

Resistance to the Dakota Access Pipeline

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On March 10, 2018, officers in Washington, D.C., coordinated traffic as protestors meandered towards the White House. Mni Waconi (“water is life”) was their motto as they protested the Dakota Access Pipeline’s implications of environmental injustice and cultural insensitivity towards Indigenous peoples. Indigenous horse nations from Standing Rock to Tioga led a Spiritual Horse Ride and rendezvoused with advocacy groups. The events at Standing Rock were a culmination of longstanding tensions. Indigenous people joined with environmental activists and farmers to resist the Dakota Access Pipeline.

The Dakota Access Pipeline is a controversial investment in an unsustainable industry. Assuming constant consumption of crude oil at present rates, projections based on British Petroleum data indicate crude oil depletion in fifty years (Ritchie, 2017). The pipeline currently moves 40 percent of Bakken oil production at over half a million barrels daily. Energy Transfer Partners, the pipeline’s builder, defends the pipeline as a “safer means of transportation over truck and rail” and as a source of jobs and internal revenue (ETP, n.d.). Pipelines are far less likely to incur spills per unit moved, yet risk contamination of groundwater and farmland. Honor the Earth contends that photovoltaic systems, wind towers, and retrofit packages would have been wiser investments with respect to sustainability (HtE, n.d.).

Currently, the main contributors of greenhouse gas emissions in the United States are transportation and electrical power, respectively, at over a quarter each. Of these, more than 90 percent of transportation emissions come from petroleum and almost two-thirds for electricity come from natural gas and coal (EPA, 2019). Acid rain, mercuric emissions and bioaccumulation, and oil spills are other liabilities owing to nonrenewable energy. Nonrenewable

energy threatens the health and security of biodiversity and will inevitably collapse, yet these sources still dominate (Greentumble, 2017).

The obstacles to renewable energy are, in part, social. Renewable energy often requires prohibitive initial investments whereas nonrenewable sources are readily available and cheap. Renewables typically require subsidies to be competitive. Fossil fuel companies exert substantial political influence through lobbying and compromise regulatory agencies. A rapid shift to renewables would render extensive infrastructure, such as pipeline networks, obsolete. The shift to renewable resources therefore demands complex planning (Greentumble, 2017).

Resistance from the Standing Rock Sioux belongs within a legacy of U.S. Settler Colonialism. The case of Standing Rock is characterized by acclaims to a lack of due diligence by the Army Corps of Engineers, who is tasked with overseeing permits for pipeline construction and operation. Earth Justice, the legal chapter representing the Standing Rock Sioux against the Corps, joins critics is citing that proper consultation was never conducted, and religious and cultural considerations were never addressed. The appeal to environmental injustice and the tactics through which Indigenous consent was evaded alludes to the techniques that have historically facilitated U.S. Settler Colonialism.

Installment of pipelines causes serious implications for farmers: decreases in property value, damages to land productivity, forfeiture of an agricultural legacy, risk of oil exposure, etc. *Just compensation* does not account for all aspects of risk, especially those accompanied by the act of installation, which warps soil infrastructure developed over generations (Mall, 2017). Critics attribute this negligence to the Federal Energy Regulatory Commission becoming a critical capture point for the petrochemical industry. Similar corporate exploits are examined in

the use of eminent domain statutes and other failed political safeguards, with Bold Iowa and the Sierra Club Iowa Chapter offering legal opposition.

Review of Research

Of significance to Dakota Access Pipeline resistance is its belonging to a legacy of U.S. Settler Colonialism that “continues on through global climate change and environmental sustainability,” as per Kyle Whyte of the University of Michigan. Whyte draws attention to the aspects of traditional U.S. Settler Colonialism, and offers parallels that exemplify the pipeline as an attempt to “erase Indigenous peoples culturally, economically, and politically.” (Whyte, 2017) Andrew Rome (2018) investigates the adequacy of tribal civil jurisdiction statutes following *Montana v. United States* over non-tribal members, such as Dakota Access. Elizabeth Bower (“Standing Together”) inspects similar legal mechanisms through which the pipeline bypasses Indigenous consultation as to environmental and cultural considerations.

Recent analysis of the Environmental Protection Agency provided by the American Journal of Public Health reveals methods through which regulatory capture may be qualified and applied to participating bodies in the Dakota Access Pipeline, and vice versa. Strongpoints include attention to “shifts in policy making and practices,” “deep and disabling ... budget cuts,” administrative secrecy, and employee morale (Brown et. al, 2018). The effects of pipeline installation on human health was analyzed by Chen et. al (2014), whose work bears “early warning signals about soil heavy metal pollution.” The studies were confined to the right-of-way passage and affirm risk of carcinogenic poisoning through “inhalation of particulates, dermal contact and oral ingestion,” especially for children.

Appeal to Environmental Injustice

Resistance to the Dakota Access Pipeline is a recent manifestation of historical resistance to environmental injustice among Native Americans. Honor the Earth is an indigenous group of pipeline opponents devoted to creating “awareness and support for Native environmental issues” for the “survival of sustainable Native communities.” An Honor the Earth banner reads: “No more desecration of our lands. No more poisoning of our people” (HtE, n.d.). Kyle Whyte, a professor at Michigan State University, contends that U.S. settler colonialism historically crippled the ecosystem upon which indigenous cultures depended. The U.S. government “erased economic vitality through transforming ecosystems and dividing Indigenous lands, and erased cultural integrity through stripping Indigenous peoples of their languages and ceremonies,” just as “law enforcement [suppressed] prayer, ceremony, and thanksgiving at Standing Rock.” Settlers’ techniques, “from dams to mines to farming implements, literally change hydrological flows, soil nutrients, and many other ecological conditions” (Whyte, 2017). The Dakota Access Pipeline continues this legacy of ecological transformation.

Whyte (2017) asserts that the permits for construction on the “environmentally and culturally significant” grounds were “never ceded consensually,” alluding to the treaty-breaking patterns that historically “erased Indigenous political self-determination.” Protestor Ezekiel Baegage asserts: “it’s not just the pipeline,” “they’re violating the civil rights, and they’re breaking treaties,” “these oaths that they signed” (Wolf, 2017). Sacred Stone Camp insists: The Corps “failed to consult tribes and conduct a full environmental impact statement” and violated the Fort Laramie Treaty, “which guarantees ... the “undisturbed use and occupation” of our permanent homeland” (“Dakota Access Pipeline”). The Army Corp of Engineers (2018) denies these allegations and insists that the organization “considered the impacts of an oil spill on ...

environmental justice” and “sought input from ... the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe,” etc. in agreement with legislation. Jan Hasselman, the Standing Rock Sioux’s lawsuit representative against the Army Corps of Engineers and staff attorney at Earth Justice, contends that the Army Corps of Engineers’ evaluation never actually implicated “any environmental justice “concerns,” either in light of Indigenous people’s environmental sensitivity or the fact that the project was “rerouted [from a nearby, suburban district to] the doorstep of the ... Tribe.” Hasselman further asserts that the Tribe supplied “cultural information to help the Corps fully understand the consequences of permitting this pipeline,” expressing the potential perversion of sacred, historic, and culturally vital sites along the projected route (“Decision on the ... Pipeline”).

These concerns were disregarded in the Corps’ original evaluation, an act in direct contradiction of the National Historical Preservation Act according to several opponents. One such opponent is Elizabeth Bower, who illustrates that the permits, although not violated, went “against the purpose of the NHPA – to preserve historic properties and promote harmony between historic properties and modern society.” Bower accredits this “procedural loophole” to “ambiguity and redundancy” in the regulation: “the Agency must consult with the tribe and consider the tribe’s “special expertise” on the matter,” though there is no explicit requirement to heed the tribe’s advice (“Standing Together”).

Legal loopholes of the sort are a recurring theme among legislature purportedly intended to integrate Indigenous consent into culturally and environmentally sensitive decisions. One such regulation, the National Environmental Policy Act of 1969, was designed to encourage participation “in federal agency decision-making,” yet “does not require the agency to implement mitigation alternatives” proposed by consulting tribes. The Archaeological Resources Protection

Act of 1979 is similar in that its purpose “is to protect archaeological resources and sites located on federal and tribal lands,” yet requires no consultation in mandating federal permits. For Bower, this ordeal is another in which safeguarding has been designed to implicitly fail and have “Native Americans and their culture ... cast aside to make way for development projects” (“Standing Together”).

Environmental and Agricultural Concerns

Aside from concerns of environmental injustice, an ongoing conflict over environmental jeopardy was revealed proceeding the events at Standing Rock to unite in opposition. Energy Transfer Partner’s justification for shifting from rail and truck to pipeline transportation is backed by Strata Corporation’s studies: “transporting oil and gas by truck is the worst method of transportation,” having the highest rate of fatality and spillage per million tons moved every mile. Strata expresses, with respect to safety, that “oil trucks often pass through densely populated areas where spills and accidents have greater potential for human fatality and injury” (Dursteler & Hansen, 2017). These conclusions, however, fail to properly account for all dimensions of safety, such as financial safety, and environmental impact as applied to rural demographics affected by pipelines. These agriculturally dependent regions are the most environmentally sensitive to pipeline spills. Waniya Locke of People Over Pipelines captures such impact, citing an incident with the Keystone Pipeline: “That ground is now contaminated with more than 16,000 gallons of oil and “farmers” don’t know how long it will be before that ground will be rejuvenated” (Garcia, 2016). Research was conducted on soil response to oil exposure by Breuninger and Thompson of the Montana Department of Natural Resources and Conservation, revealing adverse effects on soil infiltration, fertility and productivity, microbial

activity, aeration levels, wettability, and ground water pollution. Their research found that residual oils at lower limits of two weight percent create alkaline conditions and seep into seed embryos, inhibiting future germination. As such, contamination implies that “vegetation and soils would be severely damaged, and soil productivity would be reduced for two to five years or longer” (Breuninger & Thompson, 1979)

The mere installation of pipelines has also proven detrimental to farmers by interrupting drainage patterns, compacting and disrupting soil composition, and compromising future agriculture. Construction renders adjacent soil inhabitable and stumps land productivity (Streuber, 2018). Farmer Steve Hickenbottom confirms: “you cannot move 30 feet of dirt and put it back like it was” (Streuber, 2018). Breuninger and Thompson (1979) investigated such installation and found that mixture of soil horizons alters “porosity, permeability, infiltration rates,” and acidity. Amy Mall (2017) asserts on behalf of the National Resource Defense Council, whose mission is to “ensure the rights of all people to the air, the water, and the wild,” that damaging drainage patterns inadvertently affects crops adjacent to the installation cite, too. A witness to this assertion, farmer David Richter of Iowa, reports that even though Energy Transfer Partners only “had rights to access 45 acres of his farm, poor drainage has damaged more than 300 acres,” yet the company “refused to do the work necessary to restore his farm to its original condition” (Mall, 2017). This is the case for many, in which unforeseen damages exceed the scope of compensation due to an inadequate environmental impact analysis, which fails to ponder these broader impacts, as conducted by the Federal Energy Regulatory Commission (Mall, 2017).

Even if easements were adjusted to account for these factors, they could not properly compensate for the loss of tradition and family security, which for many, spans generations. For

Hickenbottom, the “damage has been so severe that he’s now rethinking his longstanding plans of handing down the farm to the next generation” (Streuber, 2018). This type of insensitivity is echoed by Mike Kelley, Chairman of the McClean County Soil Board: “farmers look down and see soil, but the pipeline company just sees dirt” (Mall, 2017). For Kelley, installation needlessly caused compacted acreage and loss of productivity even after he “raised concerns regarding the use of heavy machinery on wet soil” (Mall, 2017). Kelley’s case illustrates the widespread struggles of afflicted farmers to be heard, and to receive adequate reparations when ignored: “Kelley argued with ... personnel at the site, protesting the mix of machinery and wet ground,” yet despite a drop in crop yield, the company “concluded that the conditions did not degrade or otherwise compromise the soils” (Bennett, 2017). Moving forward, Kelley was at the mercy of the Energy Transfer Partners: “Once the line is installed, they don’t come back to fix problems” and “[even] if you’ve got it in writing, you’ll still have to go to the legal system ... and spend thousands of dollars” (Bennett, 2017).

Failure of Political Safeguards

The struggle against pipeline companies occupies a political dimension, one which is accompanied by corporate influence on policy, according to several opponents. The potential for regulatory capture provokes skepticism as to the integrity of the bodies designed to protect property owners. For Bold Iowa, an adversary of private access to eminent domain, “policy making is dominated by big money that cares only about the corporate bottom line” (Bold Alliance). Candy Woodall gives insight into the agency central to pipelines accessing private property: The Federal Energy Regulatory Commission, “designed to be self-funded, independent and non-partisan ... receives its money from fees paid by the companies it

oversees. This “funding mechanism combined with its overly broad regulatory power compels the Commission to be a business partner with, rather than a dispassionate regulator of, the industry it is tasked with overseeing” (Woodall, 2019).

These accusations are complimented by behaviors that undermine the fundamental purpose of the agency and due process guaranteed by Congress. Current statutes on eminent domain grant property owners the right to appeal repossession in federal court, but “only after they have asked the agency to reconsider its decision and had their request denied” (Faherty, 2018). According to Robert McNamara and David Bookbinder of the Faherty Law Firm, the “FERC has developed the habit of granting these requests so that it can draw out the time it spends “thinking” about them.” Meanwhile, eminent domain is used to “snatch thousands of landowners’ properties free from judicial review” (Faherty, 2018).

Swift acquisition is made possible through a “broken system with the lower courts rubber-stamping what the pipeline companies are doing,” according to the Institute for Justice. “Citing the federal courts’ power to enter “preliminary injunctions,” pipeline companies routinely demand access to land immediately, months or years before the court sets a price for the land and years before landowners get paid.” For the Institute, this action is a reversal of the steps intended to guarantee due process: “the federal government files a complaint, the court sets “just compensation” for the land, and the government then chooses whether to pay that court-fixed price or dismiss the case,” yet this authority does not “come with a more drastic power to immediately seize possession of the property before a court enters final judgment” (“Pennsylvania Pipeline”). This is the case for homeowner Ellen Gerhard, whose property was trespassed upon for installation of a Mariner East Pipeline well before compensation was set in court, even while the eminent domain case was being challenged in Pennsylvania state courts

(Farnelli, 2016) Regardless of legality, pipeline companies are “abusing this power because the courts are simply ... refusing to force the pipeline companies to operate within the limited powers Congress granted them when it created FERC in the first place” (“Pennsylvania Pipeline”). Gerhart exalts: “You would think that government officials who have sworn to uphold the Pennsylvania Constitution would do so, but they're ... allowing out-of-state companies to run over Pennsylvania citizens” (Farnelli, 2016).

Deceptively, the “agency can approve a pipeline without telling property owners that decisions will be effectively unreviewable unless they file an immediate appeal.” Faherty Law Firm asserts that similar state behavior has been “deemed ... unconstitutional,” yet the agency “continues to harm eminent-domain victims by failing to inform them how to protect their rights” (Faherty, 2018). Those that are aware and have invoked their rights are met with substantial financial obstacles in “federal court, which “takes” a lot of money many ... residents say they don’t have” according to Woodall. For those that “can’t afford an attorney, “they” just have to hope the pipeline building doesn’t want “their” property, because FERC always takes their side” (Woodall, 2019).

The private sector’s access to eminent domain was upheld in *City of Little Rock v. Raines* and *Linder and Smith v. Arkansas Midstream Gas Services Corp*, (Means, 2011) establishing precedents by which private projects that serve purportedly public purposes may condemn property (Justia, 1996). This amendment has become an engine of corporate agenda according to the Institute for Justice: “all too often, cities team up with their developer friends to condemn perfectly fine homes and businesses for private development,” which is “an unconstitutional abuse of eminent domain” (“Join the Fight”) In Iowa, two criteria must be met in accessing the statute’s authority: “public convenience” and “necessity.” Greenpeace reports that Dakota

Access's justification for "public use" is that the project is "an economic value to the public by creating construction jobs," even though "construction jobs and general economic impact have nothing to do with whether the pipeline will provide a needed service" (2018). On this basis, the Sierra Club has legally challenged Dakota Access's compliance with the *necessity* criterion, asserting: "[If] there were really a need and demand for the oil, drilling [in the Bakken region] would be increasing or at least steady, not drastically decreasing," and that "there already exists more transportation capacity for the crude oil produced in the Bakken region of North Dakota than is required to transport current production" (Taylor, n.d.).

Conclusion

Resistance to the Dakota Access Pipeline at Standing Rock is embedded within its existence as yet another colonial machination, and the circumstances by which it was founded: the failure of legislative safeguards and alleged "treaty-breaking," law enforcement intervention, suppression of peaceful ceremony, and disregard for cultural values. The installment of the pipeline, a means to ecological destruction, in effect, is a constant reminder of Indigenous powerlessness against U.S. Settler Colonialism and the technological means that delivered them from the source of their political independence, religion, and cultural unity: ecological harmony. The present research, however, fails to quantify the degree to which resistance is ascribed to this historical background vs. immediate concerns of cultural and environmental safety.

Agricultural resistance is a theme non-exclusive to the Dakota Access Pipeline. Contrary to claims of environmental sustainability and safety, it has been shown that the quantity of impact has merely been exchanged for the quality of impact. This struggle introduces a political dimension of conflict: the integrity of policy and their derivative bodies vs. corporate influence.

However, the present research presents a method only for quantifying *skepticism* of regulatory capture rather than bearing proof of this phenomenon's involvement. Regardless, the details examined illustrate the means through which corporate-policy influence is made possible and may be applied to protect future agencies. A similar analysis may be made on legislation designed to protect Indigenous customs, such that the redundancies in current statutes are addressed going forward. Present research may be substantiated from details regarding the easement compensation as applied to farmlands, and the hazards of heavy metal contamination on crop consumption.

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