

Narragansett Tribe seeks reconsideration of D.C. Circuit ruling

31 March 2020

On 23 March 2020, the Narragansett Indian Tribe filed for reconsideration of a D.C. Circuit ruling in favor of the Federal Energy Regulatory Commission (FERC), finding that the Narragansett Tribe did not have standing to sue for destruction of Tribal structures in connection with construction of a natural gas pipeline. See *Narragansett Indian Tribal Historic Pres. Office v. Fed. Energy Regulatory Comm'n*, 949 F.3d 8 (D.C. Cir. 2020).

The Tribe's case before the D.C. Circuit arose out of FERC's review of a certificate for a natural gas pipeline project to be constructed by Tennessee Gas Pipeline Company, LLC – specifically, a thirteen mile segment known as the Connecticut Expansion Project. The Narragansett Tribe elected to engage in off-the-record consultation with FERC regarding the project during FERC's initial review. FERC approved the expansion and issued a certificate in March 2016. According to the Narragansett Tribe, after FERC's approval, the Tribe became aware that several ceremonial stones would be adversely impacted by the pipeline. The Narragansett Tribe then filed a late motion to intervene in the FERC proceeding and also moved for reconsideration of FERC's order. However, while those motions were pending, construction of the pipeline commenced, resulting in the destruction of the ceremonial stones that the Tribe considered of religious and cultural importance. FERC later denied the Tribe's motions.

The Narragansett Tribe petitioned the D.C. Circuit in connection with the FERC proceedings, seeking an order mandating that FERC amend its rules and that the D.C. Circuit grant it party status in the FERC proceeding. The Tribe hoped to prevent future destruction of such historical landmarks, asking "that the [D.C. Circuit's] remedy focus on the Commission's systemic violations." However, the D.C. Circuit found on 7 February 2020 that the Tribe lacked standing to bring a claim for forward-looking relief, because the injury had already occurred and the Tribe was not facing an ongoing (or imminently threatened) injury. Further, the D.C. Circuit found that the Tribe lacked standing to assert violation of its procedural rights, considering that "fixing the alleged defect in [FERC's] regulatory procedures could not possibly prevent or mitigate the harm to the Narragansett Tribe's cultural and religious interests." The Narragansett Tribe's claim was not redressable, therefore, the Court dismissed its claim for lack of standing. Similarly, because there was no remaining case in which the Tribe could intervene (*i.e.*, the FERC proceeding had concluded), the court found that granting the Tribe party status could not redress its injury.

The Narragansett Tribe's 23 March petition for rehearing alleges (among other claims) that FERC's procedural rules are inequitable – that is, FERC's *ex parte* regulations prohibit the Tribe

from both engaging in informal consultation with FERC and then becoming a party to the FERC proceeding (note that FERC contests this interpretation of its rules). According to the Tribe, this presents a “catch-22” where “[o]nly parties to a proceeding can petition for review . . . but Tribes that choose to consult cannot intervene under the [FERC’s] rule.” Therefore, FERC’s rules caused the Narragansett Tribe’s late motion to intervene. Because the Tribe’s motion to intervene was denied, the Tribe argues, the Tribe was not a party to the FERC proceeding and cannot seek judicial review of the FERC decision. The Tribe posits that granting the Tribe party status would redress the Tribe’s inability to challenge the merits of the FERC Decision. In its petition, the Narragansett Tribe also urges the D.C. Circuit to find that FERC’s consultation rules are contrary to law.

Additionally, the Tribe argues that its harm is indeed continuing, and that its continuing injuries can be redressed on remand to FERC or by injunctive relief. The D.C. Circuit’s ruling, according to the Tribe, “has inadvertently given pipeline companies carte blanche to destroy historic resources, as long as they do so before a petition is filed.” Remedy of FERC’s procedural violations (*i.e.*, the failure to adequately consult with the Tribe regarding the project) could mitigate the continuing adverse impacts of the Connecticut Expansion Project.

It is far from certain that the Tribe’s petition for reconsideration will be successful, to say nothing of the chances of the Tribe’s success should rehearing be granted. But this case, once final, will provide important guidance for project developers and those engaged in proceedings before FERC. A victory for the Narragansett Tribe could portend the re-litigation of already completed projects. If an aggrieved party has standing to sue for injunctive relief (or require remand) for projects already placed in service, then project developers may face ongoing claims regarding the legitimacy of operating assets. The consequences of this case could also change the landscape of standing claims, generally. If the Tribe successfully claims that destruction of cultural resources can be a continuing injury, then developers should expect an influx of claims regarding prior harm to sites or landmarks of cultural significance.

If injunctive relief is granted by the D.C. Circuit, it could also involve revision of FERC’s rules regarding consultation with tribes, fundamentally changing the landscape for National Historic Preservation Act engagement with FERC.

On the other hand, should FERC prevail, project developers may take it as an indication that the D.C. Circuit is not inclined to reopen proceedings for in-service assets. Destruction of resources may be seen as an instantaneous (and not continuing) injury that is no longer redressable once a project is complete.

Note, too, that this petition was filed only days before the D.C. District Court decision in the Dakota Access Pipeline litigation (*Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*), where the court remanded the proceeding to the U.S. Army Corps of Engineers (USACE) to perform an Environmental Impact Statement under the National Environmental Policy Act. Though the court’s opinion in the *Standing Rock* case did not consider issues of legal standing, the remand to USACE highlights one of the various regulatory challenges developers face when constructing pipelines on lands of tribal significance. Of particular relevance, the court’s decision in *Standing Rock* instructed the parties “to brief the issue of whether the easement should be *vacated during the remand*” (emphasis added). Thus, the *Standing Rock* decision expressly contemplates that failure to adequately meet regulatory standards may open the door for an operating pipeline to be shut down until proper authorization is issued.

The outcome of the Narragansett Tribe litigation will clarify whether cultural resource assessments may prove to be a hurdle that may similarly jeopardize an operating project.

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