

**TESTIMONY OF
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STANDING ROCK SIOUX TRIBE
BEFORE THE
HOUSE COMMITTEE ON NATURAL RESOURCES COMMITTEE
SUBCOMMITTEE FOR INDIGENOUS PEOPLES
OF THE UNITED STATES (SCIP)
HEARING ON
ENVIRONMENTAL JUSTICE IN INDIGENOUS COMMUNITIES
MAY 13, 2021**

My name is Ira Taken Alive and I am the elected Vice-Chairman of the Standing Rock Sioux Tribe. I want to thank the Committee and the Subcommittee for the opportunity to testify on this important issue today.

The Standing Rock Sioux Reservation encompasses 2.3 million acres in North and South Dakota. The Reservation's population – approximately 8,500 Tribal members and 2,000 non-members – reside in eight districts, and in smaller communities. The Tribe is a successor to the Great Sioux Nation, or *Oceti Sakowin*, and a signatory to several treaties, including the 1851 Fort Laramie Treaty, Sept. 17, 1851, 11 Stat. 749 and the Fort Laramie Treaty of 1868, 15 Stat. 635. In these Treaties, the United States recognized our territory and promised to protect us in our homeland. But the United States did not keep its word. Because of demands for gold, and later for agricultural lands, our lands were taken without our consent. By statutes enacted over time our Reservation was reduced to what it is today. *See* Act of Feb. 28, 1877, 19 Stat. 254; Act of Mar. 2, 1889, 25 Stat. 888.

The same happened when the Oahe Dam and reservoir were built. In 1942, Congress enacted the Flood Control Act, Pub. L. 78-534, 58 Stat. 887. This authorized the Army Corps of Engineers to construct five dams along the Missouri River, including the Oahe Dam and Reservoir. The Flood Control Act was implemented at Standing Rock in 1958. The United States took 56,000 acres of the Tribe's reservation lands along the Missouri River for the Oahe project. Act of Sept. 2, 1958, Pub. L. No. 85-915, 72 Stat. 1762. The lands taken for the Oahe Project were the best remaining lands of the Reservation including timber lands and fertile farming lands. When these lands were flooded, hundreds of our families lost their homes. S. Rep. No. 102-267, at 188 (1992). The loss devastated the Tribal economy and culture. Thus, the Standing Rock Sioux Tribe has a long history of dealing with the United States when it seeks to grow, prosper and develop this Nation's resources for the benefit of others without consideration of the impact to communities like mine.

In 1994, the President issued E.O. 12898, which established the Environmental Justice Doctrine, amid growing concern that minority populations, low-income populations, and Indian tribes bear a disproportionate amount of adverse health and environmental effects. E.O. 12898 mandates, *inter alia*, that: "[E]ach federal agency shall make achieving environmental justice part of its mission by *identifying* and *addressing*, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on

minority populations and low-income populations.” E.O. 12898 § 1-101 (emphasis added). The Executive Order provides for agencies to collect, maintain, and analyze information on patterns of subsistence consumption of fish, vegetation, or wildlife. Where an agency action may affect fish, vegetation, or wildlife, that agency action may also affect subsistence patterns of consumption and indicate the potential for disproportionately high and adverse human health or environmental effects on low-income populations, minority populations, and Indian tribes.

As the Interagency Working Group (“IWG”) established by E.O. 12898 confirmed in its guidance on key terms in the Order, it applies to federal programs, policies and activities affecting Native Americans. *Council on Environmental Quality, Environmental Justice: Guidance Under the National Environmental Policy Act*, December 10, 1997 (“CEQ Guidance”), Appendix A at 25-26.¹ Similarly, the guidance released by the Council on Environmental Quality expressly incorporates Indian tribes into the definition of low-income populations and minority populations. See, e.g., CEQ Guidance at 3-7.

Pursuant to E.O. 12898, the federal agencies are obligated to identify and address any disproportionately high and adverse human health or environmental effects that the potentially affected tribes would suffer if the proposed mine were permitted. In addition, when environmental justice impacts may occur, the President’s Memorandum accompanying E.O. 12898 requires that “[m]itigation matters outlined or analyzed in an environmental assessment, environmental impact statement, or record of decision, whenever feasible, should address significant and adverse environmental effects of proposed Federal actions on minority communities and low-income communities.” Presidential Memorandum Accompanying Executive Order No. 12898, 30 Weekly Comp. Pres. Doc. 279 (Feb. 11, 1994). The President’s Memorandum further requires the federal agencies to identify “mitigation measures in consultation with affected communities.” *Id.* In carrying on these responsibilities the CEQ Guidance directs that, “[a]gencies should seek tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government’s trust responsibility to federally-recognized tribes, and any treaty rights.” *Id.* at 9.

In determining the affected environment, the CEQ Guidance further provides that “[a]gencies should recognize that the impacts within minority populations, low-income populations, or Indian tribes may be different from impacts on the general population due to a community’s distinct cultural practices. For example, data on different patterns of living, such as subsistence fish, vegetation, or wildlife consumption and the use of well water in rural communities may be relevant to the analysis.” CEQ Guidance at 14.

In addition to identifying proposed Federal actions with the potential to create disproportionately high and adverse human health or environmental effects, E.O. 12898 requires

¹ Available at http://www3.epa.gov/environmentaljustice/resources/policy/ej_guidance_nepa_ceq1297.pdf

each Federal agency to determine whether the disproportionate effects of the proposed action will be borne by a minority population, low-income population, or Indian tribe. When determining whether environmental effects are disproportionately high and adverse, Federal agencies “are to consider the following three factors:”

- (a) Whether there is or will be an impact on the natural or physical environment that significantly and adversely affects a minority population, low-income population, or *Indian tribe*. Such effects may include ecological, cultural, human health, economic, or social impacts on minority communities, low-income communities, or Indian tribes when those impacts are interrelated to impacts on the natural or physical environment; and
- (b) Whether environmental effects are significant. . . and are or may be having an adverse impact on minority populations, low-income populations, or *Indian tribes* that appreciably exceeds or is likely to appreciably exceed those on the general population or other appropriate comparison group; and
- (c) Whether the environmental effects occur or would occur in a minority population, low-income population, or *Indian tribe* affected by cumulative or multiple adverse exposures from environmental hazards.

Appendix A to CEQ Guidance at 26-27 (emphasis added). Federal agencies “are to consider” similar types of data in determining whether human health effects are disproportionately high and adverse. *Id.* at 26.

The CEQ Guidance further requires that, as environmentally preferable alternatives are considered, the disproportionately high and adverse human health or environmental effect on low-income populations, minority populations, or Indian tribes “should be a factor in determining the environmentally preferable alternative.” CEQ Guidance at 15. Further “[i]n weighing this factor, the agency should consider the views it has received from the affected communities, and the magnitude of environmental impacts associated with alternatives that have a less disproportionate and adverse effect on low-income populations, minority populations, or Indian tribes.” *Id.* Likewise, mitigation measures “to avoid, mitigate, minimize, rectify, reduce, or eliminate the impact associated with a proposed agency action . . . should reflect the needs and preferences of affected low-income populations, minority populations, or Indian tribes to the extent practicable.” *Id.* at 16.

As result of this Executive Order and Guidance, for more than two decades, each federal agency has been directed to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-

income populations in the United States[.]” Unfortunately, too often federal agencies have failed to fulfill the promise of the Executive Order and the CEQ Guidance.

For Standing Rock, this failure resulted in a world movement calling for the federal government to do better. Specifically, the construction and continued operation of the Dakota Access pipeline across the Tribes’ taken treaty lands, and across the Missouri a half a mile upstream of our Reservation, illustrates the continued historic pattern of ignoring tribal communities and the continued failure to properly consider the Environmental Justice Doctrine in federal decision making. The Tribe conveyed its concerns about the routing this pipeline in such a sensitive location at the earliest opportunity, even before DAPL applied for the permits in December 2014. But decisions were made about the pipeline route without regard to the impact of the proposed pipeline on tribal rights. This became clear in December 2015, when the Army Corps of Engineers released a deeply flawed draft environmental assessment, drafted by DAPL. The failure to consider and address tribal concerns at the outset and consider alternatives that would not put the risk of the pipeline on Indian people, ultimately resulted in a Federal Court of Appeals decision vacating DAPL’s easement and order an EIS to be conducted. *Standing Rock Sioux Tribe v. Army Corps of Engineers*, ___ F.3rd— (D.C. Cir. 2021). Unfortunately, this happened after the Army Corps of Engineers permitted DAPL to operate and now continues to allow this project to operate even though it is in trespass and in violation of the National Environmental Policy Act. Thus, the Standing Rock Sioux Tribe is once again bearing the burden for this Nation’s prosperity.

Again, the flawed history of DAPL is a tragic example of the federal agencies failing to properly implement Environmental Justice Doctrine in its decision-making. The 2015 draft DAPL EA was remarkable for the fact that it said nothing at all about how close the pipeline would cross Lake Oahe just a half mile upstream from our Reservation. The draft EA said nothing at all about the pipeline’s potential impacts on the water, which we drink and use for irrigation. The draft EA said nothing about the risk of oil spills on the fish and game and plants that our people, many of whom live below poverty, rely on to put food on the table and which are central to our religion and culture. In fact, the maps that were part of the draft EA completely omitted all information that would have shown the location of the Reservation relative to the pipeline’s crossing. At the same time, however, the draft EA showed that DAPL had originally considered a different route, which would have crossed the Missouri ten miles north of Bismarck, North Dakota. Even though the north of Bismarck route would cross the Missouri River at a point where it is only 200-300 feet wide (instead of nearly a mile wide at the Lake Oahe crossing) DAPL abandoned the north of Bismarck route in part because of risks to downstream municipal water supplies.

We submitted numerous technical and legal comments on the draft EA to make sure that the Corps had the facts about our reliance on the waters of Lake Oahe, the sacred sites that would be affected by construction and operation of the pipeline, and the very substantial risks that an oil spill would create for us. We urged the Corps to prepare an EIS to assess route alternatives that did not cross the Missouri in a place that would put all the risks of an oil spill on Indian people who are still struggling to overcome generations of poverty and the related problems that occur with poverty. Other federal agencies agreed with the concerns we raised. The Interior

Department and the Environmental Protection Agency criticized the draft EA and said that the Corps needed to do a more robust review with a focus on risks to water and to Tribal resources.

Despite this, in July 2016, the Corps released a final EA and a “finding of no significant impact” (“FONSI”). Although the final EA recognized that the Tribe existed, it still got the facts wrong. It incorrectly said that we relied mostly on wells for our water, even though we provided clear information about our extensive reliance on Lake Oahe for the drinking water in our homes, schools, community centers, IHS hospital and clinics, businesses (the casinos and hotel) and all tribal and federal public buildings. The final EA instead made conclusory statements dismissing the risks to the Reservation. But if there was no risk of an oil spill from this pipeline, why wasn’t it safe enough to cross the Missouri River 10 miles upstream of Bismarck, instead of one-half a mile upstream of an Indian Reservation? The final EA never answers that question. Compounding the arbitrariness of its analysis, the Final EA further limited its environmental justice impacts analysis to a 0.5 mile radius from the HDD site. EA at 84, 87 (“There are no low-income, minority or tribal lands within 0.5 mile of the Proposed Action.”) The Corps selected this artificial radius while failing to acknowledge that the reservation boundary was 0.55 mile downstream, a mere 80 yards beyond the EA’s analytical boundary.

The Final EA labels this half-mile radius as a “buffer area” and cites to standards used by the Federal Transit Administration and the Federal Energy Regulatory Commission to consider environmental justice issues for transportation projects and natural gas pipelines. Final EA at 84. But the environmental effects of a highway project or a natural gas pipeline are very different from the risks for a crude oil pipeline, particularly with respect to the risks to water resources. See U.S. Dep’t of Transp., Pipeline & Hazardous Materials Safety Admin., *Fact Sheet: High Consequence Areas (HCA)*, available at <https://primis.phmsa.dot.gov/comm/FactSheets/FSHCA.htm>. The notion that the Tribe would not be impacted by a spill from a major crude oil pipeline because there is a mythical half-mile “buffer area” is simply not credible. The Environmental Justice doctrine requires a robust examination of the actual risks that a proposed action poses to a Tribe, not the invocation of an arbitrary “buffer” which has no relationship to the risks posed by a particular project. \

Because of this failure, the federal government permitted this pipeline that presents a clear and present danger to not only the Standing Rock Sioux Tribe, our people, our permanent homeland, and our treaty protected resources, but to all of the Tribes whose permanent homelands are on the Missouri River.

Even after more than two decades since the Environmental Justice Doctrine was adopted to inform every significant decision the United States makes, the United States must do better. Federal agencies should not be allowed to paper over Environmental Justice concerns and conjure up arbitrary “.5 mile buffer zone” so that they do not have to examine the true impacts that a project might have on a Tribal communities. Moreover, there must real and substantive consequences for agencies failure to comply with the law. As we are seeing today, there are none. The only consequences are born by communities like the Standing Rock Sioux Tribe, who must now live with the ever-present threat of an illegal and unsafe pipeline.

Standing Rock Sioux Tribe
May 13, 2021

We appreciate the opportunity to discuss this important issue with you today.