Federal Infrastructure Permitting and the FAST Act
Effects on Tribal Nations

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GREAT RECESSION OF 2008-2011

• President wants to create jobs, build infrastructure, revive economy, and wants to move quickly

• Federal permits and approvals are slow
EXECUTIVE ORDER 13604

Improving Performance of Federal Permitting and Review of Infrastructure Projects

• Issued on March 22, 2012
• Maximum efficiency for Federal infrastructure permitting
• Surface transportation, aviation, ports, waterways, water resource projects, energy generation, electricity transmission, broadband, pipelines, and other such sectors
• Created Interagency Steering Committee on Federal Infrastructure Permitting and Review Process Improvement
STEERING COMMITTEE

• Goal: Quick Federal Permitting
• Chaired by the OMB and co-managed by CEQ
• 12 Deputy Secretaries (includes Interior)
• June 2012 Report:
  – The Committee has jurisdiction over authorization of projects through permits, licenses, and certificates
• May 2014 – Releases Implementation Plan
  – Includes recommendations on how to improve the quality of applications, and the technique for decisions regarding adverse impacts.
The Permitting Dashboard

An effort to modernize the Federal permitting and review process for better projects, improved environmental and community outcomes, and quicker decisions.
PERMITTING DASHBOARD

• Database of all federal permitting for infrastructure projects

• Includes deadlines to keep agencies track

• Creates “Covered Projects”

• Covered Projects get special attention from the Steering Council
2014 IMPLEMENTATION PLAN

• Agreements with State and Local Governments
  – Steering Committee agencies will identify opportunities to develop additional mutual agreements with state or local governments for:
    • Early participation and coordination activities
    • Share relevant environmental, scientific, cultural, and historical data related to the planning, siting, and review of proposed major infrastructure projects
    • Support the development of mitigation alternatives on a landscape- or watershed-scale.
  – Tribes are not included
OLD PERMIT SYSTEM

• Developer figures out permits needed
• Applies to five different federal agencies
• For nine different permits
• No deadlines
• Waits to see what happens
NEW PERMIT SYSTEM

• Developer submits project to Steering Council
• Steering Council figures out permits and approvals needed
• Sets schedule and deadlines for each agency
• Deputy Secretaries enforce schedule
FAST ACT – TITLE 61

• Builds off the Framework of the E.O. 13604
• Establishes Federal Permitting Improvement Steering Council
• Requires federal agencies to maintain a Permitting Dashboard.
• Judicial Review
  – Only have 2 years to file a challenge (Usually 6 years)
  – Pre-Notice of Legal Challenge: Cannot challenge in court unless “sufficiently detailed” comments during the environmental review process
• Preliminary Injunctions More Difficult
  – Courts MUST NOT presume that the economic harms are reparable
KEY POINTS OF NEW PERMIT SYSTEM

• Covered Project: Renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resources projects, broadband, pipelines, manufacturing, or any other sector

• Council surveys key federal development agencies and sets schedule for project

• When all Environmental Reviews done, lead agency has 180 days to make a decision

• Existing laws are to be followed

• But, aggressive timetables, extensions limited

• Tribes Not Included
NEED TO INCLUDE TRIBAL NATIONS

• Guidance mentions Tribal Trust Compliance, but not defined, nor is process for working with tribes
• There’s no tribal trust compliance official
• Threat: tribal rights and lands are ignored
• Opportunity: tribal rights built into comprehensive system for federally approved projects
TRIBAL TRUST COMPLIANCE

- Trust & Treaty obligations to lands, waters, and sacred places
- E.O. 13175 duty to consult
- UNDRIP duty to seek free, prior, informed consent
- Statutory obligations under National Historic Preservation Act; National Environmental Policy Act; Clean Water Act; the Native American Graves Protection and Repatriation Act, etc.

- President and the Secretary of Interior have authority to regulate matters affecting Indian lands under 25 U.S.C. §2 under “such regulations as the President may prescribe….”
SOLUTION: TRIBAL TRUST COMPLIANCE

- Integrated into Steering Council guidance, timelines, etc
- Steering Council develop a Tribal Trust Compliance Officer
- Tribal governments provided full and early participation in “purpose and need” infrastructure permitting discussions
- Funding for participation
- Tribe’s direct involvement or consent is evidence that tribal concerns over lands, waters, and sacred places have been addressed
TRIBAL INFRASTRUCTURE PROJECTS

- Tribal projects also subject to federal approvals
- Bureau of Indian Affairs slow with leases, rights-of-way, and many other projects
- General policy should support greater tribal control
- Where federal approval is needed, tribe’s direct involvement or consent is evidence that tribal concerns over lands, waters, and sacred places have been addressed

- NCAI Resolution 067 has been drafted to support
Thank You!

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