STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF PEMBINA	NORTHEAST JUDICIAL DISTRICT
State of North Dakota, Plaintiff, vs. Michael Eric Foster, Defendant. And Samuel Lee Jessup, Defendant.	**MEMORANDA DECISION AND ORDER GRANTING MOTION IN LIMINE** Case Number: 34-2016-CR-00187 Case Number: 34-2016-CR-00186

[¶1] On September 19th, 2017, Plaintiff moved to exclude testimony or exhibits in support of a climate necessity defense based on the dangers of global warming. On September 27th, 2017, Defendant filed a response resisting the motion. Trial is set for October 2nd through 6th, 2017.

[¶2] Having considered the motion, brief, and responding documents, and the matters of record, this Court now issues the following:

MEMORANDA DECISION

[¶3] **HISTORY AND NATURE OF THE CASE:** Defendant Michael Foster is charged with Criminal Conspiracy to Commit Criminal Mischief, Criminal Mischief, Reckless Endangerment and Criminal Trespass. It is alleged that he turned off a valve on the Keystone XL pipeline at a valve site in Pembina County, North Dakota. Defendant Samuel Jessup is charged with Criminal Conspiracy to Commit Criminal Mischief and Criminal Conspiracy to Commit Criminal Trespass. It is alleged that he conspired with Foster in traveling, meeting and coordinating acts of criminal mischief and criminal trespass. At a pretrial conference on September 11, 2017, Jessup indicated an intent to rely on a necessity defense and the motion in limine followed.

[¶4] **NECESSITY DEFENSE**: The United States Supreme Court has said it is an "open question whether federal courts ever have authority to recognize a necessity defense not provided by statute." U.S. v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 490, 121 S.Ct. 1711 (2001). The North Dakota Supreme Court declined to rule on this issue either way. State v. Manning, 2006 ND 25, ¶ 10, 716 N.W.2d 466. As the Eighth Circuit does appear to recognize such a

defense in U.S. v. Kabat, 797 F.2d 580 (8th. Cir. 1986), this Court will assume for purposes of this motion in limine that such a defense would be recognized.

[¶5] Even recognizing the defense, a defendant is only entitled to an instruction if it contains a correct statement of the law and has support in the record. Id. at 590 (citing U.S. v. Marchant, 774 F.2d 888, 894 (8th Cir. 1995)). It is sufficient that the defendant show an "underlying evidentiary foundation" as to each element of the defense "regardless of how weak, inconsistent or dubious" the evidence on a given point may seem. Kabat, at 590-91 (citations omitted). The Court has not held, however, that a defense must be submitted to the jury even when "it cannot be said that a reasonable person 'might conclude' the evidence supports the defendant's position." Id. at 591.

[¶6] "Both the Ninth and Tenth Circuits have affirmed convictions of military protestors where the district court not merely refused to give an instruction on necessity but further excluded such evidence because it found from the offer of proof that not all elements of the defense could be shown." Id. at 592 (citations omitted). As the United States Supreme Court explained in U.S. v. Bailey, 444 U.S. 394, 416-17, 100 S.Ct. 624 (1980):

> The requirement of a threshold showing on the part of those who assert an affirmative defense to a crime is by no means a derogation of the importance of the jury as a judge of credibility. Nor is it based on any distrust of the jury's ability to separate fact from fiction. On the contrary, it is a testament to the importance of trial by jury and the need to husband the resources necessary for that process by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses. If, as we here hold, an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense.

[¶7] If Defendants' offer of proof does not rise to a level that might allow a reasonable person to conclude the evidence supports all elements of the necessity defense, the motion in limine should be granted and evidence regarding any of the elements excluded from the jury as a matter of law.

[¶8] To succeed on a necessity defense, a defendant must show "(1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship exists between defendant's action and the avoidance of harm." U.S. v. DeChristopher, 695 F.3d 1082, 1096 (10th Cir. 2012).

A. Absence of a Legal Alternative

[¶9] "A vital element of any necessity defense is the lack of a reasonable alternative to violating the law . . ." Kabat, at 591. The defense of necessity does not arise from a "choice" of several

courses of action, it is instead based on a real emergency. Id. (citing United States v. Seward, 687 F.2d 1270, 1276 (10th Cir. 1982)). While some have argued the standard should be "effective" alternatives rather than "reasonable," the federal courts have consistently rejected that view. U.S. v. Santana, 175 F.Supp.2d 153, 160 (D.P.R. 2001). Instead, the constant principle of a necessity defense is whether there was a reasonable legal alternative to violating the law and, if there is, the defense will fail. See U.S. v. Bailey, at 410.

[¶10] In these cases, the Court need not look any further than the first element of the necessity defense to conclude Defendants' offer of proof fails as a matter of law. Defendants' evidence regarding an absence of a reasonable legal alternative include expert testimony that there was no expectation of government action to prevent continued transportation of tar sands oil in October 2016 and testimony of continued government action to "permit, support, and incentivize fossil fuel use." Defendants' Response to State's Motion in Limine to Exclude Necessity Defense, at ¶ 47.

[¶11] Reasonable alternatives outlined in other jurisdictions include participation in the electoral process, public speeches, publication or release of information to the media, peaceful protests and petitioning Congress or the President. See generally U.S. v. Dorrell, 758 F.2d 427 (9th Cir. 1985); U.S. v. Quilty, F.2d 1031 (7th Cir. 1984); U.S. v. Schoon, 971 F.2d 193 (9th Cir. 1991); U.S. v. Turner, 44 F.3d 900 (10th Cir. 1995), U.S. v. Montgomery, 772 F.2d 773 (11th Cir. 1985). Defendants' offer of proof does not allow a reasonable person to conclude that none of these reasonable legal alternatives were available to Defendants on October 11, 2016.

[¶12] Defendants also outline a myriad of reasonable legal avenues which Foster has pursued for decades, including educational presentations, launching websites, a tree-planting organization, lobbying, boycotting, conferences and meeting with elected officials. Defendant's Response to State's Motion in Limine to Exclude Necessity Defense, at ¶ 48. Defendants reference the Clean Power Plan (before indicating it falls short). Id. There is also the widely discussed "Paris Agreement" within the United Nations Framework Convention on Climate Change, which the United States was a party to in October 2016. United Nations Treaty Collection. FCCC/CP/2015.L.9/Rev. 1, 12 Dec. 2015.

[¶13] This Court would not suggest that the current steps taken indicate the government and private sector are doing everything possible to prevent climate change, but "Defendants cannot create necessity through their own impatience with less visible and more time-consuming

alternatives." Kubat, at 591 (citing U.S. v. Dorrell, 758 F.2d 427 (9th Cir. 1985)). Nor can Defendants rely on evidence "that other protest activities and political efforts has been unavailing . . . a lack of results might mean only that the will of the majority, legitimately expressed, had prevailed." Kubat, at 591 (citing Dorrell, at 432).

[¶14] The offer of proof does not rise to a level that might allow a reasonable person to conclude Defendants had no reasonable legal alternatives to the actions taken on October 11, 2016.

B. Harm To Be Prevented Is Imminent

[¶15] Even if this Court reached the other elements of the necessity defense, Defendants' offer of proof regarding an imminent harm also falls short. "The harm to be avoided must be so imminent that, absent the defendant's criminal act, the harm is certain to occur." U.S. v. Bailey, at 591. Defendant must have a reasonable belief that it was necessary for him to act to protect his life or health, or the life or health of others, "from a direct and immediate peril." U.S. v. Kroncke, 459 F.2d 697, 701 (8th Cir. 1972).

[¶16] If all evidence regarding the harms to prevent were regarded as true (global warming that results in rising temperatures, rising sea levels, flooding, more intense storms, stress on agricultural crops, stress on human life, dangers posed by pipeline spills, etc.), a reasonable person could not conclude that those harms, however serious they might be, were imminent and certain to occur absent Defendants' acts on October 11th, 2016.

[¶17] This Court need look no further than Defendants' own argument that they reasonably believed their actions would avert harms "because reducing the amount of tar sands oil transported through the TransCanada Keystone I pipeline *reduces the risk* of additional warming, which in turn *reduces the risk* of reaching tipping points and the abrupt climate change impacts associated with them." Defendant's Response to State's Motion in Limine to Exclude Necessity Defense, at ¶ 40 (emphasis added). A possibility that a harm will occur, and actions that *reduce the risk of a possible harm* becoming a reality, do not fit the definition of imminent harm. Likewise, Defendants' evidence showing pipelines have spilled in the past and likely will spill at an unknown time and place in the future cannot lead a reasonable person to conclude that a spill was imminent and certain to occur here had Defendants not acted and not acted on October 11th, 2016, specifically.

C. Direct, Causal Relationship Exists Between Defendants' Action and the Avoidance of Harm

[¶18] Defendants' offer of proof regarding the final element of a necessity defense is an expert who will testify on the efficacy of nonviolent civil disobedience as a way to create political change. The expert would also testify that Defendants reasonably believed their actions would avert harms by reducing the amount of tar sand oils transported through the pipeline, thus reducing the risk of additional warming, thus reducing the risk of reaching climate change tipping points. Defendants posit that preventing the burning of tar sands oil and shutting down the pipeline system "is an integral part of wider emissions reductions necessary to stabilize the climate." Defendant's Response to State's Motion In Limine to Exclude Necessity Defense, at ¶ 41.

[¶19] The offer of proof fails as a matter of law to reach a level that allows a reasonable person to conclude Defendants' actions (particularly after calling the pipeline and local officials to advise them of what they were doing, thereby ensuring the amount of time the valve would actually be off was shortened) could reasonably be anticipated to directly lead to a shutdown of production of tar sands oils or an end to pipeline operations. The necessity defense is not extended to cases in which the relationship between the defendant's act and the good to be accomplished is "tenuous and uncertain." See Kabat, at 592 (citing U.S. v. Kroncke, 459 F.2d 697, 701 (8th Cir. 1972).

[¶20] Defendants' offer of proof regarding the necessity defense fails as a matter of law and this defense will not be presented in the jury trial. If Defendants choose to testify, testimony from the Defendant regarding his state of mind while acting would be allowed, keeping in mind the confines of N.D.R.Ev. 403.

IT IS HEREBY ORDERED: Plaintiff's Motion in Limine is **GRANTED.**

Dated: 9/29/2017

BY THE COURT:

Laurie A. Fontaine
District Court Judge