

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

BAD RIVER BAND OF THE TRIBE OF
CHIPPEWA INDIANS OF THE BAD RIVER
RESERVATION

Plaintiff,

v.

ENBRIDGE, INC.,
ENBRIDGE ENERGY PARTNERS, L.P.
ENBRIDGE ENERGY COMPANY, INC., and
ENBRIDGE ENERGY, L.P.

Defendants.

Case No. 3:19-cv-00602

The Honorable William M. Conley

JURY TRIAL DEMANDED

**ENBRIDGE ENERGY COMPANY, INC. AND ENBRIDGE ENERGY, L.P.’S
AMENDED ANSWER, DEFENSES, AND COUNTERCLAIMS
TO PLAINTIFF’S FIRST AMENDED COMPLAINT**

For more than sixty-six continuous years, Enbridge Energy, L.P. (“EELP”)¹ has operated Line 5 safely and reliably across the Bad River Band’s (the “Plaintiff’s” or the “Band’s”) Reservation. No releases from the Line have ever occurred on the Reservation. No imminent threat of release or other hazardous condition exists on the Reservation. Line 5 was originally constructed to reduce the risk of shipping energy on the Great Lakes and has served for more than 60 years as a vital conduit to deliver energy used to heat homes and businesses, fuel vehicles, and power industry across the entire U.S. Midwest, including here in Wisconsin.

Moreover, the Band expressly consented to EELP maintaining Line 5 in its current location. In fact, in 1992 EELP paid the Band \$800,000 to secure its consent to the “construction, operation and maintenance” of Line 5 for another 50 years, until 2043, a date 23 years away. (*See*

¹ EELP constructed and operates the Line 5 pipeline. EELP and a predecessor in interest Enbridge Energy Company, Inc. (“EECI”) are collectively referred to herein as “Enbridge Energy.” Enbridge, Inc. and Enbridge Energy Partners, L.P. have filed a motion to dismiss for lack of personal jurisdiction, and accordingly do not join in this answer.

Exhibit A, a true and correct copy of 1992 Agreement.) In the same 1992 Agreement, the Band promised to “ensure that all of the objectives of . . . the Company,” as expressed in the 1992 Agreement, “are achieved, even if it means that one or both parties must do something which is not expressly described herein.” This includes providing “all consents and authorizations it is possible for the Company [EELP] to obtain, whether necessary or not to obtain a fifty (50) year easement for Right of Way for a pipeline over the Company’s existing pipeline Right of Way in which the Tribe has an interest.”

Yet in this litigation, the Band accuses EELP of a trespass for the Line that the Band itself agreed may operate on the Reservation. It does so only after it procured additional ownership interests, in the years following the 1992 Agreement, in all but a few of the parcels now at issue. The Band purports to be acting out of “safety” concerns, but those concerns are overstated and not accurate – and in any event, any potential safety concerns will be resolved by EELP before becoming an issue, so long as the Band provides timely access for EELP to conduct maintenance activities as required by the 1992 Agreement.

Line 5 is fully capable of safe operation for many more years, as the Band itself acknowledged in 1992 when it evaluated the Line and agreed it could operate on the Reservation for another 50 years. Line 5, like all interstate pipelines, is inspected and maintained in accordance with federal safety standards administered by the federal agency with exclusive jurisdiction over the safety of interstate pipelines, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”). PHMSA’s safety standards at 49 C.F.R. Part 195 are specifically designed to ensure continued safe operation of interstate pipelines, like Line 5. Under those standards, EELP has been inspecting and maintaining Line 5 in accordance with PHMSA safety standards, as well as other relevant federal laws. This includes closely monitoring the condition of Line 5 according to

EELP's pipeline integrity management program, identifying any potential safety risks and, when necessary, swiftly deploying teams of highly-qualified engineers and pipeline technicians to examine and repair the Line as necessary. This extensive oversight shows that Line 5 is operating safely, is capable of operating safely for many years to come, and is in full compliance with PHMSA safety standards. Moreover, EELP has proactively identified measures to enhance the safety and integrity of Line 5 to address areas of erosion or river movement well before they present any risk, including the areas of erosion along the banks of the Bad River that are of concern to the Band. While such erosion does not currently present any safety risk, EELP is prepared to implement maintenance activities to minimize any potential future erosion, provided that the Band provides EELP with access to do so. The Band knows this very well and the suggestion in its complaint that EELP is wholly ignoring Line 5's condition or the Band's concerns is inaccurate.

EELP and EECI answer, set forth their affirmative defenses to Plaintiff's Complaint, and counterclaim as follows. They deny each and every allegation in Plaintiff's Complaint except as expressly admitted below.

ANSWER

Answer: Enbridge Energy states that Plaintiff's opening, unnumbered Paragraph contains no factual assertions to which a response is required.

Answer to Paragraph 1: Enbridge Energy admits that the Bad River Reservation was established by treaty with the United States in 1854 and is located within the boundaries of Wisconsin as described in Paragraph 1. Enbridge Energy is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 1 and, on that basis, denies those allegations.

Answer to Paragraph 2: EELP admits that it operates a pipeline generally transporting up to twenty-three million gallons of crude oil and natural gas liquids per day across the Reservation. The remaining defendants do not operate Line 5. EELP admits that the Band has sought to shut down its transportation of oil through the pipeline, despite consenting in 1992 to a valid 50-year easement to operate and maintain a pipeline through the Reservation. Enbridge Energy denies the remaining allegations.

Answer to Paragraph 3: Enbridge Energy states that any federal treaty between the Band and the United States speaks for itself. Enbridge Energy is without sufficient knowledge or information to form a belief as to the remaining allegations in Paragraph 3 and, on that basis, denies those allegations.

Answer to Paragraph 4: Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 4 and, on that basis, denies those allegations.

Answer to Paragraph 5: EELP admits that it, or its affiliated entities, operate a network of petroleum pipelines in the United States and Canada. Enbridge Energy further admits that the pipeline known as Line 5, which was initially placed into service in 1953, begins at a terminal in Superior, Wisconsin, traverses northern Wisconsin and the Upper Peninsula of Michigan, crosses the Straits of Mackinac, and then bisects the Lower Peninsula of Michigan before crossing the St. Clair River and the international boundary line and reaching a terminal in Sarnia, Ontario, Canada. Enbridge Energy further admits that the pipe for Line 5 is made of steel pipe (as well as other materials, such as coating materials).

Answer to Paragraph 6: Enbridge Energy admits that generally on a daily basis Line 5 transports up to 540,000 barrels of light crude oil and natural gas liquids and that a percentage of

this product originates in Alberta, Canada. Enbridge Energy further admits that, at the origination point for Line 5 at Superior, WI, Line 5 receives such products from other Enbridge pipelines, not all of which originate in Canada, and states that Line 5 also transports oil that originates in Michigan and also off-loads oil and natural gas liquids at other points in Michigan. Enbridge Energy also admits that a majority of the light crude oil transported by Line 5 is transported to Ontario for refining, from where some percentage is returned to end users in the United States. Enbridge Energy denies the remainder of the allegations.

Answer to Paragraph 7: Enbridge Energy admits that Line 5 traverses the Bad River Reservation for approximately twelve miles along a corridor that includes areas that are forested and that contain stream crossings and wetlands. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 8: Enbridge Energy admits that Line 5 was installed on the Reservation in 1953. Enbridge Energy further admits that easements were issued by the Bureau of Indian Affairs in 1953 for the tribal and individual lands that lie along Line 5's path, and that certain easements over tribal and allotted lands were issued in the 1970s, and issued again in 1993. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 9: The first two sentences of Paragraph 9 consist of legal conclusions to which no response is required. To the extent that a response is required, the terms of the easements speak for themselves. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 10: Paragraph 10 consists of legal conclusions to which no response is required. To the extent a response is required, the allegations of this Paragraph are denied.

Answer to Paragraph 11: Enbridge Energy admits that the Band has, in the years since the relevant easements were issued in 1993, acquired an ownership interest in eleven of the allotted parcels at issue in this case, and that it issued a formal Resolution on January 4, 2017, in which it declared that it would not consent to the renewal of the easements for any parcels in which it has an interest. The first three sentences of the Paragraph consist of legal conclusions to which a response is not required. To the extent a response is required, those allegations are denied. The remainder of the allegations contained in the Paragraph are denied.

Answer to Paragraph 12: Enbridge Energy admits that Enbridge Energy (U.S.) Inc. participated in a confidential mediation with Plaintiff. Without divulging any mediation statements, Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 13: Denied.

Answer to Paragraph 14: Enbridge Energy admits that a meander in the Bad River has undergone channel migration (*i.e.*, changes in the river's path across the land), resulting in bank erosion. Enbridge Energy further admits that Line 5 was installed in 1953. Enbridge Energy further admits that the north bank of the meander bend has moved to approximately twenty-eight feet from Line 5. The remainder of the allegations of the Paragraph are denied, and Enbridge Energy further denies that the meander will ever reach Line 5 if Enbridge Energy is given full access and the opportunity to maintain the pipeline.

Answer to Paragraph 15: Denied, and Enbridge Energy further denies that the Bad River will erode and remove the soils surrounding Line 5 if Enbridge Energy is given full access and the opportunity to maintain the pipeline.

Answer to Paragraph 16: Enbridge Energy admits that at the meander, the Bad River sometimes overflows its banks during periods of flooding, and that channels of water can

sometimes then flow across the meander neck, eroding soil. Enbridge Energy further admits that the Bad River possesses the potential to form a new channel across the meander neck. The remainder of the allegations in this Paragraph are denied, and Enbridge Energy further denies that soil currently protecting the pipeline will erode if Enbridge Energy is given full access and the opportunity to maintain the pipeline.

Answer to Paragraph 17: Denied, and Enbridge Energy further denies that bank erosion or channelization or both will expose the pipeline to an array of stresses it was never designed to withstand if Enbridge Energy is given full access and the opportunity to maintain the pipeline.

Answer to Paragraph 18: To the extent that the allegations in Paragraph 18 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 19: Denied.

Answer to Paragraph 20: Paragraph 20 consists of legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

Answer to Paragraph 21: Paragraph 21 consists of legal conclusions to which no response is required.

Answer to Paragraph 22: Paragraph 22 consists of legal conclusions to which no response is required.

Answer to Paragraph 23: Paragraph 23 consists of legal conclusions to which no response is required.

Answer to Paragraph 24: Paragraph 24 consists of legal conclusions to which no response is required.

Answer to Paragraph 25: Enbridge Energy admits that Plaintiff is a federally recognized Indian tribe that enjoys government-to-government relations with the United States and is organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 5123. Enbridge Energy is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 25 and, on that basis, denies those allegations.

Answer to Paragraph 26: Paragraph 26 contains legal conclusions that do not require a response. To the extent a response is necessary, Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 26 and, on that basis, denies those allegations.

Answer to Paragraph 27: The treaties between the United States and the Band speak for themselves. To the extent a response is required, Enbridge Energy admits that the Band is a party to three treaties with the United States, which are stated in Paragraph 27, and that those treaties remain in effect today.

Answer to Paragraph 28: Paragraph 28 consists of legal conclusions to which no response is required. To the extent that a response is required, Enbridge Energy denies the allegations.

Answer to Paragraph 29: Admitted in part and denied in part. Enbridge Energy admits the allegations in this Paragraph, except that it denies that Enbridge, Inc. operates in the United States.

Answer to Paragraph 30: The treaties between the United States and the Band speak for themselves. To the extent a response is required, Enbridge Energy admits that treaties with the United States between 1836 and 1854 with the Ojibwe Bands of northern Michigan, Wisconsin, and eastern Minnesota resulted in reservations. Enbridge Energy states it is without sufficient

knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 30 and, on that basis, denies those allegations.

Answer to Paragraph 31: The treaties between the United States and the Band speak for themselves. To the extent a response is required, Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 31 and, on that basis, denies those allegations.

Answer to Paragraph 32: The final sentence of this Paragraph contains legal conclusions to which no response is required. The 1854 treaty speaks for itself. To the extent a response is required, Enbridge Energy admits that the Bad River Reservation was created by operation of the 1854 Treaty. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 32 and, on that basis, denies those allegations.

Answer to Paragraph 33: Paragraph 33 consists of legal conclusions to which no response is required. To the extent a response is required, Enbridge Energy is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 33 and, on that basis, denies those allegations.

Answer to Paragraph 34: Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 34 and, on that basis, denies those allegations.

Answer to Paragraph 35: Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 35 and, on that basis, denies those allegations.

Answer to Paragraph 36: Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 36 and, on that basis, denies those allegations.

Answer to Paragraph 37: Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 37 and, on that basis, denies those allegations.

Answer to Paragraph 38: To the extent that the allegations in Paragraph 38 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 38 and, on that basis, denies those allegations.

Answer to Paragraph 39: Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 39 and, on that basis, denies those allegations.

Answer to Paragraph 40: Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 40 and, on that basis, denies those allegations.

Answer to Paragraph 41: To the extent that the allegations in Paragraph 41 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 41 and, on that basis, denies those allegations.

Answer to Paragraph 42: Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 42 and, on that basis, denies those allegations.

Answer to Paragraph 43: Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 43 and, on that basis, denies those allegations.

Answer to Paragraph 44: To the extent that the allegations in Paragraph 44 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 44 and, on that basis, denies those allegations.

Answer to Paragraph 45: Paragraph 45 consists of legal conclusions to which no response is required.

Answer to Paragraph 46: Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 46 and, on that basis, denies those allegations.

Answer to Paragraph 47: To the extent that the allegations in Paragraph 47 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 47 and, on that basis, denies those allegations.

Answer to Paragraph 48: To the extent that the allegations in Paragraph 48 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy

denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 48 and, on that basis, denies those allegations.

Answer to Paragraph 49: To the extent that the allegations in Paragraph 49 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 49 and, on that basis, denies those allegations.

Answer to Paragraph 50: To the extent that the allegations in Paragraph 50 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 50 and, on that basis, denies those allegations.

Answer to Paragraph 51: To the extent that the allegations in Paragraph 51 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 51 and, on that basis, denies those allegations.

Answer to Paragraph 52: To the extent that the allegations in Paragraph 52 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 52 and, on that basis, denies those allegations.

Answer to Paragraph 53: Enbridge Energy admits the allegations contained in Paragraph 53.

Answer to Paragraph 54: Enbridge Energy admits that Line 5 was installed across the Bad River Reservation in 1953. Enbridge Energy also admits that as Line 5 crosses the Reservation it is thirty inches in diameter, made of steel with welded seams and coated in coal tar enamel. Enbridge Energy also admits that Line 5 is a subsurface pipeline, which is buried at depths that comply with PHMSA's safety standards concerning depth-of-cover for interstate pipelines. Enbridge Energy also admits that there are locations of Line 5 with lower depth of cover, that a portion of Line 5 that is approximately forty-nine feet long is exposed to the surface (but not unsupported) in an area that the parties describe as a gully, that Enbridge Energy has developed a remediation plan for covering the pipeline back up, and that Enbridge Energy has already begun that remediation work. Enbridge Energy also admits that a 1 foot by 1 foot portion of Line 5 is exposed in the channel bottom of a tributary to Denomie Creek. Enbridge Energy is without sufficient knowledge or information to form a belief as to the truth in the remaining allegations in Paragraph 54 and on that basis denies them.

Answer to Paragraph 55: Enbridge Energy admits the allegations contained in Paragraph 55.

Answer to Paragraph 56: Enbridge Energy admits that Line 5 generally transports up to 540,000 barrels (approximately twenty-three million gallons) of crude oil and natural gas liquids daily, a percentage of which originates in Alberta, Canada. Enbridge Energy also admits that such products are transported by other Enbridge pipelines from points in Canada and the United States until they reach Superior, and further states that Line 5 also transports crude oil that originates in Michigan and also off-loads both crude oil and natural gas liquids in Michigan. Enbridge Energy

further admits that a majority of the crude oil transported on Line 5 is ultimately refined in Ontario, although some percentage of the refined product is returned to the United States. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 57: Enbridge Energy admits that Line 5 was installed on the Bad River Reservation during the 1950s and that certain easements for parcels on which the pipeline was installed on the Bad River Reservation were issued in the 1970s, and issued again in 1993.

Answer to Paragraph 58: The first sentence of Paragraph 58 consists of legal conclusions to which no response is required. The easements at issue speak for themselves. Enbridge Energy admits that, at times before or after the 1993 easement over these parcels was granted, the Band acquired ownership interests in eleven of the fifteen allotted parcels and that the Band has represented to Enbridge Energy that it owns between 40 and 90 percent of those parcels, though Enbridge Energy is without sufficient knowledge or information to form a belief as to the truth of that allegation.

Answer to Paragraph 59: Paragraph 59 consists of legal conclusions to which no response is required. The easements speak for themselves.

Answer to Paragraph 60: Paragraph 60 consists of legal conclusions to which no response is required. To the extent that a response is required, Enbridge Energy denies the allegations.

Answer to Paragraph 61: Denied.

Answer to Paragraph 62: Enbridge Energy admits that the Band enacted the January 4, 2017 Resolution. The Resolution speaks for itself. Enbridge Energy denies any characterizations or descriptions inconsistent with the Resolution.

Answer to Paragraph 63: Enbridge Energy admits that Enbridge (U.S.) Inc. participated in a confidential mediation with Plaintiff. Without disclosing any confidential mediation statements, Enbridge Energy denies the remaining allegations of this Paragraph.

Answer to Paragraph 64: Denied.

Answer to Paragraph 65: Paragraph 65 consists of legal conclusions to which no response is required. To the extent that a response is required, Enbridge Energy denies the allegations.

Answer to Paragraph 66: Enbridge Energy admits that Line 5 travels west to east. Enbridge Energy further admits that Line 5 traverses the Bad River, the White River, tributaries of those rivers, and tributaries of the Kakagon River. Enbridge Energy admits that there are at least 11 river and stream crossings over Line 5 in the Reservation. Enbridge Energy further admits that these waterbodies flow northerly and empty directly into Lake Superior. The remainder of the allegations of this Paragraph are denied.

Answer to Paragraph 67: Enbridge Energy denies that Line 5 is positioned to fail. Enbridge Energy therefore denies that Line 5 is positioned to discharge crude oil to the Sloughs and into Lake Superior. The second sentence of Paragraph 67 characterizes or describes documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. The remaining allegations of this Paragraph are denied.

Answer to Paragraph 68: Enbridge Energy denies that Line 5 poses a threat, or that the purported threat is compounded by an alleged “highly problematic location.” Among other actions, Enbridge Energy performs pipeline maintenance on a routine basis on Line 5, utilizes a cathodic protection system that is highly effective at preventing external corrosion, and Enbridge

Energy's pipeline integrity management program for Line 5 includes a pressure cycling program audited by PHMSA. Enbridge Energy admits that, absent such practices used on Line 5, the risk of pipeline rupture can increase due to factors including excessive corrosion, growth of latent defects in pipeline materials, and cumulative pressures cycles that can cause crack growth. To the extent that the allegations in Paragraph 68 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations, except Enbridge Energy admits that Line 5 has been operated and maintained on the Reservation for more than sixty-six years and that it is buried in Reservation soils.

Answer to Paragraph 69: To the extent that the allegations in Paragraph 69 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy maintains a robust pipeline integrity management program on Line 5, including a crack detection program that is able to detect very small cracks and repair them before they can grow, and a pressure cycling program to minimize cyclic fatigue, which reduces the risk of crack development, and which is in fact subject to PHMSA oversight and scrutiny. Enbridge Energy denies that there are any crack features that require repair within the Bad River Reservation. Enbridge Energy admits that fatigue cracking can cause pipeline failure. Enbridge Energy further admits that fatigue cracking can occur as pipelines with manufacturing or material defects are then subject to repetitive stresses on the metal, for example, as a result of increases and decreases in pressure as oil is pumped through the pipeline in cycles. Enbridge Energy denies any remaining allegations, including any implication that Line 5 is at risk of failure due to "fatigue cracking."

Answer to Paragraph 70: To the extent that the allegations in Paragraph 70 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy maintains a robust pipeline integrity management program on Line 5, including a crack detection program that is able to detect very small cracks and repair them before they can grow, and including a pressure cycling program on Line 5 to minimize cyclic fatigue, which reduces the risk of crack development, and which is in fact subject to PHMSA oversight and scrutiny. Enbridge Energy denies that there are any crack features that require repair within the Bad River Reservation. Enbridge Energy admits that fatigue cracking may occur as a result of a manufacturing or material defect then being subjected to repeated pressures of pumping oil through a pipeline over time. Enbridge Energy denies that Line 5 is at risk of failure due to fatigue cracking. Enbridge Energy denies any remaining allegations.

Answer to Paragraph 71: Line 5 continues to operate safely and Enbridge Energy denies that Line 5 is at risk of failure due to “fatigue cracking” or any other cause. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy’s pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts. Since 2007, Enbridge has employed multiple crack detection technologies that can detect new cracks as well as cracks or similar features that could have occurred during original installation, so that potentially injurious features are repaired long before they pose a risk of failure. Answering further, Enbridge Energy admits that in November 2007, near Clearbrook, Minnesota, approximately two barrels of oil were released from an Enbridge Energy pipeline. Those two barrels were then recovered during cleanup operations. The release occurred due to a fatigue crack

that had formed during rail transport from the pipe mill to the construction site. Enbridge Energy answers further that to the extent that the allegations in Paragraph 71 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 72: Line 5 continues to operate safely and Enbridge Energy denies that Line 5 is at risk of failure due to a “manufacturing defect” or any other cause. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy’s pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts. Since 2007, Enbridge has employed multiple crack detection technologies that can detect new cracks as well as cracks or similar features that could have occurred during original installation, so that potentially injurious features are repaired long before they pose a risk of failure. Enbridge Energy also manages a pressure cycling program on Line 5 to minimize cyclic fatigue, which reduces the risk of crack development, and which is in fact subject to PHMSA oversight and scrutiny. Answering further, Enbridge Energy states that in January 2007, a section of Line 14 near Atwood, Wisconsin, released 1,500 barrels of oil, of which 1,450 barrels were recovered, and the soil containing the unrecovered oil was removed and taken to a disposal facility. Enbridge Energy further answers that the cause of the release was a welding defect that grew due to a fatigue growth mechanism related to normal operating cycles. To the extent that the allegations in Paragraph 72 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 73: Line 5 continues to operate safely and Enbridge Energy denies that Line 5 is at risk of failure due to any of the causes mentioned. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts. Since 2007, Enbridge has employed multiple crack detection technologies that can detect new cracks as well as cracks or similar features that could have occurred during original installation, so that potentially injurious features are repaired long before they pose a risk of failure. Enbridge Energy also manages a pressure cycling program on Line 5 to minimize cyclic fatigue, which reduces the risk of crack development, and which is in fact subject to PHMSA oversight and scrutiny. Answering further, Enbridge Energy admits that in 2002, in a marsh west of Cohasset, Minnesota, a section of Line 4 released approximately 6,000 barrels of crude oil. Approximately 2,574 barrels were recovered, and approximately 3,000 were consumed in a controlled burn to prevent the oil from approaching waterways. The remainder of the crude oil evaporated or was entrained in on-site soils. The cause of the release was inadequate loading of the pipe for transportation that allowed a crack to initiate along the seam of a weld during transit, which led to the initiation of fatigue cracking during pressure cycle stresses. To the extent that the allegations in Paragraph 73 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 74: To the extent that the allegations in Paragraph 74 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy

denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 75: To the extent that the allegations in Paragraph 75 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 76: Enbridge Energy admits that a section of Line 6B that had been installed in 1968 ruptured from a corrosion-related fatigue crack that occurred beneath polyethylene tape coating that had become de-bonded from the pipeline. The rupture resulted in a release of approximately 20,000 barrels of oil in a surrounding wetland that flowed into the Talmadge Creek, which Enbridge remediated. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 77: Enbridge Energy admits that the rupture of a section of Line 6B resulted in damages to natural resources. Enbridge Energy denies that Line 5 is at risk of failure. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts. Answering further, to the extent that the allegations in Paragraph 77 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 78: Enbridge Energy admits that incidents happen, and that people and organizations are not infallible. Enbridge Energy denies that the Line 6B incident

demonstrates the fallibility of pipelines. Enbridge Energy has used the Line 6B incident in Marshall, Michigan to strengthen its processes, procedures, and controls against releases, significantly decreasing the likelihood of any release. To the extent that the allegations in Paragraph 78 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.²

Answer to Paragraph 79: Line 5 continues to operate safely, and Enbridge Energy denies that Line 5 is at risk of failure. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts. Answering further, Enbridge Energy admits that conditions at the incident site are a matter of public record. To the extent that the allegations in Paragraph 79 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 80: Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts. To the extent that the remaining allegations in Paragraph 80 call into question Enbridge Energy's ability to effectively respond to any potential

² Enbridge Energy further responds that the following publicly-available photographs (found here: <https://www.enbridge.com/marshall/marshall-release-timeline>), show that Enbridge Energy diligently and effectively remediated the area affected by the incident.

release from Line 5, such allegations are denied. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 81: Line 5 continues to operate safely and Enbridge Energy denies that Line 5 is at risk of failure. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts. Furthermore, Enbridge Energy's incident rate has dropped year after year, contrary to the impression that the allegation seeks to leave. Answering further, to the extent that the allegations in Paragraph 81 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 82: Enbridge Energy denies that releases within a facility can be equated to a release by a pipeline. Enbridge further denies that there are any facilities within or even near the Bad River Reservation. To the extent that the allegations in Paragraph 82 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 83: Historical incidents on gas pipelines (as opposed to liquids pipelines like Line 5) have no bearing on Line 5, its integrity, or the potential consequences of a release from Line 5. Answering further, to the extent that the allegations in Paragraph 83 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 84: Denied.

Answer to Paragraph 85: Enbridge Energy denies that Line 5 poses a threat to the Bad River Reservation. To the contrary, Line 5 is routinely and carefully inspected and evaluated to ensure its continued safe operation. Moreover, there are no cracks in Line 5 requiring repair on the Bad River Reservation. Answering further, Enbridge Energy admits that pipelines can develop pinhole leaks or very small cracks that discharge oil or other related liquids into the environment slowly over time. Enbridge Energy further admits that in November 2017, a pinhole leak resulted in a small bubble of oil being released. Enbridge Energy further admits that in December 2017, a pinhole leak resulted in no measureable amount of oil being released. Enbridge Energy further admits that a 2014 pinhole leak also did not result in oil being released. Enbridge Energy further admits that these pinhole leaks occurred in Michigan's Upper Peninsula. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 86: Enbridge Energy admits that a pipeline integrity team identified a potential dent in a section of Line 2 near Grand Rapids, Minnesota, and that Enbridge Energy then conducted an in-line inspection, which identified a crack in the Line. Enbridge Energy denies that the leak escaped notice or defied detection. To the extent that the allegations in Paragraph 86 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. To the extent that a response is required to any remaining allegation, those allegations are denied.

Answer to Paragraph 87: Enbridge Energy denies that the 2011 release has any relationship with how Line 5 was built, is maintained, and is operated. Enbridge Energy admits that in 2011, it estimated the release to be 4 barrels based on the amount of oil that had collected

on the surface, then revised its estimate upward when its remediation efforts discovered more oil trapped beneath the surface. To the extent that the allegations in Paragraph 87 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. To the extent that a response is required to any remaining allegations, those allegations are denied.

Answer to Paragraph 88: Denied.

Answer to Paragraph 89: Enbridge Energy admits that at the meander the Bad River is eroding soil from the northern riverbank. The remaining allegations of this Paragraph are denied.

Answer to Paragraph 90: Enbridge Energy admits that at the meander the Bad River experiences channel migration and is eroding soil from the northern riverbank. The remaining allegations of this Paragraph are denied.

Answer to Paragraph 91: To the extent that the allegations in Paragraph 91 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 92: Enbridge Energy admits that a meander bend in the Bad River adjacent to where the pipeline is currently buried has been migrating, causing the river to move closer to a portion of the pipeline. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 93: Enbridge Energy admits that a meander bend in the Bad River adjacent to where the pipeline is currently buried has been migrating, causing the river to move closer to a portion of the pipeline. Enbridge Energy states it is without sufficient knowledge or

information to form a belief as to the source of or accuracy of all of the alleged photographs and the highlighted line, and, on that basis, denies the allegations contained in the Paragraph.

Answer to Paragraph 94: Enbridge Energy admits that Line 5 was installed in 1953 and that a meander bend in the Bad River adjacent to where the pipeline is currently buried has been migrating, causing the river to move closer to a portion of the pipeline. Enbridge Energy further admits that the current distance between Line 5 and the north bank of the meander bend is twenty-eight feet. The remaining allegations of this Paragraph are denied.

Answer to Paragraph 95: Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the source of or accuracy of these photographs and, on that basis, denies those allegations. The remainder of the allegations of this Paragraph are denied.

Answer to Paragraph 96: Enbridge Energy admits that it is monitoring the migration of the river closely. Enbridge Energy denies that the meander will reach Line 5 if Enbridge Energy is given full access and the opportunity to maintain the pipeline. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 97: Enbridge Energy denies that the meander will reach Line 5 if Enbridge Energy is given full access and the opportunity to maintain the pipeline. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 98: Enbridge Energy denies that the pipeline will be subjected to numerous stresses far in excess of what it was designed to withstand if Enbridge Energy is given full access and the opportunity to maintain the pipeline. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 99: Enbridge Energy denies that debris-laden waters of the Bad River, if any, will result in tremendous and repeated impacts to Line 5 if Enbridge Energy is given

full access and the opportunity to maintain the pipeline. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 100: Enbridge Energy denies that the meander will reach Line 5 and stress welds and walls of the pipeline, or accelerate metal fatigue leading to cracking and rupture, if Enbridge Energy is given full access and the opportunity to maintain the pipeline. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 101: Enbridge Energy denies that Line 5 will be exposed to the river's current, will oscillate in an up-and-down pattern, or will be subjected to vortex induced vibration if Enbridge Energy is given full access and the opportunity to maintain the pipeline. To the extent that the allegations in Paragraph 101 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy admits that vortex induced vibration can cause damage to pipelines. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 102: It is admitted that oscillation may under certain circumstances (not present at the meander or on Line 5) and over time potentially cause a pipeline feature that could result in a release. It is denied that oscillation is resulting in or will result in any damage to Line 5 or that Line 5 is at risk of failure. To the extent that the allegations in Paragraph 102 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy admits that vortex induced vibration can cause cracking to pipelines. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 103: To the extent that the allegations in this Paragraph characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this Paragraph concerning an ExxonMobil pipeline and, on that basis, denies those allegations. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts. Enbridge Energy admits that vortex induced vibration can cause a complete severance of a pipeline. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 104: To the extent that the allegations in this Paragraph characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the allegations in this Paragraph concerning an ExxonMobil pipeline and, on that basis, denies those allegations. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 105: To the extent that the allegations in this Paragraph characterize or describe documents or other sources, such sources speak for themselves, and

Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this Paragraph concerning an ExxonMobil pipeline and, on that basis, denies those allegations. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts.

Answer to Paragraph 106: To the extent that the allegations in this Paragraph characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this Paragraph concerning an ExxonMobil pipeline and, on that basis, denies those allegations. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts.

Answer to Paragraph 107: To the extent that the allegations in this Paragraph characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this Paragraph concerning an ExxonMobil pipeline and, on that basis, denies those allegations. Enbridge Energy denies the remaining allegations in this Paragraph. Historical incidents that have occurred on pipelines other than Line 5 do not mean that

the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts.

Answer to Paragraph 108: To the extent that the allegations in this Paragraph characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this Paragraph concerning any other pipeline and, on that basis, denies those allegations. Enbridge Energy denies the remaining allegations in this Paragraph. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts.

Answer to Paragraph 109: Enbridge Energy admits that PHMSA has published "*Pipeline Safety: Potential for Damage to Pipeline Facilities Caused by Flooding, River Scour, and River Channel Migration*," 81 Fed. Reg. 2,943, 2,943-44 (Jan. 19, 2016). To the extent that the allegations in this Paragraph characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts.

Answer to Paragraph 110: To the extent that the allegations in this Paragraph characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this Paragraph concerning any other pipeline and, on that basis, denies those allegations. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts.

Answer to Paragraph 111: Enbridge Energy admits that PHMSA issued a report to Congress entitled "*Report to Congress on Hazardous Liquid Pipelines Crossing Inland Waterways*," (August 23, 2013). It is denied that the meander or any other factors have resulted in, or will result in, any damage to Line 5 or that Line 5 is at risk of failure. To the extent that the allegations in this Paragraph characterize or describe that PHMSA report or other documents or sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith.

Answer to Paragraph 112: Enbridge Energy admits that the Secretary of Transportation corresponded with Congress on July 20, 2017. To the extent that the allegations in this Paragraph characterize or describe that correspondence or other documents or sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith.

Answer to Paragraph 113: The first sentence of the Paragraph is denied. Enbridge Energy is without sufficient knowledge or information to form a belief as to the truth of the

allegations contained in the second sentence of the Paragraph, and, on that basis, denies those allegations. Energy admits that in 2016, a 200-year flood affected the Reservation. Enbridge Energy is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in the final sentence of the Paragraph, and, on that basis, denies those allegations. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 114: To the extent that the allegations in this Paragraph characterize or describe photographs, Enbridge Energy lacks knowledge as to the source or accuracy of those photographs and, on that basis, denies those allegations. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 115: Enbridge Energy admits that certain flooding events can accelerate channel migration under certain circumstances. To the extent that the allegations in this Paragraph characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 116: Enbridge Energy admits that when the Bad River floods it has in the past carried in its current logs and other debris. Enbridge Energy denies that such logs or debris will reach Line 5 if Enbridge Energy is given full access and the opportunity to maintain the pipeline. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 117: Enbridge Energy admits that in April 2019 areas of the Reservation flooded. To the extent that the allegations in this Paragraph characterize or describe photographs, Enbridge Energy lacks knowledge as to the source or accuracy of those photographs and, on that basis, denies those allegations. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 118: To the extent that the allegations in this Paragraph characterize or describe photographs, Enbridge Energy lacks sufficient knowledge as to the source or accuracy of those photographs and, on that basis, denies those allegations. Enbridge Energy is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this Paragraph and, on that basis, denies those allegations.

Answer to Paragraph 119: To the extent that the allegations in Paragraph 119 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 120: To the extent that the allegations in this Paragraph characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this Paragraph and, on that basis, denies those allegations. Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts.

Answer to Paragraph 121: To the extent that the allegations in Paragraph 121 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy states it is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 121 and, on that basis, denies those allegations.

Historical incidents that have occurred on pipelines other than Line 5 do not mean that the same incident will occur in the future on Line 5, particularly given the work of Enbridge Energy's pipeline integrity management program, which includes pipeline integrity experts and pipeline safety experts.

Answer to Paragraph 122: Denied.

Answer to Paragraph 123: Enbridge Energy admits that a segment of Line 5 east of a tributary of Denomie Creek has become exposed, and, in some locations (but not all locations at which Line 5 is exposed), supporting soil has been removed from beneath the pipeline. Enbridge Energy further admits that the segment is found at a site that Enbridge has designated as "geotechnical geohazard," which is specifically defined as an individual pipeline that is located at a given slope crossing. Enbridge Energy further admits that the parties call the geographical feature "Slope 18." Enbridge Energy further admits that the Band has alleged that on August 21, 2019 the Director of the NRD and two of the Band's outside technical consultants claims to have discovered that the pipeline was exposed, though Enbridge had requested access to this site in October 3, 2018 due to observed erosion at Slope 18, and again requested access in June 11, 2019, however, access was not timely granted to Enbridge's consultants until August 22, 2019. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 124: Enbridge Energy admits that at Slope 18, as a result of erosion, a geographical feature referred to by the parties as a gully has formed with a defined channel that can carry water flow from a beaver pond located south of the pipeline corridor. Enbridge Energy further admits that the gully runs parallel with Line 5 and at places has steep slopes. Enbridge Energy further admits that the defined channel at the bottom of the gully can

convey water flows from east to west. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 125: Enbridge Energy admits that approximately forty-nine feet of Line 5 is exposed (but not that it is unsupported), that Enbridge Energy has developed a remediation plan for covering the pipeline back up at Slope 18, and that Enbridge Energy has already completed initial remediation work. Enbridge Energy further admits that some soil and vegetation slumped into the gully from the south slope. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 126: Enbridge Energy admits that an Enbridge consultant conducted a depth-of-cover study in mid-June 2018. Answering further, to the extent that the allegations in Paragraph 126 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 127: Enbridge Energy admits that tension cracks in the gully channel soils are present at the top of both the north and south slopes of the gully. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 128: Enbridge Energy admits that pipelines that are unsupported over long spans of distance may become subject to stresses that they were not designed to withstand. Enbridge Energy denies that any portion of Line 5 poses any threat due to being exposed or, in places, unsupported by soil as existing stresses are well below safety or even code limits. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 129: Enbridge Energy admits that on August 21, 2019, the NRD Director notified Enbridge Energy that approximately forty feet of pipeline had become exposed

and that, according to the NRD Director, “a significant portion of the exposed pipeline is undermined.” Enbridge Energy denies that “a significant portion of the exposed pipeline is undermined.” Enbridge Energy further admits that the NRD Director stated that the NRD would be sending representatives into the field to further investigate the conditions at Slope 18, requested that an Enbridge contractor accompany the NRD representatives, and that the NRD Director would be in touch about the schedule for the visit. Enbridge Energy further admits that before the NRD Director communicated such a schedule, approximately 8 hours after the NRD Director’s first contact, Enbridge Energy confirmed that it would have a contractor travel to the site, and that the NRD should advise of the schedule. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 130: Enbridge Energy admits that at approximately 10:00 p.m. on August 21, 2019, Bad River Band Chairman Mike Wiggins sent an e-mail and letter to Guy Jarvis, Enbridge’s Executive Vice President for Liquids Pipelines. Answering further, to the extent that the allegations in Paragraph 130 characterize or describe the e-mail that Mr. Wiggins sent, that e-mail speaks for itself, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 131: Enbridge Energy admits that Mr. Jarvis replied to Mr. Wiggins’ e-mail the next morning. Answering further, to the extent that the allegations in Paragraph 131 characterize or describe Mr. Jarvis’ e-mail, that e-mail speaks for itself, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 132: Enbridge Energy admits that after being informed by the NRD of the exposed pipeline at Slope 18, in the ensuing days Enbridge Energy sent a team of

experts to evaluate the situation, and that on August 22, after making appropriate investigation, Enbridge Energy assured the NRD in several communications that the pipeline was operating safely, was structurally sound, and that the areas of exposed or unsupported pipeline did not pose an imminent or any kind of safety concern or threat. Enbridge Energy further admits that because no imminent or any kind of safety concern or threat was present that Enbridge Energy concluded that it was not necessary to, and did not, shut down the operation of the pipeline. Enbridge Energy denies the remaining allegations.

Answer to Paragraph 133: Enbridge Energy admits that at approximately 9:00 p.m. on August 26, 2019, Mr. Wiggins e-mailed Mr. Jarvis a letter. To the extent that the allegations in Paragraph 133 characterize or describe that e-mailed letter, that letter speaks for itself, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 134: Enbridge Energy denies that it did not provide Mr. Wiggins “any of the requested information” or “the basis for Enbridge Energy’s confidence that the pipeline could remain safely in operation” until September 17. Enbridge Energy admits that on September 17, 2019, Enbridge Energy provided the NRD with a report detailing Enbridge Energy’s position as to the length of unsupported pipeline that is safe, along with calculations supporting that position, and that the report concluded that “the integrity of Line 5 at Slope 18 is not compromised,” as well as supporting calculations demonstrating same. Enbridge Energy also admits that on September 17th it also provided an erosion study to the NRD, along with erosion analysis, supporting calculations, and citations to prior and current monitoring of erosion at Slope 18 that concluded that “Conservative analysis suggests that it would take a 1 in 10 year rainfall event to result in any significant erosion to the gully that would potentially reduce pipeline support

below current levels.” Enbridge Energy is preparing to produce technical scans as part of discovery in this case, as Enbridge Energy has already produced significant data, calculations, and other information that Enbridge Energy relied on in its professions of confidence as to the pipeline’s continued integrity. To the extent that the allegations in Paragraph 134 characterize or describe documents or other sources, such sources speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 135: Enbridge Energy admits that on September 18, 2019, it placed sandbags beneath an unsupported portion of pipeline in order to provide temporary support to the pipeline. Enbridge Energy further admits that on September 25, 2019, it was provided a copy of a purported “after-the-fact permit” purportedly issued by the NRD under its Wetland and Watercourse Protection Ordinance. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 136: Enbridge Energy admits that the sandbags placed beneath Line 5 at Slope 18 are a temporary measure. Enbridge Energy further admits that it has already presented to the NRD preliminary plans for a permanent measure to prevent additional erosion at Line 5 from occurring at the gully located at Slope 18. Enbridge Energy further admits that the NRD, through a consultant, has offered comments on those preliminary plans. Answering further, to the extent that the allegations in Paragraph 136 characterize or describe the NRD consultant’s comments, those comments speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy is in the process of responding to those comments and developing a more detailed and refined plan for the permanent measure to prevent additional erosion. In the meantime, Line 5 is subject to regular monitoring,

the sandbags are firmly in place, and Line 5 does not pose any kind of safety or other kind of threat. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 137: To the extent that the allegations in Paragraph 137 characterize or describe communications by Enbridge Energy, such communications speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy does acknowledge that the Band possesses certain authority under the Clean Water Act, such as having promulgated water quality standards and possessing certain authority over wetlands that meet the legal definition of “waters of the United States” in only those discrete portions of the Reservation (or only with respect to those discrete activities on the Reservation) at which wetlands are shown to be located. Enbridge Energy further admits that it has denied that the Band possesses any jurisdiction over Enbridge Energy’s placement of sandbags in the dry gully channel beneath Line 5 because such area is not subject to the Clean Water Act. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 138: Enbridge Energy admits that it continues to operate Line 5, which generally transports up to 540,000 barrels of light crude oil and natural gas liquids through the Bad River Reservation on a daily basis.

COUNT 1: Public Nuisance – Federal Law

Answer to Paragraph 139: Enbridge Energy incorporates by reference its answers to each preceding and succeeding Paragraph, as if fully set forth herein in response to Paragraph 139 of the Complaint.

Answer to Paragraph 140: Denied.

Answer to Paragraph 141: Denied.

Answer to Paragraph 142: Denied.

Answer to Paragraph 143: Denied.

Answer to Paragraph 144: Denied.

Answer to Paragraph 145: Denied.

COUNT 2: Public Nuisance – Wisconsin Law

Answer to Paragraph 146: Enbridge Energy incorporates by reference its answers to each preceding and succeeding Paragraph, as if fully set forth herein in response to Paragraph 146 of the Complaint.

Answer to Paragraph 147: Denied.

Answer to Paragraph 148: Denied.

Answer to Paragraph 149: Denied.

Answer to Paragraph 150: Denied.

Answer to Paragraph 151: Denied.

COUNT 3: Trespass – Federal Law

Answer to Paragraph 152: Enbridge Energy incorporates by reference its answers to each preceding and succeeding Paragraph, as if fully set forth herein in response to Paragraph 152 of the Complaint.

Answer to Paragraph 153: Enbridge Energy admits that it continues to transmit crude oil and natural gas liquids across parcels identified above on the Bad River Reservation in which the Band has ownership interests. Enbridge Energy denies the remaining allegations in this Paragraph.

Answer to Paragraph 154: Denied.

Answer to Paragraph 155: Enbridge Energy admits that the Band has recently, and in violation of its prior promises to and valid and enforceable contracts with Enbridge Energy,

wrongfully insisted that Enbridge Energy cease operations of Line 5 across the Reservation. The remaining allegations of this Paragraph are denied.

Answer to Paragraph 156: Denied.

Answer to Paragraph 157: Denied.

Answer to Paragraph 158: Denied.

COUNT 4: Ejectment – Federal Law

Answer to Paragraph 159: Enbridge Energy incorporates by reference its answers to each preceding and succeeding Paragraph, as if fully set forth herein in response to Paragraph 159 of the Complaint.

Answer to Paragraph 160: Paragraph 160 consists of legal conclusions to which no response is required. To the extent that a response is required, the allegation is denied. Enbridge Energy denies the allegations contained in the Paragraph, except Enbridge Energy admits that its pipeline generally transports up to twenty-three million gallons of crude oil and natural gas liquids per day.

Answer to Paragraph 161: Denied.

Answer to Paragraph 162: Denied.

Answer to Paragraph 163: Denied.

COUNT 5: Band Regulatory Authority – Federal Law

Answer to Paragraph 164: Enbridge Energy incorporates by reference its answers to each preceding and succeeding Paragraph, as if fully set forth herein in response to Paragraph 164 of the Complaint.

Answer to Paragraph 165: Paragraph 165 contains legal conclusions to which no response is required. To extent a response is required, the allegations of Paragraph 165 are denied.

Answer to Paragraph 166: Enbridge Energy admits that it entered into a contract with the Band in which the Band consented to rights-of-way to permit Enbridge to build, operate, and maintain Line 5 on lands inside the Bad River Reservation (i.e., the 1992 Agreement), which the Band is materially breaching. Enbridge Energy denies the remaining allegations of this Paragraph.

Answer to Paragraph 167: Paragraph 167 contains legal conclusions to which no response is required. To the extent that the allegations in Paragraph 167 characterize or describe treaties entered into between the Band and the United States because 1836 and 1854, such treaties speak for themselves, and Enbridge Energy denies any characterization or description that is inconsistent therewith. Enbridge Energy lacks sufficient information to form a belief as to the truth of the remaining allegations of this Paragraph and accordingly denies them.

Answer to Paragraph 168: Denied.

Answer to Paragraph 169: Denied.

Answer to Paragraph 170: Paragraph 170 contains legal conclusions to which no response is required. To the extent that a response is required, those allegations are denied. Enbridge further states that the Band knew, understood, and expressly agreed to the siting and location of the pipeline on the Reservation.

Answer to Plaintiff's Prayer for Relief: Plaintiff's Prayer for Relief contains no factual assertions to which a response is required. Plaintiff's Prayer for Relief further states legal conclusions and Plaintiff's characterizations of this action, with which Enbridge disagrees and to which no response is required. To the extent that Plaintiff's Prayer for Relief is deemed to require a response, Enbridge Energy denies the remaining allegations in Plaintiff's Prayer for Relief.

ADDITIONAL ALLEGATIONS AND GENERAL DENIAL

Enbridge Energy denies all allegations in the Complaint unless Enbridge Energy has expressly admitted those allegations above. Further, unless otherwise expressly admitted,

Enbridge Energy denies any allegations in the headings, footnotes or in other places in the Complaint, to the extent that any such allegations require a response. Any headings, subheadings or similar text that Enbridge Energy has included in this Answer are for the convenience of the Court and the parties, and are not intended to be nor shall they be construed as an admission of any fact by Enbridge Energy. Further, Enbridge Energy lacks knowledge or information sufficient to form a belief as to whether the photographs contained in the Complaint are accurate depictions of what they purport to show, and therefore denies the characterizations accompanying to the extent that they are deemed to constitute allegations.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

1. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

2. The Band consented to Enbridge Energy's operation of Line 5 on the Bad River Reservation, including the allotted lands, in the December 23, 1992 Agreement with Enbridge Energy's predecessor in interest (the "1992 Agreement").

THIRD AFFIRMATIVE DEFENSE

3. The Band is estopped from denying that Enbridge Energy has privilege or consent to be present on the allotted lands.

FOURTH AFFIRMATIVE DEFENSE

4. Enbridge Energy is licensed to be on the allotted lands.

FIFTH AFFIRMATIVE DEFENSE

5. The Band waived any objection to Line 5's presence on the Bad River Reservation, including the allotted lands, in the 1992 Agreement.

SIXTH AFFIRMATIVE DEFENSE

6. The Band has acquiesced to Enbridge Energy's presence on the allotted lands.

SEVENTH AFFIRMATIVE DEFENSE

7. The Band comes to this Court with unclean hands, in that it has breached the 1992 Agreement and the implied covenant of good faith and fair dealing.

EIGHTH AFFIRMATIVE DEFENSE

8. Enbridge Energy holds an equitable easement on the allotted lands.

NINTH AFFIRMATIVE DEFENSE

9. The Band's trespass and ejectment claims are barred because they would operate to take Enbridge Energy's property without just compensation in violation of the Indian Civil Rights Act.

TENTH AFFIRMATIVE DEFENSE

10. The Band's trespass and ejectment claims are barred because they would operate to take Enbridge Energy's property without due process of law in violation of the Indian Civil Rights Act.

ELEVENTH AFFIRMATIVE DEFENSE

11. The Band's nuisance claim under federal common law is displaced by federal statutes, including the Clean Water Act.

TWELFTH AFFIRMATIVE DEFENSE

12. The Band has no cause of action under federal common law to sue to abate an alleged public nuisance.

THIRTEENTH AFFIRMATIVE DEFENSE

13. The Band lacks authority to sue for abatement of an alleged public nuisance under Wisconsin law.

FOURTEENTH AFFIRMATIVE DEFENSE

14. The Band's nuisance claims fail for lack of any current or probability of harm or imminent harm to the Band or asserted public rights.

FIFTEENTH AFFIRMATIVE DEFENSE

15. Line 5 does not constitute a public nuisance because it is heavily regulated by the government and is operated lawfully consistent with applicable regulations.

SIXTEENTH AFFIRMATIVE DEFENSE

16. The Band assumed the risk allegedly posed by the pipeline when it agreed to the 1992 Agreement in which, among other things, it granted Enbridge Energy an easement to operate Line 5 on tribal lands until 2043.

SEVENTEENTH AFFIRMATIVE DEFENSE

17. The Band came to any alleged nuisance (any such nuisance is denied) by its own actions in the 1992 Agreement, in which, among other things, it agreed to grant Enbridge Energy an easement to operate Line 5 on tribal lands until 2043, and when, after agreeing to grant Enbridge Energy an easement to operate Line 5 on tribal lands until 2043, it voluntarily purchased interests in allotted lands along Line 5's route.

EIGHTEENTH AFFIRMATIVE DEFENSE

18. The Band will be estopped from seeking abatement of the alleged public nuisance if it wrongfully delays or prevents Enbridge Energy from inspecting or abating the alleged nuisance.

NINETEENTH AFFIRMATIVE DEFENSE

19. The relief sought by the Band is impermissibly broader than necessary to address the alleged nuisance or the alleged trespass.

TWENTIETH AFFIRMATIVE DEFENSE

20. The Band's claims are barred by the doctrine of laches.

TWENTY-FIRST AFFIRMATIVE DEFENSE

21. The Band cannot show that it is entitled to the drastic remedy of a permanent injunction ordering the removal of Line 5 from the Reservation because issuance of the injunction that the Band seeks would harm, rather than advance, the public interest.

TWENTY-SECOND AFFIRMATIVE DEFENSE

22. The Band's Regulatory Authority Claim is preempted by federal law.

RESERVATION OF RIGHTS

23. Enbridge Energy gives notice that it intends to rely upon such defenses as may arise during the proceedings in this case and hereby reserves the right to amend its answer and defenses accordingly.

ENBRIDGE ENERGY'S COUNTERCLAIMS

INTRODUCTION

1. Enbridge Energy brings the counterclaims set forth below to enforce contractual rights granted to it by the Band, and incorporated into a federal easement grant, to enforce the Band's implied obligation of good faith and fair dealing, and for judicial recognition that the Band's interests in the allotted lands at issue here are subject to equitable easements in favor of Enbridge Energy. The Band has expressly waived sovereign immunity in this Court against the counterclaims asserted herein.

2. Enbridge Energy's Line 5 traverses approximately 12 miles of the Bad River Reservation as part of its 645-mile route from Superior, Wisconsin, to Sarnia, Ontario.

3. Line 5 has provided fuel to heat homes and feedstocks to power industry throughout the Upper Midwest for more than 60 years. It is a critical component of the energy infrastructure of Wisconsin, Michigan, and the United States as a whole.

4. In 1992, the Band entered into a contract with Enbridge Energy's predecessor-in-interest, the Lakehead Pipe Line Company, in which the Band agreed that the Secretary of the Interior should grant to Lakehead "a right of way for the construction, operation and maintenance of a pipeline for fifty (50) years" across tribal lands on the Reservation. Ex. A ("1992 Agreement") § 1(a).

5. The 1992 Agreement provided that both parties "will do whatever they can reasonably do to ensure that all of the objectives of the Tribe and the Company, as those objectives are expressed in this Agreement, are achieved, even if it means that one or both of the parties must do something which is not expressly described herein." Among Enbridge Energy's stated objectives in the Agreement was the "construction, operation and maintenance" of Line 5, as well

as “obtain[ing] from the Tribe all consents and authorizations it is possible for the Company to obtain, whether necessary or not to obtain a fifty (50) year easement for Right of Way for a pipeline over the Company’s existing pipeline Right-of-Way in which the Tribe has an interest.”

6. The purpose of the 1992 Agreement was to permit operation of Line 5 until 2043 on any Reservation land in which the Band has an interest and to require the Band to provide assistance in obtaining easements across any non-Band owned land as well. It certainly did not and does not permit the Band to file this litigation seeking to remove the Line from the Reservation prior to 2043.

7. The Band now claims to have an ownership and myriad other interests in 11 parcels of “allotted lands” within the Reservation crossed by Line 5 for which the Band gave advance consent to an easement for Line 5 in the 1992 Agreement. Thus, the Band has consented to the Line crossing those lands until 2043.

8. Despite Enbridge Energy’s safe operations of Line 5 through the Bad River Reservation since the mid-1950s, the Band has wrongfully attempted, by this litigation, to remove Line 5 from the Reservation in flagrant violation of the 1992 Agreement and the 50 year easement it contains.

9. The Band has materially breached the 1992 Agreement. In addition, the Band is in material violation of the implied covenant of good faith and fair dealing that is implicit in the 1992 Agreement.

10. The Band’s actions threaten, and if successful would directly impede, Enbridge Energy’s ability to use the entire 645-mile Line 5 pipeline, given that service between its origination point in Superior, WI and end-point in Sarnia, ON would be cut-off at the Reservation if the Band’s requested relief is granted. Disruption of pipeline service would harm thousands of

Enbridge Energy's customers and end-users throughout the region, who rely on products transported by the line to provide the necessary feedstocks and refined products to create fuel and consumer goods and to heat homes.

11. The shortfall caused by the disruption of service would have to be made up, to the extent it can be made up at all, using less efficient and likely more costly alternatives to Line 5, including trucks and train cars, which the federal agency with exclusive jurisdiction over the safety of interstate pipelines, the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), considers to be less safe.³

12. Were Line 5 to be shut down, the Band's sovereign immunity would prevent Enbridge Energy from recovering its full measure of losses through a monetary judgment. The Band's sovereign immunity in the 1992 Agreement caps any damage recovery by Enbridge Energy at \$800,000, and Enbridge Energy's damages would far exceed that amount. Therefore, Enbridge Energy lacks an adequate remedy at law.

13. Enbridge Energy accordingly seeks declaratory and injunctive relief requiring the Band to comply with its obligations that contain its consent to easements on the allotted parcels in which it owns an interest; preventing the Band from interfering with Enbridge Energy's rights to operate Line 5 across the Reservation, including on parcels in which the Band owns, and does not own, any interest; and recognizing that Enbridge Energy is entitled to easements on the allotted parcels in which the Band holds an interest.

PARTIES

14. Defendant/Counterclaim Plaintiffs EELP and EECI are a Delaware limited partnership and a Delaware corporation, respectively, both with their principal office address in

³ See <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs> ("Pipeline systems are the safest means to move [petroleum] products").

the United States in Houston, Texas. EELP is the successor-in-interest to Lakehead Pipe Line Company, the grantee of the easements at issue in this litigation. Collectively, EELP and EECI are referred to as “Enbridge Energy” in this counterclaim.

15. Plaintiff/Counterclaim Defendant Bad River Band of Lake Superior Tribe of Chippewa Indians is a federally recognized Indian tribe. The Band is located on the Bad River Reservation, an area of more than 125,000 acres in Northern Wisconsin on the south shore of Lake Superior.

16. Counterclaim Defendant Naomi Tillison is the Director of the Bad River Band Natural Resources Department.

JURISDICTION

17. This Court has jurisdiction over this action under 28 U.S.C. § 1331 because the Band asserts claims arising under federal law.

18. Enbridge Energy’s counterclaims also arise under federal law for purpose of 28 U.S.C. § 1331 because the rights that Enbridge Energy asserts herein are memorialized in federal right-of-way easements.

19. To the extent they arise under state law, this Court also has supplemental jurisdiction over the parties’ claims and counterclaims under 28 U.S.C. § 1367(a) because they form part of the same case or controversy as the Band’s federal claims.

20. The Band has expressly waived its sovereign immunity from suit in this Court with respect to the 1992 Agreement, with respect to any dispute regarding the 1992 Agreement, and with respect to enforcement of the 1992 Agreement. 1992 Agreement § 1(b). With respect to monetary judgments, the Band’s waiver of sovereign immunity is limited to \$800,000.

RELEVANT FACTS

Line 5

21. Since 1954, Enbridge Energy has operated a 645-mile crude oil pipeline known as “Line 5” from Superior, Wisconsin, to Sarnia, Ontario.

22. Line 5’s route through the upper reaches of Northern Wisconsin traverses the Bad River Reservation.

23. Line 5 transports light crude oil and natural gas liquids to and through the states of Wisconsin and Michigan.

24. PHMSA is the federal agency with exclusive jurisdiction to regulate the safety, including the operation and maintenance, of interstate liquids pipelines, like Line 5. *See* 49 U.S.C. § 60104(c).

25. PHMSA considers pipelines to be a vital component of America’s energy infrastructure, enabling “the safe movement of extraordinary quantities of energy products to industry and consumers, literally fueling our economy and way of life.”⁴

26. Every day, the volumes of light crude oil transported on Line 5 provide the regional economy with roughly: (a) enough gas to fill 120,000 passenger cars and light-duty vehicles; (b) enough diesel to fill 900 semi-trailers; and (c) enough jet fuel to move 18,500 passengers.

27. About 30 percent of the light crude transported on Line 5 remains in the United States, where it powers industry and is refined into gas, diesel, jet fuel, and other products. That volume is transported to Enbridge Energy’s pumping station in Marysville, Michigan, and delivered from there by a third-party pipeline to Marathon Petroleum Corporation’s refinery in Detroit and to other refineries in Ohio. The remainder of the light crude on Line 5 is delivered to

⁴ *See* General Pipeline FAQs, available at <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs>.

regional refineries in Ontario, with a portion of the resulting refined products also returning for import to the United States and thus providing benefits to domestic consumers.

28. Were Line 5 to be shut down, Enbridge Energy cannot provide the same volume of crude oil supply to its customers using alternative Enbridge Energy pipelines due to capacity constraints. Thus, the U.S. and Canadian refineries currently supplied via Line 5 would have to satisfy their crude oil supply needs via some combination of non-Enbridge pipelines, rail, and truck. The current capacity of the alternative transportation modes is not known to Enbridge Energy, and it is possible that regional refineries will have to reduce production due to inadequate alternative transportation capacity. Moreover, the rail and truck alternatives are more costly, less safe, and entail higher carbon emissions.

Enbridge Energy Operates Line 5 in Accordance with Federal Pipeline Safety Requirements

29. Consistent with the national interest in energy, the federal government regulates every aspect of the operation and maintenance of Line 5.

30. Under the Pipeline Safety Act (“PSA”), 49 U.S.C. §§ 60101 *et seq.*, PHMSA has exclusive authority to regulate the safety of interstate pipelines. Its regulations implementing that statute, found at 49 C.F.R. Part 195, govern all facets of pipeline operation, including the design, specifications, operation, and maintenance of pipelines, with the goal of reducing the risk that products will be released and mitigating the impact of any release that does occur.

31. For example, PHMSA regulations dictate the design and specifications of all segments of a pipeline (49 C.F.R. § 195.200 *et seq.*); the pressures at which pipelines may be operated (49 C.F.R. § 195.406); the frequency with which pipeline operators must conduct internal and external inspections of pipelines to identify potential threats to their integrity and the timeframes under which potential threats must be addressed (49 C.F.R. § 195.452); the procedures

that operators must follow, including responding to alarms or triggers that may indicate a release (49 C.F.R. § 195.446); and the placement of valves that can be controlled remotely to minimize the scope of a potential release (49 C.F.R. § 195.116). The goal of such regulations is to ensure the safety of the pipeline and its fitness for service, so as to prevent releases into surrounding resources. PHMSA regulations such as those described above are intended not only to ensure an appropriate level of pipeline safety, but are also specifically “designed to meet the need for ... protecting the environment.” 49 U.S.C. § 60102(b). Congress amended the PSA in 1992 to include a “new emphasis on environmental protection” by enacting additional measures, including but not limited to, increased inspection requirements for pipelines located in environmentally sensitive areas. *See* H.R. Rep. No. 102-247, reprinted in 1992 U.S.C.C.A.N. 2642, 2643. The PSA accordingly grants the PHMSA enforcement authority in the event of threats to “life, property or the *environment*” or if the facilities “would be constructed or operated, or a component of the facility is or would be constructed or operated, with equipment, material, or a technique that the Secretary [PHMSA] decided is hazardous to life, property or the *environment*.” *See* 49 U.S.C. § 60112(a)(2) (emphasis added).

32. Moreover, PHMSA also has broad authority to deem any interstate pipeline as one that poses a risk of a release such that it could order the pipeline to cease operations. 49 U.S.C. § 60112 (providing PHMSA with authority to take action with respect to pipeline facilities that present a hazard). In fact, Congress reiterated PHMSA’s exclusive authority to ensure the safety of interstate pipelines by enacting the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016 (the “PIPES Act”). The PIPES Act provides PHMSA with authority to issue an emergency order to cease any “unsafe condition or practice” that presents an “imminent hazard.” Pub. L. 114-183, 130 Stat. 527 (2016); 49 U.S.C. § 60117(o). In accordance with this

Act, PHMSA alone has authority to order the cessation of any pipeline operations, including any activity (such as risk of anchor strike or other factors) should such activities be determined to present an unsafe condition or practice constituting an imminent hazard to health, property or the environment

33. In accordance with PHMSA requirements, Line 5 is frequently inspected with high-resolution in-line inspection tools designed to identify potential anomalies that might create a risk of release. Using the results of those inspections along with other examination methods, Enbridge Energy implements a rigorous program of “integrity digs” to identify, examine, and repair potential anomalies to the line. Any identified anomalies are excavated and repaired, as necessary, consistent with the requirements set forth in PHMSA’s regulation at 49 C.F.R. § 195.452.

34. Furthermore, the pipeline is constantly monitored by personnel and leak detection equipment to enable operators to immediately take appropriate actions, including, if necessary, shutting down the pipeline in the event of a release and mitigating the impact of the release on the surrounding environment.

35. Pursuant to a 2012 order issued by PHMSA,⁵ Enbridge Energy developed and implements the “Lakehead Plan,” which outlines specific actions and timelines for safety improvements to specified pipelines within Enbridge Energy’s pipeline system (known as the “Lakehead System”). The Lakehead Plan includes procedures for ongoing inspection, replacement, and testing of Enbridge Energy’s pipelines. PHMSA continues to monitor the implementation of the Enbridge Energy’s Lakehead Plan. As stated by the PHMSA Administrator, Howard Elliot in his August 20, 2018 testimony before the U.S. Senate Committee on Commerce, Science and Transportation, the Lakehead Plan’s “comprehensive approach continues to produce

⁵ Order CPF No. 3-2012-5017H

significant safety improvements to the overall system that include additional remotely-operated valves, enhanced control room operations and leak detection, increased internal inspections, confirmatory hydrostatic pressure testing on specific pipelines, and pipe replacement, along with enhancements to the operator's organizational safety culture."⁶ Notably, "[a]s part of [PHMSA's] actions related to the Lakehead Plan, PHMSA conducted reviews of Enbridge Energy's internal inspections, maximum operating pressure determinations, and capacity increase modifications for Line 5 and did not identify any compliance issues." *Id.*

36. The effectiveness of Enbridge Energy's integrity dig program, leak detection monitoring, and other safety measures to comply with PHMSA regulations depends on Enbridge Energy's physical access to the pipeline's right of way to conduct such maintenance activities.

37. PHMSA has never found that Line 5's crossing of the Reservation violates an applicable safety standard or otherwise presents an imminent hazard to life, property, or the environment so as to require a cessation of its operations.

38. By contrast, PHMSA has confirmed the condition of Line 5 and its integrity and fitness for service. For example, in his August 20, 2018 testimony before the U.S. Senate Committee on Commerce, Science and Transportation, PHMSA Administrator Howard Elliot stated as follows:

- a. "PHMSA continues to require Line 5 to meet or exceed our pipeline safety regulation, policies, and procedures."
- b. "PHMSA [has] conducted reviews of [Enbridge Energy's] internal inspections, maximum operating pressure determinations, and capacity increase modifications for Line 5 and did not identify any compliance issues"

⁶ Available at <https://www.transportation.gov/content/pipeline-safety-great-lakes-incident-prevention-and-response-efforts-straits-mackinac>.

- c. “PHMSA engineers are attending, in person, [Enbridge Energy’s] hydrostatic pressure tests of the crossings, and PHMSA is monitoring [Enbridge Energy’s] compliance with the Congressional mandate for annual inspections of pipeline water crossings over 150 feet deep.”
- d. “PHMSA is in the process of completing a major integrated inspection of the Lakehead System. Inspectors are looking at all aspects of the system’s operation, including integrity management, control room management, design and construction, and corrosion. [As of July 31, 2018], PHMSA inspectors [had] spent a total of 286 combined days on this inspection, with 200 of those days in the field.”
- e. PHMSA’s inspection of Line 5 “give [the Agency] yet another way to ensure that Enbridge Energy is always pursuing necessary safety improvements. Our inspectors provide timely inspection feedback to [Enbridge Energy], keeping them informed of any potential safety issues that they find, and giving them the safety information they need as quickly as possible.”

39. Line 5 is also subject to extensive emergency response planning pursuant to the Clean Water Act (“CWA”), as amended by the Oil Pollution Act of 1990, which is also administered by PHMSA. *See* 33 U.S.C. § 2701 *et seq.* In accordance with that statute, Enbridge Energy has prepared and implemented PHMSA-approved emergency response plans, which include strategies to respond to releases from pipelines and other regulated facilities. These plans are designed to: (a) ensure that any release of oil is quickly contained; (b) direct initial clean-up efforts to mitigate the impact on natural resources; and (c) establish procedures for coordination with state and federal agencies on long-term response efforts. If a spill of oil were to occur on

Line 5, Enbridge Energy would implement these plans to ensure that any impact on surrounding resources would be avoided or mitigated.

40. The U.S. Environmental Protection Agency (“EPA”), also exercises authority over the operation and maintenance of the Line 5 Dual Pipelines in a manner so as to prevent a release into surrounding water resources. Line 5 and other Enbridge Energy lines that form Enbridge Energy’s Lakehead System are the subject of a Consent Decree entered in 2017, which resulted from the settlement of EPA’s claims relating to a different Enbridge Energy pipeline (Line 6B). *See United States v. Enbridge Energy, Limited Partnership, et al.*, Civ. No. 1:16-cv-00914, ECF No. 14 (E.D. Mich., May 27, 2017). The Consent Decree imposes special measures on Enbridge Energy, including heightened inspection protocols and more stringent repair criteria for conducting integrity digs on its pipeline, including those portions of Line 5 that traverse the Bad River Reservation.

41. Accordingly, a broad Federal regulatory regime is in place to: (i) regulate the safety of pipelines so as to prevent releases; (ii) should a release occur, ensure that the petroleum products are fully cleaned-up and resources are fully remediated; and (iii) seek enforcement against the pipeline operator for any resulting release from a pipeline, including imposing injunctive measures.

Enbridge Energy’s Easements to Operate Line 5 Through the Bad River Reservation

42. In 1953, Enbridge Energy’s predecessor company, the Lakehead Pipe Line Company, acquired easements for rights-of-way through the Bad River Reservation, including on tribal trust lands and individual Indian-owned “allotted lands.”

43. Allotted lands are former tribal trust lands allotted under federal law to individual Indians with restrictions on alienation.

44. Enbridge Energy's easements were memorialized in a series of agreements by which the Tribe and individual allotment holders granted Enbridge Energy permission to construct, operate, and maintain a crude oil pipeline traversing the Reservation.

45. The easements were then issued by the federal government.

46. Line 5's route across the reservation is roughly 12 miles long and crosses three types of land.

47. First, roughly half of the 12-mile distance covers tribally owned land (or land held in trust by the United States on behalf of the Band). Enbridge Energy has an easement on this land which does not expire until 2043.

48. Second, roughly three miles of the route cover allotted lands. To the extent the Band claims an interest in 11 of these 15 parcels, these are the lands at issue in this case.

49. Third, the rest of Line 5's route covers individually owned fee lands. Enbridge Energy has permanent easements on these lands, and they are not at issue in this litigation.

50. In 1992, the year before its then-existing easements over the tribal land and allotted lands were due to expire, Enbridge Energy negotiated and secured new easements on those lands.

The 1992 Agreement

51. To address Enbridge Energy's need for an easement on the tribal land, Enbridge Energy and the Band entered into the 1992 Agreement.

52. The 1992 Agreement provides the Band's consent to a 50-year easement for a right of way over the tribal land. The Band agreed that "[t]he Secretary [of Interior] may grant to the Company a right of way for the construction, operation, and maintenance of a pipeline for fifty (50) years within the Existing Right of Way."

53. The Band agreed to the following mutual covenant in the 1992 Agreement:

The Tribe and the Company will do whatever they can reasonably do to ensure that all of the objectives of the Tribe and the Company, as those objectives are expressed in this Agreement, are achieved, even if it means that one or both of the parties must do something which is not expressly described herein. One of the Company's objectives under this Agreement is to obtain from the Tribe all consents and authorizations it is possible for the Company to obtain, whether necessary or not to obtain a fifty (50) year easement for Right of Way for a pipeline over the Company's existing pipeline Right of Way in which the Tribe has an interest.

Ex. A, 1992 Agreement § 3.

54. The Band also consented in the 1992 Agreement to “a limited waiver of its sovereign immunity,” which covers “any sovereign immunity the Tribe [that is, the Band] may have with respect to this Agreement, with respect to any dispute regarding this Agreement, and with respect to enforcement of this Agreement.” Ex. A, 1992 Agreement § 1(b). The waiver is limited to “suit brought in the Federal District Court for the Western District of Wisconsin” and it reserves immunity against “the enforcement of any judgment or judgments in an aggregate monetary amount of more than \$800,000.00” (the amount that Enbridge Energy paid the Band under the Agreement). *Id.*

55. The Bureau of Indian Affairs (“BIA”) formally granted the easement in a grant instrument issued on February 24, 1993, which grants Enbridge Energy the right to use a 60-foot-wide strip of tribal land along Line 5's route. *See* Ex. B (Grant of Easement for Right of Way).

56. The terms and conditions of the 1992 Agreement were incorporated into the BIA's easement grant by operation of law. *See* 25 C.F.R. § 169.15 (1993) (“Such instrument shall incorporate all conditions or restrictions set out in the consents obtained” from the Indian tribe or individual tribal members); *see also* Grant of Easement for Right of Way at 2 (providing that the easement may be terminated for “[f]ailure to comply with any term or condition of the grant” and that “conditions of this easement shall extend to and be binding upon and shall inure to the benefit of the heirs, representatives, successors and assigns of the Grantee”).

57. Enbridge Energy's 50-year easement over the tribal land pursuant to the 1992 Agreement will not expire until 2043.

Enbridge Energy's 20-Year Easements on the Allotted Lands

58. Also in 1993, the BIA granted Enbridge Energy 20-year easements on the 15 allotted parcels along Line 5's route.

59. The allotted parcels were owned by numerous individuals who maintained undivided ownership interests in the parcels of varying sizes. As of 1992, the Band also maintained a small ownership interest in two of the 15 allotted parcels along Line 5's route.

60. The easements on the allotted parcels took effect in 1993 and ran for a 20-year term ending in 2013.

The Band's Refusal to Comply With the 1992 Agreement Regarding Easements on Allotted Lands

61. After Enbridge Energy obtained its 20-year easements on the allotted lands, the Band acquired additional stakes (which it claims ranges between 40 percent and 90 percent ownership) in 11 of the 15 allotted parcels traversed by Line 5.⁷

62. Beginning several months before the expiration of the 20-year easements in 2013, Enbridge Energy initiated the renewal process with the BIA and informed the Band of its intention to renew. Enbridge Energy wrote to the Band's Chairman, Mike Wiggins, on April 19, 2013, asking to meet with the appropriate tribal officials to begin the right-of-way renewal discussions. *See* Ex. D (Letter from Douglas B. Alter to Tribal Chairman Mike Wiggins Jr.).

⁷ The Band's own map of the 15 allotted parcels affected by the 20-year easements, which shows its characterization of the extent of tribal ownership for each parcel, is available on the Band's website and attached to this Answer as Ex. C. *See* http://www.badriver-nsn.gov/images/stories/docs/NaturalRes_Announcements/EnbridgeExpiredROWallotments.pdf. Enbridge Energy does not admit or concede that this map is accurate or correct as these ownership interests are being investigated.

63. Enbridge Energy also began the necessary process with both the Band and the BIA to renew its easements on the allotted lands. At the direction of the BIA, prior to the expiration of the 20 year easements, Enbridge Energy hired an appraisal firm to appraise the 15 allotted parcels. Those appraisals were completed by November 2013 and submitted to the BIA, which reviewed and approved them and sent a Statement of Fair Market Value to all ownership interests. The BIA also prepared a list of the names and addresses of the individual allottees to help Enbridge Energy contact individual owners to seek their consent. The BIA sent this list to the Band for review prior to releasing it to Enbridge Energy, but the Band did not provide it to Enbridge Energy. Rather, Enbridge Energy finally received that list from the BIA itself during a meeting in June 2016.

64. After informing the Band of its intention to renew, Enbridge Energy engaged in extensive correspondence with the Band and provided detailed responses to the Band's information requests as a predicate to discussions about renewal.

65. Notwithstanding Enbridge Energy's good-faith negotiation efforts, the Band steadfastly, and in violation of the 1992 Agreement, refused to consent to new easements on the 11 allotted parcels in which it holds an interest. The Band also refused to negotiate in good faith regarding extending these easements until 2043, as required by the 1992 Agreement.

66. Finally, the Bad River Tribal Council voted to enact a formal resolution containing the Band's decision not to consent to the renewal of easements necessary for the operation of Line 5 across the Reservation. *See* Ex. E (Press Release, "Bad River Band Denies Renewal of Enbridge Energy Line 5 Grant of Easement" (Jan. 5, 2017)).

67. According to the Band's press release, the Band's Resolution further called for the decommissioning and removal of Line 5 from all Bad River lands—including the land with respect to which the Band had agreed to a 50-year easement that will not expire until 2043. *See* Ex. E.

68. Enbridge Energy subsequently sought to convince the Band to live up to the obligations of the 1992 Agreement but was unable to do so

69. On July 23, 2019, the Band filed this lawsuit.

The Impact of the Band's Breach of Its Contract

70. In violation of the 1992 Agreement, the Band is using its ownership interests in the allotted lands to attempt to deprive Enbridge Energy of the ability to operate Line 5 across *any portion* of the Bad River Reservation.

71. Removing Line 5 from the Reservation and relocating it would damage Enbridge Energy, including through the lost income from transporting light crude oil and natural gas liquids; the inability to transport the volumes of energy products that shippers have committed to transport on Line 5; and the costs associated with decommissioning the Line 5 pipe on the Reservation and relocating it elsewhere so that the balance of the 645 miles of Line 5 infrastructure could be used again at some point in the future.

72. There is no guarantee that Enbridge Energy could obtain the necessary approvals from shippers, regulators, and landowners that may be required to run the pipeline along a new route nor is the schedule for any such effort possible to predict with precision. However, it is virtually certain that the relocation could not be completed quickly enough to satisfy existing demand due to the need to obtain required federal and state permits. That permitting process could take significant time due to the need for relevant agencies to conduct reviews prior to issuing their respective permits.

73. Taking Line 5 out of service for the time necessary to relocate the Line would have severe and far reaching consequences for local and regional energy markets which would stand to lose the roughly 540,000 barrels of light crude oil generally and currently available on Line 5 on

a daily basis. It is anticipated that the distributors would seek to transport thousands of barrels per day by rail or by truck, which would increase both the risks and costs of transportation. Moreover, transportation by truck and rail is more likely to result in a release than continued use of Line 5.

74. As stated, were Line 5 to be shut down, Enbridge Energy cannot provide the same volume of crude oil supply to its customers using alternative Enbridge Energy pipelines due to capacity constraints. Thus, the U.S. and Canadian refineries currently supplied via Line 5 would have to satisfy their crude oil supply needs via some combination of non-Enbridge pipelines, rail, and truck. The current capacity of the alternative transportation modes is not known to Enbridge Energy, and it is possible that regional refineries will have to reduce crude oil runs due to inadequate alternative transportation capacity. Moreover, the rail and truck alternatives are more costly, less safe, and entail higher carbon emissions.

75. Without a clear right of access to the entirety of Line 5, Enbridge Energy could also be impeded from conducting inspections and repairs mandated by PHMSA and the Consent Decree with EPA, thereby having the potential to create a significant threat of harm to the public health, the environment, and national security.

76. Enbridge Energy lacks an adequate remedy at law for the damages threatened by the Band's actions. In granting consent in the 1992 Agreement, the Band limited its waiver of sovereign immunity for damages to judgments up to \$800,000. The cost to Enbridge Energy of the disruption of service that would result from the Band's actions would far exceed the \$800,000 for which the Band has waived its sovereign immunity. Thus, Enbridge Energy could not be made whole by the limited legal remedies available.

COUNT I
BREACH OF CONTRACT AND FEDERAL EASEMENT GRANT

77. Enbridge Energy incorporates each and every Paragraph in this pleading.

78. The Band's refusal to consent to Line 5's presence on the allotted parcels and its attempts to drive Line 5 off of the Reservation by denying those consents and pursuing this lawsuit violate the Band's promises under the 1992 Agreement.

79. In the 1992 Agreement, the Band and Enbridge Energy mutually agreed to "do whatever they can reasonably do to ensure that all of the objectives of the Tribe and the Company, as those objectives are expressed in this Agreement, are achieved, even if it means that one or both of the parties must do something which is not expressly described herein." Agreement § 3.

80. One of Enbridge Energy's objectives, as expressed in the 1992 Agreement, was to obtain "a right of way for the construction, operation and maintenance of a pipeline for fifty (50) years," until 2043. Ex. A, 1992 Agreement § 1(a).

81. The 1992 Agreement also expressly stated that "[o]ne of the Company's objectives under this Agreement is to obtain from the Tribe all consents and authorizations it is possible for the Company to obtain, whether necessary or not to obtain a fifty (50) year easement for Right of Way for a pipeline over the Company's existing pipeline Right of Way in which the Tribe has an interest." Ex. A, 1992 Agreement § 3.

82. Thus, the Band is obligated to "do whatever [it] can reasonably do to ensure" that Enbridge Energy can "obtain from the Tribe all consents ... it is possible for [Enbridge Energy] to obtain," regardless of whether they are necessary to obtain the 50-year easement over the tribal land.

83. The Band is thus obligated under the 1992 Agreement to "do whatever [it] can reasonably do to ensure" that Enbridge Energy can obtain easements on the allotted parcels.

84. The Band is therefore obligated to consent, on reasonable terms, to easements on the allotted parcels.

85. In adopting its resolution of January 4, 2017, and declaring that it will not consent to new easements over the allotted lands in which it has acquired interests since 1993, the Band breached its obligation under the 1992 Agreement to “do whatever [it] can reasonably do to ensure that all of the objectives of ... [Enbridge Energy] ... are achieved.”

86. The Band remains in breach of the 1992 Agreement because it persists in refusing to consent to easements on the allotted parcels.

87. The Band’s actions frustrate the principal objective of the 1992 Agreement by depriving Enbridge Energy of the ability to operate and maintain its crude oil pipeline through the Reservation, including over the tribal lands that will remain subject to an easement until 2043. That easement has no value if it cannot be accessed via rights of way over adjoining lands on the Reservation, including the allotted parcels.

88. Rather than fulfill its obligations under the 1992 Agreement, the Band is actively thwarting the purposes of that Agreement. Its 2017 resolution and this litigation explicitly calls for Enbridge Energy to shut down Line 5 and remove it from the Reservation, notwithstanding that some 23 years remain on Enbridge Energy’s federally granted easement to operate through the tribal land covered by the 1992 Agreement.

89. Because the terms and conditions of the 1992 Agreement were incorporated into the BIA’s easement grant, 25 C.F.R. § 169.15 (1993); *see also* 25 C.F.R. § 169.25(a) (2016) (same), the Band’s violations of the 1992 Agreement are also violations of that federal easement grant.

90. Shutting down operations, removing Line 5, and rerouting it around the Reservation would disrupt service to thousands of Enbridge Energy's customers and end-users. It would deprive refineries in Detroit and elsewhere of necessary feedstocks, substantially disrupting the supply of energy throughout the region. And it would significantly damage Enbridge Energy in terms of costs and lost profits. Rerouting Line 5 would also require state and federal permits, which would be subject to environmental, cultural, and other reviews, which would be costly, and which would take an extensive period of time.

91. Enbridge Energy lacks an adequate remedy at law for these harms. Enbridge Energy has an interest in protecting its property rights in the particular parcels of land over which its pipeline operates and has operated for 66 years. Moreover, the Band's waiver of sovereign immunity in the 1992 Agreement does not allow for monetary judgments of more than \$800,000. That amount would be wholly insufficient to remedy the substantial harm that Enbridge Energy would suffer if it were required to remove Line 5 from the Reservation and reroute it. Thus, the legal remedy of monetary damages could not adequately compensate Enbridge Energy for the losses that it would suffer as a result of the Band's breach of the 1992 Agreement and the federal easement grant.

92. Enbridge Energy is entitled to declaratory and injunctive relief requiring the Band to give its consent, on economically reasonable terms, to new easements on the allotted parcels in which the Band holds an interest, and preventing the Band from taking further steps to deprive Enbridge Energy of the use of its existing easement over tribal land until that easement's expiration in 2043.

COUNT II
BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

93. Enbridge Energy incorporates each and every Paragraph in this pleading.

94. For analogous reasons, the Band has breached the implied duty of good faith and fair dealing under the 1992 Agreement.

95. Every contract contains an implied obligation on the part of both parties to act in good faith and to deal fairly with one another.

96. This implied covenant precludes a party to a contract from acting so as to deprive its counterparty of the benefits of their bargain.

97. The Band is in breach of its implied duty of good faith and fair dealing because it is using its ownership interests in the allotted parcels to prevent Enbridge Energy from obtaining the easements on those parcels that it needs to operate Line 5 on the tribal land covered by the 1992 Agreement and subject to a 50-year easement. By its conduct, it has deliberately frustrated the purpose of the 1992 Agreement and deprived Enbridge Energy of the benefit of the bargain with respect to its existing federally granted easement over tribal lands.

98. For the reasons set forth in Count I, Enbridge Energy lacks an adequate remedy at law and is entitled to declaratory and injunctive relief requiring the Band to comply with its duty of good faith and fair dealing under the 1992 Agreement.

COUNT III
EQUITABLE EASEMENT

99. Enbridge Energy incorporates each and every Paragraph in this pleading.

100. In light of the Band's obligations under both the express terms of the 1992 Agreement and the implied covenant of good faith and fair dealing, Enbridge Energy is equitably entitled to easements for rights of way across the allotted parcels in which the Band holds an interest so that Line 5's route across the Reservation can reach the tribal land that will remain subject to an easement under the 1992 Agreement until 2043.

101. The hardship that Enbridge Energy would suffer from the Band's denial of access to its 50-year easement on tribal land, by which the Band intends to force Enbridge Energy to remove Line 5 from the Reservation entirely, would be substantial and would be greatly disproportionate to the hardship that the Band would suffer from recognition of an equitable easement on the allotted parcels, which would be minor and which would merely require the Band to accept the state of affairs that it voluntarily agreed to in the 1992 Agreement for the remainder of the term of that Agreement.

COUNT IV
DECLARATORY AND INJUNCTIVE RELIEF
(AGAINST THE BAND)

102. Enbridge Energy incorporates each and every paragraph in this pleading.

103. EELP possesses perpetual and in force rights-of-way across multiple parcels of privately-held land inside the Reservation that expressly permit Enbridge Energy the unfettered right to operate, inspect and maintain Line 5 on those properties. These rights of way provide, in part, that Enbridge Energy has a right of way “for the . . . operation, maintenance, inspection, patrol... (including aerial patrol), alteration, removal, replacement, reconstruction and/or repair of one or more pipe lines. . . and together with the right of ingress and egress to and from said right of way and easement through and over said above described land for any and all purposes necessary, convenient, or incidental to the exercise by Grantee of the rights herein granted”

104. The Band also granted to EELP's predecessor in interest the unfettered right to operate, inspect and maintain Line 5 on certain Band property on the Reservation, for which the Band was paid \$800,000. On December 23, 1992, the Band entered into a formal, written right-of-way consent agreement in which the Band agreed that the Secretary of the Interior “may grant

to [Enbridge Energy] a right of way for the construction, operation and maintenance of a pipeline for fifty (50) years within” the Reservation. Paragraph 1(a) of the Agreement.

105. On February 24, 1993, the United States Bureau of Indian Affairs (“BIA”) issued to EELP’s predecessor in interest a grant of right-of-way (the “ROW”) for “the easement and privilege of maintaining, operating, inspecting, monitoring, and repairing a crude oil pipeline and the necessary adjuncts thereto, together with the right of ingress and egress for the purposes of which this easement is granted over and across” the Reservation.

106. The ROW is in full force and effect and does not expire until June 2, 2043.

107. The ROW was issued by the BIA pursuant to 25 U.S.C. § 323 (the “Indian Right of Way Act”) and its implementing regulations at 25 C.F.R Part 169.

108. Grants of rights-of-ways across tribal lands are subject to an extensive federal regulatory scheme under the Indian Right of Way Act and its implementing regulations.

109. Congress has chosen to grant exclusive authority to the Secretary of the Interior for the regulation, administration, and supervision of grants of rights-of-way across “tribal lands across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned.” 25 U.S.C. § 323.

110. No law, rule, or regulation confers on the Band the authority to deny, delay, and/or impose conditions upon Enbridge Energy’s access to the Reservation, particularly in instances when Enbridge Energy seeks to access privately-held land.

111. No law, rule, or regulation, including the Clean Water Act, confers on the Band the authority to issue to Enbridge Energy after-the-fact permits that seek to impose numerous conditions upon Enbridge Energy, when Enbridge Energy’s at-issue work (such as, for example, placing sandbags on dry land, beneath Line 5, on privately-held land) plainly does not trigger any

Clean Water Act permitting requirements, and when the U.S. Army Corps of Engineers independently confirmed that such work did not trigger any Clean Water Act permitting requirements.

112. The perpetual rights-of-way, the Agreement, and the ROW provide Enbridge Energy with unconditioned access to certain lands within the Reservation to operate, inspect, and where necessary maintain Line 5. That access serves to ensure the safe operation of Line 5—which EELP has operated safely for 66 consecutive years—and is to the mutual benefit of both the Band and Enbridge Energy. Such access is also necessary to continue to comply with federal requirements governing the safe operation of pipelines like Line 5.

113. Presently, the Band and certain of its officials are, and have been, unreasonably and unlawfully denying, delaying, and conditioning Enbridge Energy's access to certain parcels for operations, inspections, and maintenance of Line 5 – as shown by the Band's months-long delay in granting Enbridge Energy access to Slope 18 – in violation of Enbridge Energy's rights under the BIA's grant of the ROW, under the terms and conditions of the 1992 Agreement, which expressly consented to the issuance of that ROW, and under the terms of Enbridge Energy's perpetual rights-of-way on tracts of non-Indian fee land within the Reservation. Upon information and belief, such unreasonable and unlawful conduct by the Band and its officials will continue in the future.

114. The ROW is wholly subject to and overseen by the United States.

115. The Band's ongoing and future denials, delays, and unreasonably conditioning of Enbridge Energy's access to the Reservation are neither necessary for tribal self-government nor for control of internal relations.

116. The Band's actions described above represent an attempt to impermissibly and retroactively re-write the perpetual easements on non-Indian fee lands, the 1992 Agreement, and the ROW, to which the Band gave its express consent and for which the Band accepted the sum of \$800,000, by belatedly attaching various conditions on Enbridge Energy's access to the Reservation not contained in those binding agreements and conveyances. Enbridge Energy has fulfilled all conditions precedent, if any, under those agreements and conveyances to render them valid and enforceable as written.

117. The Band's past, current, and future interference with Enbridge Energy's access to Line 5 to perform inspection, maintenance, and repairs to ensure the safe operation of Line 5 is wrongful, unjustified and illegal. Enbridge Energy's access to maintain the pipeline benefits the public as a whole, the Band, its members, non-member Indians and other non-members residing within the Reservation, and all wildlife, plants, and the entire Reservation ecosystem.

118. The Band's actions in denying or impeding Enbridge Energy's access to Line 5 interferes with Enbridge Energy's rights under perpetual easements, the 1992 Agreement and the ROW, which is a valid and enforceable property right granted by the BIA with the Band's express consent pursuant to the Indian Right of Way Act.

119. The Band's interference is unlawful and violates Enbridge Energy's rights under all of these instruments, as well as the Indian Right of Way Act and its implementing regulations.

COUNT V
DECLARATORY AND INJUNCTIVE RELIEF
(AGAINST DIRECTOR TILLISON)

120. Enbridge Energy incorporates each and every paragraph in this pleading.

121. Naomi Tillison is Director of the Bad River Band's Natural Resources Department.

122. Director Tillison is the Band official responsible for issuing access permits to the Reservation.

123. Director Tillison, acting on behalf of the Band, has illegally and unreasonably required access permits for Enbridge Energy to access Line 5, as well as imposing access conditions on Enbridge Energy's access to Line 5, including for the purpose of ensuring compliance with federal pipeline safety requirements. Upon information and belief, such unlawful and unreasonable conduct will continue in the future.

124. Director Tillison's purported "requirements" for Enbridge Energy to obtain access permits for accessing Line 5 are unlawful and not supported by any legal authority.

125. For example, Director Tillison has illegally and unreasonably required access permits for Enbridge Energy to access Line 5 when Enbridge Energy would not traverse across any Band-owned lands.

126. As a condition for granting access, Director Tillison has also required Enbridge Energy to comply with numerous ad hoc conditions imposed on work, including pipeline maintenance and/or repair work, that Enbridge Energy and Enbridge Energy's consultants would complete on land that is privately held, in which the Band owns no interest.

127. Director Tillison, and members of the Natural Resources Department, have attempted to stop Enbridge Energy from accessing Line 5 on privately-held land, in which the Band owns no interest.

128. Director Tillison, and members of the Natural Resources Department, have attempted to regulate Enbridge Energy under the Clean Water Act and the Band's Wetlands and Watercourse Protection Ordinance ("WWPO"), and issued Enbridge Energy after-the-fact permits that Enbridge Energy never applied for in the first place that seek to impose numerous conditions

upon Enbridge Energy, when Enbridge Energy's at-issue work (for example, placing sandbags on dry land, beneath Line 5, on privately-held land) plainly does not trigger any Clean Water Act permitting requirements, and when the U.S. Army Corps of Engineers independently confirmed that such work did not trigger any Clean Water Act permitting requirements.

129. Enbridge Energy possesses valid rights to access Line 5, including under perpetual easements, under the Agreement, and under the ROW, and is obligated by federal law to do so in order to ensure the safe operation of the pipeline.

130. Director Tillison's permitting decisions have resulted and will result in illegally and unreasonably conditioning, delaying, or denying Enbridge Energy's access to the Reservation.

131. Director Tillison in engaging in such conduct is acting far beyond her or the Band's sovereign authority over Enbridge Energy, which are non-Indian entities.

132. Director Tillison has no authority to condition, delay, or deny Enbridge Energy's access to the Reservation for lands over which Enbridge Energy has perpetual easement rights and/or federal rights under the Agreement and the ROW.

133. Director Tillison has no authority to issue permits and/or impose conditions on Enbridge Energy under either the Clean Water Act or the Band's WWPO for Enbridge Energy's work at Slope 18 or elsewhere on the Reservation that does not involve any WWPO-protected waterbodies, wetlands, or other "waters of the United States."

134. Director Tillison is presently engaged in and will continue to engage in illegally and wrongfully conditioning, delaying, or denying Enbridge Energy's access to the Reservation for lands over which Enbridge Energy has perpetual easement rights and/or federal rights under the Agreement and the ROW.

135. Director Tillison has engaged in the conduct described above in her official capacity as Director of the Band's Natural Resources Department and, upon information and belief, will continue to do so in the future. Department Tillison's conduct is unlawful and represents an ongoing violation of Enbridge Energy's federal rights under the Indian Right of Way Act.

PRAYER FOR RELIEF

Enbridge Energy respectfully requests the following relief:

A. A declaration that the Band is required under the express terms of the 1992 Agreement, as incorporated into the BIA's easement grant, and under the implied covenant of good faith and fair dealing, to promptly consent on reasonable terms to access to and easements on all of the allotted lands in which the Band now or hereinafter holds any interest.

B. A declaration that Enbridge Energy holds easements for rights of way over the allotted lands in which the Band holds an interest, now or in the future, permitting, inter alia, operation, maintenance, inspection and repair of Line 5.

C. A declaratory judgment that the Band and its present or future officials do not have authority to, and may not, delay, deny or impose access conditions upon Enbridge Energy concerning or related to any tribal lands subject, now or in the future, to the ROW, the Agreement, any lands over which Enbridge Energy possesses perpetual rights-of-way or any other lands or property not owned by the Band, except for limited Clean Water Act jurisdiction on the Reservation, where it is applicable.

D. A declaratory judgment that Director Tillison, and her successor, do not have authority to, and may not, delay, deny or impose access conditions upon Enbridge Energy concerning or related to any tribal lands subject, now or in the future, to the ROW, the Agreement,

any lands over which Enbridge Energy possesses rights-of-way or any other lands or property not owned by the Band, except for limited Clean Water Act jurisdiction on the Reservation, where it is applicable.

E. A declaratory judgment that the Band and Director Tillison, and her successor, does not have authority to, and may not, impose permitting requirements or conditions upon Enbridge Energy concerning or related to any work that Enbridge undertakes at Slope 18 or elsewhere at the Reservation that does not impact WWPO-protected waterbodies, wetlands, or other “waters of the United States.”

F. A preliminary and a permanent injunction enjoining the Band from taking steps to interfere with Enbridge Energy’s operation, maintenance, inspection and repair of Line 5 on the Reservation during the time of its existing 50-year right-of-way.

G. A preliminary and a permanent injunction requiring the Band to consent on commercially reasonable terms to easements on the allotted lands in which it holds an interest and to do whatever it reasonably can do to assist Enbridge Energy in the accomplishment of its objectives under the 1992 Agreement such that the Line can continue to operate in its present location until 2043.

H. A preliminary and a permanent injunction enjoining the Band and its present or future officials from delaying, denying or imposing access conditions upon Enbridge Energy over tribal lands subject, now or in the future, to the ROW, the Agreement, any lands over which Enbridge Energy possesses perpetual rights-of-way or any other lands or property not owned by the Band, except for limited Clean Water Act jurisdiction on the Reservation, where it is applicable.

I. A preliminary and a permanent injunction enjoining Director Tillison, and her successor, from delaying, denying or imposing, or directing Band officials under her supervision to delay, deny or impose, access conditions upon Enbridge Energy over any tribal lands subject, now or in the future, to the ROW, the Agreement, any lands over which Enbridge Energy possesses perpetual rights-of-way or any other lands or property not owned by the Band.

J. A preliminary and a permanent injunction enjoining the Band and Director Tillison, and her successor, from imposing permitting requirements or conditions upon Enbridge Energy concerning or related to work that Enbridge Energy undertakes at Slope 18 or elsewhere at the Reservation that does not impact WWPO-protected waterbodies, wetlands, or other “waters of the United States.”

K. A preliminary and a permanent injunction prohibiting the Band from interfering with Enbridge Energy’s ability to promptly obtain any necessary access to Line 5 for any reasonable purpose, including operation, maintenance, inspection and repair of Line 5.

L. Any other relief that the Court deems just and proper.

JURY TRIAL DEMANDED

Enbridge Energy demands a trial by jury of all claims and defenses upon which it is entitled to a jury.

Dated: October 29, 2019

Respectfully submitted,

/s/ Michael C. Davis

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CERTIFICATE OF SERVICE

I certify that on October 29, 2019, I served the foregoing document on all counsel of record using the Court's ECF system.

/s/ Michael C. Davis
Michael C. Davis