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## Tribes May Have More Say In Projects After Dakota Pipeline

Share us on: By **Andrew Westney**

Law360, New York (September 12, 2016, 11:02 PM ET) -- The Obama administration's recent construction freeze on part of the controversial Dakota Access pipeline and promise to rethink how Native American tribes are consulted may lead to tribes getting not only more opportunity to voice concerns but also the power to determine how, or even if, infrastructure projects affecting their rights are allowed to proceed.

On Friday, the government said it would [put a hold on pipeline construction](#) at a disputed site in North Dakota while it re-examines the [U.S. Army Corps of Engineers'](#) permits for the project, moving quickly to counteract a federal judge's denial of an injunction to the Standing Rock Sioux tribe. But the government took a potentially farther-reaching step, too, calling for talks this fall on whether there should be "nationwide reform" of how tribes weigh in on infrastructure reviews.

That move follows from the Obama administration's ever-increasing commitment to make sure the government hears what tribes have to say and may show the government's ready to go beyond procedural protections by empowering tribes — potentially through changes to the National Historic Preservation Act, the National Environmental Policy Act or other federal laws — to change projects that threaten their sacred lands or waters, according to [Greenberg Traurig LLP](#) shareholder Troy A. Eid.

"Tribes don't just want to have a seat at the table. They want the right to modify a project or if there's no modification, to have a veto. They want a substantive right," Eid said.

The Army Corps defeated the Standing Rock Sioux tribe's bid to block construction for the \$3.8 billion crude oil pipeline around waters near the tribe's reservation when U.S. District Judge James E.

Boasberg ruled Friday that the Corps had "likely complied" with its duty to consult with the tribe over potential damage to sacred sites under the NHPA.

The ruling appeared to be correct, according to [Hogan Lovells](#) partner Scot Anderson, as under the NHPA, Dakota Access "went above and beyond legal requirements" to survey lands where construction was to take place and consult with the tribe.

"But there's a lingering tension between how tribes view the process and what federal agencies and private companies think is adequate consultation," Anderson said.

The [U.S. Department of Justice](#), the Army and the [Department of the Interior](#) appeared to address that tension — as well as the potential for conflict among protesters, workers and law enforcement — when they announced shortly after the ruling that they wouldn't authorize pipeline construction on the Corps' land near or under Lake Oahe in North Dakota while they decide whether to revisit the permitting decisions under the National Environmental Policy Act or other federal laws.

That's an expensive setback for the pipeline's developer, as it won't be able to transport oil for longer and is racking up costs while construction crews sit idle, attorneys say.

Yet the most important long-term effect of the Dakota Access controversy may be the Obama administration's invitation to tribes to participate in formal government-to-government consultations in the fall to address whether the government can do more within its consultation process to make sure tribes have meaningful input into infrastructure reviews and decisions, or whether legislation should be proposed to change that setup, experts say.

Clarification on how tribal consultation should work — particularly making sure that tribal policymakers are involved rather than just administrative agencies — would benefit tribes and developers alike, according to Anderson.

But if tribes can't hold companies or agencies accountable for what's revealed in consultation, "then it's really a right without a remedy," according to [Holland & Knight LLP](#) partner James T. Meggesto.

With its call for reform, the Obama administration is "taking a very important first step in examining whether the current legal framework is enough to address the concerns raised by Indian tribes," Meggesto said.

Since he took office, President Barack Obama has continued to strengthen the requirements for federal consultation with tribes, according to Eid. Now, the administration's broaching of potential new legislation holds the promise of according tribes' rights to alter or block infrastructure projects during the federal government's reviews, he said.

The government's singling out of NEPA as a basis to reconsider the Dakota Access project is "part of a trend that this administration has been chasing to use the NEPA process to try to manage energy development," according to Anderson.

Potential changes to NEPA to give tribes more power could include requiring a deeper look at a tribe's cultural concerns around water, as well as its strictly environmental concerns, Eid said. And the NHPA and the Endangered Species Act could also see changes to boost tribes' influence, he said.

"If you're talking about potential substantive powers tribes could have, you're talking about several groups of statutes," Eid said.

The administration is now in "new territory" regarding tribal rights under these federal laws, and that could lead to "some very interesting separation of powers issues," he added.

The federal agencies said they will move quickly to determine if the government needs to reweigh its permitting decisions. But having taken such a bold step, the government is likely to follow through with further review, attorneys say.

[Standing Rock Sioux Tribe](#) is represented by Patti A. Goldman, Jan E. Hasselman and Stephanie Tsosie of [Earthjustice](#).

Dakota Access LLC is represented by Kimberly H. Caine, William J. Leone and Robert D. Comer of [Norton Rose Fulbright](#) and Edward V. A. Kussy, Rob Thornton and Alan M. Glen of [Nossaman LLP](#).

[Cheyenne River Sioux Tribe](#) is represented by Conly J. Schulte and Nicole E. Ducheneaux of [Fredericks Peebles & Morgan LLP](#).

The case is Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, case number [1:16-cv-01534](#), in the U.S. District Court for the District of Columbia.

--Editing by Christine Chun and Catherine Sum.

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