



February 27, 2024

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

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

Dear President Biden,

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

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

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

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

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

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

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

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

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

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

Chi miigwetch (thank you),

Robert Blanchard, Chairman  
Bad River Band of Lake Superior Chippewa

Jon Greendeer, President  
Ho-Chunk Nation

Nicole Boyd, Chairwoman  
Red Cliff Band of Lake Superior Chippewa  
Indians

James Crawford, Chairman  
Forest County Potawatomi

John Johnson, President  
Lac du Flambeau Band of Lake Superior  
Chippewa Indians

Shannon Holsey, President  
Stockbridge Munsee Band of Mohicans

Thomas Fowler, Chairman  
St. Croix Chippewa Indians of Wisconsin

Whitney B. Gravelle, President  
Bay Mills Indian Community

Regina Gasco, Chairperson  
Little Traverse Bay Band of Odawa Indians

Jamie Stuck, Chairman  
Nottawaseppi Huron Band of Potawatomi

Bob Peters, Chairman  
Match-E-Be-Nash-She-Wish Band of  
Pottawatomi Indians

David Arroyo, Chairman  
Grand Traverse Band of Ottawa &  
Chippewa Indians

Doreen Blaker, President  
Keweenaw Bay Indian Community

Jim Williams, Chairman  
Lac Vieux Desert Band of Chippewa Indians

Ken Meshigaud, Chairman  
Hannahville Indian Community

Rebecca Richards, Chairwoman  
Pokagon Band of Potawatomi Indians

Austin Lowes, Chairman  
Sault Ste. Marie Tribe of Chippewa Indians

Tim J. Davis, Tribal Chief  
Saginaw Chippewa Indian Tribe

Faron Jackson, Sr., Chairman  
Leech Lake Band of Ojibwe

Robert VanZile, Jr., Chairman  
Sokaogon Chippewa Community

Michael Fairbanks, Chairman  
White Earth Reservation Business  
Committee

Kevin DuPuis, Sr., Chairperson  
Fond du Lac Band of Lake Superior  
Chippewa

Larry Romanelli, Ogema and Tammy  
Burmeister, Tribal Council Speaker  
Little River Band of Odawa Indians

Cathy Chavers, Chairwoman  
Bois Forte Band of Chippewa

Darrell G. Seki, Sr., Chairman  
Red Lake Band of Chippewa Indians

Melanie Benjamin, Chairwoman  
Mille Lacs Band of Ojibwe

Robert Larsen, President  
Lower Sioux Indian Community

Phyllis Tousey, Chairwoman  
Brothertown Indian Nation

Robert Deschampe, Chairman  
Grand Portage Band of Lake Superior  
Chippewa

Gena Kakkak, Chairwoman  
Menominee Indian Tribe of Wisconsin

CC: Secretary Antony Blinken  
Department of State

Secretary Deb Haaland  
Department of the Interior

Brenda Mallory, Chair  
White House, Council on Environmental Quality

John Podesta, Senior Advisor  
White House, Clean Energy Innovation and Implementation



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February 5, 2024

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

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

Dear President Biden,

On December 12, 2023, the United States Court of Appeals for the Seventh Circuit invited the United States to submit its views in a case squarely implicating your Administration's commitment to Tribal sovereignty, protection of our Nation's precious waterways, and the transition away from a fossil fuel economy. While we understand that several departments have devoted considerable attention to the matter, the United States has yet to respond to the Circuit Court's invitation, even though oral argument in the case is set for February 8<sup>th</sup>. The Bad River Band and the Bay Mills Indian Community respectfully urge the Administration to weigh in forcefully in support of our sovereignty and way of life.

For over a decade, Enbridge Inc., a Canadian pipeline company, has illegally pumped petroleum products across the Bad River Reservation in northern Wisconsin through a pipeline known as Line 5, which transports oil and natural gas liquids originating in western Canada principally to its terminal point in Sarnia, Ontario. Enbridge has continued to do so despite the expiration of its Reservation easements in 2013, the Bad River Band's repeated requests that it leave, and the uniquely high risk of a rupture where Line 5 lies directly in the path of the Bad River's natural migration. If such a rupture were to occur, nearly one million gallons of oil would spill into the river, flowing into Lake Superior and devastating the wild rice beds and fishing populations central to the Band's way of life.

After it traverses the Bad River Reservation, Line 5 crosses under the Straits of Mackinac, where (based on an engineering decision from the 1950s that would never be permitted today) it lies exposed on the bottomlands for four miles. The Straits conjoin Lakes Michigan and Huron, and leading University of Michigan researchers have concluded that given the strong, oscillating currents, a pipeline rupture there would devastate both lakes. An oil spill in the Straits would be catastrophic for all Michiganders but especially for tribes including Bay Mills, whose treaty-protected fisheries and other critical resources—which are essential to the tribe's traditions, social fabric, identity, and subsistence—would be destroyed.

Last June, a federal district court held that Enbridge has knowingly trespassed on the Bad River Reservation since 2013 and is creating a public nuisance at the river crossing, and it ordered Enbridge to cease operating Line 5 on the Reservation by June 2026. Although the district court gave Enbridge three more years to operate its pipeline in violation of the Band's sovereignty, Enbridge has appealed the ruling to the Seventh Circuit and argued that it must be allowed to trespass indefinitely. Specifically, Enbridge has argued that the 1977 Transit Pipeline Treaty between the United States and Canada prohibits any state, tribe, or arm of the federal government, including a federal court, from taking any action, no matter how compelling the reason, that would impede the flow of oil through a cross-border pipeline. Canada has vociferously supported Enbridge throughout the litigation, including through the filing of an amicus brief in the Seventh Circuit endorsing Enbridge's radical interpretation of the Transit Treaty. The Seventh Circuit has asked the United States to file an amicus brief with its views on the pipeline agreement and any other issues in the case it wishes to discuss. If the United States remains silent in the face of that request, it risks disaster for the Great Lakes and the Bad River watershed, and for bedrock principles of tribal sovereignty and the rule of law.

- a. The United States should weigh in against the Enbridge/Canadian interpretation of the Transit Treaty, as that interpretation defies the law and would eviscerate the authority of Tribes, the State of Michigan, and other governments to protect the rights of their citizens and their precious natural resources.**

The Enbridge/Canadian argument that the Transit Treaty prevents the Bad River Band from enforcing its sovereign property rights, and from protecting its Reservation against environmental calamity, is plainly incorrect as a legal matter. First, it is a bedrock principle of federal Indian law that only Congress can abrogate tribal treaty rights, and that it must clearly evidence its intent to do so. The Treaty with the Chippewa, Sept. 30, 1854, 10 Stat. 1109, created a permanent reservation for the Band, within which the Band has the sovereign right to exclude transgressors. Nothing in the text or legislative history of the Transit Treaty indicates an intent to trample tribal treaty rights, and the Band's sovereign right to exclude trespassers like Enbridge hence endures unimpaired by the pipeline agreement.

Second, the Enbridge/Canadian argument would write Article IV out of the Transit Treaty. That Article provides that transit pipelines remain subject to non-discriminatory regulation by governmental authorities for purposes including (but not limited to) environmental protection and pipeline safety.<sup>1</sup> Tort lawsuits such as the Band's constitute an accepted form of "regulation," and Enbridge has never argued otherwise. And the Band's action, grounded in a desire to protect its precious reservation resources and its sovereign rights over its territory, fits squarely within Article IV's listing of acceptable regulatory purposes.

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<sup>1</sup> 28 U.S.T. 7749, art. IV, cl. 1 ("Notwithstanding the provisions of Article II and paragraph 2 of Article III, a Transit Pipeline and the transmission of hydrocarbons through a Transit Pipeline shall be subject to regulations by the appropriate governmental authorities having jurisdiction over such Transit Pipeline in the same manner as for any other pipelines or the transmission of hydrocarbons by pipeline subject to the authority of such governmental authorities with respect to such matters as the following: a. Pipeline safety and technical pipeline construction and operation standards; b. environmental protection; c. rates, tolls, tariffs and financial regulations relating to pipelines; d. reporting requirements, statistical and financial information concerning pipeline operations and information concerning valuation of pipeline properties.")

If the Seventh Circuit were to adopt the Enbridge/Canadian interpretation of the Transit Treaty, it would not only cut the Bad River Band's ability to protect its treaty rights and its territory off at the knees, but it would do the same for *every other state and tribe* traversed by a transit pipeline. *Any* effort to enforce the property rights of a state, tribe, local government or private party would be forbidden—even when, as here, it rests on the plain terms of a freely negotiated easement. Even the understandable effort of a state or tribe to resist a re-routing through state parkland or sacred tribal land would amount to a breach of the United States' treaty obligations.

In particular, the position taken by the United States on the Transit Treaty will have immediate consequences for litigation between the State of Michigan and Enbridge. In 2020, Governor Whitmer formally terminated Enbridge's easement to operate Line 5 on the bedlands beneath the Straits of Mackinac after concluding that the risk of a catastrophic rupture was too great to justify the pipeline's continued operation. Enbridge has defied the Governor's order, and the State of Michigan (with strong support from Bay Mills and other Michigan tribes) and Enbridge are currently locked in litigation. If Enbridge's preferred interpretation of the Transit Treaty were to prevail, Michigan and its Tribes would lose the power to protect the Great Lakes, the treaty rights of the Tribes in those crucial waters, and the interests of the millions of citizens who depend on the lakes for drinking water and numerous other purposes from the devastation threatened by the pipeline.

**b. The United States should weigh in against the district court's three-year delay in imposing its injunction, as that delay violates federal laws protecting tribal sovereignty and sets a dangerous precedent.**

We also urge that the United States support the Bad River's Band's challenge to the district court's three-year delay (at a minimum) in effectuating injunctive relief. No federal circuit court has ever blessed a prolonged trespass on tribal land. If the Seventh Circuit were to affirm the district court here, it would set a highly unfortunate precedent across Indian country and violate multiple federal laws.

The United States' 1854 Treaty with the Chippewa guarantees the Band's sovereign right to exclude nonmembers from its land, a right that the Supreme Court has described as "a hallmark of Indian sovereignty."<sup>2</sup> Moreover, federal statutes categorically protect tribes from non-consensual conveyances of their land: the Non-Intercourse Act provides that "no conveyance" of rights in tribal land "shall be of any validity in law or equity" absent the consent of Congress.<sup>3</sup> And whereas federal rights-of-way laws make non-tribal land eligible for eminent domain for pipeline or other utility purposes, those laws keep tribal lands "beyond the reach of condemnation."<sup>4</sup> In short, given the tragic history of the dispossession of tribal lands for much of the Nation's history, Congress has categorically prohibited non-consensual use of tribal land.

The district court nevertheless allowed Enbridge to trespass on the Band's lands for at least three more years (with Enbridge retaining the right to return to court and ask for additional

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<sup>2</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982)

<sup>3</sup> 25 U.S.C. §177

<sup>4</sup> *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1112 (10th Cir. 2017)

delay, which it is virtually guaranteed to do). Influenced in significant part by Canada's vocal protests against a shutdown of the pipeline, the district court declared that in its view the public interest would be served by the delay. But it is a cardinal principle, essential to the rule of law, that when Congress has clearly articulated its view of the public interest by statute, a district court cannot withhold injunctive relief based on its own conception of the public interest. The United States has often taken this position, including in arguing recently that the courts cannot find the public interest served by Texas's placement of barriers in the Rio Grande River, regardless of concerns about illegal border crossings, because Congress has proscribed the obstruction of navigable waters in the Rivers and Harbors Act. The Fifth Circuit agreed.<sup>5</sup>

The Administration has all the more reason to support adherence to the rule of law in this case. The violation of tribal rights has always been justified by reference to conceptions of the public good. Tribal lands were needed for settlers, for mining, for oil, for infrastructure projects, and so on and so forth. Congress has clearly said enough is enough, and the district court should not have substituted its conception of the public interest. Your Administration has professed great fidelity to honoring tribal rights, and the Bad River litigation puts that commitment squarely to the test.

**c. A shutdown of Line 5 will not harm consumers, and Canada's interest in transporting oil cannot justify violating federal law and tribal sovereignty.**

In multiple discussions over several years, including with the State Department, we have heard only two arguments against the United States' support of tribal rights in the Bad River litigation. The first is a concern with energy prices. But while Enbridge and Canada have done a great deal of fear-mongering on this score, the undisputed, litigation-tested fact is that, given the ready availability of other sources of crude oil and a robust network of refined-product pipelines serving the Line 5 delivery area, a shutdown of Line 5 will not negatively affect energy prices. Enbridge's own expert testified at trial that a shutdown of Line 5 will cause only a half-penny increase in the price of a gallon of gasoline in Wisconsin and Michigan, and a nickel increase in Ontario. And history supports his conclusion: When Enbridge's Line 6B shut down for several months after it ruptured into the Kalamazoo River in Michigan in July 2010, there was no noticeable impact on gas prices. Likewise, in 2020, when Line 5 was shut down entirely for several weeks after an anchor nearly ruptured it in the Straits of Mackinac, and then operated at partial capacity for several months, there was again no discernible impact on gasoline prices. Furthermore, before terminating the easement for Line 5, Governor Whitmer convened multiple task forces to study whether a shutdown would impact propane markets, and she determined that Michiganders would not suffer price hikes and that a shutdown would serve the public interest. The market has only further prepared for a shutdown since then. To borrow from Senator Moynihan's famous phrasing, while everyone is entitled to their own opinions, they are not entitled to their own version of facts, and here the clear fact is that a Line 5 shutdown can be accomplished without harming the American public.

We also understand that the United States is concerned about relations with Canada. While we recognize that Canada is an important ally of the United States, Canada has not been shy about voicing its views regarding Line 5, and we do not understand why the United States

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<sup>5</sup> *United States v. Abbott*, 87 F.4th 616 (5th Cir. 2023)



would be timid on the subject. A proper regard for Canadian sensitivities cannot justify allowing a Canadian company to trample federal law and the rights of sovereign tribes to whom the United States owes a trust obligation. If Canada and Enbridge have their way, oil will continue to flow through the Bad River Reservation (and the Straits of Mackinac) indefinitely, with the Band, the State of Michigan, Michigan tribes and others being required to take all steps necessary to allow for Line 5's continued operation. All this would be in service of indefinitely transporting western Canadian oil, which experts increasingly agree to be among the dirtiest and most carbon-intensive in the world.

Nothing about that story is consistent with the espoused principles of this Administration. While Canada has many virtues, its treatment of its indigenous peoples is not one of them. Indeed, last year the Special Rapporteur on the rights of Indigenous Peoples released a report excoriating Canada for, among other things, supporting the continued operation of Line 5 and the construction of two other pipelines without even hearing input from the First Nations' whose tribal lands and waters will be affected.<sup>6</sup>

Across multiple administrations in the modern era, the United States has demonstrated a far greater fidelity to the sovereignty of its tribes and to honoring obligations grounded in treaty, statute, and the trust responsibility. If the United States rejects the Seventh Circuit's invitation, its silence will carry alarming implications. We urge your Administration to voice its unequivocal support for the Bad River Band and more generally for tribal rights, the rule of law, and the protection of some of our Nation's most precious waterways.

Miigwetch (thank you),



Whitney B. Gravelle  
President, Executive Council  
Bay Mills Indian Community



Robert Blanchard  
Chairman  
Bad River Band of Lake Superior Chippewa

CC: Secretary Antony Blinken  
Department of State

Secretary Deb Haaland  
Department of the Interior

Brenda Mallory, Chair  
White House, Council on Environmental Quality

John Podesta, Senior Advisor  
White House, Clean Energy Innovation and Implementation

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<sup>6</sup> A/HRC/54/31/Add.2, Report of the Special Rapporteur on the rights of Indigenous Peoples, José Francisco Calí Tzay at 14.