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Indigenous Environmental Network v. United States Department of State

Seth Sivinski
University of Montana School of Law, seth.sivinski@umontana.edu

Indigenous Environmental Network v. United States Department of State, 347 F. Supp. 3d 561 (D. Mont. 2018)

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Pipelines are an extremely efficient way to move large amounts of oil and gas across long distances. However, pipelines have become a lightning rod for environmentalists opposing the lines' construction and the energy sector which considers the lines a must to achieve energy independence and security. Pipelines are massive projects often crossing interstate and international boundaries. As a result, they are subject to an extensive amount of government regulation with an accompanying assortment of legal challenges. *Indigenous Environmental Network v. United States Department of State* is the latest case in the Keystone XL pipeline saga, wherein the United States District Court for the District of Montana found several procedural insufficiencies with the Department's actions in approving the pipeline.

I. INTRODUCTION

In *Indigenous Environmental Network v. United States Department of State*, the Indigenous Environmental Network, together with Northern Plains Resource Council (collectively, "Plaintiffs") brought suit against the United States Department of State ("Department").[1] Plaintiffs alleged various violations of the National Environmental Policy Act ("NEPA"), the Administrative Procedure Act ("APA"), and the Endangered Species Act ("ESA") on the part of the Department when it published a determination clearing construction of the Keystone XL pipeline ("Keystone").[2] Both parties moved for summary judgment, and the district court granted motions on both sides, denied motions on both sides, and ultimately remanded the case with instructions to the Department to fulfill its procedural requirements under federal laws.[3]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Statutory Background

The APA governs the review of Plaintiffs' claims and requires the reviewing court to "'hold unlawful and set aside' agency action deemed 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[4] Furthermore, there must be a "rational connection . . . between the facts found and the conclusions made" supporting the

1. Indigenous Envtl. Network v. U.S. Dep't of State, F. Supp. 3d 561, 570 (D. Mont. 2018).
2. *Id.* at 571–72.
3. *Id.* at 591.
4. *Id.* at 571 (quoting 5 U.S.C § 706(2)(A)).

action.[5] Judicial reviews of compliance with NEPA and ESA requirements follow the APA's arbitrary and capricious standard.[6]

B. Factual Background

This is the latest in a series of cases dealing with the proposed construction of Keystone. The district court's opinion deals with a ruling on a motion for summary judgment filed by Plaintiffs alleging the Department violated federal law when it published a Record of Decision ("ROD") and National Interest Determination ("NID"), along with a Presidential Permit for defendant-intervenor TransCanada to construct Keystone.[7] In a previous dispute, the court directed the Department to supplement its 2014 final supplemental environmental impact statement ("2014 SEIS") to include a consideration of a Mainline Alternative route approved by the Nebraska Public Service Commission, but did not vacate the Presidential Permit.[8]

III. ANALYSIS

Plaintiffs brought a total of five claims, each with several subparts.[9] The first claim focused on the Department's NEPA analysis within the 2014 SEIS. Claim two dealt with the pipeline company's need to obtain a federal right of way, which the parties' summary judgment briefs did not address; therefore, the court deferred ruling on this issue and it will not be analyzed below.[10] The third claim dealt with the Department's policy reversal because both NEPA and the APA require a "reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[11] Lastly, the fourth and fifth claims dealt with the Department's compliance with the ESA.[12]

A. Claim 1: NEPA Violations

Plaintiffs' first claim centered around various procedural violations committed by the Department in its 2014 SEIS and subsequent supplements.[13] Several procedural inadequacies alleged by Plaintiffs were dismissed by the court because: (1) the Department's "purpose and need" statement met the requirements of NEPA; (2) the alternatives presented by

5. *Id*. (citing Western Watersheds Project v. Kraayenbrink, 632 F.3d 472, 481 (9th Cir. 2011)).

6. *Id*. (citing Center for Biological Diversity v. National Highway Traffic Safety Admin., 538 F.3d 1172, 1194 (9th Cir. 2008)).

7. *Id*. at 570–71.

8. *Id*. at 571.

9. *Id.* at 590–91.

10. *Id.*

11. *Id.* at 583 (quoting Organized Village of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 966 (9th Cir. 2015)).

12. *Id*. at 584–90.

13. *Id.* at 571.

the Department, including the no action alternative, were reasonable; (3) the 2014 EIS fulfilled the requirement of a "full and fair discussion" of the Department's market analysis of the rate of tar sands extraction and its environmental effects; (4) Plaintiffs failed to show a "significant difference between current [transportation] capacity and the 2014 SEIS projections" of capacity needed for transport of tar sands crude oil; (5) the Department's use in its own NEPA analysis of the Canadian government's environmental review was permissible; and (6) the Department's response to public comments on the draft 2014 SEIS were adequate.[14] While the above procedural measures by the Department were found to comply with NEPA, the court still found a number of flaws in the Department's 2014 SEIS.[15] Those errors are discussed in turn below.

i. Keystone's Effect on Oil Markets

Plaintiffs successfully argued the 2014 SEIS did not sufficiently consider changes in oil prices and those changes' effects on oil production.[16] According to the 2014 SEIS, the price of crude oil would vary between $100 and $140 over twenty years and the price would need to be between $65-$75 per barrel for Keystone to break even.[17] The report acknowledged Keystone would be affected by supply costs if the price fell below the $65-$75 mark.[18] The court cited data from the United States Energy Information Administration, which predicted oil prices would remain below $100 "for decades."[19] Soon after the 2014 SEIS was published, a substantial fall in oil prices to nearly $38 per barrel occurred, prompting the Environmental Protection Agency to call upon the Department to revisit its oil market analysis.[20] Furthermore, prices have stayed below the "break-even" point laid out in the 2014 SEIS analysis.[21] The court stated it "makes no suggestion" of how this information should affect analysis but held it was more than "a mere fluctuation" in oil prices and required another look by the Department.[22] The court ultimately held the Department's "lack of analysis fail[ed] to satisfy NEPA's hard look requirement."[23]

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14. *Id.* at 572–82.
15. *Id.*
16. *Id.* at 576–77.
17. *Id.* at 577.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 576.

ii. Greenhouse Gas Emissions

Plaintiffs claimed the Department violated NEPA by failing to analyze cumulative impacts of Keystone along with other pipelines.[24] Specifically, Plaintiffs claimed the 2014 SEIS failed to analyze the expansion of the Alberta Clipper pipeline from 450,000 to 800,000 barrels per day.[25] The Department acknowledged the proposed expansion, and in the EIS for the Alberta Clipper considered its emissions along with Keystone's; however, in Keystone's 2014 SEIS the Department analyzed Keystone's emissions in isolation.[26] The Department claimed the Alberta Clipper's own EIS made a cumulative analysis for Keystone unnecessary and called the omission a harmless error.[27]

NEPA's cumulative impacts analysis required consideration of the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions."[28] This analysis must be more than a "catalogue" of projects in the area,[29] because the goal of this type of analysis is to ensure decisionmakers have enough information to decide whether and how to mitigate these impacts.[30] The court held that "[t]he Department thus failed to paint a full picture of emissions for the[] connected actions [of Keystone and Alberta Clipper], and, therefore, ignored its duty to take a 'hard look.'"[31]

iii. Cultural Resources

Plaintiffs also claimed the Department failed to survey over 1,000 acres for potentially affected cultural resources along Keystone's route.[32] NEPA requires agencies to analyze impacts to these resources.[33] The Department entered into agreements with a wide variety of agencies and tribal representatives to identify cultural sites and consult on how to best mitigate impacts on cultural resources,[34] and claimed the un-surveyed areas were subject to ongoing study.[35] However, the court found this claim lacking, calling the Department's explanation "outdated."[36] The 2014 EIS identified 397 cultural resources which could be affected.[37] These documented resources, along with the 1,038 un-surveyed areas, led the

24. *Id.* at 577.
25. *Id.*
26. *Id*. at 578.
27. *Id*.
28. *Id.*
29. *Id.*
30. *Id.* at 578–79.
31. *Id.* at 578.
32. *Id.* at 580.
33. *Id.*
34. *Id.*at 580–81.
35. *Id.*
36. *Id.* at 580.
37. *Id.*

court to find the Department had "jumped the gun" when it issued the 2017 ROD and acted on incomplete information.[38] As a result, the court ordered the Department to update the analysis to comply with NEPA.[39]

iv. Oil Spills

Plaintiffs also alleged the Department failed to consider new data regarding recent oil spills, which they asserted could translate to an increased likelihood of spills from Keystone than originally contemplated in the 2014 SEIS.[40] The studies cited by Plaintiffs also suggested it is more difficult to clean up spills involving tar sands oil.[41] Plaintiffs pointed to a National Academy of Sciences ("NAS") study stating the transport of "diluted bitumen"—like that coming from the tar sands—was "sufficiently different from . . . commonly transported crude oil to warrant changes in regulations."[42] The court found several of the spills, highlighted by Plaintiffs, should be considered significant and the Department's ignoring of the NAS study in its 2017 ROD did not meet the "hard look" standard required by NEPA.[43]

B. Claim 3: The Department's Course Reversal between 2015 and 2017

A federal agency may lawfully change its policy or course of action by providing a "detailed justification" for the change.[44] If the agency's explanation for a change in policy is seen as running "counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," then a court may find the agency acted arbitrarily and capriciously.[45] The court employed a four-part test from *FCC v. Fox Televisions Studios* to determine if the Department's decision complied with the APA.[46] In *FCC*, the Court held an agency must: (1) display "awareness that it is changing position;" (2) "show[] the new policy is permissible under the statute;" (3) "'believe[]' the new policy is better;" and (4) "provide[] good reasons for the new policy."[47] Additionally, "the new policy must include a reasoned explanation . . . for disregarding facts and circumstances that underla[id] . . . the prior policy."[48]

Here, the changed position related to the Department's views on climate change, which were a determining factor in *rejecting*

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38. *Id.* at 581.
39. *Id.*
40. *Id.*
41. *Id.* at 581–82.
42. *Id.* at 582.
43. *Id.*
44. *Id.* (citing FCC v. Fox Television Studios, 556 U.S. 502, 515 (2009)).
45. *Id.* (citations omitted).
46. *Id.*
47. *Id.* at 582–83 (quoting *FCC*, 556 U.S. at 515–16).
48. *Id.* at 583.

TransCanada's permit request in 2015.[49] The 2017 ROD emphasized a commitment to energy independence and detailed numerous other countries which took climate action.[50] The court acknowledged the Department may give more weight to energy security in 2017 than in 2015; however, it stated that even "after an election, an agency may not simply discard prior factual findings without a reasoned explanation."[51] The court observed the 2017 ROD "initially tracked the 2015 ROD nearly word-for-word" but "without explanation or acknowledgment, omitted entirely a parallel section discussing 'Climate Change-Related Foreign Policy Considerations,'" falling short of the requirement to provide a well-reasoned argument for a change in policy.[52]

C. Claims 4 and 5: Oil Spill Risk for Listed Species

Plaintiffs last argued the Department, alongside the U.S. Fish and Wildlife Service ("FWS"), failed to sufficiently consider the effects of Keystone on various endangered species.[53] Plaintiffs alleged the Department only considered the impacts on one species—the American Burying Beetle—and the 2014 SEIS, Biological Opinion ("BiOp"), and Biological Assessment ("BA") relied on outdated information.[54] The court agreed, and set aside and remanded the BA and the BiOp, stating the Department must coordinate with FWS in determining the impacts of Keystones on these species.[55]

IV. CONCLUSION

This case chronicles the ongoing legal battle surrounding the construction of the Keystone XL pipeline. While a new administration may wish to quickly change the policy of its predecessor, the administrative state may not arbitrarily alter course without sufficient reasoning. The Keystone XL pipeline is a contentious proposal and will likely continue to be. However, in the fight over the pipeline's development, those advocating for its construction will be required to comply with applicable regulations in a complete and thorough way.

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49. *Id*.
50. *Id.* at 584.
51. *Id.*
52. *Id*.
53. *Id.* at 585.
54. *Id.* at 587.
55. *Id.* at 591.