

The Earth, Property, Pipeline and Resistance: Waylaying Treaties Tink Tinker

Article VI: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land....

The rash of police killings of people of color over these past few years has signaled a growing impunity of police in America. Already seventeen years ago, Michael Hardt and Antonio Negri (*Empire*, 2000) associated the global increase in police impunity with the rise of a postmodern globalization empire, something that took a visceral step forward in the U.S. with the 2001 patriot act—passed right after the 9-11 bombings. In spite of ongoing Black Lives Matter protests, Trump’s executive orders on February 9, 2017 took police impunity to a new level. At the swearing in of Jeff Sessions as US Attorney General, in a moment strangely unnoticed by the press, Trump signed executive orders rhetorically couched in terms of public safety that clearly intend to increase the powers of police at all levels of society. While this auspiciously took place in the midst of Black History Month, it has immediate import for American Indian Peoples who actually suffer a higher per capita rate of police killings than do Blacks.¹

As I write this essay, a small-time rural sheriff’s heavily militarized battalion, outfitted in prime U.S. military battle gear, has geared up to squash Indian aspirations for life—one more time.² This time it is on behalf of big oil, a \$3.8 Billion dollar pipeline that the company is poised to tunnel under Lake Oahe on the Missouri River right adjacent to but still on the Treaty lands of the Standing Rock Indian Reservation. Indeed, at the height of the late fall 2016 defensive resistance on the part of Indian people and their allies, there were 42 different law enforcement agencies on the ground functioning under the command of this small-time sheriff with his seemingly unending supply of U.S. military warfare equipment. Surely he should be able to hope for some kind of promotional benefit under a Trump regime—having proved himself patriotically faithful to Big Oil fossil-fuel development.

Anyone who attempted to exercise their second amendment right at the job site, voicing their resistance with their bodies, were immediately cast by police rhetoric and by early press reports as violent, which rationalizes all sorts of violence on the part of a militarized police army. Moreover, there is little clear distinction between police and private pipeline security. Pipeline security personnel have used pepper spray on Defenders and at one point even siccing trained attack dogs on unarmed Defenders.³ Police attempts to control the Water

¹ Graphiq Staff Research, *The Guardian*, as of February 13, 2017:

https://www.graphiq.com/vlp/card?type=card&app_id=11026&h=auto&id=1&card_id=23257&context=NONE&show_sources=1&show_header=0&show_footer=0&subheader=0&publish_height=0&limit=1&utm_source=viz&utm_medium=viz.referral&utm_campaign=viz.ref&utm_viz_id=8RfXaj3o6sR&utm_cat=Bar%2FLine%2FArea&utm_click_loc=body&utm_pubreferrer=www.independent.co.uk%2Fnews%2Fworld%2Famericas%2Fdonald-trump-sign-executive-order-police-more-authority-murder-shooting-us-president-jeff-sessions-a7572001.html

² Morton County, North Dakota, listed a population of 27,471 for the 2010 U.S. census. The population includes a relatively high percentage of American Indians (3.9%).

³ “Dakota Access Pipeline Company Attacks Native American Protesters with Dogs and Pepper Spray,” *Democracy Now*, 4 Sept., 2016: https://www.democracynow.org/2016/9/4/dakota_access_pipeline_company_attacks_native.

Defenders extended to the use of dangerous “non-lethal” weapons that caused a high rate of serious injury among the Defenders. Rubber bullets actually pierce the skin and even killed one Defender’s horse. On a particularly cold, sub-freezing temperature night, the police chose to use water cannons to try to disperse the crowd, soaking Defenders. Old people, who are heavily represented among the Defenders, were particularly susceptible to life-threatening hypothermia, and while hypothermia was widely experienced, a number of elders in particular had to be rushed to medical facilities over an hour away. Indeed, a U.N. “special rapporteur” named the treatment of Defenders as inhumane.⁴

The Water Defenders, on the other hand, have persistently declared their resistance movement to be non-violent, and there was no evidence of weaponry on their part—except for a very suspicious arrest of a key Defender who was charged with having a weapon. No friends or community people know of this woman ever having had a weapon in her life. That arrest suspiciously smacks of chicanery and pure intimidation as well as a convenient *raison d’être* for police violence. To combat this non-violent resistance this small-county sheriff mustered top level military equipment, including armored personnel carriers and at least one missile launcher, enough to fully arm his huge battalion mobilized from 41 other police jurisdictions across the midwest.

The Water Defenders at Standing Rock had to wait until the last possible moment (Dec. 4, 2016) before the Obama administration stepped up and halted, temporarily at least, the construction of the Dakota Access Pipeline—just as it was poised to tunnel under the lake. Standing Rock, whose people get the bulk of their fresh water from Lake Oahe, had been formally resisting pipeline construction under the lake for more than two years, and the emerging camp of Water Defenders at the construction site had become very public beginning by April 2016 and very large by late fall. Under intense pressure from American Indian resistance and their allies, the U.S. Army Corp of Engineers issued an order denying DAPL the necessary permit to dig their tunnel. Yet, with the election of Donald Trump the task of Indian resistance to this behemoth oil industry project has become even more precarious. Trump himself had been a heavy investor in the parent corporation for the DAPL, and Gov. Rick Perry, his choice for energy secretary, held a seat on the company’s board of trustees.⁵ Indeed, only two months later under the leadership of a new commander in chief, the Army Corps of Engineers reversed its previous action and summarily granted DAPL the necessary easement without any hint of the full environmental study it had mandated in December.

In terms of modern survivance, American Indians have generally fared only minimally better under democratic administrations than republican ones, characterized most often perhaps as the difference between neglect and benign neglect. Indeed, ironically enough, one of the better administrations for Indian fortunes was under a republican president, Richard Nixon. Nixon did away with the social engineering projects of “relocation” and

⁴ “UN Condemns ‘Inhumane’ Abuse of Standing Rock Water Protectors: The U.N. special rapporteur says treatment of water protectors is “inhumane and degrading” and a violation of fundamental human rights,” *Telesur*, November 18, 2017. <http://www.telesurtv.net/english/news/UN-Condemns-Inhumane-Abuse-of-Standing-Rock-Water-Protectors-20161118-0003.html>. Accessed 2/13/2017. Julia Carrie-Wong, “Standing Rock protest: hundreds clash with police over Dakota Access Pipeline,” *The Guardian*, November 21, 2016. <https://www.theguardian.com/us-news/2016/nov/21/standing-rock-protest-hundreds-clash-with-police-over-dakota-access-pipeline>. Accessed 2/13/2017.

⁵ Tom DiChristopher, “Trump pick for Energy secretary sits on Dakota Access Pipeline company’s board,” *CNBC*, 13 Dec. 2016: <http://www.cnn.com/2016/12/13/trump-energy-dept-pick-rick-perry-sits-on-dakota-access-company-board.html>. Accessed 1/18/2017.

“termination”⁶—both Eisenhower erasure strategies aimed at trying to force assimilation of Indians into the dense, miscegenated urban landscape of America, where Indians need no longer bother the Christian conscience of American peoples or their political structures.

But let’s be clear, neglect is never really benign. By using the word neglect, I mean to charge it with relatively deleterious affect, related to the more or less casual ways in which the political system has learned to simply bypass Indians and their concerns, blithely ignoring Treaties promising the well-being of Native Nations. A self-conscious neglect characterizes the sorts of development projects that simply ignore the presence of Indians in the rush to capitalize dollars for the barons of industry and to wrest land and resources from the Natives. Relieving the Natives of their land has been and continues to be important in those continuing Euro-Christian development schemes, all under the sweeping Euro-Christian banner of progress. And the power brokers have always found a way to make it legal. Hence, it always comes under the dominating banner of the Rule of Law which all too regularly works in the favor of the already powerful. In the case of Standing Rock and the DAPL pipeline project, the trick politically and legally has been to circumvent Indian jurisdiction using sleight of hand, racialized arrogance, bullying, and outright deception.

While the resistance movement of the Water Protectors (and the public spectacle of police violence against the Defenders) finally won over Mr. Obama and his administration, Donald Trump has persistently announced his resolute and unwavering intent to support all fossil fuel development projects, including this one. The complexities of the resistance, already blurred by corporate rhetoric, become suddenly even more difficult to explicate to a larger public that suddenly seems dominated and emboldened by Trump voters.

But wait, they may object. The construction is on private and BLM federal lands; and not on Indian lands, isn’t it? Wasn’t it the U.S. Army Corp of Engineers who actually built the lake? Why are the Indians “protesting” (even though they call themselves Water Protectors)? This line of argumentation reflects the standard erasure of Indian Peoples on the American continent, an erasure that ignores virtually all Treaties signed with Indian Peoples, and in this case with the Standing Rock Lakota People.

First of all, tunneling under the lake poses a huge threat to the water supply not just for the Standing Rock Reservation community but for a number of other reservation communities downstream from Standing Rock, all of whom rely on the Missouri River and Lake Oahe for their communities’ drinking water. Secondly, the lake itself was built in the middle of the last century by displacing hundreds of reservation families and flooding the most fertile acreage on two reservations, Standing Rock and Cheyenne River Sioux Reservations. This best of the reservations’ land (some 206,000 fertile acres) was grabbed in accord with the legal principle of eminent domain. Moreover, the promised monetary compensation for loss of land was never paid. Somehow, we Indian Peoples have heard that story before. In any case, the lake bottom and the land around it still belongs to Lakota, Nakota and Dakota Peoples by Treaty promises.

Third, in the Defenders’ argument is their defense of culturally important sites in the path of pipeline construction. These sites include ancestral burial and other ceremonial sites. On one occasion in late summer, in good faith, the Standing Rock national government identified one particularly important site near the pipeline’s path. By early the next day, in an

⁶ Donald Lee Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960* (University of New Mexico Press, 1986).

act of utter meanness, DAPL had their bull dozers at exactly that site destroying ancestral treasures forever.⁷

Finally, and most importantly, for Indian Peoples the biggest issue involved is a legal concern for Treaties. To put it bluntly, Indian resistance to the Dakota Access Pipeline is fundamentally about the historical Treaties signed with the U.S., and the land where the Dakota Access Pipeline is being tunneled is still today contested land under two Treaties that the “Great Sioux Nation”, including the Lakota People at Standing Rock, have with the United States—signed at Ft. Laramie: one in 1851 and the other in 1868.. Yes, of course, it is about Standing Rock’s fresh water supply under which the pipeline is slated to tunnel. At one level, that is the up-front social justice issue that everyone ought to pay attention to. More important, however, if legally and politically more complex, are the underlying foundational legal issue pertaining to these two Treaties. Those Treaties made particular guarantees to Native Peoples that established very specific boundaries to their lands. Under the terms of those Treaties, the construction site is on “Unceded Indian Territory.” This means that the construction should only be pursued with the full consent of the Lakota, Nakota, and Dakota Peoples. It bears reiterating that Treaties, according to Article VI of the U.S. constitution, are the highest Law of the land.

The great fear today is that a Donald Trump administration will be even less disposed than a democratic Obama administration either to recognize those federal Treaties or to hear the voice of Indigenous Peoples naming the injustice. And we should note that it was no easy task, and never a completed one, to win the day with the more liberal democrats. Indeed, the expectation was that a potential Clinton administration would have sided ultimately with the oil industry and pipeline development. Even in the case of Obama, it was not until the fading moments of his presidency that this announcement came—after several months of vigorous resistance at Standing Rock on the part of Indian “Water Protectors” and their allies and the public displays of violence against the Defenders by police and pipeline security personnel. With a new administration taking power, Donald Trump is clearly making the DAPL a priority.⁸ One early Trump-aide memo reported that the president elect “intends to cut the bureaucratic red tape put in place by the Obama administration that has prevented our country from diversifying our energy portfolio” (December 2). The new Army Corps of Engineers action in North Dakota makes that new power structure very clear.

The danger lurking for Indian Peoples in this Trump administration, however, is not the usual sort of neglect. Donald Trump has already publicly voiced his deep animosity for American Indians. Indeed, it has been a long time since there was a president with greater animosity towards Indian Peoples—going back to Abraham Lincoln (perpetrator of the largest mass execution in American history—of Dakota Indians) and even beyond to Andrew Jackson and his murderous policy of Indian Removal. Trump’s rancor towards Indians surfaced a quarter

⁷ Robinson Meyer, “The Legal Case for Blocking the Dakota Access Pipeline: Did the U.S. government help destroy a major Sioux archeological site?” *The Atlantic*, 9 September, 2016: <http://www.theatlantic.com/technology/archive/2016/09/dapl-dakota-sitting-rock-sioux/499178/>. Accessed 1/18/2017.

⁸ Devin Henry, “Obama Puts Dakota Pipeline on Trump’s Desk,” *The Hill*, 12/05/16. <https://www.law360.com/articles/852176/trump-to-nix-climate-regs-boost-fossil-fuel-development>. Accessed 1/17/2017. Keith Goldberg, “Trump to Nix Climate Regs, Boost Fossil Fuel Development,” *Law360*, Nov 8, 2016. <https://www.law360.com/articles/852176/trump-to-nix-climate-regs-boost-fossil-fuel-development>. Accessed 1/17/2017. Ashley Parker and Coral Davenport, “Donald Trump’s Energy Plan: More Fossil Fuels and Fewer Rules,” *NYT*, May 26, 2016. https://www.nytimes.com/2016/05/27/us/politics/donald-trump-global-warming-energy-policy.html?_r=0. Accessed 1/17/2017.

century ago over Indian casinos. Not understanding Treaty law and the Treaty based status of Indian Peoples in the U.S., Trump complained bitterly that Indians got a better deal than he and his casino operations. Historically, since Indian Reservations are “federal” land, they are not under the legal jurisdiction of the states that surround them. Hence, in the 1980s economically poor Reservations near cities found a loophole in those states’ laws against gambling and began opening tribally owned, Reservation based casinos. Initially, the states had no jurisdiction to prevent their operations, nor did states have any recourse for collecting taxes from Indian casinos. In 1993 an infuriated Donald Trump brought a law suit against the U.S. and Indian Nations that ran nationally owned casinos charging them with unfair competition and discrimination against himself.⁹ Then that same year Trump testified before a congressional committee that these casino Indians were not Indians because they failed to pass his own “look-like” test: “They don’t look like Indians to me.” In other words, Trump replaced the international Treaties to which Indian Nations and the U.S. are co-signatories with some sort of racialized skin color test. Trump’s total ignorance of the complex corpus of “Federal Indian Law” deterred him not the least from making an all-out attack. Trump did not stop with the mere legalities of a lawsuit, but went on to engage in a “fake news” advertising campaign against Indian People in upper state New York. He is reported to have “secretly paid for more than \$1 million in ads” attempting to portray members of a tribe in Upstate New York as drug dealers and career criminals. Mr. Trump has proven again and again that he will stop at nothing to get what he wants, including bending rules and reciting made-up facts.

The problem facing American Indian folk most acutely now is our continued but heightened struggle to get the social whole and especially the federal government to recognize and respect Indian sovereignty and to interact with Indian Peoples with full attention to the Treaties they signed with us. Either the Rule of Law must mean something when it comes to protecting the Treaty rights of Indian Peoples in north America, or we have to conclude finally that the so-highly-vaunted Rule of Law is merely another euro-christian fiction for empowering the wealthy: they make the rules, and that’s the Law. Yet we seem to be entering a new stage in american democracy where the raced character of american Law is more openly exposed as punitive for all People of Color, but especially for Native Peoples who continue to have some legal and moral claim to american lands.

The final crushing blow to Indian Peoples is the brewing sentiment to finish off the colonial project of privatizing Indian lands. The Trump administration has expressed its interest in privatizing Indian reservations lands in the interest of making access to natural resources on Indian lands much more efficiently accessible to extraction industries.¹⁰ This would be a two-fold win for Whiteness and a two-fold loss for Native Peoples. Not only does it result in an immediate financial windfall for corporate America, but it finally succeeds in converting Earth into the euro-christian category of “property.” As an added bonus, then Donald Trump would

⁹ Shawn Boburg, “Donald Trump’s long history of clashes with Native Americans,” *The Washington Post*, July 25, 2016: https://www.washingtonpost.com/national/donald-trumps-long-history-of-clashes-with-native-americans/2016/07/25/80ea91ca-3d77-11e6-80bc-d06711fd2125_story.html?utm_term=.8f01daaa7521, Accessed 2-13-2017. Wayne King, “Trump, in a Federal Lawsuit, Seeks to Block Indian Casinos,” *NYT*, May 4, 1993: <http://www.nytimes.com/1993/05/04/nyregion/trump-in-a-federal-lawsuit-seeks-to-block-indian-casinos.html>. Accessed 2-13-2017.

¹⁰ “Trump advisors aim to privatize oil-rich American Indian reservations,” *CNBC*, December 5, 2016. <http://www.cnn.com/2016/12/05/trump-advisors-aim-to-privatize-oil-rich-indian-reservations.html>. Accessed 1-13-2017.

finally have full control of Indian gaming operations and the casinos of those few more economically successful Native Nations.

As Yascha Mounk, a german jewish scholar, captures our moment well: “When a candidate who promises to inflict extraordinary cruelty on the despised and the abject wins high office, he will (surprise, surprise) use his new-won powers to inflict cruelty on the abject and the despised.”¹¹

¹¹ Yascha Mounk, “Democracy Is Holding Up, for Now, Despite Trump’s Blatant Assaults on American Ideals, Our Institutions and People Are Refusing to Give in without a Fight,” *Slate*, Feb. 2, 2017:
http://www.slate.com/articles/news_and_politics/the_good_fight/2017/02/democracy_is_holding_up_well_under_trump_s_assaults_for_now.html