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Eighty Percent Of Success Is Showing Up: Or "How A Pro Se Farmer Won A Default Against The United States In His Suit To Invalidate The Permit For Half Of Keystone Xl (& Why It Probably Won't Last)"

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Case commented on: *Bishop v Bostick*, 9:13-cv-00082, (E.D. Tex, Nov. 6, 2013).

On April 25, Michael Bishop, a farmer acting *pro se*, filed a lawsuit in the U.S. District Court for the Eastern District of Texas to revoke TransCanada's permit to construct the southern half of the Keystone XL project. This part of the project, known as the "Gulf Coast Project" or "Phase III", travels from Cushing, Oklahoma to the Gulf Coast. Bishop sued the Army Corps of Engineers and its Commanding General, Thomas Bostick, because the Army Corps issued the permit to TransCanada. The complaint that Bishop filed asked the court to order the Army Corps to revoke Keystone's permit. Bishop then served this complaint on the Army Corps of Engineers, its officers, and the Attorney General of the United States.

Now, you might not like the chances of a *pro se* farmer aligned against the U.S. Attorney General, the Army Corps of Engineers, and TransCanada. But as Sheriff Bell would say: "even in the contest between man and steer the issue is not certain." And, as it turns out, no one showed up to contest the lawsuit. Even though the permit at issue belonged to TransCanada, it was not a defendant, so it was not served. It was up to the government, and the government did not show up. As a result, on Wednesday November 6, the clerk entered a default against the Army Corps and its officers.

Mr. Bishop had won, and national news stories trumpeted his victory–e.g. Bloomberg "Texas Farmer Wins Entry of Default in Keystone Lawsuit". He told Bloomberg, "Tomorrow I'm going to ask the judge for everything I had in my original petition. I'm going to ask him to revoke the permit and effectively shut this pipeline down until they comply with the law."

The victory will likely prove short-lived, however. On Thursday, the U.S. Attorney's office for the Eastern District of Texas filed an emergency motion to vacate the clerk's entry of default. Although acknowledging that the AG, Army Corps, and officers had been served, the government pointed out that the U.S. Attorney's office had not been served, a requirement under Federal Rule of Civil Procedure 4(i). As a result, the government also suggested that the complaint itself should be dismissed "due to failure of service."

In the end, it seems unlikely that a lawsuit of this importance will end in a default. But it's an important reminder of three things: 1) the myriad legal venues and strategies available to environmental plaintiffs looking to slow the flow of oil, 2) the difficulty of keeping track of the variety of resulting lawsuits, and 3) the importance of showing up.

This post originally appeared on James Coleman's blog Energy Law Prof.