

NISKANEN C E N T E R

**Progress Report for Niskanen Center's
Climate Policy and Litigation Activity
July 31, 2018**

What has been the impact of the Grant to date?

- Niskanen Center staff worked on educational efforts to raise the status of climate science with conservative elites and promote market-based climate policies as a means of reducing CO2 emissions at the national and state levels. Niskanen is widely seen as a leader in this space, because of the volume and quality of our published work and our influence in setting the terms of debate for carbon tax policy in Washington DC.
- We started an “eminent domain litigation project” by filing an amicus brief in the Iowa Supreme Court in the fight against the Dakota Access pipeline on the proper interpretation of the “Takings Clause” in the 1857 Iowa Constitution, and arguing (in support of landowners), that general economic benefits accruing to the state do not equate to the Iowa Constitution’s requirement that private property be taken only for “public use”. Oral argument has been set for September 12, and the landowner’s lawyer has asked that we come to Des Moines to help prepare the lawyers who will be doing the argument.

This project allows us to fight for property owner rights, while at the same time providing climate solutions by preventing companies from building infrastructure for carbon-based fuels or forcing companies to pay higher/truer costs for such operations.

- We have committed to participating in the Keystone XL case, and we are writing the only amicus brief in support of the landowners in the Mountain Valley Pipeline case in the D.C. Circuit while we continue to evaluate what other cases to participate in. We have also been assisting lawyers in multiple federal cases challenging FERC’s eminent domain authority: *Berkley v. Mountain Valley Pipeline* (U.S. Court of Appeals for the Fourth Circuit); *Appalachian Voices v. FERC* (U.S. Court of Appeals for the D.C. Circuit); *New Jersey Conservation Foundation v. FERC* (U.S. District Court for the District of New Jersey).

- On the legislative front, we have drafted bill text for an effort to get Congress to deal with some of the more egregious Constitutional problems and are now mapping out that educational and lobbying campaign. We will host timely educational briefing events on at least three topics, featuring new Niskanen Center research and briefing materials:
 - Carbon Tax & Infrastructure: On July 23, 2018, Niskanen co-hosted a press briefing on Carlos Curbelo’s MARKET CHOICE Act, first Republican-sponsored carbon tax legislation in nearly a decade, at the National Press Club. We co-hosted the educational event with the Columbia University SIPA Center for Global Energy Policy and Niskanen’s Director of Climate Policy moderated an expert panel discussing the details of the bill. We plan to follow up on this briefing with a hill event that will present Niskanen research and expert opinion on the MARKET CHOICE Act and other carbon tax proposals.
 - Climate Science: The fall release of the 4th National Climate Assessment, a report from leading federal agencies on national risks and responses to climate change, will provide an ideal opportunity for engaging Hill staff on climate science, the prospective impacts of climate change, and the realities of a declining carbon budget.
 - Pipelines and Property Rights: Fall – Eminent Domain Issues Under the Natural Gas Act: We are hosting a panel discussion in September on several of the serious statutory and Constitutional problems that have arisen from FERC’s implementation of eminent domain authority under the NGA.
- We are representing Boulder County, San Miguel County, and the City of Boulder in a climate nuisance case, *Board of County Commissioners of Boulder County et al. v. Suncor Energy et al.*, filed on April 17, 2018. This is the first climate nuisance case focusing on impacts beyond sea-level rise, e.g., drought, wildfires, flooding from extreme precipitation, etc., and we are currently briefing the issue of whether this case should be heard in state court (where we filed it), or in federal court (where the defendants want to be.) We are also consulting with the two other sets of lawyers who, between them, are handling all the other climate nuisance cases across the country, and filed an amicus brief on issues of federal common law in the New York case, *City of New York v. BP, P.L.C. et al.*
- We have been asked by the Federalist Society to present on the nuisance cases at their annual lawyers’ conference, and to participate in an online debate about these. We also participated in a panel discussion of the nuisance cases at the Competitive Enterprise Institute.
- Niskanen also sued the U.S. Department of Energy under FOIA to get requested records concerning the National Coal Council (“NCC”). The DOE produced some documents, but we are now asking the federal district court in D.C. to compel further production; those documents may establish that DOE and NCC have violated the Federal Advisory Committee Act, which would lead to a subsequent case. Summary judgment briefing has been completed and we await a date for argument from the Court.

What have been your biggest successes to date? What have you learned from these?

- The Niskanen Center was asked by Republican lawmaker Carlos Curbelo to provide policy advice and input on the MARKET CHOICE Act, which is the first piece of Republican-sponsored climate legislation in nearly a decade. Niskanen staff provided technical advice as well as input on how to craft a policy approach that would be seen as credible by at least some of the environmental community, while maintaining Republican-friendly regulatory reform as part of the proposal.
- Joseph Majkut and Jerry Taylor briefed 7 members of the House Liberty Caucus, in an *off-the-record discussion* on the risks associated with climate change, the costs and benefits of decarbonization, and the merits of carbon pricing.
- Niskanen Center staff—Joseph Majkut, Andrew Mills, and David Bookbinder—helped in part to secure Republican support for the revised cap-and-trade measure (AB 398) in California. The reauthorization required a 2/3 vote in each house of the CA legislature, which was accomplished on July 17, 2017, with seven Republican aye votes in the Assembly and one in the State Senate. In May and June 2017, Niskanen staff made two trips to Sacramento, educating State Republican members and staff about the merits of market-based instruments like cap-and-trade over direct regulation. The Niskanen team met with key leaders of the CA Republican party, energy and oil industry representatives, and environmental groups to discuss market solutions and carbon tax policy as means to help reduce carbon emissions.
 - One thing we learned was that, in exchange for their votes, it appears the Republicans could make a trade-off, getting refineries exempted from CARB's preferred regulatory approach and curbing local air boards' authority to regulate CO₂. This is important, because such compromise must occur on a national level if there is ever going to be market solutions or carbon taxes in place of regulatory controls. We applied these lessons in our work on the MARKET CHOICE Act.
 - We have continued to maintain a working and advisory relationship with state policymakers in California who are crafting bipartisan and Republican approaches to reducing greenhouse gas emissions.
- With regards to the eminent domain Dakota Access case, the company's attorneys were so concerned about Niskanen Center's arguments that they took the almost unheard-of step of opposing our filing of an amicus brief. This allowed us to place our arguments before the court twice through a subsequent motion, further drawing the court's attention to them (and when Dakota Access read our motion, they dropped their opposition to our brief). Then, in their brief on the merits, Dakota Access responded to our arguments; since parties rarely respond to an amici's arguments, this further emphasized the points we made.

What have been your biggest challenges to date? What have you learned from these? Please include any resulting variances from the original Budget and Milestones, as well as what the organization plans to do to address these variances.

- The state level educational work in California that we took on in May and June of 2017 was an unexpected opportunity with unplanned costs. In early May, State Sen. Bob Wieckowski introduced SB 775, which would overhaul the state's approach to cap-and-trade post-2020. The policy changes being proposed, combined with an ambitious economy-wide price on carbon (prices approach \$60-\$120 per ton by 2030), would have caused California to become the biggest carbon pricing regime on the planet. It would have also made carbon pricing, rather than regulations, the primary means of reducing greenhouse gas emissions in California. The Niskanen Center thought the legislation in that direction can offer both significant policy improvements and change the political narrative around carbon pricing across the country.
 - This opportunity was unexpected and too important to not get engaged. We decided to jump in, expecting to fund the activity through general operating revenue at a cost of \$50,000 to \$100,000 per month of engagement. We also decided to seek additional funding.
- Regarding climate nuisance cases, our approach has not been tried before. In *AEP v. Connecticut*, the Supreme Court rejected the use of federal nuisance claims because Congress "displaced" such claims by authorizing regulation under the Clean Air Act. Based on *AEP*, two federal courts have now rejected such state law claims, further emphasizing the need to keep these cases, as we are trying to do, in state court.
- In the pipeline eminent domain cases we are opposed by the entire oil and gas industry, with unlimited resources, and by state and federal agencies who view their job as issuing the necessary permits and approvals for these projects.

What are the biggest risks that you anticipate going forward? In other words, what are things that could happen that would prevent you from achieving the purpose of the Grant? How do you plan to mitigate these risks?

- With President Trump's administration, climate skepticism is ascendant in Washington. This will continue to be a challenge for our work as administration officials and staff offer climate skepticism a prominent platform.
 - In response, we have secured \$50,000 from an individual donor to build a unique web platform for presenting clear descriptions of climate science and the potential impacts of climate change. That web platform launched in August 2017 (www.climateunplugged.com) and provides a base for our staff and allies in their efforts to educate Republican staff about the risks of climate change.

- Niskanen will closely monitor the EPA and other agencies and will initiate legal action whenever 1) the Trump Administration acts to greatly weaken or eliminate regulatory action in a legally questionable manner, 2) does so without forwarding alternative market-oriented reforms that promise better policy, and 3) engages in fights where Republican opposition is at least plausible (ruling out, for instance, Niskanen legal action to defend the Clean Power Plan, which is toxic within Republican circles).
- The Trump EPA may also attempt to reverse the Endangerment Finding, the necessary administrative prerequisite for using the Clean Air Act against greenhouse gas emissions. Would that occur, Niskanen would join others in legal action challenging the factual claims the administration would need to marshal to justify such a reversal.
- Litigation may also be needed to defend state autonomy to act against climate risks. There has been a wave of cases brought against state climate measures claiming that they interfere with interstate markets and thus violate the Commerce Clause. Conservatives in Congress have expressed interest in eliminating state Renewable Energy Portfolio Standards, greenhouse gas emission trading regimes, low carbon fuel standards, and aggressive energy efficiency mandates. We are especially concerned by the efforts to encourage Secretary Perry to use his authority under the Federal Power Act to curtail such state initiatives and have published the first analysis pointing out the legal weakness of any such attempt. And we are now faced with an EPA plan to dramatically weaken federal vehicle CO₂ emission standards and overturn its previous decision allowing California to set its own vehicle CO₂ standards (which other states can then adopt) which will set up a major legal battle. If Secretary Perry proceeds, Niskanen will look for opportunities to oppose the move on legal grounds.
- Niskanen will also exploit legal opportunities to compel the administration to initiate entirely new climate-related regulatory undertakings. Given the breadth of the regulatory authority delegated to administrative agencies, statutory directives to act when scientific evidence suggests that the environment or public health is at risk, creative legal action to compel additional climate regulation could prove fruitful.
- We anticipate that the state nuisance case against the fossil-fuel industry may create hostility with the oil, gas and coal industries. We are preparing a series of blogs and op-eds to head off any PR issues, and we are preparing for a more complex and secure communication process.
 - Communication with co-counsel will frequently need to take place in person, rather than via written or telecommunications, which will require an increase in travel costs.
 - We are also considering adding heightened security ability for information technology, such as information storage and sharing.