



Episode 793: What Should Libertarians Think of the Dakota Access Pipeline?

Guest: Rob Port

WOODS: We've got to get to the bottom of this Dakota Access Pipeline, because everybody's talking about it, and I've got a lot of people asking me to talk about it. And in particular, since I have a libertarian audience, I have people who want to know the precise rights and wrongs of what's happening in terms of property. Who owns the property in question? What kind of agreements have been reached between the property owners? These are the fundamental questions that helps us to decide the moral rights and wrongs of the whole situation.

So give us a background. What is this pipeline? Is this a project that's been a long time coming where people had knowledge of it? Did they meet and discuss it? What happened? What's the history?

PORT: Well, yeah, the Dakota Access Pipeline, it's a more than 1,000-mile pipeline. It originates in the North Dakota oil fields, specifically near Stanley, North Dakota. It actually runs west, sort of loops around, crosses the Missouri River upstream from Williston, and then sort of angles down in a southeast direction across North Dakota, South Dakota, other states, until reaching refineries in the state of Illinois.

Here in North Dakota I think the public consensus generally is that this is important infrastructure for the oil fields. North Dakota, unlike other places like Texas and Oklahoma, when we had this surge in oil production it was unprecedented for us. We had never had this level of oil production before, so we didn't have the infrastructure to carry a lot of it to market, and that ended up putting a lot of the oil on trains. And then we had some incidents with trains derailing and some really unfortunate explosions and things like that that made a lot of news over the last couple years. So building out pipeline infrastructure, which I think most people consider to be a safer sort of way to transport oil, has become very important.

So that's the situation we're in. It's been a years-long process. Our state Public Service Commission held multiple public hearings about this. The federal government, you know, there's a years-long regulatory process. Really the whole thing, from the point at which this was first announced to the public to now, is nearly three years. So this has been a long time going. It's not been on the radar.

Now of course it's making national and even international headlines now, because there's been some very intense protesting going on in opposition to the pipeline. In North Dakota – In other parts along the pipeline route, the pipeline company has

used eminent domain to push that forward, which, I've got to say, makes me as a libertarian-minded guy, a little uncomfortable.

I can say, though, specifically, what's probably caught most of your readers and listeners' attention is Standing Rock's argument against the pipeline. And what they're saying is that the pipeline crosses what they describe as unceded treaty land, and that's very complicated. In North Dakota specifically, which is the part of the pipeline, since I'm from North Dakota, that I'm most familiar with, most of it is across private land, and all of those easements in North Dakota were negotiated with the pipeline and some sort of a mutually agreeable agreement was reached to cross that land.

And as a matter of fact, there's another Native American tribe, the three affiliated tribes of the Fort Berthold reservation, which is sort of in the center western part of the state, they actually approved an easement with the pipeline company to cross their land. Now, the pipeline does not cross Standing Rock's reservation as it stands today. Their argument is that it crosses, a) upstream up the Missouri River from their community and that it crosses treaty lands that the tribe continues to dispute to this day.

WOODS: All right, so that's what we have to dig out. There's also been some complaints that the presence of the pipeline could result in water contamination?

PORT: Yeah. So that one is – First of all, early on they made that claim, and the argument was that it passed right near the Standing Rock Sioux tribe's water intake, which is currently at Fort Yates, which is sort of at the northern tip of the Standing Rock reservation. The Standing Rock reservation, by the way, for people who don't know, straddles North and South Dakota, and there's a lot of history around this reservation – very interesting history, worth your readers' time to check it out.

But in terms of the water being contaminated, I think there's two important points to make. First, the water intake is actually being moved. It's being moved from Fort Yates 70 miles down river to a place near Mobridge, South Dakota. Now, this is not being done because of the pipeline; this is actually something that's been in the works for ten years by the federal government. They built a new water treatment plant at Mobridge, a better sort of intake, and the reason they did it is the intake at Fort Yates is actually in a relatively shallow part of the river, and there was a problem during drought years that that intake actually gets exposed. I actually broke that story about the intake being moved 70 miles south. So that obviously lessens the concern about oil contaminating the drinking water.

WOODS: All right, one quick thing, just because most people probably are not familiar with the term "intake."

PORT: Sure.

WOODS: You're talking about, this is the source of the water that the Standing Rock –

PORT: The source of the drinking water.

WOODS: Yeah – would have. So that's going to be in a different place, quite a substantial distance away, so it doesn't seem like the pipeline is really going to have any effect on water?

PORT: That's right; that's right. And even so, no matter where the intake is, nobody wants to see oil being dumped into the river, so another point to make is that the pipeline, I think sometimes when people hear about it crossing the river, they think of a pipeline that's actually in the water. In truth, they actually bore it under the riverbed, so it's going to be roughly about 100 feet under the riverbed as it crosses. There's all sorts of automatic shutoff valves on either side of the river. So it's very safe.

Another point to make is that it's not like this is the first time a pipeline has crossed a body of water in the United States. There are thousands upon thousands of miles of pipeline all over the United States. It crosses water streams all over the United States. As a matter of fact, upstream from Standing Rock there are already eight pipeline crossings, not all of them oil, some of them gas and things like that. But there are already eight pipeline crossings upstream from Standing Rock. So this is hardly the first time we've done this.

I think the pipeline industry, although we could all point to specific spills, has a pretty good track record with this. The idea that this pipeline out of the thousands of pipeline and the thousands and thousands of water crossings in the United States is going to pose some existential risk to drinking water I think is a little ridiculous.

WOODS: Now, you say that trying to sort out all of the questions of property and tribal ownership and claims is kind of complicated, but yet isn't that the heart of the whole issue? I mean, we've got to get that right.

PORT: Yeah, no, you're absolutely right. So part of the issue with Standing Rock, and you can actually go into their federal filings in the federal courts and look at some of the arguments that they're specifically making. And one of the arguments they actually make is that they consider their ancestral land or their tribal land or whatever to be "wherever the buffalo roamed." Now, unfortunately, in modern America today, the buffalo roamed over a lot of places that have been privately held land for a very long amount of time.

And even if we go back to the unceded treaty land – Now, when Standing Rock talks about this, they're talking about the Fort Laramie Treaties of 1851 and 1868, I believe those are the dates. And what they argue is that they didn't necessarily agree. The federal government broke those treaties when they shrunk the reservation down to its current size today and that they never actually ceded this land.

This was actually a Supreme Court case. It went all the way to the Supreme Court. The Supreme Court ruled that the reduction of that land was a taking from the Sioux tribe and ordered the federal government to basically pay them for the land. It was hundreds of millions of dollars – I think it was something like \$300 million to pay for that land. But the Sioux tribes have never accepted that money. Or I should say, the federal government has argued that they've accepted some of the money. It's a very complicated legal matter.

Complicating it even further, though, is the fact that on that land there are people who have literally owned that land for hundreds of years. One thing that somebody might want to look at is part of the land where most of the protesting is taking place is what's called the Cannonball Ranch. It's a very historic ranch in North Dakota. It's been in private ownership for well over a hundred years. And today Standing Rock is saying that's part of their unceded tribal lands.

Now, if our goal is sort this out and try to find some sort of a just property ownership outcome, it's very difficult, because on the one hand, the Native Americans are absolutely right when they talk about the federal government mistreating them. Our federal government gave them a raw deal. There's no question about it. The problem is that in 2016, there's nobody alive who was a party to that deal. There's nobody alive who was a part of negotiating that deal, and we now have other private owners who own that land and have their own longstanding, historic claims to that land.

So what do we do? If Standing Rock had their way and we gave all that back to the tribe, it seems to me we would be creating modern property rights injustices in an attempt to correct old property rights injustices. So that's the complicating matter. I tend to side on, let's move forward rather than trying to go back and unravel these complexities from the past and not commit further property rights atrocities going forward. Not everybody obviously agrees with that.

WOODS: What can you tell me about the protests themselves? This is not — The fact that people are coming from other states doesn't necessarily invalidate the protest, but it does mean that this is not some spontaneous, local uprising of residents outraged about the situation.

PORT: You know, North Dakotans have a long history of being pretty tolerant people. Our politics in North Dakota are very interesting for anybody who wants to take the time to learn a little bit about them. I think that most North Dakotans have absolutely no problem with the idea that the Native Americans have a problem with the pipeline and are protesting the pipeline. The idea of the protest itself is not necessarily a controversial one in North Dakota, although I think most citizens would probably disagree with the tribe's outlook in the pipeline itself.

The problem is that this has been elevated by sort of national leftist groups into a larger cause against oil development itself. If you listen carefully to what some of the actual tribal leaders — and I'm talking about Chase Iron Eyes, who was actually a candidate for the U.S. House during the election, who is from the Standing Rock community. If you listen carefully sometimes to what Standing Rock Chairman, David Archambault, says — What they say is that they're not necessarily for stopping oil production, and they're not necessarily against building a pipeline. What they want to see is the pipeline rerouted, sort of further away from their reservation.

And we can have a debate about that, but unfortunately I think the message that most people get from the protest in the national media is that this is full on anti-oil. This is, Keep it in the ground, oil companies are evil, we shouldn't do all this. And I don't know that that's necessarily representative of where most people in the tribe are on this.

And as a matter of fact, yesterday on SayAnythingBlog.com, if people want to go check it out, I actually had a post up where some Native American members of the protest movement are getting a little tired of I guess what they describe as these white hippies who are coming to their community and treating it like Burning Man. That's actually the quote from one of the Native American protestors. So I think that there is a sense there that the local tribe's protest against the pipeline has been coopted and sort of shoehorned in this larger leftist, sort of environmental zealot narrative, and I don't know that in the long term that that's going to serve the tribe well.

WOODS: Is there a way to distinguish between the arguments made by tribes and the arguments made by these professional leftists? In other words, are the tribes really concerned that the pipeline is going to contribute to global warming?

PORT: You know, it's hard to say, because sometimes it's hard to tell who speaks for what. I mean, from the outside of the community, I think there's definitely sort of three factions. I think there's the actual Native American protestors. I think there are the sort of hippie tourists who are just down there to have a good time and strum on their acoustic guitar, although there's probably less of that going on now. We just got about a foot of snow overnight, so I suspect the number of hippie tourists down in the camps has been minimized as of today. And then there's sort of the hardcore, almost – I hate to use – it's such a fraught term, but ecoterrorists, who are here to create violence and to create chaos and try to get their way through fear and intimidation.

I think those are sort of three factions, and it's hard – I mean, I think there's probably overlapping views between all three of them. I mean, what's really problematic is that the tribe, in filing their lawsuit against the federal government to stop the pipeline, actually partnered with a group called Earth Justice. And Earth Justice is a group that very much wants to keep oil in the ground. I mean, you can go to their website; it's basically their mission statement.

So on one hand, you have Chairman Archambault who's going around saying, We just want to reroute the pipeline; we're not necessarily against oil. On the other hand, they've partnered with a far-left environmental group that basically wants to stop oil production, which is hugely problematic, because every single person in the United States uses oil-based products every day, including the protestors. Ironically enough, Chairman Archambault himself actually owns a gas station, who, according to state records, has seen a pretty increase in the amount of gasoline that he's selling to all these anti-oil protestors.

WOODS: What do you say about the criticism that law enforcement has engaged in brutality –

PORT: Yeah.

WOODS: – against the protestors?

PORT: You know, it's tough. I have been a critic of sort of police using military-style weapons and tactic and also what I call – and I think Radley Balko is the gentleman,

an author, *Washington Post* columnist, who coined the term – but the term warrior cop – that mentality, I have been sharply critical of that. On the other hand, though, what North Dakota law enforcement has been pitted against is people who I think very much want – they want conflict, and they want violence, because that's what gets headlines. And I think it has been very unfortunate the way North Dakota law enforcement has been portrayed in this. I think that they have been very professional, and I think actually the reason why we've seen so few injuries and frankly no deaths to this point is because of the professionalism of the North Dakota law enforcement.

Now, we've seen a lot of ugly pictures of the cops standing in lines, and they've got the riot gear on and the helmets, and they have a couple of armored vehicles. But you've got to remember what's coming at them from the other side, is the protestors are shooting, like, metal nuts at them with slingshots. They're throwing rocks. They're throwing Molotov cocktails.

And by the way, these cops are not just like descending down on the protest camps. It's not like the cops are going to the protestors and harassing them. A lot of the pictures that you'll see of the cops in a line sort of marching down the highway was because the protestors literally blocked the state highway for days. And for days, law enforcement went up to the am and said, "Please leave. You're blocking a public highway. We have a duty to enforce the law. We don't want to force you off the land; we would prefer if you would remove yourself voluntarily." The protestors refused, and I think the reason why is because they wanted conflict.

Another problem is that they have consistently gone about and set up camps on private land, land where the pipeline is being built, land where the landowners gave the pipeline company permission to come on and construct their pipeline. The protestors go on that land They have caused millions of dollars in damage to pipeline equipment: excavators and bulldozers and stuff like that. They have repeatedly harassed pipeline workers. They locked themselves to the construction equipment. And so law enforcement has been tasked with trying to protect that private land as well, because those people have property rights.

So law enforcement has been put in a situation where they have to deal with people who I believe are actively seeking violent conflict to make headlines. And the cops are really in a no-win situation, because they have a mandate to enforce the law, and I think they're laws that most of us agree with: laws against not blocking a state highway that serves, not just the reservation community, but also thousands of farmers and ranchers who live in that area.

Also, not allowing them to just occupy private land that's owned by private ranchers. There have been reports of dozens of cattle that have been slaughtered, shot with bows and arrows, flat-out stolen. And I know maybe some of your urban audience is sort of laughing at the idea of cattle rustlers, but when you're a rancher who has several hundred or maybe a thousand head of cattle and 30 or 40 of them go missing or get slaughtered or are injured by protestors, that's a hit to their business that costs tens of thousands of dollars. It's a serious situation.

And so the protestors assert that they're being sort of attacked by militarized law enforcement. I would argue that law enforcement is doing their best to try to contain

people who are purposely breaking the law in order to provoke violent conflicts with law enforcement.

WOODS: Okay, I'm sorry I'm a little bit all over the place, just kind of throwing questions at you, but there's just a lot of ground I want to cover here. I've heard it said by – I don't know if the tribes themselves are making this claim or Standing Rock's making this claim, but I know that people who support them are making this claim, that the tribal community was not part of the discussion leading up to the building of this pipeline. What would you say about that?

PORT: I would say that people should get on Google, and they should look up Judge James Boasberg's opinion rejecting a request made by the tribe that he enjoined construction of the pipeline, wherein he notes that both the pipeline company and the U.S. Army Corps of Engineers – because remember, in order to cross the Missouri River, there's about 1,100 feet there that the U.S. Army Corps of Engineers, because they regulate that waterway for the federal government, must approve. So the judge goes through, and he details very specifically how many meetings the Corps tried to set up with the tribe, how many meetings the pipeline company tried to set up with the tribe, and the tribe basically rejected them. It is very detailed. And so the tribe's argument that they didn't have a seat at the table or they didn't have an opportunity to give their input is patently false.

At the state level, the North Dakota Public Service Commission heard no fewer than three public hearings about this, where the tribe could have showed up, could have presented their side of the story. As a matter of fact, they were invited specifically to these hearings by Scott Davis, who was North Dakota's Commissioner for Indian Affairs, who I've spoken to directly about this. The tribe was specifically invited to attend those hearings, and they didn't show up.

And as a matter of fact, in Judge Boasberg's opinion – and by the way, Judge Boasberg is an Obama appointee, so he's not exactly someone who's out to help oil companies build pipelines, per se. Judge Boasberg actually describes one incident where the U.S. Army Corps of Engineers set up a meeting with the tribe, and the tribe held their meeting before the Corps showed up, actually held their meeting early, and when the Corps officials showed up they said, Oh, sorry, our meeting's already over. So the tribe didn't exactly try to engage in the process, and I think it's very hard for them to say, Well, the process didn't include our point of view; the process didn't engage us, when the process did engage them and they didn't show up.

And by the way, it's not like this pipeline company has been reticent to make changes to avoid culturally significant or environmentally sensitive areas. In the state of North Dakota alone, during the planning and regulatory stages, they changed the route for the pipeline over 140 times to impact places.

As a matter of fact, just a couple of weeks ago, while building the pipeline, they ran across some archaeological finds. There were some stone cairns that can sometimes indicate where there's tribal burial sites or whatever. They ran into that as they were constructing. That triggered what's called their unexpected finds doctrine, where they have to notify the state's historic office, which they did. They notified the North Dakota State Historical Society. The Historical Society noted the site. The pipeline

company protected the site, and the Historical Society approved a route around that site. So even as the protests are going on, even in that fraught media and political environment, the pipeline company is doing the right thing and protecting even minor archaeological finds.

So again, the idea that the tribe wasn't heard from or the pipeline company was just sort of steamrolling across the countryside, it doesn't really care about the land impacts or whatever, are claims that I don't think are supported by the facts.

WOODS: What do you think then happens now? I mean, presumably the pipeline is going to continue. Are the protests making the — I'm sorry I haven't followed it closely enough to know. Are they making the continued work on it impossible, or are they just a nuisance? What happens at this point?

PORT: Well, at this point — Actually, the construction of the pipeline outside of that crossing of the Lake Oahe reservoir — Lake Oahe's actually part of the Missouri River, but it's one of the reservoirs from the dams along the river. The U.S. Army Corps of Engineers has not issued that easement. They were set to issue it, but President Obama weeks ago after the federal government upheld the regulatory process that led to the construction of the pipeline, President Obama basically upstaged his own, despite the fact that the Obama administration won in court and the federal judges ruled that their regulatory process in this matter was sound, the Obama administration upstaged them and said we're going to hold back on this easement for a while.

So actually, all construction, at least in North Dakota, outside of that Lake Oahe crossing, which is about 1,100 feet under the river, all of it's done. There's no active construction going on right now. So yeah, while it was going on, the protestors were very active. They burned excavators; they burned bulldozers; they harassed the pipeline workers; they would lock themselves to the construction. It made it very difficult. But they got it done. It's done except for the crossing.

So at this point, I expect when President Obama's out of office — I don't think he's going to issue the easement. I think when he's out of office, we're going to have President Trump, and I fully expect Trump to issue the easement. And at that point, I think the pipeline company's probably going to complete construction. They'll probably be harassed along the way by the protestors. But I think they're going to get it done, and I think early next year we're going to see oil flowing through this line.

WOODS: All right, well, a good place to keep an eye on what's going on is the Say Anything blog from Rob, who is the North Dakota go-to guy if you want to get sound news — not fake news, right? You're putting out real news at Say Anything blog, right? People can visit it at SayAnythingBlog.com. You've been blogging over there since 2003?

PORT: Yeah, yeah, 13 years.

WOODS: For a blogger, that is a long blogging career.

PORT: Yeah, and I'm very lucky now; I also get to write newspaper columns for the Forum News Service, so I'm in just about every daily newspaper in the state. And I've also got a radio show on AM 970 WDAY in Fargo, which is podcasted. The information's on the blog if people want to pick up my podcast.

WOODS: All right, definitely check out SayAnythingBlog.com, and I appreciate the briefing you've given us today. Thanks so much.

PORT: Yeah, thank you, Tom.