

Beyond the Dakota Access Pipeline: Working effectively with Indian tribes on energy projects

Troy A. Eid

Troy A. Eid is an attorney and mediator with 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.

The Dakota Access Pipeline (DAPL) is changing how Indian tribes approach infrastructure projects, presenting new risks and opportunities for energy development. DAPL—a \$3.8 billion, 1,172-mile crude-oil pipeline—entered service last June after months of construction delays; it now moves half the total daily oil production of North Dakota through South Dakota, Iowa, and Illinois for distribution, refining, and export.

DAPL's opponents included more than 100 federally recognized tribes. Protest camps on and near the Standing Rock Sioux Reservation in North Dakota swelled to 10,000 people during summer 2016; 761 protestors were arrested. Tribal lawsuits did not prevent the pipeline from being built or change its route. Yet litigation, politicking, and on-the-ground resistance unexpectedly delayed the project's completion and cost DAPL's investors at least \$750 million. Proponents of similar energy projects should bear the lessons of DAPL in mind and encourage and facilitate robust tribal consultation to ensure the project's success.

DAPL's aftermath: Heightened tribal concerns

Post-DAPL, Native American tribes and advocacy groups are scrutinizing projects more closely than ever, including new infrastructure plus right-of-way renewals for existing pipelines:

- The Bad River Band of Lake Superior Chippewa Indians in Wisconsin in January 2017 refused to renew an easement for Enbridge Line 5, a 1,100-mile pipeline roughly the same capacity as DAPL that has delivered crude oil to the Midwest and Canada since 1953.
- A federal judge in March 2017 ordered Enable Midstream Partners, L.P. to abandon and remove its 20-inch natural gas pipeline, built in 1980, from an expired right-of-way on Indian allotted lands in Oklahoma in which the Kiowa Tribe has an ownership interest but refused to give its consent to an easement renewal.
- Responding to DAPL, the National Congress of American Indians, which advocates for all 567 federally recognized tribes, recently proposed requiring federal agencies to prepare an "Indian Trust Impact Statement" whenever agency action "may harm or threaten tribal lands, waters, treaty rights, or cultural resources" on and off-reservation. Such projects could only proceed if a compelling national interest outweighs tribal interests as determined by a federal Tribal Trust Compliance Officer.

Federal consultation policies give tribes more leverage

Indian tribes—the fourth sovereign recognized in the U.S. Constitution, along with states, the federal government, and foreign countries—are protected as “domestic dependent nations,” in the words of the U.S. Supreme Court, with the inherent power to “make their own laws and be ruled by them.” The term “tribal consultation” means the federal government’s responsibility to consult with tribes on a government-to-government basis whenever energy projects need federal approval on and off Indian reservation lands. President Barack Obama expanded the executive branch’s consultation policies to give tribes more say in decision-making, establishing detailed consultation requirements at the agency level. President Donald Trump has not yet issued any policies on tribal consultation, but those currently on the books remain.

As federal agencies have adopted more sweeping consultation guidelines, tribes are seeking to enforce them in the federal courts. This gives tribes more leverage to influence energy infrastructure projects.

The need for project proponents to support tribal consultation

Supporting the consultation process between federal and tribal officials (or states and tribes; new crude-oil pipelines, for instance, are permitted largely at the state level) has practical advantages for the energy industry. The more informed tribal officials’ understanding of a proposed project, the more effectively they can comment on that project as federal law requires. Whether tribes support or oppose a project, it is imperative that their concerns be considered by decision makers and documented for potential review by the courts.

It is critical that energy companies support tribal consultation. Indeed, under federal law, tribal consultation must be “meaningful” to stand up in court. Companies can strengthen the consultation process and increase the likelihood of their projects’ success by understanding the relevant agencies’ consultation policies. Most federal and state officials conscientiously approach their duties to tribes, but some do not. Companies should monitor the process and encourage individualized interaction with tribal officials—not group informational meetings, mass mailings, or unfocused “outreach” that are less likely to withstand judicial review.

Some project proponents—an interstate pipeline company and a public utility, to cite two recent examples—also support the process by providing financial and in-kind support so tribes can retain their own attorneys, engineers, and other experts to evaluate projects and engage in mediation when disputes arise. Such arrangements may take the form of confidential mitigation agreements between companies and tribes to supplement programmatic agreements among federal, state, and tribal officials. Funding agreements can benefit tribes and companies if structured and monitored to avoid any actual or perceived conflicts-of-interests.

Best practice: El Paso Corporation's Ruby Pipeline Project

An example of the energy industry's effective support of tribal consultation is the Ruby Pipeline Project (Ruby), a 700-mile interstate pipeline completed in 2011 that delivers natural gas produced in the Rockies Basin to the West Coast. As with DAPL, Ruby does not cross any Indian reservation lands but passes through former treaty and aboriginal lands of various tribes. The late David Lester, executive director of the Council of Energy Resource Tribes, a tribal advocacy organization, assisted Ruby's owner, El Paso Corporation (since acquired by Kinder Morgan), in strengthening tribes' ability to participate in tribal consultation. Prior to construction, Ruby entered into funding agreements that tribes used to retain their own attorneys and ethnographic experts to document and protect cultural resources for federal consultation purposes.

The tribes also worked with Ruby to create a tribal monitoring program, paid for by the company, which trained 100 tribal members to assist archaeological teams prior to, during, and after construction. At the tribes' request, the pipeline was rerouted—including more than 900 "micro-reroutes" to avoid culturally important sites—at a total cost of \$11 million. Traditional plants were harvested for seeds and preserved in greenhouses, then replanted post-construction in the reclaimed right of way. Ruby also worked with tribes to enhance tribal employment. Because skilled pipeline construction jobs typically require union membership, Ruby supported tribes' requests to pay union dues and apprenticeships for tribal members. A later internal review by the company found that such reroutes and tribal capacity-building measures saved the company at least \$250 million in avoided project delay costs from potential tribal litigation and protests.

Wherever and whenever it happens, managing the next Standing Rock controversy—better yet, mitigating or avoiding it—should be on every energy developer's agenda. Supporting tribal consultation is an effective way for the energy industry to manage business risk in post-DAPL America.