RESPONSES TO QUESTIONS

RESPECT ACT [discussion draft]

MATTHEW L.M. FLETCHER

June 7, 2021

Members of the Committee, I am pleased to respond to follow-up questions arising from my testimony of May 2, 2021.

Responses to Questions from Rep. Grijalva:

1. Your testimony mentions how we're now living in the "self-determination era" for tribal governments. Except, you note that the federal government often reverts back to its older role as "guardian" by making decisions for tribal governments without consulting them first.

a. In your legal experience, why is this the case?

Background on the Duty of Protection and Self-Determination

The United States owes Indian tribes a "duty of protection." *Worcester v. Georgia*¸31 U.S. 515, 557 (1832); *United States v. Kagama*, 118 U.S. 375, 383-84 (1886). Indian tribes negotiated for this duty as part of the treaty process in which the United States received vast resources and land. *Cf. Washington Dept. of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1021 (2019) ("The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises.") (Gorsuch, J., concurring). Congress continues to acknowledge that duty of protection, usually now referring to it as the trust responsibility. *E.g.*, 25 U.S.C. § 5601(5) (finding that "historic Federal-tribal relations and understandings have benefitted the people of the

United States as a whole for centuries and have established enduring and enforceable Federal obligations to which the national honor has been committed").

Sadly, for most of the 19th and 20th centuries, the federal government betrayed its duty of protection by acting only in its own interest, not the interest of Indian tribes. During that period, every branch of the federal government asserted that Indian tribes and Indian people were "wards" of the federal government, under the "pupilage" of the United States. *E.g.*, *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a '*guardian-ward*' status, to legislate on behalf of federally recognized Indian tribes.") (emphasis added); *United States v. Rickert*, 188 U.S. 432, 437 (1903) ("These Indians are yet *wards* of the nation, in a condition of *pupilage* or dependency, and have not been discharged from that condition.") (emphasis added). This assertion of power over supposed "wards" routinely supplied the legal justification for dispossessing Indian tribes and Indian people of their lands and assets. *E.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (conforming the authority of Congress to confiscate and redistribute tribal assets "by reason of its exercise of guardianship over their interests"). The Supreme Court finally disavowed this demeaning and archaic notion in *United States v. Sioux Nation*, 448 U.S. 371 (1980), dramatically rejecting the federal government's argument that the illegal taking of the Black Hills was justified by "the true rule . . . that Congress must be assumed to be acting within its plenary power to manage tribal assets . . . ." *Id.* at 410. In that decision, the Court joined Congress in dismantling the position that the duty of protection was merely a guardianship.

Since the 1970s, Congress and the President have consistently described the duty of protection as a kind of trust relationship. Unlike a guardian, which is incompetent under the law, a trustee is legally accountable to its trust beneficiary:

> As the Solicitor for the DOI Leo Krulitz explained in 1978 letter to the Department of Justice (DOJ), it is "beyond question" that the United States has fiduciary responsibilities towards tribes. The trust responsibility is also legally enforceable and imposes fiduciary standards on all executive branch officials unless Congress acts contrary to Indians' best interests, though still subject to constitutional limits. That 1978 letter remains the most comprehensive document available on this subject from the DOI. It recognized – consistent with the basic common law of trusts – that "[t]he government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property." That opinion remains in effect today.

Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, "*We Need Protection from Our Protectors": The Nature, Issues, and Future of the Federal-Tribal Trust Relationship*, 6 MICH. J. ENVTL. & ADMIN. L. 397 (2017) (quoting Letter from Leo Krulitz, Solicitor, U.S. Dep't of the Interior, to James W. Moorman, Asst. Att'y Gen., U.S. Dep't of Justice 1 (Nov. 21, 1978)) (footnotes omitted).

Unfortunately, at times, federal agencies still disregard the federal government's duty of protection to Indian tribes and Indian people. Take two examples, (1) federal and federally approved projects that impact tribal treaty rights and (2) the application of the federal statutes of general applicability to Indian tribes.

Treaty Rights

On the first question, consider the ongoing disputes over the Enbridge Line 5 pipeline that runs under the Straits of Mackinac, near the confluence of three Great Lakes, Michigan, Huron, and Superior. Five federally recognized Indian tribes retain treaty rights within those waters under the 1836 Treaty of Washington, 7 Stat. 491.

Line 5 was first constructed on the floor of the Straits in the 1950s, during a dark period of time in federal Indian law and policy known as

"termination," when Congress and the Department of the Interior were pursuing policies to end tribal-federal relations. At that time, the federal government had "administratively terminated" three of the five 1836 treaty tribes. *See Grand Traverse Band of Ottawa & Chippewa Indians v. Office of United States Attorney for the Western District of Michigan*, 369 F.3d 960, 962 n.2 (6th Cir. 2004) (describing "administrative termination" of the Odawa nations). The State of Michigan had unilaterally decided that 1836 treaty rights had been abrogated. *See People v. Chosa*, 233 N.W. 205 (Mich. 193). In short, no federal or state official consulted with the 1836 treaty tribes on the impact of Line 5 then.

Fast forward to the 21st century and Line 5's permits are up for renewal. Five 1836 treaty tribes are now federally acknowledged (instead of one). The 1836 treaty rights are now firmly established. *See United States v. Michigan*, 471 F.Supp. 192 (W.D. Mich. 1979). Still, the United States – and the State of Michigan – failed miserably to fulfill its duty of protection to the tribes.

Attached to this submission are documents supplied by the Bay Mills Indian Community detailing these failures in great detail. Key to these failures is the outsized deference from the United States Army Corps of Engineers to the pipeline owner, Enbridge Inc. Examples include:

- The agency failed to inform the tribe of important deadlines and changes to proposals.
- The agency allowed the pipeline owner to direct the Clean Water Act Section 106 process.
- The agency accepted the pipeline owners' expert reports without independent verification.
- The agency intended to allow the pipeline owner to study and review sensitive, confidential data related to the tribe's cultural interests in the Straits of Mackinac, with an eye toward accepting any and all representations by the pipeline owner about that data.

See also Bay Mills Indian Community, Petition for Contested Case Hearing, Michigan Dept. of Environment, Great Lakes, and Energy (filed April 26, 2021), *available at* https://earthjustice.org/sites/default/files/files/egle_wrp027179_petition_for_contested_case.pdf.

In short, for the federal agency, treaty rights are practically irrelevant. Line 5 originated at a time when the United States dealt with tribes as wards, and continues to do so in the 2020s.

Federal Statutes of General Applicability

On the second question, the Department of Labor and the Department of the Interior differ on whether certain federal statutes of general applicability apply to tribes. These statutes are laws in which Congress intended to all private commercial activity, for example, but which do not mention Indian tribes. Examples include the National Labor Relations Act, 29 U.S.C. § 1451 et seq. (NLRA), and the Occupation Safety and Health Act, 29 U.S.C. § 651 et seq. (OSHA).

Consider the case of the Little River Band of Ottawa Indians. In 2008, the National Labor Relations Board brought a charge against the tribe, which had adopted a series of laws designed to address labor relations by tribal casino employees. In early 2009, the Solicitor's Office for the Department of the Interior recommended the dismissal of the charge on the ground that the Board did not possess authority over the tribe's gaming operations absent express authorization from Congress. *See* Letter from Edith R. Blackwell, Associate Solicitor, Department of the Interior to Robert Meisburg, General Counsel, National Labor Relations Board (Jan. 15, 2009), *available at* https://turtletalk.files.wordpress.com/2009/03/interior-solicitor-opinion-letter.pdf. The Board refused. The tribe brought a claim seeking to enjoin the Board's prosecution of the charge, ultimately losing before a split court in the Sixth Circuit. *See NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015).

The crux of the argument involves the settled law of Congressional modification of tribal powers – that Congress can modify tribal powers *if*

it makes its intent to do so clear. *E.g.*, *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883) ("To give to the clauses in the treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time. To justify such a departure, in such a case, *requires a clear expression of the intention of congress*, and that we have not been able to find.") (emphasis added); *United States v. Dion*, 474 U.S. 734, 738 (1986) ("As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were *clearly relinquished by treaty or have been modified by Congress*.") (emphasis added). The Supreme Court recently has reaffirmed this general principle repeatedly in the previous decade. *E.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) ("If Congress wishes to break the promise of a reservation, it must say so."); *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 790 (2014) ("Our decisions establish as well that such a congressional decision must be clear."). A federal statute that is silent as to whether it applies to tribes is, by definition, not a clear statement of intent.

Despite the settled law, the United States' litigation position is to ignore the clear statement rule of *Crow Dog*, *Bay Mills*, and *McGirt*. Instead, as it did in the *Little River* matter, the government improperly insists that the rule is the exact opposite. There, the government argued that federal statutes apply unless Congress expressly exempts tribes. *See* Brief in Opposition at 18, *Little River Band of Ottawa Indians Tribal Government v. NLRB*, 136 S.Ct. 2508 (2016) (No. 15-1024) (arguing that "the NLRA itself does not exempt tribes"). Without considering the tribe's interest, the government made a policy judgment rather than consider its duty of protection to the tribe, reasoning that "the Resort has mostly non-Indian employees and mostly non-Indian customers, and it competes with other casinos, including non-Indian casinos, located in Michigan, other States, and Canada." *Id*. at 19. These are policy points for Congress to consider, not for the Executive branch to impose by fiat. If Congress

wishes these laws to apply to tribes, "it must say so." *McGirt*, 140 S. Ct. at 2462.

In both treaty rights matters and federal statutes of general applicability, the federal government makes policy choices with staggering consequences either without consulting with tribes at all or by ignoring the tribes' concerns. The government's actions speak louder than words. The government is acting as if the duty of protection – the federal-tribal trust relationship – is more like a guardianship.

b. Can you elaborate on how the Supreme Court has made this practice possible?

The Supreme Court's relevant decisions also ignore the federal government's duty of protection and defer exclusively to federal agency prerogatives. In two key decisions, *Nevada v. United States*, 463 U.S. 110 (1983), and *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2016), the Court accepted the government's position that where the government must choose between competing policy positions – and therefore must navigate a conflict of interest with the duty of protection to tribes on one side – the government is excused from fulfilling its duties to Indian tribes and Indian people.

In *Nevada*, the Court held that a federal water rights settlement in which the government declined to assert a tribal water rights claim meant the government had waived the tribe's claims. The Court then forbade the tribe from later reopening the case on res judicata grounds. *See generally* Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 Ga. L. Rev. 1307, 1341-49 (2002) (explaining the *Nevada* decision). Professor Juliano, a former Justice Department attorney, explained that the Justice has weaponized the *Nevada* decision to avoid accountability for its decisions when they conflict with the duty of protection:

> Within the Indian community, the concern over Nevada is not only that Indian rights "compete" with other federal interests, but that they always yield to the federal interests. The Department of Justice refuses to recognize this concern over a conflict of interest. The Justice Department's position is simplistic because it believes that *Nevada* supports its position that, as long as it considers the tribal trust interest along with another governmental interest, there is no conflict. Reading *Nevada* in this manner, the Justice Department expands the decision beyond its holding and seeks to use the decision as both a sword and a shield. *Nevada* does not support this reading, and the Department of Justice can find little support from the lower courts.

Id. at 1349 (footnote omitted).

In *Jicarilla*, the Supreme Court held that trust management documents generated by the government in the course of performing its trust duties to the tribe were privileged. Department of the Interior officials had concluded in a memorandum that the government had likely committed a breach of trust, but the Department claimed the documents were privileged; indeed, the government claimed that there were no common law trust duties applicable at all. The Supreme Court agreed. Normally, when a trustee possesses documents prepared in the course of performing its trust duties, those documents are owned by the trust beneficiary. But the Court accepted the government's argument that the government owed no duty to the tribe. *See generally* Rey-Bear & Fletcher, *supra*, at 436-39 (describing the government's argument that no common law trust duties apply to the United States).

It wasn't always like this. In the 1970s, the federal government allowed "split briefs" to be filed where there was a conflict. That solution arose after President Nixon acknowledged the inherent conflict of interest that burdens the Department of Justice:

> Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation

> and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists.

Special Message to the Congress on Indian Affairs, quoted in Rey-Bear & Fletcher, *supra*, at 426. From the early 1970s until 1979, the government would file two briefs in high stakes trust breach cases:

> Notably, the Executive Branch in the early 1970s sought to address this concern pending legislation by filing in Indian trust litigation what became known as "split briefs." This was done at the direction of the White House, as reflected in two 1972 letters, one from the Attorney General to the White House and another from the Solicitor General. Under this arrangement, in cases involving a federal conflict of interest with Indians, the United States would file a single brief in which DOI would function like an Indian Trust Counsel by presenting arguments as a trustee in support of Indian interests separate from arguments in the brief by DOJ against Indians. This was done six times, and each time, the DOI position prevailed over DOJ's position. In [*United States v.*] *Critzer*, [498 F.2d 1160, 1160-61 (4th Cir. 1974),] the court even noted the government's "commendable forthrightness" in including the statement by DOI which made clear that "the government was in dispute with itself." DOJ viewed that as a criticism and used that a basis to seek to be relieved of split-briefing in 1976, which DOI and the National Congress of American Indians (NCAI) opposed. This DOI/DOJ division even arose in cases where split-briefing did not take place,

> with DOI reminding DOJ that "Congress has reposed principle authority for 'the management of all Indian affairs and of all matters arising out of Indian relations' with DOI and expressing "serious reservations" about a proposed statement by DOJ in litigation on the nature of the trust relationship between the United States and Indian tribes.190 Finally, in 1979, Attorney General Griffin Bell ended this practice, so that there would be "a single position of the United States" in Indian trust litigation.

Rey-Bear & Fletcher, *supra*, at 427-28. (footnotes omitted).

In sum, the government knows that it is burdened by conflicts of interest in the fulfillment of its trust responsibilities to tribes, but it refuses to address those conflicts. The Supreme Court enables that position. In this area, the duty of protection that Indian tribes negotiated for when they ceded their lands and resources to the United States goes completely unfulfilled.

2. In your comments on the RESPECT Act's discussion draft, you highlight the importance of including a provision of judicial review for tribal governments.

a. Can you elaborate on why Section 601 – Judicial Review is a vital element of the RESPECT Act?

Section 601's judicial review provision is necessary to ensure federal courts will enforce the substantive and procedural requirements of the RESPECT Act.

The federal government's position is that the general trust responsibility, *i.e.*, the duty of protection, is unenforceable against federal agencies absent an Act of Congress places a specific duty on the government. *See generally* Rey-Bear & Fletcher, *supra*, at 433 ("[T]he Executive Branch has continued to assert that its trust duties to Indians are limited to express statutory or regulatory mandates."). The government is generally successful in asserting that there is no common

law right grounded in the trust responsibility to require the government to act. *See* Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 448-49 (2013).

In short, absent an express Congressionally-created cause of action, the federal government's position will always be that the rights created therein are not enforceable in court. Section 601 eliminates that argument.

Responses to Questions from Rep. Leger Fernández:

1. Your written testimony includes Appendix II, which details many cases brought against federal agencies by tribal governments on the issue of inadequate tribal consultation.

a. Briefly, can you share how the RESPECT Act might help tribal governments and federal agencies avoid future court battles?

Consider as a paradigmatic example of the fireworks plan at the site within Paha Saha (the Black Hills) once known by Lakota people as Six Grandfathers before it was destroyed and replaced by the Mount Rushmore National Memorial. *See generally Noem v. Haaland*, No. 3:21-CV-03009-RAL, 2021 WL 2221728 (D.S.D. June 2, 2021). Beginning in 1998, the United States held a fireworks display at that location on the Fourth of July. The government stopped this yearly practice after 2009 because the event had become a "chaotic 'free-for-all'" with severe environmental consequences. *Id*. at *3. But then in 2019 and 2020, the government decided to restart the fireworks display, not because the government had a plan to deal with the mess, but because the President simply wished to go forward. In 2021, the National Park Service reversed course and cancelled the fireworks display. After South Dakota's governor sued the government, the court rejected the governor's claims. The court described in some detail the consultation process that led to the restarting of the fireworks display, noting that the government had solicited 20 tribes' input and received 11 responses, all in strong

opposition to the fireworks display. In short, the "consultation" was a total sham:

> The second reason for the NPS's permit denial relates to tribal concerns. Some additional facts deserve mention to describe what the NPS knew at the time of the denial. Under 54 U.S.C. § 306108, commonly referred to as § 106 of the National Historic Preservation Act, the NPS had invited 20 tribal nations to consult prior to the proposed fireworks event that ultimately took place in 2020. . . . *Eleven tribes responded in opposition to the proposed fireworks at the Memorial, either in writing or by attending a consultation meeting*. . . . During one of the consultation meetings, the NPS invited tribal historic cultural preservation officers to do an on-site Tribal Cultural Properties (TCP) survey to identify significant tribal cultural resources in the park. A 2006-2008 archeological survey of the Memorial had identified two prehistoric cultural sites and an isolated artifact listed as a prehistoric lithic found within the Memorial's boundaries. . . . *During the tribal consultation, the tribes raised thirteen separate concerns*, . . . *and then felt betrayed when during the tribal consultation in 2020 over whether any fireworks display at the Memorial should occur, the President announced that there would be a "big fireworks display" at the Memorial for Independence Day in 2020*. . . .

Id. at *13 (emphasis added and citations to the record omitted). The suit is pending.

This is just one example of the kind of powerful interests that push and pull on federal agencies, leading to dramatic shifts in federal government action. The RESPECT Act would focus the government's analysis first on tribal treaty rights in a way that likely would streamline the entire process. If enforceable law required federal agencies to take into consideration tribal interests, then government could more easily navigate and assess competing interests. The RESPECT Act would force

federal agencies to address the concerns of tribes before approving major projects and awaiting the inevitable lawsuits from Indian tribes.

Appendix

Attached are five documents that show the lengths to which the Bay Mills Indian Community must go in an effort to participate in the deliberations over the Enbridge Line 5 pipeline matter.

1. Letter from Bryan Newland, President of the Bay Mills Indian Community to Charles M. Simon, Chief, Regulatory Office of the Department of the Army (May 27, 2020)
2. Letter from Bryan Newland, President of the Bay Mills Indian Community (Aug. 18, 2020)
3. Letter from Bryan Newland, President of the Bay Mills Indian Community to Teresa Seidel, Director, Water Resources Division of the Michigan Department of Environment, Great Lakes, and Energy (Jan. 28, 2021)
4. Letter from Whitney Gravelle, President of the Bay Mills Indian Community re: The Army Corps of Engineers' National Historic Preservation Act Section 106 Process for Enbridge's Permit Application Lre-2010-00463-56-A19 (April 30, 2021)
5. Letter from Whitney Gravelle, President of the Bay Mills Indian Community to Michael Nystrom, Chair, Mackinac Straits Corridor Authority Michigan Department of Transportation (May 19, 2021).

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MAY 27, 2020

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VIA Email to Katie.L.Otanez@usace.army.mil

RE: ENBRIDGE LINE 5 PERMIT FILE NO. LRE-2010-00463-56-A19

On behalf of the Bay Mills Indian Community (Bay Mills) I am writing in response to your letter dated May 14, 2020 and the May 15, 2020 Public Notice regarding the permit application by Enbridge Energy, LP (Enbridge) to construct a tunnel, U.S. Army Corps of Engineers (USACE) File No. LRE-2010-00463-56-A19. Bay Mills requests formal government-to-government consultation, extension of the public comment period by 120 days, and that the USACE convene a public hearing.

Request for Government-to-Government Consultation

As you are keenly aware Bay Mills is a signatory to the March 28, 1836 Treaty of Washington (7 Stat. 491). In the 1836 Treaty Bay Mills reserved off-reservation fishing rights in the Great Lakes, including the Straits of Mackinac, that have been confirmed by the federal courts, *see United States v. 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).

In an effort to protect these Treaty resources, Bay Mills is requesting formal consultation with USACE as soon as possible. As set out in the US Army Corps of Engineers Tribal Consultation Policy, October 4, 2012, consultation is defined as:

> [o]pen, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the USACE

that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands. *See* §3(b).

Due to the magnitude of the proposed construction and the far reaching impacts that the construction and continued operation of Enbridge's Line 5 will have on Bay Mills' treaty protected resources, Bay Mills requests consultation between USACE, Bay Mills and other impacted Tribal Nations. Government-to-government consultation should be a process of seeking, discussing, and seriously considering the views of Bay Mills, and seeking agreement with Bay Mills on the development of regulations, rules, policies, programs, projects, plans, property decisions, and activities that may affect Treaty rights, Tribal Resources, historic properties, and contemporary cultural practices. This requires true government-to-government collaboration between the USACE and Bay Mills, where high level Department representatives meet with Tribal leadership and staff. The Department should understand that a letter inviting consultation followed by a unilateral briefing given to Tribal Nations by the Department does not constitute consultation.

Request for Extension to Submit Public Comments

Bay Mills is also requesting that USACE extend the June 4 public comment period and the June 13 Bay Mills comment period by a minimum of 120 days beyond these scheduled deadlines.

Bay Mills received notice from USACE by letter dated May 14, 2020 informing Bay Mills that Enbridge had applied for permits related to a proposed oil pipeline tunnel beneath the Straits of Mackinac and that comments were due within 30 days of the letter. Bay Mills also obtained a copy of USACE's May 15, 2020 Public notice that provides a twenty-day public comment period, which is scheduled to expire on June 4, 2020. Due to the ongoing COVID-19 pandemic and resulting state of emergency, 20 and 30 day periods are without doubt insufficient to give this proposal the meaningful review and analysis it requires. Similar to the State of Michigan, Bay Mills declared a state of emergency[1] on March 23, 2020 due to the COVID-19 pandemic, which includes a shelter-at-home order to our tribal members and employees. While some Bay Mills employees are required to work as best they can from home, they are not in a position to review and provide substantive cultural and technical comments on permit applications submitted by Enbridge regarding the siting and construction of its pipeline tunnel to be located beneath the Straits of Mackinac. Bay Mills anticipates that employees will return to work in a phased approach over a period of 8 weeks and will not be fully operational until August 1, 2020 at the earliest. Accordingly, Bay Mills requests that the USACE extend the public comment period as well as the Bay Mills' comment period for at least an additional 120 days, or until no earlier than September 14, 2020.

Request to Convene a Public Hearing

Bay Mills requests the USACE convene a public hearing to consider Enbridge's application. A public hearing should be held in person to allow the many Tribal members the opportunity to provide public comments to the USACE. Public hearing participants will include tribal fishers and

[1] Resolution No. 20-03-23C Declaration for State of Emergency in Bay Mills Indian Community due to COVID-19 Pandemic on March 23, 2020, and Resolution No. 20-03-23E Shelter at Home Executive Order in Response to Declaration for State of Emergency in Bay Mills Indian Community due to COVID-19 Pandemic on March 23, 2020.

cultural practitioners who rely heavily on the various treaty protected resources for subsistence and commercial purposes, which are once again being placed in harm's way. Furthermore, an in person public hearing will allow our members that do not have access to reliable internet or electronic online forums the opportunity to participate and provide invaluable information to the USACE. Bay Mills strongly prefers an in person public meeting when it is safe and permissible to do so, but at a minimum USACE should convene a virtual meeting where public participation is maximized with accommodations made for community members who do not have internet access or required technology to attend virtual meetings.

Bay Mills looks forward to our government-to-government consultation with the hope of finding amenable solutions, if any, to protect the invaluable Treaty resources. And please let us know your response to our extension requests and call for a public hearing so that we can plan accordingly. Should you have any questions about this communication please do not hesitate to contact Bay Mills Legal Department at candyt@bmic.net or wgravelle@baymills.org.

Sincerely,

Bryan Newland, President
Bay Mills Indian Community

Cc by email:

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August 18, 2020

Re: Invitation to Joint Consultation with Bay Mills Indian Community

On behalf of the Gnoozhekaaning, "Place of the Pike," or Bay Mills Indian Community ("Bay Mills"), I am writing to invite you to a joint government-to-government consultation regarding the proposal by Enbridge Energy, Limited Partnership ("Enbridge") to construct a tunnel underneath the lakebed of the Straits of Mackinac and to then install a 30-inch diameter pipeline within the tunnel to transport light crude oil and liquid natural gas (the "Tunnel Project"). The new pipeline would replace the existing dual pipelines that run through the Straits.

Enbridge is currently seeking the required permits for the Tunnel Project from the United States Army Corps of Engineers (the "Army Corps") (Corps File No. LRE-2010-00463-56-A19), the Michigan Public Service Commission ("MPSC") (Case No. U-20763) and the Michigan Department of Environment, Great Lakes and Energy ("EGLE") (Permit Numbers HNY-NHX4-FSR2Q and HNY-TBJC-PNK8V).

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 Washington (7 Stat. 491), in which Bay Mills and other Tribal Nations ceded territory to the United States for the creation of the State of Michigan. 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 federal courts. *See 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). The Line 5 Tunnel Project has the potential to significantly affect, and indeed poses serious threats to, the exercise of our reserved treaty rights, our ability to preserve cultural resources, our cultural and religious interests in the Great Lakes, our economy, and the health and welfare of our tribal members.

Bay Mills is very concerned about the implications of the Tunnel Project. To protect its interest and the Treaty resources in the region, Bay Mills has submitted written comments to the Army Corps identifying its concerns about the Tunnel Project and filed a petition to intervene as a party in the contested case process ordered by the MPSC. Bay Mills also intends to submit written comments addressing Enbridge's request for permits from EGLE.

Bay Mills has requested and begun formal government-to-government consultation with the Army Corps and the MPSC. Bay Mills has also begun formal consultation with EGLE, which was scheduled on August 13 to discuss Enbridge's Resource permit application and August 17 to discuss Enbridge's NPDES permit application.

Bay Mills would like to host a joint consultation with the Army Corps, the MPSC, EGLE, Michigan Department of Transportation, as well as representatives from the United States Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA"), the United States Environmental Protection Agency ("EPA") Region 5, the United

States Bureau of Indian Affairs ("BIA") and the office of Michigan Governor Gretchen Whitmer. It is our expectation that this consultation meeting would include agency directors and their respective technical staff. A joint consultation provides an opportunity for a coordinated and comprehensive conversation, where Bay Mills can ask questions and present concerns to all of the relevant agencies at once; this way, all appropriate agencies can provide responses and better understand what each government agency's review process covers and, maybe more importantly, does not cover. This type of coordinated meeting can also improve inter-agency communication to ensure all facets of the project are properly considered. Further, a joint consultation would prove more efficient and respectful of Bay Mills' time and resources especially in the time of COVID-19, which has strained resources.

Bay Mills' request for this meeting also stems from a recurring problem that results from the involvement of multiple, separate agencies in disconnected or separate actions regarding Line 5: Bay Mills' concerns are often dismissed or overlooked by a particular agency because the agency states that it does not have the jurisdiction or authority to address them. Indeed, Bay Mills is often told to seek information or redress from a different agency only to find that that agency does not have the requested information and/or it believes that it lacks the requisite jurisdiction or authority to address Bay Mills' concerns.

Joint consultation is consistent with the requirements and principles of the 2002 Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan (the "2002 Accord") and Governor Whitmer's Executive Directive No. 2019-17. The 2002 Accord defines "consultation" as:

> a process of government-to-government dialogue between the state and the tribes regarding actions or proposed actions that significantly affect or may significantly affect the governmental interests of the other. Consultation includes (1) timely notification of the action or proposed action, (2) informing the other government of the potential impact of the action or proposed action on the interests of the government, (3) the opportunity for the other government to provide input and recommendations on proposed actions to the governmental officials responsible for the final decision, and (4) the right to be advised of the rejections (and basis for any such rejections) of recommendations on proposed actions by the governmental officials responsible for the final decision.

2002 Accord, Section V. Joint consultation would improve the dialogue between the state and the tribes and ensure that all agencies would understand how their actions individually *and collectively* affect Bay Mills' interests.

Similarly, joint consultation is consistent with the federal government's obligations to consult with Bay Mills on a government-to-government basis and to honor its obligations under the 1836 Treaty. This obligation is reflected in the policies of the federal agencies with decision making authority concerning Line 5:

- U.S. Army Corps of Engineers, Tribal Consultation Policy, October 4, 2012 (https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf);

- U.S. Environmental Protection Agency Policy on Consultation and Coordination with Indian Tribes (https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf); and,

- Pipeline and Hazardous Materials Safety Administration's Tribal Assistance Protocol (https://www.transportation.gov/sites/dot.gov/files/docs/PHMSA-Tribal-Assistance-Protocol-November-2014.pdf).

See also Exec. Order No. 13175, "Consultation and Coordination with Indian Tribal Governments," 675 Fed. Reg. 67249 (2000).

The Army Corps' policy defines consultation as:

> [o]pen, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the USACE that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands. *See* §3(b).

Joint consultation would certainly allow for a more meaningful and collaborative consultation process because all relevant agencies would be able to work in concert to address Bay Mills' concerns. Furthermore, for added efficiency Bay Mills' is amenable to include other regional Tribal Nations that will be impacted by this proposed project.

Please respond to this letter on or before September 4, 2020 by indicating your willingness to participate in a joint government-to-government consultation meeting as described in this letter. After we receive responses, we will send video conference information to all participants. If you have any questions, please do not hesitate to contact Kathryn Tierney (candyt@bmic.net) or Whitney Gravelle (wgravelle@baymills.org) of the Bay Mills Legal Department.

Miigwetch (thank you),

Bryan Newland
President, Executive Council
Bay Mills Indian Community

Cc: U.S. Army Corps of Engineers
Office of the Governor, State of Michigan
U.S. Environmental Protection Agency, Region 5
Michigan Public Service Commission
U.S. Department of Transportation
Michigan Department of Environment, Great Lakes and Energy
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January 28, 2021

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RE: Bay Mills Indian Community's Concerns Regarding EGLE Tribal Consultation Efforts On Enbridge Line 5 Great Lakes Tunnel Project

Dear Director Seidel,

The Bay Mills Indian Community (BMIC) appreciates the opportunity to meet with the Department of Environment, Great Lakes, and Energy (EGLE) to discuss the status of Enbridge's Great Lakes Tunnel Project (Project) permit application, with the most recent meeting occurring last Friday, January 22.[1] We do, however, have concerns about the tribal consultation process as EGLE staff were unable to share all necessary information about forthcoming permit decisions. It has become apparent that these consultation meetings are becoming more like listening sessions, lacking robust collaboration or the sharing of relevant and critical information, which runs contrary to the stated purposes and goals of EGLE's Department Policy and Procedure 09-031 Consultation and Coordination with Indian Tribal Governments (Consultation Policy). If EGLE is not denying the required Project permits outright, at a minimum, EGLE should pause consideration of the permits until it complies with the Governor's directive and EGLE's corresponding Consultation Policy and conducts meaningful consultation with Bay Mills and affected Tribal Nations impacted by the Project, especially with regards to the Project's impact on tribal treaty and cultural resources.

It is without question that Bay Mills, as a sovereign Tribal Nation, has a long-standing and critical interest in the waters of the Great Lakes, the Straits of Mackinac, and the surrounding region. As one of the signatories to the 1836 Treaty of Washington, which ceded nearly 14 million acres to the United States for the creation of the State of Michigan, Bay Mills reserved the right to fish, hunt, and gather throughout the territory — including in the Great Lakes and the Straits of Mackinac. Not only do these waters give meaning to and support the Treaty rights of our people

[1] Project permit application numbers HNY-NHX4-FSR2Q and HNY-TBJC-PNK8V.

but they are central to Bay Mills' cultural, traditional, and spiritual identity all of which are placed in harm's way by the Project.

As you well know, the State of Michigan acknowledge BMIC's sovereignty in 2002 by entering into a Government-to-Government Accord (Accord) with the twelve Tribal Nations located in Michigan.[2] Additionally, a primary goal of the Accord also included a commitment by the State to implement a consultation process between sovereign governments on significant matters intended to minimize and avoid disputes. In October 2019, Governor Whitmer breathed new life into the Accord *via* the issuance of Executive Directive No. 2019-17 (Directive) that served to "reaffirm, implement, formalize, and extend the commitments made by the State of Michigan in the Accord.[3] The Directive requires each department and agency to develop a policy that is consistent with the Accord and Directive and the principle that "[m]eaningful communication and collaboration on matters of shared concern must always be the core and driving objective of this consultation process."[4] Of course, EGLE followed suit as directed and adopted it's tribal consultation policy in July 2020 (EGLE's Policy).[5] While Bay Mills applauds EGLE's adoption of this policy and are hopeful that its implementation will lead to improved collaboration with the Tribal Nations, so far BMIC's experience with EGLE has been extremely disappointing.

The Consultation Policy notes that "[o]ne of the primary goals of this policy and procedure is to fully implement both the Accord and the Directive, with the ultimate goal of strengthening the consultation, communication, coordination, and collaboration between tribal governments and EGLE."[6] This goal requires "**open communication and robust collaboration** with tribal partners" [7] to ensure accountability and success. EGLE's Policy explicitly distinguishes between consultation and routine communication by noting that "consultation includes formal steps to identify issues, notify parties, and provide follow up on input provided during the consultation process."[8] For purposes of this letter the formal steps three and four are of particular concern. These steps read as follows:

> 3. Step Three – Input: EGLE must then receive and consider input regarding the activity from any potentially affected tribe(s) that may choose to offer it. Input may be provided in whatever format the tribe and EGLE may mutually deem appropriate. **EGLE must coordinate with the tribe(s) throughout this step to ensure that the tribe(s)** participating in the consultation: (1) **receive all information necessary to provide meaningful input regarding the activity**; (2) are **afforded due opportunity to discuss that input**; (3) **are informed of** any significant changes to the activity, or **any other issues that may arise as to it**, over the course of the consultation process; and (4) are **afforded due opportunity to**

[2] 2002 Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan.
[3] Governor's Executive Directive No. 2019-17 State-Tribal Relations.
[4] *Id*. at 2.
[5] EGLE Department Policy and Procedure 09-031 Consultation and Coordination with Indian Tribal Governments dated July 24, 2020.
[6] *Id*. at 1.
[7] *Id*. at 2 (emphasis added).
[8] *Id*.

provide and discuss any additional input the tribe(s) may have regarding those changed circumstances.

EGLE will coordinate with the tribe(s) when sharing information about culturally significant resources that may be sensitive and/or confidential in nature.

4. Step Four – Follow-up: EGLE must then provide feedback to the tribe(s) involved in the consultation to explain how their input was considered in the final decision or action. **When feasible, taking into consideration regulatory and/or procedural time frames, EGLE will provide preliminary feedback before the final decision is made or action is taken. This feedback must be in the form of a written communication from the most senior EGLE official involved in the consultation to the most senior tribal official involved in the consultation.**[9]

Despite these policy statements and the purported goal of fostering meaningful consultation, open communication and robust collaboration, the January 22 meeting between EGLE and BMIC fell well short of the Consultation Policy goals. From the start of the meeting it was apparent that EGLE staff was unable to share any details about the Department's forthcoming final permit decisions. Staff explained that no decisions had been made so nothing to share, albeit staff referenced decisions were imminent within a week or so. Yet the Consultation Policy Step Four states that EGLE will provide feedback to the Tribes before a final decision is made, *in writing nonetheless*. As of the date of this letter staff have not provided BMIC any written feedback as to the concerns raised in BMIC's written comments or our consultation meetings to date. Furthermore, there are no meetings scheduled nor a clear indication of when a decision will be made and whether that decision will be made known to BMIC before becoming final. Again, these actions run afoul of Steps 3 and 4 of the Consultation Policy.

Likewise, in response to our inquiry about the Project's potential impacts to cultural resources, staff disclosed that EGLE was meeting with Michigan's State Historic Preservation Office (SHPO) about the recommendations SHPO provided to EGLE in a letter dated November 10, 2020. SHPO's letter and recommendations are illuminating and consequential in how to protect the cultural resources located in and around the Straits of Mackinaw. SHPO noted that the area may in fact be eligible for listing under the National Register of Historic Places as a Traditional Cultural Property or Traditional Cultural Landscape due to the invaluable tribal cultural resources and traditional place-based beliefs and practices. SHPO goes on to recommend that significant additional archaeological survey work should be undertaken as well as the completion of a baseline cultural resources data report before permits are approved. BMIC strongly agrees with SHPO's assessment and recommendations yet our team was quite surprised to learn that EGLE was meeting with SHPO about these recommendations and inferred that SHPO may be reconsidering their recommendations. Deeply concerned, BMIC staff immediately contacted SHPO to see if we could learn more about what transpired. We were relieved to learn that SHPO was standing by their letter but also learned that SHPO would provide EGLE with draft permit conditions despite no action being taken on SHPO's recommendations prior to the issuance of a permit. SHPO also disclosed that they met with EGLE's consultant about a technical report that analyzed boring machine technology and construction practices. Shortly after learning of this new information

[9] EGLE Policy at 4 (emphasis added).

BMIC asked EGLE staff for a copy of the report. Staff denied this request noting that the report will be released along with the permit decision.

Clearly, these actions are not consistent with the Consultation Policy. Meetings between EGLE and SHPO about tribal cultural resources without notification or inclusion of Tribal staff do not achieve the Consultation Policy goals of open communication and robust collaboration. Furthermore, EGLE withholding technical reports until the release of permit decisions does not comport with the requirement to share all information necessary to provide meaningful input as set out in Step 3 of the Consultation Policy. These missteps frustrate the tribal consultation process and beg the questions. What additional information has not been shared? Why weren't the Tribal Nations and their Tribal Historic Preservation Officers included in the discussions with SHPO? Will EGLE provide BMIC preliminary feedback before a final decision is made? How can EGLE make an informed decision without Tribal Nation input when Tribal Nation's hold treaty protected interests in the project area?

While it is our hope that EGLE and other state agencies fully comply with the government-to-government consultation framework, this isn't the first time BMIC has encountered such disregard for meaningful consultation. Nonetheless, BMIC will fight to be heard and continue to represent our people to the best of our ability in the hopes that state and federal government agencies will pause, listen, and learn from the Indigenous People who have occupied and cared for our homelands since time immemorial. BMIC would welcome the opportunity to meet with EGLE about the tribal consultation process going forward. Should you have any questions about this letter please do not hesitate to contact Bay Mills Legal Department at candyt@bmic.net or wgravelle@baymills.org. Thank you for your consideration of this matter.

Sincerely,

Bryan Newland, President
Bay Mills Indian Community

cc. Governor Whitmer
Leisl Clark
Michigan SHPO
Katie Otanez, USACE

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April 30, 2021

DELIVERY – VIA Electronic Mail

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RE: THE ARMY CORPS OF ENGINEERS' NATIONAL HISTORIC PRESERVATION ACT SECTION 106 PROCESS FOR ENBRIDGE'S PERMIT APPLICATION LRE-2010-00463-56-A19

The United States Army Corps of Engineers ("Corps") asked Gnoozhkekaaning, "Place of the Pike," or Bay Mills Indian Community ("Bay Mills") to provide comments regarding "Draft Guidelines for an ethnographic/traditional cultural landscape study to be requested from Enbridge by the Corps and Enbridge's plan for additional geophysical archaeological surveys dated April 7, 2021, as part of the Corps' National Historic Preservation Act ("NHPA") Section 106 review process for Enbridge Energy, Limited Partnership's ("Enbridge") permit application LRE-2010-00463-56-A19. The following comments address concerns related to the Corps' Section 106 process, and provide specific input on the Draft Guidelines and Enbridge's geophysical archaeology survey plan. Bay Mills is encouraged to see that the Corps plans to consider the Straits of Mackinac as a Traditional Cultural Landscape and make a determination of eligibility for listing on the National Register of Historic Places. However, Bay Mills is deeply concerned with the Corps' past communications and the Draft Guidelines, which reflect an applicant-driven Section 106 process without a meaningful role for Tribal Nations.

I. THE CORPS MUST MEANINGFULLY CONSULT WITH TRIBES THROUGHOUT THE SECTION 106 PROCESS

Tribal Nations are the experts regarding their cultures and histories, and how a proposed action may affect them. In carrying out its responsibilities under Section 106, the Corps must "consult with any Indian tribe . . . that attaches religious and cultural significance" to historic properties that may be affected by the undertaking.[1] When initiating the Section 106 process, the Corps' first step is to "make a reasonable and good faith effort to identify any Indian tribes . . . that

[1] 54 U.S.C. § 302706(b).

might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties."[2] The Section 106 process in and of itself is an acknowledgment that the state and federal agency records of historic sites are not always accurate or complete as the law and implementing regulations set out a process to identify and catalogue unlisted or newly discovered sites that are eligible for inclusion on the National Register.[3] Accordingly, Bay Mills has raised with the Corps the cultural, traditional, spiritual, and historical significance of the Straits of Mackinac to Bay Mills and other Tribal Nations in the region. During the Section 106 consultation meeting held on April 23, 2021, the Corps acknowledged that the Straits of Mackinac is likely to be eligible for listing on the National Register as a historic property with traditional religious and cultural importance to the Tribal Nations. Bay Mills appreciates the Corps' early acknowledgment of the importance of the Straits to the Tribal Nations and looks forward to sharing their special expertise in further explaining how the cultural landscape is central to Bay Mills' spiritual history and current way of life, and are not valued on the basis of individual sites alone but on the interconnectedness of the land, water, and people.[4] The Corps also clarified that it considers any Tribal Nation that has participated in this Section 106 process thus far to be a consulting party. Bay Mills appreciates the Corps' recognition of the Tribal Nations' formal role here as consulting parties and encourages the Corps to continue to affirmatively invite all impacted Tribal Nations to participate as consulting parties.

Bay Mills also encourages the Corps to re-evaluate the manner in which it undertakes consultation to ensure that the agency is providing opportunities for meaningful consultation consistent with its obligations to Tribal Nations and its statutory obligations under NHPA Section 106. The Advisory Council on Historic Preservation's ("ACHP") regulations implementing the Section 106 process provide that consultation "should be conducted in a sensitive manner respectful of tribal sovereignty" and must "recognize the government-to-government relationship between the Federal Government and Indian tribes."[5] Furthermore, the ACHP's regulations and guidance make clear that consultation should seek agreement and work towards consensus.[6] The Corps' 2012 Tribal Consultation Policy also provides that "[t]o the extent practicable and permitted by law, consultation works towards mutual consensus."[7] In the Draft Guidelines, the Corps states that it will consider "Tribal input in its determination." This approach is too narrow as it is focused only on obtaining information from Tribal Nations. Meaningful and robust

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[2] 36 C.F.R. § 800.3(f)(2); Advisory Council on Historic Preservation, *Section 106 Consultation Between Federal Agencies and Indian Tribes Regarding Federal Permits, Licenses, and Assistance Questions and Answers* (March 27, 2008), https://www.achp.gov/sites/default/files/2018-06/Section106ConsultationBetweenFederalAgenciesand%20IndianTribesRegardingFederalPermitsLicensesandAssistanceQandAs27Mar2008.pdf (providing that "Indian tribes have a formal role as Consulting Parties in the Section 106 process").

[3] 54 U.S.C. § 300308 and 302706(a-b).

[4] 36 C.F.R. § 800.4(c)(1) ("The agency official shall acknowledge that Indian tribes . . . possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.").

[5] 36 C.F.R. § 800.2(c)(2)(ii)(B)–(C).

[6] *Id.* § 8000.16(f) (defining consultation as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process").

[7] U.S. Army Corps of Engineers, *Tribal Consultation Policy* 2 (Oct. 4, 2012).

consultation is a dialogue that requires the two-way exchange of information and must provide opportunities for Tribal Nations to influence the Corps' decision making and achieve consensus.

To achieve this goal, the Corps should look to the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), which was endorsed by the United States on December 16, 2010.[8] UNDRIP Article 32 mandates that nation states consult with Tribal Nations "in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

To elaborate, the principle of free, prior, and informed consent is grounded in the right of self-determination. Tribes are "separate sovereigns preexisting the Constitution" with the inherent right to self-determination.[9] The "United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."[10] UNDRIP Article 3 also recognizes that "Indigenous peoples have the right of self-determination." For meaningful consultation to occur, federal agencies must have a thorough understanding of the inherent rights of Indigenous Peoples set forth in the UNDRIP, treaties, federal statutes and case law.

Free, prior and informed consent of Indigenous Peoples should be a requirement for project or permit decisions that would impact our resources and urge you to adopt provisions reflecting this principle. In 2013, the ACHP developed a plan to support UNDRIP.[11] The ACHP also issued guidance on the intersection between the Section 106 process and UNDRIP, explaining that the Section 106 process is consistent with UNDRIP in a number of ways, including the right of Indigenous Peoples to participate in decision making.[12] Bay Mills encourages the Corps to follow the ACHP's lead and incorporate the principles of UNDRIP in the Corps' Section 106 consultation process.

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[8] *Cf.* Advisory Council on Historic Preservation, *Section 106 and the U.N. Declaration on the Rights of Indigenous People: General Information and Guidance* 3 (April 2018) (providing that "federal agencies can look to the Declaration for policy guidance in general and specifically in carrying out their Section 106 responsibilities"), https://www.achp.gov/sites/default/files/guidance/2018-07/Section106andtheUNDRIPGeneralInformationandGuidance.pdf.

[9] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

[10] Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

[11] Advisory Council on Historic Preservation, *ACHP Plan to Support the United Declaration on the Rights of Indigenous Peoples* (March 2013), https://www.achp.gov/sites/default/files/guidance/2018-07/ACHPPlantoSupporttheUnitedNationsDeclarationontheRightsofIndigenousPeoples.pdf.

[12] Advisory Council on Historic Preservation, *Section 106 and the U.N. Declaration on the Rights of Indigenous Peoples: Intersections and Common Issues: Article 18 and Section 106* 2 (November 2013), (explaining that Section 106 is consistent with UNDRIP in that Section 106 "consultation requirements are intended to ensure that Indian tribes and NHOs have the opportunity not only to identify those places of religious and cultural importance to them (sometimes referred to as sacred sites) but also to influence federal decision making in order to protect those places"), https://www.achp.gov/sites/default/files/guidance/2018-06/Section106andtheUNDRIPIntersectionsandCommonIssuesArticle18andSection10622Nov2013.pdf.

II. THE CORPS MUST DIRECT AND OVERSEE ALL WORK UNDERTAKEN IN THE SECTION 106 PROCESS.

Bay Mills is gravely concerned with Enbridge's oversized role in the Section 106 process. The Corps has the legal responsibility to comply with Section 106, not Enbridge.[13] Though permit applicants, like Enbridge, have a role in the Section 106 process, the process should not be applicant driven. For example, Enbridge may participate in the Section 106 process as a consulting party[14] and the Corps may use Enbridge's services to "prepare information, analyses, and recommendations."[15] The Corps may also ask Enbridge to pay for costs associated with review.[16] However, the Corps must "remain legally responsible for all findings and determinations."[17] Like all federal agencies, the Corps has a government-to-government relationship with Tribal Nations and corresponding trust responsibilities.[18] Delegating authority to permit applicants to direct the Section 106 process denies Tribal Nations of their rights as sovereigns and falls far short of the Corps' obligations.

Because of Enbridge's past conduct undermining the integrity of the process, concerns about the applicant's role in this Section 106 process are particularly acute.[19] As we discussed in our October Comments to Michigan Department of Environment, Great Lakes, and Energy ("EGLE"), it is imperative that reviewing agencies independently verify the information submitted by Enbridge and their consultants due to veracity concerns, technical omissions and feasibility concerns.[20] Though Bay Mills has repeatedly raised these concerns, the Corps has provided no

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[13] 54 U.S.C. § 306108; 36 C.F.R. § 800.2(a) ("It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance[.]").

[14] 36 C.F.R. § 800.2(c)(4).

[15] *Id.* § 800.2(a)(3); Advisory Council on Historic Preservation, *supra* note 2.

[16] Advisory Council on Historic Preservation, *Improving Tribal Consultation in Infrastructure Projects* 2 (May 24, 2017), https://www.achp.gov/sites/default/files/2019-08/ImprovingTribalConsultationinInfrastructureProjects5-24-17-2.pdf.

[17] 36 C.F.R. § 800.2(a)(3).

[18] Exec. Order No. 13175, 65 Fed. Reg. 67,249, 67,249–50 (Nov. 6, 2000); Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7,491 (Jan. 29, 2021).

[19] *See e.g.*, Letter from John M. O'Shea, Professor and Curator of Great Lakes Archaeology, University of Michigan Museum of Anthropological Archaeology, to Martha MacFarlane-Faes, Deputy State Historic Preservation Officer (Feb. 12. 2020) (describing "serious issues concerning a cultural resources assessment" of submerged cultural resources conducted for the proposed Line 5 tunnel project); Email from Whitney Gravelle, Tribal Attorney, Bay Mills Indian Community to Katie Otanez, Regulatory Project Manager, U.S. Army Corps of Engineers (February 24, 2021) (outlining Bay Mills concerns with Enbridge and their consultant, Dirt Divers Cultural Resource Management, who (1) misused the term "cultural survey" to reach out to Tribes to collect sensitive cultural data, (2) their assertion that the information provided would be protected under FOIA and NHPA when Enbridge as a private company is not covered by those laws, and (3) any information shared with Enbridge could be discoverable in the many lawsuits taking place and then exposed to the general public).

[20] Bay Mills Indian Community and Little River Band of Ottawa Indians, *Comments of Bay Mills Indian Community and Little River Band Seeking the Denial of Enbridge's Application for Permits for the Proposed Line 5 Great Lakes Tunnel Project Pursuant to Part 325, Great Lakes Submerged Lands, And Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act* 21-22 (Oct. 2020).

substantive response or explanation of how it can hold permittees accountable for providing intentionally incomplete and inaccurate cultural surveys. The Corps must not trust any of Enbridge's submissions without independent analysis. Because of Enbridge's past conduct and concerns with Enbridge's ability to protect Bay Mills' confidential information, Bay Mills will only provide information directly to the Corps and does not consent to Enbridge, or their consultants, contacting Bay Mills citizens or employees to conduct studies.

To alleviate these concerns, the Corps should reconsider their reliance on Enbridge consultant(s) contracted to conduct necessary archaeological and ethnographic surveys. Instead, the Corps should either conduct the surveys itself or, if not equipped, select and directly manage the consultant(s), after consulting with the Tribal Nations. If the Corps chooses to defer to Enbridge in the selection and management of the consultant(s), then the Corps should provide financial support to the Tribal Nations, so the Nations can also contract with and manage qualified consultants to provide the Corps with additional archaeological and ethnographic traditional cultural landscape surveys.[21] The Corps must make a reasonable and good faith effort to identify and evaluate for inclusion on the National Register historic properties potentially affected by the undertaking.[22] The Corps will not fulfill this reasonable and *good faith* effort standard if it fails to alleviate the Tribe's significant concerns about the adequacy and integrity of Enbridge's identification efforts.

III. THE CORPS' SECTION 106 REVIEW SHOULD INCLUDE THE ENTIRETY OF LINE 5 THAT TRAVERSES THROUGH THE 1836 TREATY CEDED TERRITORY OR AT A MINIMUM ENCOMPASS THE STRAITS OF MACKINAC AS A WHOLE.

The Corps cannot rely on Appendix C to inappropriately limit the scope of its review under Section 106. Congress delegated the authority to promulgate regulations implementing Section 106 to the ACHP.[23] Under the ACHP's regulations, an agency may adopt its own alternate procedures to implement Section 106.[24] An agency seeking to adopt its own procedures must submit the proposed alternate procedures to the ACHP for review and approval.[25] If the ACHP finds that the alternate procedures are consistent with its own regulations, it will notify the agency and the agency may adopt the alternate procedures as a substitute for the ACHP's regulations.[26] Although the Corps has adopted its own regulations, 33 C.F.R. § 325, Appendix C, the ACHP

[21] *See* Advisory Council on Historic Preservation, *Consultation with Indian Tribes in the Section 106 Process: A Handbook* 13 (Dec. 2012) ("[D]uring the identification and evaluation phase of the Section 106 process when an agency or applicant is carrying out its duty to identify historic properties that may be significant to an Indian tribe, it may ask a tribe for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the tribe would be justified in requesting payment for its services, just as is appropriate for any other contractor.").
[22] 36 C.F.R. § 800.4(b)(1).
[23] 54 U.S.C. § 304108(a).
[24] 36 C.F.R. § 800.14(a).
[25] *Id.* § 800.14(a)(2).
[26] *Id.* § 800.14(a)(2), (4).

never approved them.[27] Therefore, courts have consistently held that the Corps cannot rely on its own regulations to fulfill its Section 106 obligation where the Corps' regulation are inconsistent with the ACHP's.[28] The ACHP's guidance further explains that Appendix C is "inconsistent with the government-wide Section 106 regulations issued by the ACHP in key areas, including the establishment of areas of potential effect, consultation with Indian tribes, and the resolution of effects." [29]

Bay Mills requests consultation on the scope of review at a time that is mutually acceptable to the Corps, the consulting party Tribal Nations, and the State Historic Preservation Officer ("SHPO"). Under the ACHP's regulations the scope of review is based on the "area of potential effects," defined as the "geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist."[30] In contrast, the Corps' regulations more narrowly define its scope of review based on the "permit area," defined as "those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures."[31] Because the Corps' definition of permit area conflicts with the ACHP's regulations, the Corps cannot rely on its definition to fulfill its obligations under Section 106.[32] Instead, the Corps should define the scope of analysis based on the undertaking's potential adverse effects on historic properties, including direct and indirect effects and cannot limit its determination to physical effects.[33]

Furthermore, the undertaking is defined as the entire project, program, or activity receiving a federal permit.[34] To determine whether something is part of the same project for purposes of

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[27] *Comm. to Save Cleveland's Huletts v. U.S. Army Corps of Eng'rs*, 163 F. Supp. 2d 776, 792 (N.D. Ohio 2001); *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985); U.S. Gov't Accountability Office, *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects* 51-55 (Mar. 2019), https://www.gao.gov/assets/gao-19-22.pdf (detailing the Corps' unlawful use of Appendix C).

[28] *Comm. to Save Cleveland's Huletts*, 163 F. Supp. 2d at 792; *Colo. River Indian Tribes*, 605 F. Supp. at 1438; *Sayler Park Vill. Council v. U.S. Army Corps of Eng'rs*, No. C-1-02-832, 2002 WL 32191511, at *7 (S.D. Ohio Dec. 30, 2002).

[29] Advisory Council on Historic Preservation, *Improving Tribal Consultation in Infrastructure Projects* 13–14 (May 24, 2017), https://www.achp.gov/sites/default/files/2019-08/ImprovingTribalConsultationinInfrastructureProjects5-24-17-2.pdf.

[30] 36 C.F.R. § 800.16(d).

[31] 33 C.F.R. § 325, App. C, at 1.

[32] *Comm. to Save Cleveland's Huletts*, 163 F. Supp. 2d at 792; *Colo. River Indian Tribes*, 605 F. Supp. at 1437–38.

[33] *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1088–89 (D.C. Cir.), *amended on reh'g in part*, 925 F.3d 500 (D.C. Cir. 2019); Mem. from Office of General Counsel, Advisory Council on Historic Preservation, to Staff, Advisory Council on Historic Preservation, *Recent court decision regarding the meaning of "direct" in Sections 106 and 110(f) of the National Historic Preservation Act* (June 7, 2019).

[34] 36 C.F.R. § 800.16(y)

Section 106, courts have looked to whether it has independent utility.[35] Because there is no rational need for the tunnel project absent providing for the continued operation of Line 5, it has no independent utility and therefore, should be considered as the same project. Accordingly the area of potential affect should include the entire Line 5 pipeline that traverses through the 1836 Treaty[36] Ceded Territory as set out below in figure 1.

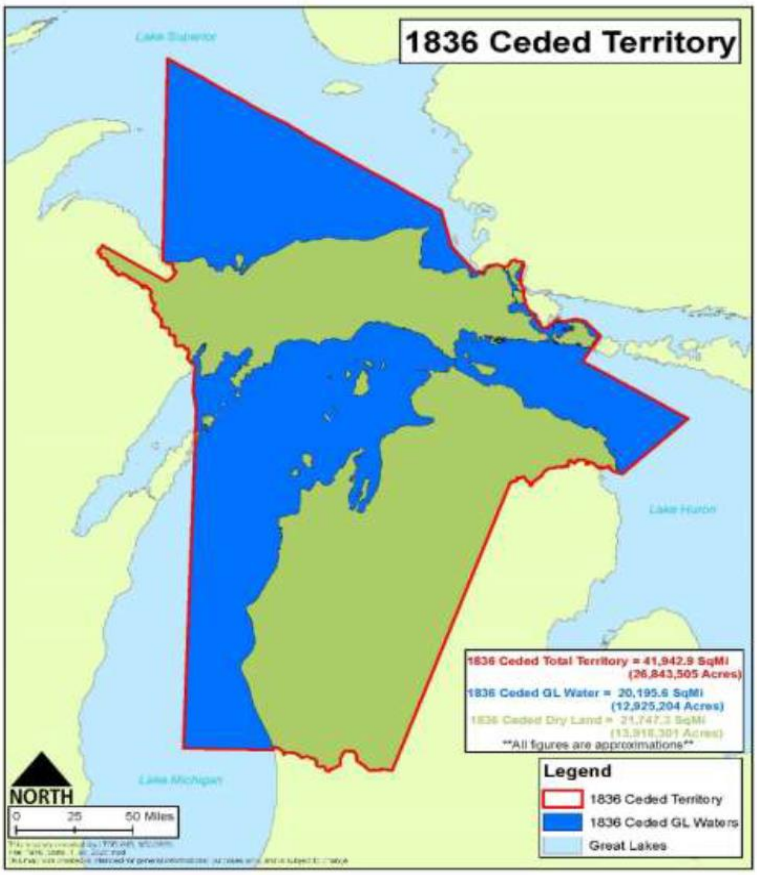

Figure 1 – This area, pictured in the map, is known as the "Ceded Territory"

[35] *Crutchfield v. U.S. Army Corps of Engineers*, 154 F. Supp. 2d 878, 905 (E.D. Va. 2001); *James River v. Richmond Metropolitan Authority*, 359 F. Supp. 611, 635 (E.D.Va.1973), aff'd 481 F.2d 1280 (4th Cir.1973) (per curiam).

[36] Bay Mills is a modern-day successor in interest to Indians who were signatories to the March 28, 1836 Treaty of Washington, 7 Stat. 491. In the Treaty of Washington, the Indian signatories ceded to the federal government 14 million acres of land and inland waters and 13 million surface acres of water in Lakes Michigan, Huron, and Superior; while reserving the right to hunt, fish, and other privileges of occupancy.

IV. COMMENTS TO ENBRIDGE'S PLAN FOR ADDITIONAL GEOPHYSICAL ARCHAEOLOGICAL SURVEYS

A. The Corps must consider SHPO's November 10, 2020 comment letter to EGLE regarding potential cultural resources impacts of Enbridge's proposed tunnel project.[37] SHPO raised concerns and noted gaps in the data that call for additional cultural resource surveys. Bay Mills shares the concerns raised by SHPO and fully supports SHPO's recommendations outlined in the letter. SHPO's recommendations should apply to any geophysical archaeological survey contemplated under this plan.

B. For the reasons set forth above in Section II, the consultant conducting any geophysical archaeological surveys should be independent of Enbridge and selected and managed by the Corps, with the selection process subject to consultation with the Tribal Nations.

C. Limiting the survey review to parts of the permit area is too limited. The survey should be expanded to the area of potential effects as defined in the ACHP's regulations as the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties of traditional religious and cultural importance to the Tribal Nations, if any such properties exist.

D. Phase I reports are cursory and designed to identify potential sites that are listed on the National Register for Historic Properties. Without properly defining the area of potential effects, it is impossible to identify and evaluate historic properties that may be affected by the undertaking. Therefore, any reliance on the Commonwealth Heritage Group Phase I Cultural Resources Survey for the Enbridge Mackinac Straits Project (August 2019) should be considered for what it is, an initial report, and supplemented with a Phase II report.

E. The Corps should require a new archaeological survey for the Straits of Mackinac bottomlands including exploration of the site that was identified last fall by a tribal expedition utilizing side sonar scans in the Straits.

F. Tribal Historic Preservation Officer ("THPO"), tribal representative, and/or tribal monitors must be invited and included in any archaeological survey and Enbridge should provide compensation for these services. The representatives and monitors must be selected by the Tribe. Enbridge and its contractors must not have any say in who is selected or what their qualifications are. The THPO, tribal representatives, and tribal monitors should have the authority to stop all work upon discovery of archaeological material or human remains. Work should not begin until the Tribe approves.

G. Require clear photographic evidence for documented features (eg. tree or "square thing"), subject to the approval of the Tribe. Some resources may be sensitive and should not be photographed. The Tribe must review all photographs to ensure that no sensitive resources are exposed.

[37] Letter from Stacy Tchorzynski, SHPO Senior Archaeologist to Joseph Haas, Gaylord District Supervisor, Water Resources Division, EGLE (Nov. 10, 2020).

V. COMMENTS TO THE DRAFT GUIDELINES FOR AN ETHNOGRAPHIC TRADITIONAL CULTURAL LANDSCAPE STUDY TO BE REQUESTED FROM ENBRIDGE BY THE CORPS OF ENGINEERS

The Corps should amend the Draft Guidelines to provide opportunities for Tribal Nations to be meaningfully involved in the design and implementation of any studies as follows:

General Comments

A. Determinations of eligibility about historic properties and cultural resources of significance to Tribal Nations should only be made by a Tribal Nation's designated representative(s).[38]

B. The THPO, or other Tribal representative, must coordinate and facilitate any interviews conducted as part of the Section 106 process and Enbridge must provide compensation for these services.

C. Guidelines should notify Enbridge that Tribal Nations may have applicable tribal law, ordinances, or protocols that control the collection of cultural and human research information and that Enbridge should ask each Tribal Nation for copies of all laws and protocols that may be applicable for purposes of conducting the cultural survey. Guidelines must require Enbridge and its contractors to acknowledge that the cultural and historic information that may be provided by the Tribal Nations is the property of the Tribal Nations, not Enbridge's or its contractors, and cannot be disseminated without the express, written consent of the Tribal Nations.

D. Require clear photographic evidence for the documented features that are not clear (eg. tree or "square thing"), subject to approval form the Tribe as described above in Section IV.G.

Specific Comments

E. In paragraph 1, the Guidelines should more fully explain the term "historic property." Historic property includes a "[p]roperty of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization."[39]

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[38] 36 C.F.R. § 800.4(c)(1) ("The agency official shall acknowledge that Indian tribes . . . possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them."); Advisory Council on Historic Preservation, *supra* note 19, at 20 (providing that "unless an archeologist has been specifically authorized by a tribe to speak on its behalf on the subject, it should not be assumed that the archaeologist possesses the appropriate expertise to determine what properties are or are not of significance to an Indian tribe); *id.* at 21 (providing that "identification of those historic properties that are of traditional religious and cultural significance to a tribe must be made by that tribe's designated representative as part of the Section 106 consultation process").

[39] 54 U.S.C. § 302706(a); 36 C.F.R. § 800.16(l)(1).

F. In paragraph 1, the term "sufficiently broad" is too vague. Instead, the study area should include, at a minimum, the "area of potential effect," as defined in consultation with the Consulting Party Tribal Nations and SHPO.[40]

G. In paragraph 3, the language should be modified to state that Enbridge "should not communicate directly with Indian tribes without prior consent from the tribes."[41] If a Tribal Nation declines to work with Enbridge or its consultant on cultural survey work, Enbridge is not allowed to contact tribal citizens of that Tribal Nation. The Corps should also amend the Draft Guidelines—which states that Corps will "provide Enbridge with a list of tribes that should be contacted as part of the study"—to make clear that Tribal Nations that do not consent to communication from Enbridge may communicate directly with the Corps. Accordingly, when seeking consent to participate, Enbridge should inform the Tribal Government that their participation is not mandatory and that the Tribal Nation can work directly with the Corps to convey any information regarding historical properties of traditional religious and cultural importance that might be impacted by the undertaking. When a Tribal Nation declines to communicate with Enbridge, it is the statutory obligation of the Corps to fulfill the consultation process. This declination cannot be construed as the Tribal Nation refusing to participate in the Section 106 process generally.

H. In paragraph 3, if the Tribal Nation consents to participate, a copy of any recording, transcripts, or collection of materials should be made available to the Tribal Nation at no cost. The cultural and historic information and knowledge contained in those materials is the sole property of the Tribal Nation.

I. In paragraph 3, the study design should be provided to the Tribal Nation, as well as all consulting parties including the SHPO, for an approval upon 45 calendar day review.

J. In paragraph 4 request that the Corps provide the draft report to the Tribal Nation and convene meaningful consultation on the report, not just "request input."

K. In paragraph 4, Bay Mills strongly agrees with the provision that the consultant provide the final report directly to the Corps, with no prior review by Enbridge.

L. On page 2, recommendation 1, the report should provide a recommendation for the "area of potential effect" and not be limited to the "permit area."

Comments Regarding the Memorandum for the Record - Protection of Sensitive Information

M. The Corps should presume that anything provided to them throughout this Section 106 process by a Tribal Nation is confidential unless the Nation states otherwise.

Bay Mills looks forward to continued consultation on these matters and the continued collaboration with the Corps to ensure the trust duty owed to the Bay Mills Indian Community is met and the

[40] 36 C.F.R. § 800.4(a)(4).
[41] Advisory Council on Historic Preservation, *supra* note 2.

treaty rights and resources are protected. Should you have any questions about this communication, please do not hesitate to contact the Bay Mills Legal Department at candyt@bmic.net.

Miigwetch,

Whitney Gravelle
President, Executive Council
Bay Mills Indian Community

CC. Scott Katalenich, Lieutenant Colonel, Commander, Detroit District, USACE
Martha MacFarlane-Faes, Deputy, SHPO
Stacy Tchorzynski, Senior Archaeologist, SHPO
Reid Nelson, Acting Executive Director, ACHP
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May 19, 2021

VIA EMAIL ONLY

Michael Nystrom, Chair, Mackinac Straits Corridor Authority
Michigan Department of Transportation
State Transportation Building
425 W. Ottawa St.
P.O. Box 30050
Lansing, MI 48909

RE: Bay Mills Indian Community's Request for Meaningful Consultation

Dear Chair Nystrom,

The Bay Mills Indian Community ("Bay Mills") appreciated the meeting, on May 10, 2021, with the Mackinac Straits Corridor Authority ("MSCA") and the Michigan Department of Transportation ("MDOT") to discuss the need for the MSCA to initiate consultation with Bay Mills and other Tribal Nations regarding Enbridge's Great Lakes Tunnel Project ("Tunnel Project"). As we discussed at the meeting, it is imperative that the MSCA engage in meaningful consultation with Bay Mills and other Tribal Nations as it exercises its responsibilities with regard to the Tunnel Project.

We would like to reiterate our requests, made during the May 10 meeting, that the MSCA and MDOT as the MSCA makes decisions related to the Tunnel Project: (1) hold regular tribal consultation meetings, (2) engage in meaningful consultation, and (3) share information, analysis, and feedback related to the Tunnel Project with the Tribal Nations. As an initial matter, we request that you hold a consultation meeting with Bay Mills and other Tribal Nations *prior* to the MSCA's next scheduled meeting. Considering that the next MSCA meeting is currently scheduled for June 2, 2021, we respectfully suggest that you may need to postpone that meeting in order to fulfill the MSCA's tribal consultation obligations; or in the alternative, table all decisions for the next meeting, thereby, providing the MSCA time to meet with the Tribal Nations prior to making decision that might affect Tribal treaty rights.

We also want to use this opportunity to set out our expectations for meaningful consultation--consistent with our August 18, 2020 letter inviting the MSCA to the October 29, 2020 joint

consultation, our presentations during the October 29, 2020 joint consultation, and during our May 10, 2021 meeting.

Government-to-Government Consultation

As you are surely aware, Bay Mills is a signatory to the March 28, 1836 Treaty of Washington (7 Stat. 491). In the 1836 Treaty Bay Mills reserved off-reservation fishing rights in the Great Lakes, including the Straits of Mackinac, that have been confirmed by the federal courts. *See United States v. 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).

In an effort to protect these Treaty resources, Bay Mills reinforces its request for formal consultation with the MSCA. As set out in the 2002 Government-to-Government Accord Between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan, consultation is defined as:

> a process of government-to-government dialogue between the state and the tribes regarding actions or proposed actions that significantly affect or may significantly affect the governmental interests of the other. Consultation includes (1) timely notification of the action or proposed action, (2) informing the other government of the potential impact of the action or proposed action on the interests of that government, (3) the opportunity for the other government to provide input and recommendations on proposed actions to the governmental officials responsible for the final decision, and (4) the right to be advised of the rejections (and basis for any such rejections) of recommendations on proposed actions by the governmental officials responsible for the final decision. Accord at V.

Furthermore, for the purposes of the 2002 Accord:

> **"state action significantly affecting tribal interests" is defined as** regulations or legislation proposed by executive departments, and other policy statements or **actions of executive departments, that have or may have substantial direct effects on one or more tribes,** on the relationship between the state and tribes, or on the distribution of power and responsibilities between the state and tribes. State action includes the development of state policies under which the tribe must take voluntary action to trigger application of the policy. *Id.* [Emphasis added].

On October 31, 2019, Governor Whitmer affirmed the 2002 Accord through the issuance of Executive Directive No. 2019-17 (Directive), again emphasizing a commitment by the State to consult with the Tribal Nations on all matters of shared concern. The Governor has the power to "influence [an] agencies' rulemaking decisions through his or her appointments and directives." *Michigan Farm Bureau v. Dep't of Envtl. Quality*, 292 Mich. App. 106, 144 (2011) (finding changed administrative policies after the election of a new governor to be within the constitutional

framework). In fact, "non-elected executive department heads, can be expected to carry out policies of the administration as communicated in [an] executive directive to the extent its directions are consistent with applicable law." Mich. Att'y Gen. Op. No. 7157, 7 (June 2, 2004).

The Governor's Directive applies to the MDOT and the MSCA. As laid out in Act 359, the MSCA is part of the transportation department: The Mackinac Straits corridor authority is created within the state transportation department." MCL § 254.324b (1). Act 359 provides further that "[t]he Mackinac Straits corridor authority is a state institution within the meaning of section 9 of article II of the state constitution of 1963, and an instrumentality of this state exercising public and essential governmental functions. *Id.*

Meaningful Consultation

State agencies must enter into the process with the goal and spirit of consultation and cooperation with the Tribal Nation to reach common agreement on the matter at issue. Starting with the definition of meaningful consultation, the MSCA and MDOT policies should clearly establish that the primary goal of consultation is to achieve consensus or consent.

At the outset, we note that the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") was endorsed by the United States on December 16, 2010, and UNDRIP Article 32 mandates that nation states consult with Tribal Nations "in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." We think, given the directives of the Governor's Directive discussed herein, that free, prior and informed consent of Indigenous Peoples should be a requirement for project or permit decisions that would impact our resources and urge you to adopt provisions reflecting this principle.

To elaborate, the principle of free, prior, and informed consent is grounded in the right of self-determination. Tribes are "separate sovereigns preexisting the Constitution" with the inherent right to self-determination. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). The State of Michigan recognized that Tribal Nations are unique and possess independent and inherent sovereign authority. Accord at III ([e]ach federally recognized Indian tribe in the state of Michigan is a unique and independent government, with different management and decision-making structures, which exercises inherent sovereign authority). UNDRIP Article 3 also recognizes that "Indigenous peoples have the right of self-determination." For meaningful consultation to occur, state agencies must have a thorough understanding of the inherent rights of Indigenous Peoples set forth in the UNDRIP, treaties, federal statutes and case law.

State agencies must enter into the process with the goal and spirit of consultation and cooperation with the Tribal Nation to reach common agreement on the matter at issue. Starting with the definition of meaningful consultation, the MSCA and MDOT policies should clearly establish that the primary goal of consultation is to achieve consensus or consent.

To achieve "meaningful communication and collaboration" the Governor's Directive lays out a four-step process designed to occur before "taking an action or implementing a decision that may affect" the Tribal Nations located in the State of Michigan. Directive at 2. The steps include, One – Identification, Two – Notification, Three – Input, Four – Follow Up.

Although neither MSCA nor MDOT has indicated that it has officially taken Step One or Step Two with regard to the Tunnel Project, Bay Mills identified the Tunnel Project as a decision requiring consultation, invited the MSCA to a joint consultation, and the MSCA attended that meeting. Tribal Nation identification is one mechanism by which an activity may be deemed appropriate for consultation, according to MDOT's updated tribal affairs policy. We appreciate MSCA's and MDOT's statements during the May 10 meeting that it plans to engage in consultation moving forward. Due to the magnitude of the proposed construction and the far-reaching impacts that the construction and continued operation of Enbridge's Line 5 will have on Bay Mills' treaty protected resources, it is imperative that the MSCA and MDOT begin as soon as possible regular government-to-government consultation with Bay Mills and other impacted Tribal Nations.

Government-to-Government consultation should be a process of seeking, discussing, and seriously considering the views of Bay Mills, and seeking agreement with Bay Mills on the development of regulations, rules, policies, programs, projects, plans, property decisions, and activities that may affect Treaty rights, Tribal Resources, historic properties, and contemporary cultural practices. This requires true government-to-government collaboration between the MSCA and Bay Mills, where high level MSCA representatives meet with Tribal leadership and staff. The MSCA should understand that a unilateral briefing given to Tribal Nations or merely cataloguing tribal concerns by the MSCA does not constitute consultation.

As set forth in the Directive, "Step Three – Input" establishes the process by which affected Tribal Nations provide input during the consultation process for MSCA activity. This Step requires that the MSCA coordinate with the Tribal Nation throughout the Step to ensure the Tribal Nation's full participation. Key to this Step is: (1) that the Tribal Nation receive all information necessary to provide meaningful input; (2) that the Tribal Nation be informed of any changes to the activity or other issues that may arise during the consultation; and (3) that the Tribal Nation be afforded an opportunity to provide any supplemental input regarding any changed circumstances. Accordingly, Bay Mills requests that the MSCA and MDOT provide all information that is being considered as part of the MSCA's decisions to approve the tunnel design and construction, including, but not limited to, any consultant reports and correspondence between the MSCA and Enbridge and/or the consultants addressing the tunnel design and construction. Bay Mills also requests that the MSCA and MDOT afford it the opportunity to review and provide meaningful input on these documents and decision points. If there are any changes to the Tunnel Project plans or documents under consideration, MSCA must immediately update Bay Mills and the impacted Tribal Nations.

"Step Four – Follow-up" of the Directive provides that, whenever feasible, the state agencies will provide preliminary feedback to interested Tribal Nations before the final decision is made or the action is taken. This preliminary feedback regarding the agency's decision must be a written communication from the most senior official involved to the most senior tribal official. Accordingly, Bay Mills requests that the MSCA and MDOT provide feedback on Bay Mill's input prior to the issuance of a final decision and clearly communicate to the Tribal Nations how the agency's final decision addresses tribal input. Where the MSCA and MDOT is unable to fully address Tribal concerns, it should clearly explain its reasoning.

At the end of the day, meaningful consultation requires agencies to undertake a good faith effort to reach common agreement with the Tribal Nation on how to proceed with a matter. This should include clear processes for documenting the consultation, ensuring protection of culturally sensitive information, complying with Tribal laws or protocols governing consultation, and implementing a certification process at the completion of consultation for both parties to agree that meaningful consultation occurred. Bay Mills welcomes the opportunity for a robust tribal consultation process going forward. Please contact Bay Mills Legal Department at candyt@bmic.net to arrange for the next consultation meeting or to discuss any matters raised in this letter. Thank you for your attention to this issue.

Miigwetch (thank you),

Whitney Gravelle, President
Bay Mills Indian Community