

June 1, 2012

VIA MESSENGER AND E-MAIL

Honorable Thomas Tidwell
Chief
U.S. Forest Service
1400 Independence Avenue, SW
Washington, D.C. 20250

Re: Complaint of High Prairie Pipeline, LLC Requesting Forest Service Enforcement of the Common Carrier Provisions of the Mineral Leasing Act against Enbridge Energy, Limited Partnership

Dear Chief Tidwell:

High Prairie Pipeline, LLC (“High Prairie”) hereby submits this complaint letter against Enbridge Energy, Limited Partnership (“Enbridge Energy”) for violations of Section 28(r)(1) and (2)(A) of the Mineral Leasing Act (“MLA”).¹ Enbridge Energy is the holder of a special use permit for an oil pipeline right-of-way crossing federal lands in Chippewa National Forest issued by the U.S. Forest Service under the terms of Section 28 of the MLA.² Section 28 (r)(1) requires that Enbridge Energy operate its pipeline as a common carrier.³ Section 28(r)(2)(A) requires that Enbridge Energy operate its pipeline on a nondiscriminatory basis.⁴ Enbridge has refused to allow High Prairie to interconnect with its pipeline on reasonable terms at Clearbrook, Minnesota, and thus has denied shippers access to Enbridge Energy’s common carrier pipeline. Enbridge Energy has allowed its affiliate to interconnect at Clearbrook, and yet has refused that same access to High Prairie and its shippers in violation of the anti-discrimination requirement of Section 28(r)(2)(A) of the MLA. High Prairie, therefore, seeks immediate Forest Service

¹ 30 U.S.C. § 185(r)(1) and § 185(r)(2)(A).

² See Exhibit A.

³ 30 U.S.C. § 185(r)(1).

⁴ 30 U.S.C. § 185(r)(2)(A).

enforcement of the common carrier provisions of the MLA as set forth in Forest Service regulations.⁵ Moreover, without the interconnect at Clearbrook, oil produced from the Mandan, Hidatsa and Arikara Nation (“MHA Nation”) will not be transported economically to market nor will it be able to economically access the most favorable markets, resulting in a significant decrease in value received by the MHA Nation and its members. This raises the federal government’s Indian trust obligation to act in the interests of the MHA Nation by enforcing applicable law.

High Prairie is submitting this complaint to the Forest Service because it believes that the Forest Service has jurisdiction over this matter under Section 28(c) of the MLA:

(c) Inter-agency coordination

(1) Where the surface of all of the Federal lands involved in a proposed right-of-way or permit is under the jurisdiction of one Federal agency, the agency head, rather than the Secretary [of the Interior], is authorized to grant or renew the right-of-way or permit for the purposes set forth in this section.

(2) Where the surface of the Federal lands involved is administered by the Secretary [of the Interior] or by two or more Federal agencies, the Secretary is authorized, after consultation with the agencies involved, to grant or renew rights-of-way or permits through the Federal lands involved. . . . *Each agency head shall administer and enforce the provisions of this section, appropriate regulations, and the terms and conditions of rights-of-way or permits insofar as they involve Federal lands under the agency head’s jurisdiction.*

⁵ 36 C.F.R. § 251.60(g).

30 U.S.C. 185(c)(emphasis added). On information and belief, High Prairie has determined that the Enbridge Energy pipeline at issue here crosses the land of only one federal agency, that of the U.S. Forest Service within the Chippewa National Forest. This provides the Forest Service with the jurisdiction to take the action High Prairie seeks in this complaint. Should an additional federal agency be identified, we request that this complaint be forwarded to the Director, Bureau of Land Management, U.S. Department of the Interior for identical action.

As discussed more fully herein, Enbridge Energy has violated and continues to violate the common carrier provisions of the MLA by unduly discriminating against High Prairie and its shippers, including shippers transporting oil from the MHA Nation, by denying them capacity on Enbridge Energy's common carrier pipeline system extending from Clearbrook, Minnesota. Enbridge Energy has allowed one of its affiliates to interconnect at Clearbrook and has stated its intention to grant an interconnection for a new pipeline it is proposing in North Dakota. Enbridge Energy also has confirmed that it has enough currently unutilized capacity on its pipelines moving downstream from Clearbrook to accept crude oil from High Prairie at Clearbrook. Enbridge Energy, however, has refused to grant High Prairie an interconnection because, according to Enbridge Energy, it is reserving such capacity for its affiliates' shipments of foreign produced oil from the Canadian tar sands. Enbridge Energy's refusal to date has been unjust, unreasonable, and unduly discriminatory. Enbridge Energy has provided no objective rationale for this unduly discriminatory denial of access. Nor has Enbridge Energy pointed to any statutory provision, regulation, or tariff provision under the rules of the Federal Energy

Regulatory Commission (“FERC” or “Commission”) that allows it to unduly discriminate against High Prairie and its shippers in denying such access.⁶

I. Background

High Prairie is a wholly-owned subsidiary of Saddle Butte Pipeline, LLC (“Saddle Butte”), a developer of gathering, processing and transportation infrastructure for crude oil and natural gas producers throughout the Mid-Continent and Rocky Mountain regions. High Prairie intends to construct a 450-mile pipeline system capable of transporting 150,000 barrels of crude oil per day from the Bakken in North Dakota to Clearbrook, Minnesota, including the development of significant operational storage facilities at or near Clearbrook. The High Prairie pipeline project (“HP Pipeline”) would provide access for production-rich areas in McKenzie, Dunn, Mountrail, and other counties in North Dakota, including the MHA Nation reservation, to transport crude oil supply in an otherwise capacity-constrained area to the market hub at Clearbrook. The HP Pipeline is designed to deliver crude oil to Enbridge Energy’s origin point at Clearbrook, Minnesota.⁷

High Prairie held a binding open season to solicit capacity commitments from shippers on the HP Pipeline from February 14 through April 5, 2012. The open season resulted in commitments from prospective shippers for a significant portion of High Prairie’s proposed capacity. A number of those commitments are contingent on High Prairie establishing an interconnection with Enbridge Energy at Clearbrook.⁸

⁶ High Prairie has also filed a complaint under Section 3(1) of the ICA with the Commission in this matter. *High Prairie Pipeline, LLC v. Enbridge Energy, Limited Partnership*, Docket No. OR12-17-000, complaint filed May 17, 2012. This does not affect the Forest Service’s authority or obligation to enforce the requirements of Section 28 of the MLA in this proceeding.

⁷ Rozga Affidavit at ¶3.

⁸ Rozga Affidavit at ¶4.

Prior to holding its open season, High Prairie commenced discussions with Enbridge Energy regarding the interconnect HP Pipeline will need at Enbridge Energy's Clearbrook origin point.⁹ At that time, High Prairie was told there was no problem with granting it the needed interconnect.¹⁰ In discussions subsequent to the launch of the open season, Enbridge Energy requested that High Prairie complete and submit a New Service Request form in connection with its interconnection request. High Prairie completed the requested form and submitted it to Enbridge Energy on March 9. Since then, High Prairie has had multiple discussions with Enbridge Energy regarding the proposed interconnection, and in those discussions Enbridge Energy expressly told High Prairie it would not be allowed to interconnect at Clearbrook.¹¹ During those discussions, High Prairie has made clear that it is willing to pay for the cost of all facilities needed for the interconnection, including but not limited to any tankage at Clearbrook to facilitate receipts and batching, notwithstanding the fact that Enbridge Energy's tariff rates for transportation from Clearbrook expressly include the costs of receipt point tankage and terminalling.¹² High Prairie has also expressed its willingness to agree to any just, reasonable, and not unduly discriminatory conditions required by Enbridge Energy.¹³

Nevertheless, Enbridge Energy has not granted High Prairie's interconnection request to date. The only justification Enbridge Energy has offered relates to Enbridge Energy's desire to preserve its own competitive position and that of its affiliated upstream pipelines. Specifically, Enbridge Energy has expressed that although Enbridge Energy has already allowed its affiliate to interconnect at Clearbrook, and although capacity exists today to accept up to 150,000 barrels of

⁹ Lytle Affidavit at ¶3.

¹⁰ The FERC regulations require an oil pipeline to include an interconnect policy in its tariff. 18 C.F.R. §341.8.

¹¹ Lytle Affidavit at ¶4.

¹² Lytle Affidavit at ¶5.

¹³ Lytle Affidavit at ¶6.

crude oil per day from the requested High Prairie interconnect,¹⁴ Enbridge Energy is reserving that capacity for its upstream affiliates because it expects that by 2016 or 2017 such capacity may become constrained due to increased volumes entering Enbridge Energy's or its affiliates' pipelines upstream of Clearbrook, largely originating from the Canadian tar sands region.¹⁵

In what appears to be an effort to address this blatant discrimination, Enbridge Energy has indicated that it may be willing to grant an interconnection subject to certain unreasonable and unlawful conditions. First, Enbridge Energy would require High Prairie to pay an excessive amount for the facilities necessary to interconnect at Clearbrook, even though Enbridge Energy's tariff rates for transportation from Clearbrook expressly include the costs of receipt point tankage and terminalling.¹⁶ High Prairie is willing to pay the reasonable costs of such facilities. However, Enbridge Energy has stated that the cost of such facilities would be approximately \$100 million, an amount that is both unsubstantiated and clearly unreasonable.

Second, Enbridge Energy would require that the interconnect be conditioned on Enbridge Energy building new downstream expansion facilities between Clearbrook and Superior, Wisconsin (*i.e.*, an approximately 200-mile loop line of existing pipelines) at an estimated cost of \$1 billion. As a condition to High Prairie's interconnection, Enbridge Energy would require the High Prairie shippers to pay a discriminatory surcharge in order to recover the \$1 billion in capital costs.¹⁷ As High Prairie understands it, Enbridge Energy intends to exempt its existing shippers from this surcharge.

¹⁴ The 150,000 barrels per day is HP Pipeline's design capacity and therefore represents the maximum amount that HP Pipeline could physically deliver to Enbridge Energy at Clearbrook on any given day.

¹⁵ Lytle Affidavit at ¶8. In fact, Enbridge Energy reiterated to High Prairie that it is a common carrier with no contracts for capacity, and thus the projected capacity constraint is dependent upon a significant increase in month-to-month shipper nominations.

¹⁶ Lytle Affidavit at ¶9a.

¹⁷ Lytle Affidavit at ¶9b.

Third, Enbridge Energy would require that the interconnection be conditioned upon Enbridge Energy receiving the consent of certain of its existing shippers to Enbridge Energy undertaking the \$1 billion expansion project.¹⁸

Fourth, Enbridge Energy would require that the interconnect be conditioned on Enbridge Energy obtaining a declaratory order from FERC approving, as High Prairie understands it, a methodology for allocating its capacity and/or recovering the costs of the expansion project.¹⁹

Last, even though Enbridge Energy acknowledged it is a common carrier and cannot accept firm contracts for capacity on its pipelines, Enbridge Energy would require that the interconnect be conditioned on High Prairie agreeing to “backstop” the \$1 billion expansion project by agreeing to pay Enbridge Energy for any revenue shortfalls that result in the event that High Prairie’s deliveries of oil to Enbridge Energy at Clearbrook do not meet certain specified levels.²⁰

Again, Enbridge Energy has stated that its pipeline facilities extending downstream from Clearbrook are not capacity constrained, though it thinks they may become capacity constrained in 2016 or 2017.²¹ In addition, Enbridge Energy has informed High Prairie that it has no contracts with shippers for any portion of the capacity on its pipeline facilities extending downstream from Clearbrook, and the tariff for its mainline does not allow for contractual arrangements providing preferential rights to capacity. Thus, all of Enbridge Energy shippers’ capacity rights are determined month-to-month.

¹⁸ Lytle Affidavit at ¶9c.

¹⁹ Lytle Affidavit at ¶9d.

²⁰ Lytle Affidavit at ¶9e.

²¹ Enbridge Energy specifically stated that they have not issued a pro-rationing order for this segment of pipeline based on the capacity of this segment.

Enbridge Energy owns and operates its mainline which provides service from north to south from the Canadian border upstream of Clearbrook and continues downstream of Clearbrook. Enbridge Energy has allowed only one other pipeline to establish a delivery interconnect into Clearbrook – its affiliate, Enbridge Pipelines (North Dakota) LLC (“Enbridge ND”). In addition, Enbridge Energy recently announced plans for a new Enbridge Sandpiper Pipeline (“Enbridge Sandpiper Pipeline”). Enbridge Energy has stated that this new affiliated pipeline will interconnect with Enbridge Energy at Clearbrook.²² Enbridge ND also recently applied for and received a declaratory order from the Commission for what it calls a “virtual expansion” of the Enbridge ND system that will allow it to deliver substantially more barrels of crude oil to Enbridge Energy’s Clearbrook origin point. Thus, Enbridge Energy clearly has no problems with accepting increased barrels of crude oil at Clearbrook, provided that those barrels come in from Enbridge-owned pipeline facilities.

II. Grounds for Complaint

A. Enbridge Energy Has Violated, and Is Continuing to Violate, Sections 28(r)(1) and 28(r)(2)(A) of the MLA By Granting Undue Preferences to Its Shippers and to Its Affiliated Pipelines and Their Shippers, and By Unduly Discriminating Against High Prairie and Its Shippers, including the MHA Nation

The Enbridge Energy pipeline is authorized to cross National Forest lands through a special use permit issued by the Forest Service²³ under section 28 of the MLA and the following Forest Service regulation:

[T]he Chief of the Forest Service, or other Agency official to whom such authority is delegated, may issue special use authorizations for National Forest

²² See <http://www.api-houston.org/presentations/claude-houston-api-20120410.pdf> at p. 18; http://www.kfyrtv.com/News_Stories.asp?news=56293. Under Enbridge Energy’s currently effective FERC tariffs, Enbridge Energy has an origin point at Clearbrook.

²³ Exhibit A.

System land under the authorities cited and for the types of use specified in this section as follows:

(e) Easements for rights-of-way for pipeline purposes for the transportation of oil and gas and products thereof where no Federal land other than National Forest System land is required, and permits for the temporary use of additional National Forest System land necessary for construction, operation, maintenance or termination of a pipeline or to protect the natural environment or the public safety under section 28 of the Mineral Leasing Act of 1920, 41 Stat. 449, as amended, (30 U.S.C. 185).²⁴

Accordingly, the special use permit for the Enbridge Energy pipeline is subject to Sections 28 (r)(1) and (r)(2)(A) of the MLA. These provisions are subject to enforcement by the Chief of the Forest Service.²⁵

Section 28(r)(1) makes it unlawful for any holder of an oil pipeline right-of-way crossing federal lands to operate other than as a common carrier: "Pipelines and related facilities authorized under this section shall be constructed, operated, and maintained as common carriers." Section 28(r)(2)(A) prohibits the holder from unduly discriminating against or in favor of shippers or any other entity in any respect whatsoever: "The owners or operators of pipelines subject to this section shall accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline without regard to whether such oil or gas was produced on Federal or non-Federal lands."

By refusing to grant High Prairie an interconnection on reasonable and not unduly discriminatory terms, Enbridge Energy is discriminating against High Prairie and its shippers, including the MHA Nation. By doing so, Enbridge Energy is also granting an undue preference

²⁴ 30 CFR § 251.53

²⁵ 30 U.S.C. § 185(r)(5). See S. Rep. 93-207 (June 23, 1973) at 33 ("Each agency head will . . . enforce the provisions of this Act . . . as they involve Federal lands under that agency's jurisdiction.")

to its shippers, its affiliated pipeline(s), and its affiliated pipelines' shippers.²⁶ The HP Pipeline is similarly situated to the crude oil pipelines that are interconnected with Enbridge Energy at Clearbrook, namely Enbridge Energy's affiliate, Enbridge ND. Shippers on HP Pipeline are similarly situated to shippers on pipelines owned and operated by Enbridge Energy and its affiliates. Enbridge Energy has failed to provide High Prairie a just, reasonable, and not unduly discriminatory justification for denying High Prairie's interconnection request and thereby denying High Prairie's shippers access to Enbridge Energy's common carrier system extending downstream from Clearbrook. By contrast, Enbridge Energy has, not surprisingly, stated that it will allow its proposed Enbridge Sandpiper Pipeline to interconnect at Clearbrook.

The FERC has recognized that "[t]he lack of an objective reason for preventing particular types of shippers from having an equitable opportunity to obtain transportation on [a common carrier's] pipeline system could violate the [Interstate Commerce Act's]²⁷ . . . section 3(1) prohibition against any undue or unreasonable preference or advantage."²⁸ There is no legally recognizable difference between the interconnection requested by High Prairie and the interconnection Enbridge Energy has granted to its affiliated upstream pipeline, Enbridge ND. High Prairie is requesting an interconnection at Clearbrook, the same origin point at which Enbridge Energy has connected Enbridge ND. In addition, High Prairie has offered to pay for

²⁶ Because Clearbrook is an origin point, Enbridge Energy also is effectively granting an undue preference to its own upstream lines in that those lines are being given preferential rights to deliver crude into Enbridge Energy's facilities extending downstream from Clearbrook. Stated another way, it is receiving and transporting barrels of crude oil in a manner that is unduly preferential to upstream lines owned by Enbridge Energy and its affiliates. In this case, that includes a preference for shipping foreign-produced oil from the Canadian tar sands, while denying access to domestically-produced oil from the Bakken region, including from the MHA Nation.

²⁷ The common carrier provisions of the Interstate Commerce Act (ICA) are relevant to the legal requirements applicable to common carriers under the MLA. See S. Rep. 93-207 at 33-34 (citing the ICA as an example of a statute that would apply to common carriers under Section 28). Nonetheless, the Commission's authority under the ICA does not affect the Forest Service's authority or obligation to enforce independently the requirements of Section 28 of the MLA. See fn. 25, *infra*.

²⁸ *Suncor Energy Marketing Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242, at P 117 (2010).

the cost of all facilities needed for the interconnection, including but not limited to any tankage at Clearbrook to facilitate receipts and batching, notwithstanding the fact that Enbridge Energy's tariff rates for transportation from Clearbrook expressly include the costs of receipt point tankage and terminalling. High Prairie has also expressed its willingness to meet any just, reasonable, and not unduly discriminatory terms necessary for the interconnection.

There also is no legally recognizable difference between High Prairie's shippers and the shippers of Enbridge Energy and its affiliated upstream pipeline. In addition, the crude oil carried on Enbridge Energy's upstream lines is understood to be primarily heavy sour production from the Canadian tar sands. The crude oil carried on Enbridge Energy's affiliate, Enbridge ND, and delivered into Clearbrook is understood to be a combination of heavy sour Canadian crude oil and light sweet crude from North Dakota. The crude oil carried on High Prairie's system will be domestically produced light sweet crude oil, much of it from federal lands held in trust by the U.S. Department of the Interior on behalf of a federally-recognized Indian nation, the MHA Nation, and its individual members.

Rather than provide a lawful justification for denying the interconnection, Enbridge Energy has admitted that it does not want the interconnection because it wishes to provide preferential access to shippers utilizing the upstream pipelines owned and operated by Enbridge Energy and its affiliates. Granting the interconnection would allow volumes to flow into Enbridge Energy's system from High Prairie at Clearbrook. Enbridge Energy has stated that at some point in the future it expects to be capacity constrained on the segment downstream of Clearbrook. At that time, volumes from all origins would need to be prorated on a not unduly discriminatory basis. Thus, the upstream pipelines owned by Enbridge Energy and its affiliates might lose throughput as a result of allowing High Prairie volumes to come on at Clearbrook. In

an attempt to provide undue preference to its upstream pipelines, its affiliates' pipelines, and each of their shippers, Enbridge Energy has refused to allow High Prairie to interconnect.

B. Enbridge Energy's Unreasonable Demands Violate the MLA

In recent discussions, Enbridge Energy has expressed a potential willingness to grant the interconnection if High Prairie agrees to certain unlawful and unreasonable demands. This is nothing more than Enbridge Energy's transparent attempt to deny the interconnection by deferring and delaying the interconnect request indefinitely.

First, Enbridge Energy would require High Prairie to pay for the facilities necessary to interconnect at Clearbrook, even though Enbridge Energy's tariff rates for transportation from Clearbrook expressly include the costs of receipt point tankage and terminalling.²⁹ High Prairie has expressed its willingness to pay for the reasonable costs of interconnection, but Enbridge Energy has stated that the cost will be approximately \$100 million, an amount that is clearly unreasonable.

Second, Enbridge Energy would require that the interconnect be conditioned on Enbridge Energy building new downstream expansion facilities between Clearbrook and Superior (*i.e.*, an approximately 200-mile loop line of existing pipelines) at an estimated cost of \$1 billion, and that High Prairie's be subjected to an unduly discriminatory surcharge to recover the \$1 billion cost. Enbridge Energy's existing shippers would be exempt from this surcharge.

Third, Enbridge Energy would require that the interconnection be conditioned upon Enbridge Energy receiving the consent of certain of its existing shippers to Enbridge Energy undertaking the \$1 billion expansion project. In other words, Enbridge Energy wants to give its

²⁹ See S. 93-207, at 33 ("Operators of common carriers are also required to furnish without discrimination loading and offtake facilities. . .").

existing shippers the privilege of determining whether or not High Prairie is granted an interconnection. If the existing shippers wish to preserve their current preferential or exclusive access to Enbridge Energy's facilities extending downstream of Clearbrook, they could simply decline to consent to the expansion.

Fourth, Enbridge Energy would require that the interconnection be conditioned on Enbridge Energy first obtaining a declaratory order from FERC approving, as High Prairie understands it, a methodology for allocating its capacity and/or recovering the costs of the expansion project.

Last, Enbridge Energy would require that the interconnect be conditioned on High Prairie agreeing to "backstop" the \$1 billion expansion project by agreeing to pay Enbridge Energy for any revenue shortfalls that result in the event that High Prairie's deliveries of crude oil to Enbridge Energy at Clearbrook do not meet certain specified levels.

These conditions are unjust, unreasonable, and unduly discriminatory terms and conditions and are stated nowhere in Enbridge Energy's tariff submitted to FERC. Such requirements would unlawfully discriminate against High Prairie and grant an undue preference to Enbridge Energy's existing shippers (*i.e.*, those coming to Clearbrook from Enbridge Energy and its affiliated upstream pipelines). Under both Sections 28(r)(1) and (r)(2)(A) of the MLA, High Prairie and its shippers are legally entitled to access Enbridge Energy's common carrier system on the same terms accorded to the Enbridge pipelines and their shippers.

Enbridge Energy's actions clearly violate its common carrier obligations under both Sections 28(r)(1) and (r)(2)(A) of the MLA to not unduly discriminate against or in favor of any shipper or entity whatsoever. Enbridge Energy is unabashedly granting preferential access to certain upstream pipelines and shippers while denying access to others.

Enbridge Energy is a common carrier pipeline and is required to grant access to its existing facilities on terms that are just, reasonable, not unduly discriminatory and stated in its tariff. It is unjust and unreasonable to condition access to the pipeline's existing system on completion of an expansion project. Such a condition unduly discriminates against new shippers, and grants existing shippers preferential access to the existing system that is unjust, unreasonable, and unduly preferential. This is particularly true in this case where the carrier has acknowledged it has unused capacity today, and will continue to have excess capacity for the next few years, but is preserving such capacity for volumes moving over its own or its affiliates' upstream lines. Enbridge Energy is clearly discriminating against High Prairie and granting preferential access to volumes moving over its and its affiliates' upstream pipelines and their shippers.

It also is unjust and unreasonable to condition the interconnection on High Prairie agreeing to backstop an expansion of Enbridge Energy's downstream system. High Prairie is not requesting that Enbridge Energy expand its downstream system and Enbridge Energy has stated that at this time it has capacity available to accommodate the HP Pipeline volumes. Moreover, Enbridge Energy is under no obligation to expand the capacity of its system downstream of Clearbrook. To the extent it believes that granting High Prairie's interconnect as well as other interconnects at or upstream of Clearbrook will at some point in the future lead to prorationing on its existing facilities downstream of Clearbrook, Enbridge Energy can seek to obtain financial commitments from its shippers to support an expansion of its downstream facilities. But it cannot condition access to its existing system on shippers or their interconnecting pipeline providing Enbridge Energy with volume or revenue guarantees.

In submitting its request to Enbridge Energy for an interconnection at Clearbrook, High Prairie has made a reasonable request. The only justification Enbridge Energy has provided for declining the interconnection request is to protect the capacity rights (as well as revenues) of its shippers and its affiliated upstream pipelines' shippers, and thus, avoid having to share line space downstream of Clearbrook with High Prairie's shippers. The Commission has held that such competitive considerations are an invalid basis on which to discriminate in the awarding of capacity and has held that denying access on such a basis violates Section 1(4) of the ICA.³⁰ It correspondingly violates the MLA.³¹

C. Enbridge Energy's Violations of the MLA Cause Economic Damage to High Prairie and its Shippers

As described above, many of the commitments High Prairie received in response to its open season are conditioned on HP Pipeline establishing an interconnect with Enbridge Energy at Clearbrook. By refusing to grant the interconnect requested by High Prairie, Enbridge Energy is denying prospective shippers on the HP Pipeline access to its mainline and to the refineries it serves and the other pipelines with which it is interconnected downstream of Clearbrook. This denial of access significantly diminishes the ability for crude oil shipped on High Prairie to economically access the most favorable markets and maximize revenue returns to the producers and landowners, including oil produced from the MHA Nation.

If it is unable to offer the option of providing interconnecting service with Enbridge Energy, High Prairie will not be able to execute transportation service agreements with a number of shippers that made conditional commitments to the HP Pipeline. The loss of shippers that

³⁰ *Suncor Energy Marketing Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242 at P 22, 24, 97 (2010) (holding that claims about the impact on a pipeline's competitive position are irrelevant to how the pipeline must allocate its capacity and finding that basing the allocation on such claims violates Section 1(4) of the ICA).

³¹ See S. Rep. 93-207, at 33-34 (ICA applies to obligations under Section 28).

made conditional commitments to HP Pipeline will result in a significant devaluation of the project's economics and termination of the project. Termination of the project or a significant devaluation of the project's economics will have a substantial negative impact on the economic and commercial interests of High Prairie.

High Prairie has estimated the financial impact of Enbridge Energy's refusal to grant the interconnection to be approximately \$123.42 million.³² This estimate is based on a calculation of the net present value ("NPV") of the net revenues High Prairie would have received over the life of the transportation service agreements for HP Pipeline. The basis of this calculation is more fully described in the affidavit of Mr. Levi Rozga which is included herein.

In addition, Enbridge Energy's refusal to grant High Prairie's request for an interconnection also has a negative impact on prospective shippers, on producers, and on landowners, including the MHA Nation and its members' crude oil production in North Dakota. In the absence of an interconnection between the HP Pipeline and Enbridge Energy at Clearbrook, there likely will be insufficient pipeline capacity for all North Dakota crude oil production to leave North Dakota by pipeline. In that situation, High Prairie believes the barrels for which there is insufficient pipeline capacity will be transported, if they move at all, on a less economic alternative – rail. High Prairie believes the increased cost to the producer, including the MHA Nation, to move barrels by rail is in the range of eight to ten dollars per barrel.³³ The basis for this estimate is more fully described in the affidavit of Mr. Levi Rozga which is included herein.

³² Rozga Affidavit at ¶8.

³³ Rozga Affidavit at ¶10.

D. The Forest Service Meets its Trust Responsibilities to the MHA Nation by Taking Enforcement Action under the MLA

In enforcement matters, the Forest Service generally has discretion to decide how to respond to a complaint. Here, however, the economic interests of the MHA Nation would be affected by the choice the Forest Service makes whether or not to assert its enforcement authorities. In such a case, the federal government's trust responsibilities to Indian Tribes must be addressed.

The federal government has a longstanding fiduciary obligation to Indian Tribes. "[T]he law is 'well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity.'"³⁴ The government's fiduciary responsibilities do not arise from judge-made common law but depends on the substantive laws creating those obligations.³⁵

Federal officials retain a substantial amount of discretion to order their priorities. Nonetheless, in carrying out his duties, the Secretary has an "overriding duty ... to deal fairly with Indians."³⁶ This duty limits an agency's discretion. When faced with several policy choices, an agency is generally allowed to select any reasonable option. But this is not the case when acting as a fiduciary for Indian beneficiaries as "stricter standards apply to federal agencies when administering Indian programs."³⁷ Summarizing federal case law on fiduciary obligations owed to Indian tribes in *Jicarilla*, the Tenth Circuit concluded that where "the Secretary is obligated to act as a fiduciary ... his actions must not merely meet the minimal requirements of

³⁴ *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993) (quoting *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987)).

³⁵ *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C.Cir.1995); see also *National Wildlife Federation v. Andrus*, 642 F.2d 589, 611 (D.C.Cir.1980) (a trust responsibility can only arise from a statute, treaty, or executive order. (citation omitted)).

³⁶ *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

³⁷ *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir.1984)(*"Jicarilla"*).

administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary.”³⁸

In this case, the Forest Service would not be asserting a generalized duty, but would be asserting existing substantive law relating to the common carrier provisions of the MLA. Moreover, where the Forest Service has more than one choice as it does here, *i.e.*, to enforce or not to enforce, the Forest Service must choose the course that it finds would benefit the affected interests of the MHA Nation. In our view, that course is to take enforcement action to assure that Enbridge Energy operates as a common carrier in a nondiscriminatory manner, and thereby protect the MHA Nation’s economic interest in producing and shipping oil from its lands by application of existing law.

III. Relief Requested

A. The Forest Service Should Order Enbridge Energy to Cease Its Unduly Discriminatory and Preferential Actions or Subject its Right-of-Way to Termination

The Forest Service has full authority under the MLA to require Enbridge to cease unduly discriminatory or preferential practices that are inconsistent with its obligations as a common carrier. Section 28(r)(5) provides: “Whenever the Secretary has reason to believe that any owner or operator subject to this section is not operating any oil and gas pipeline in complete accord with its obligations as a common carrier hereunder . . . the Secretary may, by proceeding, as provided in this section, suspend or terminate the said grant of right-of-way for noncompliance

³⁸ *Id.* at 1563.

with the provisions of this section.”³⁹ Section 28(o) of the MLA provides the following procedures for terminating a right-of-way issued under section 28:

Suspension or termination of right-of-way

- (1) . . . [N]oncompliance with any provision of this section may be grounds for suspension or termination of the right-of-way if
- (A) after due notice to the holder of the right-of-way,
 - (B) a reasonable opportunity to comply with this section, and
 - (C) an appropriate administrative proceeding pursuant to section 554 of title 5, the Secretary or agency head determines that any such ground exists and that suspension or termination is justified. . . .⁴⁰

The Forest Service regulations provide the following additional procedures for terminating a special use permit for a pipeline right-of-way issued under the MLA:

The authorized officer may suspend or revoke easements issued pursuant to § 251.53 (e) and (l) of this subpart under the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings instituted by the Secretary under 7 CFR 1.130 through 1.151. No administrative proceeding shall be required if the easement, by its terms, provides that it terminates on the occurrence of a fixed or agreed-upon condition, event, or time.⁴¹

Accordingly, High Prairie respectfully requests that the Forest Service require Enbridge Energy to remedy its unlawful actions by granting High Prairie the requested interconnection on terms and conditions that are just, reasonable, and not unduly discriminatory, or face termination of its right-of-way for violating the common carrier and anti-discrimination provisions of Sections 28(r)(1) and (r)(2)(A) of the MLA.

³⁹ 30 U.S.C. § 185(r)(5) See S. Rep. 93-207, at 33 (“Each agency head will, of course, administer and enforce the provisions of this Act, appropriate regulations, and the terms and conditions of rights-of-way insofar as they involve Federal lands under that agency head’s jurisdiction.”)

⁴⁰ 30 U.S.C. §185(o).

⁴¹ 36 CFR § 251.60(g).

B. The Forest Service Should Issue an Order to Show Cause Why the Right-of-Way Should not be Terminated

In the alternative, the Forest Service should issue to Enbridge Energy an order to show cause why the Forest Service should not terminate its right-of-way for failure to comply with the common carrier and the anti-discrimination provisions of Sections 28(r)(1) and (r)(2)(A) of the MLA.

IV. Documents in Support of this Complaint

High Prairie has included all documents in its possession that support this Complaint as attachments to this filing. Included is an affidavit of Levi Rozga, the Vice President of Finance for Saddle Butte Pipeline, LLC, the parent company of High Prairie which sets forth the calculations of the financial impact on High Prairie of Enbridge's refusal to grant the interconnect as well as the negative impact such refusal is likely to have on the HP Pipeline prospective shippers and crude oil production in North Dakota. Also included is an affidavit of David Lytle, the Senior Vice President of Business Development for Saddle Butte, LLC, which sets forth certain details and information from High Prairie's negotiations with Enbridge Energy regarding High Prairie's interconnect request. Included as Exhibit A is the record of decision upon which the Forest Service issued the special use permit for the Enbridge oil pipeline.

V. Conclusion


WHEREFORE, for the foregoing reasons, High Prairie respectfully requests that the Forest Service: (1) require Enbridge Energy to remedy its unlawful actions by granting High Prairie the requested interconnection on terms and conditions that are just, reasonable, and not unduly discriminatory or face termination of its right-of-way for violating the common carrier provisions of the MLA; or (2) issue to Enbridge Energy an order to show cause why the Forest

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Service should not terminate its right-of-way for failure to comply with the common carrier provisions of 30 U.S.C. §185(r)(1) and the anti-discrimination provisions of 30 U.S.C. §185(r)(2)(A).

Respectfully submitted,

HIGH PRAIRIE PIPELINE, LLC


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