WHITE EARTH BAND OF OJIBWE
IN TRIBAL COURT

MANOOMIN, THE WHITE EARTH BAND OF OJIBWE; MICHAEL FAIRBANKS; LEONARD 'ALAN' ROY; RAYMOND AUGINAUSH; KATHY GOODWIN; CHERYL 'ANNIE' JACKSON; TODD JEREMY THOMPSON; DAWN GOODWIN; NANCY BEAULIEU; WINONA LADUKE; PATRICIA 'ALEX GOLDEN-WOLF' OSUNA; JUSTIN KEEZER; TANIA AUBID; SIMONE SENOGLES; GINA (PELTIER) EELE; TARA WIDNER; TARA HOUSKA; JAMIE "JAIKE SPOTTED-WOLF" WORTHINGTON and other tribal members and Water Protectors similarly situated, and SHANAI MATTESON and ALLEN RICHARDSON invited non-Indian guests and Water Protectors similarly situated,

Plaintiffs

v.

MINNESOTA DEPT of NATURAL RESOURCES (DNR); COMMISSIONER SARAH STROMMEN; RANDALL DODEEN DNR, EWR CAR SECTION MANAGER (Ecological and Water Resources Conservation Assistance and Regulation Section Manager), and BARB NARAMORE, DEPUTY COMMISSIONER, DNR CONSERVATION OFFICERS (arresting or threatening tribal water protectors) JOHN DOES? (1 -10),

Defendants.

Civil Case No. GC 21-0428

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

Chippewa jurisdictional, sovereignty and sovereign immunity

The Chippewa are parties to 44 Treaties with the United States of America. The U.S. "Constitution, 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 . . ." Article VI, Clause 2. Once a treaty has been ratified by Congress, the Treaty is recorded as a federal statute, violations of which are also protected by 42 U.S.C. §1981 et seq.

In 2010, the Eighth Circuit explained in API v Sac & Fox Tribe of the Mississippi in Iowa[1] that

> the extent of tribal court subject matter jurisdiction over claims against nonmembers of the Tribe is a question of federal law which we review de novo. Nord v. Kelly, 520 F.3d 848, 852 (8th Cir. 2008). In deciding the jurisdictional issue we review findings of fact by the tribal courts for clear error and defer to their interpretation of tribal law. Prescott v. Little Six, Inc., 387 F.3d 753, 756–57 (8th Cir. 2004).

(Id. at pp. 7-8) The API Court continued in Part II to explain that

> Whether a tribal court has authority to adjudicate claims against a nonmember is a federal question within the jurisdiction of the federal courts. Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2716 (2008). Where, as here, tribal jurisdiction is not

[1] See Attorney's Process and Investigation Services, Inc., (API) v Sac & Fox Tribe of the Mississippi in Iowa, (8th Cir. 2010) No. 09-2605 https://turtletalk.files.wordpress.com/2010/07/api-v-sac-and-fox-tribe.pdf

> specifically authorized by federal statute or treaty, a tribe's adjudicatory authority must stem from its "retained or inherent sovereignty." Atkinson Trading Co. v. Shirley, 532 U.S. 645, 649–50 (2001).

Id. at 8. (Emphasis added).

Here however, Chippewa jurisdiction is specifically authorized by federal statute and expressly provided for in two treaties with the United States, ratified by Congress, and which Treaty rights have not been abrogated by Congress. The 1825 Treaty with the Sioux, Chippewas and other tribes provides at Article 13 that

> It is understood by all the tribes, parties hereto, that no tribe shall hunt within the acknowledged limits of any other **without their assent**, but it being the sole object of this arrangement to perpetuate a peace among them, and amicable relations being now restored, 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.**

The 1825 Treaty of Prairie du Chien[2] established the boundaries to perpetuate peace for future land negotiations and cessions from tribes' territories as defined. The red line on the map is the southern boundary of Chippewa Territories as defined by the Treaty of 1825.

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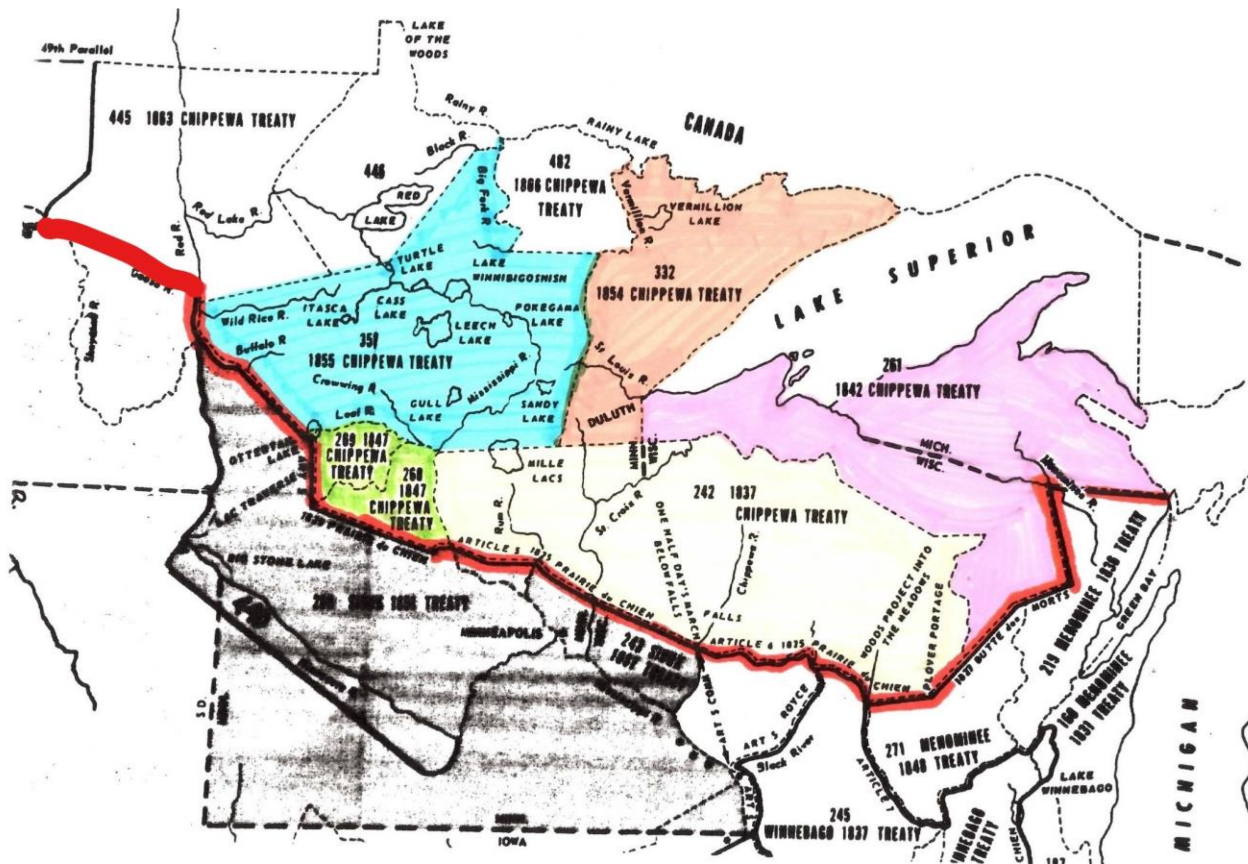
[2] See TREATY WITH THE SIOUX, Etc., August 19, 1825, Proclamation. Feb. 6, 1826, 7 Stat., 272, Treaty with the Sioux and Chippewa, Sacs and Fox, Menominie, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa, Potawattomie, Tribes.



ARTICLE 12 provided for a treaty ratification session the following year

> The 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.

Id. (Emphasis added).

The 1826 Treaty with Chippewa[3] explained the objects and advantages of the 1825 Treaty "in order to give full effect to the said Treaty, to explain its stipulations" important to understand here is grant is from original, *original* jurisdiction and sovereignty

> The Chippewa tribe grant to the government of the United States the right to search for, and carry away, any metals or minerals from any part of their country. **But this grant is not to affect** the title of the land, nor **the existing jurisdiction over it**.

See Treaty with the Chippewa, 1826, Aug. 5, 1826, Stat. 7, 290, Proclamation, Feb. 7, 1827, Article 3. (Emphasis added).

The 1826 Treaty is the second Congressional act to ratify a treaty recognizing Chippewa jurisdiction, making all of the lands north of the red line boundary federally recognized title, not aboriginal title. Jurisdiction is the right to decide what happens on your territorial lands and waters. These articles of the Chippewa Treaties have not been abrogated by Congress and therefore remain the Supreme Law of the Land.

Treaties are contracts full of many property law concepts. In the Treaty with The Wyandots[4] (1795), Aug. 3, 1795, the United States declared

[3] TREATY WITH THE CHIPPEWA, 1826. Aug. 5, 1826, Stat. 7, 290. Proclamation, Feb. 7, 1827.

[4] A treaty of peace between the United States of America and the Tribes of Indians, called the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Weea's, Kickapoos, Piankashaws, and Kaskaskias.

> To put an end to a destructive war, to settle all controversies, and to restore harmony and a friendly intercourse between the said United States, and Indian tribes

[and]

> In consideration of the peace now established and of the cessions and relinquishments of lands made in the preceding article by the said tribes of Indians, and to manifest the liberality of the United States, as the great means of rendering this peace strong and perpetual; the United States relinquish 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***, according to the boundary line agreed on by the United States and the king of Great-Britain, in the treaty of peace made between them in the year 1783. But from this relinquishment by the United States, the following tracts of land, are explicitly excepted.

Id. at Article IV.[5] (Emphasis added).

Chippewa Treaties drafted by the United States explain the rights of jurisdiction over the natural resources, waters, rights to hunt, right to decide who hunts and consent first being required. Minnesota essentially received a *quit-claim deed* from the United States of America after land cession treaties with the Chippewa after the 1825 and 1826 Treaties.

In U.S. v. Brown[6], the Eighth Circuit re-affirmed that

> When seeking to determine the meaning of Indian treaties, "we look beyond the written words to the larger context that frames the

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[5] https://ohiohistorycentral.org/w/Treaty_With_The_Wyandots_(1795)_(transcript)

[6] See https://turtletalk.files.wordpress.com/2016/09/8th-circuit-opinion-upheld-square-hook-chippewa-treaty-rights-2-10-2015.pdf U.S. v Brown et al.

Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties." Mille Lacs Band, 526 U.S. at 196 (quotation omitted). We interpret such treaties liberally, resolving uncertainties in favor of the Indians, and we "give effect to the terms as the Indians themselves would have understood them." Id. at 196, 200.

See Manoomin v DNR *Complaint*, at p. 4. In short, the Treaty Journals show other Chiefs **Ma-ghe-ga-bo** and **Hole in the Day** expressed the same continuing needs as Chippewa leader, **Flat Mouth**, a chief from Leech Lake, stated:

> Your children are willing to let you have their lands, but wish to **reserve the privilege of making sugar from the trees, and getting their living from the lakes and rivers as they have heretofore done, *and of remaining in the country***. It is hard to give up the land. It will remain and cannot be destroyed, but you may cut down the trees, and others will grow up. **You know we cannot live deprived of lakes and rivers.**

See Complaint at 5, Mille Lacs *citing Henry Dodge, Proceedings of a Council with the Chippewa Indians*, 9 Iowa J. Hist. & Pol. 408, 424-429(1911). Flat Mouth was an important signatory Chief to the 1837 Treaty expressly reserving "hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied[sic] to the Indians".[7] Flat Mouth was an important signatory chief to the 1855 Treaty land cessions for

[7] See Article 5, TREATY WITH THE CHIPPEWA, 1837, July 29, 1837, 7 Stat., 536, Proclamation, June 15, 1838.

the territory and waters at issue in this case. The *Mille Lacs* Supreme Court found "the entire 1855 Treaty, in fact, is devoid of any language expressly mentioning-much less abrogating-usufructuary rights. Similarly, the Treaty contains no language providing money for the abrogation of previously held rights."

The recent *Operation Squarehook* cases like *United States v Good*[8] in 2013 *distinguished* Chippewa usufructuary property rights as "not in common" with non-Indians, from the west coast treaty cases where some Tribal rights were "in common" with citizens of the territory or the United States in N 4 explaining

> that inquiry was necessary in Puyallup[9] because the treaty rights at issue protected hunting and fishing "in common with" other citizens of the territory so "any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with.' "Puyallup, 391 U.S. at 395, 403. Here, the treaty contains no language requiring the Chippewa to share their fishing rights "in common" with non-Indians. Rather, courts in this district have already held that the broad scope of the Chippewa's fishing rights precludes state regulation of tribe members' fishing and hunting. Herbst, 334 F. Supp. at 1006. Thus, the Court need not engage in this third inquiry because the treaty language does not contemplate that the Chippewa share their hunting and fishing rights with non-Indians. *See* United States v. Bresette, 761 F. Supp. 658, 664 (D.Minn.1991) (rejecting government's argument that "a statute of general applicability may limit Indian treaty rights under Puyallup even if it is not a clear abrogation of those rights as required under Dion" finding that "the court [in Puyallup] interpreted the Indians' fishing rights to be in common with other groups," and therefore determined that "the particular conservation measures did not exceed the Indians' understanding of the treaty" (emphasis omitted)). Thus, in Puyallup, the Supreme Court determined that the treaty **did not** protect

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[8] U.S. v Good, 2013 WL 6162801, D. Minn. Criminal No. 13-072,Nov. 25, 2013. See also *U.S. v Brown, supra* from Leech Lake Reservation. *Operation Squarehook* included Tribal netters from White Earth, Leech Lake and Red Lake being charged for selling fish.

[9] See Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 398 (1968).

> the Indians' exclusive right to fish in the manner and mode that the state prohibited, so there was no need to consider abrogation, but only whether those state regulations were valid conservation measures that did not discriminate against Indians. Puyallup, 391 U.S. at 395–403. Here, the Court concludes that Defendants **do** have a treaty-protected right to the fishing underlying the indictment, but Congress has not abrogated that right. Thus, there is no need to analyze whether the Lacey Act or the regulations are valid nondiscriminatory conservation measures, because even if they were, they cannot be applied to Defendants in violation of their treaty rights.

(Emphasis in original).

Unjust Taking

Here, the DNR's unjust taking of 5 billion gallons of water is unilaterally depriving Chippewa Tribes' and treaty beneficiaries' rights to protect and maintain the abundant, high quality, clean waters necessary for Manoomin (wild rice) and other important fisheries and natural aquatic resources' ecosystems. The Chippewas and members understand that public waters of Minnesota and the natural resources which rely upon them are threatened and/or impacted; and are where most of the wild rice grows. The Chippewa tribes and members cannot ignore that *Climate change affects lakes, walleye in complex ways*[10] and that the State is trying to preserve as few as 176 designated refuge lakes, where walleye's favorite food the *tullibee* still live, hoping the *tullibee* will be able to survive even with

[10] See *Climate change affects lakes, walleye in complex ways*, by Elizabeth Dunbar on Minnesota Public Radio, Sept. 9, 2015 at https://www.mprnews.org/story/2015/09/09/walleye-climate-change

continued warming. It is obvious that the State is not able to adequately protect waters and fisheries. The Chippewas and members understand 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 Winnibigoshish, Cass Lake and Leech Lake, which are all original 1855 reservations.

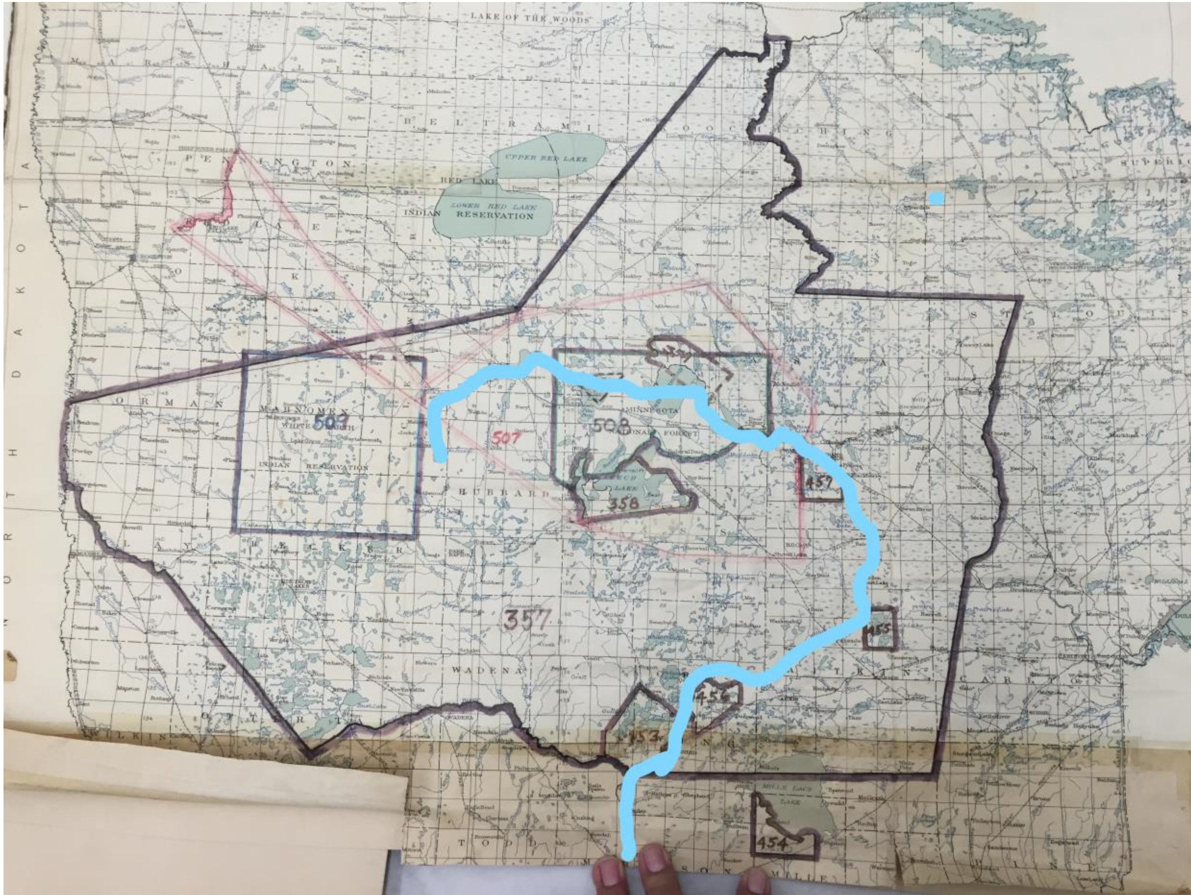
Chippewas Understanding of Nature

The *Chippewas of the Mississippi* understand Flat Mouth and other signatory chiefs did not change their minds about exercising usufructuary rights between 1837 and 1855. For the 20,000 present day *Chippewas of the Mississippi* clean water is inextricably linked to the self-sufficiency, economic development and security of present and future generations of northern Minnesota's tribal communities. 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, Rabbit and Gull Lakes, 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, primary treaty foods like manoomin (wild rice) environments and fisheries.

Consequently, 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. 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, original 1855 reservations[11] and 1864 reservation[12] ceded territories through Brainerd to St. Cloud, must be recognized as one, long, continuous, first in time, connected chain of reservations, seamlessly linked together as a common, *Chippewas' of the Mississippi* 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.

[11] See also Menominee Tribe v. United States, 391 U.S. 404 (1968)(the Supreme Court ruled that the Menominee Indian Tribe kept their historical hunting and fishing rights even after the federal government ceased to recognize the tribe and took the tribal lands.)
[12] See 1864 Treaty with the U.S. Royce 507.



An important part of protecting Chippewa sovereign rights is our ongoing struggle to preserve a culture that is best understood in terms of our relationship with the natural environment. There is no economic framework that can properly define the value of manoomin (wild rice) to the Ojibwe people because manoomin is central to Ojibwe cultural identity, spiritual traditions, and physical well-being. Most significant is that wild rice 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. Tribal members continue to harvest and rely upon manoomin for religious purposes including naming ceremonies, funerals,

Midewiwin ceremonies, and various seasonal feasts. 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".

Therefore, as the White Earth Band of Ojibwe, political successor to most of the 1855 reservations' relocated bands members from Gull, Rabbit, Rice, Sandy Pokegama, Leech Lake and Mille Lacs, the *Chippewas of the Mississippi* require 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 as riparian, water rights co-owners--for considering a 5 billion gallons of water permit for Line 3 pipeline project and crossing public lands with a regulatory easement across the ceded territories' natural resources *and the waters that unite them*. Consequently, because the DNR's Line 3 water permitting of 5 billion gallons of water, violates federal laws protecting important Chippewa water rights, to keep the waters, ground water and surface available for the Manoomin, the fish, the clams, the other plants and animals and the Anishinabe with Chippewa Treaty Rights, this Court is the best suited forum and venue.

The White Earth Band has duly adopted the Rights of Manoomin on reservation and Rights of Manoomin off reservation because Manoomin and the waters it grows in are inextricably linked to the rivers, lakes, streams and groundwater aquifers that meander and lay on and off reservation. Almost 100 years ago

> 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. This Act reads (44 Stat. 763):
>
> "An Act Setting aside Rice Lake and contiguous lands in Minnesota for the exclusive use and benefit of the Chippewa Indians of Minnesota.
>
> [. . .]
>
> the purchase price and costs of acquiring said lands to be paid out of the trust fund standing to the credit of all the Chippewa Indians of Minnesota in the Treasury of the United States upon warrants drawn by the Secretary of the Interior.

See United States v. 4,450.72 ACRES OF LAND, 27 F. Supp. 167 (D. Minn. 1939).

Here, the Chippewa had to pay for the return of Rice Lake by an act of Congress for an on reservation wild rice lake. Today, the water levels on Rice Lake Refuge and many other harvesting waters on reservation and off are too low to access by canoe to harvest manoomin that might be available. The DNR has unjustly taken everyone's Nibi, everyone's water, and in doing so, water levels that support Monoomin on and off reservation are too

low to harvest and support the aquatic ecosystem. Of course, the tribal court has jurisdiction over off-reservation waters, and because threats to manoomin have a direct effect on the economic security and health and welfare of the tribe, the tribal court possesses jurisdiction to protect manoomin on reservation lands and waters. See Montana v. United States, 450 U.S. 544, 565 (1981).

In 1908, when Ex parte Young[13] was decided it allowed for suits in federal courts for injunctions against officials acting on behalf of states of the union to proceed despite the State's sovereign immunity, *when the State acted contrary to any federal law or contrary to the constitution.* Today, the State of Minnesota is acting contrary to federal laws and the U.S. Constitution, and stealing (unjustly taking) Chippewa's water to support environmental threats.

Environmental Jurisdiction Treaty Rights

Treaty rights are better understood since the Mille Lacs decision. The 1825-1826 Chippewa Treaties acknowledged Chippewa jurisdiction, which was never specifically abrogated by Congress, nor were the Chippewa compensated for a taking of natural resource jurisdiction.

[13] Ex parte Young, 209 U.S. 123 (1908).

When the off-White Earth Reservation *Rights of Manoomin* are considered together with Menominee[14] for the chain of 1855 reservations on the Mississippi River, beginning at the Headwaters of the Mississippi, the *Chippewas of the Mississippi* necessarily enacted the environmental protections because threats to manoomin have a direct effect on the economic security, food security, health and welfare of the tribe. Manoomin (Wild Rice) is the primary Treaty reserved food, directly tied to Chippewa spiritual and religious practices, on and off White Earth Reservation. The White Earth Band is exercising its off-jurisdiction and right to make laws and be ruled by them in 2021. (Williams v Lee (1959)). "Who will speak for the trees? The trees have no mouths." Dr. Seuss, The Lorax (1971)."[15]

Therefore, because the White Earth Band has formally adopted tribal laws to protect Manoomin, on and off reservations of the Chippewas of the

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[14] See MENOMINEE TRIBE OF INDIANS, v. UNITED STATES, No. 187. 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697, Reargued April 26, 1968, Decided May 27, 1968.

[15] See Sierra Club et al v U.S. Forest Service et al, Atlantic Coast Pipeline, LLC, Intervenor, (4th Cir. No. 18-1144) On Petition for Review of a Decision of the United States Forest Service order by the Honorable Circuit Judge Thacker: See USCA4 Appeal: 18-1144 Doc: 104 Filed: 12/13/2018 Pg: 60 of 60, Part IV, Petition for Review Granted, Vacated and Remanded. https://www.southernenvironment.org/uploads/words_docs/ACP_USFS_opinion.pdf (We trust the United States Forest Service to "speak for the trees, for the trees have no tongues." Dr. Seuss, The Lorax (1971). A thorough review of the record leads to the necessary conclusion that the Forest Service abdicated its responsibility to preserve national forest resources. This conclusion is particularly informed by the Forest Service's serious environmental concerns that were suddenly, and mysteriously, assuaged in time to meet a private pipeline company's deadlines. Accordingly, for the reasons set forth herein, we grant the petition to review the Forest Service's Record of Decision and Special Use Permit, vacate the Forest Service's decisions, and remand to the Forest Service for proceedings consistent with this opinion.)

Mississippi, the tribal court necessarily possesses reserved jurisdiction to protect manoomin on reservation and off reservation, as part of the usufructuary property rights jurisdiction expressly reserved in the 1825 and 1826 Treaties with the Chippewa.

Dated: August 15, 2021

____/s/ Frank Bibeau______
Frank Bibeau, Tribal Attorney
Joe Plumer, Tribal Attorney
For the Manoomin,
White Earth Band of Ojibwe,
Chippewas of the Mississippi,
Individual tribal members and
1855 Treaty Authority