

Killing the Black Snake: The Dakota Access Pipeline’s Fate Post-*Sierra Club v. FERC*

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ABSTRACT

The Standing Rock Sioux’s resistance to the Dakota Access Pipeline captured the world’s attention in 2016. Though the pipeline now carries oil through the Sioux’s ancestral lands, and the story has generally faded from media coverage, the Tribe has continued to challenge the pipeline in the courts. This Note examines the Tribe’s legal challenges to the pipeline in light of a 2017 D.C. Circuit Court of Appeals decision, Sierra Club v. Federal Energy Regulatory Commission, which mandates that evaluations under the National Environmental Policy Act consider greenhouse gas emissions that the fuel carried in the pipeline will emit. Because the Army Corps of Engineers made no such analysis for the Dakota Access Pipeline, this Note argues that Sierra Club has created the grounds for the Tribe to challenge the Pipeline anew.

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INTRODUCTION

According to Lakota prophecy, one day, a black snake will slither across the land, destroying sacred sites and poisoning the water before destroying the earth itself.¹ The prophecy of the black snake became a source of inspiration for some of the Native American activists who gathered en masse near the Standing Rock Sioux (the “Sioux” or the “Tribe”) reservation in 2016 to protest the Dakota Access Pipeline (“DAPL”), a pipeline designed to carry 570,000 barrels of crude oil per day under Lake Oahe, the Tribe’s drinking water source.² The activists captured the world’s attention by using legal action and grassroots activism to oppose the pipeline,³ and their fight continues to progress through the courts today.⁴

This Note discusses how a 2017 D.C. Circuit Court of Appeals decision, *Sierra Club v. Federal Energy Regulatory Commission*,⁵ creates favorable precedent for the Sioux to launch another challenge to DAPL under the National Environmental Policy Act (“NEPA”). First, this Note gives an overview of the Standing Rock protest movement and the success of the legal challenges to DAPL to date. Next, the Note describes the implications of the D.C. Circuit’s 2017 decision in *Sierra Club*, in which the court held that an environmental impact statement for a natural gas pipeline was incomplete under NEPA because it did not consider the environmental impacts of burning the natural gas that the pipeline will carry. Ultimately, this Note asserts that, much like the flawed environmental assessment in *Sierra Club*, the U.S. Army Corps of Engineers’ current environmental assessment for DAPL does not include an estimate of the greenhouse gas emissions that will result from the pipeline’s operation. *Sierra Club* has therefore opened another avenue by which the Tribe can challenge the environmental assessment and potentially frustrate operation of DAPL. The Note also asserts that *Sierra*

1. Karen Pauls, ‘We Must Kill The Black Snake’: Prophecy and Prayer Motivate Standing Rock Movement, CBC NEWS (Dec. 11, 2016, 4:00 AM), <http://www.cbc.ca/news/canada/manitoba/dakota-access-pipeline-prayer-1.3887441>.

2. *See id.*

3. *See The Standing Rock Sioux Tribe’s Litigation on the Dakota Access Pipeline*, EARTHJUSTICE, <https://earthjustice.org/features/faq-standing-rock-litigation> (last visited Nov. 12, 2017) (outlining a comprehensive timeline of the Standing Rock protest struggle).

4. *See id.* This note is current as of June 25, 2018, but further developments in the Standing Rock case will likely occur post-publication.

5. *Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357 (D.C. Cir. 2017).

Club may create a significant additional barrier to the construction of similar pipelines in the future.

I. THE STANDING ROCK SIOUX'S OPPOSITION TO THE DAKOTA ACCESS PIPELINE

This Part gives a brief history of the Tribe's relationship with the United States and its activism against the pipeline to date. It then discusses the U.S. Army Corp of Engineers' ("ACE") jurisdiction over DAPL and obligations under NEPA. It concludes with a procedural history of the Tribe's legal challenges to the pipeline, including the ways in which those challenges have and have not been successful in stopping the pipeline's construction and operation.

A. THE STANDING ROCK SIOUX AND THE DAKOTA ACCESS PIPELINE PROTEST MOVEMENT

The Standing Rock Sioux Tribe of North and South Dakota ("the Sioux" or "the Tribe") is a federally-recognized Indian Tribe⁶ burdened with a long history of maltreatment by the U.S. federal government. In 1868, the Sioux signed the Treaty of Fort Laramie, establishing the boundary of the Great Sioux Reservation.⁷ However, acts of Congress reduced the size of the reservation several times in the late 1800s, ultimately establishing six separate, smaller reservations in 1889.⁸ The United States continued to restrict the Tribe's self-determination throughout the late nineteenth and early twentieth centuries.⁹ Notoriously, the U.S. military killed approximately 250 Sioux men, women, and children at the Wounded Knee Massacre in 1890.¹⁰ Beginning in 1944, ACE constructed a series of dams along the Missouri River without tribal consultation.¹¹ One dam created Lake Oahe, which submerged nearly 700 square miles of the Tribe's most fertile lands, displaced thousands of indigenous people, and flooded tribal gravesites.¹²

In 2015, Dakota Access, LLC, a subsidiary of energy company Energy Transfer Partners, stepped into the fraught history of infrastructure projects

6. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942, 1942–43, 1946 (Jan. 14, 2015) (listing the Standing Rock Sioux Tribe of North and South Dakota as a federally recognized Tribe).

7. STANDING ROCK SIOUX TRIBE, HISTORY, <https://www.standingrock.org/content/history> (last visited Dec. 3, 2017).

8. See Act of Mar. 2, 1889, ch. 405, 50 Stat. 405 (1889), <https://www.loc.gov/law/help/statutes-at-large/50th-congress/session-2/c50s2ch405.pdf>.

9. See generally United States v. Sioux Nation, 448 U.S. 371 (1980); DEE BROWN, BURY MY HEART AT WOUNDED KNEE (Wash. Square Press 1959) (describing the history of relations between the federal U.S. government and the Sioux).

10. See UNIVERSITY OF NEBRASKA, LINCOLN, *Wounded Knee Massacre*, ENCYCLOPEDIA OF THE GREAT PLAINS (David J. Wishart ed., 2011), <http://plainshumanities.unl.edu/encyclopedia/doc/egp.war.056>.

11. Carla F. Fredericks, *Operationalizing Free, Prior, and Informed Consent*, 80 ALB. L. REV. 429, 472 (2017).

12. *Id.*

impacting the Sioux.¹³ Dakota Access proposed constructing a 1,100-plus mile pipeline (DAPL) to transport crude oil from North Dakota's Bakken oil field to a terminal in Illinois.¹⁴ Dakota Access originally proposed that the pipeline cross the Missouri River ten miles north of Bismarck,¹⁵ North Dakota's capital city. However, Dakota Access ultimately rejected this pipeline route out of concern that a spill from the pipeline could taint Bismarck's municipal water supply.¹⁶ Instead, the company chose a route downstream from Bismarck: crossing under Lake Oahe, a half-mile upstream from Sioux's reservation.¹⁷

Indigenous activists began protesting the pipeline in the spring of 2016¹⁸ and subsequently challenged the pipeline in court. Ladonna Brave Bull Allard, Standing Rock's Historic Preservation Officer, founded the first protest encampment in the path of the pipeline in April 2016.¹⁹ Soon after, thousands of people began swelling the protest encampment, physically blocking the path of the pipeline.²⁰ On July 27, 2016, the Tribe filed a motion for a preliminary injunction in the United States District Court for the District of Columbia to halt the pipeline's construction.²¹

B. THE ARMY CORPS' JURISDICTION OVER DAPL AND ITS ENVIRONMENTAL ASSESSMENT OBLIGATIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

The Tribe filed its lawsuit against ACE, the federal agency responsible both for issuing the permit for DAPL to cross Lake Oahe and for evaluating the potential environmental effects of the pipeline's crossing pursuant to NEPA. Because ACE manages Lake Oahe, a federally-owned waterbody,²² federal law required Dakota Access to petition ACE for an easement for DAPL to cross ACE-administered federal property (collectively, "the permit" or "the easement").²³ ACE could not grant the easement without issuing several different permits and verifications,

13. See DAKOTA ACCESS, LLC, DRAFT ENVTL. ASSESSMENT: DAKOTA ACCESS PIPELINE PROJECT (Nov. 2015), <https://docs.house.gov/meetings/IF/IF03/20170215/105567/HHRG-115-IF03-20170215-SD036.pdf>.

14. See *id.* at 2.

15. See *id.* at 6.

16. See *id.*

17. See *id.* at 2.

18. See LaDonna Bravebull Allard, *Why the Founder of Standing Rock Sioux Camp Can't Forget the Whitestone Massacre*, YES! MAGAZINE (Sept. 3, 2016), <http://www.yesmagazine.org/people-power/why-the-founder-of-standing-rock-sioux-camp-cant-forget-the-whitestone-massacre-20160903>.

19. See *id.*

20. See Daniel A. Medina, *Dakota Pipeline Company Buys Ranch Near Sioux Protest Site, Records Show*, NBC NEWS (Sept. 23, 2017), <https://www.nbcnews.com/news/us-news/dakota-pipeline-company-buys-ranch-near-sioux-protest-site-records-n653051>.

21. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4 (D.D.C. 2016).

22. See U.S. ARMY CORPS OF ENG'RS, ENVTL. ASSESSMENT, DAKOTA ACCESS PIPELINE PROJECT 3 (July 25, 2016), <http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/2801>.

23. U.S. ARMY CORPS OF ENG'RS, *Frequently Asked Questions DAPL*, <http://www.nwo.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/749823/frequently-asked-questions-dapl/> (last visited May 9, 2018).

including a verification that the pipeline crossing would satisfy the terms and conditions of Nationwide Permit 12 (“NP 12”)²⁴ under authority from Section 404 of the Federal Water Pollution Control Act (“FWPCA”).²⁵ To verify that the pipeline construction would satisfy NP 12, ACE had to find that DAPL’s construction, including any dredging or fill from construction under Lake Oahe, would cause only “minimal adverse environmental effects.”²⁶ Granting the easement would be an agency action requiring review under NEPA.

NEPA requires that all federal agencies draw up a detailed statement describing the environmental impacts of activities that will “significantly [affect] the quality of the human environment,” known as an environmental impact statement, or EIS.²⁷ To determine whether an activity will have a “significant” impact under NEPA, the agency usually first conducts an environmental assessment (“EA”), which is an examination of the environmental impacts that a project might have on the environment.²⁸ In conducting its EA, the agency must consider numerous factors. Particularly relevant factors for DAPL’s EA include the degree to which a project is likely to be highly controversial, the project’s ecological impacts, and any unique cultural or social impacts from the project.²⁹

Depending on the significance of the impact that a project shows during the EA, the agency can then take two paths. If the EA shows that there will be no significant impact, then the agency moves forward with the project without an EIS, and instead issues a document called a “Finding of No Significant Impact” (“FONSI”).³⁰ Alternatively, the agency can issue an EA with a “mitigated FONSI”—a FONSI that is predicated on a commitment from the permit petitioner that it will mitigate any significant environmental impacts caused by the project—rendering an EIS unnecessary.³¹ However, if the agency does find a significant impact that cannot be mitigated while conducting its EA, it must draw up an EIS.³² EISs are more detailed, lengthier, and held to higher regulatory standards than EAs or FONSIs.³³ ACE’s response to DAPL’s permit request has led to multiple court challenges by the Tribe, as described below in Section D.

24. See generally U.S. ARMY CORPS OF ENG’RS, NATIONWIDE PERMIT 12 (2012), http://www.saw.usace.army.mil/Portals/59/docs/regulatory/regdocs/NWP2012/NWP12_3-23.pdf.

25. See U.S. ENVTL. PROT. AGENCY, SUMMARY OF THE CLEAN WATER ACT, <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last visited May 10, 2018); see generally 33 U.S.C. § 1344 (1987) (also known as the Clean Water Act when inclusive of the Act’s 1972 amendments).

26. 33 U.S.C. § 1344(e)(1) (1987).

27. 42 U.S.C. § 4332(c) (2012).

28. See 40 C.F.R. § 1508.9 (2018); see also U.S. ENVTL. PROT. AGENCY, National Env’tl. Policy Act Review Process, <https://perma.cc/84PW-83LS> (last visited Dec. 3, 2017).

29. See 40 C.F.R. §§ 1508.8, 1508.27 (2018).

30. See 40 C.F.R. § 1508.13 (2018); see also U.S. ENVTL. PROT. AGENCY, *supra* note 28.

31. Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843 (Jan. 21, 2011) (to be codified at 40 C.F.R. pts. 1500, 1501, 1502, 1505, 1506, 1507, 1508).

32. See 40 C.F.R. § 1508.11 (2018); see also U.S. ENVTL. PROT. AGENCY, *supra* note 28.

33. See 40 C.F.R. § 1508.11; see also U.S. ENVTL. PROT. AGENCY, *supra* note 28.

C. SUMMARY OF ACE'S INCONSISTENT RESPONSE TO DAKOTA ACCESS'S PERMIT REQUEST

In response to Dakota Access' request for a permit to cross under Lake Oahe, ACE originally issued an EA and a mitigated FONSI in accordance with NEPA.³⁴ The EA discussed DAPL's environmental impacts on soil, water quality, vegetation, wildlife, and land use.³⁵ The EA found that Dakota Access would mitigate all of DAPL's significant environmental impacts because the company planned to bury the pipeline ninety-two feet under Lake Oahe's lakebed, leaving the lake itself unaffected by the pipeline's placement.³⁶ The EA described the probability of an oil spill from the pipeline as "unlikely," but also included some discussion of the response strategy for a potential spill.³⁷ The EA, after noting that ACE made a "good faith effort" to consult with the Tribe about the project,³⁸ stated that the pipeline would have "no direct or indirect effects [on] the Standing Rock Sioux tribe," including "lack of impact to its lands, cultural artifacts, water quality or quantity, treaty hunting and fishing rights, environmental quality, or socio-economic status."³⁹

After popular protests and court challenges from the Tribe in response to ACE's decision to grant the easement based on its EA, ACE announced in December 2016 that DAPL "merit[ted] additional analysis" and "evaluation of siting alternatives."⁴⁰ Accordingly, ACE announced its intention to prepare an EIS, the results of which would determine whether ACE would grant DAPL the easement to cross Lake Oahe.⁴¹ However, after President Donald Trump's inauguration in January 2017, ACE quickly reversed course once again. ACE declared that it would not prepare an EIS after all and would instead grant DAPL the easement to cross Lake Oahe based on the mitigated FONSI alone.⁴²

D. PROCEDURAL HISTORY OF THE DAKOTA ACCESS PIPELINE COURT CASES

The Standing Rock Sioux's legal battle against DAPL has "taken nearly as many twists and turns as the 1,200-mile pipeline itself."⁴³ On August 4, 2016, the

34. See U.S. ARMY CORPS OF ENG'RS, *supra* note 22, at 1–2.

35. See *id.* at 23–74.

36. See *id.* at 36.

37. See *id.* at 38.

38. *Id.* at 2.

39. *Id.* at 86.

40. See Notice of Intent to Prepare an Envtl. Impact Statement in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe, N.D., 82 Fed. Reg. 5543, 5544 (Jan. 18, 2017).

41. *Id.*

42. Memorandum from Douglas W. Lamont, Acting Assistant Sec'y of the Army, re Compliance with Presidential Memorandum of January 24, 2017, at 2–3 (Feb. 7, 2017), <https://earthjustice.org/sites/default/files/files/Memo-Feb7-0.pdf>.

43. Memorandum Opinion, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs* (Standing Rock IV), 282 F. Supp. 3d 91, 94 (D.D.C. 2017).

Tribe moved for a preliminary injunction to halt pipeline construction,⁴⁴ alleging that ACE violated the National Historic Preservation Act by failing to ensure prevention of the destruction of culturally important sites before granting the easement.⁴⁵ On September 3, 2016, one day after the court identified where some tribal sacred sites and burials were located as it considered the Tribe's request for a preliminary injunction, Dakota Access bulldozed the sites and attacked protestors with dogs.⁴⁶ The next day, the court declined the Tribe's request for a temporary restraining order, which would have prohibited Dakota Access from further destroying the Tribe's sacred sites.⁴⁷ Days later, the court also declined to issue a preliminary injunction against Dakota Access.⁴⁸

After the court declined to issue the temporary restraining order, ACE, the Department of the Interior ("DOI"), and the Department of Justice ("DOJ") announced that the federal government would halt additional permitting for the project pending further review⁴⁹ and asked Dakota Access to "voluntarily pause" construction activities.⁵⁰ Dakota Access refused,⁵¹ continuing construction while private security forces and police officers continued to attack and arrest protestors.⁵²

On December 4, 2016, ACE announced that it would not grant the easement needed for DAPL's construction. ACE determined that because the original EA may have failed to properly account for alternatives to the proposed Lake Oahe crossing, as NEPA requires,⁵³ the proper course would be to conduct further

44. Motion for Preliminary Injunction & Request for Expedited Hearing, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock I), 205 F. Supp. 3d 4 (D.D.C. 2016).

45. *Id.* at 1.

46. *The Standing Rock Sioux Tribe's Litigation on the Dakota Access Pipeline*, EARTHJUSTICE, <https://earthjustice.org/features/faq-standing-rock-litigation#timeline> (last visited Dec. 2, 2017).

47. Memorandum Opinion, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (*Standing Rock I*), 205 F. Supp. 3d 4, 25–26 (D.D.C. 2016).

48. *Id.* at 7.

49. See Press Release, Dep't of Justice, Joint Statement from the Dep't of Justice, the Dep't of the Army, & the Dep't of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Sept. 9, 2017), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>.

50. Press Release, Joint Statement from Dep't of Justice, Dep't of the Army, & Dep't of the Interior Regarding D.C. Circuit Court of Appeals Decision in Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Oct 10, 2017), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-dc>.

51. See EARTHJUSTICE, *supra* note 46, at 10.

52. See Press Release, Nat'l Lawyers Guild, WPLC Responds to Decision to Deny DAPL Easement: Calls for Permanent Stop to Constr. & Dropping of Charges Against 550 Water Protectors (Dec. 4, 2016), <https://www.nlg.org/wplc-responds-to-decision-to-deny-dapl-easement-calls-for-permanent-stop-to-construction-dropping-of-charges-against-550-water-protectors/>; see also Alleen Brown, Will Parrish, & Alice Speri, *Oil and Water: The Battle of Treaty Camp*, THE INTERCEPT (Oct. 27, 2017), <https://theintercept.com/2017/10/27/law-enforcement-descended-on-standing-rock-a-year-ago-and-changed-the-dapl-fight-forever/>; *id.*

53. Memorandum from Jo-Ellen Darcy, Assistant Sec'y of the Army, to Commander, U.S. Army Corps of Eng'rs, on Proposed Dakota Access Pipeline Crossing at Lake Oahe, N.D., at 3 (Dec. 4, 2016), <https://earthjustice.org/sites/default/files/files/stmt.pdf> (noting that DAPL proposal, merited "additional

review by preparing an EIS.⁵⁴ After President Trump's inauguration on January 20, 2017, the incoming administration reversed course, taking hasty and, ultimately, partially unlawful steps to expedite DAPL's receipt of an easement. On January 24, 2017, seven days after ACE had formally requested public input on the EIS,⁵⁵ President Trump instructed ACE to expedite DAPL's receipt of the easement to cross Lake Oahe and to consider withdrawing the notice of intent to prepare the EIS.⁵⁶ On February 7, 2017, ACE complied, immediately terminating the EIS process and issuing the easement.⁵⁷ The Tribe asked the court to overturn the easement, arguing that ACE violated NEPA and acted arbitrarily and capriciously by reversing its decision to conduct an EIS without reasoned justification.⁵⁸ While awaiting the court's judgement, Dakota Access continued to construct the pipeline, spilling eighty-four gallons of crude oil during the construction process.⁵⁹ DAPL became fully operational on June 1, 2017.⁶⁰

On June 14, 2017, the court issued a memorandum opinion, finding that ACE's issuance of the easement unlawfully violated NEPA in three ways.⁶¹ First, the court found that ACE failed to adequately evaluate the degree to which the project's effects were likely to be highly controversial before determining that there would be no significant impact from that project.⁶² Second, the court found that ACE's EA did not adequately explain DAPL's projected impact on the Tribe's fishing and hunting rights, which are protected by treaty, even though the Tribe had alerted ACE to such a potential impact.⁶³ Instead, the court found the EA "silent . . . on the distinct cultural practices of the Tribe and the social and economic factors that might amplify [the Tribe's] experience of the environmental effects of an oil spill," including tribal members' subsistence fishing, hunting, and gathering.⁶⁴ Third, the court found that ACE failed to examine the

analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation").

54. *Id.* at 3.

55. Notice of Intent to Prepare an Env'tl. Impact Statement in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe, N.D., 82 Fed. Reg. at 5,543.

56. Memorandum from President Donald J. Trump to the Sec'y of the Army, re Construction of the Dakota Access Pipeline (Jan. 24, 2017), <https://earthjustice.org/sites/default/files/files/Construction-of-the-Dakota-Access-Pipeline.pdf>.

57. Memorandum from Douglas W. Lamont, *supra* note 42, at 2–3.

58. Memorandum in Support of Motion for Partial Summary Judgement, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II), 239 F. Supp. 3d 77 (D.D.C. 2017).

59. See EARTHJUSTICE, *supra* note 46, at 15; Shannon Marvel, *Dakota Access Pipeline Leaked 84 Gallons of Crude Oil in Spink County*, ABERDEEN NEWS, May 10, 2017, https://www.aberdeennews.com/news/local/sd-looking-into-dakota-access-oil-pipeline-leak-in-spink/article_28763200-973f-58b8-a176-15c359c477cb.html?block_id=475371.

60. Memorandum Opinion, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock III), 255 F. Supp. 3d 101, 120 (D.D.C. June 14, 2017).

61. *Id.* at 111–12.

62. *Id.* at 127–29.

63. *Id.* at 133–34.

64. *Id.* at 140.

disproportionate impact that the Tribe would bear from an oil spill compared to the impact faced by non-Native communities upstream from DAPL's crossing at Lake Oahe.⁶⁵ Instead of determining the remedy appropriate for those three flaws, the court ordered ACE to "reconsider" those aspects of its EA,⁶⁶ as ACE had "substantially complied with NEPA in many areas" outside of these three flaws.⁶⁷ The court also asked for further briefing to determine whether it should vacate ACE's EA and the easement ACE granted to DAPL as a remedy for ACE's NEPA violations.⁶⁸

After evaluating further briefing, the court decided not to vacate ACE's EA or the easement ACE granted to Dakota Access to cross Lake Oahe, reasoning that the three deficiencies in ACE's analysis were "not fundamental or incurable flaws in the agency's analysis," but instead were flaws that the agency could remedy by adjusting its EA upon remand without vacatur.⁶⁹ The court found that ACE must better articulate its reasoning regarding the social controversy the project would cause,⁷⁰ that it must articulate the effects of a potential pipeline spill on the Lake's aquatic environment and on wildlife,⁷¹ and that it must address flaws in its analysis of DAPL's impacts on the Tribe.⁷² Standing Rock Sioux Chairman Mike Faith stated that the ruling indicated that "our concerns have not been heard and the threat persists."⁷³

However, the court left open the possibility that it might impose a series of conditions on the continued operation of the pipeline under Lake Oahe.⁷⁴ On December 4, 2017, after receiving further briefing from the Tribe and ACE, the court, citing the pipeline's "inherent risk," imposed all three conditions that the Tribe has requested: (1) that ACE finalize and implement an oil spill response plan at Lake Oahe in coordination with the Tribe by April 1, 2018; (2) that DAPL select an independent, third-party auditor in consultation with the Tribe to evaluate DAPL's compliance with federal laws and regulations, also by April 1, 2018; and (3) that DAPL file bi-monthly reports regarding the status of the pipeline during remand.⁷⁵ However, as of May 9, 2018, Dakota Access still had not complied with all of the court's conditions; the court extended the deadline for complete

65. *Id.* at 138–40.

66. *Id.* at 112.

67. *Id.* at 111–12.

68. *Id.* at 147–48.

69. Memorandum Opinion, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs* (Standing Rock IV), 282 F. Supp. 3d 91, 94 (D.D.C. 2017).

70. *Id.* at 99.

71. *Id.* at 99–100.

72. *Id.* at 100–03.

73. *Dakota Access Pipeline to Remain Operational, For Now*, EARTHJUSTICE (Oct. 11, 2017) <https://earthjustice.org/news/press/2017/dakota-access-pipeline-to-remain-operational-for-now>.

74. Memorandum Opinion, *Standing Rock IV*, 282 F.Supp.3d at 91, 108–09.

75. Memorandum Opinion, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs* (Standing Rock V), 280 F. Supp. 3d 187, 191–92 (D.D.C. 2017).

compliance to June 8, 2018;⁷⁶ and ACE, as of June 2018, had requested an extension until August 10, 2018.⁷⁷

II. *SIERRA CLUB v. FEDERAL ENERGY REGULATORY COMMISSION*: A NEW AVENUE TO OPPOSE DAKOTA ACCESS

While the District Court proceedings were ongoing, the U.S. Court of Appeals for the District of Columbia Circuit issued its August 2017 *Sierra Club v. Federal Energy Regulatory Commission* decision.⁷⁸ Because the D.C. Circuit mandated that an EA of a new pipeline must include an estimate of the greenhouse gas emissions which will result from the pipeline's operation, Dakota Access now faces a new hurdle to establishing that ACE's EA of DAPL was lawful. This Part proceeds to describe (A) *Sierra Club*'s facts, argument, and ruling, (B) the two-part test the case established for when an estimate of greenhouse gas emissions resulting from a project must be included in a NEPA analysis, and (C) applies *Sierra Club*'s two-part test to DAPL's environmental assessment. This Part concludes that Dakota Access now faces a new hurdle to establishing a lawful EA because the current EA for DAPL does not include an estimate of greenhouse gas emissions stemming from the pipeline. Such a hurdle is significant for two reasons: The Tribe could use it to further delay and frustrate the pipeline's operation, and other parties could use it to challenge construction of similar pipelines in the future.

A. *SIERRA CLUB*'S FACTS, ARGUMENT, AND RULING

In *Sierra Club*,⁷⁹ environmental groups and landowners challenged the Federal Energy Regulatory Commission's ("FERC") decision to approve the construction and operation of the Sabal Trail pipeline, a pipeline designed to carry gas to power plants in the southeastern United States.⁸⁰ The pipeline's path along porous "karst" geography,⁸¹ which presents heightened risks of groundwater contamination, as well as the pipeline's proposed compressor station in a primarily African-American

76. Blake Nicholson, *Army Corps Meeting with Tribes on Dakota Access Oil Pipeline*, TAMPA BAY TIMES (May 3, 2018), <https://www.usnews.com/news/best-states/illinois/articles/2018-05-03/army-corps-meeting-with-tribes-on-dakota-access-oil-pipeline>.

77. See Blake Nicholson, *Corps to Wrap Up Dakota Access Pipeline Work in 2 Months*, STAR TRIBUNE (June 11, 2018), <http://www.startribune.com/corps-to-wrap-up-dakota-access-pipeline-work-in-2-months/485160561/>.

78. *Sierra Club v. Fed. Energy Regulatory Comm'n*, 857 F.3d 1357, 1357 (D.C. Cir. 2017).

79. In the spirit of full disclosure: I was a Legal Intern at the Sierra Club from August 2017 through November 2017. However, I was not at all involved in working on this case.

80. *Sierra Club*, 867 F.3d at 1363.

81. Karst geography is a topography dominated by sinkholes, caves, springs, and other features found where soluble rock, such as limestone, dominates. Karst landscapes are particularly vulnerable to groundwater contamination. See Duncan Adams, *Karst Landscapes Bring Challenges, Concerns for Pipeline Projects*, THE ROANOKE TIMES (Oct. 25, 2015), https://www.roanoke.com/news/virginia/karst-landscapes-bring-challenges-concerns-for-pipeline-projects/article_ae0ff6f2-bf28-586b-a0ad-519720e66449.html.

community already burdened with polluting facilities, raised serious environmental justice concerns.⁸² FERC prepared an EIS for the pipeline pursuant to NEPA.⁸³ The Sierra Club argued that the pipeline's EIS did not adequately consider the environmental effects from the project's contribution to greenhouse gas emissions.⁸⁴

B. *SIERRA CLUB'S TWO-PART TEST*

The D.C. Circuit agreed with the Sierra Club and established a two-part test to determine when an agency must include an estimate of greenhouse gas emissions stemming from a proposed action in its NEPA review. The agency must include an estimate of greenhouse gas emissions from a proposed action when: (1) the agency has the authority to consider the environmental effects of its decision and (2) greenhouse gas emissions resulting from an action are reasonably foreseeable.⁸⁵

The court followed two lines of reasoning to come to its decision. First, the court described how FERC had the authority to consider both the public benefits and the adverse effects of a project, including the project's environmental effects.⁸⁶ The court acknowledged that although an agency "has no obligation to gather or consider environmental information if it has no statutory authority to act on that information," this was not the case for FERC in regard to the pipeline.⁸⁷ Second, the court found that it was reasonably foreseeable that, in general, building new gas pipelines would lead to additional greenhouse gas emissions.⁸⁸ The court observed that, under NEPA, an environmental review must include the reasonably foreseeable effects of an action, including indirect effects.⁸⁹ The court stated the obvious: "All the natural gas that will travel through these pipelines will be going somewhere: specifically, to power plants in Florida."⁹⁰ The power plants would then burn the gas, generating both electricity and greenhouse gas emissions.⁹¹ As such, the court found that a reasonably foreseeable effect of authorizing the pipeline would be that power plants would burn the gas transported by the pipelines and emit greenhouse gases.⁹² The burning of the gas that the pipeline

82. See, e.g., Letter from Sanford D. Bishop, Jr. John Lewis, Hank Johnson Jr., & David Scott, Members of Cong., to the Comm'rs of the Fed. Energy Regulatory Comm'n (Oct. 23, 2015), available at https://bishop.house.gov/sites/bishop.house.gov/files/SabalTrail_EnvironmentalJusticeLetter102315.pdf (asking that FERC require Sabal Trail to abandon its proposed route and compressor station location to avoid adverse impacts on environmental justice for communities in Georgia).

83. *Sierra Club*, 867 F.3d at 1364.

84. *Id.* at 1365.

85. See *id.* at 1371–74.

86. See *id.* at 1373.

87. *Id.* at 1373.

88. See *id.* at 1371–72.

89. *Id.* at 1371; see also 40 C.F.R. § 1508.8(b) (2018).

90. *Sierra Club*, 867 F.3d at 1372.

91. See *id.*

92. See *id.* at 1372.

would carry was “not just ‘reasonably foreseeable,’” the court wrote, “it is the project’s entire purpose, as the pipeline developers themselves explain.”⁹³

Because FERC had the statutory authority to consider environmental information and the additional greenhouse gas emissions were a reasonably foreseeable result of the project, the court concluded that FERC’s NEPA review of the Sabal Trail pipeline should have either “given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.”⁹⁴ The court expected that FERC would be able to calculate the expected emissions, as the EIS had already included estimates of how much gas the pipeline would carry, and FERC gave no reason as to why it could not have used that estimate to calculate emissions.⁹⁵ The court stated that it did “not hold that quantification of greenhouse-gas emissions is required every time those emissions are an indirect effect of an agency action” because “in some cases quantification may not be feasible.”⁹⁶ However, in this case, because “FERC has not provided a satisfactory explanation” for why it could not calculate the foreseeable greenhouse gas emissions stemming from the pipeline, the court ordered FERC to include that calculation upon remand or to give a satisfactory reason as to why it could not do so.⁹⁷

Environmentalists hailed *Sierra Club* as a milestone victory.⁹⁸ Concurring, at least one fossil fuel pipeline proponent described the decision as a “powerful weapon” that could “jeopardize the future for pipeline projects across the country.”⁹⁹ Indeed, within days of the decision, the New York State Department of Environmental Conservation, citing *Sierra Club*, rejected a gas pipeline company’s permit application because its environmental review did not discuss the greenhouse gas emissions that would stem from the burning of the fuel that the pipeline would transport.¹⁰⁰ However, *Sierra Club*’s greenhouse gas rule has not yet been applied to DAPL.¹⁰¹

93. *Id.*

94. *See id.* at 1374.

95. *Id.*

96. *Id.*

97. *Id.* at 1375.

98. *See* Ellen M. Gilmer & Hannah Northey, *FERC, Pipelines and Climate Change: Revolution in Progress?* E&E NEWS (Nov. 21, 2017), <https://www.eenews.net/stories/1060067083>.

99. *See* Dave Forest, *Landmark Court Ruling Could Jeopardize This Major Pipeline*, OILPRICE.COM (Aug. 23, 2017), <https://oilprice.com/Energy/Natural-Gas/Landmark-Court-Ruling-Could-Jeopardize-This-Major-Pipeline.html>.

100. Letter from Thomas Berkman, Deputy Comm’r & Gen. Counsel of the N.Y. State Dep’t of Env’tl. Conservation, to Georgia Carter, Vice President & Gen. Counsel, Millennium Pipeline Co. LLC, & John Zimmer, Pipeline/LNG Market Dir., TRC Env’tl. Corp. (Aug. 30, 2017), https://elibrary.ferc.gov/idmws/file_list.asp?document_id=14599100.

101. The Tribe’s attorneys filed their most recent briefing for the latest motions in *Standing Rock* right after *Sierra Club* was decided, but because that briefing was restricted to the remedy for ACE’s NEPA breach, the briefing could not raise arguments about DAPL’s EA legitimacy under *Sierra Club*.

C. APPLYING THE *SIERRA CLUB* TEST TO THE DAKOTA ACCESS PIPELINE'S ENVIRONMENTAL ASSESSMENT

In this Section, I apply the two-part *Sierra Club* test to the NEPA analysis for DAPL to demonstrate that DAPL's current EA would fail the *Sierra Club* test. I argue that DAPL's revised environmental assessment will be insufficient under the *Sierra Club* test unless it includes a calculation of the greenhouse gas emissions stemming from the use of DAPL-transported crude oil.

1. ACE has Authority to Consider DAPL's Environmental Impact

Including downstream greenhouse gas emissions in DAPL's next environmental assessment passes the first leg of the *Sierra Club* test because the FWPCA authorizes ACE to consider environmental impacts in deciding whether to issue a permit.¹⁰² The first part of the *Sierra Club* test asks if the agency has the authority to consider environmental impacts in deciding whether to issue a permit. In *Sierra Club*, the court found that FERC, the agency in question, had the authority to consider environmental impacts when deciding whether to authorize a pipeline.¹⁰³ FERC had such authority because Congress had instructed FERC to consider "the public convenience and necessity," a phrase that subsequent case law interpreted as including environmental concerns.¹⁰⁴

ACE has even greater authority than FERC to consider a project's environmental impacts because it is unambiguously *required* to do so when issuing permits and verifications. Dakota Access needed several different permits and verifications from ACE to receive an easement to cross Lake Oahe, including a verification that the pipeline crossing would satisfy the terms and conditions of Nationwide Permit 12.¹⁰⁵ ACE may issue nationwide permits for the discharge of materials into waters of the United States if the activity in question "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment" as determined in the EA.¹⁰⁶ FWPCA thus explicitly directs ACE to consider environmental effects in its permitting decisions, meeting the first leg of the *Sierra Club* test.

See EARTHJUSTICE, *supra* note 46; see also Reply Brief of Dakota Access Regarding Remedy, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 280 F. Supp. 3d 187 (D.D.C. 2017).

102. See U.S. ARMY CORPS OF ENG'RS, *supra* note 24, at 4–8.

103. *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1373 (D.C. Cir. 2017).

104. See *id.*

105. See U.S. ARMY CORPS OF ENG'RS, *supra* note 24, at 4–8.

106. 33 U.S.C. § 1344(e)(1).

2. Greenhouse Gas Emissions from DAPL are Both Foreseeable and Calculable

The revised environmental assessment for DAPL will need to include an estimate of downstream greenhouse gas emissions from crude oil that the pipeline will carry because those emissions are reasonably foreseeable. In *Sierra Club*, the D.C. Circuit held that Sabal Trail's NEPA review must include an estimate of the downstream greenhouse gas emissions that would result from burning the natural gas that the pipeline would carry because FERC could reasonably foresee those emissions and a reasonable estimate of the emissions could be calculated.¹⁰⁷ The court wrote that the entire purpose of the pipeline was to carry gas so that it could be burned in power plants, and so the preparers of the environmental impact statement foresaw that the gas would be burned.¹⁰⁸

Akin to the Sabal Trail pipeline in *Sierra Club*, the entire purpose of DAPL is to transport crude oil for consumption.¹⁰⁹ There is only one difference between the crude oil that DAPL transports and the gas that Sabal Trail would transport: the fate of DAPL's crude oil is slightly more variable than that of Sabal Trail's gas. Sabal Trail's gas was meant for only one use: to be burned in power plants.¹¹⁰ DAPL, on the other hand, is designed to ship crude oil from North Dakota to a market hub in Illinois.¹¹¹ From that hub, other pipelines would bring the crude oil to refineries¹¹² that would refine the oil into gasoline, diesel fuel, heating oil, jet fuel, asphalt, and other products—all of which cause different levels of greenhouse gas emissions.¹¹³ As such, calculating the greenhouse gas emissions per barrel of crude oil from DAPL is arguably less straight-forward than calculating the emissions from gas to be burned exclusively in power plants.

However, the challenge of calculating greenhouse gas emissions per barrel of crude oil is not insurmountable. In fact, the U.S. Environmental Protection Agency has a calculator on its website that can estimate emissions per barrel of crude oil, based upon peer-reviewed science.¹¹⁴ The court in *Sierra Club* did not ask FERC to come up with an exact measure of future greenhouse gas emissions; instead, the court stated that an estimate including some “educated assumptions”

107. *Sierra Club*, 867 F.3d at 1374.

108. *Id.* at 1372.

109. See U.S. ARMY CORPS OF ENG'RS, *supra* note 22, at 1.

110. See *Sierra Club*, 867 F.3d at 1372.

111. U.S. ARMY CORPS OF ENG'RS, *supra* note 22, at 1.

112. *Id.*

113. See *Oil: Crude & Petroleum Products Explained*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/index.php?page=oil_home#tab1 (last visited Dec. 2, 2017) (listing the uses for crude oil). For example, each gallon of gasoline emits 8.887×10^{-3} metric tons of CO₂, whereas the average home emits 0.27 metric tons CO₂ annually by using heating oil. *Greenhouse Gases Equivalencies*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/energy/greenhouse-gases-equivalencies-calculator-calculations-and-references> (last visited Sept. 3, 2018).

114. See *Greenhouse Gases Equivalencies*, *supra* note 112.

would suffice.¹¹⁵ There is enough available information about the greenhouse gas emissions of crude oil that ACE could make such an education assumption.

ACE's current DAPL EA makes no attempt to estimate the downstream greenhouse gas emissions that will occur when the crude oil the pipeline carries is burned.¹¹⁶ In the entire 1,261-page environmental assessment and appendices, ACE mentions greenhouse gases exactly once, stating that "the contribution of the Proposed Action to greenhouse gas emissions during construction would be considered a minor indirect impact to climate change."¹¹⁷ In its revised EA, ACE must include an estimate of the greenhouse gas emissions that DAPL's 570,000 barrels of crude oil per day will generate to pass *Sierra Club's* test.

D. THE SIGNIFICANCE OF THE *SIERRA CLUB* TEST FOR DAPL AND OTHER PIPELINES

Even if many pipeline companies find it relatively straightforward to comply with *Sierra Club's* requirement that pipelines include downstream greenhouse gas emissions in their EAs and EISs, the *Sierra Club* ruling nonetheless may represent an important new tool to prevent fossil fuel pipeline projects under NEPA for several reasons. First, including greenhouse gas emissions in an EA may make it less likely that an agency will approve the permits necessary for a project because that agency will have a more complete understanding of the project's environmental costs.¹¹⁸ Second, pipeline companies now must determine (1) whether those greenhouse gas effects are significant; (2) if they are significant, how the project will mitigate the greenhouse gas emissions; or (3) that the greenhouse gas impacts are significant and cannot be mitigated.¹¹⁹ Failing to sufficiently explain the significance of a project's pipe-end greenhouse gas emissions, or failing to show mitigation for significant effects, could be grounds for an agency to decline to issue a permit on the basis of an inadequate EA.¹²⁰

Third, every mandated consideration in a NEPA analysis represents an additional requirement that a project must meet in order to have a valid EA or EIS under NEPA. All of those requirements represent leverage points for pipeline opponents to delay projects with litigation if the company fails to meet them. When fossil fuel projects are delayed, they may never be built, becoming obsolete as the economics that once justified them change in the face of ever-cheaper renewable energy.¹²¹

115. *Sierra Club*, 867 F.3d at 1374.

116. See U.S. ARMY CORPS OF ENG'RS, *supra* note 22, at 1.

117. *Id.* at 95.

118. See Michael Burger & Jessica Wentz, *Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review*, 41 HARV. ENVTL. L. REV. 109, 175–76 (2017).

119. See 42 U.S.C. § 4332(c); see also 40 C.F.R. § 1506.1 (2018).

120. See, e.g., Letter from Thomas Berkman et al., *supra* note 99.

121. See Paul Hammel, *Skeptics in Oil Industry Question Whether Keystone XL Pipeline is Still Needed*, OMAHA WORLD-HERALD (Aug. 1, 2017), http://www.omaha.com/news/nebraska/skeptics-in-oil-industry-question-whether-keystone-xl-pipeline-is/article_17800242-2085-571f-8903-aa30870153cd.html.

For example, Native Americans, landowners, and environmentalists put up staunch resistance to expanding the Keystone XL tar sands pipeline after it was first proposed in 2008,¹²² leading to years of delay. Although Keystone received preliminary approval to proceed with constructing the pipeline on November 20, 2017,¹²³ the pipeline's fate is currently in doubt. Keystone's parent company has indicated that it might abandon the project because, *inter alia*, fossil fuel economics have changed too much since 2008 to continue to justify building the pipeline.¹²⁴ In short, even though regulators eventually approved the Keystone pipeline, the years of delay and uncertainty that pipeline opponents had generated mean, approval notwithstanding, the pipeline may never be built after all.

CONCLUSION

NEPA review has two purposes: “[i]t forces an agency to take a ‘hard look’ at the environmental consequences of its actions” and “ensures that these environmental consequences, and the agency’s consideration of them, are disclosed to the public.”¹²⁵ Under the D.C. Circuit’s decision in *Sierra Club*, a NEPA review for a fossil fuel pipeline project which fails to disclose the greenhouse gas emissions the project will cause fails those primary purposes.¹²⁶ This is significant for the Standing Rock Sioux’s challenge to DAPL because ACE’s most recent EA for the project did not include an estimate of the greenhouse gas emissions that will result from burning the crude oil the pipeline will carry. ACE will release an amended EA for DAPL under NEPA to address the three flaws that the District Court has already identified in the agency’s original EA.¹²⁷ If the updated EA does not include an estimate of the greenhouse gas emissions that will result from the use of the crude oil that DAPL carries, then the Tribe can use *Sierra Club* to challenge the assessment as insufficient under NEPA.

The proper remedy for pipeline EAs and EISs held insufficient on greenhouse gas disclosure grounds is currently an open question of law.¹²⁸ Should ACE present yet another insufficient EA for DAPL, the Tribe will have the opportunity to argue that the proper remedy for failing to include an estimate of greenhouse gas emissions from a pipeline’s fuel in a NEPA analysis should be revocation of that pipeline’s permits and easements. The Tribe’s use of an argument under *Sierra Club* could help entrench greenhouse gas estimates as

122. *Id.*

123. See Mitch Smith, *Nebraska Allows Keystone XL Pipeline, but Picks a Different Path*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/us/nebraska-pipeline-keystone-xl.html>.

124. Hammel, *supra* note 120.

125. See *Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357, 1368 (D.C. Cir. 2017).

126. See *id.* at 1375.

127. Memorandum Opinion, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs* (Standing Rock IV), 282 F. Supp. 3d 91, 109 (D.D.C. 2017).

128. See *Sierra Club*, 867 F.3d at 1379.

an additional NEPA review requirement for would-be pipeline builders to surmount.

In sum, *Sierra Club* establishes another tactic that pipeline opponents can use to frustrate the pursuit of a pipeline permit. After DAPL releases its revised EA, the Standing Rock Sioux could become one of the first litigants to pursue it. Tribal and non-tribal opposition to new pipeline infrastructure, motivated by concerns about greenhouse gas emissions, land use, and tribal rights, has already created longer timelines for fossil fuel pipeline project approvals.¹²⁹ Such lengthened timelines do not always defeat pipelines. But, in the words of one fossil fuel industry insider, a “permit delayed can mean [a] permit denied.”¹³⁰ As new indigenous protests against fossil fuel infrastructure continue to erupt around the country,¹³¹ the Tribe can continue to create favorable precedent for other pipeline opponents by raising an argument under *Sierra Club*. With *Sierra Club*, the Standing Rock Sioux now have another tool with which to undermine the legality of DAPL’s permits and to make it more difficult to construct other “black snakes.”

129. See Gavin Bade, *Chatterjee Blames Nat’l Envtl. Groups for Delaying Pipeline Approvals*, UTILITYDIVE (Dec. 1, 2017), <https://www.utilitydive.com/news/chatterjee-blames-national-environmental-groups-for-delaying-pipeline-appro/512103/>.

130. Itai Vardi, *Virginia Won’t Say Whether its Official Spoke at Gas Industry Panel on Curbing Pipeline Protesters*, DESMOG (Dec. 1, 2017), <https://www.desmogblog.com/2017/12/01/virginia-hayes-framme-gas-industry-panel-dominion-pipeline-protesters>.

131. See, e.g., Kyle Swenson, *Anti-fracking Activists and Anarchists are Blocking Rail Tracks in Olympia, Wash. They Don’t Plan on Leaving.*, WASH. POST (Nov. 29, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/11/29/anti-fracking-activists-and-anarchists-are-blocking-rail-tracks-in-olympia-they-dont-plan-on-leaving/?tid=sm_tw&utm_term=.68104d3ac5b3 (describing local Tribes’ encampment to block rail shipments of materials needed hydraulic fracturing, a form of gas drilling, in North Dakota); Noah Remnick, *The Ramapoughs vs. the World*, N.Y. TIMES (Apr. 14, 2017), <https://www.nytimes.com/2017/04/14/nyregion/ramapough-Tribe-fights-pipeline.html> (describing the Ramapough Tribe’s resistance to the Pilgrim Pipeline crude oil pipeline).