

Tribal Land Rights: Snapshots on Dakota Access Pipeline Controversy

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Introduction

Indigenous communities all over the world are involved in various environmental justice controversies that have significant negative impacts upon the life, culture and environment of the tribal people. Dakota Access Pipeline in the U.S. is a recent controversy that focuses on the tribal people's right to land. The whole controversy revolves around building a pipeline to deliver crude oil to four states from North Dakota's Bakken Shale fields. Energy Transfer Partners LP applied for the project and it was cleared unanimously after year-long public hearings in the State. But the project was strongly opposed by the Native tribes. On July 27, 2014, the Standing Rock Sioux Tribe sued the U.S. Army Corps of Engineers responsible for the construction of the pipeline in the U.S. District Court of the District of Columbia. This short commentary attempts the arguments and reasonings of the case to appreciate the increasing relevance of the tribal community rights in the contemporary world.

Standing Rock Sioux Tribe Case

The controversy began when the US Army Corps of the Engineers, an agency of the United States government approved DAPL's permits to construct 1168-mile-long DAPL unanimously on January 2016 adjacent to the Tribe's reservation.¹ The decision pronounced by James E. Boasberg was a remarkable one, since it recognized certain legal rights of the Tribe and revealed certain legal flaws of the Army Corps that permit process for the DAPL. The rights of the Tribe were premised upon certain Statutes such as National Environmental Policy Act (hereinafter NEPA). The first section outlines the facts of the case and discusses the court's decision. The second section focusses on an explanation of how the case relates to the material we are currently studying in Federal Indian Law. The third and final part explains how the case may be used in actual Federal Indian Law practice.

Arguments in the Case

The Tribe complained that the decision of the Corps to build DAPL has a devastating impact on their culturally significant and sacred site Lake Oahe.² The Tribe complained that the operation of DAPL over their ancestral land would thwart their sacred land, subsistence and economic well-being.³ The Tribe sought a summary judgement on vacating the existing authorizations, easement, EA and FONSI.⁴ The Tribe furthermore challenged the Administrative Procedure Act under which the federal court may declare agency action arbitrary and capricious and abuse of discretion.⁵

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¹ Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 239 F. Supp. 3d 77 (D.D.C. 2017) at pp. 2-3.

² *Id.* at pp. 2-3.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at p.5.

The Army Corps in their response argued that the easement and authorizations have no significant impacts upon environment.⁶ They also claimed that the Corps considered the six alternatives and rejected as well and finally published the Environmental Assessment (EA) and Finding Of No Significant Impact (FONSI).⁷ The Corps added that they considered steps to minimize oil-spill risks such as Leak Detection System, inspection and testing programs etc.⁸ The Corps further contended that the EA adequately considered tribal rights and environmental justice concerns.⁹

Decision against Three Claims of the Tribe

The Tribe sought summary judgement on their three claims: a) the Corps findings that Oahe crossing did not warrant an Environmental Impact Statement (EIS) violated NEPA, b) the Corps February 8, 2017 decision to grant easement was arbitrary, capricious and contrary to law, because the decision of the corps constituted a breach of trust, c) the Corps wrongfully concluded on July 25, 2016 that the pipeline activities satisfied the terms and conditions of Nationwide Permit (NWP) 12.¹⁰

In addressing *the first claim*, the court analyzed the ‘hard look requirement’ as contemplated in NEPA that demands a rigorous EIS based on public health, safety, highly controversial or uncertain environmental effects and loss of significant cultural resources.¹¹ The court took a limited approach in analyzing the factors covered in EA such as slow leaks in the HDD bore, land slide.¹² The Court found the EIS of the corps inadequate and inappropriate such as failure to identify key pollutants, overstatement of flows that dilute likely pollutant impacts etc.¹³ The court, in fact, did not engage itself to analyze contentions and evidences after February 8, 2017.¹⁴ The court ultimately agreed with the risks of oil-spills as per EA which is slow (EA at 92) due to the 92 feet lakebed positioning of the pipeline.¹⁵ The court significantly noted and agreed with the Tribe’s finding that the Corps did not adequately consider the consequence of risks of oil-spills. The court was unwilling to deeply analyze the devastating impact of pipeline on cultural resources and hence concluded that it did not find any substantial methodological or data flaws in the corps analysis.¹⁶ In addition, the court did not consider the argument put forward by the Tribe regarding the cumulative risk imposed by pipeline.¹⁷

In answer to the *second question* whether the corps adequately assess treaty-rights including evaluated project’s impact on hunting and fishing rights, the court set a lower threshold and concluded that NEPA requires the agency to adequately analyze impacts on the resource covered by a given treaty.¹⁸ However, the court found the existing analysis on

⁶*Id* at 6-7.

⁷*Id* at p. 14.

⁸*Id*.

⁹*Id* at pp. 25-30.

¹⁰*Id* at p. 21.

¹¹*Id*.

¹²*Id* at pp. 12-13.

¹³*Id* at p. 14 (citing EarthFax Report at 5-7).

¹⁴*Id*.

¹⁵*Id*.

¹⁶*Id*.

¹⁷*Id* at p. 23.

¹⁸*Id* at p. 64.

construction-of- DAPL-impacts adequate.¹⁹ Regarding the spill-impacts, the court agreed in part with the Tribe's contention that EA never examined the impacts of oil-spills on the Tribe and its treaty-rights.²⁰ The court acknowledged the minimal risk of oil-spill on water but not on hunting or aquatic.²¹ Hence, the court found that the corps did not totally ignore the effects of oil-spill. The court, while addressing the second claim, recognized that the corps were not entirely responsible for environmental concerns of the Tribe.²² The court discovered the analysis of construction-impacts of DAPL as found place in EA inadequate.²³ The court reasoned that the corps could not properly assess the environmental justice implications of the project and was failed to take a hard look on environmental impacts.²⁴ Moreover, the court denied the Tribe's contention that the corps violated trust-responsibilities on the ground that the Tribe has not identified a provision that the corps infringed.²⁵

In response to the *third claim*, the court rejected the argument that the NWP was arbitrary, capricious and abuse of discretion, because the corps verified the terms and conditions of NWP 12 e.g. treaty rights and environmental justice considerations.²⁶ The court held that the Corp's decision on July 25, 2016 not to issue EIS largely complied with NEPA.²⁷ Here, the Court's finding was not absolute since it found substantial exceptions to which the corps did not abide by NEPA.²⁸ For example, the agency failed to adequately consider the impacts of an oil spill on Tribe's fishing and hunting rights and on environmental justice.²⁹ Thus, the court held that the Army Corps' permits were legal in some respects and illegal in others.

Relevance of the Federal Indian Law

The DAPL crosses very nearthrough the Treaty lands and waters (Lake Oahe) of the Tribe in South Dakota. The Fort Laramie Treaty of 1868 and subsequent treaties established undisturbed use and possession of the reservation of the Tribe. The current action of DAPL would thwart the existing property rights of the Tribe.³⁰ Federal Government has trust responsibilities to protect the tribal rights, resources and interests from unlawful interference, environmental threat and other disastrous impacts of the DAPL. Even, the low chance of oil-spill in the Lake Oahe may cause injury to the sacred site, culture, well-being and economic development.

Since Federal Indian Law implicates with other branches of legal study such as constitutional law, administrative law and federal jurisdiction, NEPA has application on Indian country and reservations.³¹ NEPA requires that federal agencies "take a 'hard look' at the environmental consequences before taking action." NEPA requires agencies to

¹⁹*Id.*

²⁰*Id.* at p. 54-55.

²¹*Id.*

²²*Id.* at p. 53.

²³*Id.* at p. 53.

²⁴*Id.*

²⁵*Id.* at 63.

²⁶*Id.* at pp.63-66.

²⁷*Id.* at p. 66.

²⁸*Id.* at p.66.

²⁹*Id.*

³⁰*Id.*

³¹ NEPA, 42 U.S.C. §§ 4321-4370f.

disclose all potential adverse environmental impacts of its decisions before deciding to proceed³², and requires agencies to use accurate information and to ensure the integrity of the analysis.³³If there is any agency action that is accompanied by significant adverse environmental impacts, NEPA imposes obligation of the agency to prepare an EIS.³⁴The existing summary judgement is a glaring example where the court declared the corps' environmental concerns in EA inadequate.

The Tribe came across significant challenges on their tribal land and its far-reaching impact on the environment. A hydrocarbon transport project in a right of way corridor may be an economically viable method for energy resources. But from legal perspective, such a project poses significant risks to the use and enjoyment of tribal land and sacred sites.³⁵ Still, the case is a good piece of work to assess construction-impacts in tribal land as per NEPA.

Tribal Rights Paradigm in Environmental Laws

Due to federal right of way in reservation, the property rights of the Tribe are declined as well as complicated gradually.³⁶The case involving the Dakota Access Pipeline (DAPL) has raised some legal issues and political concerns for environmental and indigenous rights. Hydrocarbon transport infrastructure projects on tribal lands encounter various hurdles. Professor Elizabeth Kronk Warner points out that the lack of necessary infrastructure, the burdensome lease and siting review process, and the lack of adequate financial incentives on Indian lands prevent full-scale deployment of alternative energy.³⁷

The State Department invited eighty-four tribes to consult on the amended PA, of which thirty-five participated.' The State Department held government-to-government consultation meetings in October 2012 to discuss the Native American role in the consultation process. An additional government-to-government meeting was held in May 2013 to "update Indian tribes concerning the Draft Supplemental EIS and the proposed Project, status of the Section 106 consultation process, [and] discussion on amending the PA.," "This meeting was followed up with a government-to-government conference call in July 2013, to discuss amending the PA. The majority of the consultation process took place through letters, emails and phone calls; and only two in-person meetings were held during the second consultation process.

Regarding tribal concerns of the projects non-cultural impacts, such as environmental impacts, and the tribal consultation processes, the State Department "gathered these issues and concerns and evaluated opportunities to address them as part of the tribal consultation and cultural resources process." The State Department asked all participating tribes to sign the Programmatic Agreement, as an indication that the Department had fulfilled its consultation duties.

³²42 U.S.C. § 4332(2)(C).

³³ 40 C.F.R. §§ 1500.1(b), 1502.24.

³⁴ See 40 C.F.R. § 1501.4.

³⁵ Alina Yohannan, *The Standing Rock Sioux Indians: An Inconvenience for the Black Gold*, 6 U. Balt. J. Land & Dev. 19 (2016).

³⁶ 25 C.F.R. part 169. See Russel L. Barsh, *Grounded Visions: Native American Conceptions of Landscapes and Ceremony*, 13 ST. THOMAS L. REV. 127, 137-41 (2000).

³⁷ Elizabeth Ann Kronk Warner, *Alternative Energy Development in Indian Country: Lighting the Way for the Seventh Generation*, 46 IDAHO L. REV. 449, 467-68 (2010).

The State Department's tribal consultation process took place only within the boundaries of a NHPA section 106 consultation, with a focus on identifying and mitigating harms to possibly affected historical property. The tribes of the Sioux Nation were never directly consulted regarding other possible concerns, including the fact that the proposed Keystone XL Pipeline would run directly through their treaty lands. The consultation process was not presented as one in which affected Native Americans could weigh in on the project's approval or implementation, but one where the project route was presented as more or less fixed, and consultation discussions focused solely on mitigating its probable negative effects to historical objects.

According to Faith Spotted Eagle, tribal elder of the Yankton Sioux (who participated in the State Department consultation process), "consultation is not concluded. In fact, it has [sic] not even started with General Council They say that an e-mail to a tribe counts as consultation, or a phone call [does], but that isn't meaningful consultation. They need to talk to tribal council."³⁸

There has been controversy surrounding the PA's cultural preservation survey statistics. In one instance, the Department of State wrongly specified that the Yankton Sioux had performed these evaluations, when in fact, they had not. Tribes who took part in State Department consultations, such as the Rosebud Sioux, have gone as far as passing tribal council resolutions stating that the tribe "objects to and refuses to sign" the PA; seeing the PA as an insincere attempt on behalf of the U.S. government to comply with its tribal consultation requirements.³⁹

Conclusion

The controversy has a far-reaching implication on tribal environmental sovereignty that the US, specifically federal government has a duty to protect. The recent DAPL case poses a serious threat to cultural resources of the Tribe. The trend of unconventional oil and gas trajectory may result in permanent cultural losses.⁴⁰ The federal government must make a proper balance between tribal sovereignty and US economic and expansionist ambitions. Doing so is not only environmentally and ecologically sound, but justice and fairness require such integrity in resource management.⁴¹ The tribal people's connection with land is a source of spiritual origins for them. The importance of land turns for them from mere subsistence to cultural and emotional imports. The 'best interest of tribe' lies in the protection and preservation of their ancestral and sacred land from unconventional oil and gas operations and the federal government has a sacred and legal duty to protect the land from devastating environmental effects and intrusion.

³⁸ See Alexander Sammon, *A History of Native Americans Protesting the Dakota Access Pipeline*, Mother Jones (Sept. 9, 2016).

³⁹ Nadia B. Ahmad (FNd1), *Trust or Bust: Complications with Tribal Trust Obligations and Environmental Sovereignty*, 41 Vt. L. Rev. 799, 842 (2017).

⁴⁰ See Hillary M. Hoffmann, *Fracking the Sacred: Resolving the Tension Between Unconventional Oil and Gas Development and Tribal Cultural Resources*, 94 Denv. L. Rev. 319 (2017).

⁴¹ Nadia B. Ahmad (FNd1), *supra* note 39.