

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION**

PARADIGM ENERGY PARTNERS,
LLC,

Plaintiff,

vs.

MARK FOX, in his official capacity as
Chairman of the Tribal Business Council of
the Mandan, Hidatsa & Arikara Nation: and
CHIEF NELSON HEART, in his official
capacity as Chief of Police for the Mandan,
Hidatsa & Arikara Nation,

Defendants.

Case No. 1:16-CV-00304-DLH-CSM

**DEFENDANTS' REPLY IN SUPPORT
OF MOTION TO DISSOLVE**

Judge Daniel L. Hovland
Magistrate Judge Charles S. Miller, Jr.

This Court should dissolve the Temporary Restraining Order (“TRO”) it granted on August 23, 2016. Under the applicable analysis of the United State Code, Plaintiffs are unlikely to prevail on their claim that consent of the MHA Nation is not required for Paradigm Energy Partners to invade the MHA Nation’s trust mineral estate under Lake Sakakawea.

Plaintiff sought a preliminary injunction based upon its assertion that the pipeline did not pass through tribal minerals based upon the 1949 Takings Act. However, it is clear that the Takings Act was superseded by the Fort Berthold Mineral Restoration Act of 1984. The Fort Berthold Mineral Restoration Act expressly restored the minerals in question to tribal trust ownership, and the undisputed evidence in this case shows that the pipeline passes through the Tribe’s trust mineral estate. Environmental Assessment, Aug. 2015 §3.3.2, table 3.5 (listing the minerals that the pipeline passes through, which include sand, gravel, silt, clay, and lignite). These

points are no longer disputable. The question presented is whether the Plaintiff has the legal right to construct a pipeline through the Tribe's trust minerals without the consent of the Tribe and the Secretary of the Interior. The answer is clearly no.

The starting point for legal analysis on this question is the Nonintercourse Act, currently codified at 25 U.S.C §177, which expressly prohibits anyone from claiming an interest in Indian land unless Congress has authorized it. *Oneida Indian Nation v. Oneida County*, 432 F. Supp. 2d 285, 289, (N.D.N.Y 2006); *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 684-685 (9th Cir.1976). Section 177 "acknowledges and guarantees the Indian tribes' right of possession [of Indian lands], . . . and imposes on the federal government a fiduciary duty to protect the lands covered by the Act." *N. New Mexicans Protecting Land Water & Rights v. United States*, 2016 U.S. Dist. LEXIS 16644, *60 (D.N.M. Jan. 30, 2016), quoting *U.S. for & on Behalf of Santa Ana Indian Pueblo v. Univ. of N.M.*, 731 F.2d 703, 706 (10th Cir. 1984). Consistent with this principle, Congress has recognized the MHA Nation's right to prevent the encumbrance of any interest in its land. 25 U.S.C. §476 (e) ("In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe")). The Tribe's Constitution incorporates this power. MHA Const. Article IX §1 (expressly including the power over tribal lands contained in the quoted provision of 25 U.S.C. § 476). The Tribe issued the Cease and Desist Order at issue in this case pursuant to this congressionally sanctioned authority.

25 U.S.C. §177 provides that no claim of right or title to tribal land is permitted unless authorized by Congress.¹ With this in mind, 25 U.S.C. § 476, as well as the Tribe's federally approved Constitution, clearly require tribal consent for any right-of-way or encumbrance upon the Tribe's trust land, or any interest therein. From there, given that the mineral estate under Lake Sakakawea is held in trust for the Tribe by the United States, 25 U.S.C. §§ 323-324 also apply and require tribal consent to a right-of-way across or through the Tribe's trust mineral estate.²

Even if we assumed, *arguendo*, that 25 U.S.C. §323 does not apply, the right-of-way would come under the more limited congressional authorization for a right-of-way for pipelines under 25 U.S.C. § 321, which is specific to oil and gas pipelines through tribal lands. And, as with 25 U.S.C. §323, any right-of-way under 25 U.S.C. §321 would also require tribal consent. 25 U.S.C. § 324; *Blackfeet Indian Tribe v. Montana Power Co.*, 838 F.2d 1055, 1058 (9th Cir. 1988) *cert. denied* 488 U.S. 828 (1988).³ As undisputed, Plaintiff did not obtain consent of the Tribe, or for that matter the Secretary of the Interior, and the failure to obtain the required approval is therefore fatal to Plaintiff's case.

¹ As the Tribe has previously discussed at length, if there is no statute through which Congress authorized the encroachment through the Tribe's trust mineral estate, then not only does Plaintiff lose but the problem is incurable: if there is no statute, then neither the United States nor the Tribe can authorize the pipeline under the lake. See *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 906 (9th Cir. 2014).

² The Tribe's mineral estate clearly is clearly considered "Indian Land" See e.g., 25 C.F.R. §§ 211.3, 212.3 (defining Indian land and Indian mineral owner), 30 U.S.C. §§ 1291, 1702 (both of which define Indian land to include the mineral interest or estate). It is blackletter law that a mineral estate is an estate in land.

³ Section 324 provides in relevant part: "No grant of a right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. In this case, the "proper tribal officials" is the Tribal Business Council; the Tribe's governing body under Article III of its Constitution.

In *Blackfeet Indian Tribe*, 838 F.2d 1055, the Court of Appeals reviewed the requirements of 25 U.S.C. §323 and 25 U.S.C. §321. As the Court noted, 323 is a broader, more general statute than §321; and §323 was adopted after §321, but did not supersede §321. The Court then held:

The Act of 1904 [25 U.S.C. 321] and the Act of 1948 [25 U.S.C. 323] can be read as coexisting. The former allows a term of 20 years, the later a term of 50 years. No matter which term the Secretary permits the consent of the Tribe is still required. 25 U.S.C. § 324.

Id. at 1059 (emphasis added).

Because section 323 is broader, it is significantly more useful than section 321, and appears to be the relevant statute. In either case, however, grant of a right-of-way requires approval of the Tribe, which has not been obtained in this case.

Section 323 can be interpreted broadly enough to include a subsurface right-of-way through a tribal mineral estate. By its terms, section 323 authorizes the Secretary to grant a right-of-way "over and across" Indian trust land. The Merriam Webster Dictionary defines the word across as "from one side to the other". Thus, the word across is not limited to rights-of-way over the surface of land, it can reasonably be construed to include a right-of-way from one side of the Tribe's mineral estate to the other. Moreover, the word "across" is synonymous with the word "through". Since a prior statute, 25 USC section 321, authorized rights-of-way for oil and gas pipelines "through" Indian Trust land, section 323 can and should be interpreted to cover rights-of-way through the Tribe's mineral estate. Any ambiguity on this question must be resolved in favor of the Tribe, since the statutes passed for the Tribe's benefit must be construed generously in the Tribe's favor. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Thus, if a statute can "reasonably be construed as the Tribe would have it construed, it must be construed that way." *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011) *aff'd* 132 S. Ct. 2181 (2012).

CONCLUSION

The Tribe had the legal right to order the Plaintiff to cease and desist the construction of the oil and gas pipeline through the Tribe's trust minerals under Lake Sakakawea. Under the Fort Berthold Mineral Restoration Act of 1984, the minerals under the lake are owned in trust by the United States for the Tribe and constitute tribal land under federal law and the Tribe's federally approved Constitution. Tribal consent is required in order for the Plaintiff to pass through the Tribe's trust mineral estate, which is an estate in land covered by the Nonintercourse Act and the Tribe's federally approved Constitution. 25 U.S.C. § 177 bars any claim of right through the Tribe's trust mineral estate without the consent of Congress, and the applicable statutes where Congress has authorized the encumbrance of the Tribe's minerals all require tribal consent as a prerequisite, which has not been obtained in this case. The court should therefore dissolve the TRO and deny any additional injunctive relief.

Respectfully submitted this 12th day of September, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2016, a copy of the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISSOLVE** was filed electronically with the Clerk of Court through the ECF filing system, which will send notification of such filing to all parties of record as follows:

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