

**STATE OF MINNESOTA
BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**

FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Application of
Enbridge Energy, Limited Partnership for
a Routing Permit for the Line 3
Replacement Project in Minnesota from
the North Dakota Border to the Wisconsin
Border

MPUC Docket Nos. PL-9/CN-14-916
PL-9/PPL-15-137

OAH Docket Nos. 65-2500-32764 and
62-2500-33377;
Sub-Docket No. 8-2500-34602

**MILLE LACS BAND OF OJIBWE
EXCEPTIONS TO FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATION**

The Mille Lacs Band of Ojibwe (the “Band”) submits the following exceptions to the Findings of Fact, Conclusions of Law, and Recommendation of Administrative Law Judge Ann C. O’Reilly dated April 23, 2018 (“ALJ Recommendation”), which recommended that the Public Utilities Commission (the “Commission”) grant the Certificate of Need (“CON”) for the proposed Line 3 Replacement Project (“L3RP” or “Project”) subject expressly to the selection of Route Alternative 07 (“RA-07”) (in-trench replacement) and additional specified conditions.

The ALJ Recommendation recognizes the significant risks associated with the creation of a new pipeline corridor across Minnesota. The Mille Lacs Band believes that the ALJ incorrectly determined that Enbridge demonstrated a need for the Project. And, even if need were demonstrated, the Band supports the conclusion that the marginal need for the project does not justify the approval of a route which would introduce the risks associated with a petroleum pipeline in an area of rich cultural and ecological significance. With respect to the selection of RA-07, the Mille Lacs Band defers to the Fond du Lac Band and Leech Lake Band who would be directly affected by the in-trench replacement of the Line 3 Pipeline.

The ALJ Recommendation also contains a discussion of the treaty rights of the Minnesota Chippewa Tribes. The treaty rights were not litigated in the proceedings before Judge O'Reilly and the Commission's dockets are not the proper venue to adjudicate treaty rights. The Mille Lacs Band requests that the summary of treaty rights be revised as set forth below.

I. THE EVIDENCE IN THE RECORD DOES NOT SUPPORT A NEED FOR THE PROJECT.

While the Report correctly determines that Enbridge cannot justify the Project as proposed because of the substantial consequences associated with creating a new pipeline corridor in Minnesota, the Band believes that there are *no* circumstances under which Enbridge has demonstrated a need for the Project. First, the significant flaws recognized by the ALJ in Enbridge's forecast of demand for the type of energy that would be supplied by the Project should have led to the conclusion that Enbridge had not demonstrated that the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply. Second, the ALJ improperly dismissed the alternatives presented by the parties.

A. The Applicant's Forecast of Demand Does Not Justify the Project.

The ALJ's Report correctly points out that the Applicant's forecast of demand suffers from numerous flaws. Specifically, the Report criticizes the fact that the Muse Stancil Report focuses primarily on the CAPP *supply* forecast, and "not on an objective analysis of future oil prices, future tar sands development rates, or future U.S. and global demand for crude oil." Report ¶ 564. The Report also recognizes the inherent bias in the CAPP forecast, because it is based on the forecasts of industry members, who are not required to disclose their underlying assumptions. Report ¶¶ 572, 580. The Report further criticizes the Applicant for not conducting any analysis of demand for refined product, and agrees with Dr. Fagan that, due to this omission, Applicant's analysis is "materially flawed." Report ¶ 585.

Despite these deficiencies in Applicant's analysis, the Report concludes that because no *other* party has presented a more thorough analysis than the Applicant, the ALJ must take the Applicant's analysis at face value. Report ¶¶ 591, 608. The ALJ has drawn the wrong conclusion. The parties demonstrated that the Applicant's forecast is not reliable or accurate because it focuses on a narrow range of views and ignores important trends or drivers for energy demand. Because the Applicant has not presented an accurate forecast, it has not demonstrated a need for the Project.

Ultimately, the ALJ concludes that because Applicant's customers cannot ship all the crude that they would like through the pipeline system, this demonstrates that there is demand for *transportation* of oil. Report ¶¶ 632-34. This, however, is not the question asked by the rules which direct the Commission to evaluate the accuracy of the Applicant's forecast of demand for the *type of energy* that would be supplied by the project; i.e. crude oil. Demand for transportation does not demonstrate that there is an unmet demand for crude oil. In fact, the evidence in the record shows that refineries are obtaining the oil they need. Accordingly, the Applicant cannot show that there is a lack of adequate and reliable energy *supply* and, therefore, cannot demonstrate a need for the Project.

Because the Applicant has not presented an accurate forecast of demand for crude oil, and has not shown that denial of the Project would adversely affect energy supply, the Commission cannot grant a Certificate of Need for this Project.

B. SA-04 and the Keystone XL Pipeline should be considered reasonable and prudent alternatives to the Project.

The Band further urges the Commission to reconsider the alternatives presented by the Parties in this case. As discussed above, the only need that the ALJ has identified is shipper demand for additional transportation of crude oil. The ALJ did not conclude that refineries in Minnesota or even the Midwest are in need of additional crude oil supplies. Thus, an alternative

that provides an additional pathway for oil to travel out of Canada could free up capacity on the Mainline and reduce apportionment. It is difficult to understand, then, why the ALJ dismisses the Keystone XL pipeline and SA-04 on the grounds that they do not directly serve Minnesota or PADD II refineries. Report ¶¶ 779, 789. That is irrelevant. If SA-04 or Keystone free up Mainline capacity, then it remedies the potential harm recognized by the ALJ, and should be considered as reasonable and prudent alternatives to the Project.

II. A ROUTE PERMIT CANNOT BE GRANTED FOR THE APR.

The ALJ correctly concludes that the risks associated with creating a new pipeline corridor in the Minnesota far outweigh any claimed need for the Project. The route proposed by the Applicant would impact thousands of acres of sensitive natural resources and would have a disproportionate and adverse impact on tribal communities from an environmental, socio-economic, and environmental justice perspective. Thus, even if the Applicant has demonstrated some need for the Project, the Applicant's Preferred Route cannot be chosen because it fails to minimize the human and environmental impact of the pipeline.

The ALJ concludes that the only way the Project is justified is if RA-07 (in-trench replacement) is chosen. The ALJ reasons that RA-07 minimizes the impact of the Project by keeping the risks associated with a pipeline within the Mainline corridor, and increases the economic benefits of the Project due to the fact that current Line 3 will need to be removed, and the new pipeline will need to be built. However, RA-07 presents unique challenges because it passes through the Fond du Lac and Leech Lake reservations. The Mille Lacs Band defers to the Fond du Lac and Leech Lake Bands on the question of whether RA-07 is an appropriate route for the Project.

III. THE DISCUSSION OF TREATY-CEDED LANDS SHOULD BE REVISED TO CLARIFY THAT THE TRIBES’ TREATY RIGHTS WERE NOT LITIGATED IN THESE PROCEEDINGS.

Paragraphs 411 through 443 of the ALJ Recommendation address the treaty-ceded territories and include a summary of the various treaties between the United States and the Minnesota Chippewa Tribes. The Tribes’ treaty rights *were not* litigated in these proceedings and the Commission should make clear that it is not adjudicating the scope of these rights.¹ The Mille Lacs Band proposes the following revisions to the ALJ Recommendation.

¶	Revision
411	In addition to the private easements that the Project will require, there are additional property issues related to the traversing of land over which American Indian tribes retain certain property rights <u>with respect to lands crossed by the APR and the route alternatives. The American Indian tribes’ rights were not litigated in these proceedings. The following paragraphs are intended as a summary are not the result of an adjudication or determination of such rights.</u>
412	In the 1800s <u>1800s</u> , the United States government undertook actions to obtain right and title to the land comprising, what is now, Minnesota. ¹⁰⁴² These actions included the execution of treaties with Indian tribes which established legal rights to the property and created Indian reservations. ¹⁰⁴³ This section discusses the unique legal implications of the Project crossing territory ceded to the United States by the Indians, as well as land designated and held in trust by the federal government as Indian Reservation property.
413	Federally-recognized tribes are sovereign nations that retain the power of self-governance over their lands and members. ¹⁰⁴⁴ The U.S. Supreme Court has characterized tribal governments as “domestic dependent nations” to whom the federal government has essentially a fiduciary relationship. ¹⁰⁴⁵ Tribal sovereignty and the right to self-govern is the central tenet of federal American Indian policy. ¹⁰⁴⁶

¹ The proceedings necessary to adjudicate treaty rights would overwhelm the Commission’s dockets related to the proposed Line 3 Replacement Project. For example, the 1995 federal court decision affirming the Mille Lacs Band’s continuing right to hunt, fish, and gather wild rice upon the lands, the rivers and the lakes included in the 1837 ceded territory was preceded by a three-week trial with fourteen witnesses—including eleven expert witnesses—and more than 400 exhibits. *See Mille Lacs Band of Chippewa Indians v. Minnesota Dep’t of Natural Resources*, 861 F.Supp. 784, 790 (D. Minn. 1994).

¶	Revision
414	<p>In the 1800s, Indian tribes residing on land now known as Minnesota entered into treaties with the United States government.¹⁰⁴⁷ Under these treaties, the Indian tribes relinquished millions of acres of their homeland to the United States in exchange for the protection of (and from) the government <u>as well as money, goods, and other consideration.</u>¹⁰⁴⁸ These treaties recognized and established rights, benefits, and conditions for tribes, including rights to occupy certain land as reservations and, in some cases, the right to use off-reservation land for hunting, fishing, and gathering.¹⁰⁴⁹</p>
415	<p>A federal Indian Reservation is an area of land reserved for a tribe or tribes as permanent tribal homelands under a treaty or other agreement with the United States, executive order, federal statute, or administrative action.¹⁰⁵⁰ <u>The United States initially held The U.S. government holds</u> title to the reservation land in trust for the benefit of the tribes.¹⁰⁵¹ The Secretary of the Interior is vested with the authority to administer the trusts.¹⁰⁵² Land held in trust cannot be sold or conveyed by its tribal or individual landowners without federal consent through the Secretary of the Interior.¹⁰⁵³ <u>As a result of allotment and surplus lands acts, such as the Nelson Act in Minnesota, many reservations today include lands owned in fee by non-Indians.</u></p>
422	<p>“Treaty-ceded lands” are those lands that Indian tribes relinquished to the U.S. government as part of a treaty.¹⁰⁶⁵ The fact that land is “treaty-ceded” does not, by itself, convey any usufructory rights to the land to any particular Indian tribe. It merely means that the land was relinquished by the Indians to the United States government under a treaty. Under the reserved rights doctrine, treaties are not grants of rights to the tribes but grants of rights from the tribes, with rights not granted being reserved by the tribes. See <i>United States v. Winans</i>, 198 U.S. 371, 381 (1905). Whether and to what extent tribes retained usufructory or other rights on treaty-ceded lands is determined on a case-by-case basis.</p>
423	<p>Notably, Indians and U.S. government officials entering into these treaties were not on equal footing, as the treaties were written in English and most often conducted under threat of harm to the Indians.¹⁰⁶⁶ Nonetheless, by entering into these treaties, the Indian tribes relinquished their <u>rights to ownership of</u> the real property and retained only those rights specifically identified in the treaties.¹⁰⁶⁷ In most treaties, the Indian tribes did not retain any usufructory rights to the ceded lands identified in the treaties.</p>
424	<p>The Project crosses property that was originally ceded to the United States under numerous treaties, six of which have been identified by the intervening parties as most applicable to this proceeding:¹⁰⁶⁸ the Treaty with the Chippewa of 1837 (1837 Treaty); the Treaty with the Chippewa of the Mississippi and Lake Superior of 1847, dated August 2, 1847 (Aug. 2, 1847 Treaty); Treaty with the Pillager Band of Chippewa Indians of 1847, dated August 21, 1847 (Aug. 21 1847 Treaty);¹⁰⁶⁹ 1854 Treaty of LaPointe with the Chippewa of Indians of Lake Superior and the Mississippi (1854 Treaty); Treaty with the Mississippi Chippewa of 1855 (1855 Treaty); and the Treaty with the Chippewa – Red Lake and Pembina Bands of 1863 (1863 Treaty); the Treaty</p>

¶	Revision
	with the Bois Fort Band of 1866 (1866 Treaty); the Treaty with the Chippewa of the Mississippi of 1867 (1867 Treaty); and the Treaty with the Chippewa Indians <u>Nelson Act</u> of 1889 (commonly known as the Nelson Act) . ¹⁰⁷⁰
430	<p>In the two 1847 Treaties, the Chippewa of the Mississippi and Lake Superior, and the Pillager Band of Chippewa Indians, ceded to the United States additional territory identified in the maps above.¹⁰⁸⁰ These treaties did not <u>expressly</u> reserve <u>any</u> usufractory rights for the Indian tribes <u>and the courts have not determined whether they implicitly reserved such rights</u>.¹⁰⁸¹</p> <p>[Footnote 1081 should refer to: <i>United States v. Winans</i>, 198 U.S. 371, 381 (1905) (“[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted.”); <i>Mille Lacs Band v. Minn.</i>, 124 F.3d 904, 928 (8th Cir. 1997) (“[T]he United States had not granted usufructuary rights to the Indians in the territory. ‘The treaty was not a grant of rights to the Indians, but a grant of rights from them--a reservation of those not granted.’ As such, the United States did not convey to the Indians anything which the State could claim the right to control, but rather the United States secured title to vast areas of land for the benefit of the future state in exchange for the Indians' reservation of usufructuary rights.”) (internal citations omitted).]</p>
433	The 1855 Treaty ceded additional land to the United States, as depicted in the maps above. ¹⁰⁸⁸ It also established the Mille Lacs and Leech Lake Reservations. ¹⁰⁸⁹ The 1855 Treaty did not <u>expressly</u> reserve <u>any</u> -usufractory rights for the Indian tribes <u>and the courts have not determined whether it implicitly reserved such rights</u> . ¹⁰⁹⁰ In addition, the 1855 Treaty provided that the tribes “fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere.” ¹⁰⁹¹
434	In 1999, in the U.S. Supreme Court ruled that the 1855 Treaty did not abrogate the tribes’ usufractory rights to hunt, fish, and gather in the 1837 Treaty-ceded territory. ¹⁰⁹² This decision did not <u>address whether the tribes retained usufractory rights in ; however, give the tribes usufractory rights to the 1855 Treaty-ceded territory—a separate territory from that ceded under the 1837 Treaty—</u> or any other treaty-ceded territories. ¹⁰⁹³
435	The 1863 Treaty ceded additional land to the United States, as depicted in the map above. ¹⁰⁹⁴ It also established reservations for the Red Lake and Pembina Bands. ¹⁰⁹⁵ The 1863 Treaty did not <u>expressly</u> reserve <u>any</u> usufractory rights for the Indian tribes with respect to the land ceded under that treaty <u>and the courts have not determined whether it implicitly reserved such rights</u> . ¹⁰⁹⁶

¶	Revision
436	<p>The 1866 Treaty ceded additional land to the United States, as depicted in the maps above.¹⁰⁹⁷ It also established a reservation for the Bois Fort Band.¹⁰⁹⁸ The 1866 Treaty did not <u>expressly</u> reserve any-usufractory rights for the Bois Fort Band with respect to the land ceded under the treaty and the courts have not determined whether it implicitly reserved such rights.¹⁰⁹⁹</p>
437	<p>The 1867 Treaty ceded additional land to the United States as depicted in the maps above.¹¹⁰⁰ It also established the White Earth Reservation and added land to the Leech Lake Reservation.¹¹⁰¹ The 1867 Treaty did not <u>expressly</u> reserve any-usufractory rights for the Chippewa with respect to the land ceded under the treaty and the courts have not determined whether it implicitly reserved such rights.¹¹⁰²</p>
439	<p>In 1889, Minnesota passed the “Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota,” commonly known as the “Nelson Act.”¹¹⁰⁵ It allowed the President to create a Commission to “negotiate” with the Chippewa tribes in Minnesota for the relinquishment of their title to reservation lands, with the exception of the White Earth and Red Lake Reservations.¹¹⁰⁶ <u>The original intent was to relocate all the Anishinaabe people in Minnesota to the White Earth Reservation (except those at Red Lake), but the legislation was amended to allow the Anishinaabe to remain and to obtain allotments on all their existing reservations. The Courts have held the Act diminished the Red Lake and White Earth Reservations, but did not diminish other reservations, such as Leech Lake, where allotments were to be made to the Anishinaabe. The Act was intended to relocate all the Anishinaabe people in Minnesota to the White Earth Indian Reservation, and to expropriate the vacated reservation land for sale to non-Indians. This Act did not reserve any usufractory rights to the Indian tribes.</u>¹¹⁰⁷</p> <p>[Footnote 1107 should refer to <i>Leech Lake Band v. Cass County</i>, 108 F.3d 820, 821-22 (8th Cir. 1997), <i>aff’d in relevant part</i>, 524 U.S. 103, 106, 108 (1998); <i>Lake Band of Chippewa Indians v. Herbst</i>, 334 F. Supp. 1001 (D. Minn. 1971); <i>State v. Clark</i>, 282 N.W.2d 902 (Minn. 1979); <i>State v. Forge</i>, 262 N.W.2d 341 (Minn. 1977).]</p>
440	<p>As set forth above, the only the treaties in which Indian tribes <u>expressly</u> retained usufractory rights to property are ceded through the 1837 and 1854 Treaties. <u>The remaining treaties did not expressly reserve usufractory rights for the Indian tribes and the courts have not determined whether they implicitly reserved such rights. Accordingly, only the land ceded under those two treaties are subject to usufractory rights claims by the tribes who were signatories to those two treaties. Indian tribes did not retain usufractory rights in or to any of the other treaty ceded territories.</u></p>

CONCLUSION

The ALJ recognized that the marginal need for the Line 3 does not support creation of a new corridor across Minnesota which would introduce pipeline related risks to an ecological and culturally important region. However, because of an error in the ALJ's analysis, even this marginal need is overstated because it is based exclusively on the need to transport oil rather than the demand for the energy. Accordingly, the Certificate of Need should be denied and the Commission need not address the application for a route permit.

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Respectfully submitted,

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