

January 2018

Beyond Dakota Access Pipeline: Energy Development and the Imperative for Meaningful Tribal Consultation

Troy A. Eid

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Recommended Citation

Troy A. Eid, *Beyond Dakota Access Pipeline: Energy Development and the Imperative for Meaningful Tribal Consultation*, 95 *Denv. L. Rev.* 593 (2018).

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BEYOND DAKOTA ACCESS PIPELINE: ENERGY DEVELOPMENT AND THE IMPERATIVE FOR MEANINGFUL TRIBAL CONSULTATION

TROY A. EID[†]

ABSTRACT

Federal agencies have a legal obligation to consult with Indian tribes on a government-to-government basis whenever projects require federal approval. The controversy over the Dakota Access Pipeline (DAPL) is reshaping how tribes approach energy development. Protests and lawsuits against DAPL's owners delayed the pipeline for months and cost its investors at least \$750 million. The industry should learn from DAPL and rethink its approach to future energy projects involving tribes.

This Article explains why the industry should embrace enhanced tribal consultation as a risk-management strategy. The adequacy of federal and state consultations with tribes on energy projects—not just whether the process occurs, but whether tribes' views are meaningfully considered in decision making—increasingly matters not only to tribes, but to policy makers and the courts. The private sector stands to gain by working proactively with tribes earlier in the project-planning process, including in pipeline routing decisions to address cultural resources concerns, and by encouraging tribes to participate in surveying, construction, and reclamation activities. Companies should also assist with project-related tribal employment and make appropriate financial and in-kind assistance available to tribes to strengthen tribal officials' ability to participate meaningfully in consultations with federal and state decision makers.

TABLE OF CONTENTS

I. AN OIL PIPELINE BECOMES A HOUSEHOLD WORD	594
<i>A. The Tribes' Litigation Strategy</i>	595
1. Fast-Track Project Permitting	595
2. The Battle of Lake Oahe	596

[†] Troy A. Eid is a principal shareholder with the Denver office of Greenberg Traurig, LLP and co-chairs the firm's American Indian Law Practice Group. He advises pipeline projects and mediates disputes between energy companies and tribes. Mr. Eid has twice received federal appointments: As the United States Attorney for the District of Colorado, appointed by President George W. Bush, and as Chair of the Indian Law and Order Commission, the independent advisory board to the President and Congress on public safety reforms for America's 573 federally recognized Native American and Alaska Native nations, under President Barack Obama. A.B. Stanford University, J.D. The University of Chicago Law School. A preliminary version of this Article received the "Best Paper Award" for 2017 from the American Bar Association Section on Environment, Energy, and Resources.

<i>B. Executive Branch Intervention</i>	597
1. President Obama Weighs In.....	597
2. President Trump Changes Course.....	598
II. HOW DAPL IS FUELING TRIBAL CONCERNS OVER ENERGY PROJECTS.....	599
III. WHY DEFICIENT TRIBAL CONSULTATION PRESENTS UNACCEPTABLE RISKS TO ENERGY PROJECTS.....	601
<i>A. Pervasive Tribal Consultation in the Executive Branch</i>	602
<i>B. Enforcing 'Meaningful' Tribal Consultation Through the Courts</i>	602
IV. HOW THE ENERGY INDUSTRY GAINS BY SUPPORTING TRIBAL CONSULTATION.....	604
<i>A. Best Practices</i>	605
<i>B. The Ruby Pipeline Project</i>	606
CONCLUSION: PREPARING FOR THE NEXT DAPL.....	607

I. AN OIL PIPELINE BECOMES A HOUSEHOLD WORD

The United States depends on some 2.4 million miles of pipeline systems to transport fossil fuels across the country.¹ None has garnered more recent attention than the Dakota Access Pipeline (DAPL).² This \$3.8 billion, 1,172-mile crude oil pipeline, owned and operated by Houston-based Energy Transfer Partners, L.P., delivers crude oil produced in the Bakken region of North Dakota through South Dakota, Iowa, and Illinois to major refining, distribution, and export centers.³ Commenced in 2014, DAPL finally entered service last June after months of construction delays.⁴ Opposition to DAPL, including from more than 100 federally recognized Native American tribes, peaked during the 2016 presidential campaign year.⁵ At one point protest camps on and near the Standing Rock Sioux Reservation in North Dakota swelled to an estimated 10,000 people.⁶ A total of 761 protestors were arrested.⁷

1. *Where Are Liquids Pipelines Located?*, PIPELINE 101, <http://www.pipeline101.org/Where-Are-Pipelines-Located> (last visited Feb. 24, 2018).

2. See Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <http://time.com/4548566/dakota-access-pipeline-standing-rock-sioux>.

3. Valerie Volcovici, *Only the Hardest Remain at Dakota Protest Camp*, REUTERS, Dec. 18, 2016, <https://www.reuters.com/article/us-north-dakota-pipeline-camp/only-the-hardest-remain-at-dakota-protest-camp-idUSKBN1470E4>.

4. Associated Press, *A Timeline of the Dakota Access Oil Pipeline*, AP NEWS (Oct. 12, 2017), <https://www.apnews.com/1a00f95c83594dac931796a332540750>.

5. Rebecca Solnit, *Standing Rock Protests: This Is Only the Beginning*, GUARDIAN (Sept. 12, 2016, 8:45 AM), <https://www.theguardian.com/us-news/2016/sep/12/north-dakota-standing-rock-protests-civil-rights>.

6. Volcovici, *supra* note 3; Reuters, *Only the Hardest Remain at Dakota Protest Camp*, FORTUNE (Dec. 18, 2016), <http://fortune.com/2016/12/18/dakota-access-protest-camp>.

7. Associated Press, *Authorities Drop 33 Cases Against Dakota Access Protestors*, ABC NEWS (Apr. 22, 2017, 4:56 PM), <http://abcnews.go.com/amp/US/wireStory/authorities-drop-33-cases-dakota-access-protesters-46959161>.

Opposing DAPL through litigation in the federal courts, as the Standing Rock Sioux Tribe did beginning in July 2016, later joined by the Cheyenne River Sioux Tribe (collectively, the Tribes), ultimately did not stop the project or alter the pipeline's final route.⁸ Yet a combination of sustained litigation supported by national legal advocacy organizations, relentless politicking, and on-the-ground protest activity delayed the project's completion by several months.⁹ By December 2016, project delays were costing DAPL's private investors more than \$83.3 million per month and had already totaled \$450 million.¹⁰

A. The Tribes' Litigation Strategy

Unlike interstate natural gas pipeline projects, which are nationally certificated by the Federal Energy Regulatory Commission (FERC), no federal agency has jurisdiction over crude oil pipelines such as DAPL.¹¹ Instead, individual state regulatory commissions authorize each state's segment of a proposed interstate oil pipeline.¹² The Tribes consequently targeted the U.S. Army Corps of Engineers in their litigation because the Corps has federal statutory authority whenever pipelines traverse jurisdictional waters of the United States.¹³ Judge James E. Boasberg, of the United States District Court for the District of Columbia, considered each of the Tribes' lawsuits against the Corps.¹⁴

1. Fast-Track Project Permitting

The Tribes' first line of legal attack concerned Nationwide Permit (NWP) 12, a streamlined Corps-permitting program for lineal infrastructure projects such as pipelines.¹⁵ NWP 12 allowed DAPL to obtain a single permit for all water crossings in the four states except Lake Oahe, a reservoir on the Missouri River.¹⁶ The Corps made the current version of NWP 12 available in 2012 to fast-track pipeline and other energy projects,

8. See Associated Press, *supra* note 4.

9. For a detailed account of DAPL-related litigation and tribal opposition to the project, see generally Timothy Q. Purdon et al., *DAPL: Storm Clouds on the Horizon in Indian Country*, 64 FED. LAW. 63, 63–66 (2017).

10. David Pitt, *Pipeline Delays Cost Builder Millions, Risking Contract Loss*, BISMARCK TRIB. (Dec. 6, 2016), http://bismarcktribune.com/news/state-and-regional/pipeline-delays-cost-builder-millions-risking-contract-loss/article_3a16abf7-b028-5152-b4ab-0c6fd00dbc8.html.

11. BRANDON J. MURRILL, CONG. RESEARCH SERV., R44432, PIPELINE TRANSPORTATION OF NATURAL GAS AND CRUDE OIL: FEDERAL AND STATE REGULATORY AUTHORITY 2, 7 (2016).

12. *Id.* at 7.

13. Steven Mufson, *How the Army Corps of Engineers Wound Up in the Middle of the Fight over the Dakota Access Pipeline*, WASH. POST (Feb. 8, 2017), <https://www.washingtonpost.com/business/economy/how-the-army-corps-of-engineers-wound-up-in-the-middle-of-the-fight-over-the-dakota-access-pipeline/2017/02/08/33eaedde-ed8a-11e6-9662-6eedf1627882>.

14. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock III)*, 255 F. Supp. 3d 101, 111 (D.D.C. 2017); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II)*, 239 F. Supp. 3d 77, 80 (D.D.C. 2017); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock I)*, 205 F. Supp. 3d 4, 7 (D.D.C. 2016).

15. *Standing Rock I*, 205 F. Supp. 3d at 11; see 77 Fed. Reg. 10,184 (Feb. 21, 2012).

16. *Dakota Access Pipeline FAQ's*, U.S. ARMY CORPS ENGINEERS, <http://www.usace.army.mil/Dakota-Access-Pipeline/FAQs> (last visited Feb. 25, 2018).

prompting numerous legal challenges from environmental groups questioning whether projects meet the Corps's terms and conditions for such an expansive permit ever since.¹⁷ Few of these challenges have so far succeeded in the federal courts and DAPL was no exception.¹⁸ After Judge Boasberg upheld the Corps's determinations regarding NWP 12, the Tribes had little practical choice but to concentrate their claims on the Lake Oahe pipeline crossing.¹⁹

2. The Battle of Lake Oahe

That the courtroom battle over DAPL centered on Lake Oahe had other ramifications for the Tribes and their political relationship with the United States. It also helps explain the remarkable outpouring of public support that the Standing Rock Sioux Tribe received from other tribes.²⁰ Damming the Missouri River nearly six decades ago to fill the Lake Oahe reservoir, which now serves as the eastern boundary of the Tribes' reservations, flooded more than 200,000 acres of Tribal lands.²¹ The Tribes consider this an epic tragedy: the inundated area of their reservations had been reserved as Indian Country in 1851 by the Treaty of Fort Laramie.²²

Congress reneged on this part of the Treaty by enacting the Pick-Sloan Flood Control Act in 1944 and imposing the Missouri Basin Program on the Tribes.²³ When the Corps initiated eminent domain proceedings in 1958 to take Standing Rock Sioux Tribal lands for the Lake Oahe site, the Tribe convinced a judge to block the Corps's condemnation, only to have Congress pass legislation overturning the court's decision.²⁴ Today Lake Oahe is the fourth-largest reservoir in the country by volume.²⁵ It destroyed communities, farms, and wooded bottomlands for which the Tribes have been seeking compensation from Congress ever since without much success.²⁶ From the perspective of Tribal members, DAPL was not

17. See, e.g., *Mobile Baykeeper, Inc. v. U.S. Army Corps of Eng'rs*, No. 14-0032-WS-M, 2014 WL 5307850, at *1 (S.D. Ala. Oct. 16, 2014) (rejecting environmental group's challenge to the Corps's approval under NWP 12 of proposed twenty-four-inch crude oil pipeline).

18. See *Standing Rock I*, 205 F. Supp. 3d at 7.

19. See William Yardley, *There's a Reason Few Even Knew the Dakota Access Pipeline Was Being Built*, L.A. TIMES (Nov. 9, 2016, 12:35 PM), <http://www.latimes.com/nation/la-na-dakota-access-pipeline-permit-20161104-story.html>.

20. See M. ROY CARTOGRAPHY, *THE DAKOTA ACCESS PIPELINE IN CONTEXT* (2016).

21. *Id.*

22. *Id.*

23. Flood Control Act of 1944, ch. 665, 58 Stat. 887.

24. *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 202 (D.S.D. 1958), *vacated as moot sub nom. United States v. Sioux Indians of Standing Rock Reservation*, 259 F.2d 271 (8th Cir. 1958); see Act of Sept. 2, 1958, Pub. L. No. 85-915, 72 Stat. 1762.

25. *Largest U.S. Reservoirs*, STAN. U., <https://npdp.stanford.edu/node/63> (last visited Feb. 28, 2018).

26. For an account of the attempts by the Standing Rock Sioux Tribe and other tribes to stop the Missouri Basin Program's taking of tribal lands, and to obtain compensation after the program's completion, see Peter Capossela, *Impacts of the Army Corps of Engineers' Pick-Sloan Program on the Indian Tribes of the Missouri River Basin*, 30 J. ENVTL. L. & LITIG. 143 (2015).

just a pipeline. It was a reminder of what Native people lost when Congress dammed the Missouri—of broken promises from the federal government to which other tribes could easily relate. The Chairman of the Standing Rock Sioux Tribe, Dave Archambault II, drew this historical connection:

When the Army Corps of Engineers dammed the Missouri River in 1958, it took our riverfront forests, fruit orchards and most fertile farmland to create Lake Oahe. Now the Corps is taking our clean water and sacred places by approving this river crossing. Whether it's gold from the Black Hills or hydropower from the Missouri or oil pipelines that threaten our ancestral inheritance, the tribes have always paid the price for America's prosperity.²⁷

From a legal standpoint, the Lake Oahe crossing required that DAPL secure (1) a Section 408 permit from the Corps under the Rivers and Harbors Act²⁸ and (2) an easement across Corps-administered lands along Lake Oahe pursuant to the Mineral Leasing Act.²⁹ The two Tribes, joined by a coalition of advocacy groups, broadly targeted DAPL's plan to drill the pipeline roughly 100 feet below the floor of Lake Oahe.³⁰ The plaintiffs emphasized the reservoir as a source of their drinking water and its importance to their Treaty-based fishing and hunting rights.³¹ Besides raising environmental, religious, and cultural claims, they challenged the adequacy of federal decision making, including tribal consultation, under the National Environmental Policy Act (NEPA)³² and the National Historic Preservation Act (NHPA).³³

B. Executive Branch Intervention

1. President Obama Weighs In

As they pressed their claims, the Tribes demanded additional consultation with executive branch officials.³⁴ It was here, outside the courtroom, that the Tribes and their allies gained traction. On September 9, 2016, Judge Boasberg issued an order denying the Standing Rock Tribe's motion for a preliminary injunction to stop DAPL construction until the Corps

27. David Archambault II, Opinion, *Taking a Stand at Standing Rock*, N.Y. TIMES (Aug. 24, 2016), <https://www.nytimes.com/2016/08/25/opinion/taking-a-stand-at-standing-rock.html>.

28. 33 U.S.C. § 408 (2012).

29. 30 U.S.C. § 185 (2012).

30. Ernest Scheyder, *For Standing Rock Sioux, New Water System May Reduce Oil Leak Risk*, REUTERS, Nov. 22, 2016, <https://www.reuters.com/article/us-north-dakota-pipeline-water/for-standing-rock-sioux-new-water-system-may-reduce-oil-leak-risk-idUSKBN13H27D>.

31. Valerie Volcovici, *Federal Judge Orders More Environmental Analysis of Dakota Pipeline*, REUTERS, June 14, 2017, <https://www.reuters.com/article/us-northdakota-pipeline-dapl/federal-judge-orders-more-environmental-analysis-of-dakota-pipeline-idUSKBN19538I>.

32. 42 U.S.C. §§ 4321–4370 (2012).

33. 54 U.S.C. §§ 300101–307108 (2012).

34. See U.S. DEP'T OF THE INTERIOR, U.S. DEP'T OF THE ARMY & U.S. DEP'T OF JUSTICE, IMPROVING TRIBAL CONSULTATION AND TRIBAL INVOLVEMENT IN FEDERAL INFRASTRUCTURE DECISIONS 12–15 (2017).

engaged in additional consultation with the Tribe under the NHPA.³⁵ Later the same day, the Corps, along with the U.S. Departments of Justice and the Interior, issued a joint statement temporarily halting the project on federal land bordering and under Lake Oahe and requesting “that the pipeline company voluntarily pause all construction activity within 20 miles east or west of Lake Oahe.”³⁶

President Obama soon announced that he had asked the Corps to consider rerouting the pipeline.³⁷ “We are monitoring this closely,” President Obama said. “I think as a general rule, my view is that there is a way for us to accommodate sacred lands of Native Americans. I think that right now the Army Corps is examining whether there are ways to reroute this pipeline.”³⁸ On November 14, 2016, the Corps issued a statement saying it had not yet determined whether to grant an easement on the Corps-administered lands at Lake Oahe “at the proposed location” and invited the Standing Rock Sioux Tribe to engage in additional consultation.³⁹ A few weeks later, the Corps rejected the easement.⁴⁰ Energy Transfer Partners described this as a “purely political action—which the Administration concedes when it states it has made a ‘policy decision’—Washington code for a political decision.”⁴¹ But as the year closed, the politics were changing. A transition was underway. Executive branch intervention on DAPL continued when President Donald Trump assumed office on January 20, 2017, but went in a different direction.

2. President Trump Changes Course

Just four days after taking office, President Trump issued a memorandum declaring DAPL to be in the national interest and directing federal agencies to review and approve it “in an expedited manner, to the extent permitted by law and as warranted.”⁴² The Corps formally notified Congress and Judge Boasberg on February 7, 2017, of its intention to grant the

35. *Standing Rock I*, 205 F. Supp. 3d 4, 7 (D.D.C. 2016).

36. Press Release, Office of Pub. Affairs, Dep’t of Justice, Joint Statement from the Dep’t of Justice, the Dep’t of the Army & the Dep’t of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs (Sept. 9, 2016). The same three departments later followed up by issuing a joint report with recommendations for enhanced tribal consultation on pipeline and other projects. See U.S. DEP’T OF THE INTERIOR, U.S. DEP’T OF THE ARMY & U.S. DEP’T OF JUSTICE, *supra* note 34.

37. Christine Hauser, *Obama Says Alternative Routes Are Being Reviewed for Dakota Pipeline*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/us/president-obama-says-engineers-considering-alternate-route-for-dakota-pipeline.html>.

38. *Id.*

39. Press Release, U.S. Army Corps of Eng’rs, Statement Regarding the Dakota Access Pipeline (Nov. 14, 2016).

40. Nathan Rott & Eyder Peralta, *In Victory for Protesters, Army Halts Construction of Dakota Pipeline*, NPR (Dec. 4, 2016, 4:45 PM), <https://www.npr.org/sections/thetwo-way/2016/12/04/504354503/army-corps-denies-easement-for-dakota-access-pipeline-says-tribal-organization>.

41. Press Release, Energy Transfer Partners, L.P., & Sunoco Logistics Partners, L.P., Energy Transfer Partners & Sunoco Logistics Partners Respond to the Statement from the Dep’t of the Army (Dec. 4, 2016).

42. Memorandum of January 24, 2017, 82 Fed. Reg. 11,129 (Feb. 17, 2017).

easement at Lake Oahe.⁴³ These developments and the North Dakota winter had already reduced DAPL protestors to a remnant; the last campers either left voluntarily or were evicted later that month.⁴⁴ Because construction on the rest of the pipeline was almost entirely completed, Lake Oahe remained the focus—this time for finishing the project. DAPL began commercial oil delivery on June 1, 2017, initially transporting 520,000 barrels per day.⁴⁵ While litigation over DAPL continues,⁴⁶ the status quo is very different; the completed pipeline moves nearly half of the total daily oil production in North Dakota, the nation's second-leading producing state behind Texas, with expanded delivery capacity planned soon.⁴⁷

II. HOW DAPL IS FUELING TRIBAL CONCERNS OVER ENERGY PROJECTS

DAPL might not have gone viral on social media or generated national headlines had the drama not unfolded during the 2016 campaign season.⁴⁸ Yet the Standing Rock controversy has heightened awareness of the ways in which energy development may affect tribal interests. Tribes and tribal advocacy groups are now scrutinizing projects more closely, including new pipelines as well as right-of-way renewals for existing systems. A few examples include:

- The Bad River Band of Lake Superior Chippewa Indians in Wisconsin made headlines in January 2017 when its elected leaders opposed renewing an easement for Line 5, a 1,100-mile pipeline owned and operated by Enbridge (U.S.), Inc. that has delivered crude oil from Canada to the Upper Midwest and Eastern Canada

43. U.S. Army Corps of Engineers' Notice Regarding Recently Issued Public Documents, *Standing Rock III*, 255 F. Supp. 3d 101 (D.D.C. 2017) (No. 16-cv-1534).

44. Mayra Cuevas et al., *Dakota Access Pipeline Protest Site Is Cleared*, CNN (Feb. 23, 2017, 7:09 PM), <http://www.cnn.com/2017/02/22/us/dakota-access-pipeline-evacuation-order>.

45. Merrit Kennedy, *Crude Oil Begins to Flow Through Controversial Dakota Access Pipeline*, NPR (June 1, 2017, 5:23 PM), <https://www.npr.org/sections/thetwo-way/2017/06/01/531097758/crude-oil-begins-to-flow-through-controversial-dakota-access-pipeline>.

46. On June 14, 2017, Judge Boasberg entered an order concluding that although the Corps "substantially complied with NEPA in many areas, the Court agrees that it did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial." *Standing Rock III*, 255 F. Supp. 3d at 112. The court remanded to the Corps to reconsider those sections of its environmental analysis, adding that "[w]hether Dakota Access must cease pipeline operations during that remand presents a separate question of the appropriate remedy, which will be the subject of further briefing." *Id.*

47. Patrick C. Miller, *DAPL Capacity to Expand; Company Files New Legal Challenge*, N. AM. SHALE MAG. (July 5, 2017), <http://northamericanshalemagazine.com/articles/2008/dapl-capacity-to-expand-company-files-new-legal-challenge>; Blake Nicholson, *Months Needed for Additional Study of Dakota Access Pipeline*, AP NEWS, (July 18, 2017), <https://ap-news.com/103a2d58712a4450b0a97994aba31a8e>.

48. Following the election, protest camps on various other pipeline rights-of-way generated media attention but failed to prevent construction. Erin Mundahl, *A Year After Standing Rock, It's Clear that Environmental Protest Camps Are Ineffective*, INSIDE SOURCES (July 5, 2017), <http://www.insidesources.com/environmental-protest-camps-ineffective>.

since 1953.⁴⁹ A planned rebuilding and realignment of another existing Enbridge crude oil pipeline, Line 3 in Minnesota, has encountered opposition from area tribes, including high-profile participants in DAPL protests.⁵⁰

- The Atlantic Coast Pipeline (ACL), a 550-mile system to deliver natural gas from West Virginia and eastern Ohio to North Carolina, has encountered unexpected resistance from tribal advocates who object that its proposed route traverses counties that are home to three state-recognized tribes.⁵¹
- Last year, a federal judge in the Western District of Oklahoma ordered Enable Midstream Partners, L.P. to abandon and remove its twenty-inch natural gas pipeline, built in 1980, from an expired right-of-way crossing a portion of a 136-acre allotment after the company failed to reach an agreement with the Kiowa Tribe of Oklahoma, which recently obtained a fractional interest in the allotment and thirty-eight individual Indian allottees.⁵²

Tribal opposition to pipelines is becoming more common even in parts of the United States that saw little tribal participation in such matters until recently.⁵³ This apparent trend is being reinforced by tribal activists and environmentalists, two constituencies whose diverse and often divergent interests frequently aligned throughout the DAPL litigation. DAPL is also casting a generational shadow. On many reservations and college campuses, some younger Native Americans now refer to themselves as “water protectors,” a term coined at Standing Rock and used generically today to denote opposition to conventional energy projects.⁵⁴

Another sign of the times is evidenced by the actions of the National Congress of American Indians (NCAI), the nonprofit umbrella organization advocating for all 586 federally recognized tribes. In late 2016, the NCAI issued recommendations for reforming tribal consultation on energy

49. John Myers, *Bad River Band Takes Action to Kick Enbridge Pipeline off Reservation*, DULUTH NEWS TRIB. (Jan. 6, 2017, 3:50 PM), <http://www.duluthnewstribune.com/news/4193734-bad-river-band-wants-enbridge-pipeline-reservation>.

50. See, e.g., Mike Hughlett, *Indian Tribes, Business Leaders Make Their Cases in Enbridge Line 3 Debate*, STAR TRIB. (June 13, 2017, 9:34 PM), <http://www.startribune.com/indian-tribes-business-leaders-make-their-cases-in-enbridge-line-3-debate/428290743>.

51. Rebecca Martinez, *Opponents Say Pipeline Would Disproportionately Affect Native Tribes*, WUNC 91.5 (July 25, 2017), <http://wunc.org/post/opponents-say-pipeline-would-disproportionately-affect-native-tribes>.

52. *Davilla v. Enable Midstream Partners, L.P.*, 247 F. Supp. 3d 1233, 1239 (W.D. Okla. 2017).

53. See Don Gentry and Emma Marris, Opinion, *The Next Standing Rock? A Pipeline Battle Looms in Oregon*, N.Y. TIMES (Mar. 8, 2016), <https://www.nytimes.com/2018/03/08/opinion/standing-rock-pipeline-oregon.html>; Elizabeth Ouzts, *North Carolina Tribes Fear Impact of Atlantic Coast Pipeline Construction*, ENERGY NEWS NETWORK (Mar. 21, 2018), <https://energynews.us/southeast/north-carolina-tribes-fear-impact-of-atlantic-coast-pipeline-construction>.

54. See, e.g., Winona LaDuke, Opinion, *The Water Protectors Are Everywhere: From One Pipeline to Another, the Water Protectors Are Standing Strong*, INDIAN COUNTRY TODAY (Feb. 28, 2017), <https://indiancountrymedianetwork.com/news/opinions/water-protectors-everywhere>.

infrastructure projects.⁵⁵ “The unprecedented showing of support for the Standing Rock Tribe’s struggle against the Dakota Access Pipeline,” NCAI stated in a report to the U.S. Department of the Interior, “has been in part due to the long history of infrastructure projects approved by the Federal Government over the objections of Tribal Nations. . . . Every single Tribal Nation has a story of federally approved destruction.”⁵⁶ NCAI would mandate that federal agencies prepare and monitor an “Indian Trust Impact Statement” whenever agency action “may harm or threaten tribal lands, waters, treaty rights, or cultural resources.”⁵⁷ Unless tribes consent, such projects could only proceed if “a compelling national interest outweighs Tribal interests” as determined by a federal Tribal Trust Compliance Officer.⁵⁸ NCAI also wants to eliminate NWP 12 for crude oil pipeline projects.⁵⁹

III. WHY DEFICIENT TRIBAL CONSULTATION PRESENTS UNACCEPTABLE RISKS TO ENERGY PROJECTS

To say that federal laws concerning tribal consultation are changing rapidly—and that the energy industry is not keeping pace—would be an understatement. President Obama and his administration spent eight years enhancing the executive branch’s consultation policies to give tribes a greater voice in federal decision-making, expanding tribal consultation at the cabinet and subcabinet department level as never before. A May 2017 report by the Advisory Council on Historic Preservation (ACHP), *Improving Tribal Consultation in Infrastructure Projects*, lists eight pages of separate agency web links to updated tribal consultation policies and points of contact.⁶⁰ President Trump has not yet issued any policies on tribal consultation, but those on the books remain and tribal leaders are unlikely to let go of them easily.

Moreover, as agencies have adopted more sweeping consultation guidelines, tribes are actively seeking to enforce them in the federal courts.⁶¹ This approach did not prevail before Judge Boasberg in the DAPL cases.⁶² However, another federal court has given life to this issue by scrutinizing tribal consultation in substantive rather than purely procedural terms and—convinced that a federal agency did not adequately take tribal perspectives into account—invalidated the government’s actions.⁶³

55. See NAT’L CONG. OF AM. INDIANS, NCAI COMMENTS ON TRIBAL TRUST COMPLIANCE AND FEDERAL INFRASTRUCTURE DECISION-MAKING (2016).

56. *Id.* at 3.

57. *Id.* at 32.

58. *Id.*

59. *Id.* at 36.

60. See ADVISORY COUNCIL ON HISTORIC PRES., *IMPROVING TRIBAL CONSULTATION IN INFRASTRUCTURE PROJECTS* 4–14 (2017).

61. See *Wyoming v. U.S. Dep’t of the Interior*, 136 F. Supp. 3d 1317, 1327 (D. Wyo. 2015).

62. See *Standing Rock III*, 255 F. Supp. 3d 101, 111 (D.D.C. 2017); *Standing Rock II*, 239 F. Supp. 3d 77, 80 (D.D.C. 2017); *Standing Rock I*, 205 F. Supp. 3d 4, 7 (D.D.C. 2016).

63. *Wyoming*, 136 F. Supp. 3d at 1353.

Whether *Wyoming v. United States Department of the Interior*⁶⁴ (discussed below) takes hold nationally remains to be seen, but the case shows the potential risk to federal decision-making when a court determines that tribal views have not been meaningfully considered.⁶⁵

A. Pervasive Tribal Consultation in the Executive Branch

While every President since Richard M. Nixon has formally recognized tribal sovereignty and self-determination,⁶⁶ President Obama, in November 2009, pledged that his administration would consult on a government-to-government basis with Indian tribes over federal laws and policies concerning them.⁶⁷ “History has shown,” he observed, “that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results.”⁶⁸ President Obama expanded the Executive Branch’s commitment to consultation, vowing after his reelection: “Greater engagement and meaningful consultation with tribes is of paramount importance in developing any policies affecting tribal nations.”⁶⁹ Ironically, a key judicial test of that commitment involved a tribe’s challenge to one of the administration’s showcase environmental regulations: The Bureau of Land Management’s (BLM) rule on hydraulic fracturing (fracking) on federal and tribal lands (Fracking Rule).⁷⁰

B. Enforcing ‘Meaningful’ Tribal Consultation Through the Courts

On September 30, 2015, a U.S. District Judge in Casper, Wyoming, enjoined, on a nationwide basis, the BLM from enforcing its Fracking Rule.⁷¹ In *Wyoming*, Judge Scott W. Skavdahl—appointed by President Obama in 2011⁷²—granted a preliminary injunction against BLM sought

64. *Id.*

65. *Id.*

66. See Gabriel S. Galanda, Opinion, *Back to the Future: The GOP and Tribal Determination*, INDIAN COUNTRY TODAY (Sept. 9, 2015), <https://indiancountrymedianetwork.com/news/opinions/back-to-the-future-the-gop-and-tribal-termination>.

67. Memorandum from President Barack Obama for the Heads of Exec. Dep’ts & Agencies (Nov. 5, 2009), <https://www.usbr.gov/native/policy/obama.pdf>.

68. *Id.* In this, his first policy statement on tribal consultation policy, President Obama directed each agency head to submit to the Director of the Office of Management and Budget, within ninety days, a detailed plan of actions agency would take to implement Executive Order 13175, an executive order setting tribal consultation policy issued in 2000 by President Bill Clinton. See Exec. Order No. 13,175, 65 Fed. Reg. 67,252 (Nov. 6, 2000). President Obama’s November 5, 2009 memorandum was elevated to Exec. Order No. 13,604, 77 Fed. Reg. 18,887 (Mar. 22, 2012) (“Improving Performance of Federal Permitting and Review of Infrastructure Projects”).

69. Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (July 1, 2013).

70. See *Wyoming*, 136 F. Supp. 3d at 1327.

71. *Id.* Such nationwide injunctions are ordinarily the appropriate remedy under the Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2012), when reviewing courts determine that agency regulations are unlawful; the rules are vacated and the result is not limited to the parties in the case. See, e.g., Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

72. Press Release, Office of the Press Sec’y, President Obama Names Two to the U.S. Dist. Court, 2/16/2011 (Feb. 16, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/02/16/president-obama-names-two-united-states-district-court-2162011>.

by four states (Wyoming, Colorado, North Dakota, and Utah), the Ute Indian Tribe of the Uintah and Ouray Reservation, and two petroleum industry associations.⁷³ Among other holdings, but significantly, the judge found that the BLM acted arbitrarily and capriciously by failing to follow the U.S. Department of the Interior's (Interior) *Policy on Consultation with Indian Tribes*, by which Interior detailed how it would rise to President Obama's call for better tribal consultation and implement President Clinton's November 6, 2000 Executive Order No. 13175 on tribal consultation and coordination, which President Obama had endorsed.⁷⁴

Wyoming focused not just on tribal consultation as a process, but on the adequacy of the dialogue and whether the federal government's engagement with tribal officials was "meaningful."⁷⁵ The BLM said it had engaged in extensive tribal consultation when it promulgated the Fracking Rule—holding four separate regional tribal meetings, offering to meet with tribal representatives individually after those meetings, distributing copies of the draft rule for tribal comment, and reaching out to affected tribes again twice after the rule was published.⁷⁶ The court held this insufficient.⁷⁷ "The BLM's efforts," Judge Skavdahl concluded, "reflect little more than that offered to the public in general. The [Department of the Interior] policies and procedures require extra, *meaningful* efforts to involve tribes in the decision-making process."⁷⁸

In reaching this result, and italicizing the word "meaningful," the judge noted that the "BLM spent more than a year developing the [Fracking Rule] before initiating any consultation with Indian tribes."⁷⁹ When the agency did make two changes to its ninety-six-page draft rule, the judge said the agency did not address tribes' expressed concerns.⁸⁰ The judge quoted concerns expressed by the Ute Indian Tribe that the "BLM has not been consulting with the Tribes in good faith."⁸¹

Wyoming raises the potential of using the alleged lack of tribal consultation not only as a sword in litigation but as leverage in negotiations over pipelines and other energy projects.⁸² It attests to the Obama Administration's success in driving tribal consultation policies at the agency

73. *Wyoming*, 136 F. Supp. 3d at 1354.

74. *Id.* at 1344–46 (citing THE SEC'Y OF THE INTERIOR, ORDER NO. 3317, DEP'T OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES (2011)).

75. *Id.*

76. *Id.* at 1345–46.

77. *See id.* at 1346.

78. *Id.* at 1345–46.

79. *Id.* at 1346.

80. *Id.*; see Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (proposed Mar. 26, 2015) (to be codified at 43 C.F.R. pt. 3160).

81. *Wyoming*, 136 F. Supp. 3d at 1345.

82. *See also* Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104, 1106–07 (S.D. Cal. 2010) (blocking a BLM-approved solar energy project—a 709-MW facility spanning 6,500 acres in the Mojave Desert—after castigating the BLM for deficient consultation in violation of the NHPA). The BLM and other federal agencies, the court said, "are not

level.⁸³ By 2015, the Obama Administration had gone well beyond reaffirming President Clinton's relatively brief 2000 directive, Executive Order 13175.⁸⁴ In July 2010, the Office of Management and Budget began providing detailed guidance to the heads of all executive branch departments, agencies, and independent agencies on how to carry out Executive Order 13175—a process that has since expanded tribal consultation policies at the cabinet and sub-cabinet level, and—as the May 2017 ACHP report attests—has so far continued in the Trump Administration.⁸⁵

IV. HOW THE ENERGY INDUSTRY GAINS BY SUPPORTING TRIBAL CONSULTATION

The cumulative effect of President Obama's efforts—beefed-up and judicially enforceable tribal consultation throughout the executive branch—provides tribes with more leverage to shape energy infrastructure projects. As a risk-management strategy for the energy industry, supporting rather than undercutting the government-to-government consultation process between federal and tribal officials (or states and tribes as the case may be) has distinct practical advantages. The more informed tribal officials' understanding of a proposed project, the more effectively they can consider that project in a meaningful way as federal law requires.

From the early days of the republic, Indian tribes—the third sovereign recognized in the U.S. Constitution, along with states and the federal government—have been recognized and protected as “domestic dependent nations”⁸⁶ with the inherent power to “make their own laws and be ruled by them.”⁸⁷ When the energy industry treats tribes as “stakeholders” in projects rather than as governments, companies disrespect tribal sovereignty and do themselves and the industry a disservice. Standing Rock Chairman Archambault explained this distinction: “You're just another stakeholder like everybody else. But we're not. We're a nation, and we expect to be treated like a nation.”⁸⁸ Many if not most tribal governments lack either a credible tax base or equivalent revenue sources for financing

free to glide over requirements imposed by Congressionally-approved statutes and duly adopted regulations. . . . The Tribe was entitled to be provided with adequate information and time, consistent with its status as a government that is entitled to be consulted.” *Id.* at 1119. For a discussion of the Quechan Tribe and the court's substantive due-process analysis of the NHPA, see Troy A. Eid, *Why Solar Projects Move Forward Despite Tribes' Objections*, LAW360 (June 22, 2015). See also Jennifer H. Weddle, *Navigating Cultural Resources Consultation: Collision Avoidance Strategies for Federal Agencies, Energy Project Proponents, and Tribes*, 60 ROCKY MTN. MIN. L. INST. 22-1, § 22.02 (2014).

83. See *Wyoming*, 136 F. Supp. 3d at 1345.

84. See Tribal Consultation Policy, 80 Fed. Reg. 57,434 (Sept. 23, 2015).

85. Memorandum from the Office of Mgmt. & Budget, Exec. Office of the President, for the Heads of Exec. Dep'ts & Agencies, & Indep. Regulatory Agencies, M-10-33 (July 30, 2010). See ADVISORY COUNCIL ON HISTORIC PRES., *supra* note 60.

86. *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831).

87. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

88. Bo Evans, *Standing Rock Sioux Tribal Chairman Dave Archambault Says Dakota Access Pipeline Conflict Is About Respect*, W. DAKOTA FOX NEWS (Sept. 6, 2016, 10:10 PM), <http://www.kfyrtv.com/content/news/Standing-Rock-Sioux-Tribal-Chairman-Dave-Archambault-says-Dakota-Access-Pipeline-conflict-is-about-respect-392525001.html>.

basic public services.⁸⁹ Yet tribes nevertheless must expend their own scarce resources, evaluating the impacts of commercial ventures not of their own making that may provide few if any direct benefits to them. Treating tribes as stakeholders shifts project costs from energy developers to tribal governments, which must consult with federal and state officials on projects not just on tribal lands, but off-reservation, such as treaty and traditional use areas and aboriginal lands that may be hundreds or thousands of miles away.⁹⁰

A. Best Practices

Fortunately, some companies are already demonstrating ways to work proactively with tribes to support the tribal consultation process.⁹¹ This approach recognizes that energy developers should not shift their project-related costs to tribes, but instead find ways to help tribal officials gain access to the specific expertise needed—from sources of tribes' choosing—to make more accurate and complete project assessments. This includes providing appropriate financial and in-kind assistance to tribes to cover project-related costs to tribal staff and other governmental resources, such as the extra expense tribes incur in evaluating off-reservation projects and consulting with federal officials about them. Such arrangements must be carefully structured and monitored by companies and tribes to create no real or perceived obligations on the part of tribal officials to support projects, and to ensure funds are expended only for legitimate and approved purposes.

While seldom disclosed publicly given the confidentiality considerations involved, it is becoming increasingly common for project proponents—an interstate pipeline company and a public utility, to give just two recent examples⁹²—to pay the tribe's project-related legal fees and costs, while providing financial and in-kind support so the tribe can retain its own experts to evaluate the project from scientific, engineering, ethnographic, and other perspectives.⁹³ Such contractual arrangements sometimes take the form of confidential mitigation agreements (Mitigation

89. See generally Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004).

90. An argument can of course also be made that, to effectuate its trust responsibilities, the federal government should shoulder the entire cost of tribes' evaluating and commenting on proposed commercial projects. After digging into the matter, I have not been able to locate any examples, even anecdotal, where this has actually occurred, including in the current federal budget environment.

91. See A. David Lester, *Lester: CERT and the Ruby Pipeline Project: Working Together to Enhance Tribal Sovereignty*, INDIAN COUNTRY TODAY (Nov. 1, 2010), <https://indiancountrymedianetwork.com/news/lester-cert-and-the-ruby-pipeline-project-working-together-to-enhance-tribal-sovereignty>.

92. Both projects are confidential but described here in very general terms with clients' permission.

93. I am finding the same tendency on the part of energy companies and tribes that ask me to mediate disputes between them. It is hard to track given the confidentiality of mediation, but I have seen instances where energy companies pay not just for the mediation, but the cost of tribes' independently retaining both attorneys and nonlegal consultants.

Agreements) between companies and tribes to supplement the government-to-government memoranda of agreement among federal, state, and tribal officials.

B. The Ruby Pipeline Project

A rare public example of the energy industry's effective support of tribal consultation is the Ruby Pipeline Project (Ruby)—a nearly 700-mile interstate pipeline that delivers natural gas produced in the Rockies Basin to the West Coast.⁹⁴ As with DAPL, Ruby did not cross any Indian reservation lands but passed through former treaty and aboriginal lands of various tribes.⁹⁵ The late David Lester, executive director of the Council of Energy Resource Tribes, a nonprofit tribal organization, assisted Ruby's owner, El Paso Corporation (now Kinder Morgan), in strengthening tribes' ability to participate in consultations with federal officials.⁹⁶ Long before any construction, Ruby entered into funding agreements that tribes used to retain their own ethnographic experts to document cultural resources for federal consultation purposes.⁹⁷ These experts, chosen by and reporting to tribal officials, compiled published ethnographies and interviewed tribal elders in the field.⁹⁸

The tribes applied this ethnography to create a tribal monitoring program, paid for by Ruby, which trained tribal members to survey the proposed route along with the archaeological teams prior to, during and after construction.⁹⁹

At [the] tribes' request, the Ruby pipeline was rerouted—including more than 900 “micro-reroutes” to avoid culturally important sites—at a total cost of approximately \$11 million. Traditional plants were harvested for seeds and preserved in greenhouses prior to ground-disturbing activity and replanted post-construction in the reclaimed right of way. Ruby also worked with tribes to develop a tribal employment program. Because skilled pipeline construction jobs typically require union membership, Ruby supported tribes' requests to pay union dues and apprenticeships for tribal members seeking work on the project. A later internal review by the company found that such reroutes and tribal capacity-building measures [supported by Ruby] saved the company at least \$250 million in avoided project delay costs¹⁰⁰

94. Lester, *supra* note 91.

95. Carol Berry, *Pipeline Creates Tribal Dissent*, INDIAN COUNTRY TODAY (Sept. 27, 2010), <https://indiancountrymedianetwork.com/news/pipeline-creates-tribal-dissent>.

96. Lester, *supra* note 91.

97. Ruby Pipeline, L.L.C. Accrual of Allowance of Funds for Funds Used During Construction, 131 FERC ¶ 61007, ¶ 61028 (Apr. 5, 2010).

98. Lester, *supra* note 91.

99. *Id.* Lester described these monitors as “eyes and ears from their respective tribal governments” who, along with tribal cultural resource technicians, offered advice on cultural resource protection issues directly to Ruby and its contractors. *Id.*

100. *Conference Panel Addresses Questions on Dakota Access Pipeline*, N. AM. SHALE MAG. (Aug. 1, 2017), <http://northamericanshalemagazine.com/articles/2028/conference-panel-addresses->

CONCLUSION: PREPARING FOR THE NEXT DAPL

Even before Watergate, Henry Kissinger complained, “There cannot be a crisis next week. My schedule is already full.”¹⁰¹ Wherever and whenever it happens, managing the next Standing Rock controversy—or better yet, mitigating or avoiding it—should be on every energy developer’s agenda. Federal law will continue to recognize Indian tribes as governments, not stakeholders. Embracing tribal consultation may prove to be the most prudent and effective way for the energy industry to manage business risk in post-DAPL America.

questions-on-dakota-access-pipeline; Amy Dalrymple, *Attorney Encourages Consultation with Tribes on Pipelines*, BISMARCK TRIB. (July 19, 2017), http://bismarcktribune.com/news/state-and-regional/attorney-encourages-consultation-with-tribes-on-pipelines/article_789e3d5c-8ad5-5988-b6f9-51bca8b72204.html.

101. Patrick Anderson, *Confidence of the President*, N.Y. TIMES MAG., June 1, 1969, at 10, 11.

