

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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THE STATE OF MICHIGAN, GOVERNOR  
OF THE STATE OF MICHIGAN, and  
MICHIGAN DEPARTMENT OF NATURAL RESOURCES, No. 1:20-cv-01142-JTN-RSK

Plaintiffs,

v.

HON. JANET T. NEFF

ENBRIDGE ENERGY, LIMITED  
PARTNERSHIP; ENBRIDGE ENERGY  
COMPANY, INC.; and ENBRIDGE  
ENERGY PARTNERS, L.P.,

Defendants.

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**AMICUS CURIAE BRIEF OF BAY MILLS INDIAN COMMUNITY, GRAND  
TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, LITTLE TRAVERSE  
BAY BANDS OF ODAWA INDIANS, AND NOTTAWASEPPI HURON BAND OF  
POTAWATOMI IN SUPPORT OF PLAINTIFFS' MOTION TO REMAND**

*Amicus curiae* Bay Mills Indian Community (“Bay Mills”), Grand Traverse Band of Ottawa and Chippewa Indians (“GTB”), Little Traverse Bay Bands of Odawa Indians (“LTBB”), and Nottawaseppi Huron Band of Potawatomi (“NHBP”) (collectively, the “Tribal Amici”) respectfully submit this brief in support of the Motion To Remand filed by Plaintiffs State of Michigan, Governor Gretchen Whitmer, and the Michigan Department of Natural Resources (collectively, “Michigan” or “the State”).<sup>1</sup>

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<sup>1</sup> Counsel for Tribal Amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than Amici, its members, and their counsel has contributed financially to the submission of this brief.

## INTRODUCTION

On November 13, 2020, Governor Whitmer and the Michigan Department of Natural Resources (“DNR”) issued a Notice of Revocation and Termination that revoked and terminated a 1953 easement that allows the Defendants<sup>2</sup> the right to operate the Line 5 pipeline through the Straits of Mackinac. Contemporaneously, the State initiated this action in the Ingham County Circuit Court to enforce the revocation and termination. Enbridge then removed the case to this Court.

The Tribal Amici agree with the State that Enbridge has failed to assert a proper basis for removal and that the matter should be remanded to Ingham County Circuit Court. The State’s claims are grounded entirely in state law. Indeed, the State’s actions that are the subject of the lawsuit are a legitimate exercise of its authority, *under state law*, to protect land, waters and treaty-protected resources that have deep cultural, spiritual, and economic significance to the Tribal Amici. Defendants’ removal efforts have no credible basis in the law. Tribal Amici, therefore, urge this Court to grant the State’s Motion To Remand.

## STATEMENT OF INTEREST AND HISTORICAL BACKGROUND

The Tribal Amici are four sovereign nations that have relied upon and vigorously fought to protect the land and waters through which Line 5 runs. Their interests in the Great Lakes and Straits of Mackinac long predate the construction of Line 5. The Tribal Amici have inhabited the lands of present-day Michigan and fished the waters of the Great Lakes and the Straits for subsistence and commerce since time immemorial. They have a long-standing concern about the risk of an oil spill from Line 5 in the Straits of Mackinac. In 2017, all twelve federally

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<sup>2</sup> The Defendants are referred to collectively herein as “Enbridge.” The 1953 easement at issue in this case was granted to the Lakehead Pipe Line Company, Inc. The State alleges, and Enbridge does not dispute, that Enbridge is the corporate successor to Lakehead Pipe Line Company.

recognized tribes in Michigan – including the Tribal Amici – detailed those concerns in formal comments to a draft analysis of alternatives to the dual-pipelines in the Straits. *See* “Tribal Comments on Dynamic Risk Draft Alternatives Analysis,” from Levi Carrick, Sr, President, Bay Mills Indian Community, et al., to Rick Snyder, Governor, State of Michigan et al., (Aug. 1, 2007), <https://turtletalk.files.wordpress.com/2017/08/tribal-comments-on-dynamic-risk-draft-alternatives-assessment.pdf> (last visited Mar. 29, 2021).

Three of the four Tribal Amici – Bay Mills, GTB, and LTBB – have interests in the Great Lakes and Straits of Mackinac that are protected by an 1836 treaty with the United States *See* Treaty of March 28, 1836, 7 Stat. 491 (the “1836 Treaty”). NHBP is not a successor in interest to signatories of the 1836 Treaty, but the tribe and its members rely on the same natural resources that are the subject of the treaty. And, as discussed below, NHBP has a unique perspective on the issues presented in this case because the rupture of Enbridge’s Line 6B pipeline and the resulting crude oil spill into the Kalamazoo River watershed in 2010 occurred in the heart of NHBP’s ancestral homeland.

The 1836 Treaty provides important historical context in understanding the Tribal Amici’s connection to the Straits of Mackinac and the surrounding area. In the 1836 Treaty, the Ottawa (alternatively, “Odawa”) and Chippewa ceded to the United States about half of the land and water that would become the State of Michigan – approximately 14 million acres of land and inland waters and 13 million acres in Lakes Michigan, Huron and Superior. This area, pictured in the map below, is known as the Ceded Territory.



The tribes only agreed to this vast cession of their ancestral home upon assurance that they would have the continued ability to exercise their inherent rights, reserved unto themselves by the Treaty, to hunt, fish, and gather throughout the Ceded Territory. *Id.* The promise of continued and permanent fishing rights in the Great Lakes, as well as hunting, fishing, and gathering within the inland portions of the Ceded Territory, formed the linchpin of the 1836 Treaty, paving the way for Michigan’s statehood. At the time of the 1836 Treaty, the Tribal Nations relied heavily on the fishery resources of the Upper Great Lakes for subsistence and as a form of commerce. *See* “Tribal Comments on Dynamic Risk Draft Alternatives Analysis,” at 7, (citing *United States v. Michigan*, 471 F. Supp. 192, 235–36, 253, 259 (W.D. Mich. 1979)).

The 1836 Treaty Tribes<sup>3</sup> have fiercely protected their Treaty fishing rights and other natural resources upon which their Treaty rights depend. Specifically, with respect to the Great Lakes waters in the Ceded Territory, Bay Mills, GTB, LTBB, and other 1836 Treaty Tribes, beginning in 1973, litigated *United States v. Michigan*, 2:73-CIV-26 (W.D. Mich.), to confirm the continued right of members of the 1836 Treaty Tribes to engage in commercial and subsistence fishing in Lakes Huron, Michigan, and Superior. After six years of extensive discovery, historic analysis, and a lengthy trial, the Court issued its seminal decision in 1979 in which it upheld the 1836 Treaty Tribes' continued right to fish for commercial and subsistence purposes throughout the Ceded Territory. The Court explained that these were aboriginal rights that were affirmed and reserved in the Treaty. *United States v. Michigan*, 471 F. Supp 192 (W.D. Mich. 1979).

The Tribal Amici's relationship with the land, water, and wildlife has sustained and defined their communities and continues to do so through this day. Members of Tribal Amici have sustainably harvested fish in northern Lakes Michigan, Huron, and the Straits, and hunted, fished, and gathered medicines throughout Michigan lands, for subsistence and commerce for many centuries. These rights remain critical to the Tribal Amici today. Today, the waters of the Straits of Mackinac are among the most important and productive in all the Ceded Waters for Tribal fishers. *See* "Tribal Comments on Dynamic Risk Draft Alternatives Analysis," at 9. Furthermore, fishing and fish are intertwined with cultural and spiritual practices and the ways in which the Tribal Amici's teachings are passed down through generations.

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<sup>3</sup> Bay Mills, GTB, and LTBB, as well as the Sault Ste. Marie Tribe of Chippewa Indians and the Little River Band of Ottawa Indians are successors to the signatories of the 1836 Treaty and are collectively known as "the 1836 Treaty Tribes."

Tribal Amici are deeply concerned about the risk of an oil spill from Line 5. Such a spill poses a grave threat to their right to fish, hunt and gather in the Ceded Territory and to the natural environment needed for fish, other animals, and plants to thrive. Indeed, the existence of the Treaty rights depends on underlying resources, such as clean water and plant habitats to support fish and game.

Tribal Amici's fears are not theoretical. As noted above, in 2010, a breach of Enbridge's Line 6B pipeline, installed in 1969, spilled approximately 840,000 gallons of crude oil near Marshall, Michigan. The Line 6B spill destroyed Talmadge Creek, a 30-35 mile span of the Kalamazoo River, and floodplains, wetlands, and islands. The cleanup of the Kalamazoo River spill cost at least \$1.2 billion dollars over a six-year period and required more than 2000 personnel. This catastrophe occurred in the heart of NHBP's homelands. Information about the devastating impact of the spill and its residual effects is collected and maintained by the Michigan Department of Environment, Great Lakes, and Energy, who partnered with the United States Environmental Protection Agency in overseeing early response efforts. *See Oil Spill News and Updates*, Mich. Dep't of Env't, Great Lakes, and Energy, [https://www.michigan.gov/egle/0,9429,7-135-3313\\_56784---,00.html](https://www.michigan.gov/egle/0,9429,7-135-3313_56784---,00.html) (last visited Mar. 29, 2021).

Tribal Amici fear that the consequences of a spill in the Straits of Mackinac could visit even worse destruction on the natural and cultural resources that are central to their ways of life. The fear of a spill in the Straits of Mackinac is not speculative,<sup>4</sup> as evidenced by a June 18, 2020

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<sup>4</sup> Tribal Amici discussed the likelihood of a spill in the "Tribal Comments on Dynamic Risk Draft Alternatives Analysis," at 2: "[T]he odds of a rupture of the Straits Pipelines are undeniably high. The Draft Report discusses those odds in mathematical/engineering terms that are somewhat obscure. *See* Draft Report at 2-105–2-108. However, at the July 6, 2017, meeting in Holt,

Line 5 accident in the Straits of Mackinac. The accident, which involved significant damage to one of the many anchor supports used to secure Line 5, prompted the Ingham County Circuit Court to issue a Temporary Restraining Order shutting down Line 5 during the pendency of the investigation. In reaching its decision to grant the request for emergency relief, the Court reasoned that “the severe risk of harm” from an oil spill was “so substantial and irreparable, and endangers so many communities and livelihoods, and the natural resources of Michigan, the danger far exceeds the risk of financial loss to the defendants.” Temporary Restraining Order, *Nessel v. Enbridge Energy*, No. 19-474-CE (Ingham County Cir. Ct. Michigan, June 25, 2020), Exhibit A.<sup>5</sup>

The potential consequences of a spill are cause for grave concern. The 2010 Kalamazoo spill affected 30-35 miles of shoreline of a non-major inland watershed and resulted in the costliest inland oil spill in American history. By comparison, the recent State-commissioned study performed under the leadership of Michigan Technological University (“Michigan Tech”), and contributed to by an array of respected experts, estimates that up to *a thousand miles* of Great Lakes shoreline are at risk of exposure to a spill at the Straits, with devastating impacts to critical habitat, fish and wildlife, and myriad sensitive ecological relationships. *See, e.g.,* Michigan Technological Institute, *Independent Risk Analysis for the Straits Pipelines, Draft Final Report, Executive Summary* at 23 (July 16, 2018), <https://mipetroleumpipelines.org/sites/mipetroleumpipelines.org/files/user/documents/Executive>

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Michigan, the project’s Chief Engineer stated clearly that, based on the figures set forth in the Draft Report, the odds of a spill from the Straits Pipelines in the next 35 years are not one in a million, or one in a thousand, or even one in a hundred. They are *one in sixty*.”

<sup>5</sup> As the State notes in its Motion To Remand, the allegations in *Nessel v. Enbridge Energy, Ltd.*, are, to some extent, similar to those made in this case. Yet, Enbridge did not remove that case to federal court.

[Summary-Risk Analysis-draft.pdf](#) (last visited Mar. 29, 2021); *see also id.* at 22–30 (discussing impacts).

The Michigan Tech analysis concluded that the most “useful analogies for ecological impacts” of a Straits oil spill are the “Deepwater Horizon and Exxon Valdez spills.” *Id.* at 3. These events are, of course, environmental catastrophes of historic infamy; but a Straits spill would pose an additional threat that those spills did not: while “marine spills do not have the risk of contaminating drinking water supplies,” *id.*, *more than thirty-five million people* rely on the Great Lakes for drinking water. *See* James Clift, *In the Great Lakes State, Water is a Core Tenet of EGLE’s Mission and Vision*, Mich. Dep’t of Env’t, Great Lakes, and Energy, <https://www.michigan.gov/mienvironment/0,9349,7-385-90161-538646--,00.html> (last visited March 29, 2021).

In summary, the Straits of Mackinac are a sacred wellspring of life and culture for Tribal Amici and other Indian tribes in Michigan. An oil spill into those waters would be culturally, economically, spiritually, and historically devastating.

## ARGUMENT

### **I. BY REVOKING AND TERMINATING THE 1953 EASEMENT, MICHIGAN IS EXERCISING ITS RESPONSIBILITY AND RIGHT, *UNDER STATE LAW*, TO PROTECT THE TRIBAL AMICI’S RIGHTS AND RESOURCES.**

Tribal Amici agree with the State’s sound arguments regarding why this matter should be remanded to the Ingham County Circuit Court. The Tribal Amici submit this brief argument to highlight a consideration of particular importance. The State’s actions in protecting the Straits of Mackinac and the Great Lakes are a legitimate and appropriate exercise of the State’s authority under Michigan law. As they declared in the Notice of Revocation and Termination, the Governor and DNR acted, in part, to safeguard the Tribal Amici’s Treaty-protected rights and resources. Their actions in preserving clean water, fish, and habitat in the Straits are critically

important to Tribal Amici and constitute a legitimate exercise of the State's authority to vindicate and protect the public trust and to enforce the terms of the 1953 easement.

Michigan's reliance on the state's public trust doctrine and state law principles of contract law to revoke and terminate the 1953 easement is consistent with Michigan's obligation to honor and protect tribal treaty rights and resources. Treaties are the supreme law of the land. U.S. Const., Art. VI, cl.2. As the United States Supreme Court has declared, not only is the federal government bound to honor tribal treaty rights, but so are states, their agents, and their grantees. *United States v. Winans*, 198 U.S. 371, 381–82 (1905). State governments and state agencies cannot act to render treaties meaningless<sup>6</sup> Indeed, Michigan has long known of its obligation under state law to honor the Tribes' rights under the 1836 Treaty. *See People v. LeBlanc*, 399 Mich. 3, 248 N.W. 2d 199 (1976) (affirming the 1836 Treaty rights and overturning a conviction, under state law, for fishing without a commercial license).

The State has explicitly recognized its obligation to safeguard treaty-protected rights and natural resources relied on by tribal communities in the Notice of Revocation and Termination:

The Great Lakes and the Straits of Mackinac also have special ecological, cultural and economic significance for the tribes of Michigan, including, but not limited to, the tribes that retain reserved hunting, fishing and gathering rights in the lands and waters ceded to the United States under the 1836 Treaty of Washington. An oil spill or release from the Straits Pipelines would have severe, adverse impacts for tribal communities. The tribes have fundamental interests in the preservation of clean water, fish and habitat at the Straits. Many tribal members rely on treaty-protected rights of commercial and subsistence fishing in the Straits and other Great Lakes waters that could be impacted by an oil spill or release.

*See* Notice of Revocation and Termination of Easement, PageID.61.

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<sup>6</sup> Only an act of Congress can diminish a treaty. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

The Governor and DNR’s express acknowledgement of tribal interests and rights in revoking and terminating the Straits easement pursuant to their obligations under state law is particularly noteworthy because it stands in marked contrast to Michigan’s decision in 1953 to grant Enbridge the easement to construct a crude oil pipeline through the very waters that formed the heart of the 1836 Treaty Tribes’ subsistence, commercial and cultural practices. The historical record is bereft of any indication that the State considered tribal interests, let alone public trust considerations, in making that decision in 1953.

For many years, the Tribal Amici have been calling on the State to fulfill its public trust obligations and protect the Straits of Mackinac and the Great Lakes from the perils posed by Line 5. In their comments on the Dynamic Risk Draft Alternatives Analysis, Tribal Amici urged the State to act on its affirmative obligation to protect resources held in public trust—including the waters of the Great Lakes and submerged lands—from impairment. “Tribal Comments on Dynamic Risk Draft Alternatives Analysis,” at 12. As they explained in those comments, the State’s obligation arises from the Michigan Constitution<sup>7</sup> and common law. *See, e.g., Glass v. Goeckel*, 703 N.W. 2d 58, 65 (2005) (“The state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lake and their natural resources.”); *Collins v. Gerhardt*, 211 N.W. 115, 118 (Mich. 1926) (recognizing the “high, solemn and perpetual trust, which it is the duty of the state to forever maintain”).

As explained in the State’s brief, the State’s Notice of Revocation and Termination seeks to fulfill this public trust obligation that derives from State law. Accordingly, it is appropriate for Michigan courts, and not federal courts, to evaluate the State’s public trust obligations.

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<sup>7</sup> Mich. Const. Art. IV, Section 52.

## CONCLUSION

For the reasons stated herein and in Plaintiffs' Motion For Remand, the Tribal Amici urge this Court to remand this case to the Ingham County Circuit Court.

March 30, 2021

Respectfully submitted,

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