

Minutes from August 7, 2020
Indian Law Section Business Meeting

The meeting began at 11:00 a.m. pacific. Thank you Teresa Baker for helping us get set up on Zoom. There were 7 members on the zoom call, as well as Professor Angelique Eaglewoman, from Mitchell-Hamline School of Law in St. Paul, Minnesota.

Julie Kane called the meeting to order. She asked everyone to think about the “old business” item of having the Indian Law Section host an Indian Law Conference. Kane then explained that she received a funding request from “Attorneys for Civic Education” (ACE), to assist with their Fall “Hilarity for Clarity” fundraiser, which is a night of improve for a good cause. ACE provides support to three organizations:

We the People,
Idaho High School Mock Trial, and
YMCA Youth in Government

Dylan Heddon-Nicely made a motion to donate \$500 from the Indian Law Section to ACE for their fundraiser. Pat Costello seconded the motion. A vote was taken and the motion passed. Kane then turned the meeting over to the CLE presenter, Angelique Eaglewoman.

Eaglewoman started with the background that Indigenous Peoples have always had an inter-dependent relationship with the earth. Many of the principles on which this country was built, were borrowed from Indigenous perspectives. Treaties with Indian Tribes were the ultimate homeland document of the United States. She expressed satisfaction with the fact that Justice Gorsuch, in the recent *McGirt* opinion cited to the Supremacy Clause of the U.S. Constitution stating that “treaties are the supreme law of the land.”

She spoke about three large pipeline projects, all of which are impacting Tribes:

Dakota Access Pipeline (DAPL),
Enbridge Line 3 in Minnesota, and
Keystone XL Pipeline

Dakota Access Pipeline (DAPL)

Eaglewoman focused on the Standing Rock Sioux Tribe’s opposition to the DAPL project, which has a long legal history. Some of the prior cases that are applicable to tribal rights were cited, such as, *U.S. v. Winans (1905)*, which stated that what Tribes did not give away in the treaty process, they reserved; *Winters v. U.S. (1908)*, which stood for an implied water right for Indian reservation; *U.S. v. Adair (1983)*, which extended an implied water rights for habitat protection; and *U.S. v. Washington (2016)*, which required the State to fix any culverts that were impeding fish passage, because fish harvest was a protected treaty right.

The decision in *Standing Rock #1* denied the Tribe's claims for failure to consult and failure to follow federal protection Acts, such as NEPA and NHPA. The neighboring Tribe was denied its violation of RFRA claim in *Standing Rock #II*. Even though Nationwide Permits (NWP's) are issued without detail as to where the activity will occur, the Tribe was "on notice" that the activity was taking place within their homelands. The judge stated that since they did not comment when the NWP was published, they were barred by laches from making the argument that oil flowing under the Missouri River would desecrate sacred waters. In 2017, in *Standing Rock # III*, the Corps of Engineers was required to provide a fuller Environmental Assessment (EA) detailing its conclusions in the FONSI (Finding of No Significant Impact), but the Corps continued to disclaim its statutory responsibility.

The Tribe renewed its suit in 2018 and finally made headway when the court ordered a halt to pipeline operations pending a more detailed EA on July 6, 2020. However, just yesterday (8-6-2020), the D.C. Circuit Court of Appeals overturned that decision and allowed the pipeline to continue operations pending the results of the EA. Eaglewoman referred the group to the Earth Justice website for up-to-date information on the case.

Enbridge Line 3 in Minnesota

This pipeline originates in Calgary, Canada and flows south, then east through the hunting, fishing and gathering grounds of seven tribes, including the Fon du Lac, Mille Lacs, and the Red Lake and White Earth Bands of Ojibwa. Again, the Corps of Engineers did not consult, nor consider the tribe's interests in the pipeline, including cultural, hunting, fishing, and gathering interests. The Tribes filed suit arguing that the FEIS was inadequate in that it does not properly analyze the impact of the pipeline on the Lake Superior watershed.

Keystone XL Pipeline

This pipeline connects the tar sands in Canada to the gulf of Mexico for export of oil to China. In September 2018, after President Trump issued a permit for the pipeline immediately upon taking office, the Rosebud Sioux and Fort Belnap Tribes sued. This suit was filed in federal court in Montana. It wasn't until April of 2020 that a Montana non-profit representing ranchers and agricultural interests filed suit claiming that the pipeline company violated the Endangered Species Act (ESA), that the court vacated the permit issues and re-issued by the President.

The EPA and the BIA are both encouraging the Corps of Engineers to consult with the Tribes before continuing with the project, but the Corps is disregarding those recommendations. The Fort Peck Assiniboine Sioux Tribes also filed suit to enjoin the Keystone XL construction in waters upstream of their reservation.

U.N. Declaration on the Rights of Indigenous Peoples

Eaglewoman shared some provisions of the UNDRIP, relating to Tribes' spiritual relationships with land and water, legal protections for indigenous lands, and a process of determining

disputes that is fair to them. She urged attorneys to include these provisions in their filings and to always relate the legal framework to the spiritual connections and cultural interests. She also recommends that Indian Law attorneys work on legal scholarship that focuses on traditional stories and to codify principles such as humanizing plants, animals and bodies of water. "We've got to indigenize our court filings."

After a few questions, the meeting was adjourned at approximately 11: 54 a.m. pacific.