



MILLE LACS BAND OF OJIBWE

Executive Branch of Tribal Government

A WHITE PAPER

PIPELINES AND TRIBAL GOVERNMENTS: THE EXPERIENCE AND RECOMMENDATIONS OF THE MILLE LACS BAND OF OJIBWE INDIANS

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INTRODUCTION

For the past two years, the Mille Lacs Band of Ojibwe has been battling a proposed pipeline project that would transport Bakken oil through lands and waters immediately adjacent to our tribal lands. Working with other tribes, organizations and allies, we were able to apply enough pressure to significantly delay this project for the interim. The battle is not over, however.

As the Standing Rock Sioux Nation fights to stop the Dakota Access Pipeline, the Mille Lacs Band of Ojibwe can attest to the inherent flaws in the consultation process utilized by the Army Corps of Engineers and other federal agencies. Having just returned from Standing Rock, I am appreciative of the President's just and necessary intervention, and the commitment by the three agencies to truly consult with tribes and seriously reform the process. And the process needs serious reforms. This white paper offers the perspective of the Mille Lacs Band of Ojibwe with regard to how this process can be improved. We look forward to participating in consultation sessions this fall to assist with reforming this process.

SANDPIPER BACKGROUND

A Canadian corporation with a history of spills affecting Indian Country, Enbridge Energy, submitted an application to construct a 612-mile pipeline (the "Sandpiper pipeline") to transport 225,000 barrels per day (BPD) of crude oil from Tioga, North Dakota to Clearbrook, Minnesota; then increase the pipeline capacity to 375,000 BPD (15,750,000 gallons per day) from Clearbrook to Superior, Wisconsin. While that project has been delayed, Enbridge is still focusing on rebuilding the Line 3 Replacement, which will transport 770,000 BPD or 32,340,000 gallons per day of tar sands oil, which would be even more devastating for our water environment than Bakken oil.

Rather than pass through established Minnesota transportation corridors and more developed areas, the proposed route would instead cross areas of pristine wilderness and pass through

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watersheds where the Band and other Ojibwe people have practiced wild rice harvesting for generations. The Minnesota Public Utilities Commission, an independent state agency which serves as the Responsible Governmental Unit (RGU) for the pipeline projects, ignored tribal interests and treated tribal governments as it would a private citizen or other interested party.

The Department of Commerce has been assigned by the PUC to administrate the pipeline projects and also did not engage in meaningful consultation with the tribes in advance of the project, and the federal agencies deferred to the State. They would not hold a hearing on any of the reservations affected, so as Chief Executive, I convened a public hearing under tribal law and commissioned a prominent environmental attorney, former attorney for the U.S. EPA and associate director of its Office of Environmental Justice, and former attorney in the U.S. Department of the Interior to conduct the hearing and an investigation into the interests of our Band in the pipeline proposal. His 49-page Hearing Examiner's report is attached.

Key findings included: 1) the pipeline route would have significant adverse impacts on the economic, cultural and spiritual resources of the Band and other Minnesota tribal communities; 2) our tribal communities constituted minority populations within Presidential Executive Order 12898; 3) substantial questions of environmental justice were raised, triggering procedural and substantive protections not afforded us; 4) approval of the route without consulting with the Band on a government-to-government basis or performing an environmental analysis would violate Minnesota law (later held to be true by Minnesota courts); 5) the process directly raises issues under Title VI of the Civil Rights Act of 1964; 6) federal agencies, including but not limited to the U.S. Army Corps of Engineers and the Environmental Protection Agency, are required to conduct government-to-government consultation with the Band "at the earliest possible time" and implement both the procedural and the substantive environmental justice requirements in Executive Order No. 12898; 7) those requirements include recognizing the Band as a "cooperating agency" pursuant to 40 C.F.R.1508.5 so the Band and its expertise is integral to analyzing the effects of the route; and 8) the federal agencies involved had to take seriously its mandate to engage on the issues of environmental justice and alternatives and mitigation measures that that would avoid the disproportionately high adverse effects on minority tribal populations.

RECOMMENDATIONS: WHAT CAN BE LEARNED FROM THE SIMILARITIES BETWEEN THE MINNESOTA AND NORTH DAKOTA PIPELINE PROJECTS

There are several similarities between the experiences of tribes working to stop both the Dakota Access Pipeline in North Dakota and the Sandpiper Pipeline in Minnesota. These similarities highlight the flaws in the current process that require reform.

- I. In Minnesota, the state Department of Natural Resources and Pollution Control Agency expressed concern about the proposed route that would cross over 80 rivers, streams or lakes through northern Minnesota. This proposed route would directly Mille Lacs Band of Ojibwe water, land and resources. An longer alternative route, which would only cross 8 rivers/streams, was proposed that would route the pipeline south along the I94 corridor before heading north again to Superior. However, an Administrative Law Judge assigned to this matter for the Public Utilities Commission cited as a rationale for a whole new pipeline going through northern Minnesota the concept that the alternative route along the

I94 corridor was more risky or dangerous to route near the population of the Twin Cities, even though current routes exist. Instead, Enbridge, the PUC and Administrative Law Judge supported the route through northern Minnesota, adjacent to Indian reservations. It is our understanding that Standing Rock experienced similar treatment, where the pipeline was supposed to route near Bismarck, ND, but the Governor asked for it to be moved to the current route. This is textbook environmental racism, defying the ACE's stated commitments to environmental justice.

- II. The Mille Lacs Band of Ojibwe was exceptionally nervous about meeting with the Army Corps of Engineers to engage in consultation about the Sandpiper Pipeline, due to our historical experience with agencies claiming to have engaged in consultation when in reality they are merely box-checking, advancing their projects ahead regardless of the views of the tribe. Yet it was also clear to us that the ACE would have moved ahead had we not met at all, so tribal consultation as it currently exists is a no-win game. Consequently the Mille Lacs Band went to great lengths to have pre-meetings with the Corps to propose and agree upon a definition of consultation, yet we were still very uncomfortable without a clear understanding of whether or not our opinions would be given deference or even considered at all. It is our understanding that meetings between Standing Rock and the ACE did not happen, and that the tribe had concerns similar to those of the Mille Lacs Band. Right now, if we meet with the ACE, they can claim they consulted regardless of what the tribes wants. Yet if we do not meet with them, they will push forward anyway. This process needs comprehensive attention and reform.
- III. The Army Corps of Engineers has billions for its projects but claims to have no budget at all to pay for archaeological firms to conduct the reviews for sacred/cultural/historic sites along the route. Instead, they fully defer to the work of the pipeline companies, who hire their own consultants with the built in bias of piper-paying. And the tribes are then expected, under the color of a federal review conducted by the Corps but wholly funded and directed by the pipeline proponents, to disclose our graves, our sacred sites and our most culturally sensitive areas to not only outsiders, but adversaries, and often in direct contravention of our religious beliefs. Again, we wanted to protect our sites but to do so meant violating cultural practices that prohibit disclosing these sacred places to the consultants paid for by the pipeline companies. The Mille Lacs Band had intense and extensive internal debates over whether or not to allow our Tribal Historic Preservation Officer (THPO) to meet with Enbridge's consultant and disclose our sacred sites. It is one thing to disclose those sites to a federal officer, another to a hired gun for the very people who threaten the sites. It is our understanding that Standing Rock had very similar issues, and only disclosed some sites at the last minute when their destruction was imminent and within days of occurring.

PROPOSED REFORM ITEMS FOR THE ADMINISTRATION'S CONSIDERATION

The Mille Lacs Band of Ojibwe offers the following ideas for consideration as federal agencies focus on reforming the consultation process.

1. Enforcement and Mandatory training on Environmental Justice. The federal government must prioritize requiring each agency and division to adopt strong environmental justice policies similar to that of the EPA, to provide enforcement mechanisms to ensure that projects can be stopped that violate Environmental Justice policies, and to train employees. Environmental Justice must have teeth behind it in order to be effective, and must cut across multiple federal agencies and departments. The Interior Department must be required to aggressively intervene when Indian trust resources are threatened by projects that violate Environmental Justice policies.

2. Making consultation meaningful, real consultation, objectively provable and not simply a process. Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Federal agencies must be required to do more than simply ask Tribes what their views are on infrastructure projects; we must be given a voice at the decision-making table.

3. Federal funding and control of the archeological, cultural, historical reviews. The pipeline companies should have no say in the hiring of firms to conduct the archeological, cultural and historical reviews, as they do now, because they are footing the bill. Rather, the federal government should assess the pipeline proponents for the costs, but exercise 100% control over the review process and ensure that the consultants hired to conduct the work are not biased toward the pipeline companies. There must be accountability built into this process, and tribes must be assured of confidentiality for all disclosures.

4. A new effort to formally integrate the Obama Administration's many federal environmental justice executive orders and policies, cited in the Band's report (Executive Order No. 12898, CEQ & USEPA Environmental Justice guidance documents), into the federal government's process for siting infrastructure. This should help push back on the concept that the need to avoid impacts to well-populated areas requires the government to site pipelines in pristine areas and impose disproportionate impacts on Native American communities.

5. Utilizing opportunities like involving tribal governments as "cooperating agencies" under NEPA regulations (40 C.F.R. § 1508.5) so that tribes are formally part of the process of environmental review rather than reduced to the same level of any other commenting member of the public.

6. Ensuring that appropriate government-to-government consultation occurs not just on the federal government's own projects but also when the federal government comments on, and has a role in reviewing, projects where the approval process is primarily occurring at the state level (such as Sandpiper).

The Mille Lacs Band of Ojibwe is prepared to fully participate in the reform of the consultation process with our fellow tribes. We appreciate the Administration's intervention in this process and commitment to improving the consultation process.

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