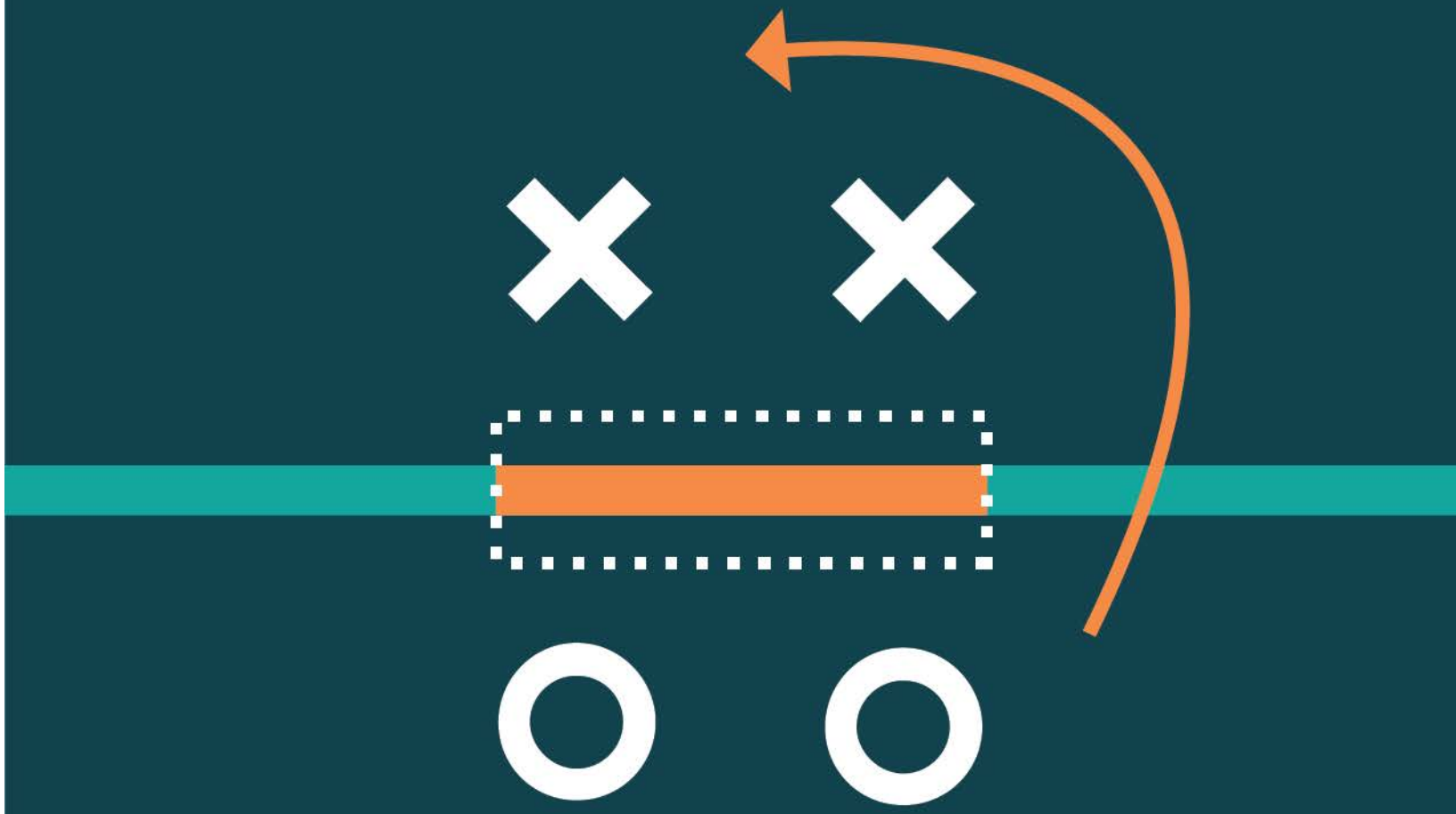
PIPELINE PLAYBOOK:

NOTES ON PUBLIC UTILITY & ENVIRONMENTAL SOVEREIGNITY



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I) Introduction & Background

A National Problem

Americans seem to have a cyclical interest in being governed by private-sector leaders, even when sliding into national-level crises that would seem to call for a public focus. In the 2000 election cycle, candidate George Bush was publicized as an oilman and a business man in the state of Texas -- where he had served one term as governor -- and where those two positions were deeply intertwined. The former vice-president and seasoned politician Al Gore, who admittedly ran on Clinton-era neoliberal approaches to social and environmental issues, summarily lost to Dubuya the cocaine cowboy. Perhaps this is unsurprising: this was before the last great recession, before Hurricane Katrina, before the Flint water crisis, and before ordinary Americans had begun to take seriously the threat caused not only by climate change but also by environmental degradation. Thus citizenry throughout the country had represented through their vote that they wanted a strong businessman with a family history of success, and in the minds of many, that was just what was elected, despite his many business failings, the loss of morale among state workers during his tenure as governor, and his education, based solely on money and legacy with a dash of recreational drug use. And Bush used his position accordingly, allowing former friends turn lobbyists from the oil industry to advise him on energy policy[1] on the domestic front, and driving a war in the Middle East that cracked open the previously nationalized Iraqi oil industry to foreign corporatization[2]. To those outside of the industry, this is an abuse of power and public trust; to those within the industry, who see their economic activity as a driver and retainer of American exceptionalism, it is standard operating procedure.

Even when the energy industry does not have a dedicated candidate, they manage to make their presence felt in politics. Fast forward to the 2016 election and again, the citizenry declared that again it wanted a strong businessman to fix the economy. Car sales were lagging, Home purchases in single-family zoning located a long drive from the core was losing its appeal as millennials were being accused of killing the car culture. The most expensive and sought after property was and continues to be in areas with mixed use real estate where people can walk to amenities and several people have begun working from home and/or developing online businesses. Young adults had indicated that they prefer to have fewer financial responsibilities in favor of higher quality of life and less debt. In language if not in deed, we seemed to be moving away Yet strangely enough, new cars kept getting redesigned and not just electric cars;

[1] Palmer, Mark J. Oil and the Bush Administration. 2002 . Earth Island Journal: http://www.earthisland.org/journal/index.php/magazine/entry/oil_and_the_bush_administration/

[2] Juhasz, Antonia. “Why the War on Iraq was fought for Big Oil.”CNN, 2013. https://www.cnn.com/2013/03/19/opinion/iraq-war-oil-juhasz/index.html

sports cars were being revamped and sport-utility vehicles finally became smaller in size to spur new sales. Moreover, the oil industry has continued to grow despite society's purported disinterest in supporting an oil-driven lifestyle. In 2015, oil subsidies in the United States topped $649 billion, which was more than pentagon spending, according to the International Monetary Fund.[3] In an era when U.S economic power is in decline relative to other states like China and Russia, the oil and gas market (for reasons we shall discuss later) has remained an area of international leverage[4]. Across the United States, the oil and gas industry continues to expand its operations, from offshore drilling to fracking to pipeline construction. All point to the same ideology: our society needs petroleum to function.

In short, while there are definite environmental costs, the industry is seen as the economic lifeblood for many communities and for the nation as a whole, and this is unlikely to change without major intervention. Moreover, due to the highly organized and centralized nature of this industry and its close relationship to federal leadership, individual municipalities and communities are often unable to pass or enforce laws that protect themselves from the environmental and economic degradation this industry brings to their homes. This is particularly true of small, low-income communities of color and indigenous communities, which often lack support at the state level and are treated as opportunities for incoming development. These communities also suffer a disproportionate share of state violence when they resist or oppose these projects (as compared to white communities that protest in the same vein.) Often, the environmental justice issues of native communities and communities of color are invisible--both when these projects are reviewed and constructed, and also when they (inevitably) experience a spill or a failure. Furthermore, the resistance to industry interference by these groups either goes unnoticed by the general public or is ridiculed as unproductive.

A recent exception to the narrative of indigenous invisibility is the high-profile case of the Dakota Access Pipeline. Because of the work of indigenous protesters and their allies, the issues of environmental justice, disproportionate siting, and the federal environmental review process of pipeline projects have become both visible and contested. Through consistent exposure to the process and its failures, activism against the oil and gas industry has become markedly more aggressive, with every level of government seeing pushback against incentives and mitigation payments. For this reason, the DAPL case is an opportunity to examine environmental review of large infrastructure projects generally, and how these processes either stymie or facilitate local sovereignty over the environment.

Our paper examines the permitting and construction of a segment of this project and its aftermath. In our report, we ask three questions: 1. What role do key federal-level protections of natural and cultural resources (NEPA/NHPA) play in protecting subject communities from environmental degradation? 2. What role does eminent domain and land aggregation play in

[3] The International Monetary Fund. "Global Fossil Fuel Subsidies Remain at Large: An Update Based on Country-Level Estimates. 2017. https://www.imf.org/en/Publications/WP/Issues/2019/05/02/Global-Fossil-Fuel-Subsidies-Remain-Large-An-Update-Based-on-Country-Level-Estimates-46509

[4] Lee Lane. "Oil and World Power." *The New Atlantis.* 2005. https://www.thenewatlantis.com/publications/oil-and-world-power

creating pathway dependencies for oil and gas? 3. Are there other strategies that could be utilized to protect small communities from corporate extraction and environmental degradation? In addressing these questions, we hope to explore the historical and legal limitations of federal environmental and land use law as it is currently applied to the DAPL case and more broadly to future pipeline cases, while also discussing issues of *environmental sovereignty.*

ETP in North Dakota

In December of 2014, Energy Transfer Partners applied for a permit to construct a new crude oil pipeline from the Bakken shale basin in North Dakota to Patoka, Illinois, approximately 1,154 miles long and varying in diameter from 12 to 30 inches[5]. The purpose of the pipeline is to transport a half million tons of unrefined oil produced by hydraulic fracking in the Bakken Formation to a crude oil market hub located at the pipeline's terminus in the refineries of Illinois, and ultimately on to other points in the Midwest and Gulf Coast, where 80% of U.S. refineries exist[6]. Energy Transfer Partners is based in Dallas, Texas (a state that hosts the top three most productive oil refineries in the country). This project became known as the Dakota Access Pipeline, or DAPL.

It is worth providing some background to explain the involvement of the Standing Rock Tribe in the project. This requires a brief look into regional land history. As of June 2019, Energy Transfer Partners continued to state on their website that the pipeline does not cross Standing Rock reservation land. The line does, however, cross through lands granted to the Sioux in the historical 1851 Treaty of Fort Laramie and several successive treaties. The US government violated the treaty when supporting Custer's search for minerals in the Black Hills in 1874. When the tribe refused to grant permission for miners and settlers to continue flooding to the area, the federal government responded by clearing Sioux people off of the land and forcibly relocating them to the eastern part of Sioux territory, now the reservation.[7] It took until 1980 for the federal government to recognize the violation. *In United States vs. Sioux Nation of Indians* (1980) the Supreme Court found in favor of the Sioux and affirmed that the land had been taken without compensation. Ultimately, the Sioux never accepted damages awarded by the court (land takings compensation, plus interest--its at about a billion dollars right now)--and continue to demand the return of land instead.

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[5] The Army Corps of Engineers. Dakota Access Pipeline Environmental Assessment. 2014. https://www.nwo.usace.army.mil/Media/News-Releases/Article/878649/dakota-access-pipeline-final-ea-and-fonsi-released-for-nd-section-408-crossings/

[6] The Army Corps of Engineers. Dakota Access Pipeline Environmental Assessment. 2014.

[7] Kimbra Cutlip. "In 1868, Two Nations made a treaty, the U.S. Broke it, and Plains Indian Tribes are Still Seeking Justice." Smithsonian.com. 2018. https://www.smithsonianmag.com/smithsonian-institution/1868-two-nations-made-treaty-us-broke-it-and-plains-indian-tribes-are-still-seeking-justice-180970741/

Beyond the Laramie Treaty's physical boundary, there were other considerations in the case, specifically the treaty-established rights to hunting and fishing in the Black Hills region (The suit was brought under a 5th amendment takings claim--takings law will be discussed in a later section). The tribe retained right to practice subsistence fishing and hunting even on lands ceded to the federal government, and these concerns were as present in the stand against DAPL as they were in previous eras. The entire pipeline route without question caused habitat fragmentation for species along its route; moreover, if the proposed pipeline crossing Lake Oahe ruptured or spilled, the tribe argued, this would contaminate the drinking water supply for the entire reservation (This is a risk that the community of Bismarck was spared, though an alternative route would have put these white citizens in a similar position).

II) Environment on Trial: NEPA/NHPA and the Federal Handle

Like Keystone XL, TransCanada, and other major pipeline projects, DAPL's need for a series of federal permits triggered the requirement to comply with the 1969 National Environmental Preservation Act, or NEPA. NEPA, which has provisions for both environmental and cultural resources, requires all projects that involve action by a federal agency and that might "significantly affect the quality of the human environment."(NEPA, 42 U.S.C. § 4332(C), 2019) to complete an environmental assessment. The 1966 National Historic Preservation Act, or NHPA, functions in a similar fashion, but has a specific focus on cultural resources. NHPA requires the identification of culturally significant sites and an exploration of the ways in which they will be impacted by coming development does to any site, anywhere (regardless of whether it is federally controlled or not) that might have "cultural significance." Section 106 of NHPA requires that any "federal undertaking" (a project, activity, or permit licensed or approved by a federal agency) is required to take into account the effects of this undertaking on historic properties. Like NEPA, NHPA requires agencies to consult with any other affected agencies as well as the State Historic Preservation Office and Tribal Preservation Offices.[8]

While NEPA and NHPA process requirements vary, they have overlapping requirements and are thus often integrated[9]. Both involve the identification of any cultural or natural resources within the project scope, the identification of parties potentially affected by the project (with particular attention to low income communities of color, in NEPAs case) an assessment of impacts (air, water, noise, impacts to historic properties) and the identification of strategies of mitigation and potential alternative routes. Each process also involves a period of public

[8] U.S. Department of the Interior. "National Historic Preservation Act, Section 106." 2012. https://www.nps.gov/history/tribes/Documents/106.pdf

[9] Council on Environmental Quality and the Advisory Council on Historic preservation. "NEPA and NHPA: A Handbook for Integrating NEPA and Section 106." March, 2013. https://ceq.doe.gov/docs/ceq-publications/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf

comment, in which local citizens and cooperating federal agencies weigh in on the report. In a series of formal public meetings during the comment period, citizens identify impacts and concerns, which are documented for the record and, in theory, are supposed to inform the report.

In this particular case, the federal handle that triggered NEPA/Section 106 compliance was the plan to cross over 200 federally controlled waterways, including the Missouri and Mississippi rivers. The most contentious of these crossings became the planned crossing at Lake Oahe, a Missouri River reservoir in the Dakotas that serves the Standing Rock Sioux Tribe. The federal agency responsible for issuing permits over federally navigable waterways is the Army Corps of Engineers (ACE); this bureau became the agency of record, tasked with leading the NEPA investigation (The ACE, it should be noted, which has a long and troubling history with the Standing Rock tribe and other Sioux communities because of previous historical projects--the dams--which will be explored in a later section[10])

Complying with the NEPA requirements for a study of potential impacts, the Army Corps of Engineers issued at Environmental Assessment and a statement of a Finding of No Significant Impact (or FONSI). They then approved the portion of the pipeline that crossed the Missouri at Lake Oahe on Army controlled land. In response, in August 2016, the Cheyenne River, Oglala, Yankton, and the Standing Rock Sioux Tribes filed the first of many successive suits against the Army Corps of Engineers. This paper does not explore each and every legal claim against the Army Corps in detail (which included, among other things, a claim under the Religious Freedom Restoration Act[11]);instead, it analyzes claims related to the implementation of NEPA/NHPA, showing in the process how pipeline companies have been able to exploit gray areas in the law to evade complying with the spirit of it's intent, while successfully following the letter of its law. The three primary issues that factor into NEPA's limited ability to halt pipeline construction (even when aspects of its provisions have clearly not been met) are as follows: 1. Agency Deference 2. Segmentation (and Minimization) 3. Flaws in Public Process.

Agency Deference

The first is the problem of agency deference. Under the Administrative Procedures Act, which governs the processes federal agencies must follow when making a decision, agencies are given huge discretion in their *conclusions* if they can prove their *process* was legal. These is especially applicable in cases related to NEPA compliance. Because environmental reviews are

[10] Nick Estes text *Our History is the Future* includes a chapter on the construction of dams on the Missouri river that displaced indigenous people from their farmlands.

[11] However, if you would like a complete timeline of legal cases related to the Dakota Access Pipeline, consult Caitlin McoCoy and Robin Just's case timeline, hosted by the environmental energy and law program at Harvard: https://eelp.law.harvard.edu/2017/10/dakota-access-pipeline/

highly technical and specialized, courts are rarely able to verify whether or not the information captured is accurate--only whether or not the agency in charge of NEPA review has met the requirements of the process, and if the decisions they made (based on the evidence they themselves collected) is reasonable, or "arbitrary and capricious". One example of an area where the Corps was critiqued, but ultimately not contested, was one of their decisions related to the scope of the study. What is considered the scope, or area of impact for a project can vary widely according to many factors, but generally this is left to the leading agency to determine (and it is thus hard to contest). The ACE utilized a highly narrow project scope; their impact zone was a half mile buffer along the pipeline route. This area did not touch formal tribal lands, even though it's clear (as Judge Boasberg pointed out in *Sioux Tribe vs. Army Corps*,) that a spill of break in the line would impact the water supply for those more than a half mile away. [12]

The DAPL cases are an important testing ground for NEPA in the era of mass pipeline construction: if NEPA analysis is proven inadequate, can a court halt construction on that basis? Ultimately, the DC Circuit court under Judge James Boasberg answered that question when they heavily critiqued the Corps, but refused to vacate the permits issued to the pipeline Company. In his ruling, Boasberg relied on a two part test established by *Allied-Signal v. U.S. Nuclear Regulatory Commission* (D.C. Cir. 1993). The criteria are 1. The seriousness of the deficiencies in the agency action; and 2. The disruptive consequences of vacating the agency approval.[13] In the first case, the court simply found that the ACE failed to adequately address the impacts of a spill on wildlife, the environmental justice impacts on the two tribes, the degree to which the project would prove controversial, and the impacts on native fishing and hunting rights.[14] Given that the court instead ruled the ACE's acts were "lawful but insufficiently or inappropriately explained"[15] the court did not vacate the Corps decision to grant DAPL permits. Once the court removed the vacating of permits as a remedy, the second point (disruptive consequences of vacating agency approval) became essentially moot. While the court hemmed and hawed, sternly telling the Corps to revisit portions of its environmental assessment, including the portion on environmental justice[16], and indicating to ETP that, were they to vacate the permits, it would represent nothing more than a "substantial inconvenience", the court nevertheless refused to stick its neck out, and let pipeline construction go forward unabated[17].

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[12] Caroline Grueskin and Amy Dalrymple. "Environmental Justice Factored in to Judge's Decision on DAPl." Bismark Tribune. 2017. https://bismarcktribune.com/news/state-and-regional/environmental-justice-factored-into-judge-s-decision-on-dapl/article_a3120c5c-3a58-556a-9e62-dae01f67a9b1.html

[13] Deidre G. Duncan and Brian R. Levey. "Federal Judge Declines to Shut Down Dakota Access Pipeline While Corps Corrects Errors in ENvironmental Review." *Pipeline Law*. 2017. https://www.pipelinelaw.com/2017/10/16/federal-judge-declines-to-shut-down-dakota-access-pipeline-while-corps-corrects-errors-in-environmental-review/#more-1822

[14] Deidre G. Duncan and Brian R. Levey. "Federal Judge Declines to Shut Down Dakota Access Pipeline While Corps Corrects Errors in ENvironmental Review." *Pipeline Law*. 2017.

[15] Deidre G. Duncan and Brian R. Levey. "Federal Judge Declines to Shut Down Dakota Access Pipeline While Corps Corrects Errors in ENvironmental Review." *Pipeline Law*. 2017.

[16] Caroline Grueskin and Amy Dalrymple. "Environmental Justice Factored in to Judge's Decision on DAPl." Bismark Tribune. 2017. https://bismarcktribune.com/news/state-and-regional/environmental-justice-factored-into-judge-s-decision-on-dapl/article_a3120c5c-3a58-556a-9e62-dae01f67a9b1.html

[17] It's worth adding that, while the Army Corps took the courts advice and themselves froze construction pending a full EIS--even going so far as to issue a notice of federal intent--the incoming Trump administration issued an order to move forward without the EIS, and the ACE withdrew their request.

While it chastised the Army Corps for only doing an Environmental Assessment (a small preliminary environmental study to determine if a larger study is needed) rather than the full Environmental Impact Statement (and encouraged them to go back and do one) it did not require this in the ruling. Thus, because of APA, provisions around agency deference, and the high bar for proving that an agency has acted in an 'arbitrary and capricious' manner, court enforcement of the provisions of NEPA did not actually result in enhanced protections for the environment.

Segmentation and Minimization

Next, there's the issue of fragmentation: Oil pipelines (unlike natural gas lines) have no overarching or centralized permitting scheme that requires the entire project to reviewed and evaluated all at once[18]. The ACE's permit is only for the portions of the pipeline that cross federal lands (the water crossings); thus the NEPA review was confined to short stretches of line at these locations, leaving unreviewed the many other hundreds of miles along the line. Furthermore, ACE did not look at all the crossings under one permit application, but instead broke them out into 209 separate "areas of potential impact (APEs). This choice also creates a problem of perception: It's a lot easier to say 209 times that 1 or 2 archaeological or cultural sites were impacted (sounds minimal), than to say once that 200 to 400 archaeological sites were impacted[19]. Too often, entities attempting to skirt the NEPA requirement to report on cumulative impacts for an entire project will permit the project in small pieces, such that each segment along the route can be argued to have a minimal impact. By vastly narrowing and then fragmenting the scope of review, the pipeline's impacts under NEPA are made to look smaller than they are. This is a typical process for oil pipeline projects that fall predominantly on private lands (as this one does). In these cases, the Army utilizes a rather generic permit called Permit 12. Permit 12 is used for "activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project."[20] In short, early decisions to minimize and fragment pipeline impacts become circular justification to fragment and minimize later portions of the permit process.

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[18] Steven Mufson. "How the Army Corps of Engineers wound up in the middle of the fight over the Dakota Access Pipeline." Washington Post. February 2017. https://www.washingtonpost.com/business/economy/how-the-army-corps-of-engineers-wound-up-in-the-middle-of-the-fight-over-the-dakota-access-pipeline/2017/02/08/33eaedde-ed8a-11e6-9662-6eedf1627882_story.html?noredirect=on

[19] Sonia Hutmacher et al. The Dakota Access Pipeline (Episode 94). CRM Archaeology Podcast. 2016. https://www.archaeologypodcastnetwork.com/iia/12

[20] William Yardley. "There's a Reason few even knew the Dakota Access Pipeline was being Built." The *LA Times. 2016.* https://www.latimes.com/nation/la-na-dakota-access-pipeline-permit-20161104-story.html

Public Process and Consultation

The third and most problematic issue is that in many pipeline projects (not just DAPL) there is a failure to adequately consult with regional tribes. While agencies follow the leader of the law with regards to public notice (advertising meetings, setting up locations, mailing stakeholders) the ongoing failure to consult--to really listen to community members and incorporate their knowledge and concerns into reports, and thus agency decisions--is illustrated clearly in the argument over NHPA compliance. Under Section 106, the Army Corps of Engineers was required to do a cultural resources survey and consult with area tribes. The purpose of tribal consultation, as several career archaeologists with experience in NHPA consultation have publicly stated, is to inform the survey beforehand. Cultural resources, broadly defined, objects both below ground (relics, graves, artifacts) and objects above ground (existing historic structures and sites). It's possible for any archeological firm to go out and do a survey, but without information from affected area tribes, resources that are spiritually, culturally, or historically important can be easily missed. While consultation is important in both the environmental and cultural aspects of NEPA/NHPA compliance, it is under NHPA that the affected parties become (essentially) the experts.

Yet this is not how tribes were treated during the process--at every turn, their input about cultural resources was minimized, or dismissed. (The timeline of their conversations is filled with conflict) While the Corps states they did consult with the Standing Rock Tribe in November of 2014 and were told there were no cultural resources of significance in the project area[21], the tribe disputes this. While the Army Corps states that it had made multiple attempts to reach out to the tribe, leadership was concerned that the ACE only wanted to consult on a narrow segment of the pipeline project (near the water crossings) rather than along the length of the pipeline[22]. The Corps did not consider private property along the route to be part of the 'federal project'; the tribe did not agree. Thus, a lack of clarity over project scope (and a refusal to adjust scope to meet tribal concerns) resulted in a total lack of cooperation between the two entities. To make matters worse, when the tribe took their own initiative to survey cultural sites along the route on private land (with their own surveyor, and with the permission of the property owners) these sites were promptly bulldozed by ETP workers. Because these areas were not part of the official scope, the tribe had no redress.

The Army Corps' final Environmental Assessment states that 'cultural resource inventories were done in compliance with section 106 on federal lands.' The FONSI stated that no eligible sites (historical structure or archaeological site) were affected by the pipeline, although they found that affected areas had been settled for more than 12,000 years and had a high likelihood

[21] Sonia Hutmacher et al. The Dakota Access Pipeline (Episode 94). CRM Archaeology Podcast. 2016. https://www.archaeologypodcastnetwork.com/iia/12

[22] Chip Cowell. "Why Sacred Sites Were Destroyed for the Dakota Access Pipeline." *Ecowatch*. 2017. https://www.ecowatch.com/sacred-sites-standing-rock-2103468697.html

(based on topography and proximity to water) of having significant archaeological deposits.[23] Still, they required no mitigation or further studies. Why would the Corps handle cultural resources in this manner? There are two reasons that stand out. First, the agency's mandate to expedite the pipeline process results in them viewing cultural resources as liabilities, not assets.[24] The Corps and ETP have many incentives not to consult with the tribe, and (furthermore) not to find any cultural resources that might derail or slow down the project. As with endangered species, so with cultural resources: A shoot, shut up, and shovel phenomenon prevails (furthermore, if burial remains are found on federal lands, NAGPRA requires a minimum 30 project shutdown!). Second, and in a related fashion, this happens because, in the words of Chip Cowell, "because federal agencies are unwilling to consider how Native Americans view their own heritage."[25] There is an implicit consensus that indigenous knowledge, both environmental and cultural, is less valuable that the proposed energy infrastructure that will erase and replace it.

When recognizing the Indigenous population, there are multiple levels of approaching the community and obtaining its consent or denial for a particular project. To be sure, the state of North Dakota does maintain an Indian Affairs Commission which is supposedly accountable for Indigenous engagement with the state. However, as discussed by Roxanne Dunbar-Ortiz, such commissions are similar to human resources departments: they function at the pleasure of the state. The governor of the state at large appoints three members to the commission, and the governor functions as the chairman. Though members must be chosen from Indigenous communities, the reality is that the governor is deemed responsible for the entire state, making his designation as the chair questionable with regards to sympathy towards Indigenous rights if that is not the governor's community of origin. In this case--as it has consistently--the governor is not from the Indigenous community, which means that the state agent does not allow full agency to properly facilitate communication.

Outside of the NEPA/NHPA process and within it, government outreach is limited. Government engagement is notoriously slow due to how administrative agencies are staffed; when people believe that there is "too much government," they are correct but not the way they mean. There are two important elements of creating barriers between the public and the process of review. First, most administrative agencies divide the components of the review in such a way that specific documents have to be turned in to the agency. Second, response times have to take a

[23] Incidentally, Energy Transfer Partners counter-sued the tribe for creating project delays, but their case was unsuccessful. This marks only the beginning of an uptick in reactive lawsuits by pipeline companies against protesters. See for example Amy Dalrmple's article "North Dakota House approves bill to protect pipelines, critical Infrastructure. Bismark Tribune, March 2019. https://bismarcktribune.com/news/local/govt-and-politics/north-dakota-house-approves-bill-to-protect-pipelines-critical-infrastructure/article_cb24f243-874e-5083-b329-5d72868559e0.html?fbclid=IwAR3l3iwxpcZ936-UgVtnCaGpXbhGuDgjmaBChH_9ZRkegMA0AuyV-D5M3hY#tracking-source=home-top-story-2

[24] The Obama Administration signed an order in 2012 essentially calling for an expedited process for energy infrastructure, including pipelines. "Presidential Memorandum -- Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects." March 22,2012. https://obamawhitehouse.archives.gov/the-press-office/2012/03/22/presidential-memorandum-expediting-review-pipeline-projects-cushing-okla

[25] Chip Cowell. "Why Sacred Sites Were Destroyed for the Dakota Access Pipeline." *Ecowatch*. 2017. https://www.ecowatch.com/sacred-sites-standing-rock-2103468697.html

great deal of time due to low staffing and gatekeepers between those submitting applications for review and those reviewing. Depending on the applicant and the amount of influence that the applicant maintains over the administrative agency, applications are expedited or delayed. The public will never fully know how much documentation a department or an agency received in a year because some players receive extra attention. Private entities often have legal departments whose sole focus is to navigate the legal requirements of running a larger corporation. While some staff members' numbers are unlisted, legal departments know that as public employees, the administrative agency might be obligated to provide a directory through the Freedom of Information Act. Most people do not have the energy and resources to combat the carefully placed barriers to communication, and most government agencies ensure that there are excessive criteria to completing applications that frustrate both the applicants and the examiners.

Competing Perceptions of Values and Futures: Why NEPA/NHPA Can't Protect Us.

The story of the failure of both federal level provisions for the protection of natural and cultural resources to successfully halt pipeline in construction in this case is a strong reality check for activists that hone in only on environmental laws to seek protection for existing places. Many scholars have argued that NEPA is exceptionally weak in its ability to actually protect citizens, and that its power lies in creating delay and public discussion.[26] A cursory review of NEPA's listed accomplishments shows that the application of NEPA can in some cases force better environmental mitigation or even project relocation but is rarely a cause for a complete project shut down--although not impossible, as in Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017) in which a DC court struck down a decision by the federal regulatory commission to improve the construction of three natural gas pipelines.[27] While this recent case is encouraging, it's success may largely be a function of its timing, rather than only it's merits. At this time, we don't have a legitimate system in place to value or manage our ecological services (the natural processes that replenish our water and soil supply) against proposed development or changes that will impact them (such as the creation of huge energy infrastructure). Under NEPA, indigenous stewardship models are not upheld or protected.

[26] Richard A. Epstein. "The Many Sins of NEPA." Texas A&M Law Review, Volume 6, Issue 1. 2018. https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1151&context=lawreview

[27] Deidre D. Duncan and Brian R. Levey. "D.C. Circuit Raises the Stakes: NEPA Defect Sufficient to Halt Pipeline Operations. The Nickel Report: Trends and Developments in Energy and Environmental Law. 2017. https://www.huntonnickelreportblog.com/2018/02/d-c-circuit-raises-the-stakes-nepa-defect-sufficient-to-halt-pipeline-operations/

III) Assembling the Land: Eminent Domain, the Public Good, and Utilities Law

The most critical piece of the development of any pipeline infrastructure is the aggregation of thousands of acres of land along the path of the proposed line, either through eminent domain, voluntary sale, easements, or some combination of all three. In this endeavor, oil and gas companies benefit from many of the standards, procedures, and rules that apply to other creators of large infrastructure, such as regional electric providers, or even city departments themselves (the local water, stormwater, or transportation departments, for example). This Section will explore takings law and eminent domain, the shifting concept of the "public good" and the special provisions allowed to utility and infrastructure providers under these laws; it will assess the impact this legal history has had on DAPI and other ongoing pipeline cases, and explore avenues for redress and reconsideration.

Eminent Domain

Government may ask for easements for public infrastructure on private land without providing compensation--for example, during the replatting and redevelopment of a property, in which the need for upgraded infrastructure to serve that development compels a new, or bigger easement--if a private citizen is taking an action that would require a permit, or some other municipal handle. Two Supreme Court Cases, Two Supreme Court Cases (*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987),and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) establish the grounds for extraction without payment; the dedication must have an essential nexus between the requested permit and government action, and the dedication must be roughly proportional to the development proposed impact. In non-legalese, the concept is simply this: if you are proposing to make changes to your property that create new impacts (increased traffic, more impervious cover, etc) the city has the right to ask for improvements related to, and proportional to, what you propose to do.

If these two conditions are not met, then takings law applies. This is often the case when the municipality, rather than the landowner, is the progenitor of a project. If the project proposed would require a citizen's entire property, or render what remained undevelopable, then the takings clause applies. Under the 5th and 14th amendments, also known broadly as takings law, it is the right of government or assignors (the aforementioned utility companies) to either take private property or have an easement on private property, as long as the taking advances

the “public good” and just compensation is provided.[28] (Individual state laws may put additional conditions on what constitutes the public good). The property owner may agree to sell outright; if not, the state or city (or its assignors) will often engage the condemnation process. Since property rights constitute not simply the land, but rather a bundle of uses (mineral rights below, for example, air rights above, and the use of the land itself) the act of condemnation may remove the landowner from the property completely, but may also result in an easement only (The Federalist Policy Brief)

What eminent domain is and how it works is a relatively simple phenomenon; how one defines which “public” benefits from a presumed good, and assesses the trade offs and risks involved, is another story. In the United States, eminent domain’s powers have been slowly expanded over the course of several centuries as what constitutes ‘the public good’ shifts and changes shape. In the 19th and 20th centuries, eminent domain was used for roads, bridges, parks, and public buildings. Courts began allowing the use of eminent domain for private entities like railroad companies and private utilities, with the understanding that these companies were both heavily regulated and providing the public equal access to their lines. In theory, this expansion had benefits; much like access to fast internet by way of fiber optic cable today, access to rail lines, water lines, or electric lines gave ordinary people at chance at utilizing new or recently expanded technologies to improve their quality of life.

This is, on its face, a reasonable-sounding request. Creating livable rural or urban space requires that those who live in those communities maintain access to basic services, which evolve and expand over time. The provision of basic utilities (water, electricity) requires vast amounts of public land and easements, through which mains can be run, and particularly in urban conditions, there is an expected trade off between absolute control over private property, and access to the basic common goods required to conduct business and life. Ultimately, it is easy to make an argument from an engineering standpoint; transmission lines, water mains, and substations all have spatial and size requirements to perform well and require setbacks for safety and operational reasons. However, what is being built is a function of perceived demand, and the demanding public (and who is classified as part of the public) has a long history of being almost always defined as the “white public.”

In the process of taking land, indigenous and black people could often expect to carry the risks and costs of otherwise laudable projects--whether they benefited from them directly or not. In his recent book Our History is the Future, indigenous historian and DAPL activist and water protector Nick Estes talks about the history of dam construction by the Army Corps of engineers

[28] Interestingly, takings law does not just apply to land per se, but to the bundle of rights that adhere to land. This can include air rights, mineral rights, water collection rights, and a number of other potential uses. This is important because *United States vs. Sioux Nation of Indians* (1980) was a takings claim related to hunting and fishing rights; the tribe won their claim because even though the land in question did not belong to them outright (for resale, for example) the court interpreted that the United States government had denied the Sioux their right to use this property in a particular way without compensation. This case is instrumental in understanding the connection between takings law and environmental management. For more information see Brian J. Perron’s article “When Tribal Treaty Fishing Rights Become a Mere Opportunity to Dip One 's Net into the Water and Pull it out Empty: The Case for Money Damages when Treaty-Reserved Fish Habitat is Degraded” in William & Mary Environmental Law and Policy Review, Volume 25 | Issue 3, 2001.

on the Missouri River. In 1946, under the Pick-Sloan Flood Control Act, the Army Corps condemned and seized native land through eminent domain to construct four dams. The construction of the dams protected white communities but flooded the fertile bottomlands, displacing over 700 native families and forever destroying their access to traditional food and medicines, as well as their buried dead.

In the 1950s, the use of eminent domain was expanded further after the *Berkman vs. Parker* decision (1954). The case revolved around the growing use of urban renewal by cities to seize land classified by a municipality as "blighted," in order to revitalize and completely reprogram an existing community. A well-known outcome of urban renewal was the targeted disruption of predominantly black communities and their permanent displacement; in place of their homes, bridges, roads, and even parks popped up. Once again, the "public" in public good was a white public. The additional significance of this case in the long run was that it established that a "public use" did not have to be a feature actually used by a (narrowly defined) public, but could also be for a "public purpose," as defined by an agency or legislature. "Public purpose", thus defined, allowed city governments the justification to condemn existing and functional businesses and homes under the argument that a higher and better use, ostensibly providing a higher tax revenue, could replace it. More recently, in *Kelo vs New London* (2005), a case in which private residential property was condemned to make way for a proposed pharmaceutical campus in New London, CT, the Supreme Court established that condemning land in order to turn it over to private development (not a utility, or transportation provider) was an appropriate use of eminent domain.

Pipelines: Public or Private Use?

How does this interpretation apply to pipelines? Are pipelines really necessary infrastructure, and in what way can they be said to serve a "public good?" If one considers the extensive public investment required to create and maintain public transportation in a rural community with extremely low returns, then perhaps yes, sustaining a supply of gasoline not only sustains the vehicle access, but much of the equipment used for agriculture. Oil and gas companies, as part of the logistics and supply chain for energy, head projects that transport energy to homes, generate electricity, and produce fuel, and thus are given the same opportunities to exercise eminent domain (though not uniformly) across most states. Since the ramping up of oil and gas production in the US from the early 2000s onward, American produced oil and gas is increasingly finding its way to foreign energy markets through export. Can the extraction of oil to sell on foreign markets be considered a "public good"? Increasingly, property rights lawyers (such as the Niskanen Center) and environmentalists are arguing "No" and the reasons are many.[29]

[29] L.M. Sixel. "Are pipeline land takings in the interest of public good if oil, gas, headed overseas?" The Houston Chronicle. April 2018. https://www.houstonchronicle.com/business/energy/article/Are-pipeline-land-takings-in-the-public-interest-12804603.php

First, advocates argue that the exportation of oil can potentially drive up the costs of energy consumption for local consumers. Pipeline infrastructure is essentially what enables this, by allowing for the rapid transport of crude oil from extraction points to states with refineries; they are, by their very nature, used to ensure that the energy produced, in the case of DAPL and the Bakken Shale, will leave the Dakotas as efficiently as possible, without incurring additional processing or transportation costs that might incur benefits to the local communities that host the pipeline. Instead, after the initial payout for condemnation, communities supporting pipeline infrastructure are essentially subsidizing the extraction of resources for private profit.[30] Second, the environmental costs incurred by the host communities, when they are properly accounted for, may not balance with (and may even outstrip) the greater benefits of overall economic growth. The current and growing movement to quantify the true value of ecological services makes this apparent; we have done a poor job of accounting for what was lost in pursuit of what might be gained. In short, the strength of the 'public good' argument, which is the foundation for the extraordinary freedom the gas companies are given to pursue their projects, is being eroded by decades of poor environmental outcomes and increased economic inequality.

Activists and landowners across the country are starting to recognize the role that eminent domain plays in allowing pipeline projects to move forward, especially in states with prior experience with the oil and gas industry, and have started pushing back with new legislation in the past 15 years.[31] The state of Texas requires agents pursuing eminent domain to provide the citizens whose properties they seek to utilize with a landowners bill of rights, which outlines due process rights, the right to notice, the right to be heard, and the right to go to court (The Federalist Policy Brief, 2019). In 2016 and 2017, South Carolina and Georgia implemented moratoriums on pipeline construction before moving to circulate legislation that would limit where and how pipeline construction can occur.[32] In Georgia, the new laws specifically take aim at the way pipeline companies use eminent domain by requiring additional legislative hurdles, such as putting the proof of the 'public good' burden on the pipeline company, require evidence of financial responsibility, and give the state jurisdiction over the entire length of a pipeline, rather than just the portion of the project that requires the use of eminent domain(Pipeline Rules Limit Eminent Domain, 2017).The proposed Palmetto Pipeline, meant to move gas between South Carolina and Georgia, was shuttered in response to the new regulations[33].

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[30] L.M. Sixel. "Are pipeline land takings in the interest of public good if oil, gas, headed overseas?" The Houston Chronicle. April 2018.

[31] Julie Dermansky. "Landowners Question if Pipeline Companies Seizing Land to Export Oil and Gas Counts as 'Public Good.' Demog Blog. April 2016.
https://www.desmogblog.com/2018/04/16/louisiana-landowners-eminent-domain-bayou-bridge-pipeline-export-oil-gas

[32] Gillian Neimark. "In Georgia and South Carolina 'the game has changed' on oil pipelines." Energy News Network. 2017.https://energynews.us/2017/03/14/southeast/in-georgia-and-south-carolina-the-game-has-changed-on-oil-pipelines/

[33] Gillian Neimark. "In Georgia and South Carolina 'the game has changed' on oil pipelines." Energy News Network. 2017.

The Role of Utility Commissions

To aggregate the land for the path of the Dakota Access Pipeline, Energy Transfer Partners utilized a combination of eminent domain and voluntary easements, seeking approval from the federal government and from boards and commissions across the 4 states in the Pipeline's path (North Dakota, South Dakota, Iowa, and Illinois). While interstate gas pipelines go through a federal permitting process as an outright requirement, seeking permit approval from the Federal Energy Regulatory Commission (per the 1938 Natural Gas Act and successive amendments), oil pipelines are not permitted by FERC.[34] Instead, FERC only regulates the rates charged by pipeline companies, and permits for each section of the line are approved on a state by state basis. The US Dept. of Transportation Pipeline and Hazardous Materials Safety Administration, or PHMSA, is responsible for the regulation of oil pipeline safety, but given that the agency has less than 200 inspectors for millions of miles of pipeline and the oil pipeline industry writes its own operating and safety standards, it probably safer to say oil pipeline operators are largely unregulated when it comes to safety checks).[35]

South Dakota's Public Utilities Commision was the first to approve the project (November 2015) followed by the Illinois Commerce Commission (December 2015). [36] Since Illinois benefits economically from the projects as the destination for Bakken crude (it is the 4th biggest oil refining state in the country) the Illinois Commerce Commission's support was not surprising (Destination Illinois). Similar support was seen in North Dakota, where the company primarily utilized and paid for voluntary easements, rather than on fee-simple purchase (see table for rough percentages on easements vs takings on a state by state basis).

The use of eminent domain proved to be highly contentious in Iowa; landowners brought a case to the Iowa Supreme Court in 2018. Local landowners (as well as farmers and environmental and indigenous activists) who opposed the project in Iowa contested the Iowa Utilities Board decision to approve the project and the use of eminent domain to acquire land, arguing that the public does not benefit the "public good," since Iowan's do not have access to the oil in the pipeline and the state itself has no oil producing or refining capacity. Unfortunately, the district court denied petitions for judicial review of the Iowa Utilities Board decision; however, individual landowners continue to file suit against Energy Transfer Partners for soil compaction, tile damage, and crop loss, among other issues.[37] (It's unfortunate but perhaps unsurprising that

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[34] William E. Bauer. "Pipeline Regulatory and Environmental Permits." Chapter 3 of Pipeline Planning and Construction Field Manual. 2011. https://booksite.elsevier.com/samplechapters/9780123838674/Chapter_3.pdf

[35] The Standing Rock Tribe considered creating their own Utility Commission to deal with this issue: https://billingsgazette.com/news/state-and-regional/standing-rock-sioux-consider-creating-a-utilities-commission/article_d846e429-10a4-5b8f-acce-bee0fd9ba37d.html

[36] B.A. Morelli. "Illinois becomes second state to approve Bakken pipeline." The Cedar Rapids Gazette. December, 2015.https://qctimes.com/news/local/govt-and-politics/illinois-becomes-second-state-to-approve-bakken-pipeline/article_c7b3fb90-6314-501c-810b-62b355d3ff34.html

[37] See Case no. 17-0243 at the Iowa Supreme Court: https://www.iowacourts.gov/iowa-courts/supreme-court/supreme-court-oral-argument-schedule/case/17-0423

white landowners have gotten some legal traction fighting pipelines for their property, while indigenous people, for whom the stakes are higher and the wounds are deeper, have not).

In short, while Energy Transfer Partners followed a lawful procedure in seeking permits, it is clear that not all laws are ethical, and that unethical laws can and should be challenged to short-circuit the ambitions of pipeline creators. To a certain extent, awareness of the use of eminent domain by pipeline companies--and legal maneuvers to stop it-- came too little, too late for DAPL.

State Review: The Role of the Utilities Commission

State	**Approving Body**[38]	**Date**	**Percent Voluntary Easements**[39]
South Dakota	South Dakota Public Utilities Commission	11/30/2015	92%
Illinois	Illinois Commerce Commission	12/16/2015	86%
North Dakota	North Dakota Public Service Commission	1/20/2016	88%
Iowa	Iowa Utilities Board	4/8/2016	78%

V) Conclusions

To understand the significance of DAPL, one has to first understand that in the United States, most of the communities are based around the automobile, and the oil and gas industry not only serves the citizenry but provides lucrative, long-term employment. In fact, the promise of jobs is the standard battlecry for most oil companies, and state and local governments are eager to comply almost explicitly for the purpose of improving their tax bases. However, ever since the destruction wreaked by the multiple oceanic oil spills, citizens are more wary of the risks; while they want good jobs, they understandably wish to avoid the liabilities. Unfortunately, this means

[38] Source list for approving body on DAPL's corporate website: https://daplpipelinefacts.com/
[39] Mike Nowatzki. "North Dakota Regulators approve Bakken pipeline." The Gazette, 2016. https://www.thegazette.com/subject/news/government/north-dakota-regulators-approve-bakken-pipeline-20160120

that since we all “must have gas,” someone has to bear the brunt of environmental degradation, which more often than not means communities of color followed closely by poorer White areas.

When determining who should be involved in public comment, people tend to forget that under federal law, reservations maintain a nebulous relationship with the United States, meaning that outreach is mostly federal government, which is vastly different from local and state government. Almost no citizen of the United States has consistent engagement with the federal government, though there are annual elections at the local level and state legislature--when most state politicians are at the capitol-- is often held every two years. Federal employees often defer to local and state government for the appropriate interaction with the citizenry, and one’s access to federal engagement frequently depends on the political leanings of the state government. Indigenous communities have been regarded as sovereign by the United Nations, but not by the United States. Similar to racially and socioeconomically segregated neighborhoods, Indigenous communities experience severe infrastructure disinvestment. However, whenever resources are discovered in close proximity, the federal government has allowed exploitation without significant recourse. Like the genocides that created this nation, Indigenous land rights are viewed as suspect in the face of immense land acquisition.

What is the real challenge in combating the lures of eminent domains and easements for the sake of big business? The purveyors of wealth in the United States are large companies; therefore, to acquire wealth and sustain a healthy economy, all levels of government consider themselves more accountable to companies than citizenry. Frequently this realty translates to less agency for those affected by the decisions of large companies, which in this case means that the people of Standing Rock are subject to the whims of Bakken and Energy Transfer.

Double Standards

Standing Rock was not originally part of the desired route of the pipeline, a narrative which has seen little exposure in the mainstream media’s push to demonize the Water Protectors. Originally, the pipeline was slated to run through the majority of the state and away from the Reservation, which would have reduced the hydrological interference and potentially created jobs in rural communities, the standard explanation for the expansion of the oil and gas industry. However, not only were the rural non-Indigenous communities placated but the resistance movement was targeted by the North Dakota House, which viewed pipelines as critical infrastructure. Instead of viewing the pipeline as interference into a sovereign entity with all rights and powers thereof, the majority population of the state negated the autonomy of the Indigenous population to make room for economic development, which even Justice Thomas contested in the case of *Kelo v New London.* Simply put, when profits are considered inevitable, the voices of acutely marginalized populations are immaterial.

Despite the crossing of two rivers and the deferral of authority to the federal government to construct the pipeline, who would be held responsible if the integrity of DAPL was compromised? For environmental regulation, the state is held responsible as the Environmental Protection Agency continues to lose both funding and authority. On its official site, the state of North Dakota touts a reputation of being in the top twenty oil producers in the world, which would indicate a definite sympathy towards the oil and gas industry. Without particular knowledge of how environmental degradation is mitigated, most laypeople would not be aware that the Department of Health's Waste Management Division is where complaints would be made for leakage, spills, and pipeline. Therefore, the public is left with an administrative nightmare in the event of a catastrophe and North Dakota has already become notorious for its oil spills, including the Belle Fourche pipeline which occurred 120 miles away from Standing Rock.

One of the most dismissed elements of the battle over rural communities is the justification for rurality. For predominantly White populations, rural communities are considered safe places that serve as opportunities for freedom. People are encouraged to live off the grid--unless they consider themselves counterculture, in which case they work tech jobs while being surrounded by, as Sarah Palin described it, the "real America." The purchase of farms whether for business or pleasure abounds in moneyed communities neighboring long-term homesteads, and businesses that still refuse to take credit cards because cash works. Predominantly White communities are considered quaint and charming, as well as being the lifestyle goal for people once they retire from the city.

For populations of color, regardless of ethnicity, the communities are viewed as far more suspect. Instead of being charming for following older methods of existence, the populations are viewed as primitive even if there are religious reasons why the population follows such practices. The long-term homesteads are seen as barriers to progress instead of sanctuaries for the elderly and inheritances for the next generations. Home gardens are viewed as unbearable poverty rather than sustainability, and sharing resources is seen as irresponsible rather than communal. If you want to get a sense of how the federal government understands indigenous people (and its relationship to them) consider this quote from Ronald Reagan in 1988:

> "Let me tell you just a little something about the American Indian in our land. We have provided millions of acres of land [for reservations] and they, from the beginning, announced that they wanted to maintain their way of life...We've done everything we can to meet their demands as to how they want to live. Maybe we made a mistake. Maybe we should not have humored them in that wanting to stay in that kind of primitive lifestyle. Maybe we should have said no, come join us; be citizens along with the rest of us."[40]

[40] Alysa Landry. "Today, Native History: Ronald Regan Says we Should Not Have Humored [Natives]." Indian Country Today. 2017. https://newsmaven.io/indiancountrytoday/archive/today-native-history-ronald-reagan-says-we-should-not-have-humored-natives-B5jxVAorNUuf7DEOtUly5Q/

Both indigenous and settler rural communities maintain that freedom is key to their survival; much of the population in both areas may hunt and/or own firearms. However, the critical component is that Indigenous land is treated as available for the taking, often considered an indication of “improving” that land when the purpose of conquest has been resource extraction. Instead of protecting the generations of homesteads among populations of color, their extinction is seen as a viable sacrifice for the good of the nation. Due to the nation’s current economic model, extraction has been the focus of building the economy and preserving what is marketed as the desired lifestyle. Most cities in the United States require vehicle ownership, and many homeowners are already nervous about supposed measures that will dictate their lives, as if their lifestyles had not already dictated the lifestyles of others.

Corporate Futures and Collective Futures

As we have shown in the case of DAPL--and in the case of most pipelines--the planning formation of large inter-state energy infrastructure projects is bolstered by federal-level legislation that gives energy companies powers over land aggregation that match and sometimes exceed the scope of those given to municipalities (such as, most critically, condemnation). Energy companies are also protected by laws such as the Interstate Commerce clause, which supports the rights of potentially environmentally damaging actors over small cities and municipalities that seek to pass local ordinances excluding these uses. Thus energy companies have the ability to commit to project plans largely without the consent of the communities they will pass through, who will be notified of project plans long after the energy companies themselves have made the decision to go ahead with the project; they have little incentive to coordinate with the thousands of potentially affected municipalities, whose resistance will likely be futile in the face of their corporate projects and profits. As a result, the environmental review of these projects under NEPA is primarily an act of compliance and notification; while the EA or EIS process is, in the case of other types of projects, a potential opportunity to question the validity of the project itself on an environmental basis, the NEPA process for pipelines rarely affords that opportunity. In order to make this process work the way it should, we should more closely scrutinize the laws surrounding our use of eminent domain, utility provision law, and the “public good.” Due to the lobbying efforts of the industry, the federal government deems it unnecessary to change any of the process. Furthermore, none of these entities or laws have ever demonstrated any compunction to respect Indigenous communities. In the fact of public outcry, instead of accepting the responsibility for neglecting appropriate community engagement and environmental liability, Energy Transfer and the government have both projected the Water Protectors as violent. They have even gone so far as to declare themselves victims of a smear campaign to rob the region of revenue, leaving the state economically helpless.

Recently, Kelcy Warren, the Texas Parks and Wildlife Commissioner and the billionaire behind Energy Transfer Partners, acknowledged a feeling of discontent due to the loss of national social capital he was experiencing after the initiation of DAPL, and how he felt punished for providing the world with a highly sought commodity that employed millions of people.[41] ETP recently filed suit against Greenpeace, one of the many entities which expressed disgust with both the DAPL strategy, and Chief Financial Officer Tom Long lamented that North Dakota's policies were less flexible than those in Texas, where Warren participated in the 2017 - 2021 strategy for the Texas Parks and Wildlife Department and avoids being disclosed on the department's website. Commissioner Warren's convenient amnesia failed to acknowledge a fundamental problem with this venture, as with many of his others: consent. Like the original genocide that created this nation, the Standing Rock community never agreed to participate with the extraction of oil in their communities. Regardless of whether their input was sought, the federal government had no right to create a way for the United States to continue exploiting an already marginalized community in conjunction with private industry. Doing so, according to the standards set by the United Nations, was tantamount to going into another country with one's own standards and demanding that all of the native citizens of that country abide by those standards without acknowledging any of the customs and procedures already in place.

Environmental Quality vs. Environmental Sovereignty

Rather than relying on federal-level environmental law to catch and condemn bad projects during the permitting phase (when it is essentially too late), activists and citizens should challenge the laws that allow pipeline companies to operate autonomously and undemocratically. The fundamental issue in the pipeline debates is not one of environmental quality, but of environmental sovereignty. The Standing Rock water protectors have taught us this. They made sovereignty a central issue of their campaign of resistance to the pipeline, and in doing so, highlighted the futility of and inherent limitations of an environmental review process that does not account for it. The DAPL case study, in addition to revealing the hard limits on NEPA's protective powers, also elucidates the problems with top-down, often white- led 'environmentalism' that does not simultaneously address social justice issues. Every large infrastructure project involves trade-offs; in order to make sure the risks and rewards of these investments are not unfairly distributed, we need to respect the agency of small communities, both in regards to qualitative and culturally sensitive environmental standards they set and, more deeply, in regards to the way they govern and make decisions about how to deploy resources and build partnerships with outside capital.

Finally, this case shows us, moreover, that settler-colonial strategies for allocating and managing resources in a time of mass extinction (UN Report on Loss of Biodiversity, 2019) and

[41] Devin Leonard. "The Billionaire Behind the Dakota Access Pipeline is a Little Lonely." Bloomberg Business. March 2019.https://www.bloomberg.com/news/features/2019-03-27/the-billionaire-behind-the-dakota-access-pipeline-is-a-little-lonely

resource insecurity[42]are inadequate to safely usher humanity into the next century. On the contrary: new evidence suggests that indigenous communities, rather than modern states, are the better ecological stewards, as recent studies have shown that biodiversity declines significantly less under their watch. Indigenous people comprise less than 5% of the world's population, but are stewards of 80% of global biodiversity. Moreover, traditional land use systems (some thousands of years old) rather than representing a set of outdated rituals, are often the source of deep ecological knowledge about place, combined with values and decision making processes that allow the people that lives there to more accurately gauge the value of the ecological services that nature provides. Our current utility, governance, and environmental laws reflect the values (of individualism, cultural narcissism, and short term gain) that our society is both defined by, and is being destroyed by. Our solutions for a sustainable future is not as simple as shoring up greater protections for "the environment" (as defined by white people) in our current legal framework; instead, we must shed the superstructures that enable the devaluation of native peoples and native lands.

When the malleability of oil was first discovered, people would not stop working to exploit its capabilities, though little was known about its full environmental effects. Oil barons became incredibly wealthy and promoted the ideology that oil meant wealth, which spurred the practice of associating the people who processed oil as wealthy. Now, with raising concerns about global temperatures and air quality, their lifestyles and business practices are under attack, and marginalized populations are gathering in force to oppose the industry's continuation. The oil barons have been in power and flush with resources for so long that they firmly believe that it is their right to maintain their resources, and so many around them have adopted the ideology so as to punish those which oppose such culture. In short, oil barons represent what happens when people who maintain a false reality are given too much power and extort that power on the general populace. The Dakota Access Pipeline could and should have ended a long time ago, but the business dealers and the politicians who were invested are so dedicated to avoiding a loss that they are willing to poison the very water that people drink to execute their plans.

[42] See the Department of State's 2012 Report on World Water Security: https://www.dni.gov/files/documents/Special%20Report_ICA%20Global%20Water%20Security.pdf

VI) Additional Resources

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https://earthjustice.org/features/faq-standing-rock-litigation

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Standing Rock vs Army Corps of Engineers (2016):
https://casetext.com/case/standing-rock-sioux-tribe-v-us-army-corps-of-engrs-12#p10