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# **The Flow Must Go On: Judicial Discretion in the Oil and Gas Context**

## INTRODUCTION

Imagine: you are the mayor of a small yet historic city. In the city's center lies a beautiful garden, which the citizens regard as sacred, precious, and holy. The garden is filled with plants, rooted in soil, that have existed for hundreds of years. To protect the garden, city planners routed the city's highways beneath it. For drivers, these highways are also the safest means of pass-through travel. Motorists heading from cities north of yours use the highways to reach destinations to the south. Those who attempt to bypass these thoroughfares have a greater chance of despair, sometimes with deadly results. An agency of the federal government has informed you that it plans to develop another highway that will run along the same path as those currently in place. The agency plans to build the new thoroughfare with the highest quality concrete, to secure it with the safest guardrails available, and to route it significantly further below ground than the existing highways.

Citizens actively protest the new highway out of fear for the sacred garden's wellbeing. Opposing the new construction feels like the right thing to do, since this will arguably protect the city's garden from reckless drivers and potentially harmful pollution. However, you also know that forcing the operation to shut down may lead to more accident-related deaths than if the agency continued the operation to its fruition. The new highway's opponents vehemently protest, while its proponents continually praise its potential safety.

Regardless of your initial feelings toward the highway's construction, the federal agency has finished the project. Outrage over the newly operational thoroughfare is still very present. A few flaws in its planning have also become apparent, and now those in opposition call for the highway's indefinite closure. As mayor, you have the power to stop the new thoroughfare's operation, pleasing those who hope for its demise. In the alternative, you also have the power to allow the thoroughfare to remain operational while those tasked with its implementation address and fix its flaws. You must weigh the conflicting interests and decide whether the increased likelihood of great harm and death to citizens traveling through your city is worth protecting the city's garden from potential damage.

The story of the city's garden is analogous to the facts at issue in a recent D.C. Circuit decision regarding the Dakota Access Pipeline (DAPL). DAPL has created uproar across the United States since Energy Transfer Partners (ETP), the company in charge of DAPL's construction,

initially shared the pipeline's plans in 2014.<sup>1</sup> The pipeline has sparked legal debate along with religious and cultural-based protests.<sup>2</sup> The U.S. Army Corps of Engineers' ("the Corps") sole defeat in its ongoing litigation with the Standing Rock Sioux Tribe ("Standing Rock") presented a difficult dilemma for D.C. District Court Judge Boasberg to untangle.<sup>3</sup> The particular state of affairs surrounding the pipeline impelled Boasberg to decide if DAPL would have to cease operations during the litigation so that the Corps could redo their environmental assessment of the possible effects that an oil spill may have had on Standing Rock's hunting and fishing rights. Boasberg's decision to keep or not to keep DAPL operational would affect all parties involved.<sup>4</sup>

In June 2017, after ruling in favor of Standing Rock in a ninety-one-page opinion, lawyers for both sides scrambled to conjure up their best arguments regarding DAPL's immediate and indefinite shutdown. Boasberg's forthcoming decision would have massive implications for DAPL's long-term operation as the United States' longest crude oil pipeline.<sup>5</sup> Legal authorities and interested citizens watched and waited while the process unfolded. The fate of the potentially safest and most technologically advanced pipeline rested in the hands of one District Court judge.

Part I of this Comment will explore crude oil's role in the United States energy sector, explain the Dakota Access Pipeline's structure and route, and provide background of North Dakota's Standing Rock Sioux Tribe. Part I will also generally explain how judges exercise judicial discretion essential to DAPL's survival. Part II will outline the litigation history of *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* and Part III will detail Judge Boasberg's October 2017 decision. Finally, Part IV will suggest how Boasberg's decision should operate as guiding precedent for future pipeline projects.

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1. Bronte Wittpenn, *Dakota Access Pipeline Timeline*, <https://perma.cc/ZJ85-TLMF> (last visited July 19, 2018).

2. Justin Worland, *What to Know About the Dakota Access Pipeline Protests* (Oct. 28, 2016), <https://perma.cc/87WE-SSUW> (last visited Sept. 7, 2017).

3. *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 255 F. Supp. 3d 101 (D.D.C. June 14, 2017).

4. "Parties" here refer to those who support the pipeline's implementation, whether actual parties to the lawsuit or not, and those who oppose it.

5. *Standing Rock*, 255 F. Supp. 3d 101.

## I. THE TREMENDOUS WORLD OF LAW AND OIL

*A. Crude Oil: A Brief Introduction to its Current Role in the United States*

Crude oil accounts for roughly twenty-three percent of the United States' energy production, second only to natural gas.<sup>6</sup> When considering consumption, however, energy's top two players swap rankings: Petroleum, the refined product of crude oil, accounts for thirty-seven percent of U.S. energy consumption, and natural gas falls behind at twenty-nine percent.<sup>7</sup> While predominantly used to facilitate personal and commercial transportation, petroleum also serves the industrial and residential sectors.<sup>8</sup> For example, crude oil, once refined as petroleum, is used to make gasoline, diesel, and jet fuel, as well as certain waxes, lubricants, and asphalt.<sup>9</sup>

Crude oil moves from oil wells to refineries via one of four methods of transportation: pipeline, train, truck, or ship.<sup>10</sup> Domestic pipelines transport roughly eighty percent of all crude oil in the U.S.<sup>11</sup> The Department of Transportation's Pipeline and Hazardous Material Safety Administration (PHMSA) requires pipeline developers to adhere to ultra-strict construction and maintenance processes.<sup>12</sup> Despite operating under such watchful eyes, accidents still occur. During the past twenty years, PHMSA recorded 11,460 "pipeline incidents," resulting in approximately

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6. U.S. ENERGY INFO. ADMIN., MONTHLY ENERGY REVIEW (Apr. 2017). Natural gas accounts for roughly thirty-two percent of the States' energy production. The remaining notable primary sources of energy are coal, nuclear, natural gas plant liquids, biomass, solar, and hydro (in descending order of production volume).

7. *Id.*

8. *Id.* Petroleum accounts for roughly eighty-eight percent of U.S. transportation energy, accounting for gasoline, diesel fuel, and jet fuel.

9. U.S. ENERGY INFO. ADMIN., OIL: CRUDE AND PETROLEUM PRODUCTS EXPLAINED (2017), <https://perma.cc/K4SS-HUPR>.

10. Tazmid Mahmood, *Oil Transport*, <https://perma.cc/P8HJ-VA3U>.

11. U.S. ENERGY INFO. ADMIN., REFINERY RECEIPTS OF CRUDE OIL BY METHOD OF TRANSPORTATION, <https://perma.cc/NL9M-4VSB> (last visited Oct. 9, 2017). This percentage represents, based on the most recent data available (2016), the volume of crude oil barrels transported domestically.

12. U.S. DEP'T. OF TRANSP. PIPELINE AND HAZARDOUS MATERIAL SAFETY ADMIN., <https://perma.cc/W9R5-YG5D> (last visited Nov. 5, 2018). The Office of Pipeline Safety administers pipeline safety regulatory programs and establishes the regulatory agenda, develops regulatory policy options and initiatives, and researches, analyzes, and documents social, economic, technological, environmental, safety, and security impacts upon existing/proposed regulatory, legislative, or program activities involving pipeline safety, among other activities.

\$7 billion in damages.<sup>13</sup> In spite of these mishaps, the dominant usage of domestic pipelines as a means of transportation suggests that perhaps both the good derived from pipeline usage outweighs the bad and that pipeline alternatives are more dangerous. Besides ships, pipelines have proven to be safer than all other transportation methods.<sup>14</sup> Both trucks and trains spill oil more frequently than pipelines.<sup>15</sup> Ships, despite being the least likely to spill, account for only five percent of crude oil transportation in the U.S. and thus lack capacity to handle the country's vast oil demand on their own.<sup>16</sup> As a result, pipelines operate at the forefront of domestic crude oil transportation.

### B. The Pipeline

The Dakota Access Pipeline is a 1,172-mile long, 30-inch wide, underground crude oil pipeline.<sup>17</sup> The pipeline's muscular, steel-walled pipes are 50% thicker than what is required by law.<sup>18</sup> It stretches from the Bakken Formation area in North Dakota to Patoka, Illinois without crossing the Standing Rock Sioux reservation at any point.<sup>19</sup> The pipeline's development created roughly 12,000 construction jobs.<sup>20</sup> Additionally, 99.98% of the pipeline lies on privately owned property, while the Federal Government owns the remaining 0.02%.<sup>21</sup> DAPL is currently the longest crude oil pipeline in North America.<sup>22</sup>

Energy Transfer Partners, the Texas pipeline company responsible for DAPL's construction, operation, and maintenance, operates over 70,000

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13. *Id.* PHMSA refers to pipeline spills as "incidents."

14. Brian Westenhaus, *Truck, Trains, or Pipelines – The Best Way to Transport Petroleum*, <https://perma.cc/94QM-GPT3> (last visited Oct. 8, 2017). While ships may be safer, they lack the capability to reach landlocked areas of the country, rendering their services useless in many places.

15. *Id.*, <https://perma.cc/F896-B2EE> (last visited Oct. 8, 2017).

16. U.S. ENERGY INFO. ADMIN., REFINERY RECEIPTS OF CRUDE OIL BY METHOD OF TRANSPORTATION, <https://perma.cc/4WP2-45KY> (last visited Oct. 9, 2017).

17. *The Dakota Access Pipeline Keeps America Moving Efficiently and in an Environmentally Safe Manner*, DAKOTA ACCESS PIPELINE FACTS, <https://perma.cc/C8SC-27GD> (last visited Nov. 8, 2017).

18. *Id.* DAPL's builders designed its thick pipes to prevent leakage.

19. *Id.*; The Baaken formation is "one of the largest contiguous oil and gas deposits in the United States." Hobart M. King, *Baaken Formation: News, Maps, Videos, and Information Sources*, GEOLOGY.COM, <https://perma.cc/6T3Z-ZGGM> (last visited Feb. 9, 2019).

20. *Id.*

21. *Is The Dakota Access Pipeline on Public or Private Land?*, DAKOTA ACCESS PIPELINE FACTS, <https://perma.cc/6TUN-VDRZ> (last visited Nov. 8, 2017).

22. WILLIAM H. RODGERS, JR., HORNBOOK ON ENVIRONMENTAL LAW § 25:50 (West Publishing Co. 2d. ed 1994).

miles of domestic pipeline.<sup>23</sup> ETP is currently constructing three pipelines, not including DAPL, in the United States.<sup>24</sup> The company monitors its pipelines twenty-four hours per day, seven days per week, to ensure safe operation.<sup>25</sup> ETP estimated that the DAPL's construction alone would generate \$156 million in sales and income taxes; ETP further estimated \$55 million in annual North Dakota property tax revenue.<sup>26</sup> ETP announced that DAPL was fully operational on June 1, 2017.<sup>27</sup>

### *1. North Dakota's Take on DAPL*

North Dakota's governor, Doug Burgum, openly expressed approval of the pipeline from its inception.<sup>28</sup> During DAPL's construction, he asked protestors to leave the site in hopes of avoiding further conflict and violence.<sup>29</sup> David Archambault, Standing Rock Sioux Tribe's Chairman, concurred in Burgum's request for protestors to evacuate the site so that the parties could settle the pipeline dispute in court.<sup>30</sup> The two further urged the pipeline's protestors—who left loads of trash, temporary sleeping equipment, and over three hundred vehicles—to clean up the site before they left. The Governor and Chairman's mutual desire for protestors to retreat from DAPL's construction site was a rare moment of

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23. *Pipeline Path Beneath Lake Oahe*, DAKOTA ACCESS PIPELINE FACTS, <https://perma.cc/ZJE3-CRB3> (last visited Sept. 21, 2018).

24. ENERGY TRANSFER, ENERGY TRANSFER PARTNERS OPERATIONS OVERVIEW, <https://perma.cc/5MH6-PY5Q> (last visited Nov. 8, 2017). ETP's ongoing projects include (1) the "Rover Pipeline," a gas pipeline routed from Virginia to Ohio, (2) the "Bayou Bridge" crude oil pipeline, of which only "Phase I" is currently operational, moving crude oil from Texas to Louisiana (Phase II, projected for early 2018, will move oil from Lake Charles, LA to St. James, LA), and (3) the "Mariner East" propane/ethane/butane pipeline stretching across West Pennsylvania, West Virginia, and Eastern Ohio, which ETP expects to be operational in late 2017.

25. ENERGY TRANSFER, PIPELINE SAFETY IS A SHARED RESPONSIBILITY, <https://perma.cc/R7NG-A8HL> (last visited Sept. 21, 2018).

26. *Dakota Access Pipeline: Overview*, ENERGY TRANSFER PARTNERS (2015), <https://perma.cc/3Y3B-HT8K> (last visited Feb. 11, 2019). ETP estimated these tax totals during the beginning stages of the pipeline's construction.

27. Jade Begay and Nina Smith, *Dakota Access Pipeline is Officially Operational* (June 2, 2017), <https://perma.cc/4YVL-A5NK> (last visited Oct. 4, 2017).

28. Julie Turkewitz, *Army Approves Construction of Dakota Access Pipeline* (Feb. 7, 2017), <https://perma.cc/X5RK-P6GC> (last visited Oct. 29, 2018) ("This is a key step toward the completion of this important infrastructure project, which has faced months of politically driven delays and will allow for safe transport of North Dakota product to market.").

29. Ernest Scheyder, *New North Dakota Governor Expects Controversial Pipeline to be Built*, REUTERS, <https://perma.cc/SE82-2VZQ> (last visited Nov. 8, 2017).

30. *Id.*

congruity between viciously opposed parties. More recently, however, the contenders have returned to their respective corners regarding the pipeline's operation.

### C. *Standing Rock: A Brief Biography*

The Standing Rock Sioux Tribe was originally a part of the Great Sioux Reservation—which comprised all tribes of South Dakota—but has operated under a constitution of its own since 1959.<sup>31</sup> The roughly one-million-acre reservation rides the western borders of both North and South Dakota.<sup>32</sup> Along with two casinos, the reservation boasts beautiful landscapes, camping sites, and waterways.<sup>33</sup> Its most relevant feature to the pipeline controversy is Lake Oahe. While the lake is Standing Rock's primary source of water, according to Standing Rock, it also services "homes, a hospital, clinics, businesses, and government buildings."<sup>34</sup> Further, Standing Rock considers Lake Oahe's waters to be sacred and "central to [its] practice of religion."<sup>35</sup> Standing Rock believes that DAPL will contaminate the lake's water, despite its route lying ninety-five feet beneath the lake's bottom.

### D. *Judicial Discretion—What it Means and How it Functions*

In most cases, judges settle disputes by applying "traditional remedies" derived from the law which may vary depending on the controlling circuit. For example, in *Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin.*, the Federal Mine Safety & Health Administration (FMSHA), via an adjudicative order, granted a mine company a requested permit allowing the company to ventilate the working-face of a mine with the air of its choosing, on the condition that the mine company install carbon monoxide detectors throughout the mine.<sup>36</sup> The mine union appealed the order to the D.C. District Court—the presiding court in the DAPL dispute—which found flaws in FMSHA's reasoning for granting the permit.<sup>37</sup>

In the D.C. Circuit, vacatur is the traditional remedy for cases involving deficient federal agency action. Vacatur involves a remand and

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31. *History*, STANDING ROCK SIOUX TRIBE, <https://perma.cc/9GMR-XGFS> (last visited Nov. 6, 2017).

32. *Visit Us*, STANDING ROCK SIOUX TRIBE, <https://perma.cc/LP3X-DF7N> (last visited Nov. 6, 2017).

33. *Id.*

34. *See* ECF No. 117 (SRST MSJ) at 4.

35. *Id.*

36. 920 F.2d 960 (D.C. Cir. 1990).

37. *Id.*

discontinuation of the agency action—here, revoking the mine company’s permit for failure to install the carbon monoxide detectors.<sup>38</sup> Exercising judicial discretion, the D.C. District Court remanded FMSHA’s order but did not vacate it, because the record did not show that the agency’s order was substantively fatal.<sup>39</sup> The Court recognized the order’s safety concerns, and thus only remanded the case so that FMSHA could address particular issues regarding the order.<sup>40</sup>

Years later, in *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, the D.C. Circuit, through an exercise of judicial discretion, again remanded an agency’s rule without vacating it. The Federal Motor Carrier Safety Administration promulgated a final rule that issued new training regimens for Commercial Motor Vehicle operators.

The Court found that the new rule was opposed to Department of Transportation standards, and therefore could not stand as written.<sup>41</sup> Yet, like in *International Union*, the Court noted that, “while unsupported agency action normally warrants vacatur . . . this court is not without discretion.”<sup>42</sup> The Court decided against vacatur, remanded the case, and left the rule in place “while the agency craft[ed] an adequate regulation.”<sup>43</sup>

The holdings in *International Union* and *Advocates for Highway and Auto Safety* present examples of judges who declined to employ traditional remedies in instances where such a remedy was inappropriate. Those judges, through exercises of judicial discretion, remanded the cases and granted the agencies opportunities to address the problems in their initial actions. The facts and history of the *Standing Rock* litigation presented Judge Boasberg with a similar opportunity to exercise judicial discretion. He weighed compelling interests on both sides in light of the traditional remedy, and—pursuant to the strength of those interests—ruled as he deemed fit.

## II. LET IT FLOW

The recent Dakota Access Pipeline litigation presented Judge Boasberg with a tricky situation—one that required a balancing of competing interests. For Boasberg, there were four prevailing sets of interests to weigh: (1) legal interests, (2) economic interests, (3) safety and alternative transport interests, and (4) interests unique to the parties.

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Advocates for Highway and Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1140.

42. *Id.* at 1151.

43. *Id.*

Judges in many instances wield judicial discretionary power when making potentially controversial decisions. Judicial discretion allows a judge to weigh competing interests and, when appropriate, forego a traditional remedy in favor of one that the judge deems fit in a particular instance. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* appeared to be a case that could potentially warrant an exercise of judicial discretion because of DAPL's potentially grand effects on the United States generally, its economy, and the safety of its people. The decision would have immediate effects—either a shutdown of DAPL or the continuation of its operation—regardless of a later appeal, making Boasberg's initial decision all the more important. Thus, Boasberg examined the aforementioned sets of interests thoroughly before issuing his opinion.

*A. Legal Interests—DAPL'S Litigation Timeline, Legal Success, and Failure*

The Standing Rock Sioux Tribe has actively opposed the Dakota Access Pipeline since the Corps' December 2015 construction proposal.<sup>44</sup> Scenes of sign-wielding protestors flooded American television screens for over a year. Disturbing images of angry rioters standing face to face with military-style law enforcement were a part of nearly every afternoon news story. Behind the scenes, however, a lengthy legal battle between Standing Rock and the U.S. Army Corps of Engineers was underway.

*1. Standing Rock I—September 2016*

Standing Rock brought suit against the U.S. Army Corps of Engineers, seeking a preliminary injunction against the Corps to halt DAPL's construction efforts.<sup>45</sup> Standing Rock's complaint alleged that the Corps violated the National Historic Preservation Act (NHPA) by encroaching on its reservation, thus placing Standing Rock's historic land and water at risk of destruction and contamination.<sup>46</sup> Standing Rock also alleged that the Corps violated the NHPA by not consulting the Tribe prior to issuing permits for the pipeline.<sup>47</sup> Further, Standing Rock's complaint stated that the Corps was in violation of the Clean Water Act (CWA) and the Rivers

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44. *Dakota Access Pipeline Environmental Assessment*, U.S. ARMY CORPS OF ENGINEERS, PROJECT REPORTS (Dec. 9, 2015), <https://perma.cc/D8ZV-FJ9V> (last visited Nov. 6, 2017).

45. *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. Sept. 9, 2016).

46. *Id.*

47. *Id.* The NHPA encompasses cultural and religious sites, such as Indian tribes, and requires that federal agencies consult with tribes regarding whether the

and Harbors Act (RHA).<sup>48</sup> Judge Boasberg denied the Tribe's injunction, stating that the Corps likely complied with the NHPA and that Standing Rock had not shown it would suffer irreparable harm that would be prevented by an injunction.<sup>49</sup>

*a. Corps' Compliance With the NHPA Consultation Requirement*

Section 106 of the NHPA requires federal agencies to consult with Indian Tribes, among other groups, prior to undertaking agency action.<sup>50</sup> In September 2015—roughly a year prior to Standing Rock's initial lawsuit against the Corps—the Corps' Tribal Liaison, Joel Ames, contacted David Archambault to schedule a meeting with Standing Rock's Vice Chairman to speak about the pipeline project. Ames and Archambault successfully scheduled the meeting; however, two days before it was set to occur, Standing Rock canceled because “nobody . . . was available to attend.”<sup>51</sup> The Corps went on to document ten additional attempts to contact the Tribe in October 2015 alone, to no avail.<sup>52</sup>

In November 2015, the Corps invited Standing Rock to a general tribal meeting in South Dakota.<sup>53</sup> Five tribes attended the meeting, but Standing Rock was absent.<sup>54</sup> In 2016, the Corps and Dakota Access offered surrounding tribes the opportunity to identify tribal areas of concern by way of cultural surveying.<sup>55</sup> Three tribes took advantage of this opportunity, each of which identified and communicated particular concerns with DAPL.<sup>56</sup> Dakota Access addressed all three concerns. Standing Rock, however, declined to participate, claiming that the scope of the surveys was too narrow.<sup>57</sup> Despite having no actual, physical meeting between the two parties, Boasberg ultimately found that the Corps had complied sufficiently with the consultation requirement under NHPA's Section 106, stating:

In summary, the Corps has documented dozens of attempts it made to consult with the Standing Rock Sioux from the fall of 2014 through the spring of 2016 on the permitted DAPL activities.

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48. *Id.*

49. *Id.*

50. Section 106 of the National Historic Preservation Act, PUB. L. NO. 89-665, as amended by Pub. L. No. 96-515.

51. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 19.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 21.

56. *Id.*

57. *Id.*

These included at least three site visits to the Lake Oahe crossing to assess any potential effects on historic properties and four meetings with [the Corps' North Dakota District Commander].<sup>58</sup>

These reasons, according to Boarsberg, were sufficient to show the Corps had complied with the consultation requirement.

*b. Corps' Compliance With the CWA and the RHA*

Both the Clean Water Act and the Rivers and Harbors Act operate under the Administrative Procedures Act (APA). Under the APA, the party alleging an agency violation of these Acts—here, Standing Rock—bears the burden of showing that the agency's actions were either unlawful or arbitrary and capricious.<sup>59</sup> Judge Boasberg found that Standing Rock's focus on vague potential impacts to cultural resources along the pipeline's route was insufficient to prove arbitrary and capricious action by the Corps.<sup>60</sup> Further, in holding that Standing Rock had not met its burden of proof for this particular claim, he noted that the Tribe had more than a year to demonstrate any unreasonable activity by the Corps, and it failed to do so.<sup>61</sup>

2. Standing Rock II – March 2017

The Cheyenne River Sioux intervened in the case as co-plaintiffs, joining the Standing Rock Sioux effort to prevent DAPL's completion.<sup>62</sup> On March 18, 2017, while its prior court order was pending appeal (*Standing Rock I*), the D.C. District Court denied the Cheyenne River Sioux's last-minute attempt to cease DAPL's flow of oil under Lake Oahe.<sup>63</sup> The two tribes claimed that DAPL's route—which runs ninety-five feet below Lake Oahe—would violate the Religious Freedom Restoration Act (RFRA) by inflicting a significant burden on Standing Rock's exercise of religion.<sup>64</sup> In his decision, Judge Boasberg of the D.C. District Court noted that Standing Rock had delayed bringing the RFRA claim for over two years from when the Corps originally disclosed

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58. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 24.

59. *Kleppe v. Sierra Club*, 427 U.S. 390, 412, 96 S. Ct. 2718, 49 L. Ed. 2d 576 (1976).

60. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 30.

61. *Id.*

62. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77 (D.D.C. Mar. 7, 2017).

63. *Id.*

64. *Id.*; 42 U.S.C.A. § 2000bb.

DAPL's route.<sup>65</sup> DAPL runs significantly further under Lake Oahe than the seven other oil and gas pipelines that also lie below the lake. Most notably, the Northern Border Pipeline has operated safely along the same path as DAPL for the last thirty-five years.<sup>66</sup> Native American tribes have neither challenged the Northern Border Pipeline in court, nor have they publicly protested the pipeline in any notable way.<sup>67</sup>

### 3. Standing Rock III – June 2017

On June 14, 2017, Standing Rock achieved its first victory in court. Judge Boasberg ordered the Corps to revise its environmental assessment of DAPL, holding that, while the Corps largely complied with the National Environmental Policy Act, it failed to properly consider both the pipeline's effects on Standing Rock's hunting and fishing rights and its more controversial effects.<sup>68</sup> The \$4 billion dollar pipeline began operating two weeks prior to the June 14 ruling.<sup>69</sup> This ruling presented Judge Boasberg with a predicament regarding the pipeline's ongoing operation. He had to decide—subject to further briefing—whether or not DAPL could continue its operations during pending litigation.<sup>70</sup>

#### *a. Environmental Impact Statement*

Standing Rock brought the majority of its claims pursuant to the National Environmental Policy Act (NEPA), a statute obliging agencies to consider all possible environmental impacts of forthcoming agency action.<sup>71</sup> NEPA ensures that agencies, when preparing to undertake some new action, make public their environmental considerations and concerns.<sup>72</sup> To reach this end, NEPA may require an agency to prepare an Environmental Impact Statement (EIS) regarding any major action proposed that may “significantly affect the quality of the human

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65. *Id.*

66. *Supra* note 23.

67. Chris White, *The Protests Over the Dakota Access Pipeline Explained*, THE DAILY CALLER (Nov. 26, 2016), <https://perma.cc/SS2G-4K27> (last visited Oct. 4, 2017).

68. *Supra* note 3.

69. Richard Epstein, *Next Steps for Judge Boasberg in Dakota Access: Let DAPL Remain Operational*, FORBES (July 17, 2017), <https://perma.cc/5GVZ-D482> (last visited Sept. 7, 2017).

70. *Standing Rock*, 255 F. Supp. 3d 101.

71. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

72. *Id.*

environment.”<sup>73</sup> Citizens living in areas immediately surrounding the Dakota Access Pipeline have a legitimate interest in knowing the pipeline’s potential environmental impact, as they often rely on the surrounding land and water. NEPA facilitates informed decision-making by fundamentally requiring disclosures of relevant information.

Before an agency prepares an EIS, it must conduct an Environmental Assessment, which is a brief, publicly available document containing evidence of whether or not an EIS is appropriate in a certain instance.<sup>74</sup> If the agency conducting the Environmental Assessment decides that an EIS is not necessary, it is then required to prepare a Finding of No Significant Impact (FONSI), which serves as the agency’s explanation for their decision.<sup>75</sup> There is also an in-between agency decision available known as a Mitigated FONSI, which allows the agency to claim that their action will cause no significant environmental harm because the agency will implement mitigation measures to ensure its safety. In *Standing Rock*, the U.S. Army Corps of Engineers filed an Environmental Assessment and then a Mitigated FONSI.<sup>76</sup> Judge Boasberg held that the Corps’ Mitigated FONSI was not sufficient in addressing the pipeline’s potential environmental impacts; he was then forced to decide whether to remand the case and allow DAPL to operate or to force cessation of the pipeline’s function while the Corps attempted to repair the NEPA violation.<sup>77</sup>

*b. Legal Controversy—More Than a News Story*

The core requirement of NEPA is known as the “hard look” requirement, which demands that agencies evaluate and identify all adverse environmental effects of forthcoming actions.<sup>78</sup> Although appearing similar to the NEPA’s EIS requirement, the “hard look” standard forces agencies, among other things, to consider the extent to which their actions’ potential environmental effects may be “highly controversial.”<sup>79</sup> While the standard for legal controversy appears fairly amorphous, the D.C. Court has found cases to be “controversial” under NEPA based not on social media uproar or news coverage but on “substantial dispute[s] . . . as to the size, nature, or effect of the major

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73. 42 U.S.C. § 4332(2)(C). The EIS describes the environmental impact of the action, unavoidable adverse effects, alternatives to the action, the relationship between brief uses of the environment and long-term productivity, and the irreversible commitments of resources.

74. 40 C.F.R. § 1504.4(b).

75. 40 C.F.R. § 1501.4(e); 40 C.F.R. § 1508.13.

76. *Standing Rock*, 255 F. Supp. 3d 101.

77. *Id.*

78. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

79. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 127.

federal action.”<sup>80</sup> In general, Standing Rock claims that the multitude of critical comments regarding the Corps’ allegedly faulty conclusions—coupled with expert evidence of DAPL’s high-risk operation—suffice as “controversial” under NEPA. Judge Boasberg found Standing Rock’s claim sufficient and thus concluded that the Corps had indeed violated NEPA on this count as well.

### *B. Remedy*

The APA governs NEPA violations.<sup>81</sup> In the D.C. Circuit, vacatur is the traditionally prescribed remedy for such violations.<sup>82</sup> When enforced, vacatur forces an agency—that the Court has found in violation of NEPA—to cease operation in that instance until that agency fixes its mistake(s) and complies with NEPA’s guidelines.<sup>83</sup> Imposing vacatur would force DAPL to cease operation until it complied fully with NEPA’s requirements. Courts, however, retain discretion to deviate from the standard remedy when they deem such deviation necessary and appropriate.<sup>84</sup> The D.C. Circuit Court in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, stated: “The decision whether to vacate depends on the seriousness of the order’s deficiencies . . . and the disruptive consequences of an interim change that may itself be changed.”<sup>85</sup> Further, the probability that an agency may substantiate its actions upon remand favors a remanding judgment over a vacating one.<sup>86</sup> This meant that for the Corps to avoid vacatur, it had to make a strong and legitimate argument as to why it believed its Environmental Assessment and Mitigated FONSI were appropriate. If the Corps was successful, such substantiation would weigh in its favor. Standing Rock argued for vacatur as the appropriate remedy; the Corps countered, as expected, stating that the *Allied-Signal* holding requires a remand without vacatur.<sup>87</sup> Boasberg ordered both parties to submit briefing on why either remand or vacatur was the proper remedy. He made the decision four months later.

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80. *Town of Cave Creek, Arizona v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003), (quoting *N. Am. Wild Sheep v. Dep’t of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982)).

81. 5 U.S.C. § 706(2)(A).

82. *Public Employees for Env’tl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016).

83. *Id.*

84. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993).

85. *Id.* (quoting *Int’l Union, United Mine Workers of Am. v. Fed. Mine Safety*

86. *Id.*

87. *Standing Rock*, 255 F. Supp. 3d 101.

## III. THE DEFINING MOMENT: STANDING ROCK IV – OCTOBER 2017

On October 11, 2017, Judge Boasberg ruled against vacatur, allowing DAPL to transport oil while giving the Corps a chance to readdress its NEPA violations.<sup>88</sup> In his decision, Boasberg acknowledged that, while vacatur is indeed the D.C. Circuit's standard remedy when vacating an action in violation of NEPA, it "is not the only option."<sup>89</sup> The reviewing court, he added, has judicial discretion to "leave the agency action in place."<sup>90</sup>

The D.C. Circuit utilizes a two-prong test when deciding whether to vacate deficient agency action. The test comes from the *Allied-Signal* case, which held that the decision focuses on (1) the seriousness of the order's deficiencies, and (2) the "disruptive consequences of an interim change."<sup>91</sup> The test does not require "either the proponent or the opponent of vacatur to prevail on both factors," a stipulation that would prove fatal for Standing Rock.<sup>92</sup>

*A. Seriousness of Deficiencies; Not Serious Enough*

In his analysis of the first prong of the *Allied-Signal* test, Boasberg sought to determine the "seriousness of the deficiencies in the underlying agency action."<sup>93</sup> The Corps argued that the three deficiencies that the Court identified in *Standing Rock III* were insignificant.<sup>94</sup> Boasberg was tasked with assessing the likelihood that, on remand, "the Corps [would] be able to justify its prior decision to issue an EA and FONSI," instead of formulating a full EIS.<sup>95</sup>

*1. Highly Controversial*

The Court in *Standing Rock III* held that the Corps failed to adequately address the extent and likelihood to which DAPL's effects on the

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88. *Standing Rock Sioux Tribe v. U.S. Corps of Engineers*, 282 F. Supp. 3d 91 (D.C. Cir. Oct. 11, 2017).

89. *Id.* at 97.

90. *Id.*

91. *Allied-Signal, Inc.*, 988 F.2d at 150.

92. *Id.*

93. *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 97.

94. The three deficiencies identified were: (1) the Corps' failure to address DAPL's possible effects on the environment; (2) the possible effects of an oil spill on Standing Rock's hunting and fishing rights; and (3) the Corps' failure to substantiate its reasoning for routing DAPL beneath Lake Oahe.

95. *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 98.

environment would be highly controversial.<sup>96</sup> This time around, Boasberg acknowledged the seriousness of the Corps' failure to give a reasoned explanation for not providing a full EIS. The lack of an EIS "leaves the Court in doubt as to whether the agency chose correctly in making its decision."<sup>97</sup> When it comes to vacatur, however, the inquiry turns to the extent of that doubt. Boasberg stated that controversial aspect of the analysis was a factual dispute that lied within the Corps' expertise. This assertion stemmed from a revisiting of the Standing Rock's expert reports that initially found the Corps' EA inadequate. The Corps should have exposed Standing Rock's expert reports as inaccurate or flawed from the outset, but it failed to do so. The absence of critique essentially allowed Standing Rock to go unopposed in pointing out the Corps' deficiencies. This decision suggests that the Corps must be gravely attentive in both critiquing Standing Rock's experts and formulating a reasonable explanation regarding its decision not to prepare an EIS. Boasberg ultimately believed the Corps could correct their shortcomings, and held that, in light of this belief, the "highly controversial" factor weighed against vacatur.<sup>98</sup>

## 2. *Fishing and Hunting*

On top of its weaknesses in assessing DAPL's potentially controversial effects, the Corps also neglected to adequately address the effects an oil spill might have on Standing Rock's hunting and fishing rights. Like the "highly controversial" issue, the Corps addressed hunting and fishing rights to some extent, but it fell short with its explanation and analysis regarding potential harm. Boasberg again demonstrated faith that the agency would be able to compensate for its mistakes on remand, making vacatur unnecessary. According to the Court, the Corps had already acquired a plethora of "information regarding Lake Oahe's fish and wildlife."<sup>99</sup> The Court thus granted the Corps a chance to use this information to legitimately analyze the potential effects of a DAPL oil spill.

## 3. *Environmental Justice*

Finally, the Court found that the Corps had provided a third short-sighted analysis. This time, it failed to adequately substantiate its reasoning

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96. *Standing Rock*, 255 F. Supp. 3d 101.

97. *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 98, (quoting *AARP v. United States Equal Employment Opportunity Comm'n*, 267 F. Supp. 3d 14 (D.D.C. Aug. 22, 2017)).

98. *Id.* at 99.

99. *Id.*

for routing DAPL underneath Lake Oahe. In *Standing Rock III*, Boasberg described the Corps' analysis as " cursory" and found that it did not "reasonably support the conclusion that [Standing Rock] will not be disproportionately affected by an oil spill in terms of adverse human health or environmental effects."<sup>100</sup> Despite Standing Rock's vehement opposition to remand without vacatur regarding this issue, Boasberg again found "that there [was] a substantial possibility that the Corps [would] . . . substantiate its prior decision to proceed" without providing an EIS.<sup>101</sup> Boasberg did concede that the "environmental justice" factor was the closest to favoring Standing Rock, yet, through an exercise of judicial discretion, still granted the Corps an opportunity to justify its actions.<sup>102</sup>

The Corps may attribute its somewhat unexpected victory in the Court's "seriousness of deficiencies" analysis to judicial discretion. Boasberg agreed that the Corps' were deficient in three areas. Yet, despite what seemed to be successful arguments by Standing Rock, Boasberg maintained the power to give the Corps a second chance to bolster their arguments. He very well could have issued vacatur and halted DAPL's production; not doing so was an example of judicial discretion at work. The Corps' victory on the first prong of the Allied-Signal test was enough to avoid vacatur on its own. However, Boasberg did address the second prong thereafter. The Court's result regarding the second prong is perhaps more surprising than the first. The Corps was unable to persuade Boasberg that vacatur would have disruptive consequences, despite the existence of statistics suggesting that such consequences were possible.

### *B. Disruptive Consequences; Not Disruptive Enough*

Even though Boasberg found that the Corps survived the "seriousness of deficiencies" prong of the Allied-Signal test, which alone was enough to avoid vacatur, he also went through the "disruptive consequences" analysis as well. First, he addressed the Corps' economic-harm argument, in which the Corps asserted that "North Dakota's oil producers will face severe costs and delays" if the Court granted vacatur.<sup>103</sup>

Crude oil transportation by pipeline is historically the cheapest method of delivering oil to refineries, with costs ranging between two dollars and four dollars per barrel.<sup>104</sup> Rail transport costs between ten and fifteen

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100. *Standing Rock*, 255 F. Supp. 3d at 140.

101. *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 102.

102. *Id.* at 100.

103. *Id.* at 103.

104. *Transporting Oil: Why Pipelines Still Rule*, FORBES (May 13, 2016), <https://perma.cc/9LQG-2XXG> (last visited Oct. 9, 2017).

dollars per barrel, several times that of pipelining.<sup>105</sup> Truck transportation, the most expensive of all methods, can cost up to twenty dollars per barrel.<sup>106</sup> Over time, as technology and pipeline capacity have grown harmoniously, pipelining has become even cheaper. Railroads, by contrast, must continually build and maintain tracks, while also paying for right-of-ways via property taxes.<sup>107</sup> Similarly, tanker trucks require rigorous upkeep because they incur wear and tear as they travel long distances to reach refineries. Crude oil contains corrosive agents that eat away at aluminum truck tanks, further increasing the associated maintenance costs.<sup>108</sup> These higher costs cut into transportation companies' profits, which they calculate by subtracting the transportation cost per crude oil barrel—among other production costs—from the price of each barrel sold.<sup>109</sup>

In its first three months of operation, the Dakota Access Pipeline increased North Dakota's state tax revenue by almost \$19 million.<sup>110</sup> DAPL's Pipeline Authority Director cited increased transportation competition as the reason for the revenue increase.<sup>111</sup> North Dakota's Tax Commissioner corroborated the Director's numbers and reasoning.<sup>112</sup> In addition—assuming the trend continues—the Commissioner estimated a \$140 million increase in future tax revenue each two-year budget cycle.<sup>113</sup> Yet, despite DAPL's proven and potential economic benefits, the Corps could not persuade Judge Boasberg to weigh this factor in its favor.<sup>114</sup> He expressed uncertainty regarding the amount of oil flowing through the pipeline at the time, as well as an apprehension to “wade into this war of the

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105. *About Pipelines*, ASSOCIATION OF OIL PIPELINES, <https://perma.cc/42D3-N63M> (last visited Nov. 1, 2018).

106. Jennifer Hiller, *Crude Oil Will Continue Rolling by Train*, FUEL FIX (July 28, 2013), <https://perma.cc/UU76-WZ3P> (last visited Oct. 11, 2017).

107. John Frittelli, et al., *Rail Transportation of Crude Oil: Background and Issues for Congress*, FEDERATION OF AMERICAN SCIENTISTS, <https://perma.cc/M5WU-ZWJD> (Dec. 4, 2014).

108. Derek Clouthier, *Purchasing and Maintaining Tanker Trailers*, TRUCKNEWS.COM (Aug. 31, 2016), <https://perma.cc/HQ2R-F74D> (last visited Oct. 9, 2017).

109. *Barrel Breakdown*, THE WALL STREET JOURNAL, <https://perma.cc/WYU9-UJB7> (last visited Oct. 11, 2017).

110. ASSOCIATED PRESS, *Officials Say Pipeline Boosts revenue by About \$6M a Month*, DAILY HERALD (Oct. 11, 2017), <https://perma.cc/E6RV-TL2N> (last visited Feb. 11, 2019).

111. *Id.*

112. *Id.* (“It’s helping all the producers and royalty owners regardless of whether those barrels are actually traveling down the Dakota Access Pipeline. That has really set the market and made the transportation much more competitive leaving North Dakota.”).

113. *Id.*

114. *Standing Rock Sioux Tribe*, 282 F. Supp. 3d 91.

crude-oil experts.”<sup>115</sup> Furthermore, Boasberg expressed his concern that denying vacatur based on “alleged economic harm” may create “undesirable incentives for future agency actions,” specifically that agencies may devote a plethora of resources “as early as possible to a challenged project—and then claim disruption in light of such investments.”<sup>116</sup>

### *1. Safety—The Risks Associated With Alternative Transport; Not Risky Enough*

Prior to Boasberg’s ruling, oil and gas experts expressed their safety concerns regarding the plan for DAPL’s oil if the Court ruled in favor of Standing Rock. The concerns revolved primarily around the possibility that the already-extracted crude oil would not go back into the ground but that alternate means of transportation would become responsible for the oil’s transport.<sup>117</sup> A decision in favor of Standing Rock would appear to ignore empirical evidence suggesting pipelines to be the safest crude oil transporters, thus effectively allowing an increased likelihood of devastating oil spills by trucks or trains.<sup>118</sup> Despite statistics that appear rather certain regarding crude oil transport, the Corps was unable to persuade Boasberg to rule in its favor on this issue.

### *2. Oil-Bearing Trains*

Oil-bearing trains are blatantly dangerous. Since 2013, twelve trains have exploded while transporting crude oil. In July 2013, a train carrying crude oil exploded in Quebec, creating a half-mile wide blast, destroying over thirty buildings, and killing forty-seven people.<sup>119</sup> The Quebec death toll is higher than that of any pipeline incident in history.<sup>120</sup> In 2015, one of these disastrous infernos occurred in North Dakota—DAPL’s starting point—forcing over 2,000 residents to evacuate their homes<sup>121</sup> Another

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115. *Id.* at 105.

116. *Id.* at 106.

117. Epstein, *supra* note 69.

118. Diana Furchtgott-Roth, *Pipelines Are Safest For Transportation*, MANHATTAN INSTITUTE FOR POLICY RESEARCH (No. 23 June 2013), <https://perma.cc/5SB8-M37V> (last visited Feb. 9, 2019).

119. Celler, Johnson, Withrow, *Shipping; Oil Train Explosions*, FOSSIL FUEL CONNECTIONS, <https://perma.cc/F3F7-HZYY> (last visited Oct. 7, 2017).

120. *Lac-Megantic Runway Train and Derailment Investigation Summary*, TRANSPORTATION SAFETY BOARD OF CANADA, <https://perma.cc/X63R-TXYU> (last visited Oct. 6, 2017).

121. *Oregon Derailment is Latest in String of US Oil Train Crashes*, THE ASSOCIATED PRESS, <https://perma.cc/2YE6-LDFB> (last visited Oct. 6, 2017).

train left North Dakota, exploded in Alabama, and spilled roughly 749,000 gallons of oil.

Crude oil is highly volatile. Any type of hiccup or derailment whatsoever presents immediately serious problems. In addition, these trains are legally allowed to travel directly through cities, increasing the likelihood of grievous devastation. Train routes are rarely disclosed to the public, leaving emergency responders unequipped and clueless as to where potential accidents may occur.<sup>122</sup>

Hazardous-material spills via railroad are roughly three times more frequent per year than pipeline spills.<sup>123</sup> A single tank-car may carry roughly 28,000 gallons of crude oil. These trains, like the one involved in the Quebec disaster, can carry over seventy tank cars.<sup>124</sup> Thus, one train could spill up to two million gallons of crude oil at once.

For comparison, in 2013, Arkansas experienced one of the most recent large-scale pipeline leaks. The Exxon pipeline spilled an estimated 80,000 gallons of crude oil, flooding the roads and backyards of Mayflower, Arkansas residents. The U.S. Environmental Protection Agency classified it as a “major oil spill.”<sup>125</sup> While undoubtedly tragic, the 80,000 gallons spilled amounts to only four percent of what an average railroad tanker-car is capable of spilling. Perhaps this difference appears as a classic “lesser of two evils” scenario. One “evil,” however, sports a far larger capacity for destruction than its counterpart.

Crude oil is an ultra-valuable limited resource, and once extracted, usually ends up at a refinery one way or another. In 2016, railroads transported roughly 110 million barrels of crude oil across the United States.<sup>126</sup> This number translates to three percent of total domestic crude oil transportation. Even with the railroads’ seemingly low involvement, these trains continually manage to create headlines that center around their failures and the devastating results. Despite the statistics, Boasberg’s ruling stated that the Corps’ “argument [was] speculative at best,” and that it “failed to persuade the Court that transport by train is significantly more dangerous than allowing oil to continue to flow beneath Lake Oahe.”<sup>127</sup> In

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122. Dan Molinski, *How to Transport Oil More Safely*, THE WALL STREET JOURNAL (Sept. 13, 2015), <https://perma.cc/RT5L-EHYP> (last visited Oct. 8, 2017).

123. Westenhaus, *supra* note 14.

124. *Lac-Megantic Disaster By the Numbers: Catalogue of a Tragedy*, CBC (Jan. 28, 2015), <https://perma.cc/W7V3-D26H> (last visited Oct. 8, 2017). The train involved in this disaster was made up of seventy-two tank cars.

125. Michael B. Kelley, *Exxon Oil Spill In Arkansas Has Left Crude Lining The Streets*, BUSINESS INSIDER (Apr. 1, 2013), <https://perma.cc/E7WM-N825> (last visited Feb. 9, 2019).

126. U.S. ENERGY INFO. ADMIN., *Refinery Receipts of Crude Oil by Method of Transportation*, <https://perma.cc/MSL8-6772> (last visited Oct. 9, 2017).

127. *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 107.

its argument, the Corps addressed oil-bearing trains but failed to expose the dangers of fuel tanker trucks. Of course, there is no way to know if an extra argument regarding fuel trucks would have tipped the scale in the Corps' favor, but the volatile vessels may have been worth mentioning.

### 3. *Fuel Tankers (Trucks)*

Just when it seems like crude oil transportation could not get any more dangerous than the use of railroads, an eighteen-wheeler rolls onto the interstate, strapped with a full tank of flammable oil. Even without spewing statistics that show the heightened risks associated with transporting 9,000 gallons of fuel on an interstate highway, one may easily infer how these trucks pose a threat. In an age of highway-dominated vehicular travel, traffic accidents are a regular occurrence. Contrary to "normal," small-scale fender-benders, accidents involving fuel tankers become literally explosive. This year, a tanker explosion in Pakistan killed 153 people. Although this disaster took place well across the globe, the incredible devastation in Pakistan exemplifies the extreme consequences of a tanker accident here in the U.S.<sup>128</sup>

Tanker trucks carried approximately 218 million barrels of crude oil across the United States in 2016, accounting for seven percent of all domestic crude oil.<sup>129</sup> With trucks bearing four percent more oil than trains, it is surprising that the Corps did not include trucks in its argument. From 2005-2009, tanker accidents averaged ten deaths per year; eight more than the runner-up, trains.<sup>130</sup> During the same time span, similar accidents hospitalized thirty-four people.<sup>131</sup>

It is inconceivable why anyone would wish to increase the amount of crude oil transported by trucks or trains and thus necessarily increase the potential for human casualties and disaster. Nonetheless, these safety concerns proved futile, standing alone, in convincing Boasberg to avoid vacatur.

### 4. *Why Pipelines are Safer, Comparatively*

The majority of pipeline spills start as small leaks as a result of corrosion from outside of the pipe.<sup>132</sup> The public first discovers around twenty-three percent of pipeline leaks, followed by pipeline operators,

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128. Elliot C. McLaughlin, *Pakistan Fuel Tanker Explosion Kills At Least 153* (June 26, 2017), <https://perma.cc/7V8G-PXHE> (last visited Oct. 6, 2017).

129. Kelley, *supra* note 125.

130. U.S. DEP'T. OF TRANSP. PIPELINE AND HAZARDOUS MATERIAL SAFETY ADMIN, *supra* note 12. This is the most up-to-date data available from the DOT.

131. *Id.*

132. Westenhaus, *supra* note 14.

specialized detection systems, emergency responders, and air patrols, among others.<sup>133</sup> In extreme cases, pipeline leaks can go on for years.<sup>134</sup> These large-scale disastrous leaks are the exception, however, and are less frequent than spills by alternative transportation methods. Pipelines remain the most managed and meticulously regulated transportation method, which often results in leaks being discovered and fixed in their earliest stages.

It is necessary to keep this analysis in perspective, because all means of crude oil transportation carry risk. Over the last ten years, pipeline spills have been responsible for an average of twelve deaths per year.<sup>135</sup> While pipeline fatalities slightly exceed those of its competitors, pipelines also account for eighty percent of all domestic crude oil transportation.<sup>136</sup> Thus, the amount of oil transported by train, truck, or pipeline, measured against each method's respective fatality rate, produces an outcome that strongly favors the use of pipeline transportation over the others.

### *C. Parties' Interests—What Each Side Expects and Deserves*

The Dakota Access Pipeline conflict has four contenders on opposing sides of the issue: The U.S. Army Corps of Engineers and Energy Transfer Partners represent the “pro-DAPL” movement, while the Standing Rock and Cheyenne Sioux Tribes represent the “anti-DAPL” position. The players on each side are very different; they represent different ideologies and seek different ends. However, “different” does not mean “opposite.” For example, just because the Corps granted ETP's easement—the legal grant necessary for DAPL's construction—does not necessarily suggest that the Corps wishes to transport oil at Standing Rock's peril. Further, Standing Rock's opposition to the Corps in this instance does not necessarily mean that Standing Rock is completely against the transportation of crude oil. Yet, the possibility of a compromise in this case—while not totally foreclosed—appears unlikely.

Lake Oahe, perhaps the most controversial area of DAPL's route, holds great significance for the Standing Rock and Cheyenne Sioux

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133. *Id.* Pipeline operators are the first to discover leaks roughly nineteen percent of the time; specialized detections systems catch twelve percent; emergency responders catch seven percent; parties who actually cause the spill turn in six percent; air patrols and controllers catch five percent; ground patrol operators find two percent; the remaining discoveries are listed under “other” and “blank.”

134. U.S. DEP'T. OF TRANSP. PIPELINE AND HAZARDOUS MATERIAL SAFETY ADMIN., *supra* note 12.

135. U.S. DEP'T. OF TRANSP. PIPELINE AND HAZARDOUS MATERIAL SAFETY ADMIN., PIPELINE SAFETY UPDATE (Sept. 2012), <https://perma.cc/LP6A-HU2U> (last visited Nov. 5, 2018).

136. U.S. ENERGY INFO. ADMIN., *supra* note 11.

Tribes. Neither the Corps, nor Energy Transfer Partners, has expressed any intent to deprive Standing Rock of clean water or religious freedom. In *Standing Rock I*, Judge Boasberg held that Standing Rock had failed to show that DAPL imposed any impending and irreparable harm on Lake Oahe's water. Six months later, in *Standing Rock II*, Boasberg appeared to find Standing Rock's two-year delay in bringing a claim under the Religious Freedom Restoration Act to suggest that their freedom to practice religion was likely not threatened by the pipeline's construction.

Had DAPL tainted or contaminated Standing Rock's land or water, ceasing its operations during the pending litigation would be undoubtedly just. Of course, this possibility still exists and is Standing Rock's top concern. Standing Rock deserved its opportunity to be heard—an opportunity the D.C. District Court fulfilled in its analyses of *Standing Rock I–III*. With his ruling in *Standing Rock IV*, Boasberg granted the Corps a similar chance to prove DAPL's safety. Judge Boasberg, in exercising his discretionary authority, allowed DAPL to operate for the time being. The pipeline's operation is the most certain way for the Judge to determine its long-term safety.

#### IV. WHAT STANDING ROCK IV MEANS FOR THE FUTURE

The D.C. Circuit's decision in *Standing Rock IV* comes with implications for future crude oil transportation projects. As of April 27, 2018, the Federal Energy Regulatory Commission identified nine "Major Pipeline Projects Pending" within the United States.<sup>137</sup> The owners of these pipelines and their legal teams have several important lessons to learn from *Standing Rock IV*. Primarily, lawyers for the pending pipeline owners should ensure that the personnel in charge of routing, construction, and development are outstandingly thorough when making decisions that may carry an environmental impact. These pipeline companies undoubtedly want to avoid litigation, so acting in a careful and meticulous manner from the outset is imperative. In the event that a lawsuit ensues, lawyers for the pipeline owners should recognize the reality that judges are individuals who differ in how they elect to use judicial discretion. This is not to say that the Corps got lucky in *Standing Rock IV* by going before Judge Boasberg, but lawyers who may soon face similar dilemmas should not be complacent in light of the Corps' recent victory.

This decision is also a win for crude oil transport by train and truck. Railroad transport notched a victory, thanks to the Corps' inability to effectively prove its danger when compared to pipeline transport. Without

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137. FED. ENERGY REGULATORY COMM'N., *Major Pipeline Projects Pending (Onshore)* (Apr. 27, 2018), <https://perma.cc/Q253-Z4YY> (last visited July 31, 2018).

even showing up to the fight, crude oil railroads walked away with heads high and chests puffed. While not as apparent as that of the railroads, crude oil and fuel tankers also bagged a win. The Corps' failed to even mention fuel trucks when making its argument that alternative means of transport would be more dangerous than DAPL. Each of these "alternative" means of transport now have a bit of legal backing to lean on in the future.

#### CONCLUSION

Judge Boasberg was not faced with an easy choice. His decision to keep DAPL operational after his ruling in *Standing Rock III* carried heavy weight. Though the traditionally prescribed remedy is vacatur, Boasberg utilized judicial discretion to deviate from this remedy as he saw fit. Particularly relevant to this case are the economic factors, safety implications, and the parties' interests, all of which affected the judge's decision and all of which the judge's decision now affects. A totality of the circumstances approach (i.e. considering all relevant factors) leaned in favor of Boasberg allowing DAPL to remain operational. DAPL is already serving the North Dakota economy very positively, and it has not harmed the Standing Rock and Cheyenne Sioux Tribes' land, water, or religious freedom.

The \$4 billion pipeline stands to be the safest and most efficient means of crude oil transportation in history; its owners, Energy Transfer Partners, deserve the opportunity to prove its safety and efficiency. This is not suggesting that a Court may not strike DAPL down in the future if it becomes a dangerous impediment to Standing Rock's land. For now, DAPL should remain operational while the U.S. Army Corps of Engineers addresses the issues in its Environmental Assessment. Once the Corps is in full compliance with NEPA, the behemoth pipeline that is DAPL will be in a position to serve the United States with an unprecedented amount of the world's most valuable energy resource, crude oil. Standing Rock has not yet proven any DAPL-related harm; obstructing its ongoing operation would lead to the first injury.

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