship between tribes and the U.S. and to "honor tribal treaty and any other rights" (Exec. Order No. 13175, 2000). A set of recommendations from the U.S. Department of the Interior (DOI) following the DAPL protests state that "treaties are agreements between two sovereign nations and are, along with the Constitution and Federal laws, the supreme law of the United States" (DOI et. al., 2017). In court, guidelines from federal agencies and the executive branch are often overlooked in favor of more definitive NEPA guidelines and court precedents. Ultimately, there is no greater accountability system for what is truly international law between two nations, one of which has immense power over the other.

The shared *treaty imaginary* of Lakota people that drives their argument that the DAPL being situated directly upstream violates their right to a protected reservation land for safe water, fishing, and hunting. This argument has been reflected in many recent acts of resistance. The Lakota and American Indian Movement (AIM) occupied Wounded Knee in 1973 to revive the Treaty of 1868 that the Oglala

Nation is independent from the U.S. and Oglala Sioux Tribal Council. In 2019, the Rosebud Sioux Tribe sued former President Trump to halt construction of the Keystone XL pipeline, and, like the SRST, also cited the 1851 and 1868 Fort Laramie treaties (Biolsi, 2021).

What is meant by 'treaty rights' in the first place is quite ambiguous. Braun (2020) states that "to claim that the issue is fully resolved is just as incorrect or disingenuous as to claim, as some of the protesters and anthropologists did, that the lands are treaty lands because they were included in the 1851 Treaty, the claims of which were superseded by the 1868 Treaty." At its core, the dispute over this territory is more political than legal. It would be myopic to argue over legal technicalities without contextualizing the power dynamics of colonization and conflicting realities.

B. Levels of Legality

This case is a matter that does and should go beyond the bounds of U.S. federal law, if there were any greater power to enforce actions of the U.S. The tribes invoked Free, Prior, and Informed Consent (FPIC) under United Nations (UN) international human rights law. Good faith consultation with tribes to obtain FPIC is outlined under the United Nations Declaration on the Rights of Ingenious People (UNDRIP). In this case, tribes pointed to articles 11 and 32, which imply that federal agencies "obtain the concurrence of the affected Tribe before it takes any action that would negatively impact (or irreparably damage) the affected Tribes traditional lands, waters, treaty rights, resources, cultures, and ways of life" (DOI et. al., 2017). In fact, the U.S. announced its support for UNDRIP in 2010, despite the language of FPIC not being fully codified into federal law. Following the violent protests in 2016, the UN Permanent Forum on Indigenous Issues released a statement in August 2016 calling on the U.S. government to implement a "fair, independent, impartial, open and transparent process" and avoid escalation of violence and human rights abuses (United Nations). While this raised public and international awareness, there is no action the UN has taken to enforce authority over the U.S. What the federal government can do is revise existing presidential memorandums, executive orders, and federal agencies to adopt UNDRIP principles (DOI et. al., 2017).

The tribes employed a nonstate-centric strategy to oppose the pipeline. They organized frontline protests and media attention to garner support from non-state actors (NSAs) such as human rights organizations (Young, 2017). This kept the issues salient, which plays an important role in influencing executive actions (such as calling on the Biden Administration to shut down operations while under EIS review) and legislation. Widespread attention provided potential for agencies to reform their permitting process. In response to DAPL resistance, the U.S. Department of the Interior, U.S. Department of the Army, and U.S. Department of Justice (2017) opened up discussion:

> "This fall, we will invite tribes to formal, government-to-government consultations on two questions: (1) within the existing statutory framework, what should the federal government do to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights; and (2) should new legislation be proposed to Congress to alter that statutory framework and promote those goals."

While they released a report that comprehensively outlined the needs of tribal nations, it was merely a series of recommendations with a clear disclaimer that Federal agencies are not legally bound to any of them. The extralegal actions that the tribes took did lead to the introduction of bills that would have helped codify FPIC. "Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act" (H.R. 2689) would have mandated tribal consultation procedures for federal agencies, and H.R. 2532 and S. 4331 would have incorporated FPIC, but none passed through congress ("Tribal Consultation," 2021).

However, the protests did not influence the review of the NEPA process in the courtroom. The D.C. District Court ruled that "something more is required besides the fact that some people may be highly agitated and be willing to go to court over the matter" and concluded that "the significant public protests near Lake Oahe do not transform the pipeline's approval into a highly controversial action within the meaning of 40 C.F.R. § 1508.27(b)(4)...Nevertheless, the court found that an EIS was required because the DAPL project was 'highly controversial' for other reasons" ("Court Rules," 2021).

C. The Permitting Process: Shortcomings and Environmental Federalism

The permitting process in the U.S. is tied up in a Western worldview of scientific materialism (Dongoske, 2015). This contributes to a form of environmental review that is imposed on tribes and departs greatly from indigenous philosophy, which sees the ecosystem as interconnected with all other aspects of life.

Environmental review under NEPA follows three possible levels of analysis: Categorical Exclusion determination (CATEX), Environmental Assessment/Finding of No Significant Impact (EA/FONSI), and Environmental Impact Statement (EIS). There are different NEPA procedures adopted by each federal agency. Generally, CATEX occurs when that agency determines no significant impact on the human environment. EA's include a discussion of the purpose of proposed action, environmental impacts, alternative actions, and who was consulted. Based on the EA, the agency will issue either a FONSI and the project will progress, or an EIS if there is significant impact. The EIS process will start with a Notice of Intent to the public followed by a draft published for a public comment period of at least 45 days. After the final EIS is published, a 30-day "wait period" will commence. Finally, a Record of Decision (ROD) will explain the agency's decision, alternatives considered, and plans for mitigation and monitoring, if necessary ("National Environmental," 2021).

In EJ considerations, federal courts have looked to the language of NEPA as well as E.O. 12898 on EJ and agency guidance on EJ in the NEPA process. In their initial EA/FONSI, the USACE merely acknowledged a significant 'minority' and 'low-income' community. Using E.O. 12898, which requires agencies to take a "hard look" at EJ, the court invalidated this FONSI because of the "cultural practices of the Tribe and the social and economic factors that might amplify its experience of the environmental effects of an oil spill" (Atencio, 2021). Based on cultural considerations, it would not be enough to find no disproportionate harm towards the tribe. The court also stated that NEPA would require the agency to determine the impacts of the project on the tribe's treaty rights, though these rights have been contested within the U.S. legal system.

The relegation of tribal concerns to cultural resources undermines how integrated what is seen as culture is to native life. In Section 106 of the NHPA, cultural tribal considerations are defined by non-Native anthropologists, archeologists and ethnographers, while impacts on fish, wildlife, and plants are defined by biologists, hydrologists, and ecologists. Science, spirituality, and culture are not conceptualized separately in Native American perspectives. Permitting processes in the U.S. are rooted in Western science, and are executed as more of a procedural checklist than a collective decision-making process (Dongoske, 2015). The very "practice of seeing culture as a resource that can be managed" (Braun, 2020) and compliance mentality lies at the heart of this systemic crisis.

Tribal consultations during the EA and EIS processes are often flawed in practice. Employees from the EPA National Center for Environmental Economics (NCEE) recalled from experience that on-the-ground collaborations with indigenous or other marginalized communities fall short because they are serious time commitments, can be exhausting, lack compensation for participation, and there is a lack of trust toward federal agencies (personal communication August 9, 2022). In "Tribal Consultation: Administration Guidance and Policy Consideration," (2021) the Congressional Research Service outlines a number of shortcomings in consultations that tribes have identified, such as:

> "timing of consultation, such as consulting late into project development stages; insufficient tribal resources to participate in consultation, such as staffing resources to respond to consultation requests; and inadequate agency officials' training on consultation requirements…difficulties in initiating consultation, such as identifying the relevant tribes to consult; limited tribal response and participation in consultation; and insufficient agency resources to conduct consultation, such as limited funding and staff to support consultation."

While NEPA and NHPA processes carried out by federal agencies provide opportunities for tribal input, their approaches are inconsistent. In the initial 2016 EA prepared for the DAPL, the USACE explicitly dismissed tribal concerns with consultations, stating that "the tribes argue the District did not adequately consult on the DAPL pipeline alignment. The EA establishes that the District made a good faith effort to consult with the tribes and that it considered all tribal comments" (Dakota Access, LLC & USACE). If the

tribes had not filed a lawsuit after this EA, the USACE could have justified their process on their own account.

Tribes stopped participating in consultations because of a lack of trust toward the process because of the perception that the USACE abided by corporate interests, which is reasonable because the company is positioned as a major stakeholder in the permitting process. Dakota Access, LLC faults the tribe for not participating in their consultation process and surveys, and for commenting that the project should not traverse the Greater Sioux Nation—an "impossible request to accommodate" (*Standing Rock Sioux Tribe & Cheyenne River Sioux Tribe v. U.S. Army Corps of Engineers & Dakota Access, LLC,* 2016). Baked into the process is the implication that the project is inevitable; "there is no consultation on the project itself, only a consultation on the implementation of the project" (Braun, 2020). Too often, consultations are carried out simply as avenues to accept comments and inform tribes about the impacts of a project that has already been decided upon, and how they should adapt to its consequences. Harper (2011) states that the federal government should ''ask the Tribe what it wants you to do, then do it, then ask if you got it right." Tribes recommend that federal agency staff be trained on Federal Indian Law, treaty rights, and trust responsibility, and that tribal consultations should not be delegated to state or local governments, nor private individuals or corporations (DOI et. al., 2017).

Data and scientific analysis must be adequate, accurate, and most importantly, relevant to those affected. Limitations in proper data and analysis played a major role in influencing the environmental review process of the DAPL. Firstly, tribes don't have sovereignty over data being collected, which results in a focus on irrelevant data to indigenous people. U.S. census data inadequately characterizes tribal populations for many reasons. Some members live off-reservation or in more remote locations and many tribes are unrecognized by the U.S. Approximately 5-20% of Native Americans are uncounted in the census (Lewis, 2017). There is a general mistrust in supporting data collection due to failed promises for projects and interventions, and a federal neglect of consistent data collection (Rainie, 2017). The EPA NCEE admits that there are poignant limitations in availability of health and pollution for EJ

communities, and in the ability for scientists to understand local impacts due to climate change (personal communication, August 9, 2022).

In analysis of EJ issues during the NEPA process, the concept of EJ must be tailored to apply to the unique perspective of tribes. Harper (2011) states that "if the EJ assessment is based solely on spatial analysis of demographic data with a criterion that 20% of a local community must be of a single ethnic group or below a certain income level in order to be recognized as an environmental justice community, then impacts to tribal natural resources and well-being will often be overlooked or significantly underestimated."

CEQ guidance for NEPA has been somewhat fickle. In 1997, CEQ guidance for NEPA established that "agencies should consider the potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards…recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action" and "seek tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility to federally-recognized tribes, and any treaty rights" ("Environmental Justice," 1997). The Trump administration explicitly removed terms relating to impact and public consultation in 2020 through E.O. 13807. The CEQ under the current administration has been working to restore this guidance. On April 22, 2022, Phase 1 of the process was completed, ruling that direct, indirect, and cumulative impacts should be considered and for community participation ("CEQ Restores," 2022). However, CEQ guidance is rarely incorporated into the NEPA permitting process, especially for tribes, often because the language only directs agencies to collect and analyze spatial demographic data. Tribes have rich, interconnected systems of eco-cultures that can not be reduced to simple statistics.

It is a neglect of federal fiduciary trust obligations for sovereign tribes to be treated as an EJ community under the jurisdiction of the United States. To abide by the federal government's trust responsibility under CEQ language, agencies should evaluate the spatial distribution of impact on natural

resources rather than evaluating demographic information. Preexisting stressors such as those mentioned in Part III should be used as a multiplier in quantifying environmental impact to indigenous populations. (Harper, 2011). NEPA should consider affected resources, health risk that implements the aforementioned considerations, socio-cultural, socio-economics, and generational impacts that respect federal fiduciary trust obligations.

D. Executive Power

Executive actions have been influential in the litigation process. Presidents have declared executive orders that changed the terms of the CEQ guidance toward NEPA, accelerated permitting, and directed federal agencies to adopt more or less stringent EJ considerations. Executive orders have also been pertinent in their power to potentially halt pipeline operations during environmental review.

In 1994, President Clinton issued executive order 12898 to identify and address the disproportionate impact of federal programs on human health and environmental effects in minority and low-income populations. In court, E.O. 12898 was pointed to in directing USACE to evaluate ‘‘populations with differential patterns of subsistence consumption of fish and wildlife,’’ who may be at risk to higher exposure to pollution. Clinton also issued E.O. 13175 which established regular, meaningful, and robust consultation with tribes, directing agencies to “respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.” However, E.O. 13175 has proven difficult to enforce. In a 2021 Presidential Memorandum (P.M.), President Biden reaffirmed a 2009 P.M. that agencies must submit and periodically update a “detailed plan of action” in accordance with E.O. 13175 to the Office of Management and Budget (OMB), with an emphasis on respecting tribal sovereignty and treaty obligations (“Tribal Consultation,” 2021). This memorandum may be influential in the stringency of the upcoming EIS that the USACE is preparing for the DAPL.

Administration changes have played a great role in the course of the proceeding. President Trump exercised executive power over the USACE by issuing a P.M. in 2017 to advance permitting and allow pipeline construction, blocking the EIS at the time. E.O. 13807 and 13766 directed the CEQ to review its existing NEPA regulations in an attempt to modernize and accelerate the permitting process. As Atencio (2021) describes: "in 2020, the Trump administration gutted NEPA regulations and targeted sections at the heart of environmental justice—striking the mandates that agencies consider indirect and cumulative impacts and further eviscerating public participation requirements." The current administration is currently working to restore these terms to CEQ guidance. Now, President Biden has the executive power to halt pipeline operations during a long EIS review process.

E. Reasoning Used by District Courts

The D.C. District Courts stuck closely to NEPA guidelines throughout the proceeding. In March 2020, Judge Joasberg found that the "highly controversial" criteria was met to trigger an EIS due to "consistent and strenuous opposition, often in the form of concrete objections to the Corps's analytical process and findings, from agencies entrusted with preserving historic resources and organizations with subject-matter expertise" ("Court Rules," 2021). The USACE failed to address the following:

1. Leak-detection system with 80% fail rate
2. Poor safety record of DAPL operator Sunoco/ETP
3. Ice interfering with oil recovery in the event of a winter spill
4. Mainly, underestimated Worst Case Discharge (WCD) impacts

During the trial, the tribes made claims asking USACE to address the impact of an oil spill on hunting and fishing rights and EJ effects. However, the court dismissed these non-NEPA-based claims given that the project remained "highly controversial" for NEPA purposes. They reasoned that, because the consultations that these EJ claims were based on were a part of the EA that had been rendered invalid, there would be no benefit to the tribes to consider anything further than the aforementioned claims. I

would speculate that tribes would only benefit from an explicit assessment of the tribal rights they advocate for in the EIS.

During the March 2020 trial, the D.C. District Court ruled that pipeline operations should halt. The U.S. Court of Appeals for the D.C. Circuit reversed this injunction to prohibit operations based on the Supreme Court precedent *Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139* (2010). The findings were not sufficient for injunctive relief (halting pipeline operations) based on a four-factor test established by this precedent. In the meantime, an EIS can take a very long time because of how long it takes to determine environmental effects.

VI. Conclusions

The course of the litigation process for the DAPL was determined by layers of factors with varying influence. The history of treaty rights shapes the U.S. government's poor treatment of tribal sovereignty, departing greatly from the *treaty imaginary* present in tribal arguments for sovereignty. The tribes used measures beyond federal legality, such as invoking international law and protests, which garnered public support and influenced legislative and executive action, though many of these actions have yet to prove fruitful in changing the course of the litigation process significantly. The courts have mainly stuck to NEPA guidelines in the permitting process. Environmental reviews governed by NEPA and NHPA center around a Western-centric *scientific materialism*, failing to account for the complex ways in which environmental factors affect the everyday lives of indigenous people. Permitting processes have also neglected the SRST's interests due to flawed tribal consultations and limitations in data and analysis methods that are relevant to their needs. Executive power has shaped the prioritization and approach to EJ considerations in the environmental review process, and has influenced permitting decisions.

VII. References

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