

BEYOND THE PERMITTING



BY JAMES KENT AND KEVIN PREISTER

The Standing Rock Sioux bring community engagement to the forefront

A recent protest event involving the Standing Rock Sioux Reservation will impact how the right of way and infrastructure profession deals with community engagement. The \$3.8 billion Dakota Access Pipe Line (DAPL), which is proposed to stretch for 1,170 miles across four states and is already underway, was ordered to halt construction on September 9, 2016 pending further federal review. This action was unprecedented since the permitting agency, the U.S. Army Corps of Engineers, had already issued a permit for the project to proceed.

The Story Unfolds

A federal judge rejected an appeal by the Standing Rock Sioux to halt the project after tribal researchers found burial and cultural sites eventually destroyed by construction crews on private land near the Missouri River. A few hours later, however, the Departments of Justice, Army and Interior temporarily blocked construction of portions of the project, calling for reform of the government's approach to tribes around large-scale infrastructure projects.

A series of actions by the DAPL set the stage for one of the largest mobilizations ever of indigenous people in support of the Standing Rock Sioux's protest of the project. As the sixth largest reservation in land area in the United States, it's estimated to have a population that exceeds 6,000.

A Mounting Series of Events

There were at least four unfortunate missteps by regulators and the pipeline company that set this confrontation in motion. The first was the use of a flawed permitting process that was designed by the federal government to fast-track smaller projects. In this instance, the Army Corps of Engineers used what is known as the Nation Wide Permits process designed for fast tracking smaller projects. That meant that a full Environmental Impact Statement (EIS) was never done and therefore, the issues that would have surfaced such as the importance of ancestral lands, were never discussed or mitigated. Using this process proved to be a disservice to all involved and launched a movement that is destined to change corridor project approvals in significant ways.

The second misstep was to move the pipeline route from private land north of Bismarck, North Dakota to skirt the Standing Rock reservation. This move began the protest, much of whose justification rests on the perceived risk of a pipeline rupture polluting the tribe's drinking water. The proposed construction route is within a half-mile of the tribe's reservation border, sparking concerns for protection of cultural resources that remain with the land. Religious and cultural sites are situated along the route of the pipeline, including burial sites of ancestors.

The third misstep was not identifying tribal lands or the people of the tribe—including the Standing Rock Sioux Reservation—on the original project maps. All the counties that the pipeline goes through appear on the map except the reservation. To the

Sioux, the map reflects what they consider a major issue, specifically that their existence is invisible to the formal powers. Of course, that has since changed with this massive mobilization of Native American Tribes. They are now visible and on the move.

The Final Straw

All of these missteps might have been resolved through negotiations, keeping the issue local, had DAPL not made the fourth misstep. For reasons that remain unclear, DAPL elected to undertake earthmoving in precisely the location that the Standing Rock Sioux had identified in court documents as a particularly sensitive cultural area. And this was done on a weekend in the presence of many protestors and the international media.

Moreover, the company deployed security personnel and guard dogs to try to prevent the protestors from their efforts to stop the work. The vision of dogs being used to attack the Sioux demonstrators and supporters brought back memories of the Selma demonstrations of the

1960s. This single act nationalized the issue—and literally overnight brought in over 200 tribes in support from North America and beyond. In addition to local landowners and environmentalists joining the protest, it is estimated that 2,000 indigenous groups worldwide have spoken in solidarity with the Sioux people.

In concert with the Departments of Justice and Interior, the Army Corps of Engineers ordered a halt to the construction of certain portions of the pipeline, promising a timely review of the National Environmental Policy Act (NEPA) and its decision-making process to evaluate whether the tribal interests were properly accounted for. The agencies also called for a government-to-government summit with tribal officials in the fall of 2016 to review the existing statutory framework and examine what the federal government could do to better ensure meaningful tribal input into infrastructure-related reviews and decisions. If deficiencies are noted, the goal is to propose new legislation to Congress that will promote the protection of tribal lands, resources and treaty rights.



Chief David Archambault II of the Standing Rock Sioux tribe said, "We want peaceful demonstrations. I need everyone to understand that what we are doing, in the manner we are doing it, is working."



As construction began, the company deployed security personnel and guard dogs to confront the protestors, elevating the issue to a national level.

The Impact of Cultural Significance

It is significant that, while the proposed pipeline does not actually cross Indian reservation land, it comes very close. Throughout the U.S., treaty rights require tribes to be consulted about projects that cross their ancestral lands, even when these projects exist outside of the reservation boundaries. It is the cultural significance of the Missouri River and the tribe's attachment to it, as well as to specific sacred sites, burial grounds and other special places, that gave rise to the game-changing intervention.

Two concepts—both with legal standing—have given tribes the kind of influence today that extends far beyond their reservation boundaries. These are known as Traditional Cultural Properties (TCPs) and Cultural Attachment. Project effects on TCPs eligible for the National Register of Historic Places must be considered under Section 106 of the National Historic Preservation Act of 1966. Section 106 requires federal agencies to take into account the effects of their actions on historic places, including TCPs.

The U.S. National Park Service defines TCPs as properties that are important because of their association with the cultural practices, traditions, beliefs,

lifestyle, arts, crafts, or social institutions of living communities. TCPs are rooted in a community's history and are important in maintaining its continuing cultural identity. By regulation, interpretation and case law, Section 106 requires a review of impacts on historic places, a Memorandum of Agreement as appropriate between traditional groups and the federal agencies, and mitigation of negative effects.

Tom King, a former director of the office of cultural-resource protection for the national Advisory Council on Historic Preservation, is now a consultant who has worked with tribes and others for over five decades. He points out that Section 106 allows a tribe to have more influence in federal decision-making than would otherwise be the case. Memorandums of Agreement require agencies to be accountable for mitigation measures. The Standing Rock Sioux used the National Historic Preservation Act in its lawsuit against DAPL.

Relationship to the Land

A related concept, Cultural Attachment, has also gained legal status over the last few decades via the National Environmental Policy Act (NEPA), the law that requires environmental impact statements.

Cultural Attachment is defined as the cumulative effect over time of a collection of traditions, attitudes, practices and stories that ties a person to the land, to the physical place and to kinship patterns. Our firm, the JKA Group, originally fashioned the cultural attachment term in 1995, and it was first used by the U.S. Forest Service in undertaking an EIS that rejected a power line proposal by American Energy Power. That particular power line would have traversed private land through the heart of the Scotch Irish settlements in West Virginia and Virginia, which dated back to the 1780s. Research showed high cultural attachment in the very area that the power company had drawn their straight and convenient route.

Six years later, through a Supplementary EIS, the power line finally received approval for an alternate route that avoided high cultural attachment areas. Now in 2016, area residents with cultural roots are using the concept to evaluate the impacts of the proposed Mountain Valley Pipeline through an EIS process that must be approved by the U.S. Forest Service and Federal Energy Regulatory Commission. Companies working within the Appalachian cultural region, as formally defined by the Appalachian Regional Commission, should be aware that high levels of cultural attachment can be anticipated in various areas of this geographic region.

Since the American Energy Power project decision, which set a precedent within NEPA, cultural attachment has been used elsewhere in the country and around the globe. The U.S. Geological Survey cited the importance of cultural attachment to address beach erosion in Hawaii. The Office of Hawaii Affairs, considered the fourth arm of the government in Hawaii and responsible for the welfare of its native people, has used the cultural attachment concept to evaluate development proposals on

Oahu and the Big Island of Hawaii. France and Australia have also made use of the concept.

The New Norm

When you consider the loss of the Keystone XL Project, along with protests and cultural attachment issues, there are two current trends that have led us to a new norm. First, it appears that the timeline from project startup to the mobilization of formal protest movements is rapidly compressing. While Keystone XL took about four years to reach a highly disruptive stage, the mobilization associated with the Standing Rock Sioux protests happened almost immediately after the Army Corps of Engineers issued the fast-tracked approvals. The movement arose within months, not years. This same compressed timeline for project opposition has been noted with a host of other projects and is a subject of active discussion within our industry.

Second, Keystone XL and the DAPL represent a higher scale of protest, leading to a nationalization of infrastructure issues that spawns debate and action across a wide social and political spectrum. The Keystone XL generated organized groups that now oppose all pipelines and power corridors on a national basis. Some groups are training protesters to relocate and oppose projects throughout the country, leading to higher levels of emotional intensity and greater media coverage.

The reality is, when an issue nationalizes, the companies who are developing the project suffer a huge loss of opportunity. And because the discussions often shift to become hot political issues, the opportunity to resolve the situation locally—where the company can have the most influence—quickly and irreversibly vanishes. Moreover, because the project receives public

attention, the players begin to jockey for power positions that they get locked into, making the situation more difficult to resolve.

A Movement is Born

A widespread power shift is occurring in which citizens are becoming more aware of how a project impacts their immediate surroundings, and they want more control over those potential impacts, with or without government or corporate allies. Yet, the corporate and government side continue to function in a state of denial as to how and why people mobilize and take action about what they believe to be unfair land practices. We introduced the concept of “geographic democracy” in the September/October issue of Right of Way Magazine, and plan to continue to keep this important issue at the forefront.

It’s important to note that many of the Tribes have unresolved issues over past relationships with the government and various companies. So this movement had actually been building for years. When the DAPL decided to use confrontational tactics, this action became the impetus for 300

tribes to come together in one place to vent their historic frustrations. When this happened, a movement was born.

A Pan Indian Alliance movement has spread, promoting unity among different American Indian groups regardless of tribal or local affiliations. Beginning at an informal community level and emerging into a non-violent movement, tribes are now mobilizing to assist each other with issues created from corridor and natural resource development projects.

An Alternative Approach

One can only imagine what might have transpired if a different approach had been used. If a traditional EIS had been properly undertaken, tribal consultations would have occurred under the National Historic Preservation Act and the National Environmental Policy Act, which recognizes the sovereign status of the Standing Rock Sioux Nation. There would have likely been discussions about sacred sites, traditional cultural properties, ancestral lands and cultural attachment outside of the reservation boundaries. Those discussions may have also given



Standing Rock Sioux leaders say the pipeline will threaten the Missouri River, the tribe’s main source of drinking and irrigation water, and forever destroy burial grounds and sacred sites.



A Pan Indian Alliance movement has spread, promoting unity among different American Indian groups regardless of tribal or local affiliations. A new village on ancestral lands has grown to over 4,000.

the Tribes an opportunity to work through any previous issues, including their unresolved issues from past projects. And while those discussions might not have led to an agreement on a course of action, at least there would have been the chance for meetings of the mind to develop, and the legal status of the Corps' permits would be less subject to debate.

Taking time for an EIS would have brought an awareness of what happened in other situations similar to the one facing DAPL. Just this year, federal officials cancelled an oil and gas lease in Northwest Montana because the Blackfeet tribes of the U.S. and Canada said the project would disturb an area they consider sacred, even though it was outside of the reservation boundaries. In another instance, the Corps rejected a \$700 million coal export terminal proposed for Washington State because regulators decided the project would violate the Lummi Tribe's treaty protecting fishing rights. Had DAPL consulted with the Tribes in advance, the company would have either worked out a solution or it would have known early on that the pipeline corridor had to be moved.

While the full extent and impact of the Standing Rock Sioux situation is not yet known, from all indications it has changed the relationship of companies, governments and the tribes in how projects will be carried out in the future. The government's intervention essentially serves as a formal notification that a nationwide reform on considering Tribal participation in infrastructure projects will take place moving forward. Understanding cultural attachment and its meaning will be a big part of this reform.

A New Indicator of Success

In its own way, the Standing Rock Sioux situation may become as significant as the actions of Martin Luther King when he delivered his "I Have a Dream" speech to over 250,000 supporters from the Lincoln Memorial in Washington DC during the 1963 civil rights movement.

The natural instinct of companies is to use what has worked before, such as organizing within the formal political system to bring clout to their positions. But that approach no longer works. Using power to confront, such as security forces using guard dogs and the governor of North Dakota ordering out the National Guard, is a lose-lose

proposition. People today will no longer tolerate such radical aggressive acts, especially with demonstrations that are consciously planned to be peaceful.

In the past, a company's success could be measured by its ability to get a project approved and completed. Today, there is a paradigm shift underway toward geographic democracy, where citizens are taking over what happens in their physical space. As a result, the new indicator of a company's success will be measured by the goodwill it builds and maintains within the communities it impacts. ✪



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