

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

Enbridge Energy, Limited Partnership;
Enbridge Energy Company, Inc.; and Enbridge
Energy Partners, L.P.,

Plaintiffs,

v.

Case No. 19-00090-MZ
Honorable Michael J. Kelly

State of Michigan; Governor of Michigan;
Mackinac Straits Corridor Authority; Michigan
Department of Natural Resources; and
Michigan Department of Environment, Great
Lakes, and Energy,

Defendants.

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**THE CITY OF MACKINAC ISLAND AMICUS CURIAE BRIEF
IN SUPPORT OF THE STATE OF MICHIGAN**

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INTRODUCTION

The City of Mackinac Island submits this Amicus Brief in support of the State Defendants¹ argument IV.B of their motion for summary disposition – that “the Snyder Administration could not, as a matter of law, validly bargain away the State’s perpetual sovereign duty to protect the public trust.” While the City supports the State’s title-object arguments, the City seeks to highlight here the importance of the public trust doctrine and the State’s responsibilities under it when administering use of the Great Lakes and the soils and bottomlands beneath them.

The State of Michigan has a duty to forever maintain “a high, solemn, and perpetual trust” in the Great Lakes and their bottomlands on behalf of the public.² This means that “the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public. “The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure.”³ This is not an obligation that may be bargained away, and the reserved powers doctrine prevents any attempts to limit by contract the State’s public trust obligations.

One of the principal arguments made by the State Defendants in this case is that the “Third Agreement,” which purports to allow Enbridge⁴ to keep the existing Line 5 in place with no specific time limit or decommission date, violates the reserved powers doctrine. Of particular

¹ Throughout this Brief, Defendants the State of Michigan, the Governor of Michigan, the Mackinac Straits Corridor Authority, the Michigan Department of Natural Resources, and the Michigan Department of Environment, Great Lakes, and Energy are interchangeably and collectively referred to as “Defendants,” the “State Defendants,” and/or “the State.”

² *Collins v Gerhardt*, 237 Mich 38, 49; 211 NW 115 (1926).

³ *Glass v Goeckel*, 473 Mich 667, 678–79; 703 NW2d 58 (2005).

⁴ Plaintiffs Enbridge Energy, Limited Partnership; Enbridge Energy Company, Inc.; and Enbridge Energy Partners, L.P. are collectively referred to as “Enbridge.”

concern is the possibility of a leak or catastrophic failure of the aging pipeline and the damage it would cause to the public trust resources protected by the State.

The City of Mackinac Island is quite literally “ground zero” in the event there is an oil spill from Line 5. As explained in detail in the motion for leave to file this Amicus Brief, the Island would be severely impacted by such a catastrophe. As such, the City is very concerned about the continued existence (in its own backyard) of a 66-year-old decrepit pipeline that has already exceeded its anticipated design lifespan by more than a decade. The City is particularly disturbed by the Third Agreement between the State of Michigan and Enbridge, which seemingly allows the existing Line 5 to remain in place indefinitely. The former Governor Snyder’s administration’s bargaining away of public trust resources in derogation of the State of Michigan’s public trust duties clearly violates of the reserved powers doctrine, and this Court should invalidate the Third Agreement.

**STATEMENT OF INTEREST OF AMICUS CURIAE
THE CITY OF MACKINAC ISLAND**

The City of Mackinac Island (“City”) is a Michigan municipal corporation which encompasses Mackinac and Round Islands, together with the navigable waters surrounding them for a distance of one mile offshore. Mackinac and Round Islands are situated in Lake Huron just east of the Straits of Mackinac. The total land area of the two islands is about 2,745 acres or 4.3 miles, including ten miles of Lake Huron shoreline. The City also lies approximately seven miles east of Enbridge’s twin petroleum pipelines traversing the Straits known as Line 5. The City’s proximity to the lines gives rise to its interest in the instant litigation.

The catastrophic inland oil spill in Enbridge’s Line 6B in 2010 near Kalamazoo and the April 2018 anchor strike on Line 5 by a tug and barge traveling through the Straits served as alarm

bells to the Michigan public generally, and more specifically, local officials, businesspeople, and residents of Mackinac Island. Computer modeling prepared by Dave Schwab, Ph.D., of the University of Michigan Water Center warns that the Island and the waters surrounding it could be the epicenter of a release of petroleum products from a Line 5 spill or rupture.

The City of Mackinac Island is a unique, historical community, highly dependent upon a tourist economy and also very reliant upon regular ferry traffic from the mainland bringing people, food, and supplies on and off the Island. If the Mackinac Island harbor in Haldimand Bay, and/or the ferry terminals at St. Ignace and Mackinaw City were impacted by a Line 5 oil spill, the effects could be devastating to the health, safety, and welfare of the City's residents and visitors, not to mention immensely destructive to its economy.

Based on Dr. Schwab's modeling, the City's territorial waters and shoreline may suffer environmental degradation and its fishery may be harmed in the event of a spill. The City's municipal water supply, which is drawn directly from Lake Huron, is potentially within the path of spreading oil. If ferry transportation were cut off in the aftermath of a spill (which could occur whether the Island was directly affected, or if petroleum products were present in the surrounding waters), the City would be forced to stockpile its solid waste materials, leading to possible secondary environmental harms. Further, decreased tourism demand and depressed real estate values would have a negative impact on the City's revenues.

In short, the City of Mackinac Island, perhaps the flagship of "Pure Michigan" tourism, faces an existential threat in the form of the twin petroleum pipelines submerged within the Straits. It therefore implores this Court to enforce the public trust duties of the State of Michigan, and invalidate Public Act 359 and those agreements flowing from it.

RELEVANT BACKGROUND

On December 11, 2018, former Governor Rick Snyder signed into law and gave immediate effect to Act 359 of the Public Acts of 2018 (“Act 359”). Act 359 tacked onto the Mackinac Bridge Authority Act of 1952 the authorization for and creation of the new Mackinac Corridor Authority. Under the Act, apparently either the Bridge Authority or the Corridor Authority is permitted to acquire and operate a new utility tunnel to accommodate utility infrastructure, including pipelines, electric transmission lines, telecommunications, and attendant “real and personal property, licenses, franchise, easements, and rights-of-way.” Act 359 further directed the State of Michigan through its departments and agencies to provide the state or public lands for the tunnel, including the public trust bottomlands under the waters of the Straits, and enter into the necessary tunnel agreement, easement or assignment of easement, and a lease, as well as a new “Third Agreement.”⁵ After former Governor Snyder signed Act 359 into law, the DNR hastily issued the tunnel corridor easement, which was then immediately assigned to Enbridge by the Corridor Authority. The Corridor Authority also entered into the Tunnel Agreement and executed a 99-year lease with Enbridge on December 19, 2018. On the same day, former Governor Snyder, the DEQ, and DNR entered into the “Third Agreement,” which, as stated in Enbridge’s complaint, specifically provided that

Enbridge may continue to operate the Dual Pipelines [existing 66-year old dual lines], which allow for the functional use of the current Line 5 in Michigan, until the Tunnel is Complete, and the Straits Line 5 Replacement [S]egment is placed in service with the Tunnel...⁶

⁵ Act 359 does not specify a contracting partner with whom the agreements it entertains might be reached. However, the legislation, which calls for the execution of a tunnel agreement presented by the governor only days after its passage, was quite clearly passed with the intent to reach a deal with Enbridge on Line 5.

⁶ Verified Complaint, para. 62, pp. 15-16 (emphasis in original).

In other words, the Third Agreement provided authorization for Enbridge to occupy and use the bottomlands beneath the waters of the Straits for the existing Line 5 dual pipelines for an indefinite period of time.

Other than the Third Agreement signed by the Governor, DEQ, and DNR, provision for the continued use of the Line 5 under, in, and across the bottomlands of the Straits belonging to the State of Michigan has not been applied for by Enbridge or approved by DEQ (now EGLE) pursuant to the Great Lakes Submerged Lands Act (Part 325 of the Natural Resources and Environmental Protection Act, MCL 324.32501 *et seq.*). The Third Agreement cannot waive or otherwise satisfy the legal requirements through contract. In short, former Governor Snyder, the DEQ, and the DNR did not subject Enbridge to any rule of law or authorization and approval process as required by the public trust doctrine that inheres in the sovereign title in, under, across, and to the soils and bottomlands beneath the waters of the Great Lakes.

Accordingly, Amicus Curiae the City of Mackinac asks this Court to rule that any authorization under Act 359 for conveyances, easements, leases, or continued occupancy and use of the public trust soils and bottomlands of the Straits is void and/or otherwise unenforceable. Further, the Amicus asks the Court to hold that the Third Agreement unlawfully attempts to contract away the State's public trust responsibility and is therefore void.

ARGUMENT

The State's public trust responsibilities may not be contracted away, and any attempt to do so violates the reserved powers doctrine. The Michigan Supreme Court has explained that

under longstanding principles of Michigan's common law, the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public. The state

serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure.⁷

Therefore the “state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources.”⁸ However, this is exactly what Enbridge would like this Court to do. Enbridge is seeking this Court’s stamp of approval on the right to keep Line 5 in place indefinitely through and during its performance of the Third Agreement. Paragraph 2 of Plaintiffs’ Verified Complaint seeks confirmation of the validity and enforceability of the Tunnel Agreement, Third Agreement, DNR easement, and subsequent assignment of the easement to the Mackinac Straits Corridor Authority (collectively, the “December 2018 Agreements”), and further alleges that under the Third Agreement and Tunnel Agreements, Enbridge has “the right to continue operating the Line 5 Dual Pipelines until the replacement line is completed.”

Likewise, Paragraph 6 alleges that the December 2018 Agreements “are valid and enforceable.” Paragraphs 48-52 aver that the Tunnel Agreement confirmed the “continuation of existing Line 5, a 99-year lease, and the assignment of subsurface bottomlands to allow Enbridge to enter, use, and occupy those subsurface soils and lands for the tunnel and replacement line. Paragraphs 55-60 assert that the 2018 DNR Easement was legally granted and assigned to Enbridge, and is valid and enforceable.

Paragraph 62 alleges that under the Third Agreement, Enbridge has the right to “continue to operate the Dual Pipelines, which allow for the functional use of the current Line 5 in Michigan, until the Tunnel is completed and the Straits Line 5 Replacement segment is placed in service, subject to Enbridge’s continued compliance with... (a) The Second Agreement; (b) The Tunnel

⁷ *Glass v Goeckel*, 473 Mich 667, 678–79; 703 NW2d 58, 64–65 (2005).

⁸ *Id.*

Agreement; (c) This Third Agreement; (d) The 1953 Easement; and (e) All other applicable laws...”

Section 4.1 of the Third Agreement dated December 19, 2018, provides in part:

4.1 The State agrees that Enbridge may continue to operate the Dual Pipelines, which allow for the functional use of the current Line 5 in Michigan, until the Tunnel is completed and the Straits Line 5 Replacement segment is placed in service, subject to Enbridge’s continued compliance with all of the following: (a) The Second Agreement (b) The Tunnel Agreement; (c) This Third Agreement; (d) The 1953 Easement; and (e) All other applicable laws...⁹

Section 4.2(d) provides in part:

In entering into this Third Agreement, and thereby authorizing the Dual Pipelines to continue to operate until such time that the Straits Line 5 Replacement Segment is placed into service..., the State has acted in accordance with and in furtherance of the public’s interest in protection of waters, waterways, or bottomlands held in public trust by the State of Michigan.

Count I of the Verified Complaint requests declaratory judgment, in part, that the Tunnel Agreement and all of the related December 2018 Agreements, including the Third Agreement, are constitutional, valid, and in effect. Enbridge specifically claims that the Third Agreement grants it the right to continue occupying the 1953 Easement and otherwise continue to use the existing dual lines in the Straits. Count II requests declaratory judgment that the 2018 DNR Easement to the Corridor Authority and the Assignment of Easement rights to Enbridge for the tunnel and replacement or new Line 5 are valid and enforceable.

⁹ The statement that the project must comply with “all other applicable laws” does not remedy the violation of the reserved powers doctrine and the public trust See Argument 3, *infra*. That provision governs future compliance; the State Defendants and Amicus Curiae the City of Mackinac Island are concerned here with Act 359 and the December 2018 Agreements’ initial failure to comply with the rule of law.

However, by contracting with Enbridge to leave Line 5 on the bottomlands and waters of Lake Michigan indefinitely, the Third Agreement violates the reserved powers doctrine and is without binding legal effect to the extent that it purports, on behalf of the State, to preemptively determine that Enbridge's continued operation of its existing pipelines in the Straits is "in accordance with and furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan."

Amicus Curiae the City Mackinac Island agrees with and adopts the State Defendant's summary of the reserved powers doctrine. As is explained in more detail below, the State's responsibility to protect the public trust in the Great Lakes and their bottomlands is one of the substantive powers of the State of Michigan as sovereign that under the reserved powers doctrine cannot be contracted away.¹⁰

1. Equal Footing Doctrine and State Sovereign Title and Trust in the Great Lakes

When Michigan joined the United States in 1837, the State of Michigan took title absolutely, as sovereign for its citizens under the "equal footing" doctrine, to all of the navigable waters in its territory, including the Great Lakes, and "all of the soils under them" below the natural ordinary high mark.¹¹ The people of each state, based on principles of sovereignty, "hold the absolute right to all their navigable *waters and the soils under them*," subject only to rights

¹⁰ See Defendants' Motion for Summary Disposition at 48; *US v Winstar Corp*, 518 US 839, 888; 116 S Ct 2432 (1996) (the reserved powers doctrine holds that "a state government may not contract away 'an essential attribute of its sovereignty'"); Cf. *Keefe v Clark*, 322 US 393, 397; 64 S Ct 1072 (1944) ("The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation." (internal citation omitted)).

¹¹ *Shively v Bowlby*, 152 US 1, 57; 14 S Ct 548 (1894); *Illinois Central R Co v Illinois*, 146 US 387, 452; 13 S Ct 110 (1892); *State v Venice of America Land Company*, 160 Mich 680, 702; 125 NW 770 (1910); *Glass v Goeckel*, 473 Mich 667, 678-79; 703 NW2d 58 (2005).

surrendered and powers granted by the Constitution to the federal government.¹² All of these navigable waters and the soils beneath them are held in and protected by a public trust.¹³

2. The Public Trust Doctrine

The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands, and in the state laws of this country.¹⁴ Today, those rights and protected public trust uses include fishing, navigation, swimming, boating, bathing, beach walking below the ordinary, natural high water mark, and sustenance.¹⁵

The public trust doctrine

remains a matter of state law, see *Coeur d'Alene*, *supra*, at 285, 117 S. Ct. 2028 (*Illinois Central*, a Supreme Court public trust case, was 'necessarily a statement of Illinois law'); *Appleby v. City of New York*, 271 U.S. 364, 395, 46 S. Ct. 569, 70 L. Ed. 992 (1926) (same), subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power. While equal-footing cases have noted that the State takes title to the navigable waters *and their beds in trust for the public*, see *Shively*, 152 U.S., at 49, 15–17, 24, 46, 14 S. Ct. 548, the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their

¹² *Martin v Waddell's Lessee*, 41 US 367, 410; 10 L Ed 997 (1842); *Phillips Petroleum Co v Mississippi*, 484 US 469, 474; 108 S Ct 791 (1988).

¹³ *Id.*; *Illinois Central R Co v Illinois*, 146 US 387, 452; 13 S Ct 110 (1892); see also *Obrecht v Nat'l Gypsum Co*, 361 Mich 399, 412; 105 NW2d 143 (1961).

¹⁴ *Illinois Central*, 146 US at 458; *National Audubon Soc'y v Superior Court of Alpine Co*, 33 Cal 3d 419, 434; 189 Cal Rptr 346 (1983); *Arnold v Mundy*, 6 NJL 1, 12-13 (1821). These cases were cited with approval by the U.S. Supreme Court in *PPL Montana, LLC v Montana*, 565 US 576, 603; 132 S Ct 1215 (2012).

¹⁵ MCL 324.32502; *Glass*, 473 Mich at 674-75; *Obrecht*, 360 Mich at 416; *Collins v Gerhardt*, 237 Mich 38, 45; 211 NW 115 (1926); *Nedtweg v Wallace*, 237 Mich 14, 37; 208 NW 51 (1926), *aff'd on reh* 237 Mich 14; 211 NW 647 (1927).

borders, while federal law determines riverbed title under the equal-footing doctrine. [Emphasis added.]¹⁶

The quintessential public trust case, particularly for the Great Lakes, is the U.S. Supreme Court's decision in *Illinois Central Railroad Co v Illinois* in 1892. The question before the Court was whether the state of Illinois had the authority to convey by legislative grant a square mile of Lake Michigan and its soils beneath the navigable waters to a private railroad company for expansion of its industrial operations.¹⁷ Despite the economic and job benefits, the Court ruled that the conveyance was beyond the authority of the state legislature.¹⁸ The basis of the Court's decision was that the title to all of the waters and soils beneath them vested in the states on admission to statehood, and that these waters and bottomlands were held in trust by the states for navigation, fishing, and other public uses and purposes.¹⁹ The Court reasoned that the state's title in the public trust bottomlands or soils could not be alienated to or controlled by private parties for primarily private purposes or where the use, occupancy or alteration of these public trust water and soils would be impaired.²⁰

The public trust doctrine dictates that the state holds the waters of the Straits of Mackinac joining Lakes Michigan and Huron, together with the soils beneath them, in trust for the public for the protection of preferred or dedicated public trust uses of navigation, fishing, boating, swimming, bathing, drinking water, and other recreation.²¹ As a general rule, there can be no disposition, transfer, conveyance, occupancy or use of any kind of these public trust waters and the soils beneath them; the state can never divest itself of the trust title in the waters and soils beneath

¹⁶ *PPL Montana, LLC v Montana*, 565 US at 603-04.

¹⁷ *Id.* at 433-34.

¹⁸ *Id.* at 454-55.

¹⁹ *Id.* at 456.

²⁰ *Id.* at 453.

²¹ See note 15, *supra*.

them.²² Subject to the rule against divestiture of the trust interest, the state can only authorize the use, occupancy, or a disposition of public trust bottomlands and soils (such as was apparently intended with the December 2018 Agreements) if there is a statute that expressly authorizes such action and the statute contains the following these standards that are determined to be met in particular circumstances:²³

- (1) It is determined that the proposed disposition, occupancy, or action will result “in the improvement of ... the public trust”; and
- (2) The proposed disposition, occupancy, or action will “be made ‘without detriment to the public interest in the lands and waters remaining.’”²⁴

3. The Third Agreement is Subject to Independent Evaluation for Compliance (or Lack Thereof) with the Public Trust

Enbridge argues in its response to the State’s motion that the determination of whether the public trust is being protected is the sole discretion of the legislature through its police powers. Pointing to this asserted legislative discretion, Enbridge contends that “the 1953 Easement was pursuant to the Legislature’s prerogative, and the 1953 Easement granted pursuant to legislative authority is binding on the State.”²⁵ Enbridge’s position seems to be that the Third Agreement’s indefinite continuation of the existing Line 5’s operations is justified by the 1953 Easement and the statement in the Third Agreement purporting to “enhance the ‘public’s interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan.’”²⁶ However,

²² *Illinois Central* at 453;

²³ *Obrecht*, 361 Mich at 416; *Illinois Central*, 146 US at 455-56.

²⁴ *Illinois Central*, 146 US at 455-56.

²⁵ Plaintiffs’ Brief in Opposition to State Defendants’ 6/27/2019 Motion for Summary Disposition at 34.

²⁶ *Id.* at 35, quoting Paragraph 4.2(d) of the Third Agreement.

the public trust is not the sole province of the Legislature. As the Michigan Supreme Court explained in *Obrecht*, all three branches of government share a co-equal responsibility for preserving the public trust:

This Court, equally with the legislative and executive departments, is one of the sworn guardians of Michigan's duty and responsibility as trustee of the above delineated beds of five Great Lakes. Long ago we committed ourselves to the universally accepted rules of such trusteeship as announced by the Supreme Court in *Illinois Central*.²⁷

Additionally, Enbridge relies on self-serving and conclusory statements in both the Third Agreement and the 1953 Easement to support its position that the public trust standards have been met. But these statements are not actual investigations, research, and findings that support a conclusion that the public trust standards have been met. As explained above, the *Illinois Central* and *Obrecht* cases outline the narrow exception to the rule that bottomlands of the Great Lakes may not be conveyed or otherwise disposed of: the conveyance must either improve the public trust resources, or the distribution will not detrimentally impact "the public interest in the lands and waters remaining."²⁸ In particular, nothing in the Third Agreement establishes how allowing Line 5 to exist indefinitely would serve or enhance a public trust interest. Nor is there discussion or evidence demonstrating that Line 5's continued operation within the Straits with no retirement date in sight will not interfere with or impair the public trust waters or public trust uses.

²⁷ *Obrecht v Nat'l Gypsum Co*, 361 Mich 399, 412; 105 NW2d 143 (1960). Cf. *Grosse Ile Twp v Dunbar & Sullivan Dredging Co*, 15 Mich App 556, 566; 167 NW2d 311 (1969) ("The title of a riparian owner in the bed of a navigable river is subject to a public trust for the preservation of the public right of navigation, fishing, etc. . . . What constitutes a violation of the public trust is necessarily a matter of Ad hoc judicial determination depending on the facts in a particular case.") (internal citations omitted).

²⁸ *Obrecht* at 412-13.

The only public trust case cited by Enbridge in support of its legislative discretion argument is *Nedtweg v Wallace*.²⁹ That case was a plurality decision where it was conceded that the lands in question were no longer “subaqueous, but relicted lands and actually surveyed as such by the state.”³⁰ Both parties were in agreement that the lands were “unfit for hunting or fishing and incapable of use for navigation.”³¹ Thus, there was no question that the “land may be occupied without any substantial impairment of the rights reserved to the public under the trust with which the state's title is burdened, no public purpose will be served by holding that the state may not permit it to be occupied.”³² Once it was clear that the public trust was not implicated, it was up to the legislature to dispose of the land as it saw fit. In contrast, this case involves the use of subaqueous bottomlands for a private purpose that could very well have dramatic impacts on the related public trust resources.

It is worth noting that there is an express statutory mechanism that was created specifically to address the public trust inquiry in the context of a requested disposition of Great Lakes bottomlands.³³ The Great Lakes Submerged Lands Act allows for such a disposition “whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition.”³⁴ The Snyder Administration and Enbridge

²⁹ *Nedtweg v Wallace*, 237 Mich 14; 208 NW 51 (1926).

³⁰ *Id.* at 18.

³¹ *Id.* at 29.

³² *Id.* at 29.

³³ The Great Lakes Submerged Lands Act (Part 325 of the Natural Resources and Environmental Protection Act, MCL 324.32501 *et seq.*).

³⁴ MCL 324.32502; see also MCL 324.32503 (conveyance of bottom lands is only allowed “after finding that the public trust in the waters will not be impaired or substantially affected”), and R 322.1006 (the Department must determine “[w]hether the deed, lease, or agreement has a clear and

attempted to bypass this review and permitting process in signing the Third Agreement. The procedural rigors outlined in Sections 32502 and 32503 of the GLSLA and Rule 6 of the GLSLA administrative rules for the use of Great Lakes bottomlands stand in stark contrast to the conclusory statements in the Third Agreement concerning the public trust. It is a clear example of the type of investigation and review a project is required to undergo in order to meet the mandates of the public trust doctrine as outlined in *Illinois Central* and *Obrecht*.

4. Compliance with the Public Trust Standards Cannot be Altered by an Act of the Legislature

The public trust is a perpetual obligation of the State to and for the benefit of the public.

The State, through legislation or otherwise, cannot abdicate this responsibility:

‘The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state.’³⁵

present necessity beyond mere convenience or economy” and the Department must determine that “the private or public use of such lands and waters will neither substantially affect the public use thereof nor impair the public trust or interest of the state”).

³⁵ *Obrecht*, 361 Mich at 415-416, quoting *Illinois Central*, 146 US at 453.

The responsibility of the State is significant in this case because Enbridge relies heavily on the existence of the 1953 Easement in order to suggest that the Third Agreement and the continued authorization of Line 5 are a natural extension of the 1953 Easement. However, the State cannot contract away its public trust duties either in the form of the Third Agreement or in the form of the 1953 Easement. Even though the terms “easement” and “agreement” are used, they cannot be more than a license to use the bottomlands that is revocable if it is not consistent with the public trust.

As explained in *Illinois Central*:

The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.³⁶

Indeed, *Illinois Central* involved the revocation of bottomland property already granted to the railway company under the public trust doctrine. Similarly, the *Obrecht* case recognized that the construction and existence of improvements on the bottomland prior to the ruling did not warrant the application of equity and the principles of estoppel to prevent the removal or regulation of use under public trust principles:

Equity cannot now abate that which, originally, should have been enjoined. Such a decree would amount to outright destruction and loss of valuable property constituting an even greater wrong than that which the Company has perpetrated. The dock may remain existent and operable but subject always to the will of the State as provided in the quoted portion of the provisional permit of August 12, 1958, and subject further to such decretal provisions for control of its use as equity may decide on new testimony to impose.³⁷

³⁶ *Illinois Central*, 146 US at 453.

³⁷ *Obrecht*, 361 Mich at 420.

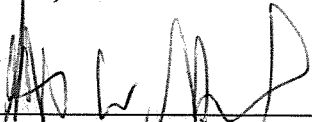
Finally, the public trust case law recognizes that the importance of protecting the public interest only increases over time. “This public interest is omnipresent wherever there is a state, and grows more pressing as population grows.”³⁸ As such, the application of the public trust doctrine to a particular project or circumstance over time may change. Amicus Curiae the City of Mackinac Island suggests that the continued operation of an aging 66-year-old pipeline must be subjected to the mandates of the public trust doctrine, including a full examination by the State of the dramatic and catastrophic harms to the public trust resources that would occur if the pipeline were to rupture.

CONCLUSION

For the reasons stated above, the City of Mackinac Island concurs with the State’s Motion for Summary Disposition and requests that this Court find the Third Agreement void or voidable as contrary to the public trust.

Respectfully submitted,

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Date: September 10, 2019

³⁸ *Id.* at 414.