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

REPLY OF HONOR THE EARTH, INTERVENOR TO: APPLICANT'S CLAIM OF EXCLUSIVE STATE JURISDICTION OVER FEDERALLY-GUARANTEED OJIBWE USUFRUCTUARY PROPERTY, IN CONTRAVENTION OF *MN. V. MILLES LACS* 526 U.S.172 (1999).

To: Administrative Law Judge Eric L. Lipman, Minnesota Department of Commerce and Applicant Enbridge and Applicant Enbridge d/b/a/NDPC

Pursuant to verbal order of Administrative Law Judge Eric L. Lipman on March 17, 2014 and written order dated April 8, 2014, for jurisdictional briefing, *Honor the Earth* does now serve its Reply Memorandum of Law.

INTRODUCTION

Applicant relies nearly entirely on case law, and other precedent, that is both inapposite and precedes the 1999 Supreme Court opinion in *Minnesota v. Milles Lacs Band of Chippewa Indians*, which completely alters all *prior* treaty analysis[1] by requiring

[1] The supplemental review of "Indian Law" (Appendix B.) submitted by Applicants is educational but inapposite since neither "Indian Title;" "Indian Country;" nor, any federal or

examination of: (a) whether the treaty(ies) in question created and guaranteed usufructuary property interests ratified by Congress; and (b) whether Congress has taken any action since ratification of the specific treaty(ies) in question that abrogates some, or all, of the usufructuary property interests created and guaranteed by Congressional ratification of the treaty in question.

ARGUMENT

1. Applicant Misapprehends the Meaning of the *Milles Lacs* Opinion, Regarding Federal Treaty-Guaranteed Usufructuary Property

Prior to the *Milles Lacs* opinion, the Supreme Court had never applied usufructuary property analysis to the interpretation of a treaty with an indigenous nation, although Seventh Circuit did apply such an analysis in the Lac Courte Oreilles (LCO) cases interpreting the 1854 Treaty with the Ojibwe in the Minnesota Arrowhead Region and Wisconsin,[2] which the Supreme Court cited favorably in *Milles Lacs*. The parties agree that the Supreme Court has already held that the same 1855 Treaty at issue before the PUC did not abrogate prior usufructuary property interests of the Ojibwe Nation regarding the 1837 land cession Treaty in *Minnesota v. Milles Lacs*.[3]

Although Applicants and Intervenors *continue to* dispute whether the *Mille Lacs*

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state statutory analysis is relevant to the straightforward "usufructuary property interests" analysis adopted by the Supreme Court in the *Milles Lacs* opinion. This property, like all other forms, is protected by the Due Process clause of the Fifth and Fourteenth Amendments of the Constitution of the United States. Only an analysis of the specific treaty(ies) at issue is relevant, under *Milles Lacs*, to determine whether a constitutionally protected property-interest is present in the treaty territory, or not.

[2] Lac Courte Oreilles v. Voigt, 700 F. 2d 341 (7th Cir. 1983)

[3] Applicant's Appendix B, p. 6

opinion upheld usufructuary property rights in the 1855 Treaty Territory directly,[4] *both* parties agree the 1855 Treaty did not abrogate pre-existing treaty-guaranteed usufructuary rights, (Applicants Response, Appendix B. p.6), *to wit*:

> 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)).

However, Applicant ignores the *two* treaties with the Ojibwe that *preceded* the 1837 Treaty, which *also* guaranteed usufructuary property interests in the 1855 Treaty Territory, itself, the Treaty of 1825 and the Treaty of 1826.

Like the 1837 Treaty, both establish treaty-guaranteed usufructuary property interests in the Ojibwe prior to 1855 and on the same territory that *includes* the 1855 Treaty land cession (as well as territory beyond the 1855 cession). Thus, the continuing vitality of the usufructuary property interests guaranteed in the 1825 and 1826 Treaties is *res judicata*, with which counsel for Applicants must agree, given the language cited from the *Milles Lacs* opinion that:

> "[the 1855 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)).

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[4] The Supreme Court held as early as 1968 that, even if Congress specifically abrogates a treaty that establishes(d) a Reservation such as the Menominee Reservation in Wisconsin (which became Menominee County, Wisconsin), usufructuary property interests survived the dissolution of the Reservation when not specifically abrogated in the dissolution measure debated and passed by Congress. See, *Menominee Band of Chippewa Indians v. U.S.*

The only questions remaining in any particular case are: (a) does the challenged activity take place within the boundaries of the Treaty Territory; and (b) does the challenged activity have a potential impact on the ability of the Ojibwe people to fully enjoy the federally-protected property belonging to all the Ojibwe Nation in that territory?

2. Minnesota Has Admitted Limited DNR Jurisdiction Over Treaty-Guaranteed Ojibwe Usufructuary Property in Minnesota's Arrowhead for Over 20-Years.

The method of analysis being advanced by Intervenor, *Honor the Earth*, was not only upheld in the *Milles Lacs* opinion, but has been in place in both Wisconsin and Minnesota since the settlement of the *LCO* litigation which upheld the usufructuary property of the Ojibwe in the 1854 Treaty Territory in the late 1980's. The Minnesota DNR has recognized for more than 20-years that it may only exercise such wildlife regulation jurisdiction in the *entire* 1854 Treaty Territory as may be agreed upon by the Ojibwe Bands within the Arrowhead Region of Minnesota. *Honor the Earth's* position is that the PUC, and other Minnesota state agencies, have no more power to act unilaterally *with respect to federally- guaranteed Ojibwe usufructuary property interests* in treaty territory than does the Minnesota DNR.

This is not a new concept, the Supreme Court has clarified in 1999 that, in some cases depending on the language of the original treaty and subsequent Congressional action, or lack thereof, "treaty rights" are *actually* federally-guaranteed usufructuary property. Once this fact is apparent, from the analysis of a particular treaty and its history, this property is entitled to the same protections as all other under the Constitution.

3. Applicants Inapposite Arguments

Applicant asserts four major points in opposition to the Motion to Dismiss for lack of subject matter jurisdiction of state Public Utilities Commission over territory, within the boundaries of specific treaties with the Ojibwe which U.S. treaty negotiators created and guaranteed usufructuary property rights to the Ojibwe with Congressional approval.

(1) The Minnesota Public Utilities Commission ("MPUC or Commission") lacks statutory authority and 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;
(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.

Intervenor Honor the Earth's Reply to 1-4.

Items (1) and (4). Applicants and Intervenors *agree* that the Public Utilities Commission lacks jurisdiction to decide claims under federal treaties (Applicant's points 1 and 4), as do Minnesota state courts. The point of difference is that Intervenors have pointed out to the Commission that the *complete* absence of subject matter jurisdiction means this is an issue that cannot be decided solely by the State of Minnesota in the first instance, since federally-guaranteed usufructuary property interests are at issue before the Commission. The distinction is made plain by the Supreme Court in *Menominee v. United States* in which the Supreme Court held that the State of Wisconsin lacked sole

jurisdiction over usufructuary property interests of the Menominee people in Menominee County, Wisconsin, an area within the Treaty territory and formerly the Menominee Reservation.

Intervenors have raised the Motion to Dismiss only in response to the PUC unlawfully claiming exclusive jurisdiction over federally-guaranteed usufructuary property interests within the territory of the 1855 Treaty. In the case of actions that impact federally-guaranteed property interests, the State of Minnesota does not have, *and cannot have*, exclusive jurisdiction to take or diminish federally-guaranteed property. The Motion to Dismiss puts the Minnesota PUC on notice of massive "taking of property" by the State of Minnesota without Due Process of any kind, at the federal level, in violation of the U.S. Constitution. Should this permitting process continue federal judicial injunctive remedies halting the Minnesota permitting process will be required.

Item (3). Applicant's "Indian Country" analysis is inapposite and completely overtaken by Constitutionally-based property-interest analysis required by the Supreme Court in the *Milles Lacs* opinion, and needs no further response. Regarding references to "Indian title" are also inapposite because all of northern Minnesota, roughly north of I-94, was subject to the Treaties of 1825 and 1826 in which Congress specifically guaranteed: (a) Ojibwe sovereignty; (b) Ojibwe jurisdiction (1826); and (c) usufructuary property interests consisting of the right to hunt, fish and gather in the entire area north of I-94.

The historical record reveals the 1825-26 Treaties supplanted *inchoate* "Indian title" with treaties between sovereigns in which the Congress guaranteed usufructuary property interests in all of northern Minnesota (including the 1837, 1847, 1854 and 1855,

etc. Treaty territories). Thus, arguments based on "Indian Country" or other non-treaty foundations are inapposite.

Item (2). "Intervenors" before the Commission have already demonstrated an interest which will be affected by granting the Application which requires no special standing in order to make the Commission aware of the federally-guaranteed usufructuary property interests at stake. The question as to whether *Honor the Earth* or any other party has standing to assert federal issues in proper federal venue that does have subject matter jurisdiction over the property interests in question is a separate matter for a separate federal proceeding.

However, Ojibwe usufructuary property interests have been exercised by individuals on behalf of others in a series of federal cases including: U.S. v Gotchnik, U.S. v Bressette, 2013 SquareHook walleye netting cases Duluth Federal District Court, Judge Tunheim[5] dismissed U.S. Lyons, U.S. v Brown, U.S. v Tibbetts for 1855 treaty rights. While these last cases are under appeal, the Department of Justice did dismiss other off-reservation Chippewa tribal member defendants who would have the same defenses and rights to assert individually under the 1855 Treaty. Or in the cases of Gotchnik and Bressette 1854 defenses and rights to assert individually.

4. Applicant uses limited vision for Chippewa property interests

Applicant pretends to know what all the Chippewa property interests are, and that everyone should just accept their dismissive words. Two additional federal sources sources of Chippewa property interests for this pipeline routing include Article 8 of the

[5] See FN 19 *Honor the Earth* Brief filed 4-7-2014

1855 Treaty with the Chippewa and the Wild Rice Refuge Acts of 1926 and 1935.

> The 1855 Treaty provided for 10 reservations as well as
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> > All roads and highways, authorized by law, the lines of which shall be laid through any of the reservations provided for in this convention, *shall have the right of way through the same; the fair and just value of such right being paid to the Indians therefor; to be assessed and determined according to the laws in force for the appropriation of lands for such purposes.*

(Art. 8, Emphasis added). The proposed pipeline route map included in Applicant's Response Brief appears to be crossing the original reservations of Sandy Lake and Rice Lake. Here, Applicant ignores important right-of-way rights and other property interests of the Chippewa.

In 1939, Minnesota sued the federal government over eminent domain litigation to resolve the creation of the Wild Rice Indian Refuge[6] on White Earth, where the pipeline is routed right through the watershed in the original boundaries, just south of Clearbrook, (where a giant pipeline fire and explosion, property damage and loss of life incident occurred and still needs more clean-up). The Court determined that

> On the 23rd day of June, 1926, Congress enacted certain legislation whereby there was created a reserve to be known as the Wild Rice Lake Reserve, for the exclusive use and benefit of the Chippewa Indians of Minnesota. The Act reads (44 Stat. 763):
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> > 'An Act Setting aside Rice Lake and contiguous lands in Minnesota for the exclusive use and benefit of the Chippewa Indians of Minnesota.

[6] See U.S. v 4,450.72 Acres of Land, Clearwater County, Minnesota et al, No. 932, (D. Minn March 7, 1939). "This is an action by the United States to acquire by condemnation 4,450.72 acres of land in Clearwater County, Minnesota, to be known as the Wild Rice Lake Indian Reserve under the Act of June 23, 1926 (44 Stat. 763), as amended by the Act of July 24, 1935 (Public Resolution No. 217, 75th Congress, 49 Stat. 496)."

> ‘Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> ‘That there be, and is hereby, created within the limits of the White Earth Indian Reservation in the State of Minnesota a reserve to be known as Wild Rice Lake Reserve, for the exclusive use and benefit of the Chippewa Indians of Minnesota,

This legislative intent of Congress and use of the Commerce Clause is superior to state interests. The Court went on to note that the Act provided in

> ‘'Sec. 3. The Secretary of the Interior is authorized, in his discretion, ***to establish not to exceed three additional wild-rice reserves in the State of Minnesota, which shall include wild-rice-bearing lakes situated convenient to Chippewa Indian communities or settlements, including all lands which, in the judgment of said Secretary, are necessary to the proper establishment and maintenance of said reserves and the control of the water levels of the lakes***: Provided, however, That there shall be and hereby is excluded from said reserves any and all areas, whether of land or water, necessary or useful for the development to the maximum of water power or the improvement of navigation in the Pigeon River, an international boundary stream, and tributary lakes and streams.[7]

This decision was upheld by the Eighth Circuit in 1942, in State of Minnesota v. U. S., 125 F.2d 636 (C.C.A.8 (Minn.) Feb 11, 1942) (NO. 12094).

One of these refuges are created at Tamarack *Refuge* on the south end of White Earth Reservation. Another is Rice Lake National Wildlife Refuge, 5 miles south of McGregor at East Lake (which is still identified on the Minnesota State map as an Indian Reservation, just like Sandy Lake reservation). The Rice Lake Ricing Committee at East Lake has been regulating exclusive Chippewa wild rice harvesting for decades. It is also

[7] Id. at 171

apparent from this section that other negative impacts are to be guarded[8] against, except for "necessary or useful for the development to the maximum of water power or the improvement of navigation in the Pigeon River."

Also in 1939, the Minnesota Legislature declared an exclusive grant to the Chippewa Indians of Minnesota, in Minn. Stat. 84.09 *Conservation of Wild Rice*[9] which recognized that in order

> to discharge in part a moral obligation to those [Chippewa} Indians of Minnesota *by strictly regulating the wild rice* harvesting upon all public waters of the state ***and by granting to those Indians the exclusive right to harvest the wild rice crop upon all public waters within the original boundaries of the White Earth***, . . . and Mille Lacs reservations.

(Emphasis added).

Obviously, this is an openly declared and notoriously published for decades GRANT of exclusive rights, to whatever degree the State may have had rights within reservation boundaries, and it quit claimed wild rice, to be protected for the Chippewa with *strict regulating* STATE-WIDE. The fact that the Minnesota Legislature has revised it statutes, does not withdraw these grants. Again, instead would require the consent of the Chippewa Indians of Minnesota to "quit claim" or otherwise transfer of this property interest.

It is readily apparent Applicant either doesn't know or doesn't care to look and consider where and what our Chippewa property interests include. Instead Applicant

[8] Id. at 173-174, "Congress has determined that it is necessary to obtain this area in order to safeguard the rights of the wards of the Government." [and]"Its supremacy over the State in looking after the Indian tribes is conceded. In its activities and in furtherance of a Federal power, the United States is supreme and the State must give way."
[9] See copy attached as Exhibit C.

choses to broadly dismiss Chippewa interests in its Response Brief, and choses an incomplete process and fair and reasonable consideration by big oil, who doesn't care about our treaty rights, state grants and federally-protected, usufructuary property interests as the Chippewa Indians of Minnesota.

5. Rule 12 Motions against Applicant including frivolous and red herring decoys subject to *Stare Decisis* and *Res Judicata*

Applicant raises a variety decoy arguments, attempting to change the question in an attempt to confuse, while ignoring (knew or should have known) the more important legal concepts of *res judicata* and *stare decisis*[10], which apply to the Minnesota v Mille Lacs Supreme Court decision. In the present matter, Counsel Randy V. Thompson[11], who submitted the *NDPC LLC's Response to Honor the Earth's Dispositive Motion* dated April 21, 2014, also served as Counsel for Respondent Landowners John W. Thompson, et al, in the Eighth Circuit and United States Supreme Court in the Minnesota v. Mille Lacs[12] appeals. NDPC suggests arguments which cite and rely upon *Oregon Dep't of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985) and the *Red Lake*[13] *cases* from 1979 and 1980, and the *Nelson Act*, finally suggesting that 1951 was the deadline for asserting federally protected, usufructuary property interests reserved and protected in part as treaty

[10] Latin for "to stand by things decided." Stare decisis is essentially the doctrine of precedent. Courts cite to stare decisis when an issue has been previously brought to the court and a ruling already issued. See http://www.law.cornell.edu/wex/stare_decisis

[11] See *Reply Brief of John W. Thompson et al* on Writ of Cert to the Eighth Circuit Court of Appeals, 1998 WL 748397 (U.S.), See also Minnesota et al v. Mille Lacs Band et al, 526 U.S. 172, 174, 119 S.Ct. 1187, 1191 (1999).

[12] Id.

[13] Red Lakes Band of Chippewa Indians v. Minnesota, 614 F. 2d 1161 (8th Cir. 1980) (per curiam), cert denied, 449 U.S. 905 (1980).

rights with the United States. It is readily obvious that LCO, Menominee, FDL v Carlson, and Minnesota v Mille Lacs to name a few all prove 1951 was no such deadline.

The afore-mentioned issues were all resolved by the Eighth circuit Mille Lacs[14] decision 1997. The Mille Lacs Appellate Court clearly indicated that res judicata does not apply[15] [to the Chippewa]. Additionally, that Court held that although

> the Counties argue that the Wisconsin and Fond du Lac Bands do not hold usufructuary rights in the Minnesota portion of the 1837 ceded territory because, allegedly, none of these Bands used and occupied the area at the time of the Treaty. ***The district court rejected the argument.*** See Mille Lacs III, slip op. at 39; Fond du Lac, slip op. at 36-37. [. . .] *The 1837 Treaty does not tie usufructuary rights to historic use or occupancy*, and thus the Counties' urgings defy the plain language of the Treaty. ***We affirm the district court on this issue.***[16]

The Appellate Court also considered that "[t]he Landowners make myriad additional arguments . . . , including (but not limited to) the following: . . . *Nelson Act* . . . " [and] ***"We have given these arguments full consideration and have determined them to be without merit."***[17]

Here, Applicant has chosen to advance arguments that their Counsel should best know are frivolous, are in fact subject to *stare decisis* and are barred by *res judicata*. As such, these issues are ripe for a rule 12.03 Motion for Judgment on the Pleadings. It

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[14] See Mille Lacs Band of Chippewa Indians v. State of Minn., 124 F.3d 904, C.A.8 (Minn.), 1997.

[15] Id. at 932-933 See IX. Additional Defenses Claimed by the Counties, at 932-33 "The district court was correct in holding that res judicata does not apply. See Mille Lacs III, slip op. at 34-36." See Brief of Respondent Counties 1998 WL 464930

[16] Id. Emphasis added.

[17] Id. Emphasis added. At 933-34. Here Respondent Counties argued Oregon Dep't of Fish & Wildlife v. Klamath Tribe, 473 U.S. 753 (1985), Red Lakes Band of Chippewa Indians v. Minnesota, 614 F. 2d 1161 (8th Cir. 1980) (per curiam), cert denied, 449 U.S. 905 (1980) and Klamath Tribe v. Oregon Fish & Wildlife Dep't, 729 F.2d 609 (9th Cir.1984), See 1998 WL 464930 at 39. See also *Reply Brief of Landowners John Thompson et al*, 1998 WL 748397.

should also be pointed out that in addition to the Mille Lacs case law which instructs to first read the treaties to see what they say, in

> Mille Lacs Band v. Minnesota, Case No. 3-94-1226 (D. Minn. December 10, 1999) (unpublished decision): The district court (Judge Davis) granted the tribes' petitions for attorney's fees from the State. The court ordered the State to pay the tribes a combined total of over $3.95 million in attorneys' fees, litigation expenses and court costs.[18]

What may be the most telling and concerning statement about how Applicant views the rights of tribal members and/or Minnesota State citizens is at the bottom of page 7 of Applicants Response Brief asserting that

> [a]ccordingly, 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.

CONCLUSION

Both Applicant Enbridge d/b/a NDPC and Intervenor *Honor the Earth* agree that the PUC process lacks the jurisdiction to consider our federally protected, usufructuary property interests. Applicant Enbridge d/b/a NDPC argues it is up to private, big oil industry to decide what federal, state and tribal laws to recognize and follow. Applicant

[18] See *Fulfilling Ojibwe Treaty Promises – An Overview and Compendium of Relevant Cases, Statutes and Agreements*, by Ann McCammon-Soltis and Kekek Jason Stark, Great Lakes Indian Fish & Wildlife Commission Division of Intergovernmental Affairs, Great Lakes Indian Fish & Wildlife Commission, 2009. See also http://www.glifwc.org/minwaajimo/Papers/Legal%20Paper%20-%20DIA.pdf

Enbridge has demonstrated a failure to recognize, assert and argue *stare decisis* of Minnesota v Mille Lacs as decided by the United States Supreme Court and instead forwards old, overruled, 15-year old arguments that are just another attempt to bite the apple barred by *res judicata*.

As such, the present Application for Routing Permit must be dismissed for lack of subject matter jurisdiction as the state lacks authority to unilaterally grant the permit without providing for due process protections for Chippewa usufructuary property interests.

Respectfully submitted April 28, 2014.

/s/ Frank Bibeau

Frank Bibeau
51124 County Road 118
Deer River, Minnesota 56636
Cellular 218-760-1258
E-mail frankbibeau@gmail.com

Peter Erlinder
International Humanitarian Law Institute
325 Cedar Street, Suite 308
St. Paul, MN 55101
Cellular 651-271-4616
Email proferlinder@gmail.com

ATTORNEYS FOR HONOR THE EARTH