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ABSTRACT

This paper will examine the tribal interests at stake in the controversy surrounding Enbridge Oil Pipeline 5 ("Line 5"), and will explore why it is consistent with Michigan's treaty obligations and public trust principles to remove the pipeline from the Straits of Mackinac. The Line runs beneath the Straits of Mackinac, the convergence of Lake Michigan and Lake Huron, and is nearly 70 years old. Should the pipeline burst, the resulting spill would irreparably harm fisheries in the Straits and impair tribal treaty rights to fish in the Great Lakes. Part I will provide a roadmap overview. Part II will explore the cultural and legal history of tribal fishing in the Great Lakes. Part III will discuss the lessons from a factually similar case in Washington State, decided by the Ninth Circuit and affirmed by an equally divided Supreme Court in 2018. Part IV will discuss the State of Michigan's public trust obligations, its treaty obligations, and the risk Line 5 poses to the public interest of Michigan and tribes.

INTRODUCTION

The Great Lakes region has been home to the Odawa, Ojibwe, and Bodewademik tribes for centuries. These groups collectively are the Anishinaabe. Tribes, tribal self-determination, and the Anishinaabe people, as a political organization, pre-date the existence of the United States.[1] Long before the signing of the Declaration of Independence and the ratification of the Constitution, tribal societies controlled the North American continent and its resources. Fish were an important staple for Anishinaabe people of the Great Lakes and the indigenous people of the Pacific Northwest.[2] Economically, fishing was a primary trading commodity that undergirded pre-colonial commerce in these regions. Fishing was as sacred to these groups as the atmosphere that they breathed.[3]

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[1] DAVID TREUER, THE HEARTBEAT OF WOUNDED KNEE: NATIVE AMERICA FROM 1980 TO THE PRESENT 42-48 (2019).

[2] *Id.* at 42-51 (describing tribal society pre-1890 in the Great Lakes Region); *Id.* at 68-79 (describing tribal society in the Pacific Northwest region).

[3] United States v. Winans, 198 U.S. 371, 381 (1905) (noting that fishing was as necessary to the Yakima Indians as the air that they breathe).

In the nineteenth century, the legal relationship between tribes and the United States was framed as one between dominator and subordinate.[4] Manifest destiny brought with it change and disruption to the lifeways of both Great Lakes and Pacific Northwest tribes.[5] The United States marked this time by entering into many treaties that forced indigenous peoples to cede vast swaths of tribal territory to the United States, often under unfair circumstances, in exchange for a "handful of modest promises."[6] Luckily, tribal treaty negotiators acted with foresight. Fishing rights, and access to fishing waters, were reserved in both the Pacific Northwest and the Great Lakes in tribal treaties that the very existence of the states of Washington and Michigan are premised upon.[7] Tribes have fought hard to maintain these rights, which are inseparable from their livelihood and culture. Today, however, states and private entities are acting with impunity with respect to treaty rights. Colonialism continues to have a modern corollary. As an example, this article will discuss the case *United States v. Washington*, or the *Culverts Case*.[8] In the *Culverts Case*, the state blocked salmon runs with under road culverts and diminished the salmon population. Washington tribes took their fight to the Courts, and ultimately, in the Supreme Court of the United States prevailed by way of a divided court.[9] In the Great Lakes, the State of Michigan has permitted a similar threat to the ecosystem and tribal treaty rights: Enbridge Oil Pipeline 5 ("Line 5").

Built in the 1953, Line 5 runs beneath the surface of the Straits of Mackinaw, where Lake Huron meets Lake Michigan.[10] The line consists of two, twenty-inch in diameter, pipelines that transport 23 million gallons of light crude oil a day.[11] The pipeline, built to last 50 years, is now nearly 70 years old.[12] Recently, Line 5 has shown significant signs of decay.[13] Further, Enbridge Energy has repeatedly misrepresented the integrity of Line 5 to the state—and by extension to the tribes—on multiple occasions.[14] A spill is only a matter of time. The risk of an oil spill in one of the most ecologically unique

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[4] *See generally e.g.* Johnson v. M'Intosh, 21 U.S. 543, 562 (1823) (defining discovery, the original foundation of titles to land on the American continent, as between the different European nations, by whom conquests and settlements were made).

[5] *See generally* TREUER, *supra* note 1.

[6] *See* Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1018 (Mar. 19, 2019) (Gorsuch, J., concurring).

[7] *See* Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly, 420-421(Univ. of Cal. Press, 1994) (discussing Washington and Michigan cases, noting that the state sovereignty arguments did not overcome the supremacy of the treaty text)

[8] United States v. Washington, 853 F.3d 946 (9th Cir. 2017) (the *Culverts Case*)

[9] The Culverts Case, 138 S.Ct. 1832 (2018) (per curiam).

[10] *The Problem*, MICHIGAN ENVIRONMENTAL COUNCIL, http://www.oilandwaterdontmix.org/problem (last visited Feb. 26, 2018).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *See Lack of Transparency*, MICHIGAN ENVIRONMENTAL COUNCIL, http://www.oilandwaterdontmix.org/transparency (last visited Feb. 26, 2018).

and fragile confluences of water in the world has caused fear and opposition to Line 5 across the Great Lakes region. In 2010, Enbridge energy caused the largest inland oil spill in United States history when Pipeline 6b burst, dumping millions of gallons of oil into the Kalamazoo river.[15] Many Anishinaabe tribes who call the straits home, and fish in its waters, fear that if such a spill were to occur in the Great Lakes, it would endanger tribal subsistence and commercial fishing.[16] Though no spill has happened as of yet, the only way to definitively protect tribal treaty interests is to decommission Line 5.

This note will be useful to all people who seek to understand the tribal, state, and private interests in the Line 5 controversy.

I. The Evolution of Tribal Interest in the Great Lakes and Line 5

In the language of Anishnaabekmowin there are many ways to say "to fish."[17] In Anishnaabekmowin verbs are the predominate part of speech.[18] The large verb vernacular that refers to fishing developed out of a long history between the Anishinaabe and the Great Lakes. The lakes and the fish within them have been the lifeblood of the Michigan tribes for centuries. The important role of fishing in Anishinaabe life prior to European contact sets the backdrop for the law surrounding tribal fishing rights today.

After the retreat of the glaciers, fishing became more prevalent in many of the pre-historic North American aboriginal cultures, and for many, held an equal role in subsistence as agriculture.[19] For the past twelve thousand years, the tribes of Michigan have subsisted off fishing in various forms.[20] Evidence of fishing in Michigan emerges around 1000 BCE and 2000 BCE.[21] With the introduction of nets and gill nets, fishing became the most important source of protein for Indigenous people in the Great Lakes region.[22] The Anishinaabe of Michigan developed migratory patterns that centered on the abundance of fish in the lakes.[23] The winter villages divided into smaller family groups in

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[15] Robert Allen, *Enbridge to pay $75M Settlement in 'win' for Environment*, DETROIT FREE PRESS (May 13, 2015), https://www.freep.com/story/news/local/michigan/2015/05/13/oil-spill-settlement/27227131/.

[16] *See generally Tribal Supporters*, MICHIGAN ENVIRONMENTAL COUNCIL, https://www.oilandwaterdontmix.org/tribal_supporters (last visited Apr. 1, 2018).

[17] *See Fish Translation*, THE OJIBWE PEOPLE'S DICTIONARY, https://ojibwe.lib.umn.edu/search?utf8=%E2%9C%93&q=fish&commit=Search&type=english (last visited Feb. 16, 2018).

[18] *See Key Parts of Speech*, THE OJIBWE'S PEOPLE'S DICTIONARY, https://ojibwe.lib.umn.edu/help/ojibwe-parts-of-speech (last visited Feb. 16, 2018).

[19] United States v. Michigan, 471 F. Supp. 192, 221-22 (W.D. Mich. 1979).

[20] *Id.*

[21] *Id.* at 221-24.

[22] *Id.*

[23] MATTHEW L.M. FLETCHER, THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, 9-13 (2012).

the southern Grand River valley of Michigan.[24] These villages subsisted on a combination of fish and game hunted in small parties in the inner forests of Michigan.[25] Fish not only comprised 65% of the Anishnaabe diet, but it also was of high cultural importance because it reunited tribes after long winters, and helped tribes subsist.[26] With the onset of spring, the Anishinaabe would move to their spring villages on the shores of the Straits of Mackinaw, there they would fish until the onset of winter.[27] These spring villages represented a coming together of families and leaders after long, and often harsh, winters.[28] The Anishinaabe would trade pelts and fish for corn, squash, and the occasional European good.[29] The Straits were the primary social gathering point where leaders were made. The Anishinaabe political system, like many North American indigenous political systems, built power through gift giving and receiving.[30] The Straits gatherings represented an opportunity to engage in such gift giving.[31]

In addition to the sociopolitical connections between fishing and Anishinaabe society, the Anishinaabe have a spiritual relationship with the land, water, and creatures that populate it. The Anishinaabe have a distinct worldview that is shaped by relationships with spiritual beings known as manidoog. In her book, Ogimaag: Anishnaabeg Leadership 1760-1845, historian Cary Miller describes the inseparability of Anishinaabe social identity from the religious belief in the manidoog.[32] Manidoog is not so much a "thing" as it is a "force" behind fate.[33] In times of abundance and scarcity, the Anishinaabe looked to the manidoog with gratitude or desperation. Keeping a spiritual balance with the manidoog was necessary to the very existence of humanity from the Anishinaabe perspective.[34] For this reason, the spiritual practices that are associated with the hunt or the fish catch are no less important than consumption of the fish itself. This perspective regarding the importance of the spiritual practice of fishing—on par with, if not more important than the economic—has rarely been addressed in a court of law. However, the federal Indian law canons of construction for treaties that mandate treaties should be understood as indigenous people would

[24] *Id. See generally* ANDREW J. BLACKBIRD, HISTORY OF THE OTTAWA AND CHIPPEWA INDIANS OF MICHIGAN, AND GRAMMAR OF THEIR LANGUAGE (1887), https://www.loc.gov/resource/lhbum.16465/?st=gallery.
[25] FLETCHER, *supra* note 21, at 57-58.
[26] Michigan, 471 F. Supp. at 222.
[27] *Id.*
[28] *See generally* FLETCHER, *supra* note 21, at 10.
[29] *See* FLETCHER, *supra* note 21, at 9-12 (describing tribal political economy prior to the treaty negotiations).
[30] *Id.*
[31] *Id.* at 5; *see also* CARY MILLER, OGIMAAG ANISHINAABE LEADERSHIP 1760-1845 15-16 (2010) (discussing the straits, gift giving, and indigenous political power in the context of Indian-white relations)
[32] *See id.*
[33] *See id.*
[34] *See generally id.*

understand them, is incomplete without considering the spiritual worldview of the Anishinaabe.[35]

By the time Indigenous tribes in Michigan encountered Europeans in 1650 A.D., fishing had become inseparable from the Anishinaabe culture and economy. With the inflow of European immigrants, and European capitalism, the Anishinaabe began to exploit fishing not only for subsistence and gift giving, but also to trade goods in European markets like Detroit and Fort Michilimackinac.[36] Though the fur trade offered a lucrative economic boon, Anishinaabe tribes traded fish as early as the onset of the eighteenth century and continue to sell fish today.[37] The fish trade has remained constant even despite the waning of the fur trade in the nineteenth century. Up until then, furs had been the primary product that Anishinaabe brought to the table when transacting for European goods, but as beaver populations decreased due to overhunting, fish came to replace this lucrative good as the primary trade commodity.[38] With the development of commercial fishing, the Anishinaabe tribes expanded the area from which they drew this valuable resource. No longer were they only fishing in the spring and summer villages, by 1830 they were traversing and fishing on the Great Lakes, inland lakes, and rivers throughout the Michigan territory.[39] By 1836, and long before, the Anishinaabe had developed a commercial and subsistence relationship with fishing. When Michigan tribes signed treaties, it would be unfathomable that the right to fish for subsistence and commercial purposes would be impaired by a land cession.[40]

When Line 5 was built in 1953 tribes were not a in a position to oppose it. Aside from the fact that at the time the nation's environmental consciousness had not yet awakened; tribes in the Great Lakes were not federally recognized and did not have standing to mount a challenge even if they wanted to.[41] Tribes across the country during this period were suffering at the hands of the United States' policy of termination, which formally destroyed any claim of treaty rights, to land, or pre-existing aboriginal rights vested with tribes and severed the trust relationship between tribes and the

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[35] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("[I]t is well established that treaties should be construed liberally in favor of the Indians.") (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943)).

[36] Michigan, 471 F. Supp. at 222-24.

[37] *Id.*; *see also Regulating/Enforcement*, CHIPPEWA OTTAWA RESOURCE AUTHORITY, http://www.1836cora.org/fishing/ (last visited Feb. 16, 2017).

[38] Michigan, 471 F. Supp. at 222-24.

[39] *Id.*

[40] *See* MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 12.2 (2016) (summarizing a history of Indigenous Great Lakes fishing, collapse of fishing in the 1850s, Michigan Indian political status limitations in the 1860s-1960s, state Indian fishing regulatory efforts 1930s-2000s, assertions of modern day treaty fishing rights 1960s to 2000s, and treaty fishing consent decrees between 1970s and 2015).

[41] *See* FLETCHER, *supra* note 21, at 10, 81(describing land claims and federal rights of the Grand Traverse Band in 1959, several years after the completion of Line 5) (citing Nancy Oestreich Lurie, *The Indian Claims Commission Act*, 311 ANNALS 56, 66-68 (1957)).

United States.[42] This caused great economic suffering across Indian country, especially in Michigan, and numerous legal scholars, historians, judges, and commentators have roundly described termination as a disastrous policy.[43]

Though the 1950s were a time in which Anishinaabe tribes were largely incapable of engaging in political activism, this changed in the 1960s and 70s. The environmental movement, the civil rights movement, and the general awakening of America's social justice consciousness in the 60s and 70s brought along with it, the American Indian Movement (AIM).[44] AIM is famous for the occupation of Wounded Knee in 1973 and the Bureau of Indian Affairs building in Washington D.C. in 1972; a much less noted faction of the movement focused on fishing rights in the Northwest and the Great Lakes.[45] Fish-ins, in which Indigenous fishermen would cast their lines in the ceded territory without a state permit, were common in these days.[46] Indigenous fishermen were often met with violence on par with the violence in the Jim Crow south.[47] In Wisconsin, Minnesota, and Michigan, Anishinaabe fishermen were subjected to tear gas, beatings, unjustified arrests, a mass surveillance effort, and innumerable run ins with armed members of sportsman associations, all in an effort to assert Anishinaabe treaty rights.[48]

In 1971, Michigan prosecuted a case against A.B. Leblanc, an enrolled member of the Bay Mills Indian Community tribe, a tribal signatory on the Treaty of 1836.[49] The State of Michigan charged and convicted Leblanc of fishing without a license and for using "an illegal device, a gill net."[50] He fought the conviction arguing that the Treaty of 1836 enabled him to fish with a gill net in the ceded territory without a license.[51] The Michigan Supreme Court held in 1976 that the Treaty of 1836 reserved the right of treaty-tribe members to fish in unceded territory not required for settlement.[52] The Leblanc court reasoned that Lake Superior was never required for settlement, and thus the treaty right to fish in such territory remained extant.[53] This case was the first in Michigan to recognize the supremacy of the Treaty of 1836 over state law and regulations. The Supreme Court came to their decision in

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[42] VINE DELORIA JR., CUSTER DIED FOR YOUR SINS, 54-77 (1969) (discussing the cases of various tribes and what the policy of termination did to eliminate economic opportunity, access to healthcare, and the obligations of the United States to Indian tribes).

[43] *Id. See generally* DAVID E. WILKINS, NATIVE PEOPLES AND AMERICAN INDIAN AFFAIRS DURING THE TRUMAN PRESIDENCY (2014); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1.06.

[44] *See generally* PAUL CHAAT SMITH & ROBERT ALLEN WARRIOR, LIKE A HURRICANE: THE INDIAN MOVEMENT FROM ALCATRAZ TO WOUNDED KNEE (1996).

[45] *Id.*

[46] *Id.; see also* LARRY NESPER, THE WALLEYE WAR: THE STRUGGLE FOR OJIBWE SPEARFISHING AND TREATY RIGHTS (2002).

[47] *See id*.

[48] *See id*; *see also* Fletcher, *supra* note 21 at 108-30.

[49] People v. LeBlanc, 399 Mich. 31, 35 (Mich. App. 1976).

[50] *Id.*

[51] *Id*.

[52] *Id*.

[53] *Id*.

LeBlanc by applying the "canons of construction," to the treaty of 1836.[54] Following the canons of construction, the Court interpreted the treaty as the Anishinaabe, who signed it, would have understood it, and resolved ambiguities in favor of the tribe in question.[55] Ultimately, the Court held that Leblanc had a right to fish for subsistence purposes in the Great Lakes. Although, under the Tenth Amendment to the United States Constitution, all non-delegated federal power is reserved to the states, Michigan recognized the supremacy of federal treaties via the Supremacy Clause at the time of the LeBlanc decision and well before.[56] In 1971, and still today, state regulations that conflict with tribal treaties are invalid and state court judges are bound by the terms of federal treaties.

Some years after Leblanc, treaty-fishing tensions were still high between state regulatory authorities and tribes. The controversy came to head in 1979 when the "Fox Decision", or *United States v. Michigan,* came down.[57] Any rights that the tribes have to assert against the continued presence of Line 5 will be shaped by the history and context of the treaty negotiations, as well as rights secured in the adjudication of *United States v. Michigan* and subsequently negotiated consent decrees. In *United States v. Michigan*, Judge Fox interpreted the Treaty of 1836 largely by examining how the Anishinaabe would have interpreted the treaty, rather than by the motives of the United States.[58] He wrote that at the close of the War of 1812, the United States sought to open the lands in Michigan and its Upper Peninsula to white settlement, trade, and mining interests.[59] However, the opinion makes clear that assessing the 1836 Treaty as nothing more than a land transaction discounts the substance of how aboriginal people viewed aboriginal property:

> A misunderstanding quickly arises if the transaction between the United States and the Indians is thought of as the ordinary land transaction where the seller conveys all of his rights in the property he sells. Under this interpretation, it would be necessary for the Indians to be able to show that the United States granted them the right to fish. The transaction is better understood if the focus is upon the concept of "reservation." The Indians gave up some rights, reserving all those not specifically conveyed. In a Washington treaty, for instance, the Indians explicitly reserved a right to fish at "all usual and accustomed places." They then conveyed their land, without conveying to the United States the right to exclude the Indians from the land adjoining the places where they fished.[60]

[54] People v. LeBlanc, 399 Mich. at 40.
[55] *Id*. at 41.
[56] U.S. CONST. art. VI, cl. 2.
[57] Michigan, 471 F. Supp. at 192 (1980).
[58] *Id.*
[59] *Id*. at 226.
[60] *Id*. at 213.

The court found that the language, "The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement" had been summarized by treaty negotiators as "the right to hunt and live on the tract, until it is required" "a defined right of hunting on the lands sold" "a full right to hunt on the ceded lands, as long as they are unoccupied" and "the conditional usufructuary right."[61] This led the Anishinaabe treaty negotiators to understand that so long as they remained in their homelands, they would have a right to continue to use their homelands as they always had:

> Many of the Indians of the treaty region lacked any experience base with which to understand even the "ordinary meaning" of settlement invoked by [federal negotiator Henry] Schoolcraft. . . In using this phrase and explaining it as they did, the treaty negotiators placed any understanding of the term of Indian occupancy beyond the comprehension of the Indians, whose sense of time was significantly different from that of white Europeans. The Indians lived in a "continuous present." The assurances given the Indians that settlement would not take place for a "very long time," an "indefinite time," and other phrases equally beyond the comprehension of the Indians, were successful in conveying an extended period of time to the extent that they placed the time of the ultimate devolution (if any) of the land, a condition sought by the United States, beyond the time frame within which the Indians could understand human affairs. Since they lived in a continuous present, any such time period related to events beyond their continuous present, which, to them, would never occur. I find this to be a fact. Accordingly, the Indians understood that they would go on hunting and fishing for as long as any Indians lived in Michigan.[62]

This understanding of the treaty right is consistent with the Anishinaabe worldview articulated by Miller. Judge Fox notes that the Anishinaabe framed understanding of the treaty within the context of a "gift exchange."[63] The Anishinaabe conception of the exchange was conferring the right to their American counterparts to cultivate a relationship with the land, water, fish, and so forth, just as the Anishinaabe had.[64] They conceived that fully incorporated ownership of the soil itself was impossible. The American treaty negotiators confused relationships with the land, fish, and manidoog, as "property." The court notes "[s]uch a view was expressed by the Chief Pabanmitabi of L'Arbre Croche when discussing the right of the United States to cut wood on Anishnaabe land under the terms of the Treaty of Greenville: 'if any wood is cut upon our land hereafter, we should be paid

[61] *Id*. at 236.
[62] *Id.*
[63] Michigan*,* 471 F. Supp. at 238.
[64] *See id.*

for it, and we authorize you to take care of our land.'"[65] Thus, at the conclusion of the treaty negotiation the tribes understood that they had secured their right to continue to hunt and fish in their territory as they always had, while having to accommodate new settlers into their lands who would use them as the Anishinaabe did.

The State of Michigan argued that even if the Anishinaabe had understood the Treaty as securing the right to hunt and fish in their territory, that the subsequent article III of the Treaty of Detroit (1855) extinguished such right:

> ARTICLE 3. The Ottawa and Chippewa Indians hereby release and discharge the United States from all liability on account of former treaty stipulations, it being distinctly understood and agreed that the grants and payments hereinbefore provided for are in lieu and satisfaction of all claims, legal and equitable on the part of said Indians jointly and severally against the United States, for land, money or other thing guaranteed to said tribes or either of them by the stipulations of any former treaty or treaties; excepting, however, the right of fishing and encampment secured to the Chippewas of Sault Ste. Marie by the treaty of June 16, 1820.[66]

The Court, however, did not find this argument persuasive. Judge Fox noted that the "legal" claims articulated in the treaty were in reference to payments of in kind goods never delivered to the Anishinaabe.[67] Further, claims of equity were in reference to equitable claims the Tribes had against the United States arising from Article Eight (removal) of the 1836 Treaty.[68] Judge Fox then employed testimony from expert witness Dr. Helen Tanner to dispose of the state's argument as factually inaccurate:

> Dr. Tanner testified that a review of the 1855 treaty minutes (Ex. P-19, 19A), reveals no mention whatever of fishing or fishing rights. (Tr. 326.) She also testified Article 3 had no impact whatsoever on the fishing rights the Indians reserved under the earlier treaty of 1836. (Tr. 326.) Further, Dr. Tanner could discern nothing from the body of correspondence she reviewed or from any other source which would lead her to believe that Commissioners Gilbert and Manypenny thought that Article 3 of the 1855 treaty had any impact on Indian fishing. (Tr. 327.) The only mention of fishing in the treaty relates to the St. Mary's rapids; however,

[65] *Id.* at 226.
[66] Treaty with the Ottawa and Chippewa, 1855 art. 3, July 31, 1855, 11 Stat. 621.
[67] Michigan, 471 F. Supp. at 243-44.
[68] *Id.* at 244.

> at the time of the 1855 treaty, this important fishery had been destroyed due to the construction of the canal and docks.[69]

Thus, the treaty rights of the Anishinaabe of Michigan are still intact today. This case generally stands for the proposition that tribes have a treaty right to fish in the Great Lakes, and such a treaty right is supreme to state law. So long as Anishinaabe remain in Michigan, the right remains extant. Therefore, the State of Michigan may not make regulations that interfere with these rights.

In 1981, the United States Court of Appeals for the Sixth Circuit qualified the tribal treaty fishing right. Though the Sixth Circuit agreed that the treaty fishing right remains extant, the Court of Appeals disagreed that Michigan could not regulate tribal fishing. Ultimately, the court held:

> [I]f Indian fishing is not likely to cause irreparable harm to fisheries within the territorial jurisdiction of the State of Michigan, the state may not regulate it. The state bears the burden of persuasion to show by clear and convincing evidence that it is highly probable that irreparable harm will occur and that the need for regulation exists. In the absence of such a showing, the state may not restrict Indian treaty fishing, including gill net fishing.[70]

The U.S. Supreme Court denied certiorari in 1981.[71] Ultimately, the state and the tribes negotiated a consent decree in 1985 with a fifteen-year lifespan, and then another in 2000 with a twenty-year lifespan which currently governs Great Lakes treaty fishing and associated property interests.[72] The next negotiations will take place in 2020 and present an opportunity for tribes to voice their concerns regarding the oil pipeline threatening their treaty rights to fish. The 1981 Sixth Circuit ruling rooted the power of the state to regulate tribal fishing in its sovereign interest over the Great Lakes fishery. However, as set forth in Sec. III, the language can equally support the proposition that tribes may restrict regulate state action when such action poses a risk of "irreparable harm" to treaty fisheries and tribal sovereign rights. The test for state regulation of tribal fishing—the "irreparable harm test"—is reciprocal between the state and the tribes. Under this test, just as tribal action cannot undermine the state's right to conservation of the fishery; state action cannot irreparably harm treaty rights. Under such a construction, the deteriorating Line 5 falls within the category of potential "irreparable harm" to tribal treaty interests and could thus lead to its decommissioning.

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[69] *Id.* at 245.
[70] United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981).
[71] Michigan v. United States, 454 U.S. 1124 (1981).
[72] *2000 Great Lakes Consent Decree FAQs*, MICHIGAN DEPARTMENT OF NATURAL RESOURCES, http://www.michigan.gov/documents/dnr/2000_Great_Lakes_Consent_Decree_FAQs_9.28.17_604500_7.pdf (last visited June 5, 2020).

II. The Culverts Case: Tribal Treaties and Estoppel of State Action

The construction of the reciprocal harm test is not without precedent. The principal contention against Line 5 maintained by tribes is that it threatens their treaty rights secured in the Treaty of 1836.[73] The reach of treaty rights to restrict state decision-making is a major flashpoint in the field of Indian law and continues to evolve today. Over the years, the Supreme Court has interpreted tribal treaties to include the right to take fish, issue commercial fishing licenses, and use traditional fishing methods.[74] However, until the Ninth Circuit's decision in the *Culverts Case* never before had a tribal treaty been interpreted to force a state to remove infrastructure. This case is an example of tribal treaty rights used as a sword to compel state action, rather than a shield from it and can illuminate how the reciprocal harm test may work in action.

On June 27, 2016, the Ninth Circuit Court of Appeals issued its decision in *the Culverts Case.*[75] The case is a continuation of *United States v. State of Washington* (1974) that had originally upheld the treaty fishing rights of tribes in the state of Washington. The case continues today under the court's continuing jurisdiction to settle disputes regarding the regulation, allocation, and management of the fishery.[76] The Ninth Circuit decision, however, is the first of its kind; the first time a court has upheld an injunction against a state requiring it to remove underground infrastructure to protect tribal treaty rights.[77] The court found that "Washington violated and [is] continuing to violate, its obligation to the Tribes under the [Stevens Treaties of 1854-1855] . . ."[78]

The factual similarities between the two cases are striking. The treaty at issue in the *Culverts Case* signed between the United States Indian agent Isaac Stevens and several Washington tribes. The treaty ceded "large swaths of land west of the Cascade Mountains and north of the Columbia River drainage area, including the Puget Sound Watershed and the Watersheds of the Olympic Peninsula north of the Gray Harbors watershed, and the offshore waters adjacent to those areas."[79] Included in the treaty was "the right of taking fish, at all usual and accustomed grounds and stations. . . in common with all citizens of the territory."[80] The language mirrors that of the Treaty of Washington (1836) with the Anishinaabe tribes of Michigan which reads:

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[73] *See Tribal Comments on Dynamic Risk Final Alternatives Analysis,* MICHIGAN PETROLEUM PIPELINES, https://mipetroleumpipelines.com/sites/mipetroleumpipelines.com/files/Tribal%20Comments%20on%20Dynamic%20Risk%20Final%20Alternatives%20Analysis%2012-22-2017.pdf (last visited June 5, 2020) [hereinafter *Tribal Comments*].

[74] *See* Washington v. Wash. St. Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), Puyallup Tribe v. Department of Game of Wash., 391 U.S. 392 (1968).

[75] United States v. Washington, 853 F.3d 946 (2017).

[76] *Id*. at 959.

[77] *Id.* at 979.

[78] *Id.* at 966.

[79] *Id.* at 954.

[80] Fishing Vessel, 443 U.S. 658 (1979).

"The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement."[81] Federal law has interpreted "usual privileges" and "usual and accustomed grounds" language to include fishing rights in the unceded territory.[82] Judge Fox ruled in *United States v. Michigan,* that Article 13 of the Treaty included the right to fish in the Great Lakes, which were never required for settlement.[83] In the original district court opinion from 1979 in *Washington*, Judge Boldt found that tribes are entitled, via the Stevens treaties, to up to 50% of the annual fish take.[84] Though these rights function differently in their respective contexts, they are rooted in the same canons of interpretation. This case stands for the proposition that treaty rights are not just guarantees of rights but impose affirmative duties on states not to build infrastructure inconsistent with tribal usufructuary rights—be it culverts or pipelines.

The Supreme Court first applied the Supremacy Clause to tribal treaty fishing rights in Washington in the seminal case of *United States v. Winans*.[85] In *Winans*, a private enterprise had acquired a license from the state of Washington to operate "fish wheels" which were mechanized devices that extracted "tons" of salmon from a prime fishing site for the Yakima tribe, a tribe party to the Stevens treaties.[86] The Supreme Court held that the state of Washington could not issue a license to Winans that "gives them exclusive possession of the fishing places."[87] The decision made clear that state action cannot impede federal treaty rights . The 1970s saw an uptick in the level of regulation in the area of fishing. States from coast to coast, including Washington and Michigan, ramped up the enforcement of fishing regulations against tribal treaty fishermen.[88] Washington tribes could not countenance such enforcement and sued in 1974 to adjudicate their right to take fish articulated in *Winans.* Judge Boldt of the District Court of Washington held that Washington tribes were entitled to up to 50% of the fish in the "Case Area" or the area outlined in the treaty.[89] In a subsequent proceeding under the court's continuing jurisdiction, he held that the tribe had a right to "a sufficient quantity of fish. . . [and a right] to have the fishery habitat protected

[81] Treaty with the Ottawas, etc. art. 13, Mar. 26, 1836, 7 Stat. 495.
[82] *See* United States v. Winans, 198 U.S. 371 (1905).
[83] Michigan, 471 F. Supp. at 259 ("Undoubtedly this clause 'until the land is required for settlement' was intended to protect the right of non-Indians to settle in the ceded area without interference from Chippewas claiming "the usual privileges of occupancy," and has limited the rights of the Chippewas to hunt. However, the ceded water areas of the Great Lakes have obviously not been required for settlement, and therefore the fishing rights reserved by the Chippewas in these areas have not been terminated.").
[84]United States v. St. of Wash, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).
[85] Winans*,* 198 U.S. at 371.
[86] *Id.*
[87] *Id.*
[88] *See* Prucha *supra* note 7, 419 – 27 (discussing treaty rights activism and backlash)
[89] State of Wash.*,* 384 F. Supp. 312 at 328.

from man-made despoliation."[90] The Ninth Circuit vacated this part of his decision, but nevertheless held, "the legal standards that will govern the state's precise obligations and duties under the treaty with respect to myriad state actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case."[91] Any disputes that arise after the Boldt decision must be pleaded as independent issues under the court's continuing jurisdiction in *United States v. State of Washington* by filing a "request for determination."[92] This is the standard articulated by the Ninth Circuit outlining what conduct the state of Washington is obliged to follow. Washington Tribes must seek relief from the court by showing a specific injury to their fishing interest in an ex post fashion. The construction and maintenance of culverts in the state of Washington presents such a scenario. Since their construction, fish stocks in the state of Washington have declined dramatically, affecting the livelihood and health of tribal people and communities across the state.

Washington is a state with many streams and when it undertook an effort to modernize its highway system, it chose to build culverts under roads through which these streams could flow rather than building bridges over such waterways.[93] Washington began to build culverts underneath its roads starting with the Federal Aid Highway Program. State and federal law prohibiting the obstruction of streams that support anadromous fish spawning had long qualified the construction of such infrastructure. For example, the 1848 Oregon Territory Act prohibited the blocking of streams used by salmon for spawning.[94] At the time of the negotiation of the Stevens Treaties, this was the law of the Washington Territory. Nevertheless, the State of Washington constructed numerous culverts before and after the *Boldt* decision that:

> block[ed] the upstream passage of adult salmon returning to spawn render[ing] large stretches of streambed useless for spawning habitat, and reduce[d] the number of wild salmon produced in that stream. Culverts which block stream areas in which juvenile salmon rear may interfere with their feeding and escapement from predators. Culverts which block the passage of juvenile salmon downstream prevent these salmon from reaching the sea and attaining maturity.[95]

As early as 1997, the State of Washington realized that the culverts it built were problematic.[96] That year the State created a "Fish Passage Task Force"

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[90]United States v. State of Wash., 506 F. Supp. 187, 203 (W.D. Wash. 1980), *aff'd in part, rev'd in part*, 694 F.2d 1374 (9th Cir. 1982), *on reh'g,* 759 F.2d 1353 (9th Cir. 1985).

[91] United States v. State of Wash., 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc).

[92] State of Wash., 384 F. Supp. 312 at 419.

[93] Pet. For Cert. at 12, Washington v. United States, 138 S.Ct. 1832 (2018).

[94] Act of August 14, 1848, § 12, 9 Stat. 323, 328.

[95] Washington at 174.

[96] Br. In Opp'n. of Cert. for Resp't. Tribes at 12, Washington v. United States*,* 138 S.Ct. 1832 (2018),

whose mission was to ensure the viability of the salmon population and allow anadromous fish to swim upstream.[97] The Task Force identified the culverts as a "key factor" preventing the recovery of the declining salmon stock in the State of Washington.[98] Parallel to these events individual tribal fishermen and entire tribal economies were suffering immensely because of the declining salmon population.[99] In 2001, tribes that were party to the Stevens treaties filed a "request for determination," in essence a complaint that aimed to force the State of Washington to "refrain from constructing and maintaining culverts under the State roads that degrade fish habitat so that adult fish production is reduced."[100] By the time the case reached trial in 2009, the State of Washington owned 1,114 culverts, 886 of which "blocked significant habitat."[101]

When the Ninth Circuit took up the question, the issues to be resolved were two-fold. First, the court considered whether the state of Washington has a treaty-based duty to ensure the availability of fish.[102] The State of Washington had already conceded that the tribes were entitled to up to 50% of the fish but contested whether the treaty restricted state land use decisions that "could incidentally impact fish. . ."[103] In *Fishing Vessel,* the Supreme Court ruled that tribes were entitled to a "moderate living" that the salmon could provide, and up to 50% of the salmon present in the treaty area, whichever is less.[104] In its Petition, the State of Washington contended that there was no minimum amount of salmon that the tribes are entitled to and that circumstances may arise that reduce the salmon population without impairing the tribal treaty right.[105] The State argues that construction of the culverts is one such scenario. Despite this, the Ninth Circuit found that the fishing right contained in the Stevens Treaty prevents the state from constructing culverts that interfere with the salmon spawn.[106] The court reasoned that the tribes understood that their livelihood in salmon would remain intact forever.[107] If the court sided with the State, interpreting the treaty to confer upon the State the power to interfere with tribal treaty rights, the rights could be impaired beyond recognition by state infrastructure decisions.[108] The court held that the terms of the treaty must be interpreted, as indigenous people would have understood them.[109] The court looked to the history and context of the treaty and the position and expertise of the

[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] Washington at 25.
[101] *Id.* at 47.
[102] *See* Washington at 11-13.
[103] Washington, Br. for State of Wash., 27-28 (2017)
[104] Fishing Vessel, 443 U.S. at 670.
[105] Pet. For Cert. at 20-4 (2018).
[106] Washington at 30-36.
[107] *Id.*
[108] *Id.*
[109] *Id.*

negotiating parties on both sides.[110] The court considered historical evidence and expert testimony that showed salmon were as important to the Washington tribes "as the atmosphere that they breathed."[111] Flatly, the court rejected Washington's argument that the primary purpose of the treaty was to promote white settlement of the Pacific Northwest:

> Opening up the Northwest for white settlement was indeed the principal purpose of the United States. But it was most certainly not the principal purpose of the Indians. . . The Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs. Governor Stevens did not make, and the Indians did not understand him to make, such a cynical and disingenuous promise. The Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them. They reasonably understood that they would have, in Stevens' words, "food and drink . . . forever."[112]

Though no article of the treaty specifically outlines the right to fish in perpetuity, much less the qualification that Washington would be responsible for preserving this right, the court came to its decision by looking to the history of the treaty. The court looked at the treaty's purpose and found that Washington's actions would impair the treaty.[113] While true that the Treaty opened the land in question to white settlement, the Indigenous people living in the area were expecting to remain there in perpetuity. The tribes today still rely on the fish much as they did in the era of the Stevens Treaties. The existence of the State of Washington is premised on the reservation of a salmon fishing right because without such a reservation the tribes would have never agreed to cede their territory. The State of Washington was interpreting the Treaty as if Washington tribes had vanished, ceased to fish, and no longer needed the salmon just as they needed "the atmosphere they breathe."[114] This was not only unacceptable to the Ninth Circuit but contrary to the law and revised history from a Eurocentric perspective. Treaties continue, much like tribal people, who are still living and catching fish today.

Unsurprisingly, Washington appealed this case and certiorari was granted on January 12, 2018. The Supreme Court affirmed the Ninth Circuit opinion in the Culverts Case by an equally divided court after Justice Kennedy recused

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[110] *Id.*
[111] *Id.*
[112] Washington at 35-36.
[113] *Id.*
[114] United States v. Winans, 198 U.S. 371, 381 (noting that fishing was as necessary to the Indians as the air that they breathe).

himself.[115] The split decision diminishes the salience of the Ninth Circuit's opinion with respect to treaty rights in Michigan. The oral argument transcript is nevertheless illuminating on how the current composition of the court may approach these issues. While we do not know how the Justices voted, there is reason to speculate that Justice Neil Gorsuch sided with the tribes. At oral argument, Justice Gorsuch exhibited dissatisfaction with Washington State's arguments on multiple fronts. He questioned the logic of the state's arguments that a 5% decline in the fishery resulting from culvert obstruction would not be "material"[116] and Washington State's limited interpretation of the scope of the treaty.[117] He went as far as to say, "I would have thought a treaty would have been the supreme law of the land and would have overridden *any* municipal interests."[118] Clearly, these kinds of cases do not generally fall along clear liberal and conservative splits; a fact, which should be noted by those who would dismiss treaty rights as empty promises.[119] Notably, in a recent decision outside of the treaty fishing context that dealt with a separate tribal treaty rights issue in the state of Washington, Justice Gorsuch, in concurrence, summarized state challenges to treaty rights in this way:

> Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.[120]

Under the Treaty of 1836, the Fox decision, and its Sixth Circuit counterpart, the State of Michigan has a reciprocal obligation with Michigan tribes to prevent irreparable harm from befalling the Great Lakes fishery.[121] Washington State had a similar obligation in the Stevens Treaty context and failed to procure an interpretation of that right that would allow it to

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[115] *See* Washington v. United States, 138 S.Ct. 1317 (2018).
[116] *Id*.
[117] *Id*. at 15-16.
[118] *Id*.
[119] *See e.g.* City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) (Ginsburg, J.) (holding that laches applied to claims for unlawful sale of aboriginal land, roundly criticized by American Indian Law academics); *cf*. Felix Cohen, HANDBOOK OF FED. INDIAN LAW § 6.01[4], n. 79 (2012) (citing Matthew L.M. Fletcher & Wenona T. Singel, *Power Authority and Tribal Property*, 41 TULSA L. REV. 21 (2005)); Joseph William Singer, *Nine Tenths of the Law: Title Possession and Sacred Obligations*, 38 COM. L. REV. 605 (2006).
[120] Washington State Dept. of Licensing v. Cougar Den Inc., 139 S. Ct. 1000, 1021 (2019) (Gorsuch, J., concurring).
[121] United States v. State of Mich., 471 F. Supp. 192 (W.D. Mich. 1979) United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981).

completely destroy the treaty fishery. Indeed, such an interpretation would render vacuous the content of the promises the United States made to the tribes in exchange for vast swaths of land that now constitute the state. The State of Michigan should heed the lessons of the Culverts Case controversy: treaty rights are alive and well, and states have an obligation to act consistently with their terms—for they are the supreme law of the land.

III. Public Trust of the State of Michigan and Private Interest of Enbridge Inc.

Immediately after the ink dried on the Treaty of 1836, Michigan joined the union in 1837. With its entry, it gained title to waters and land within the former Indian Country territory. Embedded in this title to territory was not only a reciprocal obligation to tribes to protect the Great Lakes and preserve the fishery but also a public trust obligation to its citizens to preserve and protect the use and enjoyment of the Great Lakes.

The state holds the land and water, along with its fish, in trust for the citizens of Michigan.[122] Michigan is bound by the common law public trust doctrine, which protects the right of the public to use and enjoy clean water and other aquatic resources.[123] The state has a "perpetual" duty to the public, as its trustee, to protect the integrity of the Great Lakes.[124] The Supreme Court outlined occupancy of bottomlands in *Illinois Central R.R.*[125] That case decided whether Illinois had authority to retroactively apply a state statute to a railroad leaseholder with title to the bottomlands of Lake Michigan in the interest of the public.[126] The Supreme Court held that:

> [t]he trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property… [T]here always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes." . . . "The legislature could not

[122] James M. Olson & Elizabeth R. Kirkwood, *Public Comments on the Joint Application of Enbridge Energy to Occupy Great Lakes Bottomlands for Anchoring Supports to Transport Crude Oil in Line 5 Pipelines in the Straits of Mackinac and Lake Michigan* [2rd-dfdk-y35g] (June 29, 2017), http://flowforwater.org/wp-content/uploads/2017/06/FINAL-2017-06-29-17-Comments-to-DEQ-USCOE-Joint-App-Enbridge-for-Supports.pdf [hereinafter *FLOW comments to DEQ*]; *See also* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 436-37 (1892); Obrecht v. Nat'l Gypsum Co., 361 Mich. 399, 412-14 (1960).

[123] *See e.g. FLOW comments to DEQ*, *supra* note 119; Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law*, 68 MICH. L. REV. 471 (1970).

[124] *See e.g. FLOW comments to DEQ*, *supra* note 119; Collins v. Gerhardt, 237 Mich. 38 (1926).

[125] Illinois Cent. R.R. Co., 146 U.S. at 459-60.

[126] *Id* at 389-90 (discussing purposes of writ of certiorari to the Supreme Court to decide whether the Illinois legislature's conveyance was valid under the public trust doctrine).

> give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it… There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.[127]

Michigan incorporated this ruling in *Obrecht v. Nat'l Gypsum Co.* There, the Michigan Supreme Court found that:

> [i]t will be found authoritatively that no part of the beds of the Great Lakes, belonging to Michigan and not coming within the purview of previous legislation. . . can be alienated or otherwise devoted to private use in the absence of due finding of one of two exceptional reasons for such alienation or devotion to non-public use. One exception exists where the State has, in due recorded form, determined that a given parcel of such submerged land may and should be conveyed 'in the improvement of the interest thus held' (referring to the public trust). The other is present where the State has, in similar form, determined that such disposition may be made 'without detriment to the public interest in the lands and waters remaining.'[128]

The obligations imposed on the state by the public trust doctrine are not hollow pronouncements of duty. These public trust obligations are affirmative obligations that the state "cannot relinquish."[129] Every action by the state with respect to the lakes is imbued with this obligation "at its inception."[130]

Thus, easements, like the one held by Enbridge energy for its pipeline, (1) must be granted in furtherance of public trust, and (2) must be made without detriment to the public interest in public lands and waters *ab initio*. Further, the responsibility to maintain the integrity of the fishery consistent with its reciprocal duty to tribes is one the state may not relinquish, and thus attaches to the evolving status of Line 5. As the line deteriorates, the obligation, on the state to act consistent with the public trust and the 1836 Treaty, increases.

In 1952, Enbridge (at the time, Lakehead Pipeline Company) initiated the effort to build a pipeline through Michigan to carry oil across the Straits

[127] Illinois Cent. R.R. Co., 146 U.S. at 459-60.
[128] Nat'l Gypsum Co., 361 Mich. at 412–13.
[129] Glass, 473 Mich. at 673.
[130] *Id*. at 679.

of Mackinac.[131] The legislature passed Public Act 10 in 1953 granting Michigan's Department of Conservation the power to grant a bottomlands easement to Lakehead.[132] On April 23, 1953, in exchange for $2,450 and a $100,000 security bond, which in 2018 dollars, is approximately $930,000 on a time value conversion basis, the Department of Conservation conferred the easement to Lakehead.[133] The Easement specifically says that the "proposed pipeline system will be of benefit to all of the people of the State of Michigan and in furtherance of public welfare," thus fitting itself within the framework articulated in *Illinois Central R.R.* and *Oberecht.*[134] The Easement further reiterates that the bottomlands are "held in trust" for the people of Michigan.[135] Today, the Easement is still valid and determines the bounds of conduct that are consistent with the State's public trust obligations.

The Easement is an evolving document that binds Enbridge to not only follow its specific specifications for the operation of Line 5, but also obligates it to follow relevant state and federal law passed subsequent to the issuance of the Easement. Though, normally, contracts are presumptively exempt from retroactive enforcement of statutes, *Illinois Central R.R.* and *Obrecht* carve out a public trust exception.[136] States, through their general police power, can apply legislation to public trust easements even after the issuance of such an easement. This view, is reflected in the Easement. Section A reads:

> Grantee in its exercise of rights under this easement, including its designing, constructing, testing, operating and maintaining, and, in the event of the termination of this easement, its abandoning of said pipe lines, shall follow the usual, necessary and proper procedures for the type of operation involved, and at all times shall exercise the due care of a reasonably prudent person for the safety and welfare of all persons and of all public and private property, shall comply with all laws of the State of Michigan and of the Federal Government, unless the Grantee shall be contesting the same in good faith by the appropriate proceedings. . ."[137]

Thus, the property interests, both private and public, are subject to the contractual obligations contained within the Easement, and relevant State law passed prior and subsequent to the issuance of the Easement. Violation of the terms of the Easement, or State law, can result in its termination. The Easement itself sets out requirements for maximum pressure, engineering and

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[131] *See* Apr. 23, 1952, Easement to Lakehead, Inc., *Straits of Mackinac Pipeline Easement, Conservation Commission of the State of Michigan to Lakehead Pipe Line Company, Inc.* [hereinafter *Easement*].
[132] *Id*.
[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] *See FLOW comments to DEQ*, *supra* note 122.
[137] *See the Easement*, *supra* note 131, at § A.

construction specifications, and procedures for inspection, maintenance, relocation, and abandonment. The State has the authority to shut the pipeline down if Enbridge violates the terms of the lease, but even then, Enbridge has 90 days to remedy such a breach.[138]

The case for revoking the Easement permanently, however, has never been stronger. In 2010 Enbridge Line 6b ruptured and caused the largest inland oil spill in United States history in Marshall, Michigan, irrevocably damaging the ecosystem and causing billions of dollars in damage.[139] The increased attention on Enbridge's management of its pipelines led the state to commission a report from Dynamic Risk Assessment Systems to assess the integrity of Line 5.[140] Dynamic Risk released its final report on October 26, 2017.[141] According to the Dynamic Risk Report there is a one-in-sixty chance that Line 5 will rupture in the next 35 years.[142] In fact, the Dynamic Risk Report concluded that Line 5 is particularly vulnerable to such risks:

> [I]t must be noted that with respect to the above vulnerability factors, the Straits Crossing segments cross a busy shipping lane . . . where [Line 5] lie[s] exposed on top of [the] lakebed with no protective cover. They are also situated in water that is shallow, relative to the anchor chain lengths of most cargo vessels. Furthermore, a 20-in. diameter pipeline is small enough to fit between the shank and flukes of a stockless anchor for a large cargo vessel, and thus, is physically capable of being hooked.[143]

The possibility of a rupture is not mere fantasy. On April 2, 2018, an inadvertent anchor drop resulted in a spill of more than 4,000 gallons of dielectric fluid.[144] The anchor dented Line 5.[145] The Line did not rupture, but it is only a matter of time before a future strike might land a fatal blow. In a subsequent emergency rule prohibiting the use of anchors in the straits, the

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[138] *See the Easement*, *supra* note 131, at § C.
[139] *See generally Oil Spill News and Updates: Talmadge Creek and Kalamazoo River Oil Spill*, https://www.michigan.gov/deq/0,4561,7-135-3313_56784---,00.html (last visited Apr. 1, 2019).
[140] DYNAMIC RISK ASSESSMENT SYS. INC., ALTERNATIVES ANALYSIS FOR THE STRAITS PIPELINES ES-25 (2nd ed. 2017), https://mipetroleumpipelines.com/document/alternatives-analysis-straits-pipeline-final-report.
[141] *Id*.
[142] *Id*. at 25.
[143] *Id*. at 35.
[144] Violet Ikonomova, *Hundreds of Gallons of Coolant Just leaked into the Straits of Mackinac*, DETROIT METRO TIMES (Apr. 4, 2018), https://www.metrotimes.com/news-hits/archives/2018/04/04/hundreds-of-gallons-of-coolant-just-leaked-into-the-straits-of-mackinac.
[145] Emily Lawler, *Line 5 damaged, likely from same anchor strike that caused spill* (Apr. 11, 2018), https://www.mlive.com/news/index.ssf/2018/04/anchor_strike_responsible_for.html .

state blithely admits that the Line 5 status quo poses extreme risks to the Great Lakes:

> [T]he use of anchors or other vessel equipment that may contact the bottomlands in the Straits of Mackinac by vessels . . . **poses a threat to public health, safety, or welfare to the citizens and the environment of the state of Michigan** due to the likelihood that such equipment may strike and damage critical infrastructure located on the lake bottomlands . . . The possibility of future similar anchor or other equipment strikes to the infrastructure on the bottomlands in the Straits of Mackinac **poses a significant and unacceptable risk to Michigan's environment.**[146]

This unacceptable risk is still present but remained largely unaddressed by the administration of Governor Rick Snyder. Indeed, under Snyder's leadership, the state passed lame duck legislation that purports to safeguard the public's interest in the Great Lakes by laying the groundwork for the construction of an underground "utility tunnel" that would house a reconstructed Line 5.[147] While this effort may be laudable on its surface, in reality the plan would leave the current line in place for a number of years while the various permits from state and federal agencies to build the tunnel are pursued and challenged. This leaves the risk of an irreparable spill present throughout this extensive permit application process and associated litigation, a risk that has a $5.6 billion price tag.[148] Plainly, this effort does not live up to the state's duty to safeguard the public trust, nor its reciprocal duty to prevent total destruction of the tribal treaty fishery. Further, this risk cannot be repaired in 90 days pursuant to the easement. The only solution to the Line 5 problem that is consistent with the public trust and the state's duty not to irreparably harm the treaty fishery is to remove Line 5 in its entirety.

Today the State of Michigan, and particularly Northern Michigan, emphasizes its pristine waters as its greatest asset.[149] The tourism industry, shipping, and fishing are endangered by the continued presence of Line 5 beneath the straits—as are tribal treaty rights. The notion that an aging pipeline with a $924,000-dollar insurance policy fits within the public trust doctrine and the states reciprocal treaty obligations seems unfathomable when the damage risk is in the billions. Not to mention, the intangible interests of

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[146] Emergency Rule, Establishment of Restricted Anchor and Vessel Equip. Zone in the Straits of Mackinac (May 24, 2018), https://www.michigan.gov/documents/snyder/DNR_Emg_Rule_with_LSB_Approval_form_623927_7.pdf.

[147] 2018 Mich. Pub. Acts 359.

[148] ROBERT B. RICHARDSON & NATHAN BRUGNON, OIL SPILL ECONOMICS: ESTIMATES OF THE ECONOMIC DAMAGES OF AN OIL SPILL IN THE STRAITS OF MACKINAC IN MICHIGAN, 33 (2018), http://flowforwater.org/wp-content/uploads/2018/05/FLOW_Report_Line-5_Final-release-1.pdf (estimating the cost of a spill to be 5.6 billion dollars).

[149] *See generally* PURE MICHIGAN – OFFICIAL TRAVEL & TOURISM WEBSITE FOR MICHIGAN, https://www.michigan.org (last visited May 17, 2020).

tribal people in the integrity of their ancestral homeland. It is highly unlikely that issuance of Enbridge's easement would be permitted today. The line is clearly contrary to public trust, threatening not only tribal treaty rights, but the integrity of the Great Lakes ecosystem as a whole.

CONCLUSION

Today, tribal people in the Great Lakes rely on the lakes to make their living. This is a human reality often overlooked and undervalued in discussions surrounding risks to the lakes. In the 2013 short film, 80-90 Feet, we are met with two married tribal fishers from the Grand Traverse Band of Ottawa and Chippewa Indians in Peshawbestown, Michigan.[150] The film offers an intimate portrait of the fishery and its'present day caretakers. It opens with the mist hewing closely above the water as Ed and Cindi John pull their boat out into *Gitchi-Gami*, Lake Michigan, for a day of fishing. This is the lake their ancestors have fished for generations. It provides community, livelihood, nutrition, and spiritual fulfillment. In the distance, you can hear the gulls. A bit closer, you hear the rumbling of the engine and the tightening of the gill nets, as a fish brought aboard, gasps for air. The fishing hooks clink and a license from the Chippewa Ottawa Resource Authority is shown center screen.

"Being able to see, on a daily basis, that creation, that order, in how the food chain works . . . I think that is my favorite part," notes Cindi, as she looks out on the water, her husband, Ed, adding just after, "*I'll probably die fishing, it's what I do and I am assuming that if I die, I'm going to be doing fishing . . . I don't know what the state of the fishery will be in five to ten years, there are just certain things I don't have control over.*" Cindi then remarks, while working with her equipment, "*The treaty of 1836, which we fish underprovided in exchange for a large portion of the State of Michigan that the waters of Lake Michigan be set aside to be accessed forever by tribal people to make a living.*

I just think it is incredible that the people back in the day that made those treaties, without knowledge of really what they were participating in, were able to provide for us what they did."

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In 1836, the Anishinaabe tribes of present-day Michigan were in a similar predicament. Tribal leaders, faced with the prospect of removal to the west, managed to stay in their homelands in the face of an enormous power imbalance. The words that the Anishinaabe treaty negotiators prescribed were the result of the same fear Ed and Cindi John have today, the fear of losing that which makes the Anishinaabe whole: the land, the lakes, and the fish. But this fear did not, and could not, overcome the resilience of the Anishinaabe tribes to survive. It is this resilience that motivates tribal opposition to Line 5; a resilience planted in the soil of spiritual, environmental and communal

[150] Jason B. Kohl, *80-90 Feet*, https://vimeo.com/69171232 (last visited Apr. 1, 2019).

connections that make up the landscape of the Anishinaabe spirit today. Without a doubt, the words of the treaty negotiators echo across the generations and continue to empower indigenous people to prevail in the face of immeasurable odds. The case of Line 5 will be no different.