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Relationships with Land and Water: Confronting the Line 5 Dual Pipelines

* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.

I. Introduction: the Anishinaabek of the Great Lakes

Bay Mills Indian Community (“Bay Mills”) is a sovereign federally-recognized Tribal Nation comprised of Ojibwe or Anishinaabe People whose traditional territories encompass the Upper Great Lakes, in regions now part of the United States (U.S.) and Canada. The Anishinaabe People maintain a reciprocal relationship with the natural environment where the waters, trees, animals, plants, and air are an extension of our community. This community is at the center of Anishinaabe culture and life. As Anishinaabe (also known as Anishinabek), we have a solemn responsibility to preserve our homeland, environment, culture, resources, and distinct lifeways for future generations; the Canadian and U.S. governments have committed to honouring First Nations’ rights to hunt and fish in the Great Lakes in multiple legally binding treaties.

Bay Mills has a long-standing and critical interest in the waters of the Great Lakes, the Straits of Mackinac, and the surrounding region. Bay Mills is a signatory to the March 28, 1836 Treaty of Washington¹, in which Bay Mills and other Tribal Nations ceded territory to the United States for the creation of the State of Michigan, which included approximately 14 million acres of land and 13 million acres of navigable waters. In exchange, Bay Mills reserved the right to fish, hunt, and gather throughout the territory-including in the Great Lakes and the Straits of Mackinac. These rights have been confirmed by state and federal courts.²

In 1985, the State of Michigan and the signatory Tribal Nations to the 1836 Treaty of Washington entered into a consent judgment regarding the management of the Great Lakes fishery. That agreement affirmed that the State of Michigan and the Tribal Nations must work together to protect the Tribal Nations’ treaty fishing rights and manage the Great Lakes fishery in a manner that respected tribal and state interests. In 2007, those same Parties negotiated an inland consent judgement, and again in 2023 a new decree for management of the Great Lakes fishery was issued. These agreements show the 1836 Treaty of Washington is a legally binding agreement between sovereign nations that acknowledges and establishes respective political and property relations as well as confirms each nation’s rights and privileges.

The Line 5 has the potential to significantly affect, and indeed poses serious threats to, the exercise of Bay Mills’ reserved treaty rights, including the ability to preserve cultural resources, protect cultural and religious interests in the Great Lakes, engage in economy, and ensure the health and welfare of our tribal citizens. The State of Michigan is obligated to honor these treaty-protect rights, and prohibited from diminishing them.

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. Commercial and subsistence fishing continue to be the primary occupation of members of the Bay Mills from treaty times until the present day. Over half of the citizen households in Bay Mills rely on fishing for all, or a portion of their annual income.

¹ 7 Stat. 491

² See *People v. LeBlanc*, 399 Mich. 31, 248 N.W. 2d 199 (1976); *United States v. State of Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), aff’d. 653 F.2d 277 (6th Cir. 1981), cert. denied, 454 U.S. 1124 (1981).

II. Background: The Line 5 Dual Pipelines

One day in July 2010, residents of Marshall, Michigan, smelled something toxic in the air and called 9-1-1. It took over 17 hours³ for Canadian oil giant Enbridge to detect that its Line 6b pipeline had ruptured. In that time, nearly a million gallons of heavy crude oil spilled into the Kalamazoo River in what federal investigators later called a “complete breakdown of safety.”⁴ The spill killed fish, birds, turtles, and other animals, and devastated thousands of acres of rivers and forest. While otters have begun to return to the river, environmental devastation remains more than a decade after the spill.

The Line 6b disaster was a wakeup call for the Bay Mills and other Anishinabek peoples living around the Great Lakes. Before the spill, many community members were unaware⁵ that their neighbourhoods even had pipelines, which isn’t surprising since most were installed in the 1950s. The rusting, aging infrastructure poses a serious threat of another catastrophic oil spill, particularly Enbridge’s Line 5 pipeline, a 70-year-old dinosaur lurking in the Great Lakes.

Line 5 transports up to 23 million gallons of crude oil and natural gas liquids daily from Enbridge lines principally originating in Alberta, Canada, through Wisconsin and Michigan, to Ontario.⁶ It crosses the Straits of Mackinac between Lakes Huron and Michigan, and runs over and alongside rivers, streams, and wetlands.

Expert studies⁷ show⁸, and a U.S. court has recognized, that Line 5 presents a real risk of a catastrophic oil spill, which could contaminate⁹ 375,000 acres of land and wetlands, 450 lakes, including Lakes Superior, Michigan, and Huron, and thousands of kilometers of shorelines and rivers in the United States and Canada.¹⁰ For Anishinaabe people, who see the

³ Munroe, R. (2012, August 27). Enbridge’s Kalamazoo Disaster: Straight from the files. The Tyee. <https://theyee.ca/News/2012/08/27/Kalamazoo-Disaster-Files/>

⁴ Climate-Admin. (2020, December 5). Federal Agency blames “complete breakdown of safety at Enbridge” for 2010 oil spill. Inside Climate News. <https://insideclimatenews.org/news/10072012/national-transportation-safety-board-ntsb-kalamazoo-enbridge-6b-pipeline-marshall-michigan/>

⁵ WMUK | Sehvilla Mann. (2020, July 24). How a spill from one oil pipeline launched a movement to shut down another. WMUK. <https://www.wmuk.org/wmuk-news/2020-07-24/how-a-spill-from-one-oil-pipeline-launched-a-movement-to-shut-down-another>

⁶ Michigan Dept. of Env’t, Great Lakes, and Energy, *Line 5 in Michigan, Overview*, <https://www.michigan.gov/egle/about/featured/line5/overview#Details>.

⁷ Alternatives analysis for the straits pipeline. Alternatives Analysis for the Straits Pipeline | MI Petroleum Pipelines. (n.d.). <https://mipetroleumpipelines.org/document/alternatives-analysis-straits-pipeline>

⁸ “Independent Risk Analysis for the Straits Pipelines - Final Report.” Independent Risk Analysis for the Straits Pipelines - Final Report | MI Petroleum Pipelines, mipetroleumpipelines.org/document/independent-risk-analysis-straits-pipelines-final-report. Accessed 14 Jan. 2024.

⁹ “Enbridge’s Line 5 Tunnel Could ‘Rain Devastation and Destruction’ on Great Lakes.” Earthjustice, 25 May 2023, earthjustice.org/press/2023/enbridges-line-5-tunnel-could-rain-devastation-and-destruction-on-great-lakes.

¹⁰ See Bay Mills Indian Community, *Bay Mills Indian Community’s Comments On The Scope Of The Environmental Impact Statement For The Enbridge Line 5 Tunnel Project, Submitted to U.S. Army Corps of Engineers*, at page 34 (Oct. 14, 2022), https://earthjustice.org/wp-content/uploads/bmic_scoping_comments_on_line_5_eis.pdf (hereinafter “Bay Mills Tunnel Comments”) (citing Esteban Chiriboga, Great Lakes Indian Fish & Wildlife Commission, *Cumulative Environmental Risk of Crude Oil and Natural Gas Pipelines in the 1837, 1837, 1842, and 1854 Ceded Territories*, Administrative Report 22-04 (April 2022), <http://data.glifwc.org/download/archive.bio/Administrative%20Report%2022-04.pdf>); see also David Schwab, *Statistical Analysis of Straits of Mackinac Line 5: Worst Case Spill Scenarios*, page 10, <http://glenarborsun.com/wp-content/uploads/2016/03/Mackinac-Line-5-Worst-Case-Spill-Scenarios.pdf> (concluding more than 1,000 km of shoreline could be impacted); Michigan Technological

land, water, animals, and plants as extensions of their community, a catastrophic oil spill and the consequences of climate change threaten to destroy their homelands. Indigenous communities are sounding the alarm, but everyone should be concerned: the Great Lakes hold 20 percent of the world’s fresh surface water and 80 percent of the fresh water in North America as access to water grows increasingly scarce.

At the Straits of Mackinac, Line 5 splits into two 20” pipelines that extend 4.5 miles along the lakebed of Lake Michigan. This section of Line 5 was built in 1954. The pipeline is showing its age with portions of the protective coating wearing away and other cracks and leaks along the length of it. In 2017, Enbridge acknowledged that its maintenance activities damaged Line 5 in the Straits of Mackinac. In September 2019, in the process of conducting geological work for the proposed Line 5 tunnel, Enbridge got a drill rod stuck and did not report it to EGLE for two months.

Line 5 poses real risks of catastrophic oil spills at multiple points due to its documented failures, aged infrastructure, previous spills, and the surrounding environment. The stretch of Line 5 that “lie[s] exposed in the Straits of Mackinac below . . . busy shipping lanes” poses a risk of an oil spill to an ecologically vulnerable waterway.¹¹ Indeed, Enbridge vessels struck their own pipeline with anchors or cables at least three times in 2018 and 2019.¹² In 2020, the pipeline was damaged so severely that a court ordered Enbridge to temporarily shut it down.¹³

While the stretch under the Straits of Mackinac is particularly vulnerable, an oil spill could occur anywhere along the pipeline. The Moreover, the pipeline is 70 years old; according to an engineer who worked on the pipeline installation, during construction Enbridge’s predecessor stated that it would “last 50 years.”¹⁴ Operating an aging pipeline risks dangerous

University, *Independent Risk Analysis for the Straits Pipelines* (Sept. 15, 2018),

<https://mipetroleumpipelines.org/document/independent-risk-analysis-straits-pipelines-final-report>.

¹¹ State of Michigan, Office of the Governor, Dept. of Natural Resources, *Notice of Revocation and Termination of Easement*, pages 5-9 (Nov. 13, 2020),

https://content.govdelivery.com/attachments/MIEOG/2020/11/13/file_attachments/1600920/Notice%20of%20%20Revocation%20and%20Termination%20of%20%20Easement%20%2811.13.20%29.pdf (hereinafter

“Michigan Easement Revocation”) (citing Dynamic Risk Assessment Systems, *Alternatives Analysis for the Straits Pipeline* (June 27, 2017), <https://mipetroleumpipelines.org/document/alternatives-analysis-straits-pipeline> and Michigan Technological University, *Independent Risk Analysis for the Straits Pipelines* (Sept. 15, 2018), <https://mipetroleumpipelines.org/document/independent-risk-analysis-straits-pipelines-final-report>); see also Great Lakes Science Advisory Board, *Potential Ecological Impacts of Crude Oil Transport in the Great Lakes Basin*, pages 6, 37 (Oct. 2018), <https://ijc.org/sites/default/files/2018-12/Potential%20Ecological%20Impacts%20of%20Crude%20Oil%20Transport%20in%20the%20Great%20Lakes%20Basin%20-%20Oct%202018.pdf> (noting that the Straits are particularly vulnerable); see generally Environmental Defence Canada, *Enbridge’s Line 5: Media Backgrounder* (June 2021), <https://environmentaldefence.ca/wp-content/uploads/2021/08/Environmental-Defence-Line-5-backgrounder.pdf>; National Wildlife Federation, *Enbridge Over Troubled Water*, pages 14-15 (2016), <https://www.nwf.org/-/media/PDFs/Global-Warming/Tar-Sands/Enbridge-Over-Troubled-Water-Report-Final.ashx>.

¹² Michigan Easement Revocation at page 6-7.

¹³ TRO, *Nessel v. Enbridge Energy*, No. 19-474-CE (Ingham Cnty. Cir. Ct. Mich. June 25, 2020), https://www.michigan.gov/documents/ag/Order_Granteeing_Motion_for_TRO_in_Nessel_v_Enbridge_Energy_et_al_19-474-CE_695012_7.pdf.

¹⁴ Environmental Defence Canada, *Enbridge’s Line 5: Media Backgrounder* (June 2021), <https://environmentaldefence.ca/wp-content/uploads/2021/08/Environmental-Defence-Line-5-backgrounder.pdf>; see also Spencer Chumbley, Vice Media, LLC, *The Dirty Secret at the Bottom of the Great Lakes: Oil & Water*, at 9:11 (Sept. 1, 2015) (interview with retired Engineer Bruce Trudgen who recalls that “at that time, they said . . . this pipe’s gonna last 50 years”); Rob Lee et. al, Midwest Environmental Advocates, Clean Wisconsin, Honor

infrastructure failure, because pipelines degrade over time due to corrosion, pressure, and use.¹⁵

Enbridge continues Line 5 without required easements across tribal and state lands. In 2013, Enbridge's easements on parcels of land on the Bad River Band of Lake Superior Chippewa's ("Bad River") reservation expired, and were not renewed.¹⁶ Rather than removing the pipeline, in accordance with the easement's terms and the Band's demands, Enbridge has continued to operate the pipeline.¹⁷

In 2019, after years of negotiations, Bad River sued Enbridge for trespass and nuisance.¹⁸ A U.S. court held that Enbridge is "a conscious or willful trespasser" on the Band's property.¹⁹ The court stated that due to Canada's concerns around the economic effects of decommissioning, it was inclined to allow Enbridge to continue operating the pipeline during years of rerouting,²⁰ despite its recognition that the ongoing trespass would cause "irreparable harm" to the Band's "sovereign right to control its own land" and protect tribal resources.²¹

Similarly, in November 2020, Michigan formally terminated the easement that allowed Enbridge to operate in the Straits, based on threats to the environment and Indigenous

the Earth, & Sierra Club of Wisconsin, *Comments on Draft EIS for Enbridge Line 5 in Northern Wisconsin*, page 1 (April 15, 2022), <https://midwestadvocates.org/assets/resources/MEA-L5-DEIS-Comments.pdf> (arguing that Line 5 has "exceed[ed] its designed life expectancy").

¹⁵ See Pipeline & Hazardous Materials Safety Administration, *Fact Sheet: Pipe Defects and Anomalies* (Dec. 1, 2011), <https://primis.phmsa.dot.gov/comm/FactSheets/FSPipeDefects.htm?nocache=7250> (cataloging risks with aging pipelines). Multiple actors have expressed concerns over the age of Line 5. See, e.g., U.S. Env. Protection Agency, *Comments on the State Draft Environmental Impact Statement for the Proposed Enbridge Line 5 Relocation Project in Ashland, Bayfield, Douglas, and Iron Counties, Wisconsin*, page 6 (March 21, 2022), https://widnr.widen.net/s/wpx8fhc7/e15_deis-comments_federal_usepa (noting that a safety analysis must be based on "how long a pipeline built in 1953 is expected to safely function") (hereinafter "EPA Rerouting Comments"); Kenny Bruno et. al., National Wildlife Federation, *Enbridge Over Troubled Water*, pages 14-15 (2016), <https://www.nwf.org/-/media/PDFs/Global-Warming/Tar-Sands/Enbridge-Over-Troubled-Water-Report-Final.ashx> ("Line 5 is vulnerable to material, weld and equipment failures, which PHMSA identifies as the most common causes of pipeline ruptures."); Jeff Alexander & Beth Wallace, National Wildlife Federation, *Sunken Hazard: Aging Oil Pipelines Beneath the Straits of Mackinac an Ever-Present Threat to the Great Lakes* (2012), <https://www.documentcloud.org/documents/472338-nwfsunkenhazardline5.html>; Bad River Band, *Comments on the Section 404 and Section 10 Permit Application for the Enbridge Line 5 Pipeline Segment Relocation Project*, Army Corps of Engineers, St. Paul District, File No. MVP-2020-00260-WMS, page 19 (March 22, 2022), http://www.badriver-nsn.gov/wp-content/uploads/2022/03/bad_river_band_comment_letter_to_usace_03.22.2022_2.pdf (hereinafter "Bad River Band Rerouting Comments") (expressing concern that "age may be a risk for an oil spill").

¹⁶ Bad River Band of Lake Superior Tribe of Chippewa Indians, *Mashkiziibi (Bad River) Band Denies Renewal of Line 5 Grant of Easement* (Jan. 5, 2017), [16118710_10154145497292703_2124816677_n.jpg](https://www.badriver-nsn.gov/wp-content/uploads/2017/01/16118710_10154145497292703_2124816677_n.jpg) (d3n8a8pro7vhmx.cloudfront.net).

¹⁷ *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co.*, No. 19-cv-602-wmc, 2022 U.S. Dist. LEXIS 161080, *15 (W.D. Wis. Sep. 7, 2022).

¹⁸ *Id.* at *14-15.

¹⁹ *Id.* at *45.

²⁰ *Id.* at *58-61 (holding the court is "inclined" to issue an injunction giving Enbridge five years to reroute the pipeline in order "to craft injunctive relief that would not interfere with the Pipeline Treaty or Canada's concerns about the economic impact of an immediate shutdown.")

²¹ *Id.* at *56-57.

Peoples.²² Enbridge, however, continued its operations.²³ Litigation between Michigan and Enbridge over the matter remains pending.²⁴

Natural changes in the surrounding landscape exacerbate these issues. For example, after the Bad River, sued Enbridge for nuisance and trespass, a U.S. court found that the migration of the Bad River towards the pipeline on the Bad River Reservation in Wisconsin exposes the pipeline to “an actual risk of a significant rupture,” and that “the negative impact... on the Bad River watershed and even Lake Superior itself would be catastrophic.”²⁵

In May 2023, erosion of the Bad River increased, and the Bad River reported that at four separate locations, less than 15 feet of river bank remained between the Bad River and the Line 5 pipeline.²⁶ Such rapid erosion is alarming considering that in a November 2022 opinion, a court noted that “there still remains approximately 26 or 27 feet of riverbank between the Bad River shoreline and Line 5 at its nearest point.”²⁷ The Bad River filed an emergency motion for injunctive relief to shut down Line 5 due to significant riverbank erosion “present[ing] an imminent threat” to the Bad River.²⁸ The U.S. Pipeline and Hazardous Materials Safety Administration has warned that pipelines exposed in this manner are in danger of rupture, with several devastating ruptures occurring this century.²⁹ The State of Michigan and its Attorney General have also supported the shutdown of Line 5 at the Bad

²² Michigan Easement Revocation.

²³ Beth LeBlanc, *Enbridge says it won't comply with easement revocation, plans to continue operating Line 5*, THE DETROIT NEWS (Jan. 12, 2021), <https://www.detroitnews.com/story/news/local/michigan/2021/01/12/enbridge-not-comply-easement-revocation-continue-line-5-operation/6630978002/>.

²⁴ In 2019, Michigan Attorney General Dana Nessel filed a complaint in Michigan State Court seeking a declaration that the Straits easement is void, violates the public trust, and should be revoked. Complaint, *Nessel v. Enbridge Energy Limited Partnership*, 1:21-cv-01057 (30th Judicial Circuit, Michigan June 27, 2019) (Dkt. 1). The parties are currently litigating whether this case belongs in federal or state court. Michigan brought a suit in 2020 to enforce the Governor's easement revocation. Complaint, *Michigan v. Enbridge*, 1:20-cv-01142 (W.D. Mi. Nov. 13, 2020) (Dkt. 1). Michigan later dismissed that case. Enbridge filed claims against Michigan, seeking an order that Michigan's order to shut down the pipeline was illegal. Complaint, *Enbridge v. Whitmer*, 1:20-cv-01141-JTN-RSK (W.D. Mi. Nov. 24, 2020) (Dkt. 1). These claims are pending before a Michigan federal court.

²⁵ *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, No. 19-cv-602-wmc, 2022 U.S. Dist. LEXIS 213368, at *5-9 (W.D. Wis. Nov. 28, 2022) (assessing evidence presented by Enbridge and the Bad River Band “establishing that the greatest known risk of a pipeline rupture is currently located at or near the meander where Line 5 crosses the Bad River”); *see also* Expert Opinion of Hamish Weatherly, *Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co., et al.*, No. 3:19-cv-00602-wmc (W.D. Wis. June 10, 2022) (Enbridge's expert concluding that “there is considerable potential for Line 5 to become exposed as a result of erosion”); Engineering Evaluation of the Bad River Meander Adjacent to Enbridge Line 5 and Related Water Resources Issues, *Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co., et al.*, No. 3:19-cv-00602-wmc (W.D. Wis. June 10, 2022) (DE 268); EPA Rerouting Comments, page 24; Mashkiziibii Natural Resources Department, *Enbridge Line 5 Issues Within the Bad River Band Reservation* (Feb. 2020), http://www.badriver-nsn.gov/wp-content/uploads/2020/02/202002_NRD_EnbridgeLine5_Brochure.pdf.

²⁶ *See* Bad River Band of the Lake Superior Tribe of Chippewa Indians' Memorandum of Law in Support of Emergency Motion for Injunctive Relief, *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, No. 19-cv-602-wmc (W.D. Wis. May 9, 2023) (Dkt. 629) at page 1.

²⁷ *Id.* at 3.

²⁸ *See id.* at 1; Bad River Band of the Lake Superior Tribe of Chippewa Indians' Emergency Motion for Injunctive Relief, *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, No. 19-cv-602-wmc (W.D. Wis. May 9, 2023) (Dkt. 628).

²⁹ Pipeline and Hazardous Materials Safety Administration, Department of Transportation, *Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Flooding, River Scour, and River Channel Migration*, 84 Fed. Reg. 15, 715 (April 11, 2019), <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2020-03/2019-07132.pdf>.

River, stating in a recent amicus brief, that “[t]he alarming erosion at the Bad River meander poses an imminent threat of irreparable harm to Lake Superior which far outweighs the risk of impacts associated with a shutdown of the Line 5 pipeline.”³⁰ In June 2023, a U.S. federal court ordered Enbridge to establish a more stringent shutdown and purge protocol to address the risk from the ongoing erosion.³¹

Government agencies have also documented Enbridge’s persistent violations of safety protocols.³² One database contains 32 U.S. federal enforcement actions for Enbridge’s violations of environmental regulations, including failing to inspect its pipelines for vulnerabilities. Michigan’s Department of Natural Resources found that Enbridge ignored requirements to physically support and maintain a protective coating around the pipeline, and that “threats to pipeline integrity from incorrect operations and procedural errors . . . present[] a substantial, inherent and unacceptable risk of a catastrophic oil spill with grave ecological and economic consequences.”

Line 5 and similar Enbridge pipelines have experienced multiple oil spills with catastrophic consequences. One study found that since 1953, Line 5 itself has spilled over 1 million gallons of oil over 33 incidents. According to a news report, one such incident occurred around 1980 when Enbridge reported that a 3-inch crack in the pipeline led to a spill in the Hiawatha National Forest in the Upper Peninsula of Michigan. The news report indicates that high levels of harmful chemicals remained in the area for more than 30 years after the spill. In 1991, Enbridge’s Line 3 spilled 1.7 million gallons of crude oil into Minnesota’s Prairie River. Greenpeace calculated that Enbridge spilled 2.8 million gallons of oil across the U.S. between 2002 and 2018. This includes the largest U.S. inland oil spill during that period: the Line 6B pipeline released nearly a million gallons of heavy crude oil into Michigan’s Kalamazoo River in 2010 after what federal investigators called a “complete breakdown of safety.” The Line 6B spill caused irreversible damage to the environment and trauma to Indigenous Peoples, especially the Match-E-BeNashShe-Wish and Nattawaseppi Huron Bands of the Potawatomi.

These examples are just the documented spills; advocates question whether other spills have gone unreported, or if Enbridge has underreported the quantity of oil spilled. Regarding the 1980 spill in the Hiawatha National Forest, one researcher concluded that, “[e]ither Enbridge knew about the extent of the contamination in the national forest for more than 30 years and didn’t clean it up; or it didn’t know about the spill’s effects for more than three decades.”

The U.N. Permanent Forum on Indigenous Issues concluded that Line 5 “jeopardizes the Great Lakes.”³³ The Straits of Mackinac are the “worst possible place” for an oil spill in the Great Lakes because of their strong, shifting currents,³⁴ and their location between two of the

³⁰ Amicus Brief of the State of Michigan and Dana Nessel, Attorney General of the State of Michigan, *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, No. 19-cv-602-wmc (W.D. Wis. May 17, 2023) (Dkt. 665) at page 3.

³¹ *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, No. 19-cv-602-wmc, 2023 U.S. Dist. LEXIS 105397, at pages *40–48 (W.D. Wis. June 16, 2023).

³³ United Nations Permanent Forum on Indigenous Issues, Report on the Twenty-Second Session (17-28 April 2023), U.N. Doc. E/2023/43-E/C.19/2023/7, para. 65 (2023).

³⁴ See University of Michigan, *Straits of Mackinac ‘worst possible place’ for a Great Lakes oil spill, U-M researcher concludes* (July 10, 2014), <https://news.umich.edu/straits-of-mackinac-worst-possible-place-for-a-great-lakes-oil-spill-u-m-researcher-concludes/>.

Great Lakes, which contain 20 percent of the world’s fresh surface water.³⁵ One analysis cited by the International Joint Commission – the binational commission the U.S. and Canada charged with monitoring the Great Lakes’ environmental protection – estimated that a one million-gallon leak from Line 5 into the Straits, similar in size to previous Enbridge pipeline spills in the region, would affect approximately 15 percent of Lake Michigan’s open waters and 60 percent of Lake Huron’s open waters.³⁶ A court concluded that after a spill at the Bad River, “the negative impact . . . on the Bad River watershed and even Lake Superior itself could be catastrophic.”³⁷ Oil pollution in the Great Lakes would jeopardize access to drinking water for more than 48 million people.³⁸

The ongoing operation of Line 5 also exacerbates the climate crisis at a time when countries must transition away from fossil fuels.³⁹ Line 5’s upstream and downstream greenhouse gas (GHG) emissions amount to approximately 87 million metric tons of carbon dioxide equivalent annually.⁴⁰ That equals the annual GHG emissions of nearly 19 million gasoline-powered passenger vehicles.⁴¹ Accordingly, Line 5 contributes to significant climate-induced harm to the Great Lakes and the treaty-protected natural resources vital to Indigenous communities.⁴² Experts expect climate change to cause increased precipitation and flooding

³⁵ See U.S. Env. Protection Agency, *Facts and Figures About the Great Lakes*,

<https://www.epa.gov/greatlakes/facts-and-figures-about-great-lakes> (last visited April 3, 2023).

³⁶ Great Lakes Science Advisory Board, *Potential Ecological Impacts of Crude Oil Transport in the Great Lakes Basin*, page 43 (Oct. 2018) (citing Schwab 2016).

³⁷ *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, No. 19-cv-602-wmc, 2022 U.S. Dist. LEXIS 213368, at pages *5–9 (W.D. Wis. Nov. 28, 2022).

³⁸ Mich. Dept. Env’t, Great Lakes, and Energy, *State of the Great Lakes Report*, page 3 (Jul. 2020), <https://www.michigan.gov/-/media/Project/Websites/egle/Documents/Reports/OGL/State-of-the-Great-Lakes/Report-2019.pdf?rev=f911f70978404e9d9758914a0b96c9ad>; *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, No. 19-cv-602-wmc, 2022 U.S. Dist. LEXIS 213368, at *5–9 (W.D. Wis. Nov. 28, 2022); see also Expert Opinion of Hamish Weatherly, *Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co., et al.*, No. 3:19-cv-00602-wmc (W.D. Wis. June 10, 2022); Engineering Evaluation of the Bad River Meander Adjacent to Enbridge Line 5 and Related Water Resources Issues, *Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co., et al.*, No. 3:19-cv-00602-wmc (W.D. Wis. June 10, 2022) (Dkt. 268); EPA Rerouting Comments, page 24; Mashkiiizibii Natural Resources Department, *Enbridge Line 5 Issues Within the Bad River Band Reservation* (Feb. 2020), http://www.badriver-nsn.gov/wp-content/uploads/2020/02/202002_NRD_EnbridgeLine5_Brochure.pdf.

³⁹ See Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, Summary for Policymakers (SPM), page 14 (fig. SPM.3b, para. C.2) (2018),

https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf [hereinafter, “IPCC, WGI 1.5”]; IPCC, *Climate Change 2022: Mitigation of Climate Change, Working Group III (WGIII) contribution to the Sixth Assessment Report (AR6) of the IPCC*, pages 85, 89, 1742 (2022), <https://www.ipcc.ch/report/sixth-assessment-report-working-group-3/> [hereinafter, “IPCC, WGIII A6”]; IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, SPM, pages 20 (para. B.5), 22-23 (fig. SPM.5) (2023), https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_SPM.pdf [hereinafter, “IPCC, Synthesis Report AR6”].

⁴⁰ Earthjustice, *Line 5 Media Backgrounder* (https://earthjustice.org/wp-content/uploads/2023/06/line-5-media-backgrounder_v3.pdf#:~:text=Line%205's%20upstream%20and%20downstream,to%20phase%20out%20fossil%20fuels)).

⁴¹ *Id.*

⁴² See generally Great Lakes Indian Fish and Wildlife Commission, *Aanji-bimaadiziimagak o’ow aki, Climate Change Vulnerability Assessment Version 2* (Jan. 2023), http://data.glifwc.org/download/archive.bio/Aanji-bimaadiziimagak_o_ow_aki_digital_02212023.pdf; Bay Mills Tunnel Comments, pages 35–42; Bad River Band Rerouting Comments, pages 21–24, 47.

around the Great Lakes.⁴³ Flooding causes soil runoff and erosion, which contributes to the excess nutrient pollution responsible for toxic algal blooms and “dead zones.”⁴⁴ Lake Erie has already experienced multiple algal blooms which cause drinking water emergencies.⁴⁵ The warming of the Great Lakes also threatens Anishinaabe communities’ treaty-protected culturally vital natural resources, including miin (blueberry), ziinzibaakwadwaatig (sugar maple), adikamegwag (whitefish), and manoomin (wild rice).⁴⁶

III. Cultural Significance of the Straits of Mackinac & A Continued Relationship with Land and Water

Every culture and religion in the world share the story of the Great Flood. In the Anishinaabek oral traditions and cultures, the creation of North America also begins with a flooded Earth.

According to Bay Mills’ oral histories, the animals that survived the flood received instructions from the Creator to swim deep beneath the water and collect soil that would be used to recreate the world. One by one the animals tried, but one by one they failed. The muskrat, as the last animal that tried, dove underneath the water and did not emerge. When the muskrat's body resurfaced, it carried a small handful of wet soil in its paws. The journey took the muskrat's life, but with its sacrifice the Creator used the soil collected and rubbed it on the Great Turtle's back. This land became known as Turtle Island, the center of creation for all of North America.

For the Anishinaabek, the Great Turtle emerged from the flood in the Straits of Mackinac. Because the creation of North America took place in the Great Lakes, the Great Lakes are considered the heart of Turtle Island and as such -the heart of North America. The State of Michigan shares this history with the Anishinaabek as well, and there are still signs of it in modern times. Mackinac City, Mackinac Island, Fort Michilimackinac, and the Straits of Mackinac were all named and established because of this shared history together.

In the Anishinaabek language, "michi" is an old dialect for "gichi, which means "great." The Anishinaabek word for water is "nibi," which is an inanimate word that shows no signs of life or movement. However, the word for the Great Lakes are "gichi gumee." Only things that are alive and have a spirit are assigned the word "gichi" or "michi." In addition, the Anishinaabek word for turtle is "miikinaak." By combining these words together, you learn that Michilimackinac, and the word Mackinac are all derivations of the original name of the Great Turtle from the Anishinaabek story of Creation.

The continued operation of Line 5 disproportionately endangers the Anishinaabek environment, water, land, and resources, posing a foreseeable threat to our right to a healthy

⁴³ Env't'l Law and Policy Center, *An Assessment of the Impacts of Climate Change on the Great Lakes* (2019) <https://elpc.org/wp-content/uploads/2020/04/2019-ELPCPublication-Great-Lakes-Climate-Change-Report.pdf>.

⁴⁴ *Id.*

⁴⁵ NCCOS, *Study Identifies Causes of Toledo's Unprecedented 2017 Maumee River Algal Bloom* (Aug 26, 2020), <https://coastalscience.noaa.gov/news/study-identifies-causes-of-toledos-unprecedented-2017-maumee-river-bloom/>; Alliance for the Great Lakes, *Five Years Later: Lessons From the Toledo Water Crisis* (Aug. 1, 2019), <https://greatlakes.org/2019/08/five-years-later-lessons-from-the-toledo-water-crisis/>.

⁴⁶ Great Lakes Indian Fish and Wildlife Commission, *Aanji-bimaadiziimagak o'ow aki, Climate Change Vulnerability Assessment Version 2*, pages 39-40 (Jan. 2023), http://data.glifwc.org/download/archive.bio/Aanji-bimaadiziimagak_o_ow_aki_digital_02212023.pdf; see also Native American Rights Fund, *Enbridge's Line 5 Pipeline (Bay Mills Indian Community)*, <https://narf.org/cases/enbridges-line-5-pipeline/> (last visited Aug. 8, 2023).

environment, and the associated rights to health, water, property, and culture. Moreover, an oil spill would cause substantial harm to the environment, and Enbridge's proposed tunnel under the Straits of Mackinac and re-routed pipeline in Wisconsin threaten additional harms to water, biodiversity, and land.⁴⁷ This would impact the health and wellbeing of millions of people who rely on the Great Lakes for drinking water, agriculture, fishing, and other subsistence activities. It could jeopardize access to drinking water for more than 48 million people.⁴⁸ Additionally, any oil spill would contaminate the shorelines of the Great Lakes and surrounding wetlands and rivers,⁴⁹ including Ramsar Sites like the Kakagon and Bad River Sloughs.⁵⁰

Presently, the pipeline is trespassing on the Bad River's Reservation in Wisconsin⁵¹—violating sovereign property and treaty rights. An oil spill at any point along Line 5 could also destroy Indigenous Peoples' land, and affect their rights in the fish, animals, and plants in their traditional territory. Oil pollution would irreversibly destroy many sacred sites around the Great Lakes, which are traditional cultural property.⁵²

The Anishinaabek People's relationship with the environment, including the waters, animals, plants, and air, is at the center of Anishinaabek culture, religion, health, economy, identity, and life.⁵³ An oil spill would pollute the waters that are critical for our way of life, risking the continuity of Anishinaabek culture for future generations. The Great Lakes contain many sacred sites for Anishinaabek People, which would be destroyed by an oil spill.⁵⁴ By completely “destroy[ing] a sacred cultural landscape central to Anishinaabek life,”⁵⁵ an oil spill poses an irreversible threat to our ability to practice, teach, and protect our culture and way of life.

An oil spill would also impact animal and plant species on which many of us rely for subsistence and cultural practices. Water, plants, and animals are necessary for Anishinaabek cultural ceremonies and traditions.⁵⁶ Many Anishinaabek women are water keepers and pray and care for water during ceremonies.⁵⁷ Wild rice (manoomin) is “an irreplaceable cultural,

⁴⁷ See Section II.C, *supra*.

⁴⁸ Mich. Dept. Env't, Great Lakes, and Energy, *State of the Great Lakes Report*, page 3 (Jul. 2020), <https://www.michigan.gov/-/media/Project/Websites/egle/Documents/Reports/OGL/State-of-the-Great-Lakes/Report-2019.pdf?rev=f911f70978404e9d9758914a0b96c9ad>.

⁴⁹ Bad River Band Rerouting Comments, pages 11–14.

⁵⁰ Ramsar Sites Information Service, *Kakagon and Bad River Sloughs* (Feb. 2, 2012), <https://rsis Ramsar.org/ris/2001>.

⁵¹ *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co.*, No. 19-cv-602-wmc, 2022 U.S. Dist. LEXIS 161080, page *45 (W.D. Wis. Sep. 7, 2022); *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, No. 19-cv-602-wmc, 2023 U.S. Dist. LEXIS 105397 (W.D. Wis. June 16, 2023).

⁵² Bay Mills Tunnel Comments, pages 7–8; *see also* Bad River Band Rerouting Comments, page 1; *id.*, page 18; *id.*, pages 45–48.

⁵³ Bad River Band Rerouting Comments, page 1.

⁵⁴ Bay Mills Tunnel Comments, pages 7–8; *see also* Bad River Band Rerouting Comments, page 1; *id.*, page 18; *id.*, pages 45–48.

⁵⁵ Amicus Brief of Bay Mills Indian Community et. al., page 4, *Enbridge v. Whitmer*, Docket No. 11:120-cv-01141 (W.D. Mich. Apr. 6, 2022) (Dkt. 75); *see also* Bad River Band Rerouting Comments, pages 1, 3–5; Press Release, Bad River Band of Lake Superior Tribe of Chippewa Indians, *Mashkiziibi (Bad River) Band Denies Renewal of Line 5 Grant of Easement* (Jan. 5, 2017), 16118710_10154145497292703_2124816677_n.jpg (d3n8a8pro7vhmx.cloudfront.net).

⁵⁶ Bay Mills Tunnel Comments, pages 3, 38–39.

⁵⁷ Bay Mills Tunnel Comments, page 3.

spiritual, nutritional, and commercial resource and sacred relative to ... Tribal Nations in the Upper Midwest and Great Lakes region.”⁵⁸

A spill in the Straits of Mackinac would wipe out fisheries that have provided a food source and lain at the heart of tribal way of life for millennia, and that still form the core of the Tribal treaty-protected fisheries.⁵⁹ For example, the Bay Mills community uses Lake Whitefish and Lake Trout for naming, feasting in celebration of children, ghost suppers, and burial ceremonies.⁶⁰ Bay Mills scholars have identified that “the right to fish [is] an essential part of what it mean[s] to be Indian – what it mean[s] to be a part of the Bay Mills community.”⁶¹ This right is so important that it was enshrined in treaties with the U.S.⁶² Likewise, fishing, ricing, gathering, and hunting provide sustenance and livelihood for the Bad River, and its practices and stewardship—passed on for generations—are part of “its social fabric,” and “central premise of its identity.”⁶³

IV. The Fight Against Line 5

Tribal Nations in the U.S. and Canada have worked for years to decommission Line 5 in response to the risk a catastrophic oil spill poses to their health, culture, and environment.⁶⁴ In 2015 and 2016, Tribal Nations from Michigan’s twelve federally recognized tribes passed resolutions calling to decommission Line 5.⁶⁵ As discussed above, in 2017, the Bad River

⁵⁸ Bay Mills Tunnel Comments, page 39; *accord* Complaint, paras. 37–38, 52, *Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co., et al.*, No. 3:19-cv-00602-wmc (W.D. Wis. July 23, 2019) (Dkt. 1); Bad River Band of Lake Superior Tribe, *Kakagon and Bad River Sloughs recognized as a Wetland of International Importance* (Apr. 5, 2012), <http://www.badriver-nsn.gov/kakagon-and-bad-river-sloughs-recognized-as-a-wetland-of-international-importance/>; Ramsar, *Annotated List of Wetlands of International Importance*, https://rsis.ramsar.org/sites/default/files/rsiswp_search/exports/Ramsar-Sites-annotated-summary-United-States-of-America.pdf?1491490956.

⁵⁹ Bay Mills Tunnel Comments, pages 30–31; Charles E. Cleland, *The Place of the Pike (Gnoozhekaaning): A History of the Bay Mills Indian Community*, page 83 (U. Mich. Press, 2004); *see also* Complaint, paras. 40–42, *Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co., et al.*, No. 3:19-cv-00602-wmc (W.D. Wis. July 23, 2019) (Dkt. 1); Bay Mills Indian Community, *Banishment of Enbridge Energy, Inc. Line 5 Dual Pipelines from the 1836 Treaty of Washington Ceded Territory, Waters of the Great Lakes, and the Straits of Mackinac*, 24 Res. 21-05-10A (May 10, 2021), https://narf.org/nill/documents/20210510BayMills_banish_Enbridge.pdf.

⁶⁰ Bay Mills Tunnel Comments, page at 3.

⁶¹ Cleland, page 83; *see also* Bay Mills Indian Community, *Banishment of Enbridge Energy, Inc. Line 5 Dual Pipelines from the 1836 Treaty of Washington Ceded Territory, Waters of the Great Lakes, and the Straits of Mackinac*, 24 Res. 21-05-10A (May 10, 2021), https://narf.org/nill/documents/20210510BayMills_banish_Enbridge.pdf.

⁶² *See, e.g.*, Robinson-Superior Treaty, 1850, Treaty No. 60 and Robinson-Huron, 1850, Treaty No. 61; *Treaty with the Chippewa*, WL 4123(Trty.) 7 Stat., 536 (Jul. 29, 1837) (“The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States”); *Treaty with the Ottawa*, WL 4198(Trty.), 7 Stat. 491 (Mar. 28, 1836).

⁶³ Complaint, paras. 39–43, 52, *Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co., et al.*, No. 3:19-cv-00602-wmc (W.D. Wis. July 23, 2019) (Dkt. 1); Bad River Band Rerouting Comments, pages 3–6.

⁶⁴ *See* Oil and Water Don’t Mix, *Federally-Recognized Indian Tribes are Speaking Out to Protect this Vital and Sacred Water*, https://www.oilandwaterdontmix.org/tribal_supporters.

⁶⁵ *See* Bay Mills Indian Community, *Line 5 Information Portal*, <https://www.baymills.org/enbridge-information-portal>; *see also* Michelle Woodhouse & Reg Niganobe, *Canada’s support of Line 5 violates Indigenous treaty rights and harms the natural world*, THE TORONTO STAR (Nov. 10, 2022), <https://www.thestar.com/opinion/contributors/2022/11/10/canadas-support-of-line-5-violates-indigenous-treaty-rights-and-harms-the-natural-world.html>.

ordered Enbridge to remove all infrastructure from the Bad River watershed.⁶⁶ In 2021, Bay Mills formally banished Line 5 from its territory, including the Straits.⁶⁷ The Midwest Alliance of Sovereign Tribes⁶⁸ and the Anishinabek Nation in Canada⁶⁹ have issued similar orders. Enbridge has ignored them all.

A. Line 5 & Ongoing Human Rights Violations

Ongoing support for Line 5 over the objection of impacted Indigenous Peoples violates their rights to Free Prior and Informed Consent (“FPIC”), and jeopardizes their rights to a healthy environment, life, culture, and private family and home life. State actions supporting Line 5 violate international human rights obligations and are part of a larger pattern of failure to regulate Canadian businesses at the expense of Indigenous Peoples’ rights.⁷⁰

States must respect human rights by refraining from conduct that causes or contributes to reasonably foreseeable harms to human rights.⁷¹ States violate this obligation when they “prioritize the interests of businesses over [human] rights without adequate justification or when they pursue policies that negatively affect such rights.”⁷² The duty to respect applies extraterritorially, and “requires States parties to refrain from interfering directly or indirectly with the enjoyment of the [] rights by persons outside their territories States must ensure that they do not obstruct another State from complying with its obligations.”⁷³ By supporting Line 5 and acting to ensure its continued operations, despite the foreseeable risks it poses and opposition of affected Indigenous communities, Canada has violated this obligation.

⁶⁶ Press Release, Bad River Band of Lake Superior Tribe of Chippewa Indians, *Mashkiziibi (Bad River) Band Denies Renewal of Line 5 Grant of Easement* (Jan. 5, 2017), [16118710_10154145497292703_2124816677_n.jpg](https://www.badriverband.com/16118710_10154145497292703_2124816677_n.jpg) (d3n8a8pro7vhmx.cloudfront.net).

⁶⁷ Bay Mills Indian Community, *Banishment of Enbridge Energy, Inc. Line 5 Dual Pipelines from the 1836 Treaty of Washington Ceded Territory, Waters of the Great Lakes, and the Straits of Mackinac*, 24 Res. 21-05-10A (May 10, 2021), [20210510BayMills_banish_Enbridge.pdf](https://www.baymills.org/20210510BayMills_banish_Enbridge.pdf) (narf.org).

⁶⁸ Midwest Alliance of Sovereign Tribes, *Midwest Alliance of Sovereign Tribes Opposes Continued Operation of Line 5 Across the Mackinac Straits*, Resolution No. 004-16 (April 27, 2017), <https://d3n8a8pro7vhmx.cloudfront.net/oilandwaterdontmix/pages/723/attachments/original/1487109966/MAS-T-resolution-004-16.pdf?1487109966> (representing all 35 federally recognized Tribes in the U.S. Great Lakes states).

⁶⁹ Anishinabek Nation, *Anishinabek Nation leadership supports shut down of Line 5 pipeline* (May 6, 2021), <https://www.anishinabek.ca/2021/05/06/anishinabek-nation-leadership-supports-shut-down-of-line-5-pipeline/> (representing 39 Anishinabek First Nations).

⁷⁰ See, e.g., Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada, U.N. Doc. CERD/C/CAN/CO/18*, para. 17 (May 25, 2007); Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada, U.N. Doc. CERD/C/CAN/CO/19-20*, para. 14 (April 4, 2012); Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada, U.N. Doc. E/C.12/CAN/CO/6*, paras. 13-14, 16 (Mar. 23, 2016); Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada, U.N. Doc. CERD/C/CAN/CO/21-23*, paras. 19-20 (Sept. 13, 2017); Letter from Verene Shepherd, Chair, Comm. Elimination of Racial Discrimination to H.E. Mrs. Leslie Norton, Permanent Representative of Canada to the United Nations Office, Reference CERD/EWIA [1-6th session/2022/MJ/CA/ks, (Apr. 29, 2022).

⁷¹ Office of the High Commissioner of Human Rights, *International Human Rights Law*, <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law> (last visited Mar. 29, 2023); Human Rights Committee, General comment No. 36 on article 6: right to life, CCPR/C/GC/36, para. 7 (2019) [hereinafter HRC, GC No. 36]; Committee on the Rights of the Child, General comment No. 16 on State obligations regarding the impact of the business sector on children’s rights, CRC/C/GC/16, para. 26 (2013) [hereinafter CRC, GC No. 16].

⁷² United Nations Economic and Social Council, Committee on Economic, Social, and Cultural Rights, General comment No. 24, E/C.12/GC/24, para. 12 (2017) [hereinafter CESCR, GC No. 24].

⁷³ CESCR, GC No. 24, para. 29; see also HRC, GC No. 36, paras. 22, 63; Committee on the Elimination of Discrimination Against Women, General Recommendation No. 34 on the Rights of Rural Women, U.N. Doc. CEDAW/C/GC/34, para. 13 (2016) [hereinafter CEDAW, Gen. Rec. No. 34].

States must protect human rights by “tak[ing] all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing” to reasonably foreseeable threats to human rights.⁷⁴ States must address, alleviate and mitigate foreseeable threats to human rights,⁷⁵ regulate the activities of businesses to ensure “effective protection” against rights violations, and hold corporations accountable for violations.⁷⁶ This duty applies extraterritorially; States must regulate the activities of businesses within their jurisdiction operating abroad.⁷⁷ States violate this duty “by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effects of leadings to such rights being abused,”⁷⁸ “or otherwise collaborat[ing] with or tolerat[ing] the infringements.”⁷⁹

This means bilateral agreements, including the 1977 Pipeline Treaty, must also be consistently interpreted with its human rights obligations.⁸⁰ The use of the treaty to prolong Line 5’s operations despite its threats to rights violates this obligation.

B. Line 5 and the rights of Indigenous Peoples

Actions to ensure Line 5’s continued operations despite vocal opposition by affected Indigenous Peoples in Canada and the U.S. disregards, and is interfering with, their rights to FPIC and participation. States should not form policy positions nor intervene to support Line 5 without the effective participation of affected communities. States must ensure that

⁷⁴ CRC, GC No. 16, para. 28; *See also*, HRC, GC No. 36 para. 18, 21-22 (States must adopt measures or laws protecting life from all “reasonably foreseeable threats” including those from “private persons,” “entities ... not attributable to the State,” and “other States and foreign corporations”); CEDAW, GC No. 34, para. 13; CESCR, GC No. 24, paras. 14-19, 30-32. *See also* UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295 (Oct. 2, 2007), art. 8(2)(b) [hereinafter UNDRIP]. *See generally* U.N. Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights* (2011), (adopted by the UN Human Rights Council, A/HRC/RES/17/4, July 6, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

⁷⁵ CEDAW, Gen. Rec. No. 34, para. 12; HRC GC No. 36, paras. 18, 26; Committee on the Rights of the Child, Draft general comment No. 26 on children’s rights and the environment with a special focus on climate change, paras. 75-76 (2021) [hereinafter CRC, GC No. 26]; CESCR, GC No. 24, para. 16.

⁷⁶ HRC, GC No. 36, para. 2; *see also* CESCR, GC No. 24, paras. 14-17; CEDAW, GC No. 34, para. 13; Committee on the Elimination of Discrimination against Women, General recommendation No. 39 on the rights of Indigenous women and girls, U.N. Doc. CEDAW/C/GC/39, para. 57 (2022) [hereinafter CEDAW, Gen. Rec. No. 39].

⁷⁷ CEDAW, GC No. 34, para. 13; CESCR, GC No. 24, paras. 30-32; Letter from Anastasia Crickley, Chair, Comm. Elimination of Racial Discrimination to H.E. Ms. Rosemary McCarney, Permanent Representative of Canada to the United Nations Office, Reference CERD/89th/EWUAP/GH/MJA/ks, (May. 27, 2016), https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=INT/CERD/ALE/CAN/8030&Lang=en; CERD, Concluding Observations, Canada, para. 14 (2012); CRC, Concluding Observations Canada, paras. 238-29 (2012); HRC, Concluding Observations, Canada, para. 6 (2015).

⁷⁸ CESCR, GC No. 24, para. 18.

⁷⁹ CRC, GC No. 16, para. 28.

⁸⁰ CESCR, GC No. 24, para. 13 (“The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations ... States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude.”); CESCR, Concluding Observations, Canada, U.N. Doc. E/C.12/CAN/CO/6, para. 16 (Mar. 23, 2016).

corporations within its jurisdiction, like Enbridge, obtain FPIC from Indigenous Peoples whose lands and rights are affected by their projects, including the undersigned.

- a. Indigenous Peoples have a right to participate in decisions that affect them and withhold consent for any project which affects their territories or rights.

Indigenous Peoples have a right to participate in government decisions that “may affect them,” or “their rights,”⁸¹ such as “development projects being carried out on or near their lands or territories.”⁸²

Indigenous Peoples also have a related but distinct right, which requires States to consult and cooperate in order to obtain their FPIC “prior to the approval of any project affecting their lands or territories and other resources.”⁸³ Specifically, FPIC is required for extractive industry projects within the territories of Indigenous Peoples and/or projects with a significant, direct impact on Indigenous Peoples,⁸⁴ for instance, “when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.”⁸⁵ Canada has endorsed or ratified human rights instruments that affirm and protect FPIC and the underlying and related rights to self-determination, equality, culture, and property.⁸⁶ The Human Rights Committee (HRC) has explained that “participation in the decision-making process must be effective, which requires not mere consultation but the [FPIC] of the members of the community.”⁸⁷ FPIC processes must allow Indigenous Peoples to “influence the outcome of decision-making,” suggest alternatives, and withhold consent.⁸⁸ FPIC must be continuous;

⁸¹ United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 art. 18, 19 (2007) [hereinafter UNDRIP]; *accord* Int’l Covenant on Civil and Political Rights arts. 25, 27, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights arts. 3, 15(1)(a), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Elimination of All Forms of Discrimination against Women 1979, Art. 7(b), 1249 U.N.T.S. 13 [hereinafter CEDAW]; Human Rights Committee, *Poma Poma v. Peru* para. 7.2, U.N. Doc. CCPR/C/95/D/1457/2006 [hereinafter HRC, *Poma Poma v. Peru*]; CESCR, General comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (art. 3 of the ICESCR), E/C.12/2005/4, para. 37 (2005) [hereinafter CESCR, GC No. 16]; CESCR, General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, paras. 16 (c), 55(e) (2009) [hereinafter CESCR, GC No. 21]; CEDAW, Gen. Rec. No. 39, paras. 44, 46(a), (f); Letter from Verene Shepherd, Chair, Comm. Elimination of Racial Discrimination to H.E. Ms. Leslie Norton, Permanent Representative of Canada to the United Nations Office, Reference CERD/EWUAP/2022/MJ/CS/k (Dec. 2, 2022).

⁸² CESCR, Concluding Observations: Canada, para. 14.

⁸³ UNDRIP, art. 32(2).

⁸⁴ Expert Mechanism Reports, paras. 31-35.

⁸⁵ CESCR, GC No. 21, para. 55(e).

⁸⁶ UNDRIP, arts. 10, 11, 19, 20, 32 (2007). For underlying rights, *see, e.g.*, ICCPR, arts. 25, 27; ICESCR, arts. 1, 3, 15 (1967) [hereinafter ICESCR]; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]. For explanation of relationship between FPIC and underlying rights *see also, e.g.*, Committee on the Elimination of Racial Discrimination, General Recommendation 23, U.N. Doc. A/52/18, annex V at 122, paras. 4(d), 5 (1997); CESCR, GC No. 16, para. 37; HRC, *Poma Poma v. Peru*, para. 7.2; CESCR, General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the ICESCR), U.N. Doc. E/C.12/GC/21, para. 16(c), 55(e) (2009); CESCR, GC No. 24, paras. 12, 17; Expert Mechanism on the Rights of Indigenous Peoples, Free, Prior and Informed Consent: a Human Rights-Based Approach, Study of the Expert Mechanism on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/39/62 (2018) [hereinafter EMRIP, FPIC: a Human Rights-Based Approach]. For Canada’s obligations, *see e.g.*, HRC, List of issues prior to submission of the seventh periodic report of Canada, UN Doc. CCPR/C/CAN/QPR/7, para. 24 (2021).

⁸⁷ HRC, *Poma Poma v. Peru*, para. 7.6; *see also* CEDAW, Gen. Rec. No. 39, paras. 44, 46(a), (f).

⁸⁸ EMRIP, FPIC: a Human Rights-Based Approach, paras. 14-20, 24-30.

“consent must be ongoing with express opportunities for review and renewal,” and can be revoked.⁸⁹

- b. State Support for Line 5 violates its duty to respect and protect Indigenous Communities’ right to a healthy environment, life, culture, and private home and family life.

Enbridge’s continued operation of Line 5 and proposed construction of new stretches of pipeline poses a foreseeable risk of a severe oil spill, which would cause harm to water quality and sensitive ecosystems. These significant environmental harms threaten Indigenous Peoples’ rights to a healthy environment, life, culture, and private home and family life. By failing to properly regulate Enbridge and actively promoting Line 5’s operation, Canada is enabling a foreseeable risk to and failing to protect these human rights.

- c. Line 5 poses a foreseeable threat to several human rights.
 - i. *Right to clean, healthy, and sustainable environment (life, water, health, adequate standard of living)*

The U.N. General Assembly (UNGA) and Human Rights Council recognize “the right to a clean, healthy, and sustainable environment.”⁹⁰ Canada was among the 161 States that voted in favor of the UNGA Resolution.⁹¹ The UNGA and U.N. Human Rights Treaty Bodies have recognized that the right to a healthy environment intersects with, and is encompassed within, various rights including the rights to life, health, water, and adequate standard of living, found in numerous declarations and treaties to which Canada is a party.⁹² For instance, the right to life includes the right to enjoy a life with dignity, which is predicated on a clean, healthy, and safe environment, and access to food and water.⁹³ As the HRC has recognized, “environmental degradation, climate change, and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”⁹⁴ Collectively, these rights guarantee “clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environment to live, work, study and play, and healthy biodiversity and ecosystems.”⁹⁵

⁸⁹ *Id.* para. 43. *See, also, id.* paras. 15, 50, and Annex, para. 6; Food and Agriculture Organization of the U.N., *Free Prior and Informed Consent: An Indigenous Peoples’ Right and a Good Practice for Local Communities*, page 13 (2016), <https://www.fao.org/3/i6190e/i6190e.pdf>.

⁹⁰ UNGA, The human right to a clean, healthy and sustainable environment, A/HRC/RES/48/13 (2021); *see also* UNGA, The human right to a clean, healthy and sustainable environment, A/76/L.75 (2022).

⁹¹ United Nations Digital Library, *The human right to a clean, healthy and sustainable environment: resolution / adopted by the General Assembly* (Jul. 28, 2022), <https://digitallibrary.un.org/record/3982659?ln=en>.

⁹² *See* HRC, GC No. 36, paras. 26, 62 (applying ICCPR art. 6); OHCHR, *Mapping Human Rights Obligations Relating to the Enjoying of a Safe, Clean, Healthy and Sustainable Environment: Individual Report on the International Convention on the Elimination of All Forms of Racial Discrimination*, paras. 17-18, (2013), <http://www.ohchr.org/Documents/Issues/Environment/Mappingreport/3.CERD-25-Feb.docx> (applying CERD, art. 5(e)(iv)); CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the ICESCR), E/C.12/2000/4, paras. 4, 11, 15, 27, 34 (2000) (applying Convention on Economic, Cultural and Social Rights, art. 12); UNDRIP art. 29(1).

⁹³ HRC, GC No. 36, paras. 3, 26, 62.

⁹⁴ HRC, GC No. 36, para. 62.

⁹⁵ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Right to a Healthy Environment: Good Practices, UN Doc. A/HRC/43/53, para. 2 (Dec. 30, 2019); *see also id.* pp. 8-18; OHCHR, U.N.E.P., UNDP, WHAT IS THE RIGHT TO A HEALTHY ENVIRONMENT: INFORMATION NOTE 9 (Jan. 5, 2023), <http://www.undp.org/publications/what-right-healthy-environment>.

An oil spill would cause substantial harm to the ecosystem that sustains our way of life. It would impact animal and plant species on which many of us rely for subsistence by polluting the water and shorelines of the Great Lakes and surrounding wetlands and rivers, including Ramsar Sites like the Kakagon and Bad River Sloughs.⁹⁶ A spill in the Straits of Mackinac would wipe out fisheries that have provided a food source and lain at the heart of tribal way of life for millennia, and that still form the core of the Tribe's treaty-protected fisheries.⁹⁷ Oil pollution in the Great Lakes would jeopardize access to drinking water for more than 48 million people, including our Nations.⁹⁸

Enbridge's proposed tunnel under the Straits and pipeline in Wisconsin would pose additional harms to water, biodiversity, and geography.⁹⁹ Therefore, the continued operation of Line 5 endangers our environment, water, land, and resources, which poses a foreseeable threat to our rights to a healthy environment, and the associated rights to health, water, adequate standard of living, and life.

ii. Right to culture, privacy, family, and home life

Numerous treaties protect the right to culture, including Indigenous culture. Indigenous Peoples have a right “to enjoy their own culture,”¹⁰⁰ “to take part in cultural life”¹⁰¹ and to “freely ... participate in the cultural life of the community.”¹⁰² The right to culture is woven throughout UNDRIP, which recognizes the rights to “practise,” “revitalize,”¹⁰³ “maintain, control, protect,”¹⁰⁴ “develop and teach”¹⁰⁵ cultural customs and ceremonies, “cultural heritage, traditional knowledge and traditional cultural expressions.”¹⁰⁶

The HRC has recognized that, “in the case of [I]ndigenous [P]eoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting.... Article 27 ... enshrines the inalienable right of [I]ndigenous [P]eoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity.”¹⁰⁷

⁹⁶ Ramsar Sites Information Service, Kakagon and Bad River Slough (Feb, 2nd, 2012), <https://rsis.ramsar.org/ris/2001>.

⁹⁷ Bay Mills Tunnel Comments at pages 30-31; CHARLES E. CLELAND, THE PLACE OF THE PIKE (GNOZHEKAANING): A HISTORY OF THE BAY MILLS INDIAN COMMUNITY, page 83 (University of Michigan Press, 2004); *see also* Complaint, paras. 40-42, *Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co., et al.*, No. 3:19-cv-00602-wmc (W.D. Wis. July 23, 2019) (Dkt. 1)

⁹⁸ MICHIGAN, STATE OF THE GREAT LAKES, page 3 (2019 Report), <https://www.michigan.gov/-/media/Project/Websites/egle/Documents/Reports/OGL/State-of-the-Great-Lakes/Report-2019.pdf?rev=f911f70978404e9d9758914a0b96c9ad>.

⁹⁹ *See supra* paragraph 12.

¹⁰⁰ ICCPR, art. 27; *see also* Human Rights Committee, Daniel Billy et al. v. Australia, UN Doc. CCPR/C/135/D/3624/2019, para. 8.13 (Sept. 22, 2022); Human Rights Committee, Chief Bernard Ominayak and Lubicon Lake Band v. Canada, CCPR/C/38/D/167/1984, para 32.2 (Mar. 26, 1990) (recognized that the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong).

¹⁰¹ ICESCR, art. 15(1).

¹⁰² UDHR, art. 27.

¹⁰³ UNDRIP, art. 11.

¹⁰⁴ UNDRIP, art. 31.

¹⁰⁵ UNDRIP, art. 12.

¹⁰⁶ UNDRIP, art. 31.

¹⁰⁷ Human Rights Committee, Daniel Billy et al. v. Australia, UN Doc. CCPR/C/135/D/3624/2019, para. 8.14 (Sept. 22, 2022); *accord* CESR, GC No. 21, paras. 36-37.

The right to privacy, family, and home¹⁰⁸ also protects Indigenous Peoples' way of life and the natural resources connected to their subsistence, livelihood, and wellbeing, including animals, land, crops, and ecosystems, because Indigenous Peoples enjoy a special relationship with their territory.¹⁰⁹ Treaties between the U.S., Canada, and Indigenous Peoples similarly protect our rights to the territory and natural resources needed to practice our culture and maintain our livelihoods, including rights to the land, fishing, hunting, gathering, and other customary practices.¹¹⁰

Line 5 threatens the rights to culture, livelihood, and way of life of Indigenous Anishinaabek communities surrounding the Great Lakes. The Anishinaabek People's relationship with the natural environment, including the waters, trees, animals, plants, birds, and the air, is at the center of Anishinaabek culture and life.¹¹¹ In addition, the Great Lakes contain many sacred sites for Anishinaabek People and are traditional cultural property.¹¹² According to the Anishinaabek origin story, the Straits of Mackinac are the center of creation of Turtle Island and hold an ongoing spiritual significance.¹¹³

Water, plants, and animals are necessary for Anishinaabek cultural ceremonies and traditions.¹¹⁴ Line 5's operation poses foreseeable harms to the land, water, flora and fauna, which is central to these cultural practices. In sum, an oil spill could completely "destroy a sacred cultural landscape central to Anishinaabek life."¹¹⁵ This poses an irreversible threat to our ability to practice, teach, and protect our culture and way of life.

C. State support for Line 5 violates its duty to respect and protect the plethora of rights affected by climate change.

Canada's support for Line 5 contradicts its obligations to mitigate climate change and protect against the adverse human rights impacts of climate change. To comply with its human rights obligations, Canada must phase out fossil fuels, not support extending the operation of an aging

¹⁰⁸ ICCPR, art. 16.

¹⁰⁹ See Human Rights Committee, Daniel Billy et al. v. Australia, UN Doc. CCPR/C/135/D/3624/2019, para. 8.10 (Sept. 22, 2022); CCPR, General Comment 16 on the right to property, para. 5 (emphasis added) (Apr. 8, 1988); Human Rights Commission, Benito Oliviera Pereira et al v. Paraguay, CCPR/C/132/D/2552/2015, para. 8.3 (Oct. 12, 2021). See also UNDRIP, art. 25.

¹¹⁰ See Letter to President Biden, Re: Administration Support for Michigan Tribal Nations and Governor Whitmer to Decommission the Enbridge Line 5 Pipeline (Nov. 4, 2021), https://www.baymills.org/_files/ugd/869f65_f8e5288d82084540a9f0e7d5d6c0921f.pdf ("Five of [Michigan's] Tribal Nations reserved fishing, hunting, and gathering rights in the Straits of Mackinac in the 1836 Treaty of Washington. These were among the most precious of the rights our ancestors insisted upon when forced to make massive land cessions to the United States, as the ability to take fish, game, and plants was and remains central to our people's way of life and very survival.")

¹¹¹ Bad River Band Rerouting Comments, page 1.

¹¹² Bay Mills Tunnel Comments, pages 7-8; see also Bad River Band Rerouting Comments, page 1 ("The Anishinaabe, of which our Tribe of Ojibwe are a part, have lived in this area for several hundred years, moving from the east as described in our migration story to find the place where food grows on water."); *id.*, page 18 ("an oil spill would be catastrophic to traditional cultural and sacred places"); *id.*, pages 45-48 (describing the significance of the Bad River Band watershed as a cultural resource).

¹¹³ Bay Mills Tunnel Comments, pages 2-3; Amicus Brief of Bay Mills Indian Community et. al., page 4, *Enbridge v. Whitmer*, Docket No. 11:120-cv-01141 (W.D. Mich. April 6, 2022) (Dkt. 75).

¹¹⁴ Bay Mills Tunnel Comments, page 3, 38-39.

¹¹⁵ Amicus Brief of Bay Mills Indian Community et. al., page 4, *Enbridge v. Whitmer*, Docket No. 11:120-cv-01141 (W.D. Mich. April 6, 2022) (Dkt. 75); ; see also Bad River Band Rerouting Comments at pages 1, 3-5; Press Release, Bad River Band of Lake Superior Tribe of Chippewa Indians, *Mashkizibi (Bad River) Band Denies Renewal of Line 5 Grant of Easement* (Jan. 5, 2017), [16118710_10154145497292703_2124816677_n.jpg](https://www.baymills.org/_files/ugd/16118710_10154145497292703_2124816677_n.jpg) (d3n8a8pro7vhmx.cloudfront.net).

pipeline through the construction of new sections that only lock in fossil fuel production and consumption for another century.¹¹⁶

a. Line 5 contributes to climate change, which poses a foreseeable threat to a broad range of human rights.

The world is experiencing an accelerating climate emergency. Line 5's continued operation has the foreseeable effect of increasing global greenhouse gas emissions and worsening the impacts of climate change.¹¹⁷ The adverse impacts of climate change endanger communities around the world and are projected to worsen with every fraction of a degree that average global temperature rises.¹¹⁸

Climate change constitutes one of “the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights.”¹¹⁹ As five U.N. Treaty Bodies expressed in a rare joint statement, the adverse impacts of climate change “threaten, among others, the right to life, the right to adequate food, the right to adequate housing, the right to health, the right to water and cultural rights.”¹²⁰

Countries must take “special measures” to protect the rights of persons in vulnerable situations, including Indigenous Peoples.¹²¹ Indigenous Peoples' rights to life, food, health, and water are “disproportionately vulnerable to climate change,”¹²² because they “often live in marginal

¹¹⁶ Agreement between Enbridge and the Mackinac Straits Corridor Authority to design, construct, operate, and maintain a utility tunnel at the Straits to accommodate a replacement for the Dual Pipelines and other utilities (“Tunnel Agreement”), art. 6.1 (Dec. 19, 2018), https://www.michigan.gov/-/media/Project/Websites/MDOT/About-Us/Commissions/MSCA/Documents/MSCA_Tunnel_Agreement_Enbridge_Energy.PDF?rev=fc26f727ef02446081e65a510aee72b8 (specifying that the tunnel shall have “a design life of no less than ninety-nine (99) years”).

¹¹⁷ Insert internal reference.

¹¹⁸ See IPCC, *WGI 1.5 SPM* at B.5-B.5.2; IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (SPM)*, at A.3 (2021); IPCC, *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, SPM*, B.1- B.1.7 (2022); see also Joint Statement by CEDAW, CESCR, Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, Comm. on the Rights of the Child and Comm. on the Rights of Persons with Disabilities, Statement on Human Rights and Climate Change, U.N. Doc. HRI/2019/1, ¶ 5 (May 14, 2020) [hereinafter Joint Statement on Human Rights and Climate Change].

¹¹⁹ Resolution adopted by the General Assembly on July 28, 2022, *The human right to a clean, healthy and sustainable environment*, U.N. Doc. A/RES/76/300 (Aug. 1, 2022); see also, e.g., Human Rights Council, Res. 7/23, U.N. Doc. A/HRC/RES/7/23 (Mar. 28, 2008); Human Rights Council, Res. 10/4, U.N. Doc. A/HRC/RES/10/4 (Mar. 25, 2009); Human Rights Council, Res. 18/22, U.N. Doc. A/HRC/RES/18/22 (Oct. 17, 2011); Human Rights Council, Res. 26/27, U.N. Doc. A/HRC/RES/26/27 (July 15, 2014); Human Rights Council, Res. 29/15, U.N. Doc. A/HRC/RES/29/15 (July 22, 2015); Human Rights Council, Res. 31/8: *Human rights and the environment*, U.N. Doc. A/HRC/RES/31/8, at pmb1., ¶ 4(a) (Apr. 22, 2016); Human Rights Council, Res. 32/33, U.N. Doc. A/HRC/RES/32/33, at pmb1. (July 18, 2016); Human Rights Council Res. 35/20, U.N. Doc. A/HRC/35/20 (July 7, 2017); Human Rights Council, Res. 38/4: *Human rights and climate change*, U.N. Doc. A/HRC/RES/38/4, at pmb1. (July 16, 2018); Human Rights Council, Res. 41/21, U.N. Doc. A/HRC/RES/41/21 (July 23, 2019); Human Rights Council, Res. 44/7, U.N. Doc. A/HRC/Res/44/7 (July 23, 2020); HRC GC No. 36.

¹²⁰ Joint Statement on Human Rights and Climate Change, para. 7.

¹²¹ HRC, GC No. 36, para. 23.

¹²² U.N. Special Rapporteur on the Rights of Indigenous Peoples, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, U.N. Doc. A/HRC/26/46, para. 6 (Nov. 1, 2017); see also Directorate-General for External Policies of the European Union, *Indigenous Peoples and Climate Change*, U.N. Doc. EXPO/B/DROI/2009/03 p. 12 (2009); See Wayne S. Walker et al., *The Role of Forest Conversion*,

lands and fragile ecosystems which are particularly sensitive to alterations in the physical environment.”¹²³ By fundamentally changing ecosystems, undermining traditional agricultural practices, and causing climate-forced displacement, climate change makes it difficult for Indigenous communities to continue practices that define and sustain their ways of life, threatening their rights to self-determination and cultural identity.¹²⁴ Moreover, as stewards of their land, Indigenous Peoples play a vital role in protecting carbon stores, preventing GHG emissions, and conserving biodiversity, which helps to mitigate and adapt to climate change.¹²⁵

Through its climate impacts, Line 5 contributes to significant climate-induced harm to the Great Lakes and the treaty-protected natural resources vital to many of the undersigned Indigenous communities.¹²⁶ Experts expect climate change to cause increased precipitation and flooding around the Great Lakes.¹²⁷

V. Conclusion

Line 5 represents an ongoing and serious threat to the cultural and environmental resources of the Great Lakes and, by extension, to Indigenous communities’ fundamental rights. Furthermore, the project poses an unacceptable risk to the international effort to mitigate climate change’s adverse impacts on human rights.

In failing to properly regulate Enbridge’s operation of Line 5, multiple states violate their obligation to protect human rights. More egregiously, active interventions to protect Line 5,

Degradation, and Disturbance in the Carbon Dynamics of Amazon Indigenous Territories and Protected Areas, p. 117 PNAS (2020); FAO, *Forest Governance by Indigenous and Tribal Peoples: An Opportunity for Climate Action in Latin America and the Caribbean* p. 31 (2021) (explaining even though indigenous territories cover 28% of the Amazon Basin, they generated only 2.6% of the region’s gross carbon emissions).

¹²³ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, UN Doc. A/HRC/10/61 (Jan. 15, 2009) ¶ 51; *see also* Human Rights Council, *Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, John H. Knox, UN Doc. A/HRC/22/43 (Dec. 24, 2012) ¶ 45; Human Rights Council, *Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, John H. Knox, UN Doc. A/HRC/25/53 (Dec. 30, 2013) ¶¶ 76-78; CEDAW, Gen. Rec. No. 39, para. 7.

¹²⁴ U.S. Env’t Prot. Agency, *Climate Change and the Health of Indigenous Populations*, <https://www.epa.gov/climateimpacts/climate-change-and-health-indigenous-populations>.

¹²⁵ Vicky Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Rep. on the Rights of Indigenous Peoples*, U.N. Doc. A/HRC/36/46, ¶ 7 (Nov. 1, 2017) [hereinafter Report of the Special Rapporteur on Indigenous Peoples]; *see also* John E. Fa et al., *Importance of Indigenous Peoples’ Lands for the Conservation of Intact Forest Landscapes*, 18 *Frontiers Ecology & Environment* 135 (2020); *see generally* Caleb Stevens et al., World Resources Institute and Rights and Resources Initiative, *Securing Rights, Combating Climate Change: How Strengthening Community Forest Rights Mitigates Climate Change* (2014).

¹²⁶ *See generally* Great Lakes Indian Fish and Wildlife Commission, *Aanji-bimaadiziimagak o’ow aki, Climate Change Vulnerability Assessment Version 2* (January 2023), http://data.glifwc.org/download/archive.bio/Aanji-bimaadiziimagak_o_ow_aki_digital_02212023.pdf; Bay Mills Tunnel Comments, pages 35-42; Bad River Band Rerouting Comments, pages 21-24, 47.

¹²⁷ ENVT’L LAW AND POLICY CENTER, *AN ASSESSMENT OF THE IMPACTS OF CLIMATE CHANGE ON THE GREAT LAKES* (2019) <https://elpc.org/wp-content/uploads/2020/04/2019-ELPCPublication-Great-Lakes-Climate-Change-Report.pdf>.

over the expressed opposition of affected Indigenous communities, and through decision-making processes that exclude us, promote and enable threats to human rights. This violates its duty to respect human rights. Enbridge cannot rely on the Pipeline Treaty to ignore these human rights obligations.

VI. Recommendations

- a. The U.N. member states withdraw support for Line 5, a project threatening the human rights and ways of life of Indigenous Peoples;
- b. The U.N. Permanent Forum on Indigenous Issues provide a follow-up report on the recommendation from the Special Rapporteur on the rights of Indigenous Peoples to ensure discussion continues on the importance of Tribal Treaty Rights, and the Right to Culture, Health Environment, FPIC, and Climate Change.
- c. Implement the recommendation of the U.N. Permanent Forum on Indigenous Issues to re-examine support for, and decommission, the Line 5 pipeline;
- d. The U.N. member states interpret all international treaties, including the 1977 Pipeline Treaty, consistently with its human rights obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and other human rights obligations.

Line 5 is a ticking time bomb. The question is when – not if – an oil spill will happen. Community members will not stop fighting. Their lives, homelands, and communities are on the line.