federal, state, and tribal officials. Funding agreements can benefit tribes and companies if structured and monitored to avoid any actual or perceived conflicts-of-interests.

Best practice: El Paso Corporation's Ruby Pipeline Project

An example of the energy industry's effective support of tribal consultation is the Ruby Pipeline Project (Ruby), a 700-mile interstate pipeline completed in 2011 that delivers natural gas produced in the Rockies Basin to the West Coast. As with DAPL, Ruby does not cross any Indian reservation lands but passes through former treaty and aboriginal lands of various tribes. The late David Lester, executive director of the Council of Energy Resource Tribes, a tribal advocacy organization, assisted Ruby's owner, El Paso Corporation (since acquired by Kinder Morgan), in strengthening tribes' ability to participate in tribal consultation. Prior to construction, Ruby entered into funding agreements that tribes used to retain their own attorneys and ethnographic experts to document and protect cultural resources for federal consultation purposes.

The tribes also worked with Ruby to create a tribal monitoring program, paid for by the company, which trained 100 tribal members to assist archaeological teams prior to, during, and after construction. At the tribes' request, the pipeline was rerouted—including more than 900 "micro-reroutes" to avoid culturally important sites—at a total cost of $11 million. Traditional plants were harvested for seeds and preserved in greenhouses, then replanted post-construction in the reclaimed right of way. Ruby also worked with tribes to enhance tribal employment. Because skilled pipeline construction jobs typically require union membership, Ruby supported tribes' requests to pay union dues and apprenticeships for tribal members. A later internal review by the company found that such reroutes and tribal capacity-building measures saved the company at least $250 million in avoided project delay costs from potential tribal litigation and protests.

Wherever and whenever it happens, managing the next Standing Rock controversy—better yet, mitigating or avoiding it—should be on every energy developer's agenda. Supporting tribal consultation is an effective way for the energy industry to manage business risk in post-DAPL America.

The art of the winning deposition

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A deposition is an essential discovery tool for learning relevant facts and establishing (or undermining) claims and defenses. In most jurisdictions, each party in a lawsuit has the right to

take the depositions of the other parties, third-party witnesses, and expert witnesses. Here are some general pointers:

1. **Determine your goal**. The first question to ask yourself is "What is my primary goal for the deposition?" No, it is not to make sure everyone in the room stays awake without drinking five cups of coffee. Do you wish to learn more about key facts, determine a witness's reliability, lock a witness into a particular position, have a witness authenticate documents, preserve testimony of a witness who may be unavailable at trial, lay the groundwork to impeach a witness at trial, or test your case theories? If your case is definitely headed for trial, you may decide to reserve certain questions or documents for use at trial. On the other hand, if your case is likely to settle and your deposition may be useful in gaining leverage for settlement, you may decide to employ a more comprehensive approach to questions and documents. Consider what elements you need to prove (or disprove) in arguing a motion for summary judgment, making a mediation presentation, or presenting your closing argument, then focus your deposition questions around these elements.

2. **Educate yourself**. Sure, you have spent three years acquiring a J.D. educating yourself on the law, but have you educated yourself on the case? To take an effective deposition, you will need to be familiar with the facts and applicable legal standards. Review the pleadings, research applicable law, review discovery, and research your witness.

3. **Prepare an outline**. Your outline provides a roadmap for your deposition and should, at a minimum, include the topics for your examination and the exhibits you will explore with the witness. Some attorneys identify topics by general categories or concepts, while others are less spontaneous and prefer to script most questions. If you fall in the latter category, do not let your script keep you from listening carefully and allowing the witness to lead you to other relevant questions.

4. **Think graphically**. Prepare simple demonstratives or chronologies, and get the witness to accept or comment upon those graphics. If an opposing witness adopts your chronology, then you are a long way to proving your case. A simple demonstrative establishing some core facts that are incontrovertible can eliminate multiple requests for admissions or interrogatories.

One particular type of deposition is a Federal Rule of Civil Procedure 30(b)(6) deposition of the party's corporate representative. Under Rule 30(b)(6), the named organization must designate one or more officers, directors, or managing agents, or designate other persons to testify on its behalf. The entity may set out those matters on which the designated person will testify. During the deposition, the designated representative must testify about information known or reasonably available to the organization. Here are several tips for preparing to take a 30(b)(6) deposition:

1. **Determine the best time to take the deposition**. Is it better for your case to take the Rule 30(b)(6) deposition in the beginning of the discovery period to gain a general understanding and assist in tailoring future discovery—or at the end of the discovery period to tie up loose ends and fill any gaps in information? There are pros and cons to each approach, but make this decision part of your overall case strategy.

2. **Prepare a deposition notice**. The deposing party must craft a notice of deposition that identifies the areas of inquiry with "reasonable particularity." Courts may disagree as to whether you may question the deponent on subjects that were not enumerated in the deposition notice, so it is best for the notice to include all possible topics of inquiry. Insufficient notices may be quashed or modified, so time invested in perfecting your notice may save time down the road.

3. **Confirm the deponent party has designated appropriate individuals**. The corporation must designate deponents who can testify on its behalf. Designees are not required to have firsthand knowledge, but they must be prepared to provide complete and binding answers. Begin the deposition by confirming with the designee that he/she is fully prepared to provide the information known to the organization. If it becomes evident that the identified designee is not adequately prepared, you may demand that the organization designate additional witnesses. Doing so will probably not strengthen your relationship with opposing counsel, but it will show everyone you know how to use Rule 30(b)(6) to advocate for your client.

Another critically important type of deposition is the expert witness deposition. Lawsuits are oftentimes won or lost on the basis of expert witness testimony. The following are several suggestions:

1. **Review the expert's report.** Typically, the expert witness will have provided his/her expert report in advance of the deposition. Put away your *NY Times* bestseller and make the expert report your preferred reading material in advance. The expert report provides a helpful starting point for your questions. Explore the contents of the report as well as the assumptions on which it is based. The report is typically a product of negotiation between the expert and the attorney, so look for areas of vulnerability where the expert might be willing to concede points or reach different conclusions based on assumptions other than those in the report.

2. **Learn as much as possible about the expert's area of expertise.** Even the brightest attorneys (and you certainly fall in that category for having chosen to learn more about taking winning depositions) do not know everything. An expert witness likely has more depth of knowledge and experience in his/her area than the attorney deposing the expert, but learn what you can about the area so that you can identify the relevant vocabulary and key concepts. Additionally, identify the expert's prior testimony and publications. This background research will assist

you in identifying areas to explore during the deposition, not to mention all the new conversation material you will acquire for cocktail parties.

3. **Consult with your expert to expose areas of weakness.** The best suggestions for deposition questions will often come from your expert. He/she will know the strengths and weaknesses of the opposing expert's opinions and can assist you in exposing those during the deposition. The ultimate goal, if your case is heading for trial, is to exclude the expert's opinion, so begin setting up your *Daubert* challenge at the deposition.

With ample and thoughtful preparation, you can maximize your likelihood of success at the deposition and make the record you need for use during the balance of the litigation, including negotiating settlement, drafting your summary judgment brief, or preparing for trial.

In Brief

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Clean Water Act, jurisdiction to hear challenges to WOTUS Rule

Nat'l Ass'n of Manufacturers v. Dep't of Def., **No. 16–299, 2018 WL 491526 (U.S. Jan. 22, 2018).**

The U.S. Supreme Court unanimously resolved the hotly contested issue of where challenges to a rule defining the scope of the statutorily regulated "Waters of the United States" (WOTUS Rule or Rule) under the Clean Water Act must be filed—in the federal district courts, not federal circuit courts of appeal. In 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) proffered a new definition of the term "waters of the United States" through the WOTUS Rule. Immediately following promulgation of the rule, a number of parties, including National Association of Manufacturers (NAM), challenged the Rule in United States district courts across the country. Many parties also filed "protective" petitions for review in various courts of appeals to preserve their challenges should their district court lawsuits be dismissed for lack of jurisdiction under § 1369(b). The circuit-court actions were consolidated and transferred to the Court of Appeals for the Sixth Circuit. NAM intervened as a respondent in the Sixth Circuit and moved with other parties to dismiss for lack of jurisdiction. The federal government opposed those motions, arguing that the challenges must be brought first in the court of appeals because the WOTUS Rule fell within subparagraphs (E) and (F) of § 1369(b)(1), which provides for initial review in the appellate courts of EPA actions affecting effluent limitations or in granting or denying any permit issued under the Clean Water Act. The Sixth Circuit denied the motions to dismiss and on that jurisdictional basis rejected the 2015 WOTUS