IN THE 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,

Plaintiff,

v.

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

Defendants.

Case No. 3:19-cv-00602-wmc

Judge William M. Conley
Magistrate Judge Stephen L. Crocker

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

Counter-Plaintiffs,

v.

BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF THE BAD RIVER RESERVATION and NAOMI TILLISON, in her official capacity,

Counter-Defendants.

BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS

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"We are currently operating in trespass as they spelled out in their lawsuit."

Enbridge Director of Operations (Midwest Region), March 16, 2020

INTRODUCTION

The Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation (the "Band") respectfully moves for summary judgment on the liability components of its claims for trespass and unjust enrichment, and on its entitlement to a profits-based remedy, arising out of Defendants' continued operations of the Line 5 pipeline on the Band's lands absent legal authority to do so. The Band further moves for summary judgment on Defendants' counterclaims for breach of contract and breach of the covenant of good faith and fair dealing. Finally, the Band requests a permanent injunction requiring Defendants to cease operation of the pipeline and to safely decommission and remove it.[1]

Defendants' pipeline (the "pipeline" or "Line 5") cuts an approximately twelve-mile-long, sixty-foot-wide corridor through the Bad River Reservation (the "pipeline corridor"). From 1953 until June 2013, Defendants (referred to, along with their corporate predecessors, as "Enbridge") operated the pipeline on the Reservation under easements issued by the United States Department of the Interior's Bureau of Indian Affairs ("BIA").[2]

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[1] The Band has also pled a public nuisance claim alleging that Enbridge's operation of Line 5 on the Reservation presents a grave threat of an oil release unreasonably interfering with the Band's treaty-protected rights to fish, hunt, and gather, and to control the use of its lands consistent with public health, safety, and welfare. Third Am. Compl., Dkt. 123 ("Compl."), Counts 1–2. While the Band's grave concerns about the continued operation of the pipeline on the Reservation led it to file this suit, it does not move for summary judgment on that claim, the effective elucidation of which does not lend itself well to motions practice. The Band is prepared to put on the proofs central to its nuisance claim at trial should doing so remain necessary after this Court's disposition of this Motion.

[2] Between 1953 and 2000, Defendant Enbridge Energy Partners, L.P., was known as the Lakehead Pipeline Company. Complt. ¶ 29; Second Am. Answer, Defenses, and Countercls., Dkt. 146, ¶ 29.

On June 2, 2013, the easements over fifteen parcels of land within the pipeline corridor expired. By their express terms, those easements required Enbridge to "remove [the pipeline] within six months" of expiration and to "restore the land to its prior condition." Only new easements could lawfully relieve Enbridge of those obligations. Because the Band owns or co-owns twelve of those parcels, the Band's consent is a legal prerequisite to any new easements, and hence to the continued lawful operation of the pipeline through them. The Band has declined such consent and has instead insisted that Enbridge cease further use of the parcels.

On January 4, 2017, the Band's governing body enacted a Resolution underscoring the Band's unwillingness to consent to new easements. Pl.'s Proposed Findings of Fact ("PPFF") ¶ 55, Tinker Decl. ¶ 34 & Attach. GG. That enactment highlighted the sacredness to the Band of the lands, rivers, and wetlands in the Bad River watershed and of Lake Superior; noted that an oil spill on the Reservation "would be catastrophic" and would "nullify our long years of effort to preserve our health, subsistence, culture and ecosystems"; confirmed that the Band would not renew the easements; and directed Band staff to take steps to initiate the pipeline's decommissioning. *Id.*

Enbridge has refused to respect the Band's decision. It has continued to pump millions of gallons per day of crude oil and natural gas liquids across the parcels with expired easements, notwithstanding the Band's property rights, the express terms of the easements, and the Band's sovereign authority over its lands and Reservation.

The material facts pertaining to the Band's trespass claims are not subject to genuine dispute: The Band owns or co-owns twelve of the parcels through which Enbridge's pipeline passes and for which the easements expired in 2013; the Band has not consented to Enbridge's continued operation of the pipeline across those parcels; and the easements imposed a clear legal

duty on Enbridge to "remove [the pipeline] within six months" of their expiration. Enbridge has flouted that duty in nevertheless continuing to operate its pipeline across those parcels. Furthermore, it has done so while Enbridge officials have repeatedly acknowledged in internal correspondence that the company is "currently in trespass across the Bad River Reservation," PPFF ¶ 60, Tinker Decl. ¶ 36 & Attach. II (ENB00025413), and that it has "been in trespass since 2013," PPFF ¶ 60, Tinker Decl. ¶ 42 & Attach. OO (ENB00009684). *See also, e.g.*, PPFF ¶ 60, Tinker Decl. ¶ 36 & Attach II. (ENB00023512) ("[T]he Band has the ability to hold Enbridge in trespass and likely require removal of the pipeline."). Indeed, a senior Enbridge official has acknowledged that "[w]e are currently operating in trespass as they spelled out in their lawsuit." *Id.* (ENB003159856). Enbridge and the Band are in full agreement on this point. The Band is entitled to summary judgement on the issue of trespass liability.

With regard to the Band's unjust enrichment claim, Enbridge's own financial filings reveal that it has reaped significant financial benefits from its years of unlawful operation of the pipeline upon the Band's lands.[3] Nothing more is required to entitle the Band to summary judgment on the liability component of that claim.

Nor is there any genuine dispute that Enbridge's trespass has been knowing and intentional. Accordingly, Enbridge is liable for an accounting for its profits earned as a result of the trespass.[4] Any lesser measure of recovery would allow Enbridge to profit from its knowing

[3] With regard to the Band's unjust enrichment claim, documents produced by Enbridge in discovery reveal that it has reaped significant financial benefits from its years of unlawful operation of the pipeline upon the Band's lands. PPFF ¶ 62.

[4] An "accounting for profits" is also termed "restitution" or "disgorgement." *See, e.g., Liu v. Sec. & Exch. Comm'n*, 140 S. Ct. 1936, 1942–43 (2020); Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. a (Am. Law Inst. 2011). The Band seeks summary judgment on its claim that Enbridge is liable for such a profits-based remedy, with the precise amount owed to be determined through subsequent proceedings.

violation of the Band's legal rights and would incentivize others to treat the rights of federally recognized tribes with similar disregard.

If the Court finds Enbridge liable in trespass, the Band is entitled as a matter of law to a permanent injunction requiring the prompt and safe decommissioning and removal of the pipeline. Congress has issued a clear and unambiguous legislative command—the Non-Intercourse Act, 25 U.S.C. § 177—foreclosing courts' traditional equitable discretion to effectuate any grant or conveyance of rights to occupy tribal land absent tribal and congressional consent.

Even if Congress had not precluded equitable balancing here, all the relevant factors would weigh decisively in the Band's favor with no need for further factfinding. Absent an injunction, the ongoing harm to the Band's sovereignty, rights of self-government, and treaty and property rights will be irreparable, and no adequate remedy for that harm exists at law. And because Enbridge's trespass has been willful, any harm anticipated by Enbridge should an injunction interrupt its flow of oil and profits would be self-inflicted, and warrants no weight under controlling Seventh Circuit precedent. Simply put, Enbridge has no cognizable interest in, and the public interest would be disserved by, its continuing to profit from the conscious trampling of the Band's sovereignty and property rights.

The Band's entitlement to summary judgment on Enbridge's counterclaims is equally clear. Enbridge contends that by withholding its consent to renewed easements over the twelve parcels at issue, the Band has breached the express terms of a 1992 contract between itself and Enbridge (the "1992 Agreement"). Second Am. Answer, Defenses, and Countercls., Dkt. 146 ("Answer"), Countercl. ¶¶ 78–93. It also contends that the Band has breached obligations of good faith and fair dealing implied by that Agreement. *Id.* ¶ 94–99.

But the 1992 Agreement has nothing to do with the twelve parcels on which the Band's trespass claim is based. It is a contract between the Band and Enbridge by which the Band agreed to a fifty-year renewal of easements over thirteen *entirely distinct parcels* within the pipeline corridor. The 1992 Agreement was expressly limited to those thirteen parcels and creates no obligations as to the dozens of other parcels along the pipeline corridor, including the twelve parcels on which the Band's trespass claim is based. The text of the 1992 Agreement unambiguously forecloses any argument to the contrary. By the same token, Enbridge's good faith counterclaim attempts to retroactively obtain a contract benefit that Enbridge could have bargained for but did not; and under controlling Seventh Circuit precedent it thus falls well outside the ambit of the good faith doctrine.

Enbridge's desire for profits does not exempt it from the requirements of the law. Since 2013, Enbridge has sought to exempt itself. It has knowingly violated the Band's sovereign and property rights and continues to do so as it pumps millions of gallons of oil per day without lawful basis through parcels owned or co-owned by the Band. The Band asks this Court to put a halt to Enbridge's ongoing illegal activity.

STATUTORY FRAMEWORK

The Non-Intercourse Act provides that "[n]o … conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity" absent federal consent. 25 U.S.C. § 177. The Act additionally requires "the assent of the Indian nation or tribe," *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). Thus, for a transfer of any rights in tribal land to a non-Indian person or entity, the consent of both the Secretary of the Interior and of the tribe itself is required for the conveyance to have any validity "in law or equity," 25 U.S.C. § 177.

Congress has specified how federal and tribal consent to right-of-way easements across tribal lands—both for pipelines and for general purposes—may be obtained. In 25 U.S.C. § 321, Congress provided that the Secretary of the Interior "is authorized and empowered to grant a right-of-way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation" or individual Indian allotment. 25 U.S.C. § 321. Pursuant to a broader statute, the Secretary is also "empowered to grant rights-of-way for all purposes," including pipelines, across such lands. *Id.* § 323 (the "1948 Right-of-Way Act"); *see also* 80 Fed. Reg. 72,492, 72,493–94 (Nov. 19, 2015). But under no circumstances may the Secretary authorize a right-of-way across lands owned or co-owned by tribes "without the consent of the proper tribal officials." 25 U.S.C. § 324. *See also* 25 C.F.R. § 169.4 (every "person or legal entity … must obtain a right-of-way under this part … from [the Department of the Interior], with the consent of … the tribe for tribal land"); *id.* § 169.107(a) (same).[5]

FACTUAL BACKGROUND

I. The 1953 Easement

In 1953, Enbridge obtained easements to install and operate the Line 5 pipeline within a sixty-foot-wide strip of land running approximately twelve miles across the Bad River Reservation. Third Am. Compl., Dkt. 123 ("Compl."), ¶¶ 5–8, 53; Answer, ¶¶ 5–8, 53. At the time, the pipeline corridor included parcels that were Indian lands, including parcels administered by the United States for the Band and parcels that had been allotted to individual

[5] The requirement of tribal consent has been the law at all times pertinent to this dispute. *See, e.g.*, 25 C.F.R. § 169.3(a) (1992 and 2013) ("No right-of-way shall be granted over and across any tribal land … without the prior written consent of the tribe.") and § 169.19 (1992 and 2013) (same for right-of-way renewals).

Band members. PPFF ¶ 12. Enbridge secured a twenty-year easement from the BIA covering these lands (the "1953 Easement"). *Id.* ¶ 13.[6]

Enbridge installed the pipeline across the Reservation and placed it into service that same year. *Id.* ¶ 10. Since then, Line 5 has carried petroleum products—principally crude oil and natural gas liquids—from Superior, Wisconsin, east through the Reservation and the Upper Peninsula of Michigan, and thence under the Straits of Mackinac and through Michigan's Lower Peninsula to refineries and terminals in Sarnia, Ontario. Compl. ¶¶ 55–56; Answer ¶¶ 55–56.

II. The 1975 Easement

The 1953 Easement expired in 1973. PPFF ¶ 13. The BIA authorized renewal of the easement on July 21, 1975. *Id.* ¶ 14.[7] The renewed easement ("1975 Easement") was again for a twenty-year term that ran until June 2, 1993. *Id.* ¶¶ 14–17.

III. Negotiation of the 1993 Easements

On February 21, 1992, the BIA informed the Band that Enbridge was seeking to renew its easement rights over the Indian lands within the pipeline corridor. *Id.* ¶ 18, Tinker Decl. ¶ 11 & Attach. J. At that time, there were thirteen parcels in the pipeline corridor owned in full by the Band, with the fee held in trust by the United States, PPFF ¶ 19, and fifteen allotment parcels in which individual Indians held highly fractionated ownership, with the fee again held in trust by the United States (the Band held fractional ownership in three of those allotment parcels), *id.* ¶ 20. The BIA declared that the Band should conduct the negotiations for an easement over its wholly owned parcels, while the BIA would negotiate separately with Enbridge for easements

[6] The pipeline corridor also included (and still includes) parcels held by non-Indians in fee simple that are not material to the parties' disputes over the Band's trespass claim.
[7] The reasons for the BIA's renewal of the easement roughly two years after its expiration are not entirely clear from the record.

over the allotted parcels. *Id.* ¶ 21. The BIA accordingly informed Enbridge that it should "contact the Bad River tribal officials to obtain a Tribal Council resolution authorizing a new easement over the tribal lands." *Id.* ¶ 22.

The Band and Enbridge reached agreement in December 1992 regarding the terms of an easement over the thirteen wholly Band-owned parcels. Those parcels accounted for 14,642 lineal feet (or approximately 2.8 miles) of the approximately twelve-mile pipeline corridor, with the sixty-foot-wide easement over them collectively covering approximately 20.1 acres in total area. *Id.* ¶ 27. On December 21, 1992, the Tribal Council enacted Resolution No. 12/21/92-09 (the "1992 Resolution"), conferring the Band's consent to a fifty-year easement over those thirteen parcels (hereafter referred to as the "50-Year Parcels") in exchange for $800,000. *Id.* ¶ 31. Two days later, the parties memorialized their agreement by contract, the 1992 Agreement. *Id.* ¶ 33.

Subsequently, the BIA negotiated with Enbridge for twenty-year easements over the fifteen allotted parcels. *Id.* ¶ 39. Those easements issued in May 1993. *Id.* ¶ 40. They expressly stated that they were "limited as to tenure for a period not to exceed 20 (Twenty) years, beginning on June 3, 1993, and ending on June 2, 2013[.]" *Id.* ¶ 41. They also provided as follows:

> At the termination of this Grant of Easement [i.e., June 2, 2013], Grantee shall remove all materials, equipment and associated installations within six months of termination [i.e., by December 2, 2013], and agrees to restore the land to its prior condition. Such restoration may include but not be limited to filling, leveling and seeding the right-of-way area.

Id. ¶ 42. This removal and restoration provision was indeed required under federal law. *See* 25 C.F.R. § 169.5(i) (1992).

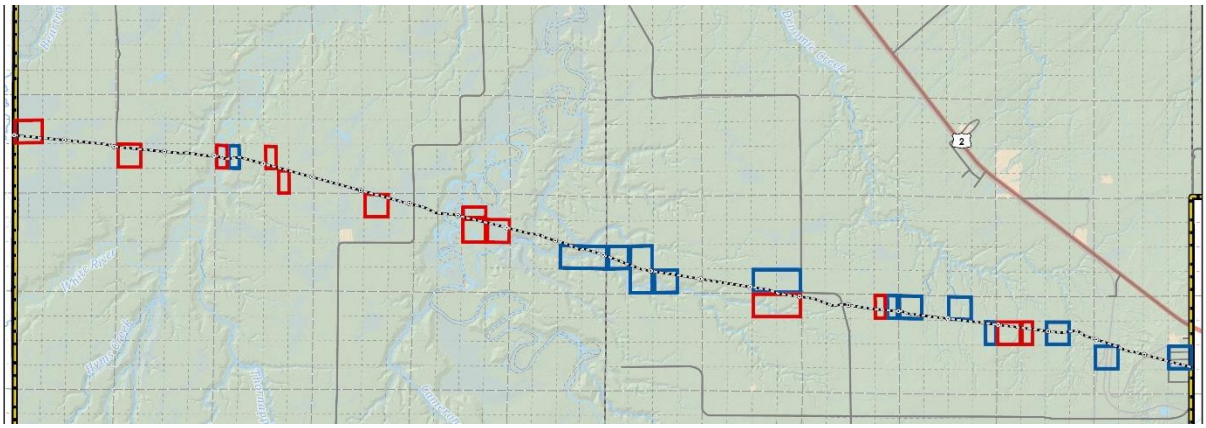
IV. The Band's Acquisition of Ownership in Allotted Reservation Lands

In 1983, Congress enacted the Indian Land Consolidation Act, 25 U.S.C. §§ 2202–2221 ("ILCA"). Its purpose was "to ameliorate the extreme fractionation problem attending a century-old allotment policy," *Babbitt v. Youpee*, 519 U.S. 234, 236–37 (1997), whereby the federal government had broken up communally held reservations into individual parcels of land. While many of those parcels were subsequently conveyed into non-Indian hands, others remained subject to restraints on alienation and became increasingly fractionated over time as the parcels descended to multiple Indian heirs. ILCA authorized the Secretary of the Interior to acquire from individual Indian owners their "fractional interest[s]" in allotted parcels and to hold them "in trust for the recognized tribal government that exercises jurisdiction over the land[s]," 25 U.S.C. § 2212(a)(1), (3). The ultimate goal of this land consolidation was to "enhance[] tribal sovereignty," ILCA Amendments of 2000, Pub. L. No. 106-462, § 102, 114 Stat. 1991, 1992; *see* 25 U.S.C. § 2212(b)(1), by rationalizing and enhancing tribal landholdings.

Since 1984, the Department of the Interior ("Department") has implemented the land consolidation program successfully on the Bad River Reservation, reclaiming for the Band significant ownership in parcels throughout the Reservation. PPFF ¶ 45. The numerous properties in which the Department has acquired full or fractional ownership for the Band include twelve of the fifteen parcels in the pipeline corridor for which the BIA issued twenty-year easements in 1993. *Id.* ¶ 46. The Band acquired its ownership in the majority of those parcels after 1992 and it presently owns 100% of two of them, and holds greater than 45% fractional ownership of the remaining ten, *id.* ¶¶ 45–47, which it holds "as a tenant in common with the other owners," 25 U.S.C. § 2213(a). The twelve parcels—hereafter referred to as the "20-Year Parcels"—are the only parcels at issue in the Band's trespass claim and are entirely

separate from the thirteen 50-Year Parcels. The relative locations of the 20-Year and 50-Year Parcels along the pipeline corridor are shown in the following illustration:

Figure 1



20-Year Parcels **50-Year Parcels**

V. Expiration of the Easements over the 20-Year Parcels

As a result of the Band's acquisition of full or fractional ownership of the 20-Year Parcels, its consent became a legal prerequisite to any renewal of the easements set to expire in 2013. *See* 25 U.S.C. § 324; 25 C.F.R. § 169.3 (1992); 25 C.F.R. § 169.1(d) (1992) (lands for which tribal consent to right-of-way is mandatory include lands in which tribe has "any interest").

On January 29, 2013, the BIA informed Enbridge "that the Easements with Bad River Tribe expire June of 2013." PPFF ¶ 59, Tinker Decl. ¶ 36 & Attach. II (ENB00001457). Enbridge acknowledged, in internal correspondence, that it "will need to submit applications" to the BIA for new easements and that the "Tribal Council will need to approve the agreements." *Id.* (ENB00001460).

On March 8, 2013, Enbridge submitted applications to the BIA to renew the easements over the 20-Year Parcels, PPFF ¶ 48. Enbridge then wrote to the Band on April 19, 2013, stating

that "[t]he easements for Line 5 on some of the allotted parcels on the Reservation are set to expire in the next few months" and noting that it had "initiated the first stages of the renewal process" with the BIA. PPFF ¶ 59, Tinker Decl. ¶ 38 & Attach. KK.

The easements over the 20-Year Parcels expired on June 2, 2013, with the Band's consent to continued operation of the pipeline not having been obtained. Enbridge nevertheless continued to operate the pipeline while acknowledging internally that Band consent remained a prerequisite to the lawful flow of petroleum products across any parcels in which the Band held even fractional ownership. On August 28, 2013, for example, Enbridge stated in internal correspondence that "where the Tribe holds any undivided interest [in a parcel], a Tribal Council Resolution is required to obtain their consent[.]" PPFF ¶ 59, Tinker Decl. ¶ 36 & Attach. II (ENB00104033–104034).

That consent was not forthcoming. The Band insisted instead on receiving from Enbridge detailed environmental, pipeline safety, oil spill, and emergency response information pertaining to Enbridge and its operation of Line 5, including Enbridge's record of spills and regulatory violations. PPFF ¶ 51. The Band's interest in this information was not surprising. On July 25, 2010, another Enbridge pipeline, Line 6B, had failed and spilled over a million gallons of crude oil into a tributary of the Kalamazoo River in southern Michigan, resulting in what federal investigators deemed the costliest inland oil spill in American history. *Id.* ¶ 52. Those investigators concluded that the extent of the environmental harm caused by the spill was "made possible by pervasive organizational failures at Enbridge[.]" *Id.* ¶ 53.

Enbridge provided some material in response to the Band's request for pipeline safety, environmental, and oil spill information, but the Band responded that Enbridge's information contained critical omissions and was deficient in other ways. *Id.* ¶ 54. On January 4, 2017, the

Bad River Tribal Council issued Resolution No. 1-4-17-738, which underscored the Band's deep-seated opposition to continued operation of the pipeline. *Id.* ¶ 55. The Resolution declares in part that:

> [T]he Bad River Band of the Lake Superior Chippewa is a signatory or successor to the Treaty of 1842, 7 Stat. 591, and the Treaty of 1854, 10 Stat. 1109; and
>
> [O]ur life is rooted in a connection to the natural world, the source of our health and wellness for the past, present, and future generations making our relationship with the natural world sacred; and
>
> [T]he Waabishkaa-ziibi (White River), Mashkiigon-ziibi (Bad River) and Anishinaabeg-gichigami (Lake Superior) are places that are full of life and death, and the natural waters found in these places continues to give life to plants and animals, and from these we are blessed with food and medicine, and the natural groundwater and springs found in these places continue to clean water, and from these we are blessed with drinking water; and
>
> [T]hese places are traditional cultural places, archeological and historical sites, and include minerals, plants and animals whose health and well-being are necessary for our health and well-being; and
>
> … 64 years ago, Lakehead Pipeline Company acquired rights of way for a crude oil pipeline across lands within the Reservation, known as Line 5; and
>
> [P]ipelines of similar setting have broken and caused extensive environmental damages ….
>
> [S]urface water studies demonstrate that a crude oil spill at the Waabishkaa-ziibi (White River) or Mashkiigon-ziibi (Bad River) would be catastrophic to the health and economy of the Odanah, WI community; river currents would impact coastal wetlands and wild rice beds, and traditional fishing areas in Anishinaabeg-gichigami (Lake Superior)[.]
>
> [A] pipeline break at these places will nullify our long years of effort to preserve our health, subsistence, culture and ecosystems, and sacrifices members have made instead of pursuing the possibility of short-term economic gain.

PPFF ¶ 55, Tinker Decl. ¶ 34 & Attach. GG (ENB00017154–17155). In light of these concerns, the Resolution provided as follows:

1. The governing body of the Bad River Band of the Lake Superior Chippewa resolves that it shall not renew its interests in the rights of way across lands within the Reservation;

2. Tribal staff are directed to send notice to [Enbridge] and federal agencies and take all action permitted under law for Line 5 removal project development on Bad River lands and watershed.

Id. (ENB00017155).

In continued defiance of the Band's position, Enbridge nevertheless continued operating its pipeline—all the while recognizing that the easements "are expired and the Band has the ability to hold Enbridge in trespass and likely require removal of the pipeline." PPFF ¶ 60, Tinker Decl. ¶ 36 & Attach. II (ENB00023512) (June 19, 2017); [redacted]. Enbridge had evidenced that same awareness prior to the Band's issuance of its Resolution. *See id.* (ENB00020820) (Oct. 13, 2016) (describing Line 5 as "currently in trespass" on the Band's lands). It continued to evidence it thereafter, acknowledging internally that "we are currently in trespass across the Bad River Reservation," *id.* (ENB00025413) (Sept. 12, 2018), and "have been in trespass [there] since 2013," PPFF ¶ 60, Tinker Decl. ¶ 42 & Attach. OO (ENB00009684) (Cell B20) (unspecified date, 2017). Enbridge's internal recognition that it is acting in conscious derogation of the Band's rights continues to this day—*see* PPFF ¶ 60, Tinker Decl. ¶ 36 & Attach. II (ENB00315986) (Mar. 16, 2020) ("We are currently operating in trespass as they spelled out in their lawsuit.")—but that recognition has not led the company to cease its extremely lucrative transmission of petroleum products across the Reservation.

After the Band issued the 2017 Resolution, the Band and Enbridge thereafter engaged in confidential mediation, but failed to reach agreement on the pipeline's removal. Compl. ¶ 12; Answer ¶ 12. This lawsuit followed. [Original] Complaint, Dkt. 1.

ARGUMENT

I. Summary Judgment Standard

"Summary judgment is appropriate if there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law." *Dunderdale v. United Airlines, Inc.*, 807 F.3d 849, 853 (7th Cir. 2015) (citing Fed. R. Civ. P. 56(a)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "The moving party is so entitled if no reasonable fact-finder could return a verdict for the nonmoving party." *Patton v. MFS/Sun Life Fin. Distribs., Inc.*, 480 F.3d 478, 485 (7th Cir. 2007). The court views the material facts and draws all reasonable inferences therefrom in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

II. Enbridge Is in Trespass on the 20-Year Parcels.

A. Federal Common Law Governs the Band's Trespass Claim.

"Federal common law governs an action for trespass on Indian lands." *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009). *See also, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 235–36 & n.6 (1985) (discussing same and citing cases); *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1153 (9th Cir. 2020) ("Tribes have a federal common law right to sue to protect their possessory interests in their lands."); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 281 (2d Cir. 2005) ("The Supreme Court has recognized a

variety of federal common law causes of action to protect Indian lands from trespass[.]" (citation omitted) (Hall, J., concurring)).

In applying federal common law, some courts borrow from state trespass law, while others look to the trespass provisions in the Restatement (Second) of Torts (Am. Law. Inst. 1965) ("Restatement of Torts"), particularly where they are consistent with state law. *See, e.g.*, *Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 965, 969 (10th Cir. 2019) (applying federal common law to claim of trespass on Indian lands and analyzing same under both Oklahoma and Restatement trespass provisions); *Milner*, 583 F.3d at 1182 (trespass under federal common law "generally comports with the Restatement of Torts, and in any event, Washington law conforms to the Restatement definition of trespass"). The Seventh Circuit has stated that "[t]he Restatement approach to trespass is a good starting point" in defining "trespass at common law." *United States v. Sweeney*, 821 F.3d 893, 899 (7th Cir. 2016). But this Court need not decide between Wisconsin law and the Restatement as the substantive basis for defining federal common law because the two are consistent. *See, e.g.*, *Grygiel v. Monches Fish & Game Club, Inc.*, 787 N.W.2d 6, 18 (Wis. 2010) (discussing "General Principles of Trespass Law" and citing Wisconsin cases applying Restatement); *Manor Enters., Inc. v. Vivid, Inc.*, 596 N.W.2d 828, 832 (Wis. Ct. App. 1999) (Restatement provides the "framework for analyzing claims of intentional trespass" under Wisconsin law).

B. The Definition of Trespass

Trespass occurs when a person or entity intentionally "'enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise.'" *Sattelberg v. United States*, No. 12-CV-898-wmc, 2013 WL 6058955, at *3 (W.D. Wis. Nov. 18, 2013) (Conley, J.) (quoting *Antoniewicz v. Reszcynski*, 236 N.W.2d 1, 4 (Wis.

1975) (applying Restatement definition of trespasser)). The requisite intent for trespass is established where "the actor desires to cause consequences of his act, or … believes that the consequences are substantially certain to result from it." Restatement of Torts § 8A.

To sustain an action for trespass, a plaintiff need not physically occupy the land at issue during the defendant's trespass. Rather, as this Court has explained, the plaintiff, "as a threshold matter … must demonstrate *an ownership interest* in the [land]." *Dakota, Minn. & E. R.R. Corp. v. Wis. & S. R.R. Co.*, No. 09-CV-00516-wmc, 2010 WL 3282936, at *10 (W.D. Wis. Aug. 19, 2010) (Conley, J.) (emphasis added), *aff'd*, 657 F.3d 615 (7th Cir. 2011). Thus, "[t]he *right* to possession is a necessary element in an action based on trespass." *Id.* (emphasis added) (citation omitted).

Additionally, a defendant need not personally enter or remain upon the land to engage in trespass—trespass also occurs where the trespasser, without the owner's consent or other legal privilege, "causes a thing … to do so[.]" *Grygiel*, 328 Wis. 2d at 461 (quotation marks omitted) (relying on Restatement of Torts § 158). *See also, e.g.*, *Scottish Guar. Ins. Co. v. Dwyer*, No. 92-C-012-C, 1992 WL 601889, at *6 (W.D. Wis. Nov. 27, 1992) ("A trespass … can occur by causing or permitting something to cross the boundary of another's property.").

Finally, a "trespass may be committed on, beneath, or above the surface of the earth." Restatement of Torts § 159.

C. The Band Has the Requisite Ownership of the 20-Year Parcels.

The BIA issued easements for the 20-Year Parcels in May 1993, and those easements expired on June 2, 2013. All of those parcels fall within the boundaries of the Band's Reservation established by the Treaty with the Chippewa art. 2, Sept. 30, 1854, 10 Stat. 1109. The Band's treaty rights in its Reservation lands are "rights guaranteed by the Federal

Government," *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 672 (1974), and are "the supreme Law of the Land," *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (quotation marks omitted); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 663 F. Supp. 682, 688 (W.D. Wis. 1987) (same). These rights include "the power to exclude non-Indians from Indian lands," *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982), and specifically "to exclude trespassers from the reservation," *United States v. Becerra-Garcia*, 397 F.3d 1167, 1175 (9th Cir. 2005); *Swinomish Indian Tribal Cmty.*, 951 F.3d at 1154, 1161 (stating that "[u]nder long-established principles of federal Indian law, treaties are enforceable in equity against third parties," including a tribe's "treaty-based federal common law right to exclude and condition a third-party's presence on, and use of, Reservation lands").

Enbridge does not dispute that the Band holds ownership interests in the 20-Year Parcels. Complaint ¶ 153; Answer ¶ 153. The Band is a sole owner of two of the parcels and has fractional ownership (all above 45%) of the remaining ten, PPFF ¶ 47, holding the latter "as a tenant in common with the other owners," 25 U.S.C. § 2213. As this Court has already determined, these ownership interests include the right of possession and the right to exclude others. *Bad River Band of Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co., Inc.*, No. 19-cv-602-wmc, 2021 WL 1425352, at *2 (W.D. Wis. Apr. 15, 2021) (Conley, J.) (referring to the "well-established, unilateral rights of tenants in common to exercise their respective rights of ownership…. 'including the right to use the property, [and] to exclude third parties from it'" (quoting *United States v. Craft*, 535 U.S. 274, 280 (2002))).

In sum, the Band has the requisite ownership of the twelve parcels on which its trespass claim is premised.

D. Enbridge Has Intentionally Entered and Remained on the Band's Lands Without the Band's Consent or Other Legal Privilege.

Enbridge is in trespass on the 20-Year Parcels because of (1) its continuous introduction of crude oil and other petroleum products onto those parcels since the expiration of the easements on June 2, 2013, and (2) independently, the continued presence of the pipeline on those parcels after the December 2, 2013 deadline for pipeline removal provided for in the easements.

1. *Enbridge's Continued Pumping of Oil and Natural Gas Liquids Across the 20-Year Parcels Is a Trespass.*

The Restatement expressly provides that "[o]ne is subject to liability to another for trespass … if he intentionally … enters land in the possession of the other, *or causes a thing … to do so*" in absence of consent or other privilege. Restatement of Torts § 158 ("Liability for Intentional Intrusions on Land") (emphasis added). Easements issued in accordance with the Right-of-Way Act provided the only lawful basis for Enbridge to pump petroleum products across the 20-Year Parcels. *See* 25 U.S.C. §§ 323–328; 25 C.F.R. §§ 169.3(a), 169.15 (1992). By continuing to do so after the expiration of the easements, Enbridge has "intentionally … caus[ed] a thing" to enter the Band's land absent privilege, consent, or other legal basis. *See also* Restatement of Torts § 158 cmt. i (trespass can occur "by … propelling … a thing either on or beneath the surface of the land"); *Dwyer*, 1992 WL 601889, at *6 ("[T]respass … can occur by causing or permitting something to cross the boundary of another's property."). *See also, e.g.*, *Swinomish Indian Tribal Cmty.*, 951 F.3d at 1157–58 ("Pursuant to the Indian Right of Way Act, if a tribe consents, the Secretary of the Interior may issue a right-of-way easement granting rights of entry to the tribe's trust land. Without a valid right-of-way easement agreement, any railroad crossing a tribe's land is doing so illegally and is trespassing.").

Accordingly, every one of the billions of gallons of crude oil and natural gas liquids Enbridge has pumped through the 20-Year Parcels since the expiration of the easements on June 2, 2013, has constituted an ongoing trespass.

Nor can there be any doubt that Enbridge has acted "intentionally," Restatement of Torts § 158. The requisite intent for trespass is established where "the actor desires to cause consequences of his act, or … believes that the consequences are substantially certain to result from it." *Id.* § 8A. "It is enough that [the] act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter" onto the land at issue. *Id.* § 158 cmt. i. Enbridge knew the easements expired on June 2, 2013, *see supra* pp. 8, 10–11, and it certainly knew that it was continuing to pump petroleum products through the 20-Year Parcels after that date had passed.

Thus, since June 2, 2013, Enbridge has been, and is today, in intentional trespass by virtue of its continuous pumping of oil and other hazardous liquids across the 20-Year Parcels.

2. *The Continued Presence of the Pipeline Is a Trespass.*

In addition to its unceasing transmission of oil, Enbridge is in trespass because of the continued presence of its pipeline on those same parcels. "One is subject to liability to another for trespass … if he intentionally … enters land in the possession of the other, *or … fails to remove from the land a thing which he is under a duty to remove*." Restatement of Torts § 158 ("Liability for Intentional Intrusions on Land") (emphasis added). Section 160 ("Failure to Remove Thing Placed on Land Pursuant to License or Other Privilege") similarly provides:

> A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land … pursuant to a privilege conferred on the actor … *if the actor fails to remove it after the privilege has been terminated*[.]

Id. § 160 (emphasis added).

Enbridge's failure to remove its pipeline from the 20-Year Parcels falls squarely within the ambit of these provisions. Enbridge's legal privilege to have the pipeline present on those twelve parcels derived from the 1993 easements, which were expressly "limited as to tenure … ending on June 2, 2013[.]" PPFF ¶ 41. *See also* 25 C.F.R. § 169.18 (1992) (easements on Indian land are limited to "the periods stated in the conveyance instrument"); Restatement (Third) of Property: Servitudes § 7.2 (Am. Law. Inst. 2000) ("a servitude terminates when it expires by its terms"). Under the plain language of the easements, termination of that privilege triggered a clear legal duty: "At the termination of this Grant of Easement, Grantee shall remove all materials, equipment and associated installations within six months of termination, and agrees to restore the land to its prior condition." PPFF ¶ 42; *see also* 25 C.F.R. § 169.5(i) (1992 and 2013) (requiring same). Enbridge has nevertheless kept the pipeline in place and is accordingly liable in trespass. *See, e.g.*, *Davilla*, 913 F.3d at 969 (stating that "the easement's expiration created a duty to remove the pipeline. Permission to lay and maintain the pipeline came hand-in-hand with an obligation to remove it…. Indeed, there would have been no sense in limiting the easement term to twenty years otherwise."); *Grygiel*, 328 Wis. 2d at 461–62 ("[W]hen an easement holder's use of an express easement contravenes its express terms, absent consent … the easement holder may be held liable for trespass.").

And once again, Enbridge has acted "intentionally[.]" Restatement of Torts § 158. No reasonable factfinder could find that Enbridge was unaware that if it failed to remove the pipeline by December 2, 2013, the pipeline would remain in place afterwards. *See also, e.g.*, *Davilla*, 913 F.3d at 970 (where pipeline company knew "the right-of-way would eventually expire … [it] cannot … claim it lacked … [the] intent to maintain the trespass" when it continued to operate the pipeline after expiration).

* * *

In sum, the law is clear and the material facts are not subject to genuine dispute. Enbridge has intentionally continued to maintain and operate its pipeline on the 20-Year Parcels long after its legal right to do so terminated, and long after its clear legal duty to remove the pipeline arose. Thus, Enbridge officials are correct in stating that "[w]e are currently operating in trespass as they spelled out in their lawsuit." PPFF ¶ 60, Tinker Decl. ¶ 36 & Attach. II (ENB315986). The Band is accordingly entitled to summary judgment regarding Enbridge's liability in trespass.

III. Enbridge Has Been Unjustly Enriched by Its Unlawful Use of the Band's Lands.

Because Enbridge has benefited monetarily from its trespass on the Band's lands, it is likewise liable in unjust enrichment. This claim is governed by federal common law as set forth in the Restatement. *See, e.g., Cent. States, Se. and Sw. Areas Health and Welfare Fund v. Pathology Labs. of Ark.*, 71 F.3d 1251, 1254 (7th Cir. 1995) (stating, in discussing "federal common law," that "as § 1 of the *Restatement of Restitution* observes, restitution is a device to avoid unjust enrichment"). And again, the Restatement is consistent with Wisconsin law. *See, e.g., Lawlis v. Thompson*, 405 N.W.2d 317, 320 (Wis. 1987) ("The jurisprudence of unjust enrichment in Wisconsin is consistent with that found in the recognized treatises and encyclopedias. *See,* Restatement of Restitution, Unjust Enrichment").

Unjust enrichment is "enrichment that lacks an adequate legal basis," such as "*when the defendant acquires benefits by wrongful interference with the claimant's rights*[.]" Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. b (Am. Law. Inst. 2011) ("Restatement of Restitution") (emphasis added). *See also, e.g., Major Mat Co. v. Monsanto Co.*, 969 F.2d 579, 585 (7th Cir. 1992) (unjust enrichment "requires a wrongful taking or appropriation of others'

property to one's own use" (quoting *Abbott Labs. v. Norse Chem. Corp.*, 147 N.W.2d 529, 541 (Wis. 1967))). For claims of unjust enrichment based on interference with property rights, "it is the law of property that draws the necessary lines, thereby determining whether or not the defendant has been unjustly enriched." Restatement of Restitution § 3 cmt. c. Accordingly, if a defendant has benefited monetarily from a trespass it is likewise liable in unjust enrichment.

Here, there is no dispute that Enbridge has benefited monetarily from its use of the Band's lands.[8] And that use constitutes a trespass under the law of property. *See supra* pp. 18–21. Enbridge has therefore "acquire[d] benefits by wrongful interference with the [Band's] rights," Restatement of Restitution § 1 cmt. b, and by a "wrongful … appropriation of [the Band's] property to [Enbridge's] own use," *Major Mat*, 969 F.2d at 585. Enbridge is accordingly liable in unjust enrichment, and the Band is entitled to summary judgment on the liability component of this claim.

IV. Enbridge Is Liable for an Accounting for Profits Derived from Its Intentional Trespass and Unjust Enrichment.

Where a defendant is liable in trespass or unjust enrichment, and where (as here) its violation of the plaintiff's rights was conscious as opposed to inadvertent, the plaintiff is entitled to damages measured not merely by the rental value of the land, but by the profits earned by the defendant as a result of its wrongdoing. This form of relief goes by various names, including "restitution" and an "accounting for profits."[9] The Band seeks summary judgment that, given the

[8] Here, there is no dispute that Enbridge has benefited monetarily from its use of the Band's lands. PPFF ¶ 62.

[9] *See, e.g.*, *Liu*, 140 S. Ct. at 1942–43 ("depriv[ing] wrongdoers of their net profits from unlawful activity" has "gone by different names. Compare, *e.g.*, 1 D. Dobbs, Law of Remedies § 4.3(5), p. 611 (1993) ('Accounting holds the defendant liable for his profits'), with *id.*, § 4.1(1), at 555 (referring to 'restitution' as the relief that 'measures the remedy by the defendant's gain and seeks to force disgorgement of that gain')"; Restatement of Restitution § 51 cmt. a. ("Restitution

conscious nature of Enbridge's wrongdoing, it is entitled to this profit-based relief. The Band does not through this motion seek judgment as to the specific amount of monetary relief owed it by Enbridge—that amount can best be determined through subsequent proceedings or negotiations once this Court has confirmed the proper measure of damages.

A. Enbridge Is Liable for an Accounting for Profits Derived from Its Trespass.

The Supreme Court has held that an accounting for profits is available under federal common law specifically for trespass to Indian lands. *See, e.g., United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 344 (1941) (railroad that unlawfully used Indian lands was required to "account for all … profits derived from the … use of the lands" (quotation marks omitted)); *Oneida Indian Nation*, 470 U.S. at 235–36 ("Indians have a common-law right of action for an accounting of 'all rents, issues and profits' against trespassers on their land." (quoting *Santa Fe*, 314 U.S. at 344)). Other federal courts have held to the same effect. *See, e.g., United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994) (acknowledging the "variety of federal common law causes of action to protect Indian lands from trespass, including … accounting of profits") (citing *Santa Fe*, 314 U.S. at 359); *Davilla v. Enable Midstream Partners, L.P.*, No. CIV-15-1262-M, 2016 WL 6952356, at *3 & n.2 (W.D. Okla. Nov. 28, 2016) (where pipeline found in trespass after expiration of BIA easements, "under federal common law" Indian landowners entitled to seek "an accounting of defendants' profits from the operation of their pipeline" (citing *Santa Fe*, 314 U.S. at 359)).

The federal common law governing liability for an accounting of profits (or restitution) follows the Restatement of Restitution. *See, e.g., Cent. States, Se. & Sw. Areas Health &*

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measured by the defendant's wrongful gain is frequently called 'disgorgement.' … or an 'accounting for profits,'" and "the remedial issues … are the same.").

Welfare Fund, 71 F.3d at 1254 ("Federal common law tracks the consensus of states, which have developed the law of restitution. We therefore turn to the *Restatement of Restitution*[.]" (citation omitted)).

And that law is clear: "A person who *obtains a benefit by an act of trespass … is liable in restitution* to the victim of the wrong." Restatement of Restitution § 40 (emphasis added). As with other violations of a plaintiff's legal rights, "restitution is available … in cases in which the defendant's wrong has enabled the defendant to profit at the plaintiff's expense." *Travelers Cas. & Sur. Co. of Am., Inc. v. Nw. Mut. Life Ins. Co.*, 480 F.3d 499, 503 (7th Cir. 2007) (Posner, J.). Where that has occurred, "*the standard of liability is … the amount of the profit wrongfully obtained*." Restatement of Restitution § 49 (emphasis added). *See also, e.g.*, *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1640 (2017) ("Disgorgement requires that the defendant give up 'those gains ... properly attributable to the defendant's interference with the claimant's legally protected rights.'" (ellipses in original) (quoting Restatement of Restitution § 51 and cmt. a)). As Judge Posner has explained, "[a] defendant who takes something (and not because of an innocent mistake, either) that belongs to the plaintiff must give it back together with *any profit from the unlawful appropriation* even if that profit exceeded what the plaintiff would have earned had his property not been taken." *Schlueter v. Latek Capital Corp.*, 683 F.3d 350, 354 (7th Cir. 2012) (Posner, J.) (emphasis added).

As discussed above, since 2013, Enbridge has reaped profits by intentionally and unlawfully pumping billions of gallons of valuable crude oil and natural gas liquids across the 20-Year Parcels. PPFF ¶¶ 61, 62. Enbridge has accordingly "obtain[ed] a benefit by an act of trespass," and is thus "liable in restitution" to the Band, Restatement § 40, for "the amount of the profit wrongfully obtained," Restatement § 49.

B. Enbridge Is Liable for Profit-Based Restitution for Its Unjust Enrichment.

The same result—liability in restitution—flows from Enbridge's unjust enrichment. And the law is just as clear here: "A person who is unjustly enriched at the expense of another is subject to liability in restitution." Restatement of Restitution § 1. *See also id*. cmt. a (enrichment "at the expense of another" includes enrichment "in violation of the other's legally protected rights" (quotation marks omitted)). As with trespass, the appropriate measure of restitution for unjust enrichment is the amount of Enbridge's profits derived from its unlawful interference with the Band's rights. This is because both claims turn on the predicate wrongful act of intentional trespass. As the Restatement explains:

> [A] claim for restitution or "disgorgement" of the profits of conscious wrongdoing normally incorporates as its predicate the substantive elements of a cause of action for tort or other breach of duty. See § 3, Comment *d*. This Restatement generally refers to the wrongdoer's unjust enrichment in such cases as a parallel source of liability: the defendant, in other words, is liable both on a theory of tort and (alternatively) on a theory of unjust enrichment.… Ordinarily, a complaint that alleges profitable wrongdoing by the defendant states a claim for restitution of unjust enrichment as well as a claim for damages in tort, whether or not it employs the language by which the claim to the defendant's profits would be described in this Restatement.

Restatement of Restitution § 1 cmt. e (3) (citation omitted).[10]

Thus, as with trespass, the "standard of liability" for unjust enrichment "is … the amount of the profit wrongfully obtained." *Id.* § 49; *see also id.* § 1 cmt. d (restitution for unjust enrichment measured "by the extent of the benefit" wrongfully obtained); 1 D. Dobbs, *Law of Remedies* § 4.1(1) at 551–52 (1993) (same); *Mgmt. Comput. Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 79–80 (Wis. 1996) (same).

[10] As this passage makes clear, profit-based restitution for trespass on the one hand and unjust enrichment on the other are alternative forms of recovery. The Band does not seek to disgorge duplicative amounts from Enbridge for each claim.

C. "Fair Market Rental Value" Is Not an Appropriate Measure of Restitution Here.

Enbridge has asserted that "the proper measure of damages, if any should be awarded, is not profits, but the fair market rental value for the portion of each parcel that is used[.]" Enbridge's Mot. to Join Parties, Dkt. 78, at 15. As the preceding two subsections make clear, this contention is wrong. "Fair market rental value" is a measure of restitution for inadvertent trespass. For *conscious* trespassers—e.g., trespassers who are aware they are entering or remaining upon the land absent legal privilege to do so—the measure is profits.

As the Restatement explains, "[t]he extent of liability in restitution for benefits wrongfully obtained depends significantly on the culpability of the defendant." Restatement of Restitution § 3 cmt e. Thus, in contrast to the "unwitting tortfeasor[]," "[t]he conscious wrongdoer … is liable to disgorge profits (including consequential gains) derived from interference with the claimant's protected interests." *Id. See, e.g., In re de Jong*, 793 F. App'x 659, 660 (9th Cir. 2020) (finding trespass "conscious" where lessee "knew" lease would expire but did not vacate premises, rendering lessee liable for "disgorgement of all profits derived from the trespass"). Simply put, "a conscious wrongdoer will be stripped of gains from unauthorized interference with another's property[.]" Restatement of Restitution § 40 cmt. b. The Seventh Circuit has squarely held to this effect. *See Schlueter,* 683 F.3d at 354 (defendant who takes something "not because of an innocent mistake" must disgorge "any profit from the unlawful appropriation").

Enbridge's trespass in this case has unquestionably been deliberate and conscious. Enbridge's internal communications are replete with express acknowledgment that the company has been in trespass on the Band's lands since June 2013 through the continued presence and operation of its pipeline. *See, e.g.*, PPFF ¶ 60, Tinker Decl. ¶ 36 & Attach. II (ENB00315986) ("We are currently operating in trespass as they spelled out in their lawsuit"); *id.*

(ENB00020820) (referring to Line 5 on Bad River Reservation as "currently in trespass"); *id.* (ENB00025413) (referring to "the portion of Line 5, in Wisconsin, where we are currently in trespass across the Bad River Reservation"); *id.* (ENB00023512) ("Our easements on Bad River's property are expired and the Band has the ability to hold Enbridge in trespass and likely require removal of the pipeline."); [redacted]; PPFF ¶ 60, Tinker Decl. ¶ 42 & Attach. OO (ENB00009684) ("Line 5 pipeline easements on ~15 tracts across the Bad River Band (BRB) Reservation have been in trespass since 2013." (Cell B20)).[11] No reasonable factfinder could find Enbridge's ongoing trespass to have been other than conscious.

Requiring conscious trespassers to disgorge their profits serves a critical public policy: to avoid creating an economic incentive to trespass. As the Restatement explains:

> Restitution requires *full disgorgement of profit by a conscious wrongdoer* … because any lesser liability would provide an inadequate incentive to lawful behavior. If A anticipates (accurately) that unauthorized interference with B's entitlement may yield profits exceeding any damages B could prove, A has a dangerous incentive to take without asking—since the nonconsensual transaction promises to be more profitable than the

[11] *See also, e.g.*, PPFF ¶ 60, Tinker Decl. ¶ 40 & Attach. MM (ENB00019336) (referring to "Native American communities where Enbridge … is in trespass due to expired easements," including where "Enbridge's license on portions of the Bad River … Reservation in Wisconsin expired in 2013")); *id.* Tinker Decl. ¶ 41 & Attach. NN (ENB00013498) ("Enbridge Line 5 easements are expired and Enbridge is at risk of Bad River filing for trespass and ejection.); [redacted]; *id.* Tinker Decl. ¶ 44 & Attach. QQ (ENB00014915) ("Line 5 is currently in trespass on 25% of the tracts on the Bad River Reservation (3 Miles) that expired in 2013"); *id.* Tinker Decl. ¶ 45 & Attach. RR (ENB00280955) (same); *id.* Tinker Decl. ¶ 46 & Attach. SS (ENB00020518) ("Line 5 pipeline easement on about 15 tracts across the Bad River Band (BRB) Reservation have been in trespass since 2013." (Cell B20)); *id.* Tinker Decl. ¶ 36 & Attach. II (ENB00016416) (referring to "greater than 50% [Band] owned allottee tracts (currently in trespass)"); *id.* (ENB00014479) ("Enbridge Line 5 easements are expired and Enbridge is at risk of Bad River filing for Enbridge trespass and ejection").

> forgone negotiation with B. The objective of that part of the law of restitution summarized by the rule of § 3 ["A person is not permitted to profit by his own wrong."] is to frustrate any such calculation.

Restatement of Restitution § 3 cmt. c (emphasis added). *See also id.* cmt. a ("Liability to disgorge profits is ordinarily limited to cases of … 'conscious wrongdoing,' because the disincentives that are the object of a disgorgement remedy are not required in dealing … with inadvertent tortfeasors … such as innocent trespassers[.]"). *See also, e.g.*, *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 165 (Wis. 1997) (monetary award that operates to "remov[e] the profit from the intentional trespass" will eliminate "financial incentive to trespass").

The same distinction between inadvertent and conscious trespassers applies in the context of unjust enrichment:

> *Enrichment resulting from intentional trespass is not properly measured by ordinary rental value*. A conscious wrongdoer will not be left on a parity with a person who—pursuing the same objectives—respects the legally protected rights of the property owner. If liability in restitution were limited to the price that would have been paid in a voluntary exchange, the calculating wrongdoer would have no incentive to bargain.

Restatement of Restitution § 40 cmt. b (emphasis added). *See also id.* § 3 cmt. c (discussing same).

Limiting the Band's recovery to the "fair market rental value" of the property would be particularly inappropriate here because in any negotiation with Enbridge for future use of its lands, the Band was, as a matter of federal law, not bound by notions of "fair market rental value." Under federal regulations governing rights-of-way over Indian lands, "Indian landowners have the right to demand as much compensation as they deem appropriate[.]" 80 Fed. Reg. at 72,511. Federal law does not "limit the Indian landowners to fair market value[.]" *Id*. They may negotiate for higher measures of compensation, including "*payments based on throughput* [e.g., volume of oil through a pipeline] or *percentage of income*," or "*payments based*

on income during an operational period." 25 C.F.R. § 169.118(a)(1) (emphasis added); *see also id*. § 169.112(a) (same). As the BIA has explained:

> Tribes have the right, through self-governance and self-determination, *to charge more than fair market value for their land*. History has taught us that some tribal values are not readily measured or estimated by market valuations…. BIA does not have the legal authority to limit the amount that Indian landowners charge for a right-of-way.

80 Fed. Reg. at 72,512 (emphasis added).

Limiting Enbridge's liability to fair market rental value as Enbridge proposes would directly contravene these clear federal policies. Indeed, exempting Enbridge from these policies would confer no less than a de facto power of condemnation on Enbridge and others willing to flout the law. As the Restatement explains:

> If a conscious wrongdoer were able to make profitable, unauthorized use of the claimant's property, then pay only the objective value of the assets taken [e.g., the fair market rental value of the land] … the anomalous result would be to legitimate a kind of private eminent domain (in favor of a wrongdoer) and to subject the claimant to a forced exchange. The law of restitution responds to this anomaly by making the wrongdoer liable to disgorge profits wrongfully obtained[.]

Restatement of Restitution § 3 cmt. c. That result would be particularly anomalous here because tribal lands, including lands in which a tribe owns fractionally, are absolutely "beyond the reach of condemnation." *Pub. Serv. Co. of New Mexico v. Barboan*, 857 F.3d 1101, 1112 (10th Cir. 2017).

* * *

For the foregoing reasons, the Band is entitled to summary judgment that Enbridge is liable for an accounting of its profits derived from the operation of Line 5 for the period during which it has been in trespass on the Band's lands.

V. The Band Did Not Consent to Fifty-Year Easements over the 20-Year Parcels and Therefore Is Entitled to Summary Judgment on Enbridge's Breach of Contract Counterclaim.

As detailed above, in 1992, Enbridge's easement rights in the pipeline corridor covered the fifteen parcels held by multiple owners and thirteen parcels wholly owned by the Band. Enbridge's negotiation with the Band for an easement over the latter resulted in the 1992 Agreement, providing fifty-year easements over the thirteen wholly Band-owned parcels (i.e., the 50-Year Parcels). *Supra* pp. 7–8. The Band continued to acquire ownership in individually held parcels throughout its Reservation after 1992, and today owns or co-owns twelve such parcels over which the BIA had issued twenty-year easements, now expired (i.e., the 20-Year Parcels). *See supra* pp. 9–10. In its breach of contract counterclaim, Enbridge contends that "[t]he purpose of the 1992 Agreement was to permit operation of Line 5 until 2043 on any Reservation land in which the Band had, now has *or has in the future any interest*," and that the 1992 Agreement therefore constituted the Band's "advance consent" to new easements over any parcels in which the Band held interests after 1992, including the 20-Year Parcels. Answer, Countercl. ¶¶ 6–7 (second emphasis added). Accordingly, Enbridge argues, "[t]he Band remains in breach of the 1992 Agreement because it persists in refusing to consent to easements" on the 20-Year Parcels. *Id.* ¶ 87.

As demonstrated below, the 1992 Agreement unambiguously forecloses Enbridge's arguments, and the Band is entitled to summary judgment on Enbridge's breach of contract counterclaim.

A. Applicable Principles of Contract Interpretation[12]

Contracts are interpreted to effectuate the reasonable expectations of the parties. *Dowell v. United States*, 694 F.3d 898, 902 (7th Cir. 2012). The interpretation of an unambiguous contract is a question of law. *First Bank & Tr. v. Firstar Info. Servs., Corp.*, 276 F.3d 317, 322 (7th Cir. 2001) (citing Wisconsin law); *GCIU Emp'r Ret. Fund v. Chicago Tribune Co.*, 66 F.3d 862, 864 (7th Cir. 1995) (same under federal common law). Contractual terms are "given their plain and ordinary meaning" and "cannot be considered in isolation; rather, the court must consider the contract as a whole[.]" *Firstar Info. Servs.*, 276 F.3d at 322 (citing Wisconsin law); *Young v. Verizon's Bell Atl. Cash Balance Plan*, 615 F.3d 808, 823 (7th Cir. 2010) (same under federal common law). Where a contract "is unambiguous, the court must give effect to the agreement as written." *Firstar Info. Servs.*, 276 F.3d at 322 (citing Wisconsin law); *Ingram Barge Co. v. Dairyland Power Coop.*, No. 04-C-881-C, 2005 WL 2812250, at *4 (W.D. Wis. Oct. 27, 2005) (same under federal common law). Where a contract is ambiguous, courts may consult extrinsic evidence to interpret its terms. *Firstar Info. Servs.*, 276 F.3d at 322. If, after doing so, "the undisputed facts permit only a single inference, the court may resolve the contract's meaning without resort to a jury." *Id.* *See also, e.g., Sound of Music Co. v. Minn. Mining & Mfg. Co.*, 477 F.3d 910, 916 (7th Cir. 2007) ("If the extrinsic evidence is conclusive, the proper reading of the contract is not a question of fact."); *ConFold Pac., Inc. v. Polaris*

[12] The following discussion of general contract interpretation principles includes cases relying on both Wisconsin contract law and the federal common law of contracts. This Court need not decide which provides the appropriate rule of decision because Wisconsin and federal common law are consistent in all relevant respects, as demonstrated in the cases cited. *See also, e.g., S & O Liquidating P'ship v. Comm'r of Internal Revenue*, 291 F.3d 454, 459 (7th Cir. 2002) ("a contract that is governed by federal common law … is interpreted under standard principles of contract law—more precisely, the core principles of the common law of contract that are in force in most states." (quotation marks omitted)).

Indus., Inc., 433 F.3d 952, 956–57 (7th Cir. 2006) (same); *Int'l Union v. ZF Boge Elastmetall LLC*, 649 F.3d 641, 649 (7th Cir. 2011) (applying federal common law of contracts and stating that "[e]xtrinsic evidence as to meaning should be put before the trier of fact only after the court determines that the evidence creates an ambiguity" and affirming summary judgment where extrinsic evidence failed to do so).

Finally, and importantly, the 1992 Agreement is a contract with a sovereign. Where a sovereign is alleged to have surrendered a sovereign power by contract, courts may only interpret the contract in that manner where "such surrender has been expressed in terms too plain to be mistaken." *United States v. Winstar Corp.*, 518 U.S. 839, 874–75 (1996) (quotation marks omitted)). That is, such surrender "must be shown in language which cannot be otherwise reasonably construed, and all doubts … are to be resolved in favor" of the sovereign. *Seton Hall Coll. v. Vill. of S. Orange*, 242 U.S. 100, 106 (1916).

B. The Plain Text of the 1992 Agreement Limits the Band's Consent to the Thirteen 50-Year Parcels.

In 1992, the existing easement over the thirteen 50-Year Parcels in the pipeline corridor (i.e., those then wholly owned by the Band) accounted for 14,642 linear feet (or approximately 2.8 miles) of the 12.5-mile corridor and 20.1 acres in total area. *See supra* p. 8. As set forth below, those thirteen parcels were the subject of Enbridge's Tribal Lands Application of June 10, 1992 (for a fifty-year easement) and the Tribal Council's Resolution of December 21, 1992 (i.e., the 1992 Resolution), consenting to a fifty-year easement over those thirteen parcels. *Supra* p. 8. The 1992 Agreement, executed just two days after the 1992 Resolution, was likewise limited to those thirteen parcels. It did not provide Band consent to easements over any other lands, including the twelve 20-Year Parcels with (now expired) easements that are the subject of the Band's trespass claim.

To begin with, the operative consent provision of the 1992 Agreement states:

> The Secretary 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. Said pipeline right of way shall be granted *pursuant to and in accordance with the Tribal Council's Resolution* Granting Pipeline Right of Way, the form of which is attached and marked Exhibit "A."

PPFF ¶ 33, Tinker Decl. ¶ 6 & Attach. E (ENB00040376, § 1.a.) (emphasis added). As the italicized phrase makes clear, the Band's consent reflected in the 1992 Agreement was coterminous with that reflected in the 1992 Resolution. *See, e.g.*, *Matthews v. Wis. Energy Corp.*, 534 F.3d 547, 554 (7th Cir. 2008) (where contract required performance "in a manner that is consistent with" a specific state policy, the contract "clearly and expressly incorporates" the requirements and limitations of that policy as part of the contract and "the parties agree to abide by those [incorporated] terms just as they agree to the other terms in the contract" (quotation marks omitted)).[13]

For its part, the 1992 Resolution incorporates by reference Enbridge's Tribal Lands Application and unambiguously limited the Band's consent to the lands covered by that Application:

> WHEREAS, the Lakehead Pipe Line Company … has requested consent from the Bad River Band … for a fifty (50) year right of way easement … across any lands in which the Tribe has a legal interest within the Company's existing rights of way, *all as is described more fully in the Company's Application For Right of Way dated June 10, 1992* (hereinafter "Application"); and
>
> WHEREAS, the Tribal Council … has reviewed *the Application* and has been advised by the Tribe's attorney with respect to *the Application* …
>
> THEREFORE BE IT RESOLVED, that the Tribal Council … hereby accepts the offer of the Company, consents to the Company's requests *and Application*[.]

[13] *See also, e.g.*, PPFF ¶ 33, Tinker Decl. ¶ 6 & Attach. E (ENB00040379, § 6) (referring to "the fifty (50) year Right of Way easement consented [to] pursuant to this Agreement *and pursuant to the Resolution of the Tribe* as set forth in Exhibit 'A[.]'" (emphasis added)).

PPFF ¶ 31, Tinker Decl. ¶ 23 & Attach. V (emphasis added). *See* 11 Williston on Contracts § 30:25 (4th ed.) ("When a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument."); *Matthews*, 534 F.3d at 554–55 (discussing incorporation by reference and citing same).

By its express terms, Enbridge's Application pertained to "Tribal Lands" through which the "[a]pproximate distance of the right-of-way will be 2.8 miles[.]" PPFF ¶ 25, Tinker Decl. ¶ 20 & Attach. S (BRB027434). That distance was the lineal distance of the thirteen parcels within the pipeline corridor then wholly owned by the Band—i.e., the thirteen 50-Year Parcels. PPFF ¶¶ 26–27. And the "Tribal Lands Schedule," attached as part of the Application, listed those *same* thirteen 50-Year Parcels by their precise township and range legal descriptions and listed a cumulative length of the right-of-way of approximately 2.8 miles. *Id.* ¶ 26.[14] There is no question, then, that Enbridge's Tribal Lands Application was limited to those same thirteen parcels, and the 1992 Resolution strictly circumscribed the limits of the Band's consent by clear reference to that Application. Accordingly, there is no question that the 1992 Agreement—entered "pursuant to and in accordance with" the Resolution—was likewise so limited. The 1992 Agreement, in other words, provided Band consent to easements over the thirteen 50-Year Parcels only, and said absolutely nothing about the Band's purported "advance consent" to easements over the twelve 20-Year Parcels that are the subject of the Band's trespass claim.

It is no surprise, then, that the executed BIA easement that issued as a result of the 1992 Agreement was likewise expressly "limited to and more particularly described as" *the same*

[14] The total of the individual lengths listed in the column entitled "Length R/W" is 14,642 feet—which is 2.773, or approximately 2.8, miles. PPFF ¶ 26.

thirteen parcels—i.e., the 50-Year Parcels—covered by Enbridge's Tribal Lands Application, which were again set forth in their precise township and range legal descriptions. PPFF ¶ 36, Tinker Decl. ¶ 15 & Attach. N (BRB004151). *See* 25 C.F.R. § 169.15 (1992) (the easement instrument over Indian lands "shall incorporate all conditions or restrictions set out in the consents obtained" from the tribe).

In sum, the 1992 Agreement unambiguously forecloses Enbridge's argument that the Band consented to easements over any additional parcels, including the twelve 20-Year Parcels that are the subject of the Band's trespass claim.

C. Section 3 of the 1992 Agreement Does Not Support Enbridge's Theory.

To support its contention that the 1992 Agreement somehow provided the Band's "advance consent" to fifty-year easements over the 20-Year Parcels, Enbridge points to section 3 of the Agreement. But that provision provides no comfort for Enbridge. It states:

> 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.

PPFF ¶ 33, Tinker Decl. ¶ 6 & Attach. E (ENB00040378–40379, § 3).

This commitment to provide "all consents and authorizations" for the fifty-year easement covered by the Agreement is a commonplace "further assurances" clause. Such clauses in a contract simply obligate the parties to undertake any ministerial actions beyond execution of the agreement reasonably required to consummate it. Their purpose "is to prevent either party from withholding consent or signatures that are required" to consummate the transaction. *Rossman et.*

al, Commercial Contracts: Strategies Drafting & Negotiating § 2.03[L][13]. *See, e.g.*, *Journey Acquisition–II, L.P. v. EQT Prod. Co.*, 830 F.3d 444, 454 (6th Cir. 2016) (further assurances clauses "are aimed at [the] purely ministerial actions necessary to complete a transaction. They are accordingly unlikely to be stretched by a court into a substantial substantive requirement" (alteration in original) (quotation marks and citation omitted)).[15]

Nevertheless, according to Enbridge, this same ministerial clause gives it broad substantive rights mentioned *nowhere else* in the contract. Namely, Enbridge contends that section 3's reference to a fifty-year easement over lands "in which the Tribe has an interest" refers to "any Reservation land in which the Band had, now has *or has in the future* any interest[.]" Answer, Countercl. ¶ 6 (second emphasis added). In other words, Enbridge asserts that the 1992 Agreement provided the Band's consent to unspecified parcels of land it did not yet own but might (or might not) acquire in the future.

But if the parties had intended to account for this contingency in the 1992 Agreement, it would have been quite simple to include language to that effect, as Enbridge's own phrasing—"*or has in the future*"—demonstrates. *See also*, *e.g.*, Answer, Prayer for Relief ¶¶ A, B (claiming 1992 Agreement provided for easements "on all of the allotted lands in which the Band now *or hereinafter* holds any interest" and "over the allotted lands in which the Band holds an interest, now *or in the future*" (emphasis added)). But the parties used no such language, and

[15] *See, e.g.*, *Boyd Grp. (U.S.) Inc. v. D'Orazio*, 2015 WL 3463625, at *5 (N.D. Ill. May 29, 2015) (identifying following as a "further assurances" clause: "The parties agree (a) to furnish upon request to each other such information, (b) to execute and deliver to each other such other documents, and (c) to do such acts and things, all as the other parties may reasonably request for the purpose of carrying out the intent of this Agreement and the documents referred to in this Agreement."); *In re Winer Fam. Tr.*, No. 05-3394, 2006 WL 3779717, at *3 n.6 (3d Cir. Dec. 22, 2006) (same for clause requiring parties "to execute and deliver all such other instruments and take all such other action as either party may reasonably request from time to time, without payment of further consideration, in order to effectuate the transactions provided for herein.").

this Court will not "read language into the contract which is not there." *Dakota, Minn. & E. R.R. Corp.*, 2010 WL 3282936, at *5 (Conley, J.). *See also, e.g., Yale Sec., Inc. v. Freedman Sales, Ltd.*, No. 97-1424, 1998 WL 690944, at *4 (7th Cir. Sept. 25, 1998) ("[Appellant] was a sophisticated party—it could have bargained for [the disputed term] …. It failed to do so[.]").

In fact, section 3's reference to Enbridge's desire for a fifty-year easement over lands within "the Company's existing pipeline Right of Way in which the Tribe has an interest," PPPF ¶ 33, Tinker Decl. ¶ 6 & Attach. E (ENB00040379, § 3), tellingly parallels the 1992 Resolution's authorization of a fifty-year easement "across any lands *in which the Tribe has a legal interest within the Company's existing rights of way*," PPFF ¶ 31, Tinker Decl. ¶ 23 & Attach. V (ENB00000509) (emphasis added). The 1992 Resolution and section 3 of the 1992 Agreement clearly are referring to the same thirteen 50-Year Parcels then wholly owned by the Band. And they would have to be, as the Band's consent in the Agreement was given "pursuant to and in accordance with" its consent set forth in the 1992 Resolution, PPFF ¶¶ 31–33, Tinker Decl. ¶ 6 and Attach. E (ENB00040376, § 1.a.), which was expressly limited to the thirteen 50-Year Parcels "as is described more fully in the Company's Application For Right of Way dated June 10, 1992," PPFF ¶ 31, Tinker Decl. ¶ 23 & Attach. V (ENB00000509).

By the further assurances clause of section 3, then, the Band simply committed itself to undertake all reasonable efforts to obtain for Enbridge the "consents and authorizations" for the fifty-year easement over the thirteen parcels that were the subject of *that* agreement. Those "consents and authorizations" included the documents set forth in section 1.d. of the 1992 Agreement, which committed the Band to providing, upon closing of the Agreement, (1) the executed 1992 Resolution; (2) an executed resolution stating the Band's approval of the terms of the 1992 Agreement; and (3) a letter from the Band's counsel stating the Band's commitment to

the terms of the 1992 Agreement and the 1992 Resolution. PPFF ¶ 33, Tinker Decl. ¶ 6 & Attach. E (ENB00040377–40378, § 1.d.). The Band fully performed these contractual promises, providing each of those items to the BIA (with Enbridge copied) in seeking its approval of the fifty-year easement. PPFF ¶ 34.

Enbridge's strained interpretation of section 3 would confer extremely lucrative, open-ended promises for easements over an unspecified number of parcels the Band did not yet own and that appear nowhere else in the Agreement. This is a classic elephant-in-a-mousehole argument. *Cf. Journey Acquisition*, 830 F.3d at 454 (further assurances clauses address "purely ministerial actions," not "substantive requirement[s]" (quotation marks omitted)). Nothing about section 3 remotely suggests such an expansive additional commitment on the part of the Band. And the untenableness of such an interpretation is further underscored by other provisions of the 1992 Agreement expressly and repeatedly limiting the Band's consent to that set forth in the 1992 Resolution and the thirteen parcels listed in Defendants' Tribal Lands Application (as confirmed in the issued fifty-year easement). *See supra* pp. 32–34 & n.13. *See, e.g.*, *Firstar Info. Servs.*, 276 F.3d at 322 ("[C]ourt must consider the contract as a whole to provide each provision with the meaning intended by the parties[.]").

* * *

In sum, in 1992 the Band consented to a fifty-year easement over the thirteen parcels in the pipeline corridor then owned in full by the Band. The 1992 Agreement said nothing about Band consent to easements over any other lands, including an indefinite number of parcels the Band might (or might not) acquire in the future. To the contrary, its plain text, and that of the 1992 Resolution and Tribal Lands Application it incorporated, unambiguously foreclose such an

expansive reading of the Band's purported consent. Accordingly, Enbridge's breach of contract counterclaim is meritless and the Band is entitled to summary judgment on that claim.

D. Sovereign Powers May Not Be Contractually Surrendered by Ambiguous Terms.

Even were this Court to find the text of the 1992 Agreement ambiguous as to whether the Band consented to easements over lands beyond the thirteen 50-Year Parcels, summary judgment in the Band's favor would still be warranted. This is because the Band is a sovereign and consenting to an easement over tribal land is a sovereign act. The Supreme Court has repeatedly explained that courts may not interpret contracts with sovereigns—including tribal sovereigns—to surrender sovereign powers by ambiguous terms. *See Merrion*, 455 U.S. at 152. "The application of the doctrine … turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government." *Winstar*, 518 U.S. at 879. That is unquestionably the case here.

1. *Consenting to an Easement on Tribal Lands Is a Sovereign Act.*

The Band is a sovereign tribal government, 80 Fed. Reg. at 72,492, and a tribal government's contractual consent to an encumbrance of its land is an act of sovereignty. The Band's Constitution includes, among the enumerated sovereign powers of the Tribal Council, the authority "[t]o approve or veto any … encumbrance of Tribal lands … which may be authorized … by the Secretary of the Interior[.]" Band Const. art. VI, § 1(c). The Tenth Circuit has described the statutory requirement of tribal consent to rights-of-way over tribal lands as grounded in congressional efforts "to protect and strengthen tribal sovereignty." *Barboan*, 857 F.3d at 1112 (discussing 25 U.S.C. § 324). Similarly, the BIA has stated that

> [c]onsenting to rights-of-way on trust or restricted land is one of several tools … that animate the traditional notions of sovereignty …. Tribal sovereignty and self-government are substantially promoted by rights-of-way under these

> regulations, which require significant deference … to tribal determinations that a grant [i.e., right of way] provision or requirement is in its best interest.

80 Fed. Reg. at 72,505–06 (quotation marks omitted). *See also id*. at 72,509 (requirement for tribal consent even where a tribe owns only fractional interests reflects "tribal sovereignty over Indian lands and is consistent with principles of tribal self-governance that animate modern Federal Indian policy").

Enbridge's position, then, is that in the 1992 Agreement, the Band contractually surrendered its sovereign prerogative to withhold its consent to new easements over lands it might acquire in the future. That argument defies the law.

2. *The Band Did Not Surrender Its Sovereign Power to Withhold Consent to New Easements in Explicit, Unambiguous Terms.*

The Supreme Court has spoken clearly. Where a sovereign is alleged to have surrendered a sovereign power by contract, courts may interpret the contract to effect that surrender *only* where the alleged surrender is explicit and unambiguous. Thus,

> a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act … nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.

Winstar, 518 U.S. at 878. *See also, e.g.*, *Seton Hall Coll.*, 242 U.S. at 106 (contractual surrender of sovereign authority "*must be shown in language which cannot be otherwise reasonably construed*, and all doubts … are to be resolved in favor" of the sovereign (emphasis added)). Accordingly, no power of sovereignty "will be held ... to have been [contractually] surrendered, *unless such surrender has been expressed in terms too plain to be mistaken.*" *Winstar*, 518 U.S. at 874–75 (ellipses in original) (emphasis added) (quotation marks omitted).

This rule applies fully to "cases involving alleged surrenders of sovereign prerogatives by … Indian tribes." *Id.* at 876. Thus, the Supreme Court has held that a court may not find a tribe

to have contractually surrendered a sovereign power "unless it has been specifically surrendered in terms which admit of *no other reasonable interpretation*." *Merrion*, 455 U.S. at 131 (emphasis added) (quotation marks omitted)). *See also id*. at 148 ("sovereign power … will remain intact unless surrendered in unmistakable terms").

Here, the text of the 1992 Agreement unambiguously forecloses Enbridge's proposed interpretation. But even if it did not, and even were this Court to find Enbridge's "advance consent" interpretation plausible, that interpretation is not remotely reflected in the text of the Agreement "in unmistakable terms," *id*., or in "terms too plain to be mistaken," *Winstar*, 518 U.S. at 875 (quotation marks omitted). Enbridge simply cannot surmount that hurdle. The Band's interpretation is, at a bare minimum, a reasonable one, well-grounded in the contract's text, and it therefore cannot be said that the Band's power to withhold consent to new easements was "surrendered in terms which admit of no other reasonable interpretation," *Merrion*, 455 U.S. at 148 (quotation marks omitted). Under *Merrion*, that alone is a sufficient basis to grant summary judgment to the Band on Enbridge's breach of contract counterclaim. *See also Seton Hall Coll.*, 242 U.S. at 106 ("all doubts which arise as to the intent to make such a contract [surrendering sovereign power] are to be resolved in favor" of the sovereign).

E. If the Court Looks to Extrinsic Evidence, That Evidence Confirms the Band's Interpretation, Again Warranting Summary Judgment for the Band.

Even if the Court were to find that the 1992 Agreement is ambiguous, and further find that its ambiguous terms could somehow waive a sovereign power, summary judgment would still be warranted. This is because extrinsic evidence demonstrates unequivocally that the parties understood the 1992 Agreement to apply to the thirteen 50-Year Parcels and no others. *See, e.g.*, *Firstar Info. Servs.*, 276 F.3d at 322 (where extrinsic evidence resolves contractual ambiguity, "the court may resolve the contract's meaning without resort to a jury"); *Sound of Music*, 477

F.3d at 916 ("If the extrinsic evidence is conclusive, the proper reading of the contract is not a question of fact."); *ConFold Pacific*, 433 F.3d at 956–57 (same).

1. *The Negotiation Record Confirms the Band's Interpretation of the 1992 Agreement.*

The negotiation record confirms that the parties' agreement pertained solely to the thirteen parcels covered by Enbridge's Tribal Lands application—i.e., the 50-Year Parcels.

On February 21, 1992, the BIA informed the Band of Enbridge's desire for a renewed easement and instructed Enbridge to "contact the Bad River tribal officials to obtain a Tribal Council resolution authorizing a new easement over the tribal lands." PPFF ¶ 22.

On April 16, 1992, the Band requested of Enbridge "a written offer of consideration for the renewal." PPFF ¶ 23, Tinker Decl. ¶ 18 & Attach. Q (BRB044413). On July 2, 1992, Enbridge, through George W. Maas, the company's Right-of-Way Manager, who negotiated and signed the 1992 Agreement on behalf of Enbridge, made its initial offer "for compensation to the Band for the easement crossing tribal lands" in the amount of $60,300. *Id.* (BRB044406). Notably, Mr. Maas explained that this offer was premised on "*the total amount of acreage of tribal land affected by the permit for the right-of-way, 20.1 acres (60' of right-of-way times 14,642 feet*)[.]" *Id*. (emphasis added). These are the exact dimensions of the thirteen 50-Year Parcels covered by Enbridge's June 10, 1992 Tribal Lands Application which stated that the "Approximate distance of the right-of-way will be 2.8 miles,"[16] PPFF ¶ 25, Tinker Decl. ¶ 20 & Attach. S (BRB027434), as well as the attached Tribal Land Schedule, which listed those same thirteen parcels as covering a total of slightly over 20 acres and exactly 14,642 feet, PPFF ¶ 26. *See supra* pp. 32–34 & n.13. And the Band's 1992 Resolution arising from these negotiations of

[16] 14,642 feet equals 2.773 miles.

course limited the Band's consent to the same thirteen parcels covered by the Tribal Lands Application. There simply is no plausible basis to suggest that the parties were negotiating for easements over any parcels beyond the thirteen 50-Year Parcels.

But if more were needed, the record provides it. Because the 1992 Resolution and the 1992 Agreement pertained to rights-of-way over Indian lands, those documents required federal approval before they could go into effect. 25 U.S.C. §§ 321, 324; 25 C.F.R. §§ 169.3 and 169.15 (1992). Band Chairman Moore accordingly submitted executed copies of those documents (and others required by the 1992 Agreement) to the BIA for approval, stating that "[t]hese documents express the terms by which the Bad River Tribe has agreed to grant to Lakehead a fifty (50) year right of way over its existing easement." PPFF ¶ 34. In responding to Chairman Moore about that submission, the BIA expressly described it as "the documentation submitted to us concerning the proposed Grant of Easement for Right-of-way to Lakehead Pipe Line Company *over 13 parcels of tribal trust lands*, Bad River Reservation," and as including "a resolution and Agreement between the Bad River Band and the Lakehead Pipe Line Company." PPFF ¶ 35, Tinker Decl. ¶ 22 & Attach. U (ENB00010942) (emphasis added). The BIA, then, unquestionably understood the 1992 Agreement to be limited to the thirteen 50-Year Parcels. The actual easement was accordingly "*limited to* and more particularly described as" those same thirteen parcels, set forth in their precise township and range legal descriptions. PPFF ¶ 36, Tinker Decl. ¶ 15 & Attach. N (BRB004151). *See also* 25 C.F.R. § 169.15 (1992) (easements over Indian lands "shall incorporate all conditions or restrictions set out in the consents obtained" from the tribe).

The only plausible reading of this evidence points conclusively to the Band's interpretation of the 1992 Agreement as limiting its consent to the thirteen 50-Year Parcels and having nothing to do with the 20-Year Parcels that are the subject of the Band's trespass claim.

2. *Enbridge's Post-Agreement Practical Construction of the 1992 Agreement Confirms the Band's Interpretation of the Agreement.*

Prior to this litigation, Enbridge did not construe the 1992 Agreement to constitute the Band's "advance consent" to easements over the twelve 20-Year Parcels. Enbridge raised its "advance consent" argument for the first time in its Answer to the Band's Complaint in this case. Indeed, its conduct in the years before this dispute arose demonstrates its understanding that it would need to obtain the Band's consent to new easements over any expired parcels the Band owned or co-owned.

In internal correspondence just months before the expiration of the easements in 2013, Enbridge noted that it "will need to submit applications" for new easements and that the Band's "*Tribal Council will need to approve the agreements*." PPFF ¶ 59, Tinker Decl. ¶ 36 & Attach. II (ENB00001460) (emphasis added). In August 2013, Enbridge acknowledged that "where the Tribe holds any undivided interest [in a parcel], *a Tribal Council Resolution is required to obtain their consent*" to new easements. *Id.* (ENB00104033–104034) (emphasis added). These statements—made long before the advent of this dispute—plainly demonstrate that Enbridge understood that the Band had not in fact given its "advance consent" as it now alleges.

Enbridge maintained that practical construction of the 1992 Agreement in the years after the easements expired. *See, e.g.*, PPFF ¶ 59, Tinker Decl. ¶ 35 & Attach. HH (ENB00016507) (stating in internal correspondence in 2016 that "the Band has ownership interest" in some of the expired parcels, "so we need their approval on this out of date renewal"); PPFF ¶ 51, Tinker

Decl. ¶ 29 & Attach. BB (ENB00015868) (where expired parcels are subject to "Tribal interests … Enbridge would … still need to negotiate with the Band").

Indeed, Enbridge has repeatedly and consistently acknowledged that, in light of the expired easements, its continued operation of the pipeline on the Band's lands and the failure to remove it are acts of trespass against the Band; and that the Band could sue the company for trespass and require it to remove the pipeline. The documentary evidence in this regard is simply overwhelming. *See supra* pp. 13, 26–27 & n.11. This evidence confirms conclusively what the text of the 1992 Agreement makes plain: that Enbridge, long before (and indeed after) this dispute arose, understood the 1992 Agreement as *not* having provided the Band's "advance consent." *See Old Colony Tr. Co. v. City of Omaha*, 230 U.S. 100, 118 (1913) (practical interpretation of contract "before it comes to be the subject of controversy is deemed of great, if not controlling, influence"); *Prince v. Packer Mfg. Co.*, 419 F.2d 34, 37 (7th Cir. 1969) (parties' practical construction of contract "at a time when the parties were harmonious …. will be adopted by the courts"). *See also, e.g.*, *Shanks v. Blue Cross and Blue Shield United of Wis.*, 777 F. Supp. 1444, 1448 (E.D. Wis. 1991) (where contract terms are ambiguous, "the court will normally adopt that interpretation of the contract which the parties themselves have adopted") (citation omitted), *aff'd*, 979 F.2d 1232 (7th Cir. 1992).

VI. Enbridge's Claim That the Band Has Breached the Implied Contractual Duty of Good Faith and Fair Dealing Is Meritless.

As an alternative to its textual breach of contract claim, Enbridge advances a non-textual claim that the Band breached a duty of good faith and fair dealing implied by the 1992

Agreement. Answer, Countercl. ¶ 98.[17] Summary judgment on this claim in the Band's favor is warranted for two reasons, as set forth next.

A. The Good Faith Doctrine Does Not Extend to Circumstances That the Parties Could Have Addressed in the Text Had They So Chosen.

Enbridge contends that by withholding consent to new easements over the expired 20-Year Parcels, the Band has deprived Enbridge of its contractual right and expectation to operate the pipeline within the Reservation until 2043. *Id*. But Enbridge had no such right or (reasonable) expectation. When the parties negotiated the 1992 Agreement, they understood that the BIA would insist upon twenty-year easements for the individually held parcels. PFFF ¶ 38. Enbridge hence had no assurance that oil could continue to flow across the Reservation after 2013, despite having secured fifty-year easements on some of the parcels. And as discussed below, Enbridge was indisputably on notice that the Band could thereafter continue to acquire ownership of other parcels within the pipeline corridor—including the 20-Year Parcels—giving it the power to withhold consent to new easements in such parcels in 2013. Had Enbridge desired to protect itself against that possibility in the 1992 Agreement, it could have sought to bargain (and pay) for such protection. It did not.

The good faith doctrine is accordingly of no help to Enbridge. As this Court has explained, the implied duty of good faith "is simply a mutual duty of cooperativeness that prohibits a party from taking 'opportunistic advantage in a way *that could not have been contemplated at the time of drafting*.'" *Betco Corp. v. Peacock*, 14-cv-193-wmc, 2016 WL 7429460, at *9 (W.D. Wis. Dec. 23, 2016) (Conley, J.) (emphasis added) (quoting *Mkt. St.*

[17] *See, e.g.*, *Rock Hill Dairy, LLC v. Genex Coop., Inc.*, 19-cv-845-wmc, 2020 WL 7042837, at *5 n.3 (W.D. Wis. Dec. 1, 2020) ("a breach of good faith claim may … be pleaded as an alternative breach of contract claim").

Assocs. Ltd. v. Frey, 941 F.2d 588, 595 (7th Cir. 1991) (Posner, J.)), *aff'd*, 876 F.3d 306 (2017). *See also, e.g.*, *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990) (Easterbrook, J.) (same). That is, the good faith obligation applies to circumstances "that could not have been contemplated at the time of drafting, and which therefore [were] not resolved explicitly by the parties." *Mkt. St. Assocs.*, 941 F.2d at 595 (quotation marks omitted). The good faith doctrine accordingly implies no obligations where the circumstances giving rise to the dispute were foreseeable at the time of drafting, giving the parties all the information necessary to address the disputed issues explicitly had they wished to do so. This is particularly so where a good faith claimant is a sophisticated corporate entity such as Enbridge. *See, e.g.*, *Am. Commercial Lines, LLC v. Lubrizol Corp.*, 817 F.3d 548, 552 (7th Cir. 2016) (Posner, J.) (affirming summary judgment against good faith claimant because "[h]ad [claimant] wanted such protection it could have negotiated a contract" that provided for it, and underscoring that "as a sophisticated commercial entity," claimant was "well positioned to protect itself" by contract rather than "a nebulous body of jargony legal theories such as … 'duty of good faith and fair dealing'").

Here, at the time of the drafting of the 1992 Agreement, the Band's authority to acquire ownership in parcels throughout the reservation was settled law. The Band's 1936 Constitution is replete with clear recognition of the Band's authority to acquire ownership interests in allotted lands within the Reservation. *See, e.g.*, Band Const. art. VI, § 1, art. VIII ("Lands"), § 7. And ILCA, which authorized tribal acquisition of "any fractional interest in trust or restricted lands" within reservations, 25 U.S.C. § 2212(a)(1), had been in effect for nearly a decade. *See Matter of Gifford*, 688 F.2d 447, 458 n.14 (7th Cir. 1982) ("existing laws [are] read into contracts in order to fix obligations as between parties") (quoting *Wright v. Union Cent. Life Ins. Co.*, 304

U.S. 502, 516 (1938)); *City of Milwaukee v. Raulf*, 159 N.W. 819, 823 (Wis. 1916) ("The existing law of the land is a part of every contract and must be read into it."); *Krause v. Mass. Bay Ins. Co.*, 468 N.W.2d 755, 758 (Wis. Ct. App.1991) ("It must be assumed that parties to a contract ha[ve] knowledge of the law in effect at the time of the agreement."). Indeed, the statute had been used by the Department to acquire parcels for the Band within the Reservation beginning in 1984. PPFF ¶ 45.

Nor was it any secret that once the Band acquired ownership of any parcels along the pipeline corridor, it could withhold consent to easements on such land. *See* 25 U.S.C. § 324 ("No grant of a right-of-way over and across any lands belonging to a tribe … shall be made without the consent of the proper tribal officials."); *Bad River Band*, 2021 WL 1425352, at *2 (Conley, J.) (referring to "well-established" rights of tenants in common, "'to exclude third parties'" from their land (quoting *Craft*, 535 U.S. at 280)). The Act requiring tribal consent to all easements across tribally owned lands had been in effect since 1948. *See* 25 U.S.C. § 324; *see also* 25 C.F.R. § 169.3(a) (1992) (same). Not only were such laws presumptively part of the 1992 Agreement, but they were literally written into it. The 1948 Right-of-Way Act is expressly referenced in the 1992 Agreement, PPFF ¶ 33, Tinker Decl. ¶ 6 & Attach. E (ENB00040377, § 1.c.), and both that Act and the Part 169 regulations are referenced in the 1992 Resolution, PPFF ¶ 32, Tinker Decl. ¶ 23 & Attach. V (ENB00000509), and in Enbridge's Tribal Lands Application, PPFF ¶ 25, Tinker Decl. ¶ 20 & Attach. S (BRB027434).

Thus, Enbridge had all the information necessary to alert it to the possible benefits of seeking to include in the 1992 Agreement a provision obligating the Band to consent to easements over any parcels it might acquire in the future. Enbridge did not do so. The Seventh Circuit has been clear that the implied duty of good faith is not a mechanism to retroactively

obtain a contractual outcome that a party, particularly a "sophisticated commercial entity" like Enbridge, "could have negotiated" for but did not. *Am. Commercial Lines*, 817 F.3d at 552. It has likewise been clear that where a party that "could have negotiated for [the disputed] provision … did not do that…. there are no genuine issues of material fact regarding the … duty of good faith and fair dealing[.]" *F.D.I.C. v. Rayman*, 117 F.3d 994, 1000 (7th Cir. 1997). That is precisely the case here, and summary judgment on Enbridge's good faith claim is called for here.

As discussed next, there is a separate and equally fundamental basis to grant summary judgement for the Band on Enbridge's good faith claim.

B. The Good Faith Doctrine Does Not Impose Implied Duties to Refrain from Exercising Sovereign Powers.

By definition, the contractual duty of good faith and fair dealing is an implied term. *See Betco Corp.*, 876 F.3d at 310 (referring to the "implied duty of good faith"); *see also Foseid v. State Bank of Cross Plains*, 541 N.W.2d 203, 212 (Wis. Ct. App. 1995) (referring to "the implied contractual covenant of good faith"). But, as a matter of law, a contractual obligation to refrain from the exercise of its sovereign power cannot be implied against the Band. *See United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987) (contractual "waiver of sovereign authority *will not be implied*" (emphasis added)). As discussed above, any such contractual surrender must instead be "*specifically surrendered in terms* which admit of no other reasonable interpretation," *Merrion*, 455 U.S. at 148 (emphasis added) (quotation marks omitted). *See also Winstar*, 518 U.S. at 874–75 ("*expressed in terms* too plain to be mistaken" (emphasis added) (quotation marks omitted)). No such terms exist here. Because Enbridge's good faith claim rests on the notion that the Band impliedly surrendered the sovereign power to withhold its

consent to easements on lands in which it holds an ownership interest—a paradigmatic sovereign power, *see supra* p. 39-40—the claim is foreclosed as a matter of law.

Indeed, Enbridge's good faith claim goes further and asserts an implied contractual duty to *exercise* a sovereign power by consenting to encumbrances on Band-owned parcels entirely distinct from those parcels covered by the express terms of the 1992 Agreement. The good faith doctrine cannot be stretched that far, even outside the context of sovereign powers. *See, e.g.*, *Rayman*, 117 F.3d at 1000 ("the covenant of good faith and fair dealing has never been an independent source of duties for the parties to a contract" (quotation marks omitted)).

VII. If the Court Finds Enbridge in Trespass, an Injunction Should Follow Automatically.

If the Court grants summary judgment in favor of the Band on Enbridge's trespass liability, it should likewise issue a permanent injunction prohibiting the further flow of crude oil and natural gas liquids across the relevant parcels and requiring the safe removal of Line 5 from them. Compl. Prayer for Relief ¶¶ D–F.

A. An Injunction Should Issue as a Matter of Law.

In *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), the Supreme Court held that under "well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *Id*. at 391 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987)). That familiar test considers (1) whether the plaintiff will endure irreparable injury absent the injunction; (2) whether there exist adequate remedies at law; (3) the balance of hardships between the parties; and (4) the public interest. *Liebhart v. SPX Corp.*, 998 F.3d 772, 779 (7th Cir. 2021).

However, *eBay* (and the precedents it relies on) expressly recognizes that Congress can depart "from the long tradition of equity practice" and foreclose a court's traditional equitable discretion wherever a statute "indicates that Congress intended such a departure." 547 U.S. at 391–92. For example, where a statute flatly prohibits the conduct sought to be enjoined, issuance of an injunction is mandatory. *Id.*; *see also Amoco Prod.*, 480 U.S. at 543 n.9; *Romero-Barcelo*, 456 U.S. at 313–14.

In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), a massive, federally funded dam project was 80% complete when an endangered species, the snail darter, was discovered in the river about to be dammed. A group of plaintiffs sought to enjoin the project under the Endangered Species Act ("ESA"), which prohibited destruction of endangered species' habitat. The district court credited the defendant's arguments that

> $80 million in public funds had been appropriated by Congress and invested in [the] project to provide flood control, navigation, hydroelectric power, water supply, and to produce other benefits, including … new job opportunities, industrial development, and to foster improved economic condition in an area characterized by underutilization of human resources and outmigration of young people.

Hill v. Tenn. Valley Auth., 419 F. Supp. 753, 759 (E.D. Tenn. 1976) (citation omitted). Accordingly, while the district court concluded that the dam would violate the ESA, it declined to enjoin its construction because doing so would have resulted in the loss of $53 million in public funds, *id.* at 759, and required "scrapping the entire project," *id*. at 758, which the court deemed an "unreasonable result," *id*. at 760.

The Court of Appeals reversed, and the Supreme Court affirmed, declaring:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded*, or *carried out* by them do not *jeopardize* the continued existence" of an

> endangered species or "*result* in the destruction or modification of habitat of such species …." This language admits of no exception.

437 U.S. at 173 (alterations in original). For the courts to have authorized any remedy other than a mandatory injunction, then, would have been "to ignore the ordinary meaning of plain language." *Id.* *See also, e.g.*, *Amoco Prod.*, 480 U.S. at 543 n.9 (discussing *Hill* and stating that "Congress … had foreclosed the traditional discretion possessed by an equity court and had required the District Court to enjoin completion of the Tellico Dam" because the ESA "contains a flat ban on destruction of critical habitats"); *Romero-Barcelo*, 456 U.S. at 313–14 (same); *Wisconsin v. Weinberger*, 745 F.2d 412, 426 (7th Cir. 1984) (discussing *Hill* and stating that because the Act "contained an unequivocal ban" on destruction of critical habitat, "refusal to enjoin the … dam would have ignored the explicit provisions of the Act").

The same holds true here. The Non-Intercourse Act provides that "*[n]o* … grant … or other conveyance" of a tribe's interests in its lands "shall be of *any* validity in law *or equity*" absent the consent of Congress. 25 U.S.C. § 177 (emphasis added). *See Fed. Power Comm'n*, 362 U.S. at 119 (Non-Intercourse Act "prevent[s]" conveyances of tribal land interests "without the consent of Congress"). "Such conveyances must, therefore, be made in accordance with a federal treaty or statute," and this requirement "may not be waived or ignored." *Shoshone Indian Tribe of Wind River Reservation v. United States*, 672 F.3d 1021, 1037 (Fed. Cir. 2012). If this Court finds Enbridge to be in trespass on the 20-Year Parcels, any relief entitling Enbridge, *as a matter of equity*, to continue to operate its pipeline on those parcels would amount to a grant or conveyance to Enbridge of the Band's rights of occupancy and possession in that land absent congressional consent—an outcome flatly prohibited by the Non-Intercourse Act.[18]

[18] "Section 177 by its very language applies to conveyances of less than complete divestment" of title. *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 906 (9th Cir. 2014). *See also, e.g.*,

The Act's unequivocal prohibition forecloses any argument by Enbridge that this Court should weigh the company's allegations of hardship and regional energy implications in deciding whether to issue injunctive relief. While the Band is prepared to rebut those allegations forcefully, they simply are not germane here. In *Hill*, the Court acknowledged the possibility that "the burden on the public" should an injunction issue "would greatly outweigh the loss of the snail darter," but declared that "neither the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make such fine utilitarian calculations" where Congress has spoken with clarity. 437 U.S. at 187. As a result, while the defendants stressed the costs associated with an injunction, the Court stated unequivocally that "*[n]one of these considerations are relevant*[.]" *Id.* at 174 n.19 (emphasis added). For "[o]nce Congress … has decided the order of priorities in a given area, it is … for the courts to enforce them when enforcement is sought." *Id*. at 194. In sum, courts of equity "cannot … override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited," and "cannot, in their discretion, reject the balance that Congress has struck in a statute." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) (citing *Hill*, 437 U.S. at 194).

The same principles require a mandatory injunction here. The Non-Intercourse Act, with roots going back to the 1790s, is a foundational statute in federal Indian law and "has been perhaps the most significant congressional enactment regarding Indian lands. The Act's overriding purpose is the protection of Indian lands. It … *guarantees* the Indian tribes' right of possession and imposes on the federal government a fiduciary duty to protect the lands covered

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United States v. S. Pac. Trans. Co., 543 F.2d 676, 684 (9th Cir.1976) (Non-Intercourse Act applies to easements granting rights of way on Tribal land); *Shoshone Indian Tribe*, 672 F.3d at 1039 (holding that resource extraction leases entered contrary to statutory requirements "are void" under Non-Intercourse Act and that "granting an implied right to extract resources from the parcels would run afoul of the Non-Intercourse Act").

by the Act." *Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996) (emphasis added) (quotation marks omitted)). And the Act is grounded in a history that makes clear that Enbridge's ongoing illegal occupation of the Band's land is not only part of a regrettably persistent pattern, but at the very core of what Congress sought to prohibit:

> Because of recurring trespass upon and illegal occupancy of Indian territory, a major purpose of these Acts as they developed was to protect the rights of Indians to their properties. Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions.

Wilson v. Omaha Indian Tribe, 442 U.S. 653, 664 (1979).

Congress could not have stated its prohibition on the unauthorized dispossession of Indian lands in language more plain, expansive, and absolute than it did in the Non-Intercourse Act: Absent congressional and tribal consent, "[*n*]*o* purchase, grant, lease, or other conveyance of lands, or of *any* title or claim thereto, from *any* Indian nation or tribe of Indians, shall be of *any* validity in law *or* equity[.]" 25 U.S.C. § 177 (emphasis added). As in *Hill*, "[t]his language admits of no exception" and forecloses any argument by Enbridge that this Court could affirmatively order a conveyance of rights to occupy and possess the Band's lands to Enbridge based on the latter's equitable claims. "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of" the protection of tribal lands. *Hill*, 437 U.S. at 194. If Enbridge believes that the equitable considerations it alleges warrant overriding the mandatory protections of the Non-Intercourse Act, it should direct that argument not to this Court but to Congress.[19]

[19] *Davilla* is not to the contrary. There, Indian landowners sued a pipeline company for trespass. The Tenth Circuit held that the district court could not issue an automatic injunction requiring removal of the pipeline upon a finding of trespass liability, but instead had to apply the four-factor test. 913 F.3d at 972–73. However, *Davilla* involved a trespass claim brought by individual Indians and did not involve land held by a tribe. *See id*. at 962. The Non-Intercourse

B. Even Were Application of the 4-Part Injunction Test Permissible Here, All of the Factors Overwhelmingly Favor the Band.

Even if this Court had discretion to apply it, the traditional four-factor injunction test readily favors the Band.

The first two factors—irreparable harm and no adequate legal remedy—"coalesce" when the injunction sought is permanent. *Ultratec, Inc. v. Sorenson Commc'ns, Inc.*, 323 F. Supp. 3d 1071, 1075 (W.D. Wis. 2018). This is because "[h]arm is irreparable if legal remedies are inadequate to cure it." *Life Spine, Inc. v. Aegis Spine, Inc.*, 8 F.4th 531, 545 (7th Cir. 2021). As noted above, the Band's sovereign rights to its reservation lands are grounded in the 1854 Treaty with the Chippewa. *See supra* pp. 16–17. These rights include "the power to exclude non-Indians from Indian lands," *Merrion*, 455 U.S. at 141; "to exclude trespassers from the reservation," *Becerra-Garcia*, 397 F.3d at 1175; and "to enforce the terms of right-of-way easement agreements issued pursuant to the Indian Right of Way Act," *Swinomish*, 951 F.3d at 1160. These sovereign rights would be eviscerated by any relief allowing Enbridge to continue to operate on the expired easement parcels against the Band's will. *See Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1003, 1005 (10th Cir. 2015) (Gorsuch, J.) (describing a state's efforts "to displace tribal authority on tribal lands" as a "harm to tribal sovereignty … perhaps as serious as any to come our way in a long time," and as irreparable for injunction purposes).

Further, it is well-settled that "interference with the enjoyment or possession of land is considered 'irreparable' since land is viewed as a unique commodity for which monetary

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Act "does not apply to allotted land … owned by individual Indians[.]" *San Xavier Dev. Auth. v. Charles*, 237 F.3d 1149, 1151 (9th Cir. 2001); *see* 25 U.S.C. § 177 (applying to lands of "any Indian nation or tribe of Indians"). The Act's foreclosure of the courts' equitable discretion (which was not raised as an issue) therefore did not apply.

compensation is an inadequate substitute." *Pelfresne v. Vill. of Williams Bay*, 865 F.2d 877, 883 (7th Cir. 1989); *see also, e.g., Computing Scale Co. v. Toledo Computing Scale Co.*, 279 F. 648, 671–72 (7th Cir. 1921) ("When … the defendant has committed repeated trespasses, and … unless enjoined, will continue … the decree of permanent injunction is *the only adequate remedy*[.]" (emphasis added)). In sum, the first two factors weigh heavily in favor of an injunction.[20]

As to the third factor, "a court does not have to balance the equities in a case where the defendant's conduct has been willful." *Sierra Club v. Franklin Cty. Power of Ill., LLC*, 546 F.3d 918, 935 (7th Cir. 2008) (quotation marks omitted); *Music v. Heiman*, No. 09-cv-341-bbc, 2010 WL 1904341, at *5 (W.D. Wis. May 11, 2010) (same). That Enbridge's trespass has been willful is not subject to genuine dispute, given its clear awareness of the pending expiration of the easements prior to June 2, 2013, and its repeated acknowledgment, year after year since then, that it has been operating in trespass by continuing to pump oil across the length of the Reservation. *See supra* pp. 13, 26–27 & n. 11. If a party knowingly "engages in unlawful conduct … [it] does so at its own risk and cannot ... be heard to complain that it will be severely injured" by an injunction. *S.C. Johnson & Son, Inc. v. Minigrip, LLC*, 16-cv-244-jdp, 2017 WL 8727853, at *4 (W.D. Wis. Oct. 16, 2017) (quotation marks omitted) (ellipses in original). *See also, e.g., Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1227 (7th Cir. 1991) ("evidence that notice had been accorded to the alleged infringer before the specific acts found to have constituted infringement occurred is perhaps the most persuasive evidence of willfulness"

[20] It is no answer that Enbridge has alleged plans to reroute the pipeline. Where a trespass is ongoing at the time of the suit, a plaintiff's right to an injunction "cannot be defeated by a mere supposition … that the defendant may cease to offend against the right asserted." *Archer v. Greenville Sand & Gravel Co.*, 233 U.S. 60, 65–66 (1914).

(citation omitted)); *Heiman*, 2010 WL 1904341, at *4 (finding defendant's conduct "knowing and willful" where it was on "notice that a license was necessary to avoid copyright infringement" but did not obtain one). And as then-Judge Gorsuch explained in *Ute Indian Tribe*, where an injunction would simply foreclose defendants from doing "something they have no legal entitlement to do in the first place …. the defendants' claims to injury should an injunction issue shrink to all but the vanishing point." *Ute Indian Tribe*, 790 F.3d at 1007 (quotation marks omitted). *See also*, *e.g.*, *Light v. Zhangyali*, No. 15 CV 5918, 2016 WL 4429758, at *4 (N.D. Ill. Aug. 22, 2016) ("There is no harm to the defendant to being enjoined from violating the law[.]").

Furthermore, the economic hardships alleged by Enbridge are, if true, hardships of its own making. It is indisputable that Enbridge has known since 1993 that the easements would expire in 2013, that renewal was by no means guaranteed, and that absent renewal, it would have to remove the pipeline within six months of expiration. PPFF ¶¶ 41–42. Enbridge could have gauged the Band's position on renewal years ahead of 2013, formulated contingency plans then, and minimized or eliminated any interruption of its profits when the easements expired. Enbridge instead was apparently of the view that it would get its way in the end and took a risk, counting on renewal in 2013 and continuing with its precarious course of inaction for years thereafter while repeatedly acknowledging that it is in trespass and could face an order to remove the pipeline. *Supra* pp. 13, 26–27 & n.11. But "self-inflicted harm does not preclude an injunction. If a party engages in unlawful conduct in spite of warnings, that party does so at its own risk and cannot ... be heard to complain that it will be severely injured" by an injunction. *S.C. Johnson & Son*, 2017 WL 8727853, at *4 (quotation marks and citation omitted) (ellipses in original). *See also*, *e.g.*, *P.P. & K., Inc. v. McCumber*, No. 94-2721, 1995 WL 46207, at *3 (7th

Cir. Feb. 6, 1995) ("the harm [a defendant] will suffer does not render injunctive relief inappropriate" where "the harm … is in part of [its] own making"); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) (alleged injury from injunction "may be discounted by the fact that the defendant brought that injury upon itself"); *Rosati v. Rosati*, No. 20-cv-07762, 2021 WL 3666432, at *13 (N.D. Ill. Aug. 18, 2021) (same).

Finally, with respect to the public interest, courts cannot, as noted above, "override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 497. Even were this Court to find that the Non-Intercourse Act does not mandate an injunction, the Act's clear prohibition on unconsented conveyances of Tribal land should certainly inform this Court's discretion as to what factors can permissibly be credited in assessing the public interest. Courts of equity may not "ignore the judgment of Congress, deliberately expressed in legislation" by considering "any and all factors that might relate to the public interest[.]" *Id.* (quotation marks omitted).

The public interest is certainly well served by protecting the Band's treaty rights, sovereignty, and rights of self-government—the very goals furthered by the Non-Intercourse Act—against their ongoing violation by Enbridge. *See, e.g., Stifel v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 13-cv-372-wmc, 2014 WL 12489707, at *25 (W.D. Wis. May 16, 2014) ("Certainly, the public interest favors encouraging tribal sovereignty and self-government[.]" (Conley, J.)); *United States v. Michigan*, 534 F. Supp. 668, 669 (W.D. Mich. 1982) (granting injunction and referring to "the protection of … treaty rights to the fullest extent possible" as an "overwhelming public interest"); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1516 (W.D. Wash. 1988) ("[T]he enforcement of rights that are reserved by treaty to the

Tribes is an important public interest, and it is vital that the courts honor those rights."); *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802, 813 (9th Cir. 2011) (referring to "Congress's clearly stated federal interest in promoting tribal self-government").

By contrast, the public interest self-evidently is not "enhanced by permitting defendants to continue to violate federal law." *Boles v. Earl*, 601 F. Supp. 737, 748 (W.D. Wis. 1985). To the contrary, it is promoted "by preventing conduct Congress declared illegal[.]" *CSC Holdings, Inc. v. Greenleaf Elecs., Inc.*, No. 99 C 7249, 2000 WL 715601, at *7 (N.D. Ill. June 2, 2000). *See also, e.g.*, *Denbra IP Holdings, LLC v. Thornton*, 521 F. Supp. 3d 677, 690 (E.D. Tex. 2021) ("The public interest is always served by requiring compliance with Congressional statutes[.]" (citation omitted)); *MetroPCS v. Devor*, 215 F. Supp. 3d 626, 640 (N.D. Ill. 2016) ("the public interest is advanced by enforcing faithful compliance with the laws of the United States and …. upholding property interests"); *Dish Network L.L.C. v. Laundrie*, Case No. 4:15-CV-1157, 2015 WL 7180010, at *3 (M.D. Pa. Nov. 16, 2015) ("[T]he public interest would be served by permanently enjoining actions that violate federal law.").

Here, Enbridge's continuing occupation of the Band's lands clearly violates the terms of the expired federal easements; the federal statutes and regulations governing rights-of-way on tribal lands; the Band's treaty rights and rights of sovereignty and self-government over its lands; and its fundamental property rights. No conception of the public interest should countenance a continuation of that lawlessness. That is especially true here, where sanctioning Enbridge's ongoing violation of the Band's legal rights would run directly counter to Congress's foundational promise of protection for tribal lands as embodied in the Non-Intercourse Act. If Enbridge is found liable in trespass, its trespass should be promptly enjoined.

CONCLUSION

Summary judgment in the Band's favor is warranted with respect to Enbridge's liability in trespass and unjust enrichment; the Band's entitlement to profit-based restitution in an amount equal to Enbridge's profits attributable to its violation of the Band's property rights; the Band's entitlement to an injunction; and Enbridge's breach of contract and good faith counterclaims.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 14, 2022, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on all counsel of record.

/s/ Riyaz A. Kanji
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