



May 11, 2020

Ms. Lisa Felice
Michigan Public Service Commission
7109 W. Saginaw Hwy.
P. O. Box 30221
Lansing, MI 48909

Via E-filing

RE: MPSC Case No. U-20763

Dear Ms. Felice:

The following is attached for paperless electronic filing:

Petition to Intervene by Bay Mills Indian Community (BMIC) and Affidavits of
Bryan T. Newland and Jacques LeBlanc Jr.; and

Proof of Service

Sincerely,

Christopher M. Bzdok
Chris@envlaw.com

xc: Parties to Case No. U-20763

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application for the Authority to Replace and Relocate the Segment of Line 5 Crossing the Straits of Mackinac into a Tunnel Beneath the Straits of Mackinac, if Approval is Required Pursuant to 1929 PA 16; MCL 483.1 et seq. and Rule 447 of the Michigan Public Service Commission's Rules of Practice and Procedure, R 792.10447, or the Grant of other Appropriate Relief

U-20763

**PETITION TO INTERVENE BY
BAY MILLS INDIAN COMMUNITY**

1. Bay Mills Indian Community, a federally recognized Indian Tribe, seeks to intervene in this case under Rule 410 of the Commission's Rules of Practice and Procedure, R 792.10410, to represent the interests of its members in protecting treaty rights and natural resources from risk and harm associated with the project for which Enbridge Energy, Limited Partnership (Enbridge) seeks approval in this proceeding.

2. Gnoozhekaaning, "Place of the Pike," or the Bay Mills Indian Community is a federally recognized Indian Tribe with a government organized under the provisions of the Indian Reorganization Act of 1934, 25 USC §5101.

3. Bay Mills Indian Community has 2,196 enrolled members and a service area that includes Chippewa, Mackinac, and Luce Counties. More than half of the enrolled members live on or near the Bay Mills Reservation.

4. Bay Mills Indian Community is a modern-day successor in interest to Indians who were signatory to the March 28, 1836 Treaty of Washington, 7 Stat. 491.

5. In the Treaty of Washington, the Indian signatories ceded to the federal government 14 million acres of land; while reserving the right to hunt, fish, and other privileges of occupancy. A map of the ceded territory over which these rights were reserved is attached as Exhibit 1 to this petition.

6. The Affidavit of Bay Mills Indian Community President Bryan T. Newland, attached as Exhibit 2 to this petition, provides further information regarding the Bay Mills Indian Community; the role of its predecessors-in-interest in the Treaty of Washington; the rights of the Bay Mills Indian Community arising out of the Treaty of Washington; and the role of Bay Mills Indian Community in the landmark case affirming those treaty rights known as *United States v. Michigan*, Case No. 2:73-cv-26 (WD Mich.).

7. As an 1836 Treaty Tribe, Bay Mills Indian Community retains usufructuary property rights to natural resources in the ceded territory, including in and around the Straits of Mackinac. The State of Michigan is obligated to honor these treaty-protected rights, and prohibited from diminishing them.

8. Bay Mills conservation officers patrol the ceded territory, including the land riparian to the Straits.

9. The Affidavit of Jacques LeBlanc, Jr., attached as Exhibit 3 to this petition, provides further information regarding the exercise of treaty-reserved fishing rights to waters in and around the ceded territory, and threats to those rights and resources posed by the project.

10. Bay Mills Indian Community and its members, are directly affected by Enbridge's application for approval of the Line 5 replacement project through its treaty resources. For this reason, Bay Mills and its members will be directly affected by the Commission's decision in this

matter. The Tribe and its members have a strong interest in protecting treaty resources and natural resources from harm caused by Enbridge's proposed project.

11. Enbridge is seeking the Commission's approval under Public Act 16 of 1929, MCL 483.1 *et seq.* ("Act 16") and Rule 447 of the Commission's Rules of Practice and Procedure, R 792.10447, to replace the segment of its Line 5 pipeline that crosses the Straits of Mackinac with a new single pipe located within a newly constructed tunnel. Enbridge requests this approval in the form of a grant of authority from the Commission; or, in the alternative, a declaratory ruling that Enbridge already has the requisite authority from the Commission to construct the project. (Application, p. 1.)

12. Bay Mills Indian Community and its members have the potential to be harmed by the project that is the subject of this application. As Bay Mills President Newland states in his affidavit attached to this petition as Exhibit 2:

At present, the Tribe is deeply concerned that environmental stressors such as climate change, invasive species, chemical pollutants and habitat destruction will combine to have a significant and perhaps permanent adverse impact of the fishery. The operation of current Line 5, and the prospect of the siting and construction of a tunnel in the Straits of Mackinac for the transport of petroleum products, is the most obvious and most preventable risk to the fishery resources throughout northern Lakes Michigan and Huron.

13. Bay Mills and its members have further concerns that the project may risk harm to the environment during construction and that it may not eliminate risk after construction. Bay Mills and its members are also concerned about the length of time in which the project may be under development and the continued operation of the pipes in the water in the meantime.

14. The Michigan Public Service Commission recognizes two types of intervention.
 - a. First, intervention by right, which requires that the party will suffer an injury-in-fact as a result of the outcome of the case, and that the party is within the zone of interest protected by the statute. See for example, *Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150; 90 S Ct 827; 250 L Ed 184 (1970).
 - b. Second, permissive intervention, where the Commission has the discretion to permit a party to intervene in the case where that party can provide useful information to the Commission or a unique perspective on the issues in the case. *In re Application of The Detroit Edison Co for Authority to Increase its Rates*, Case Nos. U-15768 and U-15751, January 11, 2010, Order, p. 7 (“*In re Detroit Edison*”).

15. Bay Mills Indian Community meets both tests.

16. As described above, Bay Mills and its members face the prolonged risk of environmental harm caused by the continued operation of Line 5 and risk of harm to natural, treaty-protected resources from the project, as described above.

17. Bay Mills Indian Community and its members are within the zone of interests protected by Act 16. Act 16 authorize the Commission “to control, investigate, and regulate” oil pipeline operators within the state. MCL 483.3. As evidenced by Enbridge’s submission of an Environmental Impact Report and alternatives analysis in its Application, the Commission may, and does, consider environmental impacts like the ones that would adversely impact Bay Mills and its members when considering Act 16 approvals. Act 16 also requires a pipeline company to “make a good-faith effort to minimize the physical impact and economic damage that result from the

construction and repair of a pipeline.” MCL 483.2b. Finally, the Commission has interpreted Act 16 to require a demonstration of public need for the proposed project; that it is designed and routed in a reasonable manner; and that the construction of the project will meet or exceed current safety and engineering standards – all of which are at issue in this case. In sum, Act 16 provides an avenue for the Commission to address the need for, design and routing of, and potential environmental harms from petroleum transport projects; and therefore, the statute protects the interests of Bay Mills and its members.

18. Bay Mills and its members are also within the zone of interests protected by the Michigan Environmental Protection Act (“MEPA”) (MCL 324.1701 *et seq.*). MEPA Section 1705(1) authorizes the agency or court to permit any person to intervene in an administrative proceeding “on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.” MCL 324.1705(1).

19. Bay Mills has organizational standing because its individual members meet the zone-of-interests test. Commission rules and precedent provide that an association may be granted intervention to represent the interests of its members. See *In re Detroit Edison* at 8. To establish standing to intervene in a Commission proceeding, an association can assert and represent the interests of its third-party members without specifically identifying each individual member whose interests are to be represented. *Id.*

20. Bay Mills also meets the test for permissive intervention, because it will provide useful information to the Commission and a unique perspective on the issues. The Commission has noted that “permissive intervention is appropriate where the intervenor’s participation will provide a benefit that outweighs any resulting delay or expense. Permissive intervention has also

been granted where a proceeding ‘raises novel questions and important issues of policy’ and the intervenor will ‘bring a unique perspective’ to the case.” *In re Consumers Energy Company Energy Optimization Plan*, Commission Order in Case No. U-17771 (October 27, 2015), p 6 (citations omitted). Both grounds exist in this case.

21. In addition to its unique perspective as a federally-recognized Indian Tribe possessing treaty rights in natural resources affected by the project, Bay Mills Indian Community has engaged in myriad ways with the Line 5 pipeline and the tunnel replacement project. These include consultation and written comments to the Michigan Department of Environment, Great Lakes and Energy on Line 5 permitting; consultation and written comments to the United States Army Corps regarding Line 5 permitting; and written comments to the Governor of Michigan regarding these matters. Bay Mills has also convened a Line 5 summit with the Great Lakes Indian Fish and Wildlife Commission; and Bay Mills President Newland was appointed by the Governor to the Michigan Advisory Council on Environmental Justice, which also has engaged on this issue.

22. Moving ahead without Bay Mills involvement would undermine the Governor’s recent Executive Directive that recognizes the government-to-government relationship between the State and Tribal Nations. The Directive requires agency consultation with the Tribal Nations before taking an action or implementing a decision that may affect a Tribal Nation. The consultation is to be meaningful and collaborative. *See* Governor Executive Directive No. 2019-17 (Detailing a four step process to ensure a meaningful consultation process is undertaken).

23. Bay Mills plans to evaluate Enbridge’s application, testimony, and exhibits, and to conduct discovery, and then to raise those issues and take those positions that best serve the interests described above. Among other things, Bay Mills is opposing Enbridge’s request for declaratory judgment that the project does not require Commission approval. Bay Mills also plans

to challenge the public need for the proposed project. Bay Mills also plans to scrutinize and potentially challenge whether the project is designed and routed in a reasonable manner; and whether the construction of the project will meet or exceed current safety and engineering standards. Bay Mills may also raise issues under MEPA. Bay Mills reserves the right to advance other issues as the case develops.

24. This petition to intervene is timely.

25. Bay Mills requests that all notices and pleadings be served on:

Christopher M. Bzdok (P53094)
chris@envlaw.com

Olson, Bzdok & Howard, P.C.
420 E. Front St.
Traverse City, MI 49686

Debbie Chizewer*
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David Gover*
Senior Staff Attorney
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Matt Campbell*
Staff Attorney
Native American Rights Fund
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mcampbell@narf.org

**Pro Hac Vice motions anticipated*

and on:

Bay Mills Indian Community
Attn: Legal Department
12140 West Lakeshore Drive
Brimley, MI 49715

Kathryn Tierney (P24837)
candyt@bmic.net

Whitney Gravelle (P83217)
wgravelle@baymills.org

For the reasons just outlined, Bay Mills Indian Community respectfully requests that the Commission grant this petition to intervene and treat it as a party to this proceeding.

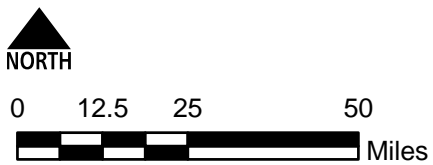
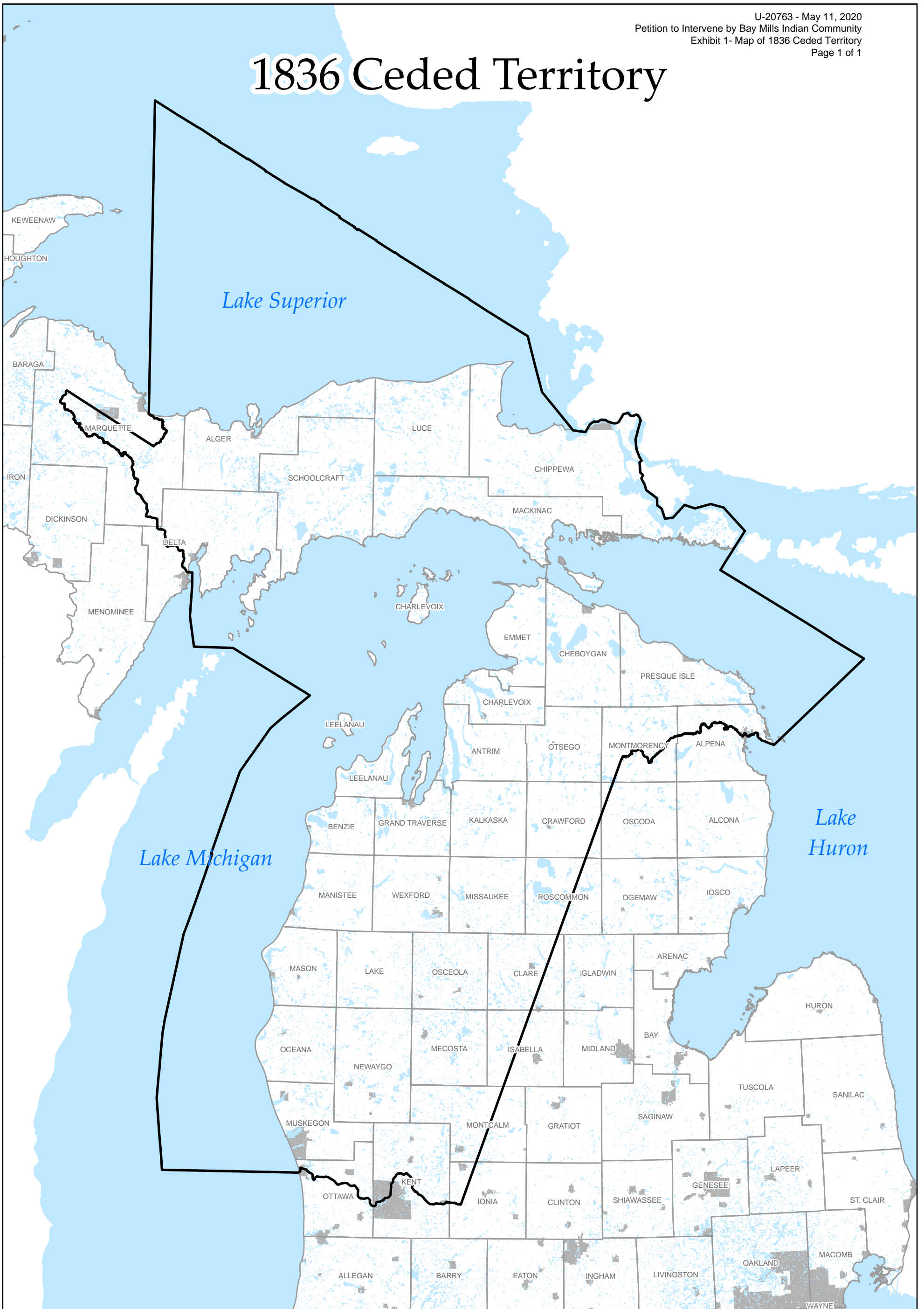
OLSON, BZDOK & HOWARD, P.C.
Counsel for Bay Mills Indian Community

Date: May 11, 2020

By: _____

Christopher M. Bzdok (P53094)
420 E. Front St.
Traverse City, MI 49686
Phone: 231-946-0044

1836 Ceded Territory



Data: LTBB NRD, State of Michigan CGI, LTBB GIS, LTBB Legal
Based on 1836 Treaty of Washington, 7 Stat. 491.
February 1, 2010

Legend

- 1836 Ceded Territory
- County Line
- City - Village
- Lake



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AFFIDAVIT OF BRYAN T. NEWLAND

Bryan T. Newland, being first duly sworn, deposes and states as follows:

1. I am the duly elected President of Gnoozhekaaning, "Place of the Pike," or the Bay Mills Indian Community, which is a federally recognized Indian Tribe with a government organized under the provisions of the Indian Reorganization Act of 1934, 25 U.S.C. §5101, *et seq.*

2. The Bay Mills Indian Community is the modern day successor in interest to six bands of Ojibwe people who were identified by the negotiators for the United States as living near Sault Ste. Marie in the Treaty of March 28, 1836, 7 Stat. 491.

3. At the time of the Treaty, the bands relied heavily on the fishery resources found in the Upper Great Lakes for their subsistence, and as an item of commerce with the citizens of the United States.

4. Band representatives joined with Ojibwe and Ottawa band representatives in Washington D.C. in early March, 1836, at the request of the United States to negotiate a treaty of cession.

5. The Ojibwe and Ottawa signed the Treaty on March 28th, and ceded to the federal government over 14 million acres of land and, in addition, the waters of Lake Superior lying eastward of the Chocolay River, the northern portion of Lake Huron to the mouth of the Thunder Bay River, and the waters of Lake Michigan from Ford River south of Escanaba to Grand Haven on Lake Michigan's southeastern shore, and including all the waters connecting the three lakes.

6. Although our ancestors were willing to provide land to the United States, they carefully protected the traditional lifeway and its reliance on the environment's natural resources for food, shelter, medicines, and for trade. This was embodied in Article Thirteenth of the Treaty, which reserved the right to hunt, and the other usual privileges of occupancy until the land was required for settlement.

7. Commercial and subsistence fishing continue to be the primary occupation of members of the Bay Mills Indian Community from Treaty times until the present day. Over half our member households rely on fishing for all, or a portion of their annual income.

8. This right to fish has been fiercely protected by the Bay Mills Indian Community and its members, including litigation regarding: the continued existence of the Treaty right; the member's right to use traditional fishing gear such as gillnets; and the limitations on the State's power to regulate the exercise of the treaty right to fish. The first round ended in the 1976 decision of the Michigan Supreme Court that the right to fish in the ceded waters of Michigan's Great Lakes, expressly reserved by Article Thirteenth, continue to exist, and that the State's power to regulate treaty-protected fishermen was limited to those restrictions exclusively necessary to protect the resource

from depletion. The case is *People v. LeBlanc*, 399 Mich. 31; 248 NW2d 199 (1976); it began with a call from Bay Mills member Albert LeBlanc to the local DNR office in 1972, stating that he had set a gill net in Lake Superior. Mr. LeBlanc was issued a citation for using an illegal fishing device and the battle began.

9. The next round was waged in federal court, and began in 1973 with the filing of a lawsuit against the State of Michigan by the United States, as trustee for the Bay Mills Indian Community, which asserted that the State's regulation of treaty-protected fishing activities by the Tribe's fishers impaired and interfered with the Tribe's treaty rights, in contravention of the laws and treaties of the United States. That litigation, known as *United States v. Michigan*, Case No. 2:73 -cv- 26 (W.D. Mich.) resulted in a decision in 1979 in which the Tribe's treaty rights were held paramount to the fishing regulations of the State; the case is reported at 471 F. Supp. 192 (W.D. Mich. 1979). The case has been on-going since then, as additional Tribes were federally recognized and management and regulatory frameworks were developed through a combination of negotiated agreements and court orders. The United States, the Tribes and the State are currently engaged in negotiations for a new management and allocation agreement which will replace the current one, which expires in August 2020.

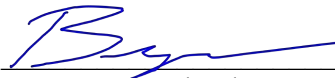
10. The legal history of the Treaty fishing controversies is recited not only to emphasize the existence of Tribal rights regarding the fishery, but also to serve as evidence that the right to fish, and the need for a natural environment in which fish can thrive, is of the utmost importance to the Tribe and its members, and will be fiercely protected.

11. At present, the Tribe is deeply concerned that environmental stressors such as climate change, invasive species, chemical pollutants and habitat destruction will combine to have a significant and perhaps permanent adverse impact of the fishery. The operation of current Line 5, and the prospect of the siting and construction of a tunnel in the Straits of Mackinac for the transport of petroleum products, is the most obvious and most preventable risk to the fishery resources throughout northern Lakes Michigan and Huron.

12. I have personal knowledge of the allegations in the Bay Mills Indian Community's Petition to Intervene in this case.

13. The factual allegations in the petition regarding the Bay Mills Indian Community, its members and its interests are true to the best of my knowledge, information and belief.

14. If called as a witness, I can competently testify as to the facts in the Petition to Intervene.



Bryan T. Newland

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AFFIDAVIT OF JACQUES LEBLANC JR.

Jacques LeBlanc, Jr., being sworn, states:

1. I am a tribal citizen of Gnoozhekaaning, "Place of the Pike," or Bay Mills Indian Community in the Upper Peninsula of Michigan.
2. Since my birth in 1982, I have lived on or adjacent to the Bay Mills Indian Community reservation in Brimley, Michigan.
3. At the age of five, I began subsistence fishing with my father Jacques LeBlanc, Sr., and learned the fundamentals of fishing, how to prepare nets, and also how to filet fish so my immediate and extended family could eat fresh whitefish or lake trout for various meals.
4. At the age of twelve, I began commercially fishing with my father and my uncle Gary Parish to help support our family with living expenses. During this time, I learned how to gill net fish and live trap net fish, while also learning how to captain a boat and navigate the Great Lakes waters.

5. My family has a long history of fishing in the State of Michigan and the Great Lakes waters. My grandfather, “Big Abe” LeBlanc, was instrumental in helping secure the treaty fishing rights for the Bay Mills Indian Community.

6. Fishing is an engrained tradition within the Bay Mills Indian Community and is considered a traditional and cultural practice by many throughout my Tribe.

7. I currently own a gill net fishing outfit and commercially fish the waters of the Great Lakes in various locations. Depending on the season and weather, I personally drive hundreds of miles to find the best location to launch my boat and catch fish to support my family.

8. Through many ways, my fishing outfit does more than just support my family. In operating my own commercial operation, I have employed several dozen tribal members throughout the years who also exercise their treaty right as a means to support their family financially.

9. I also serve on the Bay Mills Conservation Committee. The Conservation Committee is an elected nine member committee of the Bay Mills Indian Community with the authority and responsibility for regulation of all matters pertaining to hunting, trapping, and fishing. This responsibility includes all 13.7 million acres in the ceded territory that is encompassed in Bay Mills’ treaty hunting and fishing rights.

10. I am extremely concerned about the proposed tunnel replacement project for the pipelines that run across the Straits of Mackinac and in the Great Lakes waters. The proposed tunnel and the pipelines themselves threaten the treaty fishing rights I exercise, my family exercise, and that many other tribal citizens exercise to support our families.

11. Of the many things I have learned during my numerous years fishing, it is that the Great Lakes are the gate keepers of habitat management for the different species of fish that are available for harvest.

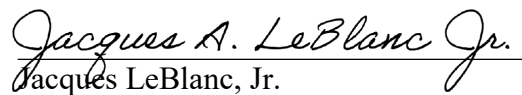
12. If a tunnel is built or the pipelines burst, the numerous spawning areas for fish in the Straits of Mackinac will be destroyed and poisoned to such an extent that no person will be able to fish, let alone eat anything that comes from those waters.

13. If the Great Lakes are harmed, there will be no more fish in the water and no means to continue supporting my family through treaty subsistence and commercial fishing.

14. I have personal knowledge of the allegations in the Bay Mills Indian Community's Petition to Intervene in this case.

15. The factual allegations in the petition concerning Bay Mills Indian Community, its tribal citizens, fishers, treaty hunting, and treaty fishing rights are true to the best of my knowledge, information, and belief.

16. If called as a witness, I could competently testify as to the facts in the Petition to Intervene.


Jacques LeBlanc, Jr.

STATE OF MICHIGAN)
) ss
COUNTY OF CHIPPEWA)

Subscribed and sworn to before me this 8th day of May, 2020, by Jacques LeBlanc, Jr.

KARLA L. GERDS
Notary Public, State of Michigan
County of Grand Traverse
My Commission Expires Nov. 13, 2024
Acting in the County of Chippewa

Karla L Gerds

Karla L. Gerds, Notary Public
Grand Traverse County, Michigan
Acting in Chippewa County

My commission expires: November 13, 2024
Notarized using electronic remote technology*

STATE OF MICHIGAN
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U-20763

PROOF OF SERVICE

On the date below, an electronic copy of **Petition to Intervene by Bay Mills Indian Community (BMIC)** was served on the following:

Name/Party	E-mail Address
Counsel for Enbridge Energy, Limited Partnership. Michael S. Ashton Shaina Reed	mashton@fraserlawfirm.com sreed@fraserlawfirm.com
Counsel for MPSC Staff Spencer A. Sattler Benjamin J. Holwerda Nicholas Q. Taylor	sattlers@michigan.gov holwerdab@michigan.gov taylor10@michigan.gov
Counsel for Michigan Environmental Council Christopher M. Bzdok Lydia Barbash-Riley	chris@envlaw.com lydia@envlaw.com
Counsel for Grand Traverse Band of Ottawa and Chippewa Indians Bill Rastetter Christopher M. Bzdok Lydia Barbash-Riley	bill@envlaw.com chris@envlaw.com lydia@envlaw.com
Counsel for Environment Law & Policy Center Margrethe Kearney	mkearney@elpc.org

[SIGNATURE PAGE BELOW]

The statements above are true to the best of my knowledge, information and belief.

OLSON, BZDOK & HOWARD, P.C.
Counsel for BMIC

Date: May 11, 2020

By: _____

Karla Gerds, Legal Assistant
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Email: karla@envlaw.com