BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
David C. Boyd	Commissioner
Nancy Lange	Commissioner
J. Dennis O'Brien	Commissioner
Betsy Wergin	Commissioner

In the Matter of the Application of North Dakota Pipeline Company LLC for a Pipeline Routing Permit for the Sandpiper Pipeline Project in Minnesota

DOCKET NO. PL-6668/PPL-13-474

HONOR THE EARTH'S **MEMORANDUM OF LAW IN SUPPORT OF LACK OF JURISDICTION FOR USUFRUCTUARY PROPERTY RIGHTS PROTECTED BY FEDERAL TREATIES**

To: ALJ Eric Lipman, Minnesota Department of Commerce and Applicant Enbridge

Pursuant to verbal order of ALJ Lipman for jurisdictional briefing, Honor the Earth does now serve its initial Memorandum of Law.

INTRODUCTION

Before there was a United States of America, it was understood by the new human immigrants to Turtle Island (North America) that

> We hold these truths to be self-evident, that ***all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness***. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.[1]

By 1787, nine of thirteen colonies (states) voted to adopt the U.S Constitution, which recognized Indians as separate and apart and that "[t]he Congress shall have Power [t]o

[1] Declaration of Independence, July 4, 1776. *Remember also* Dr. Martin Luther King, Jr. championing civil rights nearly 200 years later.

...regulate Commerce...with the Indian Tribes[2]. . .” and that Treaties are the Supreme law of the land

> and the Laws of the United States which shall be made in pursuance thereof; *and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;* **and the judges in every state shall be bound thereby,** anything in the constitution or laws of any state to the contrary notwithstanding.[3]

(Emphasis added).

In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the Supreme Court unanimously held that, by guaranteeing Anishinabe (Chippewa) rights to hunt, fish and gather in the 1837 Treaty in which the Chippewa ceded formal title to a small portion of Minnesota, and a larger area of Wisconsin, U.S. treaty negotiators severed the right to use the land for subsistence, usufructuary property rights, from formal title to the land in the same way a utilities easement, or mineral rights, might be severed from fee simple title. This was the choice of the United States government, which negotiated other treaties, with other native peoples, before and after 1837 that did not have these characteristics, as the *Milles Lacs* majority pointed out.

The *Mille Lacs* majority and dissent differed only as to whether these Treaty-guaranteed usufructuary property rights had been abrogated by certain subsequent events. The opinion was unanimous in the Court’s analysis of Treaty acknowledged and guaranteed usufructuary property rights that are not extinguished by transfer of title to land to the United States, since “title” was a meaningless concept to the Chippewa and

[2] U.S. Const., Art. 1, Sec. 8, Cl. 3
[3] Id. See Art. 6, Cl. 2.

"use for subsistence" was understood as continuing without interruption.[4]

TREATY HISTORY

In 1795, The Treaty of Greenville expressly reserved to "[t]he said tribes of Indians, parties to this treaty, shall be at liberty to hunt within the territory and lands which they have now ceded to the United States." This was a treaty of perpetual peace between the United States of America, and the tribes of Indians called the Wyandots, Delawares, Shawanees, Ottawas, ***Chippewas***, Pattawatimas, Miamis, Eel Rivers, Weas, Kickapoos, Piankeshaws, and Kaskaskias.

The Treaty of Prairie du Chien[5] 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 and the Sioux 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.[6]

(Emphasis added).

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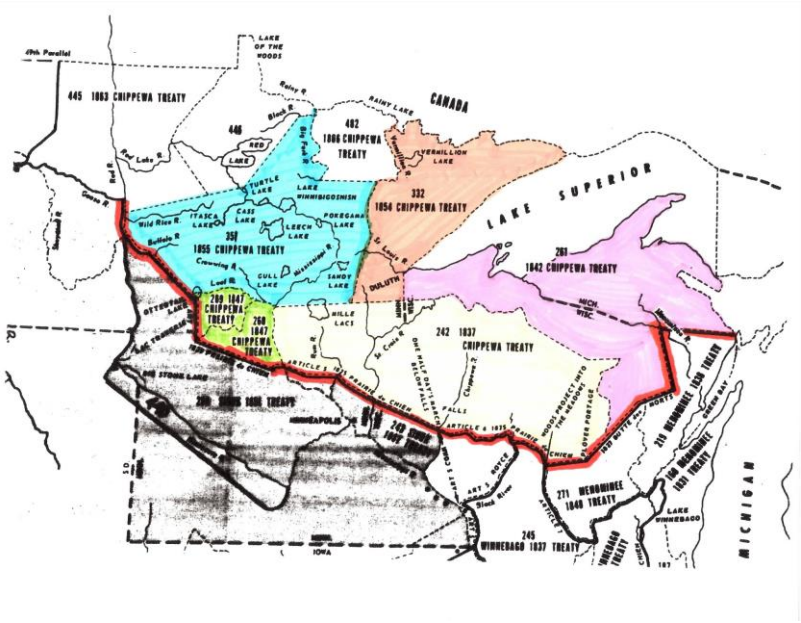
[4] *Minnesota v. the Mille Lacs Band of Chippewa Indians: 19th Century Treaty-Created Usufructuary Property Interests, the Foundation for 21st Century Indigenous Sovereignty,* by Peter Erlinder, Professor, William Mitchell College of Law and Director, International Humanitarian Law Institute, article currently invited for Law Review publication spring 2014.
[5] TREATY WITH THE SIOUX, 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.*
[6] Id. Article 13.



Here the red line is the Prairie du Chien boundary between the Chippewa and Sioux. 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 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.[7]

The 1826 Treaty, a conformation treaty for the 1825 Treaty, was conducted at Fond du Lac of the Michigan Territory, now Duluth, recognized that "this grant [from the Chippewa] ***is not to affect the title of the land, nor the existing jurisdiction over it.***[8] (Emphasis added).

[7] Id. Art. 12.
[8] 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.

An important turn of the century U.S. Supreme Court case, Johnson v Geralds involved the consumption and sale of intoxicating liquors in the 1855 ceded territory, which the relevant treaty provided for liquor ban "and citizens of the city of Bemidji, Beltrami county, Minnesota, and at the time of the filing [. . .] were, and for a considerable time had been, engaged in business there as saloon keepers, selling at retail spirituous, vinous, and malt liquors at their respective places" in violation of federal law.[9] State citizens sued trying to argue the treaty protections only applied to Indian held lands but the Supreme Court held that

> it is unreasonable to give such a construction to the stipulation contained in the second portion of article 7 as would defeat its object, by removing the restriction from scattered parcels of land whenever it should come to pass that the Indian title therein was extinguished. The restriction would be of little force unless it covered the entire ceded area *en bloc*, so that no change in the situation of the reservations by way of extinguishing the residue of Indian title or otherwise should operate to limit its effect. And so, upon the whole, we deem it manifest that the second clause of article 7 dealt with the

[9] Johnson v Geralds, 234 U.S. 422, 424, 34 S. Ct. 794, 795 (1914).

> entire ceded country, including the reservations, as country proper to be subjected to the laws relating to the introduction, etc., of liquor into the Indian country ***until otherwise provided by Congress***. ***<u>It was evidently contemplated that the bands of Indians, while making their permanent homes within the reservations, would be at liberty to roam and to hunt throughout the entire country, as before.</u>*** The purpose was to guard them from all temptation to use intoxicating liquors.[10]

(Emphasis added). This is the same, ceded, territory-wide protection the Chippewa also possess as a property interest to protect the environment against future oil spill contamination in perpetuity as we will "*be at liberty to roam and to hunt throughout the entire country, as before*."

Conceivably, this prohibition on alcohol continued until the 21t Amendment in 1933 for most citizens of the United States. However, it was not until June 11, 1934 that for the Chippewa that

> the treaty of February 22, 1855 (10 Stat. L. 1165), between the United States and the Mississippi Bands of Chippewa Indians, shall no longer be considered as "Indian country" for the purposes of article 7 of said treaties . . .[11]

which involved the health, safety and welfare rights of the Chippewa throughout the ceded territories, in Minnesota, in this case for the 1854 and 1855 Treaties.

Consequently, unless Minnesota or Applicant Enbridge can show a similar Act of Congress to abrogate the usufructruary property rights of the Chippewa to hunt, fish and gather, in similar plain language, scope and breadth as above, and show compensation for

[10] Id. at 438.
[11] An Act To modify the effect of certain Chippewa Indian treaties on areas in Minnesota, June 11, 1934. [S. 2980.] 48 Stat., 927.

the taking of the usufructuary property rights under US. v. Dion[12] and Minnesota v. Mille Lacs, the 1854 and 1855 ceded territories are Indian Country for all other purposes. Otherwise, Minnesota would have to show a grant of authority from Congress to exercise state jurisdiction over federally protected treaty rights.

Public Law 280

In 1953, Congress adopted what became known as Public Law 280, which gave certain states *criminal*[13] jurisdiction and limited *civil*[14] jurisdiction over tribal members, in several states including Minnesota. However, Congress specifically exempted from its *criminal* grant in clearly stated and unambiguous language that

> (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 deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.***

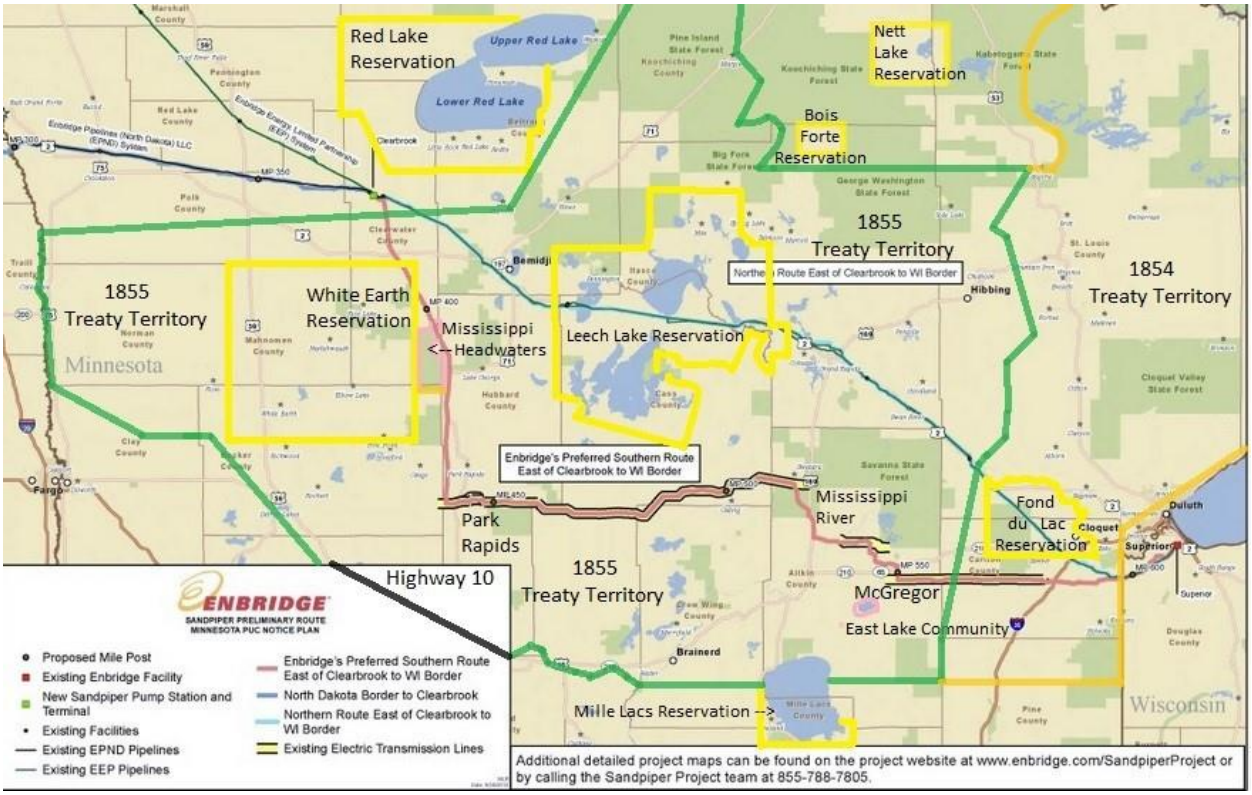
The *civil* grant also provides that

> (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

[12] United States v. Dion, 476 U.S. 734, 738 (1986).
[13] 18 U.S.C. § 1162.
[14] 28 U.S.C. § 1360

> jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

Clearly, Congress did not grant the State of Minnesota any authority or jurisdiction to decide matters related to treaty rights, federal agreement or statutes and which includes the present Public Utilities Commission proceedings considering the Application by Enbridge for a Routing Permit across the ceded territories, which in this case is primarily across the 1855 ceded territory.



The PUC should consider the Supreme Court's analysis in Chevron where

> [t]he Court, in an opinion by Justice John Paul Stevens, upheld the EPA's interpretation. A two-part analysis was born from the *Chevron* decision (called the "*Chevron* two-step test"), where a reviewing court determines:

> (1) First, always, is the question whether Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress.
>
> If the Court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute . . . Rather,
>
> (2) [I]f the statute is silent or ambiguous with respect to the specific question, the issue for the court is whether the agency's answer is based on a permissible construction of the statute.[15]

Here, the PUC is not even a *federal* agency with any delegation from Congress, and the U.S. Constitution spells out the federal relationship with Indians.

In light of the usufructuary property rights analysis unanimously adopted by Supreme Court in Minnesota v. Mille Lacs Band of Chippewa Indians, which builds upon the analysis in the earlier Lac Courte Oreilles cases in the Seventh Circuit, *Honor the Earth* provides further legal analysis for a previously unrecognized sources of Treaty-guaranteed usufructuary property rights across all of northern Minnesota, both on and off reservations.

Minnesota is without authority when it comes to federal rights in Indian country, and there is no apparent effort by Applicant Enbridge or Minnesota law to respect our unique federal protections and usufructuary property rights.

A. The *usufructuary* property rights, created by U.S. treaty negotiators in 1825, 1826, 1837, 1854, as well as in 1855, which the Supreme Court of the United States unanimously recognized in *Minnesota v. Milles Lacs Band of Chippewa Indians* in 1999, determines due process rights of the Chippewa today.

[15] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

The modern, seminal case establishing the foundation for interpreting treaty issues in Minnesota is *Minnesota v. Milles Lacs*[16], wherein several post-1855 treaties and Executive Orders, which the majority of the *Milles Lacs* Court held did not abrogate treaties agreed to with the Chippewa in 1855 and before, with a specific focus on the 1837 Treaty. In specific, the *Mille Lacs* majority and dissenting opinions were unanimous in finding that the "bundle of rights" which the U.S. treaty negotiators could retain or bargain away included "usufructuary property" rights, *i.e.* the right to "live off the land" irrespective of "fee ownership." This is a Roman Law concept, well known to U.S. treaty negotiators, who wrote such provisions out of treaties negotiated at about the same time. *See, generally,* O'Connor, J. *Minnesota v. Milles Lacs.*

Essentially, in many ways the *Minnesota v. Mille Lacs* opinion from 1999 made all prior cases obsolete with respect to understanding the genesis of usufructuary property rights recognized in U.S. courts. This is demonstrated in the 1854 Chippewa ceded territory, where the LCO cases from the Seventh Circuit helped the State of Minnesota recognize and compensate for off-reservation Ojibwe usufructuary property rights in the Arrowhead for more than 20-years. But that $15 million bi-annual compensation is only for tribal members to not exercise treaty rights, off-reservation in the 1854 ceded territory. What is the time value of money, today, for the loss of perpetual harvest rights and loss of the environment that supports that ecosystem? Priceless?

B. Prior to 1855, rights held by the Chippewa west of the 1854 Treaty Boundary were NOT "aboriginal title", but the more highly protected Treaty-

[16] Minnesota v. Mille Lacs Band of Chippewa Indians (Mille Lacs), 526 U.S. 172, 175–76 (1999).

guaranteed usufructuary property rights that were, and are, individually exercised.

Sections of the Treaty of 1825, 1826 and 1854 plainly state that the U.S. government recognized that the Chippewa were sovereign in the territory from which the 1837 Treaty territory had been ceded, and from which the 1855 territory would eventually be ceded.[17] But this was not "aboriginal title" at all. Rather the "usufructuary property right" to hunt-fish-and gather was recognized in treaties of 1825/26 then encompassed all of Minnesota Territory north of the boundary with the Lakota (Sioux) Nation, this division was ratified by Congress and recognized as a place to which Chippewa should return if they were to be removed from the 1837 ceded territory. This right was exercised individually in the geographical area the U.S. recognized as sovereign up to 1855.

This distinction makes a significant difference because the terms of the 1825-26 and 1854 Treaties describe with specificity the agreements that pre-existed the 1855 Treaty and those that followed. The territory west of the 1854 Treaty boundary was not vacant, nor was it without treaty guarantees that preceded the 1855 Treaty.

Further, because usufructuary property rights include "the right to modest living," environmental protection to maintain the long-term value of these property rights will have significant long term off-reservation land-use and wildlife

[17] The Court in U.S. v. Herbst, 334 F. Supp. 1001, 1006 (D. Minn 1971) made the same factual error. The Leech Lake Band (however defined) like all other Chippewa in Minnesota have Treaty-guaranteed usufructuary rights to hunt-fish-and gather dating to 1825-26, as sovereign people, and confirmed in the 1854 Treaty with the Chippewa of the Mississippi. This is *not inchoate and indistinct* "aboriginal title."

management implications for tribal governments and tribal members. Similarly, recent federal prosecutions of tribal members for violations of the federal Lacey Act for wildlife violations, predicated on tribal members violation of tribal game regulations are direct violations of the sovereignty explicitly guaranteed in the exercise usufructuary property rights in the heart of "Indian Country."[18] At least some of these prosecutions have been dismissed by federal district court judges who recognized the usufructuary rights established by treaties between sovereigns may be abrogated by Congress with a clear intention to do so, in language understood by both parties to accomplish that result, but cannot be set aside as merely incident to a federal statute.[19]

Another example from Supreme Court treaty analysis demonstrating that treaty-created usufructuary property rights must extend beyond the existence of any particular tribal government is Menominee v. United States in which Congress dissolved a Reservation which became Menominee County of the State of Wisconsin. The Court held that even though the entire reservation no longer existed, the usufructuary property rights created by the treaty which Congress had not specifically extinguished still

[18] For discussion of "Operation Squarehook" undercover "sting" operation, see Doug Smith and Dennis Anderson, *3-year Walleye-poaching Probe Nets More Charges in Minnesota*, STAR TRIBUNE, April 15, 2013, http://www.startribune.com/local/203006351.html

[19] United States v. Lyon, Case No. 13-68 and 13-70, Order of Judge John Tunheim, November 25, 2013, a*vailable at* http://turtletalk.files.wordpress.com/2013/11/90-dct-order-rejecting-mj-rr.pdf

remained to be exercised individually by members of the Menominee[20]. The usufructuary treaty rights were created by Congress for descendants of the signatories within the area covered by the Treaty. Individual ownership of all survival rights associated with the bundle of usufructruary rights and the right to earn a modest living[21] from and with the earth's creatures and resources, are held by the living people, reserved by prior living people in perpetuity for those Anishinabe (Chippewa) to come.

Likewise, the required *due process* for taking away individual property rights as described by US Attorney for Minnesota Renner[22] in 1971 (See Exhibit A, p. 6, item 10), would also be required for taking of a federally protected, conservation right-of-way belonging to the Chippewa. Therefore, the State's law violates all U.S. Constitutional protections and Chippewa treaty protected rights, and must be held invalid and consequently subject matter jurisdiction for the Minnesota Public Utilities Commission for the full, final and complete legal authority to grant a pipeline route permit does not independently and unilaterally exist.

[20] The Menominee are signatories to the same 1825 Treaty with the Sioux, Menominee and Chippewa.
[21] See *Treaty-Guaranteed Usufructuary Rights: Minnesota v. Mille Lacs Band of Chippewa Indians Ten Years On* by Peter Erlinder, 41 ELR 10922, 10-2011. (See copy attached as Exhibit).
[22] See United States v. State of Minnesota, Answers to Defendant's, State of Minnesota, Interrogatories, U.S. District Court of Minnesota, January 20, 1971, submitted by U.S. Attorney Robert G. Renner (No. 3-70 Civil 228). Attached as Exhibit A.

Respectfully submitted April 7, 2014.

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