

Roll Call



U.S. Army Corps of Engineers an Unfair Target Trump administration may review policies on tribal rights

By John Eisenhower

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Several high-profile events in 2016 involving Native American tribes and private developers highlighted the confusing and sometimes conflicting processes for federal environmental permitting.

As a former commander of the U.S. Army Corps of Engineers' Portland District, which often consults with tribes for projects impacting Native American tribal rights, I was dismayed to see commentators and even some elected officials unfairly target the Corps of Engineers with vitriolic and often tremendously unfair criticism.

Past administrations of both parties have frequently reviewed federal policies on the protection of tribal rights and it is possible that the Trump administration could do the same. Its first opportunity will be a review of protections outlined in the Corps of Engineers' Nationwide Permit (NWP) program, which recently underwent a periodic, 5-year review and will soon replace those in place since 2012.

Since the Nixon Administration, federal policy has continuously strengthened the fair protection of tribal rights in response to litigation, policy refinements, and lessons learned by working cooperatively with tribes, industry, and outside groups. That's why it is important for policymakers to be clear on how the Corps' permit process operates.

Anyone interested in federal tribal rights policy should recognize what Commanders at the Corps know all too well: Sometimes companies that apply for Corps of Engineers permits are their own worst enemies.

To give a recent example, last summer, the Corps of Engineers' Seattle District rejected a bid by Pacific International Holdings to build a coal-export terminal near Bellingham, WA. The Corps upheld a claim by the local Lummi Tribe that the \$700 million project would have a greater than de minimis impact on usual and accustomed fishing areas which the Tribe reserved in an 1855 treaty with the U.S. Government.

The Seattle District Commander's decision sparked immediate and angry attacks against the Corps, including several from elected officials. Those attacks were tremendously unfair.

Several accusers, including elected officials, claimed that the Corps' decision was "political." Like many attacks on the Corps for its permitting procedures, that misreads the real issue. Once the Corps determined a greater than de minimis impact to Lummi treaty rights, the Corps had no choice but to reject the proposal, in keeping with Article 6 of the U.S. Constitution ("...all treaties made [under U.S. authority] shall be the supreme law of the land....")

The important lesson for any company seeking a permit from the Corps of Engineers for a project that might impact Tribal treaty rights is that early on, you need to identify potential tribal rights issues and open a dialogue. This can identify levels of support, build trust and often mitigate Tribal opposition through compromise. It can also assist in determining the viability of a project proposed in "Indian Country."

Pacific Northwest tribes watch carefully over their treaty rights, which they see as granted by their Creator. Tribes rarely expose their reserved rights to litigation, so if a tribe is willing to do so, it likely has a solid record to support its claims and is likely to prevail. Likewise, the Corps of Engineers has an exhaustive permitting process for determining whether a project's impact meets the de minimis treaty threshold.

Consulting tribes on a permit typically starts at the staff level and any unresolved issues would ultimately be determined by the district commander. During my time in command at Portland, I always sought an audience with the tribal council and the tribal chairman before making a final decision. But staff does have a critical role in working through details of tribal staff consultation, even though decision-making authority remains with the tribal council and the tribal chairman.

Equally important, some federal agencies have their own guidelines for implementation of Section 106 of the National Historical Preservation Act, which includes consulting with tribes. The Corps of Engineers takes a stringent approach. In my Army experience, we spared no effort to attain a response, whether positive or negative, from every tribe with whom we consulted.

Federal officials and permit applicants to the Corps need to understand this difference and recognize that a more concerted effort is required to satisfy Corps requirements.

In some cases, tribes delay participating to “stretch out” the process. But my experience is that they typically do ultimately air their concerns.

Even after issuing a permit, if the Corps determines that it improperly consulted with a tribe or new information is received that may impact tribal rights, there are procedures for the Corps to suspend a permit decision and seek to reinitiate tribal consultation. These possibilities need to be accounted for in any project planning.

Finally, there is a common misconception that tribal consultation does not occur with general permits, which include Nationwide Permits (NWPs), once approved at the program level. This is clearly inaccurate. The “General Conditions” for the Nationwide Permit program mandate that Corps’ districts consult on activity-specific cases, if there is a potential impact on tribal rights and/or historic properties.

Yes, federal permit processes can always be improved and tribal consultation has been a continuously evolving process with each project that could impact Tribal lands and resources.

The bottom line for Congress, the Administration and especially a company seeking an Army Corps of Engineers permit that involves Tribal rights is that ignoring or bullying a Tribe will not work. Constructive dialogue at the outset — with a genuine willingness to listen and alter plans accordingly — is the smart move in the long run.

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