

Tribal and Treaty Rights Impacted by the Proposed Keystone XL Tar Sands Pipeline

The Keystone XL tar sands pipeline's proposed route violates basic tenets of Federal Indian Law and South Dakota law. The pipeline would infringe upon treaty-protected lands and waters, especially in the Great Plains. TransCanada has also failed to properly consult with tribal leaders -- as representatives of government units -- on plans for the pipeline's construction which is a requirement of South Dakota pipeline permitting law. The federal government, as trustee for the tribes, has a duty to ensure that tribal resources of land and water are protected from encroachment and pollution.

Treaty Violation

Although it does not infringe upon reservation land, the current proposed Keystone XL route crosses land protected by treaty and allotted land still held in trust. The tribes also hold Winter's Doctrine Rights to water for their reservation lands and peoples. On April 29, 1868, the United States entered into a peace treaty at Fort Laramie with the Oceti Sakowin, the Lakota, Dakota, and Nakota nations. The United States agreed in the treaty that all lands west of the Missouri River and within present-day South Dakota would be "set apart for the absolute undisturbed use and occupation" by the tribe and that "no persons . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article."

The Fort Laramie Treaty's continued enforceability was reinforced in the 1980 Supreme Court case *United States v. Sioux Nation of Indians*.¹ This decision upheld a Court of Claims ruling that the United States' acquisition of the Black Hills, a region included in the Fort Laramie Treaty, constituted a taking under the 5th Amendment. Accordingly, the Court ruled, the U.S. Government was obligated under the treaty to provide the affected Sioux Tribe with "just compensation."

The Tribal Trust Doctrine and the Duty to Consult

Neither the State Department nor TransCanada have properly consulted with the tribes as required by the federal government's tribal trust responsibility. The U.S. Government has a trust responsibility to Indian Nations, which is expressed in the Constitution, treaties, statutes, case law, and executive orders. This trust duty, which originally arose from tribes' land cessations, obligates the federal government to protect tribes' unique interests.² This trust obligation entails a duty to consult with Indian tribes on any activity that would affect their land. This duty is expressed in Executive Order 13175 issued by President Clinton and reinforced by President Obama's Memorandum for the Heads of Executive Departments and Agencies issued on November 5, 2009.³

TransCanada has failed to adequately consult with tribes potentially affected by the Keystone XL Pipeline, often claiming that strictly informational meetings have satisfied this requirement. Additionally, TransCanada has sidestepped the consultation process by hiring members of non-local tribes to survey areas that may be of cultural significance to the tribes that actually reside there. This deprives the impacted tribes of any meaningful consultation on Keystone XL's effects on their cultural resources.

The National Historic Preservation Act's Duty to Consult

Pursuant to Section 106 of the National Historic Preservation Act (NHPA), federal agencies must take into account projects' potential effects on locations or objects eligible for inclusion in the National Register prior to authorizing federal spending on that project. Eligible locations or objects may include "[p]roperties of traditional religious and cultural importance to an Indian tribe." Because the Keystone XL pipeline's proposed route runs through traditional tribal lands, the State Department is required to consult with the tribes that have spiritual, cultural, and historical ties to the land along the pipeline route. To date, it has failed to do so.⁴

Tribal Statements against Keystone XL

The Great Plains Tribal Chairman's Association (GPTCA) is made up of the 16 Tribal Chairmen, Presidents and Chairpersons in the states of North Dakota, South Dakota and Nebraska signed an unilateral resolution against the construction of the Keystone XL pipeline.⁵ The GPTCA resolution states that the proposed TransCanada/Keystone XL pipeline does not serve the national interest and in fact would be detrimental not only to the collected sovereigns but all future generations on planet earth.

Eight South Dakota Tribal Nations, Traditional Lakota Treaty Councils, and US property owners, with First Nation Chiefs of Canada, signed an international treaty accord against TransCanada's proposed Keystone XL tar sands pipeline and tar sands development. This document is called the Mother Earth Accord.⁶

¹ 448 U.S. 371.

² Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 112 (1995).

³ Executive Order 13175, <http://energy.gov/nepa/downloads/executive-order-13175-consultation-and-coordination-indian-tribal-governments>

⁴ Section 106 of NHPA, <http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf>

⁵ Great Plains Tribal Chairman's Association Resolution 30-9-28-11, <http://www.ienearth.org/docs/MEAccordGreatPlainsTribalChairmansAssociation.pdf>

⁶ Mother Earth Accord, <http://www.ienearth.org/mother-earth-accord/>