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## Water, Oil, and Tribal Sovereignty: The Fight for the Dakota Access Pipeline

dealing with environmental injustice. Pair suggested those problems could not be solved without providing more funding for environmental justice, which Congress has denied. He further noted that many communities do not trust the federal government to solve all of their problems, so the EPA currently has neither the political nor the financial support needed to tackle those issues. Another audience member asked how local communities can recognize access to safe drinking water as a basic human right. Wilde Anderson answered by saying that leaders do not try hard enough to make water available to communities that cannot afford it, so communities fall short of recognizing access to safe drinking water as an essential human right. The costs associated with delivering water to these communities are high, and not many cities have completed these critical delivery infrastructure projects.

*Travis Parker*

**NATIVE AMERICAN LAW STUDENTS ASSOCIATION, NATURAL RESOURCES  
AND ENVIRONMENTAL LAW SOCIETY, AND THE UNIVERSITY OF DENVER  
WATER LAW REVIEW PANEL**

**WATER, OIL, AND TRIBAL SOVEREIGNTY: THE FIGHT FOR THE DAKOTA  
ACCESS PIPELINE**

Denver, Colorado    September 27, 2016

On September 27, 2016, the University of Denver Sturm College of Law (“DU”) hosted a panel discussion about the current legal fight over the Dakota Access Pipeline in North Dakota. The panel addressed legal, historical, social justice, and environmental justice topics related to the dispute. The discussion was co-sponsored by DU’s Natural Resources & Environmental Law Society, Native American Law Students Association, and the *DU Water Law Review*.

Professor Fred Cheever, a DU Law professor and co-director of the school’s Environmental & Natural Resources Law Program, moderated the discussion and introduced the issue. The Dakota Access Pipeline (“DAPL”) is an approximately 1,170-mile pipeline constructed to transport crude oil from North Dakota to Illinois. The pipeline’s path is intended to span four states—North Dakota, South Dakota, Iowa, and Illinois—and cross the Missouri River at a point located a half-mile from the Standing Rock Indian reservation in North Dakota. The DAPL route would pass through tribal lands of great cultural, religious and spiritual significance to tribes.

Professor Brad Bartlett, a visiting assistant professor in the Environmental Law Clinic at DU Law, offered a timeline of events regarding the DAPL legal conflict. In July 2016, Earthjustice, on behalf of the Standing Rock Sioux Tribe, filed a declaratory and injunctive relief complaint in U.S. District Court for the District of Columbia (*Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*). The Cheyenne River Sioux Tribe intervened and joined the lawsuit in August 2016. In the initial complaint, the Standing Rock Sioux Tribe argued that the U.S. Army Corps of Engineers (“Corps”) violated multiple federal statutes, including the Clean Water Act, National Historic Protection Act, and National Environmental Policy Act, when it issued permits to move forward with

construction of the DAPL. First, the DAPL's route is intended to pass under the Missouri River just a half a mile upstream of the Standing Rock Sioux Tribe's reservation boundary. A federal permit is required under the Clean Water Act for any construction project impacting federally regulated rivers—including the DAPL's crossing of the Missouri River. In this case, the permitting process triggers requirements under the National Historic Protection Act that intend to protect areas of great cultural significance to the Standing Rock Sioux Tribe, such as sacred sites and burial grounds. The Tribes argue that the Corps pre-authorized construction of DAPL without ensuring compliance of the National Historic Protection Act, allowing the Corps to circumvent its statutory responsibility to ensure that the DAPL does not harm historically and culturally significant sites. The Tribe's injunctive relief complaint seeks to stop the DAPL from proceeding and causing irreparable harm.

Professor Bartlett oversees DU law students in the environmental law clinic who worked in conjunction with Fredericks Peebles & Morgan LLP, a national Indian law firm, to file a complaint on behalf of the Yankton Sioux Tribe on September 8, 2016, for declaratory and injunctive relief in U.S. District Court for the District of Columbia (*Yankton Sioux Tribe v. U.S. Army Corps of Engineers*) to stop construction of the DAPL. The Yankton Sioux Tribe Reservation is located in South Dakota along the Missouri River. The complaint seeks to prevent the Corps and other federal agencies from violating the National Historic Preservation Act, the National Environmental Policy Act ("NEPA"), the Clean Water Act, the 1851 Treaty of Fort Laramie, and the Administrative Procedures Act. Specifically, NEPA requires a federal agency to complete an environmental impact statement, including public engagement and detailed comparison of alternatives. Additionally, the complaint requests that the Corps engage in a more meaningful consultation process with the tribal communities. Professor Bartlett noted that neither has happened as of September.

On September 9, 2016, U.S. District Court Judge James Boasberg denied the tribes' motions for an injunction. Immediately following this decision, the Justice Department, the Department of the Army, and the Department of the Interior issued a joint statement moving to stop construction of the DAPL on land near the Standing Rock Indian Reservation until the Corps could revisit and reconsider previous decisions under federal laws. The joint statement also requested that tribes and government agencies meet to evaluate the current government-to-government consultation and to determine how to better include tribes in decision-making processes concerning pipeline construction.

Professor Bartlett also noted that the tribal response to the construction of this pipeline has resulted in the largest congregation of Native Americans in the past 100 years. Police and private security forces have responded with arrests and violence to tribes' peaceful acts of civil disobedience. As of September 2016 a prayer camp still remains in the area with ongoing protest demonstrations.

The second panelist, Dr. Angel M. Hinzo, is a Postdoctoral Fellow in Interdisciplinary Indigenous Studies at the University of Denver Interdisciplinary Research Institute for the Study of (In)Equality (IRISE) focusing on Native American history from the mid-19th century to the present. In the panel, Dr. Hinzo recounted how the history of U.S. governmental and tribal relations is characterized by contrasting, and often conflicting, worldviews. She said the

federal government's extraction of natural resources embodies western values of exploitation for economic gain. For example, proponents of the DAPL have framed the project as benefiting the public good by creating jobs during the construction phase of the pipeline and contributing to federal sales and income taxes. Tribes, on the other hand, view the same natural resources, as sentient beings to be respected and revered, not exploited. The current DAPL conflict illustrates this fundamental difference in worldview because the pipeline would transport crude oil over an area rich in cultural and natural resources. Historically, according to Dr. Hinzo, the Corps—the oldest agency dealing with natural resources in the United States—has harmed native lands and the environment.

Additionally, Dr. Hinzo raised concerns that the construction of pipeline threatens local tribal burial sites. In September 2016, the pipeline construction company—Dakota Access LLC—destroyed burial sites near the Standing Rock Indian Reservation to build the DAPL. Dr. Hinzo emphasized that the Native American Graves Protection and Repatriation Act (“NAGPRA”) provides regulations to protect culturally significant sites during infrastructure projects, which the Corps and pipeline workers did not respect. Dr. Hinzo also argued that discussions around the DAPL need to better address the NAGPRA. Lastly, Dr. Hinzo noted the social costs associated with the oil-and-gas boom in North Dakota. Communities living near fossil fuel extraction have witnessed an increase in violence and sex trafficking. Low income tribal communities living near the proposed route of the DAPL, who already experience difficulty with these issues, are increasingly at risk.

The panel's third speaker, Mr. David Neslin, is of counsel at Davis Graham & Stubbs LLP in Denver, Colorado. He previously managed the Colorado Oil and Gas Conservation Commission within the state's Department of Natural Resources, which regulates all oil and gas development in Colorado. During his career, Mr. Neslin has also represented multiple tribes in natural resource-extraction issues.

First, Mr. Neslin noted that the sole issue of the preliminary injunction action was whether the Corps violated federal laws when it issued permits allowing construction of the DAPL to move forward. In general, preliminary injunctive relief actions seek to halt a project and maintain the status quo until the court has a chance to go through the full litigation process and resolve the issue. Consequently, the court's denial of the injunction in this case was a narrow decision because it did not go to trial or produce a full development of record. Next, Mr. Neslin spoke about the importance of the administrative record to the court's decision and how this case represents a good example of why it is vital for parties to develop and convey a cohesive narrative to the court. While people can disagree about the substance of such records, he said that the Corps adequately documented its compliance and “checked all the boxes” needed to comply with federal regulations as to tribal consultations and environmental impacts of the DAPL. As noted earlier, the federal government is required to provide permits under the Clean Water Act to allow the DAPL to move forward, triggering requirements under the National Historic Protection Act to ensure proper treatment of sacred sites. Because the Corp followed and completed steps outlined in the permitting process, Judge Boasberg denied the tribes' motions for an injunction. Mr. Neslin argued that it was the Department of Justice's multiple affidavits, for example, that illustrated the ways in which the

Corps took the proper steps in allowing the DAPL to move forward. The tribes, he said, could have done a better job of illustrating and citing examples to the court of the DAPL's impacts on tribal cultural resources. Finally, Mr. Neslin noted that the district court opinion serves as a reminder of the potency of judicial deference toward agency decision making in cases like this. Traditionally, courts defer to agencies—such as the Environmental Protection Agency—to determine whether infrastructure projects have followed proper procedure when considering environmental and cultural impacts. When not one overarching agency exists to ensure proper compliance, as in the case of the DAPL, multiple federal agencies follow their own processes when dealing with a discrete aspect of the overall project. Mr. Neslin said that federal segmentation of this kind results in piecemealed environmental and cultural impact assessments, overlooking the potential for studying the impacts of the project as a whole.

The final panelist, Ms. Heather Whiteman Runs Him, is a staff attorney at the Native American Rights Fund (“NARF”) in Boulder, Colorado, where she works on tribal water and natural resource rights issues. She provided an overview of tribal water rights and upcoming meetings between tribes and the U.S. government to evaluate current administrative consultation requirements. Ms. Whiteman Runs Him explained that NARF's role in the current DAPL actions is to coordinate multiple amicus briefs in support of tribes' ongoing defense. Ms. Whiteman Runs Him explained that the foundation of tribal water rights under federal law rests on the Winters Decision, which says that the establishment of an Indian reservation includes an implied reservation of water for future use in an amount necessary to fulfill the needs of the reservation.

While Winters recognized tribal rights to water, Ms. Whiteman Runs Him noted, some tribes are working with state and federal governments to quantify their water rights and build water infrastructure in order to put their water to use. Currently twenty-nine tribes have settled their water rights, while many more have not. Settlement negotiations are generally expensive, lengthy, and multi-step processes that involve analyzing the land base of the reservation, hydrology, soil science, economics, etc. Ms. Whiteman Runs Him emphasized that neither the Standing Rock Sioux Tribe nor the Yankton Sioux Tribe have either quantified or settled their reservation water rights, but that does not diminish the Tribes' rights to a reliable and safe water supply for their citizens. These tribes have concerns about the DAPL's affect on their water supply because the pipeline's proposed route traverses the Missouri River, a major municipal water source to the Standing Rock Indian Reservation, directly upstream from the Standing Rock Sioux Tribe Reservation, and the point of diversion for its drinking water.

Ms. Whiteman Runs Him explained that federal agencies are required to establish policies and procedures to meet the consultation standards of the National Historic Protection Act. Most federal agencies have established such policies; the Corps, however, has a history of failing to comply with federal standards in regard to tribal sovereignty. Ms. Whiteman Runs Him believes that federal agencies need to “make the letter of the law match the spirit of the law” by not only requiring the Corps meet requirements of the administrative process, but also implementing requirements in a way that is meaningful to the intent of the regulations.

One major point illuminated throughout the panel discussion and the question and answer period is the adequacy of a permitting process that allowed the DAPL to move forward in the face of federal trust obligations to tribes. As previously mentioned, the permitting process for the DAPL requires certain mitigation activities under federal regulations to ensure proper treatment of sacred sites. While federal agencies may have completed the required steps to receive permits, the tribes argue that such steps lack substance and do not adequately and meaningfully consider tribal input. While the permitting process may be administratively sufficient, many question whether the process actually fulfills spirit of the federal trust obligations to substantively consult and include tribal input.

*Lindsey Ratcliff*

### SIXTH ANNUAL CARVER COLLOQUIUM

#### WATER FOR SALE: PRIOR APPROPRIATION OR FREE MARKET TRADE?

Denver, Colorado September 29, 2016

The Rocky Mountain Land Use Institute hosted the sixth annual Carver Colloquium on September 29, 2016. Former Colorado Supreme Court Justice, Gregory Hobbs, and Professor Gary Libecap, of the University of California, Santa Barbara Bren School of Environmental Science and Management, compared the relative merits of the prior appropriation system and the free market system of water allocation. The debate over which system of water allocation is better suited for today's environmental realities quickly evolved into an in-depth discussion about the advantages and disadvantages of the doctrine of prior appropriation, as well as an insightful comparison between Colorado's use of prior appropriation and California's hybrid utilization of prior appropriation and riparianism. University of Denver Sturm College of Law professor Jan Laitos moderated the event, which consisted of a ten-minute opening comment by each speaker, followed by three discussion questions from Professor Laitos, and a thirty-minute session in which the speakers answered questions from the audience.

Justice Hobbs began by reciting a poem and providing a brief history of water law in Colorado. He discussed how the terrain of the American West requires the prior appropriation system of water allocations because the riparian system is not realistic in a place where the few sources of water are scattered across an arid landscape. Water rights, he said, are for the beneficial use of the people, and Colorado's historical use of the prior appropriation doctrine reflects that reality.

Professor Libecap followed Justice Hobbs' introduction with a brief explanation of California's current approach to water allocation. In California, the riparian doctrine is still used in conjunction with the prior appropriation system. The state owns the few large water projects that serve the main metropolitan areas, and contracts between water rights holders in the water-rich north and the water-scarce south tend to result in unfair distributions to the detriment of southern water users. This complicated situation has led to heavy reliance on groundwater supplies, which has caused severe shortages. Professor Libecap