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The Dakota Access Pipeline: A Panel Discussion

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water quality or limit peoples' access to water. The ABA recognition of contemporary principles of ethical considerations has oscillated between being slow to change and progressing rapidly. In 2012, the ABA adopted UN guiding principles on human rights. Practitioners like Heather White Man Runs Him are at the forefront of questioning exactly how these ethical principles will be implemented.

J. Garrett Kizer

TRIBAL WATER LAW: CUTTING EDGE INSIGHTS FROM PRACTITIONERS IN INDIAN COUNTRY

Las Vegas, Nevada

October 12-13, 2017

Conference Sponsor: CLE International

THE DAKOTA ACCESS PIPELINE: A PANEL DISCUSSION

Presented by: *Bret Birdsong, Esq., Professor of Law at the University of Las Vegas, Nevada (UNLV) William S. Boyd School of Law; Constantinos (Dean) DePountis, Esq., In-House Counsel for the Standing Rock Sioux Tribe.*

A multiplicity of scholars, academics, and attorneys convened in Las Vegas for the annual Tribal Water Law Conference to discuss the major failures and successes in the field. Bret Birdsong, Professor of Law at the University of Las Vegas, Nevada (UNLV) William S. Boyd School of Law, and Dean DePountis, in-house counsel for the Standing Rock Sioux Tribe, led a meaningful panel discussion on the Dakota Access Pipeline. Through fascinating lectures, they explored the weaknesses of the legal system in dealing with this situation and assessing the relevant environmental and cultural implications. Although the pipeline stands as a tragic defeat in the eyes of tribes all across the country, the struggle can be viewed as a learning experience in many ways.

Perhaps one of most contentious and recognized disputes in Native American history, the Dakota Access Pipeline, also known as the "black snake," has exposed the complex nature of tribal water law beyond the periphery of the public eye. While disputes over Native American land and water rights often go unnoticed, the pipeline has certainly brought attention to issues that are often hidden in plain sight: constant undermining of tribal sovereignty, lack of consultation, and a disregard to environmental and human safety on the part of both the U.S. government and private corporations.

The Dakota Access Pipeline is a \$3.8 billion project developed by Energy Transfer Partners and Dakota Access, LLC. The pipeline is approximately 1,100 miles in length, transporting crude oil from northwestern North Dakota through South Dakota, Iowa, and ending in Patoka, Illinois. The most contentious segment of the pipeline, which has become the focus of media attention, is in fact a very small portion of the entire project. This segment burrows under the Missouri River at Lake Oahe a half-mile north of the Standing Rock Sioux Reservation in North Dakota. Lake Oahe is federally-owned land managed by the United States Army Corps of Engineers (the "Corps"), but it has significant spiritual value to the Tribe's culture and history.

Dean DePountis explained that the issue with the pipeline's proximity to the reservation is twofold. First, the pipeline trespasses through culturally and

historically significant lands. Second, a leakage or rupture in the pipe would have disastrous effects on the Tribe's water supply. Under the Garrison Diversion Unit Reformulation Act of 1986, Congress authorized the construction of a rural water system to serve the Tribe. This includes several water intakes on Lake Oahe, which the Tribe uses for drinking water and irrigation purposes. In addition, the Act protects tribal treaty rights to hunt and fish. The effects of a pipeline spill into a waterway with treaty-protected hunting, fishing, and water rights would be disastrous.

The Corps had initially planned to conduct an Environmental Impact Statement ("EIS") on the pipeline that would allow for "robust tribal and public engagement." The EIS would have included a catastrophic spill analysis prepared by an independent expert with the task of evaluating the risk of a rupture in the underground portion of the pipeline. However, in early 2017, the Corps issued a memo stating that it intended to withdraw its notice of intent to prepare an EIS and thereby terminated the public comment period. Instead of making legitimate, comprehensive assessments of the environmental impacts by the pipeline, the White House ordered immediate completion of the remainder of the pipeline, with oil flowing through it as soon as possible.

It is important to note that the pipeline does not technically cross tribal lands. If the pipeline did cross tribal lands, tribal consent would be required pursuant to 25 U.S.C. § 324. In that case, tribes could negotiate for financial or alternative compensation. However, the pipeline slithers through land less than a mile outside the reservation. Even though the pipeline falls so close, the Corps and the United States government have used this distance to sidestep the most important issue: cultural and historical ties to the land outside the borders of the reservation. In response, the Standing Rock Sioux Tribe has relied on the National Historic Preservation Act ("NHPA"), the National Environmental Policy Act ("NEPA"), and the Religious Freedom Restoration Act ("RFRA") as legal tools to object to the construction of the pipeline. This is why the Dakota Access Pipeline is such a complex debate—"the laws don't have teeth," DePountis said.

Over the last couple of years, the Tribe has experienced a series of disappointing decisions in the courtroom. In August 2016, the Tribe filed for a motion for a preliminary injunction against the Corps in the U.S. District Court for the District of Columbia based on NHPA § 106 claims. The Tribe noted that the pipe crosses ancestrally sacred lands, many of which have not been fully evaluated by Tribal archaeologists to determine the lands' cultural and ancestral significance; they argued that there would be irreversible harm if the court did not grant the injunction. In September 2016, the court denied the motion and ruled that the Tribe failed to demonstrate that an injunction was warranted. In March 2017, the court again denied a preliminary injunction on the RFRA claims, holding that, though members of the Tribe may feel unable to use Lake Oahe's water in religious ceremonies, the pipeline poses no specific ban on their religious practices.

DePountis made it clear that the court is evading the issue that the pipeline's presence still violates cultural and spiritual tribal identity and undermines tribal sovereignty. Since the pipeline does not technically cross through tribal lands, the court concluded that the Tribe lacks a persuading religious or cultural legal argument. DePountis stated that it is extremely difficult to be successful on

religious freedom claims.

Massive infrastructure projects such as the Dakota Access Pipeline have become such a stimulating case study for historians, scientists, economists, and a variety of other academics because of the complexity and nature of the affair. The legal debate over Dakota Access is multifaceted because it is, at its core, a water rights issue, but one that is encircled by a multitude of religious and cultural concerns. However, the most powerful laws the Tribe had on their side were the NHPA and RFRA, otherwise known by DePountis as the “look before you leap” laws.

At the end of the panel discussion I asked, “Even if the pipeline had planned to cross tribal land, would it have been possible to reroute the pipeline, or would it have been too late?” Professor Birdsong answered by saying, “If our country can extract buildings from the dust in the middle of a desert to develop a city [Las Vegas], then we can certainly re-route a pipeline at the expense of human justice.” This answer emphasized the fact that nothing is set in stone, and the government undoubtedly had the power to re-route the pipeline so that it could have avoided critical sites of historical significance. While the story of the “black snake” highlights significant failures in the United States legal system, the fight is not over. In many ways, the Dakota Access Pipeline has influenced attorneys and other legal academics to find new ways to litigate an issue like this so that Native Americans and other silenced minorities in the United States receive a fair opportunity to be represented in the legal system.

Haley McCullough

**WESTERN STATES WATER CONFERENCE AND NATIVE AMERICAN RIGHTS
FUND 15TH BIENNIAL SYMPOSIUM ON THE SETTLEMENT OF INDIAN
RESERVED WATER RIGHTS CLAIMS**

Great Falls, Montana

August 8-10, 2017

Every other year since 1991, the Western States Water Conference (“WSWC”) and the Native American Rights Fund (“NARF”) hold a symposium to discuss the complexities of settling tribal water claims and to celebrate successes from the recent years. During the three-day symposium, various panels discussed the specific details of recent settlements and the logistics of negotiating and passing Indian reserved settlements in the contemporary political climate.

The location of the WSWC-NARF Symposium changes each year to coincide with a recent settlement.¹ This year, the Symposium highlighted the passage of the Blackfeet Water Rights Settlement (“Blackfeet Settlement”).² Congress passed the Blackfeet Settlement as part of the Water Infrastructure

1. This year’s symposium was held in Great Falls, Montana, about two hours southeast of the Blackfeet tribal headquarters of Browning, Montana. The early August symposium coincided with peak tourist season in Glacier National Park, which is adjacent to the Blackfeet Reservation in northwest Montana. The busy tourist season precluded available hotel and conference space on the reservation.

2. Water Infrastructure Improvement for the Nation Act, Pub. L. No. 114-322, §§ 3701-24, 130 Stat. 1628, 1814-45 (2016) (“WIIN Act”).