Out of sight, out of mind — until they aren’t — pipelines are as yet a necessary piece of the nation’s energy puzzle, moving oil and natural gas from their origins to refineries, and thence into our gas tanks, stoves, roads, roofs and more.

But against a backdrop of heightened environmental and climate-change awareness, crude oil pipelines now also carry controversy, raising the stakes for the states, which are more or less on their own when it comes to regulating the siting of such pipelines (as long as their regulations aren’t pre-empted by applicable federal laws).

Companies that operate pipelines come under the jurisdiction of the Federal Energy Regulatory Commission. And once pipelines are operational, the U.S. Pipeline Safety Act assigns oversight to the Office of Pipeline Safety (housed within the U.S. Department of Transportation’s Pipeline and Hazardous Materials and Safety Administration).

The latest pipeline to make headlines is the Dakota Access Pipeline, a planned 1,134-mile underground pipe from the Bakken oil fields in northwest North Dakota that would run through South Dakota and Iowa to the Patoka Tank Farm in south central Illinois. If/when completed, the $3.7 billion pipeline is projected to carry more than 450,000 barrels of fracked crude oil per day.

As of February, Dakota Access had received approval in all states except Iowa. Because the pipeline
both the Iowa Utilities Board and Department of Natural Resources must sign off on it. The DNR did so in March, and in June, the Iowa Utilities Board voted 2-1 to permit pipeline construction. However, 15 Iowa farmers have since sued over the board’s granting of eminent domain powers for the pipeline project.

<table>
<thead>
<tr>
<th>State</th>
<th>Interstate miles</th>
<th>Intrastate miles</th>
<th>Total miles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illinois</td>
<td>2,744.1</td>
<td>74.2</td>
<td>2,818.3</td>
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<tr>
<td>Indiana</td>
<td>502.4</td>
<td>29.9</td>
<td>532.3</td>
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<td>Iowa</td>
<td>421.8</td>
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<td>Kansas</td>
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<td>4.7</td>
<td>2,660.7</td>
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<td>Wisconsin</td>
<td>1,181</td>
<td>N/A</td>
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<tr>
<td>Midwest</td>
<td>15,304</td>
<td>1,812.9</td>
<td>17,116.9</td>
</tr>
</tbody>
</table>

Source: American Petroleum Institute (using data from U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration)
Public utility or private entity?

The farmers argue that the pipeline does not qualify as a public use, purpose or improvement. As a result, they say, eminent domain cannot be used to force the sale of farmland to a private pipeline company. (Federal law gives crude oil pipelines no statutory right to use eminent domain; it does give that right to natural gas pipelines, however.)

As a result, they seek to have the Utility Board’s decision overturned as unconstitutional. Oral arguments are scheduled for December.

In North Dakota, the original route would have crossed the Missouri River near Bismarck, the state capital, but when concerns over potential drinking water contamination and wetlands encroachment were raised by the U.S. Army Corps of Engineers, Dakota Access, LLC, shifted the route to a point just half a mile from the Standing Rock Sioux Reservation.

Protests began earlier this year, and the tribe sought an injunction against the U.S. Army Corps of Engineers to halt construction, arguing the route would violate burial and otherwise sacred grounds, while also jeopardizing drinking water supplies. In early September, violence broke out when private security guards unleashed attack dogs and used pepper spray on protesters who were blocking bulldozers from clearing a swath through land subject to that potential injunction.

A few days later, a U.S. District Court ruled against the tribe. But within hours of that decision, the U.S. Department of Justice, U.S. Department of the Interior and Army Corps of Engineers halted construction on the pipeline within 20 miles of Lake Ohae on the Missouri River near the Standing Rock Sioux Reservation, pending further review of the project.

South Dakota’s Public Utilities Commission approved the pipeline’s construction permit last November, but attached 50 conditions that Dakota Access, LLC, must meet as part of the land restoration and reclamation process after the pipes have been laid.

Chris Nelson, chair of the South Dakota Public Utilities Commission, says the Dakota Access pipeline drew more comments and attention from residents than either the Keystone or Keystone XL pipeline proposals of 2007 and 2009.
“This was a much more highly contested docket than either of those two,” Nelson says. “People are paying closer attention to pipeline issues than they were 10 years ago.”

**Tribes say they need more say when pipelines pass through native land**

Along with the federal rules for siting natural gas pipelines, and the various state rules for siting oil pipelines, all pipelines are subject to additional rules where tribal lands are concerned.

In a Congressional Research Service report on federal and state regulatory authority over natural gas and oil pipelines, legislative attorney Brandon Murrill noted that federal law treats oil pipelines very differently from natural gas ones.

“No federal law broadly preempts state and local siting requirements for these pipelines” as it does for natural gas lines, Murrill wrote. “States retain broad authority to regulate to control pollution, as well as to protect and conserve natural, cultural and historic resources.”

As a result, oil pipeline operators often have to get additional approvals, or agree to additional consultations with federal and/or state agencies, when passing through areas with protected wildlife or cultural, natural or historical resources.

In addition, Section 28 of the Mineral Leasing Act allows the U.S. Department of the Interior to withhold a permit to cross federal land if that land is being held in trust for a Native American individual or tribe.

That law also requires the Department of the Interior, or other agency heads, to “take into consideration and, to the extent practical comply with, state standards” for oil pipeline right-of-way construction, operation and maintenance.

Other federal laws may require agencies or the pipeline operator to consult with experts to determine potential impacts to historical or cultural resources, and take steps to mitigate them. States, too, may have additional laws or regulations requiring such consultations and/or mitigations.

But the patchwork of regulations for tribal lands, tribal trust lands and private property is haphazard, and current rules are too constrained in terms of what can be looked at, says South Dakota Rep. Sean Bordeaux, a member of the Rosebud Sioux Tribe (or Sicangu Lakota) and director of the Institute of Tribal Lands at Sinte Glesca University in Mission, S.D.

Whether it’s the approval of the Dakota Access Pipeline or the next proposed pipeline, Bordeaux says, tribes should have a bigger role in siting and oversight.

For example, if construction crews uncover any bones, an archaeologist is supposed to check and see if they’re human. If so, they may be native remains (the Sioux were nomadic before the reservations were imposed, and ranged from Minnesota to Montana), and there are rules about their removal. In a couple of cases where burial remains were discovered, the pipeline was dug under rather than around them, meaning any leak would flood the burial site from below, but the state authorities deemed that acceptable, Bordeaux says.

“Too often, for the industry there’s a lot more consideration than for the entities along the route,” he adds.
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Wednesday, October 19, 2016 at 05:34 PM

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Stateline Midwest: October 2016
1.95 MB

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