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Quick Take:

Dakota Access Pipeline with Hannah Perls and Carrie Jenks—February 15, 2023

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- Hannah Perls: Welcome to Clean Law, from the Environmental and Energy Law Program at Harvard Law School, and welcome to our first ever Quick Take episode, where we take ten minutes to discuss the latest updates on a major topic in environmental or energy law. I'm Hannah Perls, a staff attorney with EELP, and today I'm talking with our executive director Carrie Jenks, about the Dakota Access Pipeline. Hi Carrie.
- Carrie Jenks: Hi, how are you? Thanks for doing this today. So let's get started. As a quick refresher for our listeners, what is the Dakota Access Pipeline?
- Hannah: So, the Dakota Access Pipeline is a 1,200-mile-long pipeline. It's owned and operated by Energy Transfer Partners, and the pipeline transports crude oil from the Bakken Fields in North Dakota, through South Dakota, Iowa, and then down to a terminal in Illinois. Now, I think most folks will remember hearing about the pipeline from the massive protests in 2016 and 2017 at Standing Rock. And the pipeline has been fiercely opposed by the Standing Rock Sioux Tribe and environmental groups because of concerns that a spill would contaminate state and tribal drinking water and damage important cultural and historic sites.
- Carrie: So is the pipeline currently in operation?
- Hannah: Yes. So construction was completed in March of 2017, and then the pipeline became operational in May of that year. And it is also worth mentioning that in September of last year, so 2022, the Illinois Commerce Commission gave permission to almost double the daily flow of crude in the pipeline, from about 570,000 barrels to 1.1 million per day.
- Carrie: So before we get into the latest news, can you maybe start with what the main litigation has been about?
- Hannah: Sure. The litigation has largely focused on one small section of the pipeline over which the federal government has jurisdiction or control. So most of the pipeline is actually built on state land, but the Army Corps of Engineers, which is a federal agency within the Department of Defense, has jurisdiction over 37 miles of the pipeline where it passes over or under certain streams, rivers, and federal dams. And so the biggest legal battle has actually focused on just one section of the pipeline that crosses under Lake Oahe in North Dakota, and this is a dammed section of the Missouri River. And that



crossing is within one half mile of the current boundaries of the Standing Rock Sioux Reservation. And I say current boundaries because Congress has significantly shrunk the size of the Tribe's reservation. And I think it's worth quickly diving into that history, just to understand the claims that the Tribe is making in the litigation.

In 1851, several tribes signed something called the First Treaty of Fort Laramie or the Horse Creek Treaty, and that established the boundaries of the Great Sioux Nation. However, the federal government has consistently violated the terms of that first treaty by shrinking and then dividing up the Great Sioux Nation into much smaller territories. So much of the Dakota Access Pipeline, including that crucial crossing under Lake Oahe, actually runs through land that was previously part of the Great Sioux Nation, and therefore through lands that the Standing Rock Sioux Tribe argues are of deep, historical, cultural and economic significance, that will be damaged by the pipeline's operation. And so the Tribe has brought these claims under various environmental and tribal laws, to argue that the Army Corps of Engineers, that federal agency, should not give Energy Transfer Partners permission or what we say in legal speak, an easement, to cross under Lake Oahe.

Carrie: And has that permission been granted yet?

Hannah: Sort of. In 2017, President Trump ordered the Army Corps to grant that easement, give that permission, which it did. But then after three years of litigation, a federal court revoked the easement in July of 2020.

Carrie: So if the pipeline's currently operational, does that mean the pipeline's operating without that permit?

Hannah: That's a great question, and yeah, that's exactly what that means. This outcome is a result of that litigation between the Standing Rock Sioux Tribe and the Army Corps. And I should say if folks want more details on that litigation, they can check out our [Regulatory Tracker page](#) and we'll link to that page in the show notes. Now, one of the Tribe's claims in this litigation is that the Army Corps violated something called the National Environmental Policy Act, or NEPA, when it granted that easement in 2017. And it's really important for listeners to know that NEPA is what we call a "look and see" statute. It requires the federal government to assess the environmental impacts of proposed actions, but it doesn't require that those agencies then choose the most environmentally friendly option. So in this case, the Standing Rock Sioux Tribe was arguing that the Army Corps failed to properly assess or take that hard look at the environmental effects of the pipeline.

And there's a lot of back and forth under the Obama and Trump administrations that we won't go into, but what you need to know is that in July of 2020, the Circuit Court of Appeals for the District of Columbia, also known as the DC Circuit, said yes, the Army Corps does need to take a harder look and do a more detailed environmental analysis,



and we call this an environmental impact statement. But they left it up to the Army Corps to decide whether to allow the pipeline to operate in the meantime. And then in May of 2021, the Biden Administration said that yes, it would keep the pipeline in operation. Tribes sued over that decision, but the court dismissed the challenge. And so what that means is that the pipeline can keep operating and the Tribe has to wait for that final environmental impact statement to come out before they can challenge the pipeline again in court.

Carrie: And so this has been in the news lately, what's actually happening at the moment.

Hannah: So after a really long delay, the Army Corps quietly announced in January, last month, that it plans to release that draft environmental impact statement later this spring.

Carrie: So how does the draft environmental impact statement affect whether or not the Corps will grant the permit that they're waiting for?

Hannah: That's a great question. So the Army Corps is going to have to issue a final environmental impact statement before it can then give that permit or easement under Lake Oahe. And so it's likely that the pipeline will continue to operate as this process goes forward. After the Army Corps releases the draft, again, probably this spring, there's going to be a 45-day public comment period, and folks will be able to submit comments on the document. That draft also might include something called the agency's "preferred alternative," which is basically a forecast of whether the agency plans to grant or deny the easement.

So after those 45 days go by, the Corps can then issue the final environmental impact statement that will respond to comments. And I should flag that it's really, really, really likely that tribes and environmental groups will again sue the Army Corps over whether that final environmental impact statement is adequate. Then depending on the course of litigation, the Army Corps will issue its final decision on whether to grant or deny the easement. And this is called the Record of Decision or ROD, and they have to do that at least 30 days after the final environmental impact statement comes out. And there might be a third option, where the Corps approves the easement, but with conditions. That said, if the Corps does choose to deny the easement, the pipeline would have to immediately stop operations.

Carrie: So you're going to be keeping an eye out for whether in that first step, the draft environmental impact statement is released, and we'll be sure to add that to [the Tracker that we keep updated](#). Are there other updates or changes from the federal government that could affect the Army Corps' analysis?

Hannah: Yes, there is new guidance that the Council on Environmental Quality, and this is an office inside the White House, they released, in January, new guidance that tells federal agencies how they're supposed to evaluate greenhouse gas emissions as part of this



NEPA analysis, that sort of environmental hard look at proposed actions. And I think this guidance matters because it will apply to the Army Corps' draft environmental impact statement that's reviewing the effects of this easement under Lake Oahe, that proposed easement. That said, I do think it's important to know the guidance doesn't impose any new legal obligations, and in many cases, it just reiterates what various federal courts have said agencies are already required to do when it comes to discussing or disclosing a project's greenhouse gas emissions. That said, there are parts of the guidance that include new, more detailed requirements, and the White House is arguing that these are consistent with NEPA and what courts are saying.

So for example, the guidance recommends that agencies monetize or put a dollar value on the costs associated with the project's estimated greenhouse gas emissions. And this is something that several courts have not explicitly required agencies to do, but they have said it's a reasonable method of complying with NEPA. So in terms of the Dakota Access Pipeline, what this means is that the Army Corps may, for the first time, put a dollar value on the environmental costs associated with the pipeline greenhouse gas emissions as part of this draft environmental impact statement. The last thing I'll say is that it's important to note the guidance can't require agencies to choose the least carbon intensive option, again, because NEPA is just this "look and see" law. Also, the guidance isn't legally enforceable on its own, so it'll be interesting to see how, or even if courts look at the guidance when assessing if this new analysis out of the Army Corps complies with federal law.

Carrie: Great. Well, let's stop there. But Hannah, thank you so much for walking us through the latest update on the Dakota Access Pipeline.

Hannah: Absolutely. Thank you.

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