DC Circ. Halts Order To Shut Down Dakota Access Pipeline

By [HYPERLINK "https://www.law360.com/nativeamerican/articles/1298846/dc-circ-halts-order-to-shut-down-dakota-access-pipeline?nl_pk=894dd615-1d89-41ce-b438-7f19a35e0818&utm_source=newsletter&utm_medium=email&utm_campaign=nativeamerican"]

Law360 (August 5, 2020, 8:03 PM EDT) -- The D.C. Circuit on Wednesday said the Dakota Access pipeline will not have to be shut down and drained of oil, halting a federal judge's order issued after he identified problems with an environmental review.

The brief order, however, refused to alter U.S. District Judge James E. Boasberg's move to throw out an easement that allowed the pipeline to cross beneath a Missouri River reservoir near sacred tribal lands. Attorneys for the tribal challengers said the order means the pipeline is operating unlawfully and the [HYPERLINK "https://www.law360.com/agencies/u-s-army-corps-of-engineers"] will now have to figure out what to do.

The order said the "district court did not make the findings necessary for injunctive relief." The D.C. Circuit panel also said the Corps and operator Energy Transfer LP were unlikely to succeed in their opposition to the lower court's order forcing the Corps to issue an environmental impact statement.

"The pipeline is now operating illegally; we are confident that it will be shut down eventually," Jan Hasselman, an [HYPERLINK "https://www.law360.com/firms/earthjustice"] attorney representing the challengers, said in a statement.

Judge Boasberg in early July [HYPERLINK "https://www.law360.com/articles/1289303"] to shut down operations until the Corps completes a full environmental impact statement for the easement. The judge later [HYPERLINK "https://www.law360.com/articles/1290923"] to pause the order to allow for appeal but said he was open to giving Energy Transfer more time to shut down and empty the pipeline. The D.C. Circuit on July 14 then [HYPERLINK "https://www.law360.com/articles/1291438"] the shutdown order so it could consider the stay requests.

Judge Boasberg in March [HYPERLINK "https://www.law360.com/articles/1257026/dakota-access-permits-axed-due-to-gaps-in-corps-review"] the Corps' easement for Dakota Access because he

said the agency didn't fill the holes he had identified in its environmental review of the pipeline's impacts.

The judge acknowledged in his order that shutting the pipeline down until an EIS is complete would significantly disrupt the pipeline as well as the Dakota oil industry and energy consumers that rely on it. But in granting the request from the Standing Rock Sioux and several other tribes, he said that the damage was outweighed by the severity of the Corps' violation of the National Environmental Policy Act in failing to produce an EIS and that his shutdown order should incentivize the Corps and Energy Transfer to put one together promptly.

In arguing for an extended stay, the Corps and Energy Transfer said previously that allowing Dakota Access — which ships crude oil from North Dakota's Bakken Shale — to shut down would irreparably harm the U.S. oil and gas industry and, ultimately, U.S. energy consumers.

Energy Transfer's general counsel Thomas P. Mason said the order granting the stay is "good news" on an earnings call Wednesday.

"We believe our legal positions are strong and we are confident that the pipeline will continue to operate," Mason said.

Judges Karen LeCraft Henderson, David S. Tatel and Thomas B. Griffith sat on the panel for the D.C. Circuit.

The Corps is represented by James A. Maysonett, Andrew C. Mergen, Reuben Schifman, Matthew Marinelli and Erica M. Zilioli of the [HYPERLINK "https://www.law360.com/agencies/u-s-department-of-justice"]'s Environment and Natural Resources Division, as well as by its own Milton Boyd and Melanie Casner.

Energy Transfer is represented by Miguel A. Estrada, William S. Scherman and David Debold of [HYPERLINK "https://www.law360.com/firms/gibson-dunn"].

The [HYPERLINK "https://www.law360.com/agencies/standing-rock-sioux-tribe"] is represented by Jan E. Hasselman and Patti A. Goldman of Earthjustice.

The Yankton Sioux Tribe and Robert Flying Hawk are represented by Rollie E. Wilson of Patterson Earnhart Real Bird & Wilson LLP.

The [HYPERLINK "https://www.law360.com/agencies/oglala-sioux-tribe"] is represented by Michael L. Roy, Jennifer P. Hughes and Elliott A. Milhollin of [HYPERLINK "https://www.law360.com/firms/hobbs-straus"].

The [HYPERLINK "https://www.law360.com/agencies/cheyenne-river-sioux-tribe"]Tribe is represented by Nicole E. Ducheneaux of [HYPERLINK "https://www.law360.com/firms/big-fire-law-policy-group"].

The case is Standing Rock Sioux Tribe et al. v. [HYPERLINK "https://www.law360.com/agencies/u-s-army-1"] of Engineers, case number [HYPERLINK "https://www.law360.com/cases/5f079bfb75a344503e6ed24a"], in the [HYPERLINK "https://www.law360.com/agencies/u-s-court-of-appeals-for-the-district-of-columbia-circuit"].

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