

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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White Earth Nation, et al,

Plaintiffs,

Court File No. 14-cv-4726 (MJD/LIB)

v.

**ORDER**

John Kerry, in his official capacity  
as Secretary of State, and the  
United States Department of State,

Defendants.

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This matter comes before the undersigned United States Magistrate Judge pursuant to a general assignment made in accordance with the provisions of 28 U.S.C. § 636(b)(1)(A), and upon Enbridge Energy, Limited Partnership's ("Enbridge") Motion to Intervene, [Docket No. 16]. After filing their motion papers, Enbridge and the parties notified of the Court of their intent to submit the motion on the papers without a hearing. Pursuant to the representations of Enbridge and parties and the Court's Order of December 18, 2014, the Court took Enbridge's Motion to Intervene, [Docket No. 16], under advisement on January 7, 2015. For the reasons discussed below, the Court **GRANTS** Enbridge's motion.

**I. ENBRIDGE'S MOTION TO INTERVENE [DOCKET NO. 16]**

Enbridge moves the Court to intervene in the present case as of right or, in the alternative, for permission to intervene. Enbridge seeks to intervene in order that it may appear in support of Defendants and file responsive pleadings to Counts I and II of Plaintiffs' complaint. (Enbridge's Motion to Intervene, [Docket No. 16], 1).

## A. Background

On November 11, 2014, Plaintiffs filed a complaint seeking declarative and injunctive relief against Defendants. (Complaint, [Docket No. 1]). In support of Counts I and II of their complaint, Plaintiffs allege that Defendants violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, by approving the construction a new border-crossing oil pipeline and the expanded operation of an existing border-crossing oil pipeline without first involving the public or considering either an environmental assessment or environmental impact statement. (*Id.* at 20-23, ¶¶ 85-99).<sup>1</sup>

On December 5, 2014, Enbridge filed the present motion to intervene, seeking to appear in support of Defendants and file responsive pleadings to Counts I and II of Plaintiff’s Complaint. (*See* Enbridge’s Motion to Intervene, [Docket No. 16], 1). On December 10, 2014, Plaintiffs filed a Response to the motion. (Pls’ Response to Motion to Intervene, [Docket No. 30]). In their response, Plaintiffs stated that they did not oppose the motion to intervene but asked the Court to impose three conditions on Enbridge’s participation in the case in the event the Court granted the motion to intervene. (*Id.* at 1, 3). On December 12, 2014, Defendants filed a Response to the motion. (Defs’ Response, [Docket No. 36]). In their response, Defendants stated that they took no position on the motion. (*Id.* at 1).

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<sup>1</sup> In pertinent part, NEPA requires all federal agencies to include in every recommendation or report on proposals for all “major Federal actions significantly affecting the quality of the human environment” an environmental impact statement that discusses the purpose and needs for, environmental impacts of, and reasonable alternatives to, the proposed action. 42 U.S.C. § 4332(2)(C). A federal agency need not prepare an environmental impact statement if it first conducts an environmental assessment and makes a finding that the agency’s action will result in no significant impact. 40 C.F.R. § 1501.4. If substantial changes are made to an agency’s actions, or there are new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, the agency must prepare a supplement to the draft or final environmental impact statement. 40 C.F.R. § 1502.9(c).

On December 16, 2014, Enbridge submitted a letter to the Court on behalf of all parties. (Letter of December 16, 2014, [Docket No. 38]). In the letter, Enbridge represented that, after a meet and confer with Plaintiffs and Defendants, Plaintiffs had agreed to withdraw two of the three previously suggested conditions that Plaintiffs had requested the Court impose on Enbridge's participation in the case. (Id. at 1). Enbridge also represented that Plaintiffs and Defendants had agreed that Plaintiffs would modify their remaining suggested condition on Enbridge's participation to suggest that the Court prohibit Enbridge from raising new claims without first obtaining written consent of the Plaintiffs and Defendants or leave of the Court. (Id.).

**B. Statement of Material Alleged Facts**

Plaintiffs allege as follows:

Enbridge is proposing to construct and operate a new 36-inch diameter border-crossing pipeline for the purpose of transporting crude oil from Canada into the United States. (Complaint, [Docket No. 1], 13, ¶ 48). Enbridge Energy has already constructed a 17.5-mile border-crossing segment of that new pipeline using 34-inch diameter pipe. (Id.). Enbridge claims that this new pipeline is an existing pipeline that Enbridge refers to as Line 3, which is subject to a 1991 Presidential Permit that allows Enbridge to import an unlimited amount of crude oil through it. (Id. at ¶ 48).<sup>2</sup> Enbridge is actually constructing an entirely new pipeline that will not follow the same route as Line 3 through parts of Minnesota. (Id. at ¶ 49). Enbridge will abandon the existing Line 3 pipeline when it completes the new pipeline. (Id.).

Enbridge's new pipeline and all of the other pipelines at issue, which are also owned by Enbridge, are international pipelines and, as such, their construction and operation are subject to

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<sup>2</sup> Enbridge asserts that the newly constructed border-crossing segment to which Plaintiffs refer is actually a recently replaced segment of Line 3. (Enbridge's Memorandum in Support of Motion to Intervene, [Docket No. 23], 5-6. 14).

approval by the State Department. (Id. at ¶ 47). The State Department has previously acknowledged that the environmental effects associated with the construction of a pipeline of the size and capacity of Enbridge's new pipeline requires the State Department to prepare an environmental impact statement. (Id. at ¶ 50).

Enbridge also owns and operates another border-crossing pipeline, referred to as Line 67, that operates in the same right of way at the U.S.-Canada border as is proposed for Enbridge's new pipeline. (Id. at 14, ¶ 55). Line 67 is subject to a Presidential Permit that the State Department has determined currently limits the amount of crude oil that may be imported through Line 67 to an annual average of 450,000 barrels per day ("bpd"). (Id.). Enbridge is currently seeking authorization from the State Department to increase the amount of crude oil it imports at the border-crossing segment of Line 67 from the annual average of 450,000 bpd to an annual average of 800,000 bpd. (Id. at ¶ 56). The State Department concluded that Enbridge's requested increase in average daily importation capacity in Line 67 requires the State Department to prepare a supplemental environment impact statement, which the State Department is currently in the process of preparing. (Id. at 15, ¶ 58).

Enbridge allegedly plans to circumvent the approval process required by NEPA for its request for an increased average daily import capacity in Line 67 by diverting 800,000 bpd from Line 67 at a point north of the U.S.-Canada border to the newly constructed border-crossing segment of its new pipeline (which Enbridge maintains is the recently replaced border-crossing segment of existing line 3) so that it will cross into the United States via the new border segment, after which Enbridge will divert the oil back into the domestic sections of Line 67. (Id. at ¶ 61). This diversion will allow Enbridge to operate Line 67 at 800,000 bpd capacity along its entire

length prior to the completion of the State Department's preparation of the supplemental environmental impact statement. (Id.).

On July 24, 2014, the State Department determined that Enbridge's plan to divert oil from Line 67 to the newly constructed border-crossing segment of its new pipeline and back, did not need further approval. (Id. at 16, ¶ 62). This approval authorized Enbridge to construct the border-crossing segment of its new pipeline and operate it at a capacity of 800,000 bpd. (Id.). As a result, the State Department has approved the construction of Enbridge's new pipeline, which is not authorized by any existing permits, without preparing either the required environmental assessment or environmental impact statement. (Id. at 14, ¶ 54). As noted above, this approval also allows Enbridge to operate Line 67 at 800,000 bpd capacity along its entire length prior to the completion of the State Department's preparation of the supplemental environmental impact statement. (Id. at 15, ¶ 61).

Based on the foregoing allegations in the Complaint, in Counts I and II, Plaintiffs ask the Court to set aside the State Department's approvals of Enbridge's new pipeline and the plan by which Enbridge diverts 800,000 bpd from Line 67 to the newly constructed border segment of its new pipeline and then back to the domestic sections of Line 67. (Id. at 26, ¶ B). Plaintiffs also ask the Court to issue preliminary injunctions prohibiting the State Department from authorizing or allowing any new construction of Enbridge's new pipeline, or operation of Enbridge's Line 67 diversion plan. (Id. at ¶ C).

### **C. Standard of Review**

Federal Rule of Civil Procedure 24 provides for intervention of right and permissive intervention. With regard to intervention as of right, Rule 24 states:

On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest

relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

With regard to permissive intervention, Rule 24 states:

On timely motion, the court may permit anyone to intervene who (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact.

In this circuit, "a party seeking to intervene must establish Article III standing in addition to the requirements of Rule 24." United States v. Metro. St. Louis Sewer Dist., 569 F.3d 829, 833 (8th Cir. 2009). If a party seeking intervention as of right is found to have standing, the party must establish that it: "(1) ha[s] a recognized interest in the subject matter of the litigation that (2) might be impaired by the disposition of the case and that (3) will not be adequately protected by the existing parties." Curry v. Regents of Univ. of Minnesota, 167 F.3d 420, 422 (8th Cir. 1999) (citing Standard Heating & Air Conditioning Co. v. City of Minneapolis, 137 F.3d 567, 571 (8th Cir. 1998); Chiglo v. City of Preston, 104 F.3d 185, 187 (8th Cir. 1997)).

#### **D. Analysis**

The Court first addresses whether Enbridge has Article III standing to intervene. Brown v. Medtronic, Inc., 628 F.3d 451, 455 (8th Cir. 2010) ("Federal courts must address questions of standing before addressing the merits of a case[.]"). In support of a motion to intervene, "the prospective intervenor must allege facts showing the familiar elements of Article III standing." Am. Civil Liberties Union of Minnesota v. Tarek ibn Ziyad Acad., 643 F.3d 1088, 1092 (8th Cir. 2011). "Constitutional standing requires a showing of: (1) an injury in fact, which is an invasion of a legally protected interest that is concrete, particularized, and either actual or imminent; (2) causation; and (3) redressability." Curry, 167 F.3d at 422. Federal standing often turns on the

nature and the source of the claims asserted. ASARCO, Inc. v. Kadish, 490 U.S. 605, 624 (1989).

Enbridge alleges as follows: After receiving approval by the State Department on July 24, 2014, Enbridge has taken steps to import oil into the United States at an increased capacity by diverting oil from Line 67 to the recently replaced border-crossing segment of Line 3 and then back to the domestic sections of Line 67. (Enbridge's Memorandum in Support of Motion to Intervene, [Docket No. 23], 5-6. 14). If Plaintiffs obtain the relief they seek, it will negatively affect a multi-million dollar interest that Enbridge has in operating its pipelines at the increased capacity the currently approved diversion plan allows. (Id. at 13).

By alleging a potential loss of the profits that it is currently receiving due to its pipelines' increased operational capacity as a result of the current State Department grant of approval, Enbridge has alleged an invasion of a legally cognizable right that is concrete, particularized, and imminent. See Ziyad Acad., 643 F.3d at 1092 (citing Metro. St. Louis Sewer Dist., 569 F.3d at 834); see also South Dakota v. Ubbelohde, 330 F.3d 1014, 1024–25 (8th Cir. 2003) (holding that business corporations had alleged a significant injury so as to justify intervention where the corporations alleged a negative impact to their ability to transport their goods if the plaintiffs prevailed in their suit).

The determination of whether Enbridge has sufficiently alleged causation is here a bit unusual, as the traditional standing inquiry requires a showing that the party's injury is fairly traceable to the defendant's conduct. See Ziyad Academy, 643 F.3d at 1093 (citing Metro. St. Louis Sewer Dist., 569 F.3d at 834). In Ziyad Academy, however, the Eighth Circuit found that an intervenor had proven causation for standing purposes where the intervenor's alleged injury was the termination of benefits the intervenor was then receiving from the defendant's actions

that would occur if the result of the litigation was to put a stop to the defendant's actions. Id. at 1092-93. The injury that Enbridge alleges, the cessation of the increased profits it has been receiving as a result of the State Department's approval of Enbridge's plan to operate Line 67 at increased capacity, is similar. If Plaintiffs prevail on their claims asking the Court to set aside the State Department's approval of Enbridge's diversion plan and to grant an injunction of any further approval of new construction of Enbridge's proposed pipeline or operation of Lines 67 at its current enhanced capacity, the increased profits that Enbridge has been receiving will cease. Under the reasoning of Zayed Academy, Enbridge's alleged injury is fairly traceable to defendant's conduct.

Finally, under the reasoning of Zayed Academy, Enbridge has also shown redressability because the injury Enbridge alleges, loss of its increased profits realized as a result of the State Department's approval to operate its pipeline at increased capacity, would be redressed by a judicial determination that the State Department's approval was proper. See Id. at 1093.

In light of the foregoing, Enbridge has Article III standing to intervene in the present case.

1. Timeliness

Rule 24 requires that the proposed intervenor timely bring its motion to intervene. Fed. R. Civ. P. 24. Although the timeliness of a motion to intervene is assessed by considering all of the circumstances of a case, the Eighth Circuit has articulated factors that a Court should consider when determining whether a motion to intervene has been brought timely:

[(1)] how far the litigation had progressed at the time of the motion for intervention, [(2)] the prospective intervenor's prior knowledge of the pending action, [(3)] the reason for the delay in seeking intervention, and [(4)] the likelihood of prejudice to the parties in the action.

United States v. Ritchie Special Credit Investments, Ltd., 620 F.3d 824, 832 (8th Cir. 2010) (quoting Minn. Milk Producers Ass'n v. Glickman, 153 F.3d 632, 646 (8th Cir. 1998)).

In the present case, Enbridge filed its motion to intervene within weeks of Plaintiffs filing their Complaint. In addition, as Enbridge brought its motion shortly after Plaintiffs filed their complaint, Enbridge had minimal prior knowledge of the pending action before seeking to intervene. There was no significant delay in Enbridge's decision to seek intervention, and there is little likelihood that Plaintiffs or Defendants will be prejudiced by Enbridge's intervention into the litigation at this early stage of the case. All of the factors weigh in favor of finding Enbridge's motion to intervene timely.

## 2. Interest

A proposed intervenor must show "a recognized interest in the subject matter of the litigation." Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC, 485 F.3d 1006, 1008 (8th Cir. 2007). The demonstrated interest must be direct, substantial, and legally protectable. United States v. Union Elec. Co., 64 F.3d 1152, 1161 (8th Cir. 1995) (citations omitted). Enbridge asserts that its interest in the continued operation of its pipelines under federal permits and its financial interest in its current level of profits from the operation of Line 67 are sufficient to show that it has an interest in the subject matter of this case. The Court agrees. The Eighth Circuit has also previously found that a developer to which the United States Army Corps of Engineers had issued a permit to construct a project had a sufficient interest to intervene in a suit alleging that the Corps of Engineers had violated NEPA by issuing the permit without first conducting an environmental impact statement. See Ripplin Shoals Land Co., LLC v. U.S. Army Corps of Engineers, 440 F.3d 1038, 1039 (8th Cir. 2006) (so holding). The Eighth Circuit has likewise found that business corporations had sufficient interests to intervene where they alleged a

negative impact on revenues that would result from the adverse outcome of a case that inhibited the businesses' ability to transport their products. Ubbelohde, 330 F.3d at 1024.

Enbridge's alleged interests in its construction of its new pipeline and the profits generated from operating Line 67 at the increased capacity allowed by the State Department's current approval are sufficiently direct, substantial, and legally protectable to allow it to intervene.

### 3. Possible Impairment

A party seeking to intervene must also show that its alleged interest is one that may be impaired by the results of the litigation. In Ubbelohde, the Eighth Circuit held that business corporations alleging that the result of the litigation could inhibit their ability to transport their products (i.e., the shipment of construction materials by river barge) and as a result, their ability to generate profits, had shown a sufficient possible impairment of their alleged interests on which to intervene. Ubbelohde, 330 F.3d at 1024. The possible impairment to Enbridge's ability to continue operating its Line 67 pipeline at the currently allowed increased capacity and the prohibition on Enbridge's construction of its new pipeline are analogous to the possible impacts alleged in Ubbelohde. Accordingly, Enbridge has shown a sufficient possible impairment to its alleged interest to allow it to intervene.

### 4. Inadequate Representation of interest.

"The third requirement for intervention is that the interest must not be adequately protected by the existing parties." United States v. Union Elec. Co., 64 F.3d 1152, 1168 (8th Cir. 1995) (citation omitted). "This requirement is met by a minimal showing that representation 'may be' inadequate." Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Associates, Inc., 60 F.3d 1304, 1308 (8th Cir. 1995). In determining the adequacy of the representation of a proposed

intervenor's interest by the parties presently in the case, a court compares "the interests of the proposed intervenor with the interests of the current parties to the action." Sierra Club v. Robertson, 960 F.2d 83, 86 (8th Cir. 1992) (citing Planned Parenthood of Minnesota, Inc. v. Citizens for Cmty. Action, 558 F.2d 861, 870 (8th Cir. 1977) (intervention appropriate where the interests of proposed intervenor and current party, "while not adverse, are disparate," even though both sought same legal goal). The theory of *parens patriae* "creates a presumption that a government agency will represent the interests of all citizens in cases raising matters of sovereign interest." Ubbelohde, 330 F.3d at 1025 (citing Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996)). "Proposed intervenors can rebut this presumption, however, . . . by showing that the proposed intervenor's interest is not subsumed within the general interests of the public." Id. Enbridge has made such a showing here. Enbridge's asserted interest is in the profits that it will generate as a result of being allowed to construct and operate a new pipeline and by continuing to operate Line 67 along its full length at the increased capacity currently allowed by the State Department's approval. Although the general public may have a broader interest in the continued and increased domestic importation of oil, it has no specific interest in Enbridge's generation of private profits. Accordingly, the interests of Defendants and Enbridge are sufficiently disparate for the purposes of intervention.

Because Enbridge has demonstrated that it has Article III standing to participate in this case, that it has filed a timely petition which shows it has a recognized interest in the subject matter of the litigation that may be impaired by its disposition, and that its interest is not adequately protected by the existing parties, Enbridge may intervene in this case as of right.<sup>3</sup>

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<sup>3</sup>Because the Court concludes that Enbridge may intervene as of right, the Court need not address Enbridge's arguments in support of permissive intervention.

Based on the foregoing, the Court **GRANTS** Enbridge's Motion to Intervene, [Docket No. 16].

## **II. Suggested Condition**

Plaintiffs ask the Court to set a condition on Enbridge's intervention in the present case to prohibit Enbridge from raising new claims without first obtaining written consent of the Plaintiffs and Defendants or leave of the Court. Courts may impose restrictions on the participation on an intervenor of right. See Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 383 (1987). The Court's review of the case law, however, indicates that, as a general rule, intervenors are limited to the claims already at issue in a case in which they are allowed to intervene. See Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Ass'n, 646 F.2d 117, 122 (4th Cir. 1981) ("Generally speaking, an intervenor is held to take the case as he finds it[.]"); see also Sw. Pennsylvania Growth Alliance v. Browner, 121 F.3d 106, 121 (3d Cir. 1997) ("It is a general rule that an intervenor may argue only the issues raised by the principal parties and may not enlarge those issues."); Thompson v. Deal, 49 F.Supp. 366 (D.D.C. 1943) ("An intervener may not introduce issues which are outside the scope of the issues in the main suit."); Nat'l Ass'n of Regulatory Utility Com'rs v. Interstate Commerce Commission, 41 F.3d 721, 729 (D.C. Cir. 1994) ("Interveners may only argue issues that have been raised by the principal parties"); Illinois Bell Tel. Co. v. FCC, 911 F.2d 776, 786 (D.D.C.1990) ("An intervening party may join issues only on a matter that has been brought before the court by another party."); Marvel Entertainment Group, Inc. v. Hawaiian Triathlon Corp., 132 F.R.D. 143, 146 (S.D.N.Y.1990) (Intervention is not proper if it expands the scope and costs of litigation.).

In addition, Enbridge has indicated to the Court that it seeks to intervene to assist Defendant and to obtain dismissal of the case. (See Enbridge's Memorandum in Support of

Motion to Intervene, [Docket No. 23], 6). In that same vein, Enbridge has represented to the Court that it seeks merely to address the “very same set of questions that the Court will already be addressing[.]” (Id. at 14). In sum, nothing in Enbridge’s motion papers indicates that it seeks to intervene to assert any new claims or defenses.

In light of the foregoing, the Court concludes that Plaintiffs’ request for the Court to impose a condition on Enbridge’s intervention to prohibit it from raising new claims or defenses without the written approval of the Plaintiffs and Defendants or by leave of the Court is consistent with the general case law and the representations made by Enbridge in support of its motion to intervene. Accordingly, Enbridge’s intervention as of right is initially limited to the claims and defenses currently at issue in the case subject to subsequent stipulation of the parties or leave of the Court to amend.

### **III. CONCLUSION**

For the foregoing reasons, **IT IS ORDERED:**

1. That Enbridge Energy’s Motion to Intervene, [Docket No. 16], is **GRANTED** as set forth above.

Date: January 23, 2015

**BY THE COURT:**

s/Leo I. Brisbois  
U.S. MAGISTRATE JUDGE