



# **BEYOND DAKOTA ACCESS PIPELINE**

## **Why the Energy Industry Should Embrace Tribal Consultation**

**Troy A. Eid**  
**Pipeline Safety Trust**  
**Annual Conference**  
**New Orleans, Louisiana**  
**November 3, 2017**

## TAKEAWAYS FROM THIS PRESENTATION



1. Native tribes and nations retain inherent sovereignty, predating the U.S. Constitution, to 'make their own laws and be ruled by them.'
2. Tribes must consent to energy and other rights-of-way on tribal trust lands. They also must consent to ROWs on trust lands owned by individual Indians ('allotments') in which tribes have acquired ownership interests.

## TAKEAWAYS FROM THIS PRESENTATION

3. Off-reservation, tribes are not legally required to consent to proposed energy infrastructure projects. However, the federal officials must consult with Native nations on all projects requiring federal approval. Tribes' rights to 'meaningful' consultation are judicially enforceable in the federal courts.



## TAKEAWAYS FROM THIS PRESENTATION

4. Energy companies can mitigate project risk by supporting the consultation process so that tribes' views are meaningfully considered in federal and state decision-making.
5. Companies should consider adopting internal Best Practices that respect tribes as governments, not stakeholders.



Tribal Monitors on the Ruby Pipeline Project



## INDIAN LAW 101

- US Constitution recognizes four sovereigns – federal, state, tribal and foreign.
- Tribes' rights to self-government and land predate the Constitution.



## INDIAN LAW 101

- Tribes' rights are inherent and continue unless divested.
- State laws do not apply to tribes unless Congressionally authorized.



## THE FEDERAL TRUST RESPONSIBILITY

- Indian tribes are political and legal entities to which the federal government owes a trust responsibility as a result of tribes' land cessions.



## THE FEDERAL TRUST RESPONSIBILITY

- As part of the federal government's trust obligations to 567 Indian tribes, the United States must consult with Native nations on a government-to-government basis.





## THE FEDERAL TRUST RESPONSIBILITY

- Energy projects needing federal approval and/or federal permitting require consultation with the affected tribal governments – including off-Reservation.



## ON-RESERVATION ENERGY DEVELOPMENT

- Tribal reservations constitute roughly two percent of the total U.S. land base but more than one-fifth of all oil and gas, one-third of strippable low-sulfur coal, and 60 percent of uranium.



## **TRIBAL CONSENT: CURRENT LAW**

### Tribal Trust Land

25 U.S.C. §§ 323-328

No grant of a right-of-way over and across any lands belonging to a tribe...shall be made without the consent of the proper tribal officials.

- 25 U.S.C. § 324

## TRIBAL CONSENT: CURRENT LAW

### Lands of Individual Indians (Allotted Lands)

25 U.S.C. § 324

- Majority of owners (allottees) must give their consent; or
- Secretary of the Interior finds the owners too numerous so “it would be impracticable to obtain their consent” and “the grant will cause no substantial injury to the land or any owner thereof”; or
- Secretary may also exclude owners whose whereabouts are unknown, as well as heirs and devisees of deceased owners whose interests have not been ascertained.



## **TRIBAL CONSENT: CURRENT LAW**

### **Lands of Individual Indians (Allotted Lands)**

- 25 U.S.C. § 357 alternatively provides that a right of way may be taken by condemnation (eminent domain), in accordance with the law of the state where the Indian land is located.
- However, Section 357 is limited by its terms to “lands allotted in severalty to Indians.”

## TRIBAL CONSENT: CURRENT LAW

### Allotted Lands in which Tribes have acquired fractional ownership interests

- In *Public Service Co. of New Mexico v. Barboan* (May 26, 2017), the U.S. Court of Appeals for the 10<sup>th</sup> Circuit upheld a New Mexico federal trial judge's ruling that *tribal* ( as opposed to individual) ownership of a fractional interest in an allotment bars condemnation of any interest in that allotment.



## TRIBAL CONSENT: CURRENT LAW

In *Barboan*, PNM sought to renew a easement, originally granted in 1960, for electrical transmission lines crossing 57 allotments.

- PNM failed to obtain the required majority percentage pursuant to 25 U.S.C. § 324 of five allotments, all of which were highly fractionated.
- Since the last right-of-way renewal, the Navajo Nation had obtained a 13.6% and 0.14% ownership interest, respectively, in two of these allotments.

## **TRIBAL CONSENT: CURRENT LAW**

- The Nation acquired its interests in those allotments under the Indian Land Consolidation Act and the American Indian Probate Reform Act, a 2004 amendment of ILCA.
- Tribes may acquire interests in allotments by gift, purchase or when an individual landowner with a 5% or smaller interest in an allotment dies intestate.
- In addition to these statutes, Tribes may acquire interests in allotments under the Cobell Buy-Back Program.



# OFF-RESERVATION ENERGY DEVELOPMENT



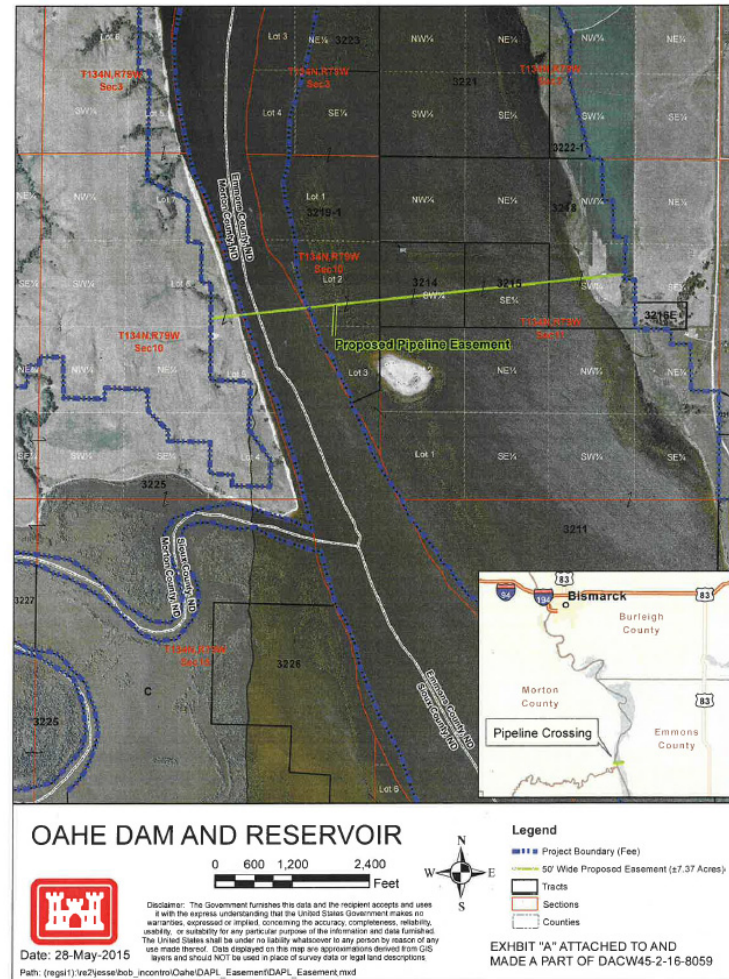
Source: Energy Transfer Partners

LARIS KARKLIS/THE WASHINGTON POST

# US ARMY CORPS OF ENGINEERS

## DAPL Federal Nexus:

- Lake Oahe Easement (Mineral Leasing Act).
- Lake Oahe water crossing (Section 408, Rivers and Harbors Act).
- Nationwide Permit 12 (all other water crossings).



## **DAPL: LESSONS LEARNED**

**Tribal litigation failed to block DAPL but imposed substantial costs on Energy Transfer Partners (ETP).**

- ETP lost an average of \$83.3 million/month from September 2016 onward, with total estimated losses in construction delays and other costs exceeding \$750 million.

## DAPL: LESSONS LEARNED

In response to DAPL, the National Congress of American Indians (NCAI) in November 2016 issued “Comments on Tribal Trust Compliance and Federal Infrastructure Decision-Making,” addressing tribes’ concerns with the prevailing approach.





## **DAPL: LESSONS LEARNED**

- NCAI proposed the elimination of USACE's nation-wide permit 12 ("fast-tracking") of crude oil pipelines in which project proponents may group multiple jurisdictional water crossings under a single permit.
- NCAI called for federal certification of crude-oil pipelines similar to the Natural Gas Act.
- Finally, NCAI urged that federal departments and agencies appoint 'trust compliance officers' to determine cumulative impacts of proposed projects on traditional tribal lands off-reservation.

## DAPL: LESSONS LEARNED

‘Federal permitting agencies tend to treat Tribal Nations as members of the public, entitled to only limited information and the ability to submit comments, rather than incorporating them into decision-making processes as non-Federal governmental entities.’

- *NCAI Comments on Tribal Trust Compliance and Energy Infrastructure Decision-Making* (Nov. 30, 2016)

## DAPL: LESSONS LEARNED

Regulators and Project Proponents stand to benefit from more focused, proactive engagement with tribes, including potential alternative routing and enhanced mitigation strategies.



# TRIBAL CONSULTATION IS JUDICIALLY ENFORCEABLE



Unlike in the litigation over DAPL, some Indian tribes have successfully challenged federally approved projects and/or proposed federal rules for lack of ‘meaningful’ consultation with tribes.

***Procedural* statutes such as the National Historic Preservation Act and the National Environmental Policy Act may be acquiring a *substantive* component.**



## TRIBAL CONSULTATION IS JUDICIALLY ENFORCEABLE

Example: *Wyoming v. Jewell et al* (D. WY 2015)

- On Sept. 30, 2015, a U.S. District Judge in Casper, Wyoming enjoined, on a nationwide basis, the Bureau of Land Management (“BLM”) from enforcing its final rule related to hydraulic fracturing or “fracking” on federal and Indian lands.

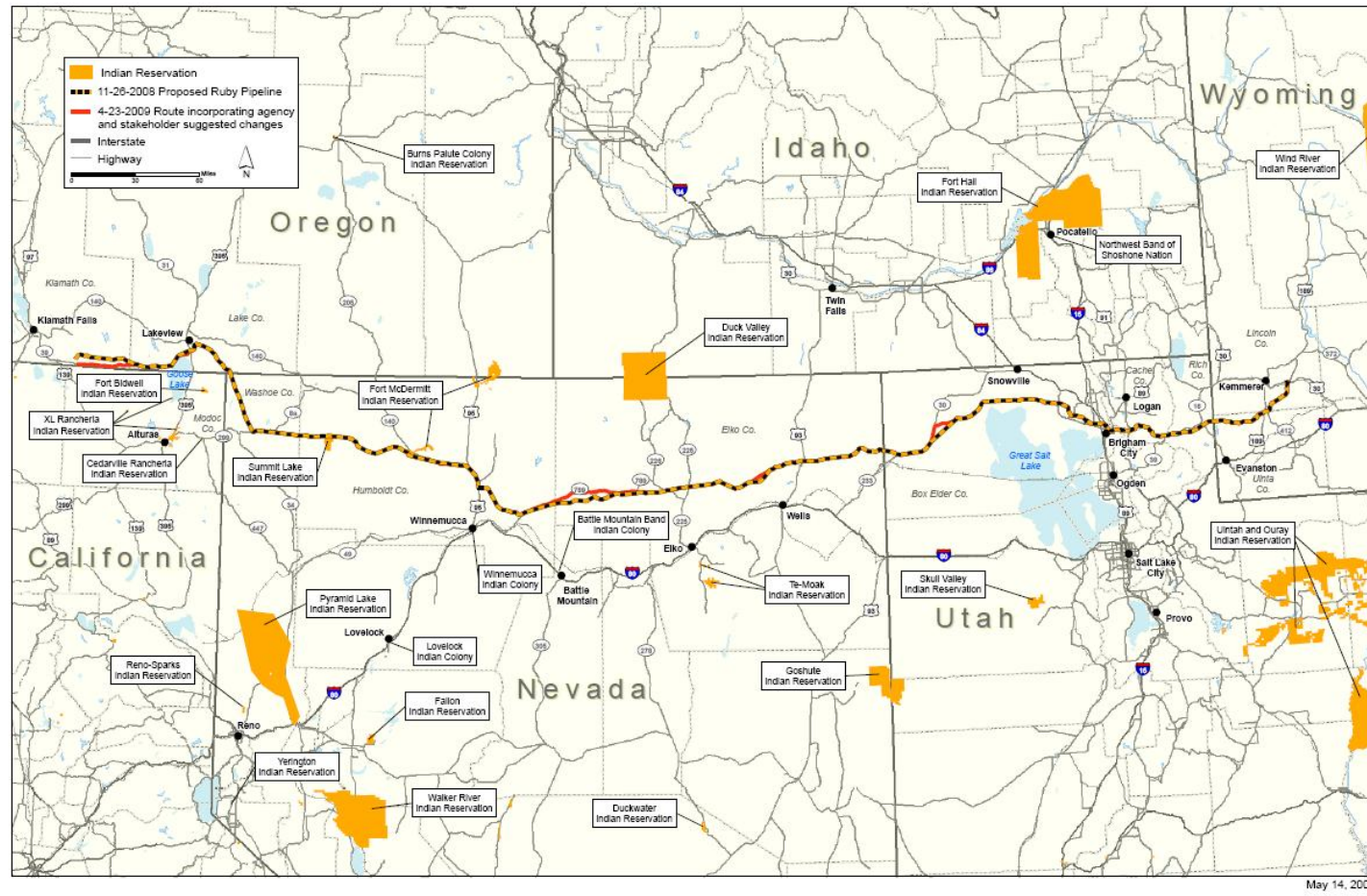


## TRIBAL CONSULTATION IS JUDICIALLY ENFORCEABLE

- **Result:** The nationwide enjoining of the BLM Fracking Rule due, in part, to federal regulators' apparent failure to consult meaningfully with tribes *before* the new rules were proposed and released to the general public.



# BEST PRACTICES: THE RUBY PIPELINE PROJECT



## **RUBY PIPELINE PROJECT**

- **Built, owned and operated by Colorado Interstate Gas (now part of Kinder Morgan).**
- **Entered service in 2011.**
- **680 miles of 42-inch - Opal, WY to Malin, OR.**
  - Links Rocky Mountain Gas w/ Western US Markets.
- **1.1 Bcf/d expandable to 2.0 Bcf/d.**
- **65% + Public Land.**
- **43 Indian Tribes identified for federal consultation.**

## **ROUTING TO ADDRESS TRIBAL CONCERNS**

- Proponents of the Ruby Pipeline modified its route 900 times in response to specific tribal cultural resource concerns.
- These reroutes cost the company approximately \$11 million but were later estimated to have saved \$250 million in avoided litigation and other delay costs.



**Reclaimed ROW, showing micro-realignment**



## **RUBY TRIBAL OUTREACH**

- Engaged in off-site mitigation projects with interested tribes, including funding for two tribally directed cultural resources center projects.
- Created the Ruby Pipeline Tribal Monitoring Program with more than 80 monitors. Also contracted with the Klamath Tribes for monitoring on traditional off-reservation lands of those tribes.
- Commissioned and funded ethnographic studies for interested tribes, which selected their preferred experts to help identify cultural resources.

## **RUBY TRIBAL MONITORS AT PIPE LOWERING**



## **RUBY TRIBAL OUTREACH**

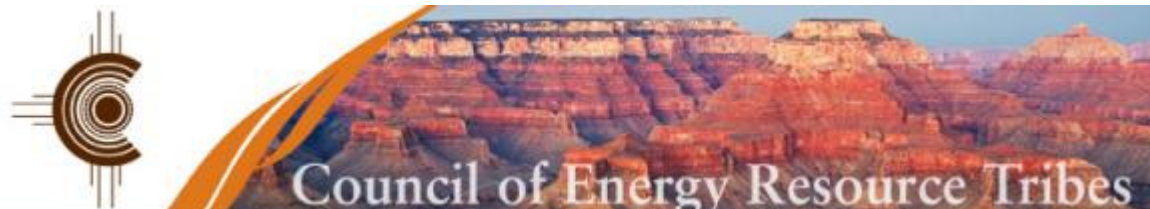
- Hosted specialized workshop on Tribal energy development free of charge to leaders from 40+ tribes.
- Recruited full-time Native American Tribal Liaison.
- Sponsored numerous tribal elder visits to areas of concern.
- Supported Tribal cultural resource internships for participating tribes.

Ruby engaged in seed-banking and supported greenhouses for preservation of culturally significant plants.



## RUBY TRIBAL EMPLOYMENT WORKSHOPS

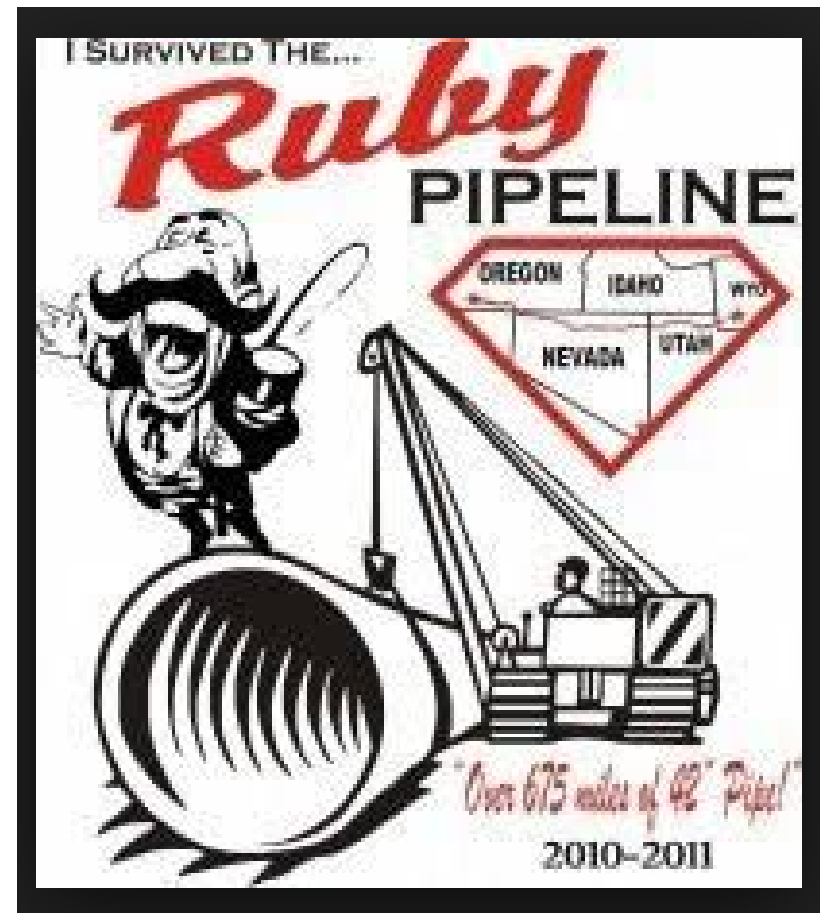
- Ruby Pipeline LLC and its construction contractors, in partnership with the Council of Energy Resource Tribes (CERT) – a non-profit coalition of 58 leading energy-producing Indian tribes and nations from the United States and Canada – conducted nine workshops in six states to encourage Native American employment.





## RUBY TRIBAL EMPLOYMENT WORKSHOPS

- More than 500 Native American tribal members attended these Ruby Tribal Employment Workshops, which focused on union and non-union positions.



*“El Paso Corporation has engaged in more and better Tribal outreach on the Ruby project than I have ever seen any energy company do in more than 30 years.”*

David Lester Executive Director Council  
of Energy Resource Tribes (2011)



# TREATING TRIBES AS GOVERNMENTS, NOT STAKEHOLDERS

## Possible Reforms

### 1) *Respecting Traditional Tribal Lands*

- Working with Tribal advocacy organizations, the energy industry could support legislation to map tribes' traditional aboriginal lands.
- Such legislation might provide a process for periodically updating these maps based on ongoing tribal consultation.



## TREATING TRIBES AS GOVERNMENTS, NOT STAKEHOLDERS Possible Reforms

- 2) Within these traditional areas, proposed energy projects would automatically trigger federal consultation with all interested tribes *prior* to finalizing pipeline routes.
- 3) Project proponents should consider funding affected tribes' project-related requests to retain their own ethnographic environmental and archaeological consultants and their own attorneys.

## **TREATING TRIBES AS GOVERNMENTS, NOT STAKEHOLDERS**

### **Possible Reforms**

- 4) If projects proceed, developers could fund tribal cultural resource monitoring programs for all tribes requesting them.
- 5) Monitors can be trained to work on the project from beginning – Class 1 literature reviews/ethnograph, Class 2 surveys for routing – through Class 3 construction into reclamation.
- 6) Federal regulations should be revised to encourage tribal curation of archeological resources removed from ROWs during Class 2 surveys.



## **TREATING TRIBES AS GOVERNMENTS, NOT STAKEHOLDERS** **Possible Reforms**

- 7) For older pipeline and other systems, companies seeking ROW renewals or modifications should provide funding to tribes to undertake cultural resource survey and preservation activities as requested.



## TREATING TRIBES AS GOVERNMENTS, NOT STAKEHOLDERS Possible Reforms

- 8) Indian trust and allotted lands frequently have expired rights of way for existing pipelines, transmission lines and other systems. **Sometimes companies are in trespass for years or decades with no effective resolution for either party.**

**Example:** The Hopi Tribe granted approval to Arizona Public Service in 1966 to run a 36-mile transmission line on Hopi trust land.

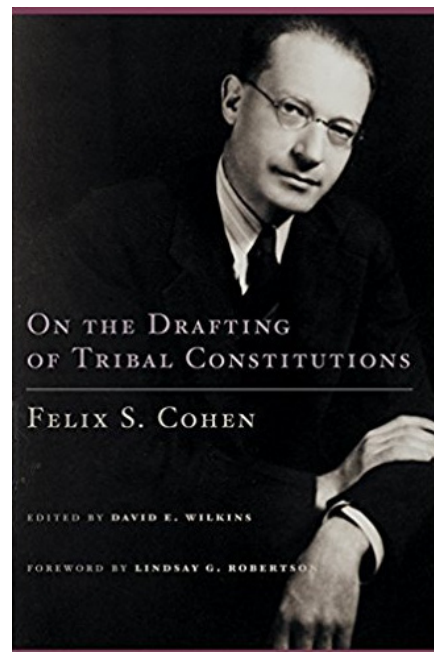


## **TREATING TRIBES AS GOVERNMENTS, NOT STAKEHOLDERS**

### **Possible Reforms**

- APS sought to renew the ROW in 1992 for roughly the same price plus inflation (\$24,000).
- The Tribe objected and APS was in trespass until November 2013, when APS paid more than \$20 million plus annual payments to settle the dispute and renew the ROW.
- Prior to ROWs expiring, companies should consider providing tribes with funding to retain valuation consultants and attorneys of their own choosing for the purpose of seeking the resolve ROW renewals through mediation. This Best Practice could be adopted prospectively for new ROW agreements.

“Like the miner’s canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.”



– Felix Cohen  
“The Erosion of Indian Rights,” Yale Law Journal (1953)



“They made us many promises, more than I can remember, but they kept only one; they promised to take our land, and they did.”

- Red Cloud (Mahpiua Luta)



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