

When Defendants Invoke ‘Necessity’ In Pipeline Sabotage

By **Robert Hogfoss, Catherine Little and Annie Cook** (May 24, 2018, 3:55 PM EDT)

Opposition to new pipeline construction has grown in recent years, moving from public comment to litigation to physical protest. In 2016 alone, several coordinated actions led to trespass and vandalism of pipelines and pipeline facilities in multiple states, some of which were prosecuted as felony criminal acts under state laws. The defendants in some of these cases have raised a “necessity defense” for their actions, and two courts have now allowed that defense to proceed.

The necessity defense derives from old common law (i.e., not established by statute, although many states have now codified the defense by statute). A necessity defense is not often invoked, in part because in order to invoke the defense one must admit that a crime was committed, but should be excused. A defendant must then persuade the court that the otherwise criminal act was required to prevent a greater harm.

The requisite showing is typically that (1) there was a significant threat of imminent hazard; (2) there was an immediate need to act; (3) no other alternative was available to prevent the harm; and (4) no greater harm was caused by the prohibited act(s). Examples of successful invocations of the necessity defense include commandeering a private car to carry victims to a hospital, taking food to keep a child from starving and escaping jail because it was on fire. In order to use the defense successfully, the defendant bears a heavy burden to show that no practical alternative to the criminal act was available, and that the criminal act did not create a greater harm.

In *Minnesota v. Klapstein*, a Minnesota case following trespass and vandalism actions in 2016, four individuals were criminally charged for turning valves on a crude oil pipeline, in an attempt to stop the flow of crude oil. The defendants claimed that although their acts violated state law, they were necessary. The trial court allowed the defendants to assert the necessity defense and present evidence at trial of the ‘greater harm’ presented by oil pipelines, in the form of climate change.

Prosecutors appealed that ruling, and on April 23, 2018, the Minnesota Court of Appeals in a split decision rejected the prosecution’s challenge and agreed that the defendants should be allowed to at least present the defense.[1] The dissenting judge stated that “there is no direct, causal connection between defendants’ criminal trespass and global warming.”

A court in Massachusetts similarly allowed the defendants in *Massachusetts v. Gore*, who trespassed and/or vandalized pipeline property, to present a necessity defense, but never reached the full merits of the defense.[2] In that case and 12 related cases, 13 protestors were charged with acts of criminal trespass and civil disobedience for efforts to stop work on a pipeline in 2016.

As with the Minnesota case, the defendants admitted to the crimes but asserted the necessity



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defense to justify their actions. The trial court allowed each defendant to explain their actions but the full necessity argument was not heard before the court issued its decision finding no criminal liability for the defendants.

Other courts in Montana, North Dakota and Washington have rejected the defense in cases stemming from a larger coordinated attempt by protestors in several states to cut padlocks and fences to enter pipeline facilities, in order to turn off valves on pipelines.[3] In at least one case, *Montana v. Higgins*, the defendant has since appealed the court's denial of his request to claim the necessity defense to the Montana Supreme Court.[4]

Allowing defendants to present evidence in support of a necessity defense does not mean the defendants have been excused from criminal conduct; they are simply allowed to make that argument at trial. No case has yet accepted the necessity defense to exonerate criminal acts involving pipelines after a trial, although some cases have been dismissed or downgraded to civil fines and resolved after a necessity defense was asserted.[5]

The burden on the defense remains high, not only to show that no other practical alternative existed, but also to establish a causal connection between a specific pipeline and global climate change. The same week that the Minnesota Court of Appeals allowed a necessity defense to proceed, the pipeline trade groups American Petroleum Institute and Association of Oil Pipe Lines released their "2018 Annual Liquids Pipeline Report" documenting the continuing reduction in number and scope of incidents releasing oil to the environment.

Similarly, as natural gas pipelines continue to replace coal for electric generation, the amount of greenhouse gas emissions from electric generation has gone down, according to data from both the U.S. Environmental Protection Agency and the U.S. Energy Information Administration.

As pipeline opponents have turned to direct acts of vandalism targeting pipelines in the past few years, those actions may present a risk of causing an accidental release that could threaten human life or adversely affect the environment. The actions also may result in criminal prosecution. Federal law enforcement agencies are now monitoring these activities under laws related to Homeland Security and terrorism, beyond state laws for criminal trespass. As a result, charges could and likely will be brought under federal law in the future, even though pipeline vandalism and sabotage cases to date have been prosecuted only under state laws.

Some states are looking to strengthen their laws to address these acts of vandalism. The same week that Minnesota allowed pipeline activists to proceed with a necessity defense, the adjacent State of Iowa signed into law a stricter felony provision applicable to interference with pipelines and other "critical energy infrastructure." The new law is called the Critical Infrastructure Sabotage Act, and carries potential penalties of up to 25 years in prison and fines of \$100,000.

Sabotage or vandalism of pipelines presents a significant risk of causing substantial harm that could result in killing or injuring people or damaging the environment. Any such harm would almost certainly preclude application of a necessity defense. Even without triggering any accident, a party seeking to invoke a necessity defense will likely be required to show the particular pipeline at issue is contributing to global climate change. That showing must be made in comparison to declining pipeline accident rates and continued reduction of greenhouse gas emissions related to pipelines.

Invocation of a necessity defense is a serious decision. Although intended to provide a platform for protest, such a defense also brings with it a heavy burden for the defendant(s). Admitting to a crime — particularly a felony criminal act — is a steep price to pay for a defense of direct action protests. The stakes are high, as are the consequences.

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[1] *Minnesota v. Klapstein*, No. 15-CR-16-413, 2018 WL 1902473 (Minn. Ct. App., April 23, 2018).

[2] *Massachusetts v. Gore*, No. 1606 CR 00923 (West Roxbury Dist. Ct., Suffolk County, MA, March 27, 2018).

[3] See, e.g., *State of Washington v. Kenneth Arthur Ward*, No. 16-1-01001-5, (Sup. Ct. Washington, Skagit County, June 23, 2017); *Montana v. Higgins*, DC-16-18 (Mont. Dist. Ct., Nov. 22, 2017); *State of North Dakota v Michael Eric Foster*, No. 34-2016-CR-00187 (N.D. Dist. Ct., Pembina County, Feb. 6, 2018).

[4] *Montana v. Higgins*, No. DA 18-0233 (Mont. Sup. Ct., filed May 3, 2018).

[5] See, e.g., *Massachusetts v. Gore*, No. 1606 CR 00923 (West Roxbury Dist. Ct., Suffolk County, MA, March 27, 2018).