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## Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers

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***Standing Rock Sioux Tribe v. U. S. Army Corps of Engineers*, \_\_\_ F. Supp. 3d \_\_\_ 2017, U.S. Dist. LEXIS 91217, 2017 WL 2573994 (D.D.C June 14, 2017)**

**Oliver Wood**

The United States District Court for the District of Columbia partially granted the Standing Rock Sioux Tribe’s motion for partial summary judgment against the Army Corps of Engineers after the Tribe alleged the violation of required environmental analysis. While the court held that the Army Corps of Engineers mostly complied with the requirements of the National Environmental Policy Act, the court found deficiencies within its environmental analysis; the remedy is forthcoming.

**I. INTRODUCTION**

The court in *Standing Rock Sioux Tribe v. U. S. Army Corps of Engineers* reviewed the Standing Rock Sioux Tribe’s (“Tribe”), and intervening Cheyenne River Sioux Tribe’s, motion for summary judgment.<sup>1</sup> The Tribe claimed the Army Corps of Engineers (“Corps”) violated the National Environmental Policy Act (“NEPA”) when it failed to adequately consider the environmental impacts of granting a pipeline easement under Lake Oahe, a federally regulated waterway.<sup>2</sup> The United States District Court for the District of Columbia partially granted the motion for summary judgment, requiring the Corps on remand to reconsider impacts of an oil spill on the Tribe’s fishing and hunting rights, environmental justice concerns, and “the degree to which the pipeline’s effects are likely to be highly controversial.”<sup>3</sup> The court concluded that the issue of whether the construction of the pipeline will cease until the Corps considers all environmental impacts was a determination for future briefing.<sup>4</sup>

**III. FACTUAL AND PROCEDURAL BACKGROUND**

The Dakota Access Pipeline (“DAPL”) is a proposed 1200-mile pipeline designed to move crude oil from North Dakota to Illinois,

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1. *Standing Rock Sioux Tribe v. U. S. Army Corps of Eng’rs*, \_\_\_ F.Supp.3d \_\_\_ 2017, U.S. Dist. LEXIS 91217, 2017 WL 2573994 (D.D.C June 14, 2017).

2. *Id.* at \*1.

3. *Id.*

4. *Id.*

crossing the Missouri River near the Standing Rock and Cheyenne River reservations.<sup>5</sup> The proposed pipeline would cross the Missouri at Lake Oahe, the primary source of drinking water for the Cheyenne River Sioux Tribe, and the Standing Rock Sioux Tribe's water reservoir for basic services throughout its reservation.<sup>6</sup>

In June 2014, Dakota Access—the private corporation constructing DAPL—notified the Corps of their intention to route DAPL under Lake Oahe.<sup>7</sup> In December 2015, the Corps sought public comment on their Draft Environmental Assessment (“Draft EA”), as required by NEPA.<sup>8</sup> The Draft EA concluded that “construction of the proposed Project was not expected to have any significant direct, indirect, or cumulative impacts on the environment.”<sup>9</sup> After the Corps published the Draft EA, the Tribe requested that the Corps prepare an EIS because it found the Draft EA did not “address potential harm from the pipeline's construction and operations to the Lake's water and the Tribe's rights thereto; did not acknowledge the pipeline's proximity to the Reservation; insufficiently analyzed the risks of an oil spill; and did not properly address environmental-justice considerations.”<sup>10</sup>

The Department of the Interior and the Environmental Protection Agency echoed the Tribes' concerns about the Corps' insufficient analysis of the effect a spill would have on water resources.<sup>11</sup> On July 25, 2016, the Corps published their Final Environmental Assessment (“Final EA”) with a Mitigated Finding of No Significant Impact (“FONSI”). The Final EA discussed the mitigation measures Dakota Access would perform in order to have “no significant impact” on the environment.<sup>12</sup> Two days later, the Tribe filed suit against the Corps for declaratory and injunctive relief under violations of a number of laws; however, this court's decision exclusively involved alleged violations of NEPA.<sup>13</sup>

After the Interior Solicitor and the Assistant Secretary of the Interior deliberated the lack of evidence in the record to support an easement for DAPL under Lake Oahe, the Corps issued a notice of intent to prepare an EIS in January 2017.<sup>14</sup> The decision to prepare an EIS was later reversed by the Trump Administration.<sup>15</sup> In February 2017, the Corps performed a technical and legal review, which determined the EA and Mitigated FONSI were sufficient under NEPA.<sup>16</sup> The Corps granted

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5. *Id.* at \*3.

6. *Id.*

7. *Id.*

8. *Id.* at \*4.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at \*5.

13. *Id.*

14. *Id.* at \*7.

15. *Id.*

16. *Id.*

Dakota Access an easement for DAPL to cross Lake Oahe on February 8, 2017.<sup>17</sup>

The court reviewed the Final EA under the requirements of NEPA.<sup>18</sup> NEPA “places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action,” and “it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process.”<sup>19</sup> NEPA requires an agency to prepare an Environmental Impact Statement (“EIS”) for any proposed major federal action “significantly affecting the quality of the human environment.”<sup>20</sup> Within the EIS, the agency must “detail the environmental impact of the proposed action, any unavoidable adverse effects, alternatives to the proposed action, the relationship between short-term uses of the environment and long-term productivity, and any irreversible commitments of resources.”<sup>21</sup> Before determining whether an EIS is necessary, the agency is required to prepare an Environmental Assessment (“EA”). The EA is a “concise public document” that “briefly provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a Finding of No Significant Impact (“FONSI”).”<sup>22</sup> If the agency issues a FONSI, it must give the reasons why the proposed action will not significantly impact the environment.<sup>23</sup> An agency can issue a Mitigated FONSI, meaning there is no significant impact because of the agency’s commitment to performance of mitigation measures.<sup>24</sup>

#### IV. ANALYSIS

The Tribe sought summary judgment on three claims. First, the Tribe asserted that the Corps’ conclusion that the Lake Oahe crossing did not require an EIS violated NEPA. The Tribe contended that the agency, in issuing a FONSI, failed to take a hard look at the project’s effects on the Tribe’s treaty rights and environmental justice considerations in the project area.<sup>25</sup> Second, the Tribe claimed that the Corps’ decision to grant the easement under Lake Oahe was arbitrary and capricious because the agency did not give adequate “reasoned justification” for reversing its decision to prepare an EIS.<sup>26</sup> In addition, the Tribe alleged that this

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17. *Id.* at \*23.

18. *Id.* at \*9.

19. *Id.* at \*2 (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)).

20. *Id.* (quoting 42 U.S.C. § 4332(2)(C) (2017)).

21. *Id.*

22. *Id.* at \*3 (quoting 40 C.F.R. §§ 1501.4(e), 1508.13 (2017)) (citations omitted).

23. *Id.* (citing 40 C.F.R. §§ 1501.4(e), 1508.13) (citations omitted).

24. *Id.*

25. *Id.* at \*9.

26. *Id.*

reversal violated the agency's federal trust responsibilities.<sup>27</sup> Third, the Tribe contended that in July 2016, the Corps wrongfully concluded that the pipeline satisfied the terms and conditions of the Nationwide Permit 12 ("NWP 12").<sup>28</sup>

*A. Failure to Prepare an EIS*

Courts have limited discretion when determining whether a FONSI—and the Final EA on which the FONSI is based—was adequate under NEPA.<sup>29</sup> Unless the FONSI is determined to be “arbitrary, capricious, or an abuse of discretion,” courts will not overturn a FONSI in favor of a full EIS.<sup>30</sup> Courts review the FONSI and whether an agency has (1) correctly identified the environmental issue, (2) taken a hard look at the environmental issue when preparing its FONSI or EA, (3) can prove why a FONSI is appropriate, and (4) can demonstrate that if a specific environmental harm occurs, the EIS is still unnecessary because alterations and safety implementations will reduce the project's impact.<sup>31</sup>

The Tribe primarily argued the Corps failed to complete a meaningful assessment when analyzing the risk of an oil spill under Lake Oahe.<sup>32</sup> Secondly, the Tribe argued the Corps did not adequately consider the environmental impacts of the pipeline construction or oil spill on the rights granted to the Tribes by their respective treaties.<sup>33</sup>

The court first assessed industry-wide criteria for determining the chance of an oil spill. The court concluded that “the EA reasonably [gave] the necessary content to its top-line conclusion that the risk of a spill [was] low.”<sup>34</sup> However, a Council for Environmental Quality (“CEQ”) regulation additionally required that an agency consider “the degree to which the effects on the quality of the human environment are likely to be highly controversial” in a proposed action.<sup>35</sup> The court concluded that because the Corps ignored contradictory scientific data, it failed to take a hard look at whether the effects of DAPL would be highly controversial.<sup>36</sup>

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27. *Id.*

28. *Id.*

29. *Id.* at \*9.

30. *Id.* (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983)).

31. *Id.* (quoting *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011)).

32. *Id.*

33. *Id.*

34. *Id.* at \*11

35. *Id.* at \*12.

36. *Id.*

37. *Id.* at \*15.

Next, the court addressed the Tribe's argument that the Corps did not consider possible environmental impacts to Treaty rights.<sup>37</sup> The court agreed with the Tribe, stating that the Final EA did not address the impacts of an oil spill to fish and game, which are the two resources implicated specifically by Treaty.<sup>38</sup> Additionally, the court held that the Corps did consider the reasonable alternatives to the pipeline crossing Lake Oahe within the scope of a NEPA analysis; the Corps compared two proposed routes in its EA.<sup>39</sup>

Finally, the court addressed the Tribe's contention that the environmental justice analysis was arbitrary and capricious.<sup>40</sup> The environmental justice analysis is a means "to determine whether a project will have a disproportionately adverse effect on minority and low income populations."<sup>41</sup> Ultimately, the court concluded that the Corps failed to take a hard look because the agency did not consider the impacts of an oil spill on the Tribe, and only considered the effects of pipeline construction.<sup>42</sup>

In conclusion, the court found that the Corps' decision to not prepare an EIS did not violate NEPA.<sup>43</sup> However, the agency: (1) failed to adequately consider the environmental impacts of an oil spill to the hunting and fishing rights guaranteed by Treaty; (2) failed to perform an environmental justice analysis of the effects an oil spill would have on the Standing Rock people; and (3) failed to consider the degree to which the project would be highly controversial, as evidenced by the dispute in scientific data.<sup>44</sup>

### B. Granting the Easement

The Tribe contended that the Corps' reversal of its January 2017 decision to deny Dakota Access the easement to cross Lake Oahe was arbitrary and capricious, and that the Corps' decision violated its trust obligations to the Tribe.<sup>45</sup> When deciding whether the Corps' reversal of prior policy was arbitrary and capricious, the court looked at whether the Corps gave a "reasoned explanation...or disregarding facts and circumstances that underlay... the prior policy."<sup>46</sup>

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38. *Id.* at \*17.

39. *Id.* at \*19.

40. *Id.*

41. *Id.* at \*23 (quoting *Mid. States Coal for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8<sup>th</sup> Cir. 2003)).

42. *Id.*

43. *Id.* at \*28.

44. *Id.* at \*1.

45. *Id.* at \*25.

46. *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

The court found that the Corps was not arbitrary and capricious when it reversed its decision to grant the easement crossing Lake Oahe.<sup>47</sup> First, the court reasoned that while this was a change in “official policy,” the Corps displayed “awareness that it was a changing position.”<sup>48</sup> The record showed that the Corps considered its earlier policy, recommending further environmental analysis, and believed that its Final EA was sufficient to move forward with the easement.<sup>49</sup> Second, the court explained that the Corps gave a reasoned explanation for its reversal when the agency stated the EA “comported with legal requirement.”<sup>50</sup>

Additionally, the court dismissed the Tribe’s trust obligation argument.<sup>51</sup> Because the Tribes did not present specific trust duties articulated by treaty, statute, or regulation, the court reasoned it could not enforce a general trust requirement.<sup>52</sup>

### C. Terms and Conditions of NWP 12

Finally, the court considered whether the pipelines crossing under Lake Oahe qualified for NWP 12 under the Rivers and Harbors Act.<sup>53</sup> The NWP 12 is a general permitting process for construction projects within the navigable waters of the United States.<sup>54</sup> The Tribe contended that the Lake Oahe crossing did not comply with the NWP 12 permit, because General Condition 17 of NWP 12 states, “no activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.”<sup>55</sup> The court disagreed.<sup>56</sup>

Although the court concluded the Corps need not verify compliance with the conditions prior to issuing the permit, the court made clear that its decision did not “forever insulate the NWP 12 permitting decision from challenge. Dakota Access ha[d] a duty to comply with these conditions if it wishe[d] to maintain its eligibility for a Nationwide Permit.”<sup>57</sup> The court concluded that the Corps did not presently violate the terms and conditions of NWP 12.<sup>58</sup>

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47. *Id.*

48. *Id.* (citing *Fox Television Stations, Inc.*, 556 U.S. at 515).

49. *Id.*

50. *Id.*

51. *Id.* at \*27.

52. *Id.* at \*26.

53. *Id.* at \*27.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at \*28.

58. *Id.*

## V. CONCLUSION

The court's *Standing Rock Sioux* decision was a cliff-hanger. The court requested further briefing as to whether it should halt construction of the pipeline while the Corps fixed the deficiencies in the Final EA. Following further briefing, the court will issue its decision as to the fate of the easement under Lake Oahe.