

North Dakota v. United States: Litigating the FTCA's Discretionary Function Exception

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In July 2019, North Dakota filed suit against the United States under the [Federal Tort Claims Act](#) (FTCA). North Dakota claims damages stemming from the alleged failure of the [U.S. Army Corps of Engineers](#) (USACE) to properly administer federal land during protests against the construction of the Dakota Access Pipeline (DAPL) from mid-2016 to early 2017. This case is proceeding before the [U.S. District Court for the District of North Dakota](#). Though the case is ongoing, several key rulings have been issued with regard to the extent of the United States' duties and liabilities under the FTCA. The court found that the USACE owed a duty of care to North Dakota with regard to the activities of DAPL protester activities on federal land. The court also found that the [FTCA's discretionary function exception](#) to federal government liability is inapplicable because North Dakota's claimed damages allegedly stem from the USACE's failure to follow mandatory [special permitting procedures](#) for actors to conduct activities on federal land, not from discretionary USACE actions. This Legal Sidebar describes the discretionary function exception, the facts of *North Dakota v. United States*, the case's procedural history and remaining legal issues, and considerations for Congress.

The Discretionary Function Exception

The FTCA, subject to [exceptions](#), waives the federal government's [sovereign immunity](#) from civil liability and lawsuits so that plaintiffs can obtain compensation from the United States for the [torts](#) of federal employees. One of the most significant exceptions to this waiver is the [discretionary function exception](#), articulated in [28 U.S.C. § 2680\(a\)](#), which provides that the federal government is not liable for a claim “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” The Supreme Court has [interpreted](#) this provision to mean that sovereign immunity is not waived when a federal employee's allegedly harmful conduct was (1) discretionary and (2) influenced by policy considerations.

Courts have held that federal employee [conduct is discretionary](#) when “the conduct at issue involves ‘an element of judgment or choice’ by the employee.” For example, the U.S. Court of Appeals for the Fourth Circuit [held](#) that U.S. Bureau of Prison decisions regarding transferring, caring for, and safeguarding

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prisoners are discretionary under the FTCA because pertinent statutes and regulations use “general language” and do “not dictate any particular course of action or proscribe certain conduct.”

Conversely, if a legal directive prescribes a specific course of action from which a federal employee may not deviate, then the [conduct in question is not discretionary](#). For example, the U.S. Court of Appeals for the Fifth Circuit [held](#) that U.S. Army officers’ failure to close and lock a gate controlling access to a low-water crossing on a military base following flooding was not an exercise of discretion under the FTCA because a regulation required the gate to be closed and locked and access to be controlled.

When determining whether federal employee conduct is influenced by policy considerations, courts employ an objective standard. That is, [courts](#) do not examine whether policy considerations *actually* influenced an employee but rather whether employee actions or decisions were, “by [their] nature, susceptible to policy analysis.” For example, the U.S. Court of Appeals for the Ninth Circuit [held](#) that U.S. Forest Service decisions with regard to combatting a fire that spread from public to private land “involved a balancing of considerations, including cost, public safety, firefighter safety, and resource damage” and that “[t]hese considerations reflect the type of economic, social and political concerns [i.e., policy considerations] that the discretionary function exception is designed to protect.”

Factual Background

The DAPL is a domestic pipeline developed by Energy Transfer Partners that carries crude oil from the Bakken fields in northwest North Dakota to southern Illinois. The project has been the subject of debate, [media attention](#), and [litigation](#) for several years. Much of the attention [centers](#) on the portion of the pipeline route that is near or under Lake Oahe in North Dakota, a lake that is of particular significance to Native Americans in the region. Because the pipeline crosses waters subject to regulation under the [Clean Water Act](#) and land controlled by the federal government, Energy Transfer Partners was required to obtain [multiple](#) permits for the project from the USACE.

In 2016, the Standing Rock Sioux Tribe (Tribe) and others [publicized](#) their opposition to the DAPL and asked the federal government to reject the company’s permitting requests. On July 25, 2016, the USACE [issued](#) a series of permits for the DAPL, [triggering](#) a legal challenge that drew further attention to the project. Protest groups began to gather in large numbers near Backwater Bridge and Lake Oahe. Following these protests, the Obama Administration announced a delay in permitting for the portion of the project near Lake Oahe. In its [statement](#) announcing the pause, the Administration included the following:

[W]e fully support the rights of all Americans to assemble and speak freely. We urge everyone involved in protest or pipeline activities to adhere to the principles of nonviolence. Of course, anyone who commits violent or destructive acts may face criminal sanctions from federal, tribal, state, or local authorities. The Departments of Justice and the Interior will continue to deploy resources to North Dakota to help state, local, and tribal authorities, and the communities they serve, better communicate, defuse tensions, support peaceful protest, and maintain public safety. In recent days, we have seen thousands of demonstrators come together peacefully, with support from scores of sovereign tribal governments, to exercise their First Amendment rights and to voice heartfelt concerns about the environment and historic, sacred sites. It is now incumbent on all of us to develop a path forward that serves the broadest public interest.

As described in subsequent litigation, around this time, the USACE also conducted negotiations with the Tribe and other protestors for a special use permit. The USACE never issued a traditional permit, but it released a statement declaring that one had been conferred, subsequently claiming that this was done to “promote order and control by explaining protestors’ First Amendment rights would be accommodated within a defined area.”

In November 2016, the USACE informed the chair of the Tribe that land north of the Cannonball River would be closed as of December 5, 2016, but protests would be allowed to continue south of the river. In response to this letter, the governor of North Dakota issued an executive order on November 28, 2016, directing protestors to evacuate the lands north of the river. Over the next several months, protestors continued to occupy various encampments near the river and Lake Oahe, allegedly engaging in unlawful and dangerous activities, including blocking highways and bridges, threatening construction workers and local residents, destroying property, and initiating violence against law enforcement personnel and first responders. The State of North Dakota, alleging that federal law enforcement did not devote sufficient resources to upholding the law and protecting public safety, confronted protestors at various times throughout these months.

The protests began to dissipate in early 2017 at the behest of the Tribal Council (the Tribe's 17-member governing body). The incoming Trump Administration issued a memorandum in early 2017 directing the USACE to revisit previous determinations regarding DAPL. The project subsequently moved forward as Energy Transfer Partners met various environmental obligations and received government permits, although the DAPL was still subject to various legal challenges alleging failure to comply with federal environmental and other permitting laws and conditions. As the protests dissipated, North Dakota claimed that it was "left with a spoiled environment and vast quantities of noxious waste, garbage, and debris that was cleaned up at a considerable cost." The state asserted that it was "forced to expend significant State resources for law enforcement and emergency response-related services."

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Procedural History and Rulings

In July 2019, North Dakota filed an FTCA claim in the U.S. District Court for the District of North Dakota seeking to recover emergency response costs incurred due to the DAPL protests. North Dakota claimed roughly \$38 million in damages. North Dakota brought five claims against the United States pursuant to North Dakota tort law:

1. public nuisance, alleging that the federal government possessed the land from which protestors carried out activities causing a nuisance, knew about the activities, and failed to prevent them;
2. negligence, alleging that the United States negligently failed to follow federal requirements for managing federal land and therefore failed to uphold its legal duties;
3. Good Samaritan negligence, alleging that the federal government voluntarily undertook responsibility for the protestors for the benefit of North Dakota and failed to fulfill its voluntary obligations;
4. gross negligence, alleging that the United States recklessly failed to follow federal law for managing federal land and therefore failed to uphold its legal duties; and
5. civil trespass, alleging that the federal government allowed protestors to use federal land and failed to prevent them from trespassing on and harming state property.

These claims allegedly stem from protestors' extended presence on federal land, the federal government's allowance of this presence, the federal government's failure to carry out its legal obligations with regard to regulating federal land use, and landowners' obligations under North Dakota law to prevent third-party entrants on their land from harming others.

The federal government filed a motion to dismiss the case for lack of subject matter jurisdiction in September 2019, arguing that the FTCA's discretionary function exception under 28 U.S.C. § 2680(a)

bars liability and that North Dakota's claims thereby fall outside the United States' waiver of sovereign immunity under 28 U.S.C. § 1346(b)(1). In August 2020, the district court found that the discretionary function exception does not apply because the USACE failed to follow its [mandatory permitting process](#) for allowing use of federal land and that this failure "tainted all other decisions." Specifically, the court determined that protesters never officially submitted an application for a special use permit, which is required by [regulations](#) for the USACE to grant such a permit and allow special uses of certain federal land. The court further reasoned that the USACE's announcement that it had granted protesters a special use permit functioned as a "de facto permit" and that this conferral was illegitimate. The court also found that North Dakota's public nuisance, negligence, gross negligence, and civil trespass claims are consistent with North Dakota tort law and that, were the United States a private person, it would be liable to North Dakota for the alleged harms. The court therefore denied the federal government's motion with regard to these four claims. The court concluded, however, that North Dakota did not present a viable Good Samaritan negligence claim and dismissed it.

In February 2021, the United States filed a motion for partial summary judgment, arguing that (1) roughly \$37 million of North Dakota's claimed damages are not legally cognizable under the FTCA; (2) any damages should be offset by \$10 million because of a federal grant North Dakota received in that amount for DAPL emergency response costs; and (3) interest on a loan North Dakota procured to cover DAPL emergency response costs should be excluded from any damages award. The district court denied the federal government's motion in October 2021. It determined that North Dakota's alleged damages—emergency response costs—are redressable under both the FTCA and North Dakota law. It also found that any damage offsets must occur [after damages are awarded](#). Finally, the court concluded that it needed more information regarding the loan that North Dakota procured before deciding whether the United States could be liable for interest payments resulting therefrom.

In summer 2023, the United States filed a new motion for summary judgment and a motion to certify a question of law to the North Dakota Supreme Court. North Dakota, in turn, filed a motion for partial summary judgment. The federal government argued that it did not owe North Dakota any duties of care with regard to activities on federal land under North Dakota law and asked the court to make such a determination or, alternatively, to certify the question of whether the United States owed duties to North Dakota in this situation to the North Dakota Supreme Court. The federal government also again asserted that North Dakota's suit is barred by the discretionary function exception. North Dakota contended that the United States had breached its duties to the state and that the discretionary function exception does not apply because the USACE did not follow its mandatory special use permit procedures. Finally, the United States argued that the USACE's actions did not cause the damages North Dakota suffered. The district court found that the federal government did owe North Dakota duties of care with regard to activities on federal land and denied the United States' request to certify this question to the North Dakota Supreme Court. It also determined that resolving whether the federal government breached its duties involves factual questions that must be answered at trial. The court next concluded that North Dakota's claims do not stem from discretionary actions on the part of the USACE but rather from the USACE's failure to follow mandatory special permitting procedures and that, as a result, the discretionary function exception does not apply. The court further determined that the question of causation with regard to the USACE's actions and the damages suffered by North Dakota are factual matters that must be resolved at trial. Therefore, the court denied the federal government's motion for summary judgment and its motion to certify a question to the North Dakota Supreme Court. The court also denied North Dakota's motion for partial summary judgment with regard to the United States breaching the duties it owed to the state. However, the court granted North Dakota's motion with regard to the USACE failing to abide by mandatory permitting procedures and the consequent inapplicability of the discretionary function exception.

Issues Going Forward

The procedural history of this case indicates that several significant legal issues have been resolved. The district court held that the USACE owed duties of care to North Dakota under North Dakota tort law with regard to the activities of the DAPL protesters on federal land. Additionally, the court found that the [discretionary function exception](#) was inapplicable in this case because North Dakota's claimed damages allegedly stem from the USACE's failure to follow mandatory special permitting procedures, not from any activities that were a matter of USACE discretion. The main issues that remain unresolved appear to revolve around the facts of the case. The court has indicated that it must still determine whether the USACE breached the duties of care that it owed to North Dakota, whether any such breaches caused the damages suffered by North Dakota, and, if damages are awarded, whether damages must be offset by federal grants already disbursed to North Dakota to cover emergency response costs. The trial court has not yet issued a ruling on these questions.

Congressional Considerations

The discretionary function exception, pursuant to [28 U.S.C. § 2680\(a\)](#), bars federal government liability resulting from "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." Courts have looked to both statute and regulation when determining whether a government function is discretionary or mandatory. In this case, the district court found that [agency regulations](#) instituted mandatory government functions with regard to issuing permits to use federal land. The statutes that give the USACE authority to manage water resource developments on and issue special use permits concerning federal land ([16 U.S.C. § 406d](#) and [33 U.S.C. § 2328a](#)) do not set out such mandatory functions.

Under current judicial interpretations of the discretionary function exception, federal agencies appear to have the ability to expand the United States' civil liability through regulation. If a statute allows for agency discretion, but an agency promulgates an implementing regulation that creates a mandatory duty, it is possible that a reviewing court—as the court did in *North Dakota*—would find that the agency regulation precludes application of the discretionary function exception. In these circumstances, an agency would effectively waive the United States' sovereign immunity when Congress may not have intended to do so. Congress could clarify agencies' ability to waive sovereign immunity in this manner. For example, Congress could amend [28 U.S.C. § 2680\(a\)](#) to state explicitly that whether a federal government function is discretionary or mandatory depends on the language of the statute authorizing agency action, not an agency's implementing regulations.

Another question impacting the application of the discretionary function exception is whether the FTCA's exceptions to federal government liability articulated in [28 U.S.C. § 2680](#) deprive federal courts of jurisdiction over claims against the United States or are instead affirmative defenses (i.e., defenses against liability that must be raised and proven by respondents). This distinction is significant because the burden of proving an exception's applicability shifts depending on which interpretation a court adopts. For example, the U.S. Court of Appeals for the Seventh Circuit [stated](#) that FTCA exceptions, and the discretionary function exception in particular, are not jurisdictional and that the federal government has the burden of proving them as affirmative defenses. Conversely, the U.S. Court of Appeals for the Eighth Circuit—the court with appellate authority over the District of North Dakota—[determined](#) that the discretionary function exception functions as "a jurisdictional bar to suit" and that plaintiffs have the burden of proving that it does not apply. This interpretation was applied in *North Dakota*.

Congress could resolve this issue through legislation. Depending on which party to a lawsuit Congress believes should have the burden of proving the applicability or inapplicability of FTCA exceptions to

federal government liability, it could amend [28 U.S.C. § 2680](#) to state clearly whether these exceptions deprive federal courts of jurisdiction over claims against the United States or are affirmative defenses that the federal government must prove. It is possible that the Supreme Court could resolve the circuit split. If neither Congress nor the Court act, it appears that the circuit split may result in inconsistent applications of the discretionary function exception and other FTCA exceptions.

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