

HISTORY IS REPEATING ITSELF AT STANDING ROCK¹

You have likely heard reports from Standing Rock. Water protectors. #NoDAPL. News of violence. But what exactly is happening at Standing Rock?

The issue is with the Dakota Access Pipeline, which reaches 1,172 miles and intends to carry crude oil between North Dakota and southern Illinois.² The pipeline directly interacts with the land of the Standing Rock Sioux Tribe,³ and is planned to cross their source of drinking water multiple times.⁴ This could jeopardize the safety of the tribe's drinking water long-term.⁵

Issues first began in February of 2015, when the US Army Corps of Engineers (USACE)—the federal government body in charge of waterways—sent a letter to the Tribal Historic Preservation Office (THPO).⁶ According to Section 106 of the National Historic Preservation Act, the USACE was required to consult with the tribe regarding the potential impacts of the pipeline.⁷ The THPO sent a number of follow-up letters requesting investigation into the impacts of the pipeline, but they stated that they never received a response.⁸ Despite continued protests from the Standing Rock Sioux that Section 106 was violated, as well as protests from other tribes affected by the pipeline such as the Osage Nation and Iowa Tribe THPO, the USACE concluded their investigation, citing that no historic properties would be affected on April 22, 2016.⁹

On July 27, 2016, the Standing Rock Sioux, represented by Earthjustice, filed an injunction to halt the USACE's Permit 12, which was needed to continue the pipeline as planned.¹⁰ However, on August 15, Energy Transfer Partners, the parent company of Dakota Access LLC, sued the Standing Rock Sioux chairman and other tribal members for blocking the construction.¹¹ At this point, members of the Standing Rock Sioux Tribe began their organized gathering at the pipeline

location as an act of civil disobedience.¹²

On September 3, Dakota Access bulldozers plowed through the Standing Rock Sioux's sacred tribal burial ground.¹³ The plowed area is two miles long and one-hundred-fifty feet wide.¹⁴ The same day marked the beginning of private security forces exerting direct, physical force against the Standing Rock Sioux protesters.¹⁵ Their use of force included police dogs, which were reported to have bitten multiple protesters, and mace.¹⁶ Disturbingly, this clash occurred on the anniversary of the Whitestone Massacre, an 1863 massacre in which over 300 members of the Standing Rock Sioux were killed by the U.S. Army.¹⁷

Three days later, on September 6, U.S. District Judge James Boasberg issued a temporary restraining order to halt the construction until a decision regarding the preliminary injunction was issued.¹⁸ That decision was expected to be issued on September 9, though damage was already done to the sacred tribal burial ground.¹⁹ On September 9, Judge Boasberg denied the Standing Rock Sioux's preliminary injunction request, but continued the emergency injunction previously entered through September 16 because the decision was appealed.²⁰ In the three days between the sixth and the ninth, Governor Jack Dalrymple called on the North Dakota National Guard to increase enforcement efforts at the protest site.²¹

Also on September 9, the Department of Justice, the Department of the Army, and the Department of the Interior (collectively referred to as the "Departments") issued a joint statement refusing to authorize construction in the area.²² The Departments requested that Energy Transfer Partners cease the construction until a determination could be made with regard to the National Environmental Policy Act.²³

A month later, on October 9, the U.S. Court of Appeals for the District of Columbia

refused to grant an injunction.²⁴ The Departments again issued a joint statement refusing to authorize construction and repeating their request that Energy Transfer Partners cease construction.²⁵ However, Energy Transfer Partners ignored this request and continued with the planned construction.²⁶

As protests continued, North Dakota authorities began to target those spreading news of the protests and violence. Amy Goodman of *Democracy Now!* was charged with criminal trespassing.²⁷ Documentary filmmaker Deia Schlosberg was arrested for recording videos of the protests²⁸ and charged with felony conspiracy, punishable by up to forty-five years in prison.²⁹

While media put a spotlight on the protesters' struggle, the assaults on protesters did not cease. On November 21, authorities began using tear gas against the protesters, along with large water cannons which are raising major concerns of hypothermia because of the near- and below-freezing outdoor temperatures.³⁰ One protester standing in solidarity with the Standing Rock Sioux water protectors, Sophia Wilansky, faces amputation of her arm due to a strike by a police weapon, according to fellow protesters.³¹

Developments continued, somewhat ironically, over the week of the Thanksgiving holiday. In just one day, November 21, nearly 300 people were treated for injuries caused by the police force, according to the Standing Rock Medic and Healer Council.³²

On November 25, federal officials wrote to the Standing Rock Sioux Tribe's chairman, Dave Archambault II, about plans to close access to the demonstration site.³³ The letter cited "public safety concerns" and the possibility of creating "free speech zones" where individuals can voice their disdain for the pipeline in a controlled environment.³⁴ Officials intend to arrest anyone who has not evacuated the site by December 5, 2016.³⁵ Archambault commented, "Although the news is saddening, it is not all surprising given the last 500 years of mistreatment of our

people."³⁶

In response, Kelcy Warren, chief executive of Energy Transfer Partners, declared that the company would not consider an alternate route.³⁷

Recently, over two thousand military veterans joined together to protect protesters at the Standing Rock encampment from physical harm by acting as a human shield.³⁸ Though some are not necessarily in agreement with the protesters' views, the veterans nonetheless felt the need to protect the right to peacefully protest.³⁹ One veteran of the U.S. Marines, Dakota Blue Serna (named after the Sioux, but describing himself as Irish-Mexican), explained why:

[W]hat we signed up to defend are the people here in our country against all enemies, foreign and domestic. And right now, I love my government, I love my country, but the government is kind of cracking down on peaceful protesters, and it broke my heart to watch these people being sprayed with water in 25-degree temperatures. That's inhumane, that's unethical and that's un-American....If there's any danger presenting itself to the American people, we will put ourselves in between that danger.⁴⁰

Ed. Note

When this article was prepared for publication on November 30, 2016, protesters faced blizzard conditions but were still encamped.⁴¹ By Sunday, December 4, 2016, the Department of the Army announced its decision not to issue the permits needed to drill under the Missouri River and were considering alternate routes for the DAPL.⁴² While this victory for the protestors appeared to be the end of the story, it was only the end of a chapter. On Dr. Martin Luther King, Jr. Day, one of the biggest protests to date was held—over one hundred protestors formed a line approaching riot-gear police behind a barbed wire fence.⁴³

Things are heating up again on the legal front, too. The company building the DAPL has filed documents with a federal district court seeking an injunction aimed at preventing the U.S. Army Corp of Engineers from publishing a notice about a full-scale environmental study.⁴⁴ In fact, the pleadings show that the company is aiming to put a halt to all such studies pending a legal decision on whether or not the company already has the required permission to drill under Lake Oahe.⁴⁵

On the legislative side, states are responding to protests with legislation which should raise red flags for all. Representative Keith Kempenich, R-Bowman, N.D., introduced a bill immunizing drivers from liability for injuries to or death of people “obstructing vehicular traffic on a public road, street, or highway.”⁴⁶ Another bill introduced by House Majority Leader Al Carlson, R-Fargo, N.D., makes wearing a mask or hood to hide ones identity illegal.⁴⁷ This is still a developing story, so please continue to follow reliable news sources for ongoing updates.



¹ This article was written by Kimya Forouzan, Temple Law '19 (J.D./M.P.H. Candidate).

² Alexander Sammon, *A History of Native Americans Protesting the Dakota Access Pipeline*, MOTHER JONES (Sept. 09, 2016),

<http://www.motherjones.com/environment/2016/09/dakota-access-pipeline-protest-timeline-sioux-standing-rock-jill-stein>. See also Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <http://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/>.

³ *Id.* See *History*, STANDING ROCK SIOUX TRIBE, <http://standingrock.org/history/> (last accessed Nov. 30, 2016) (providing general background information on the tribe and its land);

⁴ Worland, *supra* note 1.

⁵ *Id.*

⁶ *Id.*

⁷ National Historic Preservation Act of 1966, 16 U.S.C. § 470 (2012).

⁸ Sammon, *supra* note 1. See also Memorandum Opinion, *Standing Rock Sioux Tribe v. U.S. Army Corp of Engineers* (D.D.C. 2016) (No. 1:16-cv-05134-JEB), 18–19,

<http://earthjustice.org/sites/default/files/files/order-denying-PI.pdf>.

⁹ Sammon, *supra* note 1.

¹⁰ Complaint for Declaratory and Injunctive Relief, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 46 ELR 20168 (D.D.C. 2016) (No. 1:16-cv-01534). Earthjustice made the complaint available to the public online at <http://earthjustice.org/sites/default/files/files/3154%201%20Complaint.pdf>.

¹¹ Complaint, *Dakota Access, LLC v. Archambault*, 2016 U.S. Dist. LEXIS 131570 (D.D.C. 2016) (No. 1:16-cv-00296-DLH-CSM). The complaint is available to the public online at <https://turtletalk.files.wordpress.com/2016/08/1-complaint.pdf>.

¹² Sammon, *supra* note 1.

¹³ *Id.*; Press Release, Standing Rock Sioux Tribe, *Standing Rock Sioux Tribe Condemns Destruction and Desecration of Burial Grounds by Energy Transfer Partners* (Sept. 3, 2016), http://standingrock.org/data/upfiles/media/Press%20Release_Standing%20Rock%20Sioux_%2009032016.pdf.

¹⁴ *Id.*

¹⁵ Sammon, *supra* note 1.

¹⁶ *Id.*

¹⁷ Amy Goodman, *Standing Rock Sioux Historian: Dakota Access Co. Attack Comes on Anniversary of Whitestone Massacre*, DEMOCRACY NOW! (Sept. 08, 2016), https://www.democracynow.org/2016/9/8/standing_rock_sioux_historian_dakota_access.

¹⁸ Sammon, *supra* note 1. The Order was entered as a Minute Order, a brief docket entry. The full text of that docket entry states: “MINUTE ORDER: As explained at today's hearing, the Court ORDERS that Plaintiffs' [30, 31] Motions for Temporary Restraining Order are GRANTED IN PART and DENIED IN PART. As agreed by Defendants, the Court ORDERS that no construction activity on the DAPL may take place between Highway 1806 and 20 miles to the east of Lake Oahe. Construction activity to the west of Highway 1806 may proceed. Signed by Judge James E. Boasberg on 9/6/2016. (lcjeb1) (Entered: 09/06/2016).”

¹⁹ *Id.*

²⁰ Order Denying Motion for Preliminary Injunction, *et seq.*, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-01534 (D.D.C. Sept. 9, 2016), ECF Nos. 38–44.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Daniel A Medina, *Tribe to Continue Fight After Court Refuses to Halt Dakota Access Pipeline*, NBC NEWS (Oct. 9, 2016), <http://www.nbcnews.com/news/us-news/federal-court-denies-tribe-s-request-halt-dakota-access-pipeline-n662926>; Press Release, Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Sept. 9, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>.

²⁵ Medina, *supra* note 24; Press Release, Joint Statement from Department of Justice, Department of the Army and Department of the Interior Regarding D.C. Circuit Court of Appeals Decision in Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Oct. 10, 2016),

<https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-dc>.

²⁶ Rebecca Hersher, *Protests Disrupt Pipelines across the Northern U.S.*, N.P.R.: The Two-Way (Oct. 12, 2012), <http://www.npr.org/sections/thetwo-way/2016/10/12/497673866/protests-disrupt-pipelines-across-the-west>.

²⁷ Lizzy Ratner, *Amy Goodman is Facing Jail Time for Reporting on the Dakota Access Pipeline. That Should Scare Us All.*, THE NATION (Oct. 15, 2016), <https://www.thenation.com/article/amy-goodman-is-facing-prison-for-reporting-on-the-dakota-access-pipeline-that-should-scare-us-all/>.

²⁸ Nick Visser, *Filmmaker Arrested at Pipeline Protest Facing 45 Years in Felony Charges*, HUFFINGTON POST (Oct. 14, 2016),

http://www.huffingtonpost.com/entry/deia-schlosberg-arrested-north-dakota_us_58004d81e4b0162c043b342d.

²⁹ *Id.*

³⁰ Barajas, Joshua, *Police Deploy Water Hoses, Tear Gas Against Standing Rock Protesters*, PBS NEWSHOUR (Nov. 21, 2016),

<http://www.pbs.org/newshour/rundown/police-deploy-water-hoses-tear-gas-against-standing-rock-protesters/>.

³¹ Camila Domonoske, *Woman Injured at Standing Rock Protest Might Lose Arm, Family Says*, NPR (Nov. 23, 2016), <http://www.npr.org/sections/thetwo-way/2016/11/23/503120449/woman-injured-at-standing-rock-protest-might-lose-arm-family-says>.

³² Christopher Mele, *Officials to Close Standing Rock Protest Campsite*, N.Y. TIMES (Nov. 26, 2016), http://www.nytimes.com/2016/11/26/us/dakota-pipeline-protest.html?_r=0.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Christopher Mele, *Veterans to Serve as 'Human Shields' for Dakota Pipeline Protesters*, (Nov. 29, 2016)

<http://www.nytimes.com/2016/11/29/us/veterans-to-serve-as-human-shields-for-pipeline-protesters.html>; *Here & Now: One Veteran On Why He Will Stand For Standing Rock* (WBUR radio broadcast Nov. 30, 2016).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Matt Sepic, *Facing Blizzard Conditions and Orders to Leave, Pipeline Protest Camp Goes On*, MPR NEWS (Nov. 30, 2016),

<https://www.mprnews.org/story/2016/11/30/facing-blizzard-orders-to-leave-protest-camp-remains>. For ways that you can support the protesters, see Jenna Amatulli, *How You Can Help the Standing Rock Sioux Fight the Dakota Access Pipeline*, HUFFINGTON POST (Nov. 22, 2016), http://www.huffingtonpost.com/entry/help-standing-rock-sioux-dakota-access-pipeline_us_583480c9e4b000af95eca013.

⁴² Jack Healy & Nicholas Fandos, *Protesters Gain Victory in Fight Over Dakota Access Oil Pipeline*, N.Y. TIMES (Dec. 4, 2016),

https://www.nytimes.com/2016/12/04/us/federal-officials-to-explore-different-route-for-dakota-pipeline.html?_r=0.

⁴³ *Protesters Return to DAPL Monday, Some Say in Response to MLK Day*, GRAND FORKS HERALD (Jan. 16, 2017), <http://www.grandforksherald.com/news/region/4200259-protesters-return-dapl-monday-some-say-response-mlk-day>.

⁴⁴ *Company Building DAPL Aims To Block Environmental Study*, CBS MINNESOTA (Jan. 17, 2017), <http://minnesota.cbslocal.com/2017/01/17/company-building-dapl-block-study/>.

⁴⁵ *Id.*

⁴⁶ Max Grossfeld, *DAPL Bills Would Remove Liability from Unintentionally Hitting People Obstructing Traffic Wearing Masks*, WEST DAKOTA FOX (Jan. 16, 2017), <http://www.kfyrtv.com/content/news/DAPL-bills-would-remove-liability-from-unintentionally-hitting-people-obstructing-traffic-wearing-masks-410865295.html>.

⁴⁷ *Id.*