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

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East, Suite 350
St. Paul, Minnesota 55101-2147

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

Intervenor Fond du Lac Band of Lake Superior Chippewa's Exceptions to Findings of Fact, Conclusions of Law, and Recommendation of the Administrative Law Judge (April 23, 2018)

Introduction

The Fond du Lac Band of Lake Superior Chippewa (the "Band") respectfully submits the following Exceptions to the above Recommendation.[1] This is submitted and served in accordance with the Recommendation[2] and the Commission's Notice to Parties of Exceptions Period for Administrative Law Judge Report.[3]

[1] eDocket No. 20184-142237 (Apr. 23, 2018).

[2] *Id.* at 367.

[3] eDocket No. 20184-142282 (Apr. 24, 2018).

I. General Exceptions

The Recommendation discusses Ojibwe treaties, tribal lands, and off-reservation usufructuary (not "usufractory," as stated throughout) rights.[4] As drafted, the Recommendation includes a number of statements regarding the non-existence of usufructuary rights under certain treaties. But those rights have neither been litigated in these proceedings, nor in any federal court with jurisdiction, and the Commission is not empowered to adjudicate these matters.

Additionally, the Recommendation makes Findings at different points regarding the terms of the agreements that underlie existing easements between Enbridge with the Fond du Lac and Leech Lake Bands. Some of these Findings are internally conflicting.[5] These findings also fail to acknowledge that these are only *excerpts* of the respective, private agreements between each Band and Enbridge, as noted when they were filed; the full agreements contain confidential terms and are not in the record. Ultimately, however, it is not within the authority of the Commission to make a binding interpretation of *any* aspect of these agreements, which are governed by their own terms, and the easements that followed from them are governed solely by federal law.

One aspect of the Recommendation's analysis of the 2009 FDL Settlement Agreement is incorrect on its face, however. While the FDL Settlement Agreement provides for certain "repair" and "replacement" activities,[6] neither the Agreement nor applicable federal law allow for removal

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[4] *See*, *e.g.*, *Minnesota v.* Mille Lacs *Band of Chippewa Indians*, 526 U.S. 172 (1999) (using term "usufructuary" to describe treaty-reserved hunting, fishing, and gathering rights).

[5] *Compare*, *e.g.*, Finding 454 ("… *under the express terms of the FDL Settlement Agreement, Applicant is granted the right to replace Existing Line 3 within the right-of-way, which would include in-trench replacement, until 2029*.") (emphasis added), *with* Finding 1066 ("The Fond du Lac Settlement Agreement permits 'pipe replacement if required for safe and reliable operations,' but expressly prohibits construction of any new or additional pipelines without a separate agreement. Because the Project proposes 36-inch pipe (instead of 34-inch pipe), *it is likely that a replacement would be considered a 'new pipeline*.'") (emphasis added).

[6] Ex. FDL-9 (described in Master Ex. List as "Agmt. between Fond du Lac and Enbridge (May 26, 2009) (Excerpt)" and containing pages 1-3 (recitals); unnumbered page (listing permissible

of Existing Line 3 and replacement with a new pipeline across the entire Fond du Lac Reservation absent a new, voluntary agreement with the Band. That would be an "additional or new pipeline" requiring "separate Band negotiation and approval," with easement terms approved by the BIA.[7] The Band is free to either grant or withhold approval for a new pipeline across its land.

Specific, proposed changes to the Recommendation are reflected in redline below (with footnotes omitted for convenience except where noted). As for Findings and Conclusions where the Band offers no exceptions, the Band neither endorses nor rejects the existing language, and preserves all arguments.

II. Specific Exceptions to Findings of Fact

No.	Proposed Revision to Finding
411	In addition to the private easements that the Project will require, ~~there are additional property issues related to the traversing of land over which~~ American Indian tribes retain certain ~~property~~ rights on lands crossed by the APR and several of the route alternatives. Such rights have not been litigated in these proceedings and these rights are only summarized here. Any discussion of the underlying treaties is likewise not an adjudication of these rights and is intended only as a summary.
412	In the ~~1880s~~1800s, the United States government undertook actions to obtain right and title to the land comprising, what is now, Minnesota. These actions included the execution of treaties with Indian tribes which established legal rights to the ~~property~~ land and created Indian reservations~~.~~…

uses of the ROW and approvals); and 19 (signature page). Upon being requested to do so during the evidentiary hearing in November 2017, the Fond du Lac Band promptly filed all public portions of these documents and the Band understood it had filed what the ALJ had requested.

[7] *See* Ex. FDL 9 (FDL Settlement Agreement at unnumbered page); *see also* 25 C.F.R. § 169.107 (a) ("For a right-of-way across tribal land, the applicant must obtain tribal consent, in the form of a tribal authorization and a written agreement with the tribe, if the tribe so requires, to a grant of right-of-way across tribal land. The consent document may impose restrictions or conditions; any restrictions or conditions automatically become conditions and restrictions in the grant."); § 169.403 ("The tribe and the grantee on tribal land may negotiate remedies for a violation, abandonment, or non-use."); § 169.413 ("An unauthorized use within an existing right-of-way is also a trespass. We [the BIA] may take action to recover possession, including eviction, on behalf of the Indian landowners [meaning tribe or individual Indian who owns an interest in Indian land] and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law, including applicable tribal law.")

No.	Proposed Revision to Finding
414	In the 1800s, Indian tribes residing on land now known as Minnesota entered into treaties with the United States government. Under these treaties, the Indian tribes were forced to relinquished millions of acres of their homeland to the United States in exchange for the protection of (and from) the government. These treaties recognized and established rights, benefits, and conditions for tribes, including rights to occupy certain land as reservations and, in some cases, the right to use off-reservation land for hunting, fishing, and gathering.
415	A federal Indian Reservation is an area of land reserved for a tribe or tribes as permanent tribal homelands under a treaty or other agreement with the United States, executive order, federal statute, or administrative action. The U.S. government holds initially held title to the reservation land in trust for the benefit of the tribes, and today still holds certain reservation lands in trust for tribes or for individual tribal members. The Secretary of the Interior is vested with the authority to administer these trust lands. Land held in trust cannot be sold or conveyed by its tribal or individual landowners without federal consent through the Secretary of the Interior.
417	The seven Anishinaabe tribes in Minnesota include: the Bois Forte Band of Chippewa, Fond du Lac Band of Lake Superior Chippewa, Grand Portage Band of Lake Superior Chippewa Indians, Leech Lake Band of Ojibwe, Mille Lacs Band of Ojibwe, Red Lake Band of Chippewa Indians, and White Earth Band of Ojibwe. All these Ojibwe Bands but Red Lake are members of the umbrella tribal entity the Minnesota Chippewa Tribe (MCT), but each Band individually and independently functions as a federally recognized tribe. Five Four of the six MCT of these tribesBands are parties to this action (: Fond du Lac, Leech Lake, Mille Lacs, and White Earth), along with Red Lake, and White Earth.
423	Notably, Indians and U.S. government officials entering into these treaties were not on equal footing, as the treaties were written in English and most often conducted under threat of harm to the Indians. Nonetheless, by entering into these treaties, the Indian tribes relinquished their ownership rights to the real property. and retained only those rights specifically identified in the treaties. In most treaties, the Indian tribes did not retain any usufractory rights to the ceded lands.
424	The Project crosses property that was originally ceded to the United States under numerous treaties, six of which have been identified by the intervening parties as most applicable to this proceeding: …; and the Treaty with the Chippewa Indians Nelson Act of 1889 (commonly known as the Nelson Act).
430	In the two 1847 Treaties, the Chippewa of the Mississippi and Lake Superior, and the Pillager Band of Chippewa Indians, ceded to the United States additional territory identified in the maps above. While tThese treaties did not expressly reserve any usufructuaactory rights for the Indian tribes, and the no federal court with jurisdiction has have not considered or determined whether the signatory tribes implicitly reserved such rights. [Footnote 1081 here should also include the following cites and parentheticals to: *United States v. Winans*, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."); *Mille Lacs Band v. Minn.*, 124 F.3d 904, 928 (8th Cir. 1997) ("[T]he United States had not granted

No.	Proposed Revision to Finding
	usufructuary rights to the Indians in the territory. 'The treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.' As such, the United States did not convey to the Indians anything which the State could claim the right to control, but rather the United States secured title to vast areas of land for the benefit of the future state in exchange for the Indians' reservation of usufructuary rights.") (internal citations omitted).]
433	The 1855 Treaty ceded additional land to the United States, as depicted in the maps above. It also established the Mille Lacs and Leech Lake Reservations. The 1855 Treaty did not expressly reserve any ~~usufractory~~usufructuary rights for the Indian tribes~~.~~….
434	In 1999, in the U.S. Supreme Court ruled that the 1855 Treaty did not abrogate the tribes' ~~usufractory~~usufructuary rights to hunt, fish, and gather in the 1837 Treaty-ceded territory. This decision did not, however, ~~give the tribes usufractory~~address usufructuary rights to the 1855 Treaty-ceded territory – a separate territory from that ceded under the 1837 Treaty – or any other treaty-ceded territories.
435	The 1863 Treaty ceded additional land to the United States, as depicted in the map above. It also established reservations for the Red Lake and Pembina Bands. The 1863 Treaty did not expressly reserve any ~~usufractory~~ usufructuary rights for the Indian tribes with respect to the land ceded under that treaty.
436	The 1866 Treaty ceded additional land to the United States, as depicted in the maps above. It also established a reservation for the Bois Forte Band. The 1866 Treaty did not expressly reserve any ~~usufractory~~usufructuary rights for the Bois Forte Band with respect to the land ceded under the treaty.
437	The 1867 Treaty ceded additional land to the United States as depicted in the maps above. It also established the White Earth Reservation and added land to the Leech Lake Reservation. The 1867 Treaty did not expressly reserve any ~~usufractory~~usufructuary rights for the Chippewa with respect to the land ceded under the treaty.
439	In 1889, Minnesota passed the "Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota," commonly known as the "Nelson Act." It allowed the President to create a Commission to "negotiate" with the Chippewa tribes in Minnesota for the relinquishment of their title to reservation lands, with the exception of the White Earth and Red Lake Reservations. The Act was originally intended to relocate all but the Red Lake Anishinaabe people in Minnesota to the White Earth Indian Reservation. The Act was later amended to allow the Anishinaabe to remain and to obtain allotments on existing reservations. Federal courts to date have held the Act diminished part of the Red Lake and White Earth Reservations, but that the Act did not diminish other reservations, such as Leech Lake, where allotments were to be made to the Anishinaabe. ~~The Act was intended to relocate all the Anishinaabe people in Minnesota to the White Earth Indian Reservation, and to expropriate the vacated reservation land for sale to non-Indians. This Act did not reserve any usufractory rights to the Indian tribes.~~ [Footnote 1107 should include citations to the following authority: *Leech Lake Band v. Cass County*, 108 F.3d 820, 821-22 (8th Cir. 1997), *aff'd in relevant part*, 524 U.S. 103, 106, 108 (1998); *Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn.

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	1971); *State v. Clark*, 282 N.W.2d 902 (Minn. 1979); *State v. Forge*, 262 N.W.2d 341 (Minn. 1977).]
440	As set forth above, the ~~only treaties in which~~ Indian tribes expressly retained ~~usufractory~~off-reservation usufructuary rights under ~~to property are~~ the 1837 and 1854 Treaties. The other treaties discussed above did not expressly retain such rights and federal courts have not determined whether such rights were implicitly retained under any of those treaties. ~~Accordingly, only the land ceded under those two treaties are subject to usufractory rights claims by the tribes who were signatories to those two treaties. Indian tribes did not retain usufractory rights in or to any of the other treaty-ceded territories.~~
443	Existing Line 3, RA-06, RA-07, and RA-08 do cross territory ceded under the 1854 Treaty located in Carlton County. The ~~only~~ tribes that ~~can arguably claim~~ retain off-reservation ~~usufractory~~usufructuary rights under the 1854 Treaty are the Fond du Lac, Grand Portage, and Bois Forte Bands.
446	Under federal law, the U.S. Secretary of the Interior is empowered to grant rights-of-way over and across lands held in trust by the United States for Indian tribes, communities, bands, or nations. Under current regulations (25 C.F. R. Part 169.201, updated in 2016), ~~t~~The Secretary of the Interior, by and through the Bureau of Indian Affairs (BIA), generally limits rights-of-way for oil and gas purposes ~~through~~ across individually owned Indian land (individual allotments held in trust) ~~Indian reservation lands~~ to a term of 20 years. ~~Indian~~ For tribal trust land~~tribes~~, ~~the~~ Secretary of the Interior defers to the tribe's determination of a reasonable term. ~~and the BIA can only grant pipeline easements for a period of 20 years at a time.~~ At the expiration of the ~~20-year~~ a right-of-way term, the easement must be renegotiated, preventing a perpetual easement over tribal property~~.~~….
447	To give Applicant the right to place and, thereafter, maintain Existing Line 3 (and five other pipelines) on the Leech Lake and Fond du Lac Reservations, both Tribes had to voluntarily execute a grant of easement for right-of-way to Applicant. An evaluation of the public portions of those easement agreements – and the current sentiment among tribes about pipelines running through tribal property – shed light on why Applicant has chosen to pursue a new route for Existing Line 3 outside of the Mainline corridor~~.~~….
449	~~Documentation of t~~These ~~easement~~ settlement agreements are largely confidential, and so ~~has been difficult to obtain from the parties and~~ only scant documents have been produced. From these documents, it appears that, in 1954, Lakehead obtained its first easements from the Department of the Interior for the construction of Lakehead's first two pipelines (Lines 1 and 2) across the Fond du Lac and Leech Lake Reservations. The term of these easements was 20 years.
450	In approximately 1962, Lakehead requested additional right-of-way to install another pipeline (Existing Line 3) on the two Reservations and an extension of the previously existing easements. In furtherance of this agreement, the MCT's Tribal Executive Committee (which at that time exercised certain authority over specific lands on the six member Bands' reservations) executed ~~a~~ Resolution No. 6, purportedly agreeing to an additional right-of-way for Existing Line 3 for a term of 50 years. ….
452	In 2009, Applicant sought to construct two additional pipelines across the

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	two Reservations: Line 13, the Southern Lights diluent line (Line 13); and Line 67, the Alberta Clipper Line (Line 67). To install these two new lines in the Mainline corridor near existing Lines 1, 2, 3, and 4, Applicant needed to obtain new easements from the two tribes. At this time, the existing easements for Lines 1, 2, 3, and 4 were close to expiration. Moreover, in public filings made with this body in the Enbridge Alberta Clipper/Southern Lights proceeding, there was evidence that Enbridge's then-existing lines were in trespass across certain tribal parcels. *See, e.g.*, Fond du Lac Band Update Ltr. (Feb. 25, 2009), eDocket Nos. 5783960-5783961, *In the Matter of the Application of Enbridge Energy, Limited Partnership, and Enbridge Pipelines (Southern Lights) LLC for a Routing Permit for the Alberta Clipper Pipeline Project and the Southern Lights Diluent Project*, OAH Docket No. 8-2500-19094-2, MPUC Docket No. PL9/PPL-07-361. Therefore, Applicant engaged in negotiations with the tribes to purchase new easements for Lines 13 and 67, address all trespass issues, and "renew" the existing easements for Lines 1, 2, 3, and 4, thereby allowing all six lines and all tribal parcels to be ~~included~~ addressed in one document and applying ~~easement agreement, having~~ the same 20-year term.
453	To accomplish these goals, Applicant entered into separate settlement agreements with both tribes. The public portions of these ~~se~~ settlement agreements are similar~~, but different;~~ and both authorized the BIA to issue ~~in~~ easements ~~agreements approved by the BIA~~.
454	In its settlement agreement with Applicant (FDL Settlement Agreement), Fond du Lac agreed to grant to Applicant a right-of-way easement for the "construction, operation, maintenance, inspection, and repair activities (including pipe replacement if required for safe and reliable operations) associated with the Existing Pipelines" (Lines 1, 2, 3, 4) and the two new pipelines (Lines 13 and 67).~~1126 Thus, under the express terms of the FDL Settlement Agreement, Applicant is granted the right to replace Existing Line 3 within the right-of-way, which would include in-trench replacement, until 2029.~~
456	Under the FDL Settlement Agreement, Fond du Lac ~~is~~ was required to cooperate and assist in obtaining all required consents, approvals, and permits for the right-of-way from the BIA~~.~~….
458	~~While the FDL Easement does not specifically mention replacement of the pipelines like the FDL Settlement Agreement does, i~~It is apparent that the purpose and intent of the FDL Easement is to implement the terms of the FDL Settlement Agreement, to comply with federal legal requirements, and to convey to Applicant all of the ~~property~~ easement rights the tribe agreed to (and was paid for) under the FDL Settlement Agreement.
461	~~When read together, the FDL Settlement Agreement, FDL Resolution, and FDL Easement give to~~ Applicant holds an easement for Lines 1, 2, Existing Line 3, Line 4, Line 13, and Line 67 for 20 years from December 11, 2009. The easements will, thus, expire in December 2029, unless earlier terminated by the BIA or as otherwise provided under applicable law.
463	Upon termination of the FDL Easement, ~~-~~Applicant is obligated to restore the land to its "original condition," if "reasonably possible." Whether full restoration is "reasonably possible" will be left to the sole discretion of the BIA, not Enbridge, and as may otherwise be provided under the FDL Agreement or controlling law. Accordingly,

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	upon the termination of the FDL Easement ~~(either by BIA early termination or by natural expiration)~~, the ~~BIA has the right to require~~ Applicant may be required to remove the pipe from the Fond du Lac Reservation to restore the land to its original condition.
476	Because Applicant will need to seek renewal before 2029 of the existing easements for five other lines currently traversing the Fond du Lac and Leech Lake Reservations, Applicant could include the new Line 3 in that negotiation process. Given this fact, ~~and the fact that Applicant is arguably entitled to replace Line 3 under the terms of the FDL Settlement Agreement,~~ in-trench replacement of Line 3 is not an impossibility.
535	…Nor does the rule expressly distinguish between the relative importance of the effect on the Applicant, the Applicant's customers, or to the people of Minnesota and neighboring states~~, considering:~~, But the interests of the general public are emphasized throughout the remainder of this and other applicable rules. Therefore, despite the use of the disjunctive "or," this provision cannot be read "disjunctively." That would lead to an absurd result and an elevation of the interests of an applicant and its customers, wherever in the world they may be, over those of the people of Minnesota and neighboring states. An applicant and its customers can *always* provide at least some evidence to support this factor—they would not be seeking to build a project at all if they did not believe it would increase "the future adequacy, reliability or efficiency of their energy supply." Where denial is not expected to adversely affect "the future adequacy, reliability, or efficiency of energy supply" to the people of Minnesota and neighboring states, this factor simply is not met. The remainder of the rule requires:…
627	The Commission's criteria for need requires the ALJ and Commission to consider "the future adequacy, reliability, and efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states." The rule does not differentiate among the importance of these three groups, but as explained above, there must be a showing of impact upon all three or this factor is not met.~~ In other words, the interests of Applicant's customers and the people of Minnesota are on equal footing. Thus, if there is an adverse impact by denial on any of these groups, it must be considered.~~
667	~~It is a bitter pill to swallow, h~~However, ~~that~~ the "need" for this Project is to primarily assist foreign oil producers in transporting their products through (and mostly out of) Minnesota. ~~However, the rule does not prioritize the needs of Applicant's customers, the people of Minnesota, or the people of neighboring states. Each of these categories has equal priority under~~In other words, Applicant has only shown negative impacts to two out of the three groups under Rule 7853.0130(A), as explained above. There has been no showing of negative impacts upon the most important group, the people of Minnesota and neighboring states. ~~.~~
735	While Applicant has established that a denial of the Project could result in some adverse impacts with respect to reliability, efficiency, and adequacy of oil supply transport for Applicant's customers (mainly Canadian oil producers), the Commission ~~should~~ must consider these impacts in relation to Minnesota, its people and its natural resources, as well as those people in neighboring states, and should conclude this factor is not met. ~~as discussed in more detail below.~~

No.	Proposed Revision to Finding
810	Ultimately, under the facts presented, ~~none of the parties have established that an alternative to the Project would be more reasonable and prudent~~the No-Build Alternative speaks for itself as the most reasonable and prudent alternative.
833	Not building the Project would result in the continued operation of Existing Line 3—assuming that ~~,~~regulators or others with authority do not conclude that Existing Line 3 is too unsafe to continue operating and shut it down. This also assumes that Applicant will be able to maintain tribal easements that appear to be conditioned upon safe operation of oil pipelines across tribal lands. Nevertheless, ~~as~~ Applicant has made clear that it intends to continue operating Existing Line 3 if this Project is disapproved.
890	The ALJ further finds that the impacts on Minnesota's natural resources could be mitigated by: (1) a route alternative that utilizes the existing Mainline corridor where impacts have already occurred and the risk of contamination can be contained to one, existing corridor; (2) a permit that does not allow for abandonment of roughly 300 miles of steel pipe; and (3) a route that does not open a new pipeline corridor through some of Minnesota's most precious water and natural resources – a new corridor that could be used to locate or relocate other pipelines before or after 2029, when Enbridge's Mainline easements expire. Nevertheless, on balance, the only option justified on this record is the No-Action Alternative. While it is beyond the scope of this proceeding, given the seemingly imminent risks of continued operation of Existing Line 3, it is also recommended that there be ongoing state monitoring of Existing Line 3 and appropriate regulatory action to shut down and remove the line in the event of unsafe conditions.
938	Several parties have argued that the EIS was deficient in this case because it failed to include a Tribal Cultural Resources (TCR) Survey on the APR and all route alternatives as part of the EIS. The issues with respect to the adequacy of the EIS conducted on this Project were referred to ALJ Eric L. Lipman, who considered the issues argued by the parties and recommended a finding that the FEIS be found adequate. Because the adequacy of the EIS is not within the matters delegated to this ALJ for decision, the issue of whether the EIS should have include a TCR Survey is now before the Commission for final decision. ~~Therefore, it is not addressed in this Report.~~But state historic properties law protects tribal historic resources that have yet to be evaluated, and it is impossible to make a full recommendation on a record containing incomplete information—incomplete due to the Applicant's and the DOC-EERA's delays in seeking to acquire it, as explained in joint tribal briefing to the Commission on this matter. This is true not only for this factor but for the factor requiring analysis of "lands of historical, archaeological, and cultural significance." Therefore, the record is incomplete without a full TCR Survey of the APR and all route alternatives.
1033	…. The EIS did not identify any impacts to cultural resources, but, as described above and below, at least two Indian Tribes (Leech Lake and Fond du Lac) are impacted by the existence, removal, and abandonment of Existing Line 3. As explained above, however, the lack of a complete TCR Survey of the APR and all route alternatives is a major defect, the record is incomplete, and it is impossible to reach a recommendation on this factor.
1068	~~Neither the Leech Lake Settlement Agreement nor LL Easement address replacement.~~ The LL Easement is largely identical to the FDL Easement in terms of effect.

No.	Proposed Revision to Finding
1298	The Tribal Cultural Resources Survey is currently underway and has not yet been completed. Consequently, the final results of this survey have not been included in the record of this proceeding. The Tribal Cultural Resources Survey ~~was~~ to date is only being conducted with respect to ~~-~~the APR and does not address other route alternatives. Accordingly, even if completed, this survey would not assist the ALJ at this time in comparing the impacts on resources presented by the APR and the route alternatives.
1302	According to the EIS, construction and operation of a pipeline along all route options could impact archaeological and historic resources. The EIS notes, however, that, "DOC-EERA's consultation with the SHPO is ongoing, and the results of the consultation concerning recommendations of eligibility, Project effects, and any necessary treatment for impacts, are not yet available." Therefore, the analysis of historic and archaeological resources in the EIS is incomplete, making it impossible to adequately analyze this factor.
1309	Based upon the information contained in the record, the ALJ cannot adequately compare the impacts on cultural resources among the various route options, despite the mandate in the rules to do so as a core factor in route selection. With respect to archaeological and historic resources, it appears that all the route options have some impacts—with the No-Build Alternative having the fewest.~~,~~. ~~but no route alternative stands out as significantly better or worse.~~
1318	When considering disturbance or loss of wild rice stands from construction, the Applicant's preferred route would affect the least amount of acreage, while RA-06 would affect the greatest amount of land. However, the impacts would be similar in magnitude, in terms of both acreage and the dollar value of the crops. RA-06, RA-07, and RA-08 would potentially impact the economies of the Fond du Lac and Leech Lake Bands. However, the magnitude of economic impact to these Bands is still projected by the EIS to be minor and temporary—a conclusion reached with insufficient economic analysis of potential loss of wild-rice resources or other natural products and medicines that would be impacted by the routes.
1390	As set forth in considerable detail in Section IV., G. above, the construction of a pipeline through an Indian Reservation would require approval from the applicable Indian Tribes, as well as a right-of-way easement grant from the BIA, ~~which can only be granted for a limited duration (no more than 20 years)~~….
1396	It should be noted that an approval of RA-07 does not, in any way, infringe on the sovereignty of the various Indian tribes to disapprove permits or other approvals required for construction of the Project through land over which it has legal control. Just like the Commission cannot bind the BIA or require the BIA to grant easements for a route, the Commission does not have the authority to require either Leech Lake or Fond du Lac to permit the replacement of Existing Line 3. It would, however, likely encourage the Tribes and Applicant to accelerate discussions that are inevitable prior to 2029 regarding the renewal of easements through Reservation lands. Unless and until necessary tribal permits and BIA easements are actually denied, and solely to the extent that the Commission rejects the Recommendation that no Certificate of Need is justified, RA-07 continues to be a reasonable and viable route option for a true replacement of Line 3.

No.	Proposed Revision to Finding
1405	If the Commission does not adopt the recommendation that no Certificate of Need be issued, RA-07 is the best option because it would:…

III. Exceptions to Conclusions of Law

No.	Proposed Revision to Conclusion
25	Minnesota Rule 7853.0130(A) does not distinguish among the importance of the need for Applicant, Applicant's customers, and the people of Minnesota and neighboring states. Nor does the rule assign the priority of importance between adequacy, reliability, or efficiency of energy supply. But a plain reading yields an absurd result, and this rule must be read to require a showing of need for not just Applicant and Applicant's customers, but the people of Minnesota and neighboring states. Accordingly, adverse impacts to Applicant's customers is not sufficient to establish need for the Project under this criterion.
26	The ALJ further concludes that a more reasonable and prudent alternative to the Project ~~has not been demonstrated by a preponderance of the evidence by parties or persons other than Applicant~~is the No-Build Alternative.
27	Applicant has not established, however, by preponderance of the evidence, that the consequences to society of granting the certificate of need for the Project, as proposed, are more favorable than the consequences of denying the certificate. ~~so long as the Project includes Applicant's Preferred Route. However, the cost and benefit calculation under Minnesota Rule 7853.0130(C) changes if Applicant replaces Existing Line 3 in its current location (i.e., if the Commission were to select RA-07 as the pipeline route in this case). In such a circumstance, the benefits to Minnesota and regional refiners, and the people of Minnesota, slightly outweigh the risks and impacts of a new crude oil pipeline.~~
30	The Administrative Law Judge hereby concludes that, to the extent that the Commission rejects the recommendation that no Certificate of Need issue, and subject expressly to the selection of RA-07 (in-trench replacement) and the conditions recommended below, that the Commission GRANT Applicant's Application.
34	The Administrative Law Judge finds that all procedural requirements under rule and law for the issuance of a route permit were met, subject to a final order by the Commission finding the Environmental Impact Statement adequate, except~~.~~ Minnesota Rule 7852.1900 (C), which requires evaluation of impacts on~~.~~ lands of historical, archaeological, and cultural significance, which review was not possible due to the incomplete TCR Survey of the APR and all alternatives.~~;~~ To the extent the Commission concludes this is not fatal to the route decision, completion and approval of such surveys, along with appropriate mitigation, must be included at least as a permit condition.
40	For these reasons, and solely in the alternative, the Administrative Law Judge respectfully recommends that the Commission select RA-07.
43	As an integral part of her recommendation, the Administrative Law Judge recommends that the Commission include the following conditions on any CN or RP granted in this case: …

No.	Proposed Revision to Conclusion
	• Before any construction can proceed, Applicant must fund and there must be a full TCR Survey along the route, as well as implementation of mitigation and avoidance of all historic properties along the route. All required means and methods for the survey work must be resolved in consultation with all affected Indian tribes, the SHPO, and DOC-EERA, and after there is agreement that the work is complete, the final report must be submitted to the Commission for approval.

Dated: May 9, 2018

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