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The Environmental Protection of the Great Lakes and Enbridge's Line 5 Under the Straits of Mackinac

Brittany Hock

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CASE WESTERN RESERVE UNIVERSITY
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MEMORANDUM FOR THE UNITED STATES COAST GUARD

**Issue: The Environmental Protection of the Great Lakes and Enbridge's Line 5 Under
the Straits of Mackinac**

Prepared by: Brittany Hock
J.D. Candidate, 2017
Fall Semester, 2016

TABLE OF CONTENTS

I. Introduction	6
II. Summary of Conclusions	8
<i>a. The State of Michigan's Easement Authority</i>	8
<i>b. The State of Michigan's Authority under the Public Trust Doctrine</i>	8
<i>c. The State of Michigan's PHMSA opportunity to regulate oil pipelines</i>	8
<i>d. The Federal Government will likely not preempt the State of Michigan's actions</i>	8
1. Michigan, through their public trust doctrine and their statutes, do not cause a conflicting interest with the federal oversight of Enbridge Line 5.	8
2. While circuits are divided in federal preemption of public trust lands and bottomlands, the trend is to have a case-by-case analysis and it is unlikely that the federal government would preempt in the instant case.	8
<i>e. The government of Canada's is not an effected entity with legal recourse available</i>	9
III. Factual Background	9
<i>f. The 1953 Easement Granted by the State of Michigan</i>	10
<i>g. Enbridge Line 6B spill and the scrutiny of Line 5 under the Straits of Mackinac</i>	10
3. Maximum Unsupported Span Provision	11
<i>h. Enbridge Line 5 Permit Application History to the Michigan Department of Environmental Quality (MDEQ)</i>	12
IV. Legal Analysis	13
<i>i. Michigan's Sources of Authority to Act on Enbridge Line 5</i>	14
4. The 1953 Easement	14
5. The Public Trust Doctrine, Public Trust Hearings Under the Great Lakes Submerged Lands Act (GLSLA) Part 325	15
6. Pipeline Hazardous Materials Safety Administration Oil Pipeline Certification	19
<i>j. Federal preemption</i>	22
7. Federal Preemption of State Public Trust Doctrine	24
<i>k. Canada's government's interest lies strictly with Enbridge's economic benefit to Canada</i>	28
8. Enbridge's recourse in the event of a Line 5 shut down by Michigan	30
V. Conclusion	31

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I. Introduction

This memorandum discusses the environmental, legal, and governmental impact surrounding Enbridge Line 5, an oil pipeline sitting under the waters of Lake Michigan and Lake Huron through the Strait of Mackinac. Specifically, this memorandum's obligation investigates three topics including the sources of power that the State of Michigan has to act with against Enbridge and Line 5, the possibility of federal preemption by the United States Federal Government over Enbridge Line 5, and the recourse available to the country of Canada in the event of a shutdown of Enbridge Line 5 by the State of Michigan.¹

The State of Michigan has three sources of authority to act on the impending dangers caused by Enbridge's violations of the 1953 easement². First, the 1953 easement gives Michigan power to request that Enbridge comply with required safety measures documented in the Easement, and if Enbridge fails to or refuses to, Michigan can terminate the easement granting Enbridge access to lay Line 5 in its current geographical location. Second, Michigan holds public trust in the enjoyment of the Straits of Mackinac, and it is the state's duty and right to preserve it. The Public Trust doctrine is codified in case law precedent and in Michigan's Great Lakes Submerged Lands Act -- an act that Michigan could use to hold a "Public Trust Hearing." In a Public Trust Hearing, Enbridge and Michigan could work

¹ The original question presented by the U.S. Coast Guard is: the state of Michigan is currently studying whether or not to renew pipeline 5 across the Straits of Mackinac. This pipeline transfers petroleum from Northern Canada through Michigan to refineries in Windsor, Canada. The State of Michigan is reviewing whether or revoke or deny the permit, What recourse is available to effected entities? Is federal preemption a possibility? What remedies are available to the government of Canada?

² However, in October 2016, the State of Michigan granted partial permits to Enbridge, therefore, the question had to be reformulated and *the question that this paper addresses is*: following Enbridge 6B oil spill in 2010, the State of Michigan has studied Enbridge's oil pipelines and their interaction with Michigan's environment, most notably Line 5 under the Straits of Mackinac. Following the partial permit approval of support anchors for Enbridge Line 5, what is Michigan's overall authority over this interstate pipeline? Is federal preemption a possibility? What is the government of Canada's interest in Enbridge Line 5?

together collaboratively to preserve the public trust through state-facilitated communication. Third, Michigan could ask that the Pipeline Hazardous Safety Materials Administration (PHMSA), the federal entity that oversees interstate pipeline safety, transfer jurisdiction to the state of Michigan. Since Michigan has PHMSA certification of its gas pipelines, this paper concludes that the PHMSA channel of authority is the most reasonable for Michigan to pursue.

The United States federal government does have an interest in the regulation of Enbridge Line 5, granted to it through the regulatory authority of PHMSA. Federal preemption of Michigan's authority is always a therefore, but is unlikely. First, there is no "obstacle" or conflict of interest between federal regulation and any possible actions taken by Michigan. Second, courts have litigated public trust lands and federal preemption before and the trend is to not preempt lands held by states, such as Michigan and the Straits of Mackinac, in public trust.

The Canadian government's interest in Enbridge Line 5 is limited to economic interest in the jobs it provides for Canadian citizens and thus it benefits to the Canadian economy. If Michigan were to shut down Enbridge Line 5, the government of Canada would have no legal remedy action available. In a parallel situation, the Obama administration recently shut down construction of the Keystone Pipeline, an oil pipeline which was also owned by a Canadian company. While the government of Canada expressed public disappointment in that decision, the Canadian government took no legal action and the United States and Canadian governments maintained further trade friendliness. However, there is always a possibility that Enbridge's stakeholders and investors could sue the State of Michigan and the United States Government through NAFTA Chapter 11.

II. Summary of Conclusions

a. The State of Michigan's Easement Authority

The State of Michigan holds the right as the granting state of the 1953 easement to enforce Enbridge to comply with safety standards required in the document. Michigan has the option to request compliance and termination of Line 5, per provisions of the 1953 Easement.

b. The State of Michigan's Authority under the Public Trust Doctrine

The State of Michigan also holds the public trust in the bottomlands through the Straits of Mackinac. Michigan could hold a public trust hearing, which would ensure that Enbridge release documents and information showing that there was no damage or possibility of damage to the enjoyment of the waters, from the continued operation of Enbridge Line 5.

c. The State of Michigan's PHMSA opportunity to regulate oil pipelines

The State of Michigan, through legal procedural channels, could get PHMSA certified, therefore, giving them the federal power to oversee the safety and regulation of Line 5, and all oil pipelines within their state territory.

d. The Federal Government will likely not preempt the State of Michigan's actions

The United State's Federal Government has an interest in securing safety of oil and gas lines across interstate and international lands. PHMSA is the federal body overseeing and prescribing pipeline safety, pipeline regulation, and oil spill plans. Federal Preemption is a possibility, but is unlikely given two reasons:

1. Michigan, through their public trust doctrine and their statutes, do not cause a conflicting interest with the federal oversight of Enbridge Line 5.
2. While circuits are divided in federal preemption of public trust lands and bottomlands, the trend is to have a case-by-case analysis and it is unlikely that the federal government would preempt in the instant case.

e. *The government of Canada's is not an effected entity with legal recourse available*

The government of Canada's interest in Enbridge Line 5 stops at its economic impact on their country, their citizens, and the jobs it provides. The government of Canada has no recourse available, should Michigan decide to shut down Enbridge Line 5. However, the stakeholders and investors of Enbridge Line 5 could ensue legal recourse against American government under NAFTA section 11.

III. Factual Background

Petroleum is a major industry in the United States and abroad. In the United States, it plays a role in almost every facet of business, and the United States' economy is impacted by its existence. In 2011 the in oil and gas industry supported 9.8 million full-time and part-time jobs, or about 5.6% of the total United State's employment; the industry's total impact on United State's Gross Domestic Product (GDP) was 1.2 trillion, or about 8% of the economy³. In Michigan, as of 2011, Michigan ranked 11th in the country in the total number of jobs attributable to the oil and gas industry⁴. Pipelines, as the primary mode of transportation, move oil from the oil fields on and off shore to refineries, and from those refineries to sites where it is then transported for retail and other types of consumption⁵. In Michigan, pipelines, such as the Enbridge Line 5 under the Strait of Mackinac, are the preferred use of oil and gas transportation.

³ PriceWaterhouseCoopers, *Economic Impacts of the Oil and Natural Gas Industry in 2011* (Washington, D.C. July 2013) (Prepared for the American Petroleum Institute) [Electronic copy provided in the accompanying USB flash drive at Source 2]

⁴ *The Great Lakes Commission, Issues and Trends Surrounding the Movement of Crude Oil in the Great Lakes-St. Lawrence River Region* (February 2015) pg. 22, available at http://glc.org/files/projects/oil/GLC-Oil_Report-20150220-FINAL.pdf (accessed October 30, 2016)[Electronic copy provided in the accompanying USB flash drive at Source 3]

⁵ American Petroleum Institute, *Where are the oil pipelines?* <http://www.api.org/oil-and-natural-gas-overview/transporting-oil-and-natural-gas/pipelines/where-are-the-oil-pipelines> (accessed September 20, 2016)[Electronic copy provided in the accompanying USB flash drive at Source 4]

f. The 1953 Easement Granted by the State of Michigan

In March 1953, Lakehead Pipeline Company, Enbridge's predecessor in interest, obtained approval via an easement to construct, operate and maintain Pipeline 5 under the Straits of Mackinac. Line 5 was built and designed to transport crude oil produced in Canada from another pipeline in Superior Wisconsin, to a refinery in Sarnia, Ontario. Line 5 under the Straits is divided into two parallel pipelines, each of which is 20 inches in diameter and extends more than four miles across the lake bottom. Right before the creation of the easement, Michigan enacted 1953 PA 10, a law that authorized the Conservation Commission (which is now the Michigan Department of Environmental Quality) to grant easements and permits across state-owned lands and waterways for the purpose of constructing, operating, and maintaining pipelines and other utilities. Enbridge pipeline line 5 has stayed the same since it was constructed in the 1950s.

g. Enbridge Line 6B spill and the scrutiny of Line 5 under the Straits of Mackinac

Since its creation, Line 5 has transported more crude oil than anticipated at the time of the original easement, and has been exposed to destructive elements of the lake bottomlands, such as mussel overgrowth and corrosion from currents. In 2010, another project of Enbridge, Enbridge Line 6B, spilled over 800,000 barrels of oil into the Kalamazoo river in Michigan. That spill was attributed to Enbridge's failures to maintain the line safely, and failure to adequately respond to the spill in a prompt time to prevent further spillage. The location of Line 6B, also within the territory of Michigan, led to an increased amount of scrutiny and fear about what could happen if Line 5 failed under the Straits of Mackinac. This scrutiny led the State of Michigan and various environmental groups and organizations to discover at least eight violations by Enbridge of the 1953 easement. However, the maximum unsupported

span violation, listed below, is what made the state of Michigan request a permit process from Enbridge to remedy.

3. Maximum Unsupported Span Provision

Section (A)(1) of the 1953 Line 5 Easement states that “the maximum span or length of pipe unsupported shall not exceed 75 feet.”⁶ This engineering requirement was meant to ensure that the heavy steel pipelines would be adequately supported, not sitting on the bottomland, and that the pipeline would sustain the currents of the Straits of Mackinac. In 2001, Enbridge applied for an “emergency” permits to The Michigan Department of Environmental Quality (MDEQ) and the Army Corps of Engineers to “provide support underneath our pipelines in sections where the pipeline shows spans unsupported over too great a distance.”⁷ Since 2001, there has been a continuous pattern of permit applications to MDEQ to remedy the unsupported span provision, as evidenced by the most recent permit application, fifteen years later in 2016. No one really knows if the pipelines were actually outfitted with support anchors every seventy-five (75) feet during original construction, as required by the 1953 Easement. But what is known is that there has been decades of non-compliance with the support anchor provision. In 2014, Enbridge submitted documentation to the state of Michigan of ROV (underwater rover) inspection of the pipeline, as part of an ongoing construction permit process stemming from 2001⁸. The documentation shows that, as far back as 1963, there have not been support anchors at the required lengths of every seventy-five feet.

⁶ Lakehead [Enbridge] and State of Michigan 1953 Easement. [Electronic copy provided in the accompanying USB flash drive at source 5]

⁷ Letter from Enbridge to the State of Michigan. November 19, 2014. [Electronic copy provided in the accompanying USB flash drive at Source 7]

⁸ Letter from Enbridge to the State of Michigan, June 27, 2014. [Electronic copy provided in the accompanying USB flash drive at Source 8]

h. Enbridge Line 5 Permit Application History to the Michigan Department of Environmental Quality (MDEQ)

As stated above, the State of Michigan knows of Enbridge's numerous violations to the 1953 easement. The Michigan Department of Environmental Quality (MDEQ) has granted permits to Enbridge in an effort to remedy the unsupported span provision as far back as 2001⁹. The greatest effort between Michigan and Enbridge took place in 2014 when MDEQ issued Enbridge a permit for construction for forty support anchors. Following the completion of the forty additional anchors in 2014, Enbridge represented to the State of Michigan that its "predictive maintenance model...has confirmed that pipeline spans will not exceed 75 feet." However, on July 26, 2016, Enbridge filed a joint permit application to MDEQ and the Army Corps of Engineers for up to twenty-two (22) support anchors; the application for which stated that four (4) of the support anchor locations were required per the 1953 Easement, and the other remaining eighteen (18) were for further "preventative maintenance."¹⁰

On August 3, 2016, the Michigan Attorney General, MDEQ Director, and others sent Enbridge a demand letter to cure the violation of the 1953 Easement for failure to provide, at minimum, supports every 75-feet along the pipelines¹¹. The letter also demanded that Enbridge explain within fourteen days how and why the predictive model produced in 2014 had failed, causing need for more permit applications only two years after the 2014 construction project¹².

⁹ Letter from Enbridge to MDEQ. September 14, 2001. [Electronic copy provided by accompanying USB flash drive at Source 6, page 8]

¹⁰ Letter from Enbridge to the State of Michigan. November 19, 2014. [Electronic copy provided in the accompanying USB flash drive at Source 7]

¹¹ Letter from Enbridge to Attorney General. August 11, 2016. [Electronic copy provided in the accompanying USB flash drive at Source 10]

¹² *Id.*

Enbridge was unable to provide the predicative model to which they referred in 2014. Nonetheless, on October 3, 2016 MDEQ approved four of the anchors sought by the 2016 permit. MDEQ stated that “[these] four supports are proposed to maintain the integrity and safety of the exiting pipeline and to comply with Enbridge’s Straits of Mackinac Pipeline Easement...[however] due to significant public comment, and after consultation with the Grand Traverse Band of Ottawa and Chippewa Indians, the MDEQ has decided to defer a permitting decision on the additional 18 supports.¹³”

IV. Legal Analysis

The State of Michigan, as the grantor state to the 1953 Easement giving permission for Enbridge to install the original Line 5 pipelines under the Straits of Mackinac, has three sources of authority to act on the dangers presented by Line 5’s numerous violations of the Easement. The first source of authority is to act under the “termination” clause of the Easement, which gives Michigan the power to terminate the Easement in the event of any violation of any of the Easement’s provisions or law. Second, the state of Michigan could initiate a Public Trust Hearing, as mentioned in the Great Lakes Submerged Lands Act. The third, and most plausible source of authority is to get certified through the federal entity, Pipeline Hazardous Materials Safety Administration (PHMSA).

Federal preemption of any actions, by the State of Michigan, against Enbridge line 5, an interstate oil pipeline, is unlikely given two reasons. First, there is no conflict of interest between both parties. Second, should the State of Michigan act to get PHMSA certified, it is

¹³ Michigan Department of Environmental Quality. MDEQ Approves Permit to Add Four Helical Supports to Enbridge Line 5. October 3, 2016. <http://www.michigan.gov/deq/0,4561,7-135--394723--,00.html> [Electronic copy provided in the accompanying USB flash drive at source 11]

unlikely that the federal government could step in, if Michigan had a relationship with federal regulators made possible by the abovementioned PHMSA certification.

Lastly, the Canadian government is not an effected entity in this situation. The Canadian government has an interest in Enbridge and Enbridge's economic benefit to Canada, but it extends as far as such. However, should the State of Michigan decide to shut down Enbridge line 5, it is plausible that stakeholders of Enbridge could sue the administration.

i. Michigan's Sources of Authority to Act on Enbridge Line 5

4. The 1953 Easement

On April 23, 1953 the Conservation Commission of Michigan granted the "Straits of Mackinac Pipe line Easement" to Lakehead Pipe Line Company, Enbridge's corporate predecessor¹⁴. The 1953 Easement is a legally binding document between the State of Michigan and Enbridge, as successor to Lakehead Pipe Line Company. Of interest to the State of Michigan, Paragraph (C) "Termination" states: "the State can terminate the Easement if, within 90 days after notice of any breach of the terms and conditions of the Easement, Lakehead [Enbridge] fails to correct the breach¹⁵." Applied with today's situation, Enbridge is in violation of numerous provisions. Specifically they are violating eight total provisions explicitly stated in the 1953 Easement which include:

1. The Standard of Care as a Reasonably Prudent Person Provision
2. Indemnity Provision
3. Pipeline Exterior Slats and Coating Requirements

¹⁴ Michigan Petroleum Pipeline Task Report. Department of Attorney General, Department of Environmental Quality. July 2015. Pg 39. [Electronic copy provided on the accompanying USB flash drive at Source 9]

¹⁵ 1953 Easement, Paragraph C. [Electronic copy provided in the accompanying USB flash drive at Source 5]

4. Pipeline Wall Thickness Provision
5. Pipeline Minimum Curvature Requirement
6. Maximum Unsupported Span Provision
7. Federal Violation of Emergency Oil Spill Response Plan
8. State Violation under the Michigan Environmental Protection Action

Any violation of any of the above triggers the “termination” clause of the 1953 Easement.

When it becomes clear to the State of Michigan that Enbridge cannot cure all of the above-mentioned violations of the 1953 Easement, the State of Michigan can terminate the conditional authorization to transport oil in Line 5 under the Straits of Mackinac.

5. The Public Trust Doctrine, Public Trust Hearings Under the Great Lakes Submerged Lands Act (GLSLA) Part 325

When the State of Michigan granted siting privileges for Line 5 to Lakehead, Enbridge’s successor in interest, they did so on State-Owned lands. This action was codified in statute MCL 324.2129 which reads:

“The department may grant easements, upon terms and conditions the department determines just and reasonable....for the purpose of constructing, erecting, laying, maintaining, and operating pipelines.... over, through, under, and upon any and all lands belonging to the state which are under the jurisdiction of the department and over, through, under, and upon any and all lands of the unpatented overflowed lands, made lands, and lake bottomlands belonging to or held in trust by this state¹⁶.”

¹⁶ MCL 324.2129 [Electronic copy provided at the accompanying USB flash drive, Source 12]

The State of Michigan used this authority to implement the Easement between them and Enbridge that still stands today; therefore, when the Easement was granted, the concept of the public trust, the public trust doctrine, and the state's exclusive power within public trust were considered and signed upon between the two parties. In the 1953 Easement, the State of Michigan's public trust interest was also incorporated. On page three (3) through four (4) the Easement, it reads: "Grantee...at all times shall exercise the due care of a reasonable prudent person for the safety and welfare of all persons and of all public and private property.¹⁷"

Public trust is directed by the States in precedent as well. In *Illinois Central Railroad Co v. Illinois*, the Supreme Court of the United States held that each State in its sovereign capacity holds permanent title to all submerged lands within its borders and holds these lands in public trust¹⁸. The Public Trust doctrine says that certain resources are held in trust by the State for the benefit of the State's citizens and public; the State has a perpetual duty to protect those resources and the public's right to use and benefit from them for activities such as navigation, fishing, water consumption, and tourism. Applied in the instant case, the "bottomlands" of the Straits of Mackinac where Enbridge Line 5 lies is land held in public trust by the State of Michigan; therefore, it is Michigan's duty to protect this land from impairment or harm by Line 5's continued operation and maintenance.

In 1955, shortly after the establishment of the 1953 Easement, the Michigan legislature incorporated the State's public trust responsibilities under the public trust

¹⁷ 1953 Easement. Pg 3, Pg 4. [Electronic copy provided at the accompanying USB flash drive, Source 5]

¹⁸ *Illinois Central Railroad v. Illinois*, 146 U.S. 387(1892). [Electronic copy provided in the accompanying USB flash drive at Source 13]

doctrine into the Great Lakes Submerged Lands Act (GLSLA). GLSLA entails executive branch issued rules to dictate details of a public trust determination in situations where public trust could be at harm. Lastly, the GLSLA was created with the basis of the public trust doctrine, in order for “Michigan to protect the public’s interest in the bottomlands and waters...”¹⁹

Although Line 5 was permitted and constructed in 1953, prior to the enactment of GLSLA, Enbridge is subject to GLSLA’s procedures and duties. In Opinion # 5214, by Frank J. Kelley, Attorney General of the State of Michigan, stated that the “Great Lakes Submerged Lands Act requires that a person holding title or right of possession to land which has been deeded by or leased from the State pursuant to the [Great Lakes Submerged Lands Act] obtain a permit before filling, dredging, or placing soil below the ordinary high water mark.”²⁰ Pertaining to Enbridge, they hold a right of possession to the bottomlands through the Strait of Mackinac, as permitted to them via the 1953 Easement. Therefore, the 1953 Easement makes Enbridge an entity liable for proceedings, actions, and requirements as listed by the GLSLA. Additionally, Enbridge has acted within accordance of the GLSLA by filing permits for construction since 2001 until present.

If Michigan were to act under the Great Lakes Submerged Lands Act, it could hold a public trust proceeding. The procedure for such is not explicitly stated in the GLSLA, but the Act does provide opportunities under R 322.1017 “Hearings” which states:

¹⁹Great Lakes Bottomland Conveyances. Michigan Department of Environmental Quality. http://www.michigan.gov/deq/0,1607,7-135-3313_3677_3702-10865--,00.html [Electronic copy provided in accompanying USB flash drive at Source 1]

²⁰ Opinion #5214. State of Michigan, Frank J. Kelley, Attorney General. <http://www.ag.state.mi.us/opinion/datafiles/1970s/op05214.htm> [Electronic copy provided in the accompanying USB flash drive, Source 14]

(1) The department may hold a public comment hearing when a proposed project appears to be controversial, where additional information is desired before action by the department, or upon request, if such request is made within the public notice period²¹.

The GLSLA also has a section that codifies public interest which states:

“a determination by the department (the Michigan Department of Environmental Quality) that the private or public use of such lands and waters will neither substantially affect the public use thereof nor impair the public trust or interest of the State.²²”

Environmental groups have looked at the GLSLA as a whole to determine that a public trust hearing is appropriate and plausible. Under a proposed “public trust hearing,” the State of Michigan could initiate a hearing to determine whether the continued operation, installment of support anchors, or any other action by Enbridge Line 5 affects public trust in the Straits of Mackinac. The Oil and Water Don’t Mix Campaign states that the GLSLA provides specific protections which include:

1. Open public access with full disclosure with notice to impacted local units of government and riparian owners
2. Participation by the tribes to protect their public use right

²¹ Department of Environmental Quality, Land and Water Management. Great Lakes Submerged Lands Act. [Electronic copy provided in the accompanying USB flash drive at Source 15]

²² *Id.*

3. The opportunity to explore the cost and feasibility of a full range of alternatives including decommission, re-routing, replacement or secondary containment²³.

The hearing would require Enbridge to show that Line 5 pipeline does not harm or affect Michigan's public trust in the Straits of Mackinac bottomlands, or alternatively they could show that they are taking reasonable steps to protect public's use of the Straits of Mackinac. The review period for a public trust hearing could be ongoing and formally reviewed under the GLSLA on a timetable exclusively prescribed by the State of Michigan.

6. Pipeline Hazardous Materials Safety Administration (PHMSA) Oil Pipeline Certification

Under the traditional scheme of interstate oil pipelines, the Pipeline Hazardous Materials Safety Administration (PHMSA) is the federal regulator. PHMSA, a Department of Transportation agency, was created in 2004 to act as the regulator of pipeline safety. PHMSA is responsible for creating and enforcing regulations for safe, reliable, and environmentally sound operation of over 2.6 million miles of hazardous liquid pipelines on United States soil. The Pipeline Safety Act grants PHMSA two main regulatory responsibilities:

1. Transportation of Hazardous Liquids by Pipelines: this includes regulation of pipeline reports, design, materials, construction, pressure testing, operations,

²³ Oil and Water Don't Mix. The State's Duty Under Public Trust Law to Protect the Great Lakes from the Operation of Line 5 Oil Pipelines in the Straits. December 15, 2014. http://www.michigan.gov/documents/deq/Appendix_C.4_494005_7.pdf [Electronic copy provided at the accompanying USB flash drive at Source 16]

maintenance, corrosion control, integrity management, operator qualification, public awareness, and damage prevention²⁴.

2. Response Plans for Onshore Oil Pipelines²⁵: this requires oil and gas line owners, such as Enbridge in the instant case, to have federally approved oil spill response plans. While PHMSA is the entity that reviews and approves oil and gas spill cleanup and response plans, the United States Coast Guard also an opportunity to review. These regulations must be re-submitted at least every five (5) years, or sooner if any changes occur.

While regulation of interstate and intrastate pipelines takes place at the federal level, PHMSA and the federal government have generally no authority on the siting of pipelines. Siting pipelines means that states, such as Michigan, have the power to decide regarding hazardous liquid pipelines are placed, but after any oil or gas pipeline is constructed, pipeline regulation is relinquished to PHMSA. Under the Pipeline Safety Act, states can regulate intrastate pipelines under certain conditions, but states are not able to regulate interstate pipelines independent of the federal government²⁶.

The Pipeline Safety Act provides each state the option to develop and implement it's own safety protocol and programs for hazardous liquid (oil and gas) pipelines. Under this Act, Michigan could decide to establish parallel programs to their federal counterparts for regulating hazardous pipelines within the State of Michigan. Should Michigan choose to do so, this would require the enactment of new state laws, new state

²⁴ Michigan Petroleum Pipeline Task Report. Department of Attorney General, Department of Environmental Quality. July 2015. [Electronic copy provided on the accompanying USB flash drive at Source 9]

²⁵ *Id.*

²⁶ 49 USC 60104(c) [Electronic copy provided on the accompanying USB flash drive, Source 19]

regulations consistent with federal standards, and funding, recruitment, and work of staff to oversee the above-mentioned duties²⁷. To ensure federal standards and for funding benefits of state-made laws under the Pipeline Safety Act, Michigan would likely need to retain PHMSA certification of their oil pipeline programs²⁸.

The “PHMSA certification” process certifies to the federal government that the State’s oil and gas pipeline safety and regulation program is at least as strict as the federal requirements. Once approved and certified, the State can assume responsibility for regulation of intrastate pipelines in place of PHMSA²⁹. This can translate to interstate pipeline authority, which is relevant to the State of Michigan’s regulation of Enbridge line 5, since line 5 is an interstate pipeline. Should Michigan receive PHMSA certification of intrastate oil pipelines, they can enter into an agreement with PHMSA to participate in the oversight of interstate pipelines located within state-territory³⁰. Under this type of relationship between the State of Michigan and PHMSA, the established State programs can assist PHMSA with overseeing record maintenance, reporting requirements, and with required pipeline inspections. This relationship would be helpful for Michigan, as it is documented that Enbridge is in violation of the “Federal Violation of Oil Spill Response Plan” required under the Easement, therefore, Michigan could act under a PHMSA certification relationship to pursue compliance, or take actions such as shutdown. Additionally, the PHMSA-Michigan relationship also foreseeably

²⁷ Michigan Petroleum Pipeline Report 2015, pg 33. [Electronic copy provided at the accompanying USB flash drive, Source 9]

²⁸ *Id.*

²⁹ 49 USC 60105 [Electronic copy provided at the accompanying USB flash drive, Source 17]

³⁰ 49 USC 60106 [Electronic copy provided at the accompanying USB flash drive, Source 18]

opens up lines of communication between PHMSA and the State of Michigan, so as to make any chance of federal preemption of Michigan-made oil pipeline laws unlikely.

Currently, Michigan has no state regulatory programs for their oil pipelines, under the Pipeline Safety Act. There is also no established relationship between the Michigan and PHMSA regarding oil pipelines regulations. However, but the likelihood of Michigan pursuing this type of regulatory certification process through PHMSA is high. The reason being is that Michigan is home to gas lines too. Michigan has received PHMSA certification through the abovementioned process to act as the federal regulatory of intrastate gas pipelines, and they assist PHMSA to regulate interstate gas lines. Given Michigan's effort to receive PHMSA certification for their gas lines, it is plausible that they also receive PHMSA certification for their oil pipelines.

j. Federal preemption

Federal preemption is a legal doctrine by which state governments are deprived of their power to act within a given area, whether or not the state law, rule, or action is in direct conflict with federal law. The Constitutional power to preempt state laws is given to Congress; the judicial branch does not actually preempt, "they adjudicate disputes in which a litigant asserts that Congress has preempted by express words or by implication." When deciding if preemption occurred "...[the] sole task is to ascertain the intent of Congress.³¹" The intent to preempt should be "clear and manifest purpose of Congress.³²"

³¹ *California Fed. Savings & Loan Assn. v. Guerra*, 479 U.S. 272 (1978)[Electronic copy provided in the accompanying USB flash drive, Source 20]

³² *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)[Electronic copy provided in the accompanying USB flash drive, Source 21]

If the congressional intent to preempt state law is found, the scope is determined and “must rest primarily on a fair understanding of congressional purpose.³³” The court, when deciding preemption, “will look at indicia of congressional purposes concerning preemption, will consider what the preemption context or case law had been, and what the Congress had said concerning what prior context, as of the time Congress adopted the preemption language.³⁴” Applying these principles, courts have established that there is a “basic assumption that Congress did not intend to displace state law.³⁵” There is a presumption that the states still retain their utmost “police power” and that power is never preempted by federal law unless it is “the clear and manifest purpose of Congress to supplant state law...that is, the express or implied preemption criteria have been satisfied for a particular federal statute or rule, and the statute or rule applies to the particular set of facts.³⁶” Additionally, if Congress has not entirely displaced state regulation over the matter in question, state law is only preempted to the extent that it actually conflicts with federal law and the state law becomes an “obstacle³⁷.”

Applying these court rulings to the instant case, federal preemption is unlikely. The federal government and Congress, through the creation of PHMSA in 2004, did show intent to occupy the “field” of regulation of hazardous liquid pipeline safety and spill

³³ *Medtronic Inc. v. Lohr*, S. Ct. 2240, 2250 (1994) [Electronic copy provided in the accompanying USB flash drive, Source 22]

³⁴ The Basics of Preemption, The American Bar Association. http://apps.americanbar.org/abastore/products/books/abstracts/5010047samplechp_abs.pdf [Electronic copy provided in the accompanying USB flash drive, Source 23]

³⁵ *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) [Electronic copy provided in the accompanying USB flash drive, Source 24]

³⁶ The Basics of Preemption, The American Bar Association. Pg. 7. [Electronic copy provided in the accompanying USB flash drive, Source 23]

³⁷ *Silkwood v. Kerr-McGee Corp* [Electronic copy provided in the accompanying USB flash drive, Source 25]

plans. But the State of Michigan does not currently have any oil line regulatory law or agencies. The only guiding statute is that of the Great Lakes Submerged Lands Act (GLSLA), which is a broad statute that involves any activity on the Great Lakes, not just oil pipelines and it does not define any regulatory powers within. As described above, the GLSLA provides for public trust hearings, and for procedures on construction of anything on state-owned lands and waters. If the State of Michigan decided to shut down Enbridge Line 5, whether it is due to public trust concerns or the documented violations of the 1953 Easement, Congress did not intend to occupy this field allowing preemptions. The construction and placement of hazardous pipelines, or siting, is reserved to the States. Additionally, Enbridge Line 5 was enacted through a state-created Easement that predates PHMSA and federal regulation of interstate pipelines; the State of Michigan still holds power as the grantor state, to terminate the 1953 Easement due to Enbridge's failure to comply with terms or conditions of the document.³⁸

7. Federal Preemption of State Public Trust Doctrine

It is well documented that States hold lands, such as lake bottomlands, in trust for their citizens. Although the public trust doctrine is referred to generally as a single legal doctrine, the doctrine itself varies from state-to-state. The variability of the doctrine was noticed as early as 1894 in *Shively v. Bowlby*:

There is no universal and uniform law upon which the subject [of title to lands under tide waters]; but that each State has dealt with lands under which the tide

³⁸ 40 U.S. Code 1314 [Electronic copy provided in the accompanying USB flash drive, Source 26]

waters within its border according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interest of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.³⁹

Nevertheless, States hold a valid trust in their lands and waters; the federal government holds property interest in the waters and submerged lands through the federal navigational servitude doctrine. Stemming from the Commerce Clause of the United States Constitution, this power of the federal government is primarily the privilege of the federal government to appropriate private interests in water for public use without compensation⁴⁰. The States, through their public trust doctrine, have authority to regulate waters within their boundaries, but State interest must yield when in conflict with the federal navigational servitude doctrine. In *United States v. Rand* the court stated:

The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, all of the navigable waters of the United States...for this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.⁴¹

³⁹ *Shively v. Bowlby*, 152 U.S. 1, 26 (1894) [Electronic copy provided in the accompanying USB flash drive, Source 27]

⁴⁰ Federal Property and the Preemption of the State Public Trust Doctrines. Environmental Law Report, 20 ELR 10003. 1990. <https://elr.info/sites/default/files/articles/20.10003.htm> [Electronic copy provided in the accompanying USB flash drive, Source 28]

⁴¹ *United States v. Rand*, 389 U.S. 121 (1967) [Electronic copy provided in the accompanying USB flash drive, Source 29]

This doctrine is vast and it has been recognized that it is absolute. In *South Carolina v. Georgia*, the federal government used this power to reroute a waterway⁴²; in *U.S. v. Commodore Park*, the federal government used this doctrine to block a navigable creek⁴³; and in *United States v. Chandler-Dunbar Water Power Co*, the federal government used its power to de-water a river⁴⁴, all without compensation to parties adversely affected.

The federal government's interest in the Straits of Mackinac is directly related to the commerce principles articulated in *Rand*, therefore, the waters and bottomlands of the Straits of Mackinac fall under the federal navigational servitude doctrine. While the doctrine of federal navigational servitude is recognized as vast, preemption over a state's public trust lands and water will not likely occur in the instant case of Enbridge line 5 and the state of Michigan. In *Kaiser Aetna v. United States*, the court addressed the federal's government limits of the doctrine of navigational servitude. In *Kaiser*, a real-estate developer took a pond in Hawaii and widened it for the exclusive use of his development community. The United States federal government became involved when the developer denied public access to the pond, which had been transformed to a marina. The United States government alleged that the alteration of the pond made it "navigable waters" available for use of the federal government, per the Commerce Clause and the navigational servitude doctrine. The Supreme Court of the United States ruled that the marina in question had not become "navigable waters," which would

⁴² *South Carolina v. Georgia*, 93 U.S. 4, (1876)[Electronic copy provided in the accompanying USB flash drive, Source 29]

⁴³ *United States v. Commodore Park, Inc.*, 324 U.S. 386, (1945) [Electronic copy provided in the accompanying USB flash drive, Source 30]

⁴⁴ *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) [Electronic copy provided in the accompanying USB flash drive, Source 31]

trigger the doctrine, and even if it were navigable waters, the doctrine should be limited because the government could not step in and take property rights of the private developer without just compensation for the intrusion⁴⁵.

In *Phillips Petroleum Co. v. Mississippi*, the Supreme Court of the United States extended the reach of the public trust to include not only navigable waters, but to also inland non-navigable tidelands. The *Phillips* court stated that the State of Mississippi held title to all lands underneath the waters subject to the ebb and flow of the tide, regardless of whether the waters were navigable.⁴⁶ This holding extended the public trust doctrine beyond previous established precedent and common law doctrines, to also touch non-navigable lands and waters.

In conclusion, although the federal government through the navigational servitude doctrine theoretically has the power to preempt state public trust doctrines, it is not likely to do so in this case. Considering the Supreme Court's limitation on the navigational servitude doctrine in *Kaiser*, along with the expansion of the state's public trust doctrine in *Phillips*, it appears that the threat of federal preemption, by federal navigational servitude, of a state's coastal lands and waters, is minimal. Should the State of Michigan choose to take action against Enbridge Line 5, either by requesting modification, re-routing, or total shut down of Line 5 under the public trust doctrine, the federal government should not preempt Michigan's state actions under the federal navigational servitude doctrine.

⁴⁵ *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) [Electronic copy provided in the accompanying USB flash drive, Source 32]

⁴⁶ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) [Electronic copy provided in the accompanying USB flash drive, Source 33]

k. Canada's government's interest lies strictly with Enbridge's economic benefit to their country

Enbridge Line 5 is owned by a private Canadian Company whose headquarters are in Calgary, Canada. While they are a Canadian-based company, they do not have a public affiliation with the government of Canada. Therefore, should the State of Michigan decide to shut down Enbridge Line 5, the Canadian government would have no available recourse. A similar situation arose in November 2015 when President Barack Obama's administration rejected a permit to build "Keystone XL" an oil pipeline that would have stretched 1,179-miles from oil sands in Alberta, Canada to Steele City Nebraska. It would have carried 830,000 barrels of oil daily, and it would have the same origin and destination as the other pipeline "Keystone," both of which are owned by TransCanada, a Canadian oil company also based in Calgary, Canada. In March 2010, the Canadian National Energy Board had approved the construction of the Keystone XL pipeline, but because the XL pipeline would have crossed U.S. and Canadian borders, the project required a permit from the sitting U.S. President⁴⁷. In February 2014, a republican-led Congress voted to permit construction immediately, but President Obama vetoed the bill and rejected the permit altogether which stopped the construction of Keystone XL.

Just like Enbridge, TransCanada and the Keystone XL pipeline project yielded protests and environmental concerns from state and federal groups. The United States Department of State said in 2011 that TransCanada needed to assess alternative routes for the XL pipeline due to the fragile ecosystem of Nebraska. The Keystone Pipeline, owned by

⁴⁷ Application for Keystone Pipeline for Presidential Permit Authorizing Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border. 2011. <https://keystonepipeline-xl.state.gov/documents/organization/189504.pdf> [Electronic copy provided in the accompanying USB flash drive, Source 34]

TransCanada, has also had numerous oil spills, which called into question its safety and the future safety of an additional oil pipeline meant to carry more oil in a fragile environment.

Following President Obama's rejection of Keystone XL, Prime Minister Justin Trudeau stated: "we are disappointed by the decision but respect the right of the United States to make the decision...the Canadian-U.S. relationship is much bigger than any one project and I look forward to a fresh start with President Obama to strengthen our remarkable ties in spirit of friendship and co-operation."⁴⁸ While Keystone XL would have brought jobs and more financial benefit to the country of Canada, the Canadian government's interest in Keystone XL's construction and further permit rejection ended there.

Similarly, should the State of Michigan choose to shut down Enbridge Line 5, the government of Canada would not be an affected entity with standing to seek legal recourse. The governments of Canada and the United States rely on one another heavily, especially in the transport and production of oil and gas. In 2015, Canada provided 45% of all crude oil imports to the United States⁴⁹, almost three times as much oil as imported from all Persia Gulf countries combined. The transportation of this crude oil is mostly done by pipeline, with about 65% of Canadian crude oil imports done by pipelines such as Keystone or Enbridge Line 5⁵⁰. Given this, both the United States and Canada rely on each other for their energy needs. But the dangers of oil pipelines across bodies of waters are not unknown, and the dangers should not go ignored by either the United States or Canadian governments. An open-

⁴⁸ Justin Trudeau 'disappointed' with U.S. rejection of Keystone XL. CBC News. November 06, 2015. <http://www.cbc.ca/news/politics/canada-keystone-pipeline-trudeau-obama-1.3307458> [Electronic copy provided in the accompanying USB flash drive, Source 35]

⁴⁹ Today in Energy, Independent Statistics and Analysis, U.S. Energy Information Administration. November 12, 2015.

<http://www.eia.gov/todayinenergy/detail.php?id=23732&src=email> [Electronic copy provided in the accompanying USB flash drive, Source 36]

⁵⁰ *Id.*

system of communication is needed between both countries to ensure that issues, such as the issues arising out of Enbridge's violations in the Straits of Mackinac, are addressed promptly.

As a policy argument, there should be no recourse established for either country, in the event of an oil pipeline being shut down. In the instant case, Enbridge Line 5 is a documented danger to the Straits of Mackinac, it is within the best interests of both countries, and all parties involved to ensure that Enbridge Line 5 is operationally safe and devoid of significant risks for spills.

8. Enbridge's recourse in the event of a Line 5 shut down by Michigan

While the government of Canada has no legal course available in the event of a shutdown of Enbridge Line 5, Enbridge and their stakeholders do. Under Chapter 11 of the North American Free Trade Agreement (NAFTA), Enbridge and their stakeholders can sue the United State's Federal government in secret arbitrational tribunals, if they feel that a regulatory law or governmental decision affects their investment, or is in conflict with NAFTA rights given to corporations by NAFTA. If a corporation wins in a NAFTA Chapter 11 proceeding, the taxpayers of the "losing" government must foot the bill for any monetary damages awarded⁵¹. This binding dispute resolution process is done before a trade tribunal, which offers no basic due process rights provided in U.S. federal courts. These NAFTA Chapter 11 cases are litigated in special international arbitration bodies of the World Bank and the United Nations, which are closed to public participation and observation. A three-person panel composed of professional arbitrators listens to the arguments on both sides, and has the power to award an unlimited amount of taxpayer dollars to the corporations seeking

⁵¹ NAFTA Chapter 11: Corporate Cases. Public Citizen.
<http://www.citizen.org/Page.aspx?pid=1218> [Electronic Copy provided in the accompanying USB flash drive, Source 37]

damages under NAFTA's Chapter 11 proceedings. For example, in 2015 when the Obama administration denied the construction permit for TransCanada's Keystone XL pipeline, TransCanada and its investors initiated a NAFTA Chapter 11 proceeding, which is now being litigated against the Obama Administration in the above-mentioned procedural channels. Similarly, should the State of Michigan choose to shut down Enbridge Line 5, it is foreseeable that Enbridge and their stakeholders could sue the Michigan government or the Federal Government (should they decide to act under a federal regulatory power) under a Chapter 11 NAFTA proceeding.

V. Conclusion

The State of Michigan has three sources of authority to act against Enbridge and Line 5 under the Straits of Mackinac. First, Michigan could use the termination provision of the 1953 Easement to terminate the entire Easement, given the well-documented violations of the Easement by Enbridge. Second, Michigan could initiate a public trust proceeding under the GLSLA Part 325 to gain more information and set up lines of communication between Enbridge and Michigan, under a time table established by Michigan. Third, the State of Michigan could seek PHMSA certification to act as the regulatory agency over intrastate pipelines; by this process it could set up an agency relationship between PHMSA any Michigan-made regulatory law or regulatory entities.

If the State of Michigan chooses to act on Enbridge Line 5, the chance of federal preemption over the proposed state action is unlikely. First, any action most likely taken against Enbridge line 5 does not conflict with Congressional intent to regulate Line 5, and second, case law suggests that federal preemption will not occur in situations, like the case

with Michigan and Enbridge, where the regulation is question centers around a state's public trust doctrine.

Lastly, the Canadian government has no available recourse should Michigan or the United States shut down Enbridge Line 5. The United States and Canada have a well-established relationship surrounding the import and export of crude oil, so it is in the best interests of both countries, for policy reasons, to maintain open lines of communication in the event of any oil pipeline shut downs or modifications. However, should Michigan choose to shut down Enbridge Line 5, Enbridge and their stakeholders could sue Michigan and/or the United States Federal government under a NAFTA Chapter 11 proceeding.