MEMO

Fredrikson & BYRON, P.A.

TO: North Dakota Public Service Commission

FROM: Fredrikson & Byron, P.A., on behalf of Sacagawea Pipeline Company, LLC

DATE: September 23, 2015

RE: Late-Filed Exhibit 15 - North Dakota Public Service Commission Jurisdiction on Tribal Lands

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LATE-FILED EXHIBIT 15

I. INTRODUCTION.

At the public hearing held on August 21, 2015 on the Consolidated Application for a Certificate of Corridor Compatibility and Route Permit filed by Sacagawea Pipeline Company, LLC ("Sacagawea" or "Company") in Case No. PU-15-114 for the Sacagawea Pipeline Project ("Project"), the North Dakota Public Service Commission ("Commission") requested information from Sacagawea regarding the jurisdiction of the Commission on tribal lands. Essentially, the Commission has requested an analysis of whether the Commission has the authority to issue a Certificate of Corridor Compatibility and Route Permit for the portions of the Project crossing tribal lands located on the Fort Berthold Indian Reservation.

The question of whether the Commission can exercise jurisdiction here is essentially two-fold, with the issue of the tribe's authority and willingness to exercise jurisdiction over the Company for the construction of the Project also needing to be considered. As discussed below, tribal civil jurisdiction over nonmembers is a complex issue that often requires a determination based on the unique facts of each case. The determination of the Commission's jurisdiction and the ability of the Commission to issue a certificate of corridor compatibility and route permit over tribal lands in essence hinges on whether the tribe can or will exercise jurisdiction in a certain matter.

II. TRIBAL LANDS AND TRIBAL JURISDICTION GENERALLY.

Generally, there are four types of lands located on the reservation: 1) tribal lands, which are held in trust by the United States for the tribe; 2) allotted lands, which are held in trust for individual allottees; 3) state owned land on the reservation; and 4) privately held land, or fee land. Cases following the decision in *Montana v. United States* generally refer to lands owned in fee by non-Indians, including state or local governments, as "fee lands" and lands owned by Tribes, individual Indians, or held in trust by the federal government for the benefit of the Tribe or individual Indians, as "Indian lands" or "tribal lands." *See, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997); *Nevada v. Hicks*, 533 U.S. 353, 360 (2001); *N. Cent. Elec. Coop., Inc. v. N.D. Pub. Serv. Comm'n*, 2013 ND 158, ¶ 13, 837 N.W.2d 138 (*citing* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §6.02[2][a] and [b]). Title 25 of the United States Code

relating to Indian affairs further defines tribal land as "any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations . . . and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians." 25 U.S.C. § 323. This memorandum utilizes the two general classifications and will distinguish the lands at issue for the Project as fee lands and tribal lands.

As has been the general approach in North Dakota, the Commission can exercise jurisdiction over fee lands, as these privately held lands are essentially treated the same as privately owned land located outside the reservation.[1] The issue raised here is whether the Commission has the authority to exercise jurisdiction over these tribal lands in the same manner as allowable for fee lands located within the boundaries of the Fort Berthold Indian Reservation. Most of the Project is located on fee land, with only approximately 3 ½ miles of tribal land at issue here.

As noted, whether the Commission can exercise jurisdiction over the 3 ½ miles of tribal land must be weighed against the tribe's jurisdiction under the circumstances. The path marking case analyzing tribal jurisdiction over nonmembers is *Montana v. United States.* 450 U.S. 544 (1981). The central issue in *Montana* was whether the tribe had authority to regulate non-Indian hunting and fishing on lands owned in fee simple by non-Indians within the boundaries of the Tribe's reservation.[2] *Id.* at 547. As part of its detailed analysis regarding jurisdiction, the Supreme Court "readily agree[d]" the tribe could "prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe . . . [and] condition their entry by charging a fee or establishing bag and creel limits." *Id.* at 557. Thus, the Court recognized that the tribe retained substantial authority to regulate the conduct of non-Indians on lands owned or controlled by the tribe or federal government.

Fitting with the Court's finding in *Montana* is the general principal that state jurisdiction within Indian county "is preempted both by federal protection of tribal self-government and by federal statutes on other subjects relating to Indians, tribes, their property, and federal programs." *N. Cent. Elec. Coop.*, 2013 ND 158, ¶ 10, 837 N.W.2d 138 (internal citations omitted). As outlined in a recent North Dakota Supreme Court case, a noted authority on Indian

[1] In the event a dispute arises as to fee lands, a detailed analysis of applicable rules will need to be undertaken. However, such discussion is currently irrelevant to the question posed by the Commission and has been omitted from this memorandum.

[2] The discussion regarding the tribe's authority to regulate non-member activities on fee lands is a different matter, and is not discussed in detail here. Only the relevant findings of *Montana* are examined for purposes of this memorandum.

law has described the interplay between tribal and state authority within Indian country as follows:

> The general approach to determining which government has jurisdiction is relatively simple in the case of tribal member Indians in Indian country. Unless there is a specific federal law stating otherwise, they are subject to exclusive tribal jurisdiction. Congress's plenary authority over Indian affairs and the tradition of tribal autonomy in Indian country combine to preempt the operation of state law.
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> When an issue affects the property or activities of non-tribal members or non-Indians in Indian country, the basic rule is subject to more exceptions. States may not assert civil jurisdiction over the conduct or property of non-Indians in Indian country if it would cause interference with tribal self-government or a conflict with federal laws and policies. When Indians or their property are not substantially affected, however, the courts have recognized that states have "legitimate interests in regulating the affairs of non-Indians."
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> In Williams v. Lee, [358 U.S. 217 (1959),] the Supreme Court held that an Arizona state court did not have jurisdiction over a non-Indian's lawsuit to collect a debt incurred by a reservation Indian at a trading post on the reservation. The Court held that allowing the suit to proceed would undermine the authority of the tribal courts and therefore infringe on the tribe's ability to govern affairs on the reservation. Thus, an exercise of state jurisdiction over a transaction by a non-Indian with an individual Indian in Indian country can infringe on tribal self-government. This same reasoning applies to issues of state regulatory jurisdiction as well as judicial jurisdiction.

N. Cent. Elec. Coop., Inc., 2013 ND 158, ¶ 11, 837 N.W.2d 138 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01, pp. 489-91 (footnotes omitted)).

As noted, the United States Supreme Court has enumerated the general rule for analyzing tribal or state authority over nonmembers on tribal land within a reservation, and further explained that "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); *see also N. Cent. Elec. Coop.*, 2013 ND 158, ¶ 12, 837 N.W.2d 138 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.03[2][a]). Subsequent Supreme Court decisions have applied the general rule enumerated in *Williams*, and "recognized that tribal ownership of the land, by itself, may not be enough for tribal regulatory authority over nonmembers' conduct if regulation of the nonmembers' action on that land does not infringe on the right of reservation Indians to make their own laws and be ruled by them." *See Nevada v. Hicks*, 533 U.S. 353, 360-64 (2001); *see also N. Cent. Elec. Coop.*, 2013 ND 158, ¶ 17, 837

N.W.2d 138. Based on this reasoning, the status of the tribal land at issue alone should not be determinative of jurisdiction, with further analysis of relevant North Dakota case law being necessary to determine the Commission's authority to exercise jurisdiction.

III. NORTH DAKOTA CASE LAW ANALYZING JURISDICTION.

In previous matters where a district court and the North Dakota Supreme Court examined the jurisdiction of the Commission, the courts scrutinized the specific regulations in place for the tribe and any history of exercising sovereignty under similar circumstances. For example, in *Baker Electric Cooperative, Inc. v. Public Service Commission*, the Court highlighted "the general proposition that there is no 'inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent.'" *See Baker Elec. Coop. v. Pub. Serv. Comm'n*, 451 N.W.2d 95, 98 (1990). Further, the Court stated that "[u]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Id.* (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987)) (internal citations and quotations omitted). The Court then looked to the language and reasoning applied in *Montana*, and determined that while the tribe at issue had inherent sovereign authority to regulate nonmembers' conduct on tribal-owned land within the reservation, the tribe had not adopted a utility code to accomplish this and had no tradition of sovereignty over electric service. *See id.* at 107.

As done in *Baker*, the Commission should look to whether any treaties or similar authority exist for the tribe to regulate transmission pipelines through measures similar to the issuance of a Certificate of Corridor Compatibility and Route Permit. From a review of accessible information, it appears that the tribe generally, through its Constitution and various other Congressional and federal court decisions, may exercise jurisdiction under the circumstances. However, the authority of the tribe exercised here will likely be limited to the granting of a right-of-way or easement allowing the Project to cross the tribal lands. *See* 25 U.S.C. § 321.

Based on the tribe's authority to grant an easement for crossing of the tribal lands, Sacagawea has received consent for the easement from the Tribal Business Council. It is anticipated that the Bureau of Indian Affairs ("BIA") will issue the easement upon the Environmental Assessment being final and submission of all appropriate documents to the BIA. Upon execution of this easement by the tribe, the tribe will likely have exercised the only authority it intends to assert under the circumstances, with no further approvals or regulations needing to be considered. The approval granted by the BIA will only be for permission to cross the lands, but will not include the protections afforded by the Commission through the siting process.

So while the tribe will have some regulatory authority under the circumstances, the Commission should consider whether the exercise of jurisdiction by the Commission will affect any inherent sovereignty of the tribe. *See Baker Elec.*, 451 N.W.2d at 102. In analyzing the sovereignty of the tribe, the Court in *Baker* looked to the provisions of 28 U.S.C. § 1360(b), which "clearly deny states the authority, with regard to 'any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States,' to regulate 'the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto . . . ." *Id.* at 103. The Court in *Baker* ultimately found that a state law allocating electric services between competing utilities did not constitute "a law governing, regulating, or controlling 'the use or development' of trust property." *Id.*

The same rationale could be applied here. Pursuant to Title 25 of the United States Code, the tribes, through delegation of powers by the Secretary of the Interior, can allow for rights-of-way through Indian lands for pipelines. *See* 25 U.S.C. §§ 1a and 321. As noted, Sacagawea has received consent for the easement from the Tribal Business Council, and anticipates an easement from the BIA upon finalization of the Environmental Assessment and submission of all documentation. By designating a corridor and route across these tribal lands, the Commission would not be infringing on the right of the tribe to make their own laws and be ruled by them, or in any way control the use or development of the tribal lands. As noted, the tribe here has not attempted to prevent Sacagawea from constructing the Project, but instead supports the Project with an easement forthcoming. Because the BIA's easement for the Project is anticipated, the tribe will be exercising its sovereign powers to decide whether the Project can cross the tribal lands through this approval.

This Project, and the situation in *Baker*, differs from that found in a recent matter wherein the Commission declined to exercise regulatory authority over electric service on tribal trust land within the Turtle Mountain Indian Reservation. In *North Central Electric Cooperative, Inc. v. North Dakota Public Service Commission*, the Commission declined to exercise jurisdiction over a decision of the tribe regarding electrical service, a decision which the North Dakota Supreme Court upheld. *See N. Cent. Elec. Coop., Inc. v. N.D. Pub. Serv. Comm'n*, 2013 ND 158, 837 N.W.2d 138. The situation here differs from *North Central Electric* because no tribal decision is specifically at issue with respect to the Project, and any decision by the Commission would not limit the rights of the tribe to govern its affairs. Further, the Commission would not specifically be imposing any laws or restrictions upon the tribe by designating a corridor and route. Given that Sacagawea is also anticipating the appropriate authorization from the tribe to cross the tribal lands, any allowance by the Commission to cross the tribal lands, through the designated corridor and route, will in no way impede the self-governance of the tribe.

As the Commission is well aware, a wide range of stakeholders can be involved in the pipeline permitting process, from federal, state, and local agencies with varying missions and

responsibilities, to public interest groups, tribes, and private citizens. Here, as noted during the public hearing, Sacagawea consulted with many different agencies and groups in determining a corridor and route for the Project. Approval from landowners must be gained to allow for crossing of the lands by the route. Approval from the tribe for the Project to cross tribal lands must similarly be given. This approval from the tribe can be viewed as an additional piece of the siting process instead of a means by which to strip the Commission of its right to grant a route and corridor on tribal land.

A different situation would exist if the tribe objected to the Project crossing the tribal lands. However, tribal approval is forthcoming, and the Commission designating a corridor and route on the tribal lands will in no way impede the tribe's right to self-governance under the circumstances. While there is arguably no specific restriction here that would prevent the Commission from exercising jurisdiction over the tribal lands in this matter, Sacagawea is mindful that the Commission may be anticipating possible concerns that could arise for the Project and future siting matters.

If the Commission determines that tribal authorization through the issuance of an easement is sufficient for construction of the Project, and the Commission chooses not to issue a Certificate of Corridor Compatibility and Route Permit for the portion of the Project crossing tribal lands located within the boundaries of the reservation, Sacagawea would request that the Commission fashion the order and the corresponding permit and certificate in a "checkboard"[3] fashion. Essentially, the Certificate of Corridor Compatibility and Route Permit would pertain to the entire Project, minus the 3 ½ miles located on tribal lands, as depicted in Exhibit 3 presented at the public hearing. While Sacagawea would prefer for the Certificate of Corridor Compatibility and Route Permit to encompass the entire 70-mile Project, in the event the Commission declines to exercise jurisdiction, Sacagawea would request that the Certificate of Corridor Compatibility and Route Permit simply omit the 3 ½ miles of the Project located on tribal lands, with the tribal easements being sufficient to cross those lands and regulate future development.

IV. CONCLUSION.

Sacagawea is in the process of obtaining the necessary authorization from the tribe required for the Project to cross the tribal lands at issue here. This permission is no different than the authorization received for the other portions of the Project that require easements from various landowners. It would seem that the Commission could issue a Certificate of Corridor

[3] The term "checkerboard" refers to the subdivision of land that occurred on many reservations after various allotment acts were implemented in the late 1800s. The result of the differing types of reservation lands is a checkerboard pattern of Indian and non-Indian ownership of reservation lands. See FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 16.03, at 1039-57 (2005 ed.).

Compatibility and Route Permit for the entire Project, as discussed above, based on the anticipated tribal authorization to cross the tribal land.

Further, no comparable process or authorization exists through the tribe to receive a Certificate of Corridor Compatibility and Route Permit or similar approval for the Project. The only authorization from the tribe will be the consultation and approval issued to cross the tribal lands. If the Commission determines that the easement from the tribe alone is enough, and the Commission does not wish to issue a Certificate of Corridor Compatibility and Route Permit for the tribal lands located within the boundary of the reservation, Sacagawea would request that the Commission simply omit the 3 ½ miles of the Project located on tribal lands and issue an order and Certificate of Corridor Compatibility and Route Permit for the remainder of the Project.