



DAPL: Storm Clouds on the Horizon in Indian Country

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The conflict between the Standing Rock Sioux Tribe, Energy Transfer Partners (the company seeking to build the Dakota Access Pipeline (DAPL)), and the U.S. Army Corps of Engineers over DAPL catapulted the issue of the impact of energy infrastructure development on American Indian tribes to the forefront of national consciousness. The protests at Sacred Stone Camp near the Standing Rock Sioux Reservation in North Dakota drew American Indians from over 280 tribes, and were hailed by activists as the “largest, most diverse tribal action in at least a century, perhaps since Little Bighorn.”¹ While media coverage in the early days of the protest was spotty,² as support for the movement grew, it became a regular part of news coverage.³

These protests are a harbinger of what could be a new era of increased conflict between tribes and the energy industry as the strong societal trends of increasing tribal sovereignty and self-deter-

mination and increasing domestic energy development collide. This combination of media attention and evolving ideas about sovereignty may also place American Indian tribes in a unique position relative to the Trump administration. The new administration itself could also come into conflict with tribes over energy extraction and infrastructure development. What is going on at Standing Rock constitutes a harbinger of things to come.

The Fight Over DAPL

DAPL begins in the Bakken oil fields of northwest North Dakota and ends near Patoka, Ill.,⁴ where plans call for linking it to other pipelines.⁵ If completed, it would transport 470,000 barrels of Bakken crude per day.⁶ Currently, most of the oil at issue is transported by rail.⁷ For oil producers, rail transport is substantially more expensive than pipeline transport.⁸

In its permitting review of DAPL, the Army Corps examined two potential routes for the pipeline: the current route and a route that crossed the Missouri river roughly 10 miles north of Bismarck.⁹ The Bismarck route was rejected, in part, because the Army Corps was concerned that a spill would threaten the area’s municipal water supplies.¹⁰ The current route crosses the river roughly a half-mile upstream from the Standing Rock Sioux Reservation.¹¹ Energy Transfer Partners insist that underground pipelines like DAPL “are the safest mode of transporting crude oil.”¹²

The Standing Rock Sioux Tribe has opposed the pipeline since 2014.¹³ While Energy Transfer Partners points out that the DAPL

does not cross Standing Rock Sioux Land,¹⁴ it does cross treaty land that was taken from the tribe without their consent.¹⁵ To the tribe, the land is deeply culturally significant, more so because it includes sacred sites and burial grounds.¹⁶ As one of their leaders put it: “As it erases our footprint from the world, it erases us as a people.... Our young people have a right to know who they are.... The way to learn these things is through connection to our land and our history.”¹⁷ The tribe also has concerns about safety. Worried that the pipeline would contaminate the reservation’s water, the American Indians at the forefront of the fight against the pipeline called themselves “water protectors” rather than “protestors.”¹⁸

The tribe also contests the procedures used to obtain the permits for the pipeline. Normally, the tribe would have been consulted, and the impact of the pipeline on their cultural heritage would have been

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more rigorously considered. However, the pipeline was fast-tracked using the Nationwide Permit No. 12 process. This process treats construction like several small sites, each exempted from the usual environmental and cultural impact reviews.¹⁹

In early April 2016, the Sacred Stone Camp was founded to fight the pipeline through “prayer and nonviolent direct action.”²⁰ Over time, the number of water protectors and other demonstrators swelled.²¹ A native youth group called “Rezpect our Water” began a media campaign.²² The group organized a run in August from Standing Rock to Washington, D.C., to deliver a petition with 140,000 signatures to the Army Corps asking them to deny key permits.²³ Confrontations between DAPL private security, law enforcement, and water protectors helped to bring the protests into the spotlight.²⁴ DAPL private security forces used dogs and law enforcement has used pepper spray, rubber bullets, and fire hoses in cold weather against the protesters.²⁵

Along with the protests on the ground, native peoples also battled DAPL in court. In late July 2016, the Standing Rock Sioux Tribe sued the Army Corps in federal court in Washington, D.C., for declaratory and injunctive relief regarding the Army Corps’ permitting process.²⁶ The tribe argued that the Army Corps did not adequately consult with the tribe as required by the National Historic Preservation Act (NHPA) and that irreparable harm would ensue. In early September, the court concluded that the Army Corps had in fact complied with NHPA, and denied the motion.²⁷ However, on Dec. 4, 2016, the water protectors and other protestors celebrated a victory when the Army Corps reversed position and announced that it would not allow the easement and would order a full environmental impact study and re-examine alternate routes for the project. Many feared that the victory would be short-lived, and with good reason. The Army Corps is part of the Department of the Army, and thus the decision was made by the outgoing Obama administration. Given his statements of support for the completion of the pipeline, many feared that the then president-elect Trump would quickly revive the project.²⁸

Their fears were not ill-founded. On Jan. 24, 2017, Trump signed an executive memorandum ordering the Army to review and approve the pipeline in an expedited manner.²⁹ On Feb. 8, the Corps granted the easement allowing construction to go forward.³⁰ As of this writing, drilling under the Missouri River under the easement has begun and the litigation continues.³¹ Regardless of its outcome, this civil unrest and litigation over DAPL already teaches important lessons about the dawning era of tension between tribal sovereignty, energy extraction infrastructure, and the Trump administration.

Tribal Sovereignty and Self-Determination Versus Domestic Energy Extraction and Infrastructure Activity

As President Barack Obama left office in January 2017, he and his administration left behind a record of support and empowerment for American Indian tribes that was unprecedented in the history of the United States.³² With the passage of the Tribal Law and Order Act and the Violence Against Women Act’s restored tribal court jurisdiction provisions, the creation of the annual White House Tribal Nations Conference, the settlement of long-standing disputes between tribes and the United States, the restoration of millions of acres of land into trust for tribes, the historic presidential visits to Indian country, and an executive branch led by the Department of Interior and the Department Justice uniquely dedicated to government-to-government relations with tribes, the Obama record is historic. And these efforts achieved results. Tribes are, as a group, as strong as they have been in the so-called self-determination era. Indeed, many tribal institutions from courts to regulatory agencies founded in the 1970s under Nixon’s push for self-determination have come of age in the Obama era and are poised to move forward into what scholar Walter Echo-Hawk has labeled the new human rights era for American Indian law.³³

At the same time, and in many of the same places throughout the United States where tribes seek now to exercise their growing sovereignty, there has been an explosion of energy and infrastructure development as “American energy” has boomed since the beginning of the 21st century. From the natural gas fields of the Marcellus Shale to the oil fields of the Bakken in North Dakota and the Eagle Ford and Barnett in Texas, the combination of new technologies of horizontal drilling and hydraulic fracturing (or “fracking”) has produced an American oil and gas boom, created unprecedented prosperity, decreased U.S. dependence on foreign oil, and even upended

the pricing of the world's oil and gas markets.³⁴ In addition to the extraction activity itself, in all its chaotic, rough-and-tumble freneticism, these booms led predictably to a quick and dramatic increase in the need for oil- and gas-heavy infrastructure to support it. More, bigger, better roads for oil field trucks begat a flood of additional oil tanker cars on the tracks and construction of new modern, rail spurs for loading crude. Construction of the spider web of small gathering pipelines linking well site after well site led to projects like Keystone XL, Sandpiper, and DAPL. Even new refineries sprouted up from the landscape as oilmen struggled to get their new wealth to market as cheaply and effectively as possible.

A single geography serves as the stage for the emergence of these two potent societal trends—increasing exercise of sovereignty by tribes and the rapid growth of domestic oil and gas production and its attended infrastructure. Take a map of Indian country in the United States,³⁵ overlay it with a map of shale oil and gas plays,³⁶ and the future comes into focus. American Indians and oilmen, each with their own objectives and growing power, share a single theater as the next act of their respective plays begin. Indeed, American Indian reservations cover just 2 percent of the United States, but they may contain about a fifth of the nation's oil and gas, along with vast coal reserves.³⁷ Oil wells, railcars filled with crude, refineries, and pipelines will be planned on and near current and historical tribal treaty lands. Individual tribes (there are dozens and dozens within this geography) will react to these developments in a myriad of different ways that reflect the unique culture, history, traditions, and interests of each separate tribe.

Further complicating the situation will be the priorities of the Trump administration. A new executive branch with a new secretary of the interior and a new attorney general will be asked by both the energy industry and tribes to protect their respective interests. Comments by Trump transition team members suggesting that tribal lands and energy resources be privatized have put tribes on guard as such proposals harken back to so-called termination era policies.³⁸ Such careless early rhetoric and the resulting hardening of positions by tribes are unfortunate. Real, meaningful consultation with tribes can, in the long run, help avoid unrest and litigation of the sort we see associated with DAPL in North Dakota. Under Obama, it was the executive branch that led consultation and outreach efforts to tribes and opened lines of communication and robust dialogue as a result. There are legitimate questions as to whether the Trump administration will pick up this mantle and serve as a force for communication and compromise in the coming struggles.

Conflicts Are Destined for Federal Courtrooms

This backdrop has created a coming storm of increased federal litigation. Tribes have renewed confidence about their rights as sovereign nations whose powers of self-governance oblige the U.S. government to meaningfully consult with them on any federal policies that impact their tribal communities.³⁹ At the same time, even as the price of oil and natural gas has dropped, domestic energy companies and resource-rich states are bullish about bringing more fossil fuels to market. The early days of 2017, at the dawn of the Trump administration, signaled the strong probability of more legal showdowns between tribes on the one hand and energy companies and state and federal agencies on the other.

There are a number of cases to watch in 2017, and likely beyond. An early executive order issued by President Trump resulted in the

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Army Corps falling in line behind the new president and granting the disputed DAPL easement. As a result, Energy Transfer Partners is vowing to quickly complete the pipeline construction under the Missouri River. The Standing Rock Sioux Tribe remains resolved to resist “the black snake” deemed too dangerous to be routed through the majority non-native Bismarck, N.D. Earthjustice attorney Jan Hasselman, the lead attorney for the Standing Rock Sioux Tribe in the DAPL litigation based in the federal court in Washington, D.C., stated, “The Obama administration correctly found that the tribe's treaty rights needed to be acknowledged and protected, and that the easement should not be granted without further review and consideration of alternative crossing locations.⁴⁰ Trump's reversal of that decision continues a historic pattern of broken promises to Indian tribes and unlawful violation of treaty rights. They will be held accountable in court.”⁴¹

The spirit of #NoDAPL protests against pipeline infrastructure also appears to be spreading to other tribes. In January, the Tribal Council of the Bad River Band of Lake Superior Tribe of Chippewa Indians, whose lands sit on the south shore of Lake Superior in Northeastern Wisconsin, announced that it had passed a resolution declining to renew the easement for right of way to Enbridge Energy Partners LP.⁴² The tribe's resolution also calls for the pipeline's decommissioning and removal from all of the tribe's lands and its watershed.⁴³ Tribal Chairman Robert Blanchard explained in an interview with Michigan public radio that concerns that the 64-year-old pipeline could leak into its lands and watershed was the motivating factor for demanding that Enbridge remove the pipeline.⁴⁴ “We have our hunting, we have our fishing, and our harvesting, and collecting our medicines,”⁴⁵ Chairman Blanchard explained. “That would be forever lost if we were to have an oil spill of any type up there.”⁴⁶

The easement that the tribe granted to Enbridge expired in 2013, and while Enbridge reports that it has been negotiating in good faith with the tribe to renew the easement over the past few years, Chairman Blanchard stated that he is not aware of any such negotiations. “I’ve been chairman since 2015 and I’ve never been or sat into any negotiations with them regarding that issue,” he said. “So I don’t know where they’re coming from with that.”⁴⁷ It seems likely that this dispute could soon find its way into the federal courts.

The Minnesota Chippewa Tribe, consisting of the six Ojibwa/Chippewa bands in northern Minnesota, continues to oppose additional pipeline activity through its tribal lands. The tribe is preparing its own Environmental Impact Statement (EIS) for Enbridge’s proposed

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Line 3 Corridor pipeline. The tribe reports that its “EIS will be rooted in Anishinaabe cultural values, focused on the preservation of the Anishinaabe way of life, and written by a professional and credible engineering firm with both scientific expertise and experience working with tribal communities and assessing impacts on tribal resources.”⁴⁸ The impact assessment is expected to be completed in late 2017 and will inform the tribe’s future actions in relation to the Line 3 Corridor.⁴⁹

Tribal disputes not relating to pipelines have also made headlines

this year. Some could be headed to federal court while others are already there. In late January, the Suquamish Tribe, along with the environmental groups the Washington Environmental Council and Puget Soundkeeper Alliance informed the U.S. Navy that they intend to sue the Navy over its scraping of a decommissioned aircraft carrier into the Sinclair Inlet.⁵⁰ The Navy is attempting to remove barnacles and other marine growth, but in the process, the likely plaintiffs claim that the Navy is releasing toxic copper-based paint into the inlet, threatening wildlife and particularly salmon.⁵¹ Additionally, the Swinomish Tribe brought suit against the BNSF Railway in the Western District of Washington. The tribe alleges that the railway company transported Bakken crude across their reservation without informing them in violation of an easement agreement. The court found in January that the lawsuit was not pre-empted by federal law regulating railroads.⁵²

By the time this article appears in print, the DAPL legal dispute may have run its course in the federal courts. Regardless of its fate, the Standing Rock Sioux Tribe’s resistance has left an enduring impact upon the consciousness of tribes across the United States and set the stage for a coming storm of litigation in the federal courts as tribes, the oil and gas industry and the Trump administration seek to project their power to serve their own different interests. In the end, the task of deciding these complex and historic disputes will likely fall to the federal judiciary. ☺



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