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# **The Untold Story of the Dakota Access Pipeline: *How Politics Almost Undermined the Rule of Law***

*Daryl Owen*

## INTRODUCTION

On March 27, 2017, the Dakota Access Pipeline, LLC (Dakota Access) notified the Federal District Court for the District of Columbia that it had flowed oil into its pipeline beneath the Missouri River at Lake Oahe in North Dakota,<sup>1</sup> thereby becoming one of more than a dozen pipelines operating beneath the river in North Dakota.<sup>2</sup> On June 1 of that year, the pipeline became fully operational, joining more than 190,000 miles of liquid petroleum pipelines operating in the continental U.S.<sup>3</sup> This otherwise unremarkable development was the culmination of months of litigation, mass public protests, physical violence against man and machine, and political maneuvering that came perilously close to undermining the rule of law.

In his fourth ruling on the matter, Federal District Court Judge James E. Boasberg observed with understated humor, “The dispute over the Dakota Access Pipeline has now taken nearly as many twists and turns as the 1,200-mile pipeline itself.”<sup>4</sup> It is the goal of this article to chronicle those twists and turns in hopes of providing some badly needed perspective to an issue notable for a lack thereof.

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The author holds BA and JD degrees from LSU and was a member of the Louisiana Law Review from 1979-81. He spent 12 years as a staff member in the U.S. Senate where he was Chief of Staff of the Senate Committee on Energy and Natural Resources. In 1991, he founded Daryl Owen Associates. He currently serves on the board of directors of the LSU Energy Law Center.

1. Status Report of Dakota Access, LLC, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-1534 (D.D.C. filed July 27, 2016).

2. *Maps*, ND PIPELINE AUTHORITY, <https://perma.cc/V6GX-HT6W> (last visited Dec. 26, 2017).

3. *Pipeline Basics*, AOPL, <https://perma.cc/US4X-H9ZU> (last visited Dec. 26, 2017).

4. Memorandum Opinion at 1, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 282 F. Supp. 3d 91 (D.D.C. 2017) [hereinafter *Boasberg IV*].

## I. THE DAKOTA ACCESS PIPELINE

The Dakota Access Pipeline (DAPL)<sup>5</sup> is a \$3.8 billion project designed to transport up to 570,000 barrels of crude oil from the Bakken and Three Forks shale formations in North Dakota through South Dakota and Iowa to Patoka, Illinois: a journey of 1,172 miles.<sup>6</sup> From Patoka, the oil will find its way via other pipelines to markets in the Midwest and on the gulf coast.<sup>7</sup> More than ninety-nine percent of the pipeline is on private lands.<sup>8</sup> It crosses a mere 1,094 feet of federally owned land.<sup>9</sup> At no point during its almost 1,200 mile journey does the pipeline cross Tribal Reservation lands,<sup>10</sup> though it does pass about a half-mile north of the northernmost tip of the Reservation of the Standing Rock Sioux Tribe—a site chosen because it is already host to a natural gas pipeline and a high voltage electric transmission line.<sup>11</sup>

While no comprehensive federal permit was necessary for construction,<sup>12</sup> DAPL was required to secure permits for numerous water crossings under the Clean Water Act<sup>13</sup> and the Rivers and Harbors Act.<sup>14</sup> It was also required to obtain an easement under Section 28 of the Mineral Leasing Act (MLA) for the Lake Oahe crossing.<sup>15</sup>

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5. The prime sponsor and managing partner of the Dakota Access Pipeline (DAPL) is Dakota Access, LLC, generally referred to herein as Dakota Access.

6. *Modernizing Energy and Electricity Delivery Systems: Challenges and Opportunities to Promote Infrastructure Improvement and Expansion Before the Subcomm. on Energy of the H. Comm. On Energy and Com.*, 115th Cong. 1 (2017) (Testimony of Joey Mahmoud, Energy Transfer Partners) [hereinafter Mahmoud].

7. *Bakken*, ENERGY TRANSFER, <https://perma.cc/EPC7-VKC2> (last visited Jan. 16, 2018) (DAPL “delivers the crude oil to a hub outside of Patoka, Illinois where it can be delivered to the ETCO pipeline for delivery to the Gulf Coast, or can be transported via other pipelines to refining markets throughout the Midwest.”).

8. Dakota Access Pipeline, LLC Brief at 1, *Standing Rock Sioux Tribe*, No. 16-1534.

9. Mahmoud, *supra* note 6; Memorandum Opinion at 2, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 205 F. Supp. 3d 4 (D.D.C. 2016) [hereinafter *Boasberg I*].

10. Mahmoud, *supra* note 6.

11. *Id.* at 4; DAKOTA ACCESS, DRAFT ENVIRONMENTAL ASSESSMENT: DAKOTA ACCESS PIPELINE PROJECT 11 (Nov. 2015) [hereinafter Draft EA].

12. *Boasberg I*, at 2.

13. 33 U.S.C. § 1311(a) (1995); *see also* 33 U.S.C. § 1344(a) (1987).

14. 33 U.S.C. § 403 (1899); 33 C.F.R. § 322.3(a) (1986).

15. 30 U.S.C. § 185 (1995); Dep’t of the Army Corps of Engineers, Omaha Dist. Memorandum for Record at 8, *Standing Rock Sioux Tribe*, No. 16-1534

The Clean Water Act makes it unlawful to discharge dredged or fill material into navigable waters of the U.S. without a permit from the U.S. Army Corps of Engineers (Corps).<sup>16</sup> Likewise, the Rivers and Harbors Act forbids certain construction activities impacting the “navigable water of the United States” without prior permission from the Corps. After evaluating a proposal under these statutes, the Corps may grant approval for specific elements of a project,<sup>17</sup> or if the activities alone or collectively will have a minimal impact on regulated waters, the Corps may grant approval under its general permitting authority.<sup>18</sup> The Corps relies on one such general permit, known as Nationwide Permit 12 (NWP 12), for “the construction, maintenance, repair, and removal” of pipelines where no more than one-half acre of federal waters will be disturbed at any crossing.<sup>19</sup>

Activities under NWP 12 are subject to a number of General Conditions (GC) which sometimes require that the applicant give and receive “pre-construction notification and verification” (PCN) before work can begin.<sup>20</sup> GC 20 requires a PCN for any activity that “may have the potential to cause effects to any historic properties . . . including previously unidentified properties” of cultural or religious importance to a tribe.<sup>21</sup>

GC 20 traces its origins to the National Historic Preservation Act (NHPA). Enacted in 1966, the NHPA is designed to foster conditions under which “our modern society and prehistoric and historic resources can exist in productive harmony.”<sup>22</sup> Section 106 of the Act requires the agency to consider the effect of its “undertakings” on any property of cultural or religious significance to Indian tribes.<sup>23</sup> The term “undertakings” is broadly defined to include any “project, activity or program” requiring a federal permit.<sup>24</sup>

The NHPA is administered by the Advisory Council on Historic Preservation (ACHP), which is charged by the Act with development of

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(Dec. 3, 2016) (Memorandum from Col. Thomas H. Henderson) [hereinafter Henderson Memorandum].

16. 33 U.S.C. § 1311(a) (1995); *see also* 33 U.S.C. § 1342(a) (2014).

17. 33 U.S.C. § 1344(a) (1987).

18. *Id.* § 1344(e)(2); *see also* *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 38-40 (2015).

19. Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184, 10,271 (Feb. 12, 2012) [hereinafter NWP 12].

20. 33 C.F.R. §§ 330.1(e)(2)-(3), 330.6(a)(3)(i) (2013).

21. NWP 12, at 12,284.

22. 54 U.S.C. § 300101(1) (2014).

23. *Id.* §§ 306108, 302706(b).

24. *Id.* § 300320.

the regulations for its implementation.<sup>25</sup> Under both the ACHP's regulations and those of the Corps, the Corps must, pursuant to section 106, make a "reasonable and good faith effort" to identify the potential impacts of an undertaking on religious and cultural properties within its path.<sup>26</sup> The agency must also "consult with any Indian tribe . . . that attaches religious and cultural significance to historic properties that may be affected by an undertaking"<sup>27</sup> and provide that tribe "a reasonable opportunity to comment on the undertaking."<sup>28</sup> In the event of a disagreement between the Corps and a state or tribal historic preservation officer over the effects of an undertaking on those properties, section 106 requires consultation with, and an opportunity for comment by, the ACHP.<sup>29</sup> Importantly, the Act does not require the Corps to adopt any recommendation offered by the ACHP. Once opportunity for comment has been provided, the requirements of section 106 are satisfied.<sup>30</sup>

On October 21, 2014, DAPL submitted an application to the Corps for approval of over 200 river crossings, permission to lay pipe beneath seven locations used by the Corps for navigation and flood control under the Rivers and Harbors Act, and a real estate easement pursuant to Section 28 of the MLA<sup>31</sup> to allow the pipe to traverse beneath Corps-owned flood control lands at Lake Oahe.

During the more than two years of Corps consideration of this application, Dakota Access and the Corps held 559 meetings with potentially affected parties. In furtherance of obligations under the NHPA and GC 20, they held 389 meetings with fifty-five potentially affected Indian Tribes. DAPL also engaged dozens of cultural experts who worked closely with State and Tribal historic preservation officers to ensure that nothing of cultural significance was disturbed. As a result of their findings, 140 route changes were undertaken in North Dakota alone.<sup>32</sup> DAPL also accommodated the concerns of each of the fifty-five Tribes.<sup>33</sup>

In December 2015, the Corps published and sought comment on a 1,200-plus page Draft Environmental Assessment (EA) that evaluated DAPL's environmental effects, including *inter alia*, the effects of its

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25. *Id.* §§ 304101, 304108.

26. 36 C.F.R. § 800.4(b)(1) (2004).

27. *Id.* § 800.2(c)(2)(ii)(A).

28. 54 U.S.C. § 306108 (2014).

29. 36 C.F.R. § 800.4(d)(1)(iv) (2004).

30. *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 106-107 (2006).

31. Henderson Memorandum, at 8.

32. *Id.* at 2.

33. Mahmoud, *supra* note 6, at 3.

proposed crossing at Lake Oahe.<sup>34</sup> The choice of an EA rather than the more extensive Environmental Impact Statement (EIS) is significant. Under the National Environmental Policy Act (NEPA), an EIS is required for any discretionary agency action “significantly affecting the quality of the human environment.”<sup>35</sup> When a proposed project does not rise to that level, however, the reviewing agency may issue a Finding of No Significant Impact (FONSI) and produce a less rigorous EA.<sup>36</sup> The Corps’ draft EA concluded “construction of the proposed Project [was] not expected to have any significant direct, indirect, or cumulative impacts on the environment.”<sup>37</sup>

On July 25, 2016, the Corps finalized its Environmental Assessment, including its Finding of No Significant Impact.<sup>38</sup> The EA approved all 204 river crossings under NWP 12 and concluded that no historic sites were unacceptably impacted. At this point, all necessary approvals for completion of the pipeline had been received, save one—the real estate easement under Section 28 of the MLA required to pass beneath 1,094 feet of Corps-owned flood control lands adjacent to the Missouri River. That easement was the leverage the government used to delay completion of the pipeline for more than six months.<sup>39</sup>

## II. THE STANDING ROCK SIOUX TRIBE

“The Standing Rock Sioux Tribe (SRST) is a federally recognized Tribe and successor to the Great Sioux Nation.”<sup>40</sup> The ancestral homelands of the Great Sioux Nation encompassed vast portions of what is now North and South Dakota.<sup>41</sup> Western expansion led to an invasion of these lands and conflict became increasingly common. In the Fort Laramie Treaty of 1851, the United States agreed to recognize the territory of SRST and a

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34. Draft EA, *supra* note 11, at 1.

35. 42 U.S.C. § 4321 (1970).

36. *National Environmental Policy Act Review Process*, U.S. ENVTL. PROT. AGENCY, <https://perma.cc/MJA5-LVZK> (last updated Jan. 24, 2017).

37. Draft EA, *supra* note 11, at 1.

38. U.S. ARMY CORPS OF ENGINEERS, MITIGATED FINDING OF NO SIGNIFICANT IMPACT, ENVIRONMENTAL ASSESSMENT: DAKOTA ACCESS PIPELINE PROJECT (July 25, 2016), <https://cdm16021.contentdm.oclc.org/digital/collection/p16021coll7/id/2801> [hereinafter EA].

39. All State and local permits, as well as necessary rights-of-ways, had been obtained or were in the process of being obtained. Mahmoud, *supra* note 6, at 7.

40. Plaintiff Standing Rock Sioux Tribe’s Memorandum in Support of its Motion for Partial Summary Judgement at 2, *Standing Rock Sioux Tribe*, No. 16-1534 (Feb. 14, 2017) [hereinafter SRST Memorandum].

41. *Id.*

number of tribes of the Northern Great Plains<sup>42</sup> and to protect those tribes “against the commission of all depredations by the people of the said United States.”<sup>43</sup> Such protections proved illusory, however, as the discovery of gold<sup>44</sup> and continued western expansion resulted in a growing number of incursions and increased violence.<sup>45</sup>

In an effort to restore peace, the Fort Laramie Treaty of 1868 was ratified, thereby superseding the Treaty of 1851.<sup>46</sup> In exchange for a reduction in reserved lands, the United States promised the Sioux “undisturbed use and occupation” thereof,<sup>47</sup> as well as a guaranteed right to hunt over extensive other territory.<sup>48</sup> Further, “no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained, to pass through the same.”<sup>49</sup> Again, these protections proved difficult to enforce,<sup>50</sup> and in a series of statutes,<sup>51</sup> Congress stripped the Greater Sioux of significant portions of the Treaty lands, confining them to several smaller reservations, including what is now the Standing Rock Sioux Reservation.

Six decades later, in the Flood Control Act of 1944,<sup>52</sup> Congress authorized the Corps to construct five dams, including the Oahe, along the Missouri River. To facilitate construction of the project, Congress expropriated 56,000 acres of SRST Reservation lands for what is now Lake Oahe.<sup>53</sup> In compensation for the flooded lands, the Standing Rock Sioux Tribe received \$12.3 million, which was supplemented in the mid-1990’s with an additional \$90.6 million.<sup>54</sup> It is against this backdrop that the SRST viewed the proposed construction of DAPL.

In furtherance of the consultation obligations under the NHPA, Dakota Access contacted the SRST in September 2014, more than a month

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42. Fort Laramie Treaty of 1851, Sept. 17, 1851, 11 Stat 749.

43. *Id.* art 3.

44. SRST Memorandum, at 2.

45. *U.S. v. Sioux Nation*, 448 U.S. 371, 376-82 (1980).

46. Fort Laramie Treaty of 1868, Apr. 29, 1868, 15 Stat. 635.

47. *Id.* art. 2.

48. *Id.* art. 11.

49. *Id.* art. 16.

50. SRST Memorandum, at 3.

51. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 (1877); Act of Mar. 2, 1889, 25 Stat. 888 (1889).

52. Flood Control Act of 1944, Pub. L. 78-534, 58 Stat. 887 (1944).

53. Act of Sept. 2, 1958, Pub. L. 85-915, 72 Stat. 1762 (1958).

54. *Impact of the Flood Control Act of 1944 on Indian Tribes Along the Missouri River Before the S. Comm. on Indian Affairs*, 110th Cong. 4 (2007). In addition, the Cheyenne River Sioux, who later joined the SRST in opposition to the pipeline, received \$290,722,956 in compensation. *Id.*

before its first formal submission to the Corps.<sup>55</sup> In the wake of the resulting discussion, the Tribe adopted a resolution in opposition to the pipeline because it had concluded that the consultation process was meaningless.<sup>56</sup> Over the following twenty-two months, Dakota Access continued to reach out to the Tribe, both publicly and privately.<sup>57</sup> At the same time, the Corps undertook dozens of attempts to engage the Standing Rock in consultations. All efforts were met with a general lack of success.<sup>58</sup>

The Tribe's resistance to the overtures of Dakota Access was based, in part, on the fact that these were not "government-to-government" communications, which, as a sovereign, it felt it deserved.<sup>59</sup> The reasons behind the Tribe's refusal to respond to the Corps are less clear. What is clear is that the SRST took an extremely expansive view of its property rights and objected to passage of the pipeline over any of its ancestral lands—lands it did not own but nonetheless considered sacred. Described by the Tribe's Historic Preservation Officer as lands "wher[e] the buffalo roamed,"<sup>60</sup> these lands encompass the "larger part of four or five States, basically . . . the southwest corner of North Dakota, . . . probably half of South Dakota, [and] parts of Montana and Wyoming . . ." <sup>61</sup> It later became clear that the tribe had conflated "consultation" with "consent."<sup>62</sup>

Two days after the Corps issued the Environmental Assessment, the SRST, supported by EarthJustice,<sup>63</sup> filed suit alleging that the Corps failed to meet its obligations under section 106 of the NHPA because it refused to undertake consultation with the Tribe regarding the *entire* 1,172-mile

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55. Mahmoud, *supra* note 6, at 2. The SRST were the first Tribe contacted by DAPL. Fifty-five other Tribes were contacted and accommodated. *Id.*

56. *Modernizing Energy and Electricity Delivery Systems: Challenges and Opportunities to Promote Infrastructure Improvement and Expansion Before the Subcomm. on Energy of the H. Comm. On Energy and Com.*, 115th Cong. 202 (2017) (testimony of Chad Harrison, Councilman at Large, Standing Rock Sioux Tribe) [hereinafter Harrison].

57. *Id.*

58. *Boasberg I*, at 48.

59. Mahmoud, *supra* note 6, at 207-209.

60. *Boasberg I*, at 12 (citing Declaration of Jon Eagle, Sr. ¶ 24).

61. Harrison, *supra* note 56, at 242.

62. *Id.*

63. *Our Story*, EARTHJUSTICE, <https://perma.cc/U6R5-RDEL> (last visited Mar. 22, 2018). Earthjustice originated as the Sierra Club Legal Defense Fund. It is the nation's largest non-profit environmental law organization, and it provides free legal services to those it represents.



route.<sup>64</sup> Eight days later, the Tribe filed for a preliminary injunction seeking to require the Corps to withdraw NWP 12 and all PCN certifications granted to DAPL.

On September 9, 2016, the District Court for the District of Columbia issued an exceedingly thorough opinion denying the injunction and rejecting the claims of the Standing Rock regarding the consultation process under the NHPA.<sup>65</sup> The Court noted:

[T]he Corps has documented dozens of attempts to engage Standing Rock in consultations to identify historical resources at Lake Oahe and other PCN crossings. In fact, on this record, it appears the Corps exceeded its NHPA obligations at many of the PCN sites. Suffice it to say that the Tribe largely refused to engage in consultations. It chose instead to hold out for more—namely the chance to conduct its own cultural surveys over the entire length of the pipeline.<sup>66</sup>

### III. THE LAW MEETS POLITICS

Within minutes of the D.C. District Court ruling, the U.S. Departments of Justice, Interior, and the Army issued a joint statement indicating that while they:

[a]ppreciate the District Court’s opinion on the US Army Corps of Engineers compliance with the National Historic Preservation Act[,] [t]he Army will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Protection Act or other federal laws.<sup>67</sup>

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64. The Corps concluded that its jurisdiction over the line was so scant that it did not justify a review of the entire project. In a website posting that still exists at the time of this writing, the Corps stated that it had “jurisdiction over a very small portion” of the project. *Dakota Access Pipeline FAQ’s*, U.S. ARMY CORPS OF ENGINEERS, <https://perma.cc/UD9A-UHRF> (last visited Mar. 22, 2018).

65. *Boasberg I*, at 48.

66. *Id.*

67. Press Release, U.S. Dep’t of Just., Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v US Army Corps of Engineers (Sept. 9, 2016), <https://perma.cc/76DV-FZ5J>.

In other words, the government declined to accept a favorable ruling in a case in which it had successfully defended itself. Judge Boasberg did not receive this statement favorably; at a proceeding the following week, he questioned whether the government had complied with its duty of candor to the tribunal.<sup>68</sup> He also took exception to the fact that the three agencies' action was not spontaneous.<sup>69</sup> Multi-agency communications of this nature generally take many days, if not weeks, to prepare and approve.<sup>70</sup> The three agencies had long contemplated a favorable outcome, yet for undisclosed reasons were not prepared to accept it. Subsequent actions of those same agencies would lend support to the notion that their motivation was largely political.

Five days later, in an unusual combination of forces, all three elected members of Congress from North Dakota joined with the Governor in a written inquiry to the three agencies regarding their "unprecedented announcement." They requested "immediate answers" with respect to the timeline and evaluation criteria the Corps intended to employ in its decision-making process.<sup>71</sup> That letter remains unanswered.<sup>72</sup>

The quartet also stressed the degree to which the delay in issuing the easement was creating undue pressure on law enforcement officials in North Dakota.<sup>73</sup> Back in April 2016, a group of roughly thirty pipeline opponents established the Spirit Camp on the SRST Reservation about one-half mile south of the proposed crossing site.<sup>74</sup> By August, the camp had increased to more than 2,000 protestors, and things had become more confrontational.<sup>75</sup> On August 31, an estimated fifty protestors descended on the pipeline construction site. Two men chained themselves to

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68. Transcript of Status Conference before the Honorable James E. Boasberg (Sept. 16, 2017) at 6, *Standing Rock Sioux Tribe*, No. 16-1534. The Judge's display of displeasure occupies 14 pages of transcript.

69. *Id.*

70. This is the first of several instances in which the observations and professional experience of the author will be cited as authority.

71. Letter from Sen. John Hoeven and Heide Heitkamp, Rep. Kevin Cramer & Governor Jack Dalrymple, to Att'y Gen. Loretta Lynch, Sec'y Sally Jewell & Assistant Sec'y Jo-Ellen Darcy (Sept. 14, 2016) (on file with author).

72. Personal conversation with senior staff for Senator John Hoeven.

73. *Id.*

74. Lauren Donovan, *Spirit Camp Prayers Oppose Pipeline*, BISMARCK TRIBUNE, Apr. 14, 2016, <https://perma.cc/W8A7-BLW9>.

75. Mike Nowatzki, *State Pulls Relief Resources from Swelling Dakota Access Pipeline Protest Camp*, BISMARCK TRIBUNE, Aug. 22, 2016, <https://perma.cc/3ZUJ-ANDL>.

construction equipment, and a total of eight protestors were arrested.<sup>76</sup> Protestors admitted that they were seeking to delay construction, thereby driving up project costs.<sup>77</sup>

On Friday, September 2, the Tribe filed papers before the D.C. District Court indicating that it had identified several sites of “great historic and cultural value” along the path of the pipeline.<sup>78</sup> The following day, several hundred protestors, apparently operating on a rumor that Dakota Access had bulldozed an alleged burial site, “crossed onto private property and accosted the company’s private security officers with wooden posts and flag poles.”<sup>79</sup> Morton County Sheriff Kyle Kirchmeier stated, “Any suggestion that today’s event was a peaceful protest, is false.” Four security guards were injured, one of whom required hospitalization.<sup>80</sup> Tribal spokesman Steve Sitting Bear reported that six protestors, including a young child, were bitten by guard dogs.<sup>81</sup> An alleged photo of the child was published on the internet with the assertion that she was bitten by a Dakota Access security dog. The photo later proved to have been lifted from a 2012 New York Daily News article.<sup>82</sup> In part because of this confrontation, the protest movement against Dakota Access had become national news.

In an effort to defuse the matter and explore settlement, senior executives of Dakota Access and their counsel had the first in a series of meetings with senior representatives of the three agencies who issued the September 9, 2016 statement. The first meeting, which took place on September 15, included Jo-Ellen Darcy, a political appointee serving as Assistant Secretary of the Army for Civil Works, the civilian head of the

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76. Amy Dalrymple & Mike Nowatzki, *Eight Arrested After Protesters Bind Themselves to Construction Equipment in North Dakota*, AREAVOICES (Aug. 31, 2016), <https://perma.cc/8XLS-F9GJ>.

77. Max Grossfeld, *Protesters Graffiti Equipment, Attach Selves to Machinery at Dakota Access Pipeline Construction Site*, KFYZ-TV (Sept. 6, 2016, 6:29 PM), <https://perma.cc/3AS6-KS3N>.

78. Standing Rock Sioux Tribe’s Motion for Leave to File Supplemental Declaration, *Standing Rock Sioux Tribe*, No. 16-1534 (Sept. 2, 2016).

79. *Oil Pipeline Protest Turns Violent in Southern North Dakota*, CBS NEWS (Sept. 4, 2016, 1:04 PM), <https://perma.cc/FF3Y-BDYV>.

80. *Id.*

81. *Guards Accused of Unleashing Dogs, Pepper-Spraying Oil Pipeline Protesters*, CBS NEWS (Sept. 5, 2016, 10:36 AM), <https://perma.cc/B2YF-KGWB>.

82. Valerie Richardson, *Burning Teepees, Floating Buffalo and Zombies: Dakota Access Pipeline Protest Plagued by ‘Fake News’*, WASH. TIMES, Feb. 5, 2016, <https://perma.cc/5D42-NR3D>.

U.S. Army Corps of Engineers.<sup>83</sup> At this meeting a pair of assurances were offered by the government. The first was that the extra-legal and undefined review process the government was undertaking was to take a matter of weeks, not months.

The second assurance was that the purpose of that review was not to kill the project, which by that point was more than forty-eight percent complete,<sup>84</sup> but to conduct a “litigation analysis.” The veracity of this assurance was suspect. For starters, the government had just won a complete and compelling victory in federal court. When questioned whether such a “litigation analysis” was standard procedure, Assistant Secretary Darcy indicated it was not. When questioned further, she was unable to recall an instance when such a litigation review had ever been conducted.

Requests by project sponsors for the government’s assistance in achieving settlement were heard, but they never received a meaningful response. Meanwhile, the SRST, now joined by the Cheyenne River Sioux Tribe, lodged an appeal with the Circuit Court of Appeals for the District of Columbia seeking to enjoin DAPL construction activities within twenty miles on either side of the Missouri River for the pendency of the appeal.<sup>85</sup> The government’s response stated:

The Departments have also asked Dakota Access LLC to “voluntarily pause all construction activities within 20 miles east or west of Lake Oahe.” So while the Corps opposes the Tribe’s current motion and believes that it should be denied, the Departments believe that the company should implement the relief that the Tribe is seeking voluntarily.<sup>86</sup>

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83. In addition to Darcy, federal participants included Sam Hirsch, the Principal Deputy Assistant Attorney General (acting) of the Environmental and Natural Resources Division, Department of Justice, Tommy Beaudreau, Chief of Staff for the Department of Interior, and Hillary Rosen, Solicitor for the Department of Justice. The author was present for all meetings.

84. *Boasberg I*, at 53. Those unfamiliar with pipeline construction are often baffled that construction will begin prior to receipt of all necessary permits. Pipelines are not typically constructed from one end to the other, but rather in a number of segmented “spreads.” In the case of DAPL, eleven such spreads were employed, each spanning up to fifty miles. Once necessary permits are procured for an individual spread, construction typically begins in order to promote efficiency.

85. Motion for an Injunction Pending Appeal Under Fed. R. Civ. P. 62(C), *Standing Rock Sioux Tribe*, No. 16-1534 (Mar. 10, 2017).

86. Federal Defendant’s Opposition to Plaintiff-Appellant’s Emergency Motion for Injunction Pending Appeal at 6, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-5259 (D.C. Cir. filed Sept. 14, 2016).

This response, which has no grounding in law, was admittedly motivated by the growing size of the protest camps, increased media attention, and the very real threat of violence. Indeed, confrontation at the protest site continued to escalate. Before the final protestors were forcibly removed from the site in February 2017, there were 709 arrests, more than ninety-four percent of which were of individuals from outside of North Dakota.<sup>87</sup> Two publicly-owned vehicles were burned, and a pistol was fired in the direction of law enforcement officers.<sup>88</sup> The makings of an improvised explosive device were found at a bridge over the Cannonball River.<sup>89</sup> Ranchers reported incidents of stolen cattle, buffalo, fuel, and farm equipment.<sup>90</sup>

In alleged solidarity with the SRST, environmental activists attempted to sabotage four operational pipelines,<sup>91</sup> behavior which led eighty-six members of Congress to inquire of the Attorney General whether these acts constituted domestic terrorism.<sup>92</sup> Before it went into operation, above ground facilities of DAPL itself were repeatedly vandalized by protesters wielding oxyacetylene torches.<sup>93</sup> Offices of Energy Transfer Partners, the parent company of Dakota Access, LLC, were vandalized, and its computer system was hacked. Several Energy Transfer employees received death threats.<sup>94</sup>

The degree to which the growing protest movement affected the decision of the Circuit Court is unknown, but on September 16, 2017, it granted a temporary stay on construction activities while it considered the

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87. *By the Numbers*, MORTON COUNTY SHERIFF'S DEPARTMENT (Mar. 7, 2017), <https://perma.cc/335D-K8JM>.

88. Red Fawn Hollis was charged with discharge of a firearm during commission of a felony. In January 2018, she pleaded guilty to the lesser charge of civil disorder and gun possession and currently awaits sentencing. See *Sentencing Set for Dakota Access Protestor in Shooting*, KCRG (Jan. 29, 2018, 12:47 PM), <https://perma.cc/84JN-QEFT>.

89. Jessica Holdman, *Explosion at Protest Site Bears Investigation*, BISMARCK TRIBUNE, Nov. 22, 2017, <https://perma.cc/RSK5-P9AN>.

90. Mahmoud, *supra* note 6, at 4.

91. Alessandra Potenza, *Activists Claim They've Shut Down All Pipelines Carrying Crude Oil from Canada to US*, THE VERGE (Oct. 11, 2016, 2:57 PM), <https://perma.cc/8545-75G2>.

92. Letter from the Honorable Kevin Cramer, et al., to Att'y Gen. Jeff Sessions (Oct. 22, 2017) (on file with author).

93. William Petroski, *Dakota Access Protestors Claim Responsibility for Pipeline Sabotage*, DES MOINES REGISTER, July 24, 2017, <https://perma.cc/43A5-7H4T>.

94. Mahmoud, *supra* note 6.

merits of the appeal.<sup>95</sup> While the Court may have been nobly motivated, the ruling essentially directed a private party to refrain from lawful activities on private lands. As Judge Boasberg had already explained, the Tribes could not meet the burden to enjoin construction on private lands:

To understand Standing Rock's deficit in this regard, it is necessary to first consider the nature of the relief it seeks. The Tribe has not sued Dakota Access here for any transgressions; instead, this Motion seeks to enjoin Corps permitting of construction activities in discrete U.S. waterways along the pipeline route. Such relief sought cannot stop the construction of DAPL on private lands, which are not subject to any federal law.<sup>96</sup>

Perhaps reaching the same conclusion, the D.C. Circuit dissolved the stay on October 9, finding that the Tribes had failed to demonstrate irreparable harm or a likelihood of prevailing on the merits.<sup>97</sup> In dictum, the Court appeared to comfort itself when it stated, "ours is not the final word. A necessary easement still awaits government approval—a decision the Corps predicts is likely weeks away."<sup>98</sup>

The following day, the Corps issued a public statement indicating:

We appreciate the Circuit Court's opinion. The Army continues to review issues raised by the Standing Rock Sioux Tribe and other Tribal nations and hopes to conclude its review soon. In the interim the Army will not authorize constructing the Dakota Access Pipeline on Corps land bordering or under Lake Oahe.<sup>99</sup>

Having now prevailed in two separate court challenges, each of which concluded that the plaintiffs were unlikely to prevail on the merits, political appointees at the Corps continued to withhold the easement, presumably in anticipation of its long awaited "litigation analysis."

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95. Amended Order, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No 16-5259 (D.C. Cir. Sept. 16, 2016).

96. *Boasberg I*, at 51.

97. Order, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-5259 (D.C. Cir. Oct. 9, 2016).

98. *Id.* at 2.

99. Press Release, U.S. Dep't of Just., Joint Statement from Department of Justice, Department of the Army and Department of the Interior Regarding DC Circuit Court of Appeals Decision in *Standing Rock Sioux Tribe v US Army Corps of Engineers* (Oct. 10, 2016), <https://perma.cc/87PK-LMXR>.

Meanwhile, career officials at the Army Corps were working diligently on that litigation analysis. On October 20, Corps General Counsel David Cooper released a thirty-eight page memorandum that concluded: “Applying the ‘hard look’ standard of review under NEPA, the Corps’ Omaha District adequately considered and disclosed the environmental, cultural and other potential impacts of its actions and that its decisions were not arbitrary or capricious.”<sup>100</sup>

True to form, on November 14, 2016, Assistant Secretary Darcy issued a letter to the leaders of the SRST and Dakota Access in which she indicated that the Army had completed its review and while it had:

[c]oncluded that its previous decisions comported with legal requirements[,] . . . [t]he Army is mindful of the history of the Great Sioux Nation’s repeated dispossessions, including those to support water resources projects. This history compels great caution and respect in considering the concerns that the Standing Rock Sioux Tribe has raised regarding the proposed crossing of Lake Oahe north of its reservation. Accordingly, the Army has determined that *additional discussion* with the Standing Rock Sioux Tribe and analysis are warranted. . . . While these discussions and analysis are ongoing, construction on or under Corps land bordering or under Lake Oahe cannot occur because the Army has not made a final decision on whether to grant an easement.<sup>101</sup>

Dakota Access and the Corps had survived two legal challenges and an extensive extra-legal review by the Army Corps. The SRST, having steadfastly resisted numerous attempts at dialogue by both the Corps and DAPL, was now to be given a chance for “additional discussion.” This discussion, for which no legal or procedural framework was provided, was apparently designed to atone for two centuries of Tribal dispossession at the hands of the federal government. Meanwhile, an otherwise legally permitted \$3.8 billion pipeline project lay dormant for want of permission to pass ninety feet beneath 1,094 feet of Army Corps flood control lands.

Darcy’s letter further confirmed the suspicions of Dakota Access executives as to her intentions. There was a schism between the political-appointed leader of the Corps and the career officials who actually perform

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100. Memorandum on Technical and Legal Analysis of Previous Corps Decisions Regarding the DAPL Crossing at Lake Oahe from David Cooper, Gen. Counsel, U.S. Army Corps of Engineers (Oct. 20, 2016) (on file with author).

101. Letter from Assistant Sec’y Jo-Ellen Darcy, to Dave Archambault II, Kelcy Warren & Joey Mahmoud (Nov. 14, 2016) (on file with author) (emphasis added).

the permitting functions of the agency. Darcy's statement coming, as it did, more than two months after the initial meeting put the lie to the promise of "weeks, not months." Dakota Access continued to dismiss the promise of the Corps' Assistant Secretary that her purpose was not to kill the project. Given the circumstances, however, the sponsors had limited options. As the project manager testified before Congress, "even a company as large as Energy Transfer is helpless in the face of a government which will neither obey nor enforce the law."<sup>102</sup>

In response to the Darcy letter, Colonel John Henderson, District Commander of the Corps for the Omaha region, dutifully contacted Standing Rock Tribal Chairman Dave Archambault, inviting him to discuss the Tribe's concerns and any conditions that would ameliorate them.<sup>103</sup> The following day, November 23, Archambault responded:

The Tribe's fundamental position remains clear—the easement to cross Lake Oahe at the Tribe's doorstep must be denied I am willing to talk further with you, including on issues of pipeline safety. But for such discussions to be productive they must take place in the context of the Tribe's basic position regarding the pipeline and the Lake Oahe crossing.<sup>104</sup>

The Corps, SRST, and representatives of Dakota Access met on December 2, 2016 and discussed more than thirty additional terms and conditions for pipeline construction designed to lessen the likelihood and impacts of a pipeline rupture.<sup>105</sup> These terms were incorporated into a revised draft easement and forwarded to Assistant Secretary Darcy on December 3.<sup>106</sup> In his cover memorandum accompanying the revised easement, Colonel Henderson noted, "Accordingly, the Corps finds that it provided more than adequate coordination and consultation with the federally-recognized SRST despite the fact that SRST reservation lands are not involved and the SRST reservation would not be directly impacted by the easement."<sup>107</sup> He ended by saying, "I have concluded that the issuance of the attached Unexecuted Easement to Dakota Access would be consistent with the statutory requirements of 30 USC 185," which

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102. Mahmoud, *supra* note 6, at 6.

103. Letter from Col. John W. Henderson, Dist. Commander, to Dave Archambault II (Nov. 22, 2016) (on file with author).

104. Letter from Dave Archambault II, to Col. John W. Henderson, Dist. Commander (Nov. 23, 2016) (on file with author).

105. Memorandum for Commander, U.S. Army Corps of Engineers from Assistant Sec'y Jo-Ellen Darcy 2 (Dec. 4, 2016) (on file with author).

106. *Id.* at 2-3.

107. Henderson Memorandum, at 6.



authorizes the Corps to issue pipeline rights of way across Corps lands under certain circumstances.<sup>108</sup>

Notwithstanding, the following day Assistant Secretary Darcy issued a memorandum to the Corps Commander in which she stated:

The Council on Environmental Quality has advised that in some circumstances, including in some cases where environmental effects on Tribal resources are at stake, agencies “should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.”

This more heightened analysis, in my judgment, is appropriate in the circumstances present here. Thus, after careful review and consideration, to include the revised proposed easement furnished to me on December 3, 2016, I have concluded that a decision on whether to authorize the Dakota Access Pipeline to cross Lake Oahe at the proposed location merits addition[al] analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation. Accordingly, the Army will not grant an easement to cross Lake Oahe at the proposed location based on the current record. The robust consideration of reasonable alternatives that I am directing, together with potential spill risk and impacts, and treaty right, is best accomplished, in my judgment, by preparing an Environmental Impact Statement.<sup>109</sup>

This statement is remarkable in many respects, not least of which being what it overlooks. The original SRST cause of action was based on an alleged failure on the part of the government to fulfill its consultation responsibilities regarding protection of historic and cultural resources. Having witnessed the rejection of these claims by two federal courts, Darcy was instead withholding the easement for reasons related to spill risk and unspecified treaty rights.

With respect to spill risk, she failed to note that her own agency had already determined that “the likelihood of such an event is very low,” and that “in the unlikely event of a spill during operations of the pipeline, impacts to water resources would be further mitigated” by the response plans Dakota Access had in place.<sup>110</sup> She also ignored the fifteen other pipelines that pass beneath the Missouri River and the fact that DAPL

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108. *Id.* at 8.

109. Darcy, *supra* note 105, at 3.

110. EA, *supra* note 38, at 3.2.2.2.

would be constructed ninety or more feet below the deepest part of the river.<sup>111</sup>

Darcy indicated a desire to foster greater “tribal participation,” failing to note that Dakota Access and the Corps had successfully engaged and satisfied fifty-five other Tribes along the pipeline’s route or that Judge Boasberg had concluded that the Standing Rock Tribe had “largely refused to engage in consultation.”<sup>112</sup> She conveniently omitted any reference to the extra-judicial “additional discussion” provided to the SRST by the Corps, or the SRST’s own admission, in writing, that its fundamental position was that the easement “must be denied.”<sup>113</sup>

She indicated a desire to consider “alternative siting proposals” without noting that the EA issued by her own staff, which had withstood challenge in two federal courts and a rigorous, highly unusual, extra-judicial internal review, considered and rejected alternative sites as being less protective of the environment.<sup>114</sup>

She ignored the fact that the proposed crossing site at Lake Oahe was chosen precisely because it was already host to a natural gas pipeline and a high voltage transmission line.<sup>115</sup> She ignored the conclusions of her own General Counsel and the District Commander in charge of the project. Finally, Darcy suggested, in her opinion, that the easement should be postponed until the project had been subjected to a full Environmental Impact Statement. At the time of her statement, the Army Corps website contained, as it still does at the time of this writing, a passage indicating that the Corps need not undertake an EIS because “USACE has jurisdiction over a very small portion of the total DAPL project” and an EIS is “not required for any of the portions of the pipeline within USACE’s jurisdiction.”<sup>116</sup>

Company executives believed, notwithstanding repeated promises to the contrary, the actions of the Assistant Secretary, supported by fellow agencies, were motivated by politics and the purpose to kill the project, either through outright denial or by precipitating such delay that the project cratered due to cost considerations. These suspicions were confirmed when, on January 18, 2017, two days before Assistant Secretary Darcy and all other political appointees of the Obama administration were to

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111. Mahmoud, *supra* note 6, at 3.

112. *Boasberg I*, at 48.

113. Letter from Archambault II, *supra* note 104.

114. EA, *supra* note 38, at 9.

115. *Id.* at 2.3.1.2.

116. *Dakota Access Pipeline FAQ’s*, *supra* note 64.

surrender their posts, Darcy submitted a Notice of Intent to prepare an EIS on the DAPL project.<sup>117</sup>

It had also not escaped the notice of project sponsors that the incoming administration was unlikely to share the political agenda of the outgoing administration, as least insofar as DAPL was concerned. Indeed, two days after taking office, President Trump signed an executive order directing the Secretary of the Army to:

review and approve in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary and appropriate, requests for approvals to construct and operate the DAPL, including easements or rights-of-way to cross Federal areas under section 28 of the Mineral Leasing Act<sup>118</sup>

The memorandum further directed the Secretary to:

consider, to the extent permitted by law and as warranted, whether to rescind or modify the memorandum by the Assistant Secretary of the Army for Civil Works dated December 4, 2016 and whether to withdraw the Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access LLC's Request for an Easement to Cross Lake Oahe, North Dakota<sup>119</sup>

On February 3, 2017, Lieutenant General Todd Semonite released a sixteen-page memorandum, which concluded that the EA issued in July 2016 "satisf[ies] the NEPA requirements for evaluating the easement required for the DAPL to cross Corps-managed federal lands at Lake Oahe."<sup>120</sup> The memo then stated:

After reviewing the record in its entirety and giving further consideration to the input received over the last four months, including additional review and analysis identified by the ASA(CW) other federal offices and the SRST, the Corps finds that

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117. Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe, North Dakota, 82 Fed. Reg. 5543 (Jan. 18, 2017).

118. Memorandum on Construction of the Dakota Access Pipeline from Admin. of Donald J. Trump (Jan. 24, 2017).

119. *Id.*

120. Memorandum on Dakota Access Pipeline Technical and Legal Review and Recommendation to the Department of the Army from Lt. Gen. Todd T. Semonite 19 (Feb. 14, 2017) (on file with author).

the Final EA concerning the crossing of the DAPL at Lake Oahe is sufficient and does not need further supplementation.<sup>121</sup>

The memo went on to state that while the easement would reflect the Corps decision to not be bound by Darcy's December 4 memo, it recommended that the Army issue a notice in the Federal Register indicating its intent to withdraw the notice of intent to prepare an EIS.<sup>122</sup>

On February 8, 2017, six months and two weeks after issuance of the Final EA, the Department of the Army issued the easement to Dakota Access, LLC. By this time, the project was fully complete, but for the passage beneath the Corps flood control lands and Lake Oahe.<sup>123</sup>

#### IV. BACK TO THE COURTS

The following day, the Cheyenne River Sioux Tribe filed a motion for a temporary restraining order and application for a preliminary injunction to prevent construction activities under the easement based on the notion that it violated the Tribe's rights under the Religious Freedom Restoration Act (RFRA).<sup>124</sup> The Tribe asserted that "[t]he Lakota people believe that the pipeline correlates with a terrible Black Snake prophesied to come into the Lakota homeland and cause destruction."<sup>125</sup> According to the Tribe, the mere presence of the pipeline beneath Lake Oahe rendered its waters unsuitable for use in religious sacraments.<sup>126</sup>

Enacted in 1993, RFRA provides that the "Government shall not substantially burden a person's exercise of religion" unless "it demonstrates

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121. *Id.* at 11.

122. *Id.* at 14 That notice was submitted the same day by Acting Assistant Secretary for Civil Works, Douglas W. Lamont.

123. *Id.*

124. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77 (D.D.C. 2017) [hereinafter *Boasberg II*].

125. Memorandum in Support of Ex-parte Application for Temporary Restraining Order and Application for Preliminary Injunction at 2-3, *Standing Rock Sioux Tribe*, No. 16-1534.

126. *Id.* at 2. Nowhere in its argument did the Tribe indicate concerns about the numerous pipelines already operating beneath the Missouri River upstream of their reservation, an oil refinery located 7.5 miles above the northern edge of the lake, nor the wastewater treatment plant authorized to discharge into a tributary of the Missouri. *Id.* at 19. The Tribe did indicate that it had "tolerated the construction and operation of natural gas pipelines under Lake Oahe" because "they are not the Black Snake." Response of Dakota Access, LLC in Opposition to Plaintiff Cheyenne River Sioux Tribe's Motion for a Preliminary Injunction at 5, *Standing Rock Sioux Tribe*, No. 16-1534 (Feb. 21, 2017) [hereinafter *Dakota Access Opposition*].

that application of the burden . . . (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.”<sup>127</sup> Dakota Access argued that it was not the government whose actions were impacting the Sioux in the exercise of their religious rights, but rather Dakota Access.<sup>128</sup> Because the alleged violation was based on conduct by a third party, Dakota Access reasoned that the Corps’ permitting process was not governed by RFRA.<sup>129</sup> Dakota Access also asserted that the failure on the part of the Tribe to assert its RFRA claim in the more than two-year long permitting process violated the equitable doctrine of laches.<sup>130</sup> The Army Corps argued that the Cheyenne failed to demonstrate a “substantial burden” on its exercise of religion<sup>131</sup> as set forth in *Navajo Nation v. U.S. Forest Service*, as such violations occur “only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions.”<sup>132</sup>

On March 7, 2017, the Court rejected the Tribe’s request for preliminary injunction, finding it had “inexcusably delayed”<sup>133</sup> raising its RFRA claims:

For more than two years after becoming aware of DAPL’s proposed route, construction and operation[,] . . . Cheyenne River remained silent as to the Black Snake prophecy. In spite of an allegedly inadequate consultation process, the Tribe was still able to raise specific concerns about, for example, harm to water safety and burial sites, and to plead claims under the NHPA, NEPA, and other environmental statutes.<sup>134</sup>

As to the issue of whether the Corps’ permitting process was governed by RFRA, the Court concluded that because the Cheyenne River Tribe was

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127. 42 U.S.C. §§ 2000bb-1(a)-(b) (1993).

128. Dakota Access Opposition, at 14-16; U.S. Army Corps of Engineers Opposition to Cheyenne River Sioux Tribe’s Motion for Preliminary Injunction at 24-27, *Standing Rock Sioux Tribe*, No. 16-1534 (Feb. 21, 2017) [hereinafter Corps Opposition].

129. *See supra* note 128.

130. Dakota Access Opposition, at 7-11; Corps Opposition, at 1.

131. Corps Opposition, at 16.

132. 535 F.3d 1058, 1070 (9th Cir. 2008).

133. *Boasberg II*, at 14 (denying preliminary injunction).

134. *Id.* at 12.

unlikely to prevail on the merits for other reasons, the Court assumed that the Corps was so governed.<sup>135</sup>

On the matter of whether the Tribe demonstrated a “substantial burden” on its exercise of religion, the Court noted that nowhere did RFRA define the term, nor had the Supreme Court offered a definition.<sup>136</sup> The Court proceeded to draw heavily from *Lyng v. Northwest Indian Cemetery Protective Association*,<sup>137</sup> a case that preceded RFRA and involved the Free Exercise clause of the Constitution.

In *Lyng*, the Forest Service approved a six-mile road through federally-owned areas considered sacred by several Tribes.<sup>138</sup> After conceding that the Forest Service decision “would interfere significantly with private persons’ ability to pursue spiritual fulfillment,”<sup>139</sup> the Court nevertheless concluded that the Free Exercise clause was not violated because the government’s actions did not force individuals into “violating their religious beliefs” or “penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by other citizens.”<sup>140</sup> Under this precedent, Judge Boasberg concluded that the Cheyenne River Tribe was unlikely to demonstrate that a substantial burden had been imposed on its exercise of free religion.<sup>141</sup>

This was not the last of the litigation. Five days after the Cheyenne River Sioux filed its RFRA claim, the Standing Rock Sioux filed a motion for summary judgment, asserting that the Corps had violated the National Environmental Policy Act by declining to prepare an environmental impact statement on the Missouri River crossing at Lake Oahe.<sup>142</sup> The Tribe further asserted that the issuance of the easement by the Corps and its actions disregarding Darcy’s December 4 memo were arbitrary and capricious because these actions constituted a breach of trust responsibility.<sup>143</sup> In particular, the Tribe argued that the Corps failed to consider the impact of the project on its Treaty rights to hunt and fish in the affected area.<sup>144</sup> Finally, the Tribe argued that the Corps’ approval of the easement did not comport with the requirements of NWP 12. The numerous supporting arguments of the Tribe are discussed *infra*.

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135. *Id.* at 17-18.

136. *Id.* at 21.

137. 485 U.S. 439 (1988).

138. *Id.* at 442-43.

139. *Id.* at 449.

140. *Id.*

141. *Boasberg II*, at 22.

142. SRST Memorandum, at 17.

143. *Id.* at 35.

144. *Id.* at 5.

In its defense of the Corps' actions, Dakota Access noted the long and tortured procedural history surrounding the project, and—for the first time in a Court filing—noted repeated instances of political interference.<sup>145</sup> The Tribe argued that the decision to reverse the recommendations of the Darcy memo of December 4 was arbitrary and capricious. Dakota Access argued, in turn, that Darcy's memo of December 4 was the product of political pressures being put upon her by sister agencies and the White House. Dakota Access requested the Court to compel the production of all internal communications between the three federal agencies and the White House, which might prove that conclusion correct.<sup>146</sup>

In particular, Dakota Access pointed to one email which the Corps had produced for the record in support of its grant of the easement—an email from Brian Deese, Special Assistant to the President for Energy Affairs, to the Army Corps sent on December 2, two days before the Darcy memo. In that email Deese stated, “As you already know—and I just want to make absolutely clear—we expect the Army will make its own independent assessment of decisions related to the project, including when it comes to timing.”<sup>147</sup> This email confirmed that the White House was in some degree of communication and coordination with the three agencies. In the view of Dakota Access, this email represented a “self-serving, papering-of-the-record” which justified production of all inter-party communications.<sup>148</sup>

The Corps, now in the posture of defending the issuance of the easement it had withheld for months, likewise noted the extensive procedural history of the project, including multiple reviews by the agency. It concluded that nowhere did the Tribe offer substantive support for the notion that the Corps' decision to issue the easement was in error.<sup>149</sup> The Corps further contested the assertion that the revocation of the

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145. Response of Dakota Access, LLC in Opposition to Plaintiff Standing Rock Sioux Tribe's Motion for Summary Judgement at 2, *Standing Rock Sioux Tribe*, No. 16-1534 (Mar. 7, 2017).

146. Memorandum of Law in Support of Motion to Compel Completion of Administrative Record at 1-4, *Standing Rock Sioux Tribe*, No. 16-1534 (Apr. 21, 2017) [hereinafter Dakota Access Motion to Compel].

147. Email from Brian C. Deese, to Lowery A. Crook (Dec. 2, 2016) (on file with author).

148. Dakota Access Motion to Compel, at 12. The Corps' motivation in producing the Deese email is unclear; it may have been produced by someone in the Justice Department who shared DAPL's belief that improper political interference was taking place. Or it may have been included as a taunt, effectively sending the signal that “Yes, we are involved, and there is nothing you can do about it.”

149. U.S. Army Corps of Engineers Opposition to Standing Rock Sioux Tribe's Motion for Partial Summary Judgement and Cross Motion for Partial Summary Judgment at 2, *Standing Rock Sioux Tribe*, No. 16-1534 (Mar. 14, 2017).

December 4 Darcy memo represented a reversal of its policy because the memo did not constitute final agency action.<sup>150</sup> Finally, it rebutted Dakota Access's motion to compel production of the administrative record, arguing that the decision-maker who issued the July 25, 2016 EA could not have possibly relied on communications that occurred subsequent to that date.<sup>151</sup> Whether intentionally or not, the Corps sidestepped Dakota Access's more central argument that because the December 4 Darcy memo was impacted by outside political considerations, that action was fatally flawed. The Corps seemed to suggest that because Dakota Access received the easement it sought, it could not justify supplementation of the record, even though the issuance of that easement was being challenged in the instant proceeding.

On June 14, 2017, Judge Boasberg issued his third opinion in the matter. He began with a lengthy review of the NEPA, noting that its requirements are procedural, requiring "agencies to imbue their decision-making, through the use of certain procedures, with our country's commitment to environmental salubrity."<sup>152</sup> He further noted that "NEPA does not mandate particular consequences"<sup>153</sup> and that the statute merely prohibits "uninformed—rather than unwise—agency action."<sup>154</sup> Thus, an agency may approve a project with adverse environmental consequences if it concludes "competing policy values outweigh those costs."<sup>155</sup>

With respect to the Tribe's assertions that the Corps violated NEPA because the EA failed to fully evaluate the effects of a spill beneath Lake Oahe, the Judge noted that seven pages of the EA were devoted to that subject.<sup>156</sup> Judge Boasberg further noted that the line was being constructed in accordance with standards set by the Pipeline and Hazardous Materials and Safety Administration and that courts looked favorably on the reliance

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150. *Id.* at 2 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)). Darcy's inclusion of the phrase "in my opinion" in the December 4 memo signals that it was designed to make clear that hers was not a final action subject to judicial review.

151. U.S. Army Corps of Engineers Opposition to Dakota Access's Motion to Compel Completion of Administrative Record at 11, *Standing Rock Sioux Tribe*, No. 16-1534 (May 5, 2017).

152. Memorandum Opinion at 4, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101 (D.D.C. 2017) [hereinafter *Boasberg III*] (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193-94 (D.C. Cir. 1991)).

153. 938 F.2d at 194.

154. *Boasberg III*, at 4 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)).

155. *Id.* (citing *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009)).

156. *Id.* at 28.



by one agency on the safety and environmental standards of another when considering a project.<sup>157</sup> The judge also concluded that the Corps sufficiently justified its conclusion that the risk of a spill at Lake Oahe was low, noting, “[W]hile the EA does not quantify the risk of a spill with exact numerical precision . . . it reasonably gives the necessary content to its top-line conclusion that the risk of a spill is low.”<sup>158</sup>

Judge Boasberg then moved on to the Tribe’s assertion that the Corps violated regulations by the Council on Environmental Quality which state that a discriminating factor in any agency’s review of a project is whether its approval will be “highly controversial.”<sup>159</sup> Though “[j]ust what constitutes the type of ‘controversy’ that requires a full EIS is not entirely clear,”<sup>160</sup> the term refers to “cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use.”<sup>161</sup>

The Court concluded that at the time of the issuance of the EA on July 25, 2016, the Corps had no information before it, which suggested flaws in its analysis.<sup>162</sup> Expert reports submitted to the Corps *after* that date, but before the February 3 issuance of the easement, did raise such doubts.<sup>163</sup> These reports were submitted to the Corps as a function of the “additional discussion” called for by Darcy’s November 14 letter.<sup>164</sup> Both Dakota Access and the Corps had objected to the consideration of those reports as being beyond the closing of the July 25 record which led to the EA.<sup>165</sup> Dakota Access likewise took great exception to the substance of the reports.<sup>166</sup> While Judge Boasberg never fully addressed the question of timing, he did address the substantive critique:

It may well be the case that the Corps reasonably concluded that these expert reports were flawed or unreliable and thus did not actually create any substantial evidence of controversial effects. But the Corps never said as much [Therefore,] the Court cannot conclude

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157. *Id.* at 28-29.

158. *Id.* at 30.

159. 40 C.F.R. § 1508.27(b)(4) (1979).

160. *Nat’l Parks Conservation Ass’n v. U.S. Forest Serv.*, 177 F. Supp. 3d 1, 33 (D.D.C. 2016).

161. *Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003).

162. *Boasberg III*, at 33.

163. *Id.*

164. Earthfax Engineering Report at D.E. 117-18, *Standing Rock Sioux Tribe*, No. 16-1534; Accufacts Inc. Report at D.E. 117-15, *Standing Rock Sioux Tribe*, No. 16-1534.

165. *Boasberg III*, at 10.

166. *Id.*

that the Corps made a convincing case of no significant impact or took the requisite hard look.<sup>167</sup>

The Tribe's final argument on the sufficiency of the EA related to the cumulative risk imposed by the pipeline.<sup>168</sup> "Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such action."<sup>169</sup> The SRST alleged that the Corps neither assessed how DAPL would compound the overall risk of a pipeline spill in Missouri, nor did it assess "the cumulative risk to Tribal resources from the rest of the pipeline outside Lake Oahe."<sup>170</sup> After noting that the Corps devoted eleven pages to a discussion of cumulative impacts associated with the project, the Court rejected the first claim.<sup>171</sup> Citing *Sierra Club v. U.S. Army Corps of Engineers*,<sup>172</sup> the Court ruled that the fact that the Corps "did not address the cumulative risk from the *entire pipeline* . . . does not run afoul of NEPA."<sup>173</sup>

The Tribe next argued that the EA failed to assess the impacts of a spill directly to it and others and that it also failed to assess the impact a spill could have on its Treaty rights, specifically those related to hunting and fishing.<sup>174</sup> The Tribe stated "[e]cological impacts to fish and game habitat and populations present one dimension" of the impacts of a potential spill, but "the impact to Tribal members of losing the right to fish and hunt, which provides both much needed subsistence food to people facing extensive poverty as well as connection to cultural practices . . . is a separate issue."<sup>175</sup>

The Court addressed this challenge, stating that while Standing Rock "may be right that the construction and operation of DAPL under Lake Oahe could affect its members in broad and existential ways[,] . . . it offers no case law, statutory provisions, regulators or other authority to support

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167. *Id.* at 14.

168. SRST Memorandum, at 22.

169. 40 C.F.R. § 1508.7 (1978).

170. SRST Memorandum, at 23.

171. *Boasberg III*, at 35.

172. *Sierra Club*, 803 F.3d. at 32, 34.

173. *Boasberg III*, at 15 (emphasis added).

174. SRST Memorandum, at 24-25.

175. Plaintiff Standing Rock Sioux Tribe's Opposition to Corps and DAPL Motions for Partial Summary Judgment; Reply in Support of Tribe's Motion for Partial Summary Judgment at 23-24, *Standing Rock Sioux Tribe*, No. 16-1534 (Mar. 28, 2017).

its position that NEPA requires such a sweeping analysis.”<sup>176</sup> Thus, “the Court sees no basis on which to conclude that NEPA demands the type of existential-scope analysis the Tribe advocates. Rather, it is sufficient that the agency adequately analyze impacts on the resource covered by a given treaty.”<sup>177</sup>

The Court then analyzed whether the Corps’ evaluation of the Tribe’s hunting and fishing rights was sufficient. Noting numerous references in the EA to the impact of pipeline *construction* on water resources and fish and wildlife, the Court concluded that the Corps’ review was adequate in that regard.<sup>178</sup> However, “[t]he EA is not similarly attentive . . . to the impacts of a spill on *fish* and *game*, the resources implicated by the Tribe’s fishing and hunting rights.”<sup>179</sup> Thus, in this limited respect, the Court found the EA to be inadequate.<sup>180</sup>

The Court then turned to the question of NEPA’s requirements for consideration of alternatives to the proposed action. The Tribe specifically alleged that the EA did not adequately consider an alternative route that would have taken the pipeline across Lake Oahe approximately ten miles north of Bismarck, North Dakota.<sup>181</sup> Noting that the discussion of alternatives in an EA need not be as extensive as in an EIS,<sup>182</sup> the Court referred extensively to the EA itself, noting numerous additional impacts from this northern route.<sup>183</sup> It also pointed out the route selected by the Corps offered co-location with significant additional infrastructure,<sup>184</sup> and concluded that “the EA easily clears NEPA’s hurdle requiring ‘brief discussion’ of reasonable alternatives.”<sup>185</sup>

Finally, the Court turned to the SRST’s assertion that the Corps’ analysis of the environmental justice impacts of the line was arbitrary and capricious.<sup>186</sup> A 1994 Executive Order requires that federal agencies “[t]o the greatest extent practicable and permitted by law . . . make achieving environmental justice part of [their] mission by identifying and addressing . . . disproportionately high and adverse health or environmental effects of

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176. *Boasberg III*, at 15.

177. *Id.*

178. *Id.* at 16.

179. *Id.* at 17.

180. *Id.* at 18.

181. SRST Memorandum, at 26, 30-31.

182. *Boasberg III*, at 43-44.

183. *Id.* at 45.

184. *Id.*

185. *Id.* at 46.

186. SRST Memorandum, at 27.

[their] programs, policies and activities on minority populations and low income population.”<sup>187</sup>

Noting that the proposed crossing of the Missouri River is 0.55 miles north of the northern boundary of the SRST reservation, the Tribe objected to the Corps employing a unit of geographic analysis of 0.5 miles for its environmental justice analysis.<sup>188</sup> The Corps and DAPL countered that, as discussed in the EA, the one-half mile buffer was a standard measure for transportation projects at the Federal Transportation Administration and for natural gas pipeline projects at the Federal Energy Regulatory Commission.<sup>189</sup> The Court distinguished DAPL from those categories of projects and noted that the EA failed to identify any project involving a crude oil pipeline for which a half mile buffer was used. As a result, the Court agreed that the Corps failed to take the requisite “hard look” at the environmental justice consequences of its decision, finding itself “hard pressed to conclude that the Corps’ selection of a 0.5 mile buffer was reasonable.”<sup>190</sup>

The Court then turned to the SRST’s contention that the February 8 issuance of the easement was an arbitrary reversal of the December 4 Darcy memo.<sup>191</sup> The Corps and Dakota Access argued that because the easement had never been denied, the decision to award it did not constitute a reversal.<sup>192</sup> Judge Boasberg declared those arguments a mischaracterization of the Tribe’s argument. Rather, the Tribe noted that Darcy’s memo indicated the Army would not grant the easement “based on the current record.”<sup>193</sup> Darcy recommended that “additional analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation and comments” were warranted.<sup>194</sup>

Judge Boasberg then declared that by reversing Darcy’s decision, the Corps had indeed undertaken a change in official policy.<sup>195</sup> He pointed out that the Corps went to some lengths to provide justification for its

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187. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 11, 1994).

188. SRST Memorandum, at 28-29.

189. EA, *supra* note 38, at 84, 87.

190. *Boasberg III*, at 50.

191. SRST Memorandum, at 36.

192. Corps Opposition, at 24; Dakota Access Opposition, at 32.

193. *Boasberg III*, at 56.

194. Darcy, *supra* note 105, at 12.

195. *Boasberg III*, at 57.

reversal.<sup>196</sup> In large part based on this justification, the judge concluded that the Corps met the procedural requirements for such a policy reversal.<sup>197</sup>

In addition to its assertion that the decision to grant the easement was arbitrary and capricious, the Tribe argued that the decision violated the Corps' trust responsibility to protect the Tribe's treaty rights—a responsibility “even higher than the one imposed by NEPA.”<sup>198</sup> Judge Boasberg rejected the claim, noting that “[t]he trust obligations of the United States to Indian tribes are governed by statute rather than the common law.”<sup>199</sup> He went on to say, “Because Standing Rock has not identified a specific provision creating fiduciary or trust duties that the Corps violated, its breach-of-trust argument . . . cannot survive.”<sup>200</sup>

The Tribe's final argument asserted that the decision to issue the July 25, 2016 EA violated NWP 12. Specifically, the Tribe argued that the Corps failed to verify that the project complied with GC 7 related to proximity to the Tribe's water intake facilities and GC 17 related to reserve water rights.<sup>201</sup> Judge Boasberg rejected the claim, noting that to do an in-depth analysis of the project's compatibility with each GC would undermine the streamlining goals that underpin the NWP process.<sup>202</sup> While the Corps' actions were not arbitrary and capricious, the judge noted that DAPL had a continuing duty to comply with those and other General Conditions in order to maintain its NWP.<sup>203</sup>

In sum, the Court found that the Corps' decision to approve the EA on July 25, 2016, and to issue the easement on February 3, 2017, did not require an EIS and “largely complied with NEPA.” However, the Corps' record failed to justify its actions in three areas—those being (1) the failure to assess the impacts of an oil spill on the Tribe's hunting and fishing rights, (2) the failure to justify its decision under the requirements for environmental justice, and (3) the requirement to assess the degree to which the project might be highly controversial.<sup>204</sup> Judge Boasberg remanded the matter to the Corps for supplementation of the record in

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196. *Id.* at 57-58.

197. *Id.* at 59.

198. SRST Memorandum, at 39.

199. *Boasberg III*, at 60 (citing *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011)).

200. *Id.* at 63.

201. SRST Memorandum, at 43-45; NWP 12, at 10, 283.

202. *Boasberg III*, at 64.

203. *Id.* at 65.

204. *Id.* at 66.

these three areas. He ordered the parties to submit briefs on whether this remand should include *vacatur* of the easement.<sup>205</sup>

Under the Administrative Procedures Act, a court shall “hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.”<sup>206</sup> The standard remedy for a violation of NEPA in the DC Circuit is *vacatur*.<sup>207</sup> In *Allied Signal v. U.S. Nuclear Regulatory Commission*, however, that same Circuit held that the decision on whether to vacate “depends on the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.”<sup>208</sup> There is no requirement that either party prevail on both of the standard’s two prongs.<sup>209</sup>

Not surprisingly, the Standing Rock argued that the statute and precedent compelled *vacatur*, which was the only defensible outcome.<sup>210</sup> For its part, Dakota Access argued the contrary and asserted that suspension of pipeline operations through *vacatur* would have dire consequences for oil producers, refiners, and the State of North Dakota.<sup>211</sup> After a review of the three issues on remand, Judge Boasberg concluded that “the Corps has a significant likelihood of being able to substantiate its prior conclusions and determines that the first prong of Allied-Signal framework thus counsels in favor of remand without *vacatur*.”<sup>212</sup> As to the second prong, the judge concluded that while it was a close call, Dakota Access was able to demonstrate “some” economic disruption from *vacatur*.<sup>213</sup> But “[b]ecause the Court has concluded that the Corps’ errors are likely to be cured under the first prong, it need not define the precise scale of the potential disruption.”<sup>214</sup> In what one would assume to be Judge

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205. *Id.* at 66-67.

206. 5 U.S.C. § 706(2)(A) (1966).

207. *Humane Soc’y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007); *Employees for Env’tl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016).

208. 988 F. 2d 146, 150-51 (D.C. Cir. 1993).

209. *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270 (D.D.C. 2015).

210. *See generally* Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe’s Reply Brief Regarding Remedy, *Standing Rock Sioux Tribe*, No. 16-1534 (Aug. 17, 2017).

211. *See generally* Brief of Dakota Access, LLC Regarding Remedy, *Standing Rock Sioux Tribe*, No. 16-1534 (Aug. 17, 2017).

212. *Boasberg IV*, at 17 (emphasis added).

213. *Id.* at 22-23.

214. *Id.* at 27.

Boasberg's near-final ruling on the matter, he ordered remand without *vacatur*, thus allowing DAPL to remain in operation.

#### CONCLUSION

At the time of this writing, the Dakota Access Pipeline has been operating for more than nine months without meaningful incident. The protest camp disbanded on February 23, 2017 after the last forty-six protestors were forcibly evicted and arrested for trespass.<sup>215</sup> The self-proclaimed Water Protectors left an estimated 480 truckloads of food, clothing, tents, structures, and abandoned automobiles in the low lying areas adjacent to the waters they were ostensibly there to protect.<sup>216</sup> Standing Rock Sioux Tribal Chairman, Dave Archambault, was voted out of office in September of 2017.<sup>217</sup> The long and tortured litigation trail has all but come to an end,<sup>218</sup> and the focus of public attention has long since moved on to other issues.

There is much to be discussed and much to be regretted about U.S.-Tribal relations over the last 150 years. The issuance of a real estate document to a lawfully permitted pipeline seems hardly the pretext for having that discussion. Whatever their intentions at the outset, the Standing Rock quickly leapt beyond the discussion stage to a series of self-determined conclusions, which would essentially grant them and their fellow tribes veto power over infrastructure development in vast swaths of the continental U.S. In the absence of those demands being met, all efforts at cooperation were rejected.

Most troubling, senior government officials appear to have made repeated misstatements of material fact to pipeline sponsors, something for which four decades of professional life in and around government had not prepared the author. The willingness of numerous federal officials to elevate political considerations above the rules, the opinions of their own career professionals, and repeated court verdicts sends a troublesome message with respect to the rule of law. The primary victim was a company that did nothing but play by the rules. This saga will forever stand as an unfortunate footnote to the administration of a President who once billed himself as a Constitutional scholar.

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215. Lauren Donovan, *Corps Moves in to Finish What Tribe Started*, BISMARCK TRIBUNE, Feb. 24, 2017, <https://perma.cc/TF85-KEGU>.

216. *Id.*

217. Jessica Holdman, *Archambault Loses Standing Rock Chairman's Seat*, BISMARCK TRIBUNE, Sept. 28, 2017, <https://perma.cc/HZQ9-SPUX>.

218. The Army Corps has indicated it will be in a position to respond to the remand by April of 2018. Whether additional litigation will be prompted by their supplement of the record remains to be seen. *Boasberg IV*, at 26.