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## Water is Life: The Standing Rock Sioux Tribe's Legal Battle Against the Dakota Access Pipeline

Jasper Gingrich

In April 2016, Jan Hasselman, a staff attorney at Earthjustice, received an unusual call.<sup>1</sup> It was from representatives of the Standing Rock Sioux Tribe in North Dakota, and they were calling about a pipeline.<sup>2</sup> The Dakota Access Pipeline, initially planned to run near the majority white community of Bismarck, North Dakota, was rerouted after public outcry and now set to cross the Missouri River within a half-mile of their reservation.<sup>3</sup> The new route ran through significant cultural sites of multiple Indigenous tribes, including burial sites that would be completely destroyed.<sup>4</sup> Over the next several years, a vicious legal battle between Indigenous tribes and the pipeline company would ensue, snowballing into a nation-wide movement for Indigenous rights and sovereignty.<sup>5</sup>

The Dakota Access Pipeline (“DAPL”) is twelve hundred miles long and spans one-third of the continent.<sup>6</sup> It has the capacity to transport nearly six hundred thousand barrels of crude oil per day, separated from the outside by a metal tube just thirty inches in diameter.<sup>7</sup> Earthjustice led several legal battles over pipelines before Standing Rock, which is how tribal leaders had heard of them.<sup>8</sup> Pipelines are notoriously difficult to fight in court because a company does not need any overarching federal permit to build a major crude oil pipeline in the United States, only a state permit.<sup>9</sup> However, under the federal Clean Water Act, any private activity that touches a wetland, stream, or major river is required to obtain a permit from the Army Corps of Engineers (“Army

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<sup>1</sup> *In Conversation: Standing With Standing Rock*, EARTHJUSTICE, <https://earthjustice.org/features/teleconference-standing-rock#events> [<https://perma.cc/NH3X-9VBR>] [hereinafter Earthjustice].

<sup>2</sup> *Id.*

<sup>3</sup> *Dakota Access Pipeline: Environmental & Energy Law Program*, HARVARD LAW SCHOOL (Mar. 13, 2022), <https://eelp.law.harvard.edu/2017/10/dakota-access-pipeline/> [<https://perma.cc/VT85-8EA4>] [hereinafter Pipeline].

<sup>4</sup> Rebecca Hersher, *Key Moments In The Dakota Access Pipeline Fight*, NPR: THE TWO-WAY (Feb. 22, 2017, 4:28 PM), <https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight> [<https://perma.cc/3BX7-TDVR>].

<sup>5</sup> Earthjustice, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

Corps”).<sup>10</sup> This was the case with the planned route, which gave tribal leaders and attorneys hope.<sup>11</sup>

Earthjustice quickly began working with the Standing Rock Tribe in order to persuade the Army Corps to deny the pipeline permit in one particular spot—where the pipeline would cross the Missouri River at the Lake Oahe reservoir.<sup>12</sup> This reservoir is the main water source for multiple Indigenous tribes in the area, and the river flows downstream into the Standing Rock Reservation. Congress seized this land from the Sioux in 1958.<sup>13</sup> Hasselman said:

to cross the Missouri at that place, where a pipeline spill wouldn’t just be an economic and environmental disaster. It would be a cultural disaster. It would be an existential threat to these people, who rely on the Missouri River, not just for drinking water and for irrigation of farms, but for the core of their cultural and spiritual essence.<sup>14</sup>

Since April 2016, Indigenous youth activists had been organizing an on-line campaign called “Respect Our Water,” which gathered four hundred thirty thousand signatures in opposition to the pipeline.<sup>15</sup> The goal of this petition was to compel the Army Corps to carry out a thorough environmental study on impacts of the pipeline.<sup>16</sup> After an unusually truncated review, they approved the permit.<sup>17</sup> The report announcing their approval stated, “No significant comments remain unresolved.”<sup>18</sup>

On August 4, 2016, the Standing Rock Sioux Tribe filed a lawsuit against the Army Corps, alleging they failed their responsibility of consulting tribal members before approving the pipeline.<sup>19</sup> They also requested an emergency injunction against the construction.<sup>20</sup> Here, the Tribe relied on the National Historic Preservation Act (“NHPA”) to make its claim.<sup>21</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Hersher, *supra* note 4.

<sup>13</sup> Pipeline, *supra* note 3.

<sup>14</sup> Earthjustice, *supra* note 1.

<sup>15</sup> Carla Javier, *A Timeline of the Year of Resistance at Standing Rock*, SPLINTER NEWS (Dec. 14, 2016), <https://splinternews.com/a-timeline-of-the-year-of-resistance-at-standing-rock-1794269727> [<https://perma.cc/3V82-BYN8>].

<sup>16</sup> Pipeline, *supra* note 3.

<sup>17</sup> *Id.*

<sup>18</sup> Hersher, *supra* note 4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Earthjustice, *supra* note 1.

The NHPA was passed in 1966 to protect historic sites threatened by new construction.<sup>22</sup> Section 106 of the NHPA requires agencies to conduct a full assessment *before* issuing any funding, permit, or license to a project that would impact locations deemed culturally significant.<sup>23</sup> It also requires consultation with any Indigenous tribe that attaches significance to impacted areas, even if they are outside federally recognized tribal lands.<sup>24</sup>

The Tribe's brief for the lawsuit tells the story of the Standing Rock's struggle with the Army Corps.<sup>25</sup> Back in 2015, the Army Corps sent a generic form letter to the Standing Rock Tribe informing them of the pipeline reroute and seeking to initiate consultation, which the Tribal Historic Preservation Office ("THPO") responded to immediately.<sup>26</sup> The THPO continued to send frequent letters asking about the consultation, but never received a reply.<sup>27</sup> After four months of silence, the Army Corps sent the THPO another letter with a one-month deadline to comment "if they would like to consult."<sup>28</sup> The THPO replied immediately once again, requesting a tribal review and highlighting the lack of response to their previous letters.<sup>29</sup> Once again, they received no response.<sup>30</sup> The next time the THPO heard from the Army Corps was when they published a draft environmental assessment that failed to mention the impacts on the Tribe at all.<sup>31</sup> It also ignored the high risk of oil spills and the potential harm to the environment.<sup>32</sup> The Environmental Protection Agency, Department of the Interior, and Advisory Council on Historic Preservation all expressed their disapproval to the Army Corps.<sup>33</sup> The Iowa Tribe and Osage Nation, who would also be affected by the pipeline, expressed their own frustration with the lack of consultation.<sup>34</sup>

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<sup>22</sup> *National Historic Preservation Act*, NAT'L PARK SERV. (May 24, 2022), <https://www.nps.gov/subjects/historicpreservation/national-historic-preservation-act.htm> [https://perma.cc/6AFG-BEYK].

<sup>23</sup> *Id.*

<sup>24</sup> Motion for Preliminary Injunction & Request for Expedited Hearing at 2, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'g*, 205 F.Supp.3d 4, 2 (D.D.C., 2016) (No. 1:16-cv-1534-JEB), [https://perma.cc/2NC6-4EX4].

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 11.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 12.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 13.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 14.

Around this time, the Army Corps ran its own private archeological survey conducted by DAPL's non-tribal consultants.<sup>35</sup> After public outcry, the Army Corps sent representatives to tour the Lake Oahe crossing site and meet with tribal archeologists.<sup>36</sup> During the visit, the Army Corps' archeologists noted that the many sites they were witnessing had never been recorded and did not appear on any of the maps being used for the archeological analysis.<sup>37</sup> They agreed that additional study was needed.<sup>38</sup> Despite this promising consultation, no additional study was ever done, and the Army Corps issued a decision on April 22, 2016, claiming that no historic properties were affected by the pipeline route.<sup>39</sup> In their final environmental assessment published July 25, 2016, the Army Corps concluded that there would be "no direct or indirect impacts to the Standing Rock Sioux Tribe."<sup>40</sup>

One week after the lawsuit detailing this story was filed by the Standing Rock Sioux Tribe, Dakota Access LLC countersued the leaders of the Tribe due to interference at the Lake Oahe crossing.<sup>41</sup> They complained that fifteen to thirty protesters had gathered there to meet Dakota Access LLC representatives that morning, and the number had grown to one hundred by noon.<sup>42</sup> The number of protesters camped at Lake Oahe had been rapidly increasing since the lawsuit was filed.<sup>43</sup> One protester, Naelyn Pike of the Chiricahua Apache Tribe, told reporters, "Listen to our voice. Listen to our cries because our Indigenous people are suffering to protect the land that you are living on."<sup>44</sup> Chants of, "Can't drink oil, keep it in the soil!" were heard throughout.<sup>45</sup>

Despite the pending lawsuit, lack of required consultation with tribes, and growing media attention to the protests, DAPL representatives decided to move forward with construction.<sup>46</sup> On September 3rd, 2016, construction crews began bulldozing a sacred burial site located on private land while water

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 15.

<sup>37</sup> *Id.* at 16.

<sup>38</sup> *Id.* at 15.

<sup>39</sup> *Id.* at 16.

<sup>40</sup> *Id.* at 18.

<sup>41</sup> Hersher, *supra* note 4.

<sup>42</sup> *Id.*

<sup>43</sup> Javier, *supra* note 15.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Hersher, *supra* note 4.

protectors desperately tried to use their bodies to block them.<sup>47</sup> Women, children, and men came from the main camp—some riding horses, some on foot—and entered the construction site.<sup>48</sup> Private security workers began throwing nonviolent protesters to the ground and pepper spraying them.<sup>49</sup> They sent dogs into the crowd who viciously attacked several people.<sup>50</sup> Then, it was over.<sup>51</sup> Security began to leave by the trucks they drove in on, but the damage had been done.<sup>52</sup> Tim Mentz, the Tribe's historic preservation officer, said, "I surveyed this land and we confirmed multiple graves and specific prayer sites. Portions, and possibly complete sites, have been taken out entirely."<sup>53</sup> Despite this tragic loss, when a reporter asked a water protector if they felt like they had won that day, they answered, "We win every day when we stand in unity. We stand, and we fight."<sup>54</sup>

Three days later, on September 9th, 2016, U.S. District Judge James Boasberg denied Standing Rock Sioux Tribe's injunction.<sup>55</sup> He wrote in his decision, "the United States' relationship with the Indian tribes has been contentious and tragic."<sup>56</sup> However, it was his opinion that the Army Corps "likely complied with its legal obligation to consult tribal leaders," and that the Tribe "has not shown it will suffer injury."<sup>57</sup>

Remarkably, only twenty minutes after tribal representatives and their attorneys heard of this decision, the Army Corps and the Departments of Justice and the Interior announced they wanted to look harder at the issues before making a final decision.<sup>58</sup>

Despite their lack of permission, Energy Transfer Partners ("ETP") proceeded with construction.<sup>59</sup> Water protectors continued to fight with everything they had, and militarized police and the National Guard were brought in

<sup>47</sup> *Standing Rock Special: Unlicensed DAPL Guards Attacked Water Protectors With Dogs & Pepper Spray*, DEMOCRACY NOW (Nov. 24, 2016), [https://www.democracynow.org/2016/11/24/standing\\_rock\\_special\\_unlicensed\\_dapl\\_guards](https://www.democracynow.org/2016/11/24/standing_rock_special_unlicensed_dapl_guards) [<https://perma.cc/CS57-HTPR>].

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Hersher, *supra* note 4.

<sup>54</sup> Standing Rock, *supra* note 47.

<sup>55</sup> Hersher, *supra* note 4.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Earthjustice, *supra* note 1.

<sup>59</sup> Hersher, *supra* note 4.

to subdue them.<sup>60</sup> Some activists who were arrested reported that they were stripped, held in kennel-like cages, and marked with identification numbers on their arms.<sup>61</sup> As temperatures dropped below freezing, water cannons, exploding tear gas cannisters, and rubber bullets were used against protesters fighting on the front lines.<sup>62</sup> By now, thousands of people across the country had travelled to North Dakota to join the battle, and millions were watching it unfold on the news.<sup>63</sup>

On December 4th, 2016, under President Obama's direction, the Army Corps denied an easement for construction under the Missouri River.<sup>64</sup> The pipeline would be rerouted.<sup>65</sup> Protesters rejoiced with singing, drumming, and chants, but the victory was short lived.<sup>66</sup> Just one month later, the newly elected Donald Trump would issue a Presidential Memorandum directing the Army Corps to approve the DAPL easement.<sup>67</sup> The Army Corps rescinded their statement of intention to reroute the pipeline and approved the initial easement.<sup>68</sup> On February 7, 2017, construction on the pipeline began in full.<sup>69</sup> Harold Frazier, chairman of the Cheyenne River Sioux, another tribe that gets their water downstream of the Lake Oahe crossing, said, "It is clear that the coyotes which have been hiding in the shadows are taking advantage of this full lunacy."<sup>70</sup> Frazier wrote, "We will have to renew our fight and spend more of our precious resources resisting this onslaught yet again."<sup>71</sup>

<sup>60</sup> Javier, *supra* note 15.

<sup>61</sup> *Id.*

<sup>62</sup> Tim Stelloh et al., *Dakota Pipeline: Protestors Soaked with Water in Freezing Temperatures*, NBC NEWS (Nov. 21, 2016, 3:07 PM), <https://www.nbcnews.com/storyline/dakota-pipeline-protests/dakota-pipeline-protesters-authorities-clash-temperatures-drop-n686581> [https://perma.cc/3H5Z-5P5J].

<sup>63</sup> *Id.*

<sup>64</sup> Chelsea Hawkins & Sue Evans, *Standing Rock Sioux Tribe's Statement on U.S. Army Corps of Engineers Decision to Not Grant Easement*, STANDING ROCK SIOUX TRIBE (Dec. 2, 2016), <https://web.archive.org/web/20161204230930/http://standwithstandingrock.net/standing-rock-sioux-tribes-statement-u-s-army-corps-engineers-decision-not-grant-easement/> [https://perma.cc/FE4C-CATX].

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Pipeline, *supra* note 3.

<sup>68</sup> *Id.*

<sup>69</sup> Hersher, *supra* note 4.

<sup>70</sup> Bill Chappell, *Tribe Reportedly Files Legal Challenge to Dakota Access Pipeline*, THE TWO-WAY: NPR (Feb. 9, 2017), <https://www.npr.org/sections/two-way/2017/02/09/514317352/tribe-reportedly-files-legal-challenge-to-dakota-access-pipeline> [https://perma.cc/GYZ6-Y292].

<sup>71</sup> *Id.*

Two days later, the Cheyenne River Sioux, joined by the Standing Rock Tribe, filed for a temporary restraining order in federal court against Dakota Access LLC until the legal issues could be resolved.<sup>72</sup> Judge Boasberg denied the Tribes' joint motion, noting that oil had yet to start flowing through the pipeline.<sup>73</sup> The Tribes then requested summary judgment against the Army Corps and Dakota Access LLC, citing tribal land rights under the 1868 Ft. Laramie Treaty.<sup>74</sup> In this treaty, the United States bound itself to "protect" the Great Sioux Nation from the people of the United States.<sup>75</sup> They also designated a large area defined as "unceded Indian Territory" that could not be settled or encroached on by whites without the consent of the Tribe.<sup>76</sup> The Sioux were meant to have exclusive hunting and fishing rights in this area.<sup>77</sup>

The United States soon violated this treaty by allowing gold miners and others to enter the territory, destroying the native buffalo and ordering the Sioux to leave their hunting grounds.<sup>78</sup> In 1877, 1889, and 1944, various statutes stripped vast portions of this unceded land and forced the Sioux to leave their homes.<sup>79</sup> In 1958, Congress passed a law taking fifty-six thousand acres of rich lands along the Missouri River, where many of the Tribe's most vital resources were found.<sup>80</sup>

The motion for summary judgment continued to explain how today, the Tribes rely on water from Lake Oahe for their homes, hospital, clinics, schools, and industry.<sup>81</sup> Poverty is high on many reservations, so the ability to fish in the River is essential for many Tribal members to put food on the table.<sup>82</sup> Furthermore, the waters of the Missouri River are sacred to the Tribe and are central to their practice of religion.<sup>83</sup> By issuing the permit for the DAPL to be built, the Army Corps was perpetuating a historic pattern of the United States failing to respect Indigenous people's Treaty rights and ignoring their voices.<sup>84</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> Hersher, *supra* note 4.

<sup>74</sup> Pl. Standing Rock Sioux Tribe's Mem. In Supp. Of Its Mot. For Partial Summ. J., at 2 (Feb. 14, 2017). [<https://perma.cc/LCA3-FTUA>].

<sup>75</sup> *Id.* at 3.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 4.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 5.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 7.



The U.S. District Court for the District of Columbia refused to delay operation of the pipeline, but granted the Tribes' request to order the Army Corps to work with Dakota Access LLC and the Standing Rock and Cheyenne River Sioux Tribes to develop an oil spill plan and undergo a third-party audit until the Army Corps completed its environmental review.<sup>85</sup>

When the Army Corps concluded this court-ordered review, they found that its 2016 approval of the project was valid and did not need to be revisited.<sup>86</sup> After several months of intense litigation, on July 6th, 2020 Judge Boasberg found that the Army Corps' report did not fully address how the pipeline affects the Tribes along its route.<sup>87</sup> He vacated the Army Corps' easement and ordered that it be shut down and drained of oil until the Army Corps completes a full Environmental Impact Statement.<sup>88</sup> Although it was operating without a permit, the Biden administration allowed oil to continue flowing through the pipeline during the ensuing litigation.<sup>89</sup> Then, on February 22, 2022, the Supreme Court of the United States issued an order declining ETP's request for them to review Judge Boasberg's invalidation of the easement.<sup>90</sup> With that, the legal battle was over, and the Standing Rock Sioux had won.<sup>91</sup> However, this victory was a hollow one.<sup>92</sup> At present, the Dakota Access Pipeline is still operating without an easement, still flowing through stolen land, and still a threat to everyone who lives near it.<sup>93</sup>

Summer Blaze Aubrey is a citizen of the Cherokee Nation and a descendant of the Blackfeet Nation.<sup>94</sup> Among other pursuits, she is currently a Law Fellow at the Water Protector Legal Collective, an Indigenous-directed non-profit that grew out of the DAPL resistance movement at Standing Rock.<sup>95</sup> This organization is dedicated to providing legal support and advocacy for Indigenous peoples and Original Nations, the Earth, and climate justice move-

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<sup>85</sup> Pipeline, *supra* note 3.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Earthjustice, *supra* note 1.

<sup>92</sup> Pipeline, *supra* note 3.

<sup>93</sup> *Id.*

<sup>94</sup> Virtual Interview with Summer Blaze Aubrey, Law Fellow for the Indigenous Human Rights Defenders & Corporate Accountability Program and Staff Attorney for International Indian Treaty Council (Oct. 14th, 2022).

<sup>95</sup> *Id.*

ments.<sup>96</sup> Aubrey states that the DAPL protests sparked an “Indigenous Renaissance” throughout the world.<sup>97</sup> “Indigenous Peoples hold knowledge of staying in touch with the land and being a part of all things,” she says.<sup>98</sup> “We may need to do a bit of digging, but it’s there.”<sup>99</sup> Aubrey also highlights the fact that in many Indigenous Tribes, women hold the responsibility to maintain the land, resources, and ancestral knowledge of their people.<sup>100</sup> Indeed, the DAPL movement was primarily led by Indigenous Women, and Indigenous Women continue to forefront many important environmental battles today.<sup>101</sup> The DAPL protests show that, in the continuing fight against climate change and environmental destruction, the voices of Indigenous Peoples, and particularly Indigenous Women, must be centered at all times.

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Imelda Abano, *Indigenous Women at the Frontlines of Environmental Protection Efforts*, EARTH JOURNALISM NETWORK (March 7, 2020), <https://earthjournalism.net/stories/indigenous-women-at-the-frontlines-of-environmental-protection-efforts> [<https://perma.cc/93WZ-HCYD>].