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2019]

THE WILD WEST RE-LIVED: OIL PIPELINES THREATEN
NATIVE AMERICAN TRIBAL LANDS

*“We do not inherit the earth from our ancestors[;]
we borrow it from our children.”¹*

I. INTRODUCTION

Since the inception of designated reservations, the land within the reservation boundaries has served as a point of contention between the Native Americans and the federal government.² In 1851, the United States government attempted to negotiate peace with the Native American tribes by assigning designated lands as sovereign nations to the tribes under the protection of the Treaty of Fort Laramie.³ The terms of the treaty stipulated peace between the tribes and the government.⁴

1. See Kevin E. Trenberth, Graduation address to Bridge School, Boulder, Colorado: Are We Good Stewards of the Earth? (May 30, 2008), <http://www.cgd.ucar.edu/cas/Trenberth/website-archive/gradSp2-moved.pdf> (noting quote is credited to many sources). “There is an old Native American or some think it is a Pennsylvania Dutch saying . . . [o]f course it’s really both.” *Id.* (discussing value Native Americans gave to preserving land and natural resources).

2. See Robert N. Diotealevi & Susan Burhoe, *Native American Lands and the Keystone Pipeline Expansion: A Legal Analysis*, 38 *INDIGENOUS POLICY J.*, at *1 (2016), <http://www.indigenouspolicy.org/index.php/ipj/article/view/265> (discussing tense relations between government and Native American tribes).

3. See *Treaties and Broken Promises: 1851 to 1877*, NAT’L PARK SERV., <https://www.nps.gov/wica/learn/historyculture/upload/-7e-5-Chapter-Five-Treaties-and-Broken-Promises-Pp-84-132.pdf> (last visited Nov. 10, 2018) (explaining history and evolution of treaty post-civil war).

4. *Id.* at 89 (noting peace terms of treaty). “Among other things, the articles contained provisions that gave the U.S. government permission to construct roads and military posts within tribal territories and to permit the safe passage of emigrants through these areas in return for the payment of annual annuities.” *Id.* (explaining term of treaty); see also NAT’L ARCHIVES & RECS. ADMIN., Transcript of Treaty of Fort Laramie (1868), Article 1, OURDOCUMENTS.GOV, <https://www.ourdocuments.gov/doc.php?flash=false&doc=42&page=transcript> (last visited Nov. 10, 2018) (noting protection provision in favor of Native American tribes). The Treaty stipulates from the outset

[i]f bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent, and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

Id.

The years following the government's enactment of the treaties were riddled with attacks from settlers and the government agencies on Native American tribes and their reservations, primarily to hunt the food sources on the land.⁵ The settlers and the United States Cavalry led onslaughts resulting in loss of reservation land, declining game populations, and retreat of many tribes, further minimizing the size of the reservations.⁶ In 1868, the United States government attempted to control the tension and vicious attacks between Native Americans, settlers, and Cavalry.⁷ This led to a second signing of the Fort Laramie Treaty by Native Americans and the government, which combined the reservations and substantially cut the land initially designated to the tribes by the federal government.⁸ Historians theorize the willingness of the tribes to accept a substantial loss of land as being the result of extreme hunger from loss of hunting grounds, intimidation from the United States military, or misleading information regarding the terms of the treaty.⁹

The Supreme Court delivered opinions on the Native Americans in the "Marshall Trilogy," which further constricted the tribes' land rights between 1823 and 1832.¹⁰ In 1823, the Supreme Court rendered an opinion in *Johnson v. McIntosh*,¹¹ where it held Native American tribes "had no power to grant lands to anyone other than the federal government."¹² In 1831, the Court decided *Cherokee Na-*

5. See *Treaties and Broken Promises*, *supra* note 3, at 96-97 (noting general and specific instances of attack on Native American reservations).

6. See *id.* (detailing final attacks, which sparked Minnesota Conflict). "After the Minnesota Conflict in 1862 and the Sand Creek Massacre in 1864, what had once been small scale skirmishes and counter-raids turned into a full-fledged war between the United States and the Lakotas, Cheyennes, and Arapahos." *Id.* at 97; see also *id.* at 101, n.2 ("Sioux is used to refer collectively to the Lakota and Dakota populations who were included in this treaty.").

7. *Id.* at 101 (explaining treaty as attempt to stabilize relationship between settler, tribes, and cavalry).

8. *Id.* at 102 (noting theory of William Swagerty regarding succession of tribes in second treaty).

9. *Id.* (citing hunger as main reason Native Americans agreed to terms that clearly did not benefit tribe).

10. See Gayle Olson-Raymer, *Whose Manifest Destiny? The Federal Government and the American Indians*, <http://users.humboldt.edu/ogayle/hist110/unit3/indians.html> (last visited Nov. 11, 2018) (discussing historical Supreme Court cases involving Native American land rights).

11. 21 U.S. 543, 562 (1823). As a result of this case, the United States government owned all land in reservations and Native Americans were merely occupants. See Olson-Raymer, *supra* note 10 (describing court's rule as limiting "rights of Indians to sovereignty").

12. See Olson-Raymer, *supra* note 10 (discussing holding of Johnson resulting in Doctrine of Discovery). "Today the Doctrine of Discovery still governs the rights of Indian people who cannot sell, or lease, or develop their land without permis-

tion v. Georgia,¹³ and held “that Indians were neither US citizens, nor independent nations, but rather were ‘domestic dependent nations’ whose relationship to the US ‘resembles that of a ward to his guardian.’”¹⁴ The following year, the Court rendered an opinion in *Worcester v. Georgia*,¹⁵ holding tribal nations to be under control of the federal government.¹⁶ This case established that state law did not dictate control of Native Americans, but that the authority over Native Americans “belongs exclusively” to the United States Congress.¹⁷

II. BACKGROUND

A. Native Americans at the End of Nineteenth Century

Nineteenth century legislatures and courts produced numerous policies and legal precedent responsible for the dramatic decrease in the size of Native American reservation land and the decline of their population.¹⁸ The Native American population decreased in size from 10 million to 225 thousand individuals with a tribal affiliation.¹⁹ Native American tribal lands decreased in size from 138 million acres to 20 million acres.²⁰ The Dawes Act of 1887 largely contributed to this falling number.²¹ President Cleveland signed the Act in an effort to “fully assimilat[e] the Indians into American culture.”²² The Act split reservations into smaller, indi-

sion of the Department of the Interior.” *Id.* (noting role of Doctrine Discovery in Native American land rights and its existence today).

13. 30 U.S. 1, 2 (1831).

14. *See id.* (noting Supreme Court viewed Native Americans as “wards”) (finding Native American role to be less of nation and more submissive role).

15. 31 U.S. 515, 586, 595 (1832).

16. *Id.* at 531 (citing constitutional authority of federal government over Native American lands) Notably, the Court held “the said laws of Georgia are unconstitutional and void, because they interfere with, and attempt to regulate and control the intercourse with the said Cherokee nation, which, by the said constitution, belongs exclusively to the congress of the United States[.]”

17. *Id.* (noting federal government and sole source of authority over Native Americans).

18. *See Olson-Raymer, supra* note 10 (detailing policies and law set to decrease population and power of “Indian Problem”).

19. *Id.* (noting majority of tribes were extinct).

20. *Id.* (noting amount of land divided). “The divide and conquer strategy had successfully divided the remaining Indians living on reservations.” *Id.* (labeling strategy and intent in decreasing reservation size).

21. *See Cleveland Signs Devastating Dawes Act Into Law, THIS DAY IN HISTORY*, <http://www.history.com/this-day-in-history/cleveland-signs-the-dawes-severalty-act> (last visited Nov. 10, 2018) (discussing President Cleveland’s intentions in signing Dawes Act).

22. *See id.* (noting intention to improve Native Americans by assimilating tribal members into white culture).

vidual tracts to “encourage Native Americans to take up farming, live in smaller family units that were considered more American and renounce tribal loyalties.”²³ The government held the land in trust and then sold it to United States citizens if the Native American families could not properly morph into white culture and farming practices.²⁴ The lands assigned by the government under the Act were dry, desolate, not conducive to farming, and required Native Americans to abandon their familiar tribal farming practices to assimilate into farming practice of settlers.²⁵ As a result, the Tribes could not farm the land and the land was then subsequently sold to white settlers.²⁶ The once prosperous and large tribes were now confined to small areas and fell under the authority of the federal government.²⁷

B. Natural Resources on Tribal Lands

The end of the nineteenth century sparked rumors of gold and natural resources on Native American reservations.²⁸ These rumors were investigated by a “government sponsored expedition” to confirm the existence of gold, specifically “to evaluate” the value of the gold and the need to “negotiate with the Lakotas” to buy their land.²⁹ By the late 1800s, an explosion of commercial mining companies invaded tribal lands to mine for gold, particularly the Black Hills region of the Lakota, also known as Sioux, as well as Cheyenne and Arapaho.³⁰ Within two years, the Black Hills’ camping grounds and religious sanctuary was converted by settlers into white settle-

23. *Id.* (noting intention to assimilate Native American individuals and culture to white America).

24. *Id.* (discussing process of land being returned to government and sold to white settlers).

25. See NAT’L ARCHIVES & REC. ADMIN., *Dawes Act (1887)*, OURDOCUMENTS.GOV, <https://www.ourdocuments.gov/doc.php?flash=true&doc=50> (last visited Nov. 10, 2018) (discussing intent and effect of Dawes Act on Native American population).

26. *Id.* (noting hardship of farming land due to “desert-like” conditions and unfamiliar farming practices of white farmers).

27. See Olson-Raymer, *supra* note 10 (discussing government’s ownership of tribal lands).

28. See *Treaties and Broken Promises*, *supra* note 3, at 109-113 (discussing invasion of native land to extract gold).

29. *Id.* at 85 (noting Colonel Dodge’s expedition onto Native Land and further negotiations to buy land from Lakotas which held gold).

30. *Id.* at 109-23 (detailing gold rush in tribal lands). “As one elderly Cheyenne told Thomas Marquis (and Limbaugh 1973:73) ‘Soldiers came upon our Black Hills lands after we made peace with the whites and had settled there on our reservation given to us by the treaty.’” *Id.* at 109 (quoting Native American resident’s experience of soldiers invading promised land).

ments, pushing the Native American tribes further into the reservation to accommodate mining the land's natural resources.³¹

The Lakota Tribe did their best to protect their land from white settlers by setting up blockades to the entrance of the reservation.³² The Lakota Tribe, however, quickly retreated when the settlers acquired ammunition and turned the entrance into a "war zone."³³ The Lakotas turned to the federal government for support in protecting their land.³⁴ In 1875, it became clear the military did not intend to uphold the Treaty and protect the Native American lands from outside miners as directed by the President.³⁵ In a letter classified as "confidential," the President instructed the military to no longer assist the miners and declared that the troops should adopt "such attitudes" as the President directed.³⁶ A local prospector allegedly arrived in the Black Hills and was assisted by the military in "surveying and laying out plots" for his mining expedition.³⁷

The government attempted to meet with the Tribe to negotiate a "lease" of the Tribe's land which was currently under white mining occupation.³⁸ Negotiations fell apart after the government refused to meet the monetary demands of the Lakota and tribal members began to disagree on whether to lease or sell the land.³⁹ Following intense debates and heated negotiations, the government chose to withhold food rations, restrict hunting in the Black Hills, and threaten the Tribes with military force.⁴⁰ In the winter of 1876, in desperate need for food and the removal of military presence,

31. *Id.* at 130-32 (detailing violent encounters with settlers and Native Americans resulting in hostile takeover of tribal grounds).

32. *Id.* at 109, 124 (noting Lakota's attempt to prevent miners from entering land).

33. *See Treaties and Broken Promises, supra* note 3, at 119 (describing back-and-forth skirmishes between Native Americans and miners).

34. *See id.* at 123 (noting military's lack of protection for Native American rights and land).

35. *Id.* (referencing "smoking gun" in letters stating President's wishes for military to step down and allow miners on tribal lands).

36. *Id.* at 123-24 (explaining Presidential letter to military officers instructing them to allow miners on reservation).

37. *Id.* at 123 (noting John R. Brennan's account of military assistance in mining expedition).

38. *Treaties and Broken Promises, supra* note 3, at 125-28 (discussing government attempts to reach agreement with Tribes).

39. *Id.* at 126-27 (noting Tribe's unrest and refusal to sign agreement).

40. *Id.* at 128 (discussing government's action to force Tribes to sign agreement).

five tribes signed an agreement with the government to remove themselves from the Black Hill reservation.⁴¹

III. PRESENT STATE OF THE ISSUE

A. Keystone Pipeline; The Black Gold Rush

The historical struggle of Native Americans to maintain their tribal lands against the federal government remains an issue into the twenty-first century.⁴² The Native American population continues to fight to preserve their sacred lands from a new government-backed invasion of pipelines and oil drilling.⁴³ In July 2008, TransCanada, a large energy company, proposed construction of a pipeline structure to span the width of the United States, from Canada down to Texas.⁴⁴ The pipeline was called the Keystone XL Pipeline and would transport an estimated 838 thousand barrels of sand oil on a daily basis.⁴⁵ TransCanada's projected path of the pipeline was to be constructed by the company directly through the Black Hills territory.⁴⁶ This was a territory previously protected and designated for the Lakota Tribe, also known as the Sioux Nation.⁴⁷ The pipeline plan continued through Oklahoma, directly affecting thirty-eight local tribal territories.⁴⁸

In an attempt to preserve their land and avoid potential environmental hazards, the Sioux Nation delivered a "declaration," containing thousands of signatures in opposition to the Keystone XL Pipeline.⁴⁹ TransCanada countered this declaration from an economic perspective, arguing the pipeline project would provide nine thousand new American jobs, increase government revenue, encourage international commercial contracts, and would be "one of

41. *Id.* at 129 (noting speculation in subsequent historical documents that Native American members did not fully understand terms of agreement).

42. *See* Diotalevi & Burhoe, *supra* note 2 (discussing continuing battle for territory between Native Americans and government).

43. *Id.* at 1-2 (outlining Keystone Pipeline plan from Canada).

44. *See* The Canadian Press, *A chronological history of controversial Keystone XL pipeline project*, CBC (Jan. 24, 2017) <http://www.cbc.ca/news/politics/keystone-xl-pipeline-timeline-1.3950156> (detailing Keystone XL pipeline timeline).

45. *See* Diotalevi & Burhoe, *supra* note 2 (discussing TransCanada pipeline plan through United States).

46. *Id.* at 2 (noting path of pipeline construction).

47. *Id.* (tracing footprint of proposed pipeline path through sovereign nation of Sioux tribe as established under Treaties of Fort Laramie).

48. *Id.* at 6 (noting large number of protected tribal land was to be affected by pipeline project).

49. *Id.* at 5 (discussing Canadian-American tribes' encouragement of tribal councils in the United States to oppose pipeline).

the safest pipeline[s] ever constructed in the U.S.”⁵⁰ In the wake of approval, TransCanada pipelines in South Dakota spouted two oil spills, releasing over 210 thousand gallons.⁵¹ The latter spill fell within the same county and directly beside the Sioux’s tribal land of Lake Traverse Reservation of the Sisseton Wahpeton Oyate Tribe.⁵²

Despite the recent oil spills and years of back-and-forth between TransCanada and the United States, in March 2017, President Trump endorsed the Keystone Pipeline XL plan.⁵³ In November 2017, the Sioux Tribe of South Dakota retained counsel from the Native American Rights Fund (NARF) to fight the proposed Keystone XL plan with support from the local Cheyenne River Sioux Tribe.⁵⁴ NARF’s staff attorney, Natalie Landreth, stated “Keystone XL will need permission from the Tribe, so this is not over.”⁵⁵ The Tribe vowed to stand their ground and continue fighting pipeline construction.⁵⁶

B. The Standing Rock Sioux Tribe

South Dakota experienced a third oil leak from the Dakota Access Pipeline in 2016, which sparked serious controversy for its proposed expansion and potential effects on protected tribal lands of the Standing Rock Sioux Tribe.⁵⁷ On July 27, 2016, the Standing Rock Sioux Tribe took action, challenging the permit issued by the U.S. Army Corps, which allowed construction to begin on the Dakota Access Pipeline with a charted route under Lake Oahe.⁵⁸ Lake Oahe consists of 200 thousand acres of the Standing Rock Sioux

50. See Diotalevi & Burhoe, *supra* note 2, at 3 (noting TransCanada deemed pipeline “environmentally responsible”); see also *Keystone XL: Safest Pipeline Ever Built*, BUILDKXLNOW.ORG, <http://buildkxlnow.org/safest-pipeline-built/> (last visited Feb. 15, 2018) (promoting Keystone XL and safety facts).

51. See Mayra Cuevas & Steve Almasy, *Keystone Pipeline Leaks 210,000 gallons of Oil in South Dakota*, CNN (Nov. 17, 2017, 2:06 PM), <http://www.cnn.com/2017/11/16/us/keystone-pipeline-leak/index.html> (discussing Keystone pipeline spills).

52. See *id.* (discussing concern of tribal chairman regarding environmental impact of oil spill on Native American land).

53. See *id.* (noting previous Keystone spills prove Keystone XL could have serious environmental affects); see also The Canadian Press, *supra* note 44 (outlining Keystone XL pipeline timeline).

54. See Phil McKenna, *South Dakota Warns It Could Revoke Keystone Pipeline Permit Over Oil Spill*, INSIDE CLIMATE NEWS (Nov. 22, 2017), <https://insideclimatenews.org/news/22112017/south-dakota-oil-pipeline-spill-keystone-xl-rosebud-cheyenne-river-sioux-nebraska> (referencing pushback from South Dakota after Keystone oil spills).

55. *Id.* (discussing Native American counsel obtained to fight pipeline plan).

56. *Id.* (noting tribe’s intention to continue fighting pipeline construction).

57. *Id.* (noting third spill from Dakota Access Pipeline in South Dakota).

58. See Michael Kennedy, *The Dakota Access Pipeline*, EARTHJUSTICE, <https://earthjustice.org/cases/2016/the-dakota-access-pipeline> (last visited January 18,

Tribe and Cheyenne Reservation land, which was flooded under the Flood Control Act of 1944.⁵⁹ As a result, the Tribes were relocated without “compensation” and the lake became government property.⁶⁰ The land taken by the government from the tribes was considered to be of the highest quality within the reservation by the tribes.⁶¹ As a result, “[b]oth Tribes consider the waters to be ‘sacred’ and ‘central to [their] practice of religion.’”⁶² The lake itself now borders both the Standing Rock Sioux Tribe and Cheyenne Reservations.⁶³

Lake Oahe became the focal point of the Dakota Access Pipeline construction, as the alternative route was projected by Dakota Access to cost an additional thirty-three million dollars.⁶⁴ In June of 2014, the Dakota Access Pipeline contacted the U.S. Army Corps of Engineers (Corps) and requested a Nationwide Permit “permission” under the River and Harbors Act and an easement pursuant to the Mineral Leasing Act.⁶⁵ The Corps issued an Environmental Assessment (EA) on the Lake Oahe pipeline construction plan finding “construction of the proposed Project [was] not expected to

2018) (discussing timeline of Dakota Access Pipeline permit and Sioux Tribe’s representation by Earthjustice).

59. See Lorraine Jessepe, *In Missouri River Recovery Discussions, Tribes Have Their Say*, INDIAN COUNTRY MEDIA NETWORK (June 1, 2011), <https://indiancountrymedia.com/news/in-missouri-river-recovery-discussions-tribes-have-their-say/> (noting tribal initiative to restore destroyed tribal lands from Pick-Sloan Flood Control Act of 1944). “There’s just so much that’s been lost.” *Id.* (discussing loss of life, land, and tradition); see also Paul Van Develder, *Mississippi Flooding: Let the River Run*, L.A. TIMES (May 25, 2011), <http://articles.latimes.com/2011/may/25/opinion/la-oe-vandevelder-dams-20110525> (narrating flood experience of Louise Holding Eagle). “The trauma of what we lived through when the dams came, losing our land, losing our identity, livelihood, community, schools, hospitals, churches, you just can’t imagine it unless you live through something like that.” *Id.* (quoting displaced Native American resident, noting degree of loss).

60. *Id.* (establishing ownership of lake as government property).

61. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F. Supp. 3d 101, 114 (D.D.C. 2017) (noting significance of Lake Oahe in tribe’s challenge of pipeline path) (citing *South Dakota v. Bourland*, 508 U.S. 679, 683 (1993)).

62. *Id.* at 114 (noting significance of lake to both Tribes’ religions).

63. *Id.* (citing *Standing Rock I*, 205 F. Supp. 3d at 13). “Created by the Corps in 1958 via a dam constructed on the Missouri River, Lake Oahe is a reservoir that spans North and South Dakota and borders the Standing Rock Sioux and Cheyenne River Sioux Reservations to the east.” *Id.* (specifying spatial relationship between Lake Oahe and reservations).

64. See *id.* at 134-35 (discussing alternatives explored by Dakota Access Pipeline and noting route under Lake Oahe to be cheaper).

65. *Id.* at 145 (noting Dakota Access Pipeline needed special permission and satisfied requirements from Corps recognizing Lake Oahe was taken and therefore government property) (citing Rivers and Harbors Act, 33 U.S.C. § 408, and Mineral Leasing Act, 30 U.S.C. § 185).

have any significant direct, indirect, or cumulative impacts on the environment.”⁶⁶

The EA sparked an immediate reaction by the Standing Rock Sioux Tribe and multiple agencies.⁶⁷ The Department of Interior challenged the lack of consideration for the negative effects of an oil spill on “800,000 acres of land held in trust for the Tribe by Interior, as well as waters on which the Tribe and its members depend for drinking and other purposes[.]”⁶⁸ The Environmental Protection Agency (EPA) initially voiced concern of the EA’s failure to address “direct and indirect impacts to water resources.”⁶⁹ Upon learning the proposed location of the pipeline’s proximity to tribal reservations, the EPA added its concern for “potential impacts to drinking water and the Standing Rock Sioux Tribe . . . environmental justice and emergency response actions to spills/leaks.”⁷⁰ The Standing Rock Sioux Tribe commented on the EA, noting the Corps “did not acknowledge the pipeline’s proximity to the Reservation; insufficiently analyzed the risks of an oil spill; and did not properly address environmental-justice considerations.”⁷¹

While the Corps did not give an easement, it did grant a permit.⁷² It also gave permission for placement of the Dakota Access Pipeline on July 25, 2016, which was quickly challenged by the Standing Rock Sioux Tribe.⁷³ The Tribe claimed construction of the pipeline caused “grading of land,” which “desecrated sites sacred to them.”⁷⁴ On September 3, 2016, as parties awaited their

66. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 114-15 (establishing Corps’ understanding of pipeline construction to have little environmental impact).

67. *Id.* at 115 (recognizing multiple agencies’ reactions to Corps’ Environmental Assessment).

68. *Id.* (voicing concern of Department of Interior regarding land in “trust” for Native Americans).

69. *See id.* at 115-16 (discussing concerns of EPA).

70. *Id.* at 116 (discussing EPA’s concern for tribal land and drinking water contamination).

71. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 115 (discussing tribe’s concern of specific topics not covered by EA).

72. *Id.* at 116-17 (noting Corps granted permit under Nationwide 12 and permission under Rivers and Harbors Act, but granting of easement was unconfirmed and court assumed it was never given). “To begin, two days after the release of the EA on July 25, 2016, Standing Rock filed this suit against the Corps for declaratory and injunctive relief pursuant to the National Historic Preservation Act, National Environmental Policy Act, Clean Water Act, and the Rivers and Harbors Act.” *Id.* (noting various claims of Standing Rock).

73. *See id.* (discussing Standing Rock Sioux Tribe’s challenge of permission granted).

74. *See id.* at 117 (recognizing concern of Tribes that construction of pipeline would destroy sacred sites, which resulted in refusal of easement from Corps to Dakota Access Pipeline); *see also* Jessica Ravitz, *The Sacred Land at the Center of the*

motions in court, Dakota Access continued construction into tribal burial grounds, which the Department of Army and Department of Interior met, stating they would “halt any additional permitting and reconsider its past permits of the project.”⁷⁵ A protestor, Spotted Eagle, stated, “[w]hat if the Great Sioux Nation decided to build a project through Arlington Cemetery.”⁷⁶

Two months after the burial site desecration, the Corps sent a letter to the Standing Rock Sioux Tribe and Dakota Access explaining the permission granted to Dakota Access was a legally viable decision.⁷⁷ In referencing the easement, the letter continued, “additional discussion with the Standing Rock Sioux Tribe” was warranted.⁷⁸ The Corps explained that its invitation to confer was based on factors such as

the United States’ history with the Great Sioux Nation, the importance of Lake Oahe to Standing Rock, the govern-

Dakota Pipeline Dispute, CNN (Nov. 1, 2016, 2:01 PM), <http://www.cnn.com/2016/11/01/us/standing-rock-sioux-sacred-land-dakota-pipeline/index.html> (discussing desecration of sacred and burial sites along pipeline path).

75. See *The Standing Rock Sioux Tribe’s Litigation on the Dakota Access Pipeline*, EARTHJUSTICE, <https://earthjustice.org/features/faq-standing-rock-litigation#time-line> (last updated Nov. 1, 2018) (detailing litigation timeline and events of pipeline path). On November 15, 2016, Dakota Access filed suit against the United States Army for “delay[ing]” issuance of the requested easement. *Id.* (reporting docket entries).

76. See Ravitz, *supra* note 74 (noting archeologists were sent to determine if sites were in fact Native American graves). “Archeologists come in who are taught from a colonial structure, and they have the audacity to interpret how our people were buried. How would they even know?” *Id.* (discussing archeologists’ lack of knowledge regarding ancient Native American customs); see also Dan Ketchum, *Lakota Burial Ceremony Beliefs*, CLASSROOM, <https://classroom.synonym.com/lakota-burial-ceremony-beliefs-12085648.html> (last updated Sept. 29, 2017) (discussing ancient burial practices of Lakota (Sioux)). According to one source, Lakota traditions may include “burial under mounds or rocks and even tree burial, in which the limbs of a tree stand in for a scaffold.” *Id.* (finding Lakota burial practices to be of wide variation and tied to earth).

77. See *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 117-18 (finding letter from Assistant Secretary Darcy to Standing Rock as recognition of possible issues of pipeline pathway); see also 30 U.S.C. §§ 185(g), (h)(2)(D), (k) (stating requirements of Mineral Leasing Act regarding pipeline safety on federal land to consider potential oil spill damage to local residents, local wildlife, and notice to be given for comment).

78. See *id.* at 117-18 (noting Army’s concern regarding oil spill repercussion and preservation of relationship between Native American tribes and United States government); see also *The Standing Rock Sioux Tribe’s Litigation on the Dakota Access Pipeline*, *supra* note 75 (announcing delay of Dakota Access easement). The Corps stated “[w]e are encouraged and know that the peaceful prayer and demonstration at Standing Rock have powerfully brought to light the unjust narrative suffered by tribal nations and Native Americans across the country” *Id.* (quoting Standing Rock Sioux Tribal Chair David Archambault II in reacting to letter from Army requesting meeting with tribe).

ment-to-government relationship with Standing Rock, and the mandates of the Mineral Leasing Act regarding public safety and the interest of those who rely on fish, wildlife, and biotic resources in the general area of a requested right-of-way.⁷⁹

The Corps proceeded to conduct additional environmental analysis involving discussion with the Standing Rock Sioux Tribe and the Department of Interior.⁸⁰ The Tribe presented arguments involving potential harm to its traditional way of life, drinking water, and “gathering rights” under the Treaty.⁸¹ The Department of Interior responded with concerns regarding potential environmental damage and impact “on tribal rights, lands, and resources, including the socio-economic impacts.”⁸² The Department of Interior further argued its concerns should be considered “in light of the fact that the reservation is a permanent homeland for the Tribes, as well as other federal obligations towards the Tribes.”⁸³

As the Corps reviewed the statements of the Tribe and Department of Interior, tension between the tribal protestors and the Dakota Access workers intensified.⁸⁴ On November 20, 2017, law enforcement officers attempted to subdue 400 protestors at the Dakota Access construction site.⁸⁵ The government’s attempts created a “clash” between tribal protestors and law enforcement, which resulted in 160 protestors injured, seventeen hospitalized, and one arrest.⁸⁶ In response, the Standing Rock Sioux Tribe released a statement to the Obama Administration, imploring the administration to take action and protect tribal “sovereignty.”⁸⁷

79. *See id.* at 117-18 (noting Corps’ reasoning for requesting further discussion).

80. *Id.* 118-19 (recognizing Corps involvement of Tribe and Department of Interior).

81. *Id.* at 118 (noting Standing Rock Sioux Tribe’s arguments were combined with those of another local tribe, Oglala Sioux Tribe); *see generally* Transcript of Treaty of Fort Laramie (1868), *supra* note 4 (discussing terms and history of Fort Laramie Treaty).

82. *See Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 119 (noting Department of Interior’s concern for repercussion towards tribe if easement is granted).

83. *Id.* (discussing federal obligations to Tribe).

84. *See* Catherine Thorbecke, *Leader of the Standing Rock Sioux Tribe Calls on Obama to Halt Pipeline After Violent Clash*, ABC NEWS, (Nov. 21, 2016) <http://abcnews.go.com/US/leader-standing-rock-sioux-tribe-calls-obama-halt/story?id=43690859> (discussing law enforcement actions against pipeline protestors).

85. *Id.* (noting protests were peaceful and government’s reaction was violent).

86. *See id.* (noting injuries towards protestors).

87. *See id.* (discussing Standing Rock Sioux Tribe’s statement to President Obama); *see also* Standing Rock Sioux Tribe, *Tribes Call on President Obama to Deny Easement, Investigate Pipeline Safety, and Protect Tribal Sovereignty*, FACEBOOK, (Nov. 21,

On December 4, 2016 the Corps publicly stated it would not grant an easement to Dakota Access's plan to run the pipeline under Lake Oahe.⁸⁸ The Corps announced an Environmental Impact Statement (EIS) was needed to explore additional routes for the pipeline and further analyze the potential impact of the pipeline on the tribe.⁸⁹ Assistant Secretary Darcy of the Corps directed a "robust consideration of reasonable alternatives . . . , together with analysis of potential spill risk and impacts, and treaty rights" after determining prevailing policies warranted rejection of the easement application.⁹⁰ The Corps subsequently published the requirement of an EIS in the Federal Register regarding route alternatives.⁹¹ The Standing Rock Sioux Tribe issued a statement to the Obama Administration, thanking them for their efforts to stop the easement and to the Corps for considering their tribal rights and environmental impact.⁹²

2016) <https://www.facebook.com/402298239798452/photos/pcb.1442398579121741/1442398362455096/?type=3&theater> (reporting Chairman's statement on behalf of Tribe to Obama Administration).

We are deeply saddened that despite the millions of Americans and allies around the world who are standing with us at Standing Rock, a single corporate bully – backed by U.S. government taxpayer dollars through a militarized law enforcement – continue[s] to be sanctioned by aggressive, unlawful acts. President Obama, this cannot be your legacy.

Id. (discussing violent actions against protestors).

88. See Joey Podlubny, *Victory for Standing Rock: DAPL Easement Not Granted*, EARTHJUSTICE (Dec. 4, 2016) <https://earthjustice.org/news/press/2016/victory-for-standing-rock-dapl-easement-not-granted> (explaining denial of easement and request for alternative pipeline routes).

89. See *id.* (noting Corps' plan for EIS to explore alternative routes).

90. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F. Supp. 3d 101, 119 (D.D.C. 2017) (discussing Corps' decision to deny easement as "policy decision").

91. See *id.* (noting Corps published requirement for EIS in Federal Register); see also 82 Fed. Reg. 5,543 (Jan. 18, 2017) (stating Corps' plan to provide EIS).

92. See Podlubny, *supra* note 88 (quoting statement of thanks from Tribe).

We wholeheartedly support the decision of the administration and commend with the utmost gratitude the courage it took on the part of President Obama, the Army Corps, the Department of Justice and the Department of Interior to take steps to correct the course of history and do the right thing.

We especially thank all of the other tribal nations and jurisdictions who stood in solidarity with us, and we stand ready to stand with you if and when your people are in need.

Id. (quoting Dave Archambault II's reaction to easement halt).

C. The Trump Administration Pushes for Change

January 20, 2017 brought a new administration to the White House.⁹³ Within four days of President Trump taking office, the White House issued a presidential memorandum to the Corps.⁹⁴ The memorandum instructed the Corps to “review and approve in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary or appropriate, requests for approvals to construct and operate the DAPL, including easements or rights-of-ways[.]”⁹⁵

The Trump Administration proceeded to remove the former Interior Solicitor’s formal opinion “outlining reasons the government should conduct further study before granting final approval” of the pipeline construction under Lake Oahe.⁹⁶ The memorandum criticized the views of the Obama Administration regarding the pipeline easement.⁹⁷ It also denounced the environmental assessment by the Corps as “suffer[ing] from fatal flaws, including inadequate consideration of tribal treaty rights and uneven treatment of the project’s impacts on native and non-native populations.”⁹⁸ The memorandum also presented legal arguments against the easement crossing over federally protected reservation boundaries.⁹⁹ The memorandum noted the Corps declined to route the pipeline through Bismarck, North Dakota because the route was too close to a “municipality and several conservation easements and other sensitive lands” and failed to “apply the same close analysis to impacts from the Lake Oahe crossing[.]”¹⁰⁰

As a result of Trump’s presidential memorandum, the Corps “published in the Federal Register a notice of termination of its

93. See *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 119 (detailing events leading to shift in policy). Judge Boasberg wrote “[a]s we all know, elections have consequences, and the government’s position on the easement shifted significantly once President Trump assumed office on January 20, 2017.” *Id.*

94. *Id.* (noting President Trump’s quick action in favor of easement).

95. *Id.* (quoting Memorandum to Corps).

96. See Ellen M. Gillmer, *Inside the Buried Memo that Could Decide Pipeline’s Fate*, E&E NEWS, (Feb. 21, 2017) <https://www.eenews.net/stories/1060050316> (discussing contents and implications of memo “suspended” by Trump Administration).

97. *Id.* (noting Obama Administration expressed support for memo).

98. *Id.* (discussing “fatal flaws” of Corps environmental assessment).

99. *Id.* (noting criticisms of pipeline path over reservation boundaries).

100. *Id.* (noting Corps turned down North Dakota alternative due close proximity to “sensitive lands”); see also Wes Enzinna, “*I Didn’t Come Here to Lose*”: *How a Movement Was Born at Standing Rock*, MOTHER JONES, (last visited Feb. 13, 2018) <https://www.mothejones.com/politics/2016/12/dakota-access-pipeline-standing-rock-oil-water-protest/> (noting Bismarck population was 92% white).

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intent to prepare an EIS” for alternative routes.¹⁰¹ The Corps notified Congress of its plan to grant an easement to Dakota Access for construction under Lake Oahe.¹⁰² On February 8, 2017, the Corps issued the easement to Dakota Access to build the pipeline under Lake Oahe.¹⁰³ The Trump Administration brought an abrupt halt to what the Standing Rock Sioux Tribe deemed “a historical day both for the Standing Rock Sioux Tribe and for indigenous people everywhere.”¹⁰⁴ The tribe felt their environmental concerns were overlooked and were not taken into consideration by the courts or the new administration.¹⁰⁵

D. The Last Stand

The Standing Rock Sioux Tribe reacted to the easement by filing a motion for summary judgment requesting answers for pending legal matters concerning the pipeline construction.¹⁰⁶ The Tribe raised multiple important issues.¹⁰⁷ On June 14, 2017 the court specifically ruled on two outstanding issues, the results of which the Tribe perceived as “significant victor[ies].”¹⁰⁸

i. Tribal Treaty Rights to Fish and Hunt

First, the Tribe accused the Corps of failing to comply with the National Environmental Policy Act (NEPA) in withdrawing the EIS.¹⁰⁹ The Tribe asserted the Corps failed in their finding of little

101. See *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F. Supp. 3d 101, 120 (D.D.C. 2017) (noting Corps’ publication of intent in Federal Register to issue easement).

102. *Id.* (discussing Corps’ notification of intent to issue easement).

103. See U.S. Army Corps of Engineers, Release No. 17-015, (Feb. 8, 2017) <http://www.nwo.usace.army.mil/Media/News-Releases/Article/1077134/corps-grants-easement-to-dakota-access-llc/> (discussing Corps’ easement issuance to Dakota Access). “The granting of this easement follows the February 7th Secretary of the Army decision to terminate the Notice of Intent to Perform an Environmental Impact Statement and notification to Congress of the Army’s intent to grant an easement to Dakota Access for the Lake Oahe crossing.” *Id.* (citing termination of prior EIS as reason to issue easement).

104. See Podlubny, *supra* note 88 (quoting attorney for Standing Rock Sioux Tribe after Corps initially declined to grant easement to Dakota Access).

105. *Id.* (noting Tribe felt their concerns were disregarded).

106. See Kennedy, *supra* note 58 (discussing summary judgment filed by Standing Rock Sioux Tribe’s legal representation, Earthjustice).

107. See *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F. Supp. 3d 101, 122-48 (D.D.C. 2017) (analyzing three major legal questions argued against pipeline construction).

108. See Kennedy, *supra* note 58 (finding court’s decision to be “a major victory” for Standing Rock Sioux Tribe).

109. See *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 123 (noting Corps did not properly consider pipeline’s effect on tribal land).

to no environmental impact of the pipeline on treaty rights and reservation land.¹¹⁰ NEPA requires an agency to take a “hard look” at environmental actions and the effects they could potentially cause to an environment.¹¹¹ These actions are to be considered by government agencies even if they are “related to other actions with individually insignificant but cumulatively significant impacts.”¹¹²

Additionally, agencies are to consider “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources” and if the action “may cause loss or destruction of significant . . . cultural[] or historical resources.”¹¹³ The Tribe argued these terms were not met, and the Corps minimized and failed to properly address the effects of an oil spill on reservation land and on treaty rights.¹¹⁴ The Tribe also argued that an environmental action must be considered carefully when “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.”¹¹⁵

Upon consideration, the court held the Corps did take the required “hard look” at the effects of construction of the pipeline.¹¹⁶ The court, however, held the Corps failed to properly consider the potential impact of an oil spill on treaty rights concerning hunting and fishing.¹¹⁷ Further, the Corps Environmental Assessment (EA) failed to consider the effects of an oil spill on “fish or game, the resources implicated by the Tribe’s fishing and hunting rights.”¹¹⁸

Native American treaty rights regarding fishing and hunting have long been a source of contention between Native Americans

110. *Id.* at 122 (discussing three arguments of Tribe).

111. *Id.* (explaining first allegation towards Corps regarding NEPA violation).

112. *See* 40 C.F.R. § 1508.27 (explaining meaning of “context” and “intensity” as used under NEPA).

113. *See* § 1508.27(b)(3), (8) (noting consideration should be given to “historical” or “cultural” characteristics of land and “historical resources”).

114. *See Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 125 (“It principally argue[d] that the agency did not properly assess the risk of a spill under Lake Oahe or sufficiently consider the environmental impacts on Treaty rights of the construction of the pipeline or of a spill.”).

115. *See* 40 C.F.R. § 1508.27(b)(4) (stating “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.”)

116. *See Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 133 (holding Corps properly evaluated impact of an oil spill on water but not “on hunting or aquatic resources”).

117. *Id.* (holding Corps did not properly consider effects of oil spill on tribal treaty rights).

118. *Id.* at 134 (noting Corps’ evaluation of tribal fishing and hunting rights “was inadequate”).

and United States citizens.¹¹⁹ A Washington case, *United States v. Taylor*,¹²⁰ was one of the earliest cases to argue the validity of Native American fishing rights under a treaty.¹²¹ In this case, a Native American tribe challenged a local citizen who had purchased and fenced-in land previously belonging to the reservation.¹²² The fence prohibited the Native Americans from fishing on the land that was once protected under the treaty.¹²³ The court held the terms of the treaty, dating back to 1855 between the local Tribe and the federal government, protected the rights of the Tribe to fish on the newly purchased land.¹²⁴ The court stated the Tribe “had ceded to the United States most of their country” and, therefore, “certain other rights and privileges were by the Indians expressly reserved” including “the exclusive right of taking fish in all streams where running through or bordering said reservation[.]”¹²⁵

In *United States v. Winans*,¹²⁶ local United States citizens were “obstructed” Yakima tribe members fishing in lakes both on and bordering their reservation.¹²⁷ The complaint accused the Yakima population of violating local fishing laws.¹²⁸ In *Winans*, the Supreme Court noted treaties made between the United States and individual tribes preserved ancient fishing and hunting traditions of the tribe, even if they violated local law.¹²⁹ The Supreme Court held this right “was a part of larger rights possessed by Indians . . .

119. See Native American Rights – Hunting and Fishing Rights, <http://law.jrank.org/pages/8750/Native-American-Rights-Hunting-Fishing-Rights.html> (last visited Jan. 29, 2018) (discussing age old controversy surrounding protected treaty rights of Native Americans to fish and hunt).

120. *United States v. Taylor*, 3 Wash. Terr. 88 (Wash. 1887) (holding treaty rights preserved Native American rights to fish within and close to reservation boundaries).

121. See *id.* (discussing power to preserve rights of Native Americans through treaty dated June 9, 1855).

122. *Id.* at 90-1 (establishing local citizen’s recently purchased land rights does not supersede treaty).

123. *Id.* (discussing Native Americans right to continue fishing on land previously held under reservation).

124. *Id.* at 90 (noting treaty between United States and Native American tribe “constitutes as part of the supreme law of the land”).

125. See *Taylor*, 3 Wash. Terr. at 89 (noting Native Americans reserved right to fish within and around reservation border).

126. 198 U.S. 371 (1905).

127. See *id.* at 377 (holding Native American’s have special hunting and fishing rights to preserve tradition both on and close to federally designated reservations).

128. *Id.* (discussing lack of cooperation and failure to adhere to state fishing law).

129. *Id.* (stating terms of 1859 treaty between Yakima Native Americans and federal government).

and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.”¹³⁰ This holding established the “reserved right” of Native Americans both on and close to the borders of tribal land.¹³¹ The doctrine established this right “imposed a servitude” on Native American land even if a treaty did not explicitly state such “reserved rights[.]”¹³²

This particular issue of imposing a servitude was argued by the Chippewa Tribe most recently in the 1999 case, *Minnesota v. Mille Lacs Band of Chippewa Indians*.¹³³ In this case, the Supreme Court held an executive order to remove Chippewa Indians from an area of their reservation did not absolve their right to continue fishing or hunting under the Treaty of 1837 in that area.¹³⁴ *Mille Lacs Band of Chippewa Indians* is most similar to the Standing Rock Sioux Tribe’s action in that the Standing Rock Sioux Tribe had been removed from the area on their reservation, which now contains Lake Oahe.¹³⁵ As precedent holds, the right to continue hunting and fishing under the terms of the Treaty remain protected both on the active reservation and on parts of the reservation from which the tribes had been removed.¹³⁶ Article XI of the Treaty of Fort Laramie reads “the tribes who are parties to this agreement . . . reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River[.]”¹³⁷

130. *Id.* at 381 (noting treaty terms regarding fishing rights as intent to uphold and “secure a remnant of the great rights they possessed”); *see generally* *United States v. Washington*, 157 F.3d 630 (discussing Stevens Treaty with Native American tribe in challenged shellfish rights).

131. *See United States v. Winans*, 198 U.S. at 381 (establishing “reserved right” for Native Americans under federal treaties).

132. *Id.* (holding treaty rights include rights of Native Americans to fish on or close to reservation lands even if not explicitly stated in treaty); *see also* *Native American Rights – Hunting and Fishing Rights*, *supra* note 120 (explaining “reserved-rights doctrine”).

133. 526 U.S. 172, 175 (1999) (discussing treaty rights under Executive Order for removal and holding Executive Order to relocate Native Americans from reservation does not supersede treaty rights).

134. *Id.* at 174 (holding Treaty of 1837 as valid).

135. *See* Scott Russell, *Oahe Dam: Standing Rock’s Earlier Experience with Environmental Racism; and more DAPL Updates*, HEALING MINNESOTA STORIES (NOV. 26, 2016) <https://healingmnstories.wordpress.com/2016/11/26/oahe-dam-standing-rocks-earlier-experience-with-environmental-racism-and-more-dapl-updates/> (noting government taking of reservation land “displaced populations in the Dakotas, who are still seeking compensation for the loss of the towns submerged under Lake Oahe, and the loss of their traditional ways of life.”).

136. *See id.* (noting continuing treaty rights of displaced Native Americans to hunt and fish).

137. *See* NAT’L ARCHIVES & RECS. ADMIN., *supra* note 4 (noting Article XI preserved hunting rights of Lakota (Sioux)).

The court in *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*¹³⁸ held the historical protections of Tribal rights to fish and hunt under Treaties were overlooked by the Corps in creating its EA.¹³⁹ The court referenced statements by the Director of Standing Rock's Department of Game, Fish, and Wildlife in his efforts to bring the Corps' attention to the potential impacts of an oil spill on the Tribe's fishing rights.¹⁴⁰ The court noted the Corps failed to consider these concerns and the impact of an oil spill on the protected rights to fish and hunt both within and directly outside of the reservation boundaries.¹⁴¹

ii. Environmental Justice Implications

The second victory for the Tribe resulted in the court's affirmation "that the Corps did not properly consider the environmental-justice implications of the project[.]"¹⁴² The EPA offered a definition of "Environmental Justice" as:

The fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no groups of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.¹⁴³

138. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F. Supp. 3d 101, 112 (2017) (holding Corps did not properly consider environmental implications of pipeline on reservation).

139. *Id.* at 134 (holding Corps' EA as "inadequate" because it held no "acknowledgment of or attention to the impact of an oil spill on Tribe's fishing and hunting rights"). "He also spelled out the ways in which an oil spill could seriously affect game along the Oahe shoreline, including by poisoning animals that ingest, inhale, or are otherwise externally exposed to oil and preventing those birds and mammals whose feather or fur are coated in oil from maintaining their body temperatures." *Id.* (quoting Declaration of Jeff Kelly, Nov. 28, 2016) (noting Director's concerns overlooked by Corps).

140. *Id.* (noting Corps disregarded Director's concerns).

141. *Id.* (discussing negative effects of oil spill on Treaty rights as overlooked by Corps).

142. *Id.* at 140 (describing Corps' "environmental-justice analysis" to be "arbitrary and capricious").

143. See U.S. ENVTL. PROT. AGENCY: FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSIS 7-8 (1998) https://www.epa.gov/sites/production/files/2014-08/documents/ej_guidance_nepa_epa0498.pdf (discussing timeline and purpose of Environmental Justice).

Environment Justice began as a movement promoted by the EPA in the late 1960's.¹⁴⁴ The movement was initiated because of a disparity in the environmental preservation of minority communities and land in the United States.¹⁴⁵ Environmental Justice is widely recognized by activists as battling “environmental racism” and has gained notoriety through advocates of certain minority groups.¹⁴⁶ A 1982 incident involving the United States government dumping toxic waste in a predominantly black community brought national attention and took the movement to Washington, D.C. and into the office of the Bush Sr. administration.¹⁴⁷ Multiple minority groups championed the cause.¹⁴⁸

Among the minority supporters were Cherokee tribal chair Wilma Mankiller and other spokespersons for Native American tribal rights in the United States.¹⁴⁹ The EPA noted “whether by conscious design or institutional neglect, communities of color on . . . economically impoverished Native American reservations face some of the worst environmental devastation in the nation.”¹⁵⁰ The EPA’s intent in promoting Environmental Justice was to “address the inequity of environmental protection” in these communities by government agencies.¹⁵¹

In 1994, President Bill Clinton recognized the need to implement environmental justice into agency actions and, as a result, issued Executive Order 12,988.¹⁵² President Clinton issued the

144. *Id.* (quoting EPA’s definition of “environmental justice”).

145. *See Environmental Justice*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/environmentaljustice> (last visited Dec. 18, 2018) (discussing beginning of Environmental Justice Movement).

146. *See* Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RESOURCES DEF. COUNCIL, (Mar. 17, 2016) <https://www.nrdc.org/stories/environmental-justice-movement> (noting incident in Warren County, North Carolina drew government’s attention after trucks dumped toxic waste in black community).

147. *Id.* (referencing Warren County residents’ complaints regarding toxic waste).

148. *Id.* (noting minority groups leading movement “primarily” included “African-Americans, Latinos, Asians and Pacific Islanders and Native Americans”).

149. *Id.* (describing Native American groups as one of pioneers for Environmental Justice Movement).

150. *See Environmental Justice*, *supra* note 145 (quoting Professor Robert Bullard’s statement regarding impoverished, minority communities’ disparate environmental treatment).

151. *See id.* (discussing intent and timeline of Environmental Justice Movement).

152. *See* Exec. Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 11, 1994) (discussing implementation strategies for government agencies in considering environmental impact of agency actions on low income communities); *see also*

Executive Order to bring federal attention to the impact of government actions involving low income and minority communities.¹⁵³ The Order stipulates “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing . . . adverse human health or environmental effects of its programs, policies, and activities[.]”¹⁵⁴ Section 6-06 of the Order specifically noted environmental justice procedures applied “equally” to Native Americans.¹⁵⁵

The Council on Environmental Quality (CEQ) created guidelines for federal agencies in an effort to incorporate the Executive Order.¹⁵⁶ The purpose of the guidelines was to emphasize environmental justice concerns and to direct agencies to adopt measures ensuring such concerns “are effectively identified and addressed.”¹⁵⁷ The guidelines require government agencies to “consider the composition of the affected area, to determine whether . . . Indian tribes are present in the area affected by the proposed action[.]”¹⁵⁸ The CEQ continues by stating if Indian tribes are located within the proximity of proposed government action, the government agency must consider “adverse” effects on the health and environment of the tribe.¹⁵⁹ The guidance particularly noted “that the impacts within . . . Indian tribes may be different from impacts on the general population due to a community’s distinct cultural practices.”¹⁶⁰ If agency action could affect Native American environments, the CEQ requires the agency to review “pertinent treaty,

Summary of Executive Order 12,898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice> (last visited Jan. 30, 2018) (evaluating purpose of Executive Order 12,898).

153. *See Summary of Executive Order 12,898*, *supra* note 152 (discussing purpose of Executive Order 12,898).

154. *See* Exec. Order No. 12,898, 59 C.F.R. 7629 § 1-101 (1994) (specifying each federal agency must implement measures to effectuate environmental justice).

155. *See id.* at § 6-606 (noting Executive Order required initiatives to coordinate and consult with leaders of federally-recognized tribes).

156. *See* COUNCIL ON ENVTL. QUALITY, *Environmental Justice Guidance Under the National Environmental Policy Act*, 3 (1997) https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf (noting Executive Order 12,898 influence on CEQ policy).

157. *Id.* at 1 (setting forth purpose in parallel with Executive Order).

158. *See id.* at 9 (discussing agency responsibility to consider human populations within areas subject to agency action).

159. *See id.* (instructing agencies to analyze possible health and environmental impacts of their actions).

160. *See id.* at 14 (noting Native American communities may experience varying environmental effects due to their culture).

statutory, or executive orders” regarding the Tribe’s community and reservation.¹⁶¹

In July 2014, the EPA issued the Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous People.¹⁶² This policy serves as a summation of the Executive Order and previous EPA policies involving environmental justice, with a focus on Native Americans.¹⁶³ The EPA’s goal for this policy is “to be responsive to the environmental justice concerns of federally recognized tribes” regarding agency actions on and around their environments.¹⁶⁴

In evaluating Executive Order 12,898 and the policies involving environmental justice of Native American lands, the court in *Standing Rock* found the Corps’ EA to be insufficient.¹⁶⁵ The court recognized the EA discussed possible drinking water contamination and that the reservation held a minority population.¹⁶⁶ The court ultimately held the Corps should have offered “more than a bare-bones conclusion” regarding the possible effects of an oil spill from the pipeline.¹⁶⁷ As an example, the court mentioned “[t]he EA is silent, for instance, on the distinct cultural practices of the Tribe and the social and economic factors that might amplify its experience of the environmental effects of an oil spill.”¹⁶⁸

The court in *Standing Rock* concluded the Corps should conduct further environmental analysis, as their EA fell short in considering tribal rights and environmental justice.¹⁶⁹ The court held the Corps did not properly analyze the impact of an oil spill from Da-

161. *See id.* (requiring agencies to “consider” treaties, statutes, and executive orders for particular tribes affected by agency action).

162. *See* U.S. ENVTL. PROT. AGENCY, *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous People*, (July 24, 2014), <https://www.epa.gov/sites/production/files/2017-10/documents/ej-indigenous-policy.pdf> (outlining policy for working with indigenous people affected by government agency actions).

163. *See id.* at 1 (noting Executive Order 12,898 and EPA policy helped shape current policy).

164. *See id.* at 2 (discussing “principles” of EPA policy).

165. *See* *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F. Supp. 3d 101, 136-141 (D.D.C. 2017) (discussing various policies and Executive Order 12,898 that should have been applied by Corps in analyzing environmental effects of oil spill on Standing Rock Sioux reservation).

166. *See id.* at 140 (noting Corps only analyzed drinking water contamination and minority make up of tribe).

167. *See id.* (holding Corps did not offer enough evidence of applying environmental justice considerations to pipeline effects).

168. *See id.* (holding Corps should have considered culture of Standing Rock Sioux in analyzing effect of oil spill).

169. *See id.* at 132-44 (discussing holding regarding tribal rights protected under treaty and environmental justice policies).

kota Access pipeline onto the Standing Rock Sioux Tribe reservation, surrounding environment, and cultural practices.¹⁷⁰ The Standing Rock Sioux Tribe argued remand with “[v]acatur [was] the appropriate remedy” for the court to find.¹⁷¹ The court decided, however, not to vacate the permit and easement for Dakota Access as there remained the possibility that the Corps could uphold their decision on remand.¹⁷² This decision allowed Dakota Access to continue drilling for oil during the review process and was described as “deeply disappointing” by the Standing Rock Sioux Tribe’s chairman.¹⁷³

The court allowed construction of the pipeline to continue under the lake and through lands which were protected by the Fort Laramie Treaty, putting the tribal community, rights, and traditions at risk.¹⁷⁴ The Standing Rock Sioux Tribe’s attorney reacted by noting a “pattern of putting all the risk and harm on tribes and letting outsiders reap the benefit” is littered throughout our nation’s history.¹⁷⁵ He argued there is a pattern throughout our nation’s history of disregarding Native Americans’ rights in an effort to further capitalistic gain of private companies and white individuals.¹⁷⁶

IV. IMPACT

A. Trump Administration

In the wake of the *Standing Rock Tribe* decision, the Trump administration continued its quest for pipeline gold.¹⁷⁷ In December

170. See *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 147 (concluding court’s opinion on where Corps EA fell short).

171. See *id.* (noting Standing Rock Sioux Tribe argued appropriate remedy was to remand and vacate permit and easement).

172. See *id.* (holding Corps would be able to validate permit and easement issuance with further investigation into EA).

173. See Phil McKenna, *Judge Deals Blow to Tribes in Dakota Access Pipeline Ruling*, INSIDECLIMATE NEWS (Oct. 11, 2017) <https://insideclimatenews.org/news/11102017/dakota-access-pipeline-oil-ruling-standing-rock-environmental-review> (noting Standing Rock Sioux chairman Mike Faith’s disappointment in court’s failure to vacate permit). “This pipeline represents a threat to the livelihoods and health of our Nation every day that it is operational It only makes sense to shut down the pipeline while the Army Corps addresses the risks that this court found it did not adequately study.” *Id.* (quoting chairman’s concerns and reasoning in favor of vacatur).

174. See *id.* (discussing concerns over ongoing pipeline construction as Corps reviews issues as the court directed).

175. See *id.* (acknowledging “[t]he historic pattern is continuing here.”).

176. See *id.* (noting “pattern” of disregarding Native Americans to benefit “outsiders”).

177. See Jonathan Rosenblum, *Exposed: Chevron’s Secretive Drilling Site in the Arctic National Wildlife Refuge*, ECOWATCH (Jan. 11, 2018) <https://www.ecowatch.com/>

2017, a new tax bill included “a provision opening up the Arctic National Wildlife Refuge to Commercial Oil drilling.”¹⁷⁸ This provision would expose wildlife and untouched lands, enjoyed by tourists and the local Inupiat tribe, to the risks and destruction of oil drilling and pipeline spills.¹⁷⁹ A survey conducted by Yale University indicated that seventy percent of American voters “opposed” drilling in the refuge.¹⁸⁰ Further, the survey held only eighteen percent of republicans “strongly support[ed]” the provision, yet the provision was written into the tax bill.¹⁸¹

The Trump Administration also played a role in suits against environmental activists, both individuals and large organizations.¹⁸² The company developing the Dakota Access Pipeline filed suit against Greenpeace, the Red Warrior Camp, and “other environmental activists who helped organize the protest[.]” at Standing Rock.¹⁸³ The plaintiff alleged acts “of eco-terrorism, racketeering and other crimes” and brought charges generally reserved for members of criminal organizations, such as the members of the mafia.¹⁸⁴ Michael Gerrard, an environmental law professor, noted this lawsuit was “one of the most aggressive lawsuits against an environmental group” that he ever witnessed.¹⁸⁵ Greenpeace noted the actions were an attempt to silence pipeline protests and labeled the action a “strategic lawsuit against public participation” to discourage future protests.¹⁸⁶

arctic-national-wildlife-refuge-drilling-2524505765.html (discussing Trump Administration’s allowance of commercial drilling in Alaskan Wildlife Refuge).

178. *Id.* (explaining “provision” of tax bill allowed commercial drilling in refuge).

179. *Id.* (noting “native Inupiat” as local tribe of refuge).

180. See Anthony Leiserowitz, et al., *Americans Opposing Drilling in Arctic National Wildlife Refuge*, YALE PROGRAM ON CLIMATE COMM. (Dec. 4, 2007), <http://climatecommunication.yale.edu/publications/americans-oppose-drilling-arctic-national-wildlife-refuge/> (establishing statistics of voter supporting for drilling in refuge).

181. *Id.* (noting small percentage of Republican support).

182. See Dino Grandoni, *The Energy 202: Here’s How Trump is Changing Pipeline Politics*, WASH. POST (Aug. 23, 2017), https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2017/08/23/the-energy-202-here-s-how-trump-is-changing-pipeline-politics/599c9bd130fb0435b8208f8a/?utm_term=.6df0738209e7 (discussing charges filed against protestors).

183. *Id.* (noting suit was filed against multiple organizations and individuals involved in Dakota Access Pipeline protests).

184. *Id.* (discussing charges against environmental groups under Racketeer Influenced and Corrupt Organizations Act (RICO)).

185. *Id.* (quoting Columbia environmental law professor’s reaction to aggressive nature of suit).

186. See Grandoni, *supra* note 182 (noting Greenpeace countered with “anti-SLAPP motion” in similar timber case).

B. Divestment Movement

The impact of the Standing Rock protests played a role in the “divestment” initiative pushed by the Tribe.¹⁸⁷ The Standing Rock Tribe inspired the “Divest the Globe” movement in which they encourage individuals, companies, and governments to divest from banks that fund Dakota Access Pipeline.¹⁸⁸ In October 2017, activists targeted five banks resulting in over eighty million dollars in individual accounts and four billion dollars in municipal accounts closing in these banks for their current funding of the Dakota Access Pipeline.¹⁸⁹ A protestor outside of Bank of America stated “[t]his movement is not separate from Standing Rock, it is an extension of it[.]”¹⁹⁰

As a result of “Divest the Globe,” large international banks such as ING and BNP Paribas, have stated they “will no longer finance shale and oil projects” due to bad publicity and protests.¹⁹¹ Cities such as Seattle and Los Angeles divested their funds in banks supporting Dakota Access.¹⁹² Other cities such as San Francisco, Missoula, and Washington D.C. are “considering” following suit in removing monies from the banks funding pipeline construction and drilling.¹⁹³

In Cannonball, North Dakota, the Treaty Alliance Against Tar Sands, an alliance focused on fighting the expansion of tar sands, sprouted a campaign to divest from the Dakota Access Pipeline in addition to four major pipelines and the seventeen banks funding

187. See Sara Bernard, *Activists Disrupt Over 100 Bank Branches Across Seattle for Financing Tar Sands Projects*, SEATTLE WEEKLY (Oct. 23, 2017), <https://www.seattleweekly.com/news/activists-disrupt-over-100-bank-branches-across-seattle-for-financing-tar-sands-projects/> (discussing activists reacting to Standing Rock by pressuring divestment of banks financing pipeline efforts).

188. *Id.* (discussing divested monies from protests).

189. *Id.* (noting “[d]ivestment isn’t new The indigenous people having a voice, that is something new.”) (quoting protestor promoting divestment).

190. *Id.* (quoting protestor outside bank that closed due to protest activities).

191. *Id.* (noting large banks defunding due to protests).

192. See Matt Remle and Tara Houska, *Indigenous Leaders Launch New Campaign to Defund All Four Proposed Tar Sands Pipelines*, LAST REAL INDIANS (May 9, 2017), <https://lastrealindians.com/indigenous-leaders-launch-new-campaign-to-defund-all-four-proposed-tar-sands-pipelines/> (discussing coalition’s divestment goals and statements); see generally *Victory! Wells Fargo Excluded From Banking Contracts: Divest L.A. Statement*, LAST REAL INDIANS (Dec. 16, 2017), <https://lastrealindians.com/victory-wells-fargo-excluded-from-banking-contracts-divest-la-statement/> (discussing Los Angeles’ divestment of Wells Fargo due to funding of Dakota Access Pipeline).

193. See Bernard, *supra* note 187 (noting banks divesting and considering divesting).

those projects.¹⁹⁴ An indigenous member of the coalition stated “[t]hese companies may not listen to morality, but they do listen to money” as she joined a peaceful protest outside the entrance of her local Wells Fargo branch.¹⁹⁵ The coalition argued the next step in “the fight against the black snake that has come to poison our lands” is to take action against funding and cut the pipeline projects off at the source.¹⁹⁶

C. Inspired Protests & Improved Relations

The Standing Rock protests have inspired multiple pipeline protests across the United States.¹⁹⁷ The Society of Native Americans organized a protest in West Texas against drilling in three hundred and fifty thousand acres surrounding a local town.¹⁹⁸ Activists staged additional protests against pipeline construction in Texas by Trans-Peco, Apache Corporation, and Energy Transfer Partners.¹⁹⁹

In Louisiana, protesters established a “Standing Rock-like protest” at the location of the proposed Bayou Bridge Pipeline.²⁰⁰ This pipeline is scheduled to be built by Dakota Access at the end of a series of pipelines currently under construction to transport oil to the coast.²⁰¹ The protesters are local land owners who are concerned about the potential environmental impact on their community and personal property.²⁰² The land owners were inspired by the community and message of Standing Rock and attempted to recreate the Standing Rock protest atmosphere.²⁰³

In Minnesota, the Chippewa, Anishenaabe, and Ojibwe Tribes came together to protest the construction of three proposed pipe-

194. See Remle and Houska, *supra* note 191 (noting coalition’s intent).

195. *Id.* (quoting Tara Houska’s address to banks of Norway and Switzerland).

196. *Id.* (referencing black snake prophecy of Standing Rock Tribe).

197. See David Hunn, *Pipeline Protesters Setting Up Camp in West Texas*, HOUS. CHRONICLE (Dec. 27, 2016) <https://www.houstonchronicle.com/business/article/Pipeline-protesters-setting-up-camps-in-West-Texas-10821760.php> (discussing protests inspired by Standing Rock in West and South Texas).

198. *Id.* (noting large tract in Texas intended for pipeline construction and drilling).

199. *Id.* (discussing oil companies targeted by protestors).

200. See Sara Sneath, *Bayou Bridge Pipeline Opponents Aim to Build Standing Rock-Like Protest Camp*, THE TIMES PICAYUNE (Jun. 26, 2017), http://www.nola.com/environment/index.ssf/2017/06/bayou_bride_pipeline_protestor.html (discussing Louisiana’s intent to mimic Standing Rock protests).

201. *Id.* (describing proposed construction of Bayou Bridge Pipeline).

202. *Id.* (noting protestors’ concern for community and personal land).

203. *Id.* (discussing Standing Rock inspiration to protest in Louisiana).

lines.²⁰⁴ The Tribes successfully thwarted two construction plans of the Sandpiper and Enbridge pipeline in Minnesota.²⁰⁵ The Anishenaabe Tribe noted “[w]e’ve also fought in the courts, in regulatory hearings, in the media, in the streets, and on the land” to stop construction through lands protected by treaties.²⁰⁶ Tribes came together to take a stand against the remaining pipeline construction of Line 3.²⁰⁷ The Line 3 pipeline’s path passes directly through the tribes’ rice beds, lakes, and the center of “Ojibwe treaty lands[,]” which would violate their Treaty of 1855.²⁰⁸

The Standing Rock case has also inspired improved relationships between local governments and Native Americans.²⁰⁹ In January 2018, a local government in North Dakota held a conference in an attempt to create a “fresh start” with the Native American tribes.²¹⁰ Governor Burgum noted the relationship between the government and tribes involves “a ‘complex history’ that includes broken promises and ‘horrific interactions with the federal government’” on many heated issues.²¹¹ Individuals at the conference discussed the “history and importance” of tribal rights as protected by tribal treaties.²¹² The Governor assured Native Americans he would

204. See *Line 3*, HONOR THE EARTH, http://www.honorearth.org/sandpiper_line_3_corridor (discussing three pipeline construction plans charted to run through Native American reservations) (last visited Dec. 19, 2018).

205. *Id.* (noting Sandpiper and Enbridge pipelines were unsuccessful).

206. See Sarah Littleredfeather Kalmanson, *A Message from Winona About the Sandpiper*, HONOR THE EARTH, (Aug. 7, 2016), http://www.honorearth.org/winona_sandpiperstatement (discussing tribes’ victory over Sandpiper pipeline construction). “But it is a bittersweet victory, for while we have won the battle, the war remains. The black snake is a hydra – cut off one head and 2 more will emerge.” *Id.* (referencing oil pipeline construction plans through Native American lands).

207. See *Line 3*, supra note 204 (explaining Native Americans’ concern of Line 3 pipeline).

208. See *Enbridge Line 3 Fact Sheet*, HONOR THE EARTH, <https://d3n8a8pro7vhmx.cloudfront.net/honorearth/pages/2329/attachments/original/1481597789/factsheet-LINE-3.pdf?1481597789> (last visited Feb. 13, 2018) (noting substantial spills and pipeline deterioration of Line 3 and negative effects on Native American lands).

209. See John Hageman, *Bismarck Conference Aims to Improve Tribal Government Relations*, THE DICKINSON PRESS (Jan. 30, 2018), <http://www.thedickinsonpress.com/news/government-and-politics/4396010-bismarck-conference-aims-improve-tribal-government-relations> (discussing intentions and content of Bismarck conference in response to Standing Rock protests).

210. *Id.* (noting intent of Governor to create “fresh start” between local government and Native Americans).

211. *Id.* (recognizing sordid past between government and Native Americans).

212. *Id.* (noting content of conference).

include them on all future environmental issues affecting the state, both in and around their reservations.²¹³

D. Impact on Tribal Lands: The Black Snake Burrows

The Standing Rock Tribe recites an “ancient Lakota prophecy about a black snake that would slither across the land” causing destruction to the earth and poisoning the Sioux’s water source.²¹⁴ The prophecy predicts that when the snake goes underground, the Earth will be damaged.²¹⁵ The Standing Rock Tribe cited the prophecy in its lawsuit, referring to the oil pipeline as the “black snake” and explaining the imminent destruction.²¹⁶ The Tribe held strong in its efforts to destroy the “black snake” before it destroyed their land.²¹⁷ The Tribe stated “[w]e must stand together and we must kill the black snake,” embracing the sentiments at the campsite while taking care to remain peaceful.²¹⁸

The impact of a pipeline and drilling on tribal lands is not an issue of mere speculation and prophecy.²¹⁹ “A few hours away from Standing Rock” sits the Fort Berthold reservation of the Mandan, Hidatsa, and Arikara Tribes.²²⁰ Here, the Tribes decided to lease their reservation land to outside fracking and oil companies.²²¹ This decision came at a high cost to the tribal members, land, and cultural traditions.²²² The Tribes are thought to have suffered corruption within the tribal governments, stemming from numerous instances of oil royalties never making their way to the communities and allegedly having been squandered by tribal chairmen.²²³ The

213. *Id.* (discussing Governor’s initiatives to foster contact and communications through direct notifications and open-door policy).

214. See Karen Pauls, *We Must Kill the Black Snake: Prophecy and Prayer Motivate Standing Rock Movement*, CBC (Dec. 11, 2016), <http://www.cbc.ca/news/canada/manitoba/dakota-access-pipeline-prayer-1.3887441> (explaining Black Snake Prophecy of Lakota Tribe).

215. *Id.* (noting black snake underground would cause destruction).

216. See *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F. Supp. 3d 101, 120 (D.D.C. 2017) (referencing DAPL’s correlation with Black Snake prophesized to destroy the Lakota homeland).

217. See Pauls, *supra* note 214 (noting Black Snake prophecy “motivate[d] Standing Rock movement”).

218. *Id.* (quoting protester’s reaction to Black Snake prophecy).

219. See Sulome Anderson, *What Oil Pipelines Can Do To Native American Land and Life*, VICE (Nov. 28, 2016), https://www.vice.com/en_us/article/nnk3yg/standing-rock-fort-berthold-how-oil-can-transform-and-damage-native-reservations (discussing effects of oil pipelines on Native American reservations).

220. *Id.* (noting tribes living on Fort Berthold Reservation).

221. *Id.* (discussing tribes’ decision to lease reservation to oil companies).

222. *Id.* (discussing negative impact on Tribes’ finances, health, and land).

223. *Id.* (referencing corruption of missing oil royalties).

Tribe's environmentalist, Lisa Deville, noted that oil has brought "a lot of social issues" as the living conditions of the community are compared to that of a "third world country," even as those in higher positions are accused of pocketing funds from the millions of dollars received in oil revenue.²²⁴

The Fort Berthold Reservation is also experiencing extreme environmental damage.²²⁵ The Reservation experienced multiple pipeline spills, one of which amassed to one million gallons of saltwater and oil spilled.²²⁶ The spill "kill[ed] all vegetation in its path before it seeped . . . into Lake Sakakawea[.]" causing irreparable damage both above ground and under the surface of the bay.²²⁷

A study conducted by Duke University on oil and salt water spills in North Dakota found these types of oil spills are "creat[ing] a legacy of radioactivity" throughout the reservations.²²⁸ The study concluded that even if active measures are taken by the tribes for immediate clean up, the water in the surrounding areas will continue to be affected and "nothing will grow" on the once fertile grounds.²²⁹ The lands affected by the spills contain radium, other carcinogenic materials, and "radioactive matter."²³⁰ The study noted the reservation lands will never be fully healed, even after

224. See Anderson, *supra* note 219 (noting monetary issues plaguing tribes).

225. See Lauren Donovan, *Study Indicates Lingering Saltwater Contaminator in Oil Patch*, BISMARCK TRIBUNE (Apr. 27, 2016), http://bismarcktribune.com/news/state-and-regional/study-indicates-lingering-saltwater-contamination-in-oil-patch/article_d62aaa65-c9ff-5ddb-bb40-8e0983efdde3.html (discussing environmental study conducted on reservation).

226. See Anderson, *supra* note 219 (noting one million gallon salt water spill on reservation).

227. See Lindsey Konkel, *Salting the Earth: The Environmental Impact of Oil and Gas Wastewater Spills*, NCBI (Dec. 1, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5132645/> (discussing damage resulting from spills and environmental impact on land). A soil scientist from Ball State University stated the "remediation" process was a learning experience which could help "refine industry best practice". *Id.* He noted the "best solution [to oil spills] is prevention[.]" which is "easier said than done." *Id.* (noting land never fully recovers from oil and fracking spills).

228. See Donovan, *supra* note 225 (discussing peer-reviewed study of North Dakota spills that revealed hazardous after-effects of fracking activities).

229. See Anderson, *supra* note 219 (noting land can remain barren even after remediation).

230. *Id.* (noting drilling and pipeline construction results in radioactive and carcinogenic materials on lands).

remediation.²³¹ Additionally, the roadways and infrastructure were damaged by the oil company's machinery.²³²

Marcia Mikulak, a North Dakota anthropologist and professor, offered an explanation as to why the tribes have given into the oil companies and allowed their lands to be destroyed.²³³ Mikulak explained, "[t]hese people were forced to assimilate, or actually be eradicated" and were constantly told they were "worthless[,] "dependent[s] that the state has to take responsibility for[,] "and controlled under state and federal laws, creating a direct comparison to the controversial agreement of the Black Hills which forced the hand of tribe members to allow mining.²³⁴ She further explained these ideals "are deeply embedded in our legal system, in our cultural systems, our narratives of education" regarding Native Americans and the United States' history with the tribes.²³⁵ When asked by an interviewer why the Fort Berthold Reservation did not follow the footsteps of the Standing Rock Sioux in defending their land, a local tribal member stated the courts "have already ruled against the tribe's point of view in protecting the land because of the pipeline and the investment" towards the American economy.²³⁶ The Tribe noted "[w]e have lost our identity as Native Americans" and feel they have no other option than to allow drilling on the reservation.²³⁷

The Fort Berthold Reservation reacted to the aftermath of allowing "these white people" to construct oil pipelines and frack throughout their land.²³⁸ Deville stated the oil companies "just contaminated us[,] "yet their response is "[y]ou don't have to drink this water. You can go home whenever you choose."²³⁹ The fact remains, however, that the Tribes are home; the Fort Berthold Res-

231. *Id.* (noting spill's effect on agriculture). "In terms of agriculture, nothing will grow where there has been a saltwater spill and it's not properly reclaimed, and in my experience, it's not possible to completely reclaim the affected lands." *Id.* (finding full restoration of agricultural activity nearly impossible after saltwater spill from drilling).

232. *See* Anderson, *supra* note 219 (discussing oil spill's lasting effects on reservation land).

233. *Id.* (explaining reasoning behind tribes signing leasing agreements).

234. *Id.* (noting tribes' views of themselves within society); *see also* *Treaties and Broken Promises*, *supra* note 3, at 125-28, (explaining taking of Black Hills).

235. *Id.* (discussing our society's view of Native Americans).

236. *Id.* (quoting tribe member from Washington State as stating "[t]he money that already has been put down is sealed and dealed.").

237. *See* Anderson, *supra* note 219 (quoting Deville's response to tribe leaders' decisions to allow oil companies on Native American lands).

238. *Id.* (discussing aftermath of oil company activities on reservation).

239. *Id.* (quoting Deville regarding oil company's reaction to spills on reservation land).

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ervation serves as their only home assigned by the federal government.²⁴⁰

E. The Fight to Stop as History Repeats Itself

Since the inception of designated reservations, the United States government has slowly reallocated, allotted, restructured, and taken in excess of one billion acres of land from Native Americans.²⁴¹ The Tribes were segregated to reservations in an attempt to keep peace between the Native Americans and settlers.²⁴² Subsequently, settlers crossed reservation boundaries to take resources such as wildlife and gold.²⁴³ Today, Native Americans are fighting to keep what little they have left in a battle over oil that holds a stark comparison to the taking of the Black Hills and numerous examples throughout our Nation's history.²⁴⁴ Centuries later, Native Americans are still fighting to protect their land, enduring government inaction and threats, and struggling to maintain their traditional way of life.²⁴⁵

The United States' history paints a picture of pushing the Native American population further and further into smaller tracts of land and reminding them that they are "wards" of the government.²⁴⁶ The Wild West has been a way of life, as Native Americans fight the government and "the capitalist drive for profit" to defend the land they have left from the devastating effects of the "black gold rush[.]"²⁴⁷ As the Lummi Tribe noted while fighting against

240. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831) (equating Native Americans to "wards" of government).

241. See Karen Strom, *The Allotment of Indian Land*, TRAIL TRIBES.ORG <https://trailtribes.org/pierre/shrinking-reservation.htm> (last visited Dec. 19, 2018) (analyzing government taking of tribal lands since 1800's); see also Rebecca Onion & Claudio Saunt, *Interactive Time Lapse Map Shows How the U.S. Took More than 1.5 Billion Acres from Native Americans*, SLATE (Jun. 17, 2014), http://www.slate.com/blogs/the_vault/2014/06/17/interactive_map_loss_of_indian_land.html (tracking taking of Native American land).

242. See *Treaties and Broken Promises*, *supra* note 3, at 101-02 (explaining history and evolution of treaty, post-civil war).

243. *Id.* at 109 (discussing invasion of native land to extract gold).

244. *Id.* at 106 (describing taking of Black Hills)

245. *Id.* (discussing fight to save Black Hills resulted in loss of land for Native Americans).

246. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831) (holding Native Americans' "relations to the United States resembles that of a ward to his guardian").

247. See Rosenblum, *supra* note 177 (discussing capitalist intent for drilling benefits "very narrow band of one percenters"); see also Mark Udall, *Protect the West from a Black-Gold Rush*, N.Y. TIMES, (Aug. 5, 2016) <https://www.nytimes.com/2016/08/05/opinion/protect-the-west-from-a-black-gold-rush.html> (detailing rush for oil in West, government regulation, and possible environmental harm).

TransMountain Pipeline, “[s]o much we’re losing, losing, losing every generation What are we going to have left for our future generations . . . ?”²⁴⁸ “The economic devastation in American Indian communities is not simply a result of their history as victims of forced assimilation, war, and mass murder; it’s a result of the federal government’s current policies, and particularly its restrictions on Natives’ property rights.”²⁴⁹ The United States government has continually minimized the land promised under treaties and wreaked havoc on the remaining lands left to the tribes through the devastating and irreparable damage of mining and drilling activities.²⁵⁰

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248. See Chris Jordan-Bloch and Liz Judge, *Inside the Fight to Save the Salish Sea*, EARTHJUSTICE (Jan. 22, 2016), <https://earthjustice.org/features/photos-pipeline> (depicting fight of multiple tribes to stop pipeline construction under and around Salish Sea for fear of contaminating tribal lands).

249. See Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, THE ATLANTIC (July 30, 2016), <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/> (discussing poverty levels, economic hardships, and racial concerns towards Native Americans as result of government action). Riley creates a compelling argument for property rights as the first step in remedying the devastating actions against Native Americans by the federal government. *Id.*

250. See Jordan-Bloch, *supra* note 248 (discussing irreparable damage to small amount of land remaining for tribes).

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