

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Application of
Enbridge Pipelines (North Dakota) LLC
for a *Certificate of Need and Pipeline
Routing Permit* for the Sandpiper Project
in Minnesota

PETITION TO INTERVENE

OAH 8-2500-31259/MPUC PL-6668/CN-13-474
OAH 8-2500-31260/MPUC PL-6668/PPL-13-473

To: ALJ Lipman for MN PUC and OAH, Applicant “Enbridge” a/k/a NDPL LLC and State of Minnesota agencies and other parties.

Pursuant to Minnesota Rules 1400.6200, the White Earth Band of Ojibwe hereby respectfully petitions to intervene in the above-referenced Matter of the Application of Enbridge Pipelines (North Dakota) LLC for a Certificate of Need and Pipeline Routing Permit for the Sandpiper Project in Minnesota.

Background and Issues

This case arises from the application of Enbridge Pipelines a/k/a/, d/b/a North Dakota Pipeline Company, LLC (hereinafter “Applicant”) for a Certificate of Need and Pipeline Routing Permit for its Sandpiper Project in Minnesota. The Applicant has submitted its preferred route to the Public Utilities Commission for consideration and issuance of a Certificate of Need and Routing Permit. The preferred route goes east across northwestern Minnesota from northeastern North Dakota to Clearbrook, Minnesota, then south past Park Rapids, before going east again to Duluth. The preferred route detailed by the Applicant traverses a significant portion of the 1855 Treaty ceded territory, and goes through the northeast townships of the original White Earth Reservation.

In order to be approved, the Certificate of Need and Routing Permit must satisfy a number of statutory and administrative requirements.¹ The Public Utilities Commission has made a determination that the Application of the North Dakota Pipeline Company, LLC is complete.² Now the substantive issue of whether the Application meets the statutorily and administratively defined criteria is before the Administrative Law Judge at the Office of Administrative Hearings, as provided in order of the Public Utilities Commission dated February 11, 2014.³ No consideration was made to date in the proceedings of the impact of the proposed pipeline on the retained usufructuary interests of the White Earth Band of Ojibwe in the 1855 Treaty ceded territory.

Additionally, in order to move forward with the Sandpiper Project, the Applicant must seek approval from the Secretary of the Interior and request that the Secretary grant rights-of-way through public lands in the 1855 Treaty ceded territory.⁴ The involvement of the Secretary of the Interior in these proceedings requires that an Environmental Impact Statement (EIS) be completed; the Applicant and the State of Minnesota must request that an EIS be completed in order to make a meaningful determination of the substantial impacts that the Applicant's proposed pipeline presents.

Given this background, the White Earth Band of Ojibwe raises the following issues:

1. The North Dakota Pipeline Company, LLC failed to recognize off-reservation gathering, hunting, fishing, ricing, and other usufructuary rights as a compensable property interest in its Application for Certificate of Need and Pipeline Routing Permit.

¹ See Minn. R §§ 7853.0130 (2003) & 7852.1900, subpart 3 (2007).

² Order of the Public Utilities Commission dated February 11, 2014 at I.

³ *Id.* The Commission stated in its order "The ultimate issue in this case is whether [the North Dakota Pipeline Company]'s proposed pipeline meets the routing criteria set forth in Minnesota Statutes Chapter 216G and Minnesota Rules Chapter 7852. This issues turns on numerous factors that are best developed in formal evidentiary proceedings. The parties to this proceeding should address whether the proposed project meets these criteria and addresses these factors. The parties may also raise and address other issues relevant to the application."

⁴ 25 U.S.C. § 321 (2014).

2. The North Dakota Pipeline Company, LLC must seek rights-of-way from the Secretary of the Interior in order to construct and operate its pipeline on public lands in the 1855 Treaty ceded territory, and to this end, an Environmental Impact Statement is required.

Identity of Petitioner

The White Earth Band of Ojibwe is a federally recognized Indian tribe and a constituent member of the Minnesota Chippewa Tribe with its Reservation in west central Minnesota.⁵ The members of the White Earth Band of Ojibwe are amongst the successors in interest to a number of treaties entered into with the Ojibwe Bands between the 1830's and the 1860's.⁶ The preferred route offered by the Applicant traverses a significant portion of the 1855 Treaty ceded territory, in which the White Earth Band of Ojibwe possesses a compensable property interest – namely retained usufructuary rights including hunting, fishing, gather, ricing, and other similar rights. As such, the White Earth Band of Ojibwe has an interest in these proceedings, and should be permitted to intervene.

Argument

I. The Minnesota Department of Commerce – Public Utilities Commission cannot grant approval to the Application of the North Dakota Pipeline Company for a Certificate of Need and Routing Permit because the Application impermissibly failed to consider the retained usufructuary rights of the White Earth Band of Ojibwe.

a. The White Earth Band of Ojibwe retains off-reservation usufructuary rights in the 1855 Treaty ceded territory which have not been abrogated.

The White Earth Reservation Tribal Council is the governing body of the White Earth Reservation, and is among the successors in interest to the signatories of the 1855 Treaty with

⁵ Indian Entities Recognized & Eligible To Receive Services From the Bureau of Indian Affairs, 77 Fed. Reg. 47,868, 47,870 (Aug. 10, 2012).

⁶ See, Treaty of 1836, 7 Stat. 491 (March 28, 1836); Treaty of 1837, 7 Stat. 536 (July 29, 1837); Treaty of 1842, 7 Stat. 591 (Oct. 4, 1842); Treaty of 1854, 10 Stats. 1109 (Sept. 30, 1854); Treaty of 1855, 10 Stat. 1165 (Feb. 22, 1855); Treaty of 1864, 13 Stat. 693 (May 7, 1864); Treaty of 1867, 16 Stats. 719 (March 19, 1867).

the Chippewa (hereinafter “1855 Treaty”).⁷ Although the 1855 Treaty was a land cession treaty, it did not dispossess the signatories of their retained usufructuary rights in the ceded territory. While the 1855 Treaty did not contain the same express language of reserved rights that was found in the 1837 Treaty⁸, the Court in *Mille Lacs* noted in its conclusion that the 1855 Treaty did not abrogate previously guaranteed reserved rights. The Court stated:

The entire 1855 Treaty, in fact, is devoid of any language expressly mentioning—much less abrogating—usufructuary rights. Similarly, the Treaty contains no language providing money for the abrogation of previously held rights . . . The 1855 Treaty was designed primarily to transfer Chippewa land to the United States, not to terminate Chippewa usufructuary rights.⁹

In addition to the reserved rights provided for in the 1837 Treaty, the 1854 Treaty “also guarantees usufructuary property rights to the Mississippi Chippewa in the *unceded* territory west of the 1854 Treaty boundary . . .”¹⁰ The Mississippi Band was a signatory to the 1854 Treaty, and the 1855 Treaty territory is west of the 1854 Treaty ceded territory.

The retained usufructuary rights of the White Earth Band of Ojibwe were intact after the execution of the 1855 Treaty, and have not been subsequently divested.

b. The Applicant failed to consider the compensable property interests of the White Earth Band of Ojibwe in the 1855 Treaty ceded territory, and therefore its Application for a Certificate of Need and a Routing Permit fails to satisfy statutory criteria and cannot be granted.

As provided for in the applicable Minnesota Statutes and Rules, deliberation by the Public Utilities Commission regarding an application for a Certificate of Need and a Routing

⁷ 10 Stats. 1165 (Feb. 2, 1855). The signatory Bands to the Treaty of 1855 were the Mississippi, Pillager, and Lake Winnibigoshish Bands, whose people were among the Bands that would later organize under the Indian Reorganization Act (48 Stat. 987 (1934)) as the Minnesota Chippewa Tribe, which is composed of White Earth, Leech Lake, Mille Lacs, Grand Portage, Bois Forte, and Fond Du Lac.

⁸ Treaty of 1837, 7 Stat. 536, Art. 5 (July 29, 1837). “The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States.”

⁹ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195, 196 (1999).

¹⁰ Peter Erlinder, *Treaty-Guaranteed Usufructuary Rights: Minnesota v. Mille Lacs Band of Chippewa Indians Ten Years On*, 41 ELR 10921, 10930 (Oct. 2011) (emphasis added).

Permit requires consideration of a number of factors. The rules state that the Public Utilities Commission shall grant a Certificate of Need if the Commission is satisfied that:

the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states . . . a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant . . . the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate . . . and it has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rules, and regulations of other state and federal agencies and local governments.¹¹

As to the routing permit, the criteria for consideration by the Public Utilities Commission are:

the impact on the pipeline of the following: human settlement, existence and density of populated areas, existing and planned future land use, and management plans; the natural environment, public and designated lands, including but not limited to natural areas, wildlife habitat, water, and recreational lands; lands of historical, archaeological, and cultural significance; economies within the route, including agricultural, commercial or industrial, forestry, recreational, and mining operations; pipeline costs and accessibility; use of existing rights-of-way and right-of-way sharing or paralleling; natural resources and features; the extent to which human or environmental effects are subject to mitigation by regulatory control and by application of the permit conditions contained in part 7852.3400 for pipeline right-of-way preparation, construction, cleanup, and restoration practices; cumulative potential effects of related or anticipated future pipeline construction; and the relevant applicable policies, rules, and regulations of other state and federal agencies, and local government land use laws including ordinances adopted under Minnesota Statutes Section 299J.05, relating to location, design, construction, or operation of the proposed pipeline and associated facilities.¹²

Relevant to the interests of the White Earth Band of Ojibwe is the environmental impact of the proposed pipeline, the historical and cultural significance of the land at issue, the

¹¹ Minn. R. § 7853.0130 (2003).

¹² Minn. R. § 7852.1900, subpart 3 (2007).

consequences to society of not granting (or granting) the application, and the extent to which regulation could mitigate any of the foreseen consequences.¹³

Because of the retained property interests in the 1855 Treaty ceded territory, detailed consideration of the impact of the proposed pipeline on these interests is necessary, as is inclusion of the White Earth Band of Ojibwe in the process. As demonstrated in the *Mille Lacs* case, regulation of off-reservation usufructuary rights is the shared responsibility of the tribes and the State.¹⁴ The State of Minnesota is unable to proceed with issuance of the Applicant's Certificate of Need and Routing Permit without the involvement of the White Earth Band of Ojibwe and a detailed consideration of the impacts of the proposed project on the retained compensable property interests of the Tribe.

In the present instance, the Applicant failed to consider the compensable property interests of the White Earth Band of Ojibwe in its application, and the Minnesota Department of Commerce – Public Utilities Commission likewise failed to consider these interests in its initial determination that the Application was complete. Therefore, the Applicant is unable to demonstrate that the statutory and administrative criteria have been met.

II. Because the preferred route offered by the Applicant traverses a significant portion of the 1855 Treaty ceded territory, 25 U.S.C. § 321 applies, and an Environmental Impact Statement is required.

a. The Applicant is required to seek approval from the Secretary of the Interior in order to move forward with its preferred route through the 1855 Treaty ceded territory.

As stated above, the White Earth Band of Ojibwe possesses a compensable property interest within the 1855 Treaty ceded territory that is protected by treaty and federal law. In

¹³ See, supra n. 9, 10.

¹⁴ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. at 204-05 (1999).

addition to consultation with the White Earth Band of Ojibwe, in order to move forward with its preferred route, the Applicant is required to seek approval and a right-of-way from the Secretary of the Interior because of the existence of off-reservation reserved usufructuary interests in the lands at issue.¹⁵ Not only are the real property interests of the White Earth Band of Ojibwe at issue, but the federal government owes a continuing trust responsibility to the Tribe to protect its treaty-reserved rights.¹⁶ As to pipelines in particular, the United States Code provides that “The Secretary of the Interior is authorized and empowered to grant a right-of-way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas . . . through any lands reserved . . . for any other purpose in connection with the Indian Service . . .”¹⁷ The White Earth Band of Ojibwe vehemently maintains that this Code provision includes all public lands in the 1855 Treaty ceded territory because of the treaty-reserved rights existing therein, and the federal trust obligation owed.

Therefore, the Minnesota Department of Commerce – Public Utilities Commission is unable to approve the Applicant’s Certificate of Need and Routing Permit without the approval of the Secretary of the Interior for those portions of the proposed route that cross public lands in the 1855 Treaty ceded territory. Moreover, consultation with the White Earth Band of Ojibwe, as the possessor of the off-reservation usufructuary interests in the 1855 Treaty territory, is required. The proceedings at the Office of Administrative Hearings cannot move forward until

¹⁵ 25 U.S.C. § 321 (2014) (“The Secretary of the Interior is authorized and empowered to grant a right-of-way” for pipe lines through Indian lands . . . “Before title to rights of way applied for hereunder shall vest, maps of definite location shall be filed with and approved by the Secretary of the Interior.”); *see also* 25 U.S.C. § 325 (2014) (“No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just.”).

¹⁶ *See* *State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 673 (citing *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *United States v. Winans*, 198 U.S. 371 (1905)).

¹⁷ 25 U.S.C. § 321 (2014) (other lands for which approval is required include reservation territory, “former Indian Territory”, e.g. Oklahoma, any land “reserved for an Indian agency or Indian school”, and certain allotments); *cf.* 25 U.S.C. § 357 (providing for condemnation under State land of “lands allotted in severalty to Indians,” i.e. non-public lands).

consultation has occurred, and the Applicant has sought approval from the Secretary of the Interior.

To this end, the White Earth Band of Ojibwe asserts that an Environmental Impact Statement is required before any meaningful consideration can be given to the substantial tribal property rights at issue in this case.

b. Because approval of the Secretary of the Interior is required in order for the Applicant to move forward with its proposed Sandpiper Pipeline project, an Environmental Impact Statement is required.

Approval of the proposed route requires consideration by the Secretary of the Interior, and the Secretary's grant of rights-of-way through public lands in the 1855 Treaty ceded territory. Involvement of the Department of the Interior in these proceedings means that an Environmental Impact Statement is required.¹⁸ Federal law mandates that a detailed Environmental Impact Statement be prepared when actions are undertaken that will "significantly affect[] the quality of the human environment."¹⁹ The contents of the Statements are statutorily provided.²⁰ The Comparative Environmental Analysis, without the involvement and consultation of federal agencies, is insufficient to satisfy the federal statutory requirement.²¹

¹⁸ See 40 C.F.R. Part 1502.1 The purpose statement is as follows:

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

¹⁹ 42 U.S.C. § 4332 (2014) (This is the codification of the National Environmental Policy Act of 1970, which has as its purpose affirmative consideration by federal agencies of the environmental impacts of their actions, and possible alternatives. See <http://www.epa.gov/compliance/nepa/> (last visited April 6, 2014)).

²⁰ 25 U.S.C. § 4332(C) (statements must include:

The White Earth Band of Ojibwe requests that this tribunal require the Applicant to abide by federal law, and seek approval for any rights-of-way through public lands in the 1855 Treaty ceded territory with the Secretary of the Interior. And, that such a request be made only after the Applicant and the State of Minnesota have had meaningful consultation on the proposed route and its impact with the White Earth Band of Ojibwe and the Secretary of the Interior. To this end, the White Earth Band of Ojibwe requests that this matter be referred to the federal Environmental Protection Agency and other appropriate federal agencies for the preparation of an Environmental Impact Statement regarding those portions of the preferred route that traverse the 1855 Treaty ceded territory, with particular focus on the impacts that the proposed project will have upon the reserved usufructuary property interests in the territory, and the available alternatives.²²

Conclusion

The White Earth Band of Ojibwe possesses a compensable property interest in the form retained usufructuary rights within the 1855 Treaty ceded territory, and as such should be permitted to intervene in the proceedings before the Office of Administrative Hearings regarding the Application by the North Dakota Pipeline Company, LLC to the Minnesota Public Utilities Commission for a Certificate of Need and Pipeline Routing Permit for the Sandpiper Project. The White Earth Band of Ojibwe does not find that the Applicant is able to satisfy statutory and administrative criteria because of its failure to properly consider the rights of and involve the

the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.);

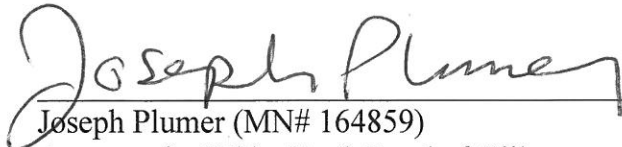
see also 40 C.F.R. Part 1502.3.

²¹ *See* 42 U.S.C. § 4332(D).

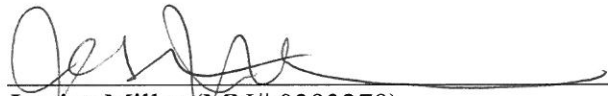
²² 42 U.S.C. § 4332(C)(i), (iii).

Tribe. Moreover, the Applicant is required to seek approval from the Secretary of the Interior for the portions of the proposed pipeline that traverse public lands in the 1855 Treaty ceded territory, and therefore, the Applicant and the State of Minnesota must request that an Environmental Impact Statement be completed in order to move forward with the Application.

Dated: 5/1/14


Joseph Plumer (MN# 164859)
Attorney for White Earth Band of Ojibwe
P.O. Box 238
White Earth, MN 56591
Telephone: (218) 983-3285
Fax: (218) 983-3269

Dated: 5/1/14


Jessica Miller (MN# 0393279)
Attorney for White Earth Band of Ojibwe
P.O. Box 238
White Earth, MN 56591
Telephone: (218) 983-3285
Fax: (218) 983-3269