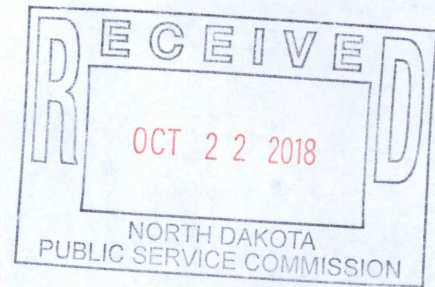




October 8, 2018

Mr. Patrick Fahn
Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480



RE: Jurisdictional Review
WPX Energy Williston, LLC – Twin Buttes Pipeline Project

Mr. Fahn,

WPX Energy Williston, LLC (WPX) is seeking a Public Service Commission (PSC) jurisdictional review of a proposed pipeline system comprised of three individual pipelines that would transport produced water, well-head gas, and crude oil. The approximate 20 mile pipeline system would cross both private lands and allotted trust lands (i.e., lands held in trust by the United States for the benefit of the Tribe or individual Indians) within the exterior boundary of Fort Berthold Indian Reservation (FBIR), and private lands located outside the FBIR boundary in Dunn County, North Dakota.

Produced water would be gathered by a pipeline collection system and delivered to a central collection point within the system. The transportation of produced water from well site(s) and or central collection point(s) to disposal facilities would utilize various means including pipeline and/or tanker truck.

Well-head gas would be gathered along a collection system (typically low pressure) and delivered to a common hub. Downstream of the hub, WPX would utilize a single trunk line (typically high pressure) aided by the addition of compression. The trunk line would deliver the well-head gas to a third-party receipt point for further transport or processing. The hub may be located either on or off the FBIR.

Crude oil would be gathered along a collection system (typically low pressure) and delivered to one or more Central Delivery Points (CDP) where it would be staged for downstream transportation. A CDP is typically comprised of aboveground storage tanks of various volumes. Downstream transport from a CDP may utilize a combination of surface transport (e.g.; tanker truck or rail) or pipeline. Typically, delivery from a CDP via pipeline requires the addition of a pump to achieve the pressure within the pipeline to assure flow. The CDP(s) may be located either on or off the FBIR.

1 **PU-18-369** Filed: 10/22/2018 Pages: 5
Request for jurisdictional determination

E3 Environmental, LLC
William McCarthy, CWB

Background

The North Dakota Century Code (N.D.C.C.) defines state authority over various activities that occur within North Dakota. Chapter 49-22.1, N.D.C.C., Energy Conversion and Transmission Facilities, defines the regulated activities and facilities associated with energy conversion and transmission while also empowering the PSC to administer said regulations. In relation to gas or liquid transmission facilities, the purview of the PSC is limited to those pipelines that are greater than four and one-half inches in diameter, or greater than 1 mile in length. Specifically, with respect to crude oil transport, the first pipeline downstream from a storage site where pressure is increased for further transport; or specific to gas the first pipeline downstream from gas processing facility (N.D.C.C. 49-22.1-01(7)). Chapter 49-22.1, N.D.C.C. does not address produced water.

A federal Indian reservation, such as FBIR, is an area of land reserved for tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, and where the federal government holds title to the land in trust on behalf of the tribe. Federal Indian reservations are generally exempt from state jurisdiction, except when Congress specifically authorizes such jurisdiction (<https://www.bia.gov/frequently-asked-questions>). No laws or rules of any State or political subdivision are applicable to the use and development of any real or personal property held in trust, or restricted from alienation, by the United States, unless the Secretary of the Interior, or his authorized agent, has adopted, or made applicable, those laws and rules. 25 C.F.R. §1.4.

The Great Plains Region (GPR) of the U.S. Department of Interior Bureau of Indian Affairs (BIA) responsibilities include the preservation of tribal sovereignty and protection of trust assets, specifically as they relate to the 16 federally recognized Tribes that occur within geographical purview of the GPR. The GPR administers the FBIR and serves the Mandan, Hidatsa, and Arikara Nation, also known as the Three Affiliated Tribes (TAT).

The FBIR is located in the counties of Dunn, Mercer, McLean, Ward, Mountrail and McKenzie, North Dakota and is bisected by the Missouri River. The reservation occupies approximately 980,000 acres of which the BIA, via its trust responsibilities, manages 343,000 acres of allotted parcels and 80,000 Tribal acres (<https://www.bia.gov/regional-offices/great-plains/north-dakota/fort-berthold-agency>).

The BIA administers requests for easements on allotted or tribal lands. The process is rigorous and has been codified (25 C.F.R. §169 Grant of Easement for Right-of-Way) and specifically addresses right-of-way (ROW) requests for oil and gas pipelines (25 CFR § 169.25.) The BIA's fiduciary responsibility on behalf of the Indian landowners is to protect and conserve the resources on trust and restricted land, including ensuring the highest and best use of resources whenever possible. The BIA may grant ROW under 25 U.S.C §§ 323-328 or pursuant to the Indian Land Consolidation Act (ILCA), (November 7, 2000, 25 U.S.C. § 2218 Sec. 219).

PSC Case Study

A review of PSC public records found Sacagawea Pipeline Company, LLC – 16-inch Crude Oil Pipeline – McKenzie and Mountrail Counties, North Dakota (PU-15-114) in which the applicant was granted a Certificate of Corridor Compatibility (No. 177) and Route Permit (No. 189) for a transmission pipeline that crossed private land and allotted lands held in trust with the BIA.

The Findings of Fact states:

5. *The Project crosses both fee and tribal lands located within the boundary of the Fort Berthold Indian Reservation (Reservation).*
6. *...TAT has consented to an easement for that portion of the Project which crosses tribal land within the Reservation. TAT did not testify at the formal hearing in this case, nor have they claimed any comparable tribal process or jurisdiction for siting or similar approval of the Project.*

The Conclusion of Law states:

1. *The Commission has jurisdiction over Sacagawea and the subject matter of these applications under North Dakota Century Code chapter 49-22.*

The Order states:

2. *Certificate of Corridor Compatibility No. 177 is issued to Sacagawea, designating a corridor for the construction, operation, and maintenance of approximately 70 miles of 16-inch diameter crude oil pipeline and associated facilities in McKenzie and Mountrail Counties, North Dakota. The Corridor shall consist of a 200-foot-wide area centered on the route.*
3. *Route Permit No. 189 is issued to Sacagawea, designating a route for the for the construction, operation, and maintenance of approximately 70 miles of 16-inch diameter crude oil pipeline and associated facilities in McKenzie and Mountrail Counties, North Dakota. The designated route for this purpose is depicted in Appendix B, "Project Maps", of Hearing Exhibit 2.*

Discussion

A jurisdictional determination is requested for the proposed project, specifically as it applies to each of the three (3) commodities (i.e.; produced water, well-head gas, and crude oil) as described herein. Further, a jurisdictional determination is requested for state authority within the exterior boundaries of FBIR and on allotted land parcel(s) held in trust by the BIA located outside the exterior boundaries of FBIR.

In PSC case PU-15-144, the PSC appears to exert jurisdictional authority for the Siting of a transmission pipeline, without limitation, on a 70-mile crude oil pipeline that crossed both fee and tribal lands located within the FBIR.

In PSC case PU-15-144, the PSC found that the TAT did not testify in PSC public hearings and further found that the TAT had no comparable Tribal process for siting or similar approval for the Project.

With respect to Tribal participation in the state's siting process, all federally recognized tribes, of which TAT is included, are recognized as sovereign entities. Environmental rules acknowledge the sovereign status and as such regulatory oversight on Indian Lands falls under the purview of the federal government. While not speaking for the TAT with respect to this instance, but rather offering a general observation in broader context, it has been our observation that it is not uncommon behavior for individual tribal members or their representatives to choose not to participate in state regulations and ancillary proceedings or hearings.

With respect to the PSC finding that the TAT had no similar siting or approval process for the Project. We suggest that the process required to gain an easement for pipeline ROW, as administered by the BIA on behalf of the Indian landowners, on lands held in trust and restricted land, is similar in many ways to the siting process administered by the PSC. Additionally it is our opinion that this process, in many ways, exceeds the requirements stipulated by the state authority (Rights-of-Way for Oil and Gas Pipelines 25 CFR 169.25).

To summarize, we reference BIA guidance that describes the relationships in question here, specifically the sovereign status of federally recognized tribes (<https://www.bia.gov/frequently-asked-questions>).

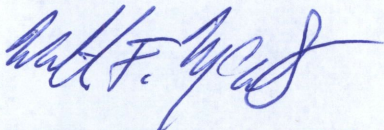
The relationship between federally recognized tribes and the United States is one between sovereigns, i.e., between a government and a government.

Because the Constitution vested the Legislative Branch with plenary power over Indian Affairs, states have no authority over tribal governments unless expressly authorized by Congress. While federally recognized tribes generally are not subordinate to states, they can have a government-to-government relationship with these other sovereigns, as well.

Furthermore, federally recognized tribes possess both the right and the authority to regulate activities on their lands independently from state government control. They can enact and enforce stricter or more lenient laws and regulations than those of the surrounding or neighboring state(s) wherein they are located. Yet, tribes frequently collaborate and cooperate with states through compacts or other agreements on matters of mutual concern such as environmental protection and law enforcement.

In closing, we greatly appreciate the PSC's review of this request and welcome the opportunity to engage the Commission in further discussion for the benefit of reaching a final determination regarding state jurisdictional authority when siting transmission line(s) that would cross various types of landownership both within and outside of the exterior boundary of an Indian Reservation.

Respectfully,



William F. McCarthy, CWB
E3 Environmental, LLC

cc:
Mike Cook, WPX Energy
Megan Lindquist, WPX Energy