

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL DISTRICT
INGHAM COUNTY

DANA NESSEL, ATTORNEY GENERAL
OF THE STATE OF MICHIGAN, ON BEHALF
OF THE PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiffs,

v.

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

Defendants.

CASE NO. 19-474-CE

HON. JAMES S. JAMO

**BRIEF OF AMICI CURIAE BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF
CHIPPEWA INDIANS, BAY MILLS INDIAN COMMUNITY, GRAND TRAVERSE
BAND OF OTTAWA AND CHIPPEWA INDIANS, LITTLE RIVER BAND OF OTTAWA
INDIANS, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, NOTTAWASEPPI
HURON BAND OF POTAWATOMI, AND SAULT STE. MARIE TRIBE OF CHIPPEWA
INDIANS IN SUPPORT OF PLAINTIFF**

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STATEMENT OF INTEREST OF TRIBAL NATION AMICI CURIAE¹

Tribal Nation amici are sovereign, federally recognized Indian Tribes that share a strong interest in preventing a catastrophic rupture of Line 5 and in the proper resolution of the legal issues presented to this Court by the parties' respective motions for summary disposition.

Line 5 traverses the Reservation of amicus Bad River Band of the Lake Superior Tribe of Chippewa Indians ("the Band") for over twelve miles. Various of Enbridge's Reservation easements expired in 2013, yet Enbridge continues to pump oil across the Reservation and in doing so threatens the Band's treasured waters and resources. Because of natural erosion, the pipeline is now only one storm away from being exposed to forces that it was not designed to withstand, creating the risk of a rupture that could devastate vast swaths of the Bad River watershed and Lake Superior, including the internationally protected wild rice stands integral to the Band's subsistence and cultural practices. To put an end to Enbridge's ongoing trespass and the grave environmental danger it presents, the Band filed suit against Enbridge in the Western District of Wisconsin in July 2019. In that court, and in its pending Seventh Circuit appeal, Enbridge has raised many of the same Transit Pipelines Treaty ("Transit Treaty") arguments that it does here. Consequently, the Band has a strong interest in having those issues resolved properly in this litigation.

For centuries, amici Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, and Sault Ste. Marie Tribe of Chippewa Indians have fished the Great Lakes for

¹ Tribal Nation amici submit this brief pursuant to an accompanying Motion for Leave and this Court's order dated October 29, 2024. No part of this brief was authored by counsel for a party, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

subsistence and commercial purposes. In the Treaty with the Ottawa, Mar. 28, 1836, 7 Stat 491, the Tribal Nations' forebears ceded millions of acres of land, paving the way for Michigan's statehood. The central promise the tribes insisted upon in return was that they could continue exercising their inherent rights to fish, hunt, and gather throughout the territory they were ceding, and in particular that they could sustain their fisheries in the Great Lakes, in order to maintain their traditional way of life. *United States v Michigan*, 471 F Supp 192 (WD Mich, 1979). In modern times, the amici Tribal Nations have fought vigorously to protect those fisheries from numerous threats, and in 2000 they formed the Chippewa Ottawa Resource Authority (CORA) "to ensure conservation of fishery resources in the treaty-ceded waters in the state of Michigan for the continued use and enjoyment by Indian tribes and all other persons entitled to use the resources."²

Amicus Nottawaseppi Huron Band of Potawatomi (NHBP) has a unique and sobering perspective on the issues before the Court. In 2010, Enbridge's Line 6B ruptured into a tributary of the Kalamazoo River, "a primary element of the Tribe's lifeways and traditions for countless generations." NHBP, *The Great Stain: 10 Years After the Kalamazoo River Oil Spill*.³ The release of nearly a million gallons of oil destroyed a large span of the river and adjoining flood plains and "permanently stained" "the spirit of the people residing within the watershed[.]" *Id.* NHBP understands acutely the signal importance of the State's efforts to honor its public trust obligations in bringing an end to Enbridge's conveyance of petroleum products through an exposed, aging pipeline on the bottomlands of the Straits of Mackinac.

² CORA: Regulating/Enforcement, <https://www.1836cora.org/fishing/>.

³ <https://nhbp-nsn.gov/media/the-great-stain-10-years-after-the-kalamazoo-river-oil-spill/>.

INTRODUCTION

Enbridge cannot use the Transit Treaty as a magic wand to wave away the preexisting legal rights of parties who bring claims regarding the injuries being inflicted by its transit pipelines. Enbridge's efforts to thus use the Transit Treaty to override the Bad River Band's treaty rights have been roundly rejected; its attempt to use the Transit Treaty here to abrogate Michigan's rights and responsibilities under the public trust doctrine is likewise infirm. Enbridge puts great weight on Article II of the Transit Treaty while dismissing Article IV, which explicitly affirms the validity of Michigan's actions. Enbridge further incorrectly invokes Article V, a temporary shutdown provision that works together with, rather than in lieu of, Article IV. Finally, Enbridge argues that Article IX, a provision pertaining only to the treaty parties—the United States and Canada—somehow preempts this action between two nonparties. Enbridge's efforts to use the Transit Treaty to evade the Attorney General's claims should be rejected.

ARGUMENT

I. The Transit Treaty Has No Talismanic Effect on Michigan's Preexisting Rights.

Enbridge argues that the relief sought by the Attorney General—the revocation of the Line 5 easement and the shutdown of Line 5 through enforcement of Michigan's public trust rights and obligations—is precluded by the Transit Treaty, 28 UST 7449, 1997 WL 181731 (Jan. 28, 1977). Enbridge made a parallel argument in the *Bad River* litigation, attempting to use the Transit Treaty to override preexisting Tribal treaty rights. The *Bad River* court properly rejected that argument. Enbridge's efforts to abrogate Michigan's deeply rooted public trust rights and responsibilities should fare no better.

A. *Bad River Flatly Rejects Enbridge’s Sweeping Argument that the Transit Treaty Overrides the Tribal Treaty Right to Exclude.*

1. Background of the *Bad River* Litigation

The Bad River Band of the Lake Superior Tribe of Chippewa Indians enjoys sovereign control over an approximately 125,000-acre reservation on the south shore of western Lake Superior. Enbridge Resp. to Proposed Facts (Dkt 208) ¶ 3, *Bad River Band v Enbridge Energy Co*, 2023 WL 4043961 (WD Wis, 2023) (19-cv-602-wmc).⁴ This Reservation was permanently set aside for the Band by the Treaty with the Chippewa, Sept. 30, 1854, 10 Stat 1109. The Band’s treaty rights include “the power to exclude non-Indians from Indian lands,” *Merrion v Jicarilla Apache Tribe*, 455 US 130, 141 (1982), and specifically “to exclude trespassers from the reservation,” *United States v Becerra-Garcia*, 397 F3d 1167, 1175 (CA 9, 2005).

Line 5 traverses over twelve miles of the Band’s Reservation pursuant to easements for Tribal and individual lands that lie along its path. *Bad River Band of the Lake Superior Tribe v Enbridge*, 626 F Supp 3d 1030, 1037 (WD Wis, 2022). Numerous easements across parcels owned or co-owned by the Band expired in 2013. *Id.* at 1040. The Band exercised its sovereign treaty right to exclude by enacting a formal resolution declining to renew the easements and ordering Enbridge to shut down and remove the pipeline from the Reservation. *Id.* Enbridge nevertheless continues to operate Line 5 across the Reservation to this day.

2. The *Bad River* Decision

The Band sued Enbridge for trespass, as well as for public nuisance (because of the looming exposure of the pipeline to the Bad River described above, which would result in the

⁴ District court filings in this case will be subsequently cited as “*Bad River* Dkt XX.” Filings from the appeal, Nos 23-2309, 23-2467 (CA 7), will be cited as “*Bad River* App Dkt XX” (using the docket numbering in No 23-2309).

catastrophic destruction of Reservation resources). Third Amended Complaint, *Bad River* Dkt 123, ¶¶ 13–19, 67. The Band averred that these circumstances represent an existential threat to the Band and to its treaty-protected rights in the lands and waters of its Reservation. *Id.* ¶ 19.

Enbridge responded that a shutdown of Line 5 would violate the Transit Treaty and that the Band is therefore precluded from acting against pipeline trespass or nuisance threats on the Reservation. As for the Band’s 1854 Treaty right to exclude, Enbridge argues that the 1854 Treaty “does not contain express language regarding the rights the signatory tribes would continue to enjoy in the face of competing federal statutes or international treaties.” Enbridge’s Bench Memorandum, *Bad River* Dkt 589, at 10 n 7. It further asserts that “[a]n injunction requiring compliance with the [Transit] Treaty does not reduce or otherwise interfere with the Band’s sovereignty or exercise of its delegated authority. Rather, it merely ensures that the Band does not abuse its authority in a manner proscribed by the most relevant federal law, *i.e.*, the Transit Pipelines Treaty.” *Id.* at 9 (citation omitted).

These claims are nothing short of preposterous. According to Enbridge, the solemn promises the United States made to the Band in 1854 about the sanctity of its Reservation homeland are meaningless because the United States did not additionally state that it would forbid a private party from later using a thence-unknown international agreement (about a thence-unknown product) to trample the Band’s rights. Moreover, by virtue of the Transit Treaty’s special significance, any effort by the Band to combat such trampling would constitute “abuse”—not by the company, but by the Band for attempting to maintain the integrity of its lands and waters.

But none of that is the law. The *Bad River* district court unequivocally rejected the notion that the Transit Treaty can override the Band’s preexisting rights and the United States’

preexisting obligations under the 1854 Treaty. Rather, the court held that the long-established principle of federal Indian law that only Congress may abrogate Tribal treaty rights, and only if it makes clear its intent do so (which it nowhere did in the Transit Treaty), applies as forcefully with respect to the Transit Treaty as it does with respect to all other laws and agreements:

[T]he Band’s property rights are themselves recognized in a federal treaty—the 1854 Treaty between the United States and the Chippewa; and ... a court cannot find that Congress abrogated Indian treaty rights absent unambiguous language to that effect. There is no such abrogation language in the 1977 Transit Treaty, as the Transit Treaty does not mention Indian treaties or treaty rights at all, let alone the 1854 Treaty with the Chippewa. [*Bad River Band*, 626 F Supp 3d at 1057 (citations omitted).]

The court accordingly granted summary judgment for the Band on its trespass claim, and after trial it held that Enbridge’s operation of Line 5 on the Reservation also constitutes a public nuisance.⁵

B. The Transit Treaty Likewise Does Not Abrogate Michigan’s Right—and Duty—To Protect the Lands Under Navigable Waters Within Its Boundaries.

Michigan holds fee title to the land under navigable waters, including the bottomlands of the Straits of Mackinac. *See, e.g., Utah Div of State Lands v United States*, 482 US 193, 196 (1987); *Nedtweg v Wallace*, 237 Mich 14, 15 (1926). The State holds that title “in its sovereign capacity” and “in trust for the use and benefit of its people[.]” *State v Venice of Am Land Co*, 160 Mich 680, 702 (1910). As the Michigan Supreme Court has explained:

[T]he state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public. The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure. [*Glass v Goeckel*, 473 Mich 667, 678–679 (2005) (footnote omitted).]

⁵ Enbridge has appealed these rulings, and a decision is pending from the United States Court of Appeals for the Seventh Circuit (Nos 23-2309, 23-2467).

The trust is “high, solemn, and perpetual,” as “it is the duty of the state to forever maintain” the public’s rights. *Collins v Gerhardt*, 237 Mich 38, 49 (1926). Michigan “cannot relinquish this duty,” *Glass*, 473 Mich at 679, since “abdication is not consistent with the exercise of that trust which requires the ... state to preserve such waters for the use of the public,” *Ill Cent RR Co v Illinois*, 146 US 387, 453 (1892). And the duty falls specifically to Michigan’s “executive departments”—“equally” with its courts and legislature—as “sworn guardians of Michigan’s duty and responsibility as trustee of the ... beds of five Great Lakes.” *Obrecht v Nat’l Gypsum Co*, 361 Mich 399, 412 (1960). Accordingly, as this Court has held in this case, “Plaintiff [Nessel] retains a duty to protect public trust lands[.]” Temporary Restraining Order (June 25, 2020) (“TRO”) ¶ 7.

Michigan’s Constitution in turn proclaims that “[t]he conservation and development of the natural resources of the state are ... of paramount public concern in the interest of the health, safety and general welfare of the people” and requires the legislature to “provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.” Const 1963, art IV, § 52. The Michigan Environmental Protection Act authorizes courts to grant temporary or permanent injunctive relief or impose other conditions to comply with this constitutional mandate. MCL 324.1704(1).

Enbridge argues that, as with the Band’s treaty rights, none of this matters: the singular importance of the public trust doctrine in Michigan law; the ironclad nature of the State’s rights and responsibilities under it; the Supreme Court’s “repeated[] emphasi[s] [on] the importance of submerged lands to state sovereignty,” *Idaho v Coeur d’Alene Tribe Idaho*, 521 US 261, 289 (1997) (O’Connor, J., concurring). In Enbridge’s retelling, all these laws and precedent lose their

force in the face of the Transit Treaty, such that transit pipeline companies enjoy free rein to trespass on lands and waters even where their operations present a grave danger.

But as the *Bad River* court properly recognized, the Transit Treaty lacks such radical power. It does not override preexisting legal rights, particularly those of sovereign dimension. Contrary to Enbridge's sweeping interpretation, the true purpose and effect of the Transit Treaty, while important, is decidedly more modest and faithful to the law: to ensure that transit pipelines are not subject to discriminatory regulation or taxation. Article IV(1) of the Treaty affirms that transit pipelines "shall be subject to regulations by the appropriate governmental authorities," and Article IV(2) requires that such regulations "shall be just and reasonable, and shall always, under substantially similar circumstances with respect to all hydrocarbons transmitted in similar pipelines ..., be applied equally to all persons and in the same manner." 28 UST 7449, art IV, cls 1 & 2. Article III similarly prohibits any discriminatory "fee, duty, tax or other monetary charge ... on or for the use of any Transit Pipeline[.]" *Id.* art III.

Numerous sources confirm that a central purpose of the Transit Treaty is to prevent discrimination by one country against transit pipelines of the other country and that nondiscriminatory regulations are entirely consistent with the treaty text, history, and application. For example, the lead treaty negotiator testified in the Senate that the Transit Treaty "does not interfer[e] with the normal powers of the provinces or states to tax and regulate pipelines, so long as those powers are not used to discriminate against transit pipelines." S Rep No 95-9, at 86 (1977). Accordingly, in *Portland Pipe Line Corp v City of S Portland*, 288 F Supp 3d 321 (D Me, 2017), the court explained that "the federal policy embodied in the Transit Pipeline Agreement is one of anti-discrimination." *Id.* at 444.

As explained in the next section, Michigan’s actions fall squarely within the ambit of Article IV. And there is no suggestion, let alone evidence, that Michigan’s actions have been motivated by discriminatory animus or have resulted in discriminatory treatment of transit pipelines. Michigan’s actions are thus entirely consistent with the purpose and text of the Transit Treaty. Just as that agreement does not abrogate the preexisting treaty rights of the Bad River Band pertaining to its sovereign Reservation lands, it does not abrogate Michigan’s longstanding public trust rights and obligations as they apply to the Great Lakes and their bottomlands.

II. Enbridge Misinterprets Article IV of the Transit Treaty, Which Squarely Authorizes Michigan’s Actions.

Enbridge contends that the Transit Treaty forbids courts from *ever* enjoining the operation of a transit pipeline, even if it is operating in flagrant violation of the law. *See* Defs.’ Suppl. Br. (“ENB Br.”) 23 (“The 1977 Treaty embodies a policy that mandates the unimpeded operation of cross-border pipelines like Line 5[.]”). This breathtaking result, says Enbridge, flows from Article II, which provides that “[n]o public authority in the territory of either Party shall institute any measures ... which are intended to, or which would have the effect of, impeding, diverting, redirecting or interfering with in any way the transmission of hydrocarbons in transit.” 28 UST 7449, art II, cl 1. Because any shutdown of a transit pipeline would impede the flow of hydrocarbons through it, the argument goes, no shutdown may ever be ordered. *See* ENB Br. 21 (“Article II bars any injunctive relief in the form of shutting down Line 5.”).

But the text of the Transit Treaty evidences exactly the opposite: Article IV explicitly confirms the regulatory powers of governmental authorities over transit pipelines. It provides that “[n]otwithstanding the provisions of Article II, ... a Transit Pipeline ... shall be subject to regulations by the appropriate governmental authorities ... in the same manner as for any other pipelines ... subject to the authority of such governmental authorities *with respect to such*

matters as ... environmental protection[.]” 28 UST 7449, art IV, cl 1 (emphases added). Hence, transit pipelines are plainly subject to Article IV regulation despite any contrary language in Article II. *See Portland Pipe Line Corp*, 288 F Supp 3d at 443 (noting that the “broad statement” of Article II “is limited ... by [the] express savings clause” of Article IV); Black’s Law Dictionary (12th ed. 2024) (“notwithstanding” means “[d]espite; in spite of”).

Enbridge tries to blunt the force of Article IV by arguing that “the Attorney General’s complaint seeks to *shut down* the Straits Pipelines permanently rather than merely subject them to ‘regulations.’” ENB Br. 21. But “the authority to regulate is normally understood to include the authority to prohibit.” *B-West Imports, Inc v United States*, 75 F3d 633, 636 (CA Fed, 1996). Enbridge does not contest the long-accepted proposition that common law suits constitute an accepted form of regulation, *see, e.g., United States v Syfy Enters*, 903 F2d 659, 673 (CA 9, 1990) (“[L]itigation itself can be a form of regulation[.]”); Eric A. Posner, *Tobacco Regulation or Litigation?*, 70 U. Chi. L. Rev. 1141, 1155 (2003) (“Tort law is a form of regulation, and always has been.”).⁶ And the courts have consistently rejected a purported distinction between the power to regulate and the power to prohibit. *See, e.g., Cal Rest Ass’n v City of Berkeley*, 89 F4th 1094, 1102 (CA 9, 2024) (“[A] regulation may assume the form of a prohibition.” (brackets and quotation marks omitted)); *RJ Reynolds Tobacco Co v Cty of Los Angeles*, 29 F4th 542, 559 (CA 9, 2022) (rejecting “the-County-may-regulate-but-not-prohibit sales argument” as “drawing [an] amorphous line” “[b]ecause ‘prohibitions’ can almost always be practically achieved by mere

⁶ Although Article IV does not define “regulations,” its second paragraph provides that “[a]ll regulations, requirements, terms and conditions imposed under paragraph 1 shall be ... applied equally to all persons and in the same manner.” 28 UST 7449, art IV, cl 2. By its very terms, then, Article IV contemplates that governmental authorities may impose non-discriminatory “*regulations, requirements, terms and conditions.*” This broad listing includes far more than administrative rules and clearly encompasses the State’s actions in this case.

well-crafted partial ‘regulations’”); *United States v Devenport*, 131 F3d 604, 607 (CA 7, 1997) (stating that distinctions between “regulatory” and “prohibitory” laws are mere “linguistic formulations”).

Enbridge hence seeks to craft a limitation on Article IV’s scope that its text simply does not support and that would defy the very purpose of the Article. Under Enbridge’s view, while governments may regulate pipelines, where those pipelines carry with them the gravest of threats governments would be rendered powerless to enforce their regulations or extend them to their logical conclusion by requiring a shutdown of pipeline operations. But Article IV instead affirms the power of governments to broadly regulate transit pipelines (in a nondiscriminatory manner) for a non-exhaustive list of illustrative purposes, including “environmental protection.”

That is exactly what Michigan has done here. The 2010 rupture of Enbridge’s Line 6B in Marshall, Michigan, declared by the National Transportation Safety Board to be the costliest inland oil spill in American history, resulted in catastrophic damage to the lands, waters, wildlife, and other resources of the Kalamazoo River watershed. NTSB, *Press Release: Pipeline Rupture and Oil Spill Accident Caused by Organizational Failures and Weak Regulations* (July 10, 2012).⁷ And as searing as this destruction was, a spill in the Straits would, according to a study commissioned by the State, “be much greater than the Marshall, MI spill,” causing potential damage to over 700 miles of Great Lakes shoreline. Mich. Tech. Univ., *Independent Risk Analysis for the Straits Pipelines: Final Report* 69, 113 (2018).⁸ Enbridge argues that the Transit Treaty prevents Michigan from acting to prevent such a disaster. But Michigan’s efforts to fulfill

⁷<https://bloximages.chicago2.vip.townnews.com/madison.com/content/tncms/assets/v3/editorial/6/e3/6e35d803-3843-5976-b2b6-a485aa0641f1/57e4202dc7799.pdf.pdf>.

⁸https://hazmaton.org/wp-content/uploads/2022/01/Straits_Independent_Risk_Analysis_Final-1-1.pdf.

its public trust responsibility by protecting the bottomlands and waters of the Straits—an aim of the highest order—are explicitly recognized by Article IV as a valid subject of regulation.

In addition, and of central significance to the Tribal Nation amici, Michigan has acted pursuant to its responsibility to respect tribal treaty rights and interests in the Straits. Governor Whitmer and the Director of the Department of Natural Resources (“DNR”) have explained that their revocation and termination order to Enbridge rests in important part on the fact that

[t]he Great Lakes and the Straits of Mackinac ... have special ecological, cultural and economic significance for the tribes of Michigan, including, but not limited to, the tribes that retain reserved hunting, fishing and gathering rights in the lands and waters ceded to the United States under the 1836 Treaty of Washington. An oil spill or release from the Straits Pipelines would have severe, adverse impacts for tribal communities. The tribes have fundamental interests in the preservation of clean water, fish and habitat at the Straits. Many tribal members rely on treaty-protected rights of commercial and subsistence fishing in the Straits and other Great Lakes waters that could be impacted by an oil spill or release. [Notice of Revocation and Termination of Easement (Dkt 1-1) (“Notice”) 9, *Enbridge Energy, Ltd P’ship v Whitmer*, Case No 1:20-cv-1141-JTN-RSK (WD Mich Nov 24, 2020) (footnote omitted).⁹]

The Governor and DNR Director have things exactly right. Line 5 runs through an area critically important to the 1836 Treaty Tribal Nations, which have occupied the Great Lakes region since time immemorial and have significant interests in the protection of the region’s resources. *See United States v Michigan*, 471 F Supp at 220–25. Citizens of the Nations engage in fishing, hunting, and gathering in the area for both subsistence and commerce, and fishing is intertwined with their cultural and spiritual practices. *Id.* at 213, 221, 235, 238, 257–58. And through CORA, the Nations co-manage the Great Lakes fisheries along with the State in an effort to ensure that future generations as well as the present one enjoy their benefits.

⁹ Filings in this case will be subsequently cited as “*ENB v Whitmer* Dkt XX.” Filings in the closely related case *Michigan v Enbridge Energy, Ltd P’ship*, 571 F Supp 3d 851 (WD Mich) (Case No 1:20-cv-1142), will be cited as “*Mich v ENB* Dkt XX.”

As the Notice acknowledges, an oil release in the Straits would have “severe, adverse impacts” on the ecosystem, thus posing an intolerable risk to Tribal Nation amici’s livelihood, cultural and spiritual practices, and identity. Notice at 9. The State has appropriately recognized that the public trust is advanced by respecting, not ignoring or violating, these significant Tribal interests. The State’s enlightened approach to vindicating Tribal interests fits comfortably within the illustrative list of cognizable regulation under Article IV.

Enbridge ignores all this, arguing instead that “PHMSA is the *only* ‘appropriate governmental authority’ with respect to pipeline safety and environmental protection—not a state attorney general or a court exercising state law.” ENB Br. 20. But Enbridge provides no support (and none exists) for the proposition that PHMSA is the “appropriate governmental authority” to enforce state or tribal trespass laws or to fulfill public trust responsibilities, whether those pertain to the Bad River Reservation or the Straits of Mackinac. Indeed, the Pipeline Safety Act explicitly “does not authorize [PHMSA] to prescribe the location or routing of a pipeline facility,” 49 USC 60104(e), instead reserving that issue for state and tribal governments—and the continued operation of the pipeline across the sensitive Straits bottomlands is the very nub of the State’s public trust doctrine claims here. In pressing those claims, Michigan is not setting or enforcing safety standards, *see* Plf.’s Suppl. Br. 21–24; rather, it is fulfilling its public trust obligations by ensuring that sovereign resources are dedicated to their proper use and that Tribal interests are vindicated. In our federalist system, the State very much is an appropriate governmental authority to be discharging these important functions.

If Enbridge’s interpretation of Article II were correct, then *any* effort by a state or tribal nation to enforce its rights and honor its obligations would be forbidden—even when, as here, a state acts pursuant to authority specifically recognized in Article IV and required by public trust

law. That theory would convert a state’s or tribe’s exercise of trust responsibilities into a breach of the United States’ treaty obligations. Only the clearest text could support such a drastic diminution of state and tribal power. But Article IV confirms exactly the opposite.¹⁰

III. Article V of the Transit Treaty Works in Tandem with Article IV.

Enbridge asserts that “Article V—the sole exception referenced in Article II—only allows shutdowns ‘temporarily,’” ENB Br. 20. However, Article V does not override Article IV but works in conjunction with it. Article V speaks of “temporary” shutdowns because it only addresses situations calling for them: “*In the event of an actual or threatened natural disaster, an operating emergency, or other demonstrable need temporarily to reduce or stop ... the normal operation of a Transit Pipeline, the flow of hydrocarbons through such Transit Pipeline may be temporarily reduced or stopped[.]*” 28 UST 7449, art V, cl 1 (emphasis added). Article IV, in turn, speaks to the general regulatory powers of governmental authorities over transit pipelines. Canons of interpretation make clear that the temporal restrictions of Article V do not apply to the regulatory authority confirmed in Article IV. As the Supreme Court has explained, “when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Collins v Yellen*, 594 US 220, 248 (2021) (citation omitted).

The Senate committee that recommended ratification of the Transit Treaty made clear that Articles IV and V serve as distinct sources of governmental authority over pipelines. “Articles IV and V allow each nation to impose proper regulations for ... environmental protection[.]” S Rep

¹⁰ The *Bad River* court agreed, finding that “the evidence at trial” regarding the Band’s actions to protect its Reservation resources “did not establish any violation of the Transit Treaty[.]” *Bad River Band v Enbridge*, 19-cv-602-wmc, 2022 WL 17249085, at *5 (WD Wis Nov 28, 2022) (citing Article IV).

95-9, at 2. Under Enbridge’s efforts to conflate the two, however, the more serious the environmental threat posed by a pipeline, the less amenable that threat is to proper regulation because of the imagined strictures of the Transit Treaty.

The dangers of that approach can be seen in this very case. In the aftermath of the June 2020 accident that damaged the Straits pipelines, this Court granted a temporary restraining order shutting down the West Line because “the severe risk of harm that may result from [continued] operation ... is so substantial and irreparable ... and endangers so many communities and livelihoods and the natural resources of Michigan[.]” TRO ¶ 7.¹¹ The Court subsequently lifted the order after finding no permanent damage to the West Line. But if this Court had concluded otherwise—that the threat posed by the pipeline’s condition or the potential for recurrence was sufficiently high that the pipeline should be shut down permanently—the Court’s hands would have been tied: according to Enbridge, governmental authorities (including the courts) can *never* permanently shut down a pipeline, no matter how dangerous or otherwise antithetical to legitimate governmental concerns.

But neither Article IV nor Article V says that. Nor does Enbridge’s reading conform with the United States’ understanding of the Transit Treaty. In 1991, the federal government issued a “Presidential Permit” to authorize an Enbridge transit pipeline crossing beneath the St. Clair River from Michigan into Canada. Presidential Permit (Dec. 12, 1991).¹² That Permit subjects the pipeline “to the limitations, terms and conditions contained in *any* orders issued by ... the

¹¹ Enbridge had already agreed not to restart the East Line until after a hearing on the State’s request for a preliminary injunction. TRO ¶ 2.

¹² See https://3376acbd-13c4-425a-946e-a9e64d441c53.filesusr.com/ugd/869f65_5373ff87997c4b499195c3b3022b5971.pdf. Despite extensive inquiry, Tribal Nation amici have been unable to determine whether the Permit was for Enbridge’s Line 5 or Line 6B, but the issue is immaterial because both are transit pipelines and subject to the Transit Treaty.

State of Michigan” and further provides that “[t]his permit shall continue in force and effect only so long as the permittee shall” comply with such orders. *Id.* art 6 (emphasis added). The United States thus clearly did not view the Transit Treaty as foreclosing a government order that might impede the flow of oil, whether on a temporary or permanent basis. *See Air France v Saks*, 470 US 392, 396 (1985) (to interpret treaties, courts may look to “the practical construction adopted by the parties” (citation omitted)). And neither did Enbridge, as the Permit is conditioned on the company’s “acceptance of the conditions, provisions, and requirements hereinafter set forth[.]” Permit Preamble.

In its present motion for summary disposition, Michigan has not invoked or acted pursuant to Article V, as it has not sought to address an emergency of a serious but time-limited nature. Its public trust claim instead focuses on the need for a permanent solution to an intractable problem. The State has found that “the threat of damage to the Straits Pipelines from anchor strikes or impacts from other external objects is very real,” Notice at 6, and that “even apart from their unique vulnerability to anchor strikes, operation of the Straits Pipelines presents inherent risks of environmental harm,” *id.* at 7. These findings lead to the unavoidable conclusion that “continued operation of the Straits Pipelines cannot be reconciled with the State’s duty to protect public trust uses of the Lakes from potential impairment or destruction.” *Id.* at 5. A permanent shutdown under these circumstances is fully consistent with Article IV’s explicit contemplation of state regulatory action.

IV. Article IX of the Transit Treaty Does Not Preempt Michigan’s Claims.

Enbridge argues that this lawsuit is precluded because Canada and the United States are engaged in dispute resolution under Article IX. ENB Br. 21. Enbridge and Canada have made an identical argument in the Bad River litigation. *See, e.g.,* Enbridge’s Opening Brief, *Bad River*

App Dkt 15 at 38–39; Canada’s Amicus Brief in Partial Support of Enbridge, *Bad River* App Dkt 22, at 16–17. In essence, Enbridge and Canada argue that simply by virtue of Canada’s invocation of the dispute resolution process, no domestic litigation involving the transit pipeline in question may proceed.

Nothing in Article IX supports this notion. By its own terms, the dispute resolution provisions of the Transit Treaty govern only disputes *between the parties to the Treaty* (i.e., the United States and Canada). Article IX provides that “[a]ny dispute *between the Parties* regarding the interpretation, application or operation of this Agreement shall, so far as possible, be settled by negotiation between them” or, if negotiation fails, “shall be submitted to arbitration at the request of either Party.” 28 UST 7449, art IX, cls 1, 2 (emphasis added). Of course, neither Michigan nor Enbridge is a party to the Transit Treaty. Article IX says nothing about nonparties and contains no instruction to courts to stay or dismiss litigation by Michigan (or any other nonparty) to enforce its rights.

The Transit Treaty contrasts starkly in this regard with treaties providing “clear directive[s] to domestic courts,” *Green Enters, LLC v Hiscox Syndicates Ltd*, 68 F4th 662, 667 (CA 1, 2023) (quotation marks omitted). In *Green Enterprises*, for example, the treaty contained “express terms” that “directly command[ed] courts to channel arbitrable disputes to arbitration[.]” *Id.* Nothing comparable exists here. Contrary to the argument of Enbridge and Canada, Article IX does not purport to dictate the course of domestic litigation, let alone to shut courthouse doors altogether.

Nor can Michigan (or the Bad River Band, or any other nonparty to the Treaty) initiate Article IX dispute resolution itself or demand that the federal government do so on its behalf. Article IX’s dispute resolution process is only available to (and only binding on) the parties to

the Transit Treaty. *See* 28 UST 7449, art IX, cl 1 (stating that the process is available only for “dispute[s] between the Parties”); *see also* *Medellin v Texas*, 552 US 491, 506 n 3 (2008) (“[I]nternational agreements ... generally do not create private rights or provide for a private cause of action in domestic courts.” (citation omitted)); *cf.* Canada’s Amicus Brief, *Mich v ENB* Dkt 45, at 8 (“Canada does not contend, and does not understand Enbridge to contend, that the Treaty creates a private right of action for Enbridge against Michigan.”).

Had Enbridge’s atextual Article IX argument succeeded in *Bad River*, the Band would have been powerless to address Enbridge’s blatant trespass on its land—a trespass that Enbridge officials have privately acknowledged, *Bad River* Dkt 168 at 3 (noting a senior Enbridge official’s admission in internal correspondence that “[w]e are currently operating in trespass as they spelled out in their lawsuit”), and that the *Bad River* court found to be “conscious and willful,” *Bad River Band*, 2023 WL 4043961, at *14 (WD Wis June 16, 2023). The Band would likewise have been powerless to address through its nuisance claim the impending environmental disaster should Line 5 become exposed to the Bad River. The *Bad River* court rejected such an extreme outcome, and this Court should do the same.

CONCLUSION

According to Enbridge, “the 1977 Transit Pipelines Treaty ... take[s] any shutdown injunction off the table as a matter of law.” Enbridge’s Supplemental Brief, *ENB v Whitmer* Dkt 91, at 6. As the *Bad River* court held, that sweeping proclamation badly misstates the law. Michigan has a “sworn” and “solemn” public trust duty to manage the invaluable resources of the Straits bottomlands for the use and benefit of its people, and Article IV explicitly authorizes the actions Michigan has taken to fulfill this responsibility. Moreover, Michigan’s actions are required to vindicate Tribal treaty rights and interests in the Straits. Enbridge cannot convert an

antidiscrimination treaty into one that abrogates Michigan's rights and duties and puts transit pipelines above the law. Instead, the Transit Treaty confirms Michigan's right to seek, and this Court's right to grant, permanent relief in this litigation.

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