Levi, Andrew (COMM)

From: Tyler Kaspar <Tkaspar@1854treatyauthority.org>
Sent: Monday, July 10, 2017 11:55 AM
To: MN_COMM_Pipeline Comments
Cc: Darren Vogt; Sonny Myers; Andy Edwards; Tara Geshick; Tony Swader
Subject: 1854 Treaty Authority Comments
Attachments: Enbridge Line 3 Comments-1854 Treaty Authority 7-10-2017.pdf

Please find attached comments from the 1854 Treaty Authority regarding the Draft Environmental Impact Statement for Enbridge Energy's Proposed Line 3 Pipeline Project.

Sincerely,

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1854 Treaty Authority

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July 10, 2017

Jamie MacAlister, Environmental Review Manager
Minnesota Department of Commerce
85 7th Place East, Suite 280
St. Paul, MN 55101-2198

RE: Draft Environmental Impact Statement for Enbridge Energy's Proposed Line 3 Pipeline Project (Docket Numbers CN-14-916 and PPL-15-137).

Ms. MacAlister,

The purpose of this letter is to provide comments on the Draft Environmental Impact Statement (DEIS) for Enbridge Energy's Proposed Line 3 Pipeline Project.

The 1854 Treaty Authority is an inter-tribal natural resource management agency governed by the Bois Forte Band of Chippewa and Grand Portage Band of Lake Superior Chippewa, both federally recognized tribes. The organization is charged to preserve and protect treaty rights and related resources within the 1854 Ceded Territory. Present day northeastern Minnesota is located within the 1854 Ceded Territory including all of Lake and Cook counties, most of St. Louis and Carlton counties, and portions of Aitkin and Pine counties. Bands continue to exercise treaty rights to hunt, fish, and gather in the 1854 Ceded Territory. It is vital that resources are available and healthy for the meaningful use of treaty rights. The 1854 Treaty Authority would like to highlight a number of concerns related to the proposed project. Please note that these comments are submitted by 1854 Treaty Authority staff with the understanding that member reservations may submit comments from their own perspective.

Water Resources

Surface Water
According to the DEIS, the applicant's preferred route would require 192 surface water crossings within Minnesota, which includes streams and lakes. Some of the streams and lakes crossed by the preferred route are within the 1854 Ceded Territory and we are concerned that construction, and more importantly a potential pipeline spill, could impact these important resources and treaty rights. The streams and lakes crossed support warmwater, coolwater, and coldwater fish species, wildlife and diverse plant communities important to the bands. Alteration of flows and/or loss of riparian cover from construction and operation could alter fish communities (e.g. change from coldwater to cool or warm water species) and decrease available habitat. Erosion from

2477-1

construction activities and runoff could increase sedimentation and impact available spawning and nursery habitats for walleye as well as other fish species. Impacts to walleye may be more severe in spring/early summer when increased sediment loads can bury/suffocate eggs and fry. An oil spill would not only impact fish and their habitat but would also impact harvest and consumption. Increased contaminates in fish is a concern, especially if there is a pipeline spill in waters crossed like the Kettle River that already have an existing beneficial use impairment for aquatic consumption (mercury). Any impacts to harvest and consumption of fish is an impact to treaty rights. There is a population of lake sturgeon in the Kettle River, which is an important cultural and spiritual species to the bands. There are few populations in the 1854 Ceded Territory, others being in Lake Superior, St. Louis River and Pigeon River, so any impacts to lake sturgeon is a concern. Impacts from a pipeline spill at a stream crossing may be far reaching and evident miles downstream of the spill location, potentially beyond the 10-mile-long downstream region of interest used in the DEIS. Similarly, a lake spill will likely impact a large area of the lake and shoreline and be spread by current and wind action.

2477-2

Wild Rice Waters

An important concern we have with surface waters crossed or in close proximity to the applicants preferred route in the 1854 Ceded Territory are wild rice waters. As noted in the DEIS, wild rice is of deep cultural significance to tribes in Minnesota, including the Bois Forte and Grand Portage bands. In Chapter 5 (page 5-64) the DEIS states "*The Applicant's preferred route intersects the highest number of wild rice lakes (17) compared to the CN Alternatives*". On page 5-73, the DEIS states "*Five wild rice waterbodies would be crossed by the Applicant's preferred route, with about 5 acres of the delineated waterbody basins within the construction work area*". Wild rice waters (a lake or river with any wild rice now or historically) in and near the 1854 Ceded Territory that may be impacted by the preferred route and are of concern to us include:

-Sandy Flowage: is just outside the 1854 Ceded Territory and is an important wild rice harvesting location. The preferred route crosses Sandy River just south of the flowage.

-Kettle River: is crossed by the preferred route near and downstream of Kettle Lake. Kettle Lake and portions of the Kettle River near the lake can contain good wild rice stands utilized by harvesters.

-Moosehorn River: is crossed by the preferred route in Mahtowa, which is upstream of an area with good wild rice stands and harvest near Moose Lake.

-Venoah Lake: is a wild rice lake identified in an update from the Minnesota Department of Natural Resources in 2013 but not identified in the project map. The preferred route runs near this lake.

Some of these wild rice waters/locations were not included in the DEIS but have or previously had wild rice present and need to be considered. While our focus is the 1854 Ceded Territory, we are concerned about any impacts to wild rice across the route as a whole.

Wild rice has been declining in areas of Minnesota and the 1854 Ceded Territory and avoidance should be used whenever possible. Tribes with treaty rights to wild rice waters that may be impacted by the proposed project should be included in discussions on how to avoid or minimize impacts (e.g. timing of construction and integrity digs will influence the degree of impact on wild rice and tribes may be the best resource for avoiding or minimizing impacts to wild rice). Pipeline leaks or spills, whether it be at a crossing or upstream of a wild rice water, are a major concern. Impacts would be permanent or likely lead to multiple years with little or no harvest in areas where it may occur. Given the cultural and spiritual connection tribes have with wild rice, there would not be any way to mitigate this impact. 2477-3 2477-4

Groundwater

The applicant's preferred route for the Line 3 pipeline replacement will impact ground and surface waters in Minnesota and the 1854 Ceded Territory from construction, operation and any potential spills. We are concerned about groundwater contamination, especially if there is a spill, in wetlands and other shallow aquifer areas where contamination of surface water can readily be transported to groundwater. An additional risk of groundwater contamination exists in Carlton County within the 1854 Ceded Territory, which is the only area blasting is planned to occur. As stated in Chapter 5, (page 5-25), "*Where blasting would occur, rock would be removed to a depth of 7 feet, which could be above the elevation of the water table in the area. If the water table is exposed by blasting, the turbidity, sedimentation, or chemical contamination that could result would be localized.*" More detail should be provided in the DEIS regarding how localized the impacts would be and whether there is potential for faults to occur from blasting that could potentially transport contaminated groundwater to other areas. 2477-5 2477-6

Wetlands

Impacts and Mitigation

Within Minnesota, the applicant's preferred route would impact approximately 499 acres of wetlands during construction. According to the DEIS, the preferred route will cross the St. Louis River watershed in the 1854 Ceded Territory. Any impacts (loss, conversion) of wetlands in the St. Louis River watershed is a concern due to substantial impacts, especially in headwater areas, that have already occurred. As noted in Chapter 5 (page 5-130 and Table 5.2.1.3-6) long term/permanent, major impacts are predicted for forested and shrub/scrub wetlands in the pipeline right of way, which are difficult to mitigate. On page 5-20, the DEIS states "*Although site-specific compensatory wetland mitigation has yet to be identified, it would continue to be considered in consultation with the permitting agencies to minimize and offset wetland impacts. Compensatory wetland mitigation would be consistent with applicable policies, regulations, and rules governing compensatory wetland mitigation for purposes of Section 404 CWA (see Section 5.2.1.3.1)*". Proper mitigation for all wetland impacts is important and needs to be in the St. Louis River watershed and the 1854 Ceded Territory (in-place and in-kind). 2477-7

Vegetation and Forests

Impacts to Resources and Access

Clearing and other impacts to vegetation and forest resources along the preferred route as well as access to the resources is a concern. According to the DEIS, the applicant's preferred route would 2477-8

result in the loss or alteration of up to 5,617 acres of existing vegetation during construction in North Dakota, Minnesota, and Wisconsin, with approximately 1,859 acres of forested land present within the construction and operation footprint of the project. In Minnesota, the preferred route would have some form of impact on about 5,081 acres of existing vegetation. Permanent impacts include up to 291 acres for facilities and roads, and 2,050 acres of forested upland and wetland vegetation from construction. In the 1854 Ceded Territory, 128 acres of Carlton County land (public land) would be crossed with 53 of those aces being in the permanent right-of-way during operation. This will not only impact treaty resources but also the exercise of treaty rights in 1854 Ceded Territory. Treaty rights are exercised on public lands, so any temporary or permanent impacts to these lands (including access) would affect tribes.

2477-8 Cont'd

2477-9

Tribal Resources

1854 Ceded Territory

We were pleased to see the efforts made to get and include input from tribes that would be impacted by the proposed project in Chapter 9. A good description was provided about the tribes, treaty rights on reservation and in ceded territories and their issues and concerns with the proposed project. However, there should be more information provided about how Fond du Lac, Bois Forte and Grand Portage bands of Chippewa manage and exercise off-reservation treaty rights in the 1854 Ceded Territory. The 1854 Treaty Authority (not mentioned in the DEIS) is governed by the Bois Forte and Grand Portage bands and protects and manages off-reservation treaty rights and resources for those bands in the 1854 Ceded Territory. The Fond du Lac Band manages their own off-reservation treaty rights and resources in the 1854 Ceded Territory. There also did not appear to be much detail about actual impacts to tribal resources and treaty rights from the proposed project in Chapter 9. Issues and concerns were described, but details of impacts were not and should be as they were described in other chapters.

2477-10

2477-11

Cultural Resources

We are concerned about impacts from the preferred route on cultural resources and proper consultation. According to the DEIS, surveys for archaeological resources were completed in Minnesota, with 63 sites documented in the survey area for the applicant's preferred route. Information from the Minnesota Historical Society indicated 53 previously recorded archaeological resources, with 9 located in the construction area (4 in the permanent right of way) and 3 in additional temporary workspace of the applicant's preferred route. The DEIS also notes that it is likely that currently unknown archaeological resources could be discovered during ground disturbing activities. Avoidance, minimization efforts and mitigation for impacts must be discussed with the appropriate agencies and tribes. Consultation should occur with tribes over impacts to known sites, potential traditional cultural properties, and for a process if unknown sites are discovered during construction.

2477-12

Accidental Crude Oil Releases

Likelihood and Uncertainty

A primary concern with the proposed project is the impacts that will occur from any potential oil spills from a pipeline failure. As stated in Chapter 10 (page 10-1), "*Although the probability of a large or catastrophic oil release at any specific location is extremely low, the probability of a*

release of some type along the entire pipeline during its lifetime is not low" and "*However, it is impossible to predict where a spill would happen, the quantity of oil involved, how far the impacts would extend, or exactly what resources would be affected.*" This gives little reason to doubt that a spill from the pipeline, of some size, is probable and the resulting impacts to resources could be major.

2477-13

Impacts and Environmental Justice

The preferred route crosses surface waters with wild rice and other sensitive aquatic species, wetlands, forest lands and areas of high biological diversity in Minnesota and the 1854 Ceded Territory. As noted in the DEIS, there will be impacts to these resources from construction and operation, which will be cumulative with the Existing Line 3 abandonment. The additional impact from a spill is an even bigger concern given that some of the most sensitive resources and resource rich areas are remote, including tribal lands and treaty resources. On page 10-102, the DEIS notes that emergency response time is typically faster in populated areas than in more remote areas. Also, emergency response equipment is only kept in a few locations, mostly in populated areas (page 10-99). This would suggest that tribal lands and treaty resources are at a higher risk from a spill since they are typically located in more remote areas and will be disproportionately affected. The disproportionate impact to the Bois Forte and Grand Portage bands in the 1854 Ceded Territory and other tribes from a pipeline spill is a major concern for us and an environmental justice issue, as pointed out in Chapter 11. Mitigation for impacts to treaty resources, whether it be on reservation or in ceded territories, will be difficult and unlikely to be adequate. As stated on page 11-13, "*The combination of tribal identity and relationship to the land and the rights tribal members have in the ceded territories complicates the traditional notion of mitigation. The ceded territories and the rights that go with them are not mobile and cannot be transferred. Tribal impacts are magnified because there would be impacts associated with abandonment and removal of the existing Line 3 and there would be additional impacts associated with the replacement of Line 3 in a new location.*"

Abandonment of Existing Line 3

Risks

2477-14

The Existing Line 3 pipeline crosses a portion of the 1854 Ceded Territory as well as the Fond du Lac Band of Lake Superior Chippewa Reservation. We are concerned about impacts to treaty rights and resources that will occur by abandoning the Existing Line 3 pipeline. As noted in Chapter 8 (page 8-1) there is potential environmental risks and impacts of any existing contamination surrounding the pipe that may never be detected and remediated if the line was abandoned and potential environmental risks and impacts associated with ongoing deterioration of the abandoned pipeline. There is also note of potential risks associated with removing Line 3 such as removal activities could damage an active pipeline located on either side of the existing Line 3 and impacts associated with disturbances at waterbody and roadway crossings. Although removal of Line 3 is presented as an option, it seems to be precluded in the DEIS due to cost.

2477-15

Permanent Impact

On page 8-3 of the DIES, it is noted that Enbridge would maintain the Line 3 right-of-way indefinitely if abandoned, which would mean that resources lost in the right-of-way will be lost indefinitely along with any potential remediation of the right-of-way. Any fragmentation of large

blocks of forest and/or wetlands will remain indefinitely as well. We consider this a permanent loss of treaty resources and it would be cumulative with the proposed route. As noted on page 8-9, capped segments of Line 3, in wetlands and water crossings in particular, have the potential to become exposed when the water table is high and will have an increased potential of exposing contaminants in those areas. This would be an additional concern for wetland and aquatic resources, especially when in proximity to wild rice. 2477-15 Cont'd 2477-16

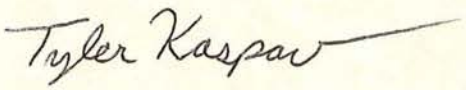
Cumulative Effects

Adequacy 2477-17

The cumulative effects analysis presented in the DEIS seems inadequate. It does not include past, present or future impacts from other projects along each proposed route and the added impact from the proposed project route(s) in any quantifiable way (e.g. total acres of forest and/or wetlands impacted along each potential route from other projects and the cumulative effect from the pipeline). For cumulative effects from past and present projects, there is only reference to Chapters 5 and 6 from the DEIS. Cumulative effects from future or reasonably foreseeable projects is only described generally in the DEIS (e.g. no estimates of cumulative acres, miles, waters that would be impacted in addition to the proposed project) with only reference given to environmental review documents for those projects. We suggest inclusion of more specific information so cumulative effects from past, present, and future projects and the proposed pipeline route(s) can be better understood and inform the public and permitting. 2477-18 There also appears to be a bias to downplay impacts with using the words "minimal" and "minimized" to describe cumulative effects. This could be remedied by providing actual acres, stream miles, etc. versus a general description. Also, as was laid out in Chapters 9 and 11 in the DEIS, any of 2477-19 the proposed pipeline routes will impact treaty rights and related resources for tribes and will be a cumulative, permanent impact. The proposed route would cross the 1854 Ceded Territory and would permanently impact treaty resources. The impact would be in addition to the impact of the existing Line 3 pipeline (past, present) and whether it is removed or left in place (future).

Thank you for the consideration of our comments.

Sincerely,



Tyler Kaspar
Environmental Biologist

Levi, Andrew (COMM)

From: Frank Bibeau <frankbibeau@gmail.com>
Sent: Monday, July 10, 2017 8:17 PM
To: MacAlister, Jamie (COMM)
Cc: MN_COMM_Pipeline Comments
Subject: 1855 Treaty Authority Comments on Line 3 DEIS
Attachments: Enbridge CEO says Canada only needs 2 more export pipelines Reuters 2-17-2017.pdf; Enbridge tax lawsuit exceed entire budget Mn counties 3-27-2017.pdf; Gov Dayton Scraps Mtg w Mille Lacs Businesses after Protest WDIO TV 7-7-17.pdf; USACE Issue Paper re Trust Responsibilities 9-29-1997 Crandon Mine EIS.pdf; 1855 Treaty Authority Comments on Line 3 DEIS 7-10-2017.pdf

Please find comments and attachments

Thank you,

Frank Bibeau

PO Box 418
White Earth, MN 56591

1855 TREATY AUTHORITY

East Lake ♦ Leech Lake ♦ Mille Lacs ♦ Sandy Lake ♦ White Earth

July 10, 2017

Submitted via email only
pipeline.comments@state.mn.us

Jamie MacAlister
Jamie.MacAlister@state.mn.us
Environmental Review Manager
MN Department of Commerce
85 Seventh Place East, Suite 280
Saint Paul, Minnesota 55101

Re: Draft EIS Comments for
Enbridge Line 3 Replacement

To whom it may concern;

The DEIS undercuts, understates, and fails to recognize some if not all of the Chippewa's treaties and rights to intentionally ignore and override the rights of tribal members and tribes. The Appendix has a variety of submitted documents attached[1] in an obvious effort ***to appear*** to be fair, informed or balanced. Yet, not all of the documents referenced are actually attached. Moreover, review of the important information shared in the documents is ignored to avoid the DEIS stated *guiding principles* of ***Intentionality to accurately reflect the information gathered***.

9.3.6 Guiding Principles
The preparation of this chapter is guided by the following principles:

[1] See Appendix, Chapter 9 - Tribal Resources and Impact, IV. II. *Oral and Written Testimony*, iii. Honor the Earth Filings and Impact Discussion and *Tribal Resolutions and Formal Reponses to Line 3*, xii. 1855 Treaty Authority Letter Filed (without attachments).

- Recognition of the privilege and importance of the information shared and presented;
- Respect for, and protection of, the rights, interests, and sensitivities of sovereign tribal governments in Minnesota;
- Accountability through face-to-face interviews and opportunity for review and feedback; and
- Intentionality to accurately reflect the information gathered.

2478-1

In reviewing a few named documents in the Appendix and my own submissions identified in the Appendix, it is readily apparent that some important attachments and enclosures are systematically omitted by name and/or not attached to the submitted documents referencing the attachment. As such the Guiding Principles failed on multiple levels.

Case in point is that the United States of America, as the other party to the treaties with the Chippewa, already understands in its 1997 U.S. Army Corps of Engineer's *Issue Paper and District Recommendation, The Agency's Trust Responsibilities Toward Indian Tribes in the Regulatory Permitting Process*. **This document is included by not identified, in the Appendix at Vol. 2, p. 184.** While the legal principles and concepts are 20 years old and predate the 1999 Supreme Court Mille Lacs decision, and need updating, there is no attempt to properly consider the rights of the Chippewa, and are in essence dismissed by DEIS rhetorical statements.

9.7 SUMMARY

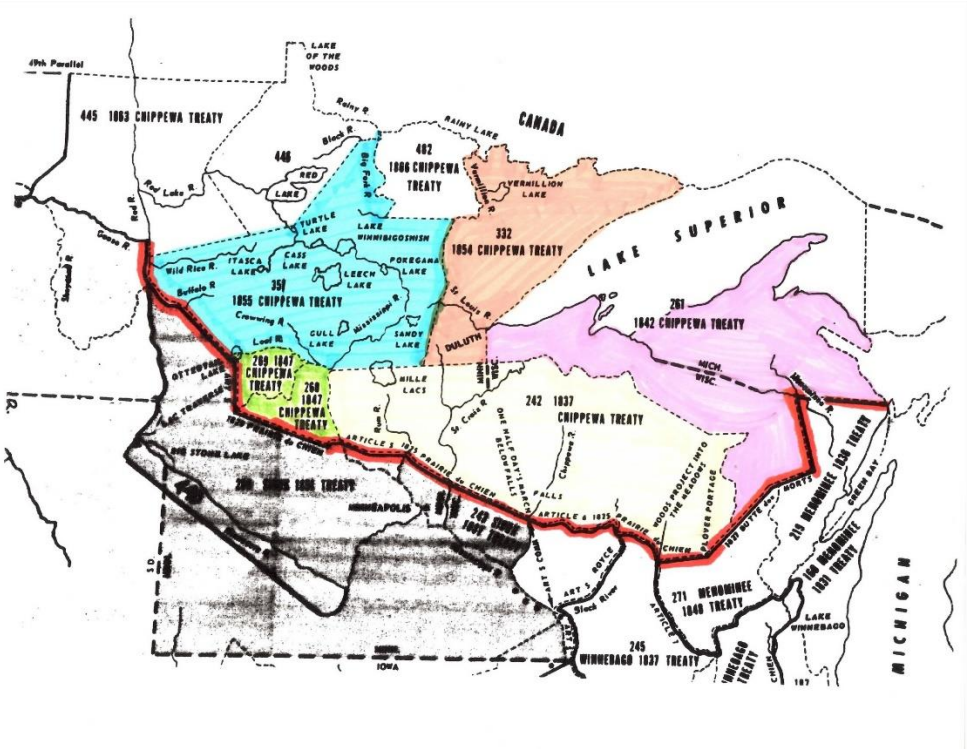
This chapter provides an American Indian perspective on the construction and operation of a new pipeline. From this perspective, any route, route segment, or system alternative would have a long-term detrimental effect on tribal members and tribal resources. The impacts cannot be categorized by duration (short term or permanent) or by extent (region of interest, construction work area, permanent right-of way). It is also not possible to determine which alternative is better when each alternative affects tribal resources, tribal identity, and tribal health.

The *no-build* or *do nothing* alternative is not even given lip service here?

The fact of the matter is Treaties are to be construed in light most favorable to the non-drafting, Indians. Interpreting treaty rights starts with an understanding of what the Indians understood at the time of the signing of the treaties. (Mn v MLB 1999). The Chippewa have 44 treaties with the United States going back to 1795, with 12 treaties affecting lands in Minnesota.

The Treaty of Prairie du Chien[2] of 1825 was the first Chippewa treaty to deal directly with land in Minnesota. The treaty created an east west boundary to separate the Chippewa to the north and the Sioux and other tribes to the south and it was

> understood by all the tribes, parties hereto, that no tribe shall hunt within the acknowledged limits of any other without their assent . . . the Chiefs of all the tribes have expressed a determination, cheerfully to allow a reciprocal *right of hunting on the lands of one another, permission being first asked and obtained*, as before provided for.[3]



Here the red line is the 1825 *Prairie du Chien boundary* between the Chippewa and Sioux. 1855 is blue, 1854 is brown, 1842 is purple and 1837 is yellow. All before Minnesota statehood. Due to

> [t]he Chippewa tribe being dispersed over a great extent of country, and the Chiefs of that tribe having requested, that such portion of them as may be thought proper, by the Government of the United States, may be assembled in 1826, upon some part of Lake Superior, that the objects and advantages of this treaty may be fully explained to them, so that the stipulations thereof may be

[2] TREATY WITH THE SIOUX, *CHIPPEWA*, ETC., August 19, 1825, Proclamation. Feb. 6, 1826., 7 Stat., 272. *Treaty with the Sioux and Chippewa, Sacs and Fox, Menominie, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa, Potawattomie, Tribes.*

[3] Id. Article 13. (Emphasis added).

> observed by the warriors. The Commissioners of the United States assent thereto, and it is therefore agreed that a council shall accordingly be held for these purposes.[4]

The 1826 Treaty, a conformation treaty for the 1825 Treaty, was conducted at Fond du Lac of the Michigan Territory, now Gary New Duluth, Minnesota, explains that the 1825 "grant [from the Chippewa] ***is not to affect the title of the land, nor the existing jurisdiction over it.***[5] Contrary to the weak descriptions in DEIS Chapter 9 about *Tribal Issues*, all of the Chippewa lands in Minnesota were federally recognized and treaty protected by constitutional due process, before land cessions were made. 2478-2

Furthermore, usufructuary property rights are individual, and operate as an affirmative defense[6] to attempts by the state to regulate Treaty-protected hunting, fishing and gathering. Pursuant to the *1842 Treaty with the Chippewa* "all the unceded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands, shall be the common property and home of all the Indians, party to this treaty."[7]

To provide further clarity, Art. 5 provides that "[w]hereas the whole country between Lake Superior and the Mississippi, has always been understood as belonging in common to the Chippewas, party to this treaty;" (referring to the 1825 treaty boundary and lands within, in what was then the Michigan Territory). As such, ***Chippewa of the Mississippi*** are parties to the 1825, 1826, 1837, 1842, 1847, 1854, 1855, 1863, 1864 and 1867 treaties.

It is intellectual dishonesty to tell a generalized story of aboriginal or Indian title and claimed rights. This DEIS tribal rights analysis is the opposite of [mis] *Guiding Principles*. There is a general failure to understand what *Indian Country* is, which is different than Indian Reservations, and, which tribal rights are individually held property rights and which are held in common, and if needed, subject to regulation by the tribe.

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[4] Id. Art. 12.

[5] 1826 TREATY WITH THE CHIPPEWA, Aug. 5, 1826., Stat. 7,290, Proclamation, Feb. 7, 1827, Art. 3. Signed at *Fond du Lac* Michigan Territory, presently Duluth, Minnesota. (Emphasis added).

[6] See U.S. v. Brown, 777 F.3d 1025 (8th Cir. 2015). (It is well settled, however, that an individual Indian may assert usufructuary rights in a criminal prosecution. For example, the Supreme Court stated in United States v. Dion that hunting and fishing "treaty rights can be asserted by Dion as an individual member of the Tribe." 476 U.S. at 738 n. 4, 106 S.Ct. 2216. Evaluating usufructuary rights in United States v. Winans, the Court explained that while "the negotiations were with the tribe," treaties "reserved rights, however, to every individual Indian, as though named therein." 198 U.S. at 381, 25 S.Ct. 662.

[7] See 1842 Treaty with the Chippewa, Art. 3.

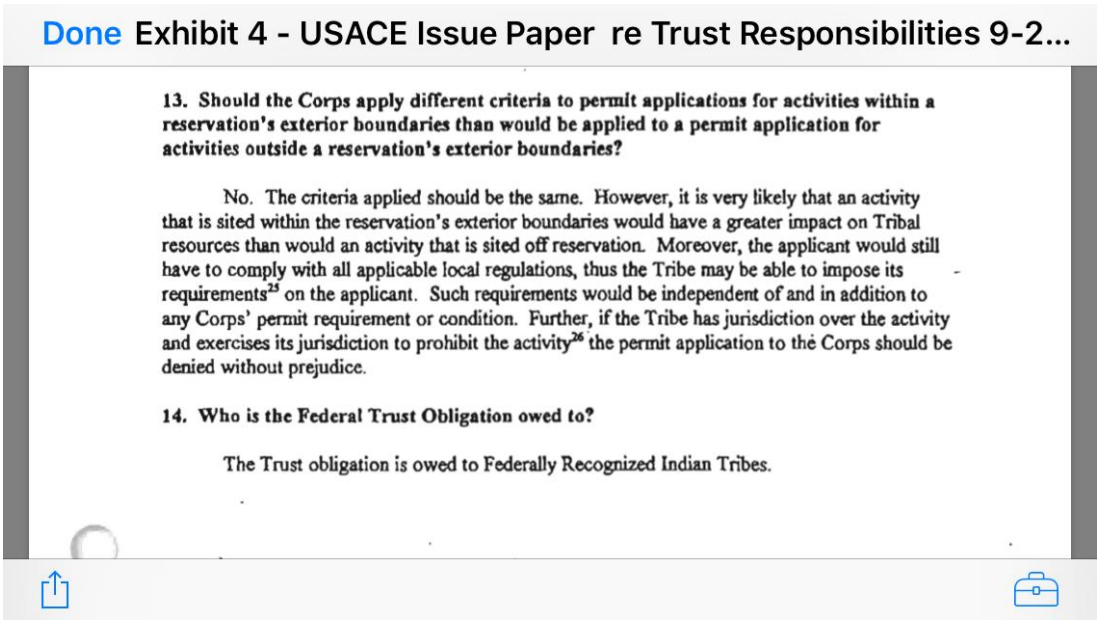
2478-2
Cont'd

As note by the Eighth Circuit in Brown,

> both the Chippewa and the representatives of the United States understood the Treaty to reserve to the Chippewa a broad right to fish as they had been accustomed – without restriction. Notably, the Leech Lake Chief stated that the Chippewa wished to reserve the privilege of "getting their living from the lakes and rivers as they have heretofore done." *Id.* at 428. This is most reasonably understood to encompass the sale of fish, as to make a 'living' off of the lakes, Indians may have needed to sell or trade the yield. As the court held in *Bresette*, "the Chippewa were part of the national and international market economy at the time of the treaties." 761 F. Supp. at 662 (citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1424 (W.D. Wis. 1987) (the Chippewa "harvested resources for their own immediate, personal use and for use as trade goods in commerce")). The court in *Bresette* found that the Chippewa's right to hunt and gather the feathers from birds encompassed a right to sell the feathers, finding that there was "ample evidence that the Chippewa understood that their hunting and gathering rights . . . encompassed the sale of their catch." *Id.* at 662, 664-65 (treaty right precluded prosecution for sale of feathers under the Migratory Bird Treaty Act).

Ultimately, the courts have held that the Chippewa's individual usufructuary rights to hunt, fish and gather are part of a right to earn a modest living, are protected by federal statutes and can only be modified or impinged upon by congress. These are important, constitutionally protected, long-term food, health, and economic rights meant to sustain the Chippewa in perpetuity. These right are meant to be accomplished by using natural resources on and off reservation. See Question 13 and Answer from 1997 Issue Paper below, and Appendix P for Ch. 9, Vol. 2, at page 184.

2478-2
Cont'd



2478-3

The Environmental Justice, Summary and Mitigation sections begins with some candor in recognizing that

> Disproportionate and adverse impacts would occur to American Indian populations in the vicinity of the proposed Project. RA-06, RA-07, and RA-08 would have direct impacts on reservation lands (Leech Lake and Fond du Lac). Based on the discussion of tribal resources in Chapter 9, any of the routes, route segments, and system alternatives would have a long-term detrimental effect on tribal members as a result of crossing treaty lands. As summarized in Chapter 9, from a tribal perspective, the impacts cannot be categorized by duration (short term or permanent) or by extent (ROI, construction work area, permanent right-of-way). It is also not possible to determine which route alternative is better from an EJ perspective when each alternative affects tribal resources, tribal identity, and tribal health. Any of the routes selected would negatively affect tribal resources and tribal members.
>
> The combination of tribal identity and relationship to the land and the rights tribal members have in the ceded territories complicates the traditional notion of mitigation. The ceded territories and the rights that go with them are not mobile and cannot be transferred. Tribal impacts are magnified because there would be impacts associated with abandonment and removal of the existing Line 3 and there would be additional impacts associated with the replacement of Line 3 in a new location.

But,

> A finding of "disproportionate and adverse impacts" does not preclude selection

2478-3
Cont'd

> of any given alternative. This finding does, however, require detailed efforts to avoid, mitigate, minimize, rectify, reduce, or eliminate the impact associated with the construction of the Project or any alternatives.

It is apparent that the Enbridge sponsored, DOC DEIS "disproportionate and adverse impacts" does not . . . require detailed efforts to avoid, mitigate, minimize, rectify, reduce, or eliminate the impact associated with the construction of the Project or any alternatives, on tribal rights and the necessary associated Rights of Nature to clean and healthy environment in which to live, with natural resources of clear air, clean water and healthy ecosystem from which to hunt, fish and gather to earn a modest living. *Environmental Justice*[8] is a mitigated misnomer.

The Raven sayeth Nevermore after visits by Ghosts of DEIS

While there is a section explaining that *Cumulative Potential Effects*[9]

> result when impacts associated with the proposed Line 3 Replacement Project (Project) are combined with impacts associated with past, present, or reasonably foreseeable future actions within the area affected by the proposed Project. Analysis of cumulative potential effects accounts for the possibility that, added together, the minor impacts of many separate actions could be significant. This cumulative potential effects analysis considers resources that are expected to be affected by the proposed Project or its alternatives and assesses past, present, and reasonably foreseeable future actions to identify any geographic or temporal overlap in impacts on these resources.
>
> **This Section Considers Direct and Indirect Effects of Greenhouse Gases on the Environment in Minnesota**
>
> Instead, this section considers that collectively the proposed Project and other reasonably foreseeable actions across the world would contribute to global climate change. This section describes the cumulative potential climate change effects of greenhouse gas emissions on the environment in Minnesota and identifies resources that could experience cumulative impacts due to both the

[8] Chapter 11 *Environmental Justice*, 11.1 INTRODUCTION, "Environmental justice (EJ) refers to the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income. In general, EJ is intended to ensure that all people benefit from equal levels of environmental protection and have the same opportunities to participate in decisions that may affect their environment or health (Minnesota Pollution Control Agency [Minnesota PCA] 2017; U.S. Environmental Protection Agency [EPA] 2017)."

[9] Chapter 12 *Cumulative Potential Effects*, 12.1 PURPOSE AND DESCRIPTION OF CUMULATIVE POTENTIAL EFFECTS ANALYSIS,

effects of climate change as well as the direct and indirect impacts of the proposed Project and its alternatives.

2478-4

Honest environmental review must start at the beginning as *Cumulative Potential Effects* result when impacts associated with the proposed Line 3 Replacement Project (Project) are combined with impacts associated with *past, present, or reasonably foreseeable future actions* affected by the proposed Project.

In the past, when the treaties were made, there was not an understanding by the Chippewa that the environment would be put into permanent peril, jeopardy and certain consequences from greenhouse gases, climate change and water pollution from pipeline construction, extreme extraction of tar sands crude oil and Existing Line 3 pipeline abandonment and/or removal. ***In the past***, the trees had not been clear cut, the rivers had not been diverted, dredged, lock and dammed. Fish, game, waterfowl, wild rice, medicines and plants and the people enjoyed all the gifts of the Creator.

In the present, there are 1000's of impaired water bodies throughout Minnesota affecting aquatic consumption,[10] due to mercury and PCBs and other factors. ***In the present***, Governor Dayton Scraps Meeting With Mille Lacs Businesses after protest[11] because he "was with a small group fishing for bass as an alternative to walleyes on Mille Lacs Saturday when about 75 protesters in boats encircled him to protest a temporary ban on walleye fishing." These were not Tribal Water Protectors, but businesses and resort owners concerned about loss of income related to environmental problems of climate change and water quality. Canaries in the mine giving warning.

In the past, pipelines were viewed as jobs and free revenue sources for counties and businesses. Enbridge has 6 pipelines along the US Highway 2 Mainline corridor. ***In the present***, an Enbridge Tax Lawsuit Could Exceed Entire Budget of Minnesota Counties, A change in property tax evaluation may cost the state tens of millions in returns to the energy company.[12] ***Also in the present***, by letter of June 26, 2017 to Jamie McAlester of DOC, the City of Grand Rapids filed comments and concerns about Line 3 Project Draft EIS and *pipeline abandonment*, city and residents *responsibility for clean-up*, Line 3 runs directly through our Well Head

[10] See https://www.pca.state.mn.us/water/minnesotas-impaired-waters-list

[11] See http://www.wdio.com/Outdoors/governor-dayton-cancels-meeting-businesses-protestors-mille-lacs-lake--/4536954/

[12] See *Enbridge Tax Lawsuit Could Exceed Entire Budget of Minnesota Counties, A change in property tax evaluation may cost the state tens of millions in returns to the energy company*, by Anders Koskinen, March 27, 2017, http://alphanewsmn.com/enbridge-tax-lawsuit-exceed-entire-budget-minnesota-counties/ "It's scary for us," Clearwater County Auditor Allen Paulson told the Star Tribune, "If Enbridge wins the appeal, the [tab for the county] will be $7.2 million, and our levy is $6.8 million." Red Lake County has a population of just over 4,000 people. Last year it had a total levy of $2.6 million. If Enbridge wins their case, the county could owe them $3.5 million.

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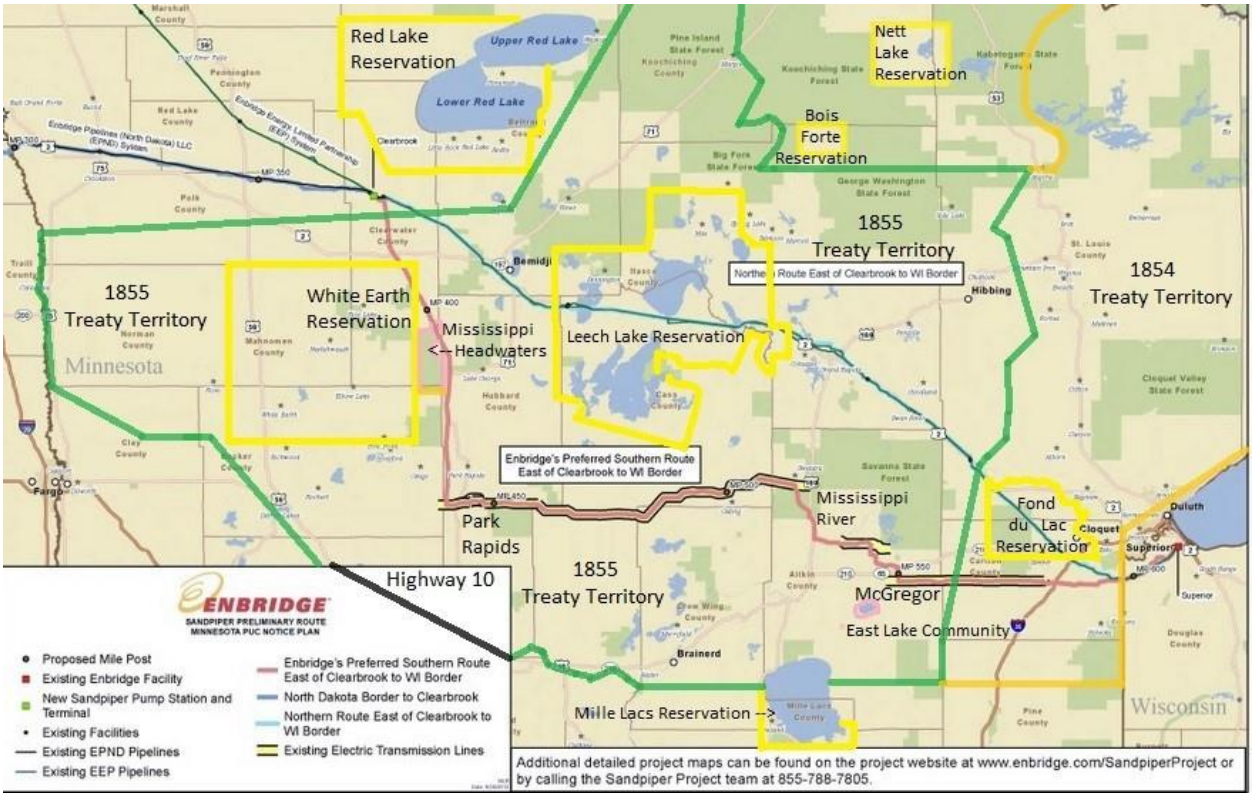
Protection Area (WHPA), which is the *sole source of municipal water* for two cities (Grand Rapids and LaPrairie), requiring total removal of Line 3 and *contaminated soils*.

In the future, Enbridge's other old pipelines along the US Highway 2 Mainline corridor will either need to be replaced or shutdown. Enbridge and the DEIS suggest clean-up and removal of old Line 3 would cost $1.28B or about the cost of the Kalamazoo clean-up, before a spill. Abandonment and a new pipeline corridor through lakes, rivers and wild rice is desired by Enbridge. Enbridge's four old lines might cost over $500 Billion to clean-up and remove, today. Or Enbridge could save $500 billion or more, after having made Trillions of dollars, and never clean up when Enbridge goes broke.

In the present, the Chippewa; Red Lake, White Earth, Leech Lake, Mille Lacs and Fond du Lac reservations have petitioned to intervene is the Line 3 PUC proceedings, to prevent further pipeline development on and off reservations.



In the past, Enbridge asserted Sandpiper was an essential and necessary project and no other alternatives. Enbridge abruptly withdrew its Sandpiper pipeline application for Bakken fracked crude to join up with DAPL. ***In the past***, DAPL had developed a false *Environmental Justice* memo which resulted in Standing Rock's drinking water being targeted, with USACE acquiescence[13]. ***In the past***, after becoming a DAPL partner, violence by DAPL security at the

[13] See *Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline*, DOI Solicitor Hilary C. Tompkins, Opinion Memorandum M-37038, dated Dec, 04, 2016, "Nor did the Corps'

2478-4
Cont'd

Standing Rock Water Protector Camps increased. People came from all over to protect the water. Enbridge was *confident in pipeline project after Dakota Access decision.*[14]

In the past, glaciers formed the Great Lakes and topography of the lands of Minnesota. Northern Minnesota is home to the 3 of the 4 major watersheds of the North American continent. The Chippewa knew how the Red River led to Hudson Bay, the St. Louis River led to Lake Superior and the Atlantic, and the Mississippi led south to Cahokia near the confluence of the Missouri River leading to the Gulf of Mexico.

In the present, Automaker Volvo says all of its cars launched starting in 2019 will be either electric or hybrids. The decision makes Volvo, which is now owned by Chinese company Geely, the first major auto manufacturer to discontinue its production of gas-only vehicles. The company plans to release three new all-electric cars by 2021. "This announcement marks the end of the solely combustion engine-powered car," Volvo Cars CEO Hakan Samuelsson said. "Volvo Cars has stated that it plans to have sold a total of one million electrified cars by 2025. [15]

In the past, the PUC was sued for an EIS in the Sandpiper saga. ***In the future***, the PUC will likely be sued again for basic violations of the DEIS Guiding Principles, Environmental Justice and lack of jurisdiction over civil regulatory actions involving property belonging to Indians and Indian tribes as provided by Congress in 1953, in Public Law 280 section (b)

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of 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; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.[16]

In the future, **present and past** *Enbridge CEO says Canada only needs two more export pipelines*[17] and that CEO Al "Monaco's comments come amid growing speculation that Canada faces pipeline overbuild after years of struggling with limited market

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conclusion take into account the Tribes' full assessment of the risks since at least two of the key analyses, the spill analysis and the Environmental Justice analysis, were considered confidential by the applicant and were never provided to the Tribes for review."

[14] See *Enbridge confident in pipeline project after Dakota Access decision* by John Hageman Fargo Forum News Service, Dec 5, 2016 at http://bismarcktribune.com/bakken/enbridge-confident-in-pipeline-project-after-dakota-access-decision/article_ed44bab3-7019-58dd-9293-31f6ee7bf0bb.html

[15] See http://www.thedailybeast.com/volvo-to-go-all-electric-with-new-models-from-2019

[16] See Public Law 83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360)

[17] See *Enbridge CEO says Canada only needs two more export pipelines* by Nia Williams, CALGARY, ALBERTA Feb. 17, 2017 at http://www.reuters.com/article/us-enbridge-inc-results-idUSKBN15W19I

access."

CONCLUSION

The 50,000 Chippewa tribal members in Minnesota individually hold constitutionally protected, usufructuary rights to hunt, fish and gather as rights to earn a modest living which includes rights to sell commercial harvests, on or off reservation unless, or as, regulated by the tribe. The Minnesota Pollution Control Agency has identified 1000s of impaired water bodies. The DNR recognizes that *Climate change affects lakes, walleye in complex ways*[18] and it affects fish in 5 different ways. Enbridge is suing to recover back taxes paid to 13 northern counties for several tax years. Enbridge has 6 pipelines along the US Highway 2 Mainline corridor, with 3 more as old as Line 3 possibly needing replacement.

In the present, Line 3 Project is a giant, greenhouse gas and climate change contributor, up wind from Minnesota, where tar sands extreme extraction exacerbates climate change, and is presently the primary reality causing Governor Dayton to suspend Walleye catch and release fishing on Mille Lacs. ***In the future*** it will likely be a Cumulative Impact Assessment[19] including real costs of pipeline abandonment ($1.28B for Line 3) and millions in paid taxes takebacks that will show the *no build alternative* is the best Social, Economic and Environmental eco-tourism future for Tribes and Minnesota, ***in the future.***

If you have any questions of need of assistance please call on me at 218-760-1258 or frankbibeau@gmail.com.

Sincerely,

/s/ Frank Bibeau

Frank Bibeau
Executive Director
1855 Treaty Authority

Attachments

[18] See https://www.mprnews.org/story/2015/09/09/walleye-climate-change by Environment Reporter Elizabeth Dunbar, Sep 9, 2015.
[19] See Minnesota Chippewa Tribe Resolution 72-17 for Tribal Cumulative Impact Assessment at Appendix P, Vol. 2, pages 221-222.

Gov. Dayton Scraps Meeting With Mille Lacs Businesses After Protest

00:41
Skate with the Pros

Associated Press
July 08, 2017 11:21 PM

ISLE, Minn. (AP) - Gov. Mark Dayton has canceled a meeting with business owners near Mille Lacs Lake after he was greeted by protesters who oppose how the state manages the lake's struggling walleye population.

The Star Tribune reports Dayton was with a small group fishing for bass as an alternative to walleyes on Mille Lacs Saturday when about 75 protesters in boats encircled him to protest a temporary ban on walleye fishing.

Dayton's spokesman Sam Fettig said the governor was expecting the protest but decided not to go ahead with the meeting because the protesters were shouting, surrounded the boat and made it difficult to fish. The protest changed the atmosphere and Dayton elected to reschedule the meeting to a later day, Fettig said.

Protestors opposing Minnesota's handling of Walle[illegible]

KSTP

Walleye fishing - even catch and release - is prohibited on the big lake for the next three weeks. The DNR is trying to protect the lake's walleyes from hooking mortality, the problem of fish dying after they're released.

Dayton said he respects the protesters' frustration, but he defended the ban as a way of preserving the walleye population.

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Information from: Star Tribune (http://www.startribune.com)

Credits

Associated Press

Updated: July 08, 2017 11:21 PM

Created: July 08, 2017 07:42 PM

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07/10/2017 03:34 PM **Some California Fire Evacuees May Return Monday (/national/wildfires-california-new-mexico/4538235/?cat=10373)**

07/10/2017 02:03 PM **Pete Stauber Announces Run for Congress (/politics/pete-stauber-8th-district-congress-race-election/4538117/?cat=10335)**

07/10/2017 12:37 PM **Forecasters: 2 Tornadoes Touch Down, No Injuries (/weather/two-tornadoes-minnesota-july-9/4538040/?cat=12319)**

07/10/2017 12:10 PM **Attorneys in Slender Man Case Argue for Sequestered Jury (/news/slender-man-trial-morgan-geyser/4538017/?cat=12319)**

SEP 29 1997

Construction-Operations
Regulatory (94-01298-IP-DLB)

Mr. James Schlender
Executive Administrator
Great Lakes Indian Fish & Wildlife Commission
P.O. Box 9
Odanah, Wisconsin 54861

Dear Mr. Schlender:

As a result of issues that have arisen during our evaluation of a permit application by Crandon Mining Company to establish a mining operation near Crandon, Wisconsin, the St. Paul District has been asked by several Native American tribes to address the nature and extent of the Corps trust responsibilities toward Indian tribes in the Corps regulatory permitting process. I have indicated at past consultation meetings that I had requested guidance from Corps Headquarters to address this question.

Enclosed is an issue paper that provides the guidelines that the District will follow to insure that it fulfills its trust obligations. This paper, while very useful for illustrative purposes, may not resolve issues that are specific to any individual treaty or pending permit action.

I propose that we hold a consultation meeting in approximately 60 days. This will provide you time to review the paper and to develop any questions or concerns that you may have regarding these guidelines, as well as to how they will be applied in our review of the Crandon Mining Company permit application. I suggest that the consultation meeting be held in early December in Eau Claire, Wisconsin. Mr. Dave Ballman, of my staff, will coordinate with your staff in scheduling the meeting.

Please contact me at (612) 290-5300 if you have any questions.

Sincerely,

/S/

J. M. Wonsik
Colonel, Corps of Engineers
District Engineer

Identical Letters:

Arlyn Ackley, Sokaogon Chippewa Community
Philip Shopodock, Forest County Potawatomi Community
Apesanahkwat, Menominee Indian Tribe of Wisconsin
James Schlender, Great Lakes Indian Fish & Wildlife Commission

Ballman	CO-R	DB 9/17
Ahlness	CO-R	9/18/97
Hauger	CO-R	
Wopat	CO-R	9/24/97
Haumersen	CO	
Adamski	OC	
Crump	PP-PM	
Breyfogle	DDE	9/29

ISSUE PAPER
AND
DISTRICT RECOMMENDATION

THE AGENCY'S TRUST RESPONSIBILITIES TOWARD INDIAN TRIBES IN THE REGULATORY PERMITTING PROCESS

1. ISSUE. Work activities performed pursuant to permits issued under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act have the potential to impact Indian treaty rights[1] and to impact resources owned or used by Indian Tribes. Because of this, questions have arisen about the Corps' trust obligations to Indian tribes with respect to the Corps' permitting processes. This paper shall attempt to delineate trust issues related to the permitting process and will attempt to set forth guidelines with respect to those issues[2]. A question and answer format will be used to accomplish this purpose.

2. **May the Corps issue a permit that will impinge on or abrogate treaty rights?**

No, treaty rights[3], absent consent of Congress, may not be impinged or abrogated[4]. As the

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[1]The term "treaty rights", as used in this paper, includes not only rights derived from treaties, per se, but also rights derived from federal statutes, agreements executive orders and the like. The terms "Tribal resources" or "Treaty resources", as used in this paper, refers to resources that the Tribe, pursuant to a treaty, has a right to exploit and includes resources that they own and resources that they have a right to gather. The term "trust resources" refers to resources held in trust by the United States (the title is held by the United States) for the benefit of the Tribe.

[2]The paper, other than as may be useful for illustrative purposes, will not attempt to resolve issues that are specific to any individual treaty or pending permit action, but will attempt to formulate guidelines which will insure that the agency fulfils all of its trust obligations.

[3]It should be noted that the terms "treaty rights" and "treaty resources" are not synonymous. For example, a treaty that guarantees a tribe the right to hunt and fish on its reservation, the "treaty right" is the right to take the resource (game or fish), the "treaty resource"

Court held in *Northwest Sea Farms, Inc., v. U.S. Army Corps of Engineers*, 931 F. Supp. 1555 (W.D. Wash. 1996) 1519-1520:

> The Supreme Court has recognized "the undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225, 103 S.Ct. 2961, 2972, 77 L.Ed.2d 580 (1983). This obligation has been interpreted to impose a fiduciary duty owed in conducting "any Federal Government action"[5] which relates to Indian Tribes. *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir.), *cert. Denied*, 454 U.S. 1081, 102 S.Ct. 635, 70 L.Ed.2d 615 (1981), ... In previous cases, this Court has tacitly recognized that the duty extends to the Corps in the exercise of its permit decisions. *See e.g. Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1523 (W.D.Wash.1988) (granting an injunction against the construction of a marina in consideration of the effect upon Indian treaty rights).
>
> In carrying out its fiduciary duty, it is the government's and subsequently the Corps', responsibility to ensure that Indian treaty rights are given full effect. *See e.g. Seminole Nation v. United States*, 316 U.S. 286, 296-297, 62 S. Ct. 1049, 1054-55, 86 L.Ed. 1480, 86 L.Ed.1777 (1942) (finding that the United States owes the highest fiduciary duty to protect Indian contract rights as embodied by treaties). Indeed, it is well established that only Congress has the authority to modify or abrogate the terms of Indian treaties. *United States v. Eberhardt*, 789 F.2d 1354, 1361 (9th Cir.1986). As such, the Court concludes that the Corps owes a fiduciary duty to ensure that the Lummi Nation's treaty rights are not abrogated or impinged upon absent an act of Congress.

3. How are treaty rights determined?

Treaty rights are determined on a case by case (treaty by treaty) basis. Each individual treaty or series of treaties must be examined to determine the specific rights provided by those treaties.

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is the game or fish. Although courts have, almost universally held that treaty rights may not be impinged, they have not held that the resource may not be negatively impacted. See also question 6.

[4]Note, however, that the same Court that decided *Northwest Sea Farms, Inc.* issued an order in *Lummi Indian Nation v. Cunningham*, case No. C92-1023C on September 1, 1992, to the effect that before a claim that treaty rights have been impinged or abrogated is cognizable "the interference with the treaty right must reach a level of legal significance".

[5]A permit is a Federal Government action"

4. How are Indian treaties to be interpreted?

There are three basic rules of treaty construction. They are: (1) Ambiguities in treaties must be resolved in favor of the Indians, (2) Indian treaties must be interpreted as the Indians would have understood them at the time they consented to the treaty, and (3) Indian treaties must be construed liberally in favor of the Indians. This does not mean, however, that the treaties are to be construed in any manner that the Indians wish them to be construed. The rules of construction do not permit the clear intent of the treaties to be disregarded.

The Court in ***Menominee Indian Tribe of Wisconsin v. Thompson***, 922 F.Supp. 184, (198-199), (W.D. Wis. 1996) described the rules of construction as follows:

> It is well known that Indian treaties must be interpreted as the Indians understood them, that doubtful expressions are to be resolved in favor of the Indians and that treaties must be construed liberally in favor of the signatory tribes. ... treaties are not to be construed by "the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Id.*
>
> Determining the Indians' understanding may require expert testimony to explain the historical and cultural context in which the Indians viewed the treaty provisions. *See, e.g. McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973) ... ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."); *Winters v. United States*, 207 U.S. 564, 576-77, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908) ("ambiguities occurring [in treaties] will be resolved from the standpoint of the Indians").
>
> It is true that "[t]he cannon of construction regarding the resolution of ambiguities ... does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506, 106 S.Ct. 2039, 2044, 90 L.Ed.2d 490 (1986). See also *Amoco Production Co. V. Gambell*, 480 U.S. 531, 555, 107 S.Ct. 1396, 1409, 94 L.Ed.2d 542 (1987) (citing *Catawba Indian Tribe*); *Choctaw Nation*, 318 U.S. at 432, 63 S.Ct. At 678 ("even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties").

Moreover, many of the issues of treaty construction that are likely to arise in the permitting process, have already been determined by the Courts[6]. Thus, the first step in

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[6]Even if the case law is not dispositive of the specific issue, it may provide rationale or additional information which will aid in the decision process. Additionally, it is recommend that Office of Counsel (or similar resource) be consulted before making a determination, in questionable cases, whether a treaty right exists or does not exist and whether the proposed

construing a treaty should be to review any Court decision that may be relevant.

5. How can we determine if treaty rights may be an issue with respect to a specific permit application?

The geographic extent[7] of all treaty rights and Tribal resources should be known to the regulatory staff. If the proposed activity could have any effect within that geographic area the treaties should be reviewed to determine if treaty rights may be affected. A determination should also be made as to whether the proposed activity may affect Tribal resources. Most importantly, the Indian Tribes that may be affected by the permitted activity should be apprised of the permit application and be given the opportunity to comment or consult with the Corps. If any Tribe asserts that the proposed permit activity would impinge on or abrogate its treaty rights or would negatively impact its resources, it should be requested[8] to provide all substantiating information it has available as to: (1) the existence of treaties, (2) claimed treaty rights, (3) any Court cases relevant to the Tribe's assertions, (4) an explanation of how the proposed activity would violate treaty rights, (5) identification of any Tribal resources that may be impacted, (6) an explanation of how the proposed activity would impact Tribal resources, and (7) a description of how the proposed activity would impact the Tribe[9]. BIA should also be informed of any proposed activity (needing a Corps permit) that might impact Tribal resources and should be requested to identify any treaty rights or Tribal resources that may be impacted by the proposed permit.

6. Does the Corps have a trust responsibility to protect Tribal resources from environmental degradation that may result from the proposed permit activity?

The Corps must consider the effect that the activity needing a Corps permit would have on the Tribe's resources, however, the fact that the Tribe's resource may be degraded, or reduced in value or utility, does not necessarily compel denial of the permit. This principle was explained by the Court in *Nez Perce Tribe v Idaho Power Co.*, 847 F.Supp. 791 807-813 (D.Idaho 1994) in a

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permit will or will not violate those rights.

[7]Including the area within the external boundaries of any Indian reservation and the geographic area in which usufructuary rights, if any, may be exercised.

[8]The Tribes are not required to respond.

[9]This request would be made to afford the Tribes every practicable opportunity to present their views. Neither the failure of the Tribes to respond nor a response from the Tribes relieves the Corps of its obligation to consider all impacts the proposed activity would have on any treaty rights or any impacts to Tribal resources that Corps is aware of, or reasonably should have been aware of. See also *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

case concerning permanent usufructuary rights[10], as follows:

> ... In other words, the Tribe argues that developments such as dams which damage, reduce or destroy the fish runs violate their 1855 Stevens treaty fishing rights and entitles them to an award of monetary damages.
>
> b) ***Treaty Rights to Preservation of Fish Runs***
>
> The ultimate issue presented is whether the treaty provides the Tribe with an absolute right to preservation of the fish runs in the condition existing in 1855, free from environmental damage caused by a changing and developing society. Only if such a right exists is the Tribe entitled to an award of monetary damages.
>
> The parties have cited, and the Court's own independent research has disclosed only three cases which directly address this ultimate issue. *United States v. Washington* (hereinafter *"Washington 1982"*), 694 F.2d 1374 (9th Cir. 1982); *Muckleshoot Tribe v Puget Sound Power and Light*, CV No. 472-72C2V (W.D. Wash.1986); and *Nisqually Tribe v. City of Centralia*, No. C75-31 (W.D. Wash.1981). However, *Washington 1982* was vacated by the Ninth Circuit on other grounds in a subsequent en banc decision. *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985). *Muckleshoot Tribe v. Puget Sound* expressly relied on the *Washington 1982* opinion which was not vacated until after the decision in *Muckleshoot* was issued. Therefore, it appears that this Court is required to address and determine an issue of first impression without the benefit of any binding guidance and direction. ...
>
> ... State regulation cannot discriminate against the Indian fishery. *Puyallup II*, 414 U.S. [44] at 48, 94 S.Ct. [330] at 333 [38 L.Ed.2d 254 [(1973)]. This principle is broad enough to encompass discriminatory granting of permits for projects with potentially adverse environmental effects.
>
> *Id.* At 1382.
>
> In addition, the Ninth Circuit rejected the trial court's conclusion that other previous cases implied a general right to environmental protection of the fish: ...
>
> Thus, according to the Ninth Circuit's persuasive reasoning in *Washington 1982*, the states may allow or even authorize development which reduces the number of fish in the annual runs as long as such action does not discriminate against treaty fishermen in determining what development will be authorized. Although the opinion was vacated on other grounds, the Court agrees with the

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[10]The treaty at issue in the case has been interpreted as creating permanent usufructuary rights (non-exclusive) to fish in all of the Tribes usual and customary places. Not all usufructuary rights are permanent as some are subject to termination upon the occurrence of a defined event. For example, Chippewa usufructary rights with respect to territory ceded by them to the United States are terminated or extinguished whenever the land is owned by private entities rather than the public. The (trust) duty to mitigate for damage to resources that may be harvestable pursuant to permanent usufructuary rights discussed by the Court in *Nez Perce* may not be applicable to usufructuary rights that can be terminated or extinguished in their entirety.

legal analysis in *Washington 1982*. In the Court's view, the Stevens treaties do not protect the Indians from degradation of the fish runs caused by development which is not part of a pattern of discrimination against Indian treaty fish runs.

... In the Court's view, the 1855 treaty does not provide a guarantee that there will be no decline in the amount of fish available to take. The only method that would guarantee such protection would be to prevent all types of development, whether or not it is discrimatory of Indian treaty rights. The Stevens treaties simply do not provide the Tribe with such assurance or protection.

... Stevens treaties require that any development authorized by the states which injure the fish runs be non-discrimatory in nature *see Fishing vessel*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 but does not, however, guarantee that subsequent development will not diminish or eventually, and unfortunately, destroy the fish runs.

7. Does the Corps trust responsibility to Indian tribes require mitigation for impacts to off reservation resources that the Tribes have a right to harvest (usufructuary rights)?

The answer to this question depends on the nature of the usufructuary rights reserved or held by the Tribes. All usufructuary rights are not alike. For example, courts have held that a number of Tribes in the Pacific Northwest have usufructuary rights that are permanent in nature and are not subject to termination[11]. Those rights were held to have both a geographic component[12] and a component that entitled the Tribes to take a share of the available fish. Those courts have also held that while the Tribes were not entitled to be protected against off reservation activity that would result in a reduction of available fish, they were entitled to reasonable steps to mitigate adverse impacts from the activity.[13] The theoretical basis for the holding that reasonable mitigation is required was explained in *United States v. State of Washington*, 506 F.Supp. 187, 203 (1980)[14] as follows:

> At the outset the Court holds that implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made

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[11]Other than by an Act of Congress.

[12]The right to fish forever in certain locations defined in the Treaty.

[13]"We do not find such an obligation in the treaty. Where the decision to allow development is not tinged with any discrimatory animus, the treaty fishing clause, as we read it, does not require compensation of the Indians on a make whole basis if reasonable steps, in view of the available resources and technology, are incapable of avoiding a reduction in the amount of available fish." *U.S. v. State of Washington*, 694 F.2d 1374, 1386 (1983)

[14]The Court's decision was vacated by the Ninth Circuit on other grounds in "*U.S. v. State of Washington*, 694 F.2d 1374. See also question 6.

> despoilation. Virtually every case construing this fishing clause has recognized it to be the cornerstone of the treaties and has emphasized its overriding importance to the tribes. ... The Indians understood, and were led by Governor Stevens to believe, that the treaties entitled them to continue fishing in perpetuity and that the settlers would not qualify, restrict, or interfere with their right to take fish. ...

In contrast to the Pacific Northwest cases, the Chippewa in Wisconsin and Minnesota have been found to have usufructuary rights to hunt, fish and gather that are extinguished upon the land passing to private ownership[15]. Thus the underlying rationale in the Pacific Northwest cases - perpetual usufructuary rights - for requiring mitigation, as a trust responsibility, is not present with respect to the Chippewa's usufructuary rights. Moreover, a determination that the United States' trust obligations would require it to ensure that mitigation would be performed would be logically inconsistent with case law which has held that the usufructuary rights were extinguished when the land over which they originally could have been exercised passed to private ownership. Under the relevant case law no compensation would be due the Tribes, even if all of the land passed to private ownership, as it was understood that usufructuary rights "were subject to and limited by the demands of the settlers." ***Lac Courte Oreilles Band v. State of Wisconsin***, 760 F.2d 177, 183 (1985)

Therefore, the specific usufructuary right in question should be examined to determine if mitigation would be required as a trust obligation. However, even if it is determined that mitigation would be required, it is not unlikely that mitigation that is or would be required in conjunction with the permit, even absent a trust responsibility,[16] would be sufficient to satisfy any Government trust obligation to mitigate.[17]

8. Does the Corps trust responsibility to Indian Tribes require mitigation for adverse impacts to Tribal resources on reservations?

Each treaty at issue must be reviewed to determine what is or is not required under that treaty. Under the rationale of the Pacific Northwest cases it would appear that mitigation, to the extent reasonable and practicable is owed. However, those cases do not indicate that there is an environmental servitude owed the Tribes such that mitigation must ensure that there is no net adverse effect resulting from the federal action. In fact, the Court in ***United States v. State of***

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[15] *Lac Courte Oreilles Band, Etc. v Voigt*, 700 F.2d 341 (1983) and *Lac Courte Oreilles Band v. State of Wisconsin*, 760 F.2d 177.

[16] Mitigation that would be required of the applicant even if there were no usufructuary rights or trust obligation to mitigate.

[17] See *Pyramid Lake Paiute Tribe v. U.S. Department of Navy*, 898 F.2d 1410 (9th Cir. 1990); *Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990); and *Nance v. Environmental Protection Agency*, 645 F.2d 701 (1981)

Washington, 694 F.2d 1374 (1982) has indicated that a resource may be rendered valueless without abrogation of treaty rights or trust responsibilities[18]. As stated by that Court at page 1381 "Any right may be subject to contingencies which would render it valueless." and at page 1382:

> The spectre the district court raises of tribal fishermen unprotected by the environmental right dipping their nets into the water and bringing them out empty, 506 F.Supp. at 203, cannot alter the scope of *Fishing Vessel*. Only the extension of the servitude to ban even non-discriminatory development occurring both within and without treaty fishing areas assure against any decline in the amount of fish taken. The treaty does not grant such assurance.

It is also not unlikely that any trust obligation owed to require mitigation would be satisfied by mitigation that would be required in conjunction with the 404 permit process, absent a trust obligation.

Accordingly, mitigation, to the extent it is reasonable and practicable, for impacts to Tribal resources sited on reservations should be required.

9. May an activity whose impact to a reservation's resources be such that it would defeat the purpose for which the reservation was established be permitted?

Before one can begin to address this question, in practice, the terms of the treaty in question must be examined to determine if the Treaty specifically contemplates the activity to be permitted and if that activity, under the terms of the treaty takes precedence over or is subservient to the interests of the Tribe[19] Assuming the treaty is not dispositive, the following is applicable.

I am not aware of a line of cases directly addressing this issue; however, *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (1973) gives us guidance as to how one court decided the issue and may be illustrative of how such issues would be decided in the future. The case concerned the Department of Interior's regulation, which the Tribe contended delivered "more water to the District than required by applicable court decrees and statutes, and improperly diverts water that otherwise would flow into nearby Pyramid Lake located on the Tribe's

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[18]This discussion is not applicable to impacts which would defeat the purpose for which the reservation was established.

[19]See *Sokaogon Chippewa Community v. Exxon Corp.*, 805 F.Supp. 680, 706 (E.D.Wis, 1992) "If the Sokoagon were to prevent Exxon from mining on the subject territory, it would be in contravention of the very considerations prompting the two treaties. Even assuming that the Sokaogon have rights in the land, the language and intent of the 1842 and 1854 Treaties demand that mineral development should take precedence over those rights.

reservation." Although the Court could have analyzed the case under the Winters doctrine[20] It chose not to do so. The Court noted, at pages 254-255, that:

> This Lake has been the Tribe's principal source of livelihood. Members of the Tribe have always lived on its shore and have fished its waters for food. ...
>
> Recently, the United States, by original petition in the Supreme Court of the United States, filed September, 1972 claims the right to use sufficient water of the Truckee River for the benefit of the Tribe to fulfill the purposes for which the Indian Reservation was created, "including the maintenance and preservation of Pyramid Lake and the maintenance of the lower reaches of the Truckee as a natural spawning ground for fish and other purposes beneficial to and satisfying the needs of the Tribe. ...

The Court then determined (page 256) that:

> ... The Secretary's duty was not to determine a basis for allocating water between the District and the Tribe in a manner that hopefully everyone could live with for the year ahead. This suit was pending and the Tribe had asserted well-founded rights. The burden rested on the Secretary to justify any diversion of water from the Tribe with precision. It was not his function to attempt an accommodation.
>
> In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power that, that all water not obligated by court decree or contract with the District goes to Pyramid Lake.

Accordingly, should the Corps determine that an activity needing a Corps permit would impact the reservation's resources to an extent that they would defeat the purpose for which the reservation was established the permit should be denied.[21]

10. What is the Winter's doctrine and is it applicable to permit decisions?

Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition, pages 575 to 576 offers a good explanation of the doctrine:

> The Supreme Court first articulated this doctrine in *Winters v. United States* in 1908 and reaffirmed it in 1963 in *Arizona v. California. Cappaert v.*

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[20] *Winters v. United States, 207 US 564, (1908)*

[21] It is likely that if the impacts were so great as to defeat the purpose of the reservation that, even without considering the Corps' trust obligations, the permit would be denied as not being in the public interest. (A permit whose impact would deprive any community of the ability to maintain a moderate living standard is not likely to be in the public interest.)

United States contains the Court's most succinct and lucid statement of the governing principles of reserved water rights:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of reservation and is superior to the rights of future appropriators. ... The doctrine applies to Indian reservations and other Federal enclaves, encompassing water rights in navigable and nonnavigable streams.
>
> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purpose for which the reservation was created.

This doctrine arose and has been applied extensively in appropriative water law states (generally western states that have limited supplies of water). The doctrine has not been applied to riparian water law states and may not be applicable to them.

11. When, in the permitting process sequence, should the Corps trust obligations be considered?

Since the Tribal trust issues, alone, may be determinative[22] of the outcome of the permit decision, those issues should be considered immediately after or in conjunction with consideration of the avoidance issue.

12. If the Tribal trust issues are not dispositive of the permitting decision, do we need to consider the Tribe's concerns further?

Yes. The Tribal concerns and the impacts of the proposed activity on Tribal resources should be considered in the public interest review just as any other similarly sized community would be. Such consideration should not be evaluated based on Tribal trust responsibility considerations[23] but should take into account the relative impact the proposed activity would have

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[22]For example, if the permitted activity would violate a treaty provision, the permit application would be denied.

[23]These considerations should have been addressed previously.

on the community[24]. The same impact to natural resources may have a greater effect on individual Indians than it would on non-Indians, not only because of greater dependence on those resources, but also because the individual Indian may be more closely tied to the defined land area than his non-Indian counterpart. Additionally, any spiritual or cultural impact to the Tribe that would result from the proposed permit activity should be evaluated in the public interest review.

13. Should the Corps apply different criteria to permit applications for activities within a reservation's exterior boundaries than would be applied to a permit application for activities outside a reservation's exterior boundaries?

No. The criteria applied should be the same. However, it is very likely that an activity that is sited within the reservation's exterior boundaries would have a greater impact on Tribal resources than would an activity that is sited off reservation. Moreover, the applicant would still have to comply with all applicable local regulations, thus the Tribe may be able to impose its requirements[25] on the applicant. Such requirements would be independent of and in addition to any Corps' permit requirement or condition. Further, if the Tribe has jurisdiction over the activity and exercises its jurisdiction to prohibit the activity[26] the permit application to the Corps should be denied without prejudice.

14. Who is the Federal Trust Obligation owed to?

The Trust obligation is owed to Federally Recognized Indian Tribes.

_____

Edwin C. Bankston
District Counsel

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[24]For example, an activity that would diminish the supply of game may affect Indian communities to a greater degree than non-Indian communities, because the Indian community may be more dependent on game than the non-Indian community. This greater importance to the Indian community should be factored into the evaluation.

[25]Including preventing the activity if the Tribe has sufficient authority to do so.

[26]Such as denying a required Tribal permit.

Fri Feb 17, 2017 | 5:17pm EST

Enbridge CEO says Canada only needs two more export pipelines

FILE PHOTO: A storage tank looms over a freeway at the Enbridge Edmonton terminal in Edmonton August 4, 2012. REUTERS/Dan Riedlhuber/File Photo

Two new crude oil export pipelines will provide enough capacity to ship Canadian production to market until at least the mid 2020s, Enbridge Inc (ENB.TO) Chief Executive Al Monaco said on Friday, making clear his company's Line 3 should be one of them.

Monaco's comments come amid growing speculation that Canada faces pipeline overbuild after years of struggling with limited market access.

The Canadian government approved Enbridge's Line 3 replacement project and Kinder Morgan's (KMI.N) Trans Mountain expansion last November, while U.S. President Donald Trump invited TransCanada (TRP.TO) to reapply for a Keystone XL permit in January. TransCanada is also awaiting permits for its proposed Energy East project.

If all four pipelines get built the 2.1 billion barrel per day surge in capacity would fast outpace industry forecasts of Canadian crude production growth of 850,000 bpd by 2021.

"If you look at the supply profile and you look at our expansion replacement capacity for Line 3 and one other pipeline, that should suffice based on the current supply outlook, out to at least mid-next decade," Monaco said on a fourth quarter earnings call.

Monaco said Enbridge had another 400,000 bpd of potential capacity expansion opportunities in addition to Line 3 but the company would be guided by the amount of supply coming out of western Canada.

Wood Mackenzie analyst Mark Oberstoetter said his firm agreed with Monaco's assessment on the need for new pipelines.

"We definitely need two of these pipelines by around 2025 and after that it depends on the supply outlook," Oberstoetter said. "There's not an evident need to get three or four pipelines built."

Enbridge, Canada's largest pipeline company, also announced a C$1.7 billion ($1.3 billion) investment in a North Sea windfarm.

The 50 percent ownership in EnBW's (EBKG.DE) Hohe See strengthens Enbridge's footprint in Europe's booming offshore wind power industry.

SEE ALSO

Insurance dampens Berkshire results before annual meeting

TransCanada Keystone XL shipper talks complicated, CEO says as profit up

Monaco said there could be more to come given the push towards renewable energy in a number of European countries.

Enbridge reported fourth-quarter profit on Friday that included a C$373 million before-tax impairment charge related to its Northern Gateway pipeline, which the Canadian government blocked last year.

Earnings attributable to the company's shareholders were C$365 million ($279 million), or 39 Canadian cents per share, in the fourth quarter, hurt by charges, including for asset impairment and restructuring.

($1 = 1.3110 Canadian dollars)

(Additional reporting by Arathy S Nair in Bengaluru; Editing by Savio D'Souza, Grant McCool and Bernard Orr)

PICTURES

Photos of the week

Enbridge Tax Lawsuit Could Exceed Entire Budget of Minnesota Counties

A change in property tax evaluation may cost the state tens of millions in returns to the energy company.

By **Anders Koskinen** - March 27, 2017

DULUTH, Minn- An enormous property tax challenge by Enbridge Energy may end up costing several counties in northern Minnesota millions of dollars.

Clearwater and Red Lake counties could end of having to refund more money to Enbridge than they raise in an entire year from all property taxpayers, reports the Star Tribune. Enbridge has appealed five years of taxes claiming the Minnesota Department of Revenue unfairly valued its pipeline network in the state. This overvaluation resulted in much higher property tax payments argues the company.

"It's scary for us," Clearwater County Auditor Allen Paulson told the Star Tribune, "If Enbridge wins the appeal, the [tab for the county] will be $7.2 million, and our levy is $6.8 million."

Thirteen counties in Minnesota contain pipelines owned by Enbridge. The pipelines transport crude oil from North Dakota and Alberta, Canada to a terminal in Superior, Wisconsin.

The effect on counties would spill down to the local government and school district levels as well. These governmental bodies receive portions of tax collections form counties. The drain on county budgets by Enbridge's potential tax returns would likely preclude some payment to the lower levels.

"We have always paid our fair share, and we expect tax increases," Jennifer Smith, an Enbridge spokeswoman in Duluth told the Star Tribune, "These [appeals] are about the amount of the increase," which ended up being 24 percent in 2012 due to a change in valuation methodology by the state."

According to Smith, in 2012 the state changed how it weights certain financial inputs into the property tax assessment equation. Up until then Enbridge's property taxes in Minnesota were in line with other states where the company has pipelines, including Wisconsin, North Dakota, and Michigan. Enbridge has appealed the taxes it has paid from 2012 through 2016

Minnesota Tax Court filings show the Minnesota Department of Revenue's 2015 evaluation of the pipeline system's value was $7.13 billion. Enbridge's evaluation totalled only $4.25 billion according to the Star Tribune.

Red Lake County has a population of just over 4,000 people. Last year it had a total levy of $2.6 million. If Enbridge wins their case, the county could owe them $3.5 million.

Comments

1 comments

Anders Koskinen

Levi, Andrew (COMM)

From: Joe Plummer <Joe.Plummer@whiteearth-nsn.gov>
Sent: Monday, July 10, 2017 1:28 PM
To: MN_COMM_Pipeline Comments
Subject: Line # DEIS Comments
Attachments: Line 3 EIS 7-9-17.pdf

Jamie:

I have attached White Earth's comments to the DEIS.

Joe Plumer
Tribal Attorney
White Earth
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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Application of Enbridge Energy, Limited Partnership for a *Certificate of Need* and *Pipeline Routing Permit* for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border

WHITE EARTH BAND OF OJIBWE'S RESPONSES TO DRAFT ENVIRONMENTAL IMPACT STATEMENT

OAH 65-2500-32764/MPUC PL-9/CN-14-916
OAH 65-2500-33377/MPUC PL-9/PPL-15-137

To: ALJ O'Reilly for MN PUC and OAH, Applicant Enbridge Energy, Limited Partnership and State of Minnesota agencies and other parties.

Introduction

Enbridge's proposed Line 3 Expansion and Abandonment project is of particular interest to the White Earth Nation. As the original people of this land, the people of White Earth strive to uphold the tenets of *Anishinaabemaadiziwin,* which dictates that we have a responsibility to look out for and protect the land, water, air, plants and animals. Enbridge's proposed project threatens our manoomin, disregards our sovereignty and places the burden of risk of any harm from the proposed project on our communities. Our responsibilities as Anishinaabeg people extend beyond our reservation boundaries, beyond the current generations, and includes a responsibility for the entire human family, similar to the fiduciary responsibility that the United States has over Native people. Our treaties with the United States, which are the supreme law of the land pursuant to the United States Constitution, recognize our responsibility to the land, water, air, plants and animals; as well as our responsibility to future generations. And in conformity with our fundamental, wide ranging responsibility we must object to the incompleteness of the Draft Environmental Impact Statement (DEIS) prepared at the direction of the Minnesota Department of Commerce (DOC).

The applicant must demonstrate that the scope of the proposed project is a good investment for future generations, because the future generations are the ones that will be dealing with the long-term impacts of this project. The benefits to the applicant are only one factor that must be considered, and the White Earth Nation submits that the benefits the proposed project would bring to Enbridge are vastly outweighed by the potential harms the project presents, directly and indirectly, for the people and the natural environment it will impact. Even if the applicant attempts to dress up the proposed project as being in the best interest of national security, the true benefits will accrue to only a handful of fossil fuel exploiters. Currently,

Enbridge would like their new energy corridor to run through the heart of the 1855 Treaty area's wild rice beds (a treaty protected resource). The development of this pipeline will directly impact the regional Ojibwe tribal access to this vital resource, and others. The manoomin is the basis of Ojibwe economy, society and religion. Ojibwe people have a responsibility to protect the manoomin and the human and natural environments, and these responsibilities are codified in the Treaties between the Ojibwe people and the United States. The federal government's responsibilities through the Treaties have filtered down to the state government and its agencies, including the Minnesota Public Utilities Commission (PUC) and the Minnesota Department of Commerce. It appears that the Minnesota DOC has recognized its responsibility to meaningfully consult with tribal nations through its outreach to tribes that will be directly impacted by the proposed project in the present EIS process. Whether or not the Minnesota PUC perceives its inclusion in Governor's Dayton's executive order requiring consultation with tribes on a government to government basis, the siting of this proposed pipeline triggers the need for government to government consultations at the federal and state levels. The White Earth Nation and other Ojibwe Tribes will continue to advocate for meaningful consultation at both the federal and state levels.

The principles of Anishinaabemaadiziwin have guided the Anishinaabe people since time immemorial, surrounded the Anishinaabe people with rich natural and cultural resources, empowered the Anishinaabe people to carry out sacred responsibilities to safeguard these natural and cultural resources and have allowed the Anishinaabe people to live in harmony with the environment. Present day Anishinaabeg continue to build upon and pass on traditional ecological knowledge for assessing use of the available air, land and water resources while treating these resources with great respect. The goal of this traditional knowledge is to leave a light footprint on the environment.

Water sustains all life, and the protection of clean water is high on our list of sacred responsibilities as Anishinaabe people. Manoomin, or wild rice, is also sacred to Anishinaabe people. Manoomin has been recognized by the federal government as a trust resource with protections to guarantee its survival. All surface waters and ground waters are inter-connected, and even subtle changes in water quality or levels can profoundly harm the health of manoomin.

Enbridge's proposed Line 3 project crosses and/or impacts lands and waters where Tribal members gather wild rice and other natural resources, and where other Tribal cultural resources are located. Additionally, construction of large infrastructure and large energy projects pose substantial threats to waters, natural resources and important cultural resources through the unavoidable disturbances during construction, as well as from the permanent environmental destruction which results through ongoing project activities.

The existing Line 3 corridor, as well as the proposed corridor cross through the heart of

the 1855 Treaty territory. When the 1837, 1854 and 1855 Treaties, and others were concluded between the United States government and the Anishinaabe Nation, usufructuary rights to hunt, fish, and gather were retained by the Ojibwe peoples in this area. Because Treaty-protected rights are the supreme law of the land pursuant to the United States Constitution, any proposed impacts on these rights must be scrutinized by permitting agencies (like the Minnesota PUC) according to the strict scrutiny analysis that is utilized by courts and other adjudicatory tribunals when fundamental rights are at stake.

Oil pipelines especially pose a unique threat to the Ojibwe in Minnesota where those pipelines cross over, under or through waters, wetlands and ecosystems on which Ojibwe depend for wild rice, fish, game, and other culturally important natural resources. Impacts to natural and cultural resources from large-diameter pipeline construction include streambank degradation, increased sedimentation of waters, long-term wetland disruption, and destruction of fish and wildlife habitat corridors through permanent vegetation removal. Enbridge's proposed Line 3 Replacement Project is planned to transport Canadian tar sands oil through a 36-inch diameter pipeline, and the preferred and alternative routes all pass through pristine wild rice lakes, surface waters, rivers and interconnected aquifers of Minnesota including the headwaters of the Mississippi and two other major North American watersheds. Clearly, the applicant's proposed project will have multiple long term impacts through a clean and sensitive water rich environment. This proposed energy corridor ends at Lake Superior, a place that is sacred to the Anishinaabeg and the source of one-fifth of the world's fresh water. Additionally, the proposed route will pass through Anishinaabeg Akiing, the land of the Anishinaabe, including the 1837, 1854 and 1855 Treaty areas. Unquestionably, this area is the mother lode of the world's wild rice.

The applicant's proposed route crosses directly through sacred landscape and historical cultural property, in which the tribal communities are already facing environmental justice and health challenges. Clearly, these challenges will be exacerbated by Enbridge's proposed new energy corridor. The present proposal represents some 302 miles of new pipeline, of which 175 miles is new and not within any existing pipeline corridor. Because of the flawed nature of the federal government's environmental and petroleum permitting regulations, there is no federal agency ultimately responsible for the oversight of projects of this nature. That means that the Minnesota Department of Commerce needs to be extra vigilant in the preparation of the present EIS to look critically at the information provided by the applicant, which is, after all, designed to assure one goal: that Enbridge gets what it wants.

Treaties and Treaty-making

Treaties are the supreme law of the land which necessarily supersede state laws, and the significance of treaty rights and treaty-protected resources in Minnesota has been acknowledged in judicial decisions that have addressed those rights both on and off reservations. Current state law which governs the permitting of oil pipelines places greater emphasis on meeting the needs

of the pipeline company than ensuring that natural resources, cultural resources, and tribal rights, interests and resources are protected in a way that demonstrates a meaningful respect for the Rights of Nature and the Anishinaabeg.

1855 Treaty with the Chippewa.[1]

On February 22, 1855 in Washington DC, the Mississippi bands of Chippewa Indians ceded 10 million acres of northern Minnesota lake country, including the headwaters of the Mississippi River, and the United States government established nine small reservations.

With the complete collapse of the fur trade, the 1855 Treaty marked a sea change in the economics of the Ojibwe.

First, the source of sustenance for Ojibwe people would become much more dependent upon annuity payments. These annual payments from the federal government were intended to be in exchange for the transfer of millions of acres, and which would be necessary to supplement hunting, fishing and other use of a land base that had been reduced to scattered reservations within the ceded territory.

Material survival would depend on the willingness of the U.S. government to honor its commitments. The annuity system, however, was vulnerable to fraud. Annuity recipients had to show up at appointed times and places to receive their funds, and any funds not distributed could be pocketed by the Indian agents in charge of annuities. In 1861, for example, Ojibwe agent Lucius Walker wrote to Dakota agent Clark W. Thompson:

"I hope that the time of payment will be kept a perfect secret. No one excepting those whom we want or need to assist ought to know anything about it. . . You nor I want anyone here but them who can render us assistance."

—Mark Diedrich
in Chief Hole-in-the-Day and the 1862 Chippewa Disturbance,
Minnesota Monthly, Spring 1987

Secondly, by allotting reservation land to individual families, the United States attempted in the Treaty of 1855 to replace the centuries-old spiritual connection of Ojibwe people to the land with a new system of private property. The federal government intended Ojibwe people to be farmers on individually-owned plots of land, and promised to plow 675 acres of land for the

[1] Treaty With the Chippewa, February 22, 1855, 10 Stat. 1165, Ratified March 3, 1855, Proclaimed April 7, 1855.

entire Ojibwe population. (It also provided 80 acres each to mixed-blood individuals, and gave missionaries the option to buy 180 acres each).

In years to come, various tracts of reservation land established in the Treaty of 1855 would be enlarged, ceded, stolen, restored, co-opted and vacated through treaties, acts of Congress, and the actions of corporations, Indian agents and other "entrepreneurs." Throughout this complicated history, the Leech Lake and Mille Lacs Bands of Chippewa held on to the land that includes their current reservations.

In the 1990s, the United States Supreme Court held that the 1837 Treaty did not cede rights to land use that the Ojibwe had retained in the 1837 land cession treaty.

1837 White Pine Treaty (aka Treaty of St. Peters)[2]

Article 5 of the 1837 Treaty granted the signatory Ojibwe bands usufructuary rights to hunt, fish and gather within the ceded territory. An Ojibwe chief from Leech Lake known as Eshkibagikoonzhe (Flat Mouth) demanded that his people retain the right to "get their living from the lakes and rivers" because "we cannot live, deprived of our lakes and rivers."

The Ojibwe received $24,000 in cash, goods and services, retaining rights to use the land for hunting, fishing and other purposes. Their mixed-blood relatives (including men who signed treaties on behalf of the United States) received $100,000; and fur traders received $70,000. Traders William Aitkin, Lyman Warren, and Hercules Dousman are mentioned by name in the 1837 Treaty as intended recipients of debt payments.

The fur trade was not the only business interest at work in these treaties. The Ojibwe treaty, called the "White Pine Treaty," transferred millions of acres of timber to the United States:

Officials in the administration of President Martin Van Buren sought the land cession not to accommodate white settlers – whites were not demanding Chippewa land – ***but to enable lumbering on a large scale.***

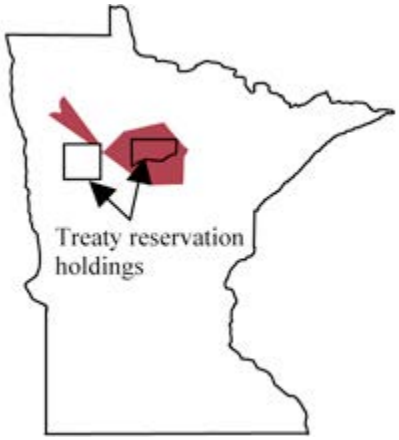
—Ronald N. Satz, Chippewa Treaty Rights

The cession of pine forests led to abuses of Ojibwe timber rights for a century, as treaty signers Dousman, Warren, and Sibley– as well as many other powerful political figures – suddenly widened their business interests from the fur trade to timber. Ojibwe negotiators made

[2] http://treatiesmatter.org/treaties/land/1837-ojibwe-dakota

it clear, however, that they were retaining rights to deciduous trees in the region (among other rights), going so far as to lay an oak leaf in front of United States negotiator Henry Dodge to clarify their point.

Extensive evidence indicates that our leaders and our ancestors believed they were merely leasing use of the pine forests. An important United States Supreme Court ruling in 1999 upheld those rights. (See Treaty of 1855).



1867 Treaty[3]

The 1867 Treaty was engineered to concentrate the Ojibwe population in a single place, White Earth. Land was allotted to individuals, in direct opposition to our traditional communal living conditions. Individual band members were given scrip to be redeemed for up to 160 acres each, located within boundaries established in the treaty.

Over the following decades, the provisions of this treaty were abused and changed by legislation to transfer ownership of reservation lands from the control of Ojibwe people. Through legislation such as the Dawes Act and Nelson Act, lands were made available for sale to white settlers and timber interests. The Clapp rider in the early 1900's made it legal for mixed blood band members to sell their land scrip, which led to wide scale fraud in which no benefits were gained for the sale.

The importance of timber interests in engineering this treaty can be found in the presence of Joel B. Bassett at the treaty signing. Serving as the United States Indian agent for the Ojibwe at Crow Wing (1865-1869), Bassett had been a lumber manufacturer in Minneapolis since 1850, and this treaty expanded his business. By the late 1880's, he was convicted of fraudulently harvesting 17,000,000 feet of timber from the White Earth reservation. There have been a number of court decisions that have supported our rights to resources within the 1855 Treaty ceded territory.

The Voigt Decision (1983)

In 1983, the United States 7th Circuit Court of Appeals delivered the "Voigt Decision" in *LCO Band of Chippewa Indians v. Lester P. Voigt, et al*, 700 F.2d 341 (7th Cir. 1983) affirming Ojibwe rights to hunt and fish anywhere on ceded territory, even on privately owned land.

[3] http://treatiesmatter.org/treaties/land/1867-ojibwe
More info: http://digital.library.okstate.edu/kappler/Vol2/treaties/chi0974.htm

1999 Supreme Court Decision - Minnesota v. Mille Lacs Band of Chippewa Indians

In *Minnesota v. Mille Lacs Band of Chippewa Indians, 562 U.S. 172 (1999*), the United States Supreme Court ruled that the Ojibwe retained hunting, fishing and gathering rights on the lands it had ceded to the federal government in the 1837 White Pine Treaty and that the state governments of Michigan, Minnesota and Wisconsin had unfairly asserted authority over hunting and fishing rights without regard for treaty rights guaranteed to the Ojibwe before those states were even formed. The Court also concluded that the same protections survived in the 1855 Treaty, even though it did not explicitly outline usufructuary rights, because the Chippewa delegates that signed it clearly did not believe they were relinquishing such rights.

2015 Squarehook case

Operation Squarehook was a large multi-year state and federal investigation into black market walleye. On February 10, 2015, the 8th Circuit United States Court of Appeals ruled that the federal government could not prosecute four Ojibwe men for netting walleye on the Leech Lake Reservation and selling them. This upheld the 2013 United States District Court decision to dismiss the cases against the Ojibwe fishermen. The men were accused of selling hundreds of thousands of dollars worth of netted fish and charged with wildlife trafficking under the federal Lacey Act. The court upheld the rights guaranteed by the 1837 White Pine Treaty as the same rights the signatory Chiefs would have understood in 1855, even though the 1855 treaty did not directly apply because the Leech Lake Reservation did not exist yet. In its decision, the court repeatedly referenced the Supreme Court's landmark 1999 Mille Lacs decision. The decision effectively ended Operation Squarehook.

Additional Consultation requirements

Beyond the consultation requirements inherent in the existence of treaties between Indian tribes and the United States government, there are additional federal statutes that trigger consultation.

Section 404 Clean Water Act

Enbridge has applied for a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers (USACE) St. Paul District for construction of the pipelines including temporary bridges, grading and utility crossings. A Clean Water Act Section 404 permit is required for the discharge of dredge or fill material into waters of the United States, including wetlands. While the White Earth Nation does not yet have treatment as a state status under the Clean Water Act, this federal statute mandates that the state and its agencies must comply with federal consultation standards. Enbridge's proposed project (including its plan to abandon the existing Line 3 in place) crosses extensive wetland areas. The USACE cannot grant these permits without the full consent of the Tribal governments that have rights in the off-Reservation ceded territories.

The United States Army Corps of Engineers also has a trust responsibility to protect tribal waters and resources. The priorities for the Corps are first to provide for navigable waters. The second priority is the protection of tribal trust resources, including wild rice. Any action taken by the Corps has to first provide for navigable water but second it must protect Tribal trust resources, these resources either developed through Treaties or acts of Congress. The Sandy Lake, Mississippi River and Rice Lake Refuges in Aitkin County are directly affected by this corridor and the Corps has a unique obligation to protect this area against potential impact because of the Tribal Trust resources. This obligation is authorized under Executive Order, general laws of the United States and internal legal review by the St. Paul District of the Army Corps.

Section 106 National Historic Preservation Act Consultation

Section 106 of the National Historic Preservation Act, as amended, requires the lead state or federal agency with jurisdiction over a state or federal undertaking (i.e., a project or activity that requires a state or federal permit, license, or approval) to consider effects on historic properties before that undertaking occurs. The intent of Section 106 is for state and federal agencies to take into account the effects of a proposed undertaking on any historic properties situated within the Area of Potential Effect (APE) and to consult with the Advisory Council on Historic Preservation (ACHP), State Historic Preservation Officer (SHPO), federally recognized Indian tribes' Tribal Historic Preservation Officer (THPO), applicants for federal assistance, local governments, and any other interested parties regarding the proposed undertaking and its potential effects on historic properties.

A "historic property" is defined as any district, archeological site, building, structure, or object that is either listed, or eligible for listing, in the National Register of Historic Places (NRHP). To be considered eligible for listing in the NRHP, a property generally must be greater than 50 years of age, although there are provisions for listing cultural resources of more recent origin if they are of "exceptional" importance.

Mikwendaagoziwag - They are remembered

The proposed project (including the to-be-abandoned line) crosses exceptional and important historic lands. These lands include our historic hunting, fishing and gathering areas; our historic homelands and for many miles, follows the route of our historic removal route and the site of the Sandy Lake Tragedy. In the 1840s, traders in Minnesota realized there could be an economic boom to moving Ojibwe from Wisconsin and Upper Michigan (areas ceded in 1837 and 1842 treaties) onto unceded lands in Minnesota. This move would require the build-out of Indian agencies and schools, and the distribution of annuity goods promised under treaties. These services could be provided by Minnesota "*entrepreneurs"*. This economic potential created political pressure, and in 1850, a plan was devised.

Since the start of the annuity payment system, Lake Superior Ojibwe had traveled to La Pointe on Madeline Island in Lake Superior to receive the payments. This traditional heartland of our people was more accessible and a traditional gathering area. In 1850, the

entrepreneurs (conspirators) told our ancestors to arrive at Sandy Lake no later than October 25th to receive their annuities.

By November 10, 1850, some 4,000 Ojibwe had arrived at Sandy Lake. They were ill prepared for what they faced at Sandy Lake. The promised annuities were not waiting for them, and the last of the limited provisions that were available were not distributed until December 2, 1850 after harsh winter conditions had set in. While they waited the nearly six weeks, the Ojibwe people lacked adequate food and shelter. Over 150 Ojibwe people died from dysentery caused by spoiled government provisions and from measles. Demonstrating their steadfast desire to remain in their homelands, the Ojibwe began an arduous winter's journey home on December 3, 1850. As many as 250 others died along the way. On the same day, Aish-ke-bo-go-ko-zhe, the Ojibwe leader also known as Flat Mouth, sent word to Minnesota Territorial Governor Ramsey that he held him personally at fault for the broken promises that resulted in suffering and death. As word of the Sandy Lake disaster spread, so did opposition to the federal government's removal policy ... Ojibwe leaders traveled to Washington to secure guarantees that annuities would be distributed at La Pointe, and that the Ojibwe could remain in their homelands ..."[4]

The federal officials responsible for the scheme hoped that worn-out tribal members wouldn't make the trip home and would stay permanently in Minnesota. At Sandy Lake and on the trek home, more than 400 people died because of delayed and meager payments, tainted food, disease, inadequate housing and the cold weather. This and other events led to the 1852 journey to Washington by Chief Buffalo and Benjamin Armstrong to meet with President Fillmore. That trip resulted in the end of the removal of the Lake Superior Chippewa, returning the annuity payments to Madeline Island and eventually establishing reservations.[5]

Ojibwe Historian Elaine Fleming has researched the Sandy Lake tragedy, and explained that: "It's estimated that 1,500 of the 5,500 Ojibwe who camped out at Sandy Lake were from northern Minnesota. We don't know for certain how many of them made it back alive, having to walk 120 miles in early December back to Leech Lake, or 140 miles to Cass Lake. But we do have our stories about their experience. (Brenda) Child writes about a family who walked home to Leech Lake. There was a father, the mother, the mother's brother, a 10-year-old son, and a 2-year-old daughter. Halfway home, the mother's brother got sick and died. They stopped to bury him. Two days from Leech Lake, the children got sick. The son died and the father carried his dead son on his back. Next, the 2-year-old daughter died. The mother

[4] http://www.chiefbuffalo.com/buffalo/Sandy_Lake_Tragedy.html
https://chequamegonhistory.wordpress.com/category/sandy-lake-tragedy-and-ojibwe-removal/
http://www.colinmustful.com/sandy-lake-tragedy/
https://www.youtube.com/watch?v=u6VaiLfy3CE
[5] http://www.chiefbuffalo.com/buffalo/Sandy_Lake_Tragedy.html

carried her dead daughter on her back, and both parents returned home to Leech Lake carrying their dead children. Sandy Lake became known as the place where their people died. Like the parents carrying their dead children on these trails of death, historical trauma is carried in the memories and bodies of the people. Those who were originally traumatized pass the trauma down to their children, and they to their children, and so on."

(Fleming, February 19, 2017)[6].

It is said that the east side of Sandy Lake was full of birchbark coffins of the hundreds who perished in this intentional act of the President. This historic trauma has not been forgotten by the Anishinaabeg, and each year is commemorated in a gathering at Sandy Lake.

Removal to White Earth

With the 1867 Treaty, great pressure was put on all bands in Minnesota to get them to relocate onto one reservation. Never the historic homeland of any Ojibwe group, it became a reservation in 1867 in a treaty with the Mississippi Band of Ojibwe. It was to become the home of all of the Ojibwe and Lakota in the state, however, not all bands wanted to move onto one reservation and give up their existing reservations. The stated purpose of the federal policy to relocate all Ojibwe people onto the White Earth Reservation was to open the existing Ojibwe Reservations to white settlement and development. The thinking of the time was that such plans could not be possible with the Ojibwe people's continued residence in their homelands. Such massive relocation was very hard on the people, and facing the prospect of leaving places where they have lived in harmony with the natural surroundings for many years, where their deceased family members were buried, and where other intimate connections with the land would be broken, was very difficult for our family members.

Mississippi Band members from Gull Lake were the first group to come and settle around White Earth Village in 1868. The 1920 census reflected those who had settled in White Earth: 4,856 were from the Mississippi Band including 1,308 from Mille Lacs, the Pillager Bands had 1,218, Pembina Band 472, and 113 had come from Fond du Lac of the Superior Band. The different bands tended to settle in different areas of the reservation. Mille Lacs Lake members moved to the northeastern part of the reservation, around Naytahwaush and Beaulieu. Pillager Band members settled around Pine Point in the southeast of the White Earth Reservation. After 1873, Pembina Band members from the Red River Valley moved into a township on the western side of the reservation. A community concentrated in the Village of White Earth where the government agency was located.[7]

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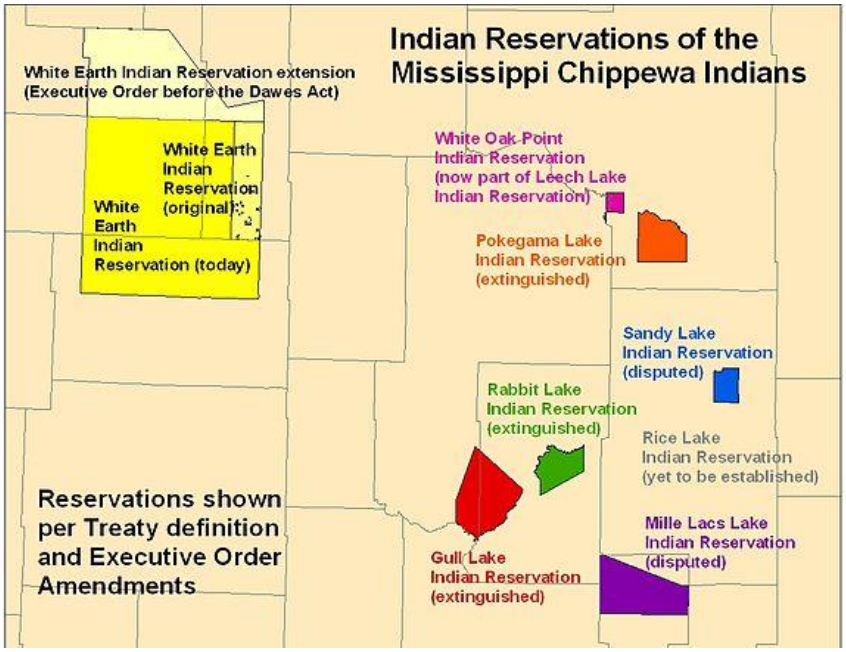
[6] Nanaboozhoo and the Wiindigo: An Ojibwe History from Colonization to the Present
Volume 28, No. 3 - Spring 2017
Bezhigobinesikwe Elaine Fleming ♦ February 19, 2017 [Tribal College, Journal of American Indian Higher Education]

[7] https://mn.gov/indianaffairs/tribes_whiteearth.html

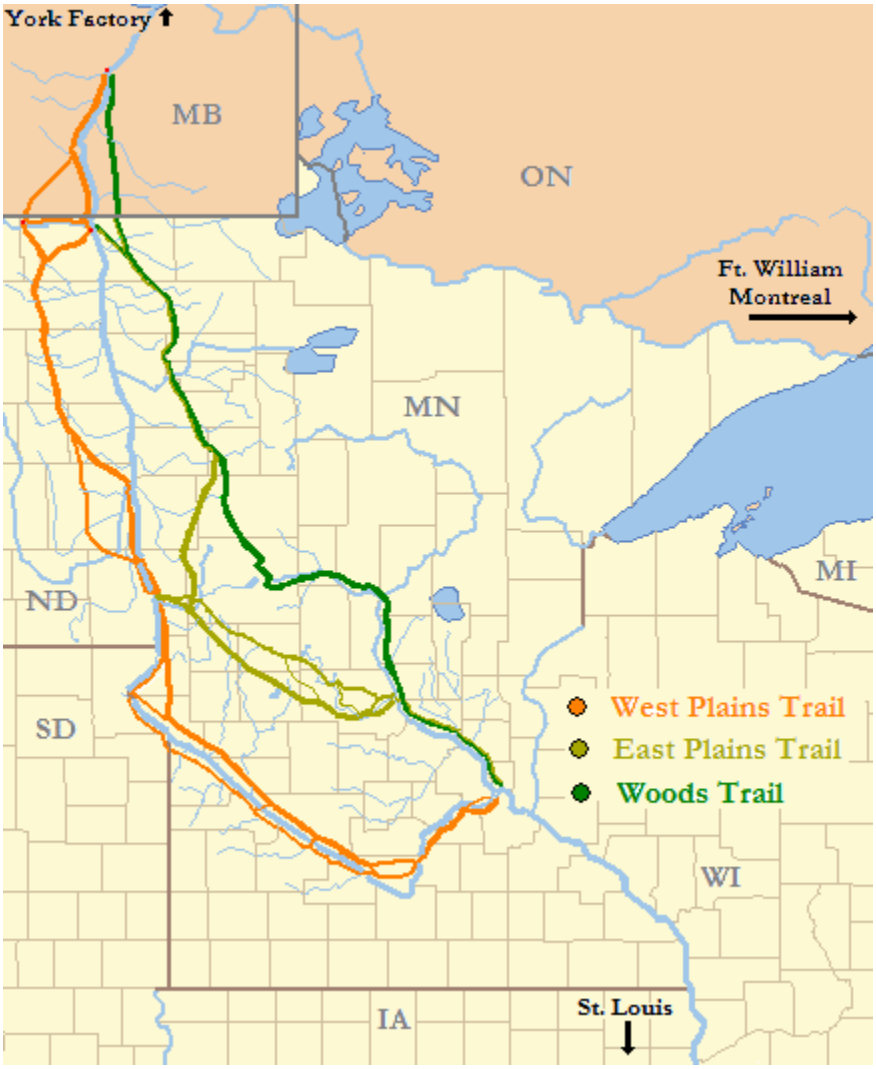
The federal government's plan to concentrate all Ojibwe people on the White Earth Reservation was met with much resistance by the people living on the other Ojibwe Reservations in Minnesota. The ultimate part of the federal government's plan to relocate all Ojibwe people to the White Earth Reservation was to disestablish all the other Ojibwe Reservations in Minnesota, including the following: Sandy Lake, Rice Lake, Pokegama, Rabbit Lake, Grand Portage, Fond du Lac, Bois Forte, Mille Lacs, Leech Lake, Red Lake and other smaller Reservations.

The federal government's massive relocation plan never came to fruition, primarily because the Ojibwe people were fed up with the long line of broken promises and constantly changing plans. Not only were the local Indian agents not to be trusted, but the solemn promises of the federal government through the President ("Great Father") that were included in the long line of treaties between the Anishinaabeg and the United States, were disregarded by non-Indian officials as well. The Ojibwe people dug their heels in and made it clear that they were not going to abandon their existing Reservations and relocate to White Earth. Likely influenced by a moment of guilt, the federal government abandoned its plans to relocate all Ojibwe people; and the Ojibwe Reservations at Grand Portage, Fond du Lac, Mille Lacs, Bois Forte, Leech Lake and Red Lake were not disestablished. The Ojibwe from those Reservations were not forcefully relocated, and they were permitted to continue to maintain their homes where they had lived for centuries in harmony with their surroundings. Those Ojibwe people who did relocate to the White Earth Reservation followed paths that are scattered throughout the 1855 Treaty area. These paths through the 1855 Treaty ceded territories were familiar to the people, and after they relocated to White Earth they continued to follow the seasons and harvest the resources that were plentiful in these areas.



Attribution: CJLippert at English Wikipedia

The routes and trails these groups of Ojbwe people followed are undoubtedly old ox-trails (which followed buffalo routes) and the current day watertrails (rivers and streams).

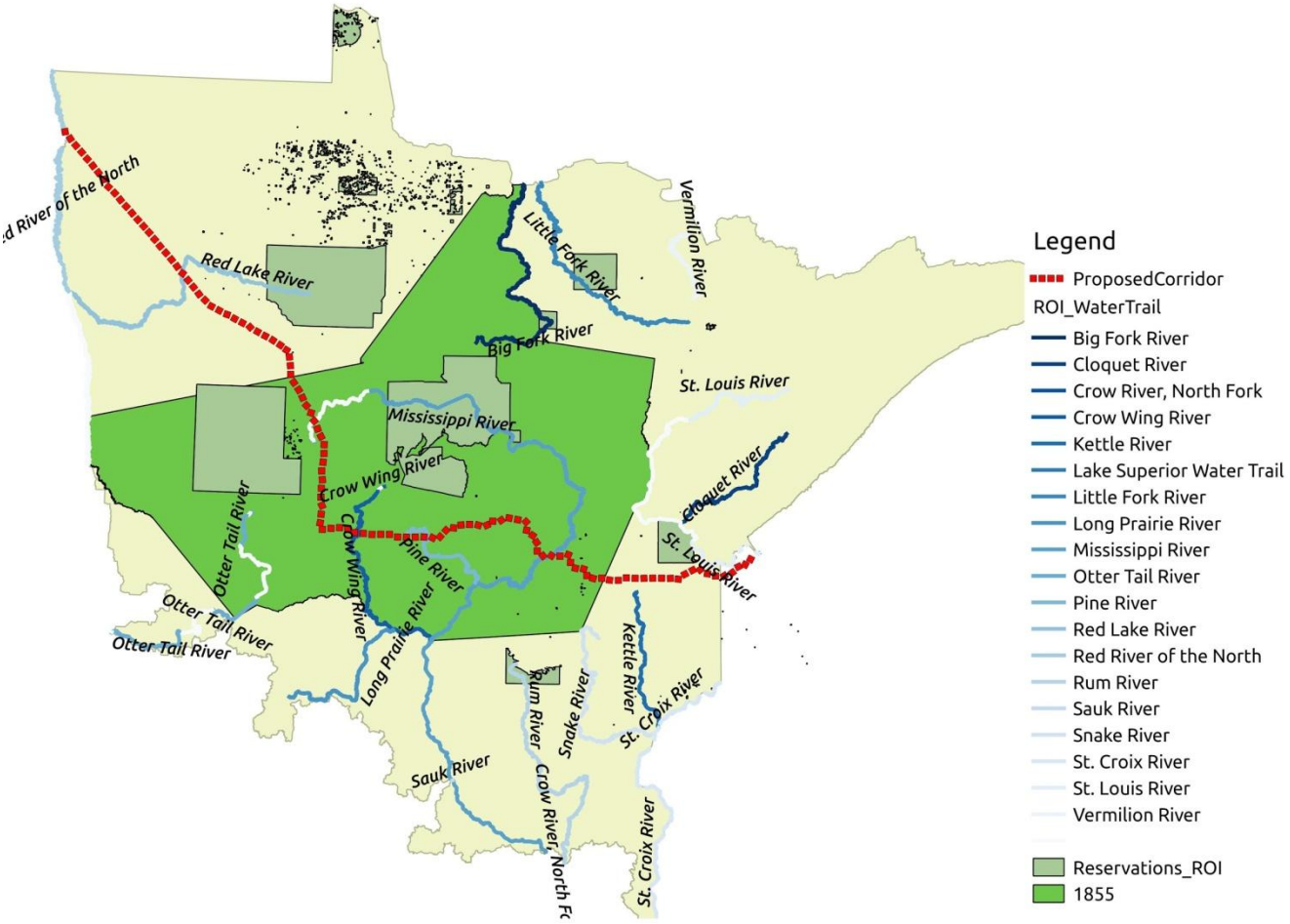


Source: US Census, Ruhrfisch, Kablammo[8]

To this day Ojibwe people follow the seasons and harvest the resources throughout each of the off-Reservation ceded territories according to the natural cycles. The most important resource is Manoomin, but other important resources include fish, deer, rabbits and other animals and plants that have been integral to Anishinaabeg existence for centuries. The customs and traditions of the Anishinaabeg illustrate how the likely impacts of Enbridge's proposed project

[8] https://commons.wikimedia.org/wiki/File:Red_River_Trails_Locator_Map_cropped.PNG#file

must be viewed broadly so that a complete appreciation of the impacts of the project upon the interconnected natural environment is considered. The following map illustrates the impact:



Endangered Species Act, Section 7 Consultation

The U.S. Fish and Wildlife Service (USFWS) is responsible for ensuring compliance with the Endangered Species Act (ESA), Section 7, as amended, which states that any project authorized, funded, or conducted by any federal agency should not "… jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined…to be critical….".

Endangered species in the 1855 treaty area may include[9]:

MAMMALS Canada lynx: threatened and critical habitat designated Gray wolf: threatened	INSECTS Dakota skipper: threatened and critical habitat Karner blue butterfly: endangered Poweshiek skipperling: endangered and critical habitat

2290-1

[9] https://www.fws.gov/midwest/endangered/lists/minnesot-cty.html

Northern long-eared bat: threatened	Rusty patched bumble bee - endangered
CLAMS (Freshwater Mussels) Higgins' eye pearlymussel - endangered Sheepnose - endangered Snuffbox - endangered Spectaclecase - endangered Winged mapleleaf mussel - endangered	PLANTS Leedy's roseroot - threatened Minnesota dwarf trout lily - endangered Prairie bush-clover threatened Western prairie fringed orchid - threatened
BIRDS Piping plover: endangered and threatened Red knot - threatened Whooping crane - nonessential experimental population	FISH Topeka shiner - endangered and critical habitat

Additionally, there are several other species of significance to the White Earth Nation, including manoomin, sturgeon, birch and maple trees.

From the Public Hearings with respect to the present draft EIS a commenter reported that:

> Other species that occupy the area, such as gray owls, northern hawk-owls, wolves, deer, bear, and beaver, are culturally significant animals for religious or traditional food purposes.[10] The area also features dancing grounds of the sharp-tailed grouse, where conditions must be ideal for the birds to perform their mating dance.[11]

To date, there has not been any comprehensive review of the status of endangered and special species in the 1855 Treaty Area. It would be irresponsible to permit Enbridge's proposed project to continue without a full assessment of the conditions and status of these species and their habitat. This assessment should be funded by Enbridge and conducted by the Bands and Nations that claim stewardship over the 1855 treaty area.

Migratory Bird Treaty Act Consultation

2290-2

The Preferred Route would pass within miles of the Rice Lake National Wildlife Refuge, one of the most important stopping points in the nation for migratory waterfowl.[12] There are also

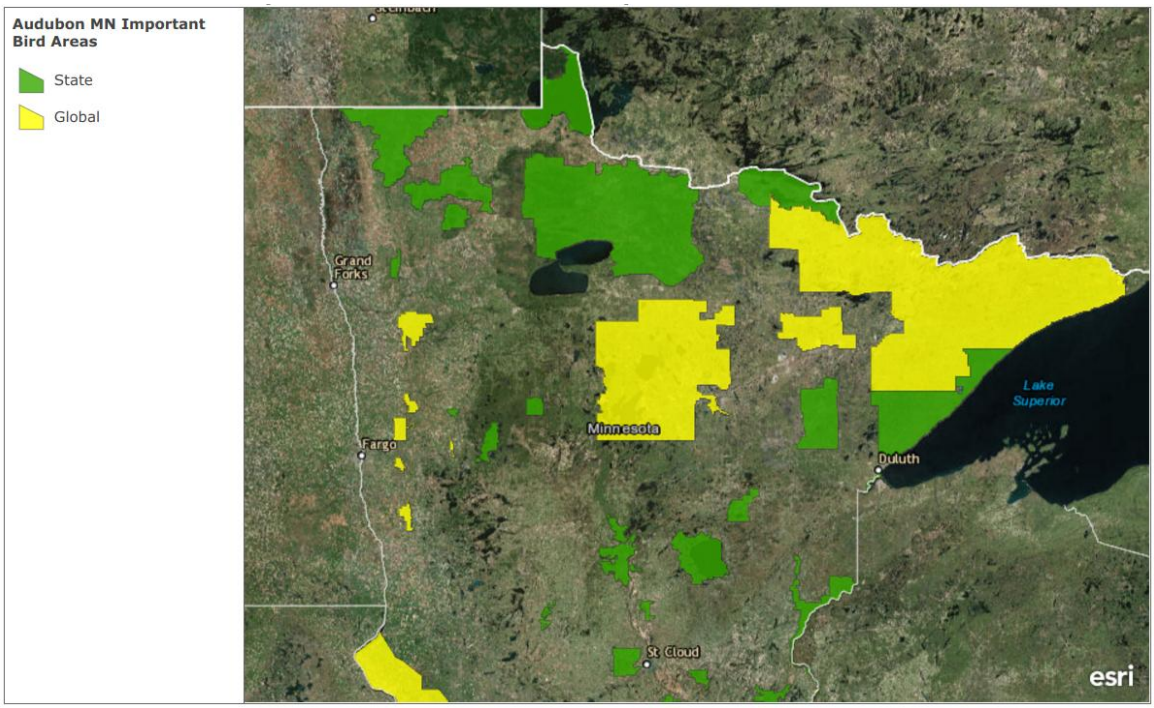
[10] Applegate Testimony, at 76.

[11] Id.

[12] Id. at 77("Rice Lake holds the state record for the most waterfowl at a single migratory stopping point of over one million waterfowl in 1994").

2290-2
Cont'd

a number of other important bird areas in Minnesota, as identified by the Audubon Society on the following map[13]:



In Wisconsin, Enbridge has requested the US Fish and Wildlife Service to provide the Project planning recommendations under the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA). There has been no similar action in Minnesota, nor any review of the status of these important areas or the risks they face from the proposed project.

Tribal Consultation

2290-3

Since the Minnesota PUC has received Enbridge's applications for the Sandpiper and the related Line 3 projects, consultation with Tribal governments has been inadequate. The situation was so negligent during the Sandpiper process that Governor Mark Dayton signed an executive order directing state government agencies to implement new tribal consultation policies aimed at improving relationships and collaboration with Minnesota's eleven Tribal Nations.[14]

While the DOC has been making efforts to increase consultation activities, these attempts have come very late in the permitting process and do not represent true participation or consent.

[13] http://mn.audubon.org/conservation/minnesota-important-bird-areas

[14] https://mn.gov/mdhr/news-community/government-relations/tribal-consultation/tribal-consultation-policy.jsp

INTERNATIONAL STANDARDS

In addition to the various federal and state statutes and policies that outline the need for consultation with Tribal governments, there are several international standards that require a higher level of collaboration between Tribal governments and federal and state agencies.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[15]

2290-4

The United States is one of numerous countries that support the United Nations Declaration on the Rights of Indigenous Peoples. The UNDRIP is an international instrument that contains many protections for Indigenous communities, which are so often subject to abuses and unjust treatment. Among the provisions are a right to practice cultural beliefs and practices.[16] Contamination from the proposed Line 3 pipeline project would wipe out the practice of harvesting wild rice and all the religious ceremonies associated with the harvest of manoomin. Wild rice is an intrinsic, identity-forming aspect of Anishinaabe life. To lose access to these wild rice beds would devastate and permanently harm our culture.

The UNDRIP also contains provisions mandating free and informed consent from an affected tribal nation by the state.[17] In this case, the state of Minnesota has failed to properly consult or fulfill the mandate for consent. The DOC has acknowledged that impacts on tribal communities "are part of a larger pattern of structural racism" that tribal people face in Minnesota. The DEIS also states that "the impacts associated with the proposed Project and its alternatives would be an additional health stressor on tribal communities that already face overwhelming health disparities and inequities," but the DEIS goes on to conclude that these additional negative impacts that will be heaped upon Native people are insufficient reasons to deny the project. **The level of "consultation" reflected in this statement is definitely not a form of meaningful consultation with which the White Earth Nation consents.**

Equator Principle[18]

The Equator Principles (EPs) is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects; which is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making. The DEIS is devoid of any Equator Principle analysis, which should be undertaken considering the magnitude of the proposed Line 3 project and the reasonably foreseeable harms that the project poses.

In the above sections, we have outlined the various statutes, principles and treaties that relate to our concern for the 1855 Treaty ceded territory and Enbridge's proposed project impacts. In the following sections, in addition to the flawed and incomplete consultation with

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[15] http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx

[16] http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

[17] *Id*.

[18] http://www.equator-principles.com/index.php/about-ep

Tribal Nations, we will illustrate the various deficiencies in the Department of Commerce's DEIS for the proposed Line 3 project.

2290-5

Lack of Traditional Ecological Knowledge and Indigenous Science (TEK/IS) Methodologies

Indigenous peoples have a different way of understanding the world, and humanity's role in creation. This alternative way of understanding is known as Indigenous science. Knowledge formed through this understanding is known as traditional ecological knowledge (TEK). Understanding Indigenous science and how it differs from Western science is essential to have true government to government relationships and guarantee true "prior and informed consent". The lack of understanding of Indigenous science and TEK by western regulators leads to the approval of projects that continue the legacy of colonization and genocide experienced by Indigenous Peoples (IP).

The Anishinaabeg[19] world consists of eight planes of existence, with an understanding of the deep relationship between the time of the ancestors and the time of the descendants. Because of this, Anishinaabeg are required to make decisions for the seventh generation, working to ensure that decisions made for current generations do not negatively impact the quality of life of future generations. This world view also includes an understanding that the physical world possesses animate and inanimate, intangible and tangible values, and family or relatives who are winged, rooted, with paws, fins and hooves. Anishinaabeg world view[20] and other indigenous knowledge systems employ an in-depth understanding of the inter-relation of all of creation. This world view is similar to the understanding of ecologists, but with a deep element of responsibility to each constituent part. The Western scientific process is reductionist and mostly unconcerned with the ethical implications of scientific research, which is in direct contradiction to Indigenous scientific processes. The gap between the two scientific approaches must be bridged to create a sustainable society.

The DEIS shows a complete lack of awareness or use of Indigenous Science methods or Traditional Ecological Knowledge.

In a practical sense, this lack of utilization of IS methods leads to an incomplete picture of the potential impacts of this project. To illustrate this deficiency, we will focus on *manoomin*.

[19] Anishinaabe is the traditional name for the original people of what is now the Great Lakes area of the United States and Canada. We may be more commonly referred to as Chippewa or Ojibwe, but those terms have been imposed upon us by European and American colonizing forces, and hence many of us choose to use Anishinaabe when referring to ourselves. The plural of Anishinaabe is Anishinaabeg, and Anishinaabemowin is our language. Akiing is our name for our homeland. - Quoted from Freeland, 2015.

[20] A worldview is the cultural framework of interrelated logics which establish a relationship to land, time, the rest of life and prescription for interacting with that life. -Freeland, 2015.

Diminishment of Manoomin (Wild Rice Assets)

"Mininaajitoomin i'iw manoomin. Niinawind nindabiitaamin o' aki amaa. Niinawind niimiijimin o'o manoomin miinawaa nindamwaanaanig ongo giigoonhyag.
We have a relationship with rice. We are the ones that live here. We are the ones that eat the rice and fish."

"Iw gaye manoomen, memwinzha iw zaaga'igan gii-mooskine, gii-mooskinemagad manoomin, noongom dash agaawaa ayaamagad magizhaa eta ingodwaasing maazhaa ishwaasing endaso-ingodwaak aginjigaadeg chi-bangii jiigibiig.
About the wild rice; we went from a lake that was full of rice to one that has about three to six percent along the shore."

-Niib Aubid[21]

"[w]hen I'm out ricing, when I'm out collecting, when I'm out harvesting, I know peace and happiness."

-Elgin Goodsky

Manoomin, primarily grows wild in the Great Lakes region, and is only harvested for food in Minnesota and Canada.[22] It is essential to Tribal life because of its rich nutritional value for subsistence, support of tribal economies, and for its importance culturally and spiritually. [23] A number of federal treaties applicable in the region specifically reserved wild rice lakes for use by Tribal people, including the creation and support for wild rice camps, still in use today.[24] Wild rice lakes are considered sacred landscapes. Lower Rice Lake on White Earth is a Traditional Cultural Property, and is also the largest continuously producing wild rice bed in the world.[25]

Many lakes have been lost to habitat fragmentation from dams, recreation, mining and development. Those that remain provide important economic resources to the Tribal community, including $1 million in annual revenue from Lower Rice Lake, and $500,000 in revenues from rice lakes in the East Lake community. If an oil spill travelled downstream into wild rice lakes from the proposed pipeline, it could potentially impact the cultural and economic value of the wild rice lakes along the proposed pipeline, and beyond.

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[21] Because of the loss of Sandy Lake- from Sacred Water: Water for Life by Lea Foushee and Renee Gourneau.
[22] Wild rice is not native to California, but the plant that is cultivated in the state is not wild rice, but is instead a genetically modified plant. Genetic modification of wild rice is an additional injustice that has been promoted by the University of Minnesota and other academic institutions.
[23] Lauren Wilcox, "Going with the Grain." Smithsonian.com, September 2007. http://www.smithsonianmag.com/heritage/going-with-the-grain-161650307/?no-ist
[24] Federal Legislation, 1937. Wild Rice Campsites: Section 5 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) funding authority Act of May 9, 1938 (52Stat. 300) and Act of August 9, 1937 (50 Stat. 573).
[25] A Traditional Cultural Property(TCP) is a property that is eligible for inclusion in the National Register of Historic Places (NRHP) based on its associations with the cultural practices, traditions, beliefs, lifeways, arts, crafts or social institutions of a living community.

According to the Minnesota Department of Natural Resources, "[n]o other native Minnesota plant approaches the level of cultural, ecological, and economic values embodied by natural wild rice."[26]

We have explicitly reserved the right to harvest wild rice on our traditional lands in treaties with the United States, grounding the tradition in an elevated contractual and property-based set of legal rights.[27]

As people of the manoomin, we rely on the rice for not only nutritional sustenance, but for our economic livelihoods as well.

The 1864 Bureau of Indian Affairs Annual report identified that the Chippewa of the Mississippi, population 3,966, gather 300,000 pounds of wild rice for the season. This translates to an average of 75 pounds of wild rice per person for that year. The 1866 Bureau of Indian Affairs Annual report identified that the Chippewa of the Mississippi, population 4,065, gathered 390,000 pounds of wild rice for the season. This translated to an average of 95 pounds per person for that year. The BIA's numbers most likely include the amount of wild rice sold to traders by Band members because the agency would have no way of measuring the amounts that individual Band members kept to eat.

Research at the Mille Lacs Band of Ojibwe in the l980s pursuant to the Mille Lacs treaty case identified that on an average year 37.5 pounds of finished wild rice could be harvested per acre. This would translate to a need to harvest between 8,000 and 10,400 acres of wild rice to meet the annual tribal demand. Since the above numbers are with respect to wild rice that could be sold, the Native population would also need approximately 75 pounds per person annually for personal consumption. This would translate to an annual requirement for the Chippewa of the Mississippi in the range of 16,000 to 20,800 acres of wild rice.

These figures represent the Chippewa of the Mississippi in 1866, with 4,065 tribal members. The successor tribal government to the "Chippewa of the Mississippi" is the White Earth Nation, with 20,000 tribal members. ***The demand of the White Earth Nation's present population would require almost l00,000 acres of wild rice itself to sustain a traditional diet and traditional trade economy.***

It is estimated that 70 percent of the wild rice stands in Minnesota have been destroyed.

Currently, there are 53 wild rice beds on the lakes within the boundaries of the White Earth Reservation, totaling over 3,000 acres. A majority of the acreage, some 1,400 acres, is on Lower

[26] Minnesota DNR Wild Rice Study, at 7.

[27] Treaty with the Chippewa, 7 Stat. 537, Art. 5 (1837).

Rice Lake. Lower Rice Lake alone is capable of producing nearly 300,000 pounds of green wild rice for harvest. Currently, the harvest of wild rice on the Reservation generates an estimated $600,000 annually (average of $200/acre). Tribal members have consistently supported expansion of wild rice production and harvest on the Reservation. Tribal members have the right to harvest wild rice in the 1855 Treaty ceded territory. This provides access to additional acres of manoomin. Because the preferred route of the proposed Line 3 project goes either through or very near wild rice waters, the impacts from construction and operation directly impact this important resource for White Earth tribal members.

The White Earth Integrated Resource Management Plan provided an estimate of the economic impact of the Reservation's natural resources at $2.2 million annually. Included in that estimate are the following:

- Fish/Wildlife $1,050,000
- Wild Rice $600,000
- Forests $107,000

Sensitivity of Manoomin

"We have a lot of contaminants and pollution in the water today that were not there a long time ago. On White Earth Indian Nation, for example, about half of our reservation is woodland on the East and the Western half is farm country. Whatever they put on their fields in the way of herbicides and pesticides comes to us in the winter from the prevailing westerly winds. Much of the soil from their field blows into the wooded areas and contaminates the water. Sometimes in the winter after a strong west wind, we can see a dirty film of soot on the snow. It is coming from the farmers' fields, when they plowed up and the fine dust and dirt blows into the wooded areas to the East. This has an effect on the wild rice. It affects other animals and people that are using the water, using the fish, eating things from the water, gathering roots or rice or animals that are living in the water or around the water. There are things at the bottom of that food chain that eat and accumulate more and more contaminants."

Earl Hoagland

Wild rice is considered to be a bio-sentinel for water quality due to its tendency to thrive under specific conditions.[28]

"Wild rice is dependent on the circulation of mineral-rich water and does not tolerate chemical pollutants."[29]

As Commissioner Klapel of the Mille Lacs Band of Ojibwe notes, in her letter to the Public Utilities Commission, the present proposal and analysis provided by Enbridge is entirely

[28] Kjerland, T. 2015. Wild Rice Monitoring Handbook. The University of Minnesota Sea Grant Program.

[29] Vennum, at 14.

inaccurate in the hydrological assessment provided by the company to the Public Utilities Commission, falsely representing the risk.

Enbridge states: "Ground disturbance associated with pipeline construction is primarily limited to the upper ten feet which is above the water table in most of the region's aquifers…' Enbridge's generalized claim depicting the water table as ten feet deep is not accurate in the Big Sandy or Rice Lake watersheds. Based on NRCS soil data, the depth of the water table in these watersheds is measured in inches, not feet…"

According to the Minnesota Department of Natural Resources, any factor that can affect water quality or water levels can endanger stands of wild rice.[30] In some locations, the quality of surface water is already impacted by sulfates from mining discharges.[31] For these reasons, biologists and engineers have concluded that routing Line 3 along the preferred route poses the potential for significant impacts to the waters of the Ojibwe homelands, the wild rice that depends upon it, the Band, and its members.[32] Vegetation clearing and grading during construction is likely to alter the complex ecosystem and increase sedimentation. Dredging of wetlands and waterways for bridges and equipment also has a significant potential to alter water levels, further affecting wild rice.[33] Operating and maintaining the pipeline will create further adverse impacts.[34] These impacts rise to a high level of significance, even before consideration of the risk of an oil spill from the pipeline into the natural environment and the watershed.

Manoomin typically grows in shallow to moderate water depths (1 – 3 feet) and is affected by water flow, turbidity, water quality and water level fluctuations. Wild rice is sensitive to varying water levels, and production in individual stands from year-to-year is highly variable depending on local water conditions. Wild rice beds are very attractive to migrating waterfowl, and many rice areas are traditional waterfowl staging and hunting areas.[35]

In the DEIS, 17 wild rice lakes were identified as potentially impacted by the proposed new corridor. In our independent analysis, 41 wild rice watersheds were identified as potentially impacted. This is unacceptable in our view. 2290-6

[30] Minnesota DNR Wild Rice Report, at 21.

[31] Id. at 25.

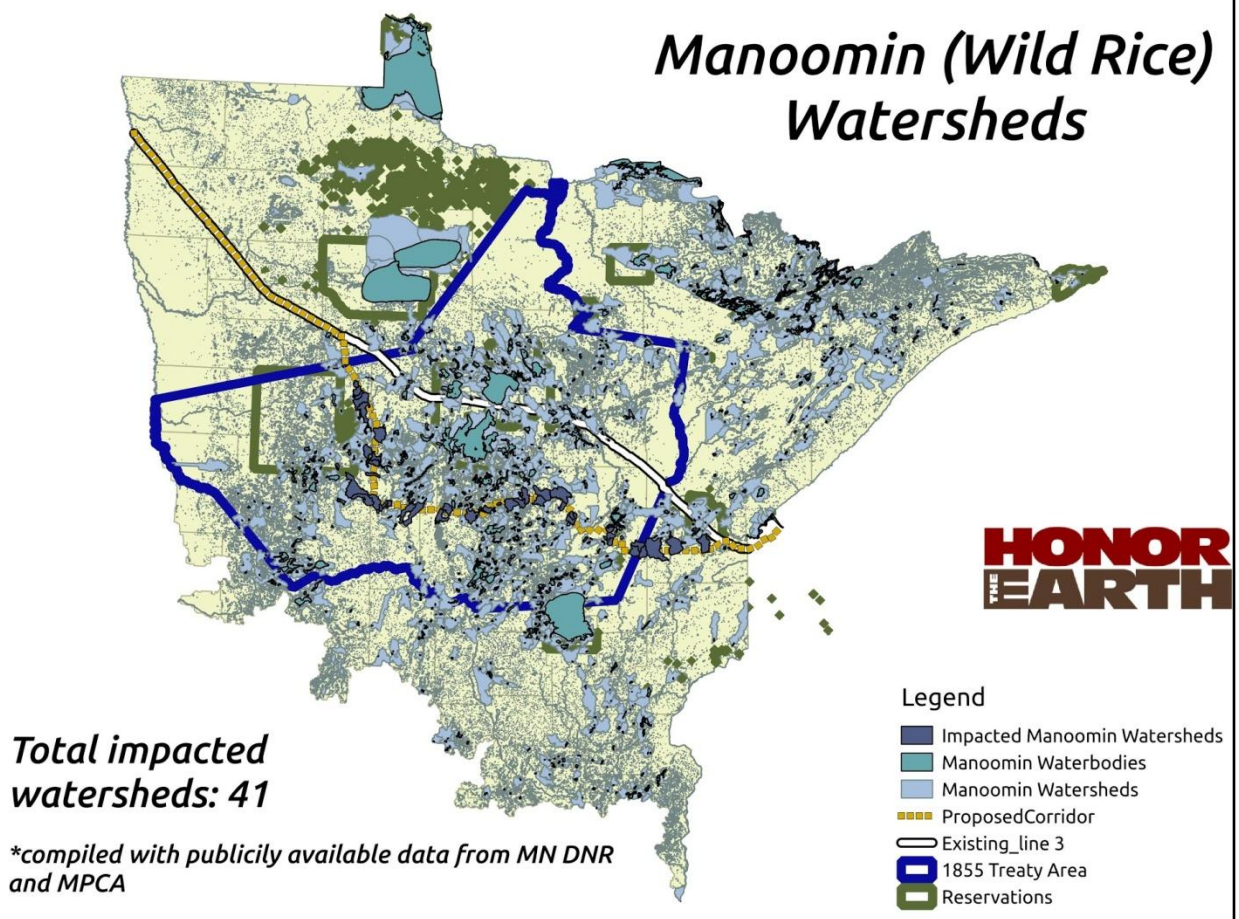
[32] Bunting Testimony at 39-45; Rupp Testimony at 45-53; Weiss Testimony at 53-58; Testimony of brownfield coordinator Todd Moilanen at 58-65; Testimony of chemical engineer and chemist Charles Lippert, Transcript at 65-71; Testimony of forester Jacob Horbacz at 71-74; Testimony of wildlife biologist Kelly Applegate, Transcript at 75-78.

[33] Weiss Testimony, at 55.

[34] Id. at 55-56.

[35] http://www.dnr.state.mn.us/wildlife/shallowlakes/wildrice.html

2290-7



Watershed level analysis is one of many tools regional planners use to assess impacts and health. The potentially impacted watersheds were defined by intersecting the proposed route with watersheds of manoomin waterbodies, as defined by the DNR and MPCA publicly available GIS datasets. In addition to a complete disregard for the nature and importance of manoomin throughout the DEIS, Enbridge (and the DEIS preparers) demonstrate a complete lack of understanding of how ecological restoration occurs. ***Nowhere in the document is an explicit explanation of how Enbridge will protect manoomin waters, or restore a damaged rice bed. This is totally unacceptable.***

2290-8

The only section in the document that details a restoration plan is with respect to wetland areas. Enbridge's process for restoring wetlands includes dumping the now compacted (and de-watered) soil back in the trench, sowing some oats and "letting nature take its course". Clearly, this is not the proper method to re-establish a wetland. Studies have consistently demonstrated that even with proper restoration practices, it can take decades for an impacted wetland to get back to the biological functioning it was at prior to the disturbance. David Moreno-Mateos, a postdoctoral fellow from the University of California, Berkeley, explains, "Once you degrade a wetland, it doesn't recover its normal assemblage of plants or its rich stores of organic soil

2290-8 Cont'd

carbon, which both affect natural cycles of water and nutrients, for many years. "Even after one hundred years, the restored wetland is still different from what was there before, and it may never recover."[36]

Additionally, studies from Pennsylvania have shown that pipeline impacted forested areas take over 100 years to return to pre-construction states. *Wetland areas may never return to their pre-construction states if there is significant altering of the hydrology.*

Abandonment

Beyond just the impacts that a new line would have on our lands and people, there is also the very significant issue of the abandonment of the existing Enbridge Line 3 (and eventually the entire aging Enbridge Mainline corridor). Because Line 3 is the first of many pipelines likely to be abandoned in the 1855 Treaty ceded territory (and elsewhere in our traditional homelands), we must take a critical look at the regulations and procedures pertaining to pipeline abandonment. To date, there is no evidence that Enbridge takes our concerns seriously. In the first round of project applications, abandonment was given little to no attention. The current DEIS does not do much to improve on this deficiency.

2290-9

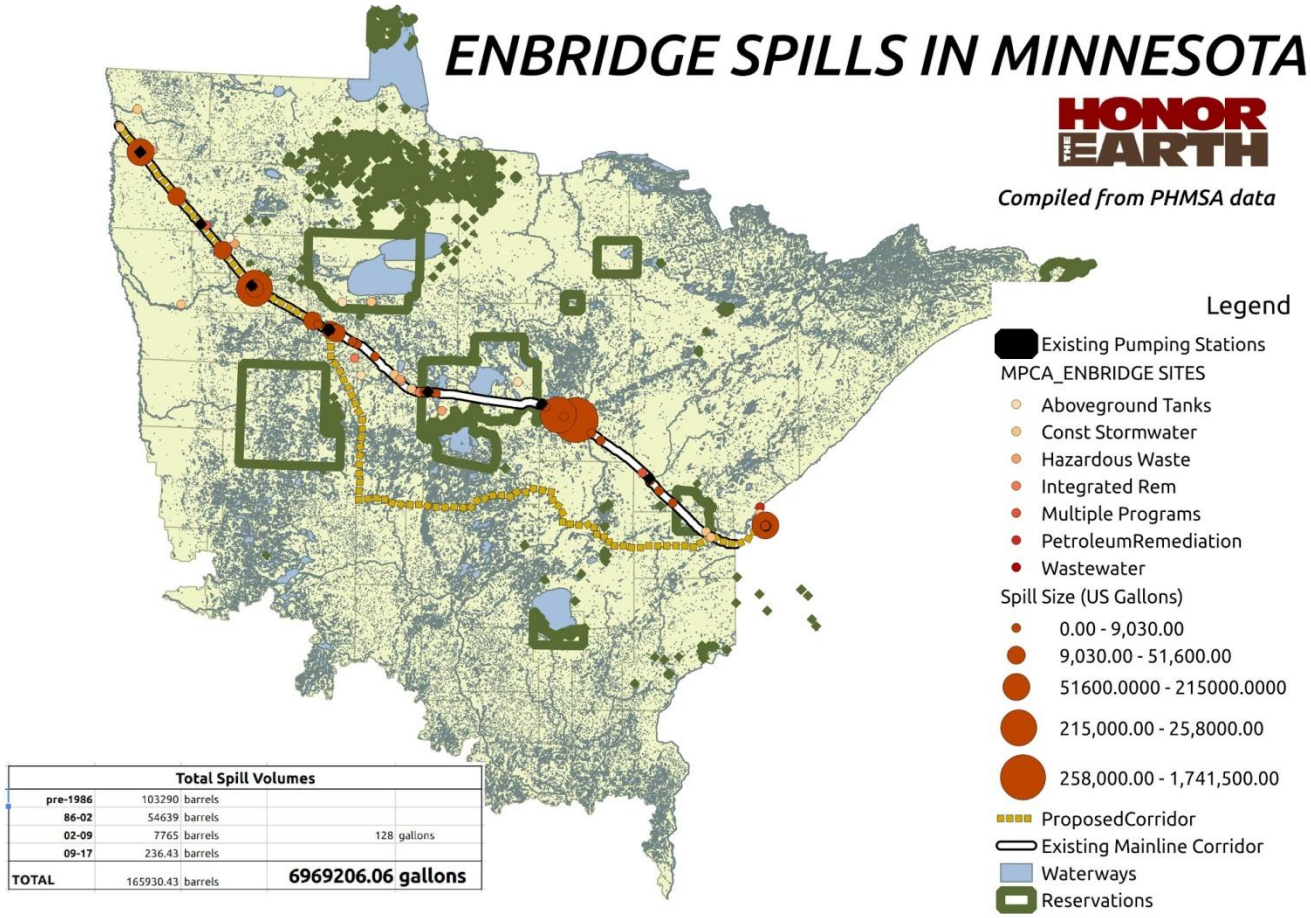
In the DEIS's 14 page abandonment section, the bulk of the information seems to have come directly from submissions prepared by Honor the Earth. While it is appreciated that this information has been included, it is imperative that the EIS include an in depth analysis of the proposed abandonment of the existing Line 3 pipeline. Particularly since it is inevitable that Enbridge will be making application for the relocation of the other aging pipelines in the existing Mainline. The information provided by Honor the Earth was gleaned from documents prepared by the Canadian National Energy Board (CA NEB). We have learned from our allies at the Canadian First Nations, and through additional research, that the Canadian National Energy Board documents also include serious flaws. It is important for the United States, Native communities and states to prepare regulations and policies on abandonment using the best science. Abandonment will become commonplace, and it is imperative that the regulators (MN DOC and MN PUC) get in front of this issue and not sit back and let the pipeline operators (Enbridge) dictate how abandonment will occur. It is disturbing that when examining the abandonment section of the DEIS appendices that most plans and estimates are based on the plans and estimates for the Canadian section of Line 3. Minnesota and the 1855 Treaty ceded territory is not Canada, and a vague abandonment plan based on another similarly contested plan is no plan at all.

Federally available spill data shows that many thousands of gallons of crude oil have been spilled by Enbridge in Minnesota and in the 1855 Treaty ceded territory. Much of that oil remains in the environment. Because of the 2010 Kalamazoo spill, Enbridge is no longer able to

[36] http://www.earthtimes.org/conservation/restored-wetlands-century-regenerate/1781/#gfixYmgJou156gyH.99

minimize the chances of a spill, nor is it able to downplay the consequences of such a massive spill. If a Kalamazoo-type spill were to occur along the water-rich environment where Enbridge seeks to relocate Line 3, the natural environment, water, wild rice, land, plants and animals would be devastated. And insurance proceeds would be little consolation for the devastation to the destruction of the Anishinaabe way of life.

The DEIS completely avoids the issue of tribal clean water and other tribal environmental standards; as well as whether Enbridge even had plans to remediate the contaminated soil and water to *Tribal defined standards*. As Enbridge has already admitted, the existing Line 3 has been leaking at many locations for some time along its 300+ mile span through Minnesota. The DEIS needs to make clear how the widespread spills and leaks along the existing Line 3 will be remediated. It is totally inadequate to allow Enbridge to abandon Line 3 and leave the gravity and number of these spills unaccounted for. The light of day definitely needs to be shined on the existing Line 3 **before** a certificate of need and a route permit are awarded to Enbridge for a new corridor to pollute. 2290-10



The DEIS cavalierly brushes off abandonment issues as "anticipated to be minimal in the near term". Appendix B to the DEIS (page 29) discusses the anticipated through-wall corrosion date

is either: 1) already occurring, or 2) within the next 20 - 50 years (from 2011). The DEIS provides:

> soil conditions. Based on the information presented in Figure 4-8, the worst case time to failure, from the original installation is estimated at 51 years. Based on this, it would be assumed that the pipeline is already penetrated or is likely to be within the next five years considering an in-service date of 1968. This demonstrates the over-conservative nature of the corrosion rates

Appendix B of the DEIS at page 35 provides:

> It is expected that given sufficient time, a pipeline that is not maintained, has poor or no coating, and without CP, will eventually collapse due to corrosion. Estimates of this timeframe have been provided in Section 4.3.1.6, as well as from industry references to be decades at the low end, and thousands of years on the high end.[1,3,6,13] The NEB recognizes that maintaining abandoned pipelines while continuing CP cannot completely eliminate the risk of pipeline degradation or collapse. However, it can be expected to significantly slow the corrosion process, and thereby delay any potential subsidence.[5]

However, the conclusions in Appendix B of the DEIS provide:

> The primary conclusions of the analyses provided are as follows:
>
> - Based on the PTAC corrosion rate curves presented, and comparison with historical ILI data for Line 3, the estimated time to through wall penetration was calculated to be between 25 to 50 years from 2011.
> - The results of the PTAC model considering generalized wall loss for the Permanently Deactivated Line 3 indicate predicted minimum time to collapse as 87 years, with estimates well above 1,000 years based on the variety of soil conditions as described in Section 4.3.1.7.

The 25-50 year time frame for through wall penetration is supported by Paul Vogel's article "Aging Pipelines- What are the Risks?".[37]

> *"Enbridge has acknowledged that the extensive disbonding of the Line 3 polyethylene tape pipe coating will render cathodic protection ineffective to prevent corrosion, and has estimated time to through-wall penetration at 25 to 50 years. Progressively greater agricultural surface loads increase the potential for pipeline collapse and ground subsidence. In addition to health and safety concerns and related costs and liabilities, topsoil loss upon ground subsidence would result in permanent long-term production losses.*

The article by Paul Vogel goes on to describe the terms of a recent settlement between CAEPLA/MPLA/SAPL and Enbridge with respect to landowner concerns. Part of this settlement requires that Enbridge will maintain a certain depth of cover over pipelines. From

[37] Vogel, Paul. "Aging Pipelines- What are the Risks?" in Pipeline Observer. Canadian Association of Energy and Pipeline Landowner Associations (CAEPLA). Summer 2016.

recent aerial surveys, there are many locations where Enbridge's existing pipelines are exposed. ***How will Enbridge maintain depth of cover in areas where no cover exists?***

The DEIS provides: "If t**here is a dearth of surrounding soil**, or if the cover for the pipeline is relatively shallow, the pipeline bears more of the load and, all things being equal, **is more likely to fail"**. (Emphasis added). The DEIS further provides with respect to abandonment as follows:

> When a pipe is empty, the weight of the liquid load that once contributed to buoyancy control is lost. As a result, the pipe could become buoyant and begin rising toward the surface at watercourse crossings, in wetlands, and in locations where soil density is low and the water table is high (DEIS, Section 8.3.1).

The DEIS further discusses *the **possibility of exposed pipe** and potential mitigation measures. Enbridge indicates in its proposed plan that it would monitor for exposed pipeline and, **if found**, would work with relevant agencies and authorities to develop site-specific mitigation measures*, which could include removing a segment of pipeline, grouting, and continued monitoring. It is easy to make such self-serving responsible-sounding intentions, but the evidence shows that Enbridge does not adequately address exposed active pipelines currently. There is no reason to believe that Enbridge would do a better job maintaining abandoned Line 3, or any of its other pipelines that will inevitably also be abandoned.

Enbridge's estimates of the costs of abandoning Line 3 fluctuate wildly. The TESTIMONY OF LAURA KENNETT, MPUC DOCKET NOS. PL9/CN-14-916, January 31, 2017, emphasizes this point in response to a question pertaining to the current estimated cost to continue a dig and repair program on Line 3, and how the dig and repair program compares to the cost of replacement of Line 3. Ms. Kennett stated:

> Conceptually, **it may be possible** to restore Line 3 to its original operating capacity if Enbridge invested nearly **$8 billion in repairs over the next 15 years** in Canada and the U.S., with **approximately $2 billion in the U.S. alone**. However, in reality, it is not feasible to conduct such an extensive dig and repair program, which would require multiple digs in concentrated areas. The resources required, and **the impact to the environment and landowners along the pipeline, would be extraordinary**. Moreover, since the total estimated cost to replace Line 3 is $7.5 billion (approximately $2.1 billion for the U.S. portion), **we are at the approximate break-even point when comparing the cost of replacement to the present value of continued repairs.**

Compliance with the requirements of the Consent Decree with respect to the federal court litigation over Enbridge's 2010 Kalamazoo spill will increase Enbridge's capital expenditure requirements for Line 3 in the range of $5 million to $40 million per year in the U.S. starting in 2018 until Line 3 is permanently deactivated. In addition, compliance with the Consent Decree

will **increase operating expenses (mainly for ILI) by approximately $8.5 million per year in the U.S.,**[38] until such time as Line 3 is permanently deactivated, which is up to three times the current amount, depending on the date Line 3 is retired. Yet, the DEIS provides:

> Enbridge estimates the short-term cost of abandoning Line 3 in place to be approximately $85 million.[39] For context, Enbridge estimates annual monitoring costs for Line 3 to be about $100,000.[40] Costs for future site-specific mitigation measures (e.g., to mitigate subsidence or loss of buoyancy control) are uncertain and would depend on the nature of the mitigation measures.

Finally, the DEIS abandonment section provides: "Enbridge estimates the cost of removing Line 3 at approximately $1.28 billion. This estimate is based on a per-foot cost for removal at about $855."[41] Because the costs of abandonment and removal of the existing Line 3 go to the core of the present dispute between the parties; and because the administrative law judge and the Public Utilities Commission will need valid and reliable information on these critical issues, it is completely unacceptable to accept Enbridge's self-serving responses for inclusion in the DEIS.

Respectfully submitted,

/s./ Joseph Plumer

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[38] ILI (In-line Inspection), or smart-pigging is merely an inspection process, not a repair process. Enbridge intends to simply "monitor" the situation.

[39] Communication with Enbridge, March 10, 2017. There needs to be objectively verifiable information on this important point.

[40] Yet in their testimony included in the Kalamazoo consent decree, Enbridge states that in-line inspection will cost $8.5 million in the US. Again, the DEIS's estimate of the annual cost of in-line inspection for the abandoned Line 3 at $100,000 is entirely unsupported.

[41] Again, this critical, and hotly contested issue must be independently verified. Reliance on a phone call to Enbridge for this critical information is unacceptable.