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Federal Intervention in Dakota Access Pipeline Project Focuses on Tribal Consultation Process

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A dramatic and surprising turn of events on Friday, September 9, 2016 created significant uncertainty for the Dakota Access Pipeline Project (Dakota Access), and may have shifted the landscape for other infrastructure projects involving National Historic Preservation Act (NHPA) Section 106 tribal consultations. On Friday afternoon, U.S. District Court Judge James E. Boasberg issued a 58-page Memorandum Opinion (Opinion) denying the Standing Rock Sioux Tribe's motion for preliminary injunction filed against the U.S. Army Corps of Engineers (Corps). That motion challenged whether the Corps complied with NHPA Section 106 consultation requirements in connection with a July 25, 2016 verification letter permitting Dakota Access to engage in certain construction activities associated with the crossing of Lake Oahe, North Dakota pursuant to the Clean Water Act (CWA) Section 404 nationwide general permit 12 (NWP 12).

NWP 12 generally allows a pipeline or other linear utility project to discharge dredged or fill materials into the waters of the United States, subject to certain limits, without having to obtain a project-specific permit. Certain General Conditions associated with NWP 12 require some discrete projects to obtain additional verification, as was the case for the Dakota Access Lake Oahe crossing. This additional verification triggers NHPA's Section 106 requirements.

The locus of the dispute is Lake Oahe, a dammed section of the Missouri River built and managed by the Corps and located one-half mile upstream of the Standing Rock Reservation on the Tribe's ancestral lands. The Lake not only serves as the Tribe's water source but the Lake Oahe Dam and Reservoir was built on lands taken from the Tribe in 1958 and the area continues to have cultural and religious significance for the Tribe.

Within less than an hour of the Court's denial of the preliminary injunction and the presumed recommencement of full construction on the Dakota Access project, the Departments of Justice, the Army (Army), and Interior released a Joint Statement regarding the Opinion (Joint Statement). The Joint Statement revealed that, despite the Opinion denying the preliminary injunction, the Army would not authorize construction of Dakota Access on Corps land bordering or under Lake Oahe until it could determine whether it needed to reconsider prior decisions regarding the Lake Oahe site under "the National Environmental Policy Act (NEPA) or other federal laws." Although the Motion for preliminary injunction only challenged the scope of the Corps' authority (and the fulfillment of its related NHPA obligations) under the Nationwide Permit scheme, the Joint Statement presages a larger reconsideration effort that will include NEPA. Presumably, this reconsideration is pursuant to the Corps' authority to voluntarily reconsider environmental determinations (including a Finding of No Significant Impact) under NEPA, as well as its discretionary authority to remove, modify, or suspend a verification. However, the Joint Statement contains no indication of the authorities the Corps will rely on, or the specific process it will undertake.

Effect of the Joint Statement

The highly unusual Joint Statement puts the Lake Oahe crossing of Dakota Access on hold but, as the Opinion found, it is unclear what might be altered on this singular crossing when more than half of the pipeline construction is complete, including on lands east and west of the crossing. The Joint Statement provides no timeline for any Corps action related to the Dakota Access project. It provides only that the agencies will "move expeditiously to make this determination, as everyone involved – including the

pipeline company and its workers – deserves a clear and timely resolution." In addition to precluding construction on Lake Oahe, the Joint Statement asks Dakota Access to voluntarily pause all construction activity within a 20-mile radius of Lake Oahe – including activities on lands that are not subject to the Corps' jurisdiction – while the Corps makes a determination.

The Joint Statement also alludes to the potential for much larger changes to the consultation process, which could affect all infrastructure projects with a federal nexus. According to the Joint Statement, Dakota Access highlighted the need for a broad, nationwide dialogue on potential reforms, including: (a) changing existing regulations and procedures to better ensure meaningful tribal input and protection; and/or (b) proposing a new statutory framework to promote those goals. The implication of the Joint Statement is that tribes should have more meaningful input into the permitting of infrastructure projects. To review these considerations, the Departments will undertake government-to-government consultation with tribes "this fall." While there is no elaboration as to specific timing, a forum for discussion could be the National Congress for American Indians annual convention in October or other regional events. Thus, regardless of the outcome of Dakota Access's immediate permitting, any existing or future infrastructure project subject tribal consultation should be aware of the potential for regulatory or statutory overhaul of the process.

The Current Requirements of Tribal Consultation under Section 106

Section 106 of the NHPA requires federal agencies to consider the effects of their "undertakings" on historic properties, which includes property of cultural or religious significance to Indian tribes and related consultation. Under the NHPA, an undertaking is broadly defined as any project, activity, or program that requires a federal permit. For oil pipelines this means that only certain portions of the project are subject to consultation when there is a federal nexus, such as a federal permit requirement, exempting the majority of construction activities occurring on private lands from NHPA oversight. This differs from interstate natural gas pipelines, which are wholly overseen and permitted by the Federal Energy Regulatory Commission. Thus, while the entire length of a gas pipeline would be subject to the NHPA, an oil pipeline is only subject to the Section 106 process for those activities that require a federal action. In the case of Dakota Access, Section 106 was triggered when it applied for CWA and Rivers and Harbors Act (RHA) authorizations from the Corps to dredge, fill, and cross certain water bodies, including Lake Oahe. In terms of the overall project, the Opinion noted that the Corps' Section 106 review was very limited and did not extend to the 97% of the pipeline that was not subject to federal permitting. For the 3% of Dakota Access that crossed federal lands and waters and was subject to additional permitting beyond the NWP, the Corps was required to comply with Section 106's requirements.

Section 106 tribal consultation requirements are defined by regulations promulgated by the Advisory Council on Historic Protection (ACHP), which oversees the implementation of the NHPA. In general, under the ACHP's regulations, tribes must have a reasonable opportunity to identify concerns about affected properties and to advise on the identification and evaluation of these properties vis-à-vis the undertaking. To accomplish this, the permitting agency must determine the appropriate State Historic Preservation Office (SHPO) and Tribal Historic Preservation Office (THPO) on tribal lands, initiate consultation with the appropriate SHPO and THPO officers, and identify potential historic properties (including their historic significance) within the area of potential effects for the undertaking. The permitting agency's evaluation must consider whether the undertaking will indirectly cause alterations in the character or use of historic properties if any such properties exist. Ultimately the permitting agency will find and document that: (a) there are no historic properties present; (b) there are historic properties present but the undertaking will have no effect upon them; or (c) there are historic properties that likely will be adversely effected and the agency may engage in additional consultation or impose modification or conditions on the project to ensure no remaining adverse effects. After the permitting agency's finding, the SHPO/THPO has thirty days to object, otherwise the NHPA consultation process is deemed complete.

Thus, the NHPA, like NEPA, is a procedural statute, not a substantive one. This means that it does not require any particular outcome. While Section 106 requires consultation, it does not mandate that the permitting agency take any particular steps to preserve or protect an identified interest. Nor does

Section 106 require tribal involvement in the planning or siting of infrastructure projects – only a consideration of identified tribal interests in the final approvals. This layered complexity is apparent in Judge Boasberg's Opinion. The Opinion describes numerous consultations and attempts at consultations between the Corps, Dakota Access, and the Tribe between the summer of 2014, when Dakota Access first crafted its route, to the summer of 2016 when the Corps issued Dakota Access its CWA and RHA verifications and authorizations. While the Court expressed discomfort with the potential effect of the project on the cultural resources of the Tribe (especially in light of the Tribe's historical relationship with land surrounding and under Lake Oahe), the Opinion noted that procedurally the Corps likely complied with its consulting requirements and that the preliminary injunctive relief requested would be ineffective in thwarting the claimed injury on non-federal lands.

Dilemmas in the Tribal Consultation Process

The Opinion determined that the Corps gave the Tribe a reasonable and good-faith opportunity to identify important cultural sites along the Dakota Access project's path. However, as the Opinion and the overall experience of Dakota Access highlight, the tribal consultation process is rife with potential pitfalls that thwart predictability for major infrastructure projects. Underscored are the contentious and sometimes adversarial relationships between the Corps, project proponents, and tribes on matters of cultural significance for tribal communities. This tension is worsened due to the overlapping jurisdiction of various state and federal agencies, the tacit burden placed on project proponents to extend consultation beyond regulatory requirements, and the inability of tribes to adequately participate.

The conflicting perspectives involved in the process are evident in the protest currently surrounding the Dakota Access project. More than 4,000 protestors currently are encamped and vowing to remain on land abutting the project's path in North Dakota, which they have deemed the "Sacred Stone Camp." While Dakota Access diligently secured all appropriate state and federal approvals, opposition within the Standing Rock community grew. In April, even before the July approval by the Corps, a few Standing Rock citizens began to gather in opposition to the pipeline. But what started as a small single-tribe protest has grown into a movement, encompassing all of Indian Country, with over 200 tribes represented at the Sacred Stone Camp. The extent and magnitude of the protest appears to have swayed the federal government's response in the Joint Statement, which offers full support for "the rights of all Americans to assemble and speak freely." The Joint Statement itself was likely, at least in part, the product of concerns regarding further clashes between the tribal protestors and Dakota Access.

Overall, what the Opinion and Joint Statement make clear is that even if its consultation efforts exceed the legal requirements, a project proponent may be unable to ensure unhindered completion. Which begs the question: what type and quality of consultation is enough?

The Future of Dakota Access and Tribal Consultation

The Tribe has appealed the Preliminary Injunction denial and the underlying complaint proceeding it initiated against the Corps remains pending. Meanwhile, Dakota Access has volunteered to refrain from construction activity in the area around Lake Oahe through Friday, September 16, 2016 and Judge Boasberg reinstated a temporary restraining order concerning construction activities until a status conference can be held on that date.

While this process continues before the district and appellate courts, the questions of how much and what kind of consultation is enough remains unanswered. As Friday's Opinion noted, it was apparent that, despite the parties' efforts, the consultation process would not result in an outcome that satisfied all sides. Additionally – although the Opinion highlights the complexities and varying interests surrounding the regulatory requirements for permitting a water body crossing – it ultimately found that the Corps' tribal consultation efforts likely were sufficient to comply with NHPA. And yet, moments after the Opinion issued, the Joint Statement was released, presumably nullifying the previous permitting process and reopening the environmental and cultural review of the Lake Oahe crossing.

For all stakeholders involved, the Opinion and Joint Statement create uncomfortable uncertainty. For project proponents, this result is troubling because Dakota Access worked diligently in the planning

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stages to site the project to avoid to the greatest extent possible federal lands and sites of cultural and historical significance; it collaborated with the Corps to ensure that legally sufficient consultation occurred; and as a result, in July 2016, it received federal authorizations for construction that the Corps may now attempt to rescind in light of the Joint Statement. For the Tribe, it is now in the position of opposing a pipeline that, at the time of the Opinion on Friday, is largely complete – with a significant portion of the pipeline already cleared, graded, trenched, piped, backfilled, and reclaimed. It is unclear what amount of consultation conducted at this point can lead to adequate mediation.

The fate of tribal consultation requirements more generally also remains unclear. Tribal consultation is a significant undertaking mandated for all federal actions, including any project requiring federal permitting and approval. The particular process required differs depending on the statutory regime, the permitting agency, and even the type of project. With this much variation, the potential for change is extensive. As emphasized by the Joint Statement, alterations could include a strengthening of the requirements of consultation within the existing, numerous regulatory frameworks or the proposal of entirely new legislation creating a singular process. The government-to-government consultation sessions held this fall may expose a system and process that limits tribal involvement with tribes feeling disadvantaged in terms of their ability to effectively participate and protect sacred sites. And it is unknown how the federal government might seek to resolve this issue. The only thing that is sure is that the tribal consultation process will likely see significant changes as a result.

For more information

The firm's unique expertise in project permitting and Native Affairs allows our professionals to provide clients the type of specialized and practical counseling required in the wake of this proceeding. For further information, Contact Emily Pitlick Mallen at 202.298.1859 or erp@vnf.com, or Maranda Compton at 202.298.1806 or mcompton@vnf.com or any member of the firm's Pipeline & LNG or Native Affairs practices.

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