

Interrelationship of Tribal Environmental and Cultural Resources

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Introduction

David Zoll

Partner

Lockridge Grindal Nauen P.L.L.P.

Natural Resources

- U.S. Laws - Materials or substances such as minerals, forests, water, and fertile land that occur in nature and can be used for economic gain.
- Tribes - All animals, plants, minerals, air, and water are gifts and humans existing within this interconnected ecosystem; not separately from it.

Cultural Resources

- U.S. Laws - Generally include places or things with cultural significance which can be mapped, cataloged, or archived.
- Tribes - Cultural resources include “cultural corridors” such as waterways, portages, and trails; historic villages and camps; gravesites; wild rice waters; maple sugar bush; essential animal habitats; sites where medicinal plants grow, and other sacred places.

Wild Rice and Climate Change

- It may be possible to develop a more resilient plant variety.
- But, is this consistent with its cultural significance?

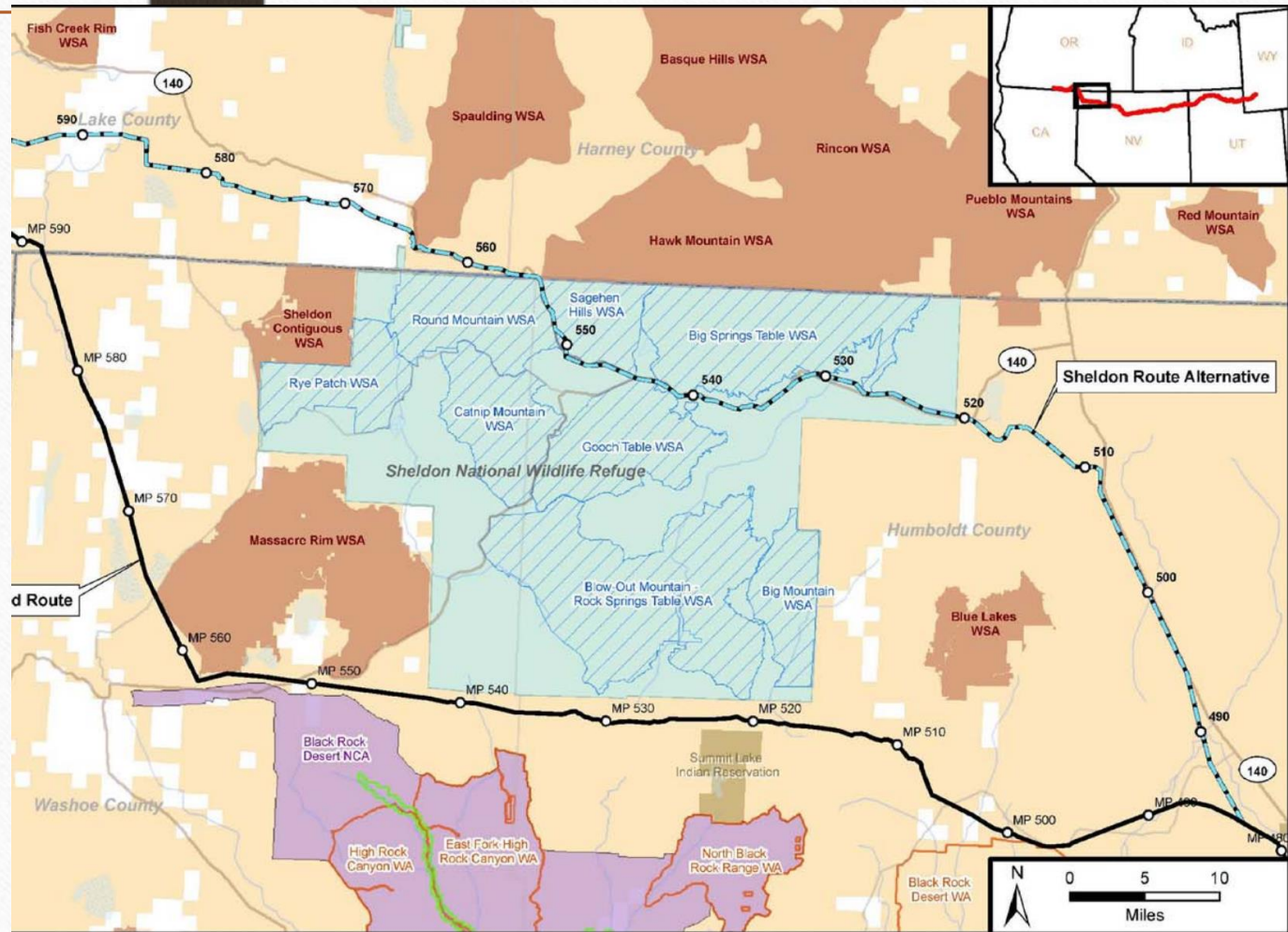
Federal Statutory Schemes

Professor Colette Routel
Co-Director, Indian Law Program
Mitchell Hamline School of Law

Indian Country Projects

- If the development occurs within Indian country (as defined in 18 U.S.C. § 1151), the Indian tribe will likely possess jurisdiction
 - Indian/tribal lands = right to exclude includes right to condition entrance on compliance with tribal laws
 - Non-Indian-owned fee lands = *Montana* exception exceptions
- If the development crosses Indian land, it will likely require tribal / tribal-member approval (e.g., 25 U.S.C. § 324; 25 C.F.R. Part 169 (rights of way))

Ruby Pipeline Project & the Summit Lake Paiute Reservation



LAND MANAGEMENT			
Compressor sites	Bureau of Land Management	Area of Critical Environmental Concern	National Wildlife Refuge Wilderness Study Area
Ruby Pipeline	Bureau of Indian Affairs	BLM Wilderness Area	National Conservation Area
Route Alternative	U.S. Forest Service	FS Wilderness Area	
	U.S. Fish and Wildlife Service National Wildlife Refuge	BLM Wilderness Study Area	

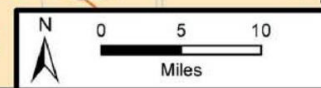
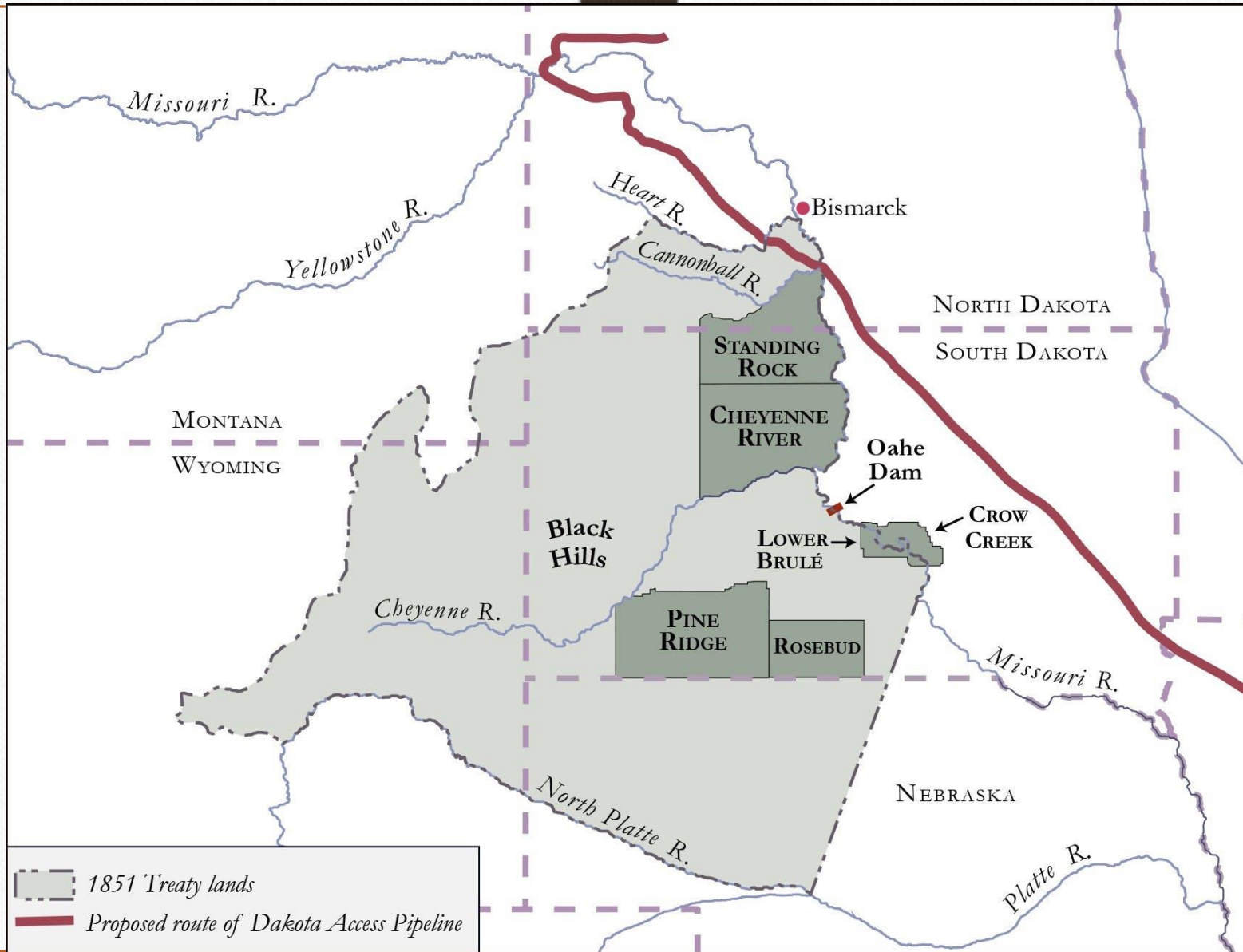




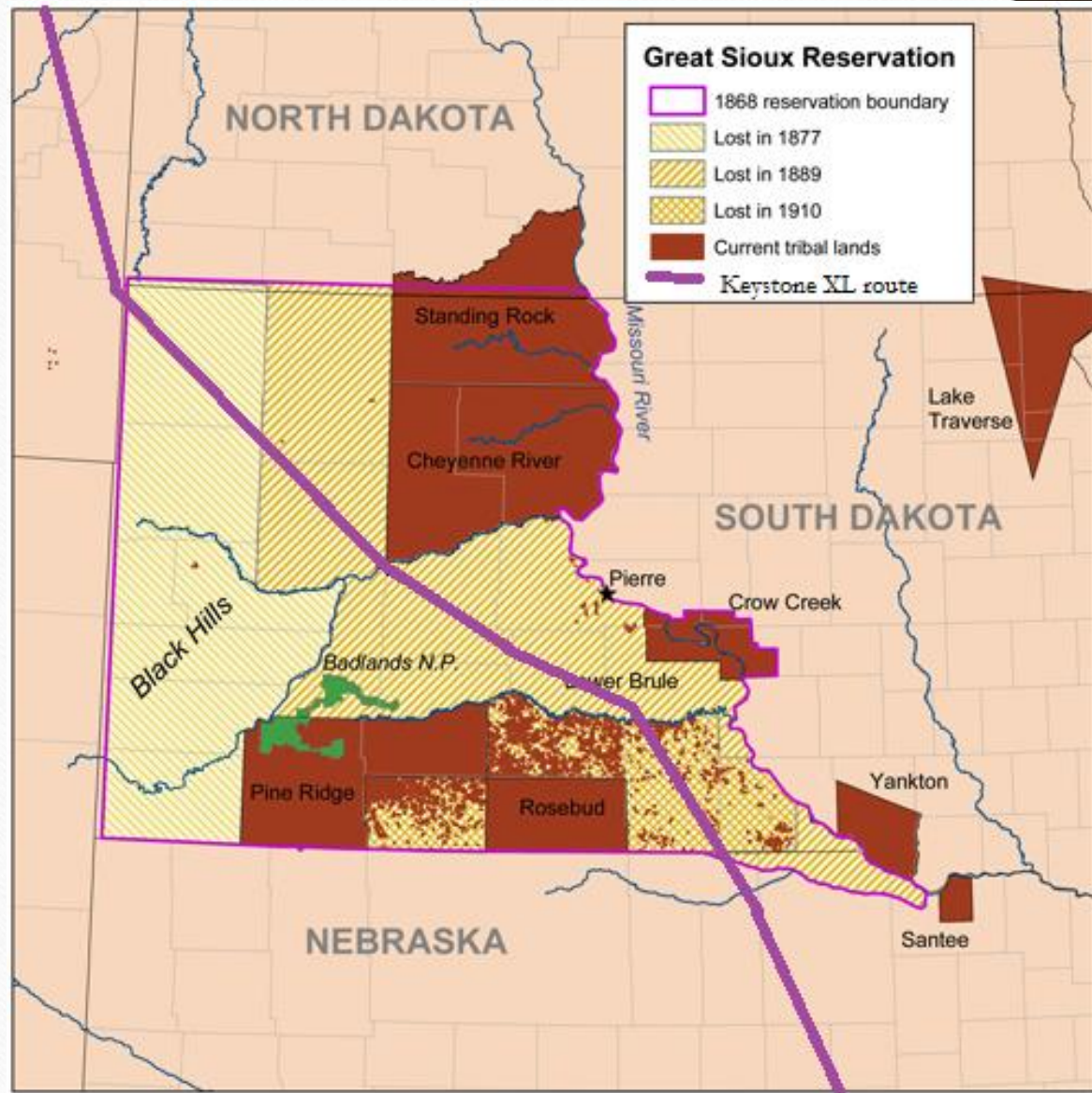
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Sheldon Route Alternative

Ruby Pipeline Project



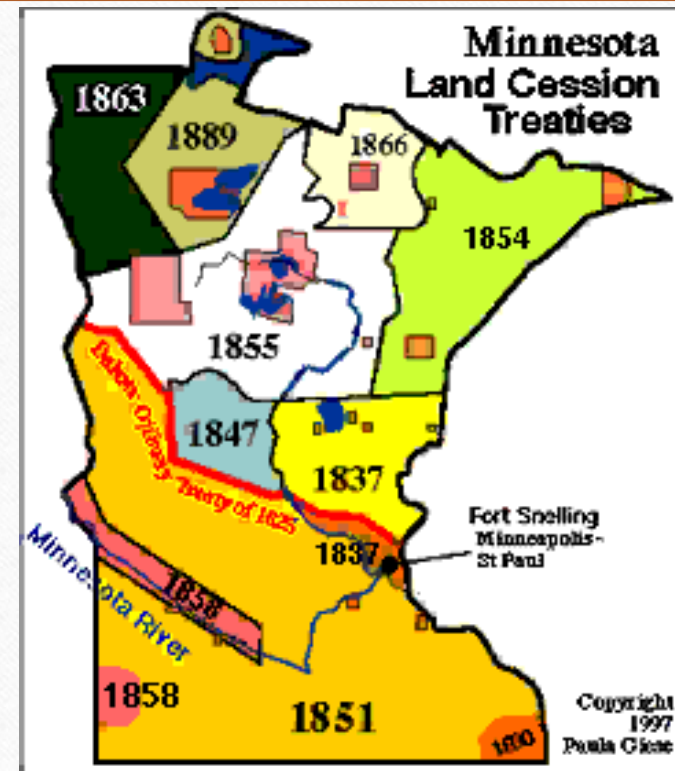
 1851 Treaty lands
 Proposed route of Dakota Access Pipeline



Proposed Route for Keystone Pipeline

Projects Outside of Indian Country

- No tribal approval required
- Likely no tribal jurisdiction
- Impacts often as severe
 - Current/historic territory
 - Water systems
 - Hunting/fishing/gathering rights
- Impacts often never seriously considered or understood by federal officials and project proponents



National Environmental Policy Act: an example

An environmental impact statement is required if the action may significantly affect “the quality of the human environment.”

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. This means that economic or social effects are not intended by themselves to require preparation of an EIS. When an EIS is prepared and economic or social and natural or physical environmental effects are interrelated, then the EIS will discuss all of these effects on the human environment.

40 C.F. R. § 1508.14

National Environmental Policy Act: an example

NEPA Cooperating Agencies:

- Any federal agency with jurisdiction
- Any federal agency with special expertise w/respect to an environmental issue
- Oftentimes state agencies w/jurisdiction or special expertise

Tribes are almost never cooperating agencies except if they are the project proponent.

The “consultation” duty for NEPA is not typically legally enforceable, and as implemented, “consultation” is not the equivalent of cooperating agency status.

Federal Land Ownership: Necessary for Certain Protections

Native American Graves Protection & Repatriation Act

Protections for Native remains and associated funerary objects “excavated or discovered on Federal or tribal lands” after the passage of the Act

NAGPRA § 3, 25 U.S.C. § 3002

Archeological Resources Protection Act

Must obtain a permit to “excavate or remove any archaeological resource located on public lands or Indian lands”

ARPA § 4, 16 U.S.C. § 470cc(a))

Executive Order No. 13007: Indian Sacred Sites

In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.



Antiquities Act of 1906

The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments. . . .

The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

54 U.S.C. § 320301
(formerly 16 U.S.C. § 431)

Bear Ears National Monument



National Historic Preservation Act



Section 106

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, *prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.* The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

“historic property” means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.

1992 Amendments: Traditional Cultural Properties

Property that is eligible for inclusion on the National Register because of its association with cultural practices or beliefs of a living community that are rooted in that community's history and are important to maintaining the community's continuing cultural identity.

Consultation Requirement

Eligibility for inclusion on National Register

- (a) In General. Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.
- (b) Consultation. In carrying out its responsibilities under section 306108 of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a).

52 U.S.C. § 302706

NATIONAL REGISTER BULLETIN

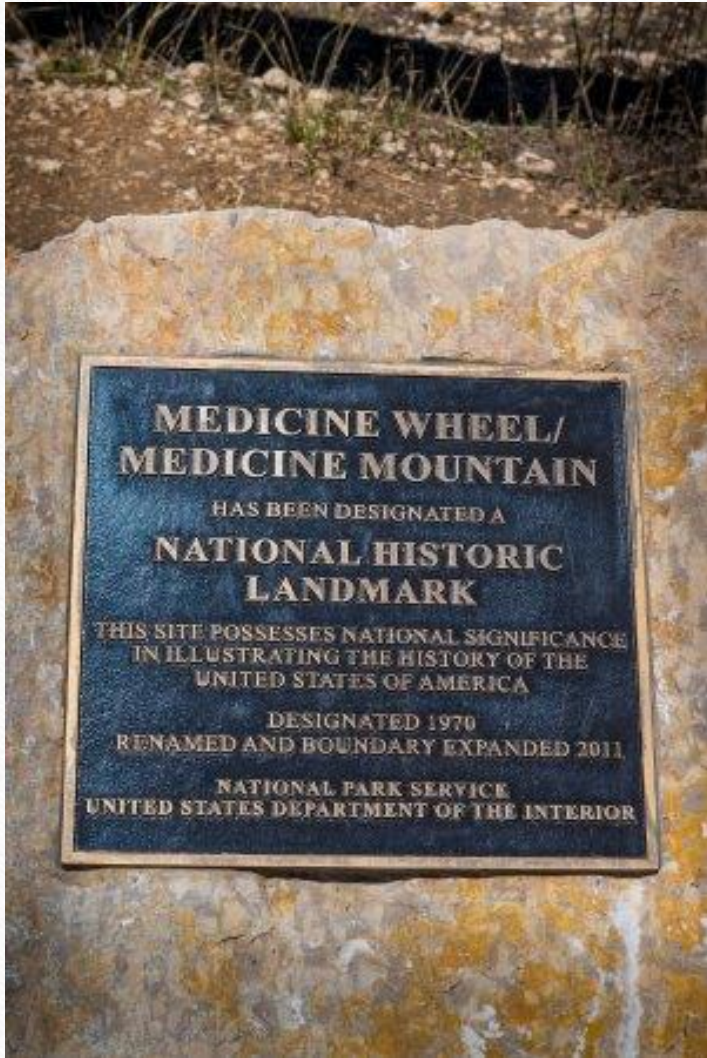
Technical information on the the National Register of Historic Places:
survey, evaluation, registration, and preservation of cultural resources



U.S. Department of the Interior
National Park Service
Cultural Resources
National Register, History and Education

Guidelines for Evaluating and Documenting Traditional Cultural Properties





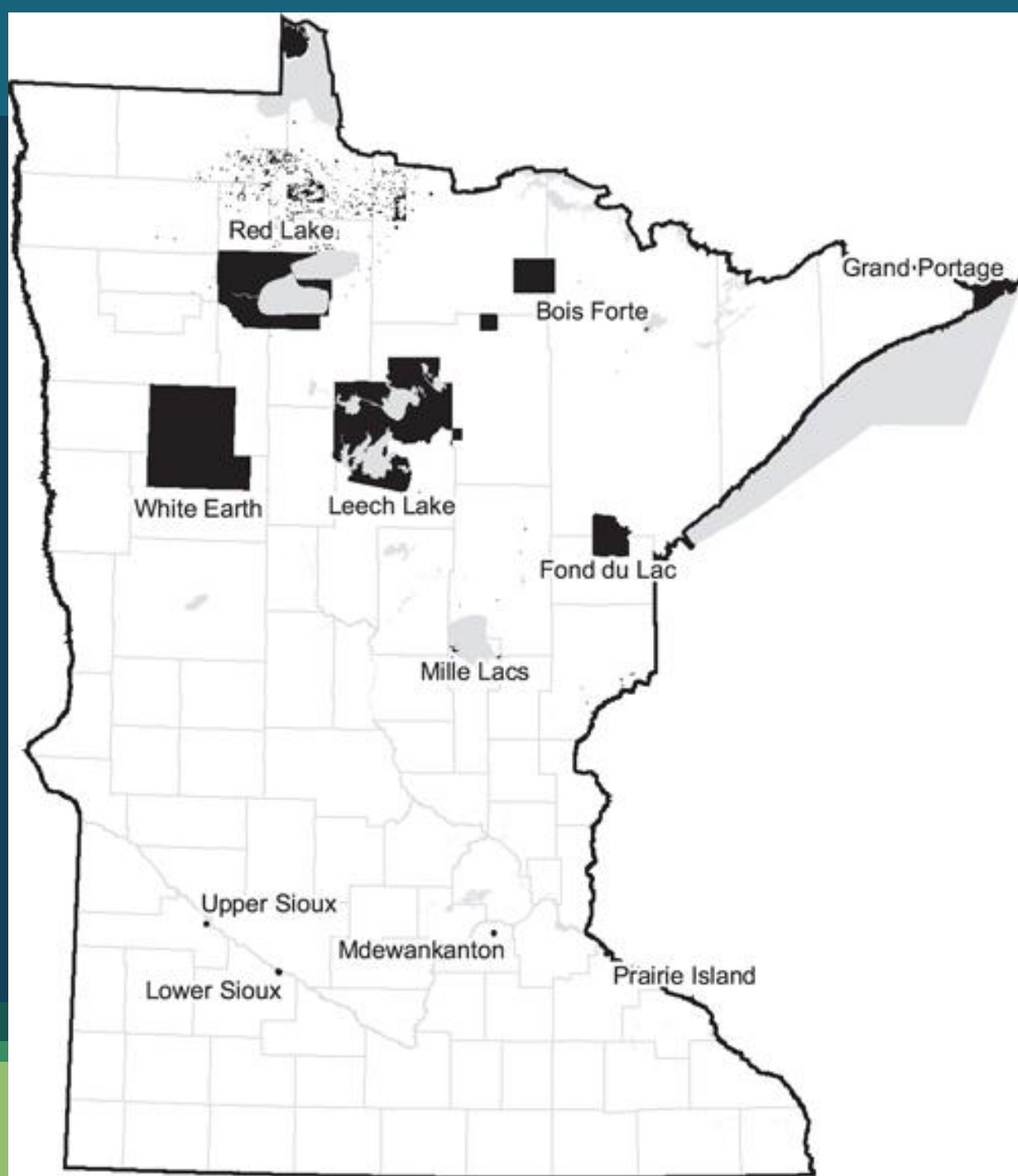
Tribal Involvement in Off-Reservation Project Permitting in Minnesota

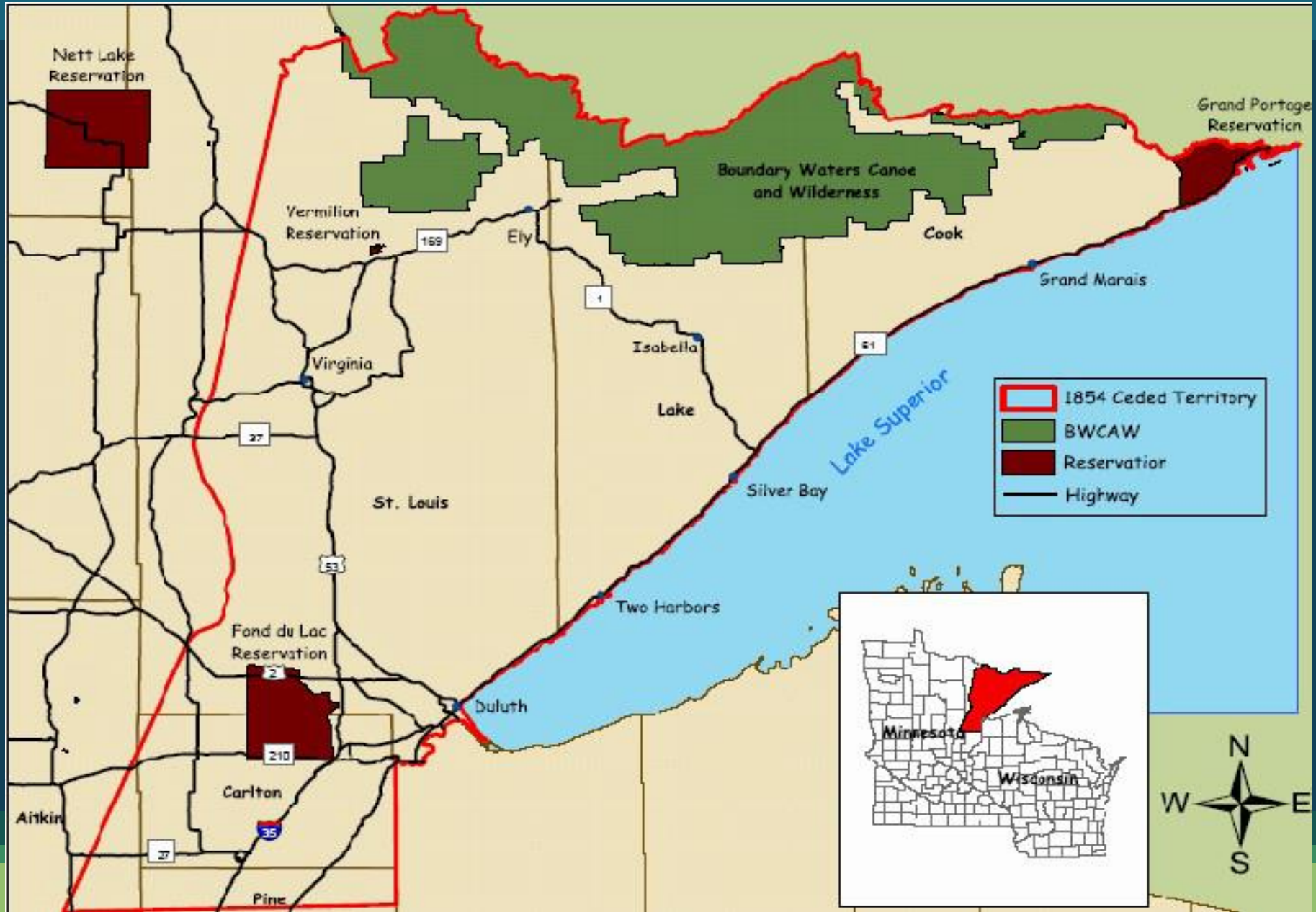
Sara K. Van Norman
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Overview

1. Minnesota Tribes
2. Tribal-State Relationship in Minnesota
3. Rising Tribal Involvement in State Processes







Federally Recognized Tribes in Minnesota

- 11 federally recognized Indian tribes
- Seven Ojibwe/Anishinaabe/Chippewa Tribes:
 - Six Minnesota Chippewa Tribe (“MCT”) Member Bands:
 - Bois Forte Band of Chippewa
 - Fond du Lac Band of Lake Superior Chippewa
 - Grand Portage Band of Lake Superior Chippewa
 - Leech Lake Band of Ojibwe
 - Mille Lacs Band of Ojibwe
 - White Earth Band of Ojibwe
 - Red Lake Band of Ojibwe

Federally Recognized Tribes in Minnesota

(cont.)

Four Sioux Tribes:

- Lower Sioux Indian Community
- Prairie Island Indian Community
- Shakopee Mdewakanton Sioux Community
- Upper Sioux Community

Tribal-State Relationship in Minnesota

- Government-to-government relationship
- State-tribal consultation requirements—EO 13-10 (now being updated)
- Minnesota Indian Affairs Council
- Co-management between DNR and 1837 and 1854 Bands for Ceded Territory resources
- Tribal liaisons coming in most Cabinet Agencies, along with tribal-state relations training
- Trend of reading MEPA and state historic preservation laws with tribal resources in mind
- Also, Lt. Gov. Peggy Flanagan (White Earth Band of Ojibwe)!

Rising Tribal Involvement in State Permit Processes

- Minnesota tribes now have developed natural resource departments, THPOs; provide comments on draft permits; intervene in contested cases; and appeal permits for large, off-reservation projects with potential to impact tribal resources.
- MEPA, state historic properties laws, and specific permitting rules require evaluation of project impacts on historic, cultural, and natural resources—and there is no carve-out for tribal impacts.

Thanks! Questions?



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