

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, Minnesota 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
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In the Matter of the Application of Enbridge
Energy, Limited Partnership for a Certificate
of Need for the Line 3 Replacement Project in
Minnesota from the North Dakota Border to
the Wisconsin Border

OAH 65-2500-32764
MPUC PL-9/CN-14-916

In the Matter of the Application of Enbridge
Energy, Limited Partnership for a Routing
Permit for the Line 3 Replacement Project
in Minnesota From the North Dakota Border
to the Wisconsin Border

OAH 65-2500-33377
MPUC PL-9/PPL-15-137

Initial Post-Hearing Legal Brief of the Fond du Lac Band of Lake Superior Chippewa

January 23, 2018

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Introduction

The Fond du Lac Band of Lac Superior Chippewa (“Band”) respectfully submits this Initial Post-Hearing Legal Brief (“Brief”), as required by the Fourth Post-Hearing Order issued by the Administrative Law Judge’s (“ALJ”) on January 11, 2018.¹ While there are numerous problems that the applicant cannot overcome, the Band here focuses on the main tribal issues that show that the applicant simply has not met the required statutory factors to justify this Project. The Band asks the ALJ to recommend against issuance of a certificate of need and route permit, whether along the applicant’s preferred route (“APR”) or any other route.

Factual Background

The Band below summarizes the relevant substantive facts. Many of these matters have been highlighted in filings to the Commission subsequent to the close of the evidentiary hearing, and appropriate citations to those briefs are listed below.

I. Applicant’s failure to analyze Project impacts on tribal traditional cultural properties (“TCPs”).

The Band, Mille Lacs Band of Ojibwe, Leech Lake Band of Ojibwe, White Earth Band of Ojibwe, and Red Lake Band (collectively the “Tribes”) have consistently and unanimously underscored Applicant’s failure to appropriately identify or analyze the Project’s impacts on TCPs, which are simply a type of historic properties subject to both state and federal protection. The only distinction is that they must be evaluated in conjunction with qualified tribal experts and planned with sufficient lead time—which is why they are often part of the same planning as for conventional archaeological surveys. Neither the applicant nor DOC coordinated this essential work, however. The DOC has taken the position that it can rely entirely on whatever tribal historic-properties work the U.S. Army Corps of Engineers (“Corps”), the federal

¹ See Fourth Post-Hearing Order at 5 (Jan. 11, 2018) (eDocket No. 20181-138800-01).

permitting agency on the Project,² may conduct in the future as part of federal National Environmental Policy Act (“NEPA”)³ and National Historic Preservation Act (“NHPA”) Section 106 compliance.⁴

Section 106 review does require tribal consultation, survey, and evaluation of impacts on historic properties of importance to tribes, including a survey of TCPs.⁵ And it is true that a state agency can sometimes meet the requirements of state historic-properties law by adopting federal work product. But that only works where there is a joint state-federal EIS—or at least better coordination of state and federal work than has been conducted on this Project. Because Enbridge suspended its federal permit applications during the current iteration of the Project, Section 106 work was suspended, too (although due to tribal insistence, Section 106 work has now restarted). But there is far more work to do to meet Section 106 requirements, including additional interviews, field work, and other analysis that remains to be done to fully assess TCPs on the Project. The Band explained this in the “Interim Report: Line 3 Corridor Tribal Cultural Survey.”⁶

² See Ex. EERA-29, FEIS at Sec. 3.6.1.1 (“The Project is expected to be required to obtain a permit to cross navigable waters under Section 10 of the Rivers and Harbors Act and an individual permit under Section 404 of the Clean Water Act.”)

³ 42 U.S.C. §§ 4321 *et seq.*

⁴ 54 U.S.C. § 300101 (formerly 16 U.S.C. § 470f). The Band acknowledges and appreciates the progress reflected in the recent statement by the DOC in its Reply to the Joint Tribal Petition that “DOC EERA anticipates that, if a route is permitted, the DOC EERA will work closely on the Commission’s behalf with SHPO and the USCOE, MIAC, the consulting tribes, and other agencies regarding compliance with pertinent State and Federal laws and completion of an appropriate cultural survey prior to any construction that could impact protected resources.” Enbridge Reply to Jt. Tribal Pet. and Sierra Club Pet. at 2 (Jan. 12, 2018) (eDocket No. 20181-138884-04).

⁵ See Ex. EERA-29, FEIS at § 5.4.2.5.3 p. 5-604. See also Ex. FDL-10, ACHP Guidance, “Consultation with Indian Tribes in the Section 106 Review Process: A Handbook” (June 2012).

⁶ Ex. FDL-11 (Nov. 16, 2017). This tribally-run Survey is the means by which the Corps seeks to partially comply with its Section 106 obligations, and it is applicant-funded. But the Corps only agreed to start it last fall, and field work could only begin in October 2017. As stated at the

Instead of adjusting for the suspension of the federal Section 106 process, the DOC simply dropped an incomplete historic-properties analysis into the FEIS. The DOC and Enbridge now take the position that “ongoing consultation” can replace the normal tribal surveys on a project like this. They propose that “tribal monitors,” on-site during the fast-paced construction phase, are sufficient to replace careful, pre-construction tribal archaeological fieldwork led by qualified professionals, consultation, interviews, literature review, and other well-established TCP survey practices.⁷ No one would suggest something similar in lieu of conventional archaeological surveys—like the one that Enbridge’s contractor was required to complete years ago on this Project. In fact, Enbridge is now trying to cast the blame on “tribal communities” for the missing historic survey information, arguing that tribes *themselves* should have already gathered and presented all TCP evidence along the 337-mile APR.⁸ There is no excuse to treat historic properties of particular importance to Native people as less deserving of protection than “other” types of historic properties, and this approach falls far below the requirements of state (and federal) law.

December 7 hearing, the Tribes also disagree that the limited scope of the work currently authorized by the Corps meets the requirements of Section 106 (not to mention state law). Only 65 (rather than 66, as noted before) miles of survey along the APR is currently included, and while the Corps has stated more scope should be added, there is not yet agreement to include the full length of the APR and alternatives, nor has any contract amendment been proposed.

⁷ See DOC Reply to Jt. Tribal Pt. at 3-4 (Jan. 12, 2018) (eDocket No. 20181138890-01); see also Enbridge Reply to Jt. Tribal Pet. at 2 (Jan. 12, 2018) (eDocket No. 20181-138884-04).

⁸ In its response to the Joint Tribal Petition to Reconsider, Enbridge mischaracterized the Tribes as saying that the DOC “has taken the position that it can rely entirely’ on federal historic properties work conducted by the Army Corps.” Enbridge Reply to Pets. for Recon.of Tribes and Sierra Club at 6 (Jan. 12, 2018) (eDocket No. 20181-138884-04). In fact, the Tribes only made this argument regarding *tribal* historic properties work. See Jt. Tribal Pet. for Recon. at 2-3 (Jan. 2, 2018) (eDocket No. 20181-138561-02). Enbridge went on to say that the DOC “sought input from tribal communities,” and “[t]o the extent that the Tribes wish that additional information was in the record and/or the FEIS, they had many opportunities to provide input concerning the FEIS; they are also parties to these proceedings and could have submitted testimony on these specific issues.” Enbridge Reply to Pets. for Recon. of Tribes and Sierra Club at 7 (Jan. 12, 2018) (eDocket No. 20181-138884-04).

In any case, there is no factual dispute regarding the tribal background and historic-properties work performed (or not performed) to date. The relevant facts are all in the record (or are subject to judicial notice, in the case of news articles and state policy guidance).

A. Tribal historic properties in Minnesota.

Ojibwe, Dakota, and other tribal people have for millennia occupied the land now recognized as Minnesota.⁹ There is extensive evidence of this habitation throughout northern Minnesota in the form of TCPs.¹⁰ TCPs in northern Minnesota take many different forms (and their classification may overlap with other historic-property types), such as “cultural corridors” including waterways, portages, and trails; historic villages and camps; gravesites; wild-rice water; maple sugar bush; essential animal habitats; sites where medicinal plants grow; and other sacred places.¹¹ Many of these places are not recorded in a written record but are part of the confidential knowledge passed down through tribal elders.¹²

It is undisputed that permitting agencies must conduct appropriate evaluation and plan mitigation of impacts to TCPs through and with tribes as the experts regarding both locations and preservation needs. Even Enbridge’s own consulting archaeologist Dr. Christopher Bergman testified in the evidentiary hearing that tribes are the “experts” who must identify tribal TCPs.¹³ Furthermore, when asked whether it would be “best management practice... to do a full

⁹ See Ex. EERA-29, FEIS at § 9.3 at 9-5.

¹⁰ See, e.g., *id.* at § 5.4.2.5.3 at 5-604. Note: Sections 5.4 (Certificate of Need, “Cultural Resources”) and 6.4 (Route Permit, “Cultural Resources”) contain similar text throughout. Citation herein is solely made to Chapter 5, although the same analysis equally applies to the parallel sections in Chapter 6.

¹¹ See Ex. FDL-11, Draft FDL “Interim Report: Line 3 Corridor Tribal Cultural Survey” (Nov. 16, 2017) at § 1.2; see also Ex. EERA-29, FEIS at § 9.5.1. p. 9-19.

¹² *Id.* Note: there is extensive guidance regarding how to review and protect even confidential, tribal TCPs. See, e.g., Ex. FDL-10, ACHP Guidance, “Consultation with Indian Tribes in the Section 106 Review Process: A Handbook” (June 2012).

¹² Ex. FDL-11 (Nov. 16, 2017).

¹³ See Evid. Hrg. Tr. Vol. 2B (Nov. 2, 2017) at 136:10-15, 136:18-25, 137:1 (Bergman Cross).

traditional resources survey along the entire scope of this pipeline on the preferred route,” Dr. Bergman agreed that it was “absolutely essential.”¹⁴ Yet only a limited TCR Survey has been authorized to date, covering only segments of the APR, and it is not possible to complete even that scope of work before the routing and need decisions are slated to be made.

B. Historic properties evaluation to date on the Project.

Despite the fact that there is no legal distinction between tribal TCPs and other types of historic properties, and the FEIS acknowledges the evidence showing TCPs are present along the APR and alternatives, the FEIS includes no TCP surveys because the DOC did not conduct or coordinate any. FEIS Section 5.4.2.5.3, “Traditional Cultural Properties,” states:

To date, no specific studies... of TCPs have been completed within the ROI, and as such, no specific locations and/or details are known at this time. However, information gathered from the consultation with American Indian tribes with an interest within the ROI [Region of Interest] have indicated that TCPs are present (see Appendix P).

At another point, in a particularly garbled statement, the FEIS seems to say that, due to the lack of TCP “studies” (which rarely exist until a project requires them), no TCPs are present:

Research conducted as part of this assessment did not identify any known studies that are specific to TCPs. Therefore, the assumption that none are present within the ROI (and for those of other alternatives) does not preclude the potential for studies of this nature to exist. This assumption is carried over into the discussion in Chapter 6 of this EIS, as well.¹⁵

In another switchback, the FEIS elsewhere correctly identifies the variability of TCPs and the need to obtain “specific knowledge” to assess impacts to them:

Without specific knowledge of the particulars of a TCP, the assessment of potential impacts is difficult to accomplish. A TCP may be important for a variety of reasons, may incorporate a small or large geographic area, and may have unique qualities that make it eligible for listing on the NRHP. In this manner, impacts would vary greatly depending on the location of the TCP in relation to a

¹⁴ Evid. Hrg. Tr. Vol. 3A (Nov. 3, 2017) at 25:7-11 (Bergman Cross).

¹⁵ Ex. EERA-29, FEIS at § 5.4.2.5.3 p. 5-604.

project component.¹⁶

Given the DOC's failure to undertake TCP survey work, the prospective mitigation methods set forth in the FEIS for protecting the as-yet-unsurveyed TCPs are general and non-specific¹⁷—little more than a plan for ongoing consultation after the need and routing decisions are made.¹⁸

C. Other historic properties work to date.

The historic-properties evaluation that the DOC *has* allowed is discussed under Section 5.4.1, “Regulatory Context and Methodology.”¹⁹ The only fieldwork includes a conventional archaeological survey, which the applicant's contractor conducted along the APR without notifying tribes and without gathering TCP data.²⁰ That contractor also did a literature review for sites along the APR and SA-04, which relied on “existing data ... obtained from MHS [the Minnesota Historical Society] for archaeological and historic resources within the ROI.”²¹ This means the literature review considered only: (1) the limited number of well-known properties actually listed on the State or National Register of Historic Places; and (2) sites that happen to have been evaluated in connection with earlier projects and therefore put into the state database—a data set that the State Historic Preservation Office (“SHPO”) has long advised is limited.²² The FEIS, at least in this section, actually recognizes the limits of the records:

¹⁶ *Id.* at § 5.4.3.1.3 p. 5-614.

¹⁷ *Id.* at § 5.4.4.2 p. 5-614 (general proposal of fencing and tribal construction monitors; ongoing consultation); § 5.4.4.2 at 5-625-26 (ongoing consultation on mitigation); § 9.6.6 p. 9-38 (proposing avoidance of pesticide use where important tribal medicines and plants grow).

¹⁸ *See, e.g., id.* at § 5.4.4.2 5-625-26 (before construction, this section only states that “the need for minimization and mitigation for impacts on archaeological and historic resources would be discussed with MHS, SHPO, the OSA, affected American Indian tribes, and other parties through continuing consultation efforts.”)

¹⁹ Ex. EERA-29, FEIS at § 5.4.1 p. 5-588 *et seq.*

²⁰ *Id.*

²¹ *Id.* at § 5.4.1.2, p. 5-596.

²² *Id.* at App'x T, “Public Comments and Responses,” Pt. 1, “Substantive Comments,” “State and

Information concerning sacred places or resources with importance to American Indian tribes is not available through SHPO databases, but may be available through consultation with affected American Indian tribes with geographic and/or traditional interests in Minnesota, North Dakota, Iowa, Illinois, and Wisconsin. Where information is known on resources of this type or TCPs, information is provided within this chapter.

Here, too, the FEIS admits “the Applicant did not conduct any surveys for cultural resources for any CN Alternative,” and states only that “DOC-EERA’s consultation with SHPO is ongoing, and the results of the consultation concerning determinations of eligibility, potential Project effects, and any necessary treatment for impacts are not available.”²³

D. SHPO and MIAC communications with DOC.

In July 10, 2017 DEIS comments, the SHPO informed the DOC that the federal Section 106 consultation with the Corps was “at a very early stage” and that the scope of the federal review “does not at this point include the entire pipeline route or any alternative routes.”²⁴ The SHPO also identified the limits of the database upon which the archaeological survey in the DEIS had relied:

...[I]t is critical to note that only data included in the SHPO’s current inventory of recorded historic/architectural and archaeological sites was utilized for the ROIs of the other alternative routes... While the SHPO inventory data is considered current, it is by no means considered a comprehensive inventory of all potential archaeological and historic/architectural resources which may be present in the ROIs for alternative routes.²⁵

Regarding alternative routes, the SHPO also confirmed that the DEIS

only included consideration of known cultural resources, which is a very limited data set and an incomplete representation of all significant cultural resources, and that there is a likelihood of additional cultural resources to be present within the

Local,” #2368, SHPO DEIS Cmts. (July 10, 2017) at 2.

²³ *Id.* at § 5.4.1.2 p. 5-596.

²⁴ *Id.* at App’x T, “Public Comments and Responses,” Pt. 1, “Substantive Comments,” “State and Local,” #2368, SHPO DEIS Cmts. (July 10, 2017) at 2.

²⁵ *Id.* at 3.

ROI for any of the alternative routes.²⁶

For these and other reasons, the SHPO’s ultimate opinion of the DEIS’s Cultural Resources sections for both the need and routing chapters was that the “office considers information and documentation presented in the DEIS as incomplete in terms of what state law requires for consultation with our office and in an effort to identify and protect the state’s significant historic and archaeological resources.”²⁷

The FEIS records the DOC responses to the SHPO letter—including to note the limits of the data sets in the FEIS.²⁸ The FEIS also acknowledged at Response 2368-7 that additional surveys might be needed as permit conditions—but only *after* the routing and need decisions are made:

Text was added within Sections 5.4.2.2 and 6.4.2.2 to show that additional survey may be needed depending on the outcome of the PUC decisions regarding the Certificate of Need and a subsequent route permit. Additional efforts regarding cultural resources also would be needed by the Applicant (and federal/state agencies) in order to obtain permits associated with the construction of the project.²⁹

The work to date ignores the advice of the MIAC, which early last year reiterated to the DOC the need to do a complete TCP survey to comply with Minnesota law.³⁰ For instance, in a May 26, 2016 letter to the DOC’s Environmental Review Manager, Jamie MacAlister, MIAC Cultural Resource Director Jim Jones advised DOC that he was concerned about the past impacts

²⁶ *Id.* at 4.

²⁷ *Id.*

²⁸ Ex. EERA-29, FEIS at Line3 FEIS ApT-2, Resp. to Subst. Cmts. at 14-15 (at 2368-5): “The text also was revised to more accurately show what is included within the Minnesota Historical Society (MHS) information from the database. Additions were made to the text to show that the analysis of the CN alternatives focuses on information obtained from these databases. Corresponding changes were made in Section 6.4, as well.”)

²⁹ *Id.* at 15.

³⁰ Ex. EERA-29, FEIS at § 9.5.2 at 9-20; *see also id.* at App’x P, Tribal Resources and Impacts Pt. 5 at p. 494-96, Ltr. of J.Jones (MIAC) to A.O’Connor (DOC) (March 31, 2017); Ltr. of J.Jones (MIAC) to J.McAlister (DOC) (May 26, 2016).

of Sandiper and L3R, and “burial and archaeology sites and important sacred sites as well as sites that have yet to be identified.”³¹ Notably, he informed the DOC that identifying those sites is essential because, “[a]s established by MN Statute 307.08, MIAC has the joint responsibility under the law to protect all American Indian Burial Sites within the State.”³²

Then, on March 31, 2017, the MIAC Cultural Resource Director advised the DOC that he had met with its Environmental Review Manager at the Department of Commerce, and Danielle Oxendine Molliver, the former DOC Tribal Liaison, and notified them that the proposed routes go through wild-rice beds and intersect cultural corridors, which likely have a variety of other TCPs.³³ In addition, the MIAC Cultural Resource Director laid out the required consultations and survey approach. He stressed twice the need to begin work immediately: “[t]here has to be a complete survey of the entire proposed route, and this survey needs to take place immediately”; “[d]ue to the timeline of the project, *these surveys would also need to start immediately.*”³⁴ Finally, he noted that “[t]here are both applicable state and federal laws which govern cultural resource management and the cultural areas of the state.”³⁵

E. State-tribal consultation to date.

The tribal consultation record also demonstrates the extent of the TCP work yet to do. For example, Section 9.4.4, “Interviews with Tribal Elders and Historians,” confirms the DOC has sought answers mainly to general questions regarding Tribal resources and values, such as “What are sacred places? How is this different from sacred sites? What are culturally significant

³¹ Ex. EERA-29, FEIS at App’x P, Tribal Resources and Impacts Pt. 5 at p. 496, Ltr. of J.Jones (MIAC) to J.McAlister (DOC) (May 26, 2016).

³² *Id.*

³³ Ex. EERA-29, FEIS at App’x P, Tribal Resources and Impacts Pt. 5 at p. 494-95, Ltr. of J.Jones (MIAC) to A.O’Connor (DOC) (March 31, 2017).

³⁴ *Id.* (emphasis added).

³⁵ *Id.*

sites or cultural sites?”³⁶ These interviews primarily served as part of the DOC’s efforts to comply with its general tribal consultation policy, rather than a coordinated effort to prepare a full TCP survey or plan mitigation.³⁷ And the problems with the DOC’s tribal consultation process have also been publicly documented.³⁸

F. Relevant comments at scoping, DEIS, FEIS, and evidentiary hearing stages.

The Tribes, including the Band, have raised the need for full TCP review, not to mention evaluation of treaty impacts, in writing and since the earliest iterations of this Project.³⁹ The Tribes likewise filed comments on both the DEIS and FEIS regarding what remains to be done.⁴⁰ For example, in its October 2017 FEIS comments, the Band highlighted “the profound lack of knowledge about archaeological resources and Traditional Cultural Properties along the preferred route”:

While a superficial amount of knowledge was obtained from an archaeological survey conducted by a contractor along the applicant’s preferred route, no survey was even attempted on the alternative routes that are supposedly being evaluated by this FEIS. The Band has worked with the Applicant in a very short period of time to organize a tribal cultural survey to evaluate the preferred alternative route

³⁶ Ex. EERA-29, FEIS at § 9.4.4 p. 9-17.

³⁷ *Id.*

³⁸ See *Jt. Tribal Pet. to Rec. Ex. List and Exs. at Ex. A*, p. 9-13 (Jan. 2, 2018) (eDocket No. 20181-138561-04) (A. Brown, “Tribal Liaison in Minnesota Pipeline Review is Sidelined After Oil Company Complains to Governor,” (Aug. 12, 2017)).

³⁹ See, e.g., Ex. EERA-29, FEIS at App’x P, Tribal Resources and Impacts Pt. 5, Mille Lacs Cmts. on Comp. Env. Analysis DSD on Sandpiper and L3R (Sept. 30, 2015) (requesting consultation regarding “potential cultural impacts, including to wild rice waters); Mille Lacs Cmts. on DSDD for Sandpiper and L3R (May 26, 2016) (requesting additional alternatives analysis, as well as review and consultation on extensive tribal cultural resources in the region); App’x P, Tribal Resources and Impacts Pt. 1, Fond du Lac Scoping Cmts. on Sandpiper and L3R (May 25, 2016) at p. 79 (“Any route alternative proposed will impact the Great Lakes, as well as the treaty-protected resources of the Band.”); *id.* at FDL Ltr. to J. MacAlister (DOC) (March 16, 2017) at p. 83 (raising concern over treaty-resource impacts).

⁴⁰ See, e.g., Ex. EERA-29, FEIS, at App’x T, “Public Comments and Responses,” Pt. 1, “Substantive Comments,” Subst. Tribal Cmts., FDL DEIS Cmts. (July 10, 2017) #2617; eDocket No. 20178-134845-01; see also FDL Cmts. on FEIS, eDocket No. 20177-134110-04 (Oct. 2, 2017).

for Traditional Cultural Properties [“TCPs”] that the project would put at risk. The tribal cultural survey is scheduled to begin immediately after the publication of these comments. It is imperative that this survey be allowed to complete its work so that knowledge of tribal cultural properties may be used to properly form this FEIS.⁴¹

In his prefiled direct testimony, Band Environmental Program Manager and Band Member Wayne Dupuis also testified regarding the need for the TCR Survey, the Ojibwe world view, and other matters.⁴² Regarding the APR, Dupuis stated that “[t]here is much wetland there and it is the headwaters area of the Kettle River watershed. The wetlands and rivers are considered like the kidneys of our Mother Earth. Wild life is plentiful, including the turkeys, deer, bear, many ducks and many cranes that make these areas their home. There are numerous small lakes and many small farms. This area’s geography is key to sustainability for the watershed.”⁴³ Dupuis is also supervising manager of the THPO, not just due to his job role, but also because he is “from the Awassisi Dodeim, or Bullhead Clan, whose responsibility includes the preservation of the history of our people.”⁴⁴ He echoed the request for a “comprehensive survey of the entire route and we will help identify those areas that have cultural/historical significance.”⁴⁵ When asked whether he expects the TCR Survey to uncover any other archaeological sites, he responded “Gegate (for sure)!”

G. Proceedings relating to TCR Survey since close of evidentiary hearing.

Multiple intervenors explained the problem with the limited TCR Survey scope at the

⁴¹ eDocket No. 20178-134845-01; *see also* FDL Cmts. on DEIS, eDocket No. 20177-134110-04 (July 20, 2017). The Tribes also provided a detailed explanation of the errors of the FEIS regarding the TCR Survey in its Exceptions to ALJ Lipman. *See* FDL Exceptions to the Report of the ALJ (Nov. 21, 2017), eDocket No. 201711-137568. The Fond du Lac and Mille Lacs Bands also reiterated these comments at the last Commission hearing.

⁴² Dupuis Direct Test. at 2: 19-23, 3: 1-18 (Sept. 11, 2017) (eDocket No. 20179-135405-02).

⁴³ *Id.* at 5:1-5.

⁴⁴ *Id.* at 5:3-7.

⁴⁵ *Id.* at 7:9-11.

December 7, 2017 Commission hearing on FEIS adequacy. When asked for the DOC’s response to tribal requests for TCP analysis to be included in the state FEIS, the DOC Deputy Commissioner of Energy and Telecommunications told the Commission: “I think the Department said that yes, but we don’t do that, that is another agency’s purview, and I believe it’s a combination in this case of the Corps and the State Historic Preservation Office.”⁴⁶ This is simply incorrect. First, as a federal agency, the Corps has no responsibility for ensuring that *state* agencies comply with state historic-properties laws. Second, the SHPO’s role is to *advise* state lead agencies on the scope of the required analysis (which it has done)—not to conduct that work itself.⁴⁷ Under the Minnesota Field Archaeology Act of 1963⁴⁸ and other law, any actual work remains with the state permitting agency—the DOC.

The Band in briefing to the Commission has also raised the fact that in 2017, the state Department of Transportation failed to conduct full historic-properties review and consult with tribal governments in the area of the Highway 23 road and bridge project in Duluth.⁴⁹ The result was the desecration of a known and documented tribal burial site and the destruction of roughly a dozen previously intact skeletal remains of Ojibwe ancestors.⁵⁰ Furthermore, the Band has

⁴⁶ See Video of PUC Agenda Meeting (Dec. 7, 2017) at 5:05:23-5:05:52 (questioning by Comm’r Tuma; responses by Fond du Lac Attorney Sara K. Van Norman and DOC Deputy Commissioner of Energy and Telecommunications Bill Grant), at http://minnesotapuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=677.

⁴⁷ Minn. Stat. §§ 138.40 (requiring state agencies to cooperate with the SHPO); 138.665 subd. 2 (requiring SHPO consultation and mitigation planning); 138.666 (requiring agencies to cooperate with the SHPO”); *see also* Ex. EERA-20, FEIS at Sec. 3.6.3.4 p. 3-15 (SHPO’s role).

⁴⁸ *Id.*

⁴⁹ See Jt. Tribal Pet. to Rec. Ex. List and Exs. at Ex. B (Jan. 2, 2018) (eDocket No. 20181-138561-04) (Lisa Kackze, “MnDOT redesigning highway project after damaging Native American burial site,” Pioneer Press/Twin Cities.com, at <https://www.twincities.com/2017/08/09/mndot-redesigning-highway-project-after-damaging-native-american-burial-site/>).

⁵⁰ *Id.* Note that while both the DOC tribal liaison and others asked that discussion of this incident be include in the FEIS, the DOC refused, as it did with a number of other tribal issues.

explained that this is one of the same, avoidable errors that the Corps made on the Dakota Access Pipeline (“DAPL”) in North Dakota. Permitting that project on an incomplete record has meant the destruction of tribal sacred sites, irreversible impacts to treaty resources, and extensive litigation—litigation in which the Corps is now being held accountable and where additional environmental review is even now being conducted.⁵¹ Moreover, the mass civil disobedience, protest camps, and worldwide demonstrations opposing DAPL are well-documented.⁵²

II. Failure to adequately analyze Project impacts on *manoomin*.

A. Meaning of wild rice to Ojibwe people; technical impacts.

As the Band has consistently underscored from the beginning of this process to date, *manoomin*, or wild rice, is central to the Band’s cultural heritage. As the Band’s Water Projects Coordinator Nancy Schuldt testified, by her best estimate, there is “less than 10% of the area of historical wild rice distribution [that] remains productive today.”⁵³ In addition to testifying about the requirements to maintain healthy wild-rice waters, Schuldt testified that a crude oil spill in a wild-rice water “would potentially mean the permanent loss of that population of wild rice, and depending upon how connected the receiving waterbody is to other wild rice beds

See Jt. Tribal Pet. to Rec. Ex. List and Exs. at Ex. A, p. 9-13 (Jan. 2, 2018) (eDocket No. 20181-138561-04).

⁵¹ *See Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F.Supp.3d 101, 131 (D.D.C. 2017).

⁵² *See, e.g.*, Jt. Tribal Pet. to Rec. Ex. List and Exs. at Ex. C (Jan. 2, 2018) (eDocket No. 20181-138561-04) (U.N. Human Rights, Office of the High Comm’r, “Native Americans facing excessive force in North Dakota pipeline protests” (Nov. 15, 2016), at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20868&LangID=E>); *id.* at Ex. D (Robinson Meyer, The Standing Rock Sioux Claim ‘Victory and Vindication’ in Court” (June 14, 2017), The Atlantic, at <https://www.theatlantic.com/science/archive/2017/06/dakota-access-standing-rock-sioux-victory-court/530427/>).

⁵³ Schuldt Direct at 4:12-13 (Sept. 11, 2017) (eDocket No. 20179-135405-01).

downstream,”⁵⁴ not to mention impacts on fish populations and other resources. She also pointed out that SA-04 “avoids all known remaining wild rice populations in Minnesota,”⁵⁵ and “would pose a substantially lesser threat to water-based treaty harvesting by the Fond du Lac Band, as it entirely avoids reservation lands/watersheds and ceded territories that the Band holds rights to.”⁵⁶

Based upon significant experience with reestablishing wild rice waters,⁵⁷ Schuldts also countered the testimony of Enbridge experts regarding the extent of potential impacts to wild-rice waters in the event of a spill:

We have observed evidence of those very impacts to wetlands adjacent to existing pipelines that cross the Fond du Lac Reservation, where permanent changes to shallow groundwater hydrology (plus changes in evapotranspiration rates due to deforestation of the corridor) have led to permanent conversion of wetland type, vegetation, and function. Wild rice has such a narrow optimal hydrologic regime that it is entirely predictable that, in some segments of the pipeline corridor across

⁵⁴ *Id.* at 7:16-22.

⁵⁵ *Id.* at 9:1-3.

⁵⁶ *Id.* at 9:4-9.

⁵⁷ Enbridge witnesses testified regarding wild rice, including the limits of the work they had done. *See* Evid. Hrg. Tr. Vol. 5A (Nov. 8, 2017) at 87:13-14 (Dr. Malcolm Stephenson) (confirming solely literature review of the effects of crude oil on aquatic plants generally); *id.* at 89:1-4 (confirming he is “an ecological risk assessment specialist” and has no experience planting or restoring a wild rice bed); Evid. Hrg. Tr. Vol. 5B (Nov. 8, 2017) (Jeffrey Lee, Barr Eng’g) at 33:4-17 (admitting no specific analysis of watersheds by ceded territories and no review of spill impacts on wild rice); 37:14-17 (no analysis of cultural impacts of any particular wild rice waters that might be affected by a spill); 39:21-25, 40:1-19 (reviewing Schedule 1 to Wild Rice Report at page 66 on, identifying among the wild rice waters as being hydrologically connected to the Project, including Lake Bemidji and Cass Lake, and including first downstream to be affected by a spill, the St. Louis River, which feeds directly into Lake Superior); Evid. Hrg. Tr. Vol. 5A (Nov. 6, 2017) (Art Haskins) at 129:6-10 (agreeing that “similar to the idea of farming, wild rice waters are necessarily connected to their product, to the food that is produced thereon, that’s part of their inherent value”); 129:15-19 (confirming no experience seeding or restoring wild rice beds); Evid. Hrg. Tr. Vol. 4B (Nov. 6, 2017) (Ray Wuolo) at 110:10-20 (confirming 127 first downstream lakes from the project as most susceptible hydrologic connections in the event of a spill); Evid. Hrg. Tr. Vol. 4B (Nov. 6, 2017) (Matthew Horn) at 65:5-23 (spill modeling did not include tribal input); Evid. Hrg. Tr. Vol. 3B (Nov. 6, 2017) at 116:12-16 (Stacey Gerard) (safety evaluation did not include specific tribal safety concerns, just general safety concerns).

Minnesota, wild-rice waters will be adversely affected simply by the permanent physical presence of the pipe, which acts essentially as a subsurface dam. In addition to observing permanent wetland degradation from simply the physical in ground presence of existing pipelines, we have also observed many instances where seemingly small hydrologic changes, such as those caused by downstream beaver dams or plugged culverts, raise water levels sufficiently that wild rice can no longer reach the surface after germination. After several seasons of water levels that are just marginally too deep for wild rice to reach maturity, the seed bank is exhausted and the rice population is lost.⁵⁸

In addition to these concerns, Schuldt confirmed that both upstream and downstream effects could result:

This phenomenon could occur for wild rice waters that are located “upstream” hydrologically from the pipeline, if there are contiguous wetlands providing that shallow groundwater connection that provides a source of water to the rice bed. The opposite situation could also occur, where wild rice waters located “downstream” from the pipeline could be deprived of sufficient groundwater inflows, and the effect – particularly in drought years – would be diminished areas with sufficient water to support wild rice through the growing season. Over time, if this water budget deficiency were to persist, that wild rice population could also be permanently lost to succession of more tolerant perennial wetland plant species. Once sedges, cattails and other robust wetland plant species become established in a former wild rice bed, they easily out-compete annual wild rice when the hydrologic conditions that the rice needs have been compromised. This is exactly the scenario we are trying to mitigate in our water level and vegetation management for on-reservation wild-rice lakes, in trying to restore large areas of historic wild rice production.⁵⁹

For these and other reasons Schuldt strongly contested the claims of Enbridge witness Jeff Lee of Barr Engineering that wild rice reseeding could be accomplished “within two to three seasons” after a spill.⁶⁰ She also pointed out that

Mr. Lee has himself identified at least 40 wild rice lakes or stream reaches that fit within his criteria for potential of direct or indirect impacts, and from my perspective, that is a substantial number. The tribes in Minnesota, including Fond du Lac, believe it is imperative to protect ALL wild rice in Minnesota, and are not

⁵⁸ Schuldt Surrebuttal at 6:1-23, 7:1-2 (Oct. 23, 2017) (eDocket No. 201710-136732-01).

⁵⁹ *Id.*

⁶⁰ *Id.* at 8:1-6.

willing to concede to the continued loss of this culturally and ecologically significant gift from the creator.⁶¹

Indeed, an understanding of the gravity of the threat the Project poses to wild rice depends entirely on understanding the significance of this resource to Ojibwe people, which the Tribal Chairwoman of White Earth Nation described as follows:

Wild rice, or manoomin is a sacred food and medicine integral to the religion, culture, livelihood, and identity of the Anishinaabeg. According to our sacred migration story, in the log ago a prophet at the third of the seven fires beheld a vision from the Creator calling the Anishinaabe to move west (to a land previously occupied long ago) until they found the place “where food grows on the water.” The Anishinaabeg of the upper Mississippi and western great lakes have for generations understood their connection to Anishinaabe Akiing (the land of the people) in terms of the presence of this plant as a gift from the Creator. . .

Our ceremonies and aadizookanag – sacred stories- also tell of our people’s relations with this plant. White Earth Anishinaabe, Joe LaGarde, notes that wild rice and water are the only two things required at every ceremony. Manoomin accompanies our celebrations, mourning, initiations, and feasts, as both food and a spiritual presence. It holds special significance in traditional stories, which are told only during ricing time or when the ground is frozen. “In these stories, wild rice is a crucial element in the realm of the supernaturals and in their interactions with animals and humans; these legends explain the origin of wild rice and recount its discovery...” by Wenabozhoo, or Nanabozhoo, the principal manidoo or spirit in our sacred aadizookanag.

Manoomin is just as central to our future survival as our past. While we try to overcome tremendous obstacles to our collective health, the sacred food of manoomin is both food and medicine. “Wild rice is consequently a very special gift, with medicinal as well as nutritional values- belief reflected in the Ojibwe use of wild rice as a food to promote recovery from sickness as well as for ceremonial purposes.” Manoomin is inextricably bound to the religion and identity of the Anishinaabeg. This is why these threats are potentially so devastating and why it is essential that the sanctity and integrity of this plant be preserved. If artificially produced or engineered varieties of wild rice were to compromise the Anishinaabe people and our way of life. Joe LaGarde puts it

⁶¹ *Id.* at 8:18-23.

plainly, “If we lose our rice, we won’t exist as a people for long. We’ll be done.”⁶²

B. Notice to DOC of insufficient wild rice analysis.

Beyond the Tribes’ and others’ consistent comments regarding the insufficiency of wild rice analysis, DOC heard from other state agencies that the FEIS did not adequately assess the Project’s impact on wild rice. During his March 31, 2017 meeting with DOC, MIAC Cultural Resource Director warned:

One major resource that is missing from the evaluations are the Traditional Cultural Places (TCP’s). These types of sites include wild rice beds, and areas that are utilized by tribal communities both on and off reservation lands. I know that the proposed route will go through these types of areas, the McGregor, MN area being one known example. This area is rich with wild rice beds that are beneficial to a number of tribal communities.⁶³

In its comments on the FEIS, the Minnesota Department of Natural Resources also cautioned that the “potential degree/severity of impacts and quantity of sensitive resources potentially impacted indicate that the APR would have a greater impact on the natural environment than the SA-04 alternative.”⁶⁴ One of its considerations was impacts on wild rice waters.⁶⁵

⁶² Minnesota Department of Natural Resources, Natural Wild Rice in Minnesota: A wild rice study document submitted to the Minnesota Legislature by the Minnesota Department of Natural Resources, at 5 (February 15, 2008) (internal citations omitted), *available at* https://www.google.com/search?q=Wild+Rice+Sacred+food+and+Medicine%2C+Erma+Vizenor%2C+Tribal+Chairwoman%2C+White+Earth+Nation+With+the+participation+of+Carlton+college+Students.&rlz=1C1GGRV_enUS751US751&oq=Wild+Rice+Sacred+food+and+Medicine%2C+Erma+Vizenor%2C+Tribal+Chairwoman%2C+White+Earth+Nation+With+the+participation+of+Carlton+college+Students.+&aq=chrome..69i57.30427j0j1&sourceid=chrome&ie=UTF-8 (last visited Jan. 17, 2018); *see also* Ex. EERA-29, FEIS at § 9.5.8 p. 9-30 (referencing DNR study).

⁶³ Ex. EERA-29, FEIS at § 9.5.2 at 9-20; *see also* *id.* at App’x P, Tribal Resources and Impacts Pt. 5 at 494, Ltr. of J.Jones (MIAC) to A.O’Connor (DOC) (March 31, 2017).

⁶⁴ DNR FEIS Cmts. (Nov. 22, 2017) at 5, eDocket No. 201711-137640-01.

⁶⁵ *Id.* at 4.

The Minnesota Pollution Control Agency, while not specifically looking at wild rice impacts, compared environmental justice impacts and, unsurprisingly, reached a similar conclusion:

The MPCA's analysis indicates that SA-04 would have the lowest impact on low-income residents, people of color, and tribal lands, with only 8 miles, or 3%, of the route in Minnesota, crossing through areas of concern for environmental justice. SA-04 also has the fewest number of low-income people along the entire route who would be impacted. The APR and other route alternatives have significantly more miles (and percentage of route) crossing environmental justice areas. The APR and other route alternatives also would impact at least 5,000 more low-income people across the entire route length, except for RA-06, which would impact approximately the same number of low income people along the entire route as SA-04.⁶⁶

The FEIS also inconsistently identifies the issues. On the one hand, it correctly acknowledges that wild rice "is sacred [] to the Anishinaabe."⁶⁷ And while it does not document the existence of other particular TCPs, the FEIS does recognize specific wild rice lakes as TCPs.⁶⁸ But again, as noted, at Section 6.4.3.1.3, the FEIS states that because DOC has no "specific knowledge of the particulars of a TCP, the assessment of potential impacts is difficult to accomplish."⁶⁹

In addition to being internally inconsistent, the FEIS fails to compare impacts of the APR on wild rice relative to the alternative routes. The FEIS acknowledges that more wild rice lakes are proximate to (and therefore threatened by) the APR than to any alternate route.⁷⁰ In fact, while the FEIS does not explicitly say so,⁷¹ only the APR actually goes *through* a wild rice lake

⁶⁶ MPCA FEIS Cmets. (Nov. 22, 2017) at 2, eDocket No. 201711-137629-02.

⁶⁷ Ex. EERA-29, FEIS at § 9.5.8 p. 9-30.

⁶⁸ *Id.*

⁶⁹ *Id.* at § 6.4.3.1.3 p. 6-641.

⁷⁰ *Id.* § 9.5.8 p 9-31 (stating that while 17 wild rice lakes are within .5 miles of the APR's centerline, there are only 11 for FA-07, 9 for RA-08, and 11 for RA-03AM).

⁷¹ *Id.*

(Mud Lake).⁷² Yet, the FEIS settles on the APR as the best route without assessing the relative impact of each route on wild rice.⁷³

And fundamentally, the FEIS offers no more than a cursory nod to the Project's environmental impact on the delicate ecosystem that supports wild rice and wild rice beds.⁷⁴ Section 9.6.1 acknowledges that a release during construction could impact wild rice but that the impact "would vary based upon the proximity of the resource and the type of resource, as well as the size and type of spill," but fails to discuss what these varying impacts would be.⁷⁵ That same section also lists certain changes to bodies of water that could result from construction, but then fails to provide any detailed qualitative or quantitative analysis (resembling analysis conducted on other aquatic resources)⁷⁶ on the cause or effects of those changes.⁷⁷ This fact was confirmed during the evidentiary hearing, as the experts providing guidance on the Project admitted that they had only evaluated the impacts on aquatic plants, generally, not wild rice specifically.⁷⁸

The result is that the FEIS acknowledges the potential for egregious harm—but then fails to discuss that harm in reaching its conclusions. Section 9.6.2 acknowledges that "[a]ny release affecting a wild rice lake or river and/or a walleye or trout lake or stream would cause irreparable impact on tribal resources."⁷⁹ Yet the FEIS omits any concrete measures to mitigate these impacts on wild rice. Again, the mitigation plans are not prospective, specific, or meaningful;

⁷² *Id.* at App'x A, Map Sheets 32-41, Map 37A of 82.

⁷³ *See id.* at § 9.5.8 p. 9-30 – 9-31; *see also* § 9.6 p. 9-35 – 9-40.

⁷⁴ *See id.* at § 9.6 p. p. 9-35 – 9-40.

⁷⁵ *Id.* at 9-32.

⁷⁶ *See id.* at § 6.3.1.3.2 at 6-280 – 6-311 (providing detailed assessment of impacts on general wetlands).

⁷⁷ *Id.* at § 9.6.1 p. 9-33.

⁷⁸ Evid. Hrg. Tr. Vol. 5A (Nov. 8, 2017) at 102: 25, 103: 1 – 3.

⁷⁹ Ex. EERA-29, FEIS at § 9.6.2 p. 9-34.

they are vague, after-the-fact disaster plans.⁸⁰

III. Failure to analyze Project impacts on off-reservation treaty rights.

The tribes that occupied this part of the Upper Midwest in the 19th century were forced to cede nearly their entire homeland under a series of treaties with the federal government.⁸¹ These treaties recognized the 11 reservations now within the state's borders. Certain of these treaties also reserved to the tribes off-reservation hunting, fishing, and gathering rights (or “usufructuary rights”) in the ceded lands to provide tribal members with resources to survive (and to protect the resources themselves).⁸²

The dimensions of Minnesota tribes' off-reservation harvest rights are recognized today via various court decisions.⁸³ The federal government has a trust responsibility to the Tribes to protect these off-reservation resources.⁸⁴ But the state also has certain obligations to the tribes, in addition to a government-to-government relationship.⁸⁵ For example, Minnesota and tribal

⁸⁰ *Id.* at § 5.4.4.2 p. 5-614 (general proposal of fencing and tribal construction monitors; ongoing consultation); § 5.4.4.2 p. 5-625-26 (ongoing consultation on mitigation); § 9.6.6 p. 9-38 (proposing avoidance of pesticide use where important tribal medicines and plants grow).

⁸¹ *See, e.g.*, Ex. EERA-29, FEIS at § 9.3.3 p. 9-7 (discussing treaties). Note: this material, too, was discussed in the Joint Tribal Petition. *Jt. Tribal Pet. to Recon. and Amend Dec. 14 Order* (Jan. 2, 2018), eDocket No. 20181-138561-02.

⁸² *Id.*

⁸³ *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 184 (1999) (noting “the 1854 Treaty established new hunting and fishing rights in the territory ceded by the Treaty”); *Fond du Lac v. Carlson*, Civ. No. 5-92-159 (D.Minn. March 18, 1996) (unpubl. op.) (holding that Fond du Lac retains usufructuary rights in the 1854 Ceded Territory); *United States v. Bresette*, 761 F. Supp. 658, 661 (D. Minn. 1991) (citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 348 (7th Cir.1983)) (noting “Seventh Circuit has interpreted the 1837, 1842, and the 1854 treaties as reserving full usufructuary rights for the Chippewa on the ceded territories.”). Note that the Commission is not being asked to evaluate the extent of these rights, which have long since been established in federal court. The requirement that impacts on these resources be evaluated in these proceedings is correspondingly well-established.

⁸⁴ *See, e.g.*, FEIS at § 9.3.3 at p. 9-8.

⁸⁵ Minn. Exec. Order 13-10, *Affirming the Government-to-Government Relationship between the State of Minnesota and the Minnesota Tribal Nations: Providing for Consultation*,

governments co-manage off-reservation natural resources and enforce regulations in the 1837 and 1854 Ceded Territories.⁸⁶

There is no question that tribal off-reservation hunting, fishing, and gathering resources (some or all of which can also be classed as TCPs) will be impacted by the Project, regardless of route (although the SA-04 route would have fewer impacts of every kind on Native Americans).⁸⁷ Correspondingly, the Tribes have repeatedly asked for inclusion of appropriate cumulative-impacts analysis on treaty uses of the APR and the alternatives,⁸⁸ but the FEIS does not contain these data. The FEIS omits any valuation for the projected or potential loss to any wild-rice waters or wildlife habitat in the ceded territories where the APR and alternatives would run.⁸⁹ Chapter 11 on the potential impacts on environmental justice from different system and route alternatives are inherently incomplete.⁹⁰

IV. Failure to conduct a cumulative impacts assessment considering impacts of past projects.

Chapter 12's cumulative potential effects analysis omits nearly any discussion of *past* projects on the locations and resources that would be affected by the new line, including TCPs

Coordination, and Cooperation; Rescinding Executive Order 03-05 (Aug. 8, 2013).

⁸⁶ See, e.g., DNR Treaty Page, at http://dnr.state.mn.us/aboutdnr/laws_treaties/index.html (discussing 1837 and 1854 Treaties and co-management).

⁸⁷ See EERA-29, FEIS at § 9.5.4.1, Tribal Lands (“Every mile of the Applicant’s preferred route crosses ceded lands (1854, 1855, and 1863 treaties)...The Applicant’s preferred route and RA-03AM would not cross any American Indian reservation land; however, these routes would cross near the White Earth Reservation and Fond du Lac Reservation on ceded land.”)

⁸⁸ See, e.g., FDL FEIS Cmts. (Oct. 2017), eDocket No. 20178-134845-01 (“...[I]t is unclear how the FEIS can acknowledge that the Band’s Treaty Rights to hunt, fish, and gather under treaties with the United States are a type of easement but then go on to fail to attempt to ascertain the value of this easement to the Band. The FEIS fails to even attempt to evaluate the potential damage by the Applicant’s proposed pipeline project to the valuable easement held by the Band.”)

⁸⁹ *Id.*

⁹⁰ Minn. R. 4410.2300(H).

and treaty-protected natural resources.⁹¹ Indeed, Enbridge’s expert witness on the environmental studies and mitigation plans developed by Enbridge confirmed that the lead environmental contractor Merjent has not performed an analysis of past projects’ impacts, nor has Merjent performed “any analysis of cumulative impacts on off-reservation treaty resources.”⁹²

V. Existing rights-of-way across Band’s Reservation along Enbridge mainline; in-trench replacement and abandonment.

The ALJ inquired at the evidentiary hearing regarding the possibility of in-trench replacement along the existing Line 3, including over Indian lands under existing right-of-way agreements. The Band takes no position on the viability of this option along the remainder of the line, but in-trench replacement is not permitted along the portion of existing Line 3 that runs across the Reservation absent a voluntary agreement with the Band.⁹³

Furthermore, the ALJ inquired regarding the in-place abandonment plan the applicant advocates. The Band continues to argue that this is not a reasonable option and will result in permanent impacts over a huge territory, regardless of the alleged permissibility of such plan under certain state or federal laws. As for the existing lines on the Band’s Reservation, however, both Band and federal law provide additional options for removal of the pipeline upon nonuse or

⁹¹ *Id.* (requiring consideration of past projects in cumulative-impacts analysis); *compare* Evid. Hrg. Tr. Vol. 2B (Nov. 2, 2017) at 118:23-25, 119:1-25, 120:1-22 (stating that “a cumulative impact assessment would be looking forward at a reasonably foreseeable future,” that the lead environmental contractor Merjent has not performed an analysis of past projects’ impacts, and that Merjent also has not performed “any analysis of cumulative impacts on off-reservation treaty resources” that will be affected by the preferred route) (Bergland Cross).

⁹² Evid. Hrg. Tr. Vol. 2B (Nov. 2, 2017) at 120:15-18.

⁹³ FDL Ex. 9 (Excerpt of Settle. Agmt. between FDL and Enbridge, May 26, 2009) (stating “Enbridge may not construct any additional or new pipelines without separate Band negotiation and approval”) at 4; Fond du Lac Band of Lake Superior Chippewa Ord. #01/16 (2016), Right of Way Ordinance at Ch. 4, Trespass Enforcement, available at <http://www.fdlrez.com/government/ords/01-16ROWOrdinance2016.09.20.pdf>; 25 C.F.R. § 169; 25 C.F.R. § 107 (tribal consent required for ROW across tribal land; provisions for seeking consent for crossing individually owned Indian land);

abandonment.⁹⁴ These same regulations also provide for ejection of utilities under certain circumstances.⁹⁵

Argument

I. The ALJ can and should determine that the record, including the FEIS (meaning those portions of it not declared inadequate already), demonstrates that neither the routing permit nor the certificate of need can or should issue.

The circumstances surrounding the timing for this brief, upon an FEIS the Commission has concluded is inadequate in material respects, are recounted in recent filings to the Commission and the ALJ.⁹⁶ The Band preserves its objections as stated in its filings, while recognizing that the ALJ's briefing schedule in the Fourth Post-Hearing Order⁹⁷ is the result of the express direction of the Commission.⁹⁸ The Commission's approach will likely mean a second round of briefing once the revised FEIS issues in February, as well as a new round of

⁹⁴ 25 C.F.R. § 408 (process for cancellation upon nonuse or abandonment of ROW across Indian lands); 25 C.F.R. § 169.413 (authorizing eviction for unauthorized possession or trespass on ROW and recourse under all applicable law, including tribal and federal); 25 U.S.C. § 175 (“In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity.”)

⁹⁵ See, e.g., *Fond du Lac Band and United States v. Northern Natural Gas*, Civ. No. 5-85-277, Order Granting Partial Summary Judgment (D. Minn. June 26, 1987); see also *Northern Natural Gas v. Area Dir., Mpls. Area Off., BIA*, 15 IBIA 124 (1987); *Davilla v. Enable Midstream Ptnrs., L.P., et al.*, 247 F. Supp. 3d 1233 (W.D. Okla. Mar. 28, 2017) (enjoining natural gas utility from further use of pipeline in trespass across individual Indian and tribal land and ordering removal within six months).

⁹⁶ See, e.g., Joint Pet. of Intervenors to Reconsider and for Post-Hrg. Conf. (Jan. 11, 2018), eDocket No. 20181-138802-01 (recounting procedure leading to current schedule); Order Denying Mot. to Reconsider (Jan. 17, 2018) at 5 n. 11, eDocket No. 20181-139033-01 (denying jt. pet.)

⁹⁷ 4th Post-Hrg. Order (Jan. 11, 2018) at 5, eDocket No. 20181-138800-01 (“All parties shall file their Initial Legal Briefs by January 23, 2018.”) See also Order Denying Mot. to Reconsider (Jan. 11, 2018) at 5 n. 11, eDocket No. 20181-139033-01 (noting “the ALJ granted the motion to extend the briefing schedule so that the parties would have a final, ‘adequate’ EIS upon which to brief their cases.”)

⁹⁸ PUC Order (Jan. 10, 2018) at 7, eDocket No. 20181-138782.

comments—at a minimum.⁹⁹ In any case, by law, the record remains open, as it is only closed “upon receipt of the final written memorandum, transcript, if any, or late filed exhibits which the parties and the judge have agreed should be received into the record, whichever occurs latest.”¹⁰⁰

The ALJ’s task in preparing this Report, and the parties’ task in briefing to the ALJ, is to advise regarding whether the record—at least, as it currently stands—supports a decision on the route (and if so, which route) and the need for the project. Under Minnesota Rule 1400.8100, subpart 1, “[n]o factual information or evidence which is not a part of the record shall be considered by the judge or the agency in the determination of a contested case.” But the ALJ is entitled to “take administrative notice of general, technical, or scientific facts within their specialized knowledge in conformance with Minnesota Statutes, section 14.60.”¹⁰¹ Once the ALJ issues the report, “the judge loses jurisdiction to amend the report except for clerical or mathematical errors.”¹⁰²

⁹⁹ See, e.g., *id.* (“If events do not proceed as anticipated, the Commission itself can revisit the need for additional record development if appropriate to address new information contained in the revised final EIS.”); Order Denying Jt. Mot. for Recon. and Post-Hrg. Conf. (“The opportunity to comment on the revised EIS is, nonetheless, available to the parties at the Commission level. Rule 1405.1800, subpart 5 provides that, ‘all comments and responses to comments which the board desires to consider shall be entered into the record promptly after they are received.’ [] In this case, the Commission takes the place of the ‘board’ referenced in the rule.[] Consequently, it is the Commission that must determine how and when comments on the revised EIS will be received. Unfortunately, given the short time between when the Commission will determine the adequacy of the revised EIS (according to staff briefing papers, mid-to-late April 2018) [] and when the Judge’s Report is due (April 23, 2018), it is unlikely that the Judge will have the benefit of a revised EIS that has been adjudged adequate by the Commission, or comments related to that revised EIS, before her Report is due. Nonetheless, the Commission has addressed this issue on certification and the Commission’s decision stands. The Administrative Law Judge assumes that the Commission will provide for receipt of these items into its record for decision in a future order.”)

¹⁰⁰ Minn. R. 1400.7800(J).

¹⁰¹ Minn. R. 1400.8100 subp. 1. See also Minn. Stat. § 14.60 subd. 4 (add’l details on judicial notice).

¹⁰² Minn. R. 1400.8300. See also Minn. R. 7829.2700 (procedure after ALJ rep. in utility proceedings). See, e.g., *Bloomquist v. Comm’r of Natural Res.*, 704 N.W.2d 184, 190 (Minn.

II. Neither the routing nor need determinations can yet be made because the historic-properties review remains incomplete.

The Band cannot overemphasize the level of concern over the lack of sufficient tribal historic-properties review on this Project to date. As the Band's THPO stated:

The United States portion of the Enbridge Line 3 Replacement Project (L3R) would traverse through approximately 14 miles in the State of Wisconsin, 337 miles through Minnesota, and 13 miles in North Dakota. In Minnesota and Wisconsin, the L3R preferred alternative route would traverse through the Band's 1854, 1855, and 1842 ceded territories, and a short distance away from the Fond du Lac Reservation in Carlton County, MN. Within those territories there are cultural corridors that encompass important navigable waterways, historic trail and road networks, historic villages and encampments for fishing, hunting, wild rice harvesting and processing, sugar bush and other traditional subsistence practices that are traditionally, currently, culturally, and spiritually in relationship to the Ojibwe people.

This land is where the Band's ancestors have lived and died for centuries:

There are also numerous gravesites of Ojibwe ancestors scattered throughout the ceded territories, many unmarked with precise locations unknown. The waterways in northern Minnesota were the essential travel routes of the Ojibwe, subsequently used by the fur traders and explorers to access the upper lakes. Portage trails were used to circumvent rough waters and rapids—at canoe portages, baggage was offloaded and carried to the next place where canoes could safely be used again. Streams, lakes and wetlands provided critical habitat, food and shelter for an immense variety of plants, fish, amphibians, and other aquatic species, reptiles, birds, insects, and mammals that are traditionally and currently in relationship to the Ojibwe. Stream channels naturally meander and shift through time, particularly during flood events; therefore, it is possible that artifacts and other cultural evidence of Ojibwe Heritage from past travel may be found along existing and former stream banks and lakeshores crossed by L3R.¹⁰³

App. 2005) (explaining that, although not binding on the commission, the ALJ's findings should not be taken "lightly" and failure to explain on the record reasons for deviating from the ALJ's findings can be evidence of an arbitrary and capricious decision.)

¹⁰³ Ex. FDL-11, Draft FDL "Interim Report: Line 3 Corridor Tribal Cultural Survey" at 3 (Nov. 16, 2017). Note: this material is also discussed in the Band's Reply to Enbridge's Petition to Reconsider. FDL Answer to Enbridge Pet. to Reconsider (Jan. 16, 2017), eDocket No. 20181-138998-02.

Despite the rich history of tribal TCPs in this area, DOC and the applicant have made little effort to identify the historic properties that its Project will impact or assess the extent of those impacts in the FEIS. This violates Minnesota law.

As detailed below, both MEPA and state historic-preservation laws confirm that an FEIS is inadequate if it simply omits project-impacts on historic properties. And Minnesota’s courts recognize that MEPA requires early environmental review “because it ensures that important [environmental] effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.”¹⁰⁴ For this Project, that means a full TCR Survey along both the APR and alternative routes—before construction. DOC has not even scoped or identified tribal historic properties along the APR or any alternate route—an effort that requires significantly more than simply soliciting comments in tribal consultation meetings.

As a result, the FEIS for one of the largest construction projects proposed in Minnesota categorically overlooks and underestimates the environmental impacts that the Project will have on historic properties situated along the APR or any alternate route. Sanctioning this approach renders specific protections under Minnesota law meaningless, including MEPA’s procedural requirements and Minnesota Statutes Section 307.08, subdivision 10, among other laws. Critically, DOC cannot stop-gap its violation of Minnesota law with the federal Section 106 process.

Moreover, the TCR Survey authorized by the Corps is limited to solely to water crossings along the APR, and even that won’t be done until after the routing and need decisions are made. This means that if DOC and the applicant get their way, *there will never be a TCR Survey done on the portions of the Project route subject solely to state permits*, not as part of the EIS, not

¹⁰⁴ *In re N. Dakota Pipeline Co.*, 869 N.W.2d 693, 698 (Minn. App. 2015) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

after permitting but before construction—never. This also means *time is of the essence*—the applicant is expected to begin work immediately on at least those portions of the line subject solely to state permits. That may happen as early as April 2018. So, it is critical that DOC conduct the TCP survey along the APR and alternate routes, before construction, before the Project destroys invaluable and irreplaceable TCPs. After all, that is what Minnesota law requires.

A. MEPA requires full evaluation of historic and cultural resources before the routing and need decisions.

MEPA creates a comprehensive environmental review process that includes evaluation and protection of historic and cultural resources as a central factor in decision-making—not simply as a permit condition. MEPA also encourages early and inclusive coordination among agencies to avoid duplication of efforts. In MEPA, the legislature declared the state’s environmental policy, identifying an affirmative obligation of the state to “use all practicable means” to “preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever practicable, an environment that supports diversity, and variety of individual choice.”¹⁰⁵ MEPA also requires the state to “assure for all people of the state safe, healthful, productive, and aesthetically and culturally pleasing surroundings.”¹⁰⁶ The Act further includes a broad definition of “natural resources,” which “shall include, but not be limited to, all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational, and historical resources.”¹⁰⁷ Historic and cultural protection is fundamental to environmental protection in Minnesota.

Consequently, state environmental impact statements must “analyze those economic,

¹⁰⁵ Minn. Stat. §116D.02, subd. 2(4).

¹⁰⁶ *Id.* at subd. 2(2).

¹⁰⁷ *Id.* at §116D.04, subd. 1a(a) (adopting the definition in Minn. Stat. 116B.02, Subd. 4).

employment, and sociological effects that cannot be avoided should the action be implemented.”¹⁰⁸ This is why “[t]o ensure its use in the decision-making process, the environmental impact statement shall be prepared as early as practical in the formation of an action.”¹⁰⁹ Additionally, the agency completing the EIS has to ensure state and federal coordination, and “[w]henever practical, information needed by a governmental unit for making final decisions on permits or other actions required for a proposed project shall be developed in conjunction with the preparation of an environmental impact statement.”¹¹⁰

MEPA’s implementing regulations further confirm these requirements, and require comparison of reasonable alternatives.¹¹¹ Among these are “alternative sites” and “alternatives incorporating reasonable mitigation measures identified through comments received during the comment periods for EIS scoping for the draft EIS.”¹¹² There is no allowance for the DOC to omit historic-properties analysis on alternatives.

B. State historic-properties law dovetails with MEPA.

Minnesota law requires state agencies “to protect the physical features and historic character of properties designated [in state law] or listed on the National Register of Historic Places.”¹¹³ It also requires the DOC to “cooperate with the Minnesota Historical Society in safeguarding state historic sites and in the preservation of historic and archaeological

¹⁰⁸ *Id.* at subd. 2a(a).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at subd. 2a(i).

¹¹¹ Minn. R. 4410.2300 subp. G.

¹¹² The Commission appropriately ruled in its December 14 Order that: “The EIS needs to (i) indicate how far and where SA-04 would need to be moved to avoid the karst topography it would otherwise traverse and (ii) provide a revised environmental-impact analysis of SA-04 specifically to reflect the resulting relocation of that alternative.” The additional TCR Survey work the Tribes argue for here is inherently part of that impact analysis on SA-04.

¹¹³ Minn. Stat. § 138.665 subd. 2.

properties.”¹¹⁴ Indeed, the FEIS itself acknowledges that state agencies “must consult with the SHPO prior to state approval of state sponsored projects or those undertaken on non-federal public lands for which a state agency or department has jurisdiction.”¹¹⁵ Additionally, “when significant archaeological sites exist, or are predicted to exist ‘on public lands or waters’ the ‘agency controlling said lands or waters’ are required to submit construction or development plans to the Minnesota Historical Society (SHPO) and the Office of the State Archaeologist (OSA) for review and comment.”¹¹⁶

These consultation and coordination requirements are not a mere formality. The requirements give effect to additional concrete protections guaranteed by Minnesota law. In the first instance, when “sites are related to Indian history or religion, the state archaeologist shall submit the plans to the Indian Affairs Council for the council’s review and recommend action.”¹¹⁷ The state archaeologist then works cooperatively with the MIAC on Indian-related sites.¹¹⁸

Additionally—and critically for this Project—Minnesota law provides for similar protections for unmarked burial sites, of which there are undoubtedly many in the treaty territories this APR crosses. These are expressly protected under Minnesota Statute Section

¹¹⁴ Minn. Stat. § 138.666.

¹¹⁵ Ex. EERA-29, FEIS at § 3.6.3.1 p. 3-14; *see also id.* at App’x T, “Public Comments and Responses,” Pt. 1, “Substantive Comments,” “State and Local,” #2368, SHPO DEIS Cmts. (July 10, 2017) at 2.

¹¹⁶ *See* Ex. EERA-29, FEIS at App’x T, “Public Comments and Responses,” Pt. 1, “Substantive Comments,” “State and Local,” #2368, SHPO DEIS Cmts. (July 10, 2017) at 3. *See also* Minn. Stat. § 138.40 subd. 2 and 3.

¹¹⁷ Minn. Stat. § 138.40 subd. 3.

¹¹⁸ *See* Jt. Tribal Pet. to Rec. Ex. List and Exs. at Ex. E, p. 4-5 (Jan. 2, 2018) (eDocket No. 20181-138561-04) (Minnesota Historical Society, SHPO Manual for Archaeological Projects in Minnesota (July 2005)).

307.08, subdivision 10, which requires construction and development plan review for both public and private sites:

When human burials are known *or suspected* to exist, on public lands or waters, the state or political subdivision controlling the lands or waters or, in the case of private lands, the landowner or developer, shall submit construction and development plans to the state archaeologist for review prior to the time bids are advertised and prior to any disturbance within the burial area. If the known or suspected burials are thought to be Indian, plans shall also be submitted to the Indian Affairs Council. The state archaeologist and the Indian Affairs Council shall review the plans within 30 days of receipt and make recommendations for the preservation in place or removal of the human burials or remains, which may be endangered by construction or development activities.¹¹⁹

Without a tribally-led survey before breaking ground, in a region rich with there is no way to give effect this protection. The Tribes are asking for only what is necessary to protect their ancestors' remains, invaluable TCPs, and what is already required by state law.

C. NEPA case law also persuasively illustrates the necessity of full TCP review even within a Minnesota FEIS.

Because there is little state case law establishing with certainty the results of a Minnesota agency's failure to conduct full historic properties review, NEPA case law serves as a particularly important guide here. Indeed, MEPA is modelled after NEPA, so "looking to federal case law is appropriate and helpful when the procedural protections of MEPA at issue are similar to the federal protections in NEPA."¹²⁰ Accordingly, Minnesota's courts rely on NEPA case law to interpret MEPA.¹²¹ In fact, the Minnesota Supreme Court has concluded that standards

¹¹⁹ Emphasis added.

¹²⁰ *Minnesota Ctr. for Env'tl. Advocacy v. City of St. Paul Park*, 711 N.W.2d 526, 533 n. 3 (Minn. Ct. App. 2006)(quoting *Minn. Ctr. for Environmental Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 468 n. 10 (Minn. 2002)).

¹²¹ See *Minnesota Ctr. for Env'tl. Advocacy v. City of St. Paul Park*, 711 N.W.2d at 533 n. 3; *Iron Rangers for Responsible Ridge Action v. Iron Range Res.*, 531 N.W.2d 874, 881 (Minn. Ct. App.

created in NEPA case law represent only a minimum bar for meeting EIS requirements under MEPA:

The Minnesota Environmental Policy Act, because of its provision authorizing citizens to petition for an EIS, goes further than NEPA in the creation of environmental rights; therefore, there is an even stronger presumption in favor of judicial review for decisions regarding environmental impact statements under the Minnesota Environmental Policy Act than under NEPA.¹²²

The OAH should adopt the approach of Minnesota’s courts and rely on the NEPA case law that delineates the type of review that a permitting agency must conduct to account for a project’s impact on TCPs.

This approach is particularly relevant here, as MEPA and NEPA both contain identical language with respect to historic and cultural preservation. In *Save the Courthouse v. Lynn*, the Southern District of New York interpreted the NEPA’s declaration of national environmental policy imposing an obligation on the government to “preserve important historic, cultural, and natural aspects of our national heritage,” language identical to MEPA’s declaration.¹²³ That court found that this language “extends [NEPA’s] procedural protections both to natural and cultural resources.”¹²⁴

MEPA, like NEPA, imposes an independent obligation on an agency to evaluate project impacts on historic and cultural resources—which must include evaluation of tribal TCPs, as discussed below.¹²⁵ In *Pit River Tribe v. U.S. Forest Service*, the 9th Circuit found that a tribe

1995); *Dead Lake Ass’n, Inc. v. Otter Tail Cty.*, No. A04-717, 2005 WL 221773, at *6 (Minn. Ct. App. Feb. 1, 2005).

¹²² *Minnesota Pub. Interest Research Grp. v. Minnesota Env’tl. Quality Council*, 237 N.W.2d 375, 381 (Minn. 1975).

¹²³ 408 F.Supp. 1323 (S.D.N.Y. 1975).

¹²⁴ *Id.* at 1340 (citing *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971)).

¹²⁵ *Diné Citizens Against Ruining our Environment v. Klein*, 747 F.Supp.2d 1234, 1258 (D.Colo. 2010) (agency did not meet the “hard look” requirement in NEPA when it issued a FONSI without mitigation measures relating to the preservation of historic and cultural resources).

had demonstrated an injury in fact under NEPA where the Forest Service's EIS failed to adequately consider the environmental impact on TCPs of the tribe.¹²⁶ In *Pit River*, the Forest Service extended federal leases and subsequently approved a geothermal plant on lands spiritually and culturally significant to the tribe. But the court held the initial environmental reviews were insufficient, and that *ex post facto* reviews premised on the validity of the original leases could not cure the inadequacy.¹²⁷

To satisfy NEPA's requirements with respect to historic and cultural resources, including TCPs an agency must evaluate and compare potential impacts on these resources both for the applicant's preferred site and alternatives. For this to be possible, the information must be in the EIS. MEPA should be read the same way.

D. Likewise, National Historic Preservation Act case law provides persuasive authority regarding the specific scope of required work.

NHPA case law also lends specific support to inclusion of a complete TCR Survey in the FEIS. In addition to the NEPA protections, the NHPA creates additional safeguards for historical and cultural sites.¹²⁸ The requirements of the two laws "should be integrated closely,"¹²⁹ as with MEPA and state historic-preservation laws. MEPA, too, directs agencies to coordinate state and federal review and to obtain "information needed by a governmental unit for making final decisions on permits or other actions required for a proposed project" during "the preparation of an environmental impact statement."¹³⁰ Indeed, whether a project complies with

¹²⁶ 469 F.3d 769, 779 (9th Cir. 2006)

¹²⁷ *Id.* at 787.

¹²⁸ 54 U.S.C. §§ 300101 *et seq.*

¹²⁹ *Apache Survival Coalition v. U.S.*, 21 F.3d 895, 906 (9th Cir. 1994); *see also* Walter E. Stern & Lynn H. Slade, *Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer*, 35 Nat. Resources J. 133, 144 (1995) (evaluating overlapping policies of NHPA and NEPA).

¹³⁰ Minn. Stat. § 116D.04, Subd. 2a(i).

other “relevant policies, rules, and regulations of other federal, state, and local agencies” is one of the criteria the DOC must consider when determining whether to grant a Certificate of Need.¹³¹

A project that will impact tribal properties and cultural resource certainly requires a full TCP evaluation. In *Pueblo of Sandia v. U.S.*,¹³² the 10th Circuit laid out clear guidelines for evaluation of the claimed TCP status of a given property. In connection with a proposed project therein, the Forest Service received “numerous claims” that a canyon project site contained TCPs. Nevertheless, the Forest Service still issued a finding that there were no TCPs in the canyon, and the Pueblo filed suit upon the issuance of the draft EIS.¹³³ The court held that the Forest Service’s process of evaluating TCPs did not constitute the requisite “reasonable effort” under the NHPA,¹³⁴ and there were sufficient communications to put the Forest Service on notice that more work was needed.¹³⁵

And current, complete information must be used. In *Montana Wilderness Association v. Connell*, the 9th Circuit found that the Bureau of Land Management (“BLM”) did not make a “reasonable and good faith effort” to identify historic and cultural resources, as required by the NHPA, by including in its FEIS an outdated, general study of the land affected.¹³⁶ These cases provide a roadmap for the state’s TCP work here.

E. Sufficient historic properties review must be completed in the FEIS for *both* the APR and the alternative routes before the route is approved.

Minnesota law requires a pipeline EIS to analyze the impacts of the proposed action on

¹³¹ Minn. R. 7853.0130(D). *See also* Ex. EERA-29, FEIS at § 3.1.1.1 and Table 3.1-1.

¹³² 50 F.3d 856 (10th Cir. 1995).

¹³³ *Id.* at 860-61.

¹³⁴ *Id.* at 861-62.

¹³⁵ *Id.*

¹³⁶ 725 F.3d 988, 1005 (9th Cir. 2013).

the preferred and alternative routes—including comparative impacts on historic properties. Minnesota Rule 7852.1900 lists the criteria that the Commission must use to determine pipeline route.¹³⁷ The Commission must “consider the characteristics, the potential impacts, and methods to minimize or mitigate the potential impacts of *all proposed routes* so that it may select a route that minimizes human and environmental impact.”¹³⁸ The rule requires that “in selecting a route for designation and issuance of a pipeline permit,” the Commission must consider “lands of historical, archaeological, and cultural significance.”¹³⁹ Additionally, Minnesota Rule 4410.2300(H) directs that an EIS must include “[f]or the proposed project and each major alternative... a thorough but succinct discussion of potentially significant adverse or beneficial impacts generated.”

Further review of the authority the Tribes cited in their Joint Petition illustrates the importance of an appropriate level of tribal historic-properties analysis in an EIS, as it can and does play a role in route selection. The 9th Circuit in *North Idaho Community Action Network v. U.S. Department of Transportation*, stated that “NEPA has no independent requirement that an agency examine, *separate and apart from any environmental impacts*, the impact that a federal action will have on historic properties.”¹⁴⁰ In other words, the court recognized that NEPA requires an agency to examine the environmental impact on historic properties—exactly what the Tribes are asking for here.

The court went on to acknowledge that the EIS included a consideration of the impacts on historic properties of *both* alternatives under consideration.¹⁴¹ It noted that the agency

¹³⁷ See also Ex. EERA-29, FEIS at § 3.2.1.

¹³⁸ Minn. R. 7852.1900 subp. 2 (emphasis added).

¹³⁹ *Id.* at subp. 3(C).

¹⁴⁰ 545 F.3d 1147, 1156 (9th Cir. 2008).

¹⁴¹ *Id.*

ultimately chose the route there in part because another route “potentially would have impacted numerous historic sites,” whereas the chosen route had fewer impacts on such sites.¹⁴² The court approved the EIS because it evaluated the environmental impact on historic properties for the proposed alternatives and because the agency used the relative impacts on these historic properties in its determination of the best route.

F. DOC cannot rely on a federal Section 106 review to comply with Minnesota law, as the Section 106 review will not assess historic properties along the portions of the routes subject to solely state jurisdiction.

It appears DOC is relying on the Corps’ federal Section 106 review as a substitute for the historic-property assessment required under Minnesota law. This approach is flawed, for numerous reasons.

In the first instance, there has been no comprehensive planning, so DOC’s existing record is severely underinclusive. As the official keeper of the state’s historic-property records within the Minnesota Historical Society, the SHPO acknowledges that its data sets are limited¹⁴³—there is no such thing as a single, comprehensive survey of all historic properties in *any* state. This is why state law requires surveys to be conducted in connection with each project requiring state permits. As the FEIS acknowledges, many anticipated historic sites in northern Minnesota are TCPs.¹⁴⁴ By nature, many of these will *never* yet have been surveyed and recorded; that often happens only once a project prompts the review.

Moreover, the existing work of Enbridge’s archaeological contractor appears unusually limited. As the Band’s THPO pointed out in the “Interim Report: Line 3 Corridor Tribal Cultural Survey,” in federal tribal consultation:

¹⁴² *Id.*

¹⁴³ *See, e.g., id.* at 9 (citing Ex. EERA-29, FEIS App’x T, “Public Comments and Responses,” Pt. 1, “Substantive Comments,” “State and Local,” #2368, SHPO DEIS Cmts. (July 10, 2017) at 2.

¹⁴⁴ *Id.* at 6 (citing Ex. EERA-29, FEIS at § 5.4.2.5.3 at 5-604).

The ACOE supplied maps and GIS data representing areas where archaeological survey occurred. These records were encoded with values indicating the archaeological survey type and status. Records included survey type values indicating no survey was accomplished; these included “Field Verified – Disturbed”, “Field Verified - Low Sensitivity/No Survey”, “Previously Surveyed” (in some instances 1993-1994), “Not Complete”, or “Field Verified – Wet”. The Ojibwe live in land that is surrounded by and saturated with water—some areas with a survey type of “Field Verified – Wet”, for instance, are important wetland areas within traditional cultural corridors.

In other words, the content of the archaeological survey on its face raises questions about whether it is comprehensive even for its stated purposes. It plainly does not take into account many sites of particular Ojibwe concern (or sites that may still qualify as TCPs, even if the site is “disturbed”).

The insufficiency of the current record, combined with the inherent limitations of the forthcoming federal Section 106 review, *ensures* that DOC will never assess the environmental impact of the project on TCPs. As noted in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, because a domestic oil pipeline requires no general approval from the federal government, applicants need almost no federal permits to construct their project.¹⁴⁵ As a result, and practically speaking, it is the state that is responsible for ensuring the environmental integrity of the vast majority of the project. The Corps exercises federal jurisdiction only over the water crossings and the state has jurisdiction over the rest of the APR.¹⁴⁶

It is unclear whether the DOC understands the arbitrary result that this distinction effects when it comes to historic-properties review. So, the Band’s THPO prepared the attached map as a demonstrative exhibit, with red dashes showing the only places currently scheduled to

¹⁴⁵ 205 F. Supp. 3d 4, 4 (U.S.D.C. 2016).

¹⁴⁶ Again, this is despite the Tribes’ argument that the Corps, too, is required to authorize more under Section 106, but that is a dispute for another forum.

survey.¹⁴⁷ The Corps' approach leaves enormous gaps in the work. Moreover, the Band again confirms that the contract under which the Corps commissioned this work, with Fond du Lac as the fiscal agent, currently includes dozens of short segments totaling only about 65 miles—which Enbridge knows, as it is a party to that contract.¹⁴⁸ The federal TCR Survey scope in no way reflects the actual potential for historic-properties impacts from this Project. It appears to require surveyors to ignore TCPs that lie even one step outside the permit boundary, regardless of whether they might still be within the APR. It is also unclear how TCPs that may lie both within and without the permit are will be treated. This is despite the fact that there can be no reasonable expectation of mitigation of impacts if only *part* of a TCP (which might include anything from a maple sugar bush, to a petroglyph, to a gravesite) is acknowledged.

In other words, right now, everywhere along the APR that is under state jurisdiction—and is therefore *not* included in the Corps' TCR Survey. But the state has authorized *no* TCR Survey along the remainder of the APR. And again, neither the state nor the federal permitting agency has authorized any TCP survey work along any alternative. This approach ensures that neither the federal nor state permitting decisions will take into account whether one of the other routes would affect fewer historic properties—despite the requirements of both state and federal law that this comparative analysis be included as a decision factor.¹⁴⁹

¹⁴⁷ See FDL TCR Survey Overview Map, attached at Ex. A. This was also submitted as part of the Band's Response to Enbridge's Petition for Reconsideration. Exhibit to Band Ans. to Enbridge Pet. to Rec. (Jan. 16, 2018) (eDocket No. 20181-138998-04).

¹⁴⁸ Despite indications that the Corps is willing to add some additional scope, the Corps has to date rejected the requests for a full survey along the APR, and neither the Corps nor the applicant have yet sought to add that scope to the contract.

¹⁴⁹ See Joint Tribal Pet. at 21-22, eDocket No. 20181-138561 (discussing Minnesota Rule 7852.1900, Minn. R. 7852.1900, Minn. R. 4410.2300(H); *North Idaho Community Action Network v. U.S. Department of Transportation*, 545 F.3d 1147, 1156 (9th Cir. 2008) (discussing importance of comparative impacts on historic properties to the choice among alternatives).

Again, if the state does not require that the TCR Survey be performed along the entire APR, then none will ever be performed. This is despite the requirements of state law; despite the unanimous request of all consulting tribes;¹⁵⁰ despite the fact that Enbridge apparently was willing and able to secure timely access along the APR for a conventional archaeological survey; and despite the fact that even Enbridge’s own consulting archaeologist testified that “a full traditional resources survey along the entire scope of this pipeline on the preferred route”¹⁵¹ was “absolutely essential.”¹⁵²

If the FEIS is approved, Enbridge will presumably begin construction on those portions of the line that require only state permits, at the fastest possible pace in order to meet its business needs. At that point, the Band’s and the public’s only hope then will be that, during construction, one of the tribal monitors may *happen* to see a sacred stone formation, a maple sugar bush, or one of likely hundreds of other unsurveyed TCP sites, and will be able to move quickly enough to call a halt. This is all the more unlikely because tribal monitors usually cannot come from the very small pool of people qualified to manage and direct TCR Survey fieldwork. *That* pool includes archaeologists specializing in Ojibwe tribal landscapes, certain Tribal Historic Preservation Officers (“THPOs”), and other trained professionals experienced with Minnesota’s tribal TCPs.

¹⁵⁰ See Ex. FDL-11 at 4 (“Based on the archaeological survey results, which did not identify properties of religious and cultural significance to tribes on ancestral homelands within ceded lands, the consulting tribes unanimously requested access to 100% of the L3R corridor for tribal survey—to be given the same opportunity that the former survey archaeologists had. In response to this request, the ACOE stated they do not have control over the entire project and that they will not require the applicant/Enbridge to obtain permission for tribes to access all areas the original archaeological survey had access to.”)

¹⁵¹ See Evid. Hrg. Tr. Vol. 2B (Nov. 2, 2017) at 136:10-15, 136:18-25, 137:1 (Bergman Cross).

¹⁵² Evid. Hrg. Tr. Vol. 3A (Nov. 3, 2017) at 25:7-11 (Bergman Cross).

Or perhaps the way that an as-yet-unsurveyed site will only come to light will be the same way as it did last year on the Highway 23 project in Duluth: when construction equipment actually turns over graves and destroys part of a burial ground.¹⁵³ Minnesota Department of Transportation Commissioner Charlie Zelle acknowledged this irreparable loss as an “incredibly horrific event,” for which MnDOT took full responsibility.¹⁵⁴ Once tragedy strikes, it is far too late to “avoid” or “mitigate” the damage during construction, as Enbridge suggests.¹⁵⁵

Finally, it is difficult to imagine anyone taking such a position if any *other* aspect of historic-properties review had not been completed by the time the FEIS issued. The DOC, and Enbridge, timely undertook the conventional archaeological survey without question, while at the same time ignoring the requirement of a TCR Survey. In fact, Enbridge has recently resorted to language that is not only offensive but that contradicts all applicable state and federal law, regulation, and guidance on the issue of identification of tribal historic properties. In its response to the Joint Tribal Petition to Reconsider, Enbridge stated that the DOC “sought input from tribal communities,” and “[t]o the extent that the Tribes wish that additional information was in the record and/or the FEIS, they had many opportunities to provide input concerning the FEIS; they are also parties to these proceedings and could have submitted testimony on these specific issues.”¹⁵⁶

In other words, Enbridge argues that it is incumbent not on the applicant, but upon whatever individuals or groups Enbridge refers to as “tribal communities,” to locate, evaluate,

¹⁵³ See Jt. Tribal Pet. to Rec. Ex. List and Exs. at Ex. B (Jan. 2, 2018) (eDocket No. 20181-138561-04).

¹⁵⁴ *Id.*

¹⁵⁵ There are also profound project delays in these circumstances. In fact, the Corps has revoked the Highway 23 project permit. *Id.*

¹⁵⁶ Enbridge Reply to Pets. for Recon. of Tribes and Sierra Club (Jan. 12, 2018) at 7, eDocket No. 20181-138884-03.

and disclose every historic property of significance to Native history that lies along the 337-mile APR and alternatives. The bias and absurdity of such a statement should be apparent. But if not, the Band suggests substituting any other ethnic or religious group in this statement. Would Enbridge make such claims about the supposed obligations of, say, “Jewish communities” or “African American communities”? Or suggest that places of particular historic importance to those communities are *only* important to those communities? Or suggest that there are lesser legal protections for sites important to those communities, and they need not be surveyed or protected in the same way as “other” historic sites?

In Enbridge’s view, the Tribes are supposed to have already done all of the work—despite the fact that surveys of TCPs are only done when a project occasions them, which is no different from the conventional archaeological surveys conducted in connection with this project.¹⁵⁷ Enbridge also appears to argue that the Tribes are obligated to openly publish the location of properties that are fragile (like most historic sites), confidential (including sacred sites that must be protected from looting), and/or not yet known—contrary to protections throughout state and federal law.

In any event, Enbridge and the DOC simply assumed that whatever the Corps did or will do is enough to meet the requirements of state law—and it plainly is not. There is no excuse for this approach, and no basis to conclude that the FEIS is complete, or that the routing decision can be made, without the TCR Survey information.

¹⁵⁷ See also Enbridge Proposed Findings and Conclusions at 176 ¶¶ 645-46 (Jan. 16, 2017) (eDocket No. 20181-138991-01) (“In addition, Enbridge submitted Information Requests (“IRs”) to several of the Intervenor Bands for the purposes of identifying specific areas of concern....The responses to the IRs provided some general areas of concern in the vicinity of the Preferred Route; however, resource-specific locations that may be impacted by construction of the Project were not provided.”)

G. There is an apparent lack of understanding of what would be required to conduct a “full TCR survey on the APR and all alternatives.”

The DOC’s general tribal consultation; public meetings where some people may have testified about TCPs; tribal participation in the evidentiary hearing; and the fact that a few of sites that qualify as tribal TCPs are already listed in the SHPO records do not equal good-faith efforts to evaluate TCPs along a 337-mile APR. Just as such an approach would not result in a complete *conventional* archaeological record, it is also insufficient to compile a TCR Survey. Nevertheless, the applicant has at multiple points insisted that the Tribes are asking for something excessive and unnecessary, far beyond the bounds of state law.

To be clear: the Tribes *have not* requested access to do shovel tests and other fieldwork on each and every inch of the APR and each alternative, no questions asked, as Enbridge has suggested. As the Tribes stated in their Joint Petition: the first step is simply a consultation between the SHPO, MIAC, DOC, and the Tribes for purposes of determining the *extent* of the TCR Survey needed.¹⁵⁸ Only after that initial work, along with additional research and interviews, will it even be *possible* to determine the actual extent of fieldwork along the APR and alternatives necessary. This is the path laid out in ACHP Guidance, “Consultation with Indian Tribes in the Section 106 Review Process: A Handbook” and other widely available authority.¹⁵⁹ A “full TCR Survey” on a long, linear project, even along the resource-rich APR, will undoubtedly include areas where there is *no* indication of TCPs and where everyone agrees no fieldwork is necessary—just as Enbridge’s conventional archaeological survey concluded. This is even more likely along long stretches of SA-04. This is why the Band continues to ask

¹⁵⁸ Jt. Tribal Pet. at 24 (Jan. 2, 2018) (eDocket No. 20181-138561-52).

¹⁵⁹ Ex. FDL-10 (June 2012); see also 36 C.F.R. Part 800.4 (Identification of historic properties); National Register Bulletin No. 38, “Guidelines for Evaluating and Documenting Traditional Cultural Properties, available at <https://www.nps.gov/nr/publications/bulletins/nrb38/>.

the DOC to consult and begin this TCR Survey work as part of its supplementation on SA-04 as soon as possible.

The applicant has made much in a recent filing of the fact that these statutes do not expressly use the word “survey,” but this is unremarkable.¹⁶⁰ The list of state laws that leave the specifics of implementation to state agencies is lengthy. Moreover, there simply *are* no other tools besides a TCR Survey to carry out the necessary work—again, just as a conventional archaeological “survey” is needed. But without such work, the requirement of MEPA to preserve “historical resources”¹⁶¹ would have no meaning. Nor would the state’s pipeline regulations. A pipeline EIS must analyze the impacts of the proposed action on the preferred and alternative routes, and there is no exception for analysis of impacts on historic properties.

The applicant has also remarked that this request has not been before the DOC and Commission in the past—but this does not mean the requested survey is outside the law. Instead, the unprecedented effort by Minnesota tribes in these proceedings is a reflection of the particular threats posed by this oil pipeline, and the need to mitigate cumulative impacts on precious tribal resources.

III. The record is inadequate because it does not adequately consider the Project’s impact on treaty-protected natural resources located both on and off-reservation.

The recent, hard lessons of the Dakota Access Pipeline, and current litigation over it, reinforce the principle that off-reservation, treaty-resource impacts must be considered in a

¹⁶⁰ Enbridge Reply to Jt. Tribal Pet. at 3 (Jan. 12, 2018) (eDocket No. 20181-138884-04) (“Nothing in these laws requires the completion of field surveys on a proposed route and all alternatives before an EIS is determined to be adequate. Indeed, nothing in these laws specifically requires the completion of such surveys, period.”)

¹⁶¹ Minn. Stat. §116D.04, subd. 1a(a) (adopting the definition in Minn. Stat. 116B.02, Subd. 4).

federal FEIS.¹⁶² MEPA, too, must be read as requiring a state EIS to include a full analysis of treaty-protected resources. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, the Court acknowledged the requirement under NEPA that an EIS analyze “the effects on a specific resource identified in the treaty.”¹⁶³ The Court found the environmental assessment was inadequate because it “offered only a cursory nod to the potential effects of an oil spill...”¹⁶⁴ An agency “generally must examine both the probability of a given harm occurring and the consequences of that harm if it does occur.”¹⁶⁵

Here, too, the FEIS only addresses treaty rights in a cursory manner and it fails to address in any meaningful way the probability of impact to specific treaty rights for the various routes proposed and the consequences of that harm. It attempts to describe important treaty rights as easements but fails to “ascertain the value of this easement.”¹⁶⁶ The applicant suggests that the quantitative impacts assessment in Chapter 5 and 6 doubles as an assessment of the impacts on treaty-protected resources. But nothing in Chapter 5 or 6 accounts for this equivalency, and even if it did, the resources assessed are under-inclusive and do not account for all of the Band’s treaty-protected resources. Indeed, the FEIS offers no “detailed impacts assessment” on the

¹⁶² See *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312 (Minn. 1977) (finding that MEPA was “[p]atterned on NEPA” and then considering federal caselaw on NEPA EIS requirements to apply MEPA).

¹⁶³ 255 F.Supp.3d 101, 131 (D.D.C. 2017) (citing *Ground Zero Ctr. For Nonviolent Action v. Dept. of the Navy*, 918 F.Supp.2d 1132, 1152 (W.D. Wash. 2013) (assessing impact on tribe’s treaty fishing rights by considering surveys of fish patterns and Navy’s mitigation efforts); *Nw. Sea Farms, Inc., v. U.S. Army Corps. of Eng’rs*, 931 F.Supp. 1515, 1521-22 (W.D.Wash. 1996) (explaining Corps correctly concluded that project would impair treaty fishing rights by conserving impact on tribe’s access to fish)). Note that the *Standing Rock* court rejected the tribes’ federal trust responsibility argument, concluding that the requirement to analyze the impact on treaty-protected resources was based on NEPA itself.

¹⁶⁴ *Id.* at 134.

¹⁶⁵ *Id.* at 132 (citing *New York v. Nuclear Regulatory Comm’n*, 681 F.3d 471, 482 (D.C. Cir. 2012)).

¹⁶⁶ See, e.g., FDL Cmts. on FEIS (Oct. 2, 2017), eDocket No. 20178-134845-01 at 1.

natural resources that are uniquely valued by the Band as TCPs, such as berry patches and wild rice waters. This further underscores that the FEIS offers nothing more than a cursory nod to the Band's treaty-protected resources. Moreover, the FEIS also fails to address cumulative impacts to treaty rights.¹⁶⁷ Simply put, by failing to acknowledge the treaty-protected interests of a large group of Minnesotans, the FEIS fails to fully analyze the impacts of this Project in accordance with MEPA's requirements.

IV. The FEIS is inadequate under Minnesota law because it does not include any assessment of the cumulative impacts of the Project based on past projects.

The current FEIS, and remainder of the record, reflect a failure to assess the cumulative impacts of the Project based on past projects. Minnesota Rule 4410.2300(H) dictates that an FEIS assess the cumulative impacts of a project on the environment. Minnesota Rule 4410.0200 subpart 11 specifically defines "cumulative impact" as:

...the impact on the environment that results from incremental effects of the project in addition to other *past*, present, and reasonably foreseeable future projects regardless of what person undertakes the other projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

Despite the fact that FEIS Chapter 9 at Section 9.6.5 confirms that there have been and will be many impacts on tribal resources, Chapter 12's cumulative potential effects analysis omits nearly any discussion of *past* projects on the locations and resources that would be affected by the new line, including treaty resources.¹⁶⁸

¹⁶⁷ *Id*; see also Minn. R. 4410.0200 subp. 11 (defining cumulative impacts as including past, present, and future impacts).

¹⁶⁸ Minn. R. 4410.2300(H) (requiring consideration of past projects in cumulative-impacts analysis); compare Evid. Hrg. Tr. Vol. 2B (Nov. 2, 2017) at 118:23-25, 119:1-25, 120:1-22 (stating that "a cumulative impact assessment would be looking forward at a reasonably foreseeable future," that the lead environmental contractor Merjent has not performed an analysis of past projects' impacts, and that Merjent also has not performed "any analysis of cumulative impacts on off-reservation treaty resources" that will be affected by the preferred route) (Bergland Cross).

Conclusion

Among other defects, the record lacks sufficient analysis of impacts on tribal resources of all kinds. Despite the fact that this is one of the largest construction projects in state history, and despite repeated calls for better analysis, the record includes profoundly incomplete review of impacts on wild rice, off-reservation treaty resources, and historic properties of importance not just to Minnesota tribes but to all Minnesotans. The ALJ should recommend against approval of any route, much less the APR, as well as against issuance of the certificate of need on this record.

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