



MEMORANDUM

To: Michigan Petroleum Pipeline Task Force
Attention: Co-Chair Bill Schuette, Attorney General
Attention: Co-Chair Dan Wyatt, Director, MDEQ

From: Desmond Berry, Manager, GTB Natural Resources Department

Date: February 4, 2015

Re: "Line 5" pipeline extending through Straits of Mackinac

The Grand Traverse Band of Ottawa and Chippewa Indians possesses Great Lakes fishing rights reserved under the Treaty of Washington executed March 28, 1836 (7 Stat. 491). The Grand Traverse Band's off-reservation fishing rights in the Great Lakes were confirmed by federal court litigation, *see United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd*, 653 F. 2nd 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). Subsequently the federal courts confirmed that the Indian Tribes signatory to the 1836 Treaty retain property rights in the Great Lakes fishery resources:

Treaty reserved rights to access traditional fishing areas and catch fish are property rights protected by the United States Constitution. *See Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 853 F.Supp. 1118, 1125 (D.Minn. 1994); *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1510 (W.D.Wash. 1988).

Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources, 971 F.Supp. 282, 288 (W.D.Mich. 1995), *aff'd*, 141 F.3d 635 (6th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998).

The Straits of Mackinac is central to these Treaty-reserved fishing fights, due to the abundance of fish stocks and related spawning grounds. The oil pipelines ("Line 5") extending through the Straits of Mackinac pose a great risk to our tribal fishing rights, especially if Enbridge were to begin transmitting tar sands crude oil mixed with sand, clay and other corrosive material under greater pressure, thereby increasing the risk of ruptures in the old metal pipelines.

When that occurs¹, much of this heavy mixture will sink to the bottomlands, destroying spawning grounds and precluding relatively easier surface water clean up. The potential devastating harm to our Treaty-reserved fishing rights is unacceptable if less harmful alternative(s) exist.

The Grand Traverse Band's Natural Resources Department (GTB-NRD) has communicated with three federal agencies (EPA, USACE & PHMSA) requesting a comprehensive analysis of the type normally required by the National Environmental Policy Act (NEPA). Unfortunately those agencies at this time don't have authority under NEPA to review these pipelines constructed six decades ago. However, the State of Michigan does have such ability under the Great Lakes Submerged Lands Act (GLSLA) and the terms of the 1953 easement.

The GTB-NRD has reviewed presentations posted on the Task Force's web site: http://www.michigan.gov/deq/0,4561,7-135-3306_69266---,00.html
We emphasize the statement of the Great Lakes Commission: "Response technologies for heavy oil spills in open freshwater are lacking." We concur with the points made by For Love of Water (FLOW). As proposed by the organizations and governments involved in the FLOW presentation, Enbridge should be required to file a proceeding under GLSLA demonstrating that its pipelines will not substantially affect the Indian Tribes' Treaty-reserved fishing rights, the public's use of the natural resources, and the State's public trust interests.

Moreover, it must be understood that the 1836 Treaty Tribes' property right in the Straits of Mackinac fisheries resources was established in the *United States v. Michigan* litigation. The State of Michigan's duty not to interfere with these Treaty-reserved fishing rights is analogous to the State's duty to all Michigan citizens to protect and preserve the public trust in the natural resources potentially impacted by Line 5. We urge this Task Force to embrace the GLSLA process requiring the MDEQ to make a determination that "the private or public use of such lands and waters will neither substantially affect the public use thereof nor impair the public trust or interest of the State." Mich. Admin. Code R 322.1006(d). Inherent in this process should be an alternatives assessment, not merely an analysis of the status quo. MDEQ should evaluate and understand potential alternatives to the status quo of letting the old pipelines rest on state-owned bottomlands indefinitely. The GTB-NRD offers to assist the DEQ in that process.

The importance to Michigan's Indian Tribes of protecting the natural resources dependent upon the Great Lakes cannot be overemphasized. In the words of an esteemed tribal elder and former Chairperson of the Little Traverse Bay Bands of Odawa Indians:

The single most important defining element of the place we live, what makes this place unique in the entire world, is the Great Lakes and the waters that recharge these lakes from the springs, creeks, streams and rivers that make up this vast watershed. We speak for and honor the waters as the

¹ It is inevitable; sooner or later the breach will occur in that old, corroded pipeline. When that happens, not only will it be an ecological disaster, but also it will destroy the 1836 Treaty Tribes' property right in the fisheries resources. This risk is unacceptable.

life-blood of our Mother Earth as an integral part of our traditional spirituality. As Native Nations we utilize these waters to define our boundaries, transport ourselves and trade goods, fish for our food and commerce, and enjoy their value for recreation and a strong economy.

-Frank Ettawageshik²

Thank you for requesting input from Michigan's Indian Tribes. This is a situation where the interests of the State and Tribes are aligned. We must remain vigilant to preserve and protect our precious natural resources. As previously stated, the professional staff within this Department could assist the State in the GLSLA process.

² Frank Ettawageshik, *Protecting the Life-Blood of Mother Earth*, BEDOHGEIMO (Office of the United States Attorney for the Western District of Michigan, Grand Rapids, Mich.), Winter 2004-05, at 3, reprinted with permission from:
<http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1159&context=facpubs>