

ENVIRONMENTAL BATTLE CONTINUES AFTER DECISION ON CONTROVERSIAL DAPL

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The Department of the Army will not issue an easement that would allow the proposed Dakota Access Pipeline to cross under Lake Oahe in North Dakota.- This is the latest ruling in a controversial legal battle that has been ongoing since July of this year that implicates provisions in the Clean Water Act ("CWA"), the Rivers and Harbors Act ("RHA"), the National Historic Preservation Act ("NHPA"), and the National Environmental Policy Act ("NEPA").

The DAPL is a \$3.7 billion project that would construct a 1,172-mile, 30-inch diameter pipeline from the Bakken and Three Forks production areas in North Dakota, southeast through South Dakota, Iowa, and end in Dakota, Illinois.-The current proposed pipeline route would cross Lake Oahe, an Army Corps of Engineers project on the Missouri River, which is located approximately .5 miles upstream of the northern boundary of the Standing Rock Sioux Tribe's (the "Tribe") reservation.- According to the proponents of the pipeline, the Corps fulfilled and continues to meet its duties under the CWA, RHA, NHPA, and NEPA.

The DAPL case is a political hot potato with important implications for Tribal rights on lands that are adjacent or in proximity to Tribal lands.- In July, the Tribe sued the Army Corps of Engineers (the "Corps") for violations of the CWA, RHPA, NHPA, and NEPA.- The Tribe expressed concern about the possibility of oil spills and leaks from the pipeline into bodies of water, in violation of the CWA and RHA, and that the DAPL impacts historically significant sites in violation of the NHPA.

The Tribe filed an emergency TRO and alleged that construction on the DAPL was "in the process of destroying sites of great historic and cultural significance to the Tribe." -The district court denied the injunction, finding that the Corps fulfilled, and in some cases exceeded, its obligations under NHPA by engaging in meaningful discussions with the Tribe that, in some cases, resulted in concrete changes to the pipeline's route.- Immediately after this ruling, the Department of Justice, the Department of the Army, the Department of the Interior (collectively, the "Departments") issued a statement overturning the district court's opinion and requesting that Dakota Access pause construction activity within 20 miles east or west of Lake Oahe until the Corps can determine whether it will need to reconsider any of its previous decisions regarding Lake Oahe under NEPA or other federal laws.

On appeal, the D.C. Circuit issued an order temporarily enjoining construction of the DAPL for 20 miles on both sides of the Missouri River at Lake Oahe.- The court emphasized that this administrative injunction was not a ruling on the merits, but rather was issued to give the court sufficient opportunity to consider the emergency motion for injunction.- The court denied the Tribe's motion for an injunction and dissolved the previous administrative injunction.- This allowed construction to resume on a small section of the DAPL that runs on private lands within 20 miles of Lake Oahe.- However, the Departments' request that construction halt on federally owned lands until the Corps reconsiders its decisions still stood.-

Thus, although construction was permitted on a small section of land, the bigger question—whether construction may continue on federally owned land—remained unanswered until now.- In a press release issued on December 4, the Department of Army announced that it would not approve the easement that would allow the pipeline cross under Lake Oahe.- Jo-Ellen Darcy, the Army's Assistant Secretary for Civil Works, stated in a supporting memorandum that the decision was based on the need to explore alternate routes for

the crossing, as well as to allow for further discussions with the Tribe about protecting its water supply.- Ms. Darcy found that the decision on whether to authorize the easement required additional analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation and comments as contemplated by NEPA.- Ms. Darcy said that the consideration of alternative routes would be best accomplished through an Environmental Impact Statement with full public input and analysis.-

Bick Law recently published an article regarding the procedural difficulties that this case poses for the Corps under the Clean Water Act and other federal laws.- As we noted, the Corps has created for itself a conundrum, as it must argue in court that it met its legal obligations under federal law to review the DAPL water crossings, while simultaneously reconsidering its decisions concerning the pipeline approvals and the easement.- After reviewing its previous decisions, the Corps concluded in mid-November that, although its previous decisions comported with legal requirements, additional discussion with the Tribe was warranted in light of the history of the Tribe's disposessions of the land, the importance of Lake Oahe to the Tribe, the government-to-government relationship, as well as the Mineral Leasing Act's direction to protect the environment.-

The battle is far from over, and many questions remain unanswered.- For instance, the Corps' decision to reassess its decision on the DAPL leaves room for future activist groups to similarly petition that a Corps decision should be reassessed.- One of the biggest questions is what will happen to the DAPL when President-Elect Donald Trump takes office in January.- Mr. Trump supports the completion of the DAPL, and once in office, Trump and his administration could allow construction to continue along the original route despite this ruling.-

The California environmental litigation attorneys at Bick Law continue to closely monitor this case and the complex legal issues that are implicated by the Corps' decision to reassess its decision-making process not only concerning the DAPL, but also for all past and future projects impacting federal lands.- Bick Law also continues to closely monitor this case as it moves through the court system, as well as the potential impacts to the court decisions when the Trump administration takes office.