

THE PENNSYLVANIA STATE UNIVERSITY
SCHREYER HONORS COLLEGE

DEPARTMENT OF GEOGRAPHY

BREAKING GROUND AND BREAKING TREATIES: JUSTICE, NATIVE AMERICANS,
AND THE DAKOTA ACCESS PIPELINE

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SPRING 2018

A thesis
submitted in partial fulfillment
of the requirements
for a baccalaureate degree
in Geography
with honors in Geography

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ABSTRACT

The Dakota Access Pipeline has been a controversial issue in the news since 2016 due to the negative effects it will have on the Standing Rock Sioux Tribe. There has been significant discussion of whether it is an issue of environmental justice, as well as whether or not it is legal. I argue that through the Dakota Access Pipeline is a case of environmental justice and illegal by discussing treaty making and breaking and tribal consultation clauses included in laws protecting water, historic sites, and the environment. I also illustrate that the Dakota Access Pipeline is a continuation of the narrative of settler colonial exploitation of Native groups and suggest societal changes to remedy this.

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ACKNOWLEDGEMENTS

I want to thank Dr. Roger Downs for his incredible patience and logic without which I would not have been able to complete this thesis. Dr. Downs, I walked into your office countless times on the verge of tears, and your calm, kind words made me realize I was often making a mountain out of a molehill. You have supported all my endeavors through my years in the Geography Department and have taught me how to take my passions and turn them into something constructive and meaningful.

I also want to thank Dr. Lorraine Dowler for inspiring me to understand the problems facing the underserved and underprivileged in our country. Dr. Dowler, from the first day in your Cultural Geography class, my way of thinking has changed for the better. You have taught me how to view the world through perspectives I could never imagine. The past two semesters with you have helped embolden me to pursue a law degree to protect the rights of others and the environment.

Most importantly, I want to thank my family, Alan, Lisa, and Catherine for their unwavering love and support of every decision I've made that has gotten me to this point. Mom and Dad, thank you for teaching me to be concerned for the needs of others. Without your guidance through example, I may not have the passions that I do today. Mom, I am so grateful for the amount of times you've listened to me vent my frustrations on the phone and calmed me down. Dad, your jokes and stories brought a smile to my face even during the most stressful points in this process. Cat, thank you for being such an incredible model of drive, dedication, and passion and for teaching me the importance of following your dreams. Thank you, Fergus, Bodhi, and Scarlett, for the endless supply of happiness you've given me this year as well.

Chapter 1

Introduction

Since the creation of the United States (US), the indigenous people of North America have been treated with nothing short of inhumanity. The American people's own Declaration of Independence on 1776 characterized them as “merciless Indian Savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions” (Merjian, 2010, 611). This statement is the foundation for a picture of the Native Americans as subhuman and immoral, thus allowing for moralizing narratives that made them seem unworthy of inhabiting their own homelands. These homelands covered the entire continental United States and consisted of hundreds of tribes and many linguistic groups (Figure 1).

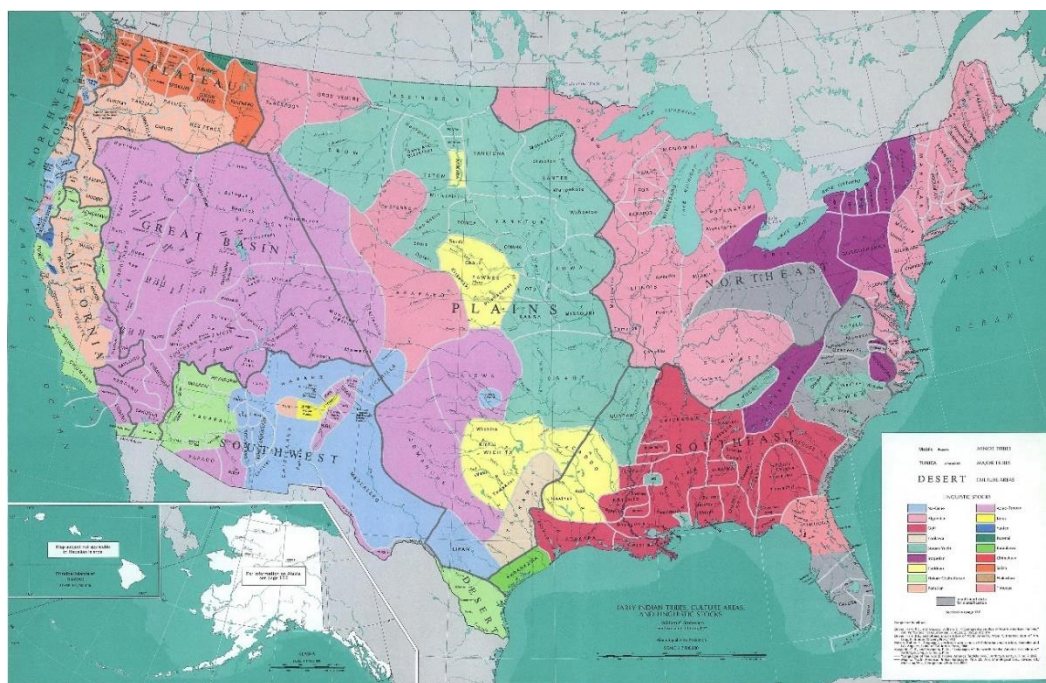


Figure 1. Historical Map of the United States - Early Indian Tribes, Culture Areas, and Linguistic Stocks (Sturtevant, n.d.)

Centuries after 1776, Native Americans are still subject to discrimination, especially in respect to environmental justice issues. Environmental justice is a politically-charged term for the approach to fighting against environmental decision-making practices that inordinately impact minority groups such as African and Native Americans (Warner, 2017). The approach began from a combination of social justice movements, including the Civil Rights movement and the environmental movement (Warner, 2017). Environmental justice has aided in sparking the protests against the Dakota Access Pipeline (DAPL) that is designed to carry sweet crude oil from North Dakota to a crude oil hub in Illinois (Whyte, 2017).

DAPL's proposed route (Figure 2) would pass under the main water supply of the Standing Rock Sioux tribe and through lands taken from the Sioux by the US government (Bell, 2018). The construction of this pipeline is being protested by members of over 400 federally-recognized tribes who call themselves "water protectors" (Whyte, 2017). Non-native people such as war veterans, politicians, and even movie stars have joined the water protectors to support their rights to clean water. The protesters object to the environmental and cultural threats posed by the pipeline and are fighting back against injustice and the harmful policies that Native American tribes have been experiencing for hundreds of years (Whyte, 2017). Not everyone is against DAPL, however.

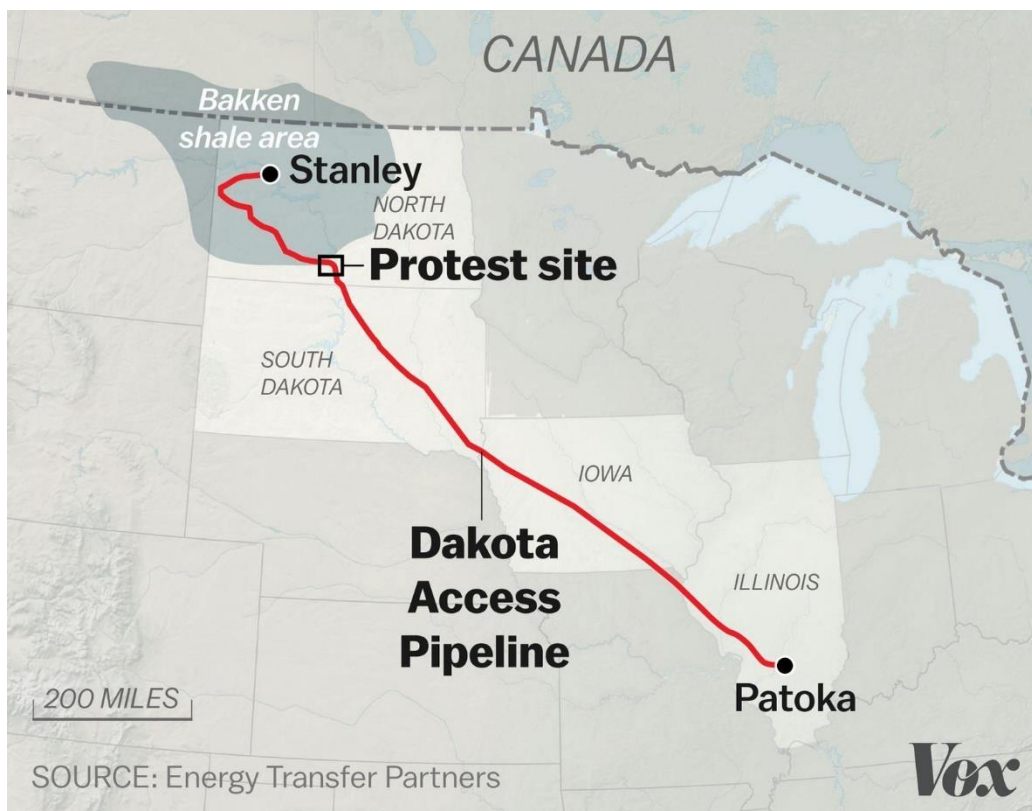


Figure 2. Dakota Access Pipeline route with protest site (Zarracina, 2017)

The arguments for and against DAPL are multifaceted and take into account the views of those who will benefit from and who will be harmed by the pipeline. Pipeline supporters believe that it will help the US to achieve energy independence by allowing us to produce our own gasoline instead of importing it from other countries (Yan, 2016). Supporters also believe that DAPL will offer employment through construction and maintenance and boost local and state economies through sales and income taxes (Yan, 2016).

Opponents of the pipeline argue that temporary solution for energy independence will do more harm than good to Earth in the long term because of fossil fuel's role in global warming (Yan, 2016). There has also been significant concern about the lack of consultations between the federal agencies and tribes. Federal legislation requires that tribes be consulted about any project that could impact lands important for their cultural and spiritual well-being (Yohannan, 2016).

The Standing Rock Sioux Tribe filed a lawsuit against the Army Corps of Engineers, the federal agency that approved permits for the pipeline on federal lands, stating that the Corps did not follow the necessary steps for appropriate tribal consultation (Yohannan, 2016; Yan, 2016). As a result of this lack of consultation, DAPL's construction has already destroyed sacred burial sites that are supposed to be protected under federal law (Yohannan, 2016).

The DAPL is not the first time that the Sioux Nation tribe has had to fight to protect rights to resources and land from extractive, capitalist ventures. These ventures began in 1874 during the Gold Rush in South Dakota. General George Custer led an expedition into the Black Hills, lands that are sacred to the Sioux, and discovered gold (Laidler, 2017). From Gold Rush to present day, Native American lands have been targets for extractive industries. Proposed in 2008 and recently approved for construction by the Trump administration, the Keystone XL pipeline that crosses the US border from Canada also threatened the Sioux Nation (Woods, 2015). The issues surrounding DAPL and the Keystone XL pipelines are very similar. Both pipelines threaten the physical environment and the culturally important spaces and artifacts of the Sioux (Woods, 2015).

Two maps (Figures 2 and 3) of the proximity of the Keystone XL pipeline and DAPL to Native American tribes and areas of high Native American population make it clear that there are significant impacts on Native Americans, both on and off reservations along the pipeline route. The pipelines pass through areas very close to reservations that contain a relatively large population of Native Americans. The pipelines' impacts on Native American communities highlights ethical issues about how the route was decided.

Keystone Pipeline in proximity to tribal lands

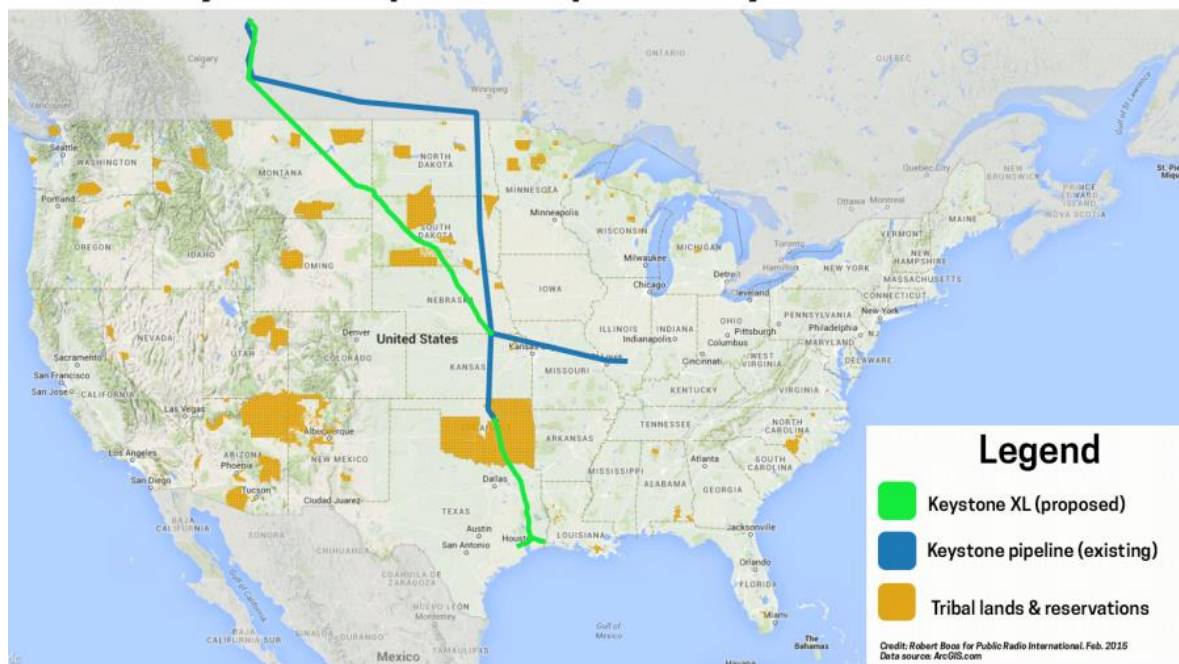


Figure 3. Keystone Pipeline in proximity to tribal lands (Boos, 2015)

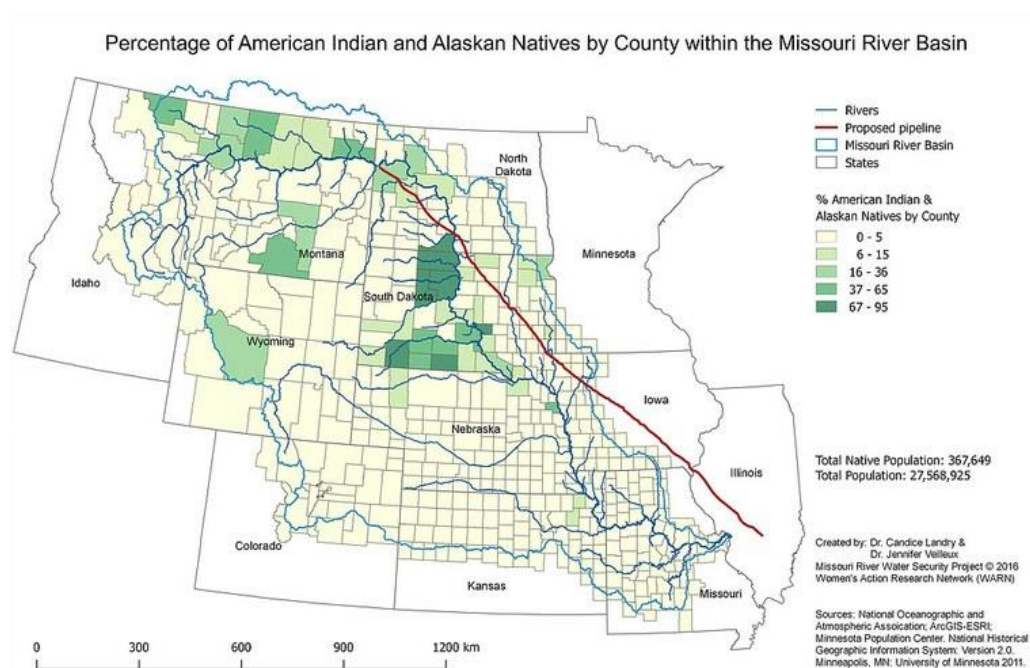


Figure 4. Percentage of Native American and Alaskan Natives by county within the Missouri River Basin (Veilleux, 2016)

News headlines have focused on the environmental justice aspect of this dispute, covering the protests and lawsuits extensively. What is not being mentioned in mainstream media coverage, however, are the historical injustices that underpin and complicate the argument against the pipeline. It is important to understand the rights to lands and resources that were given to Native Americans in treaties over 100 years ago and the settler colonial processes that led to the creation of these treaties and the subjugation of native peoples. The treaty rights given were never explicitly taken away even though the treaties were continually broken, and new laws were created to formally end all treaty-making with Native Americans (Tsosie, 2001).

Because of the historic conflicts over land and the resulting treaties that affected the Sioux tribes important cultural and spiritual sites, there are two major questions about DAPL: (1) are the permits given by the federal government to construct the pipeline legal under the historic treaties and (2) how do the conflicts, treaties, and importance of sites influence and strengthen the case of environmental justice resulting from DAPL? The answers to these questions require an understanding of historic documents such as the Fort Laramie Treaty of 1868, the Appropriation Act of 1871, and the Dawes Act of 1883. Modern acts also need to be included in the discussion, including the Clean Water Act of 1972, National Environmental Policy Act of 1970, and National Historic Preservation Act of 1966.

This thesis will answer these questions. I begin with an explanation of the emergence of the environmental justice movement in the US and specifically how it relates to Native American communities in respect to their cultural and spiritual beliefs and their experiences as a subjugated group. To understand Native American subjugation and how it continues to this day, I will describe the influence of settler colonialism on tribes, the varying levels of sovereignty of tribes

that are the result of settler colonial practices, the making and breaking of treaties and other laws, and how the treaties and laws complicate their rights to land. I will explain what DAPL is and the process behind its approval, as well as the protesting of its construction. The background information in the second and third chapters will allow me to unpack the issues of justice, both with regard to breaking laws and to role of environmental justice, in the context of DAPL. Finally, I will assess the legality of DAPL and discuss the future of Native American rights, including social changes that could aid in the fight to honor indigenous rights.

Chapter 2

Environmental Justice

Background of Environmental Justice

Environmental opportunities and risks, things introduced to the environment that threaten the health of its residents such as pollutants, do not exist evenly within and between the world's societies, leading to different effects on these societies' populations ("Environmental Health," 2018; Cutter, 1995). Environmental justice is used with many different connotations and in global and cross-cultural contexts, some uses of the term being broader than others (Capek, 1993). To ensure that my definition is consistent throughout, I will use the Environmental Protection Agency's (EPA) definition of environmental justice. This is the best definition for my purposes because they are the federal agency that monitors and creates policy relating to environmental justice issues.

The EPA definition of environmental justice is:

"the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies. Meaningful involvement means that: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) their concerns will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected" ("Environmental Justice," 2018).

Environmental justice movements were initially a reaction to the presence and siting of hazardous waste facilities in poor and minority communities (Foster, 1998). Starting in 1982, residents began fighting back aggressively against unjust environmental decision-making

practices (Cutter, 1995). The argument is that victims of toxic contamination's rights were ignored by groups that have more social power, and they will only have justice when these rights are returned (Capek, 1993). Historically, this movement has been led by grass-roots groups coming from the affected communities (Capek 1993). They are that are then joined by other organizations that focus on aiding marginalized groups classified by race, class, gender, and power distribution (Capek, 1993).

The first instance where environmental justice was used to fight back against the placement of an environmental hazard was in Afton, North Carolina (Cutter, 1995). In 1982, this town was selected by the state government as the site for a hazardous waste landfill, and 30,000 cubic yards of contaminated soil would be dumped there (Cutter, 1995). The majority of residents of this town were African-American, rural, and poor. Civil rights organizations, environmental groups, clergy, and members of the Black Congressional Caucus joined these residents to protest the decision to build the facility in Afton (Cutter, 1995). They were not able to reverse the decision to build on the land, but these demonstrations marked the first time that African Americans mobilized at a large scale against an environmental threat. This struggle was repeated as many other minority groups fought against the racist decisions to place environmental risks on their communities (Capek, 1995).

One study by the US General Accounting Office in 1983 and another by the United Church of Christ's Commission for Racial Justice in 1987 synthesized the empirical support in reports that those making the claims desperately needed in order to be taken seriously. Others were thus able to understand how minority communities bore the brunt of toxic waste dumping in the U.S (Cutter, 1995). These two studies catalyzed action on a national scale, causing the establishment of the EPA's Workgroup on Environmental Equity in 1991, and in 1992 the

formation of the Office of Environmental Equity. Many bills were also introduced Congress at this time to regulate hazardous waste dumping and to make environmental justice a more pressing legal issue, the most important being the Environmental Justice Act 1992, with the EPA acting as the Administrator of the bill (Cutter, 1995; “EPA History,” 2018).

The Environmental Justice Act of 1992 had multiple purposes. It called for data collection on environmental health effects so that differential impacts could be understood. This would allow the EPA to identify the areas that have had the greatest load of toxic chemicals placed on them and assess the impact the areas experience in terms of negative health effects. It would ensure that the residents of these highest impact areas have the appropriate opportunities and resources to participate in the process that will identify negative health impacts. It requires that the appropriate federal agencies manage and put an end to the activities that have significant health impacts on the areas of highest impact. Lastly, and most importantly, this Act would attempt to ensure that significant health impacts related to environmental pollution are distributed equally within and between communities in the United States (“Civic Impulse”, 2018).

Toxic waste dumping is not the only source of environmental injustice. In 1994, the National Wildlife Foundation compiled a report that reviewed the role of environmental, racial, and economic disparities as factors in 64 studies. The studies covered pesticide exposure, workplace exposure, air pollution, toxic releases, childhood lead poisoning, toxic fish consumption, water pollution, solid waste, hazardous, waste, incineration, sewage plants, and regulatory benefits (Goldman, 1994). Only one of these 64 studies did not find a disparity by either race or income. Of the 63 studies finding disparities, race was found to be the most

important disparity in two-thirds of the studies (Goldman, 1994). This review solidified evidence that legitimized the need to look at environmental issues through an environmental justice frame.

The environmental justice frame is based on claims to certain rights surrounding the safety of the affected group's environment (Capek, 1993). First, the residents have a right to information about their situations. Many communities that face these issues do not have the resources to hire someone with expertise to work on their community's behalf and must rely on experts employed by the industry or federal officials to supply them with information. The community members received the information individually, which meant that they did not have opportunities to work as a community to understand and react as a whole to the problems they were facing (Capek, 1993).

Second, communities also have a right to a hearing when actions of environmental injustice are claimed (Capek, 1993). In these hearings, they would not only gain information, but they would also be given the chance to present their claims in a space that allows respect for their concerns and for their personal knowledge of the situation (Capek, 1993). In many cases, companies manipulate scientific data in court to depict environmental justice cases as anecdotal or statistically insignificant. The residents of a community must be given the formal opportunity to have a hearing, but their testimonies are often discounted.

Carver Terrace, a neighborhood of Texarkana, Texas, was a former dump site for many toxic chemicals, but the black, upwardly mobile people who bought homes in this area were unaware of the extent of the toxicity (Capek, 1993). When it was named a Superfund site, a designation given only to the most contaminated sites in the country that then receive priority status for cleanup, the residents who had been experiencing health concerns sued the company, Koppers, that used the area as a dump site (Capek, 1993). When the community voiced their

concerns about not being relocated in public hearings with EPA officials, the community members believed that the hearings acted more as a form of managing the people reporting these concerns than as a true hearing (Capek, 1993). They tried to ask yes and no questions, such as would the officials be willing to live there and drink the water, to humanize their situation, but the EPA officials refused to answer and would steer the conversation to more quantitative data (Capek, 1993). These tactics were disrespectful to the residents' concerns and sent a very negative message, especially when they discovered that an all-white community in another part of Texas would be receiving a federal buyout to relocate when the officials explicitly stated to Carver Terrace residents that they "don't do any relocations" (Capek, 1993, 15).

Third, communities should be able to take part democratically in public decisions being made about their own lives (Capek, 1993). After discovering that traditional channels of justice did not work, groups started developing networks that gathered information to fight back against the biased, manipulated science often presented in court. They have worked with groups fighting similar environmental issues regarding contamination to better their own protest strategies. This creates supportive "cultures of solidarity" (Capek, 1993, 16). These cultures are vital because so often there is significant social conflict surrounding issues of environmental injustice, and the newly synthesized social connections replace those that are lost because of intra-community conflicts (Capek, 1993).

The fourth and final environmental justice claim is that the affected community has a right to be compensated by the group that placed the environmental risk on them (Capek, 1993). Both the company and federal government need to be involved in the mitigation process. Rarely, if ever, do corporations acknowledge fault, and they generally make settlements out of court. Unfortunately, the Environmental Protection Agency does not have enough funding to clean up

polluted sites or even to regulate industry (Capek, 1993). The US government tends to downplay the reported environmental injustices. They state that community protests caused overreactions by the companies that polluted the land and led to company buyouts of that land (Capek, 1993).

The thing that needs to be understood when talking about environmental justice is environmental equity. Environmental equity describes the unequal effects of environmental issues on people and places (Cutter, 1995). One way to view environmental equity that is most relevant in the context of DAPL is through the mechanisms that cause inequities, referred to as process equity. These mechanisms can stem from social inequities such as class, race, gender, ethnicity, and political power (Cutter, 1995). One of the greatest questions in environmental justice that stems from the idea of process equity is which came first: the community or the pollution? Was the community targeted as a potential site because its residents were poor, largely a minority population, and politically weak? Or were these environmental hazards already present and the composition of race changed because white residents had the mobility to move out, housing prices were lowered, etc. (Cutter, 1995)?

Native American Environmental Justice

This question of what came first, the people or the hazard, is easily answered in the cases of Native Americans. Their situation is unique in that they were the original inhabitants of the United States before it became the United States; therefore, any environmental threat occurring in or around their reservations was placed on them by colonial powers. Native Americans also differ from other environmental justice communities because they are sovereign nations within another domestic nation state (Warner, 2017). Because of historic struggles over land and human

rights with settlers and the government, Native American communities are especially vulnerable to the exploitative nature of the U.S. dominant culture (Vickery & Hunter, 2016). Native Americans lost their original land due to the resources the land contained, and now the poor-quality lands they have been “given” by the U.S. government continue to be sites of resource extraction and have become coveted spaces for dump sites and nuclear weapons testing facilities (Vickery & Hunter, 2016).

A review done by Vickery and Hunter (2016) determined the following three reasons that Native American environmental justice issues are distinct from those of other minority communities (1) due to cultural differences, such as deep spiritual connections to the land and water, typical environmental justice indicators will not work for indigenous experiences; (2) “Native American” is difficult to define; and (3) tribal sovereignties need to be considered for research approaches by academics within these communities and the policies created from the results.

Susceptibility Factors Specific to Native American Communities

Native American tribes are sovereign nations that have different beliefs, cultures, religions, traditional beliefs, and ecologies from those of the European settlers (Harris & Harper, 2011). There is currently no overall, universal approach for tackling environmental justice issues for Native Americans because of these cultural differences. However, there are certain similarities among the groups that allow for an environmental justice framework to be implemented in discussions between tribes and federal agencies (Harris & Harper, 2011).

One of the biggest issues in responding to Native American environmental justice is that tribal communities have a holistic worldview and follow an eco-cultural system in which human and natural systems are interconnected, unlike that of dominant American society (Harris & Harper, 2011). This eco-cultural system includes hunting, fishing, gathering food, governance, commerce, art, education, health care, and social support systems through which there is a back and forth flow of ecosystem services. Native American tribes rely on subsistence activities for both survival and cultural and traditional practices (Walker, Bradley, & Humphrey, 2016). When water, soil, air, plants, and animals are contaminated by pollutants, the tribes will be directly affected through ingestion, contact, and inhalation. Pollution of their lands therefore affects them in many more significant ways than it would an urban minority group due to the tribe's strong reliance on the environment (Harris & Harper, 2011). This complicates the way that Native American communities are affected by actions taken under the trust obligation, or fiduciary, relationships with the federal government and its trusteeship of natural resources (Harris & Harper, 2011).

Federal Involvement in Environmental Justice Issues

When the federal government is involved in a project that has potential environmental impacts, they must do an analysis of these impacts on minority groups under the National Environmental Policy Act of 1970 (NEPA) (Harris & Harper, 2011). This analysis generally appears in the environmental impact statement as an environmental justice chapter. NEPA analysis works by looking at the impacts in a fragmented way, however, and does not take into

account the interconnectedness of all things on Earth as the Native Americans understand it (Harris & Harper, 2011; Pierotti, 2011).

An example of Native American environmental justice framework being implemented in this process comes from Harris and Harper (2017). They listed five steps to help explain to federal officials how to navigate the differential effects on Native Americans due to their worldviews:

1. “Prepare a tribal narrative describing the overall ethno-habitat or eco-cultural system(s), with a holistic worldview and general spatial boundaries as appropriate. The EJ goal of ‘meaningful involvement’ suggests that the tribe(s) should prepare this narrative.
2. Compare the spatial distribution of natural or cultural resources appertaining to tribes with the spatial distribution of potential impacts. Overlaps may indicate a need to discuss affected resources with tribes.
3. Prepare tribal narratives for individual resources and cultural keystone species, with recommendations for impact evaluation.
4. Prepare tribal narratives for human health, sociocultural, subsistent economic, and homeland security impacts.
5. Conduct a cumulative analysis across all impacts and determine whether individual or cumulative impacts are unevenly distributed among affected populations. (Harris & Harper, 2017, 232)”

These five steps will give Native American communities a voice and ensure that the agencies are considering tribal needs. These steps would reduce the many of the environmental justice issues facing Native American communities stem from decades of federal policies that promoted extractive, exploitative natural resource development on tribal land (Walker et al., 2016). These policies reflect hundreds of years of settler colonialism activities during which indigenous people’s homelands were transformed into settler homelands by framing the indigenous groups as inferior (Whyte, 2017). In the next chapter, I will discuss the historical factors that have influenced current issues facing Native American tribes.

Chapter 3

Settler Colonialism, Sovereignty, and Treaties

Before the events that decimated Native American livelihoods unfolded after the discovery of America, there were about ten million Native Americans inhabiting what is now the United States (Glauner, 2001). Now there are only about 5.2 million (Norris, Vines, & Hoeffel, 2012). This population loss can be attributed to the invasion of their lands by white settlers from Europe. When European settlers came to America, they brought disease, settler colonialist expansion policies, and a military presence that contributed to the destruction of the indigenous population (Brave Heart & Debruyn, 1998). In 2000, The Bureau of Indian Affairs formally apologized for the treatment of indigenous peoples and their participation in the ethnic cleansing of the tribes (Glauner 2001). This cleansing process included such steps as forced relocations, often called “long walks,” that resulted in death from disease, starvation, and fatigue; kidnapping of children to be put in boarding schools meant to erase their identities and assimilate them into the white man’s way of life; and the forced sterilization of Native American women (Glauner, 2001; Brave Heart & Debruyn, 1998).

The greatest issue that needs to be understood in the context of current Native American struggles today is the dispossession of land by white settlers. My focus on settler colonialism does not mean that no other factors have led to the current condition of Native American life, but that a focus on settler colonialism is the most important in the context of DAPL. This chapter will discuss the background to settler colonialism, the complicated sovereignties of Native American’s space resulting from settler colonial practices, and the treaties that have been made and broken, thus creating complicated legal issues in respect to land ownership.

Settler Colonialism

“Colonialism is not satisfied merely with holding a people in its grip and emptying the native’s brain of all form and content. By a kind of perverted logic, it turns to the past of the oppressed people, and distorts, disfigures, and destroys it. This work of devaluing pre-colonial history takes on a dialectical significance today” (Fanon, 1963, 210).

Settler colonialism is distinctly different from typical colonialism. Colonialism often involves original displacement of indigenous peoples and colonizers moving in (Veracini, 2011). The relationships between the colonizers and indigenous peoples are unequal, and the colonists establish their power (Veracini, 2011). All these aspects of colonialism are also involved in the early stages of settler colonialism, but the relations between the colonizers and indigenous peoples create the distinction between the two (Veracini, 2011). Colonialism focuses on maintaining the colonial power structure imposed by the colonizer on the colonized, while settler colonialism aims to remove that difference by erasing those who would be subjugated (Veracini, 2011) Settler colonialism is the “complex social process in which at least one society seeks to move permanently onto the terrestrial, aquatic, or aerial places lived in by one or more other societies who already derive economic vitality, cultural flourishing and political self-determination from the relationships they have established with the plants, animals, physical entities, and ecosystems of those places” (Whyte, 2017, 158). The goal of encroaching settler societies is to make indigenous homelands their own, often using moralizing narratives that make the indigenous groups seem unworthy of having that land. It These narratives rationalized the destruction of indigenous populations. Settler colonialism is often considered a form of genocide (Whyte, 2011; Wolfe, 2006).

Colonialism is distinct from settler colonialism in the necessity of a colonial ‘encounter’ with the indigenous people of the land they conquer (Veracini, 2011). Colonialism needs these

groups to be permanently subservient for the system to work. The goal of colonialism is to keep the subservient labor force constant to build their colonial economy (Veracini, 2011). Settler colonialism, on the other hand, was focused on a ‘non-encounter’ that denies the existence of indigenous peoples. It is ever-changing to fit the need to tame wilderness, establish independent nations, repress, co-opt, and extinguish indigenous others (Veracini, 2011). By the time settlers reach their goals, they would no longer have indigenous groups to be concerned about and the colonial system would become postcolonial (Veracini, 2011).

Because of the differences in the structure of these forms of colonialism, the pushback from the colonized groups varies. To fight against colonization that needs labor, colonized people withhold it (Veracini, 2011). If the colonization process needs the colonized population to disappear, the colonized need to make themselves present through persistence and thus the survival of their people and culture (Veracini, 2011).

Settler colonialism is vital to understanding the relationship between Native Americans and the descendants of people who settled in the US from Europe. Indigenous groups’ existence is generally rooted in a particular place, and they are conscious of the need for an oppositional struggle against colonization (Alfred & Corntassel, 2005). They struggle to survive as their own distinct culture, to keep their homelands and natural ways of life as they are threatened by the colonizing force’s efforts to eradicate their existence as a people and/or culture. Today, we are living in a time of contemporary colonialism, and post-modern imperialism is the greatest threat to indigenous peoples (Alfred & Corntassel, 2005).

“The colonial system is always a way of gaining control over another people for the sake of what the colonial power has determined to be ‘the common good.’ People can only become convinced of the common good when their own capacity to imagine ways in which they can govern themselves has been destroyed” (Manuel & Posluns, 1974, 60)

Human geographers are beginning to study settler colonialism not only in a historical context, but instead they are developing a historicized account of how settler colonialism is still at work to this day (Bonds & Inwood, 2016). European imperialism that led to settler colonialism in the US stems from white supremacist ideals that are still in place. The idea that white settlers are more deserving of the land than Native Americans and should be at the top of the social hierarchy is an inherently racist belief that “valorized whiteness” (Bonds & Inwood, 2016, 720). The racialized capitalist system in the US was created through Eurocentric norms (Bonds & Inwood, 2016), one of which is ‘accumulating wealth and property by extracting it, via labor, from nature or inferior beings’ (2016 Seawright, 2014, 563). Both slavery and genocide are key to the development of the US through the privatization of land formerly belonging to Native Americans and the (often forced) labor needed to make it productive. (Bonds & Inwood, 2016). Settler colonialism introduced a “racialized and gendered economic and political system benefitting the few at the expense of the many” (Smith, 2012, 238). This system was directly oppositional to the Native Americans’ way of life and has drastically altered the way they live and their identities.

Unlike the early days of settler colonialism, today’s colonization tactics in the US are subtler than outright human rights violations by the military and missionaries. The goal is to quietly erase the indigenous groups’ cultures and histories and replace them with state-informed foundations for Native American’s cultural identities and sense of place. The state has created ethnic groups such as “Native Americans” in the US and “aboriginals” in Canada (Alfred & Cornthassel, 2005). These newly created identities turn the original autonomous identities to ones based on an outside source which has a warped sense of the true cultural backgrounds. The new identities emerge from the ruse of trying to work toward justice and positive integration when in

reality they act as indicators of a continued assault of colonialism on indigenous existence resulting in land that remains occupied and people who remain disempowered (Alfred & Corntassel, 2005).

These created identities in the US are influenced by the historic and current dispossession of indigenous groups as well as contemporary deprivation and poverty (Alfred & Corntassel, 2005). Because of restrictions to access to resources, indigenous people rely on cooperation with the state authorities. This then creates an identity that focuses on this relation to the state instead of their historical identity. Their historical identity would be based on their heritage within their own communities. Reliance on the state confirms the daily reality that indigenous peoples' lands, cultures, and governmental authorities are attacked, denied, and reconstructed under a colonial framework. Colonial actions constantly strip indigenous peoples of their national spirit and sources of their spirituality: relationships within the community, to each other, their homelands, ceremonial components of their lives, languages, and histories. These components of indigenous identities are vital to living a meaningful life as not only Native Americans but also simply as human beings (Alfred & Corntassel, 2005). The worldview of Native Americans is intimately connected to their relationship with the lands, a connection the settlers saw as primitive and simpleminded. The settlers twisted these beliefs and used them against the tribes, calling them savage, as a way to rationalize their right to take lands away from native people (Alfred & Corntassel, 2005).

Because of their communal way of life at the time of US settlement, Native Americans had very different ideas about land ownership than the European settlers. Native Americans believe they were placed on the land by the Creator, and they abide by the same natural laws that govern all organisms in that space. This eco-centric, holistic worldview created a system of

order, balance, and an abundance of resources for both the human and nonhuman members of society (Tsosie, 2001). Europeans did not understand this relationship and used Native American's lack of structure and ideas about property rights to vilify and take advantage the Native Americans. The Native Americans' desire to keep their land allowed settlers to make them the enemy of expansion (Hoxie, 2008). The Bureau of Indian Affairs and other agencies created treaties and programs to impose their own cultural systems and beliefs in order 'civilize' the Native Americans and strip them of their own culture, which led to varying levels of sovereignty (Hoxie, 2008).

Sovereignty

Federally recognized Native American tribes are independent, sovereign nations, but their sovereignty is more complicated than the nation-state political geography to which most countries are accustomed. Biolsi (2005) determined that there are four different types of imagined spaces that have been fought for and sometimes achieved by Native Americans: (1) tribal sovereignty within a Native homeland/reservation; (2) territorially-based rights to resources that are not on a reservation but which imply dual-management by tribes and the federal or state government on these overlapping lands; (3) indigenous rights that extend to all lands of the United States; and (4) hybrid indigenous space in which Native Americans claim citizenship in both the US and a tribal nation.

There are key points within each of these four levels of sovereignty that help us understand how Native Americans are still subjected to discrimination even though they are technically members of sovereign nations. I have found that the most immediately relevant issues

for understanding the fight against DAPL arise from a combination of the first two types, tribal sovereignty and co-management, with the third and fourth types of indigenous rights to all the lands and hybrid citizenship being more abstract influencers. I use Bolsi's framework, unless otherwise noted, because he is an authority on the topic with his article having been cited over 200 times.

Tribal Sovereignty

Each tribal nation has its own culture, language, history, and place on the map. They should have autonomy and be included in multinational discourse. On paper, tribal nations check most of these boxes, but tribal sovereignty is much more complicated than it appears. Native Americans are technically exempt from state laws within the borders of their historic homelands, reservations, and the federal government will not interfere with Native American's internal affairs over which they have no authority. This is a basic principle of federal Indian laws and the legal status of tribes. Tribes are both preconstitutional, existing on the land as sovereigns before the founding of the US as a new country, and extraconstitutional, not bound to follow the constitution or federal laws. However, there are some important exceptions to this idea. The current status of tribal sovereignty is severely limited and represents racist views of indigenous peoples by Congress, the court system, and white members of the US public.

Tribal sovereignty is undercut by the doctrine of "plenary power" which gives Congress absolute power over the Native American tribes. Congress can repeal treaties and pass legislation that controls tribes without consultation with them. This legislation is still in place and utilized to this day. The most recent case of the use of plenary power was in the 1980s to regulate the tribal

gaming industry. Casinos are the main source of economic development on reservations and they could be run without federal interference. After the Indian Gaming Regulatory Act was passed, however, tribes could only offer gambling that was legal in the state, and they needed to have a compact with the state otherwise they would not be allowed to open the casino. This means that states now have the ability to veto anything they do not approve of as it relates to tribal gaming. This reaction to the economic vitality of tribal casinos has greatly reduced its potential benefits to tribes.

On top of plenary power, the Supreme Court and other federal courts invented “implied” repeals of understood tribal sovereignties. This means that courts reduce sovereignty even when Congress has not explicitly put legislation in place. The court does this when it believes that reducing tribal sovereignty is logical in terms of Congress’ intent toward Native Americans or their status as wards of the state. For example, most reservations are interspersed with non-native settlers, who sometimes even make up the majority. This interconnection of native federal trust land and non-native deeded land made it confusing to understand who had criminal jurisdiction over which areas. Supreme Court Justice William Rehnquist decided that the intent of Congress would be to forbid tribes to exercise criminal justice over anyone who was not Native American, even if they were living within reservation borders. He stated that there are “inherent limitations on tribal powers that stem from their incorporation into the United States” (Bolsi, 2005, 244). One limitation is that the US’ “great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. ...By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-[Native American] citizens of the United States” (Bolsi, 2005, 244)

These two examples show that tribal sovereignty is a very constrained kind of sovereignty: “internal self-determination” or “dependent sovereignty” in terms of the federal courts. Tribes have rights over their own people within their borders, but federal interference is fairly common. These regulations suggest a racist sentiment that Native Americans cannot be trusted to carry out democratic governance responsibly.

Co-management

Many Native American lands were ceded to the US government through treaties, but they are still culturally and spiritually critical to the people of the tribes. The treaties maintain Native American sovereignty over the lands surrounding their reservations for use of resources for hunting and gathering. This can generate confusion over management because some of this land is federal, some state, and some private. This is important to understand as much of the contested Dakota Access Pipeline runs through land taken from the Sioux Nation by the US.

Tribal advocates argue that they should be given shared sovereignty rights over these lands, or at least be allowed to co-manage with federal, state, municipal, and county governments. They state that they have these rights because of importance to tribal health and protection of food sources laid out in the treaties. This would mean that sovereignty would be structured coequally, not hierarchically, with tribes on the same level as federal and state government. Unsurprisingly, the state and federal governments have not agreed to this because it would threaten their own sovereignty. The governments do, however, offer some space for dialogue if the lands will be affected by policy in a way that “significantly or uniquely affect their communities” (Bolsi, 2005, 246).

National Indigenous Space

Contemporary Native American life is based on the fact that more indigenous peoples live off reservations in metropolitan areas than on reservations because they offer greater economic opportunities, such as more jobs and higher wages, than the majority of reservation economies can offer their inhabitants. This relocation has its basis in history. Relocation as an attempt to integrate native peoples into dominant society was the official policy of the US government during the 1950s and 1960s. The government believed this would eradicate the “Indian problem” by destroying once and for all their tribal identities, eradicating the legal categories of “Indians” and “tribes.” Oftentimes, these urban Native Americans exist in liminal space; they are viewed as “second class” tribal citizens but are also out of place and not authentically urban, similar to immigrants and others often not seen as Americans. Native American status should be portable, meaning they should not have to give up their legal status as Native Americans or their rights and ability to practice their culture.

There has been an attempt to create laws that would represent the entire US as Native homelands, meaning that Native Americans traditions such as using bald eagle feathers for ceremony would be legal no matter if they are on a reservation or not. These laws would attempt to ensure that Native Americans feel at home on and off reservations. They would reflect the principle that Native Americans maintain the rights they have on reservations as well as a claim to their indigenous identity even when they live surrounded by non-indigenous peoples. This would also allow people who are not “card-carrying” Native Americans because they have never lived on a reservation to exercise their claims to an indigenous identity. This idea of Native Americans maintaining their rights on and off the reservations is important when thinking of Native Americans’ hybrid political space.

Hybrid Political Space

Native Americans not only have a stake in their tribal laws but also state and federal laws, especially since they became citizens in 1924. Civil rights laws are very important in Native Americans' lives. They regularly invoke these laws in situations of affirmative action and other protections against discrimination. They are invested in protecting voting rights, the right of the accused to a fair trial, and the rights of racial minorities. Native Americans should have a place at the table to have their voices heard when discussing policies that will affect them. Many pieces of legislation are either harmful or fail to protect the tribes, their welfare, and their rights.

There are conflicting feelings among Native Americans about this dualistic identity. Some do not see it as a problem. They are loyal to the US and fight in wars, some even becoming heroes. Others, however, believe that dualism is problematic because it plays into the government's settler colonization goals of assimilating Native Americans into US society, destroying tribal culture and identities.

These four indigenous spaces underpin the complexities surrounding issues of Native American rights in the US. One instance where they come into play significantly is the Dakota Access Pipeline. To understand the issues with land and natural resource rights surrounding DAPL, the Fort Laramie Treaties and their subsequent modifications as well as the Dawes Act of 1887 must be considered.

Treaties and Tribal Rights

From the Revolutionary War to the beginning of the 1900s, the US transferred about two million square miles of Native American-inhabited lands into its possession (Spirling, 2012).

Much of this was done through the creation of treaties (Spirling, 2012). Treaties were land transactions in which the tribes gained protection by the federal government and a sovereign recognition of their inhabitation of the lands they retained, and this was a common practice between the US and Native American tribes (Peyton, 1975) When tribes allowed the US government to protect them, they acknowledged the guardian-ward relationship (Peyton, 1975).

The original purpose of these treaties was to create a trust responsibility through which the tribes' ability to govern their own internal affairs would be extensively protected (Peyton, 1975). This tribal autonomy should have also been supported by the US government's duty to ensure the tribes maintain the land and resources needed to survive. Treaties act as contracts that the president negotiated and Congress ratified, and there are currently 367 undisputed treaties between the US and tribes active today (Spirling, 2012). They are legally binding for both parties, but are not set in stone because new treaties can be created to nullify previous terms and change the objectives the treaties are attempting to meet (Peyton, 1975)

Treaties were also used to create Native American reservations. Until the first creation of reservations in 1851, European settlers forced Native Americans westward to quench the settlers' thirst for more land (Merjian, 2010). European settlers violated treaty after treaty, even forcibly marching entire tribes to more remote lands, causing death by starvation, fatigue, and disease (Bell, 2018; Merjian, 2010). Before 1851, the Great Sioux Nation's land formerly spread across vast areas of the Great Plains, but as a result of the first Fort Laramie Treaty of 1851 (Figure 4) their lands were reduced significantly to make up the Great Sioux Reservation (Bell, 2018). The treaty stated that lands surrounding the reservation were still open for the Sioux to hunt, fish, and travel through without interference from the US government (Yohannan, 2017). It also gave the US government the right to build railroads, roads, and military posts within the reservations but

would not allow white settlers to move onto the tribal lands (Merjian, 2010; Yohannan, 2017).

Native Americans were allowed to live in the communal way to which they were accustomed because the treaty did not break up the land into private holdings (Merjian, 2010).

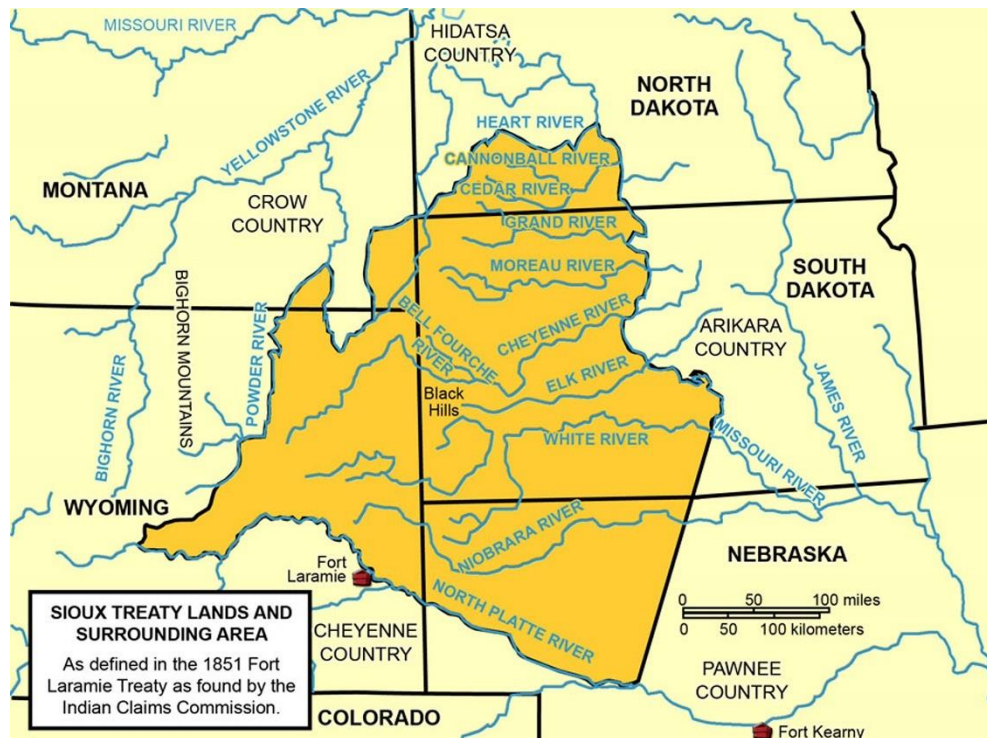


Figure 5. Sioux Treaty Lands and Surrounding Area (n.d.)

In 1868, a new Fort Laramie Treaty was created. The language contained in this treaty was significantly more forceful, and, unlike the treaties that came before it, it made a concerted effort at destroying the communal lifestyle of the Sioux and attempted to turn them into farmers (Bell, 2018). Article 2 of the 1868 treaty shrank the Great Sioux Reservation, forcing the people farther east. This was done to remove immediate access to the prime buffalo herds that inhabited the land farther west in Wyoming (Bell, 2018). The rules for off-reservation hunting were much stricter as well. Native Americans were only allowed to hunt off the reservation if they were chasing a large herd of buffalo, and they must return immediately after the kill; this was intended to encourage a farming rather than hunter gatherer lifestyle (Bell, 2018).

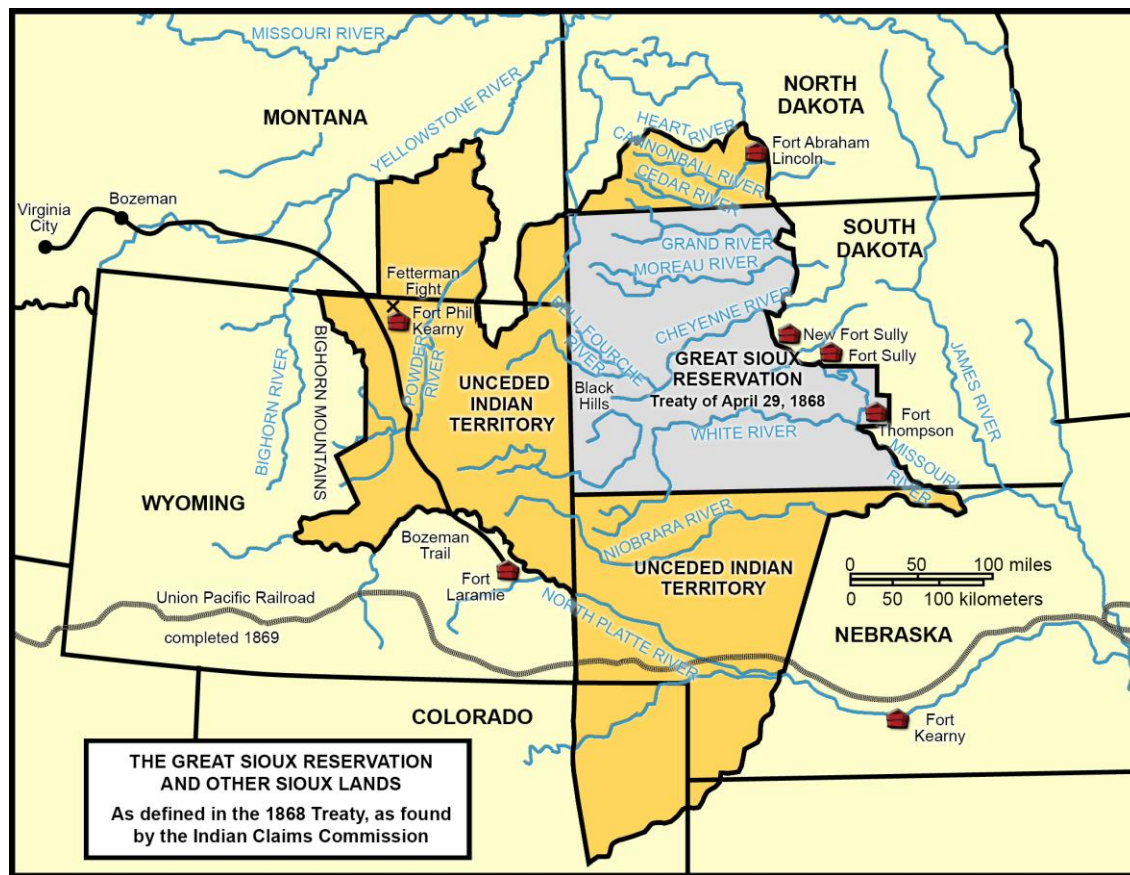


Figure 6. The Great Sioux Reservation and other Sioux Lands (n.d)

The most important part of this treaty, however, is Article 12:

“No treaty for the cession of any portion or part of the reservation herein described which may be held in common, shall be of any validity of force as against the said Indians unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same, and no cession by the tribe shall be understood or constructed in such manner as to deprive, without his consent, any individual member of the tribe his rights to any track of land selected by him as provided in Article 6 of this treaty” (Bell, 2018, 2)

In 1871, the Appropriations Act was passed by Congress to end treaty making. It altered the relationship between the federal government and tribes by no longer recognizing tribes as independent nations that can make treaties with the US (Johnson & Hamilton, 1995). This led to Congress passing legislation that could be applied to all Native American people instead of individual tribes. Most importantly, however, the Appropriations Act stated that the Act was not

created to invalidate any treaties that have already been ratified, including the Fort Laramie Treaty of 1868 (Johnson & Hamilton, 1995).

Article 12 of the 1868 Fort Laramie Treaty was broken when the gold rush began, and gold was discovered in the Black Hills, sacred land of the Sioux, in 1874 (Tsosie, 2001). In 1887, after the discovery of gold and precious minerals on many reservations, the General Allotment Act of 1887, more commonly referred to as the Dawes Act, was passed to make it easier for the wealthy and land-hungry US government to gain tribal land (Tsosie 2001; Merjian, 2010).

Through the Dawes Act, the US government allotted parcels of land to Native Americans to be kept under trust by the US for twenty-five years (Johnson & Hamilton, 1995). After that time passed, the lands were passed to the descendants of the owner and partitioned evenly among them (Johnson & Hamilton, 1995). This meant that the Native Americans would not be able to sell or lease their land unless the government allowed it (Merjian, 2010) The US Department of the Interior then sold any surplus land to non-Native Americans, including miners (Merjian, 2010). Three-fourths of the adult male members of the tribe did not approve this cession of land, making it illegal under the rights laid out in the Fort Laramie Treaty of 1868. This destroyed the communal culture of Native Americans and allowed for a checkerboarding pattern of land ownership by many different stakeholders within reservation borders (Figure 6).

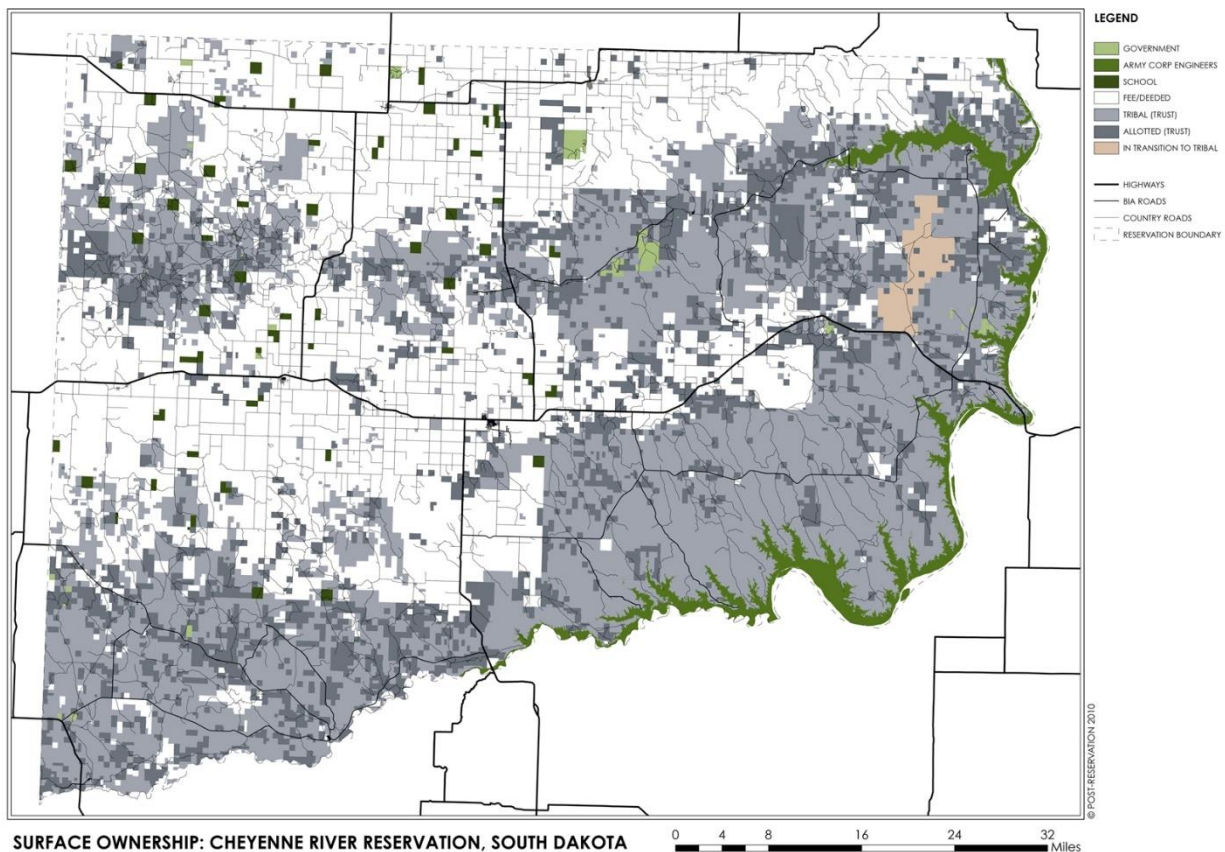


Figure 7. Surface Ownership: Cheyenne River Reservation, South Dakota (n.d.)

The lack of uniformity of land ownership has allowed US courts to severely limit the sovereignty of tribal governments. When Native Americans lost the rights to keep non-native settlers out of their reservations through the allotment programs after the Dawes Act, they also lost their rights to regulate the land that had been allotted (Tsosie, 2001). When tribal governments try to regulate non-native property, the courts generally rule that the “dependent” status of Native American nations conflicts with their ability to regulate non-Native American landowners’ interests (Tsosie, 2001). Essentially, the government is telling tribes that they cannot protect their own nation because they are dependent on the American government. This dependency stems from hundreds of years of subjugation through relocation to reservations and allocation of the best lands on these reservations. This subjugation led to the destruction of

communal hunter-gatherer livelihoods. This political exemption of non-native people from regulation on native land, however, does not mean reciprocally that native people are exempt from property regulations on non-native land. Native Americans are subject to nearly all laws in the US (Tsosie, 2001).

Given this context, in the following chapters, I will explain what DAPL is, the protests surrounding it, and how the information from the previous chapters creates a strong case against the construction of the pipeline.

Chapter 4

The Dakota Access Pipeline, Sacred Sites, and the Protests

The Dakota Access Pipeline

DAPL is a 1,172-mile, 12-to-30-inch diameter pipeline built by Dakota Access, LLC, a subsidiary of Energy Transfer Partners, LLC (ETP) that connects the Bakken Shale of North Dakota with a crude oil storage hub just outside Patoka, Illinois (Figure 7) (“Bakken”, 2018). It is a joint project between ETP with 38.25% interest, MarEn Bakken Co., LLC with 36.75% interest, and Phillips 66 Partners with 25% interest. The pipeline’s design allows it to carry a maximum capacity of 570,000 barrels of crude oil daily from northern North Dakota, where Bakken Shale has been estimated to contain about 7.4 billion gallons of crude oil (Park, 2016). ETP’s website states that the pipeline would eliminate 500-700 rail cars or 250+ trucks that would be used to transport the same amount of oil every day (“Bakken,” 2018). The company also claims that the pipeline will meet the highest environmental standards, is safer than the rail cars and trucks it replaces, and that it will create greater energy independence and generate related jobs in construction and monitoring (Whyte, 2017).



Figure 8. Dakota Access Pipeline route with protest site marked (Karklis, 2017)

The original proposed route for the pipeline (Figure 8) would pass through suburbs of Bismarck, North Dakota, but it was rerouted partly due to concerns over the risk of contamination of the mostly-white community's drinking water (Buncombe, 2016). "This pipeline was rerouted towards our tribal nations when other citizens of North Dakota rightfully rejected it in the interests of protecting their communities and water. We seek the same consideration as those citizens," said Dave Archambault II, chairman of the Standing Rock Sioux tribe in an interview with ABC News (Thorbecke, 2016). The reactions by DAPL and permitting agencies stated that the reason the pipeline was rerouted was the environmental impacts of the pipeline through this area. "The river crossing north of Bismarck was a proposed alternative considered by the [Dakota Access] company early in the routing process. This route was never included in the proposed route submitted to the PSC and therefore was never vetted or

considered by us during our permitting process. It had been eliminated by the U.S. Army Corps of Engineers during their environmental assessment," said North Dakota Public Service Commission Chair Julie Fedorchak in a statement (Thorebecke, 2016). The company also says that it will be extremely safe with low risk of leakage ("Bakken," 2018).

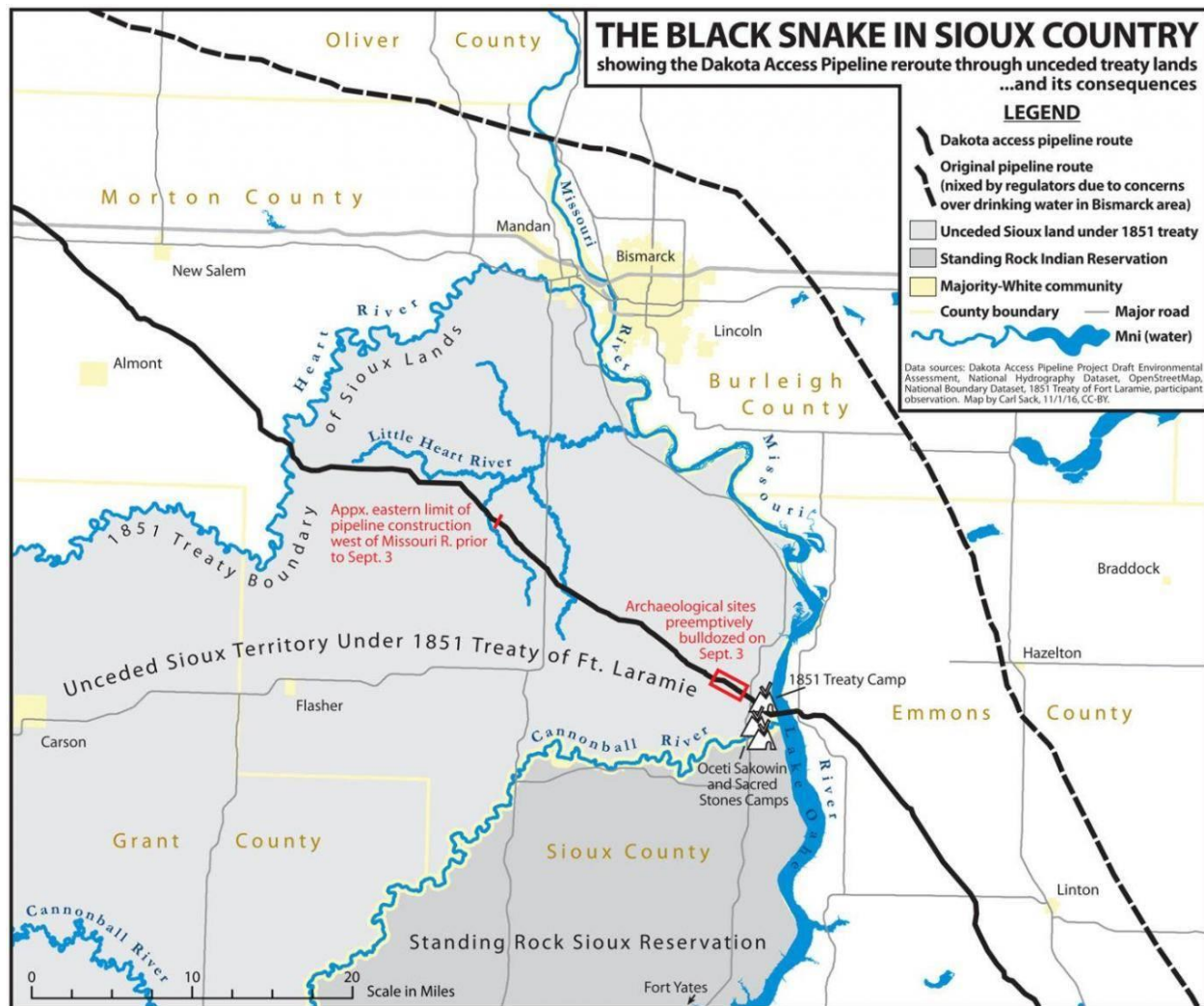


Figure 9. The Black Snake in Sioux Country (Sack, 2016)

All ETP pipelines are constructed and monitored according to stringent safety measures. They are made of high tensile strength steel with a protective coating and are pressure tested at the mill. The pieces are welded together and are x-rayed, nondestructively evaluated, and pressure tested at over 100% of maximum operating pressure. Tools within the pipeline test for

metal loss from corrosion or gouges, dents and deformities, and cracks and similar defects. There are also many markers indicating the location of the pipeline, with the number of the pipeline operator and the 811 “Call Before You Dig” number. Above ground valves, protected by chain link fences as well as security cameras and regular monitoring, exist along the length of the pipeline to inhibit flow between sections of the pipe in case of emergency and for inspection of the pipe. The entire length of the pipeline is regularly checked for signs of leaks both from the air and the ground. All information from both human and technological inspection is reported to an offsite the control center where engineers react to malfunctions and can adjust or shut off flow at points on the pipeline (“Pipeline Operations and Safety Overview”, 2017). However, no number of safety precautions can guarantee a leak will not occur, and there will always be a concern that the pipeline will leak into Lake Oahe and contaminate the source of the Standing Rock Sioux’s drinking water.

The process for putting the Dakota Access pipeline in the ground began with filing a Petition for a Declaratory Order with the Federal Energy Regulatory Commission on September 26, 2014. The petition stated that this pipeline, part of the Bakken Oil Project, will “establish critically needed, cost-effective crude oil pipeline transportation from the Bakken/Three Forks shale play in North Dakota to multiple refining markets throughout the United States” (*Declaratory Order*, 2014). ETP then had to apply for multiple permits for each state that the pipeline would run through, all of which were approved in early 2016 through North Dakota Public Service Commission, South Dakota Public Utilities Commission, The Iowa Utilities Board, The Illinois Commerce Commission, and the U.S. Army Corps of Engineers (“The Legal Process,” 2017).

The Army Corps of Engineers (the Corps) is a crucial part of the permitting process. The Corps builds and operates projects around the country related to navigation, controlling flooding, and restoring ecosystems (“Environmental Program”). They are involved in this process because of the federal flowage easements at the Missouri River and federal ownership of land at Lake Oahe (“Dakota Access Pipeline Environmental Assessment,” 2016). They are also the federal agency that consults with tribes when a project, such as the Dakota Access Pipeline, affects or threatens tribal cultural properties or natural resources (Yohannan, 2016). The Corps is the main target of tribal protests and lawsuits against it are being filed (“The Standing Rock Sioux Tribe’s Litigation on the Dakota Access Pipeline,” 2017).

Sacred Sites of the Standing Rock Sioux

Because the pipeline route passes through lands that belonged to the Standing Rock Sioux, many traces of their history, culture, and spirituality are at risk of destruction. Jon Eagle Sr. (2017), the Tribal Historic Preservation Officer for the Standing Rock Sioux, wrote an article about the importance of the land and natural resources in the path of DAPL construction. The area is considered a traditional cultural landscape. Traditional cultural landscapes refer to properties consisting of many linked features creating a cohesive area that has cultural importance to the people who have used the lands and who included the places in their practices over the years. This particular landscape contains burial cairns, ancient village sites, stone features and effigies, and sacred sites that hold cultural and spiritual significance for the tribe (Eagle, 2017). The site at Lake Oahe was historically a place of commerce. Enemies would often

camp very close to each other, but there was never any violence or death in the area because the groups believed that the land was sacred (Eagle, 2017).

Not only is the land sacred but the water is as well. A phrase commonly heard in the tribal fight against DAPL is *Mni Wiconi*, water is life, because life cannot exist without it (Eagle, 2017). Mothers carry new life in water, and some Native American tribes would bury the afterbirth in the place the woman's water broke (Eagle, 2017). This connected children to their place of birth forever (Eagle, 2017). They also believed that because the human body is made of mostly water the water within us is what reacts to spoken word. Ancestors of the Standing Rock tribe would pray with the water while the morning star was still in the air to activate properties that gave life. They believe water was the first medicine (Eagle, 2017).

Water in the area of the protests had its own sacred component. The confluence of the Cannonball and Missouri Rivers created a whirlpool forming perfect, round stones that the tribes living in the area found sacred (Eagle, 2017). This whirlpool was destroyed when the Corps created dams along the sacred Cannonball River in 1958 to produce hydroelectric power (Varsalona, 2016). It also formed Lake Oahe. At that time, there were no regulations requiring consultation with tribes (Varsalona, 2016). This action destroyed not only a sacred site but also over 160,000 acres of land on the Standing Rock and Cheyenne River Reservations (Varsalona, 2016). This destruction of land also led to the loss of traditional food and medicines, making them more reliant on the Bureau of Indian Affairs health services (Eagle, 2017).

The Protests and their Effects

"Mother Earth is our mother. She's everything. She's life. She brings life, she takes life. We get everything from her; we get our food, our shelter, medicines. The water flows through

her creeks, the lakes, sacred places. This is why we're here. This is why we chose this planet, because of her. It's everything.” – Rachelle Figueroa, 65, water protector at Standing Rock Reservation (Zambelich & Alexandra, 2016)

Ms. Figueroa’s words represent the views of many of the tribal members resisting the construction of DAPL on tribal land. She and many others fear for the safety of their water and their rights as Native Americans, minorities, and simply human beings. The water protection movement had humble beginnings on August 10, 2016 with just a small group of only fifteen to thirty people fighting the pipeline at the construction site in the morning (Hersher, 2017). By the afternoon, the group had grown to 100, and soon thousands of people joined to protect the rights of the Standing Rock Sioux (Hersher, 2017; Zambelich & Alexandra, 2016). The water protectors set up camp next to the Cannonball River at the Oceti Saowin Camp (Barajas, 2016). Overall, the water protectors were peaceful, using prayer ceremonies and non-violent protests in the face of militarized law enforcement (Figure 10).



Figure 10. Dakota Access Pipeline Protests at Standing Rock (2016)

Andrew Cullen Their actions were met with unnecessarily aggressive treatment, many even being chased by dogs on private property where the construction was occurring (Figures 7 and 8). This was documented by a reporter for *Democracy Now!* (“Guards accused of unleashing dogs, pepper-spraying oil pipeline protesters,” 2016; Worland, 2016). On October 24, 2016, the increasingly militarized conflict between water protectors and construction efforts led Standing Rock Sioux Tribal Chairman Archambault II to request that the Department of Justice investigate police tactics and civil rights violations (“Updates & Frequently Asked Questions: The Standing Rock Sioux Tribe’s Litigation on the Dakota Access Pipeline,” 2017).

On November 14, 2016, the Corps stated that they would wait until further analysis and discussion were completed to approve or deny the easement. They cited historical dispossession of Sioux lands, the cultural importance of Lake Oahe to the Standing Rock tribe, the government-to-government relationship, and the statutes that govern easements through federal land as reasons for further discussion (Kelley & Kershaw, 2016). The tribe saw this as a victory and believed their voices were being heard (“Updates,” 2017). The Corps then closed the protesting camps on Thanksgiving, November 25, 2016, stating that there were public safety concerns but that they would allow a “free speech zone” for protesters (Barajas, 2016; “Updates,” 2017). Just days earlier, over 300 water protectors were injured and 26 hospitalized after law enforcement used water hoses in freezing temperatures, rubber bullets, and tear gas against them (Figure 10) (Barajas, 2016). Because of the excessive force used against the protesters, The Water Protector Legal Collective filed a lawsuit against the county in which the protests had been taking place, Morton County, the Morton County Sheriff, and the other involved law enforcement agencies.



Figure 11. Police use a water canon to spray protesters during a clash overnight near Cannon Ball., N.D. (Keith, 2016)

The protests brought to the forefront the human rights violations Native Americans are facing at the hands of the pipeline construction. In the next section, I will delve deeper into the federal laws that have been broken throughout the process of constructing the pipeline and discusses how historic and cultural factors strengthen the argument that DAPL is an issue of environmental justice.

Chapter 5

Legal and Environmental Justice Issues in the Context of DAPL

The Dakota Access Pipeline represents an environmental justice issue and an unjust, illegal use of land and resources historically and legally belonging to the Standing Rock Sioux. Under the Fort Laramie Treaty of 1868, neither the state nor the federal government has a right to approve a project by any private or public agency on the land and water that are threatened by the pipeline. Unfortunately, this treaty has been broken countless times, and using only the treaty as a basis for legal action has been unsuccessful (Yohannan, 2016). The most notable case in which the Fort Laramie Treaty was used unsuccessfully to fight the government taking Sioux land was the Sioux Nations fight against the US government's illegal taking of the Sioux's sacred Black Hills during the gold rush (United States v. Sioux Nation of Indians, 1980). We cannot talk about tribal rights in the context of DAPL without talking about environmental justice. Lawsuits were filed not only to protect the tribal property rights to land, water, and resources but also to enforce federal regulations regarding clean water, historic sites, and the health of the environment overall.

Legal Issues Surrounding DAPL

The legal actions taken against the pipeline's construction began in the summer of 2016. The Standing Rock Sioux tribe filed a lawsuit against the July 27, 2016 against the Corps of Engineers for declaratory and injunctive relief because of the permits they issued to DAPL to

allow for construction of the pipeline. They accused DAPL of violating the Clean Water Act (CWA), National Historic Preservation Act (NHPA), and National Environmental Policy Act (NEPA) (Yohannan, 2016). The violations come from the Corps' preapproval to build on lands that are culturally significant to the Sioux and would threaten the main source of their drinking water, Lake Oahe. Just days later, on August 4, the Standing Rock Sioux petitioned the courts to halt the construction of the pipeline, but while the decision was being made by a judge, construction continued with ETP destroying sacred burial grounds and tribal sites (Yohannan, 2016). Protests increased in intensity, and many water protectors were attacked by guard dogs and pepper sprayed by the private security team hired to protect the pipeline (Yohannan, 2016). This led the tribe to file for an emergency restraining order to stop construction, which a judge granted on September 6, 2016 (Yohannan, 2016). The Department of Justice, Department of the Army, and Department of the Interior stopped any permitting processes for more construction and urged ETP to stop construction 20 miles from either side of the Missouri River, but they did not halt it until the restraining order was granted (Yohannan, 2016). The North Dakota Public Service Commission also filed a complaint against Dakota Access because they did not notify them of historic or cultural artifacts discovered on construction sites, a stipulation of their permit (Yohannan, 2016).

The protests became more and more heated, with regular confrontations between the tribe and law enforcement causing David Archambault II, Standing Rock Sioux tribal chairman, to ask for civil rights violations to be investigated on October 24. By November 14, the Corps agreed to wait until after more environmental impact reviews with the tribe was accomplished to approve an easement for construction under the Missouri River to Dakota Access ("Updates," 2017). On December 4, 2016, the easement was denied by the Corps ("Updates," 2017).

Because the use of the Fort Laramie Treaty historically has not had enough legal strength to stop pipeline construction alone, other federal laws were brought to bear in the fight against DAPL. These laws protect more than just Native people and can help protect the land by offering new perspectives on the issue (Yohannan, 2016). Luckily for the Sioux, there were plenty of other laws broken that allowed for the tribes and federal agencies to file lawsuits against the Corps and Dakota Access. Three Acts, CWA, NHPA, and NEPA were violated and strengthened the case against the legality of DAPL.

The Clean Water Act

CWA strictly prohibits the pollution of water through discharge of pollutants unless granted either a general or nationwide permit from the Corps (Yohannan, 2016). The Corps granted Dakota Access a permit that covers “utility line activities,” allowing it to transport gaseous, liquid, or slurry substances for any reason. A condition of this permit, however, is that a pre-construction notification (PCN) must be submitted if there is a possibility of the project affecting historic sites or sites that are eligible to be listed on the National Register of Historic Places, a requirement of the National Historic Preservation Act (Yohannan, 2016).

Both these components of the CWA were violated. Although Dakota Access denies it, the pipeline passes through former Native American territory that contains significant spiritual and cultural meaning for the Sioux, but tribal experts were not meaningfully consulted about the pipeline’s impact (Yohannan, 2016). Consultation that is done for the purpose of checking a box, being able to say it was done but does not adequately inform the tribes, does not meet the requirements of the laws and policies regarding indigenous consultation (Penn-Roco, 2016).

Meaningful consultation is true collaboration, a process that allows the tribe's input to have an impact on the final result and requires informed consent from the tribes (Penn-Roco, 2016). The company also only applied for twelve of the approximately 1,100 federally regulated water crossings in North and South Dakota. They also never submitted PCNs for the tribal historic sites that were disrupted (Yohannan, 2016). Had they been more thorough and clear during their consultation with the tribe, they would have discovered the importance of the areas and recognized that they were destroying the tribe's cultural identity. Any PCNs that were submitted were done so *only* after construction had already begun on tribal historic sites (Yohannan, 2016).

The National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires that any federal agency approving a permit or license needs to consider the effect of whatever is being proposed will have on historic sites (Yohannan, 2016). It explicitly requires agencies to identify historic properties and notify not only state but also tribal historic preservation offices and the Advisory Historic Preservation (ACHP). ACHP is the council that administers NHPA and they need to be informed about these sites so that they can evaluate any threats. The project cannot be approved until issues surrounding historic sites are resolved (Yohannan, 2016).

Multiple courts ruled that the Corps was not compliant with NHPA Section 106, the section that provides alternative compliance through a programmatic agreement for multi-state projects or when tribes and public participation are needed to determine the project's effects (Yohannan, 2016). The ACHP stated that the Corps only considered the direct effects of the pipeline on a sliver of land around the drilling at Lake Oahe. They did not consider indirect

impacts caused by the clearing, digging, and excavating. The lack of adequate communication between the Corps and the Tribal Historic Preservation Office led to the destruction of culturally significant ancestral lands (Yohannan, 2016).

The National Environmental Policy Act

The National Environmental Policy Act (NEPA) was established to protect the environment from the federal government beginning or approving projects that could cause damage to the environment (Yohannan, 2016). Federal agencies must make environmental assessments, and if they are relevant, the results need to be reported to the public. If the effects are adverse and significant, the federal agency must provide an environmental impact statement (EIS) which considered both direct and indirect effects. The EIS also must analyze the synergistic impacts of the project as a whole (Yohannan, 2016).

Environmental assessments were completed by the Corps and Fish and Wildlife Services and the EIS were released to the public. These assessments were only completed on individual segments but not on the pipeline and its construction's cumulative effects on grasslands and wetlands. Because the total synergistic impacts were not studied in North Dakota, the EPA decided that the impacts of drinking water and irrigation supplies and emergency preparedness were not adequately analyzed. The Department of the Interior sent a letter to the Corps stating that they must complete a full EIS, which they Corps has since begun (Yohannan, 2016).

Environmental Justice and DAPL

When the Corps decided not to allow the pipeline to pass north of Bismarck in the original route consideration, they focused on the proximity of the pipeline to the wellhead source for the city, the fact that it would be 11 miles longer, and would threaten more waterbodies, wetlands, and acres of land than the current pipeline (Warner, 2017). Because ETP chose to reroute the pipeline only a half mile upstream from the Standing Rock Sioux Reservation, with a population that is only 13.9 percent white, those against the pipeline argue that Native Americans are again being forced to bear a greater risk of issues from environmental degradation than white Americans (Warner, 2017).

Aside from the potential racism behind the rerouting, each of the Acts and any project involving Native Americans requires the free, prior, and informed consent (FPIC) of the tribes before ground can be broken on their culturally significant land (Woods, 2016). It can also be argued that FPIC is an important aspect of the EPA's definition of environmental justice. The EPA requires the affected group to be involved in the decision-making process and the group's concerns to be taken into account, ensuring that they are able to influence the process. The intent of the environmental justice approach is that one group, especially the underserved and underrepresented, should not bear the brunt of environmental degradation without their consent. A lack of consent has been a common issue in Native American communities since the beginning of colonialism on US soil.

The issues of environmental justice are distinct from those typically discussed in the US because of the deep, spiritual, and cultural connections the Standing Rock Sioux and the dispossession of these valued lands by the federal government. The process of settling the US directly undermined the ecological conditions, or complex relationships to place, that Native

Americans need for their cultures, economies, and political self-determination to flourish (Whyte, 2017). It can thus be argued that *all* the historic injustices experienced by the Native Americans are “environmental” injustices (Whyte, 2017, 165).

Chapter 6

Conclusion

The Standing Rock Sioux is a minority group that has experienced over centuries the profound loss of life, land, and culture at the hands of the federal government. They were killed, relocated, and forcibly assimilated into white dominant society. Trying to protect their sovereignty and land, they signed treaties created by US presidents and ratified by Congress. Because of the Fort Laramie Treaty, the Standing Rock Sioux has rights to the lands and resources surrounding their reservation. Thus, every piece of legislation passed after 1868 that took land from Native Americans without the consent of three-fourths of the adult male members of the tribe was illegal on the basis of the Treaty. This means that the US government has no right to provide permits to Dakota Access to construct the pipeline.

Apart from the breaking of the Fort Laramie Treaty, many other laws were broken that require the FPIC of tribes before starting projects in places that have cultural significance to the tribes. This lack of FIPC for projects that place environmental risks on the tribes also constitutes environmental injustice under the EPA's definition. Environmental justice issues are exacerbated by the destruction of the deep-rooted relationship between Native Americans and the land through settler colonial processes. "In the U.S. context, the very agricultural, military, transportation, and extractive industries that were facilitated by broken treaty agreements, allotment, and boarding schools, are the ones polluting and overusing lands and waters" (Whyte, 2017, 165).

Unfortunately, this blatant disregard for indigenous rights and cultural beliefs is nothing new, and it is extremely unlikely to end with the Dakota Access Pipeline, especially given the nature of the current U.S. administration. Our President has already taken executive action to approve the easements needed to complete both the Keystone XL and Dakota Access pipelines (“Updates,” 2017). His decision enforces the capitalist system that exploits indigenous people and other minorities for the benefit of white members of our society. DAPL is another extension of settler colonial tactics of domination of Native Americans and destruction of their culture through extractive ventures. President Trump is simply continuing the historical narrative of the subjugation and exploitation of indigenous people.

It is extremely important to educate the American people and those Native Americans who have lost touch with their cultural roots about the true history of cruelty towards those who came to this land at least 10,000 years before the creation of the United states. I believe this will inspire more people fight for indigenous rights. Many people do not understand even a portion of what occurred and is still occurring in the United States. Although I hope an issue to the magnitude of DAPL does not happen again, I think it has been important in opening dialogue in our nation about the treatment of its most dependent and vulnerable people. The subjugation and exploitation of Native Americans is a moral and ethical stain on our country, one that claims to be the land of the free and the home of democracy, and yet we still have trouble following our own laws. More people, Native and non-Native American, need to be educated and empowered to fight against racist practices that continue to place undue environmental burdens on Native American communities.

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The Pennsylvania State University
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HONORS

Schreyer Honors College Scholar
Thesis Title: Breaking Ground and Breaking Treaties: Justice, Native Americans, and the Dakota Access Pipeline
Dean's List: 2014 to 2017
The Honor Society of Phi Kappa Phi: April 2018 to present

EXPERIENCE

Parks and People, Cape Town, South Africa **January 2017 - April 2017**

- Participated in an integrative research and learning experience in which students acted as ecological research assistants and aided in educational events for middle school students
- Developed business plans, resumes, and decision-making reports
- Assisted in managing the Parks and People social media accounts to showcase completed work
- For more information on the program, visit www.sites.psu.edu/parksandpeoplesouthafrica/

National Great Rivers Research and Education Center, East Alton, IL **May 2016 - August 2016**

Environmental Education Intern

Organized and executed focus groups for educators in cities near the Mississippi River to gauge student and adult understanding of the deep-rooted connection between the communities and the river

Analyzed and interpreted qualitative data acquired from focus groups and interviews for use in the development of a curriculum for the Mississippi River Swarovski Waterschool

LEADERSHIP & ACTIVITIES

Waynewood Lake Committee, Lake Ariel, PA **May 2011 - Present**

Lake Mat Subcommittee

- Collected water samples and consulted with the lab which conducted the analysis
- Discussed environmental issues with members of the committee and prioritized next steps
- Created educational materials to inform the community of ecosystem quality issues

- Worked with a subgroup in the committee to test the efficacy of lake mats to stop growth of nuisance plants

Penn State Dance Marathon (THON), University Park, PA **September 2014 - Present**
Dancer Relations Committee Member

- Worked as part of a group dedicated to maintaining the mental and physical health and safety of dancers who stood for 46 hours during the Penn State Dance Marathon dedicated to raising money for children battling pediatric cancer

Bits and Spurs 4-H Club, Lake Ariel, PA **October 2004 – August 2013**
President, 2012

- Led meetings, organized community service projects, and managed club members administratively in order to promote agricultural activities and awareness among youth

SKILLS

- Proficient in Microsoft Office, ArcGIS (ArcGIS Pro, ArcGIS Online, Esri Storymaps), and NVivo