

## MEMORANDUM

TO: Chairwoman Alkire  
Tribal Council

FROM: Peter Capossela

DATE: October 29, 2024

RE: Filing of lawsuit against the Army Corps of Engineers challenging  
the operation of the Dakota Access Pipeline

Attorney Jeff Parsons and I filed the attached complaint against the Army Corps of Engineers in federal district court for the District of Columbia, on October 14. The complaint asks for the temporary and permanent shut down of DAPL. We allege that DAPL violates numerous laws, as follows:

- The 2016 easement was vacated and the Corps of Engineers has not issued a new easement as required by the Mineral Leasing Act. 30 U.S.C. §185(a).
- DAPL should be shut down (at least temporarily) because Energy Transfer has been debarred by the Environmental Protection Agency from federal contracts and assistance under the Government Acquisition and Streamlining Act of 1994, 31 U.S.C. §6101. The act governs the debarment and suspension of contractors and applicants due to fraud or criminal conduct. On October 28, 2022, EPA debarred Energy Transfer after conviction of 23 criminal convictions of the Pennsylvania Clean Streams Act. Energy Transfer lacks an easement today, and arguably is not eligible for a permanent easement until it gets off of the federal debarment list. The complaint asks the court to shut down DAPL, at least until that may occur.
- DAPL should be shut down (at least temporarily) because Energy Transfer has not prepared a Facility Response Plan for clean-up of an oil spill as required by the federal Clean Water Act. 33 U.S.C. §1321(j)(5). The complaint asks the court to shut down DAPL, at least until it demonstrates compliance with the emergency planning requirements of the Clean Water Act and the regulations.

- DAPL should be shut down permanently because Energy Transfer intentionally destroyed Native American burials during pipeline construction, and did so to obstruct compliance with the National Historic Preservation Act. An applicant that violates section 110(k) is ineligible for the permit or other federal assistance requested. 54 U.S.C. §306113. In the complaint, we request a trial on this issue. We also explained that the destruction of burials invokes the “bad man” clause of Article 1 of the 1868 Fort Laramie Treaty, and that DAPL is a treaty violation.

The lawsuit does not address the environmental impact statement process currently underway by the Corps. As the Tribe has said for nearly five years, the Corps should shut down the pipeline during the EIS process, and then do so permanently. That is the objective of the lawsuit.

Judge James Boasberg has issued an order to be the trial judge. On balance, that is a very good development. Judge Boasberg is already familiar with the controversy over DAPL. He ruled in the Tribe’s favor, but only did so after giving the Corps a second chance to comply with NEPA in 2017, after identifying at least three NEPA violations. He issued an order in 2020 that DAPL should be shut down, but after his order was modified on appeal, he issued a ruling that the Tribe could not demonstrate irreparable harm, one of the criteria for an injunction. One of the challenges that we have in the current lawsuit is circumventing the 2021 denial of the injunction for DAPL.

There are four defendants: the U.S. Army Corps of Engineers, Assistant Secretary Michael Connor, Omaha Commander Robert Newbauer and Northwestern Division Commander Geoff Van Epps. We sued the agency itself, and the officers with the authority to shut down DAPL. They are being served summonses now. The return proof of service has not yet been received.

Once it does, the Corps of Engineers will have 60 days to respond. That should start tolling by next week. Energy Transfer will inevitably intervene, and perhaps the State of North Dakota. Jeff and I are working on a motion showing the need for shut down on the issue of no easement. These are the next steps in the process. For its part, the Corps may try to avoid the merits of the lawsuit by issuing the easement or taking some other action to protect the operation of the pipeline. I hope this information is helpful. Thank you.