



February 27, 2024

President Joseph R. Biden
The White House
1600 Pennsylvania Avenue Northwest
Washington, DC 20500

Re: Seventh Circuit Request to the United States for its Views Regarding the Transit Pipeline Treaty and Tribal Sovereignty in *Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Company, Inc.*

Dear President Biden,

On December 12, 2023, the United States Court of Appeals for the Seventh Circuit requested the United States submit its views in a case squarely implicating your Administration’s commitment to Tribal sovereignty, Tribal treaty rights, the protection of our Nation’s precious waterways, and the transition away from a fossil fuel economy. Despite this request being made over two months ago and oral argument having been held on February 8, 2024, the United States has yet to substantively respond to the Circuit Court. The undersigned Tribal Leaders, who represent Tribal Nations across Michigan, Minnesota, and Wisconsin respectfully urge your Administration to weigh in forcefully in support of our sovereignty and way of life.

As explained in the attached letter from Bad River Band and Bay Mills Indian Community, for over a decade, Enbridge Inc., a Canadian pipeline company, has illegally pumped petroleum products across the Bad River Reservation in northern Wisconsin through a pipeline known as Line 5, which transports oil and natural gas produced in western Canada principally to its terminal point in Sarnia, Ontario. Enbridge has continued to do so despite the 2013 expiration of the easements it held to cross the Reservation, the Bad River Band’s repeated requests that it leave, and the uniquely high risk of a rupture where Line 5 crosses and lies directly within the Bad River’s natural migration. If such a rupture were to occur, nearly one

million gallons of oil would spill into the river, flowing into Lake Superior and devastating the wild rice beds and fishing populations central to the Band's way of life.

Last June, a federal district court held that Enbridge has knowingly trespassed on the Bad River Reservation since 2013 and is creating a public nuisance at the river crossing, and it ordered Enbridge to cease operating Line 5 on the Reservation by June 2026. Although the district court gave Enbridge three more years to operate its pipeline in violation of the Band's sovereignty, Enbridge appealed the ruling to the Seventh Circuit and argued that it must be allowed to trespass indefinitely. Specifically, Enbridge has argued that the 1977 Transit Pipeline Treaty between the United States and Canada prohibits any State, Tribal Nation, or arm of the Federal Government, including a Federal court, from taking any action that would impede the flow of oil through a cross-border pipeline. Canada has vociferously supported Enbridge throughout the litigation, including through the filing of an *amicus curiae* brief in the Seventh Circuit endorsing Enbridge's radical interpretation of the Transit Treaty. The Seventh Circuit has asked the United States to file an *amicus* brief with its views on the Transit Treaty and any other issues in the case it wishes to discuss. If the court adopts Enbridge's and Canada's interpretation of the Transit Treaty while the United States remains silent, the decision will fundamentally undermine bedrock principles of Tribal sovereignty for all Tribal Nations throughout the United States. The Bad River Band should not be left to wage an existential fight against Enbridge and Canada while its trustee and treaty partner, the United States, remains on the sidelines.

Tribal Nations are separate sovereign governments that exercise inherent sovereign authority. One aspect of the inherent sovereign authority that Tribal Nations have retained is their absolute right and power to exclude non-Indians from, condition non-Indians' entry on, and expel trespassing non-Indians from Tribal lands. This right is a core aspect of Tribal sovereignty and has been repeatedly affirmed by the United States Supreme Court for over two centuries. Moreover, many Tribal Nations, like the Bad River Band, have entered into treaties with the United States guaranteeing them permanent homelands and reserving for them the right to exclude non-Indians from their homelands. These treaties are the supreme law of the land.

If the Seventh Circuit does not hear from the United States, and it adopts Enbridge and Canada's interpretation of the Transit Treaty, that would have devastating consequences for Tribal Nations and Tribal sovereignty. Multiple federal statutes categorically protect Tribal land from condemnation, and that protection has been critical to preserving what remains of Tribal land bases. But Enbridge and Canada's preferred interpretation of the Transit Treaty would effectively grant condemnation power to transit pipeline companies by allowing them to trespass indefinitely without regard for Tribal sovereignty. Enbridge and Canada's interpretation of the Transit Treaty attempts to abrogate Tribal treaties and undermine Tribal Nations' most fundamental sovereign obligations to provide for the health, welfare, and security of their Tribal members. And their arguments, if wrongly accepted, would impair the ability of the United States, as trustee, to remove trespassing transit pipelines from lands held in trust for Tribal Nations.

Enbridge and Canada's interpretation not only aims to eviscerate Tribal Nations' inherent sovereign authority to protect and manage their lands and resources, but also would do the same for the Federal Government and *every State and private landowner* along the Canadian border

with a cross-border pipeline traversing its lands. *Any* effort to enforce the property rights of a State, Tribal Nation, local government, or private party would be forbidden. This radical interpretation of the Transit Treaty would even prevent Tribal Nations, as well as the Federal Government, States, and private individuals from refusing to have their lands used in the rerouting of cross-border pipelines.

The United States' silence on this issue, in the face of the Seventh Circuit's request and Canada's vociferous support of Enbridge, is deeply concerning. By remaining silent and not forcefully refuting Enbridge's and Canada's radical interpretation of the Transit Treaty, the United States is abdicating its trust responsibility to the Bad River Band and to all Tribal Nations, in favor of a foreign country and foreign corporation. This issue is of great significance to all Tribal Nations in Michigan, Minnesota, and Wisconsin, transversed, as our region is, with numerous cross-border pipelines. We are all keenly watching to see what the United States will do.

We urge your Administration to voice its unequivocal support for the Bad River Band and more generally for Tribal rights, the rule of law, and the protection of some of our Nation's most precious waterways.

Chi miigwetch (thank you),

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Whitney B. Gravelle, President
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