

The Dakota Pipeline: The Human Right to Water at Standing Rock

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As thousands of Indigenous people from the Standing Rock Sioux Tribe, other Native American tribes, and their allies continue their protest against the Dakota Access pipeline (DAPL), corporate media have continued to focus almost exclusively on the presidential election. Most media ignored last week's vicious attack on the Water Protectors, as they call themselves.

The construction of the pipeline would violate the human right to water, the right of Indigenous peoples to practice their cultural traditions, and several federal statutes.

On October 27, more than 100 police from seven different states and the North Dakota National Guard, clad in riot gear and carrying automatic rifles, arrived in MRAPs [Mine-Resistant Ambush Protected military vehicles], Humvees and an armored police truck. They defended Energy Transfer Partners (ETP), the company behind the pipeline, and arrested 142 Water Protectors. That brings the total arrested since August to over 400. More than 40 people have been injured, and some have broken bones and welts from rubber bullets fired by officers.

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Ret. Army Col. Ann Wright, who spent four days at Standing Rock, reported: "Police used mace, pepper spray, tear gas and flash-bang grenades and bean-bag rounds against Native Americans who lined up on the highway."

The 1,170-mile, \$3.7 billion oil pipeline is scheduled to traverse North Dakota, South Dakota, Illinois and Iowa. Slated to transport over 570,000 barrels of fracked oil daily, the pipeline would pass under the Missouri River at Lake Oahe, just a half-mile upstream from the Standing Rock Sioux Tribe's drinking water source. It could affect 28 tribes and millions of people.

An inevitable oil spill from the pipeline, releasing diesel fuel and toxic levels of contaminants into the river, would be culturally and economically catastrophic to the tribe, polluting its source of water and critical farmlands.

Oil spills are all too common. The Pipeline and Hazardous Materials Safety Administration documented over 2,000 significant accidents from oil pipelines since 1995. An average of 121 accidents has taken place annually from 2013 to 2015.

People who drink water with oil in it or eat meat from livestock exposed to oil have a higher rate of cancer and digestive problems, according to a 2010 report by Worcester Polytechnic

Institute, which studied three major oil spills. And people who use oil-contaminated water for bathing or laundry have a higher incidence of skin problems, including rashes, eczema and skin cancer.

North Dakota and six other states deployed their police officers to attack and arrest the Water Protectors in order to facilitate the construction of this pipeline, which would seriously threaten the tribe's water supply, in violation of the human right to water.

Torture and Degrading Treatment of Water Protectors

Those arrested were held at the Morton County Correctional Center in 10-by-14 foot cages, some in dog kennels. They reported being forced to wait for access to food, water, bathrooms and medical attention. Some charged with misdemeanors were strip-searched. Women were left naked in their cells and male guards harassed them. Some people were zip-tied in stress positions for hours.

Water Protectors who had locked themselves to some construction equipment reported being waterboarded. Waterboarding has long been considered torture, which violates the UN's Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the United States.

Amnesty International, which has sent a team to Standing Rock to investigate the human rights abuses, stated that some of this treatment violates the prohibition on cruel, inhuman or degrading treatment. (In addition to ratifying the Convention against Torture, the United States has also ratified the International Covenant on Civil and Political Rights, which outlaws cruel, inhuman or degrading treatment.)

Violation of the Human Right to Water

The mantra of the Water Protectors at Standing Rock is "Water Is Life." The World Health Organization (WHO) stated in its 2010 [Fact Sheet on The Right To Water](#), "Water is the essence of life. Safe drinking water and sanitation are indispensable to sustain life and health, and fundamental to the dignity of all."

The WHO also determined, "Access to safe drinking water by indigenous peoples is closely linked to their control over their ancestral lands, territories and resources. Lack of legal recognition or protection of these ancestral lands, territories or resources can, therefore, have far-reaching implications for their enjoyment of the right to water."

Indeed, the international community has recognized that access to safe drinking water must be analyzed within a human rights framework.

States have a duty to ensure access to the means of survival, the United Nations Human Rights Committee wrote in its 1982 general comment No. 6. The Committee was interpreting the International Covenant on Civil and Political Rights.

The UN Committee on Economic, Social and Cultural Rights, in its 2002 general comment No. 15, stated, "The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights." The Committee defined the right to water as the right of all people "to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses." Water must be free from chemical substances that constitute a threat to health, according to the WHO's analysis of

general comment No. 15.

Construing the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights noted that the right to water is part of the right to an adequate standard of living.

Although the United States has not ratified the covenant, we have signed it, thereby incurring a legal obligation to refrain from taking actions inconsistent with the object and purpose of the covenant, under the Vienna Convention on the Law of Treaties. The United States has not ratified the Vienna Convention but considers it to be binding customary international law.

The WHO also observed that a violation of the right to water violates the well-established international principle of non-discrimination enshrined in all major human rights treaties. *Discrimination* means any distinction, exclusion or restriction made on the basis of specific characteristics of an individual such as race, religion, age or sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms.

The Dakota Access pipeline was originally set to go through Bismarck and Mandan, North Dakota, which would have adversely affected white people. (Both Bismarck and Mandan are around 90 percent white.) When people in those communities opposed the projected route, it was altered to travel through areas close to Native American communities. This is a violation of the non-discrimination principle.

In 2010, the UN General Assembly specifically recognized the human right to water and sanitation, and stated that clean drinking water and sanitation are essential to the realization of all human rights.

Violation of Indigenous Peoples' Right to Practice Cultural Traditions

The pipeline would pass through areas of great cultural significance, including sacred sites and burial grounds protected by federal law. Construction would destroy these burial grounds, sacred sites and historically significant areas in its path.

Cultural resource surveys were conducted by out-of-state, non-tribal consultants of the company seeking to build the pipeline. But only tribally trained and approved consultants are actually able to assess such sites. The Standing Rock Sioux Tribe has never had the opportunity to discuss protocols for cultural surveys, or participate in surveys that were conducted. It was only provided partial surveys after they were completed.

The UN Declaration on the Rights of Indigenous Peoples states, "Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites."

This declaration, a moral document but not a treaty, passed with 144 states voting in favor, four voting against, and 11 abstentions. The United States voted in opposition.

Violation of Federal Statutes

On July 27, the Standing Rock Sioux Tribe sued the US Army Corps of Engineers, the primary

federal agency that granted permits needed for the construction of the pipeline. The lawsuit alleged violations of multiple federal statutes, including the Clean Water Act, National Historic Preservation Act and National Environmental Policy Act, when the permits were issued.

Moreover, the Corps did not do a full Environmental Impact Statement as required by the National Environmental Policy Act.

“Construction and operation of the pipeline, as authorized by the Corps, threatens the Tribe’s environmental and economic well-being, and would damage and destroy sites of great historic, religious, and cultural significance to the Tribe,” the complaint reads.

The Standing Rock Sioux were not properly consulted on the cultural and environmental impacts of the pipelines, as required by law. The tribe requested a preliminary injunction to halt construction until it could survey the pipeline route for cultural and heritage resources.

“Although federal law requires the Corps of Engineers to consult with the tribe about its sovereign interests, permits for the project were approved and construction began without meaningful consultation,” Standing Rock Sioux Chairman David Archambault II wrote in an op-ed in The New York Times.

The UN Declaration on the Rights of Indigenous Peoples states, “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights.” The declaration further says, “Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including ... sanitation, health” and “to be secure in the enjoyment of their own means of subsistence.” That includes the right to clean water.

On September 9, US District Judge James Boasberg denied the tribe’s request for injunctive relief and the tribe appealed.

Immediately following the court’s denial of the injunction, responding to pressure from the Water Protectors, three federal agencies — the Department of Justice, Department of the Army, and Department of the Interior — issued a joint statement announcing they will halt any additional permitting and reconsider their past permits for the project.

There is still one remaining permit that has not been issued. Since the Corps owns land on either side of Lake Oahe, Dakota Access must obtain an easement from the Corps to dig the tunnel for the pipeline underneath the lake on federally owned lands.

The three federal agencies asked that the pipeline company voluntarily pause all construction activity within 20 miles east or west of Lake Oahe. The company refused.

If Dakota Access is found to have knowingly damaged a historic or cultural resource with the intent of sidestepping the National Historic Preservation Act, the Corps cannot issue the easement.

Meanwhile, Chairman Archambault has called on the Department of Justice to conduct an investigation into heavy-handed police tactics and possible civil rights violations.

UN Special Rapporteurs and Observers Concerned About Abuses

The UN Special Rapporteur on the rights of Indigenous peoples, Victoria Tauli-Corpuz, called on the United States to halt the construction of the DAPL because it poses a significant risk to the drinking water of the Standing Rock Sioux Tribe and threatens to destroy their sacred sites and burial grounds.

Tauli-Corpuz's call was endorsed by eight other UN mandate holders, including the special rapporteurs on the situation of human rights defenders, the human right to safe drinking water and sanitation, human rights and the environment, the rights to freedom of peaceful assembly and of association, cultural rights, human rights of the environmentally sound management and disposal of hazardous substances and wastes, as well as the chairperson of the working group on business and human rights.

They also expressed concern at reports of intimidation, harassment and prosecution of Indigenous peoples exercising their right to peaceful assembly at Standing Rock.

A delegation from the United Nations Permanent Forum on Indigenous Issues sent observers to Standing Rock to investigate the Water Protectors' claims of human rights abuses, including the right to water, protection of sacred sites, the right to free prior and informed consent before development affecting their territories, the protection of Indigenous human and environmental rights defenders, unlawful arrests, excessive force and mistreatment in custody.

In a letter to President Barack Obama, Sen. Bernie Sanders asked that the president urge the Corps to stop construction within a mile between Highway 1806 and the Missouri River. Sanders also asked Obama to direct the Department of Justice to send observers to protect the Water Protectors' First Amendment rights to protest, and remove the National Guard from the camp. Finally, Sanders wrote that all federal permits should be suspended until the Corps completes a full cultural and environmental review.

There is renewed hope for the Water Protectors. On November 1, Obama said the Corps is examining whether the pipeline can be rerouted to southern North Dakota to alleviate the concerns of the Standing Rock Sioux Tribe and its allies. "As a general rule, my view is that there is a way for us to accommodate sacred lands of Native Americans, and I think that right now the Army Corps is examining whether there are ways to reroute this pipeline," he said.

The National Lawyers Guild formed the [Red Owl Legal Collective](#) on site to provide legal representation for those arrested — including protesters, members of the press, legal observers and lawyers — and to work on civil litigation.

Marjorie Cohn is professor emerita at Thomas Jefferson School of Law, former president of the National Lawyers Guild and on the advisory board of Veterans for Peace. Her books include *Cowboy Republic: Six Ways the Bush Gang Has Defied the Law*; *The United States and Torture: Interrogation, Incarceration, and Abuse* and *Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues*. Visit her website: MarjorieCohn.com. Follow her on Twitter: [@MarjorieCohn](https://twitter.com/MarjorieCohn).

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