

Historical Injustices and the Dakota Pipeline: Law Is to Justice as Treaties Are to Native Americans

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“Since the founding of this nation, the United States’ relationship with the Indian tribes has been contentious and tragic. America’s expansionist impulse in its formative years led to the removal and relocation of many tribes, often by treaty but also by force.” Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001). This case also features what an American Indian tribe believes is an unlawful encroachment on its heritage. More specifically, the Standing Rock Sioux Tribe has sued the United States Army Corps of Engineers to block the operation of Corps permitting for the Dakota Access Pipeline (DAPL). – (opening paragraph of STANDING ROCK SIOUX TRIBE, et al., v. U.S. ARMY CORPS OF ENGINEERS, et al., Civil Action #16-1534 (JEB))

After seeming to quote sympathetically another judge’s oblique acknowledgement of historic injustice (above), a U.S. District Judge went on to [issue an opinion](#) perpetuating that injustice, as required by law. On September 9, 2016, Judge James E. (“Jeb”) Boasberg issued his order based on his self-described cursory review of the record (“digging through a substantial record on an expedited basis” [emphasis added]). This cursory review is again acknowledged in the judge’s conclusion that “the Corps has likely complied with the NHPA [National Historic Preservation Act] and that the Tribe has not shown it will suffer injury that would be prevented by any injunction the Court could issue.” The judge took 58 pages to justify his ruling on a likelihood rather than a finding of fact, which was not easily found given the spotty state of the evidence. Judge Boasberg’s lengthy exposition of the case is filled with surmises and, as a whole, suggests that few, if any, of the participants have consistently acted in good faith.

Judge Boasberg’s decision, to deny an injunction halting construction of the Dakota Access Pipeline (DAPL), appears reasonable enough on its face since the pipeline is already about half built (on private land) and the Standing Rock Sioux made no specific representations of culturally significant sites that would be irreparably damaged in the absence of an injunction, at least according to the judge, who wrote: “These people created stone alignments, burial cairns, and other rock features throughout the area to conduct important spiritual rituals related to the rhythms of their daily life. Along the region’s waterways in particular, the prevalence of these artifacts reflects water’s sacred role in their deeply held spiritual beliefs.” His decision to discount these non-specific monuments (“at least 350”) was more of a [psychological defeat](#) than a legal one for the tribe, since the Standing Rock Sioux had, from the beginning, wanted the Army Corps of Engineers to treat the entire pipeline as a single project. The Corps insisted that its legal jurisdiction applied only to unconnected bits and pieces totaling about 12 miles along the route of the 1,172-mile pipeline. Although Congress has regulated natural gas pipelines, it has passed no law

putting oil pipelines under federal jurisdiction, even when a pipeline, like DAPL, passes through several states.

U.S. Justice Dept. plays both sides of pipeline issue

Whatever impact Judge Boasberg's ruling had didn't last long. Apparently the U.S. Justice Dept., having represented the Corps of Engineers in the Standing Rock Sioux case, had anticipated Judge Boasberg's decision. And the Justice Dept. also apparently had mixed feelings about the likely decision, having prepared to render it moot if the injunction was denied. Within minutes of the judge's ruling, the Justice Dept. [issued a joint statement](#) that began:

We appreciate the District Court's opinion on the U.S. Army Corps of Engineers' compliance with the National Historic Preservation Act. However, important issues raised by the Standing Rock Sioux Tribe and other tribal nations and their members regarding the Dakota Access pipeline specifically, and pipeline-related decision-making generally, remain. Therefore, the Department of the Army, the Department of Justice, and the Department of the Interior will take the following steps....

The first step was effectively to impose a [non-injunction injunction](#) that halts construction on at least some of the contested areas where the pipeline approaches or encroaches on waterways. For now, the Corps of Engineers will withhold the permits necessary for construction to continue, pending the resolution of cultural site issues along the pipeline as well as the larger issue of how the U.S. relates to the supposedly sovereign tribal governments. This three-agency federal intervention has all the look of an attempt at political de-escalation of a situation threatening to get out of hand. Starting in April 2016 and increasing at the end of summer, [thousands of Native Americans](#) from a number of tribes across the country have gathered near Lake Oahe as "protectors of the waters," using nonviolent direct action techniques to block pipeline construction. Both the pipeline company and the state of North Dakota have responded with force and violence, as well as apparently illegal violations of the protesters' rights. As the Justice Dept. statement of September 9 put it:

... we fully support the rights of all Americans to assemble and speak freely. We urge everyone involved in protest or pipeline activities to adhere to the principles of nonviolence. Of course, anyone who commits violent or destructive acts may face criminal sanctions from federal, tribal, state, or local authorities. The Departments of Justice and the Interior will continue to deploy resources to North Dakota to help state, local, and tribal authorities, and the communities they serve, better communicate, defuse tensions, support peaceful protest, and maintain public safety.

In recent days, we have seen thousands of demonstrators come together peacefully, with support from scores of sovereign tribal governments, to exercise their First Amendment rights and to voice heartfelt concerns about the environment and historic, sacred sites. It is now incumbent on all of us to develop a path forward that serves the broadest public interest.

Despite the reasonable rhetoric, the only action proposed by the Justice Dept. is to "invite tribes to formal, government-to-government consultations." This is an ancient paradigm that has rarely turned out well for the tribes. The Justice Dept. agenda for the consultations has

just two items: (1) “to better insure tribal input” into decisions affecting tribal lands and rights “within the existing statutory framework,” and (2) to consider proposing new legislation to Congress. Implicitly, the first point contradicts Judge Boasberg’s conclusion that the Corps of Engineers “likely” complied with the law. But what the Justice Dept. proposes will take a long time to reach any satisfactory solution, if it ever does. This is in direct opposition to pressures on the ground, where the white population (roughly 90% of North Dakota) is restive and the owner of the pipeline, Energy Transfer Partners, faces a contractual obligation to start delivering oil in early 2017. There is no middle ground here.

Once again, it’s the American empire versus interfering outsiders

Energy Transfer Partners represents the tip of [the corporate oligarchy](#) that has no profitable stake in alleviating climate change. The international banks (38 of them according to Bloomberg) that have put up more than \$10 billion for DAPL and other oil projects are, in reality, underwriting the burning of more and worse fossil fuels as far as the planet is concerned. Mainstream media [coverage, when it exists](#), typically focuses on protest and confrontation over the local water issue, without meaningful context and without going deeper into underlying issues. For detailed coverage of both events on the ground and wider context, Democracy NOW has been [covering the story in depth](#) since early August, as tensions were building.

On July 25, 2016, the Corps of Engineers issued an environmental assessment that found that the pipeline would have “no significant impact” on the tribe’s burial grounds or other cultural landmarks. The Corps also instituted a “Tribal Monitoring Plan,” under which DAPL was required to notify the tribes when working on sensitive areas so that the tribe could monitor the work. This was roughly seven years since work began on the pipeline, by which time almost half the pipeline had already been built without monitoring.

On August 4, the tribe filed for an injunction to stop work on the pipeline. Judge Boasberg held a hearing on the motion on August 24, promising a decision on September 9. The judge noted that 90% of the clearing and grading, the work most damaging to tribal sites, had been completed in North Dakota. He added: “One of the few exceptions is the crossing leading up to the west side of Lake Oahe, which has not yet been cleared or graded.”

On September 2, the tribes filed a supplemental declaration with Judge Boasberg, identifying a number of cultural sites both within and near the pipeline route, areas that had been untouched by construction. The following day, Saturday, September 3, DAPL bulldozers moved in and plowed up the area, without regard for any tribal sites in their way. To get this done, DAPL brought in private security forces from out of state. Local and state law enforcement withdrew and watched, or went away. Caught by surprise, tribal protesters belatedly but peacefully swarmed the site to stop the bulldozers. There they were met by aggressive private security forces who [used dogs and pepper spray](#), as well as personal violence, to hold protestors at bay while the bulldozers finished their work. An unknown number of protestors were hit, shoved, pepper sprayed, maced, bitten by dogs, and otherwise attacked by DAPL workers and security. And the state of North Dakota responded by issuing a warrant for the arrest of [journalist Amy Goodman](#) for criminal trespass.

In his ruling a week later, Judge Boasberg covered this event in a single sentence: “The next day, on Saturday, September 3, Dakota Access graded this area.” In the same section, Judge Boasberg went to much greater lengths to minimize the findings of previously unidentified

cultural sites. He also conflated them with others that were not in areas that needed permits. His writing sounds like a brief for the pipeline, showing not the slightest displeasure with DAPL's actions. Another judge, faced with pre-emptive bulldozing of property in active litigation might have had a word or more to say about actions in contempt of court.

Tribal suffering makes a great panopticon for shows of caring

Later in his decision, where he finds that the tribe will suffer no irreparable harm in the absence of an injunction, Judge Boasberg wrote without apparent irony of "the likelihood that DAPL's ongoing construction activities - specifically, grading and clearing of land - might damage or destroy sites of great cultural or historical significance to the Tribe." The judge does not consider whether this is exactly what happened on September 3. Instead, in a growing fog of mock respect, the judge quotes the [Standing Rock Sioux](#) Tribal Council chairman, Dave Archambault II:

History connects the dots of our identity, and our identity was all but obliterated. Our land was taken, our language was forbidden. Our stories, our history, were almost forgotten. What land, language, and identity remains is derived from our cultural and historic sites.... Sites of cultural and historic significance are important to us because they are a spiritual connection to our ancestors. Even if we do not have access to all such sites, their existence perpetuates the connection. When such a site is destroyed, the connection is lost."

With breath-taking sanctimony, the judge then ignores not only the future possibility of irreparable harm from DAPL construction, but also the actual irreparable harm of September 3 as well. Judge Boasberg writes: "The tragic history of the Great Sioux Nation's repeated dispossessions at the hands of a hungry and expanding early America is well known. The threat that new injury will compound old necessarily compels great caution and respect from this Court in considering the Tribe's plea for intervention." Whereupon the judge exercised no caution whatsoever, denied the request for an injunction, and left the tribe at the mercy of the pipeline company (until the Justice Dept. intervened). In his order, the judge then justified his choice with an argument of inevitability as to the destruction of tribal sacred sites: "any such harms are destined to ensue *whether* or not the Court grants the injunction the Tribe desires." [emphasis added] But later the judge admitted that "there may be many sites that ... the Court has missed."

Judge Boasberg, whatever his personal qualities, appears here as an agent of the state, a state that has been hostile for centuries to those who lived here before. Despite his lip service to Native American suffering, Judge Boasberg is little different in cultural representation from Jack Schaaf, 60, the white, angry, North Dakota rancher who is mad at the tribes for legally trying to defend their rights, as reported in [the New York Times](#) September 13, showing no awareness of self-contradiction:

Mr. Schaaf said he had no problem with people standing up for a cause, but he was tired of navigating a police checkpoint if he wanted to drive into Mandan for a pizza. He complained that closings at Lake Oahe had prevented him from boating. And he said the protesters had no right to march on a public highway. "I think it's totally wrong," he said. "If they want to protest, they should be in the ditch."

This, like Judge Boasberg, is the voice of the conqueror whose denial of who he is requires him to deny the conquered their rights. This is class war and race war. This is the power to attack the living and disturb the dead without remorse, without hesitation, without even awareness. This is the continuity of American genocide that underlies everything America says it wants to stand for. This is the bedrock of American entitlement. This is entitlement that sees no contradiction in denying some of the public access to public roads. This is entitlement that enables law officers to lie about pipe bomb threats when tribal leaders talk about loading up their peace pipes. This is entitlement that shows itself in the actions of a pipeline company that, while waiting for a judge to rule on the protection of a burial ground, sends in its goons and bulldozers to rape the land and then argue that there's no burial ground left to protect. It's like the boy who kills his parents and then pleads for mercy because he's an orphan.

Entitlement that robs a grave for a skull to use in ritual kissing

This is the deeply pathological American entitlement that has no difficulty sharing blankets laced with smallpox, no difficulty wiping out men, women, and children at [Sand Creek](#) or [Ludlow, Colorado](#), no difficulty slaughtering guards and prisoners at Attica, and no difficulty waging war crimes in countries sorely in need of disentanglement, at least in American eyes.

And strangely enough, Judge Boasberg has been beautifully cast by fate as the embodiment of the American pathology as it attacks the tribes once more. Jeb Boasberg is a [child of American privilege](#). From St. Albans School to Yale to Oxford to Yale Law School and on up the federal judicial ladder, there is nothing apparent in his published life story that prepares him even to understand tribal realities, much less deal fairly or compassionately with them.

Judging by Jeb Boasberg's [answers to the U.S. Senate](#) before being confirmed for his next federal judgeship, he is the antithesis of an activist judge. He had no objection to mandatory sentencing. He wrote: "I have not presided over cases in which my desired outcome was contrary to the law." He answered that he does not consider his own personal values (unstated) relevant. With regard to the right to bear arms and to the death penalty, he said he would follow current law as determined by the Supreme Court. He said he does not believe the U.S. Constitution is a living document that can evolve with society. He said a federal judge must do as the Supreme Court says. He said more, much of it repetitive, none of it suggesting any inclination to deviate purposely from current legal doctrine, whatever it might be.

These answers create an impression of a legal automaton, insofar as it's possible for a human to be robotic. Judge Boasberg portrays himself as a man who only follows orders. He does not bring up the way "only following orders" runs against the Geneva Conventions (but he is not a soldier being ordered by judicial authority to make fundamental moral choices, the same choices he flees from). Asked for his view of "the role of a judge," he answered: "A judge should fairly and impartially uphold the law as it is written and apply it to the cases that appear before him or her." With perfect consistency, he does not address the problem of how to uphold the law fairly when the law itself is unfair (a longstanding, common problem with American law).

The ruling class does as the ruling class does

The ruling class writes the law and the ruling class is not concerned with the law's fairness

to others than themselves. Jeb Boasberg, when he was at Yale College, was a member of a secret society of the ruling class, [Skull and Bones](#) (familiarily known as “Bones”), founded in 1832 by William H. Russell, heir to an opium-trade fortune. A great many of its members have served the American empire, especially in the CIA. Bonesmen as President include William Howard Taft and both Bushes (and their father/grandfather Prescott Bush). Other Bones alumni include William F. Buckley, William Sloane Coffin, Averill Harriman, Lewis Lapham, Henry Luce, and Secretary of State John Kerry [among a long list of other notables](#).

Judge Boasberg’s deference to law, to government agencies, to oil pipeline companies is all consistent with his membership in a ruling class club. What is especially neat about this club is that, [by credible legend](#), it has long been directly involved in Native American grave desecration. As the story goes, [Prescott Bush](#) was stationed at Fort Sill, Oklahoma, in 1918. The Apache warrior Geronimo had died at Fort Sill in 1909. Bush and fellow [Bonesmen dug him up](#) and brought his skull and other bits back to the Tomb, the New Haven home of Skull and Bones. A [lawsuit in 2009](#), seeking the [return of Geronimo’s skull](#) to his heirs, [ended in dismissal](#) by a federal judge before the truth of the skull could be established. The judge ruled that the Native American Graves Protection and Repatriation Act, under which the suit was filed, did not protect any graves desecrated before 1990, when the law was passed. That let Skull and Bones off the hook. And left [Geronimo in limbo](#), or New Haven.

Assume the legend is literally true: then, as a Yale senior joining Skull and Bones, Jeb Boasberg kissed Geronimo’s skull. Metaphorically, that act of atavistic triumphalism shines through in his legal decision against the Standing Rock Sioux. Kissing the skull of an enemy is just another way of showing who’s in control here, whose burial is sacred, and whose is not.

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