

Emmet County Lakeshore Association

Summer 2021 Newsletter



Tribal Lawsuit Update 2021

Little Traverse Bay Bands of Odawa Indians (LTBB) Lawsuit Continues.

BACKGROUND RECAP:

As most of you know, the LTBB (or the "Tribe") filed suit against then-Governor Snyder right after Labor Day in 2015, asking the federal court to declare that 337 square miles of Emmet County and a portion of Charlevoix County is today an Indian Reservation pursuant to the language of an 1855 Treaty. The area includes all of Petoskey and Harbor Springs. No notice of the lawsuit was provided to the affected counties or municipalities.

The case was assigned to Judge Maloney in the Federal District Court in Kalamazoo. ECLA/PORA, both Counties, and the Cities and Townships in the area sought intervention as Defendants into the lawsuit. The Tribe objected to ECLA/PORA coming into the suit but Judge Maloney approved our intervention as Defendants. After extensive briefing and argument, Judge Maloney ruled against the Tribe and in favor of the Defendants, holding that the 1855 Treaty did not create a reservation.

The Tribe appealed that decision to the U.S. Court of Appeals for the Sixth Circuit. A panel of 3 appellate judges ruled again, unanimously, in favor of the Defendants.

The Tribe then asked that the 6th Circuit reconsider the decision and hear the case en banc, with all active judges of the 6th Circuit hearing the appeal. This too was denied. Five other Indian Tribes sought to file amicus briefs before the appellate court, which request was also denied.

GOING FORWARD:

We fully expect the Tribe ask the U.S. Supreme Court to hear the case. The Tribe hired Riyaz Kanji, a specialist in Indian Law and a practitioner with successes before the U.S. Supreme Court, to handle the 6th Circuit appeal. The Tribe has now added attorney Ian Gershengorn, a former acting U.S. Solicitor General who has argued 15 cases before the U.S. Supreme Court. Messrs. Kanji and Gershengorn also regularly file briefs in the Supreme Court as part of the Tribal Supreme Court Project of the National Conference of American Indians and the Native American Rights Foundation.

A case is not automatically accepted by the U.S. Supreme Court. The Tribe must first file a Petition for certiorari requesting the Court to hear the case. It is speculation to try to guess whether the Court will accept the case, although the Court can also ask the current U.S. Solicitor General for his or her opinion on whether to accept the case. We can

expect counsel for the Tribe to lobby the Solicitor General to recommend that the Court accept the case, and it's possible that the Department of Interior, now headed by a member of a New Mexico tribe, will also do so. It takes four of the nine justices to grant certiorari and accept the case. Based on the Court's timing, the petition will likely be considered early next year, and if the Court asks for the Solicitor General's view, it could be summer of 2022 until we know if the Court will hear it.

THE OKLAHOMA CASE

In 2020, the U.S. Supreme Court ruled in favor of an Oklahoma Tribe in a 5-to-4 decision declaring half of the state of Oklahoma to be an Indian Reservation, including all of Tulsa. Four justices appointed by Democratic Presidents, joined by Trump appointee Justice Gorsuch, ruled in favor of the Tribe. Justice Gorsuch has a track record of siding with the Tribes. The unknown going forward is which way Justice Barrett would rule if our case reached the U.S. Supreme Court.

As a side bar, while our case was pending, both the Michigan Supreme Court and the U.S. Supreme Court were presented with two cases where a criminal defendant sought to have convictions overturned on the basis that their crimes occurred on LTBB's "Reservation." ECLA filed a brief in the Michigan Supreme Court case explaining that this issue was already pending before the 6th Circuit Court of Appeals and that the lower court had already determined that the area was not an Indian Reservation. Not surprisingly, the Tribe has filed a brief supporting this defendant. In the U.S. Supreme Court matter, a certiorari petition filed by the criminal defendant was denied. We do not read anything into that decision, however, as there were numerous procedural reasons for the Court to deny cert.

THANK YOU TO OUR SUPPORTERS

The outcome of the LTBB case will determine whether each and every one of us will be subject to Tribal control. A recent U.S. Supreme Court Case ruled that tribal police may stop and detain non-tribal members on a reservation. Earlier ECLA articles talked about the various adverse impacts a ruling in favor of the Tribe might have upon our area – ranging from property values (would you rather buy a home in a reservation or some other area, like Torch Lake, that is not within a reservation?) to zoning, sign regulations, the location of marijuana dispensaries, casinos, etc., if the area were declared to be an Indian Reservation.

We thank each of you for your contributions and support in defending against this case brought by the LTBB. ECLA/PORA remain committed to seeing this case through to its conclusion, utilizing the best legal expertise available. We are appreciative of the State and municipal attorneys involved in this case for their commitment and cooperation.

Line 5

The Line 5 pipeline of Enbridge Energy, Limited Partnership (“Enbridge”) was built in 1953. The pipeline extends across the Straits of Mackinac for a distance of approximately 5 miles. The pipeline consists of two 24-inch pipelines and was installed pursuant to a permit issued by the State of Michigan. Line 5 transports daily up to 540,000 barrels – or 422.68 million gallons -- of light crude oil and liquid natural gas.

Because of the age of this line, previous mishaps concerning this line, as well as a major 2015 oil spill by Enbridge in the Kalamazoo River which cost approximately \$1 billion to clean up, many individuals and organizations have taken steps to have Line 5 removed from the Straits of Mackinac. The 2019 and 2020 newsletters provide much more detail concerning the history of these lines and the problems associated with Enbridge and Line 5.

Former Governor Snyder previously approved Enbridge’s proposal to construct a tunnel in the bedrock underlying the Straits to house the pipeline, ostensibly to avoid a spill entering the waters of the Great Lakes. This proposal has brought opposition and challenges -- some against the tunnel with concerns about its environmental impacts, and others voicing a concern that during the 7 to 10 years it will take to construct the tunnel, Line 5 continues to pose a threat of contaminating the Great Lakes if it should rupture. This newsletter will update the readers on what has transpired in enforcement efforts since ECLA’s newsletter in 2020.

CHALLENGES TO LINE 5

- MPSC Overruled Administrative Law Judge in April 2021

On April 17, 2020, Enbridge filed an application with the Michigan Public Service Commission (MPSC or Commission) pursuant to Public Act 16 of 1929, MCL 483.1 et seq, also referred to as Act 16, requesting authority to replace and relocate the segment of Line 5 crossing the Straits of Mackinac into a tunnel beneath the Straits of Mackinac. Opponents of the tunnel argued that in evaluating the impact of the proposed tunnel, under the Michigan Environmental Protection Act, Enbridge must also address the issue of Climate Change -- namely, what impact would the construction of the tunnel and the extension of the flow of fossil fuels have upon the environment by reason of Green House Gas emissions (“GHG”). Enbridge rejected this argument and an Administrative Law Judge (“ALJ”) ruled in favor of Enbridge. The ALJ’s decision was appealed to the full Commission which reversed the ALJ. This is a significant decision in that it is the first one determining that GHG is likely to pollute or impair the environment and thus must be considered under the Michigan Environmental Protection Act.

- Governor Whitmer’s Order -- challenged in court by Enbridge

While the appeal was pending, Governor Whitmer revoked and terminated Enbridge’s 1953 easement from the State to operate the pipeline on the bottomlands of the Straits.

Enbridge file a lawsuit in Federal Court to block the Governor’s order. This case remains pending and the Governor’s office is seeking to move the case from Federal Court to State Court.

- Tribal Challenge -- Bay Mills. The Tribe has also challenged the tunnel and the continued operation of the pipeline across the Straits. The basic premise of the Tribe’s challenge is the impact upon their cultural landscape -- “This is where the Great Turtle rose out and formed the first land. This is where the Fish Clan gave up its life to provide food for the people. This is where everything started.”

FEDERAL LEVEL NEGOTIATIONS

- Biweekly meetings – U.S. and Canadian Governments:

The Governor’s order to shut down Line 5 was not well received by the Canadian government, which strongly opposes shutting down Line 5. Quietly there have been biweekly meetings between representatives of the Biden Administration and the Trudeau Administration. The Army Corps of Engineers in June issued a directive that an Environmental Impact Statement needed to be prepared identifying all possible environmental impacts from the construction of the tunnel. This order of the Army Corps was not well received by Enbridge and not received well by certain opponents who are concerned that this will lengthen the time for the construction of the tunnel and thus leave Line 5 in continued risky use for even longer.

ECONOMIC LIKELIHOOD OF ENBRIDGE CONSTRUCTING A TUNNEL

It has been estimated that the tunnel’s cost of construction will be \$500,000,000. Many, including ECLA in its last Newsletter, questioned whether Enbridge was ever intending to construct the tunnel, given the low cost of oil. Was Enbridge merely buying more time to keep its 67-year-old pipeline operational as long as possible? This economic assessment may have changed. With the Dakota Access Pipeline now not going to happen and the construction of Line 3 in Wisconsin being challenged, the economic feasibility numbers have changed in favor of Enbridge actually constructing the tunnel.



Avian Botulism Outlook 2021

ECLA in its last Newsletter reported "High Water Levels May Keep Avian Botulism at Bay for 2020."

What is the outlook for 2021? While we all like the wide expansive beaches with lower water levels, these lower water levels allow the sun's rays to penetrate to the shallow lake bottom which, along with warmer water, is the main ecological factor causing the growth of Cladophora algae and, in turn, a concern over increases in the botulism toxin along the shore. The algae is back this year, and accumulations along the lake shore and in shallow waters in late spring and early summer have been observed.

What is significant about this algae? When algae die, the plant matter forms mats on the lake bottom. Later in the summer these algal mats can be seen along the shoreline. Naturally occurring botulism, which is not toxic, becomes toxic when it is in anaerobic (low-oxygen) conditions. The mats of algae cause the anaerobic conditions beneath the algae mats, and the botulinum bacteria then produce toxins.

While there are several possible ways birds ingest the toxin, the most likely way for ducks is by eating fish, frequently the small Round Goby (an invasive species), which has ingested the toxin type E botulism by eating zebra and quagga mussels (invasive species) that have filtered in the toxin. The ducks die by paralysis, either drowning because they are unable to hold their heads up, or by washing up on shore to die.

In 1999 there were an estimated 800,000 birds on the Great Lakes that died from the ingestion of the botulinum toxin. Hundreds of thousands of birds continue to die each year when the ecological events described above occur.

The largest number of ducks die in late fall as they migrate south, stopping to eat along the Great Lakes, including Lake Michigan. The Tip of the Mitt Watershed Council has organized volunteers, including ECLA members, to walk assigned sections of the beach to count and identify the species of dead waterfowl along the beaches. This writer a few years back counted 20 dead loons along a 200-foot stretch of beach. The volunteers then bury the dead birds to prevent other animals from feeding on the dead waterfowl and ingesting the botulinum toxin. The botulism toxin is highly lethal to many animals, including humans.

The Cross Village General Store is Closed:

Lots of rumors have been circulating as to why the Cross Village General Store is closed. Here's the scoop, the long and the short of it. The owner and operator, Jan Hill, understandably as explained ran out of steam – the store became just too much to handle.

Prior to the current store, the Cross Village store was located in an old yellow building where the Legs Inn parking lot is now located. Creaky floor, and a screen door that snapped let the person working at the store know a new customer had arrived.

The new store was built by Jan's father, Lee, in 1999 -- the first commercial building to be constructed in the Village since 1920. Gas, groceries, and deli foods were available. For those living 20 miles from Cross Village, and for tourists short on fuel, the CV Store was an oasis. For the locals, a big round table was in the store where you could gather to have breakfast or just coffee and catch up. The family encouraged the get-togethers at the store.

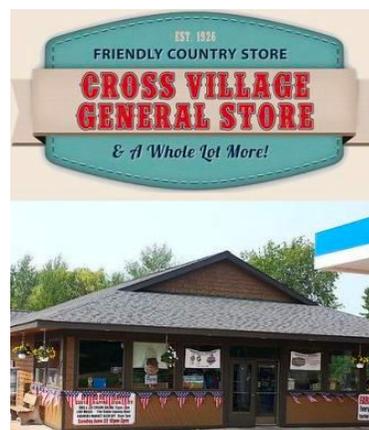
The store was a family affair. Jan's brother Leroy, her dad, her mom Sue, her granddad Bill, and Jan operated the store. Riley, Jan's son, worked there for a short time. All the work got spread out among family members. Sue loved to cook in the deli. She would call me to tell me she had just

made a batch of "Susie's Salsa" -- the best I have ever had.

Unfortunately, granddad, then dad, then Leroy, then Sue passed away. The entire workload was then on Jan's shoulders, and was just too much.

The store is for sale, and there are several interested parties, but no offers as yet. We will see. I spoke with Jan and she misses being at the store and seeing all her close friends. She hates tuna mac, but many of her friends and customers loved it. So, she just made a big batch and passed it out to them.

We miss the store, but even more we miss Jan and her family at the Cross Village Store.



Great Lakes Water Levels

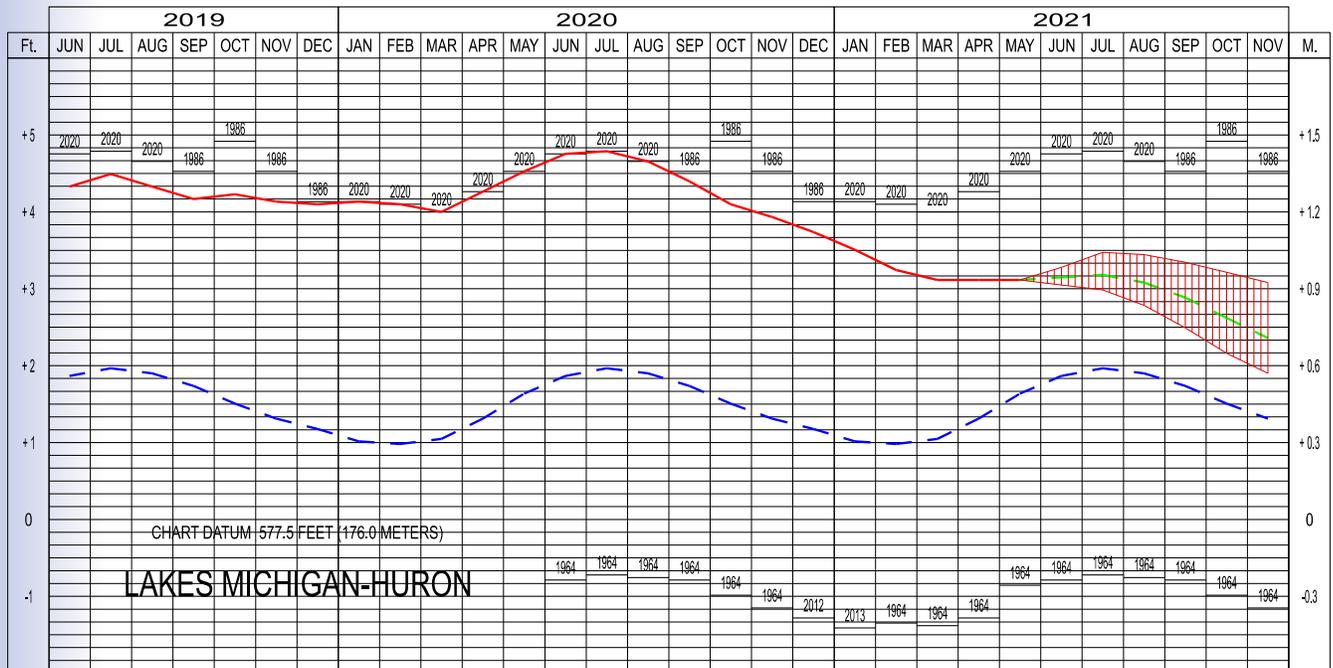
The Michigan Great Lakes projected water levels for June 4th 2021 are all within one inch of the May 4th 2021 measured levels and all are below levels measured during June 2020. Lakes Superior and Ontario are forecast to rise 2 inches by July 4th, while Lake Michigan-Huron is forecast to rise one Inch. Lake St. Clair will remain near its current level by July 4th, while Lake Erie forecasts a decline of one inch by July 4th 2021.

Table 1 lists changes in average water levels as compared to 2020, and Graph 1 shows the recorded and projected water levels for Lake Michigan-Huron from June 2019-2021.

	Superior	Michigan-Huron	St. Clair	Erie	Ontario
Differences from average water level for May 4, 2021 (Inches)	0	-1	+1	+1	0
Differences from average water level for June 4, 2020 (Inches)	-6	-20	-16	-17	-25
Differences from long-term monthly average of June (Inches)	+3	+14	+15	+13	-15

TABLE 1

LAKES MICHIGAN-HURON WATER LEVELS - JUNE 2021



LEGEND

- RECORDED
 - PROJECTED
 - AVERAGE **
 - MAXIMUM **
 - MINIMUM **
- ** Average, Maximum and Minimum for period 1918-2020

Tick Boom

Expect more ticks in Michigan this year than ever before, partly due to our warm winter. Dr. Howard Russell of MSU says the number of ticks has greatly increased in the Lower Peninsula, particularly in West Michigan, over the last decade.



While there are five types of ticks throughout Michigan, there are two that are most commonly found in Emmet County—the American dog tick and the Deer tick (or black-legged tick.)

American Dog Tick (*Dermacentor variabilis*)

- The most common tick in Michigan
- Have white markings on their backs that should be visible
- Can transmit Rocky Mountain Spotted Fever and other tick-borne diseases
- Active from early May–November
- Will bite humans and pets

Deer Tick/Black Legged Tick (*Ixodes scapularis*)

- Can spread potentially deadly Lyme disease
- Found most commonly on the western side of the state
- Often found on forest vegetation, and along trails

Dr. Russell says the possibility of catching Lyme disease from a tick is very real in Michigan.

“We have several hundred cases of Lyme disease a year in Michigan”. And the stage that’s most likely to transmit is the Nymph stage, which occurs in July, and it’s a very, very tiny tick.”

You can find info about how best to avoid ticks, and remove them once they’ve attached themselves, at a website maintained by the Michigan Department of Health and Human Services.

Dr. Jean Tsao, PH.D and associate professor at Michigan State University realizes many people are re-introducing themselves to the outdoors since the pandemic hit, so she and some colleagues from the have created “The Tick App” thetickapp.org

If you find a tick, embedded or not, take a clear picture of it and submit it online through the app, then within a day or two, you’ll receive the information back on what kind of species it is in the life stage. And that information will come from graduate students in the lab. That’s important because not all ticks transmit the pathogens.

If you do find out it’s a black-legged tick, you can talk to your doctor and decide whether or not you want to take one dose of prophylactic dose of Doxycycline.

Hemlock Disease

The common name for an evergreen conifer tree common to Northern Michigan is the Hemlock. My first time hearing “Hemlock” was as a name for challenging ski run at Boyne Mountain Ski Resort about 60 years ago. Later, my parents discovered that the additional lake shore land they’d purchased had several beautiful hemlocks. They were thrilled at the huge, deep green tree with graceful branches with tiny needles and pine cones. Now those trees are huge old specimens that shade walking paths through the woods. Fortunately these hemlocks were never used for construction, manufacturing of boxes or paper pulp. Hemlocks are slow growing trees gaining one to two feet in height per year. In this area, these lovely trees are Eastern Hemlocks and they are susceptible to an invasive pest from Japan that eats from the tree, especially the needles. This pest is called the Hemlock Woolly Adelgid (HWA). They suck the nutrients from the tree killing them in 3 to 5 years. This hungry pest is destroying hemlock forests in Michigan, Minnesota, and Wisconsin and in every state along the eastern seaboard. As hemlocks die, the entire forest eco system is affected including mammals, birds and fish species. Streams along hemlock forests have higher trout populations that can be adversely affected by the erosion of silt into the streams. As the trees die the hydration of the forest bed is decreased and the dead trees create higher risk of forest fires.

How can we interrupt the infestation of these voracious pests and save our trees?

Planting of trees from down state nursery stock increases the risk of introducing the HWA pests. As nursery stock is moved through the state, pests can move from host to host, tree to tree. After the HWA pest was identified near Muskegon, some governmental and environmental groups have notified land owners in northern Michigan to request permission to inspect the hemlocks on the landowners property. The white woolly appearance on the needle growth can indicate HWA pests or a number of other non-threatening possibilities, such as beech scale, that maybe present. Property owners can inspect their hemlocks trees looking for this white woolly pests. If found, a high definition photo and/or a specimen can be sent to the Michigan State University Plant Diagnostic Lab in Lansing. (<https://www.canr.msu.edu/pestid>). The specialists there can identify and make an accurate diagnosis and may guide you in the possible treatment options available.

Treatments include chemical pesticides or biological controls such as the introduction of another predator to the HWA. The positive effects and the negative effects of either type of treatment need to be carefully considered. As science regarding these two types of treatments develops, it is important that land owners obtain accurate, current information about the benefits of both types of treatment





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In unity, there is strength

Emmet County Lakeshore Association

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