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Under Coyote's Mask: Environmental Law, Indigenous Identity, and #NoDAPL

Danielle Delaney
University of Wisconsin-Madison

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UNDER COYOTE’S MASK: ENVIRONMENTAL LAW,
INDIGENOUS IDENTITY, AND #NODAPL

Danielle Delaney*

This Article studies the relationship between the three main lawsuits filed by the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, and the Yankton Sioux Tribe against the Dakota Access Pipeline (DaPL) and the mass protests launched from the Sacred Stone and Oceti Sakowin protest camps. The use of environmental law as the primary legal mechanism to challenge the construction of the pipeline distorted the indigenous demand for justice as U.S. federal law is incapable of seeing the full depth of the indigenous worldview supporting their challenge. Indigenous activists constantly re-centered the direct actions and protests within indigenous culture to remind non-indigenous activists and the wider media audience that the protests were an indigenous protest, rather than a purely environmental protest, a distinction that was obscured as the litigation progressed. The NoDAPL protests, the litigation to prevent the completion and later operation of the pipeline, and the social movement that the protests engendered, were an explosive expression of indigenous resistance—resistance to systems that silence and ignore indigenous voices while attempting to extract resources from their lands and communities. As a case study, the protests demonstrate how the use of litigation, while often critical to achieving the goals of political protest, distorts the expression of politics not already recognized within the legal discourse.

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* Ph.D. candidate, University of Wisconsin-Madison 2019; J.D., Georgetown University Law Center; M.A. in Political Science, University of Wisconsin, May 2012. My sincerest thanks to my dissertation advisor, Howard Schweber at University of Wisconsin-Madison for his thoughtful comments and interrogation of my methodology. I also thank the editorial staff of the Michigan Journal of Race & Law for their help in revising this article.

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“Zuzeca Sape (the black snake) will come down out of the north, following the rivers, towards the waters of the people and poison all that it touches.”

– Lakota Sioux prophecy linked to the Dakota Access Pipeline

INTRODUCTION

“*Mni Wiconi!* My relations, it is time to get up and greet the sun. It is time to wake up and protect our mother, to protect the water. The construction workers are already awake!”¹ This wake-up call was the first thing activists heard every morning from August 2016 until February 2017 during the protests against the construction of the Dakota Access Pipeline.² *Mni Wiconi* served as rallying call, a reminder and a prayer for

1. ‘Mni Wiconi’ is a Lakota phrase meaning ‘water is life.’ ‘Mni Wiconi’ became the touchstone phrase of the protestors not just at Sacred Stone and Oceti Sakowin, but also on social media as activists worked to raise awareness of the protests against the pipeline. *Mni Wiconi – Water is Life*, Stand With Standing Rock, <http://standwithstandingrock.net/mni-wiconi/> (last visited Feb. 10, 2018) [hereinafter *Mni Wiconi – Water is Life*]; see also Intervenor-Plaintiff Cheyenne River Sioux Tribe’s Memorandum in Support of Ex-Parte Application for Temporary Restraining Order and Application for Preliminary Injunction at 4-8, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs (Standing Rock II)*, 239 F. Supp. 3d 77 (D.D.C. 2017) (No. 16-1534), 2017 WL 1454128 [hereinafter *Cheyenne River Sioux Tribe Memo in Support of Motion for Preliminary Injunction*].

2. The Dakota Access Pipeline is a 1,200-mile-long oil pipeline running through North Dakota to at transfer point in Pakota, Illinois. Mary Delach Leonard, *End of the Line, We Visit the Southern Illinois Towns Where the Dakota Access Pipeline Ends*, ST. LOUIS PUB. RADIO (Feb. 14, 2017), <https://news.stpublicradio.org/post/end-line-we-visit->

activists staying at the Sacred Stone and Oceti Sakowin protest camps.³ Activists engaging in direct actions against the construction of the pipeline invoked the phrase as much for identification as for justification.⁴ It was one of the many ways that indigenous activists grounded the protests in the Lakota language, seeking to remind both their allies and their opponents of precisely *who* organized, ran, and sustained the protests.⁵ The constant re-centering of protest activities within Lakota traditions served to foreground the indigenous interests at stake in the protests: respect for tribal sovereignty, indigenous religious and cultural practices, and respect for the land. The language of the litigation distorted indigenous demands for justice and indigenous activists sought to combat that distortion through a calling back to key indigenous ideas: *mni wiconi*—water is life, *inyan wakháŋagapi othí*—the sacred spaces, and *mitákuye oyás'iy*—all my relations.⁶ As the litigation progressed—revolving around increasingly technical interpretations of the requirements of the National Historic Preservation Act, the Religious Freedom Restoration Act, and the National Environmental Policy Act—both elected tribal leaders and the indigenous leadership of Sacred Stone and Oceti Sakowin sought to remind non-indigenous protestors at the camps and the wider audience of society that the NoDAPL protests were an *indigenous* protest as opposed to a purely *environmental* protest, a distinction that became obscured as litigation progressed.

I argue that while indigenous leadership⁷ understood the NoDAPL protests as an expression of indigenous politics, an expression that was distorted by the strategic demands of the litigation, non-indigenous allies and the media at large viewed the protests as an environmental challenge

southern-illinois-towns-where-dakota-access-pipeline-ends#stream/0. Construction began on the pipeline in June of 2016 and pipeline commercial operation began in June 2017. See Stephanie Keith, *Out of Spotlight, Tribes Keep Fighting Dakota Pipeline*, REUTERS (Aug. 2, 2018), <https://www.reuters.com/article/us-south-dakota-native-americans/out-of-spotlight-tribes-keep-fighting-dakota-pipeline-idUSKBN1KN1HT>.

3. See *Mni Wiconi – Water is Life*, *supra* note 1.

4. As explained by tribal Elders during discussions around the Sacred Fire at Oceti Sakowin. The Young Warriors—a loose group of indigenous activists whose ages ranged from sixteen to early thirties, that decided and organized most of the direct actions from Oceti Sakowin—often started meetings and direct actions with the phrase to re-center the focus of indigenous activists and their allies.

5. *Oceti Sakowin*, STAND WITH STANDING ROCK, <http://standwithstandingrock.net/oceti-sakowin/>.

6. The history of the *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* case can be read as a fundamental disagreement between the tribal leadership of the Standing Rock Reservation and the Energy Transfer Partners corporation on what qualifies as “authentically” part of Lakota Sioux culture and history.

7. By which I mean both the elected leadership of the Tribes party to the litigation and the informal leadership of the protest camps.

to oil development.⁸ Non-indigenous news stories about the protests and litigation often reiterated the legal language of the courts rather than the language used by tribal Elders and indigenous leadership. These retellings obscured the indigenous critique of the ways that humans could and ought to relate to the land. The NoDAPL protests were a multi-layered response to more than just the threat to the water supply of the Standing Rock Reservation.⁹ The protests were also an explosive expression of the political and legal frustrations of the entire American Indian/Alaska Native community in the face of the erosion of tribal self-determination rights, which had been gained through difficult political struggle following the Termination and Relocation Era.¹⁰ The difference between the language of the Tribes over the course of the litigation and the language of indigenous activists at the protest camps comes from how the law requires that claims be dressed in certain forms to be recognizable as claims.¹¹ At the protest camps, indigenous activists constructed their demands for justice through the storytelling traditions of the Dakota, but the Tribes had to cut down those demands to the specifics of *this* pipeline

8. See Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <http://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/> (framing the protests as predominantly about environmental and civil rights, indigenous issues); David Medina, *Sioux's Concerns Over Pipeline Impact on Water 'Unfounded,' Company Says*, NBC NEWS (Sept. 13, 2016), <https://www.nbcnews.com/storyline/dakota-pipeline-protests/sioux-s-concerns-over-pipeline-impact-water-supply-unfounded-company-n647576> (framing the protest as tribal fears of threats to the Tribe's drinking water); Phil McKenna, *Beyond Standing Rock: Environmental Justice Suffered Setbacks in 2017*, INSIDE CLIMATE NEWS (Jan. 3, 2018), <https://insideclimatenews.org/news/03012018/standing-rock-environmental-justice-2017-year-review-hurricane-puerto-rico-texas-human-rights> (describing the protests entirely within the frame of environmental issues, dropping the discussion of indigenous rights entirely). See also generally, ZOLTÁN GROSSMAN, *UNLIKELY ALLIANCES: NATIVE NATIONS AND WHITE COMMUNITIES JOIN TO DEFEND RURAL LANDS* (2017) (describing how the DAPL protests differed from the Keystone XL Pipeline protests in terms of framing and non-indigenous support).

9. There are protests against the construction and operation of oil pipelines near tribal lands and sacred spaces—specifically, the Keystone XL pipeline, DAPL, and the Kinder Morgan pipeline—however, this paper focuses upon the protests at the Sacred Stone and Oceti Sakowin pipelines and does not discuss the ongoing indigenous protests.

10. Cajsá Wiksom, *Native Nations Rise Brings DAPL Protests to Washington DC*, AL JAZEERA (Mar. 11, 2017), <https://www.aljazeera.com/news/2017/03/standing-rock-tribe-takes-dapl-protest-washington-170310032032028.html>; Leah Donnella, *The Standing Rock Resistance Is Unprecedented (It's Also Centuries Old)*, NPR (Nov. 22, 2016), <https://www.npr.org/sections/codeswitch/2016/11/22/502068751/the-standing-rock-resistance-is-unprecedented-it-s-also-centuries-old>; Lauren Gambino, *Native Americans Take Dakota Access Pipeline Protest to Washington*, THE GUARDIAN (Mar. 10, 2017), <https://www.theguardian.com/us-news/2017/mar/10/native-nations-march-washington-dakota-access-pipeline>.

11. See PATCHEN MARKELL, *BOUND BY RECOGNITION* 19–25 (2003) (discussing the compounding effects of the performative demands of state recognition).

and *these* cultural sites in the litigation to fit within the established legal discourse.¹² By using environmental law as the primary vehicle to file a complaint against the state, the linguistic and representational bind of law distorted the indigenous demand for justice and obscured its philosophical roots and commitments.¹³ To be recognized by the law, one must use the law's language as a character within the larger national story. This requires that one fit inside the legal narrative, the history of jurisprudence, and the juridical decisions about the stories judges find compelling.¹⁴ Finding space within the story that the law tells about federal power has been a challenge for American Indians and Alaska Natives since the *Cherokee Cases*.

I theorize that because tribal leadership chose environmental law—and enlisted the aid of EarthJustice to draft the case briefs—as the initial legal mechanism through which they sought to block the construction of the pipeline, non-indigenous activists were inclined to primarily view the protests in terms of environmental protection rather than an expression of indigenous resistance. Indigenous activists, however, understood the protests to be primarily about a violation of indigenous rights, thus setting up a conflict of perception and goals that continues to haunt the resistance to

12. As noted earlier, the protests against the Dakota Access Pipeline were the greatest gathering of the Tribes since the American Indian Wars, thus complicating tracking the actors involved. See Jack Healy, *From 280 Tribes, a Protest on the Plains*, N.Y. TIMES (Sept. 11, 2016), <https://www.nytimes.com/interactive/2016/09/12/us/12tribes.html>; Nick Estes, *Fighting For Our Lives: #NoDAPL in Historical Context*, INDIAN TIMES TODAY (Oct. 26, 2016). When I refer to 'the Tribes' I mean specifically the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe who drove the litigation and determined the main litigation strategies.

13. See MARKELL, *supra* note 11, at 46; see also Jessica Cattelino, *From Locke to Slots: Money and the Politics of Indigeneity*, 60 COMP. STUD. SOC'Y & HIST. 274, 301 (2018); ELIZABETH POVINELLI, *THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM* (2002). The bind of using environmental law as the main vehicle to pursue claims—particularly claims related to how we ought to relate to the land—has been commented upon by a number of scholars. The primary issue relates to how Western law sees the land as an object acted upon, opposed to indigenous philosophy which sees the land as a party to the action. See VINE DELORIA, *THE WORLD WE USED TO LIVE IN* (2006) [hereinafter DELORIA, *THE WORLD*]; Gail Whiteman, *All My Relations: Understanding Perceptions of Justice and Conflict Between Companies and Indigenous Peoples*, 30 ORG. STUD. 101 (2009).

14. Here I draw upon Vine Deloria's idea that the law is the colonizer's storytelling tradition; meaning, the law is how the state tells itself what it is and what it is meant to be. See VINE DELORIA, *SPIRIT AND REASON: THE VINE DELORIA, JR READER* 207-222 (Barbara Deloria, Kristen Foehner, & Sam Scinta eds., 2009). I further rely upon James Scott's theory of how high-modernist states—especially a state in the midst of litigation similar to that which was surrounding the construction and operation of the pipeline—are unable to see local customs and sources of knowledge. See JAMES SCOTT, *SEEING LIKE A STATE* 310 (1998).

the operation of the Dakota Access Pipeline.¹⁵ I argue there is a dialectical relationship between the legal cases and the political protests: the more indigenous activists dressed their resistance in Western legal language and used theories unrelated to the tiny corner of legal accommodation the tribes have carved out for themselves within U.S. federal law, the more they sought to ground their political protests and direct actions within indigenous language and values.

Part I provides a brief background on the NoDAPL litigation and the protest events. Part II analyzes first, the *Standing Rock* series of cases and indigenous activists' invocation of specific legal mechanisms during the DAPL protests, and second, how the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe challenged the construction and operation of the Dakota Access pipeline under the National Historic Preservation Act,¹⁶ the Religious Freedom Restoration Act,¹⁷ and environmental law.¹⁸ Part III analyzes the political protests at the Sacred Stone and Oceti Sakowin protest camps and how indigenous activists engaged with non-indigenous activism.

I. BACKGROUND: THE NoDAPL PROTESTS AND LITIGATION

A. *A Note on Methodology*

From August 17, 2016 until February 21, 2017, I spent two weeks out of every month living at the main direct-action camp for the NoDAPL protests, Oceti Sakowin. My first visit to Oceti Sakowin was prompted by the request of a traditional healer who felt that my legal training and background working with the tribes and tribal organizations could be of service to the community.¹⁹ I returned to Oceti Sakowin two

15. Complaint for Declaratory and Injunctive Relief, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (*Standing Rock I*), 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 16-1534) [hereinafter *Standing Rock I* Complaint].

16. Pub. L. No. 89-665, 80 Stat. 915 (codified as amended in scattered sections of 54 U.S.C.).

17. 42 U.S.C. §§ 2000bb - 2000bb-4 (1993).

18. Specifically, the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 7 U.S.C., 10 U.S.C., 15 U.S.C., 16 U.S.C., 22 U.S.C., 26 U.S.C., 40 U.S.C., & 42 U.S.C.); 42 U.S.C. §§ 13201-13574 (1992); the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1973); and the Rivers and Harbors Act, 33 U.S.C. § 403 (1899).

19. Moke Eaglefeathers (Ve'keseheveho) was a member of the Cheyenne Nation, the Executive Director of the North American Indian Alliance (NAIA), the President of the National Council of Urban Indian Health (NCUIH), and my mentor. On the eve of my final research trip to Russia, I called Moke to discuss rumors I had heard regarding a prayer camp on the banks of the Canonball river to protest the construction of the Dakota

weeks later and made arrangements with the International Indigenous Youth Council and the Young Warriors to make multiple return trips. While I lived at the camps, I participated in direct action protesting the construction of the pipeline,²⁰ listened to tribal Elders and traditional healers at the Sacred Fire,²¹ spoke with members of the Young Warriors, and participated in the daily life of the camps.²² This paper reflects a mixed-methods approach to explain what happened on the banks of the Cannonball and its importance. I use the material I gathered through ethnographic research done at the camps—interviews, participant observation of the protests, and listening sessions of tribal Elders²³—in con-

Access Pipeline. The prayer-centered protest sounded similar to protests around the then-proposed Otdelnoye oil field expansion in the Khanty-Mansi region of Siberia and I wanted his opinion on events. Moke suggested that I cancel my trip to Russia and instead go to what would become Sacred Stone. He passed away May 31, 2016 and upon my return from Russia I went straight to Oceti Sakowin.

20. On direct actions I often served as a legal observer after being trained by the National Lawyers Guild.

21. Research involving tribes and tribal members requires an understanding of culturally appropriate research practices, specifically any research involving tribal Elders and traditional healers. In my field work I follow protocols for community involvement and participation published by the National Congress of American Indians (NCAI) as well as protocols suggested by the Wisconsin State Tribal Initiative (WSTI). See NAT'L CONG. OF AM. INDIANS POLICY RESEARCH CTR. & MICH. STATE UNIV. CTR. FOR NATIVE HEALTH P'SHIPS, *WALK SOFTLY AND LISTEN CAREFULLY: BUILDING RESEARCH RELATIONSHIPS WITH TRIBAL COMMUNITIES* (2012) [hereinafter *Walk Softly and Listen Carefully*]; NAT'L CONG. OF AM. INDIANS POLICY RESEARCH CTR., *TIPS FOR RESEARCHERS: STRENGTHENING RESEARCH THAT BENEFITS NATIVE YOUTH* (2016); NCAI, *Comments on Proposed Rule for Human Subjects Research Protections: Enhancing Protections for Research Subjects and Reducing Burden, Delay, and Ambiguity for Investigators* (Oct. 25, 2011). I recognize that knowledge passed down by tribal Elders is a gift and informs the decision-making process of the Young Warriors, but I do not report those stories here as that knowledge is bound within an oral tradition which I have not been trained to transmit.

22. With both criminal trials and the civil litigation stemming from the events of October 22, 2016 and November 20-21 still ongoing, I have chosen to withhold identifying information regarding individuals living at the camps in general and the Young Warriors in particular.

23. "Listening sessions" are a technique developed by researchers working with indigenous Elders. See *Walk Softly and Listen Carefully*, *supra* note 21, at 17, 17 n.10. Rather than classic interviews, or even semi-structured interviews, where the researcher guides the conversation, in listening sessions the researcher turns over control to indigenous Elders as the storyteller and guide. Storytelling is deeply rooted in indigenous ways of knowing and transmitting knowledge. Thus, turning over control to tribal Elders both respects that tradition and invites that way of knowing into one's research. LINDA SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* (1999); see also Daniel Solorzano & Tara Yosso, *Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research*, 8 *QUALITATIVE INQUIRY* 23, 26, 32, 36-37 (2002);

junction with a legal analysis of the *Standing Rock* case series, to analyze the NoDAPL protests.

As noted by multiple indigenous scholars, litigation is an uncertain proposition for indigenous activists, yielding mixed results at high costs, with difficult hurdles to entry.²⁴ These scholars argue that the law is not merely unable to hear indigenous claims, but that the law is actively hostile to indigenous claims and ways of knowing.²⁵ However, because indigenous activists often have few avenues available, even the unreliable prospect of litigation is a better alternative than inaction.²⁶ I ground my legal analysis within a framework developed by federal Indian law scholars that presents a seeming contradiction in indigenous use of litigation: that the use of law is strategic by indigenous advocates, but limits the full scope and force of their arguments.²⁷ Some scholars then conclude that there is little to no succor to be found within litigation strategies.²⁸ I, however, follow Vine Deloria's theory that the law is the storytelling tradition of the state.²⁹ The struggle, then, is to get the storyteller to tell *your* story as you understand it.

I make use of Robert Cover's work around the interplay of the twin forces of jurisgenerative and jurispathic principles in the law to ex-

see generally SHAWN WILSON, RESEARCH IS CEREMONY: INDIGENOUS RESEARCH METHODS (2008).

24. *See, e.g.,* VINE DELORIA & DAVID WILKINS, TRIBES, TREATIES, & CONSTITUTIONAL TRIBULATIONS (1999); *see also* VINE DELORIA & CLIFFORD LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983); GLEN SEAN COULTHARD, RED SKIN, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION (2014); WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE TEN WORST INDIAN LAW CASES EVER DECIDED (2010).

25. *See* DELORIA & WILKINS, *supra* note 24, at vii-xi.

26. *See generally* STEPHEN PEVAR, THE RIGHTS OF INDIANS AND TRIBES (2012). Pevar's work not only outlines the practical applications of federal Indian law, it provides a concrete example of how tribal advocates have used multiple legal frames outside of federal Indian law to expand the reach of tribal sovereignty and self-governance. *Id.* As opposed to Baumgartner and Jones' focus on venue shopping, *see generally*, FRANK BAUMGARTNER & BRYAN JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (1993), since tribes rarely have available the political capital necessary to engage in venue shopping of that kind, Pevar's work demonstrates how the tribes are innovative in their use of the law and how that innovation does pay off. *See* PEVAR, *supra*, at 83-84, 106-07. The Standing Rock Sioux Tribe's attempt to insert their theory of tribal sovereignty into environmental law's understanding of consultation rights is part of that tradition.

27. *See* DELORIA & WILKINS, *supra* note 24; DELORIA & LYTLE, *supra* note 24; COULTHARD, *supra* note 24; ECHO-HAWK, *supra* note 24.

28. *See* David E. Wilkins, A History of Indigenous Claims in the United States (2013); ECHO-HAWK, *supra* note 24.

29. *See generally* DELORIA, THE WORLD, *supra* note 13; *see further*, DALE TURNER, THIS IS NOT A PEACE PIPE: TOWARDS AN INDIGENOUS CRITICAL PHILOSOPHY (2006).

plain this struggle.³⁰ That is, every time a judge interprets a legal text and develops a new understanding of the law, an equally violent force within that law kills alternative interpretations.³¹ In particular, the courts of the state become jealous of jurisdiction and power, killing legal interpretive streams which threaten them.³² Cover argues:

But the jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion. And from this fact we may come to recognize a special role for courts. Courts, at least the courts of the state, are characteristically “jurispathic.”³³

In the case of the NoDAPL protests and litigation, I argue that the courts killed, though softly and with sympathy, legal claims made from within the language of indigeneity. To be heard by the court, the Tribes had to force their demands for justice to fit within the existing legal discourse, thus both doing violence to their claims and distorting indigenous politics. Despite Judge Boasberg's stated sympathy with the historical injustice suffered by the Tribes and their demands for justice, he argued he was bound by existing law and thus could not grant them the relief they sought.³⁴ The complexity of the *Standing Rock* line of cases, and how that line was then re-interpreted by indigenous activists as the decisions were handed down, demonstrates not only how the law distorts indigenous politics, but how that distortion is returned back to the community as indigenous leadership tell the story of the litigation.

B. *The NoDAPL Protests*

I divide the timeline of events after Energy Transfer Partners began construction into three distinct phases: the first, August through to Octo-

30. See Robert Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 16, 40 (1983).

31. *Id.* at 40.

32. *Id.* at 40–44.

33. *Id.* at 40.

34. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock I)*, 205 F. Supp. 3d 4, 25 (D.D.C. 2016). Robert Cover's theory of the “judicial ‘can’t’” also comes into effect with Judge Boasberg's opinions, particularly in his decision regarding the Cheyenne River Sioux Tribe's RFR claim in *Standing Rock II* when he argued that he was bound the form of the law and thus could not comment upon the Tribe's claim. See ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 119–123 (1975); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II)*, 239 F. Supp. 3d 77, 83 (D.D.C. 2017).

ber, 2016, marking the main issue-framing period of the protests; the second, November 2016 to February 28, 2017, marking the most violent period of policing against protestors; and the third, from February 28, 2017 until the present, characterized by the long process of litigation and the rise of solidarity protests against other pipelines threatening tribal lands, such as the Keystone XL pipeline, the Kinder Morgan pipeline in Canada, Bears Ears, and the protests over energy development in the Chaco Canyon.

1. Phase I: Framing the Issues

Standing Rock Sioux Tribe filed the initial petition for *Standing Rock I* on July 27, 2016 following the final collapse of the consultation process between the Tribe and the Army Corps of Engineers.³⁵ Starting in 2014, the Tribe attempted to engage in government-to-government consultation with the Army Corps of Engineers regarding construction of the Dakota Access Pipeline, since the Army Corps are the primary licensing body for all construction projects that impact major water ways, cultural sites, and federal lands.³⁶ The Tribe attempted to engage in what they believed was meaningful government-to-government consultation as promised by the federal government's trust responsibility.³⁷ However, the Army Corps of Engineers maintained that the standard process of Federal Notice and Comment served as a consultation process sufficient to satisfy the federal requirements under Executive Order 13157 as well as Section

35. *Standing Rock I*, 205 F. Supp. 3d at 10-15 (giving a brief recitation of the abortive consultation process between the Tribe and the Army Corps of Engineers).

36. *Id.* at 14-16.

37. Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000); Policy on Consultation with Indian Tribes, 76 Fed. Reg. 28,446 (proposed May 17, 2011). The Department of the Interior (DOI) policy states: "[c]onsultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making [with Indian tribes and Federal decision-makers]. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian tribes or the government-to-government consultation process." *Id.* at 28,446. See generally Memorandum on Government-to-Government Relations with Native American Tribal Governments, 30 WEEKLY COMP. PRES. DOC. 936 (May 2, 1994). The 567 federally recognized tribes have historically taken this understanding of consultation to require more robust processes than the standard federal notice and comment process. See PEVAR, *supra* note 26, at 32, 40-42; see also Amanda Rogerson, *The Tribal Trust and Government-to-Government Consultation in a New Ecological Age*, 93 OR. L. REV. 771, 785-791 (2015).

206 of the National Historic Preservation Act.³⁸ As the process broke down, and Energy Transfer Partners proved intractable on the route of the pipeline, the Standing Rock Sioux Tribal Council withdrew from the consultation process to consider other alternatives.³⁹

EarthJustice staff attorneys working in conjunction with Standing Rock Tribal Council⁴⁰ wrote the main brief for the *Standing Rock I* petition for injunctive relief, while the Spirit Lake and Yankton Sioux Tribes joined the litigation as intervenor-plaintiffs later.⁴¹ The petition was the first move by the Standing Rock Sioux Tribe to attempt to expand the venue of conflict beyond the consultation process over permits, a process under the sole control of the Army Corps of Engineers. As the protest camps grew, the tribal council had to decide whether to limit and/or denounce the actions of the protestors, or to put the full political weight of Standing Rock Reservation—one of the most politically active and organized of the 567 federally-recognized tribes in the United States—behind the protests.⁴² Chairman Archambault chose to support the protests, even participating in direct action himself.⁴³

2. Phase II: Aggressive Awareness Strategies

In August, when Judge Boasberg denied the Tribe's petition for emergency relief, Chairman Archambault went before the United Nations Human Rights Council to raise international awareness about the protests and to repeat the Tribe's argument that their sovereignty rights had been violated by the Army Corps of Engineers' decision to grant the

38. See United States Army Corps of Engineers' Opposition to the Plaintiff's Motion for Preliminary Injunction at 4-5, 20-24, *Standing Rock I*, 205 F. Supp. 4 (No.16-1534), 2016 WL 4445384 [hereinafter *Opposition to Preliminary Injunction*].

39. *Standing Rock I*, 205 F. Supp. 3d at 8-9 (describing the breakdown of the consultation process as Judge Boasberg understood it). See also *Standing Rock I* Complaint, *supra* note 15, at 10, 17-18, 23-28 (describing the Tribe's understanding of the breakdown of the consultation process); *Opposition to Preliminary Injunction supra* note 38, at 5 (providing the Army Corps' of Engineer's statement that the demands of consultation were neither onerous nor unmet).

40. Jan Hasselman and Stephanie Tsosie are the main attorneys working with Standing Rock Tribal Council. Both attorneys have worked closely with the tribal governments on other environmental issues that threaten tribal lands and nations.

41. Spirit Lake Sioux Tribe and the Yankton Sioux Tribe joined the litigation in August 2016 after the Dakota Access Pipeline joined as an intervenor-defender; the Cheyenne River Sioux Tribe joined as an intervenor-plaintiff in the litigation in February of 2017, filing the petition for injunctive relief that forms the basis of *Standing Rock II*.

42. Standing Rock Sioux Tribe, Council Minutes (Aug.-Sept. 2016) (on file with author).

43. Chairman Archambault was arrested with eighteen other protestors on August 12, 2016 on trespass charges that were eventually dropped.

permit allowing the construction of the pipeline over sites sacred to the Lakota.⁴⁴ From August to October, the Standing Rock Tribal Council, led by Chairman Archambault, and indigenous activists on the ground, began to deploy an aggressive strategy to raise awareness of the protests in conjunction with the ongoing litigation. The increased visibility of the protests was met with progressively aggressive policing by North Dakota police, resulting in the mass arrests of 140 protestors on October 22, 2016. The events of October 22 are the subject of a civil lawsuit filed by the Water Protectors Legal Collective against the North Dakota police for use of excessive force.⁴⁵

From October 2016 to February 2017 the protests, and the response from police and paid private security, became increasingly militant despite attempts by both indigenous leadership at the camps and elected tribal leadership to keep protests centered on prayer and ceremony.⁴⁶ November 21-22, 2016 marked the highpoint of clashes between protestors and police. At that time, North Dakota police, supported by private security forces, used high pressure water hoses, flexible baton rounds, and long-range acoustic devices (LRAD) against protestors on Turtle Island.⁴⁷ All of the tactics used by the North Dakota police were non-lethal, approved methods of dispersing large crowds. However, getting hit with flexible baton rounds feels like getting punched very hard by a very strong individual and leaves major contusions, and at close range it can result in lac-

44. On August 31, 2016, the UN Permanent Forum on Indigenous Issues issued statements condemning the construction of the pipeline, stating that failure to meaningfully consult with the tribe was a violation of Article 19 of UNDRIP. Press Release, Alvaro Pop Ac, Chair, Dalee Dorrough & Chief Edward John, Members, Permanent Forum on Indigenous Issues, Department of Economic and Social Affairs, United Nations, Statement on the Protests on the Dakota Access Pipeline (Aug. 31, 2016), <https://www.un.org/development/desa/indigenouspeoples/news/2016/08/statement-on-protests/> [hereinafter UN Forum on Indigenous Issues Press Release]. The decision to go before the Human Rights Council was motivated by a desire to raise the level of the issue to seek greater attention for the protests.

45. Complaint for Damages, Declaratory & Injunctive Relief, *Thunderhawk v. Morton Cty.*, No. 18-00212 (D.N.D Oct. 18, 2018); Complaint, *Wilansky v. Morton Cty.*, No.18-00236 (D.N.D Nov. 19, 2018).

46. TigerSwan, a private security and intelligence firm, organized the private security for Energy Transfer Partners. There were allegations that TigerSwan also coordinated the actions between private security and the police forces deployed to Oceti Sakowin. These allegations were denied, but leaked documents suggest they were not totally without merit. See Allen Brown, Will Parrish & Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to "Defeat Pipeline Insurgencies,"* THE INTERCEPT (May 27, 2017), <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>.

47. Declaration of Thomas C. Frazier, *Dundon v. Kirchmeier*, 2017 WL 5894552 (D.N.D. Feb. 7, 2017) (No. 16-cv-406); see also Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017).

erations and fractured bones.⁴⁸ LRADs produce a painful high-pitched sound that rattles the teeth and makes it difficult to think; long term exposure can result in tinnitus.⁴⁹ These events are the subject of an additional civil suit brought by the Water Protector's Legal Collective.⁵⁰

Protestors remained at the camps through December and January despite Governor Dalrymple's unenforced evacuation order.⁵¹ Following President Trump's January 24, 2017 memorandum to the Army Corps of Engineers directing the Corps to move ahead with the permitting process for the pipeline, the Corps granted the final easement for the pipeline on February 8, 2017.⁵² After granting the final easement, newly-elected Governor Burgum issued a dispersal order that was enforced by the North Dakota police resulting in the razing of Oceti Sakowin.⁵³ The Morton County Police Department came to the site of Oceti Sakowin and used heavy equipment to remove what protestors were unable to deconstruct before the deadline. What was left was burned by the police.

3. Phase III: Continued Protest and Litigation

Standing Rock II marks the start of the third phase of the NoDAPL protests, a phase characterized predominately by continued litigation and solidarity protests. The Cheyenne River Sioux Tribe filed a petition for injunctive relief based on a Restoration of Religious Freedom Act (RFRA) claim immediately after the easement across Lake Oahe was

48. See KEN HUBBS & DAVID KLINGER, *IMPACT MUNITIONS DATA BASE OF USE AND EFFECTS* 16–17 (2004).

49. See *Edrei v. City of New York*, 254 F. Supp. 3d 565 (S.D.N.Y. 2017) (holding that the use of LRADs can constitute excessive use of force due to the damage done to hearing); see further, Colin Moynihan, *Noise as a Weapon? Police Use Of Sound Cannons Questioned*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/nyregion/sound-cannon-protest-lawsuit-long-range-acoustic-device.html>.

50. *Dundon v. Kirchmeier*, 2017 WL 5894552, at *1 (D.N.D. Feb. 7, 2017).

51. Hersher, *supra* note 47.

52. Memorandum on Construction of the Dakota Access Pipeline, 82 Fed. Reg. 8661 (Jan. 30, 2017) (January 24, 2017 memorandum directing the Corps to “take all actions necessary and appropriate to . . . review and approve in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary or appropriate, requests for approvals to construct and operate the DAPL, including easements or rights-of-way . . .”). See also Press Release, Capt. Ryan Hignight, U.S. Army Corps of Eng'rs, Corps Grants Easement to Dakota Access, Ltd., (Feb. 8, 2017), <https://www.nwo.usace.army.mil/Media/News-Releases/Article/1077134/corps-grants-easement-to-dakota-access-llc/> [hereinafter Hignight Press Release].

53. Exec. Order 2017-01, State of N.D. Office of the Governor (Feb. 15, 2017), <https://www.governor.nd.gov/sites/governor/files/documents/Executive%20Order%202017-01.pdf>.

granted.⁵⁴ The Standing Rock Sioux Tribe filed a separate petition to enjoin the operation of the pipeline under a National Environmental Policy Act (NEPA) challenge to the grant of easement that the Cheyenne River Sioux Tribe later joined. This challenge is the basis for *Standing Rock III*, which joins together two other challenges of the section 408 granting of easement under the Mineral Leasing Act.⁵⁵ Judge Boasberg denied the Cheyenne River Sioux Tribe's petition for emergency relief without reaching the merits of the Tribe's RFRA claim but found in part for the claims under NEPA.⁵⁶ Tribal Chairman David Archambault failed in his bid for re-election in September 2017 and was succeeded by Mike Faith.⁵⁷ While it is unclear the degree to which the NoDAPL protests and the continuing litigation played in the election results, the Tribe continues to be heavily involved.

II. #NoDAPL AND THE COURTS

Very few, if any, of the legal mechanisms available to indigenous peoples to protect their lands and resources are grounded within their language and traditions.⁵⁸ Even in legal systems that provide spaces of legal accommodation, that accommodation is still structured in terms of the dominant culture.⁵⁹ At best, legal discourse, its values and its goals, works tangentially to indigenous goals—thus the appropriation of these structures by indigenous activists is a fraught project.⁶⁰ The *Standing Rock* case series is a testament to the complexity of appropriating Western legal structures for indigenous ends. During *Standing Rock I* through *Standing Rock III*, the Standing Rock Sioux Tribe and intervenor-plaintiff the Cheyenne River Sioux Tribe fought to stop the construction and opera-

54. Cheyenne River Sioux Tribe Memo in Support of Motion for Preliminary Injunction, *supra* note 1.

55. Plaintiff Standing Rock Sioux Tribe's Memorandum in Support of its Motion for Partial Summary Judgment, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock III)*, 255 F. Supp. 3d 101 (D.D.C. 2017) (No. 16-1534), 2017 WL 1454134 [hereinafter *Standing Rock Sioux Tribe Memo for Partial Summary Judgment*].

56. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II)*, 239 F. Supp. 3d 77, 87 (D.D.C. 2017); *Standing Rock III*, 255 F. Supp. 3d at 122.

57. Jeff Brady, *Standing Rock Sioux Chairman Voted Out of Office*, NPR (Sept. 28, 2017), <https://www.npr.org/sections/thetwo-way/2017/09/28/554329202/standing-rock-sioux-chairman-voted-out-of-office>.

58. See DELORIA & LYTLE, *supra* note 24.

59. Legal accommodation within the literature on indigenous politics generally refers to the space of tribal and indigenous law within the settler-colonial law. See generally COULTHARD, *supra* note 24; see also, ECHO-HAWK, *supra* note 24.

60. See Beth Rose Middleton, *Just Another Hoop to Jump Through? Using Environmental Laws and Processes to Protect Indigenous Rights*, 52 J. ENVTL. MGMT. 1057, 1057 (2013).

tion of the Dakota Access Pipeline through shifting legal strategies. First, the Tribes argued that the Army Corps of Engineers' failed to comply with § 106 of the National Historic Preservation Act, which directs federal agencies to consult with tribes over any site of cultural, historic, or religious significance that might be affected during the course of a project.⁶¹ Second, in *Standing Rock II*, the Cheyenne River Sioux Tribe sought to suspend the easement across Lake Oahe until their full RFRAs claims could be heard.⁶² The Tribe argued, "[t]he Lakota believe that the very existence of the Black Snake under their sacred waters in Lake Oahe will unbalance and desecrate the water and render it impossible for the Lakota to use that water in their Inipi ceremony."⁶³ Third, in *Standing Rock III*, the Standing Rock Sioux Tribe sought to suspend the easement across Lake Oahe and enjoin the operation of the pipeline, arguing that the Army Corps of Engineers' failed to conduct an adequate environmental impact survey.⁶⁴ The Tribe further argued that the Army Corps' decision to grant the easement following President Trump's January 24th memorandum, after President Obama had directed the Corps to withhold the easement until a full assessment of the Tribes' claims could be undertaken, was an arbitrary and capricious decision.⁶⁵

Historically, American Indians and Alaska Natives resort to the Corps under duress, often with disappointing results.⁶⁶ *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* is, unfortunately, not an exception to that rule. Judge Boasberg denied the Tribes' application for emergency relief in *Standing Rock I*,⁶⁷ did not reach the merits of the Cheyenne River Sioux Tribe's arguments in *Standing Rock II*,⁶⁸ and de-

61. See 36 C.F.R. § 800.1(a) (2019).

62. Cheyenne River Sioux Tribe Memo in Support of Motion for Preliminary Injunction, *supra* note 1, at 2.

63. *Id.*

64. Standing Rock Sioux Tribe Memo for Partial Summary Judgment, *supra* note 55, at 20-31; see also, Intervenor-Plaintiff's Memorandum in Support of its Motion for Partial Summary Judgment at 8, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock III)*, 255 F. Supp. 3d 101 (D.D.C. 2017) (No. 16-1534), 2017 WL 1090174 [hereinafter Cheyenne River Sioux Tribe Memo for Partial Summary Judgment].

65. Cheyenne River Sioux Tribe Motion for Partial Summary Judgment, *supra* note 64, at 5.

66. ECHO-HAWK, *supra* note 24, at 19 (discussing the fundamental point of dissonance in asking a Western legal system to protect the sovereignty rights of tribes); see also CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 189-205 (2005). See generally PEVAR, *supra* note 26.

67. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock I)*, 205 F. Supp. 3d 4, 27 (D.D.C. 2016).

68. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II)*, 239 F. Supp. 3d 77, 87 (D.D.C. 2017).

nied in part the Tribes' motion in *Standing Rock III*, ordering the Army Corps of Engineers to re-assess their environmental impact survey and remand their decision to grant an easement across Lake Oahe.⁶⁹ The Tribes only enjoyed limited success with their litigation strategies when they cut down their claims to fit within the narrow confines of U.S. federal law and gave up the more complicated theories of government-to-government consultation and attempts to assert indigenous values into the law. The jurisprudential principle of law was in full effect over the course of the *Standing Rock* case line. While Judge Boasberg expressed sympathy with the Tribes, he rejected language that reached beyond the narrow—relative to how indigenous peoples spoke of relationship to the land—bounds of environmental law.

A. *Standing Rock I: NHPA, CWA, RHA and Tribal Sovereignty*

The Tribe's argument had three central points: one hinging upon indigenous worldview, and two involving highly technical complaints with the Army Corps construction permit process regarding the Dakota Access Pipeline.⁷⁰ First, the Tribe argued that it would face an immediate and irrevocable threat if pipeline construction continued.⁷¹ The Tribe divided this threat between, first, an existential, spiritual threat posed by the pipeline's mere presence and, second, a physical threat to the specific water supply for the reservation.⁷² The complaint stated: "[s]ince time immemorial, the Tribe's ancestors lived on the landscape to be crossed by the DAPL. The pipeline crosses areas of great historical and cultural significance to the Tribe, the potential damage or destruction of which greatly injures the Tribe and its members."⁷³

The idea that harm to the land is the same as harm to the Tribe as a whole and to each of its members individually is an old idea within indigenous beliefs.⁷⁴ The initial complaint used an indigenous worldview to argue standing and to frame the immediate threat, which soon prompted edits to the petition for injunctive relief.⁷⁵ The Tribe did not cite specific economic or ecological harm—though it referenced them in passing—but rather asserted that the immediate harm was the construction and

69. *Standing Rock III*, 255 F.Supp.3d 101.

70. *Standing Rock I* Complaint, *supra* note 15.

71. *Id.* at 22-25.

72. *Id.* at 20-21.

73. *Id.* at 4.

74. DELORIA, *supra* note 14, at 151-152, 161-162 (describing the role of sacred spaces and stones to protect the wellness of the community).

75. *Standing Rock I* Complaint, *supra* note 15.

presence of the pipeline over lands of cultural, religious, and spiritual importance to the Tribe.⁷⁶

From this statement of impending harm, the Tribe turned to its technical arguments. It shifted away from the overarching threat to the dignity of tribal lands, to the specific failure of the federal government to engage in § 106 consultation under the National Historic Preservation Act (NHPA), and to deficiencies within the Army Corps' permitting process.⁷⁷ In these arguments, the Tribe repeatedly referenced the threat to the land as the underlying reason consultation must precede any issuance of permits or licenses.⁷⁸ However, the Tribe predominantly relied on § 106 to argue that the Army Corps failed to engage in government-to-government consultation.⁷⁹ This was a substantive claim dressed in procedural language. The Tribe argued that, prior to issuance of any permit or license, federal agencies are required under § 106 of NHPA to engage in "consultation with Indian Tribes on federal undertakings that potentially affect sites that are culturally significant to Indian Tribes."⁸⁰

The consultation process demanded by § 106 dominated the pleadings in *Standing Rock I*. The Tribe made two arguments: first, that the Corps was incorrect in its interpretation that § 106 consultation could only occur on areas immediately within CWA jurisdiction, and second, that the Corps had abdicated its responsibility to engage in government-to-government consultation with the tribes by issuing an NWP 12 permit.⁸¹ The Tribe argued that the consultation must respect tribal sovereignty, citing statutory language.⁸² During oral arguments the Tribe argued that the informative process followed by the Corps failed to satisfy both requirements of the Advisory Council on Historic Preservation (AHCP)⁸³ and the requirements of government-to-government consultation as demanded by the trust responsibility.⁸⁴ The Tribe stated that the

76. *Id.* at 13.

77. *Id.*

78. *Id.* at 4, 8-9, 20-22.

79. *Id.* at 8-9.

80. *Id.* at 8.

81. *Standing Rock I* Complaint, *supra* note 15, at 18, 32-35.

82. *Id.* at 33.

83. *Id.* at 18-20.

84. The trust responsibility is a nebulous concept within federal Indian law that holds that the federal government has established a near-fiduciary duty to federally recognized Indian tribes. The governing theory behind the trust responsibility is that the United States federal government has taken upon itself "moral obligations of the highest responsibility and trust" towards American Indian and Alaska Natives, and that the "fulfillment of which the national honor has been committed." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176, 207 (2011) (citations omitted). *See also* *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *United States v. Navajo Nation*, 537 U.S. 488, 490 (2003) (finding

§ 106 requirement to consult “impose[d] on agencies a ‘reasonable and good faith effort’ by agencies to consult with Tribes in a ‘manner respectful of tribal sovereignty.’”⁸⁵

This sovereignty claim, something Chairman Archambault made repeatedly to the media and before the United Nations Permanent Forum on Indian Issues, was muted in the final complaint. The Tribe instead fit its argument inside the available language of existing legal practice and argued:

In issuing NWP 12, however, the Corps does not fulfill the requirements of § 106 or “take legal and financial responsibility” for compliance. Rather, it provided up-front CWA/RHA authorization to discharge fill into waters of the United States, effectively ending its involvement in most situations. In so doing, it improperly abdicated its § 106 responsibility, and delegated to the proponent its NHPA duty to determine whether there would be any potential impact to historic properties. If the proponent determines for itself that no historic properties are affected, the Corps is not notified of the action and provides no verification of NWP 12 authorization. In such circumstances, the Corps does not consider, and does not give the ACHP or interested parties a reasonable opportunity to comment on, the potential impacts to historic sites. In so doing, the Corps abdicated its § 106 duties and/or improperly delegated them to private parties.⁸⁶

The argument here was both subtle and dressed within the existing legal language, but the claim was based upon tribal interpretations of federal Indian law. Specifically, the Tribe argued that the government could not abdicate its consultation responsibilities, because consultation with the tribes, as opposed to with other interested parties, was part of the tribes’ sovereignty rights.⁸⁷ As such, consultation with the tribes is a government-to-government relationship, and not one that can be fulfilled by private parties.⁸⁸

Consultation was central to the Tribe’s argument because it was through consultation that its story, and the importance of the land to the

a “general trust relationship” between the federal government and Indian tribes in which the federal government must move to protect Indian interests).

85. *Standing Rock I* Complaint, *supra* note 15, at 8 (citing 36 C.F.R. § 800.2(c)(2)(II)(B)).

86. *Id.* at 32-33.

87. *Id.* at 8-9, 33.

88. *Id.* at 33.

Tribe and its members, could be heard.⁸⁹ From the tribal perspective, consultation was not only a process of finding and resolving conflict, but also a process of storytelling—a way to be seen and heard within their own context and in their own words. Government-to-government consultation does not merely invite the tribes to the federal government's table, it also invites the federal government to listen to the tribes.⁹⁰ The consultation process offers a different interpretation of the law—a different possible source for the story that the state tells itself about itself. In Cover's framework of state interpretations of the law, the process of consultation presents a potential challenge to the primacy of the state as the creator of the normative world.⁹¹ Storytelling is collaboration between the teller and the listener in indigenous communities and neither leaves the telling of the story unchanged.⁹² In the eyes of the Tribe, by refusing to engage in government-to-government consultation the Army Corps not only violated a federal statute and abdicated its responsibilities, it also rejected the entire storytelling process. Unfortunately, the Tribe's demand to be heard and to have their understanding of the land reflected in the national story, did not fit well within the confines of U.S. federal law. Judge Boasberg found that the Tribe could not articulate a specific harm that was imminent upon completion of the pipeline—only the possibilities of harm and harm to abstracted concepts, which the law has a difficult time conceptualizing—and therefore no emergency relief could be granted.⁹³

B. *Standing Rock II: RFRA and Indigenous Spirituality*

After the Army Corps granted the easement across Lake Oahe, the Cheyenne River Sioux Tribe petitioned the Court for a temporary restraining order (TRO) and preliminary injunction against the application of the easement and the pipeline construction under Lake Oahe.⁹⁴ Cheyenne argued that granting the easement and permits for the construction under Lake Oahe violated their free exercise of religion under the Reli-

89. *Id.* See also UN Forum on Indigenous Issues Press Release, *supra* note 44.

90. See generally VINE DELORIA, WE TALK, YOU LISTEN: NEW TRIBES, NEW TURF (1970) [hereinafter DELORIA, WE TALK, YOU LISTEN].

91. Cover, *supra* note 30, at 40 (describing statist theories of the interpretation of the law which suggest that while everyone may have opinions and suggestions on the normative world we share, only the state can construct it).

92. See DELORIA, THE WORLD, *supra* note 13.

93. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock I)*, 205 F. Supp. 3d 4, 26-27 (D.D.C. 2016).

94. Cheyenne River Sioux Tribe Memo in Support of Motion for Preliminary Injunction, *supra* note 1, at 1.

gious Freedom Restoration Act (RFRA).⁹⁵ By using RFRA, the Tribe foregrounded indigenous ways of understanding how society ought to relate to nature and the land. Similar to the argument made by the Standing Rock Sioux Tribe in *Standing Rock I*, the Cheyenne River Sioux Tribe argued that “[t]he Lakota people believe that the mere existence of a crude oil pipeline under the waters of Lake Oahe will desecrate those waters and render them unsuitable for use in their religious sacraments.”⁹⁶ In the RFRA claim, the Tribe argued that even absent an environmental harm, real or potential, the mere presence of oil flowing through the pipeline was a violation of Lake Oahe because it was a violation of the spirit of the land.⁹⁷ If that violation were allowed, the land would no longer speak to tribal members during the Inipi ceremony.⁹⁸ This argument relied on indigenous understandings of how humanity ought to relate to the land as beings in community, as opposed to individuals who may make use of an inanimate object.⁹⁹ The Tribe argued that “traditional Lakota religious perspective is based upon a concept of oneness, balance, and unity with nature Lakota people believe as a part of their religious worldview that human beings are a part of nature, not separate from it.”¹⁰⁰ The Tribe in *Standing Rock II* thus made explicit the implied harm in *Standing Rock I*, that any harm to the land, which included a violation of its dignity caused by an active oil pipeline, was the same as a harm to the Tribe as a whole.

The Tribe stated that their description of the practice should not be taken as definitive for all indigenous peoples, or even for all Lakota peoples, as “[t]he Lakota people acknowledge, as discussed above, that because theirs is an oral tradition, there may be more than one version of a religious teaching or belief.”¹⁰¹ The importance of storytelling reemerged in the Cheyenne River Sioux Tribe’s RFRA claim. The Combined Motion spoke to the indigenous tradition’s discomfort with writing down important knowledge—thus trapping the interpretation and ending the transformative process between storyteller and listener. The Tribe describes the history of their relationship to *nni*, the water, in terms of sto-

95. *Id.* at 4-10; 24-40.

96. *Id.* at 2.

97. *Id.* at 2, 24-29. See DELORIA, *supra* note 14, at 149-66.

98. Cheyenne River Sioux Tribe Memo in Support of Motion for Preliminary Injunction, *supra* note 1, at 1-4.

99. See DELORIA, *THE WORLD*, *supra* note 13, at 125-48 (describing the relationship to the land—as taught through oral tradition and traditional healers—that holds the land has ways of speaking to and through medicine men and is thus like an elder sibling to humanity rather than an inanimate object).

100. Cheyenne River Sioux Tribe Memo in Support of Motion for Preliminary Injunction, *supra* note 1, at 4.

101. *Id.* at 6.

ry, ceremony, and relationship between humans and the land.¹⁰² Stories are told through ceremony, and the federal government had already rejected the invitation to engage in that storytelling process when it rejected government-to-government consultation.

In *Standing Rock II*, the Tribe instead sought to fit the form of their beliefs, ceremony, and story into the established legal discourse around religion. If the courts could not see law itself as a transformative storytelling process and a type of ceremony, then the Tribe would attempt to cut down and shape their claim to fit their beliefs and demand for justice under Coyote's mask, thus shaping it into something that U.S. federal law could see.

Unfortunately, Judge Boasberg never reached the substantive arguments put forward by the Tribe when handing down his decision.¹⁰³ Judge Boasberg held that, under a theory of laches, the Tribe was barred from emergency injunctive relief.¹⁰⁴ He did not revisit the threat of harm raised by the Cheyenne River Sioux Tribe and he did not comment on whether the Tribe's beliefs were "sincerely held beliefs" as required by the law.¹⁰⁵ Judge Boasberg held that if the Tribe wished to have a RFRA argument heard, it should have presented such an argument either during the consultation period with the Army Corps of Engineers or during the initial filing.¹⁰⁶

In both legal challenges, the Tribe attempted to foreground indigenous interpretations of legal doctrine and was rebuffed. In *Standing Rock I*, the attempt to foreground indigenous beliefs regarding relationship to the land as the basis upon which Standing Rock Sioux Tribe's petition for injunctive relief to prevent a substantial harm to that relationship was explicitly rejected.¹⁰⁷ However, because Judge Boasberg ruled on a technicality in *Standing Rock II*, his opinion left open the possibility of a RFRA challenge after the completion and start of operations of DAPL, and thus recognized the possibility of a viable religious-exercise claim.¹⁰⁸

102. *Id.* at 6-9.

103. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II)*, 239 F. Supp. 3d 77, 83 (D.D.C. 2017).

104. *Id.* at 84-88.

105. *Id.* at 91.

106. *Id.* at 84-87.

107. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock I)*, 205 F. Supp. 3d 4, 36-37 (D.D.C. 2016).

108. *Standing Rock II*, 239 F. Supp. 3d at 83.

C. Standing Rock III: NEPA and Indigenous Environmental Justice

The Standing Rock Sioux Tribe's final legal challenge to the construction of DAPL followed classic environmental law challenges and has been the most successful to date.¹⁰⁹ The National Environmental Policy Act (NEPA) has two major aims: first, it "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action," and second, it "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process."¹¹⁰ NEPA is primarily a procedural statute; it dictates neither a particular finding nor a particular legal philosophy.¹¹¹ Instead, it lays out procedural requirements which an agency must meet before reaching a decision.¹¹² NEPA does not provide any room to interject substantive legal understanding of any kind.¹¹³ As the Supreme Court has held, "NEPA merely prohibits uninformed—rather than unwise—agency action."¹¹⁴ Claims under NEPA concern the *process* rather than the *substance* of an environmental challenge.¹¹⁵ Until *Standing Rock III*, the Tribes' arguments had all been arguments based on a substantive legal challenge to the Army Corps of Engineers' decision to grant an NWP-12 permit or the easement across federal lands. In *Standing Rock I*, the Standing Rock Sioux Tribe argued that there was an imminent harm to the land that threatened the Tribe's connection and well-being.¹¹⁶ In *Standing Rock II*, the Cheyenne River Sioux Tribe argued that the construction of

109. *Standing Rock Sioux Tribe v. Army Corps of Eng'rs (Standing Rock III)*, 255 F. Supp. 3d 101 (D.D.C. 2017) (remanding the case, directing the Army Corps of Engineers to complete a review of their decision to grant a NWP-12 permit to the Dakota Access Pipeline on the grounds that the initial environmental survey was insufficient). The Army Corps of Engineers completed the review on August 31, 2018 and filed a two-page decision with the court essentially stating that the original environmental survey was without fatal legal flaw. The supporting administrative documents and brief are currently under a protective order and not publicly accessible. Memorandum for Record in *Standing Rock III*, Col. John Hudson, Army Corps of Engineers (Aug. 31, 2018), https://earthjustice.org/sites/default/files/press/2018/10-24-18_Revised_Redacted_Version_of_USACE-Remand_Analysis.pdf.

110. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 US 87, 97 (1983).

111. WILLIAM H. RODGERS, ENVIRONMENTAL LAW IN INDIAN COUNTRY § 1:18 (2005).

112. *Id.*

113. *See id.*

114. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

115. *Id.*

116. *Standing Rock I* Complaint, *supra* note 15. *See also* Declaration of David Archambault II in Support of Motion for Preliminary Injunction at 3-4, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock I)*, 205 F. Supp. 3d 4 (D.D.C. Aug. 4, 2016) (No. 16-1534).

the pipeline would destroy the sacramental nature of the water, rendering it unfit for the *Inipi* ceremony, thus infringing upon the Tribe's religious rights.¹¹⁷ In *Standing Rock III*, by relying upon NEPA, the Standing Rock Sioux Tribe switched tactics to a primarily procedural challenge to the Army Corps of Engineers' decision to grant the Dakota Access Pipeline their final permits.¹¹⁸

The decision to file a challenge under NEPA represented not only the Tribe's shifting focus from a substantive challenge based on indigenous rights to a process-oriented challenge based on the construction of the Dakota Access Pipeline, but also the reality of the political situation after November 11, 2016.¹¹⁹ The change in presidential administration had an immediate impact upon the decision-making process of the Army Corps of Engineers.¹²⁰ Where President Obama had directed the Army Corps of Engineers to conduct a thorough review of their decision, President Trump directed the agency to move forward in granting the easement immediately, lifting executive directions to the contrary.¹²¹ In the face of an Administration that was actively hostile to indigenous claims rather than merely indifferent, the Standing Rock Sioux Tribe changed tactics to focus on legal claims that might not have foreground indigenous ways of knowing, but had a greater likelihood of success.

As part of the NEPA challenge, Standing Rock Sioux Reservation still presented a theory of environmental justice that revolved around a respect for, rather than a use of, the land.¹²² The Tribe argued that the fundamental harm arising from the construction and operation of the pipeline was not that the Tribe or that tribal members would be prevented from the use of the land, but rather that the land itself would be used at all.¹²³ The Tribe presented a theory of environmental justice that shifted the entire interpretation of "use" to include a protection of the decision to *not* use the land.¹²⁴ However, even under NEPA the tribe has had limited success. The NEPA's requirement of a "hard look" does not

117. Cheyenne River Sioux Tribe Memo in Support of Motion for Preliminary Injunction, *supra* note 1.

118. Standing Rock Sioux Tribe Memo for Partial Summary Judgment, *supra* note 55.

119. This is not to say that the substantive challenge to DAPL was missing from the Tribe's argument in *Standing Rock I*, but rather the argument under NEPA necessarily foregrounded the procedural and environmental claims rather than claims based upon violations of tribal sovereignty or indigenous religious practice. See Cheyenne River Sioux Tribe Memo in Support of Motion for Preliminary Injunction, *supra* note 1, at 2.

120. Hignight Press Release, *supra* note 52.

121. Memorandum on Construction of the Dakota Access Pipeline, *supra* note 52.

122. Cheyenne River Sioux Tribe Memo in Support of Motion for Preliminary Injunction, *supra* note 1, at 10-15.

123. *Id.*

124. *See id.*

guarantee outcomes or even a substantive review.¹²⁵ The Tribe argued under NEPA that the Army Corps of Engineers' Environmental Impact Survey was flawed because it failed to consider key studies as well as indigenous theories of environmental justice.¹²⁶ Although Judge Boasberg was sympathetic to the technical claims presented under NEPA, he did not address the theories of indigenous environmental justice presented by the Tribe.¹²⁷

From *Standing Rock I* to *Standing Rock III*, the Standing Rock Sioux Tribe and the Cheyenne River Reservation Lakota-Sioux Tribe repeatedly attempted to bring indigenous understanding of storytelling, ceremony, and relationship to the land into legal interpretation. The guiding argument from indigenous activists has always been that the construction of DAPL—both the fact of it and the process by which Energy Transfer Services has approached its construction—represents not only a violation of federal law and tribal rights, but an active insult to indigenous identity and expression.¹²⁸ The court has repeatedly closed these interpretive pathways, engaging in what Cover refers to as jurispathy—the killing of a method of understanding both the law and what it says about our normative world. The language the Tribes used to describe the harm they sought to prevent evolved away from the language of indigenous storytelling—describing the land as in community with humanity and as part of our relations—to first a language of religious rights, and then to a straight environmental law challenge. This evolution distorted the Tribes' underlying demand for justice. As the protests and litigation continued, the tribes were increasingly forced to make arguments from purely Western legal theories—to rely predominantly upon classical environmental law claims to prevent the construction and operation of DAPL. However, a study of the actual arguments made both in the original complaints, to the media, and to the UN, demonstrate that they always understood the fundamental harm in terms of indigenous ways of knowing, but that expression became increasingly distorted through the extended litigation.

125. RODGERS, *supra* note 111, at § 1:17.

126. Standing Rock Sioux Tribe Memo for Partial Summary Judgment, *supra* note 55, at 14–18.

127. Standing Rock Sioux Tribe v. Army Corps of Eng'rs (*Standing Rock III*), 255 F. Supp. 3d 101, 160 (D.D.C. 2017).

128. See Declaration of David Archambault II in Support of Motion for Preliminary Injunction, *supra* note 116; Second Declaration of David Archambault II, at 2, 6–8, *Standing Rock III*, 255 F.Supp. 3d 101 (No. 16-1534).

III. #NoDAPL AND INDIGENOUS PROTEST

The tension between the language used for the litigation and the language of the protest, particularly as the court steadily disciplined the Tribes into the established legal discourse, ebbed and flowed during the course of events. The tension between the litigation and the protest was echoed in the way the media covered the protests.¹²⁹ The alliance between the Tribes and EarthJustice created an expectation by the media and non-indigenous protestors of a purely environmental challenge. A number of environmental blogs and media outlets focused on EarthJustice's environmental work, ignoring the non-profit's work with tribal governments to protect their lands from exploitation on the basis of tribal sovereignty and treaty rights.¹³⁰ Despite the Tribe's use of the National Historic Preservation Act as the primary vehicle to file the injunction, and its decision to ground the harm within indigenous language of the sacredness of the entire landscape as opposed to select sites threatened by the path of the pipeline, the media continued to cast the protests in terms of environmental activism. Indigenous activists, particularly the traditional healers and tribal Elders who initiated the spirit camp at Sacred Stone (*Iyyay Wakháragapi Othí*), understood the protest to be deeply-rooted in indigenous beliefs of the sacredness of the land—a belief that EarthJustice attorneys attempted to centralize in *Standing Rock I*¹³¹—while non-indigenous activists brought myriad expectations of the types of claims protest movements ought to be making.¹³² These expectations were fur-

129. Note the difference between the multimedia produced by Young Warriors versus that produced by environmental organizations. Compare Katrina Villacisneros, *What is the Standing Rock Movement? ft. Oceti Sakowin Camp*, YOUTUBE (Feb. 4, 2017), <https://www.youtube.com/watch?v=Dj6oKz3tL4E>, and Todd Darling, *Final Prayer - Drums and Songs Lead Water Protectors Out of Oceti Sakowin*, YOUTUBE (Feb. 24, 2017), <https://www.youtube.com/watch?v=E7goMikqixo>, with Vogue, *Stories from Standing Rock: Vogue*, YOUTUBE (Nov. 22, 2016), <https://www.youtube.com/watch?v=QFjnudxcfv0>.

130. EarthJustice has worked with Navajo Nation, the Hopi Tribe, the Ute Mountain Indian Tribe, the Jicarilla Apache Tribe, the Fort Peck Reservation, the Muckleshoot Indian Tribe, the Pit River Tribe, the Suquamish Tribe, the Tulalip Tribe, the Winnemem Tribe, the Crow Indian Tribe, and the Atakapa Indian Band to stop the construction of a variety of oil and gas development projects that threaten places sacred to indigenous peoples. While these cases share an environmental focus, EarthJustice attorneys have frequently foregrounded tribal treaty rights, sovereignty rights, and the government-to-government consultation over purely environmental law claims, demonstrating a deftness navigating the complexity of federal Indian law.

131. *Standing Rock I* Complaint, *supra* note 15.

132. The disconnect between the expectations of indigenous activists versus non-indigenous activists when they came to Sacred Stone and Oceti Sakowin were such that non-indigenous activists had to be repeatedly reminded that they were guests upon tribal

ther complicated by the retelling of the litigation through the camp by word of mouth and through the media.¹³³ Indigenous activists sought to manage the diverging expectations through constant re-centering of the protest activities within Lakota traditions.¹³⁴

Non-indigenous activists, mobilized by environmental networks and informed by media depictions of the camps, arrived with an already-entrenched environmental frame regarding protest.¹³⁵ Indigenous activists, particularly Chairman Archambault, struggled to shift that framework for both non-indigenous activists and the wider media to one informed by indigenous values and language. The litigation distorted the narrative frame indigenous activists sought to set for non-indigenous allies and the media. There are few examples of indigenous-lead protests in collective memory—the last being the American Indian Movement’s occupation of Alcatraz—and language of the established legal discourse distorted indigenous attempts to differentiate the protests against the Dakota Access Pipeline from other protests against oil development. The litigation’s distorting effect followed the progression of the cases as indigenous leadership relayed back Judge Boasberg’s decisions to protestors and EarthJustice drafted and filed the Tribes’ legal responses.

A. *Inyan Wakháragapi Othí and the Language of the Sacred*

In early April 2016, when the river was only just beginning thaw, tribal Elders and traditional healers came to Turtle Island to pray for a

lands. When non-indigenous activists attempted to speak over or take control of meetings around the Sacred Fire they were politely, but firmly, reminded that the protests were not only about preventing environmental harm, but protecting the sacredness of the land as *indigenous peoples* understood it to be sacred.

133. Progress of the litigation was frequently reported back to protestors as part of the news and announcements provided at the Sacred Fire. However, while indigenous leadership were careful to foreground the particularly indigenous claims at stake in the litigation as they explained what had occurred during oral arguments or in the briefs filed, that nuance was frequently stripped out when non-indigenous activists retold the story amongst themselves.

134. I asked one Young Warrior in late November if he found the influx of non-indigenous activists difficult to deal with. He looked at me for a moment and shrugged before commenting, “I don’t know, but maybe they [non-indigenous activists] should be paying me for all the Indian 101 I’ve been doing.”

135. I asked one non-indigenous activist who was a frequent fixture at the media tent how he became aware of the protests, and he cited a number of environmental action blogs. Most of the non-indigenous activists I talked to cited environmental action mailing lists or action groups. Indigenous activists cited tribal leadership, Indianz.com, and Indian Country Today as their primary source of information.

consultation process that was steadily dissolving.¹³⁶ Tribal leadership had become increasingly frustrated with the Corps' minimalist approach to consultation.¹³⁷ Government-to-government consultation under federal Indian law is more substantive than most consultation provisions in U.S. federal law.¹³⁸ Due to the trust responsibility and the complex history of treaty rights between the U.S. federal government and the tribes, consultation is "about communication, respect, and partnership. Through meaningful consultation, a federal agency can respect tribal sovereignty, honor the trust relationship, learn and appreciate tribal values, avoid misguided errors and false presumptions, and make informed decisions on what is the best course of action."¹³⁹ Traditional healers and tribal Elders saw the consultation process as an invitation to the federal government to listen and join in their process of storytelling. The breakdown of the con-

136. Ownership of land continues to be a contentious issue in the NoDAPL protests. The Federal Government maintains the far bank of the Cannonball River is federally controlled parkland, ceded to the state under the 1877 revisions to the Fort Laramie treaty of 1868. See Nick Estes, *'The Supreme Law of the Land': Standing Rock and the Dakota Access Pipeline*, INDIAN COUNTRY TODAY (Jan. 16, 2017), <https://newsmaven.io/indiancountrytoday/archive/the-supreme-law-of-the-land-standing-rock-and-the-dakota-access-pipeline-25phRkIJB0GmipEDLvPLPw/>; *History*, STANDING ROCK SIOUX TRIBE, <https://www.standingrock.org/content/history> [hereinafter Standing Rock History]. The Lakota Sioux, however, argue that the land continues to be tribally controlled as the 1876 and 1889 revisions to the 1868 treaty were unilaterally done through changes to the original document in Washington, DC, not through negotiation. See Estes, *supra*; Standing Rock History, *supra*. The tribe further argues that the 1868 treaty was not ratified by three-fourths of the male members of the tribe as required, thus the proper treaty is the 1851 treaty signed at Fort Laramie. Standing Rock History, *supra*. The Supreme Court in 1980 agreed with the tribe that the eastern bank of the Cannonball, along with other lands, were illegally seized by the federal government and ordered the tribe be paid \$88 million. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423-24 (1980). The tribe, however, refused to accept the money, arguing that the case should not be considered a takings case, but violation of international treaty and thus the proper remedy is the return of the land. See Maria Streshinsky, *Saying No to \$1 Billion*, ATLANTIC MAG. (Mar. 2011), <https://www.theatlantic.com/magazine/archive/2011/03/saying-no-to-1-billion/308380/>. This case repeats the theme of indigenous activists arguing under a theory of violated sovereignty while the legal institutions around them shift the claim to other legal claims, legal claims that do not disrupt the unified power of the state.

137. Council Minutes, Standing Rock Sioux Tribe (Apr. 2016).

138. Exec. Order No. 13175 (Nov. 9, 2000), *supra* note 36.

139. PEVAR, *supra* note 26, at 40 (citing *Pueblo of Sandia v. United States*, 50 F.3d 856, 862 (10th Cir. 1995); *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 718-19 (8th Cir. 1979); *Klamath Tribes v. United States*, No. 96-381-HA, 1996 WL 924509, at *9 (D. Or. Oct. 2, 1996); *Lower Brule Tribe v. Deer*, 911 F.Supp 395, 402 (D.S.D. 1995); *Mescalero Apache Tribe v. Rhoades*, 804 F. Supp. 251, 261-62 (D.N.M. 1992); *Attakai v. United States* 746 F. Supp 1395, 1407-08 (D. Ariz. 1990) (each case overturning an agency decision on the grounds of insufficient consultation with tribal governments)).

sultation process was of great concern for tribal Elders who saw it as a sign that the heart of the federal government was turning away once again from indigenous people and their demands for justice. The Elders, joined by younger members of the community who would become the core of the Young Warriors, gathered to pray that the land would speak through them and to the hearts of those involved in the consultation process. It was from this camp on Turtle Island that everything moved forward.

The language used by indigenous activists in the early period of the protest—from April until September 2016—reflected the leadership of traditional healers and tribal Elders.¹⁴⁰ In the first complaint filed by the Standing Rock Sioux Tribe, the language of harm to the spirit of the land and the threat to the entire Tribe if sacredness of the land was violated echoed the stories and values taught by tribal Elders who first gathered at Turtle Island.¹⁴¹ EarthJustice attorneys sought to recraft the demand that the Federal government, particularly the Army Corps of Engineers, protect the sacred in their statement of impending harm.¹⁴² It was not sufficient to say that 120 potential burial sites might be disturbed, or that the water supply for Standing Rock was threatened, but that the spirit of the Mississippi and the Black Hills had to be held inviolate, protected. The initial brief attempted to make that idea the central grounds of the Complaint. However, the law sees only a tidy slogan in the translation of *mní wiconi*, water is life, and not the force of history and philosophy behind it. *Mní wiconi* was not a phrase used lightly by tribal Elders but as a call to listen. When opening talking circles or calling activists to reflect upon the proper way to engage in protest, tribal Elders would say: “My relations, *mní wiconi* and we are here to protect the sacred.” The repeated refrain of sacredness of the entire lake and its system of tributaries rather than a particular grave or ceremony site was repeated in *Standing Rock I*, although distorted by the demands of established legal practice.¹⁴³ The traditional healers and tribal Elders did not speak in terms of rights or sovereignty, but rather in terms of connection to the land, often invoked

140. The focus on prayer walks, spirit runs, and invoking a deep connection to the land flowed from the teachings of tribal Elders at Turtle Island.

141. *Standing Rock I* Complaint, *supra* note 15. Traditional healers and tribal Elders used oral traditions and storytelling to explain the importance of Turtle Island and Lake Oahe. While the litigation required the Tribes to point to a specific use for the land (even if that use was religious), Elders resisted the language of use and extraction. They instead filled my hands with dirt from the riverbed and said: “These are the bones of our relations—you do not fill your bones with poison; you do not ask them if they are of use. They are your bones that hold you up and hold you together.”

142. *Id.*

143. *Id.*

by the phrase *mitákuye oyás'iy* (all my relations), the sacredness of the land (*inyan wakháragapi othí*), and the necessity of water (*mni wiconi*).

The introduction of direct action sparked a discussion among indigenous activists about the underlying philosophy and direction of protests. Tribal elders and traditional leaders resisted calls to direct action, arguing that Turtle Island and Lake Oahe were spiritual sites and thus must be protected spiritually.¹⁴⁴ Traditional healers and tribal Elders argued that direct action was too likely to be undertaken with the wrong mindset and with a closed heart. Members of the Young Warriors, however, argued that concerted and visible resistance to the construction of the pipeline was necessary.¹⁴⁵ The conflict between the two approaches led to the division of the camps between Sacred Stone and Oceti Sakowin. Sacred Stone continued to be led by traditional healers and elders with a focus on prayer, ceremony, and spiritual practice as method of resistance. Meanwhile, Oceti Sakowin became the central location for direct action, leadership, communications, and legal teams. Sacred Stone, Oceti Sakowin and the tribal council of the Standing Rock Sioux Tribe developed lines of informal communication to facilitate the education and direction of several thousand protestors living on the banks of the Canon-Canonball River.¹⁴⁶ The Sacred Fire at Oceti Sakowin became the central gathering point and the source of information for both camps. Although traditional healers and tribal Elders led conversations at the Sacred Fire, opening and closing all discussion, they were no longer the main drivers of conversation, as the Young Warriors increasingly led the direct actions against the pipeline construction.

B. *Oceti Sakowin and the Language of Rights*

After Judge Boasberg denied the petition for emergency relief, the language at the protest camps shifted to more legalistic demands. The Young Warriors still understood the fundamental threat to be to the sacredness of Turtle Island and Lake Oahe, but they also made repeated calls to the illegality of the permits, to the violation of their constitutional

144. Interview with Sacred Stone leadership (Sept. 26, 2016).

145. Interview with Young Warriors leadership (Oct. 12, 2016).

146. Standing Rock Tribal Council often acted as the main conduit for information regarding the litigation as the legal teams involved avoided direct communication with the Young Warriors to prevent prejudicing their decisions regarding direct actions. See Meeting Notes, Water Protector Legal Collective (Oct. 2, 2016) (on file with author); Saul Elbein, *The Youth Group That Launched a Movement at Standing Rock*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/magazine/the-youth-group-that-launched-a-movement-at-standing-rock.html>; Council Minutes on NoDAPL Litigation, Standing Rock Reservation Tribal Council (Nov. 27, 2016) (on file with author).

rights, and to Energy Transfer Partners' refusal to abide by the Obama Administration's request to temporarily suspend construction.¹⁴⁷ From August 2016 until early January 2017 the language at Sacred Stone and Oceti Sakowin shifted to reflect the language of the litigation—both the *Standing Rock I* decision and the draft litigation that would become *Standing Rock II* and *Standing Rock III*. Despite attempts by the legal teams from both EarthJustice, which handled the main legal challenges to the pipeline, and the Water Protector Legal Collective, which handled the mass defense of protestors arrested during direct actions, to avoid prejudicing the language and tactics of indigenous leadership, there was nonetheless a noticeable shift in language during this period from the language of spirituality and prayer to violations of rights and questions of legality. The rights in question were framed as explicitly indigenous—protection of tribal lands, recognition of indigenous religious values, recognition of indigenous rights to protest—but the language of rights and the violation thereof was a new development that followed the arrival of lawyers at the protest camps and the intensity of the litigation. However, even as law and lawyers became more central to the protests, indigenous activists sought to set the frame of the protests within indigenous narratives and beliefs.

The use of ceremony, prayer, and the repetition of key phrases—*inyan wakháŋagapi othí, mni wiconi, mitákuye oyás'iy*—were methods by which indigenous activists sought to remind both themselves and their non-indigenous allies of the roots of the protests. All direct actions led by the Young Warriors were opened by ceremonies under the aegis of traditional healers and tribal Elders. Non-indigenous activists were continually reminded that they were guests of Standing Rock Sioux Reservation and the land they sought to protect was tribal land first and foremost. The Young Warriors resisted calls to make the protests about the failures of the federal government, but rather strove to keep the protests grounded in a language of spirituality and prayer even as increasingly aggressive police tactics led to police brutality lawsuits.

As traditional healers and tribal Elders feared, direct actions meant direct confrontations with the police, which shifted the focus of the protests. As protestors faced arrest, harassment, and violence from the North

147. Joint Statement, Departments of Justice, Army, and Interior Regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Sept. 9, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>; see also Joint Statement, Departments of Justice, Army, and Interior Regarding D.C. Circuit Court of Appeals Decision in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Oct. 10, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-dc>.

Dakota police and the paid security for the Dakota Access Pipeline, the Young Warriors began to talk in terms of rights violations and the illegality of the actions of the pipeline. Evenings around the Sacred Fire, which had originally been moments of quiet reflection and prayer, became time to take stock of who had been arrested, who had been hurt, and what could be done in the immediate aftermath.

Tribal leaders were frequent speakers around the Fire, explaining both the course of the litigation—the countersuit filed by Energy Transfer Partners, the monthly updates demanded by Judge Boasberg, recent statements from the Obama Administration—and the decisions of the Standing Rock Sioux Reservation's tribal council. As indigenous leadership retold the arguments of the litigation around the Sacred Fire, they reconstructed them within the language of protest and indigenous storytelling, until those arguments resembled neither the original arguments of traditional healers and tribal Elders at Turtle Island back in April nor the formally filed Complaint, but rather an amalgamation of the two that captured neither entirely. These retellings stripped out the complex stories and oral histories that traditional healers and tribal Elders used to explain sacredness of the land and why it must be protected in certain ways. The retellings also flattened the nuanced legal arguments advanced in the litigation and by tribal leadership at places like the UN. At the height of the protests, with nearly three thousand protestors in residence, the language of Oceti Sakowin was a blend of the established legal discourse and the maxims of traditional healers and tribal Elders, but without much of the nuance. It was the beginnings of a legal story that centered indigenous peoples in a manner U.S. federal law had been unable to manage. However, the development of that language with its particular grammar and touchstones was cut short by the razing of Oceti Sakowin.

C. Mitákuye Oyás'iy and Solidarity

The final shift in the language used by indigenous activists came after the North Dakota police department razed Oceti Sakowin following the dispersal order from Governor Burgum.¹⁴⁸ In the month between President Trump taking office and the razing of Oceti Sakowin, indigenous activists re-emphasized the language of protecting the sacred, which had never left the camps but had been muted during the intense months at the height of the protests, and began speaking in terms of solidarity movements. During February and after the razing of Oceti Sakowin, in-

148. Press Release, Office of the Governor of North Dakota, Burgum Issues Emergency Evacuation Order (Feb. 15, 2017), <https://www.governor.nd.gov/news/burgum-issues-emergency-evacuation-order>.

indigenous leadership spoke of the protests on the banks of the Canonball River as being part of something larger, repeating frequently that: “Standing Rock is not an adjective, it’s a movement.” They pointed to protest camps that indigenous activists were building at Chaco Canyon, New Mexico, the rejuvenated protests against the Kinder Morgan Trans Mountain Pipeline, the Cheyenne-led protests against the Keystone XL, and the growing protests against the Line 2 pipeline led by the Oneida and Menominee in Wisconsin.¹⁴⁹ There had always been an expectation that the fight against the pipeline would be a long one, and perhaps without a good end, but the language of solidarity—the idea that the resistance to the Dakota Access Pipeline had built something beyond a sudden expression of years’ worth frustration crystallized and took hold of indigenous activist during the last days of Oceti Sakowin.¹⁵⁰ Indigenous activists, after Oceti Sakowin was razed and the protestors had returned home, spoke of the protests as the first in a long line of future protests.¹⁵¹ The last days of Oceti Sakowin suggested that legal strategies, the language of environmental law, and litigation were a mask indigenous people had to use to protect the sacred, that the language was a cover to slip into, the language of a government that continually rejected the values of indigenous people—even if they had to distort their claims to do it.¹⁵²

149. The Young Warriors were particularly funny with me about the Line 2 pipeline opposition: “Dani, you won’t have to drive ten hours to stand in the cold and watch the government shoot Indians anymore. You’ll be able to go to your backyard.” Something about the protests engendered a type of black humor in those last few weeks in February.

150. It is difficult to gainsay indigenous activists in this when one considers that the International Indigenous Youth Council and the Indigenous Youth Network sprang from the protests at Standing Rock. Indigenous youth created networks and relationships that they continue to use to mobilize resources to protest resource extraction from indigenous lands around the globe.

151. “Who better to fight for the forgotten rights of the land than the ones the government already wants to forget?” The idea that it could only be indigenous people that could lead the fight against oil development was a common idea during the last weeks of Oceti Sakowin.

152. One of the Elders told me a long story of Coyote wearing the masks of every other animal when Death came for him, each time putting off his mortality for another decade, until at last Coyote only had his own mask to wear, all of the other masks long since spent. When Death came for him and he only had his own mask, Death did not believe it was Coyote after being tricked for so long, and went away in a huff leaving Coyote free to do what he wanted. Only once Coyote took off his last mask, he could not remember what he looked like anymore. “It’s a good trick,” the Elder said as we watched the sunset, “to use their masks against them. As long as you can remember what you are supposed to look like underneath.”

CONCLUSION

The NoDAPL protests, the litigation to prevent the completion and later operation of the pipeline, and the social movement that the protests engendered, were an explosive expression of indigenous resistance to systems that silence and ignore them while attempting to extract resources from their lands and communities. As a case study, they demonstrate how the use of litigation, while often being critical to achieving the goals of political protest, can distort the expression of politics not already recognized within the legal discourse. As Cover states: “[t]he transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken.”¹⁵³ The Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe sought to bring forward not just their interpretation of the law, but their interpretation of the world, and have it reflected within the story the law tells about the state. The protests and litigation were an attempt, one with mixed results, to insert indigenous theories of sovereignty, spirituality, and understandings of the land into both U.S. federal law and into the broader social conversation on oil development, protest, and federal power. I argue that the results were mixed because the use of legal mechanism to mount a challenge necessarily constrains the available vocabulary of any political protest, much less an indigenous protest whose language is based in a system of values not reflected within the larger polity.

Indigenous activists at Sacred Stone and Oceti Sakowin sought not only to protect the sacred and protest the violation of indigenous rights, but also to demonstrate how a specifically indigenously-led protest functioned. It was a protest grounded in spiritual practice, memory, and respect for both the physical place they sought to protect and traditions that that place engendered. Non-indigenous activists who came to the camps were informed that they were invited to participate, but never explicitly told what to do or how to behave; rather they were shown through actions and words of indigenous leadership.

Law can change, albeit slowly, through demonstration and invitation to practice. Subsequent indigenous challenges to resource extraction schemes on indigenous lands suggest the hopefulness of indigenous activists during those last days of Oceti Sakowin was not in vain. New litigation against energy development schemes at Chaco Canyon and the Keystone XL pipeline have met with judicial favor, even if that success is

153. See COVER, *supra* note 34, at 45.

fragile.¹⁵⁴ The law continues to struggle to find its place within the traditional legal discourse of indigenous philosophy. The supposed disjointedness that Judge Boasberg noted regarding the Standing Rock Sioux Tribe's arguments on tribal sovereignty, the trust relationship, and consultation was not due to an inability of the Tribe to explain their legal philosophy, but rather legal language's limited ability to contain it.¹⁵⁵

The evolution of law is a slow process of shifting legal language to accommodate alternative modes of thinking. There is a way forward for the incorporation of indigenous philosophy within U.S. federal law, but it requires converting indigenous ways of understanding the world and how we relate to it, into 'religions' as understood by statutes like the Religious Freedom Restoration Act. As Judge Boasberg noted in his opinion in *Standing Rock II*, this claim could have been successful had it not been barred by laches.¹⁵⁶ Using RFRA as a frame does a certain degree of violence to the nature of indigenous worldviews. However, that frame still allows for the assertion of indigenous values into U.S. federal law outside the context of federal Indian law. From a legal perspective, the assertion that the land has a spirit that must be respected is no more alien than the assertion that baking a cake is an act of religious expression.¹⁵⁷ Indigenous activists have used less germane legal frames—for example, the framework of government contracting to pursue expanded tribal self-governance—to introduce indigenous theories into U.S. federal law. However, as the *Standing Rock* case line demonstrates, the use of Western law is an uncertain prospect for indigenous activists, and one that requires them to do violence to their own claims to fit them within existing legal discourses.

The alternative way forward requires a critical assessment and reformulation of legal discourse as a whole. Scholars studying the legal accommodation of minority communities argue that if the law is to have a serious moral component, particularly when it comes to indigenous

154. *Dine Citizens Against Ruining Our Env't v. Zinke*, No. 18-2089 (10th Cir. June 18, 2018) (appealing decision to allow fracking in the Chaco Canyon on cultural grounds and as a violation of NEPA); *Indigenous Env'tl. Network v. U.S. Dep't of State*, 317 F. Supp. 3d 1118 (D. Mont. 2018) (holding that the Department of State violated NEPA by granting Nationwide 12 permit to build the pipeline when it had not redone the environmental impact survey that originally found the permit should *not* be granted. Further held consultation had not be completed, and that sufficient harm to cultural significance of the land existed to grant relief).

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

156. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II)*, 239 F. Supp. 3d 77, 87 (D.D.C. 2017).

157. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 US ___ (2018).

communities, this critical assessment and reformulation is necessary.¹⁵⁸ I suggest that one alternative way forward is to follow the indigenous theory of law laid out by Vine Deloria, one that sees law as a transformative process of storytelling within which both the storyteller and the listener have vital roles to play. Examining *Standing Rock Sioux Tribe vs the Army Corps of Engineers*, both how it played out in the courts and how it was retold and reconceptualized at the protest camps, lays out the violence that is done to the language of protest.

158. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1996) (arguing that the multicultural fabric of society requires the legal accommodation of minority cultural practices); Ayelet Shachar, *On Citizenship and Multicultural Vulnerability*, 28 *POL. THEORY* 1, 64-89 (2000) (discussing the demands of multiculturalism upon our conception of citizenship rights); Dolores Morondo Taramundi, *Legal Pluralism and Reasonable Accommodation of Religious Diversity*, 24 *INT'L J. MINORITY & GROUP RTS.* 467, 467-83 (2017).

