BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, Minnesota 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Applications of North Dakota Pipeline Company LLC for a Certificate of Need and Pipeline Routing Permit for the Sandpiper Pipeline Project	MPUC Docket No. PL-6668/CN-13-473 OAH Docket No. 8-2500-31260 MPUC Docket No. PL-6668/PPL-13-474 OAH Docket No. 8-2500-31259

NORTH DAKOTA PIPELINE COMPANY LLC'S
RESPONSE TO HONOR THE EARTH'S DISPOSITIVE MOTION

SUMMARY

Pursuant to Administrative Law Judge Eric Lipman's Second Pre-Hearing Order, North Dakota Pipeline Company LLC ("NDPC") submits its response to Honor the Earth's "Notice of Lis Pendens and Motion to Dismiss for Lack of Jurisdiction" (the "Motion") and "Memorandum of Law in Support of Lack of Jurisdiction for Usufructuary Property Rights Protected by Federal Treaties" (the "Memorandum").

NDPC respectfully requests that Honor the Earth's Motion be denied:

(1) The Minnesota Public Utilities Commission ("MPUC or Commission") lacks statutory authority and jurisdiction to consider the claims raised in the Motion;

(2) Honor the Earth lacks standing to assert treaty rights purportedly belonging to the Ojibwe Bands; [1]

[1] The White Earth and Leech Lake Bands are two of several bands comprising the Minnesota Chippewa Tribe. Although the historical term is "Chippewa," "Ojibwe" is more commonly used today, and NDPC's Response will refer to the "Ojibwe Bands."

(3) The Sandpiper Pipeline does not cross "Indian country," and the Ojibwe Bands do not have jurisdiction over nonmembers outside of Indian country; and

(4) Honor the Earth's claims that granting a route permit will result in "inevitable oil spills and environmental degradation across the ceded territories"[2] is a contested issue of material fact and is not an appropriate basis for a motion to dismiss for lack of subject matter jurisdiction.

FACTS

I. NDPC APPLIED FOR A CERTIFICATE OF NEED AND ROUTE PERMIT.

On November 8, 2013, NDPC filed applications for a certificate of need ("CN") and pipeline route permit ("Route Permit") to construct approximately 299 miles of new pipeline in Minnesota in order to meet the need for reliable and secure petroleum transportation facilities. The Minnesota segment is part of a larger pipeline project, known as the Sandpiper Pipeline Project ("Project" or "Sandpiper"), which will transport Bakken and Three Forks crude oil from the Williston Basin in western North Dakota to Clearbrook, Minnesota and Superior, Wisconsin.

II. THE PROPOSED ROUTE DOES NOT CROSS TRIBAL LANDS.

NDPC's preferred route (the "Proposed Route") crosses through the northern half of Minnesota, including Polk, Red Lake, Clearwater, Hubbard, Cass, Crow Wing, Aitkin, and Carlton counties.[3] The Proposed Route does not cross land owned by tribes, land held in trust by the federal government for tribes, trust allotments, or land within a reservation held in fee simple. In short, the Proposed Route has no contact with any parcel over which a tribe could purport to exercise civil regulatory jurisdiction.

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[2] Motion, at 2.

[3] See Exhibit A for a map showing the Proposed Route and tribal lands.

III. MPUC REFERRED NDPC'S APPLICATION TO OAH FOR A CONTESTED CASE PROCEEDING.

On February 11, 2014, the MPUC issued an order finding NDPC's Application for a Certificate of Need to be substantially complete upon supplementation (the "CN Order"). On the same day, the Commission issued an order finding that NDPC's Application for a Pipeline Route Permit was substantially complete (the "RP Order"). In its orders, the Commission referred the matters to the Office of Administrative Hearings ("OAH") for contested case proceedings pursuant to Minn. Stat. § 14.57 *et seq.* and noted that an administrative law judge ("ALJ") had been assigned.[4]

Pursuant to the CN Order and the RP Order, two issues are to be addressed in the contested case proceeding: (1) "whether NDPC's proposed pipeline meets the need criteria set forth in Minn. Stat. § 216B.243 and Minn. Rules Chapter 7853;"[5] and (2) "whether NDPC's proposed pipeline meets the routing criteria set forth in Minn. Stat. Chapter 216G and Minn. Rules Chapter 7852."[6] Both orders provide that parties "should address whether the proposed projects meets these criteria and address these factors. The parties may also raise and address other issues relevant to the application."[7] Both orders provide that the contested case hearing will be conducted in accordance with the Administrative Procedures Act,[8] OAH rules,[9] and the Commission's rules,[10] to the extent not otherwise superseded.[11]

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[4] CN Order, at 5.

[5] CN Order, at 5.

[6] RP Order, at 9.

[7] CN Order, at 5; RP Order, at 9.

[8] Minn. Stat. §§ 14.57 to 14.62.

IV. HONOR THE EARTH'S INTERVENTION AND MOTION.

On March 11, 2014, Honor the Earth petitioned to intervene in MPUC Docket Nos. PL-6668/CN-13-473 and PL-6668/PPL-13-474 ("Petition to Intervene"). In support of its Petition to Intervene, Honor the Earth stated that it "is a nonprofit environmental organization, focused on . . . [the] protection of the environment and rights of Native peoples."[12] Honor the Earth asserted that, "in Minnesota the Chippewa have usufructuary property interests across the ceded territories, which are essentially north of I-94 to Canada and from North Dakota to Wisconsin."[13] On March 17, 2014, the ALJ granted Honor the Earth's Petition to Intervene.[14]

On March 16, 2014, Honor the Earth submitted its Motion asserting that the MPUC did not have "complete and independent right" to grant a CN and Route Permit, and therefore lacked jurisdiction.[15] Honor the Earth asserted that NDPC was required to apply to "Chippewa reservation tribal governments" for approval of the proposed Project because of those tribes' purported usufructuary rights.[16]

The ALJ ordered additional briefing on Honor the Earth's Motion, and, on April 7, 2014, Honor the Earth submitted its Memorandum. In the Memorandum, Honor the Earth asserts that

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[9] Minn. R. 1400.5100 to 1400.8400; 1405.0200 to 1405.2800.

[10] Minn. R. 7829.0100 to 7829.3200.

[11] CN Order, at 8; RP Order, at 11.

[12] Petition to Intervene, at 3.

[13] Petition to Intervene, at 5.

[14] Second Pre-Hearing Order, at 2.

[15] Motion, at 2.

[16] Motion, at 8.

the MPUC does not have subject matter jurisdiction to grant a pipeline route permit because it does not have "full, final and complete legal authority" to do so as a result of various tribes' purported usufructuary rights in the northern half of the State of Minnesota.[17]

ANALYSIS

I. THE COMMISSION LACKS STATUTORY AUTHORITY AND SUBJECT MATTER JURISDICTION TO INTERPRET INDIAN TREATY LAW.

The MPUC is a creature of statute and has only the authority granted to it by the Legislature.[18] "[A]ny enlargement of [the MPUC's] express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature."[19] "[R]easonable doubts as to the question of jurisdiction should be resolved in favor of finding a lack of jurisdiction."[20] Pursuant to Minn. Stat. § 14.69, the Court of Appeals will reverse or modify any MPUC decision that is "in excess of [its] statutory authority or jurisdiction."

The Legislature has granted the MPUC the authority to regulate utilities:

> The Public Utilities Commission shall have and possess all of the rights and powers and perform all of the duties vested in it by

[17] Memorandum, at 13.

[18] *In re Petition of Minn. Power*, 545 N.W.2d 49, 51 (Minn. Ct. App. 1996) ("The MPUC, being a creature of statute, has only those powers given to it by the legislature.") (citing *Great N. Ry. v. Pub. Serv. Comm'n*, 169 N.W.2d 732, 735 (Minn. 1969)); *see also In re Investigation into the Comm'n Juris.*, 707 N.W.2d 223, 226 (Minn. Ct. App. 2005)

[19] *Comm'n Juris*, 707 N.W.2d at 226 (citing *Peoples Natural Gas Co. v. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985)).

[20] *In re Appeal of the Selection Process for the Position of Electrician*, 674 N.W.2d 242, 248 (Minn. Ct. App. 2004) (citing *Essling v. St. Louis Cnty. Civil Serv. Comm'n*, 168 N.W.2d 663, 665 (Minn. 1969)).

> [Chapter 216A] and those formerly vested by law in the Railroad and Warehouse Commission.[21]

In furtherance of this authority, the MPUC is allowed to:

> [M]ake such investigations and determinations, hold such hearings, prescribe such rules, and issue such orders with respect to the control and conduct of the businesses coming within its jurisdiction as the legislature itself might make but only as it shall from time to time authorize.[22]

The MPUC is authorized to "order the issuance of franchises, permits or certificates of convenience and necessity."[23] With respect to pipelines, the Commission has "primary responsibility and regulation" of pipeline routing within the State.[24] While the route selection criteria require the Commission to consider the impact of a route on "the relevant applicable policies, rules, and regulations of other state and federal agencies, and local government land use laws . . .,"[25] the Legislature has not charged the Commission with interpreting, applying or enforcing other state, federal, or local laws. Rather, it is the responsibility of the applicant – NDPC – to comply with all relevant and applicable laws necessary to construct the pipeline.[26]

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[21] Minn. Stat. § 216A.01; *see also* Minn. Stat. § 216B.08 (vesting the MPUC with "powers, rights, functions, and jurisdiction to regulate in accordance with the provisions of Laws 1974, chapter 429 every public utility as defined herein").

[22] Minn. Stat. § 216A.05, subd. 1.

[23] *Id.* at subd. 2(4).

[24] Minn. Stat. § 216G.02, subd. 4.

[25] Minn. R. 7852.1900, subp. 3(J).

[26] *See, e.g.*, Minn. R. 7853.0130(D) (stating that a CN will be granted if "it has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rules, and regulations of other state and federal agencies and local governments").

The Legislature has *not* authorized the MPUC to: (1) interpret treaties between the United States government and Indian tribes; (2) recognize new rights under those treaties; (3) order utilities to seek regulatory approval from Indian tribes; (4) expand its own jurisdiction; or (5) constrict or limit in any way the jurisdiction and authority of the State.

Indeed, a review of the case law shows the limited scope of the MPUC's authority. For instance, courts have determined that the MPUC would exceed its statutory authority by: regulating a gas pipeline operated by a municipal utility;[27] requiring a public utility to refund rates;[28] and awarding damages to utility customers based on a nuisance claim for stray voltage[29] - activities arguably related to the authority conferred on the MPUC by the Legislature. If those activities are beyond the scope of the MPUC's authority, it is surely beyond the scope of the MPUC to recognize rights, never before recognized by a court, under a treaty negotiated between the Ojibwe Bands and the federal government prior to Minnesota's statehood. Because the ALJ's jurisdiction arises from the MPUC, the ALJ's authority is likewise limited.[30]

Accordingly, the MPUC does not have the authority to determine whether the Project requires the consent of any of the Ojibwe Bands, any more than the MPUC has the authority to decide whether the Project needs a particular permit from a federal agency under federal law. Nor may the MPUC rely on the assertions made by a third party that another entity has

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[27] *In re Investigation into Comm'n Juris.*, 707 N.W.2d 223, 226 (Minn. Ct. App. 2005).

[28] *Peoples Natural Gas Co. v. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985).

[29] *Siewert v. N. St. Power Co.*, 793 N.W.2d 272, 285 (Minn. 2011).

[30] *Dep't of Human Rights v. Spiten*, 424 N.W.2d 815, 820 (Minn. Ct. App. 1988) (holding that, in contested case under the Human Rights Act, ALJ's jurisdiction was limited to that set forth in the Human Rights Act).

permitting authority without establishing any legal foundation for that authority.[31] Rather, the federal courts have authority to determine whether the consent of Ojibwe Bands is required under treaty laws. Congress has explicitly stated so.[32] To the extent the Ojibwe Bands claim permitting authority beyond that authorized by long-standing, well-recognized legal precedent, any dispute over whether that claimed permitting authority is required is appropriately addressed by a federal court.[33]

II. HONOR THE EARTH LACKS STANDING TO ASSERT RIGHTS PURPORTEDLY BELONGING TO OJIBWE BANDS.

In its Motion and Memorandum, Honor the Earth asserts that Ojibwe Bands have permitting authority over the Proposed Route by virtue of purported usufructuary rights. However, Honor the Earth does not have standing to assert the Ojibwe Bands' treaty rights, if any.

As the Minnesota Court of Appeals has noted, it is well-established that treaty rights to hunt and fish belong to tribes, and not to individuals:

> We note first that appellant's treaty hunting rights do not belong to him as an individual. It is well established that the treaties with the Indians gave no vested rights to individuals' because the government dealt with the tribes and all promises were made to the tribes. Thus, the hunting rights, which appellant argues have been abridged, belong to the tribe as a whole and not to any individual member of the tribe.[34]

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[31] As set forth in more detail below, NDPC disputes that Honor the Earth itself even has standing to bring the Motion.

[32] 28 U.S.C. § 1362.

[33] Notably, Honor the Earth's Motion does not provide any law or fact that would suggest that a federal court would make such a finding.

[34] *State v. Roy*, 761 N.W.2d 883, 886 (Minn. Ct. App. 2009) (emphasis added) (internal quotations and citations omitted).

Honor the Earth is not a tribal government. The claim to treaty rights can only be asserted by Ojibwe Bands that were treaty signatories. Accordingly, Honor the Earth lacks standing to bring the claims asserted in its Motion, and the Motion should be denied.

III. HONOR THE EARTH'S MOTION FAILS ON ITS MERITS.

In claiming tribal authority over pipeline routing, Honor the Earth's Motion also ignores the fact that the proposed Sandpiper Pipeline route does not cross "Indian country."[35] This is important because (1) tribes lack jurisdiction over the activities of nonmembers outside of Indian country, and, (2) tribes generally lack jurisdiction over the activities of nonmembers even on fee lands within Indian country.[36] The 1855 ceded territory is not "Indian country," except for certain lands in reservations that are not crossed by the Proposed Route.

Even within Indian country, tribal jurisdiction over nonmembers is limited.[37] As a general rule, tribes do not have jurisdiction over nonmembers within Indian country on fee land.[38] This general rule applies regardless of the extent, if any, the 1855 Treaty reserved hunting and fishing rights for the Ojibwe Bands.[39] In *Montana*, the Supreme Court recognized

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[35] For a tribe to have jurisdiction over any land, that land must qualify as "Indian country." 18 U.S.C. § 1151. Section 1151 defines "Indian country" to include all reservation land, dependent Indian communities, and allotments "the Indian titles to which have not been extinguished." *See also Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999).

[36] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *see also, South Dakota v. Bourland*, 508 U.S. 679, 688 (1993).

[37] *Montana v. United States*, 450 U.S. 544 (1981).

[38] *Id.*

[39] To the extent the ALJ reviews the merits of Honor the Earth's Motion regarding reserved usufructuary rights, it is important to note that the Motion is premised on a novel analysis which ignores a long line of controlling Supreme Court precedent. In the 159 years that have passed since the 1855 Treaty was signed, no court has recognized an 1855 Treaty right to

two limited exceptions to this general rule.[40] Under the *Montana* test, tribes have jurisdiction over nonmembers within Indian country only if: (1) there is a consensual relationship, such as a commercial contract, between the tribe and the nonmembers; or (2) nonmembers' conduct "menaces the political integrity, economic security or health and welfare of the tribe."[41] As an initial matter, the application of *Montana* to this case is questionable because the Project does not touch Indian country. However, even if the *Montana* test applied, Ojibwe Bands could not exercise jurisdiction over NDPC, a nonmember.[42]

The issue of tribal authority over nonmember activities was recently before the United States District Court for the District of Minnesota.[43] In *Otter Tail*, the MPUC issued a route permit to build a transmission line that crossed the historical boundaries of the Leech Lake Reservation.[44] The transmission line did not cross over any tribal trust lands of the Leech Lake Band of Ojibwe ("LLBO") or the Ojibwe Bands.[45] LLBO filed a petition with the MPUC to

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hunt and fish by any Ojibwe Band in the 1855 ceded territory. The State of Minnesota has exercised exclusive regulatory authority over the natural resources in that area since statehood in 1858, except when federal regulatory interests are at stake. Appendix B provides a detailed analysis of Honor the Earth's 1855 Treaty rights claims. Because resolution of this Motion does not require the ALJ to interpret the treaty rights to determine whether the 1855 Treaty reserved hunting and fishing rights in the 1855 ceded territory -- which it did not -- the arguments are not repeated here.

[40] *Montana v. United States*, 450 U.S. 544 (1981).

[41] *Id.*

[42] *See, e.g., Otter Tail Power Co. v. Leech Lake Band of Ojibwe*, No. 11-1070, 2011 U.S. Dist. LEXIS 67377 (D. Minn. June 22, 2011).

[43] *Id.*

[44] *Id.* at *5.

[45] *Id.*

revoke the Route Permit, claiming that LLBO had regulatory authority over the transmission line.[46] Otter Tail Power Company and the other utilities ("Utilities") filed an action for declaratory relief in federal district court, seeking temporary and preliminary injunctive relief.[47]

The court granted the Utilities' motion for a temporary restraining order.[48] The court first noted that a tribe bears the burden of showing that its assertion of jurisdiction falls within one of the *Montana* exceptions because "efforts by a tribe to regulate nonmembers . . . are presumptively invalid".[49]

The court then found that, even where the transmission line crossed reservation lands, the Utilities were likely to prevail on their claims that LLBO had no regulatory jurisdiction over the Project because LLBO could not meet either of the two *Montana* exceptions: (1) the Utilities did not have a commercial contract with the tribe; and (2) LLBO failed to demonstrate how, "under the relevant authority, the impairment of [reserved rights] via the construction of the Project will rise to a level of disruption that will imperil the subsistence of the Tribe's community."[50] As a result, the court issued a temporary restraining order preventing LLBO from attempting to assert jurisdiction over the transmission line.

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[46] *Id.*at *6.

[47] *See id.*

[48] *Id.* at *19.

[49] *Id.* at *10 (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008); *see also Nevada v. Hicks*, 533 U.S. 353, 359-60 (2001) ("The Supreme Court has rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude.").

[50] *Otter Tail*, 2011 U.S. Dist. LEXIS 67377, at *13-16.

As in *Otter Tail*, Honor the Earth here cannot show that either *Montana* exception applies. First, there is no evidence that NDPC has consented to the Ojibwe Bands' jurisdiction over the Project. There is no commercial contract or other evidence of a consensual relationship. Accordingly, the first *Montana* exception does not apply. And, like *Otter Tail*, Honor the Earth has presented no evidence that any impairment of the purported usufructuary rights because of the Project "will imperil the subsistence of the [Ojibwe Bands'] community."

Accordingly, even if (1) the MPUC had statutory authority, (2) Honor the Earth had standing, and (3) the 1855 Treaty had reserved hunting and fishing rights, the Motion should be denied because reserved rights do not grant Ojibwe Bands civil regulatory authority over the Project.

IV. THE ISSUES RAISED IN HONOR THE EARTH'S MOTION ARE NOT PROPERLY CHARACTERIZED AS A MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.

To the extent Honor the Earth argues that the Commission should not issue the Route Permit because of potential environmental damage, such an argument is not properly characterized as a motion to dismiss for lack of subject matter jurisdiction and is premature. Rather, it is a policy argument that is more appropriately considered in the course of the contested case proceeding. A project's environmental impact is one issue upon which the parties will present evidence and the ALJ will consider when issuing a report. This contested case proceeding is still in its early stages, and there has been no evidence presented on the issue of environmental damage. As such, any dispositive motion on this issue is premature.

V. THE ALTERNATIVE RELIEF REQUESTED BY HONOR THE EARTH SHOULD BE DENIED.

In its Motion, Honor the Earth requested, apparently in the alternative, that this contested case proceeding be "stayed or expanded" for several reasons.[51] Honor the Earth also requested "[a]ny other procedural and substantive safeguards deemed fair and just."[52] As set forth above, and in the authorities cited in Appendix B, the claims asserted by Honor the Earth are not recognized under well-established, long-standing law. In addition, this proceeding is limited to the scope established by the Commission.[53] Thus, the alternative relief requested by Honor the Earth should be denied.

CONCLUSION

As set forth above, the Commission lacks statutory authority to consider the claims raised in Honor the Earth's Motion. Even if the Commission had authority, Honor the Earth does not having standing to assert treaty rights because, pursuant to well-established federal law, only tribes have standing to assert treaty rights. Finally, even if Honor the Earth's Motion was procedurally proper, it fails on its merits because tribes do not have jurisdiction to regulate the activities of nonmembers outside of Indian country. For these reasons, NPDC respectfully requests that the ALJ deny Honor the Earth's Motion.

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[51] Motion, at 9. One of Honor the Earth's requests is to extend the public comment period. NDPC notes that the Commission issued a notice extending the public comment period, in response to a separate request by Honor the Earth, and that NDPC is separately contesting that decision.

[52] *Id.*

[53] *See* CN Order; RP Order.

Dated: April 21, 2014

Respectfully submitted,

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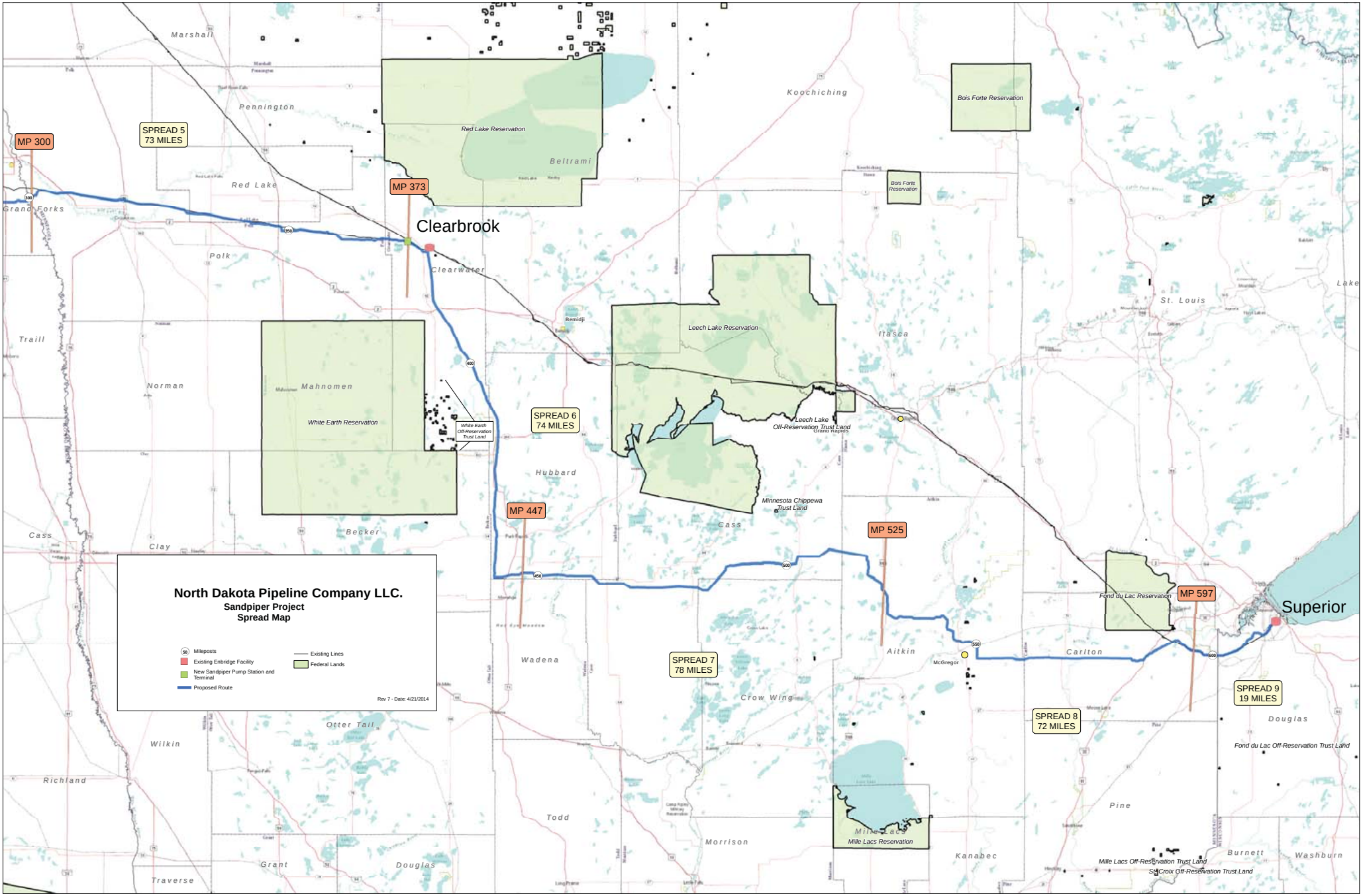
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Red Lake Reservation
Bois Forte Reservation
Leech Lake Reservation
White Earth Reservation
Leech Lake
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Minnesota Chippewa
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Fond du Lac Reservation
Fond du Lac Off-Reservation Trust Land
Mille Lacs Reservation
Mille Lacs Off-Reservation Trust Land
St.Croix Off-Reservation Trust Land
McGregor
Marshall
Pennington
Red Lake
Polk
Clearwater
Beltrami
Koochiching
Itasca
St. Louis
Lake
Bemidji
Grand Rapids
Grand Forks
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Hubbard
Cass
Clay
Becker
Wadena
Crow Wing
Aitkin
Carlton
Douglas
Pine
Otter Tail
Wilkin
Richland
Todd
Morrison
Grant
Traverse
Douglas
Kanabec
Burnett
Washburn
North Dakota Pipeline Company LLC.
Sandpiper Project
Spread Map
Mileposts
Existing Enbridge Facility
New Sandpiper Pump Station and Terminal
Proposed Route
Existing Lines
Federal Lands
Rev 7 - Date: 4/21/2014

APPENDIX B
NORTH DAKOTA PIPELINE COMPANY LLC'S
ANALYSIS OF VARIOUS INDIAN LAW
ISSUES RAISED BY HONOR THE EARTH

I. Overview

In its March 16, 2014 "Notice of Lis Pendens and Motion to Dismiss for Lack of Personal Jurisdiction" (the "Motion") and accompanying April 7, 2014 "Memorandum of Law in Support of Lack of Jurisdiction for Usufructuary Property Rights Protected by Federal Treaties" (the "Memorandum"), Honor the Earth ("HTE") claims hunting and fishing rights that it, in turn, purportedly provide Ojibwe Bands broad jurisdictional control over a large area of northern Minnesota ceded primarily under the 1855 Treaty with the Chippewa, 10 Stat. 1165, February 22, 1855 (the "1855 Treaty") and the 1889 Nelson Act, 25 Stat. 642 (the "Nelson Act"). North Dakota Pipeline Company LLC's ("NDPC") response to the Motion and Memorandum addresses issues relevant to the Minnesota Public Utilities Commission. This Appendix B discusses why the Indian Law-related claims raised by Honor the Earth fail on numerous legal, substantive and procedural grounds:

(a) The areas crossed by the Sandpiper Pipeline that were ceded by the 1854 and 1855 Treaties and the Nelson Act are not "Indian country." Outside of Indian country, Indian tribes have no jurisdiction over nonmembers and their activities.

(b) Neither the 1855 Treaty nor the 1889 Nelson Act reserved hunting and fishing rights in the areas ceded to the United States.

(c) The burden is on an Indian tribe, who seeks to assert jurisdiction over nonmember activities, to establish in federal court that it (i) has the right to exercise jurisdiction over the nonmembers, (ii) the pipeline crosses Indian country over which the tribe has jurisdiction, and (iii) the activity of the nonmember imperils the subsistence of the tribe; and

(d) The claims by HTE to the hunting and fishing rights are barred by the statute of limitations and the jurisdictional bar of the Indian Claims Commission Act.

II. The Ceded Territories[1] in Minnesota are Not "Indian country" and are Therefore Outside of Tribal Jurisdiction.

In *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (1999),[2] the Eighth Circuit further clarified that the tribe had no jurisdictional authority over a proposed landfill or waste site, reasoning as follows:

> For the Tribe to have jurisdiction over any land under the current statute, it must qualify as Indian country pursuant to 18 U.S.C. §1151. The statute defines Indian country to include all reservation land (§1151(a)), dependent Indian communities (§1151(b)), and allotments 'the Indian titles to which have not been extinguished' (§1151(c)). . . .[B]ut if there is no reservation, the State has primary jurisdiction over all land except allotments which continue to be held in trust, §1151(c).

Id. at 1017 (citations omitted). The ceded territory (except for certain lands in reservations not crossed by the pipeline) is not within the statutory definition of "Indian country."[3]

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[1] Each of the Indian land cessions is shown by the Royce Area maps. For example, the 1855 cession is Royce Area 357. See the maps attached as Figures 1 to 3. For a discussion of the background of the Royce Area maps and a specific discussion regarding the Royce Areas ceded in Minnesota, *see Minnesota Chippewa Tribe v. United States*, 11 Cl. Ct. 221, 224-225, 227-228 (Cl. Ct. 1986).

[2] Cert. denied 530 U.S. 126 (2000), on remand from the United States Supreme Court's decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

HTE argues that because the 1855 Treaty, Article 7 prohibited the sale of alcohol within the entire boundaries of the ceded area, that area continued as "Indian country." HTE's argument is based upon a misreading of *Johnson v. Gearlds*, 234 U.S. 422 (1914). The Supreme Court expressly found that the 1855 Treaty extinguished "Indian title," and the ceded territory was therefore no longer "Indian country."

> By the 1st section of the act of 1834 [an Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers (4 Stat. at L. 729, chap. 161)], the term "Indian country" was defined, for the purposes of that act, as meaning land to which the Indian title had not been extinguished. At the making of the treaty [of 1855], therefore, the restriction respecting the liquor traffic was enforced within the ceded area, because **until then the Indian title had not been extinguished**. It was the evident purpose of article 7 [of the 1855 Treaty] to continue the restriction in force in the ceded territory, **notwithstanding the extinguishment of the Indian title**. Such stipulations were not unusual. . . .and it has been uniformly recognized that such stipulations amount in effect to an amendment of the statute, so as to make the restriction effective throughout the ceded territory.

Id. at 435-36 (emphasis added and citations omitted).

The 1854 statute authorizing the 1855 Treaty negotiations contains the directive from Congress that the land acquired would cease to be "Indian country":

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[3] This same analysis applies also to other Ojibwe land cessions including (a) lands ceded under the 1837 Treaty with the Chippewa, 7 Stat. 537; (b) lands ceded under the 1854 Treaty with the Chippewa, 10 Stat. 1109; and (c) the Nelson Act of 1889, 25 Stat. 642 and Nelson Act Agreement that was approved and accepted by the President on March 4, 1890. *See* discussion at *United States v. Mille Lacs Band*, 229 U.S. 498, 504 (1913). Each of these treaties and the Nelson Act and Agreement provided for the cession and sale of land, removing the lands sold from "Indian country." *See United States v. Minnesota*, 466 F.Supp. 1382, 1385-88 (D. Minn. 1979) *aff'd sub nom Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) ["the express language of the 1889 Nelson Act. . . 'operate[d] as complete extinguishment of the Indian title' to the land sold. . ." and "abrogate[ed] any aboriginal hunting, fishing, trapping or wild ricing rights."]. The Nelson Act and Agreement may have also diminished many of the Ojibwe reservations in Minnesota. *See United States v. Mille Lacs Band*, 229 U.S. at 504-05 regarding Mille Lacs Reservation and *South Dakota v. Yankton Sioux Tribe* on diminishment generally. The Sandpiper Pipeline's proposed route does not cross the 1837 ceded area.

> Fourth. The laws of the United States and the Territory of Minnesota shall be extended over the Chippewa Territory in Minnesota whenever the same may be ceded, and the same shall cease to be 'Indian country' except that the lands reserved to said Indians, or other property owned by them, shall be exempt from taxation and execution; and that the Act passed 30th June, Eighteen hundred and thirty-four, "to regulate trade and intercourse with the Indian tribes," etc., be inoperative over the said ceded territory, except the twentieth section, which prohibits the introduction and sale of spirituous liquors to Indians.

Ch. 7, 10 Stat. 598.

HTE quotes the United States Supreme Court's statement that "the Bands of Indians, while making their permanent homes within the reservations, would be at liberty to roam and hunt throughout the entire country, as before," but that statement is hardly novel. In the mid-1800s, settlement was just beginning in northern Minnesota, and both Indians and American settlers would continue to hunt and fish for some of their food. *See Menominee Tribe of Wisconsin v. Thompson*, 943 F.Supp. 999, 1008 (W.D. Wis. 1996) and *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F.Supp. 184, 201 (W.D. Wis. 1996) (noting that the fact that both Indians and non-Indians hunted and fished as part of frontier life does not change what the Indians agreed to in a Treaty). What HTE ignores is that the hunting and fishing activities outside of "Indian country" would be subject to state jurisdiction, for Indians and non-Indians alike, on the land ceded under the 1855 Treaty. *See* Ch. 7, 10 Stat. 598. In any event, 18 U.S.C. §1151 unmistakably excludes the 1854, 1855, Nelson Act and other ceded areas from the definition of Indian country, except for the current reservation lands.

III. The 1855 Treaty Did Not Reserve a Right to Hunt and Fish When the Lands Were Sold to the United States.

HTE's analysis ignores a long line of controlling Supreme Court precedent by concluding, without textual or legal support, that the 1855 Treaty somehow preserved hunting and fishing rights. HTE argues that because a deeply divided United States Supreme Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), held that the 1855 Treaty did not revoke hunting and fishing rights in the 1837 ceded territory expressly reserved to the Mille Lacs Band under the 1837 Treaty, it follows that the 1855 Treaty did not terminate Chippewa usufructuary rights in the 1855 ceded territory.

The 1855 Treaty ceded a large area of lands in Minnesota west of the 1854 cession area. The "cession and sale" language of the 1855 Treaty, Article 1 extinguished all claims and rights of interest in and to land ceded in 1855, including hunting and fishing rights:

> **Article 1.**
> The Mississippi Pillager and Lake Winnibigoshish Bands of Chippewa Indians hereby cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota and included within the following boundaries [description of the 1855 ceded area].

10 Stat. 1165. Despite the fact that one year earlier the 1854 Treaty had expressly reserved hunting and fishing rights,[4] the 1855 Treaty does not reserve hunting and fishing rights.

[4] HTE states that it is "comprised of Native people including enrolled Ojibwe who reside within the 1855 and 1837 treaty areas." HTE's Petition to Intervene, p. 3. HTE does not have members who hold the right to hunt and fish under the 1854 Treaty, since they did not "reside in the territory thereby ceded" pursuant to the express terms of the 1854 Treaty, Article 11. The Sandpiper Pipeline does not cross the 1837 ceded area.

The issue in the *Mille Lacs* case was not whether the quoted provision from the 1855 Treaty ceded hunting and fishing rights in the 1855 ceded area, but rather whether a second provision in Article 1 ceded the 1837 Treaty hunting and fishing rights in the 1837 ceded territory. The second provision of the 1855 Treaty provides that the Indians "relinquish" rights they may have "in and to any other lands in the Territory of Minnesota." 1855 Treaty, Article 1. The majority opinion in *Mille Lacs* held that the second provision was insufficient, in light of the legislative history and the history of the 1855 Treaty negotiations, to demonstrate that the Indians understood that they were giving up their 1837 hunting and fishing privileges by signing the 1855 Treaty. *See Mille Lacs,* 526 U.S. at 196-98 (stating that the treaty "would reserv[e] to them [i.e. Chippewa] those rights which are secured by former treaties") (citing *Cong. Globe*, 33 Cong., 1st Sess., 1404 (1854)).

Importantly, the majority distinguished its prior decision in *Oregon Dept. of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985), where the Court held that the Klamath Tribe agreed to "cede, surrender, grant and convey to the United States all of their claim, right, title and interest in and to certain lands . . .[and therefore] the Klamath Tribe did not retain any usufructuary rights on the land it had ceded." *Mille Lacs*, 526 U.S. at 201-02. In fact, the majority and minority opinions in *Mille Lacs* agreed that when a tribe cedes all of its right, title and interest in and to a tract of land, that act terminates hunting and fishing privileges on that tract of land which was ceded. *See also United States v. Minnesota*, 466 F.Supp. 1382, 1388 (D. Minn. 1979), *aff'd sub nom Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (1980), *cert. den.* 101 S.Ct. 279 (1980)

(holding that the Red Lake Band of Chippewa Indians "does not retain hunting, fishing, trapping or wild ricing rights in the areas ceded in 1889 and 1904").

Numerous other cases similarly recognize that the language of cession and sale of all right, title and interest is "precisely suited" to extinguish tribal jurisdiction over the land. In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998), the Court noted:

> Indeed, we have held that when a surplus land Act contains both explicit language of cession, evidencing 'the present and total surrender of all tribal interests' and a provision for a fixed-sum payment, representing 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land' a 'nearly conclusive,' or 'almost insurmountable' presumption of diminishment arises.

(citing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) and *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). The 1855 Treaty contains both the "explicit language of cession," ("cede, sell and convey to the United States all of their right, title and interest in, and to, the lands. . .") and a "provision for a fixed-sum payment," as set forth in specific monetary amounts in Article 3 of the 1855 Treaty.

In the 159 years that have passed since the 1855 Treaty was signed, no court has recognized an 1855 Treaty right to hunt and fish by any Chippewa Band in the 1855 ceded area. [5] *Mille Lacs* did not change the fundamental and longstanding holding from the *Klamath Tribe* case that a cession and sale of land without a reservation of hunting

[5] Even more fanciful is the "discovery" of a hunting and fishing right by treaty pursuant to the Treaty of Prairie du Chien of 1825, 7 Stat. 272 and the 1826 Treaty with the Chippewa, 7 Stat. 290. These were treaties specifically designed to secure peace between various bands. The tribes agreed to dividing lines, and agreed not to hunt on the territory of the other without permission. This is hardly a treaty-based right to hunt and fish, reserved by treaty during a land cession to the United States, and no court has ever held that it creates such a right. Put simply, this was not a reservation of a hunting and fishing right by treaty, but rather a peace treaty between tribes mediated by the United States government.

and fishing rights extinguishes those usufructuary rights in the area ceded by the treaty. Moreover, the State of Minnesota has exercised primary regulatory authority over the natural resources in that area since statehood.

IV. The Burden is on the Tribes to Establish in Federal Court the Existence of Treaty Rights and the Right to Exercise Jurisdiction Over Nonmembers.

The United States Supreme Court held in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008), that because "efforts by a tribe to regulate nonmembers. . .are presumptively invalid," a tribe bears the burden of showing that its claim of jurisdiction meets one of the exceptions set forth in *Montana v. United States*, 540 U.S. 544 (1981).[6] The exceptions to the *Montana* rule are narrow and "cannot be construed in a manner that would 'swallow the rule.'" *Id.* As Judge Donovan Frank found in *Otter Tail Power Co. v. Leech Lake Band of Ojibwe*, in order to assert a claim of regulatory control, the tribe must establish it meets one of the *Montana* exceptions. No. 11-1070, 2011 U.S. Dist. LEXIS 67377 (D. Minn. June 22, 2011). Here there is no express provision of the 1855 Treaty that recognizes a hunting and fishing right in the 1855 ceded territory. Additionally, there is no court decision recognizing an 1855 Treaty right to hunt and fish in the 1855 ceded territory. Before the claim can be made that there is regulatory authority under one of the *Montana* exceptions, a Tribe or Band must first establish that it has such a hunting, fishing or gathering right.

[6] The *Montana* exceptions are discussed more fully in Section III of NDPC's Response to Honor the Earth's Motion. In sum, a tribe does not have jurisdiction over non-member activities within Indian country unless: (1) the non-member has a consensual relationship with the tribe; or (2) the non-member's activities threaten the political integrity, economic security or health and welfare of the tribe.

The burden is on any Minnesota Ojibwe Bands that may claim a hunting and fishing right in the 1855 ceded territory to file an action in federal court against the State of Minnesota, establish that such a right exists, and then bear the burden of proving that the usufructuary right forms a basis for jurisdiction over non-member activities.

Even if the hunting and fishing rights exist in the 1855 and Nelson Act ceded areas, which they do not, the Ojibwe Bands would still lack regulatory authority over the activities of non-Indians outside of Indian country. So the Ojibwe Bands would have the second burden to establish that the area of pipeline construction is Indian country before it could begin to claim regulatory jurisdiction. Even then, meeting a *Montana* exception remains as a final burden on tribal regulatory jurisdiction.

V. The Claims of HTE are Barred by the Indian Claims Commission Act.

On August 13, 1946, President Harry S. Truman signed into law the Indian Claims Commission Act of 1946, 60 Stat. 1049. The ICCA allowed any claims that a tribe had against the United States, extending back to the American Revolution, to be brought before the Commission. The claims could be based on both purely legal principles and also on notions of "fair and honorable dealings that are not recognized by any existing rule of law or equity." 60 Stat. 1049, § 2. *See Minnesota Chippewa Tribe v. United States*, 11 Cl. Ct. 221, 231-34 (Cl. Ct. 1986).

The ICCA also provided for complete and final closure to all claims existing prior to the passage of the Act, which would be forever barred if not filed by August 13, 1951. *Id.* 11 Cl. Ct. at 232. In this way, Congress "provide[d] for a final adjudication of all tribal claims." 102 Cong. Rec. 11931 (1956).

The Indian Claims Commission Act created the Indian Claims Commission (ICC) with broad and exclusive jurisdiction to hear claims arising under treaties, laws, executive orders, takings, and claims of unfair and dishonorable dealings. 11 Cl. Ct. at 232. All claims that arose before 1946, however, had to be filed with the ICC within five years, or they would be forever barred. *See* 60 Stat. 1049, § 12 ("[N]o claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.") Thus, neither the courts nor an administrative agency has jurisdiction to hear these claims today, and tribes are barred from submitting these claims to the courts or to administrative agencies.

The claim that the 1855 Treaty preserved hunting and fishing rights in the 1855 and Nelson Act ceded areas that were subject to Minnesota's primary jurisdiction existed prior to 1946. If the Ojibwe Bands intended to make a claim that they held hunting and fishing rights in the 1855 or Nelson Act ceded areas or that the ceded lands remained "Indian country", or that those lands were not under state jurisdiction, the Bands needed to file those claims by 1951.

In fact, the Minnesota Chippewa Tribe did file claims under the ICCA under the 1855 Treaty, the Nelson Act and other treaties. The ICC placed the numerous claims filed by Indian Tribes into "Dockets." The Minnesota Ojibwe Bands filed claims for every treaty cited by HTE, which claims are found in several docket numbers including 7, 8, 18 (with numerous sub-dockets), 19, 20, 188 and 189. For example, the 1855 Treaty claims were placed in Docket 18-B. Many of the ICC decisions were appealed to the U.S. Claims Court. *See, e.g., Minnesota Chippewa Tribe v. United States*, 11 C1. Ct.

221 (Cl. Ct. 1986) (court decided certain Nelson Act claims from Dockets 19, 188 and 189-A). When claims were filed for the land cessions, the Indian Tribes sought recovery for the complete taking of land and all of its right, title and interest under each of the treaties, which necessarily included the hunting and fishing (usufructuary*)* rights. *See Menominee Tribe of Wisconsin v. Thompson*, 943 F.Supp. 999, 1016-20 (W.D. Wis. 1996) (discussing why usufructuary rights were included in the ICC awards for the taking of lands ceded by treaty). These claims by the Minnesota Ojibwe Bands, filed with the Indian Claims Commission, were the last claims that could be brought for the hunting and fishing rights claimed here.

The Indian Claims Commission Act was intended to bar all claims that were in existence in 1946 if they were not filed by 1951. *United States v. Dann*, 470 U.S. 391 (1985); *Minnesota Chippewa Tribe*, 11 Cl. Ct. at 232. Efforts to circumvent the closure intended by the ICCA by bringing claim against states and even private citizens over the taking of land or trespass are barred by the ICCA. *Oglala Sioux Tribe v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. den*. 455 U.S. 907 (1982); *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407 (8th Cir. 1983). The effort to circumvent the ICCA by filing a claim asking an administrative agency to recognize the existence of treaty hunting and fishing rights is expressly barred by Section 12 of the Act. 60 Stat. 1049. No further claim can be brought in any forum because of this statute of limitation and jurisdictional bar.

Respectfully submitted,

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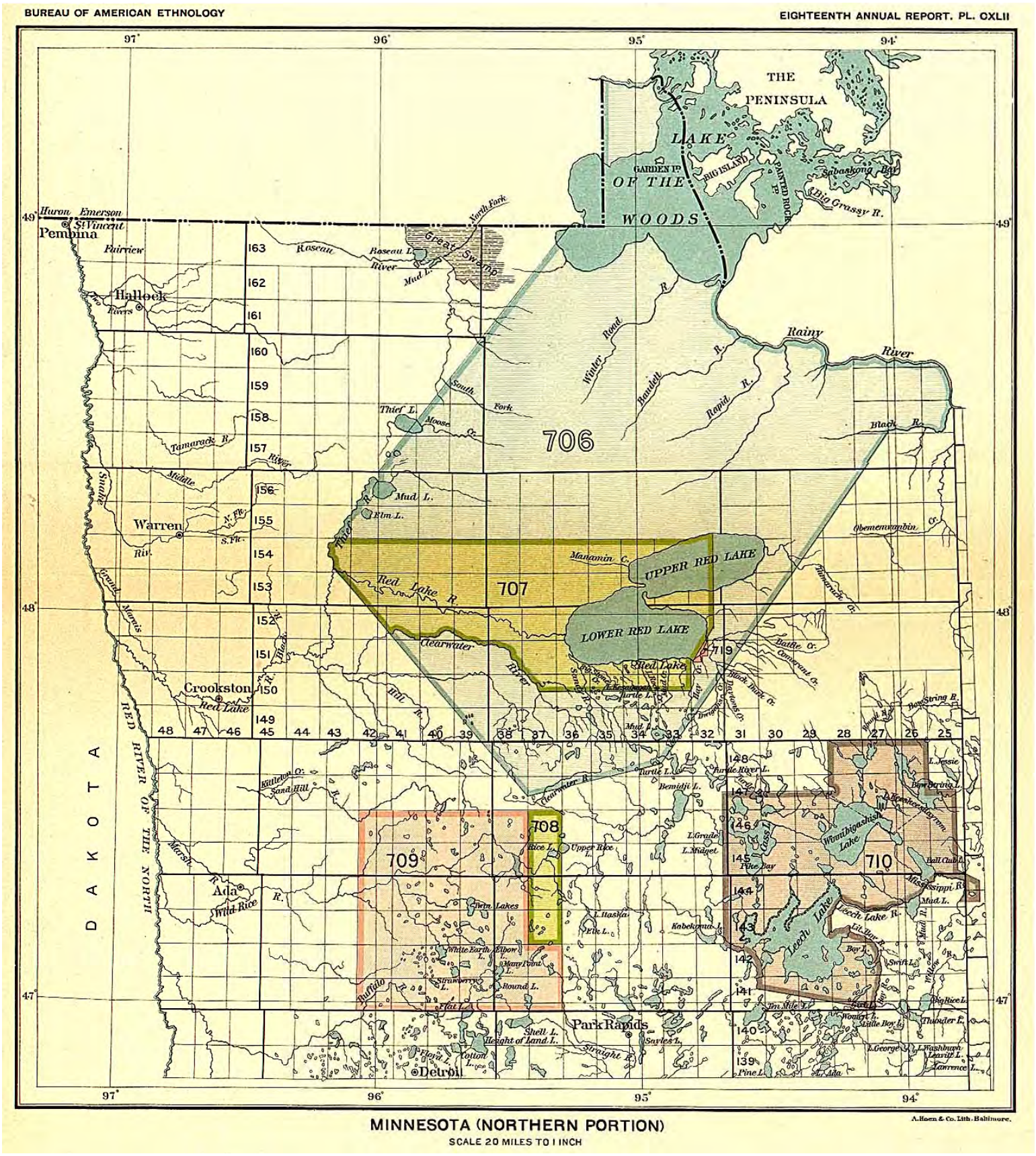
Figure 1

This map is available at: http://usgwarchives.net/maps/cessions/ (Map 33). For a discussion of the background of the Royce Area maps and a specific discussion regarding the Royce Areas ceded in Minnesota, see Minnesota Chippewa Tribe v. United States, 11 Cl.Ct. 221, 224-225, 227-228 (U.S. Claims Court 1986).

This map is available at: http://usgwarchives.net/maps/cessions/ (Map 34). For a discussion of the background of the Royce Area maps and a specific discussion regarding the Royce Areas ceded in Minnesota, see Minnesota Chippewa Tribe v. United States, 11 Cl.Ct. 221, 224-225, 227-228 (U.S. Claims Court 1986).



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