

**WHITE EARTH BAND OF OJIBWE
COURT OF APPEALS**

Minnesota Department of Natural Resources, et al.,

Appellants,

MOTION FOR RECONSIDERATION

v.

Case No. AP21-0516

Manoomin, et al.,

Respondents.

INTRODUCTION

Respondents Manoomin, the White Earth Band of Ojibwe, members of the White Earth Reservation Business Committee, tribal members, and non-Indians respectfully request the Court reconsider its March 10, 2022 Order dismissing Respondents’ Complaint in the above-referenced case.

The case concerns the Minnesota Department of Natural Resources’ (DNR) activities and conduct involving the granting of a dewatering permit to Enbridge for the construction and operation of the Line 3 pipeline. Appellants argue that this Court lacks subject matter jurisdiction over Respondents’ claims, and also enjoy absolute immunity from suit. In its Order, the Court dismissed Respondents’ Complaint, holding that a plaintiff must “show that [a] nonmember defendant engaged in *activities on the reservation* to invoke subject matter jurisdiction in tribal court under the second *Montana* exception.” Order Dismissing Respondents’ Complaint at 17. Because Respondents could not cite a single case in which a court has enforced this interpretation of the *Montana* framework for exercising tribal jurisdiction over a nonmember party, the court “believes that federal law requires dismissal of this case.” *Id.*

The Court’s Order warrants reconsideration for several reasons. First, the Court erred by ignoring Tribal law conferring subject matter jurisdiction over a particular case of this type. In

Tribal Court, the Band's Judicial Code is binding, and it is improper for the Court to predict how a federal court might resolve jurisdictional questions. Second, the Court failed to appropriately consider the on-Reservation impacts to Manoomin caused by DNR's activities and conduct. The Court's Order focused only on *off-reservation* impacts, rather than analyzing all alleged harm set forth in Respondents' Complaint. Third, there is new evidence relating to recently uncovered thermal imaging showing negative impacts caused by DNR's dewatering activities and aquifer breaches that is highly relevant to this case, and should be considered by the Tribal Trial Court in developing a full and complete factual record. If the Court denies this Motion for Reconsideration, Respondents request leave to amend.

ARGUMENT

I. The Court Improperly Declined to Apply Binding Tribal Law to Determine the Scope of Tribal Jurisdiction Over DNR

The Court's starting point for determining whether it has subject matter jurisdiction to hear Respondents' claims was "the jurisdiction granted by the Tribe." Order Dismissing Respondents Complaint at 5. Rather than faithfully applying Tribal law, the Court turned to predicting how a federal court applying federal law *might* decide the jurisdictional question presented in this case. The Court's analysis, however, missed the mark.

The Court's starting point should also have been the ending point of the Court's jurisdictional analysis.¹ The White Earth Judicial Code states that "[t]he jurisdiction of the Tribal Court shall extend to ... [a]ll actions arising under the Codes, Laws, and Ordinances of the White Earth Band of Chippewa, and to all persons alleged to have violated provisions of those

¹ "Subject matter jurisdiction can be raised at any time." *Alternate Fuels, Inc. v. Cabanas*, 538 F.3d 969, 975 (8th Cir. 2008).

Ordinances, provided that the action or violation occurs within the boundaries of the White Earth Reservation[.]” Judicial Code Ch. 2 § 1(b).

The use of “shall” in the Judicial Code imposes an obligation on the Tribal Court to exercise jurisdiction over cases falling within the specific jurisdictional grant conferred by the Band. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (recognizing that “shall” is “mandatory” and “normally creates an obligation impervious to judicial discretion”); *Association of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (“The word ‘shall’ generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive”); *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (“The word ‘shall’ is ordinarily ‘the language of command.’”) (citations omitted). In other words, the Judicial Code does not authorize the Court to exercise discretion in deciding whether or not a particular case falls within the Code’s grant of jurisdiction. But that is precisely what the Court did here. *See Order Dismissing Respondents’ Complaint* at 7 (“[W]hile White Earth grants jurisdiction in its Tribal Court for a case like this one, we must also determine whether federal law authorizes subject matter jurisdiction in this case.”).

Furthermore, the use of “all” to modify the terms “actions” and “persons” in the Judicial Code signals that the Band intended the Code to have a broad reading. The word “all” “conveys breadth,” *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 372 (2019), “indicat[ing] no limitation,” *Norfolk & Western Railway Co. v. American Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991). So when the Judicial Code states that Tribal jurisdiction “shall” extend to “all persons” who violate the Band’s laws, provided the “action or violation occurs within the boundaries of the White Earth Reservation,” the Court’s analysis must not focus on the nonmember’s physical location. Rather, the focus of the Court’s analysis must be on the location of the alleged violation of Tribal law. In

this case, this question is whether the Rights of Manoomin—a Tribal law relevant to this case—were violated within the boundaries of the White Earth Reservation. Respondents’ Complaint includes allegations that the Rights of Manoomin were violated within the boundaries of the White Earth Reservation.

The Code specifically contemplates violations of Tribal law occurring on-Reservation regardless of the person’s physical location are subject to Tribal jurisdiction. As explained by the Tribal Court below, the Judicial Code only “require[s] Plaintiffs to show that the alleged actions or inactions taken by the Defendants ‘occurs within the boundaries of the White Earth reservation’, but this may include actions taken off the reservation that impact on-reservation rights.” Order Clarifying Aug. 18, 2021 Order Denying Motion to Dismiss at 8. Nowhere does the Judicial Code limit Tribal Court jurisdiction to conduct taken solely within the White Reservation. In this case, as discussed further below, the Tribal Court below correctly stated that “the complaint alleges that [Defendants’] actions or inactions have resulted in harm to the Plaintiffs’ rights on the reservation[.]” Order Clarifying Aug. 18, 2021 Order Denying Motion to Dismiss at 8.

It is a court’s “job to apply faithfully the law Congress has written.” *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). It is “never” the court’s “job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone’s account, it never faced.” *Id.*; see also *Nasrallah v. Barr*, 140 S. Ct. 1683, 1692 (2020) (“[I]t is not the proper role of the courts to rewrite the laws passed by Congress and signed by the President.”). It is also true that the “cardinal canon” of interpretation, which comes “before all others” is that “[w]hen the words of a statute are unambiguous ... judicial inquiry is complete.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

Moreover, the Supreme Court has also determined “tribal courts are best qualified to interpret and apply tribal law.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1986). Federal courts “defer to the tribal courts’ interpretation” of tribal law. *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir. 1993) (deferring to tribal court’s decision that a tribal constitution gave the tribal court personal jurisdiction over non-Indians), *cert. denied*, 512 U.S. 1236 (1994). “It is only when the tribal court applies federal law that the tribal court’s determinations are accorded no deference and are reviewed by the district court de novo.” *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994). With these legal principles in mind, it uncertain why this Court would go ahead and issue a speculative decision interpreting federal law when it is aware of a pending Eighth Circuit appeal reviewing the same jurisdictional question.

Instead of speculating about how a federal court applying federal law might decide the jurisdictional question, the Court should have applied the Band’s own Judicial Code. It is not the job of this Court to make predictions on how foreign courts might rule on questions before those courts,² or second guess the jurisdictional grant set forth in the Band’s Judicial Code. The Court

² In analyzing federal law, the Court’s Order also incorrectly determined that the Band lacks inherent sovereign authority to exercise civil jurisdiction over nonmember activities and conduct that originate off-reservation but have on-reservation impacts. The Court mistakenly “believe[s]” that *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), “may be understood as a case in which Congress authorized the EPA to grant authority to Tribes to regulate water quality when local pollution sources threatened tribal waters.” Order Dismissing Respondents’ Complaint at 13. Rather, while *Wisconsin* concerned a tribe’s authority to enforce water quality standards against non-Indians pursuant to their treatment as state status under the Clean Water Act (CWA), the dispositive issue in the case was whether the tribe possessed the inherent sovereign authority to enforce water quality standards against non-Indians in the first place. The Seventh Circuit in *Wisconsin* explained that a tribe’s “inherent authority over activities having a serious effect on the health of the tribe[] ... is not defeated even if it exerts some regulatory force on off-reservation activities[.]” *Wisconsin*, 266 F.3d at 749 (emphasis added). Thus, *Wisconsin*’s discussion on a tribe’s inherent authority (whether in reference to the *Montana* framework or not) to regulate such non-Indian activities and conduct are relevant in the non-CWA context.

should reconsider its dismissal of Respondents' Complaint based on the jurisdictional grant in the Band's Judicial Code.³ Alternatively, the Court should remand the case to the Tribal Trial Court for further fact-finding to resolve the jurisdictional question presented in this case. Remanding the case to the Tribal Trial Court will help "clarify[] the factual and legal issues that are under dispute and relevant for any jurisdictional evaluation." *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013) (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856–57 (1985)).

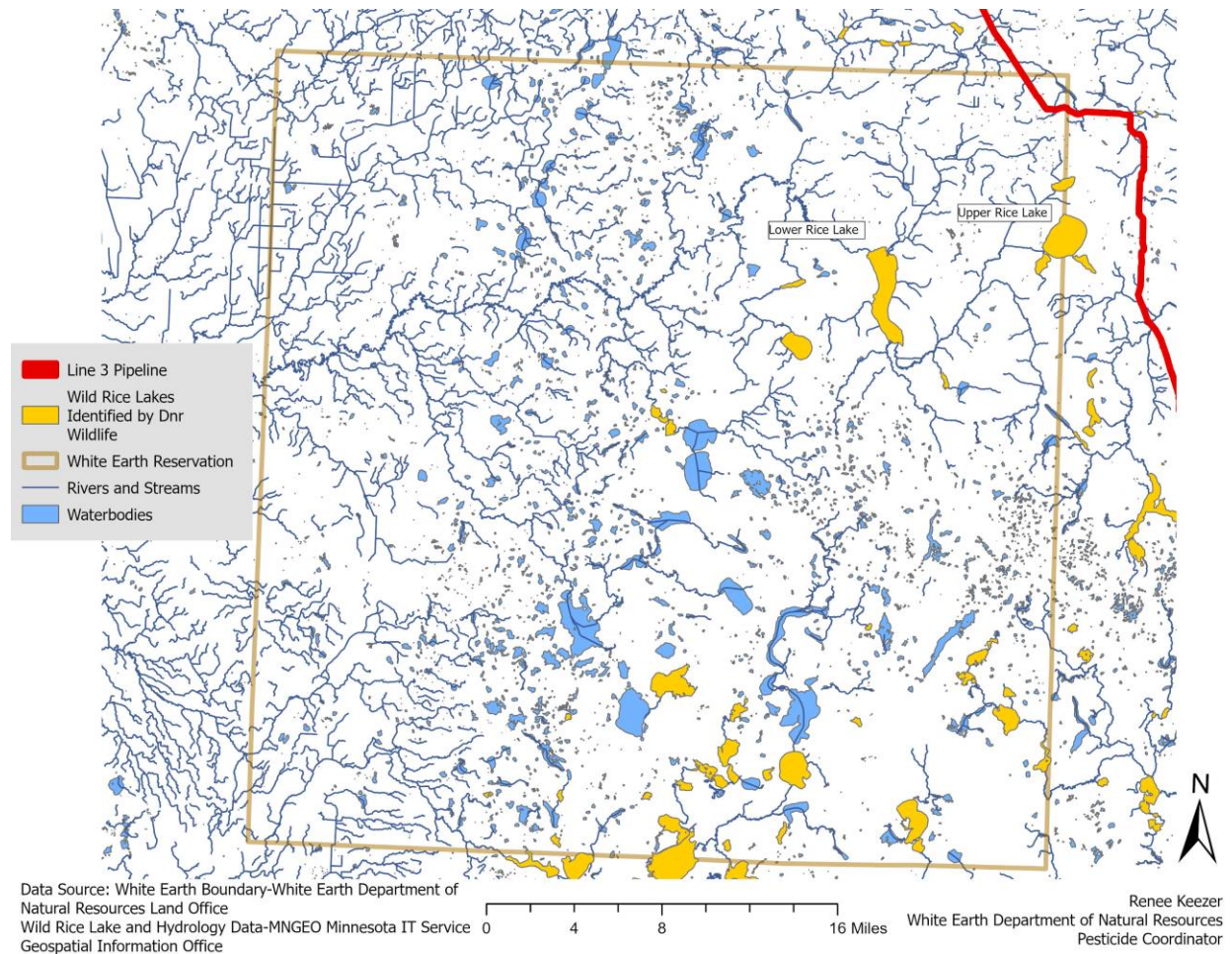
II. The Court's Order Failed to Adequately Consider On-Reservation Impacts to Manoomin

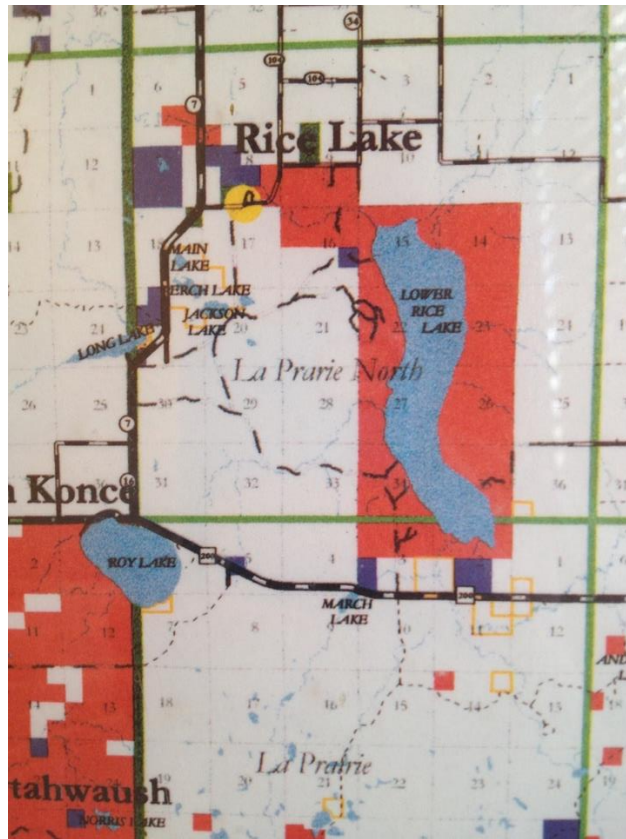
In the Order, the Court considered only the allegations of harm to Manoomin located *off-reservation*, and failed to consider whether Respondents' claims involving *on-reservation* impacts to the Manoomin where Appellants' conduct originates *off-reservation*. Specifically, the Court stated that the Band claims it "retain[s] rights beyond the reservation ... and that the grant of a water permit by DNR officials ... impairs or threatens the growth of Manoomin on those lands" that Respondents' lawsuit "seeks to enforce treaty rights to protect Manoomin and other resources on 1855 Treaty ceded land." Order Dismissing Respondents' Complaint at 1, 6. But nowhere in the Order did the Court consider the on-reservation impacts to Manoomin.

As explained by the Tribal Trial Court below, "the complaint alleges that [Defendants'] actions or inactions have resulted in harm to the Plaintiffs' rights on the reservation[.]" Order Clarifying Aug. 18, 2021 Order Denying Motion to Dismiss at 8. Respondents' Complaint seeks a declaration that DNR has "intentionally and knowingly violated the Rights of Manoomin by

³ "A motion for reconsideration 'serve[s] the limited function of correcting manifest errors of law or fact'" *Bradley Timberland Resources v. Bradley Lumber Co.*, 712 F.3d 401, 407 (8th Cir. 2013) (citation omitted).

unilaterally granting 5 billion gallons of water, without official notice to tribes, without Chippewa consent, on and off White Earth Reservation” Compl. at 14, ¶ i. Respondents also seek injunctive relief to prevent DNR from “further, continued waste of fresh water resources, both surface and groundwater, on reservation and across the ceded territories (necessary for the Manoomin to live and flourish; and so tribal members may enjoy their rights to harvest manoomin[.]” Compl. at 14, ¶ j. The maps below illustrate the geography of the White Earth Reservation and its boundaries:





As the maps demonstrate, Lower Rice Lake—the Band’s crown jewel and the largest, continuously producing wild rice bed in the world—is located entirely within the boundaries of the White Earth Reservation. Respondents’ Complaint attaches a Waters Report prepared by Renee Keezer, Pesticide Coordinator at the White Earth Department of Natural Resources,⁴ explaining that the dewatering permit granted by DNR has resulted in impacts “observable in the rice lakes and other waters and wetlands in the region. The water levels in Lower Rice Lake on

⁴ “A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.” Fed. R. Civ. P. 10(c). “In addressing a motion to dismiss, ‘[t]he court may consider the pleading themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record.’” *Illig v. Union Elec. Co.*, 652 F.3d 971, 976 (8th Cir. 2011) (quoting *Mills v. City of Grand Forks*, 614 F.3d 495, 498 (8th Cir. 2010)); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.”).

the White Earth Reservation are so low that it will be difficult if not impossible to harvest wild rice” Compl. Ex. A. The Complaint thus alleges impacts to the Band’s resources located *on-reservation*. These impacts to Manoomin located on Lower Rice Lake within the boundaries of the White Earth Reservation were not sufficiently considered by the Court in its Order. This case presents complex factual and legal questions about the interconnectedness of water systems and the nature and extent of Tribal jurisdiction. The precise location and extent of both DNR’s activities and the impacts of those activities involves a fact-intensive inquiry that is best suited for the Tribal Trial Court to resolve in the first instance.⁵

III. New Evidence Relating to DNR’s Activities Warrants Reconsideration

Following the Court’s March 10, 2022 Order, new factual evidence has come to light regarding DNR’s dewatering activities relevant to this case. This new evidence includes a report by Jeffrey Broberg, a Minnesota licensed professional geologist, regarding Line 3 construction impacts that have potential for significant environmental effects on water dependent ecosystem, particularly wild rice. Exhibit A. The new evidence also includes a March 21, 2022 press release by DNR, disclosing two new aquifer breaches that occurred during the construction of Enbridge’s Line 3 Replacement Project. Exhibit B.

Mr. Broberg’s report is based on the initial environmental review for the Line 3 pipeline, the Enbridge permit application submittals, data from the Clearbrook aquifer breach restoration order of DNR, and newly acquired high-definition thermal imaging designed to identify hydrologic disturbances causing upwelling groundwater, which was commissioned by the Band. The report

⁵ See *Crow Creek Sioux Tribe v. Bureau of Indian Affairs*, 463 F. Supp. 2d 964, 967 (D.S.D. 2006) (“[C]ourts have also recognized that the jurisdictional issue and substantive issues can be so intertwined that a full trial on the merits may be necessary to resolve the issue.”).

states that new thermal imaging shows as many six sites with upwelling groundwater that have not been disclosed by DNR, and final thermal imaging reports will be available in summer 2022.

In its press release, DNR acknowledged that it has “conducted additional investigative work, including an aerial inspection, to assess whether there were any other unidentified aquifer breach sites. Thus far, the DNR has not confirmed any additional aquifer breach sites. To ensure thoroughness, [DNR] will finalize [its] assessment of the potential for any additional aquifer breaches following the spring thaw.” DNR Press Release at 1. The two newly disclosed aquifer breaches include: (1) a breach on or around August 2, 2021, near LaSalle Creek in Hubbard County, which released about 9.8 million gallons of groundwater; and (2) a breach on or around September 10, 2021, near the Fond du Lac Band of Lake Superior Chippewa reservation in St. Louis County where groundwater began welling up as crews removed sheet piling after finishing construction on the pipeline. DNR stated that Enbridge has substantially slowed—but not completely stopped—the breach near the Fond du Lac Reservation, which has resulted in the release of nearly 220 million gallons of groundwater. DNR Press Release at 1. DNR explained that the breach has “the potential to impact Dead Fish Lake on the Fond du Lac Reservation, a valuable wild rice water for the band.” *Id.*

The new factual evidence regarding Mr. Broberg’s report and the newly disclosed aquifer breaches is highly relevant to this case. The evidence shows DNR’s dewatering activities and conduct that are subject of this case, which has caused substantial harm to natural resources, including within reservation boundaries. The full extent of DNR’s activities and conduct are unknown at this time. But what is known at this time is that DNR’s activities and conduct at issue in this case have led to devastating impacts to Manoomin within the boundaries of the White Earth

Reservation. The Court should not permit DNR to refuse to disclose all relevant facts at issue in this case.

IV. In the Alternative, the Court Should Grant Leave for Respondents to Amend Their Complaint

In the alternative, if the Court denies Respondents' Motion for Reconsideration, Respondents seek leave to amend their Complaint. The Court's Order did not indicate whether leave was given to Respondents to amend their Complaint. Generally, leave to amend is freely given. *See* Fed. R. Civ. P. 15(a)(2) (stating that "[t]he court should freely give leave [to amend] when justice so requires"); *McIndoo v. Burnett*, 494 F.2d 1311, 1313 (8th Cir. 1974) ("Pleadings are merely to facilitate a proper decision on the merits."); *Tatung Co., Ltd. v. Shu Tze Hsu*, 43 F. Supp. 3d 1036, 1058 (C.D. Cal. 2014) ("Leave to amend lies within the sound discretion of the trial court, which 'must be guided by the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities.'). In the event the reconsideration is denied, the Court should grant Respondents leave to amend.

CONCLUSION

The Court should grant Respondents' Motion for Reconsideration. Alternatively, if the Court denies the Motion, the Court should grant leave for Respondents to leave their Complaint.

Dated: March 25, 2022

Respectfully submitted,

/s/ Joseph Plumer

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EXHIBIT A

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March 25, 2022

SENT VIA EMAIL ONLY
Frankbibeau@gmail.com

White Earth Tribe
Frank Bibeau, Tribal Attorney
White Earth Band of Ojibwe
White Earth, Minnesota

RE: Line 3 Thermal Imaging Data Initial Analysis
Dear Mr. Bibeau:

The Enbridge Line 3 pipeline crossed northern Minnesota trenching across the western end of the range of wild rice and across Ojibwa ceded territory where the wild rice is recognized as both an important food and as a cultural and spiritual icon given protection under Tribal authorities.

I am a Minnesota Licensed Professional Geologist with 45 years of experience with the rocks and waters of Minnesota. I am familiar with the terrain, geologic history, geomorphology, and hydrology of the Line 3 route across northern Minnesota.

Since the Enbridge breach of the artesian aquifer near the Clearbrook Station I have been evaluating a range of construction impacts from Line 3 using drone images from the Indigenous Environmental Network (Figures 1-3), reports from the Minnesota Department of Natural Resources (MNDNR) and Enbridge Permit application documents. I have concentrated on the impacts that affect groundwater and surface water/groundwater interaction.

Line 3 crosses the headwaters of three major Minnesota Watersheds: The Red River of the North, the Mississippi River and the St. Louis/Great Lakes (Figure 4). All of Line 3 crosses Ojibwa territory including reservations and ceded territory

that are subject to the White Earth Reservation Business Committee Resolution 001-21-056 (Exhibit 1)¹.

I was asked to evaluate the Line 3 construction impacts that have a potential for significant environmental effects on water dependent ecosystems, particularly wild rice. For my review I reviewed the initial environmental review, the Enbridge permit application submittals, drone photos taken during construction, data from the Clearbrook aquifer breach restoration order from the Minnesota Department of Natural Resources and newly acquired high-definition thermal imaging designed to identify hydrologic disturbances causing upwelling groundwater that was commissioned by the White Earth Tribe.

The question was whether compiled evidence from the permit application protect the usufructuary property rights discussed on the White Earth Resolution (Exhibit A) and whether the history of hydrological impacts that occurred during construction interfere with the tribal rights?

My goal was to identify risks to Manoomin that were not adequately addressed in State and Federal Permits and where Tribal Consultation might have helped avoid and/or mitigate risks.

Because Line 3 crosses Tribal lands and ceded territories across the headwaters of three major watersheds it would have been reasonable and prudent for the Tribes, the State of Minnesota, and Federal permitting agencies to identify both the expected construction impacts for inclusion in project need, route selection and/or permit conditions. It would also be prudent and necessary to document all the hydrological impacts that occurred during construction.

Trenching Impacts to Groundwater and Groundwater/Surface Water Interactions:

The permit applications address trench construction and dewatering and treats these impacts as temporary impacts, but evidence from older pipelines, drone photos during the project, and observations from the post-construction High-Definition Thermal Imaging along the length of Line 3 show that permanent hydrological impacts are occurring where the line crosses wetlands, bogs and drainageways.

¹ White Earth Reservation Business Committee, June 20, 2021, Resolution 001-21-056, Consent for USAW Enbridge Line 3R Water Quality Permitting, 9 p

The thermal evidence of groundwater disturbance I have reviewed show that the pipe trench commonly fills wetlands and blocks shallow groundwater flow across wetlands and drainageways. From data I have reviewed to date I see as many as six more sites where artesian flow now comes to the surface after the pipeline was constructed. We are in the process of planning field verification of these new areas using drones and on-site observations. Adding this new data to the evidence of the shallow artesian aquifer breach near LaSalle Lake I believe that we now see significant hydrological disturbance that was not anticipated, nor were these impacts considered by Enbridge or the permitting agencies. The question remains whether the project proposer and State/Federal regulators consulted with the Tribes?

Water Use by Enbridge:

In 2018-2020 Enbridge sought water appropriations permits for 510 million gallons of water for the entire project. In 2021, a drought year that devastated northern Minnesota (Figures 5-6), Enbridge requested permits to use 4.5 billion gallons of water, fifty time more than their 2020 permit allowed².

According to the attached report the Enbridge Water Appropriations Permit was granted by MNDNR without a 30-day public Comment Period and with no official consultation with the Tribes or the 1855 Treaty Authority³. The Permit allowed water withdrawal from the headwaters of an important wild rice production area without consideration of the impacts during a drought, or the permeant impacts from the filled pipe trench.

Originally Enbridge claimed the 510 million gallons significant water uses across the length of the project. But the May 2021 amended permit proved that Enbridge engineers were in error; they had grossly underestimating their original water use permits in 2018 and could not have understood or evaluated the true impacts of water appropriations on water dependent ecosystems. I found no evidence of a review of ecological impacts in the amended permit.

It is not known whether the erroneous permit applications were due to Enbridge failing to investigate the existing hydrology conditions of the pipe trench along the route, did not understand the hydrodynamics and hydroperiods of the pipe trench in

² MNDNR, June 4, 2021, Enbridge Water Appropriations Permit #20183420, MNDNR

³ Keezer, R, July 16, 2021, Waters Report What Happens When the Water Goes Down? Report to White Earth Band of Ojibwe

the headwaters, or whether Enbridge intentionally underestimated the water use to ease public concerns over the water use permits.

From the available record⁴ neither Enbridge, nor the MNDNR considered impacts to wild rice and did not consult with the White Earth Tribe about the water use or impact on Manoomin⁵.

Even during the drought Enbridge claimed they needed dramatically more water because they had grossly underestimated the water needs for dust control, Horizontal Directional Drilling (HDD), pipe buoyancy control, trench dewatering of the shallow groundwater and uncontrolled flow from the breach of at least three artesian aquifers. As a professional geologist this raises significant concerns about the standards of care Enbridge and the State/Federal regulators used in assessing impacts to wild rice along the route.

Wild Rice Concerns:

Many researchers have identified the importance of wild rice (*Zizania palustris L.*)⁶

“Northern wild rice (Zizania palustris L.), once abundant across the lakes of the Upper Midwest, has largely disappeared from the southern portions of its range during the last century [1,2]. Recognized as the state grain of Minnesota, conservation of this culturally, ecologically, and economically significant species is critical [3]. Indigenous peoples of the northern Great Lakes region have a strong cultural connection to wild rice and have harvested it for over two thousand years [4]. The annual harvest is still a sacred tradition to this day, which is critical for indigenous economic and food security [3]. Additionally, wild rice is fundamental to the habitat and diets of native waterfowl, fish [5], and 17 species of wildlife that are listed by the Minnesota Department of Natural Resources (MN DNR) as “species of greatest conservation need”

Other researchers have cited the declining population of wild rice during the last century and have identified factors driving the decline⁷. O’Shea et. al. summarized

⁴ Water use inquiries made by State Senator John Marty in January were denied because the water uses and aquifer ruptures were “under investigation” and protected by the Minnesota Data Practice Act by the MNDNR and Minnesota Pollution Control Agency.

⁵ Keezer, 2021

⁶ O’Shea, K., et.al, Sept 2020, Improved Remote Sensing Methods to Detecting Northern Wild Rice (*Zizania palustris L.*), *Remote Sensing*, v12, 3023.

⁷ Pillsbury, R.W., McGuire, M.A., 2009, Factors Affecting the Distribution of Wild Rice and the Associated Macrophyte Community, *Wetlands*, v 29, p 724-734

the widespread decline and concluded that “*Zizania (and other aquatic plants) may be very sensitive to small changes within their watershed that are typical of moderate development.*”

For decades resource managers have advised that wild rice management strategies should include consideration of land disturbances and land-use patterns, yet Enbridge and the MNDNR did not document that they have taken concerns for wild rice into consideration.

Enbridge and the State of Minnesota appear to have ignored the need to consult with the Tribes, have ignored the rights of Manoomin, and neglected the need to maintain stable water levels for wild rice to thrive. The Enbridge water use was much greater than was planned and both Enbridge and the State of Minnesota claimed pipeline rights to higher water appropriations even during the drought.

New Work Confirming Line 3 Construction Impacts to Water Resource.

New data released by the MNDNR show that Enbridge Line 3 ruptured artesian aquifers in three locations causing uncontrolled flow of groundwater to the surface⁸, proof of water resource impacts affecting hundreds of millions of gallons of groundwater. New thermal imaging shows as many as six other sites with upwelling groundwater that are not being addressed.

The initial thermal data interpretations have shown there to be four types of groundwater/surface water impacts from the pipeline:

- Aquifer ruptures like those confirmed by MNDNR at Clearbrook, La Salle and PM1102 near the Fond du Lac Reservation.
- Frac outs and the inadvertent release of drilling mud at Horizontal Directional Drilling River crossings.
- Sheet Pile impacts have been implicated in two of the three aquifer ruptures
- Trenching impacts when the trench depth went below the static water level like documented by MNDNR at La Salle.

In each of these categories the data is revealing common groundwater disturbances where upwelling groundwater along the pipe trench or the pipe borings kept the ground from freezing in late November. This groundwater disturbance also

⁸ MNDNR, March 21, 2022, Update of Line 3 Aquifer Breach Investigating and Enforcement, 3 pages

including disturbance of groundwater flow patterns. The final thermal imaging reports will be available later in the summer of 2022.

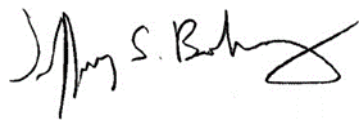
Conclusion:

While the importance of stable hydrology for wild rice is traditional tribal ecological knowledge and is well documented in the academic literature the risks of hydrologic disturbance from pipe trenching and HDD have been ignored for Line 3 in construction or water appropriation permit decisions.

I have advised legal counsel for the Tribes to inquire about both the upstream and downstream after-the-fact effects of pipe trenching, the hydrological impacts of trench dewatering, pipe trench hydrological disturbances and the disturbance from ruptured artesian aquifers

The record shows that Enbridge grossly underestimated the Line 3 water use in their original 2018 permit applications. This gross underestimation gave regulators a false sense of modest water use. The new 4.9-billion-gallon water use more accurately predicted water use but the amended permit never considered Tribal concerns or the potential impacts to wild rice. Between Enbridge and the State and Federal Regulators there was no one speaking to the concerns of sustaining health stands of wild rice along Line 3.

Sincerely:



Jeffrey S. Broberg, LPG

Minnesota Licensed Professional
Geologist #30019

Renee Keezer

Environmental Specialist

Figures:

1 IEN Drone Photo 1

2 IEN Drone Photo 2

3 IEN Drone Photo 4

4 Line 3, Watersheds, Tribal Lands
and Wild Rice Lakes

5 MNDNR 2021 Drought Graphs

6 MNDNR May 2021 Drought Map

Figure 1. Mississippi River Crossing Fracouts during construction July 2021. Image by Indigenous Environmental Network



ssing #1

Figure 2. Fracouts, November, 2021, four months after river crossing was complete. Drone Image by Indigenous Environmental Network.



Figure 3. March 2022 Drone Image of Mississippi River Crossing 1 Fracout with drilling muds still leaking to surface wetlands 9 months after river crossing was complete.



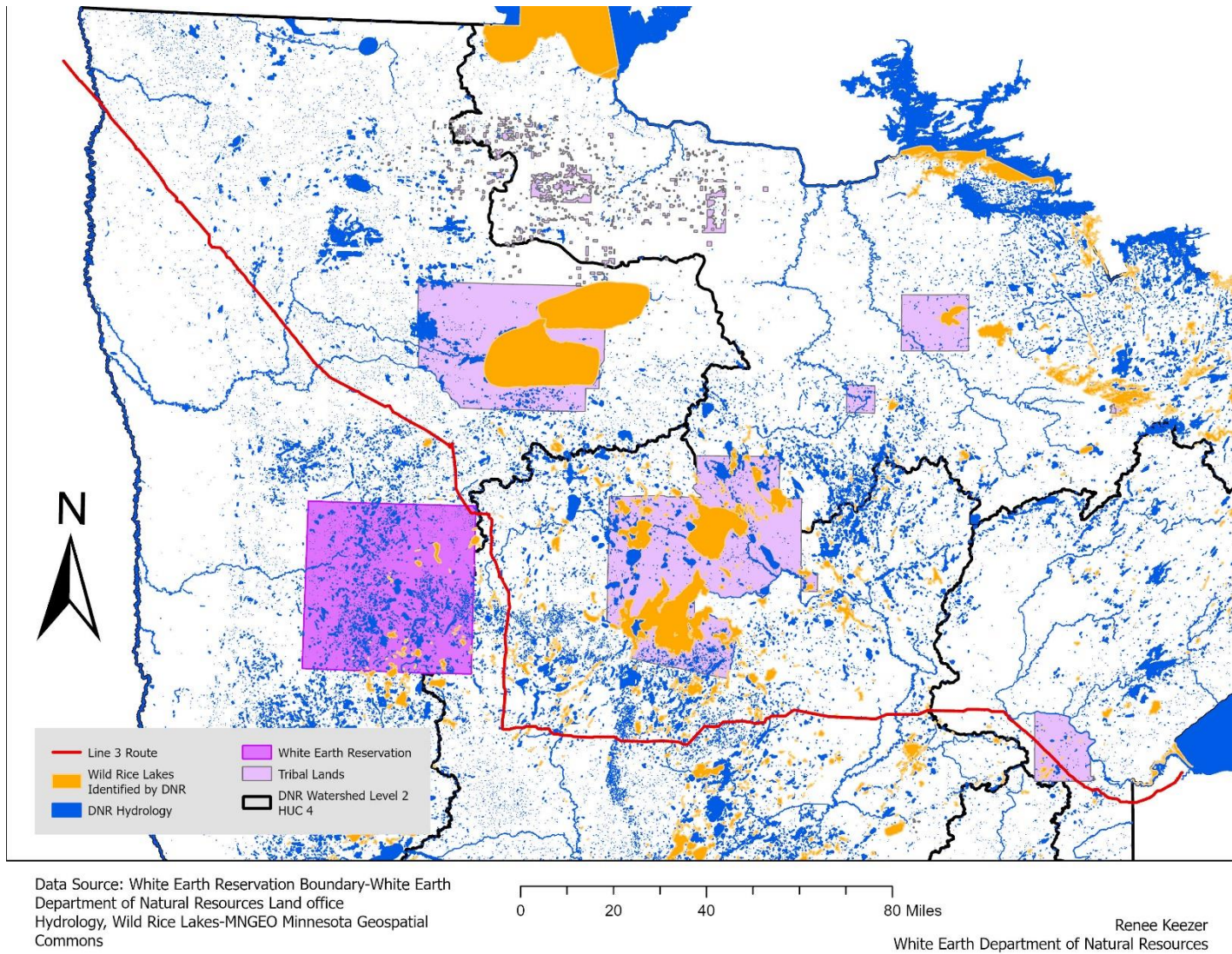


Figure 4 Showing Line 3 crossing Minnesota’s three major watersheds, wild rice lakes, and tribal lands

Monthly Precipitation and Departures, Minnesota January 2020 - December 2021

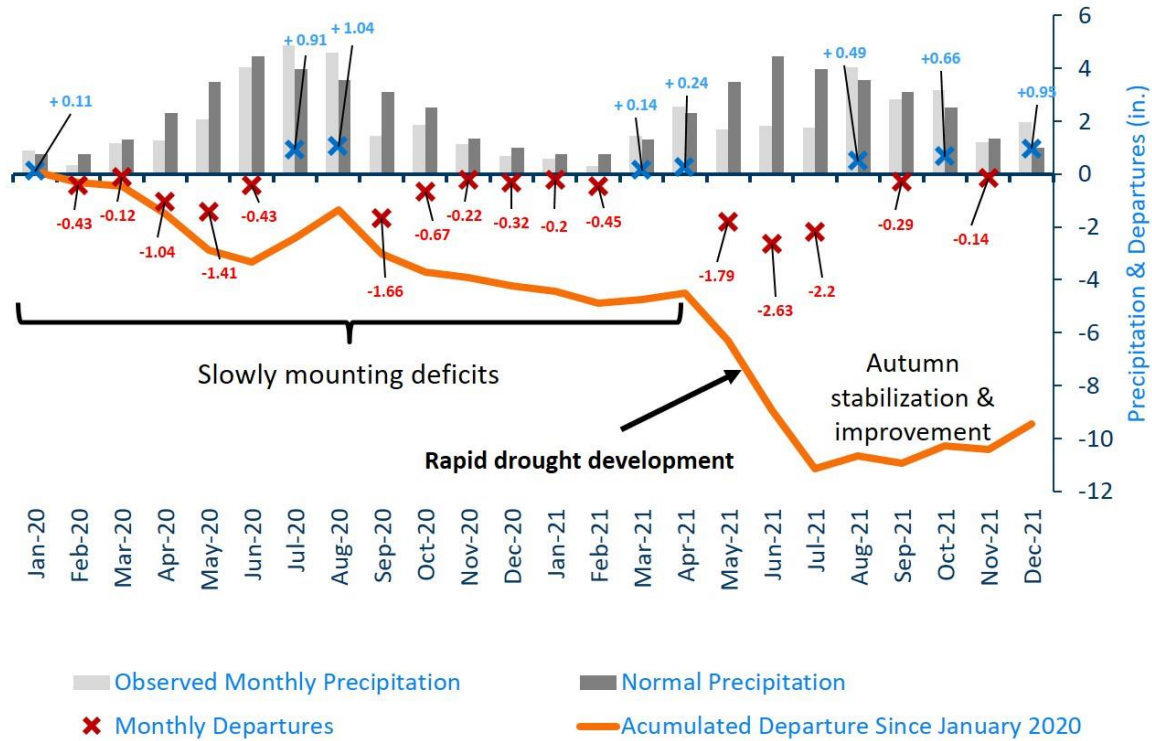
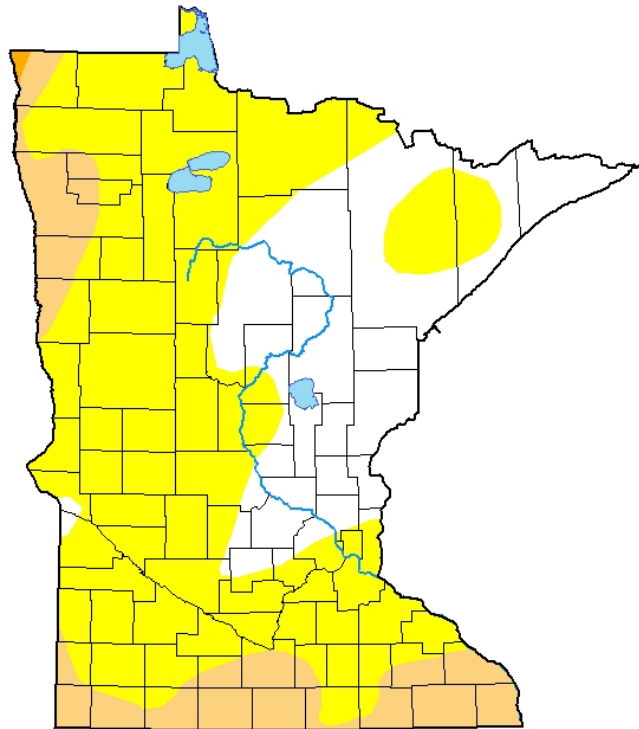


Figure 5: Minnesota Monthly Precipitation Departures. Statewide data shows “Rapid Drought Development in May 2021” at the time Enbridge was granted a 50-fold increase in water use.

**U.S. Drought Monitor
Minnesota**



June 1, 2021
(Released Thursday, Jun. 3, 2021)
Valid 8 a.m. EDT

Drought Conditions (Percent Area)

	None	D0-D4	D1-D4	D2-D4	D3-D4	D4
Current	26.79	73.21	13.45	0.18	0.00	0.00
Last Week <i>05-25-2021</i>	26.79	73.21	13.42	0.18	0.00	0.00
3 Months Ago <i>03-02-2021</i>	0.00	100.00	39.53	0.61	0.00	0.00
Start of Calendar Year <i>12-29-2020</i>	1.60	98.40	23.40	0.28	0.00	0.00
Start of Water Year <i>09-29-2020</i>	54.95	45.05	8.39	0.00	0.00	0.00
One Year Ago <i>06-02-2020</i>	44.33	55.67	17.69	0.00	0.00	0.00

Intensity:

None	D2 Severe Drought
D0 Abnormally Dry	D3 Extreme Drought
D1 Moderate Drought	D4 Exceptional Drought

The Drought Monitor focuses on broad-scale conditions. Local conditions may vary. For more information on the Drought Monitor, go to <https://droughtmonitor.unl.edu/About.aspx>

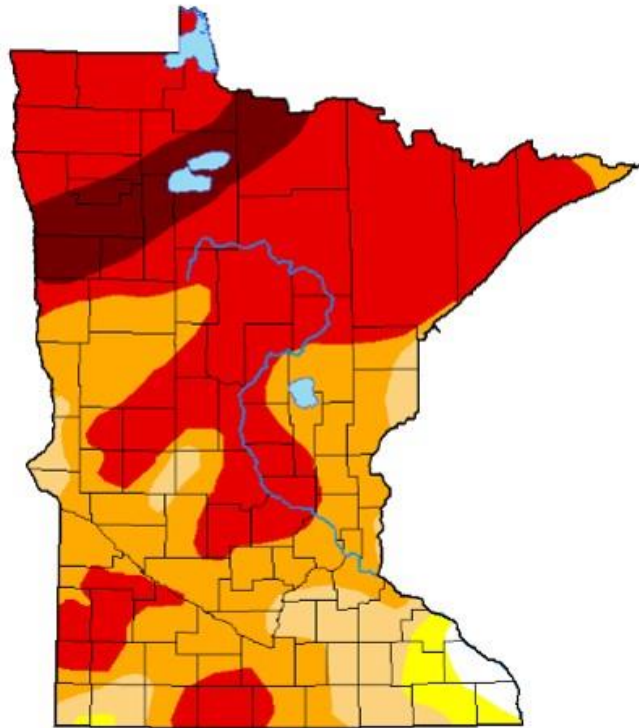
Author:
Brian Fuchs
National Drought Mitigation Center



droughtmonitor.unl.edu

Figure 6. Minnesota Drought Monitor June 1, 2021. The White Earth Reservation and surrounding Counties in the Headwaters of the Wild Rice River were classified as “Abnormally Dry” as they had been for months.

**U.S. Drought Monitor
Minnesota**



August 24, 2021

(Released Thursday, Aug. 26, 2021)

Valid 8 a.m. EDT

Drought Conditions (Percent Area)

	None	D0-D4	D1-D4	D2-D4	D3-D4	D4
Current	1.15	98.85	96.58	87.63	57.65	8.07
Last Week <small>08-17-2021</small>	1.15	98.85	96.56	88.29	49.77	8.07
3 Months Ago <small>05-22-2021</small>	26.79	73.21	13.42	0.18	0.00	0.00
Start of Calendar Year <small>12-28-2020</small>	1.60	98.40	23.40	0.28	0.00	0.00
Start of Water Year <small>09-29-2020</small>	54.95	45.05	8.39	0.00	0.00	0.00
One Year Ago <small>08-25-2020</small>	68.89	31.11	12.23	0.00	0.00	0.00

Intensity:



The Drought Monitor focuses on broad-scale conditions. Local conditions may vary. For more information on the Drought Monitor, go to <https://droughtmonitor.unl.edu/About.aspx>

Author:

Curtis Riganti
National Drought Mitigation Center



droughtmonitor.unl.edu

Figure 5, Minnesota Drought Monitor August 24, 2021. White Earth Reservation and upgradient Counties were in “Exceptional Drought”

Many Enbridge Construction Activities Use High Volumes of Water

EXHIBIT 1

**WHITE EARTH RESERVATION BUSINESS COMMITTEE
WHITE EARTH BAND OF CHIPPEWA INDIANS**

Resolution No. 001-21-056

- WHEREAS,** the White Earth Reservation Business Committee is the duly elected governing body of the White Earth Reservation pursuant to Article VI, Section 1, of the revised constitution of the Minnesota Chippewa Tribe, as amended, and organized under Section 16, of the Act of June 18, 1934 (48 Stat. 984), and
- WHEREAS,** the White Earth Reservation Business Committee is the duly authorized governing body of the White Earth Band, and
- WHEREAS,** the White Earth Reservation was established by Treaty in 1867 as a final relocation reservation for the *Chippewas of the Mississippi* following prior relocation attempts via the 1863 and 1864 Treaties with the Chippewa, moving us from our 1855 Chippewa reservations “known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake” to Leech Lake reservation initially, then soon after to White Earth Reservation, and
- WHEREAS,** the White Earth Band of Ojibwe (WEBO) has approximately half of the 40,000 total tribal members enrolled in the Minnesota Chippewa Tribe (MCT), which are all treaty beneficiaries of the many Chippewa Treaties with the United States and who retain the usual rights of use and occupancy across the 1855 ceded territory and former 1855 reservations; including usufructuary property rights to hunt, fish, trap, gather wild rice as part of earning a modest living, and
- WHEREAS,** the White Earth Reservation Business Committee is the duly elected governing body authorized by the *Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Minnesota* as the constituent band of the Minnesota Chippewa Tribe organized under Section 16 of the Act of June 18, 1934 (48 Stat. 984) and therefore has the responsibility and authority to provide for the safety, health and welfare of its tribal members, and
- WHEREAS,** the White Earth Band of Ojibwe is primarily comprised of *Chippewas of the Mississippi* from Gull Lake, Rabbit Lake, Mille Lacs, Rice Lake and Sandy Lake, Pokegama but also includes Pillager, Winnibigoshish and Lake Superior band members and other relocated who are beneficiaries to many of the Chippewa treaties with the United States of America, and
- WHEREAS,** the Northwest Ordinance of July 13, 1787, Article III provides that the *utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent*, and the United State Constitution was ratified 1788 providing in Article VI that treaties are the

supreme law of the land, and Article I, Section 8 of the Constitution states that “Congress shall have the power to regulate Commerce with the Indian tribes” and Bill of Rights ratified in 1791 Fifth Amendment provides for property rights being protected by due process and from unjust taking, and shortly thereafter in the 1795 Treaty of Greenville “the United States relinquish[ed] their claims to all other Indian lands northward of the river Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes *and the waters uniting them . . .*” (See Article IV), and

WHEREAS, the 1825 and 1826 Chippewa Treaties with the United States further recognized Chippewa national sovereignty, regulation of hunting and *jurisdiction* with regard to future land cessions and the exercise of usufructuary property rights over those territories in states now known as Michigan, Wisconsin, Minnesota and North Dakota, and

WHEREAS, various federal courts have recognized the historical importance of these activities in Chippewa life and the emphasis of the Chippewa chiefs on usufructuary rights during their negotiations with the United States indicate that the Indians believed they were reserving unrestricted rights to hunt, fish, and gather throughout a large territory. [. . .]

The history suggests that the Chippewa Indians' exercise of their usufructuary rights included selling what they hunted, fished, or gathered in order to make a modest living.

(See United States v. Brown, citing Mille Lacs Band of Chippewa Indians v. Minnesota, and Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, see also United States v Gotchnik), and

WHEREAS, the Chippewas' federal treaty protected usufructuary property rights to hunt, fish and gather wild rice in order to earn a modest living are in fact the same on and off reservation, yet the U.S. Army Corps of Engineers appears to apply different criteria to permit applications for activities within reservation's exterior boundaries than would be applied to permit application for activities outside a reservation' exterior boundaries as demonstrated by Regional General Permit-003-MN in the State of Minnesota Except for within the exterior boundaries of Indian Reservations, and

WHEREAS, the U.S. Army Corps of Engineers (USACE) recognized and responded to Chippewa treaty bands and the Great Lakes Indian Fish and Wildlife Commission in their *1997 Issue Paper and District Recommendation, the Agency's Trust Responsibilities Toward Indian Tribes in the Regulatory Permitting Process* for Crandon Mine in Question

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

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

(See MCT Tribal Executive Committee (TEC) Resolution 32-17, Exhibit A, *Issue Paper and District Recommendation, the Agency's Trust Responsibilities Toward Indian Tribes in the Regulatory Permitting Process* issued September 29, 1997 by J. M. Wonsik, Colonel, Corps of Engineers, District Engineer, St. Paul Office to James Schlender, Executive Administrator, Great Lakes Indian Fish Wildlife Commission, resulting from a permit application by Crandon Mining Company, the St. Paul District had been asked by several Native American tribes to address the nature and extent of the Corps trust responsibilities toward Indian tribes in the Corps regulatory permitting process), and

WHEREAS, that the 1997 USACE Issue Paper is now over two decades (20+ years) old and that the Tribal Executive Committee of the Minnesota Chippewa Tribe requested that "the U.S. Army Corps of Engineers: (1) consult with the Minnesota Chippewa Tribe and its constituent bands to update the guidelines (Exhibit A) [the 1997 USACE Issue Paper]; (2) make a firm unequivocal commitment that it will follow those guidelines and fulfill its trust obligations to Indian tribes; and (3) enter into agreements with the MCT or constituent band to establish protocols for tribal input and consultation on proposed actions impacting tribal cultural and natural resources" by TEC Res. No. 32-17 duly adopted on Nov. 30, 2016, and

WHEREAS, the reservation of sovereign rights is an important part of our ongoing struggle to preserve a culture that is best understood in terms of our relationship with the natural environment and that there is no economic framework that can properly define the value of manoomin to the Ojibwe people because manoomin is central to Ojibwe cultural identity, spiritual traditions, and physical well-being and serves as an important indicator species to the ecology of Minnesota's lakes and rivers and provides critical food and habitat to both endemic and migratory species, and

WHEREAS, the Tribal members continue to harvest and rely upon manoomin for religious purposes including naming ceremonies, funerals, Midewiwin ceremonies and various seasonal feasts and these activities are critical components in perpetuating Anishinaabe lifeways and cultural practices, whereby the Ojibwe-Anishinaabe spiritual beliefs mandate the use of certain plants, animals, and fish in ceremonies attendant to hunting, fishing, and gathering activities and these ceremonies ensure the perpetuation of the resources and the physical, mental, and spiritual well-being of the person for *bimaadiziwin* “living a good life, and

WHEREAS, White Earth Band of Ojibwe and the 1855 Treaty Authority have adopted *Rights of Manoomin* ordinances to protect wild rice on and off reservation and given notice of consent required to Minnesota Governor Walz. (See Exhibits B-E; White Earth Chairman Tibbetts, Jan. 25, 2019 letter to Governor Walz Re: 401 water quality consent with the attachments; White Earth Band of Ojibwe Resolutions (001-19-009 and 001-19-010) and 1855 Treaty Authority Resolution 2018-05). We can see the Corps’ understands that

As part of the [Corps’] authorized mission of conserving and managing natural resources, the Headwaters attempt to maintain stable operating levels for the purpose of wild rice[, . . . which] grows in shallow to moderate water depths (1-3 feet) and is affected by water flow, turbidity, water quality and water level fluctuations. Wild rice is sensitive to varying water levels and production in individual stands from year-to-year is subjective, depending on local water conditions. Wild rice has special cultural and environmental significance to the Native Americans. From an environmental perspective, it is an important habitat component and is often viewed as an ecological indicator species due to its sensitivity to growing conditions.

(See **USACE-Mississippi River Headwaters Reservoirs Master Plan, Main Report October 2016**, at p 36).

According to the **2016 Main Report, 2.8.1 Climate Change and Wildlife Impacts** the Master Plan emphasizes the need to have adequate resource protection to maintain species diversity, habitat quality, and outdoor recreational opportunities. Environmental challenges beyond our control could significantly impact natural resources. Climate change may alter the landscape of the Headwaters in multiple ways, the most visible being changes in river flows and/or lake levels. More erratic high flows and droughts can influence rates of siltation, rim erosion, lake access for recreational boating, and flood protection. Wildlife can move or migrate as conditions change, but plants have difficulty surviving significant

climatic change. Some species can be generalists across a wide range of growing conditions, but more conservative species with very specific growth niches will likely be impacted. The exact impacts are difficult to predict, but **climate is singularly the most influencing determinant of landscapes.**

See Main Report at p 48. **The Main Report also speaks to Tribal Trust responsibility** and that

As part of the Corps' tribal trust responsibility, the Corps considers the relationship between local Native American tribes and the Federal Government on various operational elements of the Headwaters' projects. Portions of the Headwaters' project sites are located within the boundaries of Native American Reservations. **The lakes and streams of the Mississippi Headwaters' area, as well as the plants and animals associated with them, hold spiritual, economic, and subsistence value to the various bands and tribes in the area. Natural resources are a fundamental aspect of their cultural identity.**

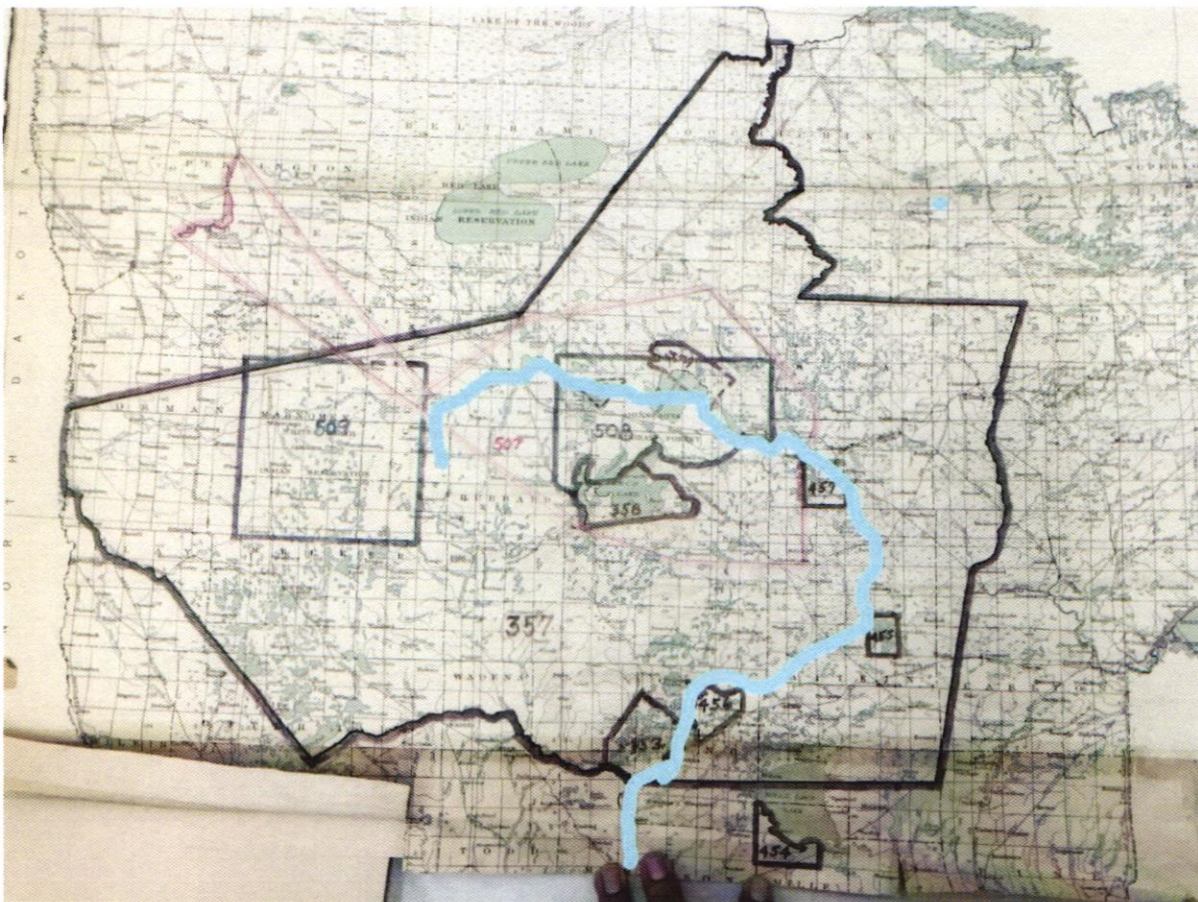
The greatest density of culturally important archeological sites in the Headwaters' area is typically found along the shorelines of lakes, rivers, and streams. These sites are located both above and below the current water levels. The primary tribal goal, with regard to cultural resources, is to ensure that the heritage of Native Americans is preserved as an integral part of community life, providing orientation to its people, their language, music, stories, and traditions. The preservation of these cultural sites is considered a vital legacy to be maintained for future generations.

(See Main Report at p 59).

WHEREAS, the Chippewa ceded territories in Minnesota, including the 1855, are the actual headwaters of 3 of the 4 major North American continental divides; north from the Red River basin to Hudson Bay, East to the St. Louis and other rivers sourcing Lake Superior and the other Great Lakes, and south including all of the upper Mississippi River watershed to the Gulf of Mexico, and

WHEREAS, the circuitous nature of the upper Mississippi River in particular begins adjacent to the White Earth Reservation (established by the 1867 Treaty) and then flows through the 1855 ceded territory reservations of Cass Lake, Winnibigoshish, Pokegama, Sandy Lake, Gull Lake and Rabbit Lake, and then forms the border between the Chippewa territories ceded in 1847 and 1837, with interconnected tributaries, upstream and downstream in all aquatic ecosystems which are the primary sources for important wild rice environments, wild life and fisheries, and

WHEREAS, for the *Chippewas of the Mississippi*, abundant, clean water is inextricably linked to the self-sufficiency, economic development and security of present and future generations of northern Minnesota's tribal communities' health and welfare and consequently the upper Mississippi watershed (in light blue on the map), from the Headwaters of the Mississippi River adjacent to White Earth Reservation through the various 1855 reservations and ceded territories through Brainerd to St. Cloud, must be recognized as one, long, continuous, first in time, chain of reservations, seamlessly linked together as a common priority quality water property rights' under the Winter's Doctrine including all the upper Mississippi watershed tributaries, lakes, aquifers, wetlands and natural resources, reserved for the *Chippewas of the Mississippi* to enjoy and protect, and



WHEREAS, the White Earth Reservation has intervened in the Enbridge Application process for certificate of need and routing permits in the Minnesota Public Utilities Commission (PUC) for both Sandpiper (fracked Bakken crude) and Line 3 Replacement (Canadian extracted tar sands crude) pipeline projects to protect the freshwater resources habitat that support wild rice and prevent related climate

change impacts to air and water quality resources and our primary, natural food resources that rely upon avoiding further degradation to the overall upper Mississippi River from the Headwaters at Lake Itasca by White Earth to below Brainerd, and

- WHEREAS,** the Tribal Executive Committee of the Minnesota Chippewa Tribe directed on March 15, 2017 that a tribal cumulative impacts assessment be initiated immediately by TEC Res. No. 72-17 (See Exhibit F); the Anishinabe Cumulative Impacts Assessment (ACIA) was developed and Notice of public comment period issued, with a follow-up PUBLIC NOTICE Extension of Comment Period for Minnesota Chippewa Tribe's Cumulative Impact Assessment for Line 3 to February 2, 2018, (e-filed on the MN PUCe-docket Nov. 30, 2017 for Enbridge's certificate of need application at 14-916 and Enbridge's route permit application at 15-137) for all parties on the PUC Line 3 e-dockets, and
- WHEREAS,** the White Earth Reservation was an active partner in the development the Anishinabe Cumulative Impacts Assessment (ACIA) and did post the final, completed ACIA as a report on MN PUC e-docket for Enbridge's certificate of need application at 14-916 and Enbridge's route permit application at 15-137 on February 23, 2018, and
- WHEREAS,** the State of Minnesota has been actively engaging in large infrastructure projects that pose permanent, environmental damages to Chippewa tribal resources on and off reservations, which threaten the long-term health, safety and welfare of the Chippewa with federally protected usufructuary property rights to hunt, fish and gather wild rice in perpetuity throughout tribal aquatic resources in violation of a series of Chippewa Treaties with the United States of America and in violation of Public Law 280, section (b) excluding state jurisdiction over *water rights* in Indian Country; and which are ultimately violations of our federally protected civil rights under 42 U.S.C. §1981 *et seq*, and
- WHEREAS,** on April 13, 2018 the 1855 Treaty Authority adopted the Anishinabe Cumulative Impacts Assessment (1855 TA Res. 2018-03, See Exhibit G) as the environmental risk analysis tool for the Line 3 pipeline projects across the 1855 ceded territory and finds that climate change and other consequential and collateral impacts are too great and therefore adopted a *No Build Option* to protect off reservation natural resources, and
- WHEREAS,** on Feb. 21, 2019, the 1855 Treaty Authority provided Comments on USACE Permit Application No.: 2014-01071-TJH, for Enbridge Line 3 Replacement, regarding environmental impacts to Chippewa Treaty Protected Resources and Cultural Properties to the U.S. Army Corps of Engineers that reveal the scope of the Corps' Line 3 Clean Water Act Jurisdiction primarily over 3 water crossings

across navigable waters is insufficient to protect 211 water bodies which impact Chippewa territorial water quality and property rights of the upper Mississippi River watershed (See Exhibit H), and

WHEREAS, the bulk of the waters of the United States, the other party to the Chippewa treaties, have predominantly become public waters of Minnesota under Section 401 review of the Clean Water Act by the Minnesota Pollution Control Agency, and which Minnesota public waters are where most of the wild rice grows and consequently the White Earth Band of Ojibwe cannot ignore that *Climate change affects lakes, walleye in complex ways*¹ and that years later an *Ojibwe leader says Mille Lacs walleye have not recovered yet*²; that any increase in tar sands extraction will only speed up climate change and compound environmental and aquatic problems in Minnesota; and when walleye fishing people can't fish Mille Lacs, they usually shift further north to Big Sandy, Pokegama, Big Winnie, Cass Lake and Leech Lake, which are all original 1855 reservations, and

WHEREAS, the White Earth Band of Ojibwe has adopted the Minnesota Chippewa Tribe's Anishinabe Cumulative Impacts Assessment as the White Earth Band's environmental risk and evaluation tool for the meaningful assessment of the short and long term impact of the abandonment of the existing Line 3 pipeline, as well as the impacts from tar sands extraction, greenhouse gases, climate change and additional, future pipeline abandonment from the decreased demand for crude oil, now

NOW THEREFORE BE IT RESOLVED, that the White Earth Band of Ojibwe FINDS that the Minnesota Chippewa Tribe's Anishinabe Cumulative Impacts Assessment is superior to the EIS that has been approved by the Minnesota PUC in examining the cumulative impacts from the proposed Line 3 project upon surface waters, groundwater, fish, wildlife, waterfowl, wild rice, plants, as well as the broader environmental consequences resulting from the proposed Line 3 project, which necessarily requires prohibiting the Line 3 Pipeline Replacement, new route corridor for the replacement pipeline across the 1855 ceded territory in violation of White Earth Band of Ojibwe and 1855 Treaty Authority established codes, laws and customs required consent as co-owners.

¹ See *Climate change affects lakes, walleye in complex ways*, by Elizabeth Dunbar on Minnesota PublicRadio, Sept. 9, 2015 at <https://www.mprnews.org/story/2015/09/09/walleye-climate-change>

² See *Ojibwe leader says Mille Lacs walleye have not recovered yet* by Tony Kennedy Star Tribune OCTOBER 1, 2017 at <http://www.startribune.com/ojibwe-leader-says-mille-lacs-walleye-have-not-recovered-yet/448842053/>

NOW THEREFORE BE IT FURTHER RESOLVED, that the White Earth Band of Ojibwe in exercise of original, retained jurisdiction from the Northwest Ordinance, 1795 Treaty of Greenville, the 1825 and 1826 Chippewa Treaties with the United States and sovereignty of the thousands of treaty beneficiaries and the jurisdiction of the federally recognized reservation with tribal regulatory authorities for the reserved, priority, water quality property rights and *Rights of Manoomin* now requires that the United States Army Corps of Engineers fulfill its legal obligation under federal laws to honor and respect the White Earth Band's and *Chippewas of the Mississippi* rights to parity recognition of usufructuary property rights in the 1855 treaty ceded territory, same as the 1837 and 1854, and more importantly include all of the "off reservation" interconnected waters quality property rights as describe and provided for in the Winter's Doctrine for the upper Mississippi River in Minnesota, for the same environmental protection treatment and as "on reservation" for the Line 3 Clean Water Act permitting under 404/408 with appropriate consultation and *required consent* of the *Chippewas of the Mississippi*.

NOW THEREFORE BE IT FINALLY RESOLVED, that White Earth Band of Ojibwe requires written confirmation by the Corps' that separate, free and prior, informed consent (as required by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)) is required by and from the *Chippewas of the Mississippi* as co-owner, for this Line 3 pipeline project, as original owners of the undivided, one-half interest in the ceded territories natural resources and waters that link them, within the State of Minnesota regarding eminent domain over public waters and lands.

We do hereby certify that the foregoing resolution was adopted by a vote of 4 for, 0 against, 0 silent, a quorum being present at a special meeting of the White Earth Reservation Business Committee held on June 20, 2021 in White Earth, Minnesota.



Michael A. Fairbanks, Chairman



Leonard Alan Roy, Secretary/Treasurer

EXHIBIT B

March 21, 2022

Contact: Gail Nosek at Gail.Nosek@state.mn.us

Minnesota Department of Natural Resources Update on Line 3 Aquifer Breach Investigation and Enforcement

The Minnesota DNR has completed its investigation of three aquifer breaches that occurred during the construction of Enbridge's Line 3 Replacement Project. This update outlines the results of the investigation and the status of restoration work at each site, building upon the information provided by DNR in the fall of 2021. The DNR continues to work on a comprehensive enforcement resolution, with the goal of addressing restoration, mitigation, and additional penalties associated with the three breach locations. The DNR will not be providing further detail regarding the comprehensive enforcement resolution at this time, but will release a statement upon completion of any final action.

Background

[On September 16, 2021, the DNR announced](#) that it had ordered Enbridge to pay \$3.32 million for violations associated with the breach of the confining layer of an artesian aquifer, during the construction of the Line 3 replacement project near Enbridge's Clearbrook Terminal.

[On October 15, 2021, the DNR announced](#) that Enbridge had agreed to additional penalties for lost groundwater at the Clearbrook site and that DNR was pursuing a comprehensive enforcement resolution with Enbridge to address the Clearbrook site and any other uncontrolled groundwater flows. The DNR stated that it was also investigating two additional sites of uncontrolled flow due to breaches of the confining layers of artesian aquifers. Due to the ongoing nature of the investigation, the DNR was not able to share the locations of the additional sites at that time.

Over the course of the last several months, the DNR has also conducted additional investigative work, including an aerial inspection, to assess whether there were any other unidentified aquifer breach sites. Thus far, the DNR has not confirmed any additional aquifer breach sites. To ensure thoroughness, we will finalize our assessment of the potential for any additional aquifer breaches following the spring thaw.

Clearbrook Terminal Aquifer Breach Site, Clearwater County

On January 18, 2022, Enbridge informed the DNR that it had successfully stopped the flow of groundwater at the Clearbrook site. The DNR has determined that from October 16, 2021, through January 18, 2022, there was the additional discharge of approximately 32,600,000 gallons of groundwater. The discharged water was first directed to a treatment structure to remove sediment and then returned to the environment. The DNR has inspected the Clearbrook site repair and has determined that the corrective actions have successfully stopped the uncontrolled flow at this time. DNR is implementing ongoing monitoring of the aquifer breach repair to verify long-term effectiveness.

LaSalle Creek Aquifer Breach Site, Hubbard County

On August 5, 2021, the DNR learned that an aquifer breach had occurred during the construction of Line 3 near LaSalle Creek. The investigation indicates that the breach occurred on or about August 2, 2021,

during pipeline construction through the river valley's eastern slope, where sheet piling was installed prior to trench excavation. Sheet piling was used during the construction to minimize the trench width and maintain trench stability. Enbridge stopped construction work at the LaSalle Creek site and the DNR outlined the immediate actions that Enbridge needed to take to address the uncontrolled groundwater flow.

On August 18, 2021, the DNR approved a remedial groundwater investigation plan to gather hydrological information needed for the development of a corrective action plan to stop the flow. Following completion of this study, on September 29, 2021, the DNR approved the Corrective Action Plan to stop the uncontrolled flow of groundwater at the site.

On December 20, 2021, Enbridge notified the DNR that it had successfully stopped the groundwater discharge at the site. A report from the company further indicated that the total volume of groundwater discharged at this site was 9,800,000 gallons. Initial monitoring of the site by Independent Environmental Monitors has confirmed that the discharge at the site has been stopped. The DNR will conduct additional onsite monitoring to verify conditions after the spring thaw and continue to monitor the aquifer breach repair for long-term effectiveness.

Mile Post 1102.5 Aquifer Breach Site, St. Louis County

On September 15, 2021, the DNR learned of an aquifer breach resulting in the uncontrolled flow of groundwater near Mile Post 1102.5 of the Line 3 pipeline construction. This site is located on county land in southern St. Louis County and is just west of the Fond du Lac Band of Lake Superior Chippewa Reservation. The DNR has partnered with the Fond du Lac Band, St. Louis County, Minnesota Pollution Control Agency (MPCA) and Minnesota Department of Health (MDH) in investigating the site and reviewing corrective action plans to stop the uncontrolled flow.

The investigation indicates that the aquifer breach was identified on or about September 10, 2021, when groundwater began upwelling during the removal of sheet piling following completion of pipeline construction in the area. The DNR outlined the immediate actions that Enbridge needed to take to address the uncontrolled groundwater flow at the Mile Post 1102.5 site and approved an initial groundwater investigation plan on September 29, 2021.

The Mile Post 1102.5 site is located in a wet forest complex that gently drops in elevation eastward toward the Fond du Lac Reservation lands. The aquifer breach at this location resulted in high pressure flow of groundwater, with the potential to impact Dead Fish Lake on the Fond du Lac Reservation, a valuable wild rice water for the band. To date, it is estimated that 219,600,000 gallons of groundwater have been released by this aquifer breach. The hydrogeology at this site is particularly complex, resulting in a challenging groundwater investigation and corrective action planning process.

Between October 2021 and February 2022, the DNR, Fond du Lac Band, St. Louis County, MPCA, and MDH provided regulatory oversight of the groundwater investigation and development of the Corrective Action plan for the site. State, tribal and county governments approved the plan by February 16, 2022. Enbridge has informed the DNR that initial corrective action at the Mile Post 1102.5 site has substantially reduced the flow of groundwater, from approximately 330 gallons per minute (gpm) to 6 gpm. Additional work is ongoing and the DNR and its partners continue to monitor progress.



The DNR appreciates the close working relationship with the Fond du Lac Band, St. Louis County, MPCA, and MDH to investigate this site and agree upon the Corrective Action Plan.

For Additional Information

[Please visit to view groundwater investigation plans and corrective action plans associated with the three sites.](#)

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