



# Dakota Access:

## A Review of the Policy and Legal Issues

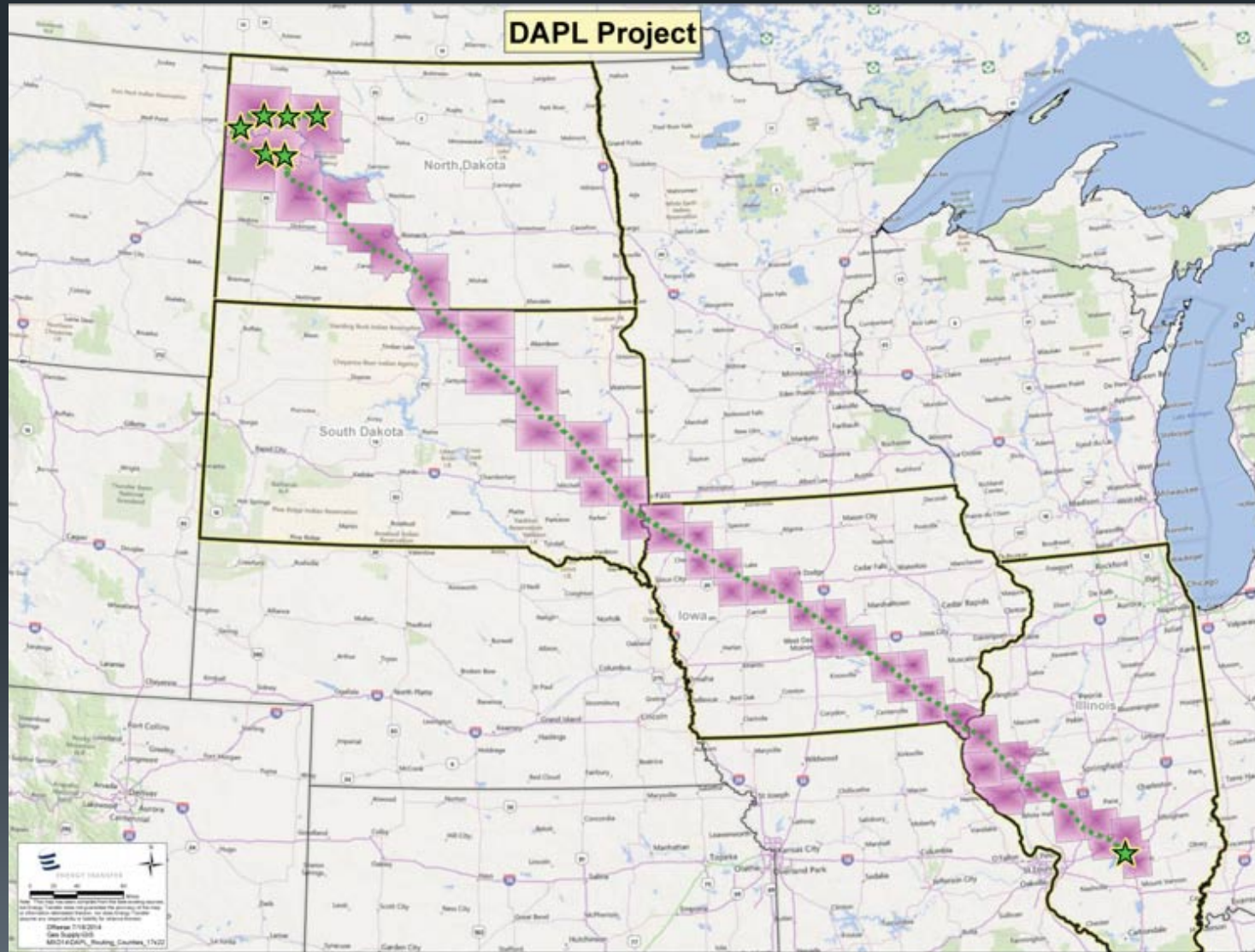
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Penn/Wharton Public Policy Initiative/Kleinman Center for Energy Policy, February 28<sup>th</sup>, 2017

# Dakota Access Pipeline: Lake Oahe Crossing

- In 2016, a protest began 0.5 miles north of the Standing Rock Sioux Reservation in North Dakota
- The protest concerns the Dakota Access Pipeline and its crossing of the Missouri River at Lake Oahe.
- Designed to be 1,172 miles long, 30 inches in diameter
- Will carry up to 570,000 barrels of North Dakota crude oil from the Bakken Shale formation to an oil tank farm in Pakota, Illinois.
- Will cost \$3.7 billion dollars, and is owned by Energy Transfer Partners and Phillips 66.

# Dakota Access Pipeline: Lake Oahe Crossing

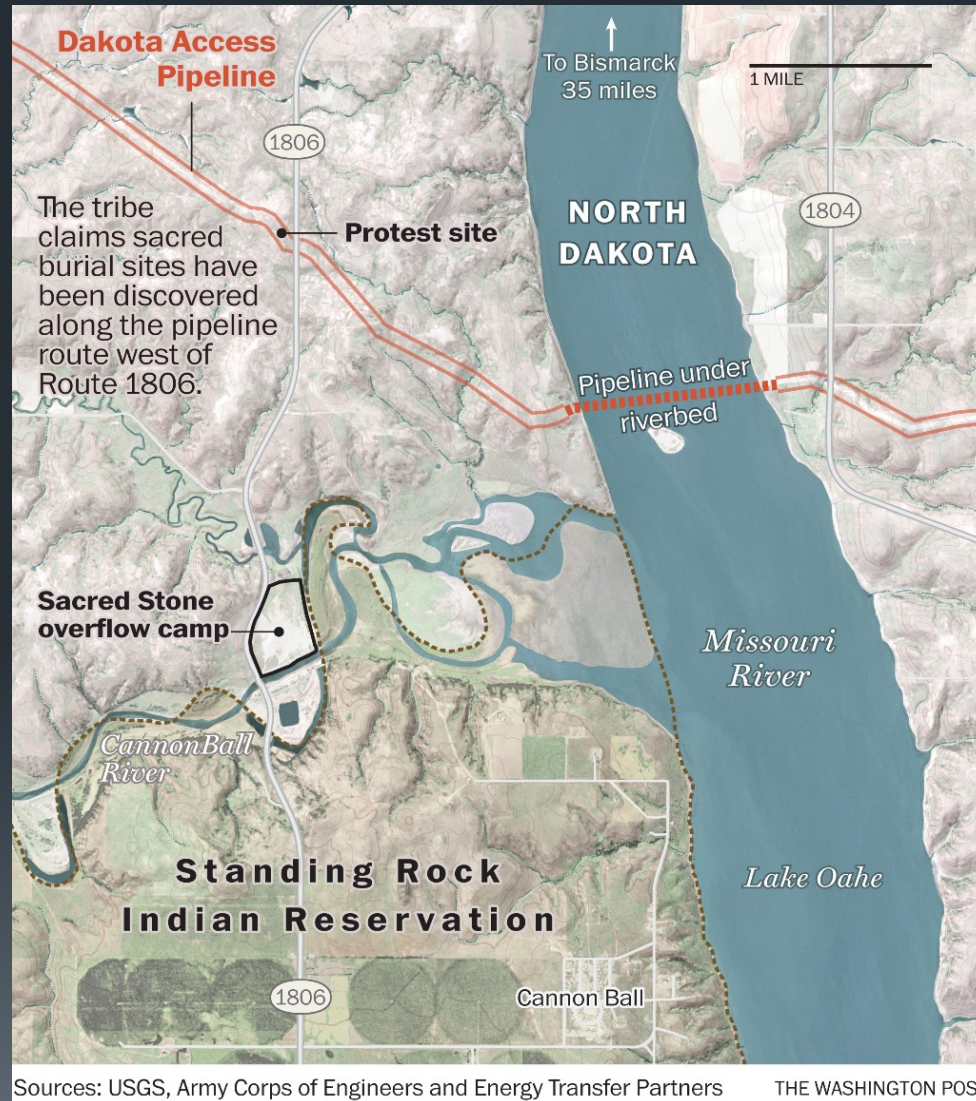


# Dakota Access Pipeline: Lake Oahe Crossing

- The protest focuses on two main issues:
  - A concern that constructing the pipeline will disturb Native American burial and cultural heritage sites along the Missouri River.
  - A concern that a spill or leak from the pipeline will contaminate the water of the river and lead to environmental degradation emanating from the site of any potential spill.



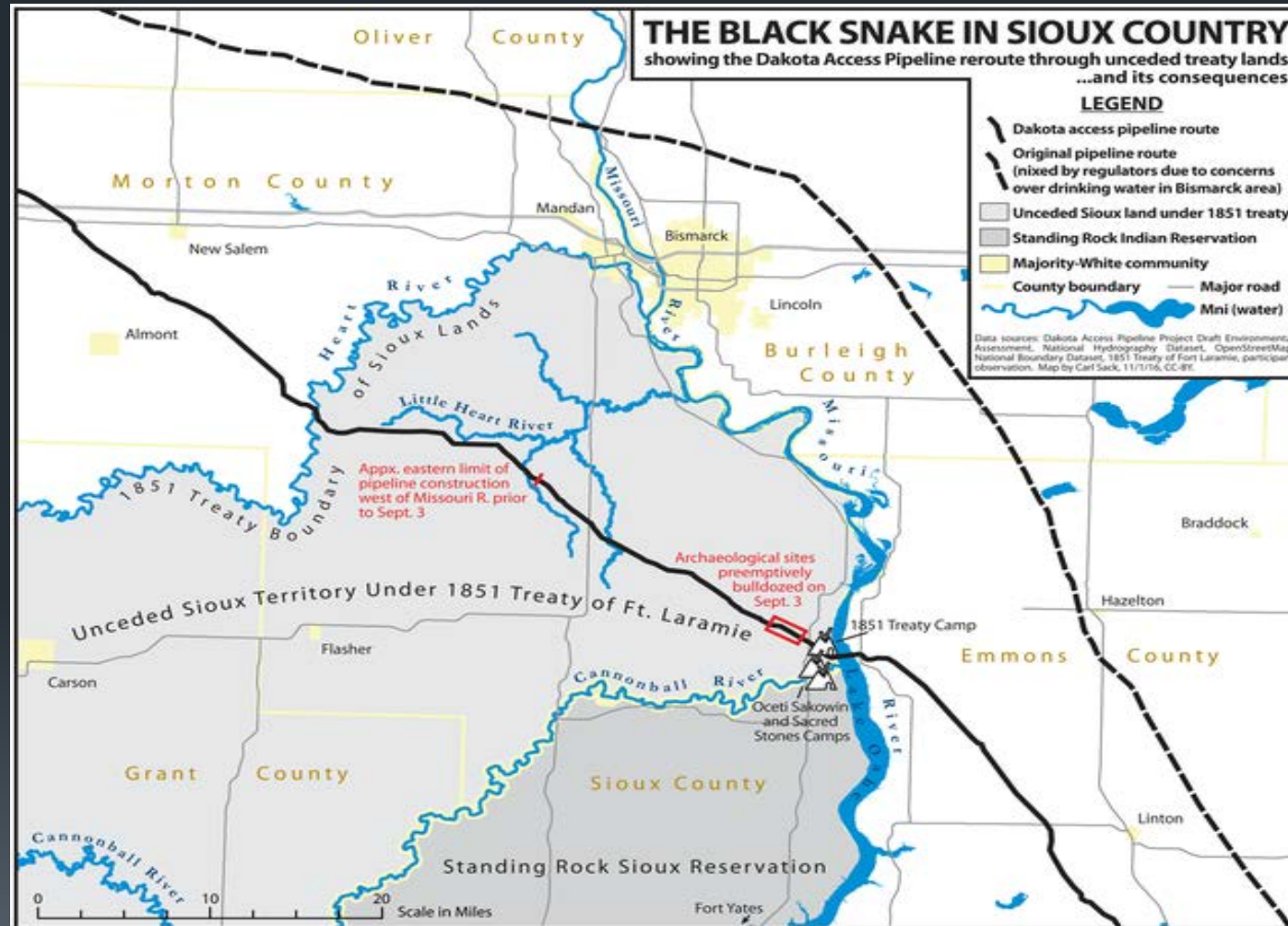
# Dakota Access Pipeline: Lake Oahe Crossing



# Dakota Access Pipeline: Issue of Sacred Land

- One focal point of the protest is that the pipeline will traverse land that is sacred to the Standing Rock Sioux Tribe.
- The Tribe argue that there are Native American burial and prayer sites along the path of the river.
- The Tribe believes that the land currently owned by the U.S. Army Corps of Engineers is in fact their land, ceded by the Fort Laramie Treaty of 1868.
  - The Tribe asserts that the Army Corps of Engineers seized land adjacent to Lake Oahe in violation of the treaty following the damming of the Lake.

# Dakota Access Pipeline: Issue of Sacred Land



# Dakota Access Pipeline: Issue of Sacred Land

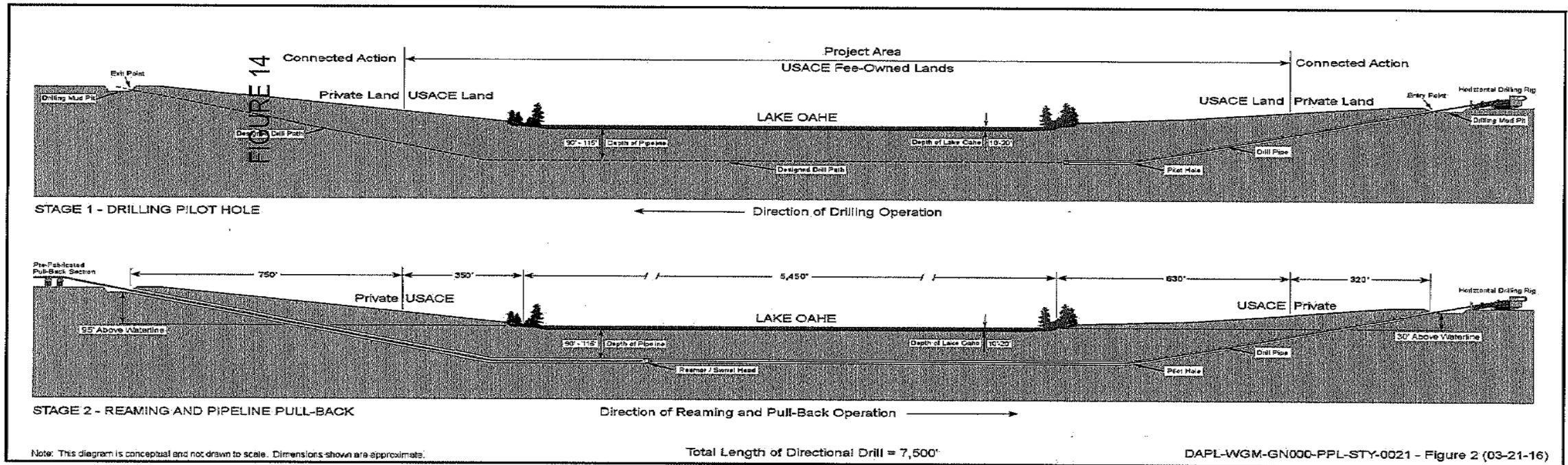
- The Fort Laramie Treaty makes no mention of land rights other than surface use.
  - Most tribes do not own their subsurface rights (meaning oil, gas, minerals, etc.)
- The Fort Laramie Treaty also states:
  - “[The Tribes] will not in future object to the constructions of railroads, wagon roads, mail stations, or other work of utility or necessity, which may be ordered or permitted by the laws of the United States.” (Article XI, 6<sup>th</sup> Provision, Fort Laramie Treaty, 1868)
- Pipelines are considered works of utility, and are generally built only after a showing of necessity.
  - Meaning that there is enough committed supply of oil or natural gas (or other products) that would use the pipeline to justify its construction.



# Dakota Access Pipeline: Issue of Sacred Land

- Dakota Access designed a plan to cross Lake Oahe in a manner which would cause the least amount of disturbance.
- The pipe will go under the lake using horizontal directional drilling, where it will enter the earth approximately 750 feet from the border of the land contested between the Army Corps of Engineers and the Standing Rock Sioux.
- It will emerge 320 feet from the border on the other side of the lake.
- Underneath Lake Oahe, the pipeline will be approximately 90-115 feet below the lowest depth of the river.
- Because of the horizontal directional drilling and the setback, the pipe has virtually no chance of disturbing any gravesites, which would be at a much shallower depth (<10 feet).

# Dakota Access Pipeline: Issue of Sacred Land



CROSS-SECTION DIAGRAM OF LAKE OAHE HDD CROSSING

# Dakota Access Pipeline: Issue of Sacred Land

- Issues of sacred land typically come up during tribal consultations, and a process under the National Historic Preservation Act.
- According to the Environmental Assessment, an analysis of environmental issues affecting major Federal actions, the Army Corps of Engineers conducted tribal consultations between October 2014 and March 2016.
  - The issue of Native American burial and prayer sites was not broached, and no mitigating measures were proposed within the EA.
- Other reports stated that efforts to reach Standing Rock Sioux Chairman David Archambault were futile.
- The Tribe also could have voiced their concerns about the route to the North Dakota Public Service Commission, who is responsible for approving the route within the state.
  - The Commission said that the tribe failed to take part in the 11-month permitting process.

# Dakota Access Pipeline: Issue of Sacred Land

- The Tribe was afforded ample opportunity to engage on the sacred land issue and get mitigation provisions put in to diminish the impact.
- But even if one accepts their argument about the Fort Laramie Treaty, the pipeline itself will not disturb graves because of the difference in depths, the HDD method, and they failed to take advantage of their opportunity to express their concerns at the state level, the Federal level, or through particularized proceedings aimed at engaging tribes.

# Dakota Access Pipeline: Issue of Water

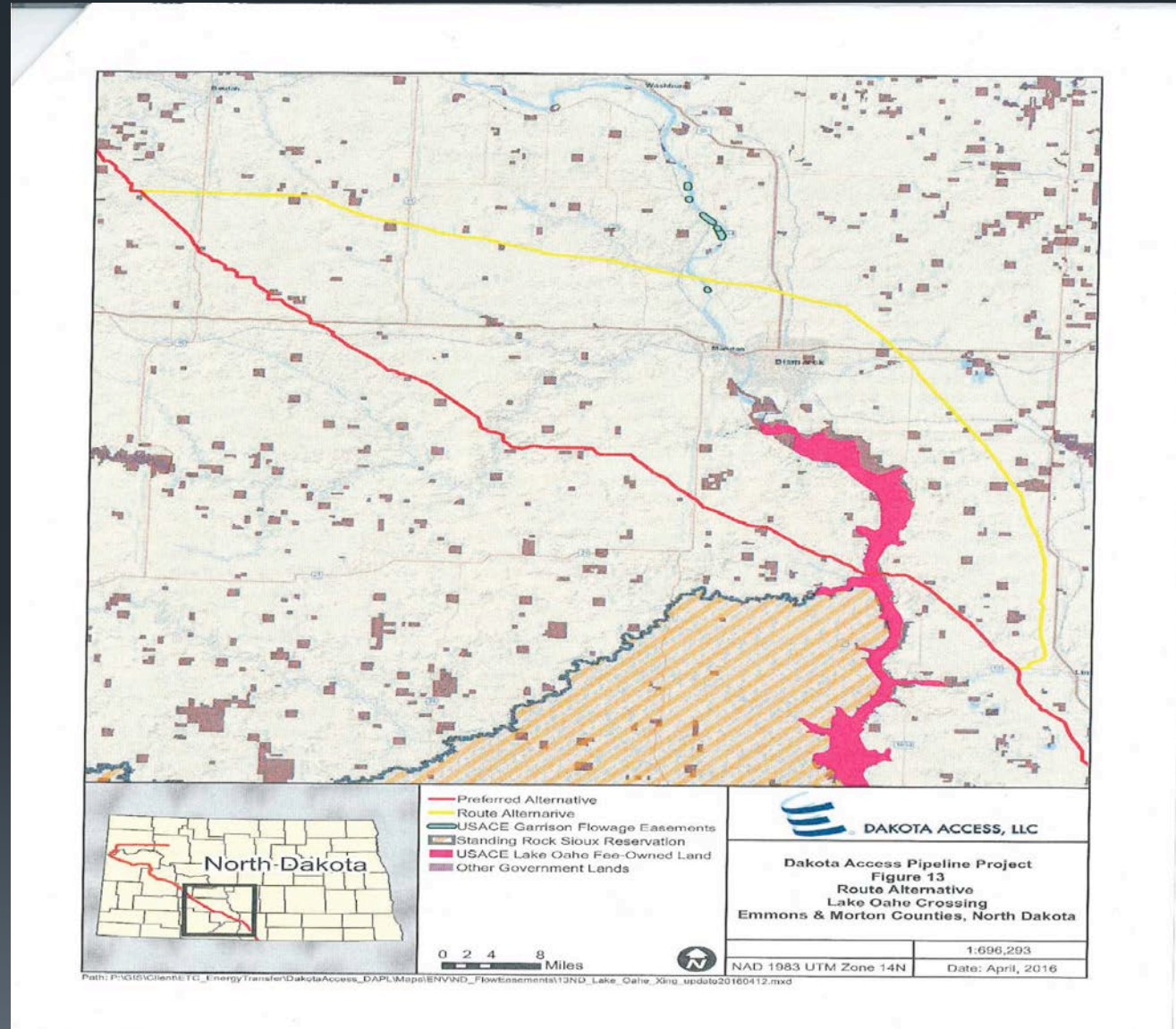
- The second significant issue of concern to the protestors is water protection.
- Many feel that a leak in the pipeline could cause a significant contamination, and imperil the lives of the tribe and others downstream from the crossing.



# Dakota Access Pipeline: Issue of Water

- The route of the pipeline means it must cross the Missouri River somewhere, simply to get from the oil fields to the tank farm.
- The pipeline also must cross the Mississippi River before it gets to Patoka, Illinois.
- Many pipelines exist which cross hundred of waterways, and as a consequence, there are liability laws in place which impose significant penalties if there is a spill.
  - Clean Water Act, Oil Pollution Act
- In the EA, the pipeline laid out response plans, training, and pipe testing plans.

# Dakota Access Pipeline: Issue of Water

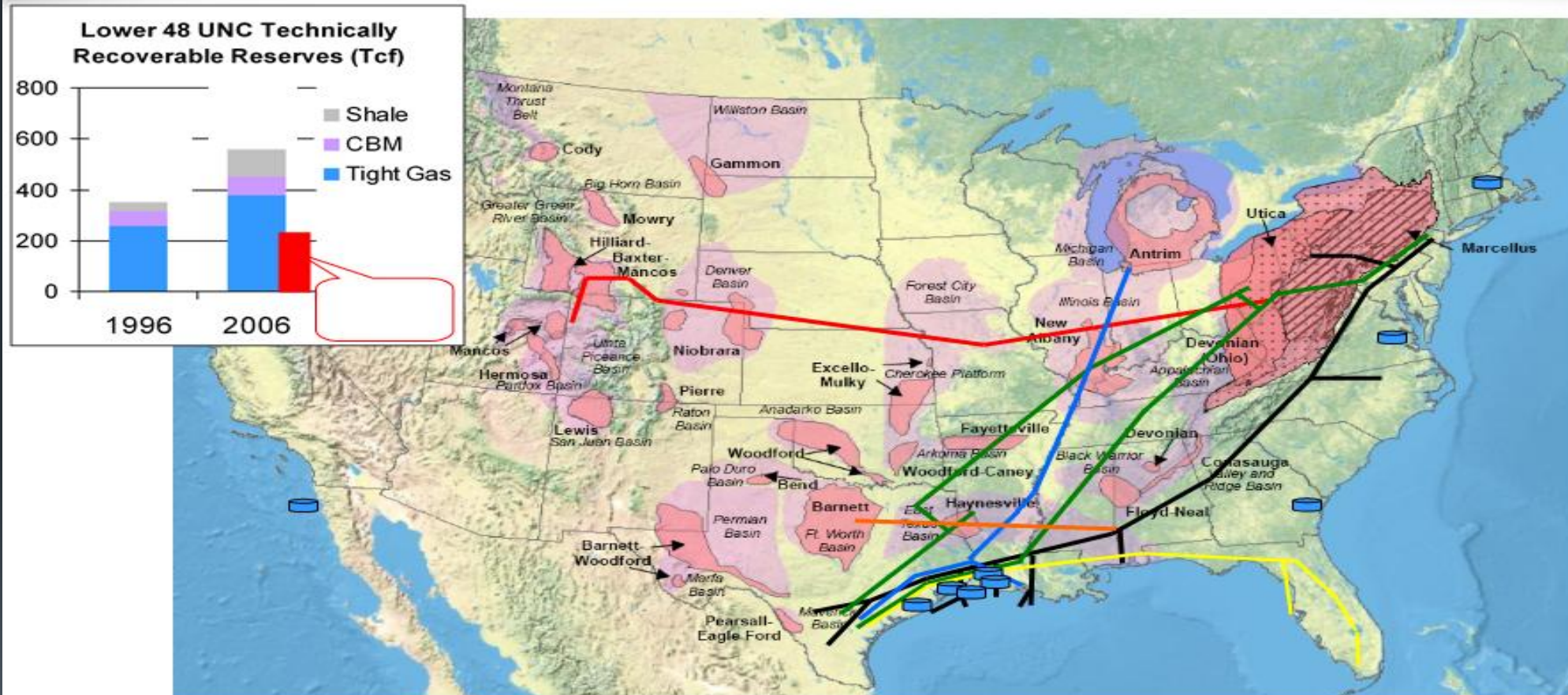


# Dakota Access Pipeline: Issue of Water





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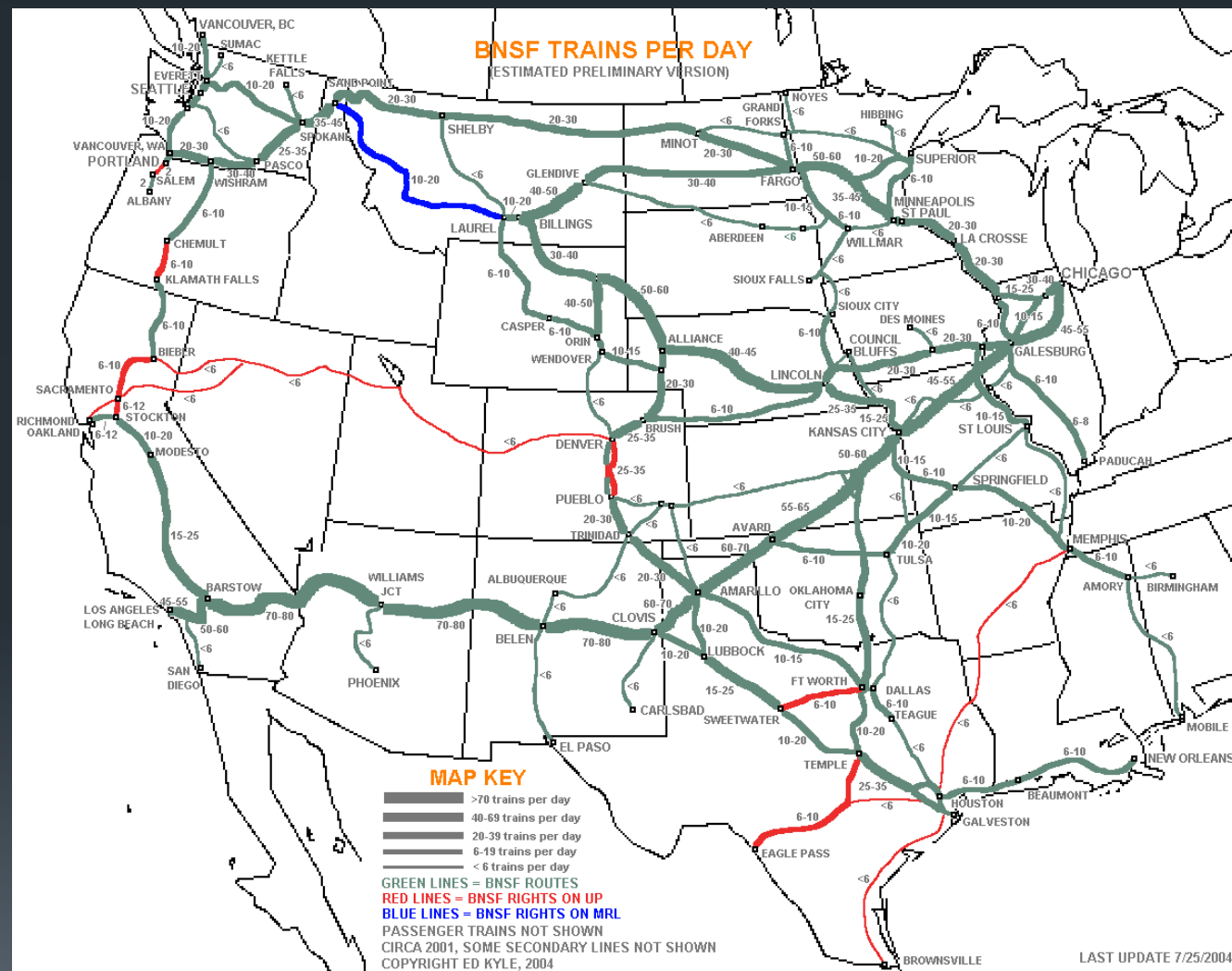
- Water protection from pipeline spills is not a new or novel issue, and has been considered within the EA.
- A failure in any way will cost the company a significant amount of money, in the same way the Deepwater Horizon spill impacted BP.
- Many other pipelines in the US cross major water bodies, and account for and manage their risks accordingly.
- Even if the pipeline had chosen its non-preferred crossing, a spill would have still had downstream affects on the Standing Rock Sioux.



# Dakota Access Pipeline: Alternatives

- What's the Alternative?
  - Use Trucks (2850 per day for the maximum volume)
  - Use Trains (695 rail cars per day for the max)
- Both of these options are more costly, inefficient, and not as safe as constructing a pipeline.
- Pipeline safety is managed by the Pipeline and Hazardous Materials Safety Administration at the Department of Transportation.
- Information on pipeline incidents can be found here:  
<http://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends>

# Dakota Access Pipeline: Alternatives - Trains



# Dakota Access Pipeline: Alternatives – Trains – Lac-Megantic Explosion



# Dakota Access Pipeline: In the Courts

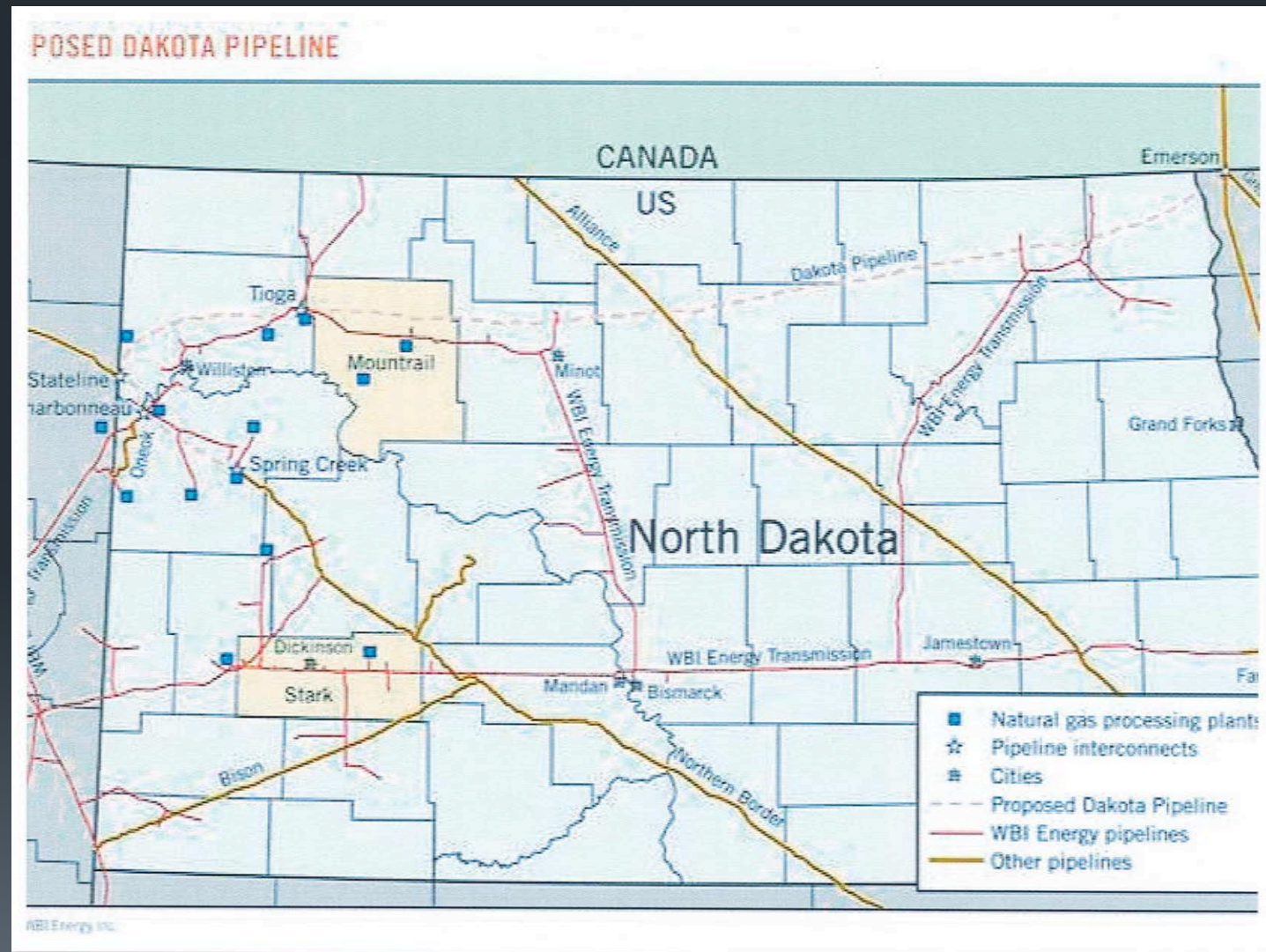
- The Standing Rock Sioux sought a preliminary injunction against the Army Corps of Engineers for violating the National Historic Preservation Act.
  - No claim under National Environmental Policy Act or potential environmental harms.
- Judge Boasberg in the D.C. District Court ruled on September 9<sup>th</sup>.
- NHPA requires a multi-step consultation process, even for lands outside a reservation.
- There must be a reasonable opportunity for tribes to identify concerns, participate in resolution of issues, with respect for tribal sovereignty and government to government relationships.

# Dakota Access Pipeline: In the Courts

- The Administrative Record in the case found:
  - Dakota Access used past cultural surveys to avoid sites which had been identified as historic properties.
  - More extensive surveys done as well.
  - Pipeline crossing at Lake Oahe is 100% adjacent to, and within 22-300 feet from the existing Northern Border Gas Pipeline.
  - SRS and USACE arranged a meeting for October 2, but when USACE timely arrived for the meeting, SRS said it was already over.
  - Tribe's Historic Preservation Officer did not attend a meeting in November, 2014.



# Dakota Access Pipeline: Adjacent Pipeline





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# Dakota Access Pipeline: In the Courts

- The Administrative Record of the consultations found:
  - Tribe did not respond to soil bore testing on the area in question. Had the opportunity to state whether it would affect cultural resources.
  - Again, no evidence Tribe was responsive in November, December, or January, 2014-2015.
  - Tribe continued to decline to participate throughout the process.
  - Scoping continued into 2016, with other tribes participating, but the Standing Rock Sioux declining to participate.

# Dakota Access Pipeline: In the Courts

- The Administrative Record in the case found:
  - Standing Rock Sioux wanted analysis of the entire pipeline, and not just their affected portion.
  - Corps did identify a cemetery, 1.2 miles from the nearest bore pit and 0.6 miles from the HDD preparation site.
- The Army Corps concluded “No Significant Impact”.
- Standing Rock Sioux sought a preliminary injunction focused on the NHPA claims.
- Court found there to be little likelihood of success on the merits of their arguments.
- Court also found the Corps exceeded its obligations under the NHPA.

# Dakota Access Pipeline: In the Courts

- Boasberg held:
  - No suit against Dakota Access for transgressions, only the Army Corps of Engineers for the permitting.
  - Relief sought cannot stop DAPL on private lands, which account for 97 percent of the project.
  - Tribe can't show that the relief it seeks, from the Corps, will result in the protection of cultural or heritage sites.
  - The harms the Tribe describes are destined to ensue whether or not the court grants injunction (p. 52).
  - Construction is already complete at 95% of the sites which required a Pre-Construction Notice and Verification.



# Dakota Access Pipeline: Moving Forward

- Court ruled against Standing Rock Sioux based on these reasons.
- Standing Rock Sioux appealed the decision.
  - The appeal was denied on January 18, 2017.
- Obama Administration sought a voluntary pause in construction.
- Army Corps of Engineers is attempting to remove protestors, as Dakota Access is going to court to compel relevant Federal agencies to allow them to finish construction. Corps ordered the protestors off their land by December 5<sup>th</sup>, 2016.

# Dakota Access Pipeline: Moving Forward

- Army Corps of Engineers denied Dakota Access the final permit on December 4, 2016.
- USACE sought to review alternative crossings, and called for an Environmental Impact Statement.
  - Judge Boasberg denied Dakota Access' request for a TRO to stop the EIS on January 18, 2017.
- An Environmental Impact Statement is more comprehensive in its environmental analysis than the current document, which is an Environmental Assessment.
- Any route South of the current route will cross the Standing Rock Sioux Reservation.
- Routes North of the current route will be difficult due to setback requirements from homes, and municipal water supplies.

# Dakota Access Pipeline: Moving Forward

- President Trump has 3 options upon inauguration:
  - Allow the USACE to conduct its EIS (could take months)
    - President Trump's executive order provided for this option, but sought to expedite it.
  - Ask Congress to create a special exception (occurred for Trans-Alaska Oil Pipeline)
  - Ask the USACE to re-examine and reverse its decision of December 4<sup>th</sup>.
    - On January 31, Acting Secretary of the Army Robert Speer took this option.
- Dakota Access has sought summary judgment claiming that the USACE granted the easement over the summer.

# Dakota Access Pipeline: Moving Forward

- On February 7<sup>th</sup>, the USACE issued Dakota Access the permit to cross under Lake Oahe.
- The decision has been met by renewed protests and promises of future lawsuits.
- On February 10<sup>th</sup>, the Cheyenne River Sioux, a tribe whose reservation abuts Lake Oahe, and is directly south of the Standing Rock Sioux Reservation, became the first group to sue over the easement.
  - They filed a revised complaint, citing the Religious Freedom Restoration Act, a preliminary injunction to stop construction, and a temporary restraining order to block construction prior to a court hearing.
    - The temporary restraining order was rejected, and hearings on the preliminary injunction are scheduled for February 28<sup>th</sup>.
  - Also filed for partial summary judgment on February 22<sup>nd</sup> claiming pipeline will interfere with treaties, and management of the water in Lake Oahe.

# Dakota Access Pipeline: Moving Forward

- The Oglala Sioux sued on February 11<sup>th</sup>.
- The Rosebud Sioux intervened in the Oglala suit on February 15<sup>th</sup>.
- The Yankton Sioux have also sued.
- Dakota Access has claimed that going under Lake Oahe will take 60 days, and they anticipate having the pipeline in service in Q2 2017.
  - However, in court hearings, they have put completion closer to 30 days.
  - Dakota Access has stated in court that the pipeline could be complete with oil ready to flow anywhere between the week of March 6<sup>th</sup> and April 1, 2017.



# Dakota Access Pipeline: Moving Forward

- Decision is reverberating across other proposed pipelines, such as the proposed Diamond Pipeline from Oklahoma to Tennessee.



- Additional protests are occurring near the Comanche Trail and Trans-Pecos pipelines in Texas, which are also on the verge of completion, and would transport U.S. natural gas to Mexico.