

**STANDING ROCK SIOUX TRIBE: WHY WINNING
VACATUR UNDER NEPA MAY NOT BE ENOUGH TO
LIMIT DAMAGE TO THE ENVIRONMENT**

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I. INTRODUCTION

Beginning in April 2016, thousands of native and non-native people from across the world gathered at what is now known as the Oceti Sakowin Camp in North Dakota to protest the construction of the Dakota Access Pipeline (DAPL), which could contaminate the water supply for the Standing Rock Sioux Tribe as well as millions of Americans downstream.¹ The protest brought together over

1. Kolby KickingWoman, *Dakota Access Pipeline: Timeline*, INDIAN COUNTRY TODAY, <https://indian-countrytoday.com/news/dakota-access-pipeline-timeline>.

200 tribes that had not convened for more than 150 years.² They were met with police militarization and intimidation, with over 300 injuries at the hands of police in just one instance.³ What followed was years of court proceedings.⁴

On January 26, 2021, the U.S. Court of Appeals for the D.C. Circuit in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* affirmed in part and reversed in part the United States District Court for the District of Columbia.⁵ The U.S. Court of Appeals for the D.C. Circuit agreed with the lower court's rulings that the U.S. Army Corps of Engineers (the Corps) must prepare an Environmental Impact Statement, and that the easement granted to Dakota Access must be vacated.⁶ However, the Court of Appeals noted that the lower court's order for the emptying of the pipeline was improper.⁷ This reversal rested on the application of a four-factor test by the court.⁸

The test applied by the court requires that a plaintiff seeking a permanent injunction demonstrate that it has suffered an irreparable injury, remedies at law are inadequate to compensate for that injury, a remedy in equity is warranted after balancing the parties' hardships, and that the public interest would not be disserved by a permanent injunction.⁹ The court analyzed the irreparable injury prong and determined that the Standing Rock Sioux Tribe failed to show such an injury, therefore reversing the lower court's decision ordering the Corps and Dakota Access to empty the pipeline of oil.¹⁰

The D.C. Circuit's opinion is a case of first impression in that the court has never before had to decide whether to vacate an easement in a case where construction had already been completed.¹¹ It can also be read to reinforce the perception that the case marks a continuation of the federal government's historic lack of concern for tribal equitable interests.¹²

As the D.C. Circuit's opinion is related to issues of agency consultation with tribes and environmental justice, this note provides a history of the Standing Rock Sioux Tribe and the area the pipeline affects; a brief history of the Dakota Access Pipeline and pipelines in general; relevant permits and permissions; treaties and acts specific to tribal concerns; and a brief overview of tribal consultation. This

2. *Stand with Standing Rock: Protect Protesters' Rights*, ACLU, <https://www.aclu.org/issues/free-speech/rights-protesters/stand-standing-rock>.

3. *Id.* Protesters were subject to water cannons in subfreezing weather, as well as concussion grenades, sound cannons, and automatic rifles. *Id.* The National Guard was deployed to assist Dakota Access' private security guards in dealing with the protesters. Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017, 4:28 P.M.), <https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight>.

4. *See* KickingWoman, *supra* note 1.

5. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032 (D.C. Cir. 2021).

6. *Id.* at 1054.

7. *Id.*

8. *Id.* at 1053-54.

9. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010).

10. *Standing Rock Sioux Tribe*, 985 F.3d at 1053-54.

11. *Id.* at 1054.

12. For more information on the history of federal Indian law in the United States, *see generally* STEPHEN PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* (Oxford Univ. Press, 4th ed. 2012).

note further provides a brief discussion of the District Court proceedings; a detailed discussion of the appellate court's reasoning; reasons why NEPA is ineffectual in protecting the interests of tribes; an argument for stronger federal tribal consultation; and the future implications that this case will have for environmental justice.

II. BACKGROUND

A. *History of Lake Oahe and the Standing Rock Sioux Tribe*

Lake Oahe is the fourth largest manmade water reservoir in North America, stretching from Pierre, South Dakota to Bismarck, North Dakota.¹³ Its waters provide irrigation, conservation, flood control, electric power, and recreation to many Midwestern States.¹⁴ The lake is also known for the fishing of walleye and other species as well as for the hunting of several species of waterfowl.¹⁵ It is situated along the Missouri River, which forms the fourth largest river system in the world,¹⁶ and runs along the Standing Rock Sioux and Cheyenne River Sioux Indian reservations.¹⁷ The lake's waters service homes, healthcare and educational facilities, businesses, and government buildings and support agriculture and industry on the Standing Rock Sioux Reservation.¹⁸ It is also the primary water source for the Cheyenne River Reservation, and both tribes consider the waters to be sacred and central to their religious practices.¹⁹

The lake was created by the Corps after the Flood Control Act authorized construction of a dam in 1944.²⁰ As part of the Pick-Sloan Plan, a joint water development program between the Corps and the Bureau of Reclamation to facilitate the dam's creation, the Corps removed 190 Indian families from their homes on the Standing Rock Sioux Reservation.²¹ "Nearly one hundred sixty thousand acres of Indian land" on both the Standing Rock and Cheyenne River reservations was flooded to accommodate the project, and a large hydroelectric power plant

13. *Lake Oahe, South Dakota*, NASA EARTH OBSERVATORY, <https://earthobservatory.nasa.gov/images/145962/lake-oahe-south-dakota#:~:text=Lake%20Oahe%20is%20the%20fourth,changes%20frequently%2C%20especially%20during%20droughts>.

14. *Id.*

15. *Oahe Hunting and Fishing Details*, U.S. ARMY CORPS OF ENG'RS, <https://www.nwo.usace.army.mil/Missions/Dam-and-Lake-Projects/Missouri-River-Dams/Oahe/Hunting-Fishing-Details/>.

16. *Missouri River*, AM. RIVERS, <https://www.americanrivers.org/river/missouri-river/#:~:text=The%20Missouri%20River%20will%20travel,to%20the%20Gulf%20of%20Mexico>.

17. CHEYENNE RIVER SIOUX TRIBE, <https://www.cheyenneriversiouxtribe.org/>; *The Founding of Standing Rock Sioux Tribe*, STANDING ROCK SIOUX TRIBE, <https://standingrock.org/about/>.

18. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 114 (D.D.C. 2017).

19. *Id.*

20. U.S. BUREAU OF RECLAMATION, OAHÉ UNIT: JAMES DIVISION 8-9 (2008), <https://www.usbr.gov/history/ProjectHistories/PSMBP%20OAHÉ%20UNIT.pdf>.

21. Michael L. Lawson, *The Oahe Dam and the Standing Rock Sioux*, 6 S.D. HIST. 203, 203-4 (1976).

was installed.²² The construction of the dam was one in a long series of land cessions that reduced the reservation area from its original 2.3 million acres in 1889 to 844,000 acres by 1976.²³

B. A General History of U.S. Pipelines and DAPL

The first successful crude oil pipeline was erected in 1865 and transported approximately 2,000 barrels of oil a day across five miles.²⁴ Such pipelines were intended to allow private companies to control the transport of oil.²⁵ In the late 1800s, Standard Oil, an oil refining company formed by John D. Rockefeller, controlled ninety percent of oil refining nationwide.²⁶ Subsequently, Congress enacted the Sherman Antitrust Act in 1890, which challenged the company's monopoly, and the Hepburn Act in 1906, which "required oil pipeline carriers to provide equal service costs to all shippers."²⁷ Standard Oil was later dissolved by court order in 1912.²⁸

As the nation entered WWII, oil became critical to the war effort.²⁹ In response, the federal government built what was known as the Big Inch, a pipeline that stretched from Texas to New Jersey and was later converted to a natural gas pipeline.³⁰ In the decades following, companies built more pipeline than any time before or since, a process that went largely unnoticed and undocumented.³¹ This increase in pipeline construction was due to growth of industry that took place during the war and increasing awareness of the importance of petroleum to the nation's security interests following wartime gasoline rationing.³² As of 2014, the U.S. had 2.6 million miles of pipeline running throughout the country, "more than anywhere else in the world,"³³ and as of 2019, the world's longest crude oil pipeline ran 2,353 miles, transporting over 1.6 million barrels a day.³⁴

22. *Id.* at 204-5.

23. *Id.* at 205.

24. Laura Clark, *Oil Companies First Built Pipelines in the 1860s: They've Been Contested Ever Since*, SMITHSONIAN MAG. (Jan. 12, 2015), <https://www.smithsonianmag.com/smart-news/americas-first-oil-pipelines-180953870/>.

25. *Id.*

26. *Standard Oil Established*, LIBR. OF CONG., <https://guides.loc.gov/this-month-in-business-history/january/standard-oil-established>.

27. Claudia Farrell, *Digging Further Into the History of Pipelines*, BURNS MCDONNELL (Aug. 14, 2020), <https://blog.burnsmcd.com/digging-further-into-the-history-of-pipelines>.

28. *Id.*

29. Stephanie Joyce, *The Strange History of the American Pipeline*, KUNC NEWS, (Aug. 5, 2014), <https://www.kunc.org/business/2014-08-05/the-strange-history-of-the-american-pipeline>.

30. *Id.*

31. *Id.*

32. *Foreign Economic Policy, Report to the National Security Council by the Executive Secretary*, OFF. OF THE HISTORIAN (1977), available at <https://history.state.gov/historicaldocuments/frus1950v01/d156>.

33. Joyce, *supra* note 29.

34. Clark, *supra* note 24.

One of the more controversial modern pipelines is the DAPL.³⁵ Owned and operated by Dakota Access,³⁶ the DAPL was announced publicly in 2014.³⁷ It transports approximately 570,000 barrels of crude oil over 1,200 miles, from the Bakken shale in North Dakota to southern Illinois.³⁸ From there, the oil moves through other pipelines to refineries near the Gulf of Mexico.³⁹ The DAPL also crosses the Missouri River at Lake Oahe, half a mile upstream from the Standing Rock Sioux reservation.⁴⁰ The land where the pipeline crosses Lake Oahe was reserved as Sioux territory in the two Treaties of Fort Laramie and later taken away from the Sioux by a congressional Act.⁴¹ The originally proposed route would have had the pipeline run upstream from Bismarck, North Dakota, the state's capital.⁴² This route was rejected by the Corps due to concerns of potential contamination to the city's water supply.⁴³

C. Permitting Procedures and Permissions

Pipeline developers must comply with several permitting procedures and permissions before construction can begin.⁴⁴ Authorization for oil pipeline routes "must be granted by individual states."⁴⁵ However, many other federal approvals and permits are required, triggering agency obligations under the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA).⁴⁶

1. National Historic Preservation Act, Section 106

The National Historic Preservation Act was passed to protect national heritage sites from federal development.⁴⁷ It sets federal historic preservation policy, establishes partnerships between federal, state, and tribal governments, and creates

35. See generally Aaron Sidder, *Understanding the Controversy Behind the Dakota Access Pipeline*, SMITHSONIAN MAG. (Sept. 14, 2016), <https://www.smithsonianmag.com/smart-news/understanding-controversy-behind-dakota-access-pipeline-180960450/>; see also Arlette Saenz and Catherine Thorbecke, *Sanders Protests Controversial Dakota Access Pipeline Outside White House*, ABC NEWS (Sept. 13, 2016, 8:28 P.M.), <https://abcnews.go.com/US/sanders-protests-controversial-dakota-access-pipeline-white-house/story?id=42055322>.

36. *Dakota Access Pipeline*, NS ENERGY, <https://www.nsenegybusiness.com/projects/dakota-access-pipeline/>. Dakota Access was a joint venture between Energy Transfer Partners, MarEn Bakken Company, and Phillips 66. *Id.*

37. Cooper Thomas, *Oil, Water, and Steel*, COOPERTHOMAS.COM, <https://infinitecoop.github.io/oil-water-steel/index.html>.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Oil, Water, and Steel*, *supra* note 37.

42. *Id.*

43. *Id.*

44. See generally INTERSTATE NAT. GAS ASS'N OF AM., PIPELINE PERMITTING (2019), <https://in-gaa.org/wp-content/uploads/2019/01/34233.pdf>.

45. Paul W. Parfomak, *Dakota Access Pipeline: Siting Controversy*, FED'N OF AM. SCIENTIST (June 15, 2017), <https://sgp.fas.org/crs/misc/IN10567.pdf>.

46. *Integrating NEPA and Section 106*, ADVISORY COUNCIL ON HIST. PRES., https://www.achp.gov/integrating_nepa_106.

47. *National Historic Preservation Act of 1966*, NAT'L PARK SERV. (Nov. 9, 2021), <https://www.nps.gov/subjects/archeology/national-historic-preservation-act.htm>.

the National Register of Historic Places and National Historic Landmarks programs.⁴⁸ In addition to recognizing national sites significant to “American history, architecture, archeology, engineering, and culture,” the NHPA also recognizes sites that are significant to state and local entities.⁴⁹

In cases where a project will affect an historic property, defined as “prehistoric or historic districts, sites, buildings, structures, or objects that are eligible for or already listed in the National Register of Historic Places,” agencies must refer to Section 106 of the National Historic Preservation Act.⁵⁰ This requires agencies to take into account the effects of the project on historic properties and “to provide the Advisory Council on Historic Preservation (ACHP) with a reasonable opportunity to comment.”⁵¹ Agencies are also required to consult with “State Historic Preservation Offices (SHPO), Tribal Historic Preservation Offices (THPO), Indian Tribes (to include Alaska Natives) [Tribes], and Native Hawaiian Organizations (NHO)” on the Section 106 process.⁵²

2. National Environmental Policy Act

The National Environmental Policy Act was signed into law in 1970 and requires federal agencies to engage in pre-decision assessments of the environmental impacts of their proposed actions.⁵³ NEPA covers a broad range of actions, including “decisions on permit applications, adopting federal land management actions, and constructing highways and other publicly-owned facilities.”⁵⁴ Agencies also use the NEPA process to evaluate any social and economic impacts of their proposed projects and provide opportunities for public comment on such evaluations.⁵⁵ Agencies are required to prepare “detailed statements assessing the environmental impact” of actions that will significantly affect the environment, and any alternatives to such actions.⁵⁶ These statements are known as Environmental Impact Statements (EIS) and Environmental Assessments (EA).⁵⁷

The President’s Council on Environmental Quality (CEQ) oversees NEPA implementation.⁵⁸ The CEQ’s duties involve making sure that agencies meet their NEPA obligations, overseeing “agency implementation of the environmental impact assessment process,” and issuing regulations to agencies regarding NEPA compliance.⁵⁹ Many agencies have “developed their own NEPA procedures” to

48. *Id.*

49. *Id.*

50. U.S. DEP’T OF THE INTERIOR, NATIONAL HISTORIC PRESERVATION ACT, SECTION 106: A QUICK GUIDE FOR PRESERVING NATIVE AMERICAN CULTURAL RESOURCES (2012), https://home.army.mil/lewis-mcchord/application/files/9315/8040/2885/Sec_106_Process_flyer_pdf

51. *Id.* at 1.

52. *Id.*

53. *What is the National Environmental Policy Act?*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/nepa/what-national-environmental-policy-act>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *What is the National Environmental Policy Act?*, *supra* note 53.

58. *Id.*

59. *Id.*

supplement the regulations provided by the CEQ that are tailored to each agency's "specific mission and activities."⁶⁰ The NEPA process may involve a lead agency, which is responsible for complying with NEPA and "supervis[ing] the preparation of the environmental analysis," and one or more cooperating agencies, which have "special expertise with respect to an environmental issue or jurisdiction by law."⁶¹ In order for an oil pipeline's construction to be proper, the Corps must comply with NEPA's environmental documentation requirements.⁶²

D. *Relevant Treaties and Acts*

Several Acts and Treaties are relevant to the Dakota Access Pipeline controversy.⁶³ In 1851, the first Treaty of Fort Laramie was signed between the U.S. government and twenty-one Great Plains tribal chiefs.⁶⁴ The treaty called for peaceful relations between the tribes and the federal government, government right to establish roads and posts within tribal territories, government protection of the tribes from attack by non-Indians, boundaries of tribal territories, and government annuities to be paid to the tribes.⁶⁵ In 1868, a second Treaty of Fort Laramie was signed recognizing "the Black Hills as part of the Great Sioux Reservation, set aside for exclusive use" by the Sioux.⁶⁶ It also guaranteed the "undisturbed use and occupation" of reservation lands for the Sioux.⁶⁷ Areas of the DAPL run through the "1851 territories of tribal bands that make up" the Standing Rock Sioux, Cheyenne River Sioux, and Yankton Sioux Tribes, as well as the Great Sioux Reservation outlined in the second Treaty of Fort Laramie.⁶⁸

In 1889, Congress divided the Great Sioux Reservation into six smaller reservations, which remain intact today.⁶⁹ However, this did not invalidate the Fort Laramie treaties due to the Supremacy Clause,⁷⁰ lack of explicit congressional repeal, and U.S. Supreme Court holdings that subsequent treaties do not invalidate earlier treaties "unless the new treaty specifically addresses and removes the terms of the older treaty."⁷¹ This means that the lands that the DAPL crosses are still guaranteed to the Sioux for their undisturbed use and occupation.⁷²

60. *Id.*

61. *What is the National Environmental Policy Act?*, *supra* note 53.

62. See generally Nicole T. Carter et al., OIL AND NATURAL GAS PIPELINES: ROLE OF THE U.S. ARMY CORPS OF ENGINEERS, CONG. RES. SERV. (2017), <https://crsreports.congress.gov/product/pdf/R/R44880>.

63. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d 101; Complaint, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 1:16-cv-01534 (D.D.C. 2016).

64. *Fort Laramie Treaty of 1851 (Horse Creek Treaty)*, NAT'L PARKS SERV., <https://www.nps.gov/articles/000/horse-creek-treaty.htm>.

65. *Id.*

66. *Sioux Treaty of 1868*, NAT'L ARCHIVES, <https://www.archives.gov/education/lessons/sioux-treaty>.

67. *Treaties Still Matter: The Dakota Access Pipeline*, SMITHSONIAN NAT'L MUSEUM OF THE AM. INDIAN (2018), <https://americanindian.si.edu/nk360/plains-treaties/dapl>.

68. Jenny Schlecht, *1851 treaty resonates in DAPL discussion*, BISMARCK TRIB. (Nov. 10, 2016), https://bismarcktribune.com/news/state-and-regional/1851-treaty-resonates-in-dapl-discussion/article_e9bd6a47-e14e-507e-bb0a-8ee29eb30c9e.html.

69. *Id.*

70. *Id.*

71. *Id.* See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

72. See Schlecht, *supra* note 68; see also *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172.

In 1978, the American Indian Religious Freedom Act (AIRFA) was enacted by Congress.⁷³ The Act protects the right for Indians to exercise their traditional religions by ensuring “access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”⁷⁴ Such sites may trigger review under Section 106 of the NHPA due to potential eligibility “for inclusion in the National Register.”⁷⁵

In 1990, Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA).⁷⁶ The Act provides for the “repatriation and disposition of certain Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony” and recognizes that “human remains and other cultural items removed from Federal or tribal lands” belong firstly to the respective descendants and tribes.⁷⁷ The Act encourages a dialogue between museums and tribes to promote a greater understanding between the two while also recognizing museums’ societal functions in preserving the past.⁷⁸

III. ANALYSIS

A. *Factual and Procedural History*

In June 2014, Dakota Access, notified the Army Corps of Engineers of its intent to construct a portion of the Dakota Access Pipeline under Lake Oahe.⁷⁹ In order to receive permission for construction, it needed “three authorizations from the Corps: (1) verification that its activities satisfied NWP 12; (2) permission under the RHA; and (3) a real-estate easement under the MLA.”⁸⁰ In December 2015, the Corps published a Draft EA that evaluated the environmental effects of DAPL’s proposed crossing of Lake Oahe.⁸¹ It determined that there would be no significant environmental impacts, despite the Standing Rock and Cheyenne River tribes’ concern that the Corps had not sufficiently analyzed the “risks and consequences of an oil spill” and concerns from the Department of the Interior and the EPA.⁸² Both tribes and the Interior “requested that the Corps prepare an EIS.”⁸³ The Interior criticized the Corps for not adequately justifying its conclusion “that

73. 42 U.S.C. § 1996 (1978).

74. *Id.*

75. AMERICAN INDIAN RELIGIOUS FREEDOM ACT, NOAA (2011), <https://coast.noaa.gov/data/Documents/OceanLawSearch/Summary%20of%20Law%20-%20American%20Indian%20Religious%20Freedom%20Act.pdf>.

76. 25 U.S.C. §§ 3001-3013 (1990).

77. *Native American Graves Protection and Repatriation Act: Facilitating Respectful Return*, NAT’L PARKS SERV., <https://www.nps.gov/subjects/nagpra/index.htm> (last updated May 23, 2022).

78. *Id.*

79. *Standing Rock Sioux Tribe*, 985 F.3d 1032, 1040.

80. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d 101, 114.

81. *Standing Rock Sioux Tribe*, 985 F.3d at 1040.

82. *Id.*

83. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 115.

there would be no significant impacts” to the surrounding area, and the EPA requested additional information and mitigation be added to the EA due to lack of “sufficient analysis of direct and indirect impacts to water resources.”⁸⁴

On July 25, 2016, eight months after releasing its Draft EA, the Corps published a Final EA and a Mitigated Finding of No Significant Impact (Mitigated FONSI).⁸⁵ It concluded that the crossing at Lake Oahe would not “significantly affect the quality of the human environment” and, therefore, an EIS was not necessary.⁸⁶ It then verified that the pipeline activities satisfied NWP 12 and “granted permission under Section 408 of the Rivers and Harbors Act” for the pipeline’s placement at Lake Oahe.⁸⁷

1. Filing of Suit

Two days after the Corps released the Final EA, Standing Rock filed suit in the U.S. District Court for the District of Columbia against the Corps for declaratory and injunctive relief “pursuant to the [NHPA], [NEPA], [the CWA], and the [RHA].”⁸⁸ The complaint also alleged, among other things, that the consultation procedures the Corps adopted to satisfy its § 106 obligations were never approved by the Advisory Council on Historic Preservation, and were therefore invalid.⁸⁹ Dakota Access intervened in support of the Corps, and Cheyenne River intervened as a Plaintiff.⁹⁰ “The tribes initially sought a preliminary injunction based solely on the NHPA, contending principally that the clearing and grading of land along the pipeline route desecrated sites sacred to them.”⁹¹ After the district court denied that motion, “the Departments of Justice, the Interior, and the Army issued a joint statement” that the pipeline construction “bordering or under Lake Oahe would not go forward’ until the Army could determine whether reconsideration of any of its previous decisions regarding the crossing under NEPA or other federal laws was necessary.”⁹² At that time, the Corps refused to grant the MLA easement.⁹³

2. Further Consideration

The Corps’ Chief Counsel prepared a memorandum as part of its internal review process that concluded that it had “adequately considered and disclosed” potential impacts, that its decisions were not arbitrary or capricious, and that “supplementation of the EA . . . [was] not legally required.”⁹⁴ On November 14, 2016, Assistant Secretary of the Army for Civil Works Jo-Ellen Darcy informed Standing Rock and Dakota Access that the Army had completed its review and had

84. *Id.*

85. *Standing Rock Sioux Tribe*, 985 F.3d at 1041.

86. *Id.*

87. *Standing Rock Sioux Tribe*, 225 F. Supp. 3d at 116.

88. *Id.* at 116-17.

89. Complaint for Declaratory and Injunctive Relief at 9, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101 (D.D.C. 2017) (No. 1:16-cv-01534), 2016 WL 4033936.

90. *Standing Rock Sioux Tribe*, 225 F. Supp. 3d at 117.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Standing Rock Sioux Tribe*, 225 F. Supp. 3d at 117.

concluded that its previous decisions satisfied legal requirements.⁹⁵ The Army then invited Standing Rock to discuss potential conditions that would “enhance the protection of Lake Oahe, the Tribe’s water supplies, and its treaty rights,” among other things.⁹⁶

On November 16, Darcy and other Corps officials met with representatives from the Great Plains Tribal Chairpersons’ Association to confirm that the correspondence “constituted an invitation to the [T]ribes to provide any new information . . . relevant to the Corps’ consideration of the easement.”⁹⁷ Further comments were offered by Standing Rock.⁹⁸ The Corps’ Omaha District Commander met with Standing Rock and Dakota Access representatives to review the tribe’s concerns and discuss conditions that could be imposed to reduce spill risks.⁹⁹ The next day, the District Commander recommended that the Corps grant the easement.¹⁰⁰

The Corps also solicited the opinion of the Department of the Interior regarding the “extent to which tribal treaty rights” weighed for or against authorizations for the crossing.¹⁰¹ The Interior’s Solicitor recommended that the Corps not decide whether to issue the easement before consulting with the tribe; prepare an EIS; and more comprehensively assess the pipeline’s tribal impact “in light of the fact that the reservation is a permanent homeland for the Tribes, as well as other federal obligations towards the Tribes.”¹⁰² That same day, Darcy issued a memorandum to the Corps’ Commander stating that the Army had “not made a final decision on whether to grant the easement.”¹⁰³ On January 18, 2017, she published a notice of intent in the Federal Register to prepare an EIS.¹⁰⁴

3. A New Administration

On January 24, soon after taking office, President Trump issued a memorandum directing the Army to expedite approval for the construction and operation of the DAPL, and to consider whether to rescind or modify the notice of intent to prepare an EIS.¹⁰⁵ After completing a technical and legal review on February 3, the Army determined that the Final EA and FONSI satisfied NEPA requirements and “support[ed] a decision to grant an easement.”¹⁰⁶ It further determined that the Final EA “did not require further supplementation” and published a “notice of termination of its intent to prepare an EIS.”¹⁰⁷ After providing notice to Congress,

95. *Id.*

96. *Id.* at 118.

97. *Id.*

98. *Standing Rock Sioux Tribe*, 225 F. Supp. 3d at 118.

99. *Id.*

100. *Id.* at 118.

101. *Id.*

102. *Standing Rock Sioux Tribe*, 225 F. Supp. 3d at 118-19.

103. *Id.* at 119.

104. *Id.*

105. *Id.*

106. *Standing Rock Sioux Tribe*, 225 F. Supp. 3d at 119.

107. *Id.* at 119-20.

the Corps issued an easement on February 8.¹⁰⁸ Dakota Access completed construction of the segment beneath Lake Oahe in late March, and the pipeline “became fully operational on June 1, 2017.”¹⁰⁹

4. Response to DAPL Construction

Cheyenne River filed a Second Amended Complaint and a motion for preliminary injunction and application for a temporary restraining order, which Standing Rock joined.¹¹⁰ The district court denied the motions.¹¹¹ Standing Rock moved for “leave to amend its Complaint to address new developments” since July 2016, and then filed a Motion for Partial Summary Judgment on claims concerning “the Corps’ decision not to prepare an EIS . . . ; its granting of the easement; and its permitting of the Lake Oahe crossing under NWP 12.”¹¹² The Corps responded with a Cross-Motion for Partial Summary Judgment, and Dakota Access joined.¹¹³ Cheyenne River joined Standing Rock’s Motion and filed its own Motion for Partial Summary Judgment on claims concerning “the Corps’ decisions to grant Dakota Access a permit under Section 408 of the RHA and an easement under the MLA.”¹¹⁴ The Corps and Dakota Access then cross-moved for partial summary judgment on those claims.¹¹⁵

5. District Court Decision and Subsequent Appeal

The district court ultimately ordered the Corps to conduct an EIS, vacated the pipeline’s easement, and ordered that the pipeline be shut down and emptied of oil.¹¹⁶ The Corps and Dakota Access appealed to the U.S. Court of Appeals for the D.C. Circuit in order to challenge the district court’s conclusion.¹¹⁷

B. Appellate Court Analysis

The Corps and DAPL criticized the court’s analogizing to its decision in *National Parks*, which held that in order for a decision to be highly controversial, a substantial dispute must exist as to the “size, nature, or *effect* of the major federal action,” and there must be something more beyond the fact that some people might be agitated enough to go to court about it.¹¹⁸ They argued that the Corps’ efforts to respond to the Tribes’ criticisms were not superficial.¹¹⁹ The court responded that it had not taken a position on the matter, only that it noted that other agencies

108. *Id.* at 120.

109. *Id.*

110. *Standing Rock Sioux Tribe*, 225 F. Supp. 3d at 120.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Standing Rock Sioux Tribe*, 225 F. Supp. 3d at 120-21.

115. *Id.* at 121.

116. *Standing Rock Sioux Tribe*, 985 F.3d at 1042.

117. *Id.*

118. *Id.* at 1042 (quoting *Nat’l Parks Conservation Ass’n v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019)).

119. *Id.* at 1043.

had expressed such concerns.¹²⁰ It further stated that the Corps' position regarding the superficiality of its efforts did not comport with the court's statement in *National Parks* that the deciding factor is whether the agency has not only addressed, but resolved the controversy surrounding its analysis.¹²¹

The Corps and DAPL also argued that in the current case, the criticism came from the Tribes and their consultants rather than from disinterested public officials as in *National Parks*.¹²² The court responded by explaining that the Tribes are not merely not-in-my-backyard neighbors, but sovereign nations with stewardship responsibilities over the natural resources implicated by the project.¹²³ The court further explained that while the Tribes are not the federal government, it emphasized in *National Parks* that entities other than the federal government play an important role, and that the Tribes qualified as such.¹²⁴

The court then turned to four aspects of the Corps' analysis that, according to the district court, involved unresolved scientific controversies regarding NEPA's highly controversial factor:¹²⁵ DAPL's leak detection system and operator safety record, winter conditions, and worst case discharge.¹²⁶

1. DAPL's Leak Detection System

The Corps pointed out that the 2012 PHMSA study relied on by the district court did not reflect an 80 percent failure rate, but rather that in 80 percent of all incidents, the monitoring system used by DAPL was not the first to detect a leak.¹²⁷ However, the court stated that the fact that DAPL's monitoring system was eclipsed by visual identification cast serious doubt on the Corps' assurance that the system will detect leaks within seconds.¹²⁸ In fact, the study explained that the type of monitoring system used by DAPL did not respond more often than personnel or members of the public passing by pipeline leaks.¹²⁹ The court further stated that the Corps' failure to address the disconnect between its representations about the system and the results of the PHMSA study was especially significant since visual identification will be unlikely to make up for deficiencies in the monitoring system due to the fact that the pipeline is buried deep underground.¹³⁰ The court also emphasized several instances where pipelines leaked for days after similar detection systems failed, including an instance involving DAPL's own operator, concluding that there is adequate reason to believe that such a leak could cause substantial harm.¹³¹

120. *Standing Rock Sioux Tribe*, 985 F.3d at 1043.

121. *Id.* at 1043.

122. *Id.*

123. *Id.* at 1043-44.

124. *Standing Rock Sioux Tribe*, 985 F.3d at 1044.

125. *Id.*

126. *Id.*

127. *Id.* at 1045.

128. *Standing Rock Sioux Tribe*, 985 F.3d at 1045.

129. *Id.*

130. *Id.*

131. *Id.*

2. DAPL's Operator Safety Record

The court agreed with the district court that the Corps' decision to rely on general pipeline safety data rather than DAPL's operator's safety record in regard to its risk analysis rendered the Corps' decision highly controversial.¹³² DAPL's operator was described as having one of the lower performing safety records of any pipeline operator for spills.¹³³ The Corps made two arguments in response.¹³⁴ The first was that 70 percent of the operator's accidents were minor and limited to the operator's property.¹³⁵ However, the court explained, this did not address the 30 percent of spills that were not limited to operator property and "the criticism that the spill analysis should have incorporated the operator's record."¹³⁶ The second argument was that the Corps did not need to address the operator safety controversy at all because the Court should have deferred to the agency's technical judgment.¹³⁷ The court explained that Supreme Court precedent had previously stated that agencies must explain why they choose to exercise their discretion in the manner that they do, and that the Corps did not make such an effort in the present case.¹³⁸

3. Winter Conditions

The Corps argued that its non-quantitative response to a winter spill scenario was adequate, so it did not need to conduct a quantitative evaluation.¹³⁹ The court, however, declared the agency's lack of attempt at explaining its conclusion as insufficient.¹⁴⁰ The Corps continued, arguing that the Tribes did not present a specific alternative for incorporating winter conditions into its spill response modeling.¹⁴¹ The court countered that this did not justify the Corps discounting "relevant, serious criticism" of its analysis, and that the Corps cannot "foist its duty to consider such technical matters onto commenters who point out valid deficiencies."¹⁴²

4. Worst Case Discharge

The Corps argued here that an accident leading to a large rupture was extremely unlikely, and that no statute or regulation required it to calculate a worst case discharge.¹⁴³ The court agreed with the district court that because the Corps performed such a calculation and relied on it in its analysis, it could not dispel

132. *Standing Rock Sioux Tribe*, 985 F.3d at 1046.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Standing Rock Sioux Tribe*, 985 F.3d at 1046

137. *Id.* at 1047.

138. *Id.*

139. *Id.*

140. *Standing Rock Sioux Tribe*, 985 F.3d at 1047.

141. *Id.* at 1048.

142. *Id.*

143. *Id.*

doubts about its methods by simply stating that it did not need to use such a calculation anyway.¹⁴⁴ It concluded that the agency's failure to explain why it did not consider human errors or technical malfunctions, as well as why its conservative assumption model counterbalanced the spill risks, left unresolved the dispute as to its worst-case discharge calculation.¹⁴⁵

The court further stated that although risk of a leak is low, the risk is sufficient "that a person of ordinary prudence would take it into account in reaching a decision" to approve the pipeline's placement.¹⁴⁶

5. Challenge to the District Court's Remedy

Regarding the district court's order requiring the Corps to prepare an EIS, the Corps argued that implicating the highly controversial factor did not mandate preparation of an EIS.¹⁴⁷ The court countered by stating that this case was like *National Parks* in that an EIS was ordered when the Corps failed to make a case that an EIS was unnecessary, both cases presented the exact circumstances for which Congress intended to require an EIS, and the context of the present case weighed in favor of an EIS.¹⁴⁸

Regarding vacatur of the easement, the court explained that ordinary practice is to vacate unlawful agency action.¹⁴⁹ However, courts may exercise discretion to leave an agency action in place while the decision is remanded depending on the seriousness of the order's deficiencies and the disruptive consequences of an interim change.¹⁵⁰ As to the seriousness of the deficiency, the district court concluded that resolution of the controversies on remand was unlikely because the Corps had failed to resolve them on remand previously, and that the Corps focused on whether it could justify its easement decision rather than its decision not to conduct an EIS.¹⁵¹

As to the disruptive consequences of vacatur, the district court noted that shutting down pipeline operations would result in significant economic harm, but nonetheless concluded that that did not justify remanding without vacatur for four reasons: (1) the Corps' expedited EIS preparation timeline would slow economic disruption of a shutdown, (2) economic disruption is not on its own a basis for declining to vacate agency action, (3) Dakota Access' approach would undermine NEPA's objectives, and (4) the risk of a spill counseled in favor of vacatur.¹⁵²

Regarding the district court's order to have the pipeline shut down and emptied of oil, the appellate court explained that the district court had not made the necessary findings for injunctive relief "under the traditional four-factor test."¹⁵³

144. *Standing Rock Sioux Tribe*, 985 F.3d at 1048.

145. *Id.* at 1049.

146. *Id.* at 1050 (quoting *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016)).

147. *Id.* at 1050.

148. *Standing Rock Sioux Tribe*, 985 F.3d at 1050.

149. *Id.*

150. *Id.* at 1051.

151. *Id.*

152. *Standing Rock Sioux Tribe*, 985 F.3d at 1051.

153. *Id.* at 1053 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 158 (2010)).

While the Tribes argued that an injunction was unnecessary because vacatur itself invalidated the easement, this approach did not comport with *Monsanto Co. v. Geertson Seed Farms*, which instructed that “a court must determine that an injunction *should* issue under the traditional four-factor test.”¹⁵⁴ The court further explained that with or without oil flowing, the pipeline would remain an encroachment on federal land, and there is no other instance in which a court had to determine “whether an easement already in use . . . must be vacated on NEPA grounds.”¹⁵⁵

6. Appellate Court Decision

The court affirmed the district court’s order vacating the easement and directing the Corps to prepare an EIS, but reversed that court’s order directing that the pipeline be shut down and emptied.¹⁵⁶

C. Argument for Injunction and Pipeline Shutdown

According to the Supreme Court in *Monsanto*, a party seeking permanent injunction must satisfy a four-factor test before such relief may be granted.¹⁵⁷ The party must demonstrate

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.¹⁵⁸

1. Irreparable Injury Prong

The D.C. Circuit in *Standing Rock* ruled that vacatur did not automatically result in removal of oil from the pipeline and the Tribes would still need to satisfy the four-part test for a permanent injunction to get that type of relief.¹⁵⁹ In so ruling, therefore, the Court did not address the fact that there were twelve spills, resulting in 6,000 barrels of leaked oil, in the first eighteen months of the pipeline’s operation or whether those facts might establish irreparable harm.¹⁶⁰ As of October, 2020, North Dakota, Iowa, and Illinois regulators approved expanding the pipeline, which doubled its capacity to 1.1 million barrels of oil per day.¹⁶¹ And,

154. *Id.* at 1053-54 (quoting *Monsanto*, 561 U.S. at 158).

155. *Id.*

156. *Standing Rock Sioux Tribe*, 985 F.3d at 1054.

157. *Monsanto Co.*, 561 U.S. at 156.

158. *Id.* at 156-57 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

159. *Standing Rock Sioux Tribe*, 985 F.3d at 1054.

160. Dan West & Jennifer Sass, *Huge Win for Standing Rock and the National Environmental Policy Act*, NRDC (Mar. 25, 2020), <https://www.nrdc.org/experts/dan-west/huge-win-standing-rock-and-national-environmental-policy-act>.

161. Kristin Lam, *North Dakota OKs expanding Dakota Access Pipeline, setting up legal fight with Standing Rock*, USA TODAY (Feb. 19, 2020, 7:50 PM), <https://www.usatoday.com/story/news/nation/2020/02/19/dakota-access-pipeline-expansion-approved/4812580002/>; Susan Cosier, *Expand the DAPL? Only Illinois Stands in the Way*, NRDC (May 5, 2020), <https://www.nrdc.org/stories/expand-dapl-only-illinois-stands-way>; *Illinois*

Energy Transfer expects to have expanded capacity available by the third quarter of 2021.¹⁶² This development will require “more pumping stations and significantly increase[s] the pressure inside the pipeline,” greatly increasing the risk of a spill.¹⁶³ These factors too may be relevant in ruling on whether a permanent injunction warranting removal of oil from the pipeline should be required to redress irreparable harm.

2. Inadequate Remedies, Balance of Hardship, and Public Interest

Regarding the inadequate remedies prong of the four-part test that will be before the district court, “damage theory is predicated on a theory of economic inadequacy.”¹⁶⁴ Certain considerations, such as lost profits from a new business, are too speculative to properly award monetary damages.¹⁶⁵ Courts have attempted to address this economic inadequacy problem by forgoing money damages and enjoining “to vindicate the legally recognized but subjective . . . impairment” which damages doctrine fails to consider.¹⁶⁶ Pollution actions, such as the present case, clearly illustrate the inadequacy of monetary compensation.¹⁶⁷ Seeing as how the injury experienced by the Tribes affects public health,¹⁶⁸ remedies at law are unlikely to adequately compensate for such injury.

When addressing a permanent injunction, courts will assess and balance the relative hardships that the parties will endure if an injunction is granted or denied.¹⁶⁹ The effect on third parties is considered irrelevant.¹⁷⁰ Given the environmental, health, and safety considerations facing the Tribes,¹⁷¹ they will be forced to endure a greater hardship than the economic hardship experienced by Dakota Access and the oil industry if the injunction is not granted.¹⁷²

Given that Lake Oahe feeds into the Missouri River, creating the longest river system in the country relied upon by several Midwestern states,¹⁷³ shutting down the pipeline and therefore eliminating the risk of a catastrophic spill would benefit the public interest rather than disserve it.¹⁷⁴

approves expansion of Dakota Access oil pipeline, REUTERS (Oct. 15, 2020, 10:59 AM), <https://www.reuters.com/article/us-energy-transfer-oil-pipeline-illinois/illinois-approves-expansion-of-dakota-access-oil-pipeline-idUSKBN2702DL>.

162. *Illinois approves expansion of Dakota Access oil pipeline*, *supra* note 161.

163. West & Sass, *supra* note 160.

164. Doug R. Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 349 (1981).

165. *Id.*

166. *Id.*

167. *Id.* at 350.

168. See West & Sass, *supra* note 160; see also *Standing Rock*, 985 F.3d at 1046.

169. Jean Dassic, *Federal Circuit on balancing the hardships for a post-eBay injunction*, FED. CIR. ON DAMAGES AND OTHER REMEDIES (Sept. 9, 2016), <http://www.fedcircdamages.com/federal-circuit-on-balancing-the-hardships-for-a-post-ebay-injunction/>.

170. *Id.*

171. See West & Sass, *supra* note 160; see also *Standing Rock Sioux Tribe*, 985 F.3d at 1046; *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 114.

172. *Standing Rock Sioux Tribe*, 985 F.3d at 1051.

173. *Lake Oahe, South Dakota*, *supra* note 13; *Missouri River*, *supra* note 16.

174. See West & Sass, *supra* note 160.

D. *Waiting to Shut Down the Pipeline Will Harm the Tribe*

Here, the D.C. Circuit Court of Appeals did not address the question of irreparable harm because it found that vacatur of the easement did not itself imply that the pipeline had to be shut down.¹⁷⁵ This it added, however, did not mean that the Tribe was without recourse:

It may well be—though we have no occasion to consider the matter here—that the law or the Corps’s regulations oblige the Corps to vindicate its property rights by requiring the pipeline to cease operation and that the Tribes or others could seek judicial relief under the APA should the Corps fail to do so. But how and on what terms the Corps will enforce its property rights is, absent a properly issued injunction, a matter for the Corps to consider in the first instance, though we would expect it to decide promptly.¹⁷⁶

The problem created for the Tribes by this ruling is that while the injunction litigation proceeds, the pipeline will continue to fully operate while trespassing on federal lands.¹⁷⁷ Given the poor safety record of the operator the court’s narrow reading of the scope of vacatur may set a dangerous precedent for future environmental justice situations.

E. *Future Implications for Environmental Justice*

Water is a critical resource to tribes, and it affects the “physical, cultural, and economic wellbeing” of those who reside on or near tribal lands.¹⁷⁸ Native Americans are at a higher risk for health issues resulting from water contamination compared to other populations,¹⁷⁹ and quality water resources are essential for economic growth in Indian Country.¹⁸⁰ Former Commission of Civil Rights chair Martin Castro has stated that “the issues raised by the pipeline relate[d] to ‘the entire relationship between the United States and sovereign Indian Nations, their rights, traditions[,] and religious beliefs.’”¹⁸¹ According to legal scholar Mary Kathryn Nagle, NEPA failed to achieve an outcome requiring the federal government and Dakota Access to respect the Tribe’s inherent sovereignty.¹⁸²

The pipeline continues to operate as usual, despite the fact that it is trespassing on federal land.¹⁸³ Because the court has allowed Dakota Access to continue its operations and held that vacatur was not enough to shut down the pipeline, the

175. *Standing Rock Sioux Tribe*, 985 F.3d at 1053-54.

176. *Id.* at 1054.

177. Lawrence Hurley, *Dakota Access Pipeline suffers U.S. Supreme Court setback*, REUTERS (Feb. 22, 2022), <https://www.reuters.com/business/energy/us-supreme-court-turns-away-dakota-pipeline-operators-appeal-2022-02-22/>.

178. U.S. COMM’N ON CIVIL RIGHTS, *BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS* 181 (2018), <https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf>.

179. *Id.* at 182.

180. *Id.* at 183.

181. *Id.* at 185.

182. Mary Kathryn Nagle, *Environmental Justice and Tribal Sovereignty: Lessons from Standing Rock*, 127 YALE L.J. 667, 668 (2018).

183. *See Standing Rock Sioux Tribe*, 985 F.3d at 1054.

unfortunate consequence is to delay resolution of the case until a permanent injunction can be litigated, which will result in serious interim harm and potentially disastrous environmental justice consequences.

IV. CONCLUSION

In *Standing Rock Sioux Tribe*, the D.C. Circuit reversed the District Court's decision regarding the order to shut down the Dakota Access Pipeline and empty it of oil.¹⁸⁴ At the heart of the Court's decision was its determination that the scope of vacatur was narrower in the case of federal easements than it was where construction and operating permits or certificates were unlawfully issued.¹⁸⁵ The tribes had argued that an injunction was unnecessary because vacatur of the easement necessarily implied that the pipeline would have to suspend operations.¹⁸⁶ And they had reasonable grounds to think so. Only a few years earlier, the same Court had "vacated a [natural gas] pipeline authorization due to a NEPA violation"¹⁸⁷ and had also "appeared to accept the parties' assumption that vacating Corps-issued construction permits would require ceasing construction of the challenged electrical towers or tearing them down."¹⁸⁸ But, the Court explained, "[t]hose cases involved challenges to agency authorizations of the very activities the court assumed would end"—namely authorizations to construct and operate facilities.¹⁸⁹ By contrast, in this "quite unusual case" the pipeline being challenged would remain an encroachment, "with or without oil flowing."¹⁹⁰ In essence, the court refused to affirm the shutdown order because the issue of whether to vacate an easement already in use, as opposed to vacatur of an operating or construction license or permit, is a case of first impression.¹⁹¹

The court explained that the law or the Corps' regulations might require the Corps to "vindicate its property rights by requiring the pipeline to cease operation," but that this was a matter for the Corps to consider itself.¹⁹² Despite the Court's expectation that the agency would deal with the issue "promptly,"¹⁹³ one might reasonably be skeptical that the agency will act with alacrity, given that its failure to conduct an environmental review had been remanded to the agency numerous times with no result.¹⁹⁴

The case provides a cautionary tale for those with solid cases challenging an agency's failure to comply with NEPA before granting easements as opposed to

184. *Id.* at 1032.

185. *Id.* at 1054.

186. *Id.* at 1053.

187. *Standing Rock Sioux Tribe*, 985 F.3d at 1054 (citing *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017)).

188. *Id.* (citing *National Parks Conservation Ass'n v. Semonite*, 925 F.3d 500, 502 (D.C. Cir. 2019)).

189. *Id.* at 1054.

190. *Id.*

191. *Standing Rock Sioux Tribe*, 985 F.3d at 1054.

192. *Id.*

193. *Id.*

194. *Id.* at 1051; see also Jan Hasselman, *DAPL Update: Tribe Asks Court to Shut Down DAPL Due to Failed Remand; Massive Pipeline Expansion Planned*, EARTHJUSTICE (Mar. 18, 2020), <https://earthjustice.org/feature/dakota-access-pipeline-legal-explainer-remand>.

operating or construction permits. Parties in this posture would be well advised to seek expedited action on permanent injunctions at the same time they seek vacatur. That extra step may be needed to ensure that agencies will adequately comply with NEPA and similar statutes before and during project construction in the future,¹⁹⁵ not only when it comes to projects with tribal impacts, but those impacting minority and low-income communities as well.¹⁹⁶

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195. West & Sass, *supra* note 160.

196. See generally *Hearing on Envtl. Just. In Indigenous Cmty's.: Before the H. Comm. on Nat. Res. Comm. Subcomm. for Indigenous Peoples of the U.S.* (2021) (testimony of Ira Taken Alive, Vice-Chairman, Standing Rock Sioux Tribe).

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