

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

BAD RIVER BAND OF THE
LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS
OF THE BAD RIVER RESERVATION,

Case No. 3:19-cv-602

Plaintiff /
Counterclaim
Defendant,

The Honorable William M. Conley

v.

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

Defendants /
Counterclaimants,

v.

NAOMI TILLISON, Director of Mashkiiziibii
Natural Resources Department of the Bad River
Band of the Lake Superior Tribe of Chippewa
Indians of the Bad River Reservation, in her
Official Capacity,

Counterclaim
Defendant.

**BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS’
ANSWER TO AMENDED COUNTERCLAIM**

INTRODUCTION

Defendants Enbridge Energy Company, Inc. and Enbridge Energy, L.P. (“Defendants” or “Enbridge”) bring counterclaims asking this Court to rewrite the 1992 Agreement (“Agreement”) on which those counterclaims are based. In that Agreement, the Band consented to fifty-year easements over a limited category of lands – *i.e.*, the lands within the pipeline corridor held in

trust by the United States wholly on behalf of the Band when the Agreement went into effect. The Band further committed to providing, with respect to that limited category of lands, the requisite official “consents and authorizations” of the Tribal Council that would potentially help in securing the Bureau of Indian Affairs’ approval and issuance of the easements, a commitment the Band fully performed.

But the category of lands encompassed by the Agreement did not include the allotted parcels with twenty-year easements that expired in 2013. The Defendants were well aware while negotiating the 1992 Agreement that the BIA was likely to insist on twenty-year easements for the allotted parcels (as it did), and thus that a significant portion of the pipeline right-of-way on the Band’s Reservation would be subject to such easements, with their renewal in 2013 by no means certain. The Parties did not address those lands in the 1992 Agreement.

Defendants further knew that the Band (then as now) possessed the sovereign right and obligation to protect its Reservation and its members from the risk of environmental harm, including the right to confer authority on tribal officials such as Director Tillison to implement relevant Band laws and regulations in service of those sovereign objectives. The 1992 Agreement in no way limits the Band’s sovereignty in that regard, or otherwise authorizes Defendants to operate the pipeline under circumstances posing an unreasonable threat to the health and safety of the Band, its members, and the Band’s Reservation, including the rapidly approaching encroachment of the Bad River on the pipeline.

Nor does the 1992 Agreement authorize Defendants to undertake any and all invasive measures in order to counter that threat, irrespective of the risks associated with such measures or their unproven efficacy. While Defendants claim an entitlement to radically alter the Reservation landscape in order to perpetuate their operation of the pipeline, no such entitlement

exists. Defendants – whether by choice or negligence – never acknowledged the existence of the meander, much less the grave risks it posed, until well into this dispute and several years *after* the twenty-year easements expired in 2013 (and even then they did so only after the Band brought the matter to Defendants’ attention). The time to raise the issue of the meander was before the expiration of the easements in 2013, such that the Band could have had fair and timely opportunity to factor the threat posed by the meander, and any measures proposed by Enbridge to address that threat, into its consideration of any suggested renewal. The Defendants chose not to take that approach, and it is they, rather than the Band, that should bear the consequences of that choice.

While Defendants accuse the Band of coming to this Court with unclean hands, the Band has done nothing but stand on its federally protected rights as a sovereign and property owner, rights that the 1992 Agreement does not abrogate. In contrast, Defendants promised that they would, “within six months” of the expiration of the twenty-year easements in 2013, remove the pipeline and “restore the land to its prior condition.” In their Answer and Counterclaim, Defendants have not even pretended to be compliant with this unambiguous legal obligation. Instead, Defendants continue to pump crude oil across the Band’s Reservation in massive (and in fact steadily increasing) quantities despite the indisputably expired easements, and despite the threat posed by the continued operation of the pipeline. Defendants are hardly in position to invoke the doctrine of unclean hands.

In sum, Defendants appear to have planned for neither the expiration of the twenty-year easements, which they had agreed to in unambiguous terms, or for the environmental risks inherent in the pipeline’s operation on the Reservation. That the Defendants have instead proceeded with their pipeline operations heedless of these matters, and as a result have allegedly

exposed themselves and the markets they serve to the consequences they posit, does not entitle them to relief that would destroy the Band's sovereign authority over its Reservation lands, including its authority to enforce basic property rules with respect to its own lands, and its authority to protect against environmental disaster and impairment of its treaty rights.

ANSWERS TO SPECIFIC ALLEGATIONS

In answer to the specific allegations of the Defendants' counterclaim, the Band states as follows, using the numbering of the paragraphs in the Defendants' counterclaim. The Band denies each and every allegation in Defendants' amended counterclaim that is not expressly admitted herein:

1. The Band admits that Defendants have brought counterclaims. The remainder of the first sentence of paragraph 1 contains legal characterizations that require no response. To the extent a response is required, the allegations are denied. The second sentence of paragraph 1 is denied as Defendants' requested relief exceeds the scope of the Band's waiver of sovereign immunity.

2. Admitted.

3. The Band admits that Line 5 has conveyed crude oil and natural gas liquids through the Upper Midwest, principally en route to Canada, for more than sixty years. The Band denies that Line 5 is a critical component of the energy infrastructure of Wisconsin, Michigan, or the United States as a whole.

4. Paragraph 4 characterizes the 1992 Agreement, which speaks for itself. To the extent the allegations in paragraph 4 are inconsistent with the 1992 Agreement – which applied only to lands within the pipeline corridor held in trust by the United States wholly on behalf of the Band on the effective date of the 1992 Agreement – they are denied.

5. Paragraph 5 quotes and characterizes the 1992 Agreement, which speaks for itself. The Band denies any characterization or description inconsistent therewith.

6. Paragraph 6 characterizes the 1992 Agreement, which speaks for itself. The allegations in paragraph 6 are inconsistent with the 1992 Agreement and are denied, as the Agreement applied only to lands within the pipeline corridor held in trust by the United States wholly on behalf of the Band on the effective date of the 1992 Agreement. The Band admits that it has acquired an interest in parcels of allotment land since the effective date of the 1992 Agreement. The remaining allegations are denied.

7. Denied.

8. Denied.

9. Denied.

10. The Band admits that if its requested relief is granted, that outcome would preclude Defendants' ability to operate Line 5 across the Band's Reservation, consistent with the expiration of a significant number of easements along the Reservation right-of-way. The Band is without sufficient information or knowledge to ascertain to what extent such an outcome would impede Defendants' ability to use the remainder of Line 5, as the Band is unaware whether Defendants, either prior or subsequent to 2013, responsibly planned for the clearly foreseeable expiration and non-renewal of easements across the Band's Reservation or for the clearly foreseeable possibility that conditions in the constantly shifting riparian environments on the Reservation would render the pipeline's location on the Reservation untenable, and therefore denies that allegation. The remaining allegations in paragraph 10 are denied.

11. The Band is without sufficient information or knowledge to ascertain the truth of the allegations in paragraph 11, including whether Defendants, prior or subsequent to 2013,

responsibly planned for the clearly foreseeable expiration and non-renewal of numerous easements across the Band's Reservation or for the clearly foreseeable possibility that conditions in the constantly shifting riparian environments on the Reservation would render the pipeline's location on the Reservation untenable, and therefore denies those allegations. The Band further denies the suggestion that the Pipeline and Hazardous Materials Safety Administration ("PHMSA") considers pipelines to be the safest available mode of transportation of petroleum products under circumstances such as are present on the Band's Reservation.

12. Paragraph 12 contains legal conclusions that require no response. The Band further states that had Defendants, as sophisticated corporations, desired a greater amount of potential financial liability for the Band, or some other form of relief, beyond the \$800,000 set forth in the 1992 Agreement, they could and should have bargained for such a term.

13. The Band admits Defendants seek declaratory and injunctive relief. The remainder of paragraph 13 contains legal characterizations and conclusions regarding the Parties' respective rights and obligations that require no response. To the extent a response is required, the allegations are denied.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Paragraph 18 consists of legal conclusions that require no response.

19. Paragraph 19 consists of legal conclusions that require no response.

20. Paragraph 20 characterizes the 1992 Agreement, which speaks for itself. To the

extent the allegations in paragraph 20 are inconsistent with the 1992 Agreement, they are denied. Paragraph 20 further states legal conclusions that require no response.

21. Admitted.

22. Admitted.

23. The Band admits that Line 5 transports petroleum products and crosses the States of Wisconsin and Michigan. The Band is without sufficient information or knowledge to ascertain the truth of the remainder of paragraph 23 and therefore denies those allegations.

24. Paragraph 24 consists of legal conclusions that require no response.

25. Paragraph 25 characterizes the views of a federal agency. To the extent those characterizations are inconsistent with the oft-expressed concerns of that same agency regarding the serious risks of failure for pipelines operating under circumstances like those that exist on the Bad River Reservation, they are denied.

26. The Band is without sufficient information or knowledge to ascertain the truth of the allegations in paragraph 26 and therefore denies those allegations.

27. The Band is without sufficient information or knowledge to ascertain the truth of the allegations in paragraph 27 and therefore denies those allegations.

28. The Band is without sufficient information or knowledge to ascertain the truth of the allegations in paragraph 28, including whether Defendants, prior or subsequent to 2013, responsibly planned for the clearly foreseeable expiration and non-renewal of numerous easements across the Band's Reservation or for the clearly foreseeable possibility that conditions in the constantly shifting riparian environments on the Reservation would render the pipeline's location on the Reservation untenable, and therefore denies those allegations.

29. Paragraph 29 consists of legal conclusions that require no response.

30. Paragraph 30 contains legal conclusions that require no response. To the extent paragraph 30 characterizes federal statutory and regulatory provisions, those provisions speak for themselves. To the extent the allegations in paragraph 30 are inconsistent with those provisions, they are denied.

31. Paragraph 31 contains legal conclusions that require no response. To the extent paragraph 31 characterizes federal statutory and regulatory provisions and legislative history, those provisions and that legislative history speak for themselves. To the extent the allegations in paragraph 31 are inconsistent with those provisions or that legislative history, they are denied.

32. Paragraph 32 contains legal conclusions that require no response. To the extent paragraph 32 characterizes federal statutory and regulatory provisions, those provisions speak for themselves. To the extent the allegations in paragraph 32 are inconsistent with those provisions, they are denied.

33. Paragraph 33 contains legal conclusions that require no response. The Band further states that the federal regulatory provision referenced in paragraph 33 speaks for itself. To the extent the allegations in paragraph 33 are inconsistent with that provision, they are denied. The Band admits that Defendants have conducted in-line inspections and integrity digs with respect to the portion of Line 5 that crosses the Reservation, but is without sufficient information or knowledge to ascertain the truth of the remaining allegations in paragraph 33 and therefore denies those allegations. To the extent the allegations in paragraph 33 suggest that Defendants' pipeline integrity activities are sufficient in light of the circumstances that exist on the Band's Reservation, they are denied.

34. The Band denies the allegations in paragraph 34 to the extent they relate to the portion of Line 5 that crosses the Reservation.

35. The Band admits that PHMSA issued Order CPF No. 3-2012-5017H against Defendants on July 30, 2012, and that the order found, two years *after* the catastrophic spill of Line 6B at Marshall, Michigan, that Defendants continued to operate portions of the Lakehead System in a manner that would “likely result in serious harm to life, property, and the environment,” and that, given Defendants’ “history of failures,” including those after 2010, its “integrity management program may be inadequate.”¹ The Band further admits that PHMSA subsequently amended that order, noting the “history of failures on Respondent’s Lakehead Pipeline System,” the existence of “additional failures throughout all parts of the Lakehead System,” PHMSA’s “longstanding concerns about this pattern of failures,” and “the gravity of this pattern of accidents.”² The Band further admits that as a result PHMSA imposed a range of pipeline integrity management requirements on Defendants, known as the “Lakehead Plan,” in light of the company’s demonstrated failure to accomplish those requirements pursuant to its own volition or abilities.³ The Band further admits that on August 20, 2018, the PHMSA Administrator testified to a Senate Committee that the Lakehead Plan had resulted in safety improvements but that PHMSA was prepared for the continuing possibility that Defendants

¹ Corrective Action Order at 4-5 (July 30, 2012), *In the Matter of Enbridge Energy, LP*, CPF No. 3-2012-5017H, https://primis.phmsa.dot.gov/Comm/Reports/enforce/documents/320125017H/320125017H_Corrective%20Action%20Order_07302012_text.pdf.

² Amendment to the Corrective Action Order at 1-2 (August 2, 2012), *In the Matter of Enbridge Energy, LP*, CPF No. 3-2012-5017H, https://primis.phmsa.dot.gov/comm/reports/enforce/documents/320125017H/320125017H_Amended%20Corrective%20Action%20Order_08012012_text.pdf.

³ *See supra* nn.1-2.

would “not comply” with the Plan’s requirements.⁴ The Band is without sufficient information or knowledge to ascertain whether Defendants have fully complied with the Lakehead Plan, or whether they have fallen short of its requirements, as Defendants were recently found by the United States Environmental Protection Agency (“EPA”) to have done with respect to a separate regime of spill-prevention requirements imposed through a 2017 Consent Decree, with the shortfalls including Defendants’ failure to comply with crack and corrosion defect monitoring requirements, the very defects that resulted in the costliest inland oil spill in American history at Marshall, Michigan, six years earlier.⁵ The Band accordingly denies those allegations. To the extent the allegations of paragraph 35 suggest Defendants’ pipeline integrity activities are sufficient for the circumstances that exist on the Band’s Reservation, including with respect to the array of treaty-protected resources and associated rights therein, they are denied.

36. The Band admits that physical access is one factor bearing on the integrity and safety of Enbridge’s pipeline operations. The Band further admits that numerous other factors bear on the safety of Enbridge’s operations, including the serious siting considerations present on the Bad River Reservation, and whether Enbridge demonstrates proper regard for such considerations. To the extent the allegations of paragraph 36 suggest that access is sufficient to

⁴ *Pipeline Safety in the Great Lakes: Incident Prevention and Response Efforts at the Straits of Mackinac, Before the Subcomm. on Surface Transp. and Merchant Marine Infrastructure, Safety and Sec. of the S. Comm. on Commerce, Sci. and Transp.* (August 20, 2018) (statement of Howard Elliott, Administrator, PHMSA), <https://www.transportation.gov/testimony/pipeline-safety-great-lakes-incident-prevention-and-response-efforts-straits-mackinac>.

⁵ See Stipulation and Agreement, *United States v. Enbridge Energy, Ltd. P’ship*, No. 1:16-cv-914 (W.D. Mich. May 2, 2018), [https://www.epa.gov/sites/production/files/2018-05/documents/enbridge - stipulation and agreement re stip penalties final filed 05 02 18.pdf](https://www.epa.gov/sites/production/files/2018-05/documents/enbridge_-_stipulation_and_agreement_re_stip_penalties_final_filed_05_02_18.pdf); see also Press Release, U.S. Dep’t of Justice, *United States, Enbridge Reach \$177 Million Settlement After 2010 Oil Spills in Michigan and Illinois*, <https://www.justice.gov/opa/pr/united-states-enbridge-reach-177-million-settlement-after-2010-oil-spills-michigan-and>.

render Line 5's operation on the Bad River Reservation safe and appropriate in light of the geographic and hydrologic circumstances present there, they are denied.

37. The Band is without sufficient information or knowledge to ascertain the truth of the allegations in paragraph 37 and therefore denies those allegations. To the extent the allegations of paragraph 37 suggest that PHMSA has found Line 5's crossing of the Reservation to be safe under present conditions, they are denied.

38. The August 18, 2018, testimony of the PHMSA Administrator speaks for itself. To the extent the allegations in paragraph 38 are inconsistent with that testimony, they are denied. To the extent the allegations in paragraph 38 suggest that the PHMSA Administrator's testimony relates in any way to the particular circumstances that exist on the Band's Reservation, they are denied.

39. To the extent the allegations in paragraph 39 characterize the requirements of federal statutes, those statutes speak for themselves. To the extent the allegations in paragraph 39 are inconsistent with those statutes, they are denied. To the extent the allegations in paragraph 39 suggest that Defendants' emergency response plans and capabilities are adequate for the circumstances that exist on the Band's Reservation, including the array of treaty-protected resources and associated rights therein, they are denied. The Band is without sufficient information or knowledge to ascertain the truth of the remaining allegations in paragraph 39 and therefore denies those allegations.

40. The Band admits that the 2017 Consent Decree with the United States imposes pipeline integrity requirements on Defendants, including heightened inspection protocols specifically designed to prevent a recurrence of Defendants' catastrophic 2010 spill at Marshall,

Michigan.⁶ The Band further admits that in 2018 the EPA, along with independent investigators, found that Defendants had failed to “satisfy the requirements of the Consent Decree” – including with respect to the monitoring of crack and corrosion defects, the very defects that resulted in the costliest inland oil spill in American history at Marshall six years earlier, and including on “the Superior Terminal to Iron River segment of Line 5,” which is *the very segment of Line 5 that crosses the Band’s Reservation*.⁷ The Band further admits that Enbridge has acknowledged “continuing concerns about the reliability” of its crack detection tools as recently as 2018.⁸

41. Paragraph 41 states legal conclusions that require no response.

42. Admitted.

43. Paragraph 43 states legal conclusions that require no response.

44. Any agreements between Defendants and the Band or individual allotment holders speak for themselves. To the extent the allegations in paragraph 44 are inconsistent with any such agreements, they are denied.

45. The allegations of paragraph 45 are vague as to timeframe and as to the lands in question. The Band admits that easements have been issued relating to Line 5’s presence on the Band’s Reservation.

46. The Band admits that Line 5 crosses lands on the Band’s Reservation with varying ownership arrangements.

47. The Band admits that a portion of the right-of-way across the Reservation consists of parcels held in trust wholly for the Band that are subject to an easement that expires in 2043.

⁶ Consent Decree, *United States v. Enbridge Energy, Ltd. P’ship*, No. 1:16-cv-914 (W.D. Mich. May 23, 2017), https://www.epa.gov/sites/production/files/2017-06/documents/enbridge_consent_decree.pdf.

⁷ Stipulation and Agreement ¶¶ 7-13, *supra* n.5.

⁸ *Id.* ¶ 13.

48. The Band admits that eleven trust parcels in which it holds a beneficial interest and for which the easements expired in 2013 are among those at issue in this case. To the extent that paragraph 48 suggests that those eleven parcels are the only Reservation lands at issue in this case, the Band denies those allegations. Defendants' continued operation of its pipeline as a public nuisance implicates numerous parcels of Reservation land, the Band's regulatory authority over those parcels with respect to that nuisance, and the associated treaty rights of the Band and its members.

49. The Band admits that certain parcels traversed by the right-of-way are individually owned fee lands. The Band is without sufficient knowledge or information regarding the status of the easements across those lands and therefore denies the allegations regarding that status. The Band denies that these lands are not at issue in this case, as Defendants' continued operation of the pipeline as a public nuisance implicates numerous parcels of Reservation land, the Band's regulatory authority over those parcels with respect to that nuisance, and the treaty rights of the Band and its members.

50. Admitted.

51. The Band is without sufficient knowledge or information to ascertain the truth of the allegations in paragraph 51 with respect to Defendants' purpose in entering the 1992 Agreement, and therefore denies those allegations. The Band denies that the allegations in paragraph 51 fully and accurately characterize the Band's purposes in entering the 1992 Agreement.

52. The allegations of paragraph 52 characterize the 1992 Agreement, which speaks for itself. To the extent those allegations are inconsistent with that agreement, they are denied. The Band further states that the terms of the 1992 Agreement were limited to lands within the

pipeline corridor held in trust by the United States wholly on behalf of the Band on the effective date of the 1992 Agreement.

53. The allegations of paragraph 53 characterize the 1992 Agreement, which speaks for itself. To the extent those allegations are inconsistent with that Agreement, they are denied. The Band further states that the terms of the 1992 Agreement were limited to lands held in trust by the United States wholly on behalf of the Band on the effective date of the 1992 Agreement.

54. The allegations of paragraph 54 characterize the 1992 Agreement, which speaks for itself. To the extent those allegations are inconsistent with that Agreement, they are denied.

55. The allegations of paragraph 55 characterize a grant instrument issued on February 24, 1993, which speaks for itself. To the extent the allegations in paragraph 55 are inconsistent with that instrument, they are denied.

56. The allegations set forth in paragraph 56 state legal conclusions that require no response. To the extent the allegations characterize the requirements of a federal regulation or an easement grant instrument, that regulation and that instrument speak for themselves. To the extent the allegations in paragraph 56 are inconsistent with the regulation or the instrument, they are denied.

57. The Band admits that the easement entered pursuant to the 1992 Agreement expires in 2043. To the extent that the reference in paragraph 57 to “tribal land” suggests that the terms of the 1992 Agreement extend to the eleven parcels of tribal land with respect to which easements expired in 1993, the allegation is denied.

58. Admitted.

59. The first sentence of paragraph 59 is admitted. The second sentence is subject to ongoing investigation by the Band. Subject to the results of that investigation and the Band’s

reserved right to amend this answer, the Band admits that in 1992 it held fractional interests in at least two allotted parcels within the pipeline right-of-way.

60. Admitted.

61. The Band admits that it acquired additional interests in the eleven referenced parcels subsequent to the grant of the twenty-year easements.

62. The Band admits that Defendants sent the correspondence attached as an exhibit at paragraph 62. That correspondence speaks for itself. To the extent the allegations of paragraph 62 are inconsistent with that correspondence, they are denied. To the extent that the allegations of paragraph 62 suggest that initiating the renewal process only a few months before the expiration of the twenty-year easements provided sufficient notice or allowed for sufficient time to consummate that process, the allegations are denied.

63. The Band lacks sufficient information to ascertain the truth of the allegations contained in paragraph 63 and accordingly denies them. To the extent that the allegations of paragraph 63 acknowledge that Defendants commenced any renewal process too late to complete it prior to the expiration of the easements in June 2013, those allegations are admitted.

64. Because the allegations of paragraph 64 refer to unspecified communications with the Band, the Band is without sufficient information to ascertain the truth of the allegations and therefore denies them.

65. Denied.

66. The Band's January 4, 2017, Resolution speaks for itself. To the extent the allegations in paragraph 66 are inconsistent with that Resolution they are denied.

67. The Band's January 5, 2017, Press Release speaks for itself. To the extent the allegations in paragraph 67 are inconsistent with that document they are denied.

68. The allegations contained in paragraph 68 consist of characterizations with which the Band firmly disagrees, and the allegations are accordingly denied.

69. Admitted.

70. Denied.

71. The Band is without sufficient information or knowledge to ascertain the truth of the allegations in paragraph 71, including whether Defendants, prior to 2013, responsibly planned for the clearly foreseeable expiration and non-renewal of numerous easements across the Band's Reservation or for the clearly foreseeable possibility that conditions in the constantly shifting riparian environments on the Reservation would render the pipeline's location on the Reservation untenable, and therefore denies those allegations.

72. The Band is without sufficient information or knowledge to ascertain the truth of the allegations in paragraph 72, including whether Defendants, prior to 2013, responsibly planned for the clearly foreseeable expiration and non-renewal of numerous easements across the Band's Reservation or for the clearly foreseeable possibility that conditions in the constantly shifting riparian environments on the Reservation would render the pipeline's location on the Reservation untenable, and therefore denies those allegations.

73. The Band is without sufficient information or knowledge to ascertain the truth of the allegations in paragraph 73, including whether Defendants, prior to 2013, responsibly planned for the clearly foreseeable expiration and non-renewal of numerous easements across the Band's Reservation or for the clearly foreseeable possibility that conditions in the constantly shifting riparian environments on the Reservation would render the pipeline's location on the Reservation untenable, and therefore denies those allegations. The Band further denies that local and regional energy markets would stand to lose roughly 540,000 barrels of light crude oil daily

if Line 5 were taken out of service, as by Defendants' own admission a significant majority of the oil transported on Line 5 is conveyed to Canada and refined there.

74. The Band is without sufficient information or knowledge to ascertain the truth of the allegations in paragraph 74, including whether Defendants, prior or subsequent to 2013, responsibly planned for the clearly foreseeable expiration and non-renewal of numerous easements across the Band's Reservation or for the clearly foreseeable possibility that conditions in the constantly shifting riparian environments on the Reservation would render the pipeline's location on the Reservation untenable, and therefore denies those allegations. The Band further states that many of the allegations in paragraph 74 are stated in highly speculative and uncertain terms and do not call for a response for that reason.

75. The terms of the PHMSA and EPA requirements speak for themselves. To the extent the allegations of paragraph 75 are inconsistent with those terms, they are denied.

76. Paragraph 76 contains legal conclusions that require no response. The Band further states that had Defendants, as sophisticated corporations with highly skilled negotiators, desired a different form of remedy or a greater amount of potential financial liability for the Band than the \$800,000 set forth in the 1992 Agreement, they could and should have bargained for such a term. The Band further states that it is without sufficient information or knowledge to know whether Defendants, who have been well aware of the damages provision of the 1992 Agreement since its effective date, reasonably planned and undertook their pipeline operations in light of that provision, and it accordingly denies the remaining allegations in paragraph 76.

COUNT I

77. Paragraph 77 consists of a statement that requires no response.

78. Paragraph 78 contains a legal conclusion that requires no response. To the extent a response is required, the allegation is denied.

79. Paragraph 79 characterizes the 1992 Agreement, which speaks for itself. To the extent the allegation in paragraph 79 is inconsistent with that document, it is denied.

80. Paragraph 80 characterizes the 1992 Agreement, which speaks for itself. To the extent the allegation in paragraph 80 is inconsistent with that document, it is denied.

81. Paragraph 81 characterizes the 1992 Agreement, which speaks for itself. To the extent the allegation in paragraph 81 is inconsistent with that document, it is denied.

82. Paragraph 82 characterizes the 1992 Agreement, which speaks for itself. To the extent the allegation in paragraph 82 is inconsistent with that document, it is denied. To the extent paragraph 82 sets forth a legal conclusion, no response is required. To the extent a response is required, the allegation is denied.

83. Paragraph 83 characterizes the 1992 Agreement, which speaks for itself. To the extent the allegation in paragraph 83 is inconsistent with that document, it is denied. To the extent paragraph 83 sets forth a legal conclusion, no response is required. To the extent a response is required, the allegation is denied.

84. Paragraph 84 sets forth a legal conclusion that requires no response. To the extent a response is required, the allegation is denied.

85. Paragraph 85 sets forth a legal conclusion that requires no response. To the extent a response is required, the allegation is denied.

86. Paragraph 86 sets forth a legal conclusion that requires no response. To the extent a response is required, the allegation is denied.

87. The first sentence of paragraph 87 states legal conclusions that require no response. To the extent a response is required, the allegation is denied. The Band further states that the 1992 Agreement speaks for itself. To the extent the allegations of paragraph 87 are inconsistent with that document, they are denied. The Band further states that to the extent the second sentence of paragraph 87 assumes Defendants have any right of access over parcels with respect to which easements have expired, it is denied.

88. The first sentence of paragraph 88 is denied. The Band admits that it seeks the cessation of the use of Line 5 on the Reservation but denies that such relief would be contrary to the 1992 Agreement.

89. Paragraph 89 states legal conclusions that require no response. Paragraph 89 further characterizes the 1992 Agreement and the requirements of a federal regulation, which speak for themselves. To the extent the allegations in paragraph 89 are inconsistent with the 1992 Agreement or that regulation, they are denied.

90. The Band is without sufficient information or knowledge to ascertain the truth of the allegations in paragraph 90, including whether Defendants, prior to 2013, responsibly planned for the clearly foreseeable expiration and non-renewal of numerous easements across the Band's Reservation or for the clearly foreseeable possibility that conditions in the constantly shifting riparian environments on the Reservation would render the pipeline's location on the Reservation untenable, and therefore denies those allegations.

91. The first and second sentences of paragraph 91 state legal conclusions that require no response. To the extent a response is required, the allegation in the first sentence is denied and the allegation in the second sentence is denied to the extent it alleges Defendants have property rights in all parcels on the Reservation through which the pipeline passes. The Band

admits the third sentence. As to the remainder of paragraph 91, the Band is without sufficient information to ascertain the truth of those assertions and therefore denies them. The Band further states that had Defendants, as sophisticated corporations with highly skilled negotiators, desired a different form of remedy or a greater amount of potential financial liability for the Band under the 1992 Agreement than the \$800,000 set forth therein, then they could and should have bargained for such a term. The Band further states that while Defendants have been well aware of the damages provision of the 1992 Agreement since its effective date, the Band does not know whether Defendants thereafter responsibly planned and undertook their pipeline operations in light of that provision. The remainder of paragraph 91 also states legal conclusions that require no response.

92. Paragraph 92 sets forth a legal conclusion that requires no response. To the extent a response is required, the allegation is denied.

COUNT II

93. Paragraph 93 consists of a statement that requires no response.

94. Paragraph 94 sets forth a legal conclusion that requires no response. To the extent a response is required, the allegation is denied.

95. Paragraph 95 sets forth a legal conclusion that requires no response. To the extent a response is required, the allegation is denied.

96. Paragraph 96 sets forth a legal conclusion that requires no response. To the extent a response is required, the allegation is denied.

97. Paragraph 97 sets forth legal conclusions that require no response. To the extent a response is required, the allegations are denied.

98. Paragraph 98 sets forth a legal conclusion that requires no response. To the extent a response is required, the allegation is denied.

COUNT III

99. Paragraph 99 consists of a statement that requires no response.

100. Paragraph 100 sets forth legal conclusions that require no response. To the extent a response is required, the allegations are denied.

101. Denied.

COUNT IV

102. Paragraph 102 consists of a statement that requires no response.

103. Paragraph 103 contains legal conclusions that require no response. The language of any rights-of-way agreements possessed by Defendants speak for themselves. To the extent the allegations in paragraph 103 are inconsistent with any such rights-of-way agreements, they are denied.

104. The allegations in paragraph 104 characterize the 1992 Agreement, which speaks for itself. To the extent the allegations in paragraph 104 are inconsistent with that document, they are denied.

105. The allegations in paragraph 105 characterize a BIA right-of-way easement grant, which speaks for itself. To the extent the allegations in paragraph 105 are inconsistent with that document, they are denied.

106. The allegations in paragraph 106 characterize a BIA right-of-way easement grant, which speaks for itself. To the extent the allegations in paragraph 106 are inconsistent with that document, they are denied.

107. Admitted.

108. Paragraph 108 states a legal conclusion that requires no response. The Band further states that the federal regulations applicable to rights-of-way on Indian lands speak for themselves. To the extent the allegations in paragraph 108 are inconsistent with those regulations, they are denied.

109. Paragraph 109 characterizes a statutory provision, which speaks for itself. To the extent the allegation in paragraph 109 is inconsistent with that provision, it is denied.

110. Paragraph 110 states a legal conclusion that requires no response. The Band further states that the laws, rules, and regulations applicable to rights-of-way on Indian lands speak for themselves. To the extent the allegations in paragraph 110 are inconsistent with those laws, rules, and regulations, they are denied.

111. Paragraph 111 contains legal conclusions that require no response. To the extent these conclusions are premised on and mixed with factual assertions, they are denied. The Band further states that the Clean Water Act speaks for itself. To the extent the allegations in paragraph 111 are inconsistent with that statute, they are denied. The Band further specifically denies the allegation with respect to its characterization of any position taken by the U.S. Army Corps of Engineers.

112. Because the first sentence of paragraph 112 is vague as to which lands within the Reservation it refers and because Defendants have no “unconditioned” right of access to any lands within the Reservation, that sentence is denied. The second sentence is likewise denied. The third sentence states a legal conclusion requiring no response and characterizes federal requirements governing pipelines, which speak for themselves. To the extent the third sentence is inconsistent with those requirements, it is denied.

113. Paragraph 113 contains legal conclusions that require no response. To the extent the allegations in paragraph 113 characterize the 1992 Agreement and related easements, those documents speak for themselves. To the extent the allegations in paragraph 113 are inconsistent with those documents, they are denied. The Band further states that its actions with respect to Defendants' access to the Reservation have been timely, lawful, reasonable, and fully consistent with the terms of the 1992 Agreement and all relevant easements, and accordingly denies any assertions to the contrary.

114. The allegation in paragraph 114 is vague and is a legal conclusion and for these reasons requires no response. Further, the law governing the United States' obligations and authority with respect to rights-of-way on the Band's Reservation speaks for itself. To the extent the allegation in paragraph 114 is inconsistent with that law, it is denied.

115. Paragraph 115 contains legal conclusions that require no response. To the extent the allegation in paragraph 115 characterizes the Band's past, current, or future conduct as dilatory or unreasonable, it is denied. To the extent the allegation asserts that the Band has taken (or will take) any action affecting Defendants that is unwarranted by the sovereign interests of the Band and the well-being of its members and Reservation, it is denied.

116. Paragraph 116 contains legal conclusions that require no response. Paragraph 116 also advances factual assertions about the Band's actions, which are denied. It further characterizes documents that speak for themselves. To the extent the allegations in paragraph 116 are inconsistent with those documents, they are denied.

117. Paragraph 117 contains legal conclusions that require no response. Paragraph 117 also advances factual assertions about the Band's actions and about the benefits of Defendants' access to Reservation lands, which are denied.

118. Paragraph 118 contains legal conclusions that require no response. Paragraph 118 also advances factual assertions about the Band's actions, which are denied. It further characterizes documents that speak for themselves. To the extent the allegations in paragraph 118 are inconsistent with those documents, they are denied.

119. Paragraph 119 contains legal conclusions that require no response. Paragraph 119 also advances factual assertions about the Band's actions, which are denied.

COUNT V

120. Paragraph 120 consists of a statement that requires no response.

121. Admitted.

122. Admitted.

123. Paragraph 123 contains legal conclusions that require no response. Paragraph 123 also contains factual assertions about Director Tillison's actions, which are denied.

124. Paragraph 124 contains legal conclusions that require no response. Paragraph 124 also contains factual assertions about Director Tillison's actions, which are denied.

125. Paragraph 125 contains legal conclusions that require no response. Paragraph 125 also contains factual assertions about Director Tillison's actions, which are denied.

126. The allegation in paragraph 126 refers to "ad hoc conditions," which is too vague to require a response. To the extent the allegation asserts that Director Tillison has imposed requirements on Defendants that are unreasonable, beyond her authority, or otherwise unwarranted by the sovereign interests of the Band and the well-being of its members and Reservation, it is denied.

127. The Band denies that any actions by Director Tillison regarding Defendants' access to any Reservation lands – including those lands in which the Band does not hold a

proprietary ownership interest – have extended beyond her authority or have otherwise been unauthorized under the law or unwarranted by the sovereign interests of the Band and the well-being of its members and Reservation.

128. Paragraph 128 contains legal conclusions that require no response. To the extent these conclusions are premised on and mixed with factual assertions, they are denied. The Band further states that the Clean Water Act and the Band's Wetlands and Watercourse Protection Ordinance speak for themselves. To the extent the allegations in paragraph 128 are inconsistent with those laws, they are denied. The Band further specifically denies the allegation with respect to its characterization of any position taken by the U.S. Army Corps of Engineers.

129. Paragraph 129 states legal conclusions that require no response. The Band further states that the 1992 Agreement, the relevant easements, and applicable law speak for themselves. To the extent the allegation is inconsistent with the Agreement, the easements, or that law, it is denied.

130. Paragraph 130 contains legal conclusions that require no response. Paragraph 130 also contains factual assertions about Director Tillison's actions, which are denied.

131. Paragraph 131 contains legal conclusions that require no response. Paragraph 131 also contains factual assertions about Director Tillison's actions, which are denied.

132. Paragraph 132 contains legal conclusions that require no response. Paragraph 132 also contains factual assertions about Director Tillison's actions, which are denied.

133. Paragraph 133 states legal conclusions that require no response. The Band further states that the Clean Water Act and the Band's Wetlands and Watercourse Protection Ordinance speak for themselves. To the extent the allegations in paragraph 133 are inconsistent with that statute or that ordinance, they are denied. To the extent Paragraph 133 rests on factual

characterizations of the watercourses or wetlands found at Slope 18, those characterizations are denied. Any allegations about watercourse or wetlands “elsewhere on the Reservation” are too vague to require a response.

134. Paragraph 134 states legal conclusions that require no response. It also characterizes the 1992 Agreement and right-of-way, which speak for themselves. To the extent the allegations in paragraph 134 are inconsistent with those documents, they are denied.

135. Paragraph 135 states legal conclusions that require no response. The Band further states that, assuming the reference in the first sentence of paragraph 135 to “the conduct described above” incorporates Defendants’ prior legal and factual characterizations of that conduct, it is denied. The second sentence of the allegation is denied.

PRAYER FOR RELIEF

Defendants’ Prayer for Relief does not contain factual allegations that require a response. To the extent the Prayer for Relief contains legal conclusions and characterizations, no response is required. To the extent a response is required, those legal conclusions and characterizations are denied.

JURY TRIAL DEMAND

The Band understands that Defendants’ jury trial demand extends to all actions at law that Defendants believe are presented in this case, including ejectment and breach of contract. It is the Band’s position that these claims are susceptible to resolution prior to trial, but the Band does not oppose a jury trial on actions at law if the case reaches that stage.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Band enjoys sovereign immunity from any remedy for breach of contract beyond the \$800,000 set forth in the 1992 Agreement.

SECOND AFFIRMATIVE DEFENSE

The Band enjoys sovereign immunity from any remedy for breach of any easement.

THIRD AFFIRMATIVE DEFENSE

In violation of federal treaties, statutes, regulations, and common law, Enbridge's claims and requests for relief seek to alienate, encumber, or otherwise affect title, possession, use, or enjoyment of Indian trust or restricted lands, including through the imposition of an equitable easement. Such relief is not available as a matter of law or equity against the lands at issue in this case.

FOURTH AFFIRMATIVE DEFENSE

Consistent with federal law, the Band enjoys sovereign authority to regulate activities on its Reservation to protect against harm to public and environmental health, safety, and well-being, and neither the 1992 Agreement nor any associated easements operated to diminish that authority.

FIFTH AFFIRMATIVE DEFENSE

Defendants failed to timely seek renewal of the expired easements and as such are not entitled to the equitable relief they seek.

SIXTH AFFIRMATIVE DEFENSE

Defendants acted in bad faith and/or with reckless disregard for the consequences in failing to timely disclose the threat of environmental harm arising out of the increasing proximity

of the pipeline to the Bad River meander, and as such are not entitled to the equitable relief they seek.

SEVENTH AFFIRMATIVE DEFENSE

Defendants have unclean hands and are not entitled to the equitable relief they seek.

RESERVATION OF RIGHTS

The Band reserves the right to further amend its answers and affirmative defenses as appropriate throughout the proceedings in this case.

Dated this 12th day of November, 2019

Respectfully Submitted,

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in her official capacity.*