

III. NEPA

*Back and Forth: The Continuous Legal Battle
Over the Oil Flow in Dakota Access Pipeline*

Fearing severe environmental consequences, American Indian Tribes on nearby reservations have sought for several years to invalidate federal permits allowing the Dakota Access Pipeline to carry oil under the lake. Today they finally achieve that goal—at least for the time being.¹

The time being was one month, and then the oil kept flowing.² The fight over the Dakota Access Pipeline—which boils down to environmental and cultural preservation versus economics and energy dominance—continues to evolve in U.S. federal courts and the status of the pipeline seems to change every month. The midwestern pipeline travels more than 1,000 miles from North Dakota to Illinois, but one particular segment of the pipeline has elicited especially fervent protest from several Sioux Tribes.³ Along with other Sioux reservations, the Standing Rock reservation is located downstream of the segment that travels under the Missouri River on Lake Oahe. The Tribes are concerned that the pipeline will contaminate their drinking water and cause detrimental impacts to their sacred lands.⁴ At the center of the long-running litigation and its “multiple twists and turns” is the easement granted by the U.S. Army Corps of Engineers to Dakota Access.⁵

1. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs, No. 16-1534, 2020 WL 3634426, at *1 (D.D.C. July 6, 2020).

2. Ellen M. Gilmer, *Dakota Access Pipeline Faces Renewed Legal Bid for Shutdown (1)*, BLOOMBERG L. (Sept. 8, 2020), <https://news.bloomberglaw.com/environment-and-energy/Dakota-access-pipeline-faces-renewed-legal-bid-for-shutdown> [<https://perma.cc/DW2N-XQFX>?type=image].

3. Merrit Kennedy, *Judge Orders Environmental Review of Controversial Dakota Access Pipeline*, NAT’L PUB. RADIO (Mar. 25, 2020), <https://www.npr.org/2020/03/25/821643911/judge-orders-environmental-review-of-controversial-dakota-access-pipeline> [<https://perma.cc/W5GV-Z7N3>?type=image]; see also U.S. Army Corps of Engineers, *Dakota Access Pipeline*, <https://www.usace.army.mil/Dakota-Access-Pipeline/#:~:text=Dakota%20Access%2C%20LLC%2C%20submitted%20an,region%20of%20North%20Dakota%20to> [<https://perma.cc/3RUS-M7PZ>?type=image] (“[T]he Dakota Access Pipeline (DAPL) Project, a 1,168-mile, crude oil pipeline system designed to carry up to 570,000 barrels per day of U.S. light sweet from the Bakken and Three Forks production region of North Dakota to Patoka, Ill.”).

4. *Id.*

5. *Standing Rock Sioux Tribe*, 2020 WL 3634426, at *1 (“For the full history of this case, the interested reader can refer to the Court’s ten prior Opinions in this matter.”); see also *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 114-16 (D. D.C. 2017).

The litigation began in 2016, but the Tribes were initially unsuccessful in their attempt to obtain a preliminary injunction via claims under the National Historic Preservation Act and the Religious Freedom Restoration Act.⁶ Despite this early failure in court, the Tribes pressured the Corps of Engineers to perform its statutory duty under the National Environmental Protection Act (NEPA) to evaluate all aspects of the proposed project, which momentarily led to a halt in construction in 2017.⁷ Then, politics got involved. President Donald Trump issued an executive order to move the project forward, and the Dakota Access Pipeline was fast-tracked with oil flowing shortly thereafter.⁸ Legal challenges once again followed, but this time under NEPA, because the Corps of Engineers had determined that an Environmental Impact Statement (EIS) was not necessary and allowed the project to move forward.⁹ The district court rejected the NEPA argument and remanded the decision back to the Corps of Engineers to address concerns raised by the Tribes, which included whether the effects of the project were “highly controversial,” the impact on the fishing and hunting rights of the Tribes, and environmental justice issues.¹⁰ Hence, another momentary win for the tribe, but what about the oil? It continued to flow, and the Corps of Engineers doubled down and re-issued its decision in favor of the Dakota Access Pipeline because there were no “significant impacts.” The Tribes’ attorney characterized the Corps’ decision as a “sham conclusion” resulting from a “sham process.”¹¹ The Court agreed with the Tribe, invalidated the Corps of Engineers’

6. *Standing Rock Sioux Tribe*, 2020 WL 3634426 at *2.

7. *Id.*

8. *Id.* (“[A] presidential memorandum urging acceleration of the project, the Corps again reconsidered and decided to move forward. It granted the sought permit, construction was completed, and oil commenced flowing through the Dakota Access Pipeline”) (internal citations omitted).

9. See *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 112; *Dakota Access Pipeline Final EA and FONSI Released for ND Section 408 Crossing*, U.S. ARMY CORPS OF ENGINEERS (July 28, 2016), [https://www.nwo.usace.army.mil/Media/News-Releases/Article/878649/dakota-access-pipeline-final-ea-and-fonsi-released-for-nd-section-408-crossings/\[https://perma.cc/8ESH-FBZK?type=image\]](https://www.nwo.usace.army.mil/Media/News-Releases/Article/878649/dakota-access-pipeline-final-ea-and-fonsi-released-for-nd-section-408-crossings/[https://perma.cc/8ESH-FBZK?type=image]).

10. See *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 147 (“Yet there are substantial exceptions: the agency failed to adequately consider the impacts of an oil spill on Standing Rock’s fishing and hunting rights and on environmental justice, and in February 2017, it did not sufficiently weigh the degree to which the project’s effects are likely to be highly controversial in light of critiques of its scientific methods and data.”).

11. *The Standing Rock Sioux Tribe’s Litigation on the Dakota Access Pipeline*, EARTHJUSTICE (last updated Sept. 10, 2020), [https://earthjustice.org/features/faq-standing-rock-litigation \[https://perma.cc/TWA-Y484?type=image\]](https://earthjustice.org/features/faq-standing-rock-litigation [https://perma.cc/TWA-Y484?type=image]).

permits, and ordered an EIS to be conducted, but the controversy over the oil flow was by no means over.¹²

As the legal fights progressed through federal court, the Dakota Access Pipeline moved forward with plans to expand the pipeline and increase the daily capacity of crude oil to 1.1 million barrels a day.¹³ Additionally, the pipeline had experienced several leaks since it began operation in 2017, which only exacerbated the environmental concerns surrounding the project.¹⁴ Unsurprisingly, the Dakota Access Pipeline (and the Corps of Engineers) wanted the oil to keep flowing during litigation so as to avoid shutting down operations.¹⁵ The Tribes disagreed.¹⁶

In July 2020, U.S. District Judge James E. Boasberg granted the Tribes the victory they had sought for years and vacated the Dakota Access permits until an EIS was conducted as required by NEPA.¹⁷ Judge Boasberg explained that a shutdown was the only appropriate option because the Corps of Engineers' NEPA error was serious and most of the economic risks were knowingly undertaken by Dakota Access.¹⁸

However, the shutdown never occurred, and one month later, a motions panel from the U.S. Court of Appeals for the D.C. Circuit tossed the injunction and allowed the pipeline to continue operations.¹⁹ The panel reasoned that Judge Boasberg failed

12. *Standing Rock Sioux Tribe*, 2020 WL 3634426 at *3 (“Unsurprisingly, the Tribes have argued for vacatur of the permits, Defendants have opposed, and each side is joined by an army of amici.”).

13. Kristin Lam, *North Dakota OKs Expanding Dakota Access Pipeline, Setting Up Legal Fight with Standing Rock*, USA TODAY (Feb. 19, 2020, 7:50 PM), [https://www.usatoday.com/story/news/nation/2020/02/19/dakota-access-pipeline-expansion-approved/4812580002/\[https://perma.cc/PS6U-CLRQ?type=image\]](https://www.usatoday.com/story/news/nation/2020/02/19/dakota-access-pipeline-expansion-approved/4812580002/[https://perma.cc/PS6U-CLRQ?type=image]).

14. See Alleen Brown, *Five Spills, Six Months in Operation: Dakota Access Track Record Highlights Unavoidable Reality—Pipelines Leak*, THE INTERCEPT (Jan. 9, 2018, 2:38 PM), [https://theintercept.com/2018/01/09/dakota-access-pipeline-leak-energy-transfer-partners/\[https://perma.cc/3U3G-KYZ9?type=image\]](https://theintercept.com/2018/01/09/dakota-access-pipeline-leak-energy-transfer-partners/[https://perma.cc/3U3G-KYZ9?type=image]).

15. See Redacted Brief of Dakota Access, LLC Regarding Remedy at 1-2, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 1:16-cv-1534-JEB (D.D.C. July 6, 2020); United States Army Corps Brief Regarding Remedy at 1, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 1:16-cv-1534-JEB (D.D.C. July 6, 2020).

16. See Consolidated Brief of Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Oglala Sioux Tribe, and Yankton Sioux Tribe Regarding Remedy at 1, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 1:16-cv-1534-JEB (D.D.C. June 6, 2020).

17. *Standing Rock Sioux Tribe*, 2020 WL 3634426 at *5-6 (“The Corps must perform a full and complete EIS for the entire project, potentially subject to the full scope of judicial review normally applied to environmental impact statements.”).

18. *Id.* at *10.

19. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 2020 WL 4548123 at *1 (D.C. Cir. Aug. 5, 2020).

to make the necessary findings for injunctive relief.²⁰ However, the motions panel did uphold the order vacating the Dakota Access Pipeline permit, which is set for oral argument before the D.C. Circuit.²¹ As a result, the pipeline's continued operation was illegal without a permit, and the Corps classified it as an "encroachment" on federal property.²²

In January 2021, the D.C. Circuit affirmed the judgment in favor of the Tribes vacating the Dakota Access easement, and ordered the Corps to prepare an EIS for the project.²³ The court found that an EIS was necessary and required by NEPA because of the uncertainty and controversy surrounding the scope of the project's impacts, as well as the cultural significance of the Tribes' land that would be disturbed by the project.²⁴ The D.C. Circuit upheld the vacatur of the easement because of the "seriousness of the NEPA violation," but once again found that the shutdown order was improper because the district court failed to make the necessary findings.²⁵

Hence, after years of litigation and multiple court orders, the Corps of Engineers has announced its intention to begin the EIS, but the oil continues to flow.²⁶ The final verdict on the Dakota Access Pipeline is still unknown.²⁷ The Tribes are once again moving for a permanent injunction against the pipeline in district court, and, as the chairman of the Standing Rock Sioux Tribe stated: "We've been in this legal battle for four years, and we aren't giving up this fight."²⁸

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20. *Id.* (citing *Monsanto Co. v. Geertown Seed Farms*, 561 U.S. 139, 158 (2010)).

21. *Id.* ("At this juncture, appellants have failed to make a strong showing of likely success on their claims that the district court erred in directing the Corps to prepare an environmental impact statement.").

22. United States Army Corps of Engineers' Status Report at 2-3, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 1:16-cv-1534-JEB (D.D.C. Aug. 31, 2020).

23. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 20-5197, 2021 WL 244862, at *10-11 (D.C. Cir. Jan. 26, 2021).

24. *Id.*

25. *Id.* at *13-14.

26. Notice of Intent to Prepare an Environmental Impact Statement for an Easement to Cross Under Lake Oahe, North Dakota for a Fuel-Carrying Pipeline Right-Of-Way for a Portion of the Dakota Access Pipeline, 85 Fed. Reg. 176, 55843 (Sept. 10, 2020).

27. Judge Boasberg has set a status hearing for February 10, 2021 at which the Corps will need to show how it "expects to proceed" without a federal permit granting easement for the pipeline to cross beneath Lake Oahe. Associated Press, *Judge: Corps Must Decide Next Move on Dakota Access Pipelines*, WASH. POST (Jan. 27, 2021 at 2:19 PM), https://www.washingtonpost.com/climate-environment/judge-corps-must-decide-next-move-on-dakota-access-pipeline/2021/01/27/ed7f5c84-60dc-11eb-a177-7765f29a9524_story.html.

28. *D.C. Circuit Issues Mixed Decision on Dakota Access Shutdown Order*, EARTHJUSTICE (Aug. 5, 2020), <https://earthjustice.org/news/press/2020/dc-circuit-mixed-decision-dakota-access-shutdown-order> [<https://perma.cc/MKB6-436Q?type=image>].

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