

Obama Administration Seeks Tribal Input on Federal Infrastructure Decisions, Dakota Access Litigation Continues

Article By:

Maranda S. Compton

On Friday, September 23, the **Department of the Interior** (Interior), **Bureau of Indian Affairs** (BIA), in conjunction with the **Department of Justice** (DOJ) and the Department of the Army (Army), released a “Dear Tribal Leader” letter (Letter) that initiated a government-to-government consultation seeking “Tribal Input on Federal Infrastructure Decisions.” The consultations will begin October 11, 2016 and proceed along an extraordinarily compressed schedule, with a total of seven sessions completed by November 21, 2016, all in cities in the western U.S., and one by teleconference. The Letter invites representatives of 562 federally-recognized tribes to participate in the consultation sessions, and refers to the consultation schedule as appropriately “aggressive...given the importance and urgency of the issues.” The first consultation session will occur at the National Congress of American Indians Annual Meeting in Phoenix, Arizona.

The consultation sessions will focus on two questions raised in the September 9, 2016 Joint Statement of the Departments of the Interior and Justice and the Army (Joint Statement): (1) how federal agencies can better ensure meaningful tribal input into infrastructure-related reviews and decisions, to protect tribal lands, resources, and treaty rights, within the existing statutory framework, and; (2) whether Federal agencies should propose new legislation to change the statutory framework to promote these goals. The Letter stated that Interior, DOJ, and Army plan to provide a framing paper with additional detail, including a description of the statutory framework currently in place, prior to the initial meeting on October 11.

The Joint Statement that gave rise to the consultation process was released moments after a judge in the U.S. District Court for the District of Columbia (District Court) denied the Standing Rock Sioux Tribe’s (Tribe) Motion for Preliminary Injunction to enjoin construction of the Dakota Access Pipeline Project (Dakota Access). The judge’s denial of the Tribe’s motion is pending before the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), and construction activity on lands adjacent to the Tribe’s reservation remains stayed. Oral arguments on the merits of the underlying injunction are scheduled for October 5, 2016. For more background on the Joint Statement and pending litigation, see the [Alert published on September 13, 2016](#).

Government-to-Government Consultation and the Potential for Regulatory and Statutory Changes

The government-to-government consultations that will occur over the next two months are the type of activity that the federal government is required to engage in prior to proposing certain regulatory or legislative changes. Due to the unique legal relationship between tribal governments and the U.S. and in accordance with EO 13175, federal agencies must seek and ensure “meaningful and timely input by tribal officials” prior to the implementation of any federal policies with tribal implications – including regulations, legislative comments or proposed legislation.

In observance of this directive, the Letter stated that “Tribal Nations’ voices must be heard, in a timely and meaningful way, with regard to Federal decisions that could affect their treaties, homelands, environment, cultural properties, and sacred sites.” Accordingly, the Letter also seeks input on how Interior, DOJ, and Army “and the Federal Government as a whole, can improve Federal decision-making processes that affect Tribal lands, resources, and treaty rights to ensure that those decisions are fully consistent with our obligations to Tribal Nations.”

The U.S. Army Corps of Engineers’ Review of Dakota Access’s Permits – Unclear and Ongoing

In addition to the broader consultation on infrastructure decisions, the Army, Interior and DOJ issued a Joint Statement announcing that the U.S. Army Corps of Engineers (Corps) would not authorize any further Dakota Access construction on Corps land bordering or under Lake Oahe pending a review as to whether the Corps will need to reconsider any of its prior decisions regarding Dakota Access under the National Environmental Policy Act (NEPA) or other federal laws. At this time, the Corps has not revoked or modified any of Dakota Access’s existing permits or authorizations. In documents filed with the D.C. Circuit, the Corps explained that it has yet to execute an easement, which typically follows a Rivers and Harbors Act (RHA) Section 408 approval, to Dakota Access. The Corps has relied on the absence of such an easement to halt construction under Lake Oahe.

As explained our [September 13 Alert](#), the Joint Statement did not remark on whether revocation or modifications of previously-granted governmental approvals are possible. Nor has the Corps offered any additional support for such actions. While typically occurring where there are changed circumstances or significant new information comes to light regarding potential adverse environmental effects from a proposed project, the Corps may voluntarily reconsider environmental determinations (including a Finding of No Significant Impact (FONSI)) under NEPA. Further, the Corps has the discretionary authority to remove, modify, or suspend verification of authorized activities under a nationwide permit pursuant to the Clean Water Act (CWA). The Corps has committed to making a “timely” determination on whether any reconsideration of the NEPA review or other actions will be required, but no specific timeline has been announced. The result continues a state of ambiguity for Dakota Access.

Ongoing Litigation between the Tribe, the Corps, and Dakota Access

Construction on the Dakota Access project for 20 miles on both sides of the Missouri River and Lake Oahe has remained paused while an injunction is pending before the D.C. Circuit. The parties’ legal briefs draw clear lines, including legal and policy arguments in support of their particular interests. Dakota Access’s pleadings question government overreach in the abrupt suspension of its work by the Corps and stress that billions of dollars may be at stake for an approximately 1,200 mile-long project, while the only federal land subject to the injunction is approximately 1,094 feet along and underneath Lake Oahe. The Corps is defending its actions in pleadings, but has not committed to issuing the easement necessary for construction to continue underneath Lake Oahe. The Tribe’s

court-filed documents assert that the federal government's trust responsibility and government-to-government relationship with American Indian tribes requires expansive federal intervention. The Tribe continues to argue that the discrete federal approvals required for certain water crossings, trigger a much broader application of Section 106 of the National Historic Preservation Act (NHPA), including a consideration of the projects' indirect effects to sacred sites on private lands. Additionally, the Tribe has asserted that the Corps failed to comply with the requirements of NHPA Section 106 when it authorized certain pipeline construction activities at Lake Oahe under the CWA Section 404 nationwide general permit 12 (NWP 12). Whether or not accepted by the court, these arguments also may be raised by participants in the government-to-government consultation process.

Potential Consequences

In the few months since the July 27, 2016 filing of the Tribe's initial complaint in the Dakota Access litigation, there has been a flurry of activity and rapid developments concerning tribal participation and tribes' role in the federal approval and oversight of infrastructure projects. A broader, national discussion has emerged, and issues that are pending in the Dakota Access litigation may be discussed as part of the forthcoming government-to-government consultations. For example, the Tribe's litigation position is that the Corps' discrete regulatory approvals under CWA Section 404 and RHA Section 408 should trigger a broader review of the project's impact on Indian tribes and their interests under NEPA and NHPA. This position may be picked up by tribal participants in the consultations, as well as the extent to which federal agencies can further integrate tribal input on issues affecting treaty rights, tribal lands, and sacred grounds into federal permitting and authorization decisions for infrastructure projects. Further, the question of federal agencies' permitting or authorization of projects occurring on private lands that neighbor tribal lands and resources is likely to be a focus.

Additional atmospherics that may influence the government-to-government consultation process include a statement on "Reinforcing the NHPA and Self-Determination," released by the Obama administration on September 26, 2016 as part of the Annual White House Tribal Nations Conference (Tribal Nations Conference Statement). According to the Tribal Nations Conference Statement, the Advisory Council on Historic Preservation (ACHP), the agency with oversight over NHPA implementation, is expected to provide formal guidance on an existing regulatory process whereby an American Indian tribe and the ACHP may enter into an agreement to substitute the tribe's historic preservation regulations for the ACHP's regulations in the Section 106 process. This may increase the number of tribes that assume Section 106 authority, which to date is only two.

Other interests outside of the government-to-government consultations may seek assurances that any changes to the NHPA tribal consultation process be clearly defined and not further delay the federal decisionmaking process for infrastructure projects.

While some issues specific to Dakota Access likely will be resolved through the judicial review process, it is still unclear how the Corps will proceed with its easement and permitting determinations under the CWA and RHA. And, tribal leaders informed by Dakota Access's experiences may become more active in future infrastructure project proceedings. Ultimately, this means that project proponents doing business in Indian Country may encounter heightened levels of uncertainty for an extended period of time. Van Ness Feldman will continue to monitor these developments and also is available to discuss strategies with impacted stakeholders who should continue to remain attentive.

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