

MAY 24, 2019 -- STATEMENT -- Anishinaabek Caucus of the Michigan Democratic Party

## **Line 5/Tunnel Plan Unconstitutional, In Violation of Treaties: Michigan Tribes Call For the Decommissioning of Enbridge's Line 5**

In accordance with the Tribal Treaties recognized under the United States Constitution and in solidarity with the position of the Twelve Tribes of Michigan as stewards of the land and water, the **Anishinaabek Caucus of the Michigan Democratic Party** enjoins the Governor and the State of Michigan to shut down Line 5 immediately to eliminate catastrophic risks to water and land, and to abandon plans for a tunnel which would perpetuate existing risks to our resources.

Furthermore, the **Michigan Anishinaabek Caucus** stance is to immediately REVERSE the damage to our ecosystems and climate from burning fossil fuels, not to create opportunities to expand their use.

Michigan officials have spent the past year pursuing a plan to tunnel an oil pipeline beneath the Straits of Mackinac while ignoring the 182-year-old treaty rights of Native Americans. Federally recognized Native American tribes have entered into treaties with the United States government, releasing portions of their land in exchange for off-reservation hunting and fishing rights, among others. That these treaties protect not just the right to fish, but also the right to a habitat for these fish to exist, has been established by jurisprudence.<sup>1</sup> A landmark decision by the US Supreme Court on May 20 2019 upholds these rights and clarifies that state laws do not supersede treaty obligations.<sup>2</sup>

In accordance with these Federal Treaties, which are **the supreme law of the land under the Constitution**, the Michigan Tribes are to be **included** in policy decision making. We do not seek "consultation". Any process which does not include tribal representation is unconstitutional. The pre-existing treaties render the easement granted to Enbridge Energy company invalid, as the tribes, whose rights were not recognized when it was granted, have not consented to it.

The position of the Anishinaabek Caucus along with the Federally recognized 12 tribes of Michigan and CORA (Chippewa Ottawa Resource Authority) is in line with the United Tribes of Michigan resolution which "opposes continued operation of unsafe pipelines that endanger tribal lands and resources." The Michigan Anishinaabek Tribes are and will continue to be vigilant stewards of the land and water, who are resolved to protect these resources and rights onward for the Seventh Generation. The five tribes making up CORA retain fishing rights in the area under a treaty signed in 1836, while Line 5 was built by Enbridge in 1953. Details of the treaty can be found at [www.1836.org/](http://www.1836.org/).

<sup>1</sup> Washington v U.S., [scotusblog.com/case-files/Washington-v-united-states/](http://scotusblog.com/case-files/Washington-v-united-states/)

<sup>2</sup> Herrera v Wyoming, [supremecourt.gov/opinions/18pdf/17-532\\_q86b.pdf](http://supremecourt.gov/opinions/18pdf/17-532_q86b.pdf)

Enbridge's Line 5 is a 1,098 mile pipeline with 4.6 miles beneath the Straits of Mackinac that transfers 23 million gallons of fuel daily, which is about 1 million gallons an hour. Enbridge is a Canadian oil company and Line 5, which bisects both of Michigan's peninsulas, is a shortcut from oil fields in Alberta Canada to a port in Sarnia Ontario Canada, where it also crosses waterways in Port Huron. Line 5 was designed for a 50-year useable life. Line 5 is 66 years old.

Modern science has revealed fluid dynamics that were not known in the 1950s. For example, the flow through the Straits exceeds the flow over Niagara Falls by 10%.<sup>3</sup> Moreover, the United States Coast Guard has stated that they are not equipped to address a rupture of Line 5. Waves over six feet and winter present further hindrances to participate in any emergency response or cleanup. Numerous small ruptures have already occurred on land portions of this line, including a spill in early December 2014, on the bank of the Manistique River just 1 mile from Lake Michigan.

Propane needed by Upper Peninsula residents and businesses can be provided by truck and rail with a two-mile rail spur. Although Line 5 provides 250 jobs and 22 million in tax revenue, it cannot measure up the economic significance of Michigan's tourist or agricultural industries.<sup>4,5</sup> Tourism employs 214,000 Michiganders directly with another 326,685 in related and supporting industries. Tourism generates 37.8 billion in sales and another 2.4 billion in local and state taxes. Agriculture provides 923,000 farming jobs and another 22,600 in supporting industries. There are 52,194 farms over 10 million acres in Michigan and 93% are family farms. Michigan's 300 agricultural commodities generates 13 billion dollars directly with another 101.2 billion in related and supporting industries. Good stewardship of Michigan would not risk so much for a foreign interest.

A catastrophic oil spill in the Straits of Mackinac would devastate the tribal fishing industry, shut down water intakes for numerous communities and devastate the shoreline, island ecosystems and the tourist industry.

On May 3rd, tribal leaders of ten of Michigan's federally recognized Indian tribes met with the Executive Office of the Governor regarding the future of Line 5 and the possible tunnel under the Straits of Mackinac. Governor Whitmer has continued to negotiate with Enbridge regarding a tunnel under the Straits of Mackinac to house Enbridge's oil and gas Line 5. The Sault Tribe says that is unacceptable. "I'm not looking for a deal to be struck with Enbridge," Sault Tribe Chairperson Aaron Payment said. "I'm looking for the governor to stand up for the people of Michigan. We have a stake here and we have property rights here as well." Payment said the Tribes also were not informed of the November 2017 agreement between the State of Michigan and Enbridge that effectively set the stage for a tunnel plan.

<sup>3</sup> "Straits of Mackinac 'worst possible place' for a Great Lake oil spill, U-M researcher concludes," Michigan News, July 10 2014, University of Michigan

<sup>4</sup> [michiganbusiness.org/cm/file/Reports/Michigan-2014-Tourism-Economics-impact.pdf](http://michiganbusiness.org/cm/file/Reports/Michigan-2014-Tourism-Economics-impact.pdf)

<sup>5</sup> [michigan.gov/mdard/0,4610,7-125-1572-7775-,00.mtml](http://michigan.gov/mdard/0,4610,7-125-1572-7775-,00.mtml)

Andrea Pierce, Chair of the Anishinaabek Caucus, says,

*Negotiating with Enbridge is foolhardy at best. Putting the Great Lakes at risk for a Canadian Corporation's bottom line while ignoring the citizens of Michigan is not a good way to foster trust and a good working relationship. We were ignored under the Snyder/Schuette administration and we will not be ignored again. We voted and campaigned for Gov. Whitmer due to her platform of shutting down Line 5 and it is still operating. Governor Whitmer, please shut it down, you do not want to be the Governor in charge when Line 5 explodes, that would be a horrific legacy.*

*Waters of the Great Lake Basin are too important to give away to Enbridge. Our water is in a state of emergency, and we need to react as if we are in a state of emergency, as if our lives depend on it because they do. The pipeline safety advisory study was clear; we know it is when and not if pipelines break. Given the previous record of more than a 1000 recorded leaks since 1968 and the recorded deterioration of the submerged portion, Line 5 should have been shut down years ago.*

Further, a tunnel spanning the Straits of Mackinac should not be pursued. Housing electric and natural gas in the same tunnel is courting disaster. Considering Enbridge's ineptitude managing pipelines it is also foolhardy to entrust Enbridge with management. Most pipeline leaks have not been caught by Enbridge; they were discovered by locals and others. The largest inland spill was perpetrated by Enbridge, whose operator increased pressure when a pressure loss was detected. Line 6b spilled over 800 thousand gallons into the Talmadge Creek of the Kalamazoo River over 17 hours. Enbridge reported 1.2 million cleanup cost. Locals continue to report that oil remains fouling the waterway. "Kalamazoo knows what Enbridge will do for greed just as Flint knows what Michigan will accept for money. Evart knows what Michigan will give away for next to nothing," Pierce reminds us. Michigan must do better.

### **Tribal officials have also issued statements**

"We had that treaty before Michigan was even formed. Enbridge came in the 1950s. If the governor is meeting with anybody it should be with us," –Thurlow "Sam" McClellan, chairperson of the Grand Traverse Band of Ottawa and Chippewa Indians.

*CORA tribes have a legally protected interest — a property right, if you will — in the fish and the Upper Great Lakes. That carries with it the ability to protect our property rights, including the habitat to make sure fish continue to exist...The state also rebuffed the tribes' efforts to have Line 5 shut down during maintenance and to receive information that was shared between the state and Enbridge. – Bryan Newland, Chairman of the Bay Mills Indian Community*

## **Precedent**

**Herrera vs. Wyoming:** the US Supreme Court ruled 5-4 on May 20th to uphold treaty rights in Wyoming, acknowledging that hunting rights for the Crow tribe under a 19th-century treaty did not expire when Wyoming became a state.

**Washington v. U.S.:** This past year, more than 20 tribes in Washington and surrounding areas filed suit against the state. The suits argued that the state defied fishing treaties by continuing to build and maintain culverts, which diminished the size of salmon runs in the area.

The circuit court ruled in favor of the tribes, requiring the state to remove all culverts. The state of Washington said that would cost \$2 billion and appealed to the U.S. Supreme Court. The Supreme Court affirmed the lower court's ruling with a split 4 to 4 decision. Justice Anthony Kennedy recused himself from the case.

The U.S. Supreme Court in a *per curiam* decision (evenly split) ruled that Native fishing treaties include the right to healthy fish habitat.

*...if it can be shown there is a possibility that the pipeline would rupture and release a catastrophic release of oil, then that directly affects the tribe's treaty rights.* –Matthew Fletcher, director of the Indigenous Law and Policy Center at Michigan State University.

## **Addendum: Supporting Material**

–Attorney General Dana Nessel: *Legislation to allow Line 5 tunnel is unconstitutional.* – Gov. Gretchen Whitmer ordered state agencies and a newly created authority to halt action on a planned Line 5 oil pipeline tunnel Thursday, after Attorney General Dana Nessel issued an opinion that said the 2018 legislation to allow for the tunnel was unconstitutional.

–Michigan Democratic Party's Environmental Caucus: Concerned about talks between Whitmer and Enbridge and that considering a pipeline tunnel "has numerous risks, including ecological and financial ones."

–Statements from Pipeline Advisory Committee show evidence of catastrophic risks of Line 5 and support the need to decommission the pipeline as soon as possible.

## **Resolutions passed by the Tribes**

excerpt from [https://www.oilandwaterdontmix.org/tribal\\_supporters](https://www.oilandwaterdontmix.org/tribal_supporters)

The Sault Ste. Marie Tribe of Chippewa Indians passed a resolution in February 2015 entreating any regulatory authority, be it federal, state, or other, to take all action toward requiring decommissioning of the Enbridge Line 5 pipeline at the Straits of Mackinac, and specifically requesting the Michigan Petroleum Pipelines Task Force to

include in its recommendations the decommissioning of the Enbridge Line 5 pipeline at the Straits of Mackinac.

Bad River Band of Lake Superior Tribe of Chippewa Indians: Mashkiziibi (Bad River) Band denies renewal of Enbridge Line 5 Grant of Easement on January 4, 2017, and calls for the decommissioning and removal of the pipeline from all Bad River lands and watershed.

Pokagon Band of Potawatami Indians: Resolution passed Sept. 12 2017, calling for the immediate and permanent decommissioning of Line 5.

Bay Mills Indian Community: Resolution passed March 16, 2015 in support for decommissioning of Enbridge Line 5 oil pipeline under the Straits of Mackinac.

Chippewa Ottawa Resource Authority (CORA): CORA exists for the purpose of managing the fishery resource under the Treaty of 1836, 7 Stat. 491, through regulation of treaty fishing activity by members of the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Little River Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians and the Sault Ste. Marie Tribe of Chippewa Indians. Resolutions passed: January 23, 2014 in opposition to the transportation of diluted bitumen and other heavy petroleum products in the Great Lakes. January 28, 2016 in support for removal or decommissioning of Enbridge Line 5 in the Mackinac Straits. November 16, 2017 in opposition to placing an oil pipeline in trenches or tunnel beneath the Straits of Mackinac.

Grand Traverse Band of Ottawa and Chippewa Indians

A Certificate of Tribal Council Action was adopted on February 18, 2015, to remove Enbridge Line 5 from the Straits of Mackinac.

Lac Vieux Desert Band of Lake Superior Chippewa Indians

Resolution adopted August 11, 2016 to shut down Enbridge Line 5 in the Straits of Mackinac.

Little River Band of Ottawa Indians

Resolution adopted on March 2, 2016, to urge the Michigan legislature and other regulatory agencies to immediately decommission the Line 5 oil pipeline in the Mackinac Straits.

Little Traverse Bay Bands of Odawa Indians

A Resolution was adopted on March 2, 2016, in support of decommissioning and safe removal of the Enbridge Line 5 oil pipeline under the Straits of Mackinac.

Michigan Indian Elders Association

A Resolution was adopted on April 1, 2017, in support of decommissioning Enbridge Line 5 oil pipeline under the Straits of Mackinac.

Midwest Alliance of Sovereign Tribes

The Midwest Alliance of Sovereign Tribes, an inter-tribal organization representing all 35 federally-recognized Tribes located in Michigan, Minnesota, Wisconsin, Indiana, and Iowa, called for the immediate closure of Enbridge Line 5 situated under the five mile stretch underneath the Mackinac Bridge. The motion was passed unanimously on April 28, 2016.

Match-E-Be-Nash-She-Wish Band of Potawatomi Indians (a.k.a Gun Lake Tribe)

Resolution adopted on April 21, 2016 in support of the decommissioning of Enbridge Line 5 in the Straits of Mackinac.

National Congress of Indians

A Resolution opposing continued operation of unsafe pipelines that endanger tribal lands and resources was adopted on June 30, 2016. Sault Ste. Marie Tribe of Chippewa Indians Tribal Chairperson Aaron Payment was instrumental to the passage of this resolution.

Nottawaseppi Huron Band of the Potawatomi Indians

A Resolution was adopted on April 6, 2015, recommending decommissioning of Enbridge Line 5 beneath the Straits of Mackinac, and that the State of Michigan exercise its authority to address current risks associated with Line 5 pending decommissioning.

Saginaw Chippewa Indian Tribe

A Resolution was adopted on June 2016 in support of decommissioning the Enbridge Line 5 oil pipeline at the Straits of Mackinac.

United Tribes of Michigan

Resolution adopted on October 26, 2016 in opposition to the continued operation of unsafe pipelines that endanger tribal lands and resources.