STATE OF MICHIGAN
IN THE COURT OF CLAIMS

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

Plaintiffs,

v.

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

Defendants.

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

AMICUS CURIAE BRIEF OF FOR LOVE OF WATER (FLOW) IN SUPPORT OF STATE OF MICHIGAN

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AMICUS CURIAE BRIEF OF FOR LOVE OF WATER (FLOW) IN SUPPORT OF STATE OF MICHIGAN

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Constitutional Provisions

INTRODUCTION AND SUMMARY

The Enbridge Line 5 dual pipeline runs along the bottomlands and waters of the Straits of Mackinac. The surface of this bottomland, the waters above it, and the soils below it, are owned by the State of Michigan and are held in trust for the public. This has been the case since Michigan became a state, and holds true today under the equal footing and public trust doctrines.

The State's role in the existing and proposed tunnel and new Straits segment has taken various forms: legislation (e.g., existing Line 5, 1952 PA 10 ["Act 10"]; 2018 PA 359 ["Act 359"]), easements (e.g., 1953 utility easement under Act 10 to Lakehead Pipeline Co., 2018 Easement to the Mackinac Straits Corridor Authority, Assignment to Enbridge), the 2018 99-year lease to Enbridge for use and occupancy of the soils or bottomlands under the Straits), and agreements for use and occupancy in and on soils and lands under the waters of the Straits (First, Second, and Third, Tunnel Agreements). However, not one of these forms, conveyance documents, and agreements have been authorized under the narrow limitations and requirements of the common law of public trust for the waters, soils, and lands beneath the water, of the Great Lakes, or the only law authorizing such disposition or use.

The ability of the State to authorize Enbridge's use and occupation of these public trust lands and waters through these various instruments is strictly limited. Under well-established Michigan common law, the State is prohibited from conveying any type of interest in the State's public trust soils, bottomlands, or waters to a private entity unless at least one of two narrow exceptions is satisfied and justified by the State: the State must determine either (1) that the use or occupancy will improve public trust resources and

uses, or (2) that the use or occupancy will not impair the public trust resources and uses remaining. Michigan's Great Lakes Submerged Lands Act ("GLSLA")[1] codifies this common law.

In this amicus brief we do three things. First, we set forth the existing well-established law of the public trust as applicable to the soils, bottomlands, and waters of the Great Lakes within Michigan's borders. Second, we examine the specific exceptions and requirements that the State, as the trustee of the public trust, must satisfy. Third, we demonstrate that legislation, easements, assignments, leases, and agreements that purport to convey or allow use and occupancy of the public trust bottomlands and waters of the Straits of Mackinac are void because they lack the authorizations and determinations required by the public trust doctrine and the GLSLA.

In a broader context, Plaintiff Enbridge's and the State's (former Governor, the Department of Environmental Quality, and the Department of Natural Resource's) interrelated agreements near the end of 2018 constituted one of the most flagrant attacks on the sovereign public trust title and interest in and to the waters, soils, and lands of the Great Lakes in the jurisprudential history of the jurisprudence of Michigan. As this Court stated in its landmark public trust decision in 1960, "This Court, equally with the legislative and executive departments, is *one of the sworn guardians of Michigan's duty and responsibility as trustee* of the above delineated beds of five Great Lakes." *Obrecht v. National Gypsum Co,* 361 Mich 399, 105 N.W.2d 143, 149-150 (1960).

> [N]o part of the beds of the Great Lakes, belonging to Michigan . . . can be alienated or otherwise devoted to private use in the absence of due

[1] Great Lakes Submerged Lands Act (GLSLA), MCL 324.32501 *et seq.*

> finding of one of two exceptional reasons for such alienation or devotion to non-public use. One exception exists where the State has, in due recorded form, determined that a given parcel of such submerged land may and should be conveyed in the improvement of the interest thus held (referring to the public trust). The other is present where the State has, in similar form, determined that such disposition may be made without detriment to he public interest in the lands and waters remaining.
>
> *Id.*, 360 Mich at 412[2]

Amicus FLOW submits that as one of the "sworn guardians" of the public trust in the waters of and soils beneath the Great Lakes, that this Court should rule that December 2018 Third Agreement, Tunnel Agreement and related DNR Easement, and Assignment to Enbridge are void and unenforceable under the common law of public trust and the Great Lakes Submerged Lands Act, MCL 324.32502, MCL 324.32503(1) et seq.—the Legislature's sole express mechanism for authorizing a disposition or use and occupancy of the water, soils, and bottomlands of the Great Lakes within the narrow exceptions of public trust of Michigan.

STATEMENT OF FACTS AND PROCEEDINGS

For purposes of the Motion for Summary Disposition under MCR 2.116(C)(8), Amicus FLOW adopts the Statement of Factual Background of Michigan Defendants.[3] In addition, FLOW states the following facts and proceedings for the Court's review and decision on the questions of law presented under MCR 2.116(C)(8) related to the State's sovereign title and public trust obligations, as government trustee, in the waters, soils,

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[2] *State v. Lake St. Clair Fishing & Shooting Club, 127 Mich 580, 594, 595, 87 N.W. 117 (1901); State v. Venice of America Land Co., 160 Mich. 680, 702, 125 NW 770(1910); Nedtweg v. Wallace*, 237 Mich. 14, 21, 24, 34, 208 NW 51, (1926)(the trusteeship as announced by the Supreme Court in Illinois Central Railroad Co. v. State of Illinois. 146 U. 387, 13 SCt 110, 119 (1892)).

[3] Brief in Support of Defendants' Motion for Summary Disposition, June 27, 2019, pp. 1-14.

and bottomlands of the Great Lakes, specifically the Straits of Mackinac that connects Lake Michigan and Lake Huron.

Paragraph 2 of Plaintiffs' (collectively "Enbridge") Verified Complaint alleges the validity and enforceability of the Tunnel Agreement, Third Agreement, DNR Easement, and Assignment to the Mackinac Straits Corridor Authority ("MSCA") (collectively, the "December 2018 Agreements"). Similarly, Paragraph 6 alleges that the December 2018 Agreements "are valid and enforceable," and paragraphs 48-52 allege that the Tunnel Agreement confirmed the "continuation of existing Line 5, a 99-year lease, and the assignment of subsurface bottomlands to allow Enbridge to enter, use, and occupy those subsurface soils and lands for the tunnel and replacement line. Paragraphs 55-60 allege that the DNR 2018 Easement was legally granted and assigned to Enbridge, and are valid and enforceable.

Paragraph 62 alleges under the Third Agreement that Enbridge has the right to "continue to operate the Dual Pipelines, which allow for the functional use of the current Line 5 in Michigan, until the Tunnel is completed and the Straits Line 5 Replacement segment is placed in service, subject to Enbridge's continued compliance with... (a) The Second Agreement, (b) The Tunnel Agreement; (c) This Third Agreement; (d) The 1953 Easement; and (e) All other applicable laws..."

Section 4. 1 of the Third Agreement[4] provides, in part:

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

[4]Third Agreement, 4.1. See https://mipetroleumtaskforce.com/document/3rd-agreement-between-state-micigan-and-enbridge -energy.

Section 4.2(d)[5] provides and purports to declare, in part:

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

In Count I of its Verified Complaint, Enbridge requests declaratory judgment, in part, that the Tunnel Agreement and all of the related December 2018 Agreements, including the Third Agreement, are constitutional, and otherwise valid and in effect; this includes a specific claim that the Third Agreement transfers a valid right to continue to use the existing dual lines in the Straits. In Count II, Enbridge requests declaratory judgment that the 2018 DNR Easement to the MSCA and the Assignment of Easement rights to Enbridge for the tunnel and replacement or new Line 5 pipeline are valid and enforceable.

Michigan Defendants request summary disposition that pursuant to MCR 2.116(C)(8) the allegations of Enbridge's Verified Complaint fail to state a cause of action and claim for relief. Defendants' request for summary disposition is based on two grounds: first, that Act 359 and all of the related agreements are unconstitutional under the Title-Object clause, Mich. Const., 1963, art. 4, sec. 24; second, apart from the constitutional defects, that, "(4) The Third Agreement is void, by its terms because (a) the Tunnel Agreement is void, and (b) the Third Agreement is without binding legal effect to the extent that it purports, on behalf of the State, to determine that Enbridge's continued operation of its existing pipelines in the Straits is "in accordance with and furtherance of

[5] Id., 4.2(d).

the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan."[6]

STANDARD OF REVIEW

Amicus Curiae FLOW adopts the standard of review on the questions of law addressed in this Amicus Brief as stated in the Michigan Defendants Brief in Support of Summary Disposition under MCR 2.116(C)(8). To the extent that Plaintiff Enbridge requests summary disposition pursuant to MCR 2.116(I)(2), the standard of review is the same, because the Motion and any counter-motion are limited to the standards for review of the claims on the pleadings under MCR 2.116(C)(8).

ARGUMENT

Amicus Curiae FLOW confines its Brief of Amicus Curiae to the arguments that refute as a matter of law Plaintiff Enbridge's claims regarding the validity and enforceability of the 2018 Third Agreement, Tunnel Agreement, and 2018 DNR Easement and Assignment of Easement to Enbridge, because these agreements violate the public trust doctrine at common law and as specifically incorporated by the Legislature in 1955 into the Great Lakes Submerged Lands Act, MCL 324.32501 et seq.[7]

I. Upon Statehood, Michigan Acquired the Soils, Bottomlands, and Waters of the Great Lakes within Michigan's Borders as an Incident of Sovereignty and Holds Those Resources in a Public Trust for the Benefit of its Citizens.

[6] Third Agreement, 4.2(d) https://mipetroleumtaskforce.com/document/3rd-agreement-between-state-micigan-and-enbridge -energy.

[77] Based on FLOW's analysis and formal public comments solicited by and submitted to the Attorney General before the issuance of OAG No. 7309, Amicus FLOW adopts the arguments of the Michigan Defendants.

According to the core public trust doctrine, upon winning the Revolutionary War, each of the original 13 states acquired title (previously held by the sovereign in England) to the soils and beds of its navigable water bodies to hold in trust for its citizens. *See Phillips Petroleum Co. v. Mississippi*, 484 US 469, 473–76 (1988); *Shively v. Bowlby*, 152 U.S. 1, 12–13, 57 (1894); *Champlin's Realty Assocs., L.P. v. Tillson*, 823 A2d 1162, 1166 (R.I. 2003) ("After the American Revolution, the original colonies, including Rhode Island, incorporated the public trust doctrine into their law and assumed ownership over tidal lands and the concurrent responsibility for managing them to benefit the public."). To ensure that each new state subsequently carved out of the territories is admitted to the Union on an "equal footing" with the original states, the equal footing doctrine constitutionally mandates that each new state automatically receive at statehood the same right of title to the soils and beds beneath its navigable water bodies as that held by the original states. See *Shively*, 152 US at 57-58; *Pollard's Lessee v. Hagan*, 44 US 212 (1845); *North Carolina v. Alcoa Power Generating, Inc.*, 853 F3d 140, 147 (4th Cir. 2017), *cert. denied*, 138 SCt 981 (Feb. 20, 2018). In short, the equal footing doctrine delivers the core public trust doctrine to each new state joining the Union, including Michigan.

Thus, upon statehood in 1837, Michigan acquired ownership of the soils, bottomlands, and waters of the Great Lakes within Michigan's borders as an incident of sovereignty, to hold in trust for the public. *State v. Venice of America Land Co.*, 160 Mich 680, 702, 125 NW 770 (1910); *State v. Lake St. Clair Fishing & Shooting Club, 127 Mich 580, 594, 595, 87 NW 117* (1901). The State, as sovereign, "has an obligation to protect and preserve the waters of the Great Lakes and *the lands beneath them* for the

public" (emphasis ours), and the state serves "as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure. *Glass v. Goeckel*, 473 Mich 667, 703 NW2d 58, 64–65 (Mich 2005). Critically, the State "cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources." *Id.* at 65. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997) ("An attempted transfer was beyond the authority of the legislature since it amounted to abdication of its obligation to regulate, improve, and secure submerged lands for the benefit of every individual.") (citing *Illinois Cent. R. Co. v. Illinois*, 146 US 387, 455–60 (1892)); *Obrecht v National Gypsum Co*, 361 Mich 399, 105 NW2d 143, 149–150 (1960) (citing and adopting the principles of *Illinois Cent. R. Co.*).

The Court in *Glass* affirmed that the ordinary high water mark, as that term has been understood at common law, is the landward boundary of the public trust rights of Michigan citizens, regardless of who actually owns the land. 703 NW2d at 69–70. When the State conveys ownership or other property interest to portions of the soils and bottomlands beneath the Great Lakes, the State "necessarily conveys such property subject to the public trust." *Id.* at 65. This public trust imposes a "high, solemn and perpetual trust which it is the duty of the State to forever maintain." *Collins v Gerhardt*, 237 Mich 38, 49 (1926).

II. The Public Trust Doctrine Requires that No Part of Michigan's Soils, Bottomlands, or Waters of the Great Lakes Can be Alienated or Otherwise Devoted to Private Use or Occupancy Unless the Legislature Expressly Grants the Necessary Authority, There Is a Determination that the Conveyance Will Improve the Public Trust Interest or Not Impair the Public Interests in the Lands and Waters Remaining, and the Disposition in Fact Falls Within These Narrow Exceptions.

A. The Michigan Legislature cannot authorize, and the executive branch cannot approve, any conveyance or agreement for private use or occupancy of Great Lakes soils, bottomlands, or waters without a formal determination that one of two narrow exceptions applies.

As discussed in Argument III below, the violation of the public trust doctrine in the instant case arises out of Enbridge's failure (along with the previous DEQ and DNR administration) to apply for and obtain the required authorizations for the continued use and occupancy for the existing Line 5 dual pipelines, the 2018 DNR Easement to the MSCA, and its assignment to Enbridge. Not only is there a requirement for express authorization under public trust law and the GLSLA, but this express authorization must be documented by determinations or findings in "due recorded" form to assure that the conveyances or agreements fall within the standards comply with the two exceptions under public trust law and the GLSLA.[8] In order for this Court to understand the nature of the determination or finding that is required under public trust law and the GLSLA, we briefly consider what constitutes a violation of the two exceptions to the general prohibition on conveyance or disposition of public trust waters, soils, and bottomlands.

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[8] In *Obrecht v. National Gypsum Co.*, 361 Mich 399, 105 NW2d 143, 149–150 (1960), Michigan adopted two narrow exceptions to the general prohibition on alienation or disposition of public trust land or water for private use or occupancy:

> [N]o part of the beds of the Great Lakes, belonging to Michigan . . . can be alienated or otherwise devoted to private use in the absence of due finding of one of two exceptional reasons for such alienation or devotion to non-public use. One exception exists where the State has, in due recorded form, determined that a given parcel of such submerged land may and should be conveyed in the improvement of the interest thus held (referring to the public trust). The other is present where the State has, in similar form, determined that such disposition may be made without detriment to the public interest in the lands and waters remaining.

Obrecht, 105 NW2d at 149 (citations and quotation marks omitted) (citing *Illinois Cent. R. Co. v. Illinois*, 146 Us 387 (1892)).

B. Exception 1: Great Lakes soils, bottomlands, and waters cannot be devoted to private use or occupancy unless the disposition is primarily for the public purpose of improving the public trust resources and uses.

Under the *Obrecht* standard, the first exception to the general rule prohibiting disposition of public trust land and water for private use or occupancy would apply if the disposition has the primary public purpose of improving the public trust interests in the Great Lakes. Those interests might be improved if the public trust resources are enhanced, or citizens' rights to use those resources (e.g., fishing, navigation, swimming, drinking water) are enhanced, or both.

Conveyances or agreements for use by the State for the enhancement or improvement of recognized public trust uses may include improvements in navigation (e.g., dredging of public harbors, building of public docks); in fishing and hunting opportunities (e.g., habitat protection and restoration); in walking opportunities (e.g., removal of structures blocking beach); and in water uses (maintaining safe drinking water).

In contrast, the State's conveyance or use agreement for a private interest to control public trust waters or the soils and bottomlands beneath them for the purpose of operating an oil pipeline would not be considered an "improvement" of the public trust interest or citizens' rights of use as contemplated in *Obrecht*. Conveyances and agreements that transfer primary use and control to a private entity fall short of this public trust public purpose standard.

C. Exception 2: Great Lakes soils, bottomlands, and waters cannot be devoted to private use or occupancy unless the disposition can be made without impairing the public interests and uses in the public trust lands and waters remaining.

The second exception to the general rule prohibiting disposition of public trust land and water for private use or occupancy would apply if "such disposition may be made without detriment to the public interest in the lands and waters remaining." *Obrecht*, 105 NW2d at 149.

Although the term used by the *Obrecht* court in this second exception is "detriment," this exception is generally interpreted as an "impairment" (or non-impairment) standard. *See Illinois Central*, 146 US at 453 ("The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or *can be disposed of without any substantial impairment of the public interest* in the lands and waters remaining.") (emphasis added); *Superior Public Rights, Inc. v. State Dep't. of Nat. Res.*, 80 Mich App 72, 263 NW2d 290, 296 (1977) ("The *Illinois Central R. Co.* case [] expressly authorizes the state to permit the private use of public trust lands when 1) the private use will improve the public trust, or 2) the private use will not substantially impair the trust lands and waters that remain."). The Great Lakes Submerged Lands Act (GLSLA), MCL 324.32501 *et seq.*, also frames the protection of public trust interests as an impairment standard. *See* MCL 324.32505(2) ("The department may allow, by lease or agreement, the filling in of patented and unpatented submerged lands and allow permanent improvements and structures after finding that *the public trust will not be impaired* or substantially injured.") (emphasis added); *see also* MCL 324.32502; MCL 324.32503(1).

The word "impairment" means "in the state of being weakened" or "diminished." (Merriam Webster, https://www.merriam-webster.com/dictionary/impaired). In the context of conduct that is or was likely to "impair" fish (which are the property of the

State held in public trust, *Aikens v Department of Conservation*, 28 Mich App 181, 184 NW2d 222 (1970)), the Court of Appeals ruled that "impair" means "to weaken, to make worse, to lessen in power, diminish or relax, or otherwise affect in an injurious manner." *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 105-106, 280 NW2d 883, 887 (1970). In applying this meaning, the court issued an injunction to "prevent conduct that would have a probable injurious affect." *Id.*

In *People v Broedell*, 365 Mich 201, 204-205, 112 NW2d 517 (1961), the Court rejected the argument that filling submerged lots subject to the state's public trust in the Great Lakes was "trifling" or "de minimis" defense, because the cumulative impacts of such actions to the State's public trust interests were not a "trifling matter." Further, in determining impairment of public trust resources, values, and uses, the Michigan Court of Appeals held in *Grose Isle Twp. v Dunbar & Sullivan Dredging Co*, 15 Mich App 556, 566-567, 167 NW2d 311, 3-15-316 (1969), that, the determination of whether there is an impairment is an "ad hoc" decision, and "that the public trust would be impaired logically requires a consideration of the value of navigable water for public use and the extent of such use. Defendant offers no authority, however, to indicate that substantial value for public use must be shown in order for the public trust to be impaired." In other words, the key to the legal assurance that the standards under the public trust doctrine is the factual determination, and the burden of proof of no public value or use and impairment is on the party claiming no impairment.

In a leading Michigan case involving a determination of whether there was a threshold violation of the "likely to... impair" standard under the Michigan Environmental Protection Act, MCL 3234.1701 *et seq.*, the Court first held that there

must be adequate findings of fact to assure the prevention of likely impairment of water and natural resources. *Ray v Mason County Drain Comm'r*, 393 Mich 294, 224 NW2d 883 (1975). To satisfy this finding-of-fact requirement of "impairment" under the MEPA, the trier of fact must consider the evidence introduced, the burden of proof, and the likely harm: "Such a showing is not restricted to actual environmental degradation but also encompasses probable damage to the environment as well... [the] evidence necessary to constitute a prima facie showing will vary with the nature of the alleged environmental degradation involved." 393 Mich at 307-310. In short, findings must be sufficiently detailed to substantiate the finding of "no impairment" or "impairment," and the proof required to establish "impairment" depends on the degree or magnitude of harm; i.e., the higher the degree or magnitude of harm, the more likely it is that the burden of proof of impairment is satisfied.[9]

In the instant litigation over Enbridge's agreements with the past administration, in Argument III, below, there were no determinations or findings of "no impairment" or "improvement of public trust interests" at all. Moreover, to the extent that Enbridge argues that legislative declarations constitute sufficient findings, any such declaration in this case does not satisfy the *Obrecht* test for determining whether to alienate or allow the private control or use of public trust waters, soils, and bottomlands. In fact, the inclusion of a legislative declaration of public purpose does not constitute a finding; in fact, it demonstrates that, on the face of the statute, the required public trust standards for the

[9] In the leading court decision on "imminent" risk or "endangerment" in environmental law, the D.C. Circuit ruled that the government, when faced with uncertainty of devastating or serious harm does not have to wait for a catastrophe or harm to occur, but can act to prevent it. *Ethyl v. EPA*, 541 Fed2d 1 (D.C. 1976); See also *Reserve Mining v. EPA*, 514 Fed2d 492, 519-520 (8th Cir. 1975).

two exceptions were not incorporated into the statute. As noted in *Superior Public Rights, Inc.*, *supra*, a statute that authorizes the disposition, use, or occupancy of a public trust resource must contain standards that are consistent with the narrow exceptions in *Illinois Central* and *Obrecht.* Moreover, for similar reasons, the declaration in the 2018 Third Agreement that "the State has acted *in accordance with and in furtherance of the public's interest* in protection of *waters, waterways, or bottomlands held in public trust by the State of Michigan*, does not satisfy the determination or finding requirements of *Illinois Central* and *Obrecht*, or their codification in the GLSLA.

D. The State is entitled to retract a prior disposition of public trust land whenever the private use no longer meets the narrow exceptions in *Obrecht.*

As discussed above, to avoid a violation of the public trust doctrine, state legislation, easements, leases, or agreements involving public trust land or water must contain the required formal determination that the disposition falls under the improvement or non-impairment exception, and such disposition must in fact satisfy an *Obrecht* exception. In cases where the original disposition failed to satisfy either requirement, the State has a right and duty to subsequently declare the original disposition void. Moreover, if the state-authorized operation of the pipeline currently is found to impair the public trust interest as a matter of fact, the State's disposition now violates the public trust and the State has the right and duty to revoke the disposition, even if the disposition did not impair the public trust when initially authorized.

These principles can be derived from the *Illinois Central* decision.[10] In *Illinois Central*, an act of the Illinois Legislature passed in 1869 conveyed to the private railroad company a large swath of submerged land in Lake Michigan. *Illinois Central*, 146 U.S. at 448–49. The *Illinois Central* Court held that this conveyance, despite the economic benefits, violated the public trust, and that the state could subsequently revoke the conveyance. *Id.* at 455.

In its opinion, the *Illinois Central* Court discussed its prior decision in *Newton v. Commissioners*, 100 US 548 (1880), in which the dispute was over whether an act passed by the Ohio Legislature in 1846 to establish a county seat in one town could be revoked by the 1874 legislature, which passed an act for the removal of the county seat to another town. *Illinois Central*, 146 U.S. at 459. The Court stated,

> [L]egislative acts concerning public interests are necessarily public laws; that every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment, neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so, in the nature of things; that it is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.

The Court then applied the principle from *Newton* to the *Illinois Central* dispute and concluded,

> The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its

[10] See also the government defendants' discussion of the "reserved powers doctrine" in its summary judgment brief. State SJ Br. at 45-49.

> existence, exercise the power of the state in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. *There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.*

Id. at 459–60 (emphasis added).

In *Newton*, there was no finding that the original legislation was unlawful, yet the state had the power to revoke it. In *Illinois Central* itself, the Court found that the original grant to the railroad company violated the public trust. *Id.* at 453 ("A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation."). The common principle is that subsequent government bodies can revoke, independently of the reserved powers doctrine,[11] the public trust decisions of prior government bodies if the original disposition was unlawful or if the disposition becomes unlawful due to changed circumstances.

For example, because 1953 PA 10 or 2018 PA 359 involve dispositions of public trust lands and soils beneath waters of the Great Lakes, they must contain the "due recorded" determinations required by *Obrecht*. If they do not these acts would violate the public trust doctrine and be void from their inception. The same result must also apply to

[11] While Amicus FLOW agrees with the Michigan Defendants' reliance on the "reserved powers doctrine," Michigan Defendants Brief in Support of Summary Disposition, p.48, it is not necessary where the revocation is based on the inherent, inalienable limitation under the public trust doctrine.

easements, licenses, and other agreements that are authorized by and implement these legislative dispositions, occupancy, or uses, such as the December 19, 2018 Tunnel Agreement, the December 17, 2018 DNR Easement, and its Assignment to Enbridge. Because the State can never authorize a conveyance, lease, easement, or other disposition or agreement to occupy and use public trust soils and waters unless there is express statutory express authority that requires the required findings that the standards for the exceptions under *Illinois Central*, *Obrecht,* and GLSLA are met. If the statute does not contain these standards, the authorizing statute violates the public trust, and the dependent instruments also must fail.

Thus, under the above *Illinois Central* and *Obrecht* principles, a subsequent administration always retains the irrepealable and inalienable authority and right to declare a legislative act unlawful at its inception under the public trust doctrine, just as subsequent legislatures always retain the right to contradict unlawful legislation. And if such act is declared unlawful, the easements, leases, and agreements predicated on the act also must be unlawful.

Even if a procedurally-valid public trust determination that satisfies the *Obrecht* standard accompanies a legislative disposition of public trust resources, the grant remains voidable by a subsequent administration that makes a contrary substantive determination. The original determination may have been based on a mistake or misunderstanding of law or fact, and was thus invalid at its inception, or circumstances may have significantly changed since an original valid determination such that the authorized disposition now impairs the public trust. In either case, the principles in *Illinois Central* allow for a subsequent administration or legislature to replace the original defective determination

with a new determination that is valid in law and fact. *See also National Audubon Society v. Superior Court*, 33 Cal3d 419, 658 P2d 709 (1983).[12]

III. The December 2018 Third Agreement, Tunnel Agreement, DNR Easement to the Corridor Authority, Authority Assignment of Easement Rights to Enbridge, and the 99-year Lease are void and unenforceable because they are not authorized by or in compliance with the findings or determinations required for the narrow exceptions for disposition or use under the public trust doctrine and Great Lakes Submerged Lands Act, MCL 3234.32501 et seq.

Amicus Curiae FLOW submits that this Court, independently from its ruling under art. 4, sec. 52, should hold that the Third Agreement right to continue using and operating the existing Line 5, the Tunnel Agreement, and the DNR 2018 Tunnel Easement and Assignment are invalid and unenforceable for the reason that they were and are not authorized as required by public trust law and the GLSLA (The GLSLA is the Legislature's express provision for authorized dispositions or other agreements under the public trust doctrine).

A. The December 2018 Third Agreement is void and unenforceable because it was not authorized by and is otherwise in violation of the requirements and standards of the Great Lakes Submerged Lands Act (GLSLA) and the common law public trust doctrine.

As described above in detail in the Statement of Facts and Proceedings, Plaintiff Enbridge's Verified Complaint alleges throughout that the 2018 Third Agreement grants it a valid and enforceable right to "continue to operate the Dual Pipelines, which allow for the functional use of the current Line 5 in Michigan, until the Tunnel is completed" and the Tunnel "is completed and the Straits Line 5 Replacement segment is placed in

[12] The issues of reliance damages and due process are separate from these principles.

service."[13] Finally, Plaintiff Enbridge under Count I of its Complaint requests declaratory judgment that all of the 2018 Agreements, including the Third Agreement, and the DNR Easement and Assignment to Enbridge are valid and enforceable under Michigan law.[14].

1. The Third Agreement Was Not Authorized as Required by the Great Lakes Submerged Lands Act.

The GLSLA, Part 325, NREPA, MCL 324.32501 et seq. was effective in 1955, just two years after the State's Department of Conversation (now the DNR) granted the 1953 Easement to Lakehead (now Enbridge) to occupy and use the public trust bottomlands and waters of the state—the Straits of Mackinac, connecting Lake Michigan and Lake Huron. The GLSLA was and is the first and only express grant of authority to the Department of Conservation, later the DNR (which held the public trust title), and now the DEQ, to dispose of, grant, deed, lease, or convey by other agreements the right to private persons or interests to own, occupy, or use the these public trust waters and bottomlands or lands under these waters as required by the public trust doctrine. Section 32502, GLSLA, MCL 324.32502 provides, in part:

> Section 32502. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, *to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of lands whenever it is determined by the department* that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation *or that the public trust in the state or that the public trust in the state will not be impaired by those agreements for use, sales, lease or other disposition...* (Emphasis ours)

First, as can be seen, the GLSLA provides for sale, lease, exchange, or "other disposition" and "the private or public use of lands," and for or by "agreements for use,

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[13] Verified Complaint, para. 62; See also Third Agreement, Sec. 4.2(d), and 4.1. https://mipetroleumtaskforce.com/document/3rd-agreement-between-state-micigan-and-enbridge -energy.

[14] Verified Complaint, paras. 91-93.

sales, lease or other disposition." Second, the GLSLA provides that no such "sale, lease..., or other dispositions or agreements for use, sales, lease, or other disposition" can be authorized unless "it is determined by the department that..." Third, the determination itself must substantiate that "the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation" or "that the public rust in the state will not be impaired by those agreements..."

In other words, the GLSLA prohibits any sale, lease, or other disposition or agreements for use, sale, lease or disposition unless there is an express determination or finding that the proposal and conduct (1) "will not substantially affect the public use" for fishing, boating, swimming, navigation, or (2)"the public trust in the state will not be impaired." Without application for such disposition or agreement and a determination that these two standards in the GLSLA are substantiated, the conveyance, lease, disposition, or agreement is unlawful, invalid, and unenforceable.

Section 23503(1), GLSLA, MCL 324.32503(1), contains substantially similar authorization and findings:

> Sec. 32503. (1) Except as otherwise provided in this section, the department, *after finding that the public trust in the waters will not be impaired or substantially affected*, may enter into *agreements* pertaining to waters over and the filling in of submerged patented lands, or to lease or deed unpatented lands, *after approval of the state administrative board.* Quitclaim deeds, leases, or agreements covering unpatented lands... shall contain such terms, conditions, and requirements as the department determines to be just and equitable and in conformance with the public trust. (Emphasis ours)

Again, the department is prohibited from entering into any agreements for use, filling, lease or deed only "after finding that the public trust in the waters will not be impaired or substantially affected." Further, Section 32503(1) provides that after

approval, the deeds, leases, or agreements "covering unpatented lands shall contain such terms, conditions, and requirements... in conformance with the public trust." *Id.*

The GLSLA was subsequently amended to provide for marinas, and later to prohibit *activities, such as dredging or filling* or *"other material"* as defined in the GLSLA, unless permitted in accordance with public trust standards and other requirements for activities. Sec. 32512(1)(c). MCL 324.32512(1)(c). Significantly, the GLSLA was amended to prohibit the department from entering into "a deed or lease that allows *drilling beneath the unpatented lands for the exploration or production of oil or gas,*" last provision of Section 32503(1), MCL 32503(1). Consistent with the State's sovereign title and trust "in the waters and soils beneath them," the Legislature clearly confirmed the State's common law and statutory jurisdiction under the GLSLA extends to the soils and lands far beneath the waters of the Great Lakes.

There is no question that the Third Agreement, as well as the Tunnel Agreement, granted and assured Enbridge the uninterrupted and continued use of the existing Line 5 dual pipelines in the Straits of Mackinac. There is no dispute over the fact that the Third Agreement and the right to continued use were not authorized under the GLSLA by the DEQ (now EGLE) before entering into the agreement. There is no question that there is no recorded findings or determinations that the lands, waters, public trust uses will not be impaired or substantially affected, Sec. 32502, or "will not be impaired." Sec. 32503(1).

Further, the Third Agreement purports to amend or continue the 1953 Easement that was issued based on the specific design when the Department of Conservation approved it, and the declaration in the 1953 Easement that Enbridge is now in compliance

with the Easement[15] does not constitute an authorization and finding or determination required by the GLSLA; and the existing 1953 pipeline has never been authorized under the 1955 GLSLA or under the findings required for compliance within the narrow exceptions of the common law public trust doctrine. *Ill Central, supra,* at 453; *Obrecht, supra*, 105 N.W.2d. at 149.

While it could be argued that the 66-year old Easement was authorized by the Department of Conservation pursuant Act 10 of 195, MCL 324.2129, Act 10 expressly recognizes that its grants are subject to the public trust in the bottomlands of the Great Lakes:

> Sec. 2129. The department may grant easements, upon terms and conditions the department determines just and reasonable, for state and county roads and for the purpose of constructing, erecting, laying, maintaining, and operating pipelines . . . over, through, under, and upon any and all lands belonging to the state [and] over, though, under, and upon any and all of the unpatented overflowed lands, made lands, and lake bottomlands belonging to or held in trust by this state.

Moreover, the standards that are required under the common law are not incorporated into this statutory provision for granting public utility easements in, under, over, or through public trust bottomlands. *Ill Central*, *Obrecht*, and Superior Public Rights, *supra*, Argument II, *this Amicus Brief,* pp. 8, 10, 15.[16] Absent the findings or determinations that the standards for the narrow exception for allowing easements, uses, or other disposition of public trust bottomlands and waters, Act 10 on its face is void as to easements on bottomlands belonging to or held in trust by this state." *Obrecht*, *Superior Public Rights, supra.* And, in any event, even if Act 10 (Sec. 2120) authorized the 1953 Easement, it is void because the department did not make the required common law

[15] Third Agreement, Sec. 4.2(d),

[16] It should also be noted that Act 10, Sec. 2129, by its express terms does not authorize any conveyance of deeds, leases, other dispositions or agreements to occupy and use public trust bottomlands.

determinations or findings to comply with the standards for the narrow exception for such easements or dispositions in *Illinois Central*, *supra*, and *Obrecht*, *supra*. The 1953 Easements by its terms is itself subject to a continuing duty to protect private and public property, like the public waters, soils and bottomlands of the Great Lakes, and comply with state and federal law and regulations: "A. Grantee in its exercise of rights under this agreement... at all times shall exercise the due care of a reasonably prudent person for the safety and welfare of all persons and of all public and private property, [and] shall comply with all laws of the State of Michigan and of the Federal government... ."[17]

Moreover, when the GLSLA was passed two years later in 1955, it unequivocally covers any unpatented, patented, filled or unfilled bottomlands and waters of the Great Lakes. Nothing in the GLSLA grandfathered previous easements. Nothing in the GLSLA legalizes previously allowed utility grants, such as the 1953 Easement transferred under Act 10 of 1952 (MCL 324.2129) which did not contain the standards required by Illinois Central or Michigan public trust law, and in any event, there are no recorded determinations or findings required for compliance with the public trust doctrine and the exceptions allowed by *Illinois Central* and *Obrecht*. Thus, while not directly at issue in this case, to the extent the question arises in the Court's mind, the 1953 Easement is itself void under the public trust law or the requirements for compliance with public trust standards incorporated into the GLSLA in 1955.

In any event, the Third Agreement clearly purports to establish additional and new authority for Enbridge to continue to use and occupy the bottomlands of the Straits

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[17] 1953 Easement, paragraph A., p. 4, Exhibit C to Plaintiff Enbridge's Brief in Opposition to State Defendants'6/27/2019 Motion for Summary Disposition and in Support of Judgment in Plaintiffs' Favor under MCR 2.116(I)(2), Aug. 1, 2019.

for the existing Line 5 dual pipelines, and for new and additional measures not part of the 1953 Easement:

"In entering into this Third Agreement, and *thereby authorizing* the Dual Pipelines to continue to operate....., the State has acted in accordance with and in furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan."[18] (Emphasis added)

There's no question the State and Enbridge recognized the requirements of the public trust doctrine, and tried to avoid those requirements, determinations, and findings required by the common law of public trust and the GLSLA. There can be no stronger evidence than the attempt to avoid or suspend the public trust and GLSLA by the language of the Third Agreement to "hereby authorize" the granting or creation of the continuing right to use and operate the existing Line by including the self-serving declaration in the agreement that the State acted "in accordance and in furtherance of the public's interest in the protection of waters... or bottomlands held in public trust by the State of Michigan." The problem is that the Enbridge has not obtained and the State has not authorized any such continued use under the Third Agreement under the GLSLA or by findings required by the public trust doctrine.[19]

2. The Third Agreement and its right of continued use was not authorized because it was not based on any determinations for the exceptions for disposition or use of public trust bottomlands and waters under the public trust doctrine.

The Michigan Defendants request this Court to dismiss Plaintiff Enbridge's claim that the Third Agreement grants it the right to continued use of the existing Line 5 dual pipelines in the Straits based on a violation of the common law public trust doctrine, citing *Glass v Goeckle*, *supra*, 473 Mich at 670, and *Collins v Gerhardt*, *supra*, 287 Mich

[18] See Verified Complaint, para. 63.c, p. 16.
[19] Argument II, A and B, this Brief, pp. 9-10, *supra*.

at 49.[20] Amicus Curiae FLOW agrees with this analysis and argument, but expands on the background and basis for this Court to grant summary disposition because the Third Agreement's right to continue use of the existing Line 5 was not based on the express determinations or findings required by the common law public trust doctrine under *Illinois Central* and *Obrecht*, *supra.*

The State, as sovereign, "has an obligation to protect and preserve the waters of the Great Lakes and *the lands beneath them* for the public" and "as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure." *Glass v. Goeckel*, *supra,* 703 N.W.2d at 64–65 (Mich. 2005). The State cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources. *Illinois Cent. R. Co. v. Illinois*, supra, at 455–60; *Obrecht v National Gypsum Co*, 105 NW2d at 149–150 (1960) (citing and adopting the principles of *Illinois Cent. R. Co.*). No part of the soils or bottomlands beneath the waters of the Great Lakes can be disposed of or occupied and used unless there is a finding that the disposition falls within at least one of two narrow exceptions (1)"improvement of the interest thus held;" or "without detriment to the public interest in the lands and waters remaining." *Obrecht,* 105 NWd 2d at 149; *Illinois Central*, 397 US at 455-60.[21]

On the face and within the reasonable inferences of Plaintiffs' Verified Complaint, there is no set of facts under which Plaintiff Enbridge can show or argue that Enbridge, the DNR, or the DEQ submitted or obtained the required authorization and findings for the Third Agreement and its claimed right to continue indefinitely the existing dual

[20] Michigan Defendants' Brief in Support of Summary Disposition, pp. 48-49.
[21] Argument II, *supra,* p. 9.

pipelines on and in the public trust lands and waters of the Straits of Mackinac. Moreover, as previously established, the self-serving contractual declaration in the Third Agreement does not constitute a finding of one or more of the standards for the narrow exceptions under *Illinois Central* and *Obrecht.*

Accordingly, the provision in the Third Agreement for the continued use or operation of the Line 5 dual pipelines in the Straits as a matter of law is invalid and unenforceable.

B. The Tunnel Agreement, DNR Easement to the Mackinac Straits Corridor Authority, and the Authority's Assignment of the Easement to locate, construct, use the public trust soils, bottomlands beneath the Straits of Mackinac are void and unenforceable because these dispositions and agreements were not authorized as required by the Great Lakes Submerged Lands Act and the common law public trust doctrine.

Further, the Verified Complaint alleges that the Tunnel Agreement, DNR Easement to the Mackinac Straits Corridor Authority, and the MSCA's Assignment of the Easement to Plaintiff Enbridge are all valid and enforceable.[22] Plaintiff claims that the Tunnel Agreement, DNR Easement, and its Assignment grant Enbridge the right "to enter, use, and occupy those subsurface soils and lands for the tunnel and replacement line."[23] Finally, Plaintiff Enbridge under Counts II of its Complaint requests declaratory judgment that all of the 2018 Tunnel Agreement, the DNR Easement and Assignment to Enbridge are and remain valid and enforceable under Michigan law.[24]

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[22] Id., paras. 6, 48-52.
[23] Id.
[24] Verified Complaint, paras. 91-93.

1. **The Tunnel Agreement, DNR Easement, and Assignment of Easement to Enbridge are Invalid and Unenforceable because they were not authorized as required by the Great Lakes Submerged Lands Act.**

As established above, the GLSLA applies to any disposition, conveyance document, or agreement for occupying or using the waters of the Great Lakes or the soils and lands beneath them. No deed, lease, or other disposition or such agreement for occupancy or use can be granted unless it is "determined by the department that the private use of those lands and waters... or that the public trust in the state will not be impaired by those agreements." GLSLA, *supra*, Section 32502, 32503(1); *Obrecht*, *supra*.

On the face and within the reasonable inferences of Plaintiffs' Verified Complaint, there is no set of facts under which Plaintiff Enbridge can show or argue that Enbridge, the DNR, or the DEQ submitted or obtained the required authorization and findings under the GLSLA and public trust exceptions for the Tunnel Agreement for 2018 Easement and Assignment to Enbridge or the 2018 Easement and Assignment to Enbridge, or the 99-year lease, for Enbridge to occupy, control, build, and operate a corridor tunnel for its proposed new pipeline in and through the soils under or beneath the Straits of Mackinac. And, as noted above, no self-serving contractual declaration or provision that the agreement, easement, or assignment are in the public interest regarding the waters and soils beneath the Great Lakes satisfies the determination or finding that one or more of the standards for the narrow exceptions under the GLSLA h*as been met. Obrecht, supra.*

Accordingly, the provisions in the Tunnel Agreement, the 2018 DNR Easement, and the 2018 Assignment of the Easement rights to Enbridge are invalid and unenforceable.

2. The Tunnel Agreement, DNR Easement, and Assignment of Easement to Enbridge are invalid and Unenforceable because they were not authorized as required by the common law public trust doctrine.

Again, as set forth in Argument III, A., 2, above, no disposition or alienation of public trust bottomlands on, in, under, or through the public trust soils under the Straits of Mackinac is authorized unless it is determined that one or more of the standards for the narrow exceptions for such conveyance or alienation are met.

On the face and within the reasonable inferences of Plaintiffs' Verified Complaint, there is no set of facts under which Plaintiff Enbridge can show or argue that Enbridge, the DNR, or the DEQ submitted or obtained the required authorization and findings under the GLSLA and public trust exceptions for the Tunnel Agreement for 2018 Easement and Assignment to Enbridge or the 2018 Easement and Assignment to Enbridge, or the 99-year lease, for Enbridge to occupy, control, build, and operate a corridor tunnel for its proposed new pipeline in and through the soils under or beneath the Straits of Mackinac. And, as noted above, no self-serving contractual declaration or provision that the agreement, easement, or assignment are in the public interest regarding the waters and soils beneath the Great Lakes satisfies the determination or finding that one or more of the standards for the narrow exceptions under the GLSLA has been met. *Illinois Central at 143,* and *Obrecht, 105 N.W. 2d. at 149, supra.*

Also, as discussed, in Argument III, A., above, it cannot be argued that the DNR conveyed the DNR Easement or authorized the Mackinac Straits Authority to transfer the Assignment of the Easement rights to Enbridge under 1952 PA Act 10, MCL 324.2129, because there is no evidence it was applied for or authorized by the DNR and/or the DEQ under the GLSLA or *Obrecht* standards. Act 10 public utility easements are and have

been subject to the GLSLA since it was passed in 1955. But even without reaching the question of a whether a public utility easement is subject to the GLSLA, Act 10 contains no standards at all that comply with *Illinois Central*, *Obrecht,* and *Superior Public Rights*, *supra*, 263 NS 2d. at 296.

Finally, Plaintiff Enbridge may point to the language and legal description in the 2018 Easement and Assignment to argue that the 2018 Easement and Assignment are not subject to the public trust doctrine or the GLSLA. First, under well more than 100 years of U.S. Supreme Court and Michigan Supreme Court precedent, the state sovereign title and interest held in trust extends to the soils, bottomlands, and lands beneath the navigable waters of Michigan, including the Great Lakes.

Second, any such easement, assignment, or other disposition or agreement for use and occupancy is expressly subject to the GLSLA. Section 32502 applies to any "sale, lease, exchange, or other disposition" and "those agreements for use, sales, lease or other disposition." See also Section 32503(1), which applies to "deeds, leases, or agreements covering unpatented lands.," and the express assertion of jurisdiction and the State's property and public trust power and obligations in prohibiting oil and gas development in the soils far beneath the waters of the Great Lakes. See also Section 325051) and (2).

Third, limiting the GLSLA or public trust doctrine to the surface area or near-surface area of the bottomlands of the Great Lakes would disturb the federal and state title relationship, and other titles or dispositions previously made by the State under the GLSLA; and, finally, under the plain meaning rule of statutory interpretation, *NL Ventures v City of Livonia,* 314 Mich App 222, 886 NW2d 782 (2015); *People v Allen,* 499 Mich 307, 315, 884 NW2d 548(2016), there is not is no language or phrase within

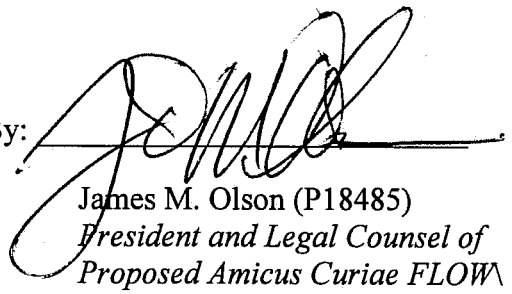
the GLSLA or public trust law that limits the title, sovereign property power or police power of the State, or the GLSLA to surface or near-surface lands beneath the waters of the Great Lakes; as stated above, the Legislature has already exercised its property, trust, and police power over oil and gas development in and under the bottomlands of the Great Lakes, development that would reach thousands of feet below the lakebed.

CONCLUSION AND RELIEF

For the foregoing reasons, Amicus Curiae Flow for Love of Water (FLOW) submits that this Court should grant, independently and in addition to the constitutional claims under Mich. Const. 1963, art. 4, sec. 24, summary disposition in favor of Michigan Defendants and against Plaintiff Enbridge, and expressly grant declaratory judgment to Michigan Defendants that the Third Agreement, the Tunnel Agreement, the 2018 DNR Easement, and the Assignment of the Easement to Enbridge are void, invalid and/or unenforceable as a matter of law under the requirements and standards of the common law of public trust and the Great Lakes Submerged Lands Act, MCL 324.32502 and 32503, the Legislature's sole authority for any deed, lease, exchange, other disposition, or agreement for use and occupancy of the waters of the Great Lakes and the soils, lands, and bottomlands beneath them.

Respectfully submitted,

Date: September 10, 2019

By: 

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

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

Plaintiffs,

v.

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

Defendants.

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

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PROOF OF SERVICE

On the date below, I sent by first class mail a copy of **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF FOR LOVE OF WATER (FLOW) IN SUPPORT OF STATE OF MICHIGAN** and **AMICUS CURIAE BRIEF OF FOR LOVE OF WATER (FLOW) IN SUPPORT OF STATE OF MICHIGAN** to the counsel of record of all parties to this cause, at their business addresses as set forth in the caption and/or disclosed by the pleadings filed in this matter.

The statements above are true to the best of my knowledge, information and belief.

OLSON, BZDOK & HOWARD, P.C.

Date: September 10, 2019

By: Karla Gerds
Karla Gerds, Legal Assistant

Courtesy copy via email to Counsel for Proposed Amicus Curiae:

Michigan Chamber of Commerce

Michigan Legislature