

Public Summary of Foley Hoag LLP Report, “Good Practice for Managing the Social Impacts of Oil Pipelines in the United States”

Due to their linear nature, pipeline projects affect a large number of stakeholders, which increases the likelihood of broad opposition and protests. Tribal opposition to projects in the United States sometimes reflects fundamental disagreements between the U.S. government and tribes about tribal rights. Many environmentalists believe that preventing pipeline projects decreases the risk of oil spills, increases the cost of energy produced with oil, and makes renewable energy more attractive. Protests against oil pipelines also reflect decreasing public trust that existing governmental pipeline approval processes will adequately prevent environmental harm. Due to these increasing concerns, companies are likely to find that legal compliance by itself is insufficient to secure a social license to operate.

Banks providing project finance to the Dakota Access Pipeline Project retained Foley Hoag LLP (“Foley Hoag”) to provide an independent report, using the pipeline as a case study, that considered international industry good practice (“IIGP”) for community engagement in the development of oil pipelines, with a particular focus on engagement with Indigenous Peoples. Foley Hoag was asked to review the U.S. legal framework on community engagement, tribal consultation, and security, and compare that framework to IIGP. Foley Hoag’s final report provided recommendations for the project sponsors on steps they can take beyond U.S. legal requirements, as well as more general industry good practice guidance. The full report is confidential, but the banks requested that Foley Hoag share some general findings and the general industry good practice guidance. This good practice guidance may help companies building future pipelines in the United States incorporate IIGP, and may assist banks when they evaluate those projects.

IIGP for community engagement evolved significantly during the past decade in response to community stakeholder concerns that led to lawsuits, campaigns, and project delays or stoppages. The report’s analysis draws extensively on the International Finance Corporation’s Environmental and Social Performance Standards (“IFC Performance Standards”), particularly the provisions stemming from the U.N. Declaration on the Rights of Indigenous Peoples. These standards are a widely respected benchmark for good practice with regard to community engagement, including company consultation with Indigenous Peoples and security practices. The IFC Performance Standards were developed for application in emerging market contexts with limited rule of law and were not developed with the U.S. legal context in mind, but they nevertheless provide a useful benchmark to consider for U.S. projects. The report considers the Equator Principles, a voluntary global framework used by financial institutions to assess environmental and social risk in project finance. The analysis also incorporates good practice from the International Council on Mining and Metals (“ICMM”), the U.N. Global Compact, and the Voluntary Principles on Security and Human Rights.

U.S. Law and IIGP

U.S. law differs from IIGP in certain ways. The U.S. legal system is complex, consisting of multiple levels: federal law, the laws of each of the 50 states, and municipal law. U.S. law governing non-tribal community engagement and security varies by state, so companies complying with the law will be required to take varied actions in different states. The potential variations in state law make it challenging for companies that rely only on legal compliance to apply a consistent approach

to community engagement or security. Companies are likely to perform more consistently and to reduce risk if they develop corporate policies and processes that go “beyond compliance” and are based on IIGP.

Tribal engagement is governed by U.S. federal law, and tribes have special status and unique rights. The U.S. federal government maintains government-to-government relations with tribes and has the primary power to regulate relations with them. The federal government holds “Indian country” -- tribes’ federally recognized lands -- in trust for tribes, which confers fiduciary duties on the government to manage those lands for the good of the tribes. Tribes have internal sovereignty on Indian country and thus typically control, and have the right to profit from, natural resources located on or under Indian country.

Laws, regulations, and Presidential executive orders require federal agencies to consult with Indian tribes if a project is not on Indian country but federal actions -- such as permitting -- may impact the tribes in certain ways. These sources do not, however, provide detailed definitions of consultation. The consultation requirements are also difficult to legally enforce. Each federal agency has developed its own internal, more detailed guidelines. These guidelines differ significantly from one another and are, typically, unenforceable. Such consultation is procedural, offering tribes an opportunity to express concerns, but not guaranteeing that concerns raised during such consultations will ultimately prevent a federal action from affecting the tribes. Tribes have complained about certain aspects of tribal consultation for years, including inconsistent implementation, but they have limited legal recourse. This lack of consistency and clarity in government-to-government consultation creates challenges for both tribes and companies.

Although U.S. law is generally robust, international law – and related IIGP – has developed rapidly in recent years, particularly in the area of indigenous rights. U.S. law is less stringent than international standards in at least two vital ways. First, IIGP provides more detailed guidance than U.S. law on what constitutes company-tribal consultation, and offers a solid foundation for companies and potentially impacted tribes to develop strong working relationships, regardless of the government’s level of involvement. IIGP defines consultation as a two-way exchange that begins early, with tribes playing an active role in risk identification, mitigation, and monitoring. Companies may need to financially assist tribes with such activities, and compensate them for certain impacts created by projects.

Second, IIGP calls for company-tribal consultation and even Free, Prior, and Informed Consent (“FPIC”) in a significantly wider range of circumstances than U.S. federal law. Under U.S. federal law, if a project is not sited on Indian country, tribal consent is almost never required. Tribes have a right to consultation when projects are not sited on Indian country only in limited circumstances, typically when a federal action would impact their cultural heritage, legally recognized hunting/fishing/gathering rights, or the environment on Indian country. Compounding the challenges, no single federal agency has overall jurisdiction over oil pipelines. As a consequence, permits are typically only required for small portions of such projects, and the portion of the pipeline’s cultural or environmental impacts that is likely to require tribal consultation under federal law is correspondingly limited.

In contrast, IIGP calls for company-tribal consultation and even FPIC for certain impacts arising from projects, regardless of whether impacts are on private or public land or a federal permit is required. For example, the IFC Performance Standards call for FPIC when cultural heritage would

be significantly impacted or a project would impact traditional or customary lands or resources to which Indigenous Peoples maintain a collective attachment. The guidance below highlights the good practices that IIGP identifies for consultation and/or to achieve consent, and that are vital components to build relationships of trust and mutual benefit between companies and Indigenous Peoples, including in the United States.

Notably, the IFC Performance Standards were developed for emerging economies, where Indigenous Peoples' rights, including their land rights, may be less protected as a matter of law and implementation. However, the evolution in Indigenous Peoples' rights under international law (and related IIGP) contributes to expectations in the United States that are unlikely to be met under current law and practice, potentially leading to project risk and social conflict. IIGP can help address such risk in the United States.

The following table contains good practice guidance based on IIGP that companies developing pipelines in the United States should consider building into their corporate practices. To the extent possible, pipeline companies should work with government agencies to implement these practices.

A. General Consultation and Community Engagement Pipeline companies need to be proactive in engaging all potentially affected stakeholders. For example, companies should:	
A.1	Ensure appropriate staffing expertise and capacity: At an early stage of a project, before a company seeks a permit, it should hire staff with expertise in community engagement who can dedicate the necessary time to this activity. Companies should strive for continuity in staffing so that relationships and trust with local communities can be established.
A.2	Conduct stakeholder mapping: A company should conduct stakeholder mapping on an ongoing basis and for specific projects to better understand the social landscape in which it operates.
A.3	Create a stakeholder engagement plan: The company should develop a stakeholder engagement plan that differentiates between interested stakeholders and stakeholders who are directly impacted by a project. The plan should also identify and focus on stakeholders who are most impacted by the project, or who are marginalized and may require special measures for effective engagement. The engagement should begin before there is a problem or a campaign against the company, and should continue throughout the project lifecycle, which may help to pre-empt or minimize problems and campaigns.
A.4	Engage in information-sharing: A company should share information proactively about projects, and try to connect personally with potentially affected stakeholders as much as possible to share accurate information about the project. Potentially affected community members should have an opportunity to share their concerns about the project as well.
A.5	Establish a grievance mechanism: A company should establish a grievance mechanism at an early stage of a project and ensure that it is staffed and monitored so that complaints are not only received but resolved in a timely fashion. Complaints should be tracked and timelines by which issues are likely to be resolved should be regularly communicated to complainants. To be effective, grievance mechanisms need to be culturally appropriate. An effective grievance mechanism should help prevent issues from escalating. If a grievance is significant and the parties cannot reach a resolution on their own, the company should consider bringing in a third party mediator.
A.6	Rely upon expropriation only as a last option, and provide fair compensation: Given recent pushback against the use of eminent domain for pipeline projects in the United States, companies should rely on expropriation as seldom as possible and only as a last resort. Moreover, companies should evaluate the compensation provided under law and consider whether it is adequate to improve or restore livelihoods. Companies should develop project timelines that allow for time to negotiate with landowners.

B. Engagement with Indigenous Peoples

To avoid the risk of project opposition, litigation, and delays, companies should incorporate IIGP to develop positive relationships and partnerships. Many of the recommendations below focus on building trust. Companies engaging with Indigenous Peoples may struggle to develop trust with tribes due to the challenging history of relations between Indian tribes and the U.S. government and, in some instances, with companies. To overcome this, companies need to invest in the relationship and spend adequate time on consultation. This does not always fit neatly within normal project timelines. Yet a failure to spend adequate time can also lead to significant and costly operational delays. The following recommendations would help companies better achieve IIGP in the United States:

B.1	<p>Develop policy guidance: Companies should develop guidance that clarifies their position on Indigenous Peoples’ rights. Such rights are different from those of other stakeholders under international law, particularly collective procedural rights such as consultation and FPIC. Similarly, tribes enjoy special rights under U.S. law, including collective rights, that differentiate them from other groups. Company policies should reflect this. A policy helps provide internal clarity and, if the guidance is public, sets expectations for external parties. The guidance should be based on IIGP and should identify when companies plan to consult or seek FPIC from Indigenous Peoples for:</p>
B.1.a.	<ul style="list-style-type: none"> • Potential impacts on tribal cultural heritage that are subject to protections in the IFC Performance Standards, whether or not consultation under the National Environmental Policy Act (“NEPA”) or the National Historic Preservation Act (“NHPA”) is triggered.
B.1.b.	<ul style="list-style-type: none"> • Environmental impacts affecting Indian country/water or off-reservation usufructuary rights (e.g. hunting, fishing, gathering), whether or not consultation under NEPA or the NHPA is triggered.
B.1.c.	<ul style="list-style-type: none"> • Projects on unrecognized traditional lands to which tribes still have a strong and active collective attachment.
B.2	<p>Conduct due diligence to understand tribal interests and rights: Companies should conduct due diligence to understand tribes’ historical grievances, including with particular federal agencies; tribal land claims and whether tribes continue to seek rights to traditional lands; off-reservation usufructuary rights (e.g. fishing, hunting, or gathering); known cultural heritage sites; and the experiences other companies have had engaging with those tribes. This should help companies define more realistic timelines, approach tribes sensitively, plan projects with consideration of tribal rights and interests, and hire appropriate personnel. Pipeline projects may affect many tribes to varying degrees. To the extent necessary, companies should prioritize engagement with particular tribes if: the activities will occur on reservations, may affect (or are thought to affect) the environment on their reservations/trust lands, may affect off-reservation usufructuary rights, may affect their cultural heritage, or are located on their traditional, unrecognized lands to which they maintain a collective attachment. The more of these factors are present and the more severe the potential impact, the greater the priority that should be given to that tribe.</p>

B. Engagement with Indigenous Peoples <i>continued</i>	
B.3	Consider appropriate timelines: Company timelines and budgets should take into account the time needed to consult or seek FPIC in accordance with international standards for potentially affected Indian tribes. These processes may lengthen the front end of a project, but also should help ensure the project is able to proceed without significant social unrest.
B.4	Consult early: Companies should engage potentially affected Indian tribes early. Under the IFC Performance Standards, for a pipeline this engagement should occur during project planning so that there is still flexibility to adapt the project. Company guidelines should establish a well-defined stage-gated process that calls for and enables the company to consult earlier than regulations require in certain situations, thus facilitating tribal input into site selection and potential re-routing. This would enable consideration of tribal views in routing, environmental risk assessment, and mitigation plans. Ideally, companies would undertake this early engagement along with the permitting agency. Consultation should be ongoing throughout the project life cycle.
B.5	Ensure appropriate staffing and expertise: Companies should hire staff with experience engaging with Indian tribes to conduct consultation for projects that might have impacts on tribes. Companies also sometimes hire tribal members to assist with community liaison. Companies would also benefit from consulting with Indian tribes and/or anthropologists to design and support the stakeholder engagement process, particularly if trust between the parties is low. Company representation at meetings with tribal leadership should be at a sufficiently senior level. Conducting such consultation should be written into relevant job descriptions and performance indicators. All employees and contractors engaging with tribes should receive cultural training.
B.6	Share adequate information: Share information with potentially affected tribes regarding: (1) <u>Project impacts and mitigation:</u> This would include information that is sufficient for them to understand the potential positive and negative impacts of the project, including cumulative effects, as well as planned mitigation steps. This may entail sharing more information than is mandated by law. Information sharing should be a two-way dialogue, where tribes have an opportunity to share potential impacts and concerns with companies and have those taken into account in project planning. (2) <u>The consultation or FPIC process:</u> Given the complexity of agency consultation processes in the United States, and the number of consultation processes in which tribes are asked to participate, companies can play a vital role by sharing information to clarify the project, the government’s process, the company’s process, and thus can help tribes engage more effectively. Companies should prioritize information sharing with tribes if the activities may affect the environment/water on their reservations/trust lands, may affect their usufructuary rights, are located on their traditional, unrecognized lands and the tribe still has a strong attachment to them, or may affect their cultural heritage. The more of these factors are present and the more severe the potential impact, the greater the priority that should be accorded to the tribe. Companies should share as many documents as possible to help tribes understand project risk, and should redact them when they cannot be shared in full so that tribes have adequate information.

B. Engagement with Indigenous Peoples <i>continued</i>	
B.7	<p>Identify potential cultural heritage impacts together and develop mitigation plans: If a project will potentially impact cultural heritage, companies should work with the affected Indian tribe’s elders, cultural heritage experts, or archeologists to plan cultural heritage assessments, identify those sites, and develop mitigation plans. Many U.S. tribes have their own archaeologists. If they are licensed and meet legal requirements, companies should hire them. Otherwise, companies should incorporate tribal elders into archaeological and cultural surveys at an early stage before on-the-ground assessments begin.</p>
B.8	<p>Identify potential environmental risks together and include tribal input related to mitigation: Companies should provide potentially impacted tribes an opportunity to share their concerns about environmental risks and potentially integrate those concerns into Environmental Assessments (“EAs”) and other environmental studies. Tribes might be aware of impacts on wildlife or fauna that a conventional environmental study might miss. Moreover, understanding tribal concerns, even if they ultimately prove unfounded, helps companies respond to those concerns and explain why those impacts would not arise. Companies should also provide an opportunity for tribes to suggest and comment on mitigation methodologies, and ensure that the tribes know whether their suggestions were incorporated and, if not, why not. Providing an opportunity for this feedback helps create a positive and respectful working relationship from the beginning, and may help avoid project opposition and protests. Companies may need to provide financial support to potentially impacted tribes so that they can hire experts to assist them and obtain scientifically accurate information about risks. When identifying which tribes might be impacted, companies should consider impacts of the project as a whole, as well as the risk of a spill, even if a spill is improbable.</p>
B.9	<p>Consider creating an impact-benefit agreement: These documents are a potential outcome of a consultation or a consent process. They identify the potential impacts of the project on a tribe and how mitigation will occur or the tribe will be compensated for those impacts. If the goal of the engagement process was to obtain FPIC, the document would include a formal statement of that agreement. Impact-benefit agreements can include components such as employment and contracting opportunities, environmental, social, and cultural impact management, compensation or disbursements to address impacts, governance arrangements, and other commitments such as continued access to land. Of particular importance for pipeline companies, impact-benefits agreements can address:</p>
B.9.1	<ul style="list-style-type: none"> • A tribal role in monitoring and managing impacts: Tribes play an ongoing role in monitoring cultural and environmental impacts, particularly in the context of certain projects in Canada and Australia. In many of these instances, a company places funds in escrow for the tribe so that it can hire environmental and other experts as needed and produce its own reports or data. For some projects, the company and the tribe have developed joint environmental and cultural oversight boards, with representation from or selected by each party. A government agency has also joined the oversight board in some cases. Enabling tribes to play a role in monitoring can produce significant benefits. It creates trust in project-related data and mitigation approaches. It also provides an opportunity to develop and maintain a constructive relationship between the company and tribe.

B. Engagement with Indigenous Peoples <i>continued</i>	
B.9.2	<ul style="list-style-type: none"> • Compensation for impacts: To the extent that a project is expected to potentially adversely impact a tribe’s lands, environment, usufructuary rights, livelihoods, or cultural heritage, companies should provide compensation. Companies should prioritize land-based compensation where feasible. Offering a tribe a revenue stream from the project is another way to build mutual interest in the project’s success and to offset impacts. These practices are used in Canada and Australia.
C. Security	
<p>The security situation facing U.S. pipeline proponents has changed significantly in recent years. Today, pipelines under construction are much more likely to be the subject of protests. Such unrest, in turn, can increase the risk of disproportionate use of force. As a result of these changes, pipeline companies need to be more proactive in their approach to security. To that effect, companies should:</p>	
C.1.	<p>Seek to use conflict resolution first: If a situation appears likely to escalate into protests, companies should consider hiring a mutually acceptable third party mediator to help the two sides manage the conflict peacefully through dialogue to attempt to avoid the outbreak of protests and the need to engage security forces. Companies should consider developing a list of respected third party mediators to facilitate quick action in a crisis.</p>
C.2	<p>Require Private Security Contractors (“PSCs”) to act in a manner consistent with the Voluntary Principles on Security and Human Rights and proportional use of force: Companies should include this expectation in their negotiations and agreements with PSCs.</p>
C.3	<p>Conduct security risk assessments: To better understand and address security risks in a responsible manner, companies should consult with a broad range of sources regarding security risks, conflict dynamics, the potential for violence, the effectiveness of rule of law, the human rights records of public and private security, and the risk of equipment transfers from private to public security.</p>
C.4	<p>Screen potential private security providers: Companies should not only ensure that security providers are licensed, but also review the security company’s record, including any lawsuits or reports regarding the excessive use of force. Companies should ensure that the security provider is adequately screening its employees’ records for histories of violence or criminal acts. Companies should also consider whether their chosen security provider has the experience and training to peacefully handle more complex security scenarios, such as large crowds and protests or sabotage of equipment. If not, given the challenges that the pipeline industry currently faces, companies should have in place a back-up provider with such capabilities.</p>
C.5	<p>Ensure private security providers have adequate training: Companies should require that private security providers receive robust training on proportionate use of force, conflict resolution, and responsible crowd control, where relevant.</p>

C. Security <i>continued</i>	
C.6	Ensure that security incidents are investigated: Companies should contractually require their PSCs to report any use of force, weapons discharge, or injury related to security to them. Such incidents should be investigated and any potentially criminal acts reported to the authorities. Security personnel should be disciplined, including by dismissal, if they used excessive force.
C.7	Engage with public security regarding expectations: In the United States, corporate influence on the police or other public security forces may be limited, and the ability of public security to act in accordance with international standards regarding the use of force is frequently assumed. Companies should nevertheless clarify with relevant public security that their first priority is protection of human life and health of their own employees and of any protesters. They should make clear that they would never wish for lethal force to be used to protect company property. These steps have the potential benefit of helping to protect the company from the appearance of complicity in public security abuses and potential lawsuits.
C.8	Avoid sharing equipment with public security: Companies should ensure that they and their private security providers do not provide equipment to public security forces. Were this equipment to be used against individuals, the company could be considered to be complicit in any abuses. Sharing of equipment is less likely in the U.S. context, where public security is well-equipped. These steps nevertheless have the potential benefit of helping to protect the company from the appearance of complicity in public security abuses and potential lawsuits under the Alien Tort Statute.