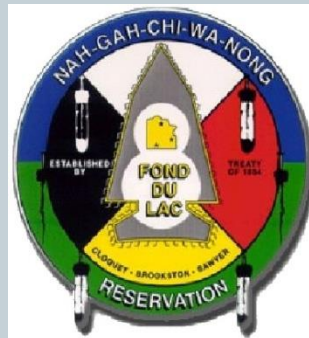


# Fond du Lac Band of Lake Superior Chippewa

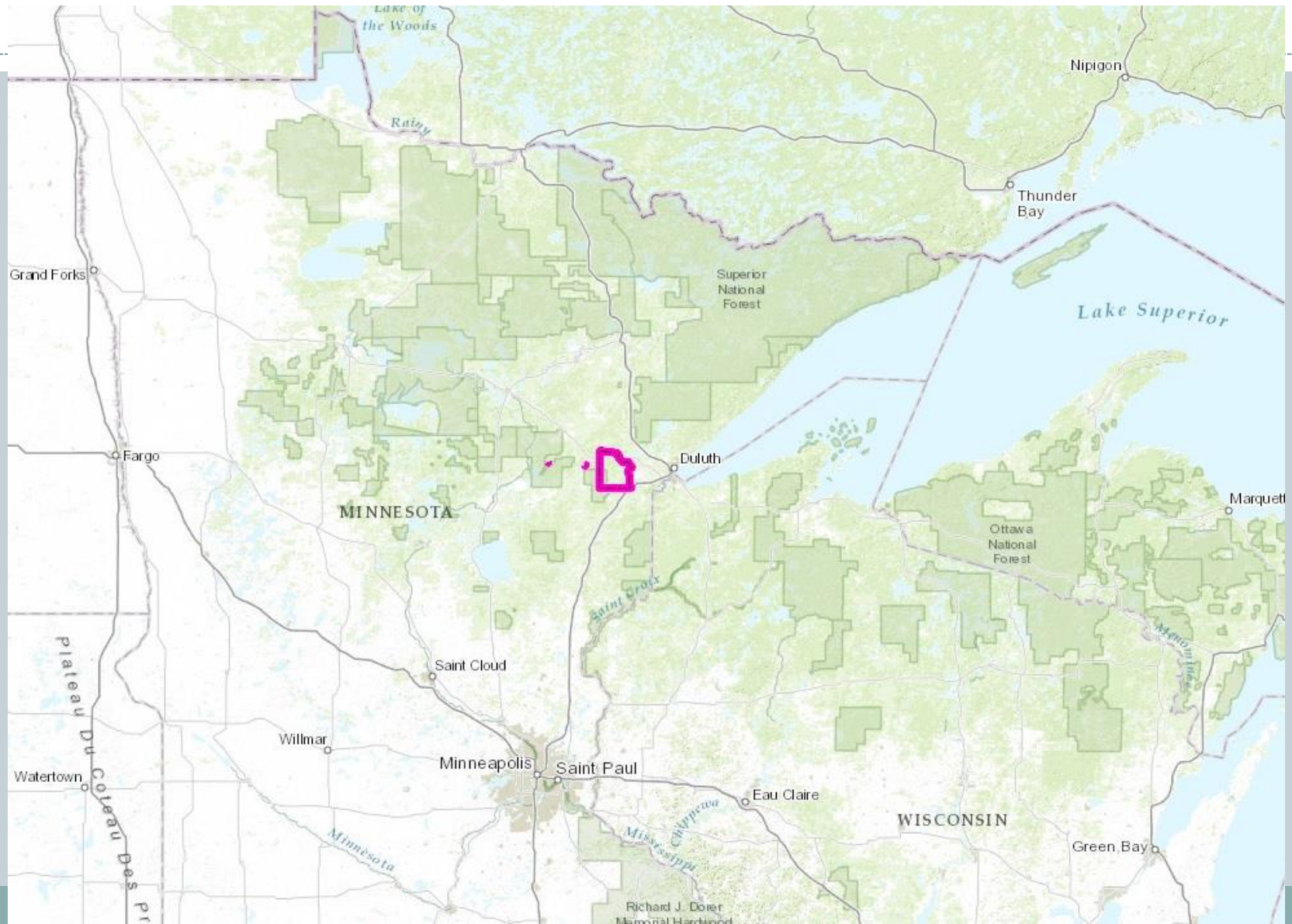


**CLEAN WATER ACT SECTION 404 ASSUMPTION  
ANALYSIS AND UNIQUE TRIBAL ISSUES**

**RICHARD GITAR  
WATER REGULATORY SPECIALIST  
FOND DU LAC OFFICE OF WATER PROTECTION**



# Where is Fond du Lac?



# Fond du Lac Reservation



- Established by Treaty of La Pointe (1854)
- 101,500 acres in size (approx. 42,000 Indian owned)
- Population approx. 4,200 (1,800 FdL members)
- 108 Water Bodies (24 named lakes) (2,850 acres)
- 8 Wild Rice Waters (828 acres)
- St. Louis River (approx. 20 miles of Reservation)
- Approx. 19 Streams (total = 67+ miles)
- Numerous Ditches (Judicial Ditches = 47 miles)
- 6,310 Wetlands (42,581 acres)
- 47% of the FdL Reservation is an aquatic resource (AR)
- All ARs mapped and assigned unique ID #
- All ARs have LLWW coding (Landscape position, Landform, Water flow path, Water body type)

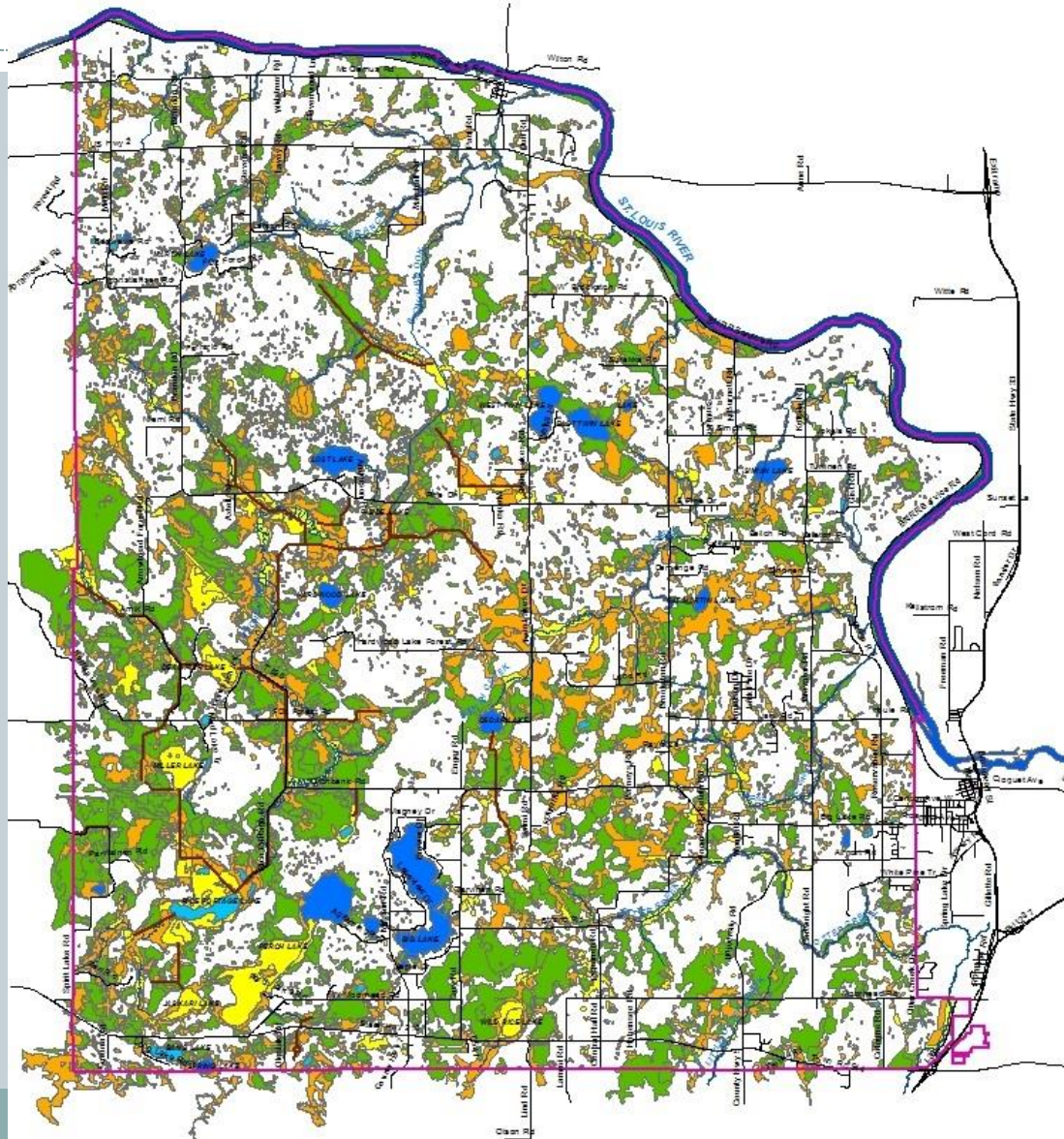
# Fond du Lac Regulatory



- Water Quality Standards established in December 1998
- 401 Water Quality Certification established in March 2006
- Wetland Regulatory Program established in June 2006
- Other regulations include Land Use, Solid Waste, and Air Quality



# Fond du Lac Aquatic Resources



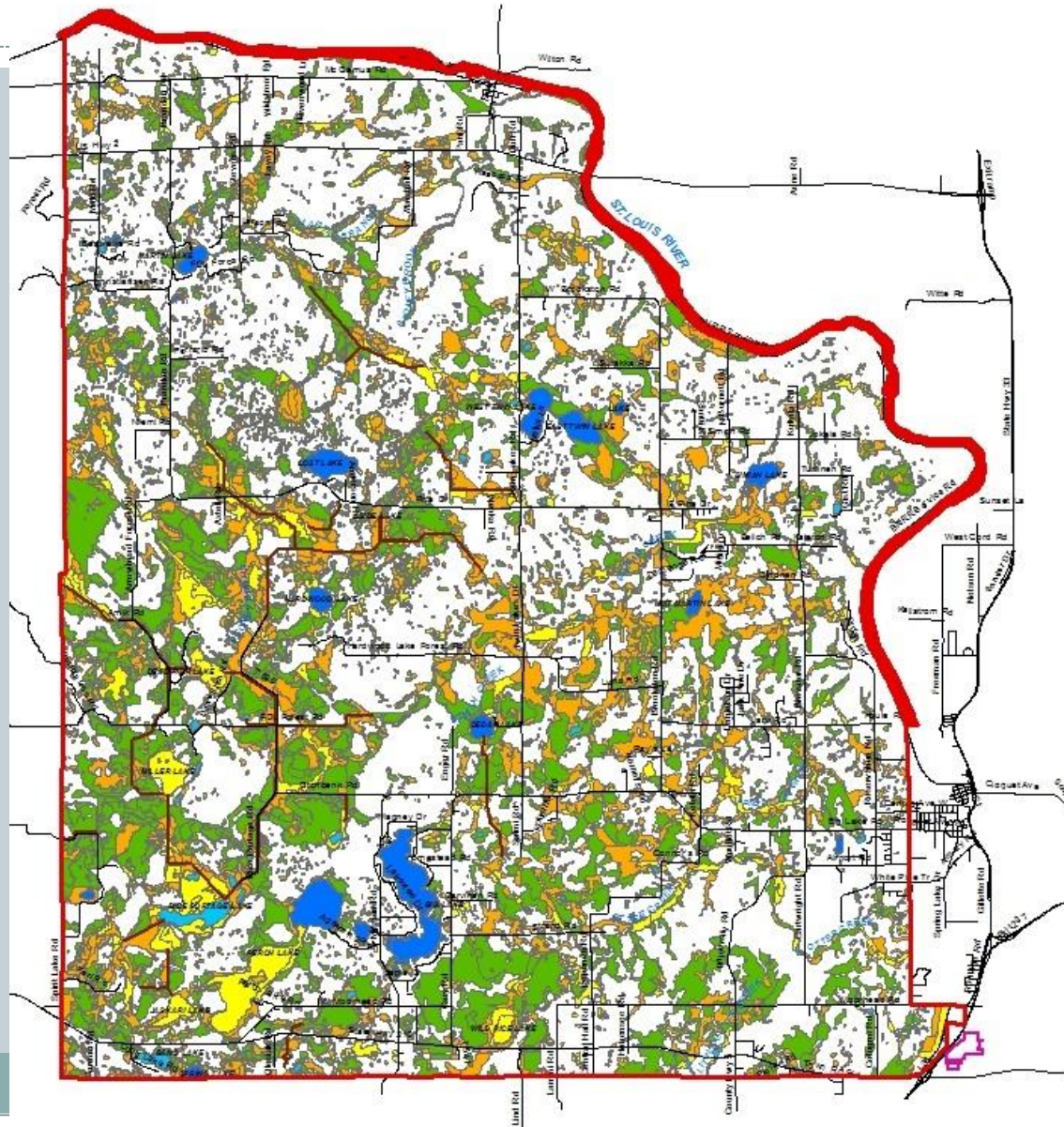
# Assumption Analysis – Retained by USACE



- The St. Louis River (forms the northern and portion of the eastern Reservation boundary) is a navigable water (Section 10 Water)
- Identified by USACE St. Paul District in “Navigable Waters of the United States in Minnesota” (12/30/2004)\*
- While the document identifies some lakes and tributaries to navigable waters, no lakes or tributaries on the Reservation are identified as also being navigable waters other than the St. Louis River
- \* [www.mvp.usace.army.mil/Portals/57/docs/regulatory/RegulatoryDocs/mn\\_nav\\_waters.pdf](http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/RegulatoryDocs/mn_nav_waters.pdf)



# Fond du Lac - Section 10 Waters



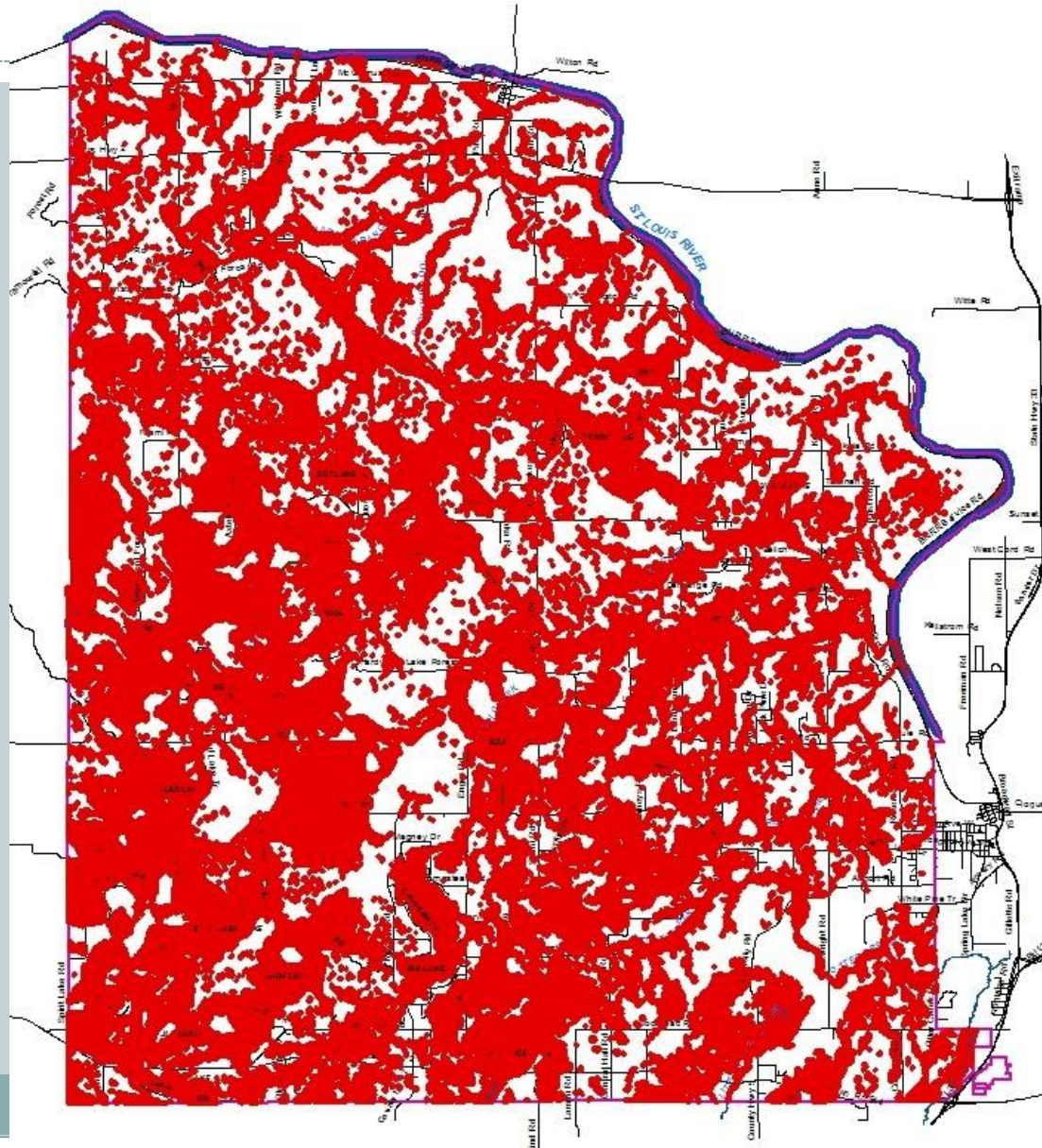
# Assumption Analysis – Assumable by FdL



- All Reservation lakes
- All Reservation streams
- All Reservation ditches
- Nearly all Reservation wetlands (other than “adjacent wetlands”)
- Jurisdiction regardless of land ownership
- Based upon the “Montana Test”



# Fond du Lac – Assumable Waters



# The “Montana Test”



- **Montana v United States** (SCOTUS decision 1981)
- The case was basically whether a tribe (in this case the Crow Tribe of Montana) could prohibit non-Indians from hunting and fishing within the external boundaries of the reservation.
- **The court ruled:** *“The Tribe's "inherent sovereignty" does not support its regulation of non-Indian hunting and fishing on non-Indian lands within the reservation...Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members...exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”*

# The “Montana Test” continued



- **Montana Test:** *“A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the **health or welfare** of the tribe.”*  
(Montana v United States (1981) No. 79-1128)(Emphasis added)

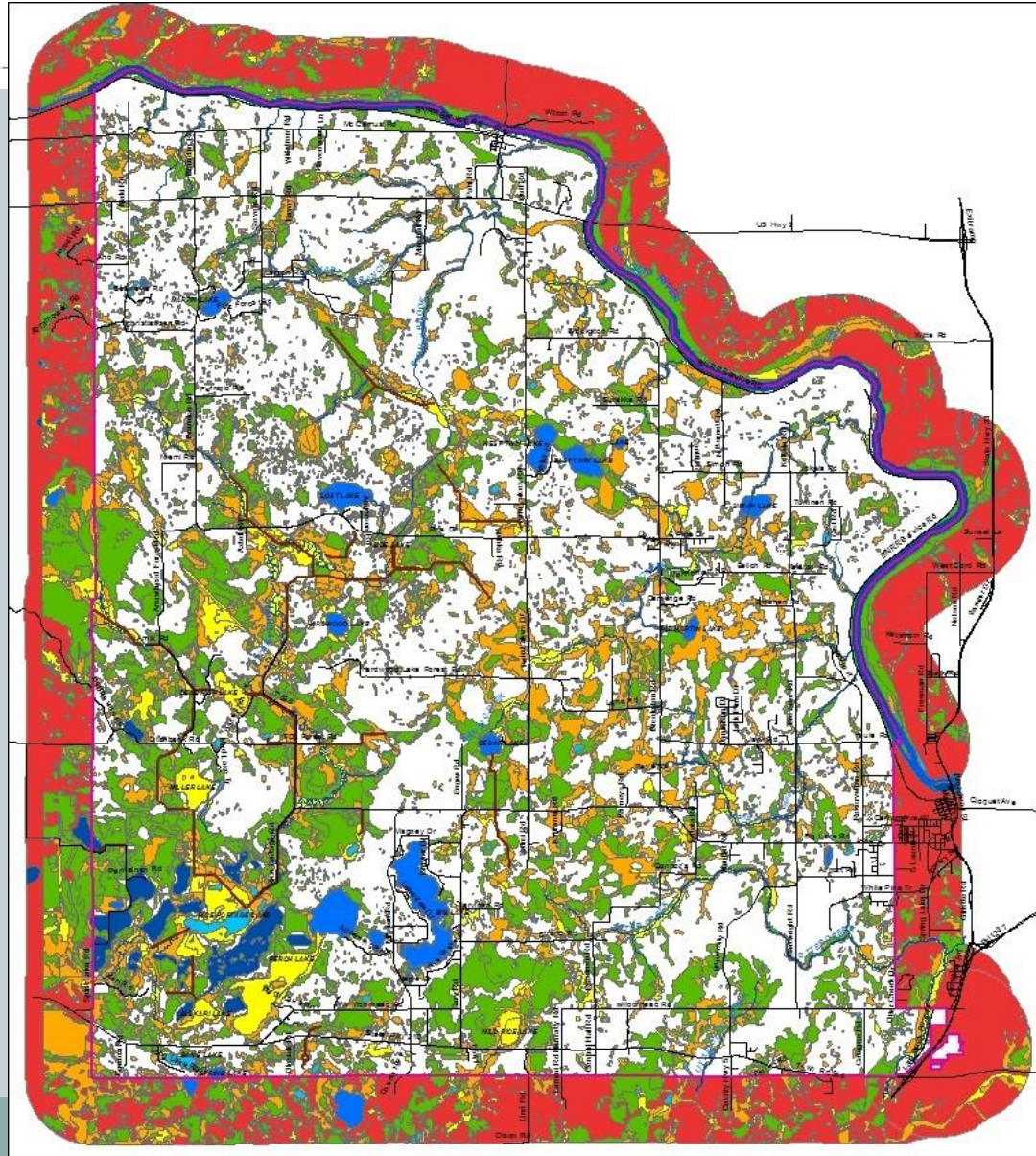
# Additional Issues – Reservation Boundary



- Boundaries of Indian Reservations are not necessarily static
- *“The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, **or to add such lands to existing reservations:** Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.”* (25 U.S. Code § 467 – Indian Reorganization Act of 1934) (Emphasis added)



# Land Purchases Extending Rez Boundary



# Additional Issues – T.A.S.



- Additional step required by Tribes
- TAS (Clean Water Act § 518(e))
  - Treatment As a State
  - Treatment in a similar manner As a State
  - Treatment As a Sovereign
- Basically – Tribes must “prove their existence” before “assuming” any administrative or regulatory program, including the Clean Water Act (§ § 104, 106, 303, 305, 308, 309, 314, 319, 401, 402, 404, 406)

# TAS Steps



- Tribe must prove it is a “Federally Recognized” Indian Tribe.
- Tribe must show it has a government able to enact laws, regulations, ordinances, etc.
- Tribe must demonstrate it has jurisdiction over the resource it wants to regulate.
- Tribe must demonstrate the capability to administer the program it wants to regulate.
- Each program the Tribe wants to “assume” it must submit a separate TAS application.

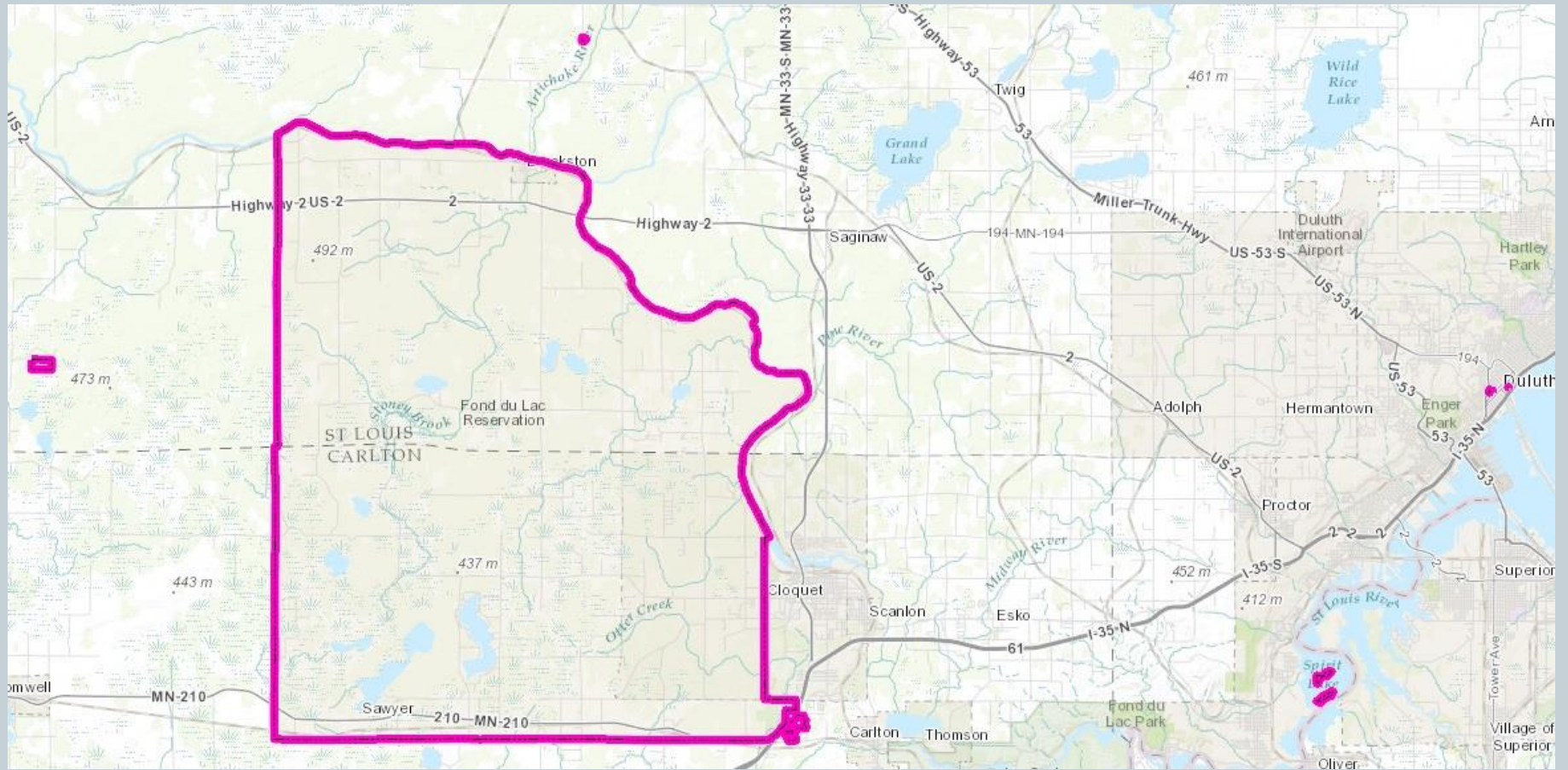
# Additional Issues – Additional Properties



- Some Tribes own properties outside of their Reservation boundaries (some not contiguous)
- Fond du Lac believes these properties can be included in Clean Water Act programs
- *“the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust of Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and” (CWA § 518(e)(2)*



# Additional Fond du Lac Lands



# Additional Fond du Lac Lands



# Additional Issues - Enforcement



- Enforcement of non-band members is difficult
- Tribes cannot take a non-band member into Tribal Court
- For its current wetland regulatory program, Fond du Lac relies on its federal partners (USACE, EPA, DOJ) to take the lead in enforcement, but does have Wetland Inspection Authority under CWA § 308 and an MOU between EPA and Fond du Lac
- Fond du Lac also relies on the Minnesota Wetland Conservation Act LGU for enforcement on non-tribal lands on the Reservation
- Fond du Lac stresses “voluntary cooperation” in its Wetland Protection and Management Ordinance (WPMO)

# Questions?



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# Assumption Analysis - Questionable



- Where do “adjacent wetlands” end?
- Some wetlands directly adjacent to St. Louis River (most likely retained by USACE)
- Other wetlands very near St. Louis River (but above the OHWM) that directly drain into the river (maybe retained by USACE)
- Other wetlands very near St. Louis River (but above the OHWM) and separated by a raised railroad grade (some have culvert connections other do not) (???)

# Adjacency Issues

