

## Viewing Both Sides

### *A Look at the Relationship Between Tribes and Pipeline Companies*

By Lou Thompson

Working as a Tribal Relations Program Manager for an energy pipeline company provided me a unique insight into the inner workings of large corporations while also providing me an extraordinary opportunity to work directly with tribal governments and communities. I began working with tribes on pipeline projects in early 2009, and by 2010, I had successfully developed relationships with many tribes on several projects. Then, on April 20, 2010, the Deepwater Horizon oil spill occurred. The well was declared sealed on September 19, 2010. During those five months, there was 24-hour media coverage of the spill.

At that point some of the tribes stopped working with me as the movement against oil extraction took hold. Many of the tribes publicly opposed the projects we were developing, but privately the tribes were very interested in keeping the relationship alive. In some cases, it would have been political suicide if a tribal official came out publicly in favor of a pipeline project. By 2015, the situation with tribal opposition on pipeline projects had ratcheted up and outside interest groups began using these events to their advantage. By 2015, pipeline projects had experienced a significant increase in the permitting time table. A process that once took 18 months to permit would now take up to four years or more.

How can energy companies and the energy industry as a whole shorten these cumbersome and outdated processes in the United States? If energy companies sincerely want to shorten the permitting time frame and avoid tribal opposition, then a solution that seems obvious to me is that energy companies should voluntarily make a concerted effort to work directly with tribes on pipeline projects. Pipeline companies would be very surprised of the positive benefits those relationships could bring. Unlike Canada, there are no serious requirements for pipeline companies in the United States to work with tribes as *impacted communities* on pipeline projects. From a business standpoint, energy companies reason that they don't need to invest the time or resources required to effectively engage with the tribal communities. The biggest reasons *why* the pipeline industry does not actively engage with tribes on their projects can best be illustrated by comparing current policies within the United States and Canada.

## Aboriginal/Native American Rights

In Canada, Aboriginal people have constitutionally protected aboriginal and treaty rights under section 35 of the Canadian Constitution. These rights are collective individual rights on and off Reserve. The Supreme Court of Canada has described the relationship between Aboriginal people and the federal government as a fiduciary or trust-like relationship. In the United States, the federal government recognizes the tribes as sovereign nations with a "government-to-government" relationship. This is acknowledged through treaties, congressional acts, executive orders, Supreme Court decisions, laws and everyday transactions. Native American rights are more focused on the tribal governments themselves and the reservations in which they live.

## Regulatory Landscape

In Canada, relative to pipeline projects, the government delegates the responsibility of *consultation* to the *project applicant* throughout the regulatory and permitting processes. Any decisions to approve pipeline projects or to issue permits in relation to those projects comes from the federal and provincial governments which expect the applicant to engage directly with Aboriginal people.

In the United States, however, the federal government takes the lead role as the "agency official" and is responsible for government-to-government consultation. Of note, federal agencies cannot unilaterally delegate their responsibilities to conduct government-to-government consultation with Indian tribes to non-federal entities. Every tribe I have worked with in the United States has told me that the government-to-government consultation process is severely flawed.

Take the case of the Dakota Access Pipeline project for example: The U.S. Army Corp. of Engineers is considered the lead regulatory agency *but only on Corps jurisdictional lands which are usually water crossings*. Thus, over ninety-five percent of the pipeline does not have a lead regulatory agency official and is left entirely up to the state for permitting. This means that "federally recognized tribes" only have the opportunity for "government-to-government" consultation on less than five percent of that entire project.

## Permitting Process

In Canada, The National Energy Board (NEB) determines whether the applicant's consultation with respect to its project has been adequate. The National Energy Board is the regulator for federal pipeline projects. It is an independent federal agency established by the Parliament to regulate international and inter-provincial pipelines. The NEB determines if the applicant's consultation has been adequate to address the concerns raised by Aboriginal people with respect to the project. In the United States, the federal government determines whether there has been adequate consultation *by its own agency's activities*. When there are federal lands involved in a proposed right of way, these lands fall under the jurisdiction of one federal agency (commonly the Department of State and the Federal Energy Regulatory Commission) that agency is authorized to grant the right-of-way or permit.

The Federal Energy Regulatory Commission (FERC) regulates gas pipelines but one solution I would recommend is that FERC also *regulate oil pipelines*. One-hundred percent of a pipeline could then be regulated and permitted by a single federal agency for compliance. For this to work however, the FERC, through Congressional guidance and mandates, should also strengthen requirements for energy companies to *fully engage with tribes impacted by their projects*. In my opinion, if these recommendations were implemented the energy industry would drastically increase their chances of avoiding the numerous protest issues which have arisen over the last three to four years.

It must be understood that regarding consultation and outreach to Native American tribes, the term "consultation" refers to the *formal* federal-tribal consultation process. An applicant's tribal outreach is considered *engagement*. The current regulations use the term *consultation* interchangeably referring to both the outreach between the project applicant and the formal federal-tribal consultation. These terms and the processes related to them need to be more clearly defined.

So, why should pipeline companies want to work closely with tribes on pipeline projects? How can tribal engagement strengthen a permit application and the social license to operate a pipeline? When a company builds and operates pipeline projects in the United States the company can *potentially* work in close partnerships with many sovereign nations. Native American tribes scattered across the continent are recognized as dependent sovereign governments enjoying government-to-government relationships with federal agencies. These tribes often times, just like any government, have their own fire, police and emergency services and possess land rights extending beyond their own reservations to the surrounding areas. Those rights include tracts of land that were negotiated as part of the government-to-government treaties, settlement judgements, homelands ceded to the federal government, and aboriginal lands where the origins of the tribe are imbedded within their oral histories. As a practical matter, the lands may also include hunting, fishing, trapping and use rights that have traditional cultural significance.

Pipeline companies have a great opportunity to formalize their approach to working with tribal communities by developing a tribal engagement strategy for their pipeline projects. The strategy could be designed to be flexible to address the legal, social and economic realities of tribal communities throughout North America. Companies could develop and maintain collaborative, long-term working relationships through continual communications and engagement with native communities. The approach to native engagement should be guided by principles of trust, respect and responsibility. Pipeline companies could work together with tribal governments to find mutually acceptable solutions to issues and provide benefits to impacted communities. Accordingly, tribal engagement could be strengthened by building a *corporate capacity* of ensuring key departments and their employees understand sensitive tribal issues and the positive and negative impacts these issues have on their business.

### **Early Participation with Tribes**

Early engagement and participation by Native American tribes ensures that there is consideration of tribal concerns in both the Environmental Impact Statement or Environmental Assessment documents. Be mindful that some Native American tribes wish to speak directly with their federal government representatives rather than respond to communications initiated by the project applicant or its consultant. As a result, the first communications with tribes regarding a project typically does not take place until the *formal* federal-tribal consultation process occurs, which is during the federal environmental review. Early tribal participation, however, should occur before the formal government-to-government consultation and is necessary when the project applicant is developing its right-of-way and preparing the necessary information to complete the EA or EIS. Early engagement also allows an applicant to address Native American concerns and facilitates a tribe's active and timely participation in the *pre-filing* and *formal permitting* process.

Early participation by Native American tribes is essential to ensure that tribes identify any cultural resources associated with a project. The project applicant needs this participation to avoid, minimize, and mitigate impacts to cultural resources. Delay in engagement with Native American tribes can result in a pipeline company's inability to fully

access and accurately complete the cultural resource surveys. Developing a relationship with tribes early in the planning stages would also provide an opportunity for the tribes to provide expertise and participate in the cultural resource surveys. By doing so, the chances of an unanticipated discovery delaying or completely stopping a project is greatly reduced. How companies can continue to conduct cultural resource surveys without any tribal involvement is a mystery to me.

Why are some tribes participants in pipeline projects? Some tribes are seeking long-term relationships with pipeline companies due to the fact that their pipes are in that tribe's traditional territory and will be operating there for generations to come. Federally regulated pipeline projects are deemed to be in the national interest when awarded their permit. The majority of the time, pipeline projects that have the necessary permits to construct will complete their projects, with or without tribal participation. Tribes have a special expertise that no other group within the regulatory and permitting process possesses. Tribes realize this and have switched their focus to looking out for not only their cultural resources but the best interests and economic needs of their tribal communities. As part of their engagement with tribes, pipeline companies should listen closely to the needs of these affected communities and be willing to fund initiatives that promote and strengthen not only tribal participation in all aspects of a proposed pipeline project, such as; involvement in cultural resources surveys, tribal monitoring, and jobs related to the construction of the pipeline but in the everyday needs and economic development of tribal community life and culture.

In sum, there are lessons to be learned from the processes of how Canada and the United States conduct tribal consultation. Overall, however, the responsibility to actively pursue relationships and engage with tribes on pipeline projects rests solely in the hands of the pipeline companies, plain and simple. If that does not happen at a corporate and company level the unrest you see in North Dakota today, may very well continue far into the future.