

State of Minnesota
In Court of Appeals

In the Matter of the Determination of the
Need for an Environmental Impact
Statement for the Nolte Family Irrigation
Project in the Township of North Germany,
Wadena County, Minnesota.

**BRIEF OF AMICI CURIAE
HONOR THE EARTH AND PINE POINT COMMUNITY
MEMBERS ON THE WHITE EARTH
RESERVATION AND ADDENDUM**

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INTEREST OF AMICI CURIAE

Honor the Earth is a native-led nonprofit organization formed in 1993 that works to create awareness and support for Native environmental issues and to develop needed financial and political resources for the survival of sustainable Native communities. Honor the Earth works to create a sustainable world by transforming unjust economic, social and political relationships. The organization also works to combat the rise of highly inefficient, extractive industry, including industrial farming, on and adjacent to Native lands and to return to a system of land-based economics in which intergenerational and inter-species equity are valued and cyclical systems are reaffirmed. Honor the Earth is based on the White Earth Reservation in the Pineland Sands region of Minnesota.

Honor the Earth members and their organic farming operations on White Earth treaty reservation treaty lands have, for decades, been impacted by the negative air, water, deforestation and habitat impacts that are a direct result of industrial potato, corn and other row crop production on or near tribal treaty and reservation lands. Members have been specifically harmed by the industrial farming operations of the R.D. Offutt Company, its subsidiaries and its contract growers that are operating in the vicinity of the tribal and reservation lands.

Pine Point Tribal Community Members on the White Earth Reservation (Community Members) include individual members of the Pine Point Tribal Community and representatives of the Pine Point Tribal Elementary School located on the White Earth Reservation in the Pineland Sands Region of Minnesota. Community members and the school have been directly impacted, for decades, by negative air, water, deforestation and habitat impacts that are a direct result of industrial potato, corn and other row crop production on or near the Pine Point community and the Pine Point Elementary School on the White Earth Reservation. Members have been specifically harmed by the industrial farming operations of the R.D. Offutt Company, its subsidiaries and its contract growers that are operating in the vicinity of the tribal and reservation lands.

Honor the Earth and community members assert a public interest. The Minnesota Environmental Policy Act (“MEPA”) at issue in this case requires environmental review of a proposed industrial row crop operation associated with the R.D. Offutt Company, its subsidiaries and other related parties in the vulnerable Pineland Sands region of Minnesota. The environmental review process at issue in this case must be informed by and has broad implications for people and the environment in the vulnerable

Pineland Sands region, especially impacted individuals and natural resources located on indigenous treaty and reservation lands.

The implications also extend beyond the Pineland Sands region to other areas of rural Minnesota, the Midwest and beyond where individuals, communities and the environment are threatened by unchecked, unsafe and unsustainable industrial, irrigated row crop farm expansion. Through this brief, Amici provides assessment of potentially significant and unassessed environmental harms impacting tribal members in the Pineland Sands region.

TRIBAL WATER RIGHTS

The purpose of these amicus arguments are to raise concerns regarding federally and treaty¹ protected Chippewa Tribal Water Rights and Environmental Jurisdiction, which ultimately require free, prior, informed consent, before the Minnesota Department of Natural Resources (DNR) may grant a regulatory easement or permit across water resources in which the state and Tribes have a common property interests, but separate or individual rights.

To the *Chippewas of the Mississippi*, abundant, clean water is inextricably linked to the self-sufficiency, economic development and

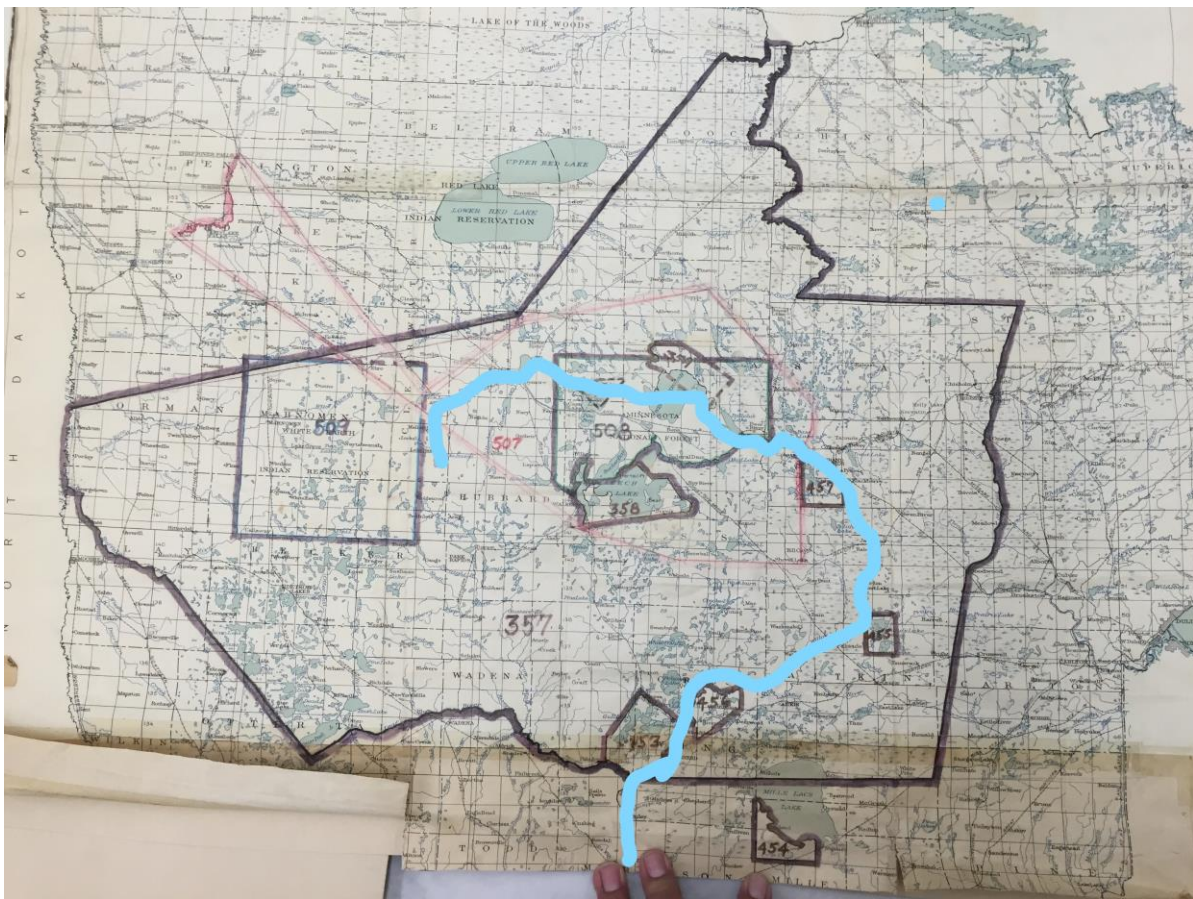
¹ See United States Treaties with the Chippewas 1795-1867 (1795, 1825, 1826, 1837, 1842, 1854, 1855 etc.)

security of present and future generations of northern Minnesota's tribal communities' health and welfare. The upper Mississippi watershed (in light blue on Figure 1), from the Headwaters of the Mississippi River adjacent to White Earth Reservation through the various, original 1855 reservations² (see Figure 2) and ceded territories through Brainerd to St. Cloud, must be recognized as one, long, continuous, first in time, connected chain of reservations. This sacred area is seamlessly linked together as a common. The *Chippewas' of the Mississippi* have priority water property rights under the *Winter's Doctrine*³ in all the upper Mississippi watershed including tributaries, lakes, aquifers, wetlands and natural resources, reserved for the *Chippewas of the Mississippi* to enjoy and protect.

² See also *Menominee Tribe v. United States*, 391 U.S. 404 (1968)(In 1961, Congress terminated the tribe's federal recognition, ending its right to govern itself, federal support of health care and education programs, police and fire protection, and tribal rights to land and transferred the lands to Wisconsin. But the Supreme Court ruled (1968) that the Menominee Indian Tribe kept their historical hunting and fishing rights even after the federal government ceased to recognize the tribe. It was a landmark decision in Native American case law. See current 2019-2021 *Menominee Indian Tribe Fishing Regulations* <https://menominee-nsn.gov/GovernmentPages/Documents/FishingRegulations.pdf>

³ See *Winters v. United States*, 207 U.S. 564 (1908), was a United States Supreme Court case clarifying water rights of American Indian reservations. This case set the standards for the United States government to acknowledge the vitality of American Indian water rights, and how rights to the water relate to the continuing survival and self-sufficiency of American Indian people. See Thorson, John. (2006). "Tribal Water Rights", p. 35-36. University of Arizona Press. ISBN 978-0-8165-2482-2.

Last year, the White Earth Band Natural Resources Director submitted comments⁴ to the Commissioner of MN DNR about these exact concerns with regard to a pipeline permit at the Public Utilities Commission. The comments clearly stated that the agency is required to get prior, informed consent of tribes before taking actions that may impact water quality or resources in the 1855 ceded territory. (See below Figures 2, 3).



⁴<https://whiteearth.com/assets/files/home/news/White%20Earth%20comments%20on%20the%20Line%203%20Replacement%20Project%20to%20MNDNR%20from%20MH.pdf>

An important part of protecting Chippewa sovereign rights is our ongoing struggle to preserve a culture that is best understood in terms of our relationship with the natural environment. There is no economic framework that can properly define the value of manoomin (wild rice) to the Ojibwe people because manoomin is central to Ojibwe cultural identity, spiritual traditions, and physical well-being. Most significant is that wild rice serves as an important indicator species for the ecology of Minnesota's lakes and rivers and provides critical food and habitat to both endemic and migratory species. Tribal members continue to harvest and rely upon manoomin for religious purposes including naming ceremonies, funerals, Midewiwin ceremonies, and various seasonal feasts. These activities are critical components in perpetuating Anishinaabe lifeways and cultural practices, whereby the Ojibwe-Anishinaabe spiritual beliefs mandate the use of certain plants, animals, and fish in ceremonies attendant to hunting, fishing, and gathering activities and these ceremonies ensure the perpetuation of the resources and the physical, mental, and spiritual well-being of the person for bimaadiziwin "living a good life".

**RECORD OF FACTS DEMONSTRATE POTENTIALLY
SIGNIFICANT NEGATIVE ENVIRONMENTAL HARMS
IMPACTING TRIBAL MEMBERS AND TREATY LANDS**

The administrative record contains substantial evidence of potentially significant negative environmental harms likely to impact tribal members and treaty territory. The record demonstrates the potential for significant negative environmental effects including groundwater quality and quantity effects, surface water quality and quantity effects and pesticide drift. AR 349, 374, 482, 484, 486, 497, 711, 783. The record also contains substantial evidence indicating that this project is part of a much larger, 7,000-acre 54-part project proposed by R.D. Offutt Company (RDO) in 2015, which RDO continues to implement today. AR 64, AR 90, AR 484 at 13-15, AR 82, AR203 at ¶ 21 (e). Of note, the record includes the Minnesota Pollution Control Agency's Straight River study (AR 349), which shows 100 times higher nitrate contamination in the straight river compared to non-irrigated areas that retain native forest cover. This river runs through reservation and treaty territory.

Both localized and region wide potentially significant negative environmental effects identified in the record directly threaten tribal rights to hunt, fish, trap and gather wild rice, etc. on treaty territory identified below in Figure 1. However, the evidence in the record also reflects only initial and cursory consideration and then complete disregard for negative environment

effects impacting tribal lands and people. AR 372 at DNR06763, DNR06768.

The below figures 2 and 3 show that tribal treaty territory is coextensive with the potentially significantly impacted Pineland Sands Region.

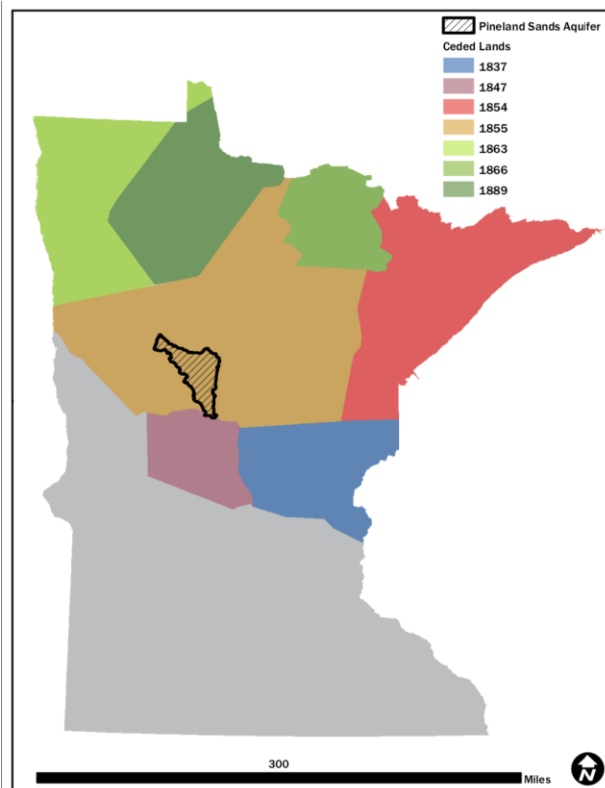


Figure 2.

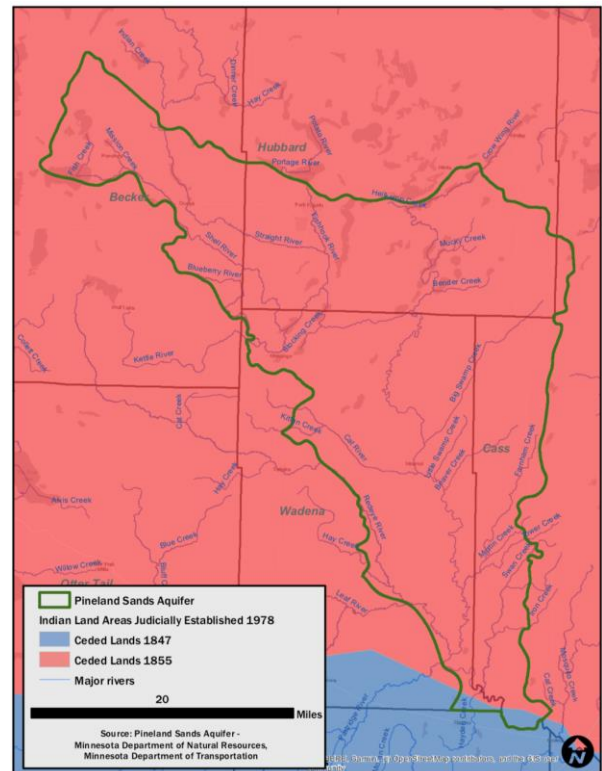


Figure 3.

Despite this evidence of potentially significant negative environmental effects in the record, DNR issued a Negative Declaration on the need for an EIS for the proposed Nolte Family Irrigation Project. AR 711, without any mention of Minnesota Chippewa Tribe's Anishinabe Cumulative Impacts Assessment as resource to consider.

ARGUMENT

MEPA requires that an EIS be ordered if a project has the potential for significant environmental effects. Minn. Stat. 116D.04 Subd. 2a. In evaluating the potential for significant environmental effects, DNR was required to consider the type, extent, and reversibility of environmental effects, including effects to surrounding lands. Minn. R. 4410.1700, Subp. 7A; Environmental Assessment Worksheet Section 9. Tribal lands surround the proposed 303-acre project site as well as the much larger 7,000-acre RDO phased action of which it is a part. However, DNR wholly failed to evaluate any potentially significant effects to tribal lands or the use of the same by tribal members. Accordingly, DNR failed to evaluate the potential for significant environmental effects and its decision should be reversed.

As part of the Line 3 environmental review process the White Earth Band of Ojibwe helped develop and has adopted the Minnesota Chippewa Tribe's *Anishinabe Cumulative Impacts Assessment* (ACIA)⁵ as the White

⁵ The White Earth Band of Ojibwe filed the *Anishinabe Cumulative Impacts Assessment* (ACIA) and Report as part of the Environmental Impact Statement process with Line 3 E-Docket Public Utilities Commission proceedings as filings 20182-140455-01, 20182-140455-02, 20182-140455-03, 20182-140455-04, 20182-140455-05, 20182-140455-06, 20182-140455-07, 20182-140455-08, 20182-140455-09, 20182-140455-10 and 20182-140456-01 REPORT--CONCLUSIONS AND RECOMMENDATIONS filed on the PUC, E-Docket 15-137 on 02/26/2018.

Earth Band's environmental risk and evaluation tool for the meaningful assessment of the short and long term impact of the abandonment of the existing Line 3 pipeline, as well as the impacts from greenhouse gases, climate change and need to protect high quality fresh water resources for fisheries and habitats. The Band reviewed the new corridor route and pipeline abandonment for Line 3 and found the ACIA superior to the Public Utilities Commission's Environmental Impact Statement (EIS) and chose the No Build Alternative. The tribes should have been similarly consulted and their input incorporated into environmental review of the proposed Nolte project and the larger RDO operation of which it is a part.

In addition to required consideration under MEPA, consideration of tribal rights as part of the environmental review process is required under Executive Order 19-24.⁶ Subdivision 5 of the Executive Order provides that “[a]s appropriate, and at the earliest opportunity, each agency will develop and maintain ongoing consultation with Minnesota Tribal Nations related to each area where the agency's work intersects with Minnesota Tribal Nations.” The Executive order further provides in Subdivision 6 that “[a]gencies must consider the input gathered from tribal consultation into

⁶ See https://mn.gov/governor/assets/2019_04_04_EO_19-24_tcm1055-378654.pdf

their decision-making processes, with the goal of achieving mutually beneficial solutions.”⁷

Finally, DNR’s failure to consider the negative environmental harms associated with proposed Nolte Family Irrigation Project, including proposed irrigation permits, deprives Chippewa Tribes and treaty beneficiaries of rights to protect and maintain the abundant, high quality, clean waters necessary for survival. The DNR is regulating Tribal water property rights in violation of Public Law 280 83-280⁸. Public Law 280 specifically exempts from Congress’s federal grant of jurisdiction to Minnesota any authority for

the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

⁷ Executive Order available at: <https://www.leg.mn.gov/archive/execorders/19-24.pdf>

⁸ See (18 U.S.C. § 1162(b) criminal and 28 U.S.C. § 1360(b)) civil grants of jurisdiction exempted from States’.

The DNR's failure to fully evaluate potentially significant effects to tribal water resources, as part of its environmental review, threatens clean waters necessary for manoomin (wild rice), other fisheries and aquatic resources.

CONCLUSION

Because the DNR wholly failed to consider potential effects to tribal rights as part of its environmental review analysis in violation of MEPA, Executive Order and Federal Law, the agency's decision must be reversed.

Respectfully submitted November 20, 2020

/s/ Frank Bibeau

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RESERVATION AND ADDENDUM

Pursuant to Civ. App. Pro. R. 132.01, subd. 3, legal counsel for
Appellant, Frank Bibeau, does hereby certify that the Appellant's Brief is 12
pages in length, contains 2,151 words using Microsoft Word software and
complies with the typeface requirements by using 14 pt.

DATED: November 20, 2020

Respectfully */s/ Frank Bibeau*

ADDENDUM

Executive Order 19-24; Rescinding Executive Order 13-10

Affirming the Government to Government Relationship between the State of Minnesota and Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation

STATE OF MINNESOTA

Executive Department



Governor Tim Walz

Executive Order 19-24; Rescinding Executive Order 13-10

Affirming the Government to Government Relationship between the State of Minnesota and Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation

I, Tim Walz, Governor of the State of Minnesota, by the authority vested in me by the Constitution and applicable statutes, issue the following Executive Order:

It is important to recognize that the United States and the State of Minnesota have a unique legal relationship with federally recognized Tribal Nations, as affirmed by the Constitution of the United States, treaties, statutes, and case law. The State of Minnesota is home to eleven federally recognized Tribal Nations ("Minnesota Tribal Nations") with elected or appointed Tribal Governments.

The State of Minnesota recognizes and supports the unique status of the Minnesota Tribal Nations and their right to existence, self-govern, and possess self-determination.

The State acknowledges that Minnesota Tribal Nations are comprised of a majority of the State's 108,000 American Indians and provide significant employment in the State. Members of the Minnesota Tribal Nations are citizens of the State of Minnesota and possess all the rights and privileges afforded by the State.

The State of Minnesota and the Minnesota Tribal Nations significantly benefit from working together, learning from one another, and partnering when possible.

Meaningful and timely consultation between the State of Minnesota and the Minnesota Tribal Nations will facilitate better understanding and informed decision making by allowing for collaboration on matters of mutual interest and help to establish mutually respectful and beneficial relationships between the State and Minnesota Tribal Nations.

For these reasons, I order that:

1. "Agencies" are defined for purposes of this Executive Order as the following: Department of Administration, Department of Agriculture, Department of Commerce, Department of Corrections, Department of Education, Department of Employment

and Economic Development, Department of Health, Office of Higher Education, Housing Finance Agency, Department of Human Rights, Department of Human Services, Minnesota IT Services, Department of Iron Range Resources and Rehabilitation, Department of Labor and Industry, Minnesota Management and Budget, Bureau of Mediation Services, Department of Military Affairs, Metropolitan Council, Department of Natural Resources, Minnesota Pollution Control Agency, Department of Public Safety, Department of Revenue, Department of Transportation, and Department of Veterans Affairs.

2. All agencies must recognize the unique legal relationship between the State of Minnesota and the Minnesota Tribal Nations, respect the fundamental principles that establish and maintain this relationship, and accord Tribal Governments the same respect accorded to other governments.
3. By June 30, 2019, all agencies will, in consultation with Minnesota Tribal Nations, have implemented tribal consultation policies to guide their work and interaction with Minnesota Tribal Nations and will submit these policies to the Office of the Governor and Lieutenant Governor.
4. Prior to September 1 of each year, every agency will consult with each Minnesota Tribal Nation to identify priority issues in order to allow agencies to proactively engage Minnesota Tribal Nations in the agencies' development of legislative and fiscal proposals in time for submission into the Governor's budget and legislative proposal each year.¹ By October 1 of each year, these priorities will be submitted to the Office of the Governor and Lieutenant Governor for review.
5. As appropriate, and at the earliest opportunity, each agency will develop and maintain ongoing consultation with the Minnesota Tribal Nations related to each area where the agency's work intersects with Minnesota Tribal Nations.
6. Agencies must consider the input gathered from tribal consultation into their decision-making processes, with the goal of achieving mutually beneficial solutions.
7. Each agency must designate a Tribal Liaison to assume responsibility for implementation of the tribal consultation policy and to serve as the principal point of contact for Minnesota Tribal Nations. The Tribal Liaison must be able to directly and regularly meet and communicate with the Agency's Commissioner and Deputy and Assistant Commissioners in order to appropriately conduct government-to-government conversations.
8. The State has instituted Tribal State Relations Training ("TSRT") which will be the foundation and basis of all other tribal relations training sources. All agencies must direct certain staff to complete training to foster a collaborative relationship between the State of Minnesota and Minnesota Tribal Nations. In addition to all

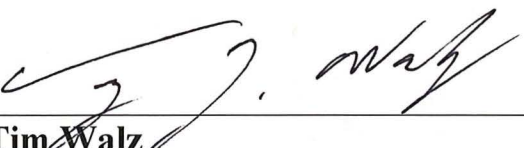
¹ The Department of Iron Range Resources and Rehabilitation will consult with Minnesota Tribal Nations within its service area.

Commissioners, Deputy Commissioners, and Assistant Commissioners, all agency employees whose work is likely to impact Minnesota Tribal Nations will attend TSRT training. Tribal Liaisons will actively support and participate in the TSRT.

9. Nothing in this Executive Order requires state agencies to violate or ignore any laws, rules, directives, or other legal requirements or obligations imposed by state or federal law or set forth in agreements or compacts between one or more Minnesota Tribal Nations or any other Tribal Nation and the State or its agencies. This Executive Order is not intended to, and does not create, any right to administrative or judicial review, or any other right or benefit or responsibility, substantive or procedural, enforceable against the State of Minnesota, its agencies or instrumentalities, its officers or employees, or its subdivisions or any other persons. Nothing in this Executive Order prohibits or limits any state agency from asserting any rights or pursuing any administrative or judicial action under state or federal law to effectuate the interests of the State of Minnesota or any of its agencies.
10. If any provision in this Executive Order conflicts with any laws, rules, or other legal requirements or obligations imposed by state or federal law, state and federal laws will control.
11. Executive Order 13-10 is rescinded.

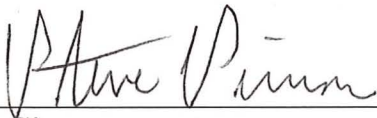
This Executive Order is effective fifteen days after publication in the State Register and filing with the Secretary of State. It will remain in effect until rescinded by proper authority or until it expires in accordance with Minnesota Statutes 2018, section 4.035, subdivision 3.

Signed on April 4, 2019.



Tim Walz
Governor

Filed According to Law:



Steve Simon
Secretary of State

