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' REQUEST FOR TEMPORARY RESTRAINING ORDER

Manoomin et al respectfully requests a Temporary Restraining Order (TRO) pursuant to Rule XI, section (b) because it clearly appears from specific facts shown by the verified complaint that immediate and irreparable injury, loss, or damage will result before notice can be served and a hearing thereon. *Manoomin* also requests an evidentiary hearing scheduled for Preliminary Injunction pursuant to Rule XI, section (a) and any other relief the Tribal court deems fair, just and equitable.

The test used by the courts for evaluating a motion for a Temporary Restraining Order (TRO) and Preliminary Injunction (PI) is generally the same. Although the test for obtaining a TRO or PI may vary slightly across jurisdictions, generally a plaintiff seeking preliminary injunctive relief must satisfy a four-factor test: (1) that he or she is likely to succeed on the merits of his claims; (2) that he or she is likely to suffer irreparable harm without preliminary relief; (3) the balance of equities between the parties support an injunction; and (4) the injunction is in the public interest.

(1) that he or she is **likely to succeed on the merits of his claims**;

This is case of first impression and tribal remedies as officially established by the White Earth Band of Ojibwe tribal laws have not yet been exhausted. The

Tribal Court has already found jurisdiction under the White Earth tribal laws and ordinances, which are federally protected under Public Law 280 §1360(c).

The Chippewas have unique, expressly reserved, treaty rights to title to the lands and environmental jurisdiction over interests in Chippewa lands, water rights, surface rights to lands, and subsurface mineral and metal rights.[1] These rights need to be protected from the DNR infringement and recognized as pre-empting the State's sovereign immunity, which like Ex parte Young, came after the relevant treaties in time.

Jurisdiction is not an old Indian word. It means the right to decide over a specified territory, and that word *jurisdiction*, was written by the drafters in the 1826 Treaty with the Chippewa for other non-Indians to recognize. The Mille Lacs[2] decision treaty analysis declared start point is *what did the Indians understand* at the time of the treaties, ambiguities in treaties to be construed in favor of the non-drafting Indians. Any rights not expressly relinquished or abrogated by Congress with Dion[3] analysis and compensation paid, are retained by the Indians. As this Tribal Court already determined the Chippewa are relying upon their inherent sovereignty that preceded land cession treaties with the United States, recorded at the 1825 and 1826 Treaties with the Chippewa, ratified by

[1] See 1825 and 1826 Chippewa Treaties with the United States *generally*.
[2] See Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).
[3] See United States v. Dion, 476 U.S. 734 (1986).

Congress and codified as a federal statute, which describes the environmental jurisdiction separate from title to the land.

The DNR is relying on Ex parte Young State sovereign immunity, which in part is relying on the Eleventh Amendment to the United States Constitution whereby

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment was not intended to apply to Indians. At the time of the forming of the Constitution, Indians were specifically identified and separated out by Treaties being the law of the land[4] and recognized as *Indians not taxed*, twice, once in the Constitution[5] and again in the 14th Amendment[6]. It was not until 1924 that Indians were made citizens by Congress under the Indian Citizenship Act.[7]

The Indian Reorganization Act[8] (IRA) created federal corporations for tribes to

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[4] Article VI, Clause 2.
[5] Article I, Section 2.
[6] See meaning of Indians not taxed https://www.legalgenealogist.com/2015/03/13/9643/
[7] See https://www.archives.gov/files/historical-docs/doc-content/images/indian-citizenship-act-1924.pdf
[8] See https://aghca.org/wp-content/uploads/2012/07/indianreorganizationact.pdf Sec. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing lands for Indians.

operate and account for federal funding etc. based primarily on federal treaties with the United States.

Ex parte Young is not an Indian sovereignty vs Minnesota's sovereign immunity case. However, the Supreme Court did rule that the exception to Eleventh Amendment immunity set out in Ex parte Young, 209 U.S. 123 (1908), is not limited to suits against those who implement or enforce state laws or policies, and extends to state officials who act unconstitutionally in their official capacities.

Plaintiffs Manoomin et al assert that the state officials are in fact acting unconstitutionally in their official capacities by intentionally regulating Chippewa water property rights and usufructuary property rights, all of which are inextricably linked, in violation of treaties, federal statutes and the limited grant of jurisdiction from Congress 1953, Public Law 280. Therefore, there is *no actual law* regarding a state's sovereign immunity, *just case law* like Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).[9] The Seminole case preceded in federal courts before most tribal courts were established, and relied on federal Indian Gaming Act in federal

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For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year . . . .

[9] See Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), a United States Supreme Court case which held that Article One of the U.S. Constitution did not give the United States Congress the power to abrogate the sovereign immunity of the states that is further protected under the Eleventh Amendment.

court for relief. The Chippewa are not relying on an Eleventh Amendment waiver or an act of congress, but instead a ratification by Congress after the Executive Branch negotiated and drafted the Treaty, and consistent with the U.S. Supreme Court in Mille Lacs, how did the Indians in 1837 understand the treaty. Important to remember is Chippewa treaties are different from other tribes and case law involving Florida Seminole in Florida, cannot simply be substituted for Chippewa environmental jurisdictional rights, without proper treaty and federal Indian law analysis.

Minnesota, along with several other states were granted limited civil and criminal jurisdiction over Indians on and off reservation under Public Law 280, across *Indian Country* everywhere in Minnesota but the Red Lake Reservation. For the Chippewa, *Indian Country* is north of the 1825 Prairie du Chien boundary, on and off reservation.

Public Law 280 *criminal* and *civil* sections (b) both provide almost identical exceptions to the congressional grants of jurisdiction to Minnesota[10] declaring

> (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**

[10] See also Bryan v Itasca County Minnesota, 426 U.S. 373, 96 S.Ct. 2102 (1976).

> **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.**

See 18 U.S.C. § 1162. (Emphasis added). Similarly, 28 U.S.C. § 1360 provides at section (b) 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;

Id. (Emphasis added).

Here, DNR has zero authority granted by Congress in Public Law 280 to alienate or encumber Chippewa water rights, or the related treaty rights of Indians. Unfortunately, the DNR giving 5 billion gallons of water unilaterally to Line 3 and letting too much water go out of the rivers *is regulating Chippewa water property rights inconsistent with Chippewa treaty rights*. Maintaining water levels are critically important for Manoomin and all of living creatures of the share ecosystems.

The DNR obviously knew making tribes aware of the 5 billion water appropriation request by Enbridge after December 2020, was going to be challenged.[11] Consequently, the DNR officials intentionally took steps to avoid a contested case proceeding for the excessive water demand as compared to the original Line 3 EIS alleged water need. The DNR waited until May 14, 2021, then to only contact some tribal natural resource people, but not Chippewa elected leaders directly with an actual Notice or Opportunity to be heard, or right to appeal the DNR decision.[12]

The DNR is without any federal grant of authority to regulate Chippewa water property rights, but when the river is way down, *de facto* regulation of fresh water resources is occurring by Minnesota, in violation of tribal rights protected by Public Law 280. The DNR officials are acting with unclean hands and therefore outside the scope of their authority, contrary to rights, protections and privileges of the Chippewa, and contrary to the health, safety and welfare of the Chippewa on and off reservation.

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[11] Enbridge was issued permit no. 2018-3420 on December 8, 2020 for a total of 510.5 million gallons of water and are requesting to increase that volume through this amendment for a total volume of 4,982,768,568 gallons.

[12] See ENBRIDGE LINE 3 REPLACEMENT PROJECT Water Appropriation Permit Amendment No. 2018 – 3420 (Construction Dewatering), FINDINGS OF FACT, CONCLUSIONS AND ORDER, Water Appropriation Permit No. 2018-3420 Enbridge Line 3 Replacement Project June 4th, 2021. See also report at DNR website https://files.dnr.state.mn.us/features/line3/decisions/04june2021-update-trench-watering-decisions.pdf

Additionally, the DNR must defer to Congress' paramount authority in matters concerning Indian policy to respect the unique relationship between Indian tribes and the United States. The DNR must also defer to the inherent sovereign authority of the White Earth Band of Ojibwe (a/k/a WERBC) to adopt and enforce their own environmental protection and water quality regulations in their own forums. Accordingly, in the absence of a clear and plain intent by Congress for the Eleventh Amendment to apply to Indian tribes, the DNR's reliance on Ex Parte Young in White Earth Tribal Court is misplaced. Consequently the DNR officials acts are *ultra vires* and deprive the Chippewa of significant civil rights protections under §1981 *et seq* on and off White Earth reservation.

Consequently, because the Eleventh Amendment is silent about Indians and cannot be simply presumed to apply to an Indian tribe, Ex Parte Young sovereign immunity cannot be raised as of right or suggest a waiver is necessary, without clear abrogation of the jurisdiction described in the 1826 ratification Treaty with the Chippewa. This is a case of first impression and tribal remedies have not been exhausted.

THE WHITE EARTH TRIBAL COURT AND JUDGE ARE ACTING WITHIN THE SCOPE OF TRIBAL LAW AS DULY ADOPTED BY THE WHITE EARTH RESERVATION BUSINESS COMMITTEE (WERBC).

The Minnesota Chippewa Tribe (MCT) is a federally recognized, Indian Reorganization Act tribal government. The White Earth Band of Ojibwe is considered a constituent band and a federally recognized Indian tribe, and the White Earth Reservation Business (WERBC) is the federally-recognized, duly elected tribal government to which the federal trust responsibility is owed. The DNR does not have a trust responsibility or trust obligation.

The White Earth Tribal Court and its Chief Judge DeGroat, are acting within scope of their jurisdictional authority as provided for by the White Earth Reservation Business Committee, the duly elected governing body of the federally recognized tribe. The White Earth Band has adopted a series of tribal laws to protect off and on reservation treaty protected resources and the health, safety and welfare of tribal members. Public Law 280, §1360(c) provides that

> Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Id. Tribal ordinance established White Earth Tribal Court two decades ago. There is/was not a state law preventing establishment of tribal courts or for those tribe's to decide which forum and venue to regulate off-reservation usufructuary rights in *Indian Country*.

White Earth Tribal ordinance established the Conservation Code for the 1855 Ceded Territory in 2010, based entirely (changing 4 to 5 in 1854 to 1855 mostly) on the 1854 Treaty Authority off-reservation treaty area conservation code ***because***: the 1854 territory is wholly within the state of Minnesota like the 1855 territory, the 1854 bands are part of the MCT like the 1855 bands, and whereby Minnesota compensates the 1854 Chippewa[13] millions of dollars every year to not exercise their commercial, off-reservation treaty protected usufructuary rights.

Tribal ordinances for the *1855 Conservation Code*, for *Rights of Manoomin* and *Rights to Travel, Use and Occupy* are valid laws, duly adopted and very much based on ancient natural law, as well as Chippewa customs and cultural practices and spiritual beliefs. The White Earth tribal laws, including the 1855 Conservation Code are not inconsistent with any applicable civil law of the State, and must be given full force and effect in the determination of civil causes of action.

Recently Minnesota has criminalized civil rights of people to assemble in public places, public waters and public lands which are the primary places under Mille Lacs for the Chippewa to enjoy and protect off-reservation usufructuary property. The DNR Conservation Officers in conjunction with other state law enforcement have arrested tribal water protectors for trespass, unlawful assembly,

[13] See 97A.157 1854 Teaty Area Agreement
https://www.revisor.mn.gov/statutes/2019/cite/97A.157/pdf

attending unlawful assemblies and nuisance for being on public lands protecting nature's gifts and food for the people. The recently adopted White Earth resolution to establish off-reservation jurisdiction for this Tribal Court is not inconsistent with other Chippewa Indians exercise of off reservation Indian Country jurisdiction through the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) or the 1854 Treaty Authority.

The existing paradigm of Ex Parte Young has continued in federal and state courts, but this is a case of first impression, based on a very unique set of express treaty protected property rights and legal terms. The White Earth Band has provided for tribal laws under the jurisdiction of the tribal court for the *Rights of Manoomin* on and off reservation and 1855 Treaty Authority *Rights to Travel Use and Occupy Traditional Lands and Waters Code*. These are administrative remedies provided to protect tribal resources and tribal members, under the tribal law which enabled this Tribal Court to find jurisdiction.

Here, case law history suggests Ex parte Young would prevail, but Mille Lacs, Hererra and U.S. v Brown[14], Tibbetts, Bellefy, et al in Operation SquareHook reveal that Chippewa treaty rights are not subject to an act of congress where the language does not specifically abrogate treaty rights. Ex parte Young

[14] 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.

isn't an act of congress, nor a federal law case decision based on Chippewa treaty rights. As such, the White Earth Tribal Court off-reservation environmental jurisdiction and conservation code are contemplated by Congress and provided for and protected by Public Law 280, §1360(c) so that all tribes may declare and recover their individually inherent and uniquely, distinct rights through the creation of tribal laws.

Under this unique set of treaty rights and the establishment of tribal civil laws not inconsistent with the State under Public Law 280(c), the federal court will be more likely to dismiss the State's Complaint about jurisdiction than enjoin this tribal court for exercising its different civil rights protections and immunities from state laws, under duly adopted tribal laws, whose remedies have not been exhausted.

(2) that he or she is **likely to suffer irreparable harm without preliminary relief**;

It is hard to imagine what irreparable harm Minnesota DNR can experience except finding out Ex parte Young doesn't apply to Chippewas. There is no harm to DNR other than declarations about civil rights deprivations under 42 U.S.C. §1981 et seq and ultra vires acts of unjust taking of Chippewas and other creatures necessary waters, to facilitate and exacerbate climate change impacts from fossil fuel. Plaintiff's will still need federal enforcement.

The DNR is more likely concerned that its veil of sovereign immunity may be pierced and may not provide the protections contemplated in the 11th amendment, than protecting the environment which we all depend upon.

Irreparable harm can only continue to happen to the Manoomin and the health, safety and welfare of the Chippewas and the entire freshwater ecosystem on and off reservation as has happened to Rice Lake based on the unjust taking of 5 billion gallons of public waters for Line 3. It is happening every day and public waters that support Manoomin on and off reservation are severely impacted irreparably harming certain ecosystems.[15] Those waters support the ecosystems that supports the Chippewa lifeways and ability find food, clothing and shelter and earn a modest living on and off reservation. The DNR's unilateral giving 5 billion gallons of water during a clear and obvious drought is unconscionable. It's a callous disregard for the rights and spirituality of the Chippewas to waste water on facilitating environmental threats compounding climate change impacts to water and air and life. Sovereign Immunity can be a shield provided state actors have not acted contrary to rights and laws protecting tribal civil rights as described in Public Law 280(b).

[15] See *Water Report: What Happens When the Water Goes Down?* By Renee Keezer, previously attached as Exhibit A to the Manoomin Complaint and attached here as Exhibit 2.

Environmental irreparable harms include about 30 plus frac-outs that the DNR's partner Minnesota Pollution Control Agency (MPCA) appears unprepared and incapable of stopping Line 3 non-compliant releases of drilling compounds, chemical and trade secret unknowns and concerns *generally* of irreparable environmental harms necessarily relying on the 5 billion gallons of water from DNR.[16]

Cultural genocide irreparably harms spiritual practices, the language, practices and community wellness, all achieved through the intentional destruction of cultural foods, practices and places to gather with DNR permits across public lands and waters, the primary place for the Chippewa to exercise treaty reserved usufructuary rights and particularly harvesting manoomin. See *On-going Conditions Creating Cultural Genocide Report*, By Dale Greene, Jr., Expert Witness, Chippewa Culture, History and Practices for Manoomin et al v DNR et al, Civil Case No. GC 21-0428 – August 23, 2021 attached as Exhibit 1.

(3) the balance of equities between the parties support an injunction;

Normally federal interests are the same as tribal interests with regard to treaty rights and civil regulatory jurisdiction in *Indian Country*, on or off

[16] See MPCA Frac-Out Report and Comments dated August 23, 2021, by Renee Keezer, Renee, White Earth Pesticide Coordinator attached as Exhibit 3.

reservation.[17] Because the White Earth tribal laws, ordinances and customs are within the authority and rights of tribes, and because the DNR has violated tribal laws and the public trust to unjustly take 5 billion gallons of water of clean, fresh waters from Plaintiffs unjustly to exponentially exacerbate and worsen plaintiffs environmental threats on and off reservation from increased fossil fuel extraction and production, the unjust taking requires an injunction now.

DNR filed in federal court, for a determination on jurisdiction. The federal complaint does not suggest any urgency or emergency at issue for the Plaintiffs Manoomin, the Chippewas or the unjust taking of 5 billion gallons of water. Therefore, this White Earth Tribal Court must continue to exercise jurisdiction, continue to work through and exhaust tribal remedies and provide an Injunction against the DNR because by the time federal court looks at filings the issue of 5 billion gallons of water unjustly taken by DNR will be completed and moot and Plaintiffs will be left without remedy because Line 3 is likely to be completed[18].

[17] See Exhibit 4 *USACE 1997 Issue Paper and District Recommendation, the Agency's Trust Responsibilities Toward Indian Tribes in the Regulatory Permitting Process*, regarding Mole Lake Band of Chippewa treaty rights and Crandon Mine in Wisconsin. See last page about on and off usufructuary rights and federal trust responsibility owed to federally recognized tribes.
[18] See *Line 3 pipeline to be in service by end of year, despite legal challenges: Enbridge* CEO says pipeline remains on schedule and is now 80 per cent complete The Canadian Press · Posted: Jul 30, 2021 7:45 AM MT https://www.cbc.ca/news/canada/calgary/enbridge-q2-2021-earnings-1.6123832

This Court is exercising the proper jurisdiction and must provide a TRO immediately to preserve and protect Chippewas treaty protected resources which all rely on abundant, clean freshwater . . . the environment that Manoomin and everything else depends upon. The Court should also schedule a full evidentiary hearing for the preliminary Injunction.

(4) the injunction is in the public interest.

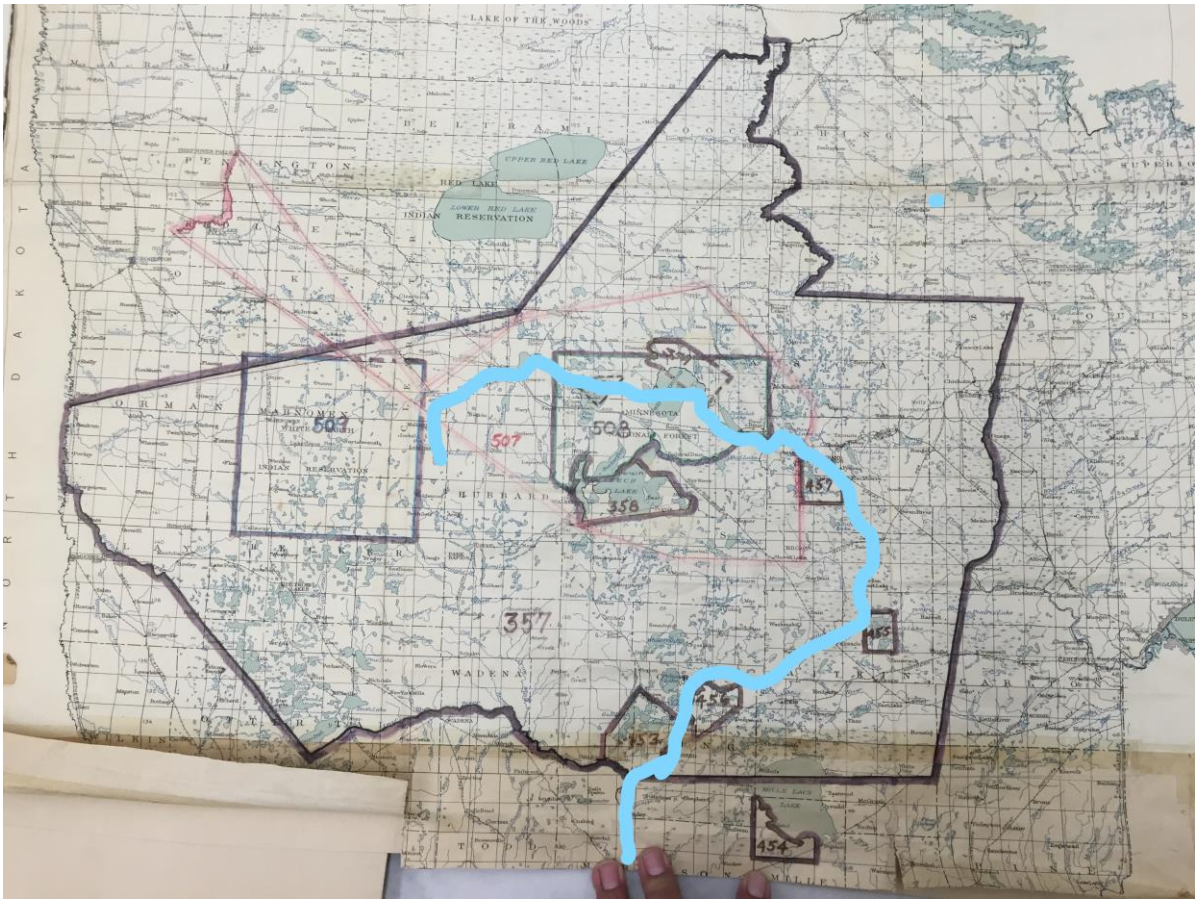
Fighting the causes of climate change is THE public interest to creatures who like to drink clean water and breathe clean air, and want the same for their family and friends and our future generations. The White Earth Band of Ojibwe with the Minnesota Chippewa Tribe developed the *Anishinabe Cumulative Impact Assessment* for the Line 3 EIS process and White Earth adopted the *No Build* option along with the 1855 Treaty Authority and filed same with the Minnesota Public Utilities Commission.

Minnesota's politicians and state agencies are caught up regulatory capture by big oil corporations more interested in profits than protecting actual public and nature's interests. Line 3 does cross through the greater Leech Lake Reservation created by the Treaties of 1863-64 to relocate the Chippewas of the Mississippi north. Three years later White Earth Reservation is created as 36 townships Royce 509. But Royce 507 remains as a Menominee type Chippewas of the Mississippi

reservation with exclusive usufructuary and water property rights and protections being usurped and unjustly taken by DNR.

The *Chippewas of the Mississippi* have a lot of natural resources being irreparably harmed on and off reservation and more in jeopardy from DNR's unilateral, unjust taking, which is still an on-going crime against nature that can only be stopped now, by this Tribal Court. Raparian water rights means we all share the water and we all are expected to leave the waters in the same fashion we found them, as we all share the rights and responsibility with Raparian water rights. Chippewa have first in time water rights, in quantity and quality necessary for the production of manoomin, fish and maple, our primary treaty foods, under the Winter's Doctrine[19].

[19] See Winters v U.S. (1908) decision http://supreme.justia.com/us/207/564/case.html



Therefore, because the White Earth Band has formally adopted tribal laws to protect Manoomin, on and off reservations of the Chippewas of the Mississippi, the tribal court necessarily possesses inherent and treaty-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 23, 2021

/s/ Frank Bibeau
Frank Bibeau, Tribal Attorney
Joe Plumer, Tribal Attorney
For the Manoomin, *et al*