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' REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS

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INTRODUCTION

Enbridge has submitted 241 pages of briefing and witness statements in opposition to the Band's motion for summary judgment. No part of that sprawling mass of allegations and arguments undermines the merits of the Band's straightforward case for summary judgment on its trespass claim. Nor does it undermine the Band's entitlement to an automatic injunction against further trespass and to profit-based damages for Enbridge's conscious infringement on the Band's legal rights. It is instead a bid to create an illusion of factual and legal complexity in the hopes that this Court will throw up its hands and conclude that a trial is necessary. But that gambit notwithstanding, summary judgment is amply warranted here. As shown in the Band's opening brief and confirmed below, the material facts are few and not genuinely disputed, the law is clear, and the relevant documents speak with one voice in favor of the Band's position.

ARGUMENT

I. The Governing Documents Plainly Establish that the Fifty-Year Easement Is Limited to the Thirteen Parcels of Wholly Owned Tribal Land.

Like a burst of squid's ink, Enbridge's arguments seek to obscure the clear, operative language in the core documents pertaining to the Band's trespass claim: the 1992 Agreement between the Band and Enbridge, the 1992 Tribal Council Resolution, the 1992 Tribal Lands Application, and the 1993 Fifty-Year Tribal Lands Easement. That language establishes beyond any genuine dispute that the Band's consent in 1992 to a fifty-year easement was limited to the thirteen parcels of land then wholly owned by the Band, none of which is the subject of the Band's trespass claim. Band Br. at 7–8, 32– 35.[1] Enbridge has no answer for it, and hence seeks desperately to divert attention elsewhere.

[1] "Band Br." refers to the 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

Section 1.a. of the 1992 Agreement provides the Band's consent to, and authorizes BIA approval of, a fifty-year easement "pursuant to and in accordance with" the 1992 Tribal Council Resolution in exchange for $800,000. PPFF ¶ 33, Tinker Decl. ¶ 6 & Attach. E (ENB00040376). That 1992 Resolution—which, as discussed in the Band's opening brief, was a legal prerequisite to any easement over the Band's lands, Band Br. at 42–44—granted Band consent to a fifty-year 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')," also in exchange for $800,000. PPFF ¶ 31, Tinker Decl. ¶ 23 & Attach. V (emphasis added). The Band thus explicitly tied its consent for an easement to the lands described in Enbridge's Tribal Lands Application, and that Application could not have been clearer in limiting itself to the thirteen parcels wholly owned by the Band: It provided that the "[a]pproximate distance of the right-of-way will be 2.8 miles," PPFF ¶ 25, Tinker Decl. ¶ 20 & Attach. S (BRB027434), and attached the list of parcels that the easement would govern—a list consisting of the thirteen parcels, identified by their precise legal descriptions, and covering approximately 2.8 miles, *id.* ¶ 26. Not surprisingly, then, the fifty-year easement issued thereafter by the BIA was expressly "limited to and more particularly described as" the same thirteen parcels, which were listed with the same legal descriptions used in the Application, and with a compensation figure of $800,000. PPFF ¶ 36, Tinker Decl. ¶ 15 & Attach. N (BRB004151).

The clear language in these core documents—delineating in real property terms the scope of the parties' agreement—confirms beyond any genuine dispute that the 1992 Agreement

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Judgment on Defendants' Counterclaims. "Enbridge Br." refers to Opposition to Band's Partial Motion for Summary Judgment.

provided the Band's consent to a fifty-year easement over thirteen parcels of land, nothing more and nothing less. Their plain text should mark the end of the matter. *See First Bank & Tr. v. Firstar Info. Servs., Corp.*, 276 F.3d 317, 322 (7th Cir. 2001) (where contract "is unambiguous, the court must give effect to the agreement as written"); *Church Mut. Ins. Co. v. Travelers Cas. Sur. Co. of Am.*, 533 F. Supp. 3d 688, 695 (W.D. Wis. 2021) (Conley, J.) (substantially same).

The surrounding documents, should the Court consider them, likewise compel the same conclusion. Band Br. at 42–44. George Maas, who negotiated the 1992 Agreement for Enbridge, represented to David Siegler, the Band's principal negotiator, that "the total amount of acreage" covered by the easement was "20.1 acres (60' of right-of-way times 14,642 feet)." PPFF ¶ 23, Tinker Decl. ¶ 18 & Attach. Q (BRB044406). These are the exact dimensions of the thirteen parcels listed in Enbridge's Tribal Lands Application. PPFF ¶¶ 25-27. And when the Band's Chairman submitted the results of that negotiation—the 1992 Agreement, the 1992 Resolution, and a resolution approving the terms of the 1992 Agreement—to the BIA for its approval as required by federal law, he stated that "[t]hese documents express the terms by which the Bad River Tribe has agreed to grant to Lakehead a fifty year right of way over its existing easement." PPFF ¶ 34. In response, the BIA fully understood itself to be reviewing and acting upon "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." PPFF ¶ 35 (emphasis added).

The Band highlighted these statements in its opening brief, Band Br. at 42–44, but Enbridge nowhere acknowledges them in its brief. Enbridge has no answer to their clear meaning, and like the plain text of the governing documents, they call for summary judgment in the Band's favor. *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 Indus., Inc.*, 433 F.3d 952, 956–57 (7th Cir. 2006) (summary judgment is appropriate where consideration of extrinsic evidence and language of contract would permit trier of fact to come to but one conclusion).

II. Enbridge's Arguments Do Not Overcome the Plain Meaning of the Governing Documents.

Enbridge proposes several arguments to escape the box created for its position by the governing documents. None has merit.

A. Enbridge Advances a Narrative of a "Pre-Approved Succession of 20-Year Easements" That Would Have Been Illegal Had the Parties Attempted It.

As the foundation of its contract interpretation arguments, Enbridge posits an overarching narrative purporting to explain the parties' and the BIA's collective motivations behind the 1992 Agreement. It is a story spun from whole cloth and estranged from documentary evidence and logic. If true, it would mean that Enbridge, the Band, and the BIA cooperated in a flagrant violation of federal law. They did not.

Enbridge contends that the BIA insisted on "conformity," Enbridge Br. at 12, of the duration of the easements over the allotted and Tribal lands in order "to provide continued rights for Line 5 to operate across the entire Reservation until 2043," *id*. at 15. Enbridge then describes the scheme by which the parties purportedly accomplished that end in the 1992 Agreement. Because the easements over the allotted parcels would be limited to twenty years, the argument goes,

> subsequent renewals of the BIA-approved easement across the Allotted Parcels would be necessary to achieve the total easement term of 50 years. These renewals could be obtained based on the Band's 50-year consent and agreement to cooperate provided in advance in the 1992 Agreement via Section 3. *Id.* ¶¶ 25, 28, 29. Thus, … the 1992 Agreement was intended to provide continued rights for Line 5 to operate across the entire Reservation until 2043 *by pre-approving a*

> *succession of 20-year easements over the Allotted Parcels in the same location in which it was originally installed in 1953 to "conform" with the Band's 50 years of consent.* The Band's future cooperation would be required to achieve this conformity[.]

Id. (emphasis added).

This theory is demonstrably false.

First, it has a basic math problem. The easement over the Tribal Lands would end in 2043. One cannot get to 2043 from 1993 with a "succession of 20-year easements." Even if the BIA and the parties sought "conformity" of the duration of the easements across the Reservation, a succession of twenty-year easements was not the way to achieve it.

Second, the theory has a documentation problem. Federal law required that the purported scheme be reduced to writing in the relevant easement instruments. *See* 25 C.F.R. § 169.15 (1992) (the easement instrument "shall incorporate all conditions or restrictions set out in the consents obtained" from the tribe); *id.* § 169.18 (1992) ("All rights-of-way granted under the regulations in this Part 169 shall be in the nature of easements for the periods stated in the conveyance instrument."). Yet evidence of the scheme appears nowhere in the relevant documents. The only fifty-year easement in the record of this case expressly pertains to lands "limited to and more particularly described as" the thirteen parcels wholly owned by the Band in 1992. It catalogues these parcels using their precise legal descriptions and contains not a word supporting Enbridge's theory. The fifteen twenty-year easements over the allotted parcels—including the easements over the three allotted parcels in which the Band held fractional interests in 1992—state a clear termination date of June 2, 2013, and likewise contain not a word qualifying that end-date or otherwise supporting Enbridge's theory. Enbridge has not even suggested otherwise with respect to these pivotal and dispositive legal instruments. It is no

surprise that the records of the parties' negotiations and the BIA's review nowhere reflect anyone discussing a pre-approved succession of twenty-year easements.

Third, and most fundamentally, the scheme described by Enbridge of "pre-approving a succession of 20-year easements over the Allotted Parcels," Enbridge Br. at 15, would have been illegal had it been attempted. The easement over the thirteen wholly owned Tribal parcels was issued "pursuant to the provisions of the Act of February 5, 1948 (… 25 USC 323–328)"—which, as noted, allows for fifty-year terms. PPFF ¶ 36, Tinker Decl. ¶ 15 & Attach. N (BRB004151). But the BIA issued all 15 of the easements over the allotted parcels "pursuant to the provisions of … 25 USC 321[.]" *See, e.g.*, PPFF ¶ 40, Tinker Decl. ¶ 16 & Attach. O (ENB00000553). And under that statute, the BIA was flatly prohibited by Congress from pre-approving easement rights beyond twenty years. *See* 25 U.S.C. § 321 ("[T]he rights herein granted *shall not extend beyond a period of twenty years*[.]" (emphasis added)). The Secretary of the Interior could extend that period "upon such terms and conditions as he may deem proper," but only "*at the expiration* of said twenty years," and not in advance. *Id*. (emphasis added). *See, e.g.*, *Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864, 868 n.1 (8th Cir. 2021) (§ 321 "authorizes the Secretary to grant easements lasting up to twenty years"); *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055, 1056 (9th Cir. 1988) (§ 321 "authoriz[es] the Secretary to grant rights-of-way as easements … for a period no longer than twenty years").

Whether wittingly or not, Enbridge's theory that the parties and the BIA agreed to a scheme involving the "pre-approving [of] a succession of 20-year easements over the Allotted Parcels," Enbridge. Br. at 15, replicates designs that parties used frequently in the late 19th and early 20th centuries to circumvent important federal protections for Indian lands, including time limits on the leases of such lands. "Lessees tried to avoid these restrictions through various

practices, including so-called overlapping leases." *Stray Calf v. Scott Land & Livestock Co.*, 549 F.2d 1209, 1210 (9th Cir. 1976). The Supreme Court long ago rejected such practices and held instruments arising out of them to be "void" for "transgressing the statutory restrictions." *United States v. Noble*, 237 U.S. 74, 84 (1915); *see also, e.g.*, *Bunch v. Cole*, 263 U.S. 250, 254 (1923) (leases entered by Indian landowner for a time period inconsistent with the applicable statute "were made in violation of a congressional prohibition. They were not merely voidable … but absolutely void[.]... Nothing passed under them"); *Smith v. McCullough*, 270 U.S. 456, 464–65 (1926) (substantially same); *Shoshone Indian Tribe of Wind River Reservation v. United States*, 672 F.3d 1021, 1037 (Fed. Cir. 2012) ("[T]he statutory requirements regarding the transfer of Indian lands may not be waived or ignored.").

If Enbridge's narrative is correct, the 1992 Agreement was "void" the moment it was signed because through it the parties and the BIA sought to convey rights in Indian land beyond the limits set by Congress. Not only would Enbridge be in trespass on the twenty-year parcels, it would be in trespass on the fifty-year parcels as well. To be clear, this is not the Band's argument. The Band does not contend that the 1992 Agreement and the twenty-year easements were void ab initio as part of an illegal scheme. They were not, because no evidence exists that the parties and the BIA "pre-approved a succession of 20-year easements over the Allotted Parcels" in violation of § 321 as Enbridge claims. The Court should reject Enbridge's theory, grounded as it is in artifice discredited long ago, out of hand. *See Walsh v. Schlecht*, 429 U.S. 401, 408 (1977) ("[C]ontracts should not be interpreted to render them illegal and unenforceable

where the wording lends itself to a logically acceptable construction that renders them legal and enforceable.").[2]

B. Enbridge's Textual Arguments Provide No Support for Its Illegal Theory.

Enbridge posits an array of arguments that seek to ground its pre-approval theory in the text of the 1992 Agreement. Each is as patently unsound as the theory they purport to support.

1. *Enbridge's Tribal Lands Application of June 10, 1992, was part of the 1992 Agreement.*

As discussed above and in the Band's opening brief, Enbridge's June 10, 1992 Tribal Lands Application, which was limited to the thirteen parcels of land wholly owned by the Band, formed the predicate of the Band's consent to a fifty-year easement in the 1992 Tribal Council Resolution and the 1992 Agreement. Enbridge attempts to escape that fact by arguing that because the 1992 Tribal Lands Application was not attached to the 1992 Agreement, it can play no role in interpreting the latter:

> Had the parties intended to qualify or limit the Band's consent in the 1992 Agreement to tracts specifically identified in an application, that application would have either been attached to the document, referenced in the contract's defined "Existing Rights of Way" term, or both. It was not, and no such limitation otherwise exists by the terms of the Agreement.

Enbridge Br. at 30 (citation omitted).

[2] Enbridge contends that the Band "*agrees* that the Band had lawful authority to provide such 'advance consent'" to fifty-year easements over the allotted parcels. Enbridge Br. at 24. But that is wishful thinking based on a careless reading of the Band's argument. *See* Band Br. at 46 (stating that Enbridge "could have *sought* to bargain (and pay) for such protection. It did not." (emphasis added)). Demonstrating that the negotiation record is barren of evidence of any attempt by Enbridge to secure the purported advance consent hardly equates to agreeing that the Band lawfully could have agreed to it for easements issued under § 321.

This argument is meritless. The 1992 Tribal Council Resolution was attached to and expressly incorporated into the 1992 Agreement: The Band's consent in the Agreement was given only "pursuant to and in accordance with" the Resolution, "which is attached and marked Exhibit 'A.'" Band Br. at 33. Enbridge does not dispute this. Enbridge Br. at 18 ("The Band's consent to a BIA-issued easement was to be conveyed pursuant to the 'Tribal Council's Resolution Granting Pipeline Right of Way' attached as Exhibit A to the contract."). Whatever comprises the substance of the Resolution, then, unquestionably became part of the terms of the 1992 Agreement. And the 1992 Tribal Lands Application was central to the Resolution, as the Tribal Council expressly provided its consent to a fifty-year easement over specific lands "all as is described more fully in the Company's Application For Right of Way dated June 10, 1992 (hereinafter 'Application')[.]" Band Br. at 33. The balance of the Resolution likewise underscores the centrality of the Application because it turns entirely on it, stating that

> the Tribal Council, the governing body of the Tribe, has reviewed *the Application* and has been advised by the Tribe's attorney with respect to *the Application* … that the Tribal Council, in special session assembled, hereby accepts the offer of the Company, consents to the Company's requests and *Application*, and requests the Secretary of the Interior … to approve and grant *the Application* and the rights of way[.]

PPFF ¶ 31, Tinker Decl. ¶ 23 & Attach. V (emphases added).

Enbridge's argument, in other words, is that because the 1992 Agreement did not directly attach the Tribal Lands Application, but instead attached the Tribal Council Resolution whose terms rest squarely on and incorporate the Application, the Application has no bearing on the construction of the Agreement. To call this argument strained, hypertechnical, and wholly without support in the case law would give it too much credit. It is an argument designed not to get at the substance of parties' agreement but rather to run as far away from it as possible, and as such it should be rejected.

2. *The 1992 Agreement did not encompass any allotted parcels*.

Enbridge next contends that the Band's consent to a fifty-year easement in section 1.a. of the 1992 Agreement must have encompassed the fifteen allotted parcels at issue in this action because the Band then owned fractional portions of three of those parcels:

> The Band's consent to a BIA-issued easement was to be conveyed pursuant to the [1992 Resolution]. That resolution … mirrored Section 1(a) by consenting to: "a fifty (50) year right of way easement for a pipeline over and across <u>any lands in which the Tribe has a legal interest within the Company's existing right of way</u>." EPFF ¶¶ 24–25 (emphasis added).

Enbridge Br. at 18. The Band concurs with Enbridge that the consent provided by the Band in the 1992 Agreement and the consent it provided in the 1992 Resolution "mirrored" each other. They unquestionably referred to the same parcels of land. No genuine issue of material fact exists on that point.

Nor does any *genuine* issue exist as to whether that contractual language included any allotted parcels. For in the block quote above, Enbridge has, without acknowledgment, inserted a period and omitted the remainder of the last sentence, which goes on to say "*all 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 (emphasis added). As discussed above and in the Band's opening brief, this language is central to the proper interpretation of the parties' agreement in 1992 as it clearly delineates the parcels with respect to which the Band was consenting to a fifty-year easement. And Enbridge has no answer for it other than to bleach it from the 1992 Resolution.

It goes without saying that the operative text is that agreed to by the parties in 1992, not that as rewritten in 2022. The excised text directly undermines Enbridge's argument by tying the Band's consent to the thirteen wholly owned Tribal parcels. That language can no more be

wished away by a magic wand than it can be by omitting it from the arguments presented to this Court.[3]

From its transparently erroneous predicate, Enbridge asks the Court to conclude that "the BIA must have understood that tribal consent for these Allotted Parcels was reflected in the 1992 Agreement and [1992] Resolution." Enbridge Br. at 19. But the Court need not accept Enbridge's invitation to speculate based on excised text as to what the BIA "must have understood" because the documentary record tells us what the BIA *in fact* understood. As noted above, the agency plainly viewed the 1992 Agreement and 1992 Resolution—which the Band tellingly submitted under the subject heading "Lakehead Pipe Line Right of Way Application (6/10/1992)," PPFF ¶ 34, Tinker Decl. ¶ 24 & Attach. W—to constitute "the proposed Grant of Easement for Right-of-way to Lakehead Pipe Line Company *over 13 parcels of tribal trust lands*," PPFF ¶ 35 (emphasis added). Again, Enbridge nowhere acknowledges this clear statement of the BIA's understanding, much less grapples with its implications for the credibility of its argument.

Enbridge instead places great weight on the three parcels in which the Band held miniscule interests (low-single-digit percentages of two of them and less than one percent of the other, Tinker Suppl. Decl. ¶ 2 & Attach. A) in 1992. It urges that since available BIA records contain no evidence that the Band's consent to the twenty-year easements was sought or obtained for those interests, those allotments (and therefore all the allotments) must have been

[3] Even were this Court to find the phrase "lands in which the Tribe has a legal interest" ambiguous in isolation, "[a] search for patent ambiguity must canvass the entire agreement. A provision that seems ambiguous might be disambiguated elsewhere in the agreement." *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 545 (7th Cir. 2000). Here, any ambiguity in that phrase is plainly disambiguated by the language that *immediately* follows it—i.e., the language Enbridge has deleted without acknowledgment.

encompassed in the 1992 Agreement. *See, e.g.*, Enbridge Br. at 19–20. The argument is meritless. It has no support in the actual text or context of the 1992 Agreement, the 1992 Resolution, or the surrounding negotiations and BIA approval process. And there is a far more credible explanation for why the BIA did not account for the Band's small interests in those parcels in agreeing to the twenty-year easements, one grounded in fact and history. In the early 1990s, the BIA's recordkeeping and management pertaining to fractional Indian ownership (both tribal and individual) was at a historic nadir, earning a damning rebuke from Congress in 1992 and ultimately leading to litigation against the United States for the BIA's breach of fiduciary duties and a multi-billion-dollar settlement. *See Cobell v. Salazar*, 679 F.3d 909, 913–16 (D.C. Cir. 2012).

In April 1992, House Report No. 102-499 conveyed the findings of the Committee on Government Operations, which expressed its grave "concerns about the accuracy of the BIA's land ownership records," H.R. Rep. No. 102-499, at 26 (1992), including "tens of thousands of minuscule ownership interests," *id.* at 28, and noted "significant deficiencies in the accuracy and use of the Bureau's ownership records and undivided fractional interests in real estate and income," *id.* at 27 (footnote omitted). The Committee stated that the "explosive growth of undivided fractional interests" in Indian allotments had "been a serious problem for the Bureau for years," and "these difficulties have been worsened" as fractionalization increased. *Id.*

All of this compounded the "[f]inancial management problems" at the BIA, which had "been neglected for decades" and by 1992 reflected "a continuing crisis in the management of the [BIA.]" *Id.* at 56. The "BIA had failed to provide a timely explanation of payments to allotees, and failed to establish a comprehensive system for identifying underpayments, overpayments, and nonpayments" of monies owed them. *Id*. at 45. "As a result, … lease

payments were not being collected in a timely manner, and revenues were being posted to the wrong accounts." *Id*. at 26. By 1992, "[o]nly marginal and grudging progress has been made by the Bureau since the subcommittee began its oversight efforts in 1989." *Id*. at 5. "That it has taken place in the administration of the Federal Government's sacred trust for native Americans," the Committee stated, "can only be described as a national disgrace." *Id.* at 56.

The Band's extremely small fractional interests in the three parcels would have entitled the Band to, at most, a few hundred dollars each for the twenty-year easements over those parcels. *See* PPFF ¶ 23, Tinker Decl. ¶ 17 & Attach. P (ENB00000833–834), (BRB044657–44658). That such a relative pittance fell through the cracks during the peak years of the BIA's bureaucratic disarray—when it was mismanaging "*$2 billion* in tribal and individual Indian funds," House Report No. 102-499 at 2 (emphasis added)—is sadly not surprising, and provides no warrant for Enbridge's effort to leverage those interests to rewrite a contract the text, context, and negotiation records of which all flatly contradict such an interpretation.

3. *The 1992 "Application" referenced in the 1992 Resolution did not encompass fifteen separate applications for allotted lands.*

Enbridge further seeks to cloud the clear documentary waters by contending that the singular reference to "the Company's Application for Right of Way dated June 10, 1992" in the 1992 Resolution harkened not to one but to two applications, one for the wholly owned tribal parcels and the other for the allotment parcels. *See* Enbridge Br. at 30 ("There were actually two applications submitted by Enbridge, both dated June 10, 1992—one for 'allotted' lands and one for 'tribal lands[.]'" (emphasis omitted)). Enbridge again has its facts, and the text, wrong.

First, on May 1, 1992, the BIA provided Enbridge with "*an Application form for each allotment* which should be signed and returned." Nemeroff Decl. ¶ 13 & Ex. 11 (emphasis added). Enbridge thereafter submitted sixteen applications to the BIA: one "Tribal Lands"

application covering the thirteen wholly owned tribal parcels, PPFF ¶ 25, Tinker Decl. ¶ 20 & Attach. S; and fifteen separate and distinct applications, one for each of the fifteen allotted parcels—each separately titled "APPLICATION FOR RIGHT-OF-WAY RENEWAL" and separately executed by George Maas. Decl. of Justin B. Nemeroff in Opposition to the Band's Motion for Partial Summary Judgment ("Nemeroff Decl.") ¶ 4 & Ex. 2. Each of the fifteen allotted-parcel applications resulted in a separate easement. PPFF ¶ 40, Tinker Decl. ¶ 16 & Attach. O. And not all of those applications were dated June 10, 1992. *See* Enbridge Ex. 2 (ENB00000645) (allotted-parcel application dated June 17, 1992).

Enbridge's argument, then, is that the clear textual reference to a single Application for Right of Way in the 1992 Resolution was not to the sole application pertaining to the Band's lands, but in fact swept in the fifteen separate applications pertaining to the allotment lands. The plain text of the Resolution cannot bear that weight, and for that reason alone Enbridge's argument should be rejected. *First Bank & Tr.*, 276 F.3d at 322; *Church Mut. Ins. Co.*, 533 F. Supp. 3d at 695.

Second, the 1992 Resolution (which expressly incorporates "the Company's Application For Right of Way dated June 10, 1992") and the 1992 Agreement both list $800,000 as the total compensation to be paid by Enbridge. PPFF ¶ 31, Tinker Decl. ¶ 23 & Attach. V; PPFF ¶ 33, Tinker Decl. ¶ 6 & Attach. E. The resulting fifty-year BIA easement *also* lists $800,000 as the total compensation and was expressly limited to the *same* thirteen wholly Band owned parcels that were listed in Enbridge's Tribal Lands Application of June 10, 1992. PPFF ¶ 36, Tinker Decl. ¶ 15 & Attach. N (BRB004151). Thus, the 1992 Resolution's reference to "the Company's Application For Right of Way dated June 10, 1992" cannot plausibly be read to reference additional applications beyond Enbridge's Tribal Lands Application of June 10, 1992.

Third, Enbridge acknowledges, as it must, that it negotiated the easements over the allotted parcels with the BIA, not with the Band, and that it did so after its negotiations with the Band had concluded, as required by the BIA. Enbridge Br. at 12 ("[T]he BIA instructed Enbridge to complete negotiations in two phases: first with the Band, *then … with the BIA for the Allotted Parcels*." (emphasis added)). Thus, when the 1992 Resolution provided that Enbridge "has requested consent from the Bad River Band" for a fifty-year easement across lands "described more fully in the Company's Application For Right of Way dated June 10, 1992," that the Band "has reviewed the Application," and that the Band "*hereby accepts the offer of the Company* [and] consents to the Company's requests and Application," PPFF ¶ 31, Tinker Decl. ¶ 23 & Attach. V (emphasis added), it can only have been referring to the Application that had been the subject of the negotiations between Enbridge and the Band up to that point, and not to the separate applications to be discussed between Enbridge and the BIA in negotiations that had not yet even begun.

Should the Court consult them, the surrounding documents are likewise at war with Enbridge's position. As noted above, Enbridge's own negotiator stated that "the total amount of acreage" of the easement he was negotiating with the Band was "20.1 acres (60' of right-of-way times 14,642 feet)"—i.e., the exact dimensions of the thirteen parcels listed in Enbridge's Tribal Lands Application of June 10, 1992. PPFF ¶ 23, Tinker Decl. ¶ 18 & Attach. Q (BRB044406); PPFF ¶¶ 25-27. And again, the Band submitted the 1992 Agreement and the 1992 Resolution (along with Resolution 12/21/92-10) to the BIA under the heading "Lakehead Pipe Line Right of Way Application (6/10/1992)." PPFF ¶ 34, Tinker Decl. ¶ 24 & Attach. W; *see supra* p. 11. And the BIA expressly understood that application to pertain to "the proposed Grant of Easement … over 13 parcels of tribal trust lands[.]" PPFF ¶ 35. As noted, Enbridge mentions these direct

and extremely probative statements nowhere in its brief, much less grapples with their fatal implications for its argument.[4]

4. *Section 3 of the 1992 Agreement did not provide separate consent to easements across the entire Reservation*.

As established in the Band's opening brief, section 3 of the 1992 Agreement is a ministerial "further assurances" provision committing the Band to undertaking all reasonable steps to effectuate the fifty-year easement it consented to in section 1.a., including providing the consent and authorization documents listed in section 1d. Band Br. at 35–38.

Enbridge argues that section 3 instead provides an additional and broader consent than section 1.a. because "Section 3 uses the broadly worded, undefined phrase—"'existing pipeline right of way,'" which "refers to the entire pipeline corridor." Enbridge Br. at 21. Therefore, the argument goes, "Section 3 expresses a separate commitment … to cooperate with Enbridge in providing consents beyond those already found in Section 1[.]" *Id.* at 34. That is, section 3 provides *separate consents to separate easements*. This elephant-in-a-mousehole argument fails for several fundamental reasons.

First, there is no basis to conclude that the term "existing pipeline right of way" as used in section 3 referred to the entire pipeline corridor. To the contrary, the parties clearly did not use "existing" to mean "entire" in 1992. The 1992 Resolution (which both parties agree is part of the 1992 Agreement) provides Band consent to a fifty-year easement over "the Company's existing rights of way" and follows that phrase immediately with language leaving no reasonable doubt as to what that phrase referred to: "*all as is described more fully in the Company's*

[4] *See Sound of Music Co.*, 477 F.3d at 916 ("If the extrinsic evidence is conclusive, the proper reading of the contract is not a question of fact."); *ConFold Pac.*, 433 F.3d at 956–57 (7th Cir. 2006) (stating that summary judgment is appropriate where consideration of extrinsic evidence and language of contract would permit trier of fact to come to but one conclusion).

Application For Right of Way dated June 10, 1992[.]" PPFF ¶ 31, Tinker Decl. ¶ 23 & Attach. V (emphasis added). In anchoring Enbridge's "existing" right of way to the Application (which, as discussed above, was limited to the thirteen wholly Band-owned parcels), the Resolution runs squarely counter to Enbridge's current effort to conflate that right of way with the entire pipeline corridor across the Reservation.

Should the Court consider them, the surrounding documents again compel the Band's construction. The Band presented the 1992 Agreement and the 1992 Resolution to the BIA as "express[ing] 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 (emphasis added). The BIA, as noted, plainly understood that submission to cover a fifty-year easement over the "13 parcels of tribal trust lands." PPFF ¶ 35. That was the "existing" easement the renewal of which the Band and Enbridge had negotiated. Indeed, during negotiations the Band's negotiator plainly expressed his understanding that "you are requesting a 50-year renewal of the existing easement across parcels owned by the Bad River Tribe within the Bad River Reservation." PPFF ¶ 23, Tinker Decl. ¶ 18 & Attach. Q (BRB044413); *see also id.* (BRB044404) (stating that Enbridge sought "renewal of the existing Lakehead right-of-way"). And again, Enbridge's negotiator described "the total amount of acreage" to be covered by that easement as "20.1 acres (60' of right-of-way times 14,642 feet)"—the precise dimensions of the thirteen parcels then wholly owned by the Band and listed in Enbridge's Tribal Lands Application of June 10, 1992. Band Br. at 42.

Second, the structure of the 1992 Agreement contradicts Enbridge's theory that section 3 provided "a separate commitment" for easements "beyond those" covered by section 1, Enbridge Br. at 34. *See Tech. Mktg. Corp. v. Hamlin, Inc.*, 974 F. Supp. 1224, 1227 (W.D. Wis. 1997)

(interpreting contract "as a whole," including its "basic structure"). The Agreement is structured as follows:

> Preamble
>
> "Whereas" clauses
>
> NOW, THEREFORE, in consideration of the mutual promises set forth herein, the Tribe and the Company agree as follows:
>
> 1. The Tribe agrees that: ….
> 2. The Company agrees that: ….
> 3. The Tribe and the Company will do whatever they can reasonably do ….
> 4. Closing will occur within fifteen (15) days ….
> 5. This Agreement is binding on the Tribe and the Company and their successors ....
> 6. In the event that the grant of the fifty (50) year Right of Way easement consented pursuant to this Agreement and pursuant to the Resolution of the Tribe as set forth in Exhibit "A" is not approved by the Secretary, [parties agree to twenty-year term] ….
> 7. This Agreement shall be kept confidential … except as part of the Tribal approval process … or as may be required by law….
>
> Signatures

PPFF ¶ 33, Tinker Decl. ¶ 6 & Attach. E.

As their lead-in phrasing—"The Tribe agrees," "The Company agrees"—plainly indicates, sections 1 and 2 set forth what the parties understood to be the substantive core of their agreement, and both list $800,000 as the consideration for the bargain. Section 3 follows. It notably does not say "the Tribe and Company *also agree* …," which it logically would have done under Enbridge's theory that section 3 provided "a separate commitment," and it makes no mention of additional consideration. Rather, as discussed in the Band's opening brief, it uses typical further assurances language. Band Br. at 35–38.

Furthermore, section 6 appears after section 3 and refers to "the fifty (50) year Right of Way easement consented pursuant to this Agreement and pursuant to the Resolution of the Tribe as set forth in Exhibit 'A[.]'" PPFF ¶ 33, Tinker Decl. ¶ 6 & Attach. E (ENB00040379, § 6). This language unambiguously sweeps in all sections (including 3) in tying "the fifty (50) year" easement covered by "this Agreement" to the 1992 Resolution, contradicting Enbridge's position that the 1992 Resolution pertained only to section 1 but not section 3. *See* Enbridge Br. at 37.

The Band's position is further reflected in section 7. Its reference to "the Tribal approval process" underscores that the parties understood that additional steps were necessary to effectuate their agreement, including approval of the two Resolutions. Indeed, Resolution 12/21/92-10 makes clear that the 1992 Agreement was drafted before the two Resolutions were executed. *See* Nemeroff Decl. ¶ 3 & Ex. 1 (BRB044356) ("the Tribal Council … has reviewed the Agreement and … desires to expressly approve the terms of the Agreement"). Section 3 provided the Band's commitment that these necessary "consents and authorizations" would be undertaken, Band Br. at 35—the classic function of a further assurances clause.[5]

Third, Enbridge asserts that section 3 reflects the Band's consent to future easements because "Section 3 does not limit its obligation to providing consent over lands in which the Band "***now*** has a legal interest" (*i.e.*, 'now' meaning at the time of contract execution). Instead, Section 3 refers to lands in which the Band '*has an interest.*' EPFF ¶ 25." Enbridge Br. at 22. But the 1992 Resolution, which is indisputably part of the 1992 Agreement and the controlling expression of the Band's consent, also does not use the word "now"—it merely refers

[5] Enbridge contends that "[t]he Band conveniently omits this Resolution from its papers in the hope that the Court does not consider it." Enbridge Br. at 27. This is baseless. The Band clearly referenced that resolution. *See* Band Br. at 37. And that resolution's mere reference to the "existing" right of way does not salvage Enbridge's theory for the reasons noted above.

to "lands in which the Tribe *has a legal interest* within the Company's existing rights of way," and, again, follows that up with language rendering the parties' understanding unmistakable: "all 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 (emphasis added). The absence of the word "now" in section 3 cannot bear the weight Enbridge seeks to place on it.

Finally, if section 3 had provided for separate consents to separate easements beyond that referenced in sections 1 and 2, it would have included compensation terms of its own. The $800,000 sum referenced in sections 1 and 2 of the 1992 Agreement was expressly limited to the section 1 consent. *See* PPFF ¶ 33, Tinker Decl. ¶ 6 & Attach. E (ENB00040376) (section 1.a., describing and consenting to fifty-year right of way "pursuant to and in accordance with" the 1992 Resolution and stating that "[t]he consideration … *for such* pipeline … right of way … is … $800,000" (emphasis added)). *See, e.g.*, *Culbertson v. Berryhill*, 139 S. Ct. 517, 522 (2019) (stating that "the adjective 'such'" refers to "'[t]hat or those; having just been mentioned'" (quoting Black's Law Dictionary 1661 (10th ed. 2014)). The 1992 Resolution contains the same limitation. *See* PPFF ¶ 31, Tinker Decl. ¶ 23 & Attach. V (describing "the Company's Application for Right of Way dated June 10, 1992" and stating $800,000 as consideration "for such" right of way). And as noted above, the fifty-year easement—which is expressly limited to the thirteen parcels of Tribal Land—lists as compensation the sum of $800,000. PPFF ¶ 36, Tinker Decl. ¶ 15 & Attach. N (BRB004151). If section 3 provided separate consent for separate easements beyond that authorized in section 1.a., as Enbridge alleges, then the Band made that purported promise for no consideration, and Enbridge cannot rely on it for either its affirmative defense of consent or its claim of breach: "It is a basic tenet of contract law that in order for a promise to be enforceable against the promisor, the promisee must have given some

consideration for the promise." *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997). Enbridge nowhere acknowledges this clear implication of its counter-textual argument.

* * *

Enbridge's narrative of a "pre-approved succession of 20-year easements" is a work of fiction produced for this litigation. Evidence of it appears nowhere in the 1992 Agreement, the 1992 Resolution, the 1993 Tribal Lands easement, or the 1993 allotted lands easements. Enbridge's theory is instead flatly contradicted by these documents, individually and together, and depicts nothing short of an elaborate scheme to evade the prohibitions enacted by Congress in the very statute under which the twenty-year easements were issued. It is no wonder, then, that Enbridge is likewise unable to quote a single statement from the negotiation and BIA approval record describing such a scheme. Enbridge has accordingly identified no genuine issue of material fact with respect to the Band's trespass claim, or with respect to its affirmative defense of consent and its breach of contract counterclaim. The Band is entitled to summary judgment on these issues.

C. The 1992 Agreement may not be interpreted Enbridge's way absent terms that admit of no other reasonable interpretation.

Even were the Court to identify a material ambiguity in the 1992 Agreement and conclude that it was not resolved conclusively by the negotiation documents, summary judgment in the Band's favor would still be warranted. Enbridge argues that in that Agreement, the Band contracted away its power to withhold consent to renewal of the twenty-year easements when they expired. This clearly describes the contractual surrender of a sovereign power and renders squarely applicable the holding in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), that such surrenders must be set forth "in terms which admit of *no other reasonable interpretation*,"

id. at 148 (emphasis added) (quotation marks omitted). *Accord United States v. Winstar Corp.*, 518 U.S. 839, 877 (1996). *See* Band Br. at 39.

1. *Granting or withholding tribal consent to an easement over tribal lands is a sovereign power.*

Seeking to escape the clear implications of *Merrion* for its strained interpretation of the 1992 Agreement, Enbridge contends that a tribe's granting or withholding of consent to an easement over lands in which the tribe has an interest is not a sovereign power, but a mere property right and that the Band therefore entered the 1992 Agreement in a capacity no different from any other landowner. Enbridge Br. at 57.

In our modern era of tribal self-determination, the authority to determine whether to consent, or to withhold consent, to property conveyances is a core sovereign power for tribes. It is no accident that the "Enumerated powers" article of the Band's Constitution includes the power "[t]o approve or veto any … encumbrance of Tribal lands … which may be authorized … by the Secretary of the Interior[.]" Bad River Const. art. VI, § 1(c). *See* Enbridge Br. at 57. That provision derives directly from section 16 of the Indian Reorganization Act of 1934 ("IRA"), which provides that tribes may adopt a constitution which "shall … vest in such tribe or its tribal council" the authority "to prevent the … encumbrance of tribal lands … without the consent of the tribe[.]" 25 U.S.C. § 5123(e). *See* 78 Cong. Rec. 11,731 (1934) (statement of Rep. Howard) (referring to same as "[a]mong the *most important powers* conferred by this section [16]" (emphasis added)).

The IRA, which marked the first step in the federal government's efforts to restore sovereign powers to tribes, was not enacted to confer mere private property rights. "The overriding purpose of the [IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of *self-government*[.]" *Morton v. Mancari*, 417 U.S. 535, 542 (1974)

(emphasis added); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 499 F.2d 1095, 1097 (D.C. Cir. 1974) (describing the powers recognized in section 16 as "attributes of Indian sovereignty").

The tribal consent requirement of the Indian Right-of-Way Act of 1948, Pub. L. No. 80-407, 62 Stat. 17 ("1948 Act"), was enacted in recognition of the sovereign powers set forth in section 16. *See* S. Rep. No. 80-823 (1948), at 4 (Letter of Department of Interior to Senate) ("The bill [that would become the 1948 Act] preserves *the powers* of those Indian tribes organized under the [IRA] … with reference to the disposition of tribal land." (emphasis added) (ellipses in original)). Hence, the Ninth Circuit has held that a "Tribe has the right to pursue injunctive relief to enforce the terms" of an easement not as a matter of property rights, but because "tribes retain *sovereign authority* to … enforce the terms of right-of-way easement agreements[.]" *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1160–61 (9th Cir. 2020) (emphasis added).

The Department of the Interior, the agency charged with implementing the 1948 Act, has made crystal clear its view that tribal consent to a right of way is a sovereign act. In the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, Congress directed the Secretary of the Interior and the Secretary of Energy to provide "an assessment of the tribal self-determination and sovereignty interests implicated by … energy rights-of-way on tribal land[.]" *Id.* § 1813(b)(3). In 2007, the agencies provided that assessment, including with respect to "oil pipelines," and specifically with reference to the "Indian Right-of-Way Act of 1948 (1948 Act) and historical acts of Congress permitting ROWs across tribal lands." Dep't of Energy and Dep't of the Interior, *Report to Congress: Energy Policy Act of 2005, Section 1813–Indian Land Rights-of-Way Study* 5, 7 (May 2007).[6] The Departments stated, in pertinent part:

[6] https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/EPAct_1813_Final.pdf.

> *The principle of tribal sovereignty is central to understanding the statutory and regulatory requirement of tribal consent to energy ROWs*. Sovereignty is generally defined as the authority of a government to define its relationship with other governments, commercial entities, and others. *A tribe's authority to confer or deny consent to an energy ROW across tribal land derives from its inherent sovereignty*—the right to govern its people, resources, and lands….
>
> ....
>
> A tribe's determination of whether to consent to an energy ROW across its land *is an exercise of its sovereignty …. Any reduction in the tribe's authority to make that determination is a reduction in the tribe's authority and control over its land and resources, with a corresponding reduction in its sovereignty*[.]

Id. at 19, 21 (emphases added) (footnote omitted). It is difficult to imagine a more pointed rejection—from the federal agencies with clear expertise over the subject matter—of Enbridge's position.[7]

Judge William Canby, Jr.—one of the foremost authorities on federal Indian law to have served on the federal bench and whose treatise on the subject is regularly relied on by the Supreme Court and the Seventh Circuit[8]—agrees. In *Southern Pacific Transportation Company v. Watt*, 700 F.2d 550 (9th Cir. 1983), a railroad challenged a Department of the Interior regulation requiring tribal consent to rights of way under an 1899 statute that did not mention such a requirement. The railroad argued that the regulation was an impermissible redelegation of

[7] Enbridge misses the mark badly with its argument that consenting to rights of way cannot be a sovereign power because the BIA regulations "that require consent clearly apply to both Indian tribes and individual Indian landowners," Enbridge Br. at 58. *But see* 25 C.F.R. § 169.107(b)(1) (requiring tribal consent for all rights of way but allowing rights of way under certain circumstances "without the consent of *any* of the individual Indian owners" (emphasis added)). As the BIA explains, the regulations "address[] tribally owned land differently than individually owned land because … the U.S. … has a government-to-government relationship with tribes and seeks to promote tribal self-governance." Rights-of-Way on Indian Land, 80 Fed. Reg. 72,492-01, 72,492 (Nov. 19, 2015).

[8] *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004); *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1082 (7th Cir. 2015); *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 347–48 (7th Cir. 2001).

the Secretary's "decisional authority to the Indian tribes." *Id*. at 556. Judge Canby rejected the argument in terms grounded emphatically in tribal authority not as a private landowner but as a government:

> The regulation at issue is not an abdication of the Secretary's power to administer the 1899 Act but rather an effort by the Secretary to incorporate into the decision-making process the wishes of *a body with independent authority over the affected lands*. The regulation does not relinquish to a tribe the final authority to approve; it *delegates a power to disapprove*…. *[A] tribe has independent authority to regulate the use of its own lands*. The Supreme Court has stated that the limitations on Congressional delegation of *legislative power* are "less stringent in cases where the entity exercising the delegated authority itself possesses *independent authority over the subject matter*." *United States v. Mazurie*, 419 U.S. at 556–57 (citation omitted). Applying that principle to the redelegation of *legislative authority* by an administrative body, we conclude that the redelegation embodied in 25 C.F.R. § 161.3 is not improper.

Id. at 556 (Canby, J.) (emphases added) (citation omitted).

All three branches of the federal government, then, regard tribal determinations about rights of way over tribal lands to constitute exercises of sovereign power. As such, *Merrion* and *Winstar* govern the interpretation of contracts purporting to surrender that power, and make clear that such surrender may not be found absent terms "which admit of no other reasonable interpretation." *Merrion*, 455 U.S. at 148 (quotation marks omitted).

2. *The unmistakability doctrine is not limited to legislative and regulatory acts*.

Enbridge next claims that the unmistakability doctrine does not apply because "the Band has not enacted, passed or created any 'subsequent governmental act,' as defined in *Winstar*." Enbridge Br. at 59. But *Winstar* nowhere limits its holding to new enactments or regulatory changes. While it involved a statutory change, it contains not a word supporting Enbridge's purported categorical restriction on the types of sovereign acts subject to the doctrine. Rather, "[t]he 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, which is precisely the case here.

3. *The Band did not "target" the 1992 Agreement.*

Enbridge next argues that the unmistakability doctrine does not apply because the Band's refusal to renew the twenty-year easements "is targeted on reneging obligations it agreed to in one particular contract: the 1992 Agreement." Enbridge Br. at 60–61. But the Band did not "target" the 1992 Agreement. Enbridge approached the Band and asked the Band to renew the twenty-year easements. The Band declined, and when Enbridge failed to respect that choice, the Band sued for trespass. Enbridge then invoked the 1992 Agreement as an affirmative defense and as a basis for a counterclaim of breach. If Enbridge is correct, then any party with a government contract could defeat application of the unmistakability doctrine on the grounds that the government had impermissibly "targeted" its contract by disagreeing with the plaintiff's interpretation of it. But the doctrine is not so easily evaded.

4. *The implications of the unmistakability doctrine for summary judgment*

Because the unmistakability doctrine applies here, the Court may interpret the 1992 Agreement to provide Band consent to a "pre-approved succession of 20-year easements over the Allotted Parcels" only if it finds that scheme evidenced in the text of the Agreement in terms that "admit of *no other reasonable interpretation*," *Merrion*, 455 U.S. at 148 (emphasis added) (quotation marks omitted). Thus, each party's burden is clear.

While the Band's position, as detailed above, is that the 1992 Agreement conclusively does not provide consent to fifty-year easements over the allotted parcels, it need only establish that there exists a "reasonable interpretation" to that effect. *See id.* If it has done so, no trial is necessary regarding the meaning of the agreement and summary judgment is warranted because

"an ambiguous term of a grant or contract [cannot] be construed as a conveyance or surrender of sovereign power." *Winstar*, 518 U.S. at 878. Enbridge, by contrast, may only survive summary judgment on the interpretation of the 1992 Agreement by establishing that it is susceptible to "no other reasonable interpretation," *Merrion*, 455 U.S. at 148 (quotation marks omitted), beyond the one it has offered.[9]

In sum, if the 1992 Agreement is unambiguous in Enbridge's or the Band's favor, no trial is necessary. And if the 1992 Agreement is ambiguous—i.e., reasonably subject to both the Band's and Enbridge's interpretation—then, again, no trial is necessary because the Band should prevail as a matter of law under *Merrion* and *Winstar*.

III. Section 558(c) of the Administrative Procedure Act Provides No Refuge for Enbridge.

Enbridge alternatively invokes 5 U.S.C. § 558(c) of the Administrative Procedure Act ("APA") to assert that the twenty-year easements at issue have never in fact expired. Section 558(c) states, in pertinent part, that "[w]hen the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." *Id*. According to Enbridge, its applications "complied with BIA procedural requirements; they are therefore sufficient" and thus still in effect under § 558(c). Enbridge Br. at 69. Legal infirmities plague the argument, and it should be rejected.

A. Enbridge's 2013 applications were not "sufficient" as a matter of law.

Section 558 requires a "timely and sufficient application for a renewal or a new license in accordance with agency rules[.]" 5 U.S.C. § 558(c). Enbridge asserts that its applications

[9] As shown above, Enbridge would of course still face the insurmountable hurdle that the 1992 Agreement interpreted as such would be illegal under 25 U.S.C. § 321. *See supra* pp. 6–8.

"complied with BIA procedural requirements" but does not say what those requirements were in 2013, except that providing landowner consents was not among them, Enbridge Br. at 69 n.34. But Enbridge is sorely mistaken, and since it did not submit landowner consents with its 2013 applications, its § 558(c) argument collapses as a matter of law.

Enbridge's argument turns entirely on 25 C.F.R. § 169.5 (2013), which it describes as "listing in detail what an application must include and *not* listing landowner consents[.]" *Id.* But § 169.5 nowhere states that it is exhaustive, and the 2013 rules plainly contain other requirements for the application not mentioned in that provision. *See*, *e.g.*, §§ 169.6 and 169.25(d). One such requirement is set forth in § 169.14, which in 2013 provided:

> *At the time of filing an application* for right-of-way, the applicant *must* deposit with the Secretary the total estimated … consideration for the right-of-way …. In no case shall the amount deposited as consideration for the right-of-way over any parcel be less than the amount *specified in the consent covering that parcel*. If in reviewing the application, the Secretary determines that the amounts deposited are inadequate to compensate the owners, the applicant shall increase the deposit to an amount determined by the Secretary to be adequate.

25 C.F.R. § 169.14 (2013) (emphases added). This rule, nowhere acknowledged by Enbridge, required the applicant to negotiate compensation with the Indian landowner in exchange for written consent to the right of way, and to provide documentation of the consent and negotiated compensation to the Secretary "[a]t the time of filing the application" for the Secretary's evaluation.

Enbridge's contention that landowner consents were not required prior to submitting a right-of-way application also contradicts the plain text of the very application forms used by Enbridge in 2013—forms that state on their face that both written consent and the deposit required by § 169.14 had to be submitted as part of the application. The forms list five items as "Required Supporting Documents," which include:

"*Written consent of landowner* (ROW Form 94.7)."

"Deposit of estimated damages or compensation (See … 169.14)."

Tinker Suppl. Decl. ¶ 4 & Attach. C (BRB135313) (emphasis added).

And the procedure set forth in § 169.14 and required by the application forms was further confirmed in the BIA's 2006 *Procedural Handbook: Grants of Easement for Right-of-Way on Indian Lands* ("Handbook"), which was "designed to provide procedural requirements in preparing a Grant of Easement for Right-of-Way (ROW) across [Indian] land[.]" Handbook 1.[10] The Handbook includes a sample application form identical to the ones used by Enbridge in 2013, with the "Written consent of landowner" again listed as a "Required" item to be submitted with the application. *Id.* at 20 (Attach. 1, second page of application). The Handbook also lists the step-by step procedure for obtaining a right of way that was fully operative in 2013. Step 8 was to "Request the consent of the landowner(s) to grant the ROW." *Id.* at 18. And Step 9, consistent with the § 169.14 requirements discussed above, stated:

> The applicant provides the Application for Grant of Easement for ROW in duplicate with the following to the BIA Realty Office:
>
> - Written consent of the landowners.
>
> ….
>
> - A deposit equal to the total estimated consideration and damages, which includes consideration for the ROW …. The amount deposited must always be equal to or greater than the consideration for the ROW specified in the landowner consent.

Id. (also listing several additional requirements).

All of this is fatal to Enbridge's argument that its 2013 application was "sufficient" for purposes of § 558(c). And Enbridge's argument is not salvaged by its assertion that in 2015, the BIA "changed that rule by adding a requirement that a right-of-way applicant must submit

[10] Slide 1 (iltf.org).

landowner consents *with the right-of-way application*." Enbridge Br. at 69 n.34. The BIA has published a detailed explanation of the differences between the 2013 version of the rules and the current version, listing dozens of requirements that were "add[ed]," clarified, deleted, or otherwise substantively or procedurally changed. *Rights-of-Way on Indian Land (25 CFR 169): Comparison of Current Rule & New Rule* (Mar. 2016).[11] Nowhere has it mentioned the addition of a landowner consent requirement to the application process, because that requirement was already in place.

Nor does the case law cited by Enbridge support its position. While the D.C. Circuit stated in *Natural Resources Defense Council, Inc. v. E.P.A.*, 859 F.2d 156 (D.C. Cir. 1988), that "'sufficient' [for purposes of § 558(c)] means only that the application must be procedurally proper," *id.* at 215, it made clear that this means "a complete application" in compliance with the "procedural standards set by the agency," *id.* & nn.158, 163 (quotation marks omitted). Lacking written landowner consent, Enbridge's applications failed that test. And that is indeed the position taken by the BIA with regard to the very applications at issue here. Tinker Suppl. Decl. ¶ 5 & Attach. D at 4 ("Each of [Enbridge's] 15 applications was incomplete as they failed to include any landowner consents.").

In sum, Enbridge's 2013 applications were not "sufficient … in accordance with agency rules[.]" 5 U.S.C. § 558(c). Section 558(c) accordingly cannot rescue Enbridge from its trespass.

B. Enbridge's interpretation of § 558(c) would lead to results both absurd and illegal.

It is axiomatic that courts "interpret statutes to avoid absurd results." *Treadway v.*

[11] Rights-of-Way Comparison Chart FINAL RULE (bia.gov).

Gateway Chevrolet Oldsmobile Inc., 362 F.3d 971, 976 (7th Cir. 2004). Under Enbridge's interpretation of § 558(c) and its interplay with the 2013 BIA regulations, a pipeline operator or other right-of-way grantee could have timely filed an application in 2013 to renew a soon-to-expire easement over Indian land, triggering an indefinite extension under § 558(c) despite the failure of the operator to obtain (much less pay for) landowner consents or agency approval. Indeed, Enbridge has explicitly taken this position in its separate proceedings against the BIA over the BIA's refusal to grant Enbridge's applications with respect to the allotted parcels in the absence of landowner consent. *See* Tinker Suppl. Decl. ¶ 6 & Attach. E (stating that "the 2013 regulations … do not include mention of a deadline for providing landowner consents" and do not "confer on the BIA the ability to deny pending applications …. while consents are being procured," *id.* at 20 (quotation marks omitted), and that "BIA officials …. cannot … impose deadlines" on obtaining such consents, *id.* at 21).

In the BIA proceedings, Enbridge has taken issue with the BIA's view that under Enbridge's position "the right-of-way applications could remain pending in perpetuity," *id*. at 20 (quoting BIA), even *absent* tribal consent. Enbridge has done so not because it views the agency as mischaracterizing Enbridge's position, but because the statement

> implies that a pending, unapproved application has the potential to interfere with a landowner's rights or interests. This is simply untrue.… To be clear, the mere pendency of a right-of-way application has no potential to harm the landowner or infringe upon any of the landowner's rights. This is intuitive, and underscored by the fact that the BIA lacks authority to approve an application until it has received the requisite consent.

Id. at 20–21.

This "intuitive" robber-baron arrogance is straight out of the 19th century and makes explicit what has been implicit in Enbridge's continued pumping of oil across the Band's lands without easements or compensation since 2013: a view that tribes and tribal members possess no

rights the company must acknowledge much less respect in its blindered pursuit of profit. And under this view, that pursuit of profit—and its consequences for Indian landowners—may be without end: The company does not have to act to secure landowner consent within a given time period, and neither the agency, the tribe, nor individual landowners can do anything about it. Nothing in § 558(c) suggests that Congress intended it to confer such power on companies, much less such an evisceration of tribal rights and sovereignty.

And even if all this were not enough, Enbridge's interpretation of § 558(c) founders upon Congress's very next utterance in the APA. Section 559 provides that "[t]his subchapter … do[es] not limit or repeal additional requirements imposed by statute or otherwise recognized by law." 5 U.S.C. § 559. That is, if laws existing when the APA was enacted in 1946 would preclude an easement over the Band's lands absent its consent, § 558(c) cannot operate to accomplish a contrary result. That is the case here.

The Non-Intercourse Act, 25 U.S.C. § 177, forbids conveyances of any interest in tribal lands absent the consent of Congress *and* the affected tribe. *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119–20 (1960) (Section 177 "at the very least contemplates the assent of the Indian nation or tribe," and absent tribal consent, "it follows that the mere consent of Congress, however express and specific, would avail nothing."). Under § 559, § 558(c) cannot operate to "limit or repeal" the Act, which is precisely what would happen if Enbridge's argument were to prevail.

Nor is § 177 the only law that Enbridge's theory would torch. The 1854 Treaty with the Chippewa, 10 Stat. 1109, created a permanent reservation for the Band, with permanent rights of occupancy and possession. *See Wisconsin v. Hitchcock*, 201 U.S. 202, 214–15 (1906); *United States v. Thomas*, 151 U.S. 577, 582 (1894). "[T]reaties … are the 'supreme law of the land.'"

McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) (quoting U.S. Const. art. VI, cl. 2). With a treaty-guaranteed reservation comes the "power to exclude non-Indians from the reservation" and "the lesser power to place conditions on entry, on continued presence, or on reservation conduct[.]… When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian *as long as the non-Indian complies with the initial conditions of entry*." *Merrion*, 455 U.S. at 144 (emphasis added). When the twenty-year easements expired in 2013, Enbridge was no longer in compliance with the conditions of its entry on the Reservation, and § 559 again makes plain that § 558(c) cannot operate to "limit or repeal" the Band's fundamental treaty right to exclude Enbridge in this situation.

The same is true for § 321 (as enacted in 1904 and amended in 1917, and under which the twenty-year easements were issued). It provides that "the rights herein granted shall not extend beyond a period of twenty years[.]" 25 U.S.C. § 321. The singular exception to that limit is that "*the Secretary*" may extend those rights at their expiration "upon such terms and conditions as he may deem proper." *Id*. (emphasis added). That clear requirement for affirmative agency action and deliberation would be overridden if § 558(c) applied as Enbridge contends because under § 558(c), "the expired permit is continued, *not by affirmative agency action, but by operation of law*." *Nat. Res. Def. Council*, 859 F.2d at 214 (emphasis added). *See also Costle v. Pac. Legal Found.*, 445 U.S. 198, 210 n.10 (1980) (expired permit "remained in effect by operation of law.... See 5 U.S.C. § 558(c)").[12] Such a result is again proscribed by § 559.

* * *

[12] Both *Natural Resources Defense Council* and *Costle* involved statutes enacted after 1946 and thus not subject to the no-repeal provision of § 559.

Enbridge's argument under § 558(c) of the APA rests on the infirm premise that Enbridge submitted a "sufficient" application to the BIA in 2013, a position the BIA itself has rejected. The argument not only misconstrues the sufficiency requirement but would lay waste to a number of fundamental treaty and statutory provisions, all in contravention of § 559. Section 558(c) cannot save Enbridge from its liability for trespass any more than can its other legally infirm contentions.

IV. The Pipeline Safety Act Did Not Preempt the Band's Decision to Withhold Its Consent to Renewal of the Easements.

Enbridge next contends that the Pipeline Safety Act ("PSA") preempts the Band's decision to withhold its consent to renewal of the easements. According to Enbridge, the Band

> would not consent to new easements because of its concerns that Line 5 is not safe enough. The federal Pipeline Safety Act, however, precludes domestic authorities—such as the Band—from regulating interstate pipeline safety.… Because the Band's withholding of consent contravenes federal law, it is void.

Enbridge Br. at 73 (citation omitted).

This argument is meritless.

As to Enbridge's "field preemption" argument, this Court does not need to inquire as to whether the PSA preempts the field of pipeline safety. This is because Enbridge makes no argument that the Band's trespass claim substantively touches upon pipeline safety in any way. Its sole preemption hook is its allegation that the Band brought its trespass claim because of subjective concerns about the safety of Line 5. *See* Enbridge Br. at 73–82. The Supreme Court has rejected such an argument out of hand. Field preemption turns

> on *what* the State did, not *why* it did it. Indeed, this Court has analyzed most every other modern field preemption doctrine dispute in this way ….
>
> Our field preemption cases proceed as they do, moreover, for good reasons…. [F]ederal courts would risk subjecting similarly situated persons to radically different legal rules as judges uphold and strike down materially identical state

> regulations based only on the happenstance of judicial assessments of the "true" intentions lurking behind them.

Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1905–06 (2019) (citations omitted). *See also N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) ("Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it[.]").

Enbridge's express preemption argument fares no better. In interpreting a statutory preemption provision, a court must focus on "the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). The PSA provides that "[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). This text creates two insurmountable problems for Enbridge's argument.

First, Enbridge nowhere explains how the Band qualifies as a "State authority." To the contrary, the Act defines the term in a manner making clear that it does not. "'State' means a State of the United States, the District of Columbia, and Puerto Rico[.]" 49 U.S.C. § 60101(a)(20).

Second, even if the Band were a State authority, it has not adopted any pipeline "safety standards" falling within the purview of the preemption provision. Enbridge points to no aspect of the Band's positive law—statutory or regulatory—that establishes pipeline safety standards for Enbridge to follow. *See Enbridge Energy, Ltd. P'ship v. Town of Lima*, No. 13-cv-187-bbc, 2013 WL 12109106, at *4 (W.D. Wis. Apr. 4, 2013) ("[B]ecause defendants' road use proposal and demands are not safety regulations, they do not come within the express preemption provision of the Pipeline Safety Act."). Rather, Enbridge seeks to preclude the Band from pursuing its common law trespass action. That runs Enbridge headlong into the PSA's

preemption savings clause, which states, in terms that admit of no doubt, that "[t]his chapter [49 U.S.C. §§ 60101–60143] does not affect the tort liability of any person." *See* 49 USC § 60120(c). Trespass is indisputably a tort, and Enbridge nowhere explains how its argument can be squared with the saving clause's plain language.[13]

Indeed, the wording of the PSA's preemption provision is nearly identical to a provision held not to expressly preempt common law claims by the Supreme Court in *Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861 (2000). The statute at issue there restricted states from establishing any "safety standard" relating to motor vehicles. *Id.* at 867–68. But the statute also contained a savings clause preserving common law liability. Reading the two together, the Court held that the preemption provision did not apply to common law claims because "a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language[.]" *Id.* at 868.

The same reasoning applies with equal force to the preemption provision and savings clause of the PSA. And it precludes Enbridge's argument that because the Band made its decision not to renew Enbridge's easement with subjective "concerns" about pipeline safety in mind, Enbridge Br. at 73, that decision and the Band's enforcement of it through a trespass action morphed into a safety standard. Given the plain language of the savings clause, federal courts have consistently interpreted the PSA to allow tort claims even if they have some effect on pipeline safety. *See, e.g.*, *Cheverez v. Plains All Am. Pipeline, LP*, Case No. CV15-4113 PSG (JEMx), 2016 WL 4771883, at *7 (C.D. Cal. Mar. 4, 2016) (§ 60120(c) protects tort claims "even where they bear on the operation of pipes otherwise regulated by the PSA"); *4 C's Land*

[13] "Person" includes corporate and other business entities. 49 U.S.C. § 60101(a)(17) (cross-referencing 1 U.S.C. § 1).

Corp. v. Columbia Gulf Transmission Co., No. 13-5532, 2014 U.S. Dist. LEXIS 65062, at *6 (E.D. La. May 12, 2014) ("[The PSA preemption provision] only preempts state pipeline safety standards."); *Am. Energy Corp. v. Tex. E. Transmission, LP*, 701 F. Supp. 2d 921, 931 (S.D. Ohio 2010) ("The PSA does not preempt Ohio property or tort law."); *Stutler v. Marathon Pipe Line Co.*, 998 F. Supp. 968, 970 (S.D. Ind. 1998) (the PSA savings clause "clearly sets forth Congress' intention not to preempt tort claims"); *Martin v. Mapco Ammonia Pipeline*, 866 F. Supp. 1304, 1306 (D. Kan. 1994) ("It is clear from the plain language of the statute, which is further supported by the legislative history, that evidence of compliance with the Act and its regulations cannot be the basis for avoiding liability in a tort action.").

Nor does Enbridge's perfunctory "obstacle preemption" argument have any merit. Enbridge Br. at 79. It again relies wholly on the erroneous assumption that the Band has adopted "its own set of safety standards." *Id*. Moreover, Enbridge has not even attempted to identify a provision in the PSA with which the Band's trespass claims, if successful, would render it unable to comply. *See Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 985 (7th Cir. 2012) ("Absent a conflict between state and federal law in the first place, state law cannot possibly stand as an obstacle to the accomplishment of congressional objectives.").

The cases relied upon by Enbridge do not salvage its arguments. None of them suggests that the subjective concerns that Enbridge attributes to the Band, Enbridge Br. at 73–82, be they about pipeline safety or anything else, are relevant to PSA preemption. Rather, those cases involved the attempted imposition of objective safety standards. For example, *Williams Pipe Line Co. v. City of Mounds View*, 651 F. Supp. 551 (D. Minn. 1987), did not find preemption because of a county's "concerns over danger posed by interstate pipeline," Enbridge Br. at 76,

but rather because the county had promulgated an ordinance allowing it to regulate the installation and maintenance of a pipeline, and to "make all rules with respect to possible hazards as he shall deem necessary and advisable," 651 F. Supp. at 553, which the county conceded would constitute "higher safety standards" than required by the PSA, *id.* at 568. *Northern Border Pipeline Co. v. Jackson County*, 512 F. Supp. 1261, 1264 (D. Minn. 1981), found a county pipeline depth requirement preempted because "[t]he Department of Transportation is vested with the authority to adopt safety standards; it did so . . . and one of those standards is the requirement that the pipe be buried a minimum of 36 inches." And *Olympic Pipe Line Company v. City of Seattle*, 437 F.3d 872, 879 n.20 (9th Cir. 2006), held that the PSA preempted a contractual provision prohibiting the installation and maintenance of "the pipeline system except under the supervision, and in strict accordance with plans and specifications, approved by the Director," who "in his or her judgment may order such reconstruction, relocation, readjustment or repair of the pipeline system … because of the … unsafe condition of the pipeline system … or for any other cause."

Under Enbridge's theory, had the Band decided against new easements because of "concerns" about, say, climate change, Enbridge's corporate ethics, or whether a pipeline was the best future use of the parcels given the Band's spiritual traditions, there would be no preemption of the *very same governmental decision*. That is not how preemption works. *See Va. Uranium*, 139 S. Ct. at 1906 (rejecting notion that preemption doctrine can operate to subject "similarly situated persons to radically different legal rules … based only on the … intentions lurking behind" state regulatory acts). The PSA preempts safety standards, not subjective concerns, and Enbridge's countertextual argument founders on that shoal.

V. The PSA Does Not Displace the Band's Federal Common Law Trespass Claim.

Enbridge's displacement argument is of the same ilk. The Seventh Circuit has been clear:

> The important displacement question is whether Congress has provided a sufficient legislative solution to the particular [common law claim] to warrant a conclusion that this legislation has occupied the field to the exclusion of federal common law.
>
> ....
>
> The test ... is simply whether the statute speak[s] directly to [the] question at issue.

Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 777–78 (7th Cir. 2011) (brackets in original) (quotation marks omitted). In that case, the Seventh Circuit considered a federal common law public nuisance claim brought by five Midwestern states and an intervenor tribe against the Army Corps of Engineers. *Id.* at 768–69. The plaintiffs alleged that the Chicago ship canal, operated by the Army Corps, threatened the introduction of two species of invasive carp into the Great Lakes. *Id.* at 768. The Army Corps predicated its displacement argument on several statutes that dealt with invasive species and with the ship canal itself, including one statute that required the Secretary of the Army to "implement measures . . . to prevent aquatic nuisance species" from entering the Great Lakes through the canal. *Id.* at 779 (quoting Energy and Water Development and Related Agencies Appropriations Act 2010, Pub. L. No. 111-85, § 126, 123 Stat. 2845, 2853 (Oct. 28, 2009)). In holding that those statutes were not sufficient to displace the plaintiffs' common law claims, the Seventh Circuit emphasized the fact that "Congress has not provided any enforcement mechanism or recourse for any entity or party negatively affected by the carp[.]" *Id.* at 780. Lacking such a recourse, the states' reliance on federal common law was sustained.

What "legislative solution" or "enforcement mechanism" the PSA has provided for claims of trespass on Indian lands, Enbridge does not say. Nor can it, as the PSA is silent on such issues. *Cf. Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 237 (1985) (holding that a Tribe's federal common law trespass claim was not displaced because the relevant statute "did not establish a comprehensive remedial plan for dealing with violations of Indian property rights").

Enbridge again seeks to remedy this fatal omission by grafting a subjective concern component onto a doctrine having nothing to do with subjectivity: "The entire thrust of the Band's trespass claim is the Band's contention that Line 5 is unsafe and should therefore be shut down." Enbridge Br. at 82. But "the plaintiff is the master of the complaint," *Rice v. Panchal*, 65 F.3d 637, 639 (7th Cir. 1995) (quotation marks omitted), and while Enbridge (as discussed above) has little regard for the Band's rights in its Reservation lands, the "entire thrust" of the Band's trespass claim is to vindicate those rights:

> 153. Enbridge continues to transmit crude oil and other hazardous liquids across parcels (identified above) on the Bad River Reservation for which no valid easement exists and in which the Band has ownership interests.
>
> 154. Enbridge has failed to remove the pipeline from the aforementioned parcels despite having a lawful duty to do so under the 1993 easements and pursuant to federal statutes and regulations governing rights-of-way on Indian lands.
>
> 155. The Band has expressly disclaimed any consent to Enbridge's actions and omissions and has instead insisted that the company cease the flow of oil and remove the pipeline from the Reservation.
>
> 156. No other lawful basis exists for Enbridge's continued use of the aforementioned
> parcels to transmit crude oil and other hazardous liquids across the Reservation.
>
> 157. Enbridge is accordingly committing an intentional, ongoing trespass on the Band's Reservation under federal law.

Third Am. Compl. ("Compl.") ¶¶ 153–57.

The sole question the Band's trespass claim implicates is whether Enbridge may occupy the Band's land absent a legal privilege to do so. Congress did not "speak directly" to or provide the Band with an enforcement mechanism for trespass through the PSA, and hence did not displace federal common law remedies aimed at that problem. Indeed, the only provision in the PSA that speaks directly to the Band's trespass claim is § 60120, which, as discussed above, provides that the PSA "does not affect the tort liability of any person." 49 U.S.C. § 60120(c). That language was "designed to assure that the tort liability of any person existing under common law or any statute will not be relieved by reason of the enactment of this legislation[.]" H.R. Rep. No. 90-1390 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3223, 3239. Enbridge again does not acknowledge this provision anywhere in its brief, much less endeavor to explain how its displacement argument survives it. It does not.

VI. Enbridge's Good Faith and Fair Dealing Argument Is Meritless.

Enbridge has identified no genuine issue of material fact or otherwise undermined the Band's entitlement to summary judgment by virtue of its good faith and fair dealing claim.

A. Sovereign powers may not be surrendered by implied contractual terms.

As discussed above and in the Band's opening brief, sovereign powers may not be deemed contractually surrendered absent express contract terms that admit of no other reasonable interpretation. *Supra* pp. 21–25; Band Br. at 32, 39–40. Accordingly, because the doctrine of good faith and fair dealing involves *implied* contractual terms, it may not be invoked to enjoin a government to act contrary to its sovereign prerogatives. *See* Band Br. at 49–50; *see also United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987) (contractual "waiver of sovereign authority will not be implied").

Enbridge does not dispute these settled principles. Instead, in asserting the applicability of the good faith doctrine, it relies solely on its argument that tribal consent to easements over tribal land does not implicate a sovereign power. Enbridge Br. at 86–87 ("[F]or the reasons already addressed in Section II, granting consent to renew an easement is not a sovereign power and the 'unmistakability' doctrine does not apply[.]"). Enbridge is sorely mistaken. Granting or withholding consent to an easement over tribal lands is a sovereign power. *See supra* pp. 22–25; Band Br. at 39–40. The unmistakability doctrine accordingly applies, and the doctrine of good faith and fair dealing may not be invoked to derogate from the Band's control over its lands in the manner that Enbridge posits.

B. Enbridge has identified no cognizable good faith contractual obligation that the Band has breached.

Even if the good faith doctrine applied here, Enbridge has made no colorable claim that the Band has breached it. The doctrine turns on "the reasonable contractual expectations of the parties." *Betco Corp., Ltd. v. Peacock*, No. 14-cv-193-wmc, 2016 WL 7429460, at *6 (W.D. Wis. Dec. 23, 2016) (Conley, J.), *aff'd*, 876 F.3d 306 (7th Cir. 2017). According to Enbridge, "the parties' 'contractual expectations' with the 1992 Agreement are *explicitly set forth therein*: the primary purpose was indisputably to permit Enbridge to benefit from *a 50-year easement to operate Line 5 across the entire Reservation* …. Given the parties' objectives in signing the Agreement, the Band has unquestionably sought to frustrate the purpose of that contract." Enbridge Br. at 84 (emphasis added).

The purported "contractual expectation" that is the linchpin for Enbridge's good faith argument, then, is the expectation grounded in the theory that "the 1992 Agreement was intended to provide continued rights for Line 5 to operate across the entire Reservation until 2043 *by pre-approving a succession of 20-year easements over the Allotted Parcels*[.]" Enbridge Br. at 15

(emphasis added). And because that interpretation is infirm, *see supra* pp. 4–21, Enbridge's good faith claim cannot survive as a matter of law: The doctrine "does not override express terms of a contract" but rather provides that "obligations under those [express] terms must be performed subject to the implied covenant." *First Bank & Tr.*, 276 F.3d at 325 n.10 (brackets in original) (quotation marks omitted). Several additional considerations confirm this conclusion.

First, because the good faith doctrine is an interpretive tool that "guides the construction of the explicit terms in the agreement," *Baxter Healthcare Corp. v. O.R. Concepts, Inc.*, 69 F.3d 785, 792 (7th Cir. 1995) (quotation marks omitted), it may not be invoked to "render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable." *Walsh*, 429 U.S. at 408. As discussed above, *supra* pp. 6–8, Enbridge's asserted scheme of successive twenty-year easements would violate 25 U.S.C. § 321, the very statute under which the twenty-year easements were issued, rendering them, and the 1992 Agreement, legally void. The Band certainly cannot be deemed to have assumed a good faith obligation to conspire in circumventing the strictures of an act of Congress.

Second, Enbridge's good faith argument would add obligations to the 1992 Agreement that do not appear in its text. As this Court has explained, "courts must avoid adding obligations and conditions to contracts *that go beyond the agreement reached by the parties*…. [T]he implied duty of good faith is not a license to rewrite a contract." *Betco*, 2016 WL 7429460, at *6 (emphasis added) (quotation marks omitted). No scheme of "pre-approved … successive" easements appears in the express provisions of the 1992 Agreement, *see supra* pp. 4–6, 8–21, and the good faith doctrine cannot be used to create one.

Third, all of this renders Enbridge's allegations regarding the Band's purported motives utterly beside the point. The implied obligation of good faith and fair dealing guards "against

opportunistic behavior … designed to change *the bargain struck by the parties* in favor of the opportunist." *Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 281 (7th Cir. 1992). But where "the bargain struck by the parties" does not impose the obligation asserted—here, an illegal scheme of pre-approving a succession of twenty-year easements across the entire reservation to circumvent a statutory twenty-year limit—there simply is no role for the good faith doctrine to play. *See, e.g.*, *Pharm. Horizons, Inc. v. SXC Health Sols., Inc.*, No. 11 C 6010, 2012 WL 1755169, at *4 (N.D. Ill. May 15, 2012) ("Because the contract did not impose a duty upon PHI to [undertake certain conduct], PHI *cannot* have breached the implicit covenant of good faith and fair dealing by failing to do so." (emphasis added)).

Fourth, this is not a situation where the doctrine could apply because "gaps exist in the contract." *First Bank & Tr.*, 276 F.3d at 325 n.10. Indeed, both parties disavow any such "gap" in the 1992 Agreement. Enbridge asserts that its theory is "explicitly set forth therein" in "indisputabl[e]" terms. Enbridge Br. at 84. The Band counters that the Agreement expressly limits the Band's consent to thirteen parcels. "[W]here the disputed issue in a contract is governed by the express terms, there is no gap to be filled" by application of the good faith doctrine. *F.D.I.C. v. Rayman*, No. 92 C 3688, 1995 WL 505960, at *8 (N.D. Ill. Aug. 23, 1995), *aff'd*, 117 F.3d 994 (7th Cir. 1997).

Fifth, Enbridge cannot claim that any such gap exists because the parties could not have contemplated the circumstances that gave rise to this dispute and therefore did not address it in the text of the Agreement. *Mkt. St. Assocs., Ltd. P'ship v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991) (Posner, J.) (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" (emphasis added) (quotation marks omitted)). *See* Band Br. at 46–49 (discussing same). To the contrary, Enbridge's theory of a pre-approval scheme is expressly premised on Enbridge's affirmative awareness that the Band had been acquiring fractional ownership of the allotted parcels and could continue to do so in the future. "Enbridge knew it needed to obtain the Band's cooperation and consent *in advance* for future BIA easement renewal(s) over the Allotted Parcels." Enbridge Br. at 13. Thus, there is simply no role for the good faith doctrine here. The question is simply whether Enbridge contracted expressly for the circumstances it admits that it foresaw. It did not. *Cf. Baxter Healthcare*, 69 F.3d at 792 ("This is not a situation where the duty of good faith is required to 'fill a gap' in a contract. There is nothing to suggest that the parties 'could not have contemplated' O.R. selling Thermadrape to other buyers.").

Enbridge's attempts to distinguish the case law do not salvage its claim. It notes that in *Betco*, the Court "found as a matter of fact after trial—not on summary judgment—that there was no breach of the duty of good faith where the problem [that gave rise to the dispute] was 'obvious'" to the parties at the time of the drafting. Enbridge Br. at 87. Enbridge similarly states that in *Market Street Associates*, the Seventh Circuit held a trial to be necessary to determine the applicability of the good faith doctrine. But here, unlike in *Betco* and *Market Street Associates*, no trial is needed because Enbridge has affirmatively admitted that it had anticipated the circumstances giving rise to this dispute prior to entering the 1992 Agreement. Enbridge Br. at 13 ("Enbridge knew it needed to obtain the Band's … consent *in advance* for future BIA easement renewal(s) over the Allotted Parcels[.]").[14]

[14] That admission is fatal to Enbridge's good faith claim, but even without it, as discussed in the Band's opening brief, Enbridge had all the information it needed in 1992 to foresee that the Band could continue to acquire allotted parcels, with the corresponding power of consent. *See* Band Br. at 46–49.

Enbridge next quotes *Uebelacker v. Paula Allen Holdings, Inc.*, 464 F. Supp. 2d 791, 803 (W.D. Wis. 2006), as stating that a Wisconsin court "did ***not*** lay down a general rule that the implied duty of good faith is inapplicable where the non-breaching party has the ability to protect itself from harm." Enbridge Br. at 89. But *Uebelacker* addressed whether the doctrine applies where a party "could have taken actions to minimize her harm" *after* the contract is formed, not in the text of the contract at the time of drafting. *See* 464 F. Supp. 2d at 804.

In *Northern Crossarm Company, Inc. v. Chemical Specialties, Inc.*, 318 F. Supp. 2d 752 (W.D. Wis. 2004), *see* Enbridge Br. at 89, Judge Crabb simply held that the absence of "record evidence suggesting that either party had anticipated" the circumstances that gave rise to the dispute was not dispositive of a good faith claim. 318 F. Supp. 2d at 763–64. This hardly supports the proposition that where the complaining party admittedly did anticipate the circumstances and failed to bargain for text in the contract addressing them, as here, the good faith doctrine may retroactively save it from that failure.

Finally, in *American Commercial Lines, LLC v. Lubrizol Corp.*, 817 F.3d 548 (7th Cir. 2016), Judge Posner admonished a "sophisticated commercial entity" for relying on "a nebulous body of jargony legal theories such as … 'duty of good faith and fair dealing,'" in lieu of an actual contract providing the protection it claimed. *Id*. at 552. Enbridge asserts that its argument is different because "there is a valid contract between the parties[.]" Enbridge Br. at 89 n.52. But this distinction simply begs the question whether Enbridge has a contract for a "pre-approv[ed] succession of 20-Year easements" across the entire Reservation. It does not. "[T]he implied duty of good faith is not a license to rewrite a contract." *Betco*, 2016 WL 7429460, at *6 (quotation marks omitted). Because that is precisely what Enbridge is asking the Court to do, the Band is entitled to summary judgment on Enbridge's good faith claim.

VII. Enbridge Has Not Undermined the Band's Entitlement to Summary Judgment on Enbridge's Liability for Unjust Enrichment.

Enbridge first asserts that "no federal cause of action for unjust enrichment exists[.]" Enbridge Br. at 90. The Seventh Circuit does not concur. Judge Posner, writing for the Circuit, has referred to "'[u]njust enrichment,' and its synonym 'restitution.'" *ConFold Pac.*, 433 F.3d at 957. Judge Easterbrook, again writing for the Circuit, has explained that "[f]ederal common law tracks the consensus of states, which have developed the law of restitution[.] We therefore turn to the *Restatement of Restitution*[.]… And as § 1 of the *Restatement of Restitution* observes, restitution is a device to avoid unjust enrichment." *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Pathology Lab'ys of Ark., P.A.*, 71 F.3d 1251, 1254 (7th Cir. 1995) (citations omitted).

In the Seventh Circuit, then, the Restatement sets forth the federal common law of unjust enrichment, and the Restatement is clear: "A person who is unjustly enriched at the expense of another is subject to liability in restitution." Restatement (Third) of Restitution and Unjust Enrichment § 1 (Am. Law. Inst. 2011) ("Restatement of Restitution"); *see also id.* cmt. b (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"); *see also id.* § 40 ("A person who obtains a benefit by an act of trespass … is liable in restitution to the victim of the wrong."). *See* Band Br. at 21–25 (discussing same).

Enbridge next contends that if such a cause of action exists, summary judgment is inappropriate because "there are disputed issues of material fact regarding the Band's interpretation of the 1992 Agreement and whether Enbridge already paid full consideration ($800,000) for the Band's consent to operate across the Reservation until 2043." Enbridge Br. at 91. This argument is of no moment. The Band has expressly premised its unjust enrichment

liability argument on Enbridge being found in trespass. *See* Band Br. at 22 ("*[I]f* a defendant has benefitted monetarily from trespass it is likewise liable in unjust enrichment." (emphasis added)); *id.* at 25 ("[B]oth claims [unjust enrichment and trespass] turn on the predicate wrongful act of intentional trespass."). Enbridge does not dispute that it has benefited monetarily from its operation of Line 5 on the Band's lands. *See* Enbridge Response to Band's Proposed Findings of Fact ¶ 62. Thus, if the Court finds on summary judgment that Enbridge is in trespass, Enbridge has as a matter of law been unjustly enriched, and the Band is entitled to summary judgment on the liability component of that claim.

Enbridge seeks to avoid this outcome by invoking the Seventh Circuit's statement that "[w]hen two parties' relationship is governed by contract, they may not bring a claim of unjust enrichment unless the claim falls outside the contract." Enbridge Br. at 91–92 (quoting *Util. Audit, Inc. v. Horace Mann Serv. Corp.*, 383 F.3d 683, 688–89 (7th Cir. 2004)). This argument is, again, of no moment because the Band's trespass claim clearly "falls outside the contract." *See* Band Br. at 34 ("The 1992 Agreement … said absolutely nothing about ... easements over the twelve 20-Year Parcels that are the subject of the Band's trespass claim.").

Finally, Enbridge contends that "a party cannot pursue an equitable remedy, like unjust enrichment, where, as here, there is an adequate remedy at law." Enbridge Br. at 92. This argument rests on a wholly flawed premise, as unjust enrichment is not an equitable but rather a legal remedy. *See, e.g.*, *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1164 (7th Cir. 1997) ("[R]estitution is being sought in an action at law for unjust enrichment … and is therefore a legal remedy." (citation omitted)). As the Restatement puts it, "[t]he most widespread error is the assertion that a claim in restitution or unjust enrichment is by its nature equitable rather than legal." Restatement of Restitution § 4 cmt. c. "Although some remedies in

restitution are indeed equitable in origin, there is no requirement that a claimant who seeks any [such] remedies … must first demonstrate the inadequacy of a remedy at law. An argument to the contrary should appear antiquated today[.]" *Id.* cmt. a.

VIII. Enbridge Has Not Undermined the Band's Entitlement to Profits-Based Relief.

Enbridge fails entirely to undermine the Band's claim to profits-based damages.

A. The Band's Complaint adequately sought a profits-based remedy.

Enbridge first argues that the Band is not entitled to profits-based damages because "[a]n 'accounting' is not a remedy for a trespass action, but a separate, standalone cause of action that is not pled by the Band." Enbridge Br. at 93. The Supreme Court, the Seventh Circuit, and the Restatement disagree. *See, e.g.*, *Liu v. Sec. & Exch. Comm'n*, 140 S. Ct. 1936, 1942–43 (2020) (describing "depriv[ing] wrongdoers of their net profits from unlawful activity" as a "remedy" that has "gone by different names," including "Accounting" and "restitution," and stating that the underlying principles are the same "[n]o matter the label"); *Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994) (describing an "accounting of the profits" as "a form of restitutionary relief"); Restatement of Restitution § 51(4) ("Restitution remedies that pursue this object [depriving a wrongdoer of profits] are often called 'disgorgement' or 'accounting.'"). Thus, the Band properly sought profits-based relief. *See* Compl., Prayer for Relief H ("Enter an order awarding the Band damages for trespass and restitution for unjust enrichment, including for profits derived from Enbridge's unlawful transmission of petroleum products across the Band's lands[.]").

B. Fair market rental value is not the relevant measure of relief.

In its opening brief, the Band established that "'[f]air market rental value' is a measure of restitution for inadvertent trespass. For conscious trespassers … the measure is profits." Band

Br. at 26; *see id.* at 23–29. *See* Restatement of Restitution § 3 cmt. c ("Restitution requires full disgorgement of profit by a conscious wrongdoer … because any lesser liability would provide an inadequate incentive to lawful behavior."); *id*. cmt. a ("the disincentives that are the object of a disgorgement remedy are not required in dealing … with inadvertent tortfeasors … such as innocent trespassers").

Enbridge responds that "[t]he overwhelming weight of authority … across the country … reveals that fair rental value of land occupied by the trespassing party, not profits, is the controlling measure for damages." Enbridge Br. at 95. But that is not the law. "The object of the disgorgement remedy—to eliminate the possibility of profit from conscious wrongdoing—is one of the cornerstones of the law of restitution and unjust enrichment." Restatement of Restitution § 51 cmt. e. And profit includes financial gains that "result from a profitable … use … of the claimant's property," including "an especially profitable use—beyond the ordinary rental or use value that the same assets would have in another's hands." *Id.* § 53 cmt. d.

Enbridge cites a slew of authorities stating or applying the ordinary compensation damages rule for inadvertent trespass. As such, none of them undermines the Band's argument, and many of them directly support it. For example, Enbridge cites the Restatement (Second) of Torts § 929 (1979) as limiting trespass damages to a "rental or market value of the land." Enbridge Br. at 95. Yet the comments to that very provision state that "if the defendant is a wilful trespasser, the owner is entitled to recover from him the value of any profits made by the entry." Restatement (Second) of Torts § 929 cmt. c (Am. Law Inst. 1979). *Enbridge Energy, Ltd. P'ship v. Engelking*, 2017 WI App 1U, 372 Wis. 2d 833, 890 N.W.2d 48 (Wis. Ct. App. 2016) (unpublished), Enbridge Br. at 95–96, likewise provides no support for Enbridge's argument. While the plaintiff's recovery was limited to the fair rental value of the land on which

Enbridge had trespassed, the trial court expressly found that Enbridge "*did not act … in disregard of the [property owner's] rights, but rather committed an honest mistake* when they located the … pipelines" beyond the easement, 2017 WL App1U, ¶ 22 (emphasis added) (quotation marks omitted), and the Court of Appeals agreed, *id.* ¶ 75.

Riddle v. Lodi Telephone Company, 185 N.W. 182 (Wis. 1921), Enbridge Br. at 95–96, is even farther afield. It is not a trespass case at all, but instead addressed "the measure of damages where a telephone company condemns" a plaintiff's land. 185 N.W. at 183. Nor does *Blodgett v. Hitt*, 29 Wis. 169 (1871), Enbridge Br. at 95, say a word about the proper measure of damages for conscious trespass. It was an ejectment action in which the defendant had purchased the property "in the most perfect good faith, … believing … that he was receiving a perfect title to the land in controversy." 29 Wis. at 177.

In *Martin v. Comcast Cablevision Corp. of California, LLC*, 2014-NMCA-114, 338 P.3d 107, 109 (N.M. Ct. App. 2014), Enbridge Br. at 97, the court denied profits-based remedy but only after upholding "the district court's conclusion that Comcast's conduct was not willful or deliberate." *Id.* ¶ 19, 338 P.3d at 113. And *in Texas Eastern Transmission, LP v. 7 Acres of Land*, CIVIL ACTION NO. H-16-2498, 2016 WL 6901324 (S.D. Tex. Nov. 22, 2016), Enbridge Br. at 97, the court premised its denial of profits-based relief on the fact that "an innocent trespasser … [is] liable only for the actual damages sustained." 2016 WL 6901324, at *2 (citation omitted).

Hammond v. County of Madera, 859 F.2d 797 (9th Cir. 1988), Enbridge Br. at 96–97, an abrogated case brought under 42 U.S.C. § 1983, is Enbridge's only citation that even arguably denies profits-based relief to a conscious trespasser, though the decision is far from clear on that point. And *Hammond* has since been harshly criticized by the Ninth Circuit: "It is little wonder

that our district courts have found difficulty in navigating the Section 1983 damage claims waters," *L.W. v. Grubbs*, 92 F.3d 894, 898 (9th Cir. 1996). Indeed, in a case that is far more on-point, the Ninth Circuit very recently upheld a profits-based remedy for conscious trespass in language reiterating the very rationale for such relief that the Band has advanced here:

> The Restatements expressly allow for the disgorgement of profits derived from the conscious trespassory use of real property. *See, e.g.*, Restatement (Third) of Restitution and Unjust Enrichment § 40 cmt. b (2011)[.]… As the Third Restatement emphasizes:
>
> > 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 or the harm inflicted, 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.
>
> Restatement (Third) of Restitution and Unjust Enrichment § 3 cmt. c (2011).

In re de Jong, 793 F. App'x 659, 660 (9th Cir. 2020).

In sum, Enbridge has thoroughly failed to rebut the Band's argument that conscious trespassers are liable for profits attributable to the trespass.

C. Profits-based remedies for conscious trespass are not limited to profits derived from the removal of resources from the land.

Enbridge next contends that "[c]ourts around the country have held that a plaintiff has no right to profits where, as here, the only alleged 'benefit' is use of plaintiff's land (but not removal of timber, minerals, or some other valuable property from that land)." Enbridge Br. at 98. Enbridge has cited not a single case that so holds in the context of conscious trespass.

For example, Enbridge reproduces an extended block quote from *Young v. Appalachian Power Company*, Civil Action No. 2:07-479, 2008 WL 4571819 (S.D. W. Va. Oct. 10, 2008), limiting a plaintiff to fair market rental value where the defendant had taken no resources from its land. Enbridge Br. at 99–100. According to Enbridge, "the court's sound reasoning fully

supports Enbridge's position[.]" *Id.* at 99. That this is Enbridge's lead authority for its position evidences just how badly that position misses the mark. For in a portion of the opinion nowhere acknowledged by Enbridge, the court emphasized that "Plaintiffs have adduced no evidence that the defendant acted in conscious derogation of plaintiff's property rights." *Young*, 2008 WL 4571819, at *8. It further noted that "[a] conscious wrongdoer … will be required to disgorge all gains (including consequential gains)," *id*. at *8 n.3 (quoting Restatement (Third) of Restitution and Unjust Enrichment, § 40 (Tentative Draft No. 4, 2008)), and underscored that because "[p]laintiffs have adduced no evidence that the defendant was a 'conscious wrongdoer' … plaintiffs are entitled only to the value of an easement over the land for the period of the trespass." *Id.* In *Scott Hutchison Enterprises, Inc. v. Cranberry Pipeline Corp.*, CIVIL ACTION NO. 3:15-13415, 2016 WL 6585284 (S.D. W. Va. Nov. 4, 2016), Enbridge Br. at 98–99, the court made no inquiry into conscious trespass, but instead noted that the case was "similar" to *Young* and "that the similarities help lend support to limiting an unjust enrichment claim to the reasonable rental value of the land." 2016 WL 6585284, at *2.

Beck v. Northern Natural Gas Company, 170 F.3d 1018, 1021 (10th Cir. 1999), Enbridge Br. at 98, is equally unhelpful to Enbridge. That case again did not involve conscious trespass. Instead, "*geological faults had allowed [the company's] gas to migrate*" to a geologic reservoir beneath plaintiff's land. 170 F.3d at 1021 (emphasis added). In limiting relief to fair rental value, the court simply applied the standard rule for inadvertent trespass. *See* Restatement of Restitution § 3 cmt. e ("[I]nnocent and inadvertent interference with the claimant's property leads to a liability in restitution … measured by the cost of a license."). As another case cited by Enbridge makes plain, Enbridge Br. at 100, "nothing in *Beck* suggests that the equitable relief can never, as a matter of law, be measured by defendants' gains." *A-W Land Co. LLC v.*

Anadarko E & P Onshore LLC, Civil Action No. 09-cv-02293-MSK-MJW, 2014 WL 7051161, at *3 (D. Colo. Dec. 12, 2014).

Nor was *Martin v. Comcast Cablevision*, Enbridge Br. at 97, a conscious trespass case. As noted above, the court specifically upheld "the district court's conclusion that Comcast's conduct was not willful or deliberate." 2014-NMCA-114, ¶ 19, 338 P.3d at 113. In *Mullins v. Equitable Production Company*, No. 2:03CV00001, 2003 WL 21754819, at *1 (W.D. Va. July 29, 2003), Enbridge Br. at 98, the court likewise did not question the defendant's assertion that "the pipeline was placed across Mullins' property in error," and stated that "for some reason the line as built crossed one edge of the Mullins tract," 2003 WL 21754819, at *1 (emphasis added).

Finally, Enbridge cites *A-W Land*, Enbridge Br. at 100, which will be searched in vain for any suggestion that the court's views on disgorgement turned on the extraction of resources. Rather, the court stated that a "conscious" trespasser "can be compelled to disgorge the full benefit or gain accrued to the defendant" and cited for that proposition an illustration from the Restatement having nothing to do with removal of resources. *A-W Land*, 2014 WL 7051161, at *3 (citing Restatement of Restitution § 40 cmt. c., illus. 6, and stating that where defendant saved $50,000 by "willful trespass [that] … caused no injury to [plaintiff's] land," defendant could be compelled to disgorge that amount).

In sum, Enbridge has come up entirely devoid of support for its proposition that profits-based remedies are limited to resource extraction contexts.

D. Enbridge has been in conscious trespass.

Enbridge's argument that it is has not been in conscious trespass fares no better. Critically, Enbridge does not dispute that it was on notice of the pending expiration of the easements. *See* Enbridge PFF ¶ 73, Nemeroff Decl. ¶ 32 & Ex. 30 (Enbridge informing Band

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"). It does not dispute that Enbridge officials made numerous statements attesting to the lack of, and the corresponding need to obtain, Band consent both before and after the expiration of the easements; and thereafter repeatedly described Enbridge as being in "trespass" and at risk of an order of ejectment. *See* Enbridge Response to Band PFF ¶¶ 59–60; Enbridge PFF ¶¶ 60–63.[15] And it does not dispute that, all the while, oil continued to surge across the Reservation at a rate of over 20 million gallons per day. *See* Enbridge Response to Band PFF ¶ 61.

Enbridge contends that the Enbridge officials "who made the cited statements … were corresponding without knowledge of and/or without reference to Section 3 of the 1992 Agreement," and therefore "[w]hether Enbridge acted *innocently* is a disputed fact for the jury to resolve and one that is inappropriate for summary judgment." Enbridge Br. at 101. *See also* Enbridge Response to Band PFF ¶¶ 59–60. But as this argument makes clear, the 1992 Agreement is beside the point. Because none of those officials relied on it one way or the other, it is irrelevant to what they understood at the time they made the statements and undertook the acts and omissions that the Band contends constitute conscious trespass.

And on that score, the facts and law are clear:

> A "conscious wrongdoer" is a defendant who is enriched by misconduct and who acts
> (a) with knowledge of the underlying wrong to the claimant, or
> (b) despite a known risk that the conduct in question violates the rights of the claimant.

[15] Enbridge's contention that its officials made those statements without the benefit of Enbridge's current interpretation of the 1992 Agreement is not a material fact, as discussed below.

Restatement of Restitution § 51(3). That Enbridge's conduct satisfies not just one but both of these criteria is not subject to genuine dispute. Prior to the expiration of the easement in 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 the "Tribal Council will need to approve" new easements, *id.* (ENB00001460), and stated to the Band in April 2013 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," PPFF ¶ 59, Tinker Decl. ¶ 38 & Attach. KK.

After the easements expired, Enbridge continued to operate the pipeline, and its officials made clear their views that Band consent was required but had not been obtained. *See* PPFF ¶ 59, Tinker Decl. ¶ 36 & Attach. II (ENB00104034) (Enbridge email stating that "where the Tribe holds any undivided interest [in a parcel], a Tribal Council Resolution is required to obtain their consent"). And they further made clear their views as to the implications of that fact. *See id.* (ENB00020820) (describing Line 5 as "currently in trespass" on the Band's lands); *id.* (ENB00025413) ("we are currently in trespass across the Bad River Reservation"); PPFF ¶ 60, Tinker Decl. ¶ 42 & Attach. OO (ENB00009684) (Cell B20) (we "have been in trespass [there] since 2013"); PPFF ¶ 60, Tinker Decl. ¶ 36 & Attach. II (ENB00315986) ("We are currently operating in trespass as they spelled out in their lawsuit.").

By any measure, these are the statements of a company acting "with knowledge of the underlying wrong to the claimant." Restatement of Restitution § 51(3)(a). *See Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 970 (10th Cir. 2019) (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).[16] The first Restatement criterion is hence fully satisfied.

Enbridge's response is legally inapposite and hence creates no genuine issue of material fact. It matters not a whit that company officials were not lawyers stating definitive legal conclusions or that they had no knowledge of the Company's current interpretation in litigation of the 1992 Agreement. They clearly evidenced their knowledge of the wrong they understood Enbridge to be committing, in full satisfaction of subsection (3)(a).

Moreover, their contemporaneous statements are, at the very minimum, *acknowledgments of legal risk*, and under subsection (3)(b), a "conscious wrongdoer" is one "who acts … *despite a known risk* that the conduct in question violates the rights of the claimant." Restatement of Restitution § 51(3)(b) (emphasis added). Indeed, Enbridge officials acknowledged that risk in the most direct of terms. *See*, *e.g.*, PPFF ¶ 60, Tinker Decl. ¶ 36 & Attach. II (ENB00023512) (stating that the easements "are expired and the Band has the ability to hold Enbridge in trespass and likely require removal of the pipeline"); *id.* (ENB00034222) (referring to "the easements that expired in 2013" and stating that under "[t]he removal language" in the easements, "the tribe can require Enbridge to remove" the pipeline).

Subsection (3)(b) of the Restatement is addressed to "contexts in which—although the risk of liability is known—the legal conclusion that a wrong has been committed may not be reached until after the fact. See § 3, Comment *e*. *Subsection (3)(b) makes clear that one who*

[16] *Cf. 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" (quotation marks omitted)); *Major Bob Music v. Heiman*, No. 09-cv-341-bbc, 2010 WL 1904341, at *4 (W.D. Wis. May 11, 2010) (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).

chooses to act in such circumstances bears the risk of liability by a disgorgement measure." Restatement of Restitution § 51 cmt. a (emphasis added). Thus, "[t]he existence of colorable or even plausible justification does not immunize the defendant in such cases from a liability to disgorge gains that are determined—after the fact—to have been realized through interference with another's interests[.]" *Id*. § 3 cmt. e. Accordingly, Enbridge's post hoc, litigation-based justification for its actions, even if colorable, does not save Enbridge from a disgorgement remedy.

E. Enbridge's "windfall" argument is meritless.

Finally, Enbridge argues that the Band seeks an unwarranted "windfall." Enbridge Br. at 102–04. It emphasizes that the Band obtained its interests in the allotted parcels at market value "at taxpayer expense through federal programs," *id.* at 102, and that therefore a profits-based remedy would be "inequitable," *id*. at 104. Enbridge's repeated references to "taxpayer expense" and "federal programs" are an obvious shot at atmospheric advantage that serve only to illuminate the company's transcendent historical blindness. The programs in question were enacted to reverse the decimation of tribal land bases wrought by the government's allotment policy. As Congress has explained, "as a result of the allotment Acts and related Federal policies, over 90,000,000 acres of land have passed from tribal ownership[.]" Indian Land Consolidation Act Amendments of 2000 ("ILCAA"), Pub. L. No. 106-462, 114 Stat. 1991, § 101(2). The Seventh Circuit has recognized this same history. *Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 670–71 (7th Cir. 2020) ("as a result of allotment, Indians drift[ed] toward complete impoverishment and lost their land" (brackets in original) (quotation marks omitted); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137, 1180 (1990) ("Allotment … destroyed most of the

Indian land base."). Statutes including the Indian Land Consolidation Act were enacted "to reverse the effects of the allotment policy on Indian tribes." ILCAA, 114 Stat. 1991, § 102(5). The only equities that the Band's participation in these programs implicates are those that weigh against further dispossessing tribes of their property rights and sovereignty over their land.

Enbridge also contends that a profits-based remedy "would be a windfall and should not be awarded" because "the purpose of damages is to compensate fairly and adequately." Enbridge Br. at 104. That is the purpose of compensatory damages, as the lone case Enbridge cites states, *MCI, LLC v. Patriot Eng'g & Envtl., Inc.*, 487 F. Supp. 2d 1029, 1039–40 (S.D. Ind. 2007), but it is not the purpose of restitution for conscious wrongdoing, to which the case does not speak. As discussed above and in the Band's opening brief, the purpose of restitution is to take away what would otherwise be the very strong incentives for wrongdoers to act exactly as Enbridge has here. 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 forgone negotiation with B.

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

The Seventh Circuit has underscored these very principles, stating that for "a deliberate tort, … one way to deter it is to make it worthless to the tortfeasor by *stripping away all his gain*, since if his gain exceeded the victim's loss a damages remedy would leave the tortfeasor with a profit from his act." *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 576 (7th Cir. 2004) (emphasis added). *See also, e.g.*, *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1643 (2017) ("deterrence is

not simply an incidental effect of disgorgement" but its "primary purpose" (quotation marks omitted)); *Taylor v. Meirick*, 712 F.2d 1112, 1120 (7th Cir. 1983) (the law "prevent[s] infringers from obtaining any net profit" because "limiting damages to [the plaintiff's] loss would not effectively deter" infringement); *Baumann Farms, LLP v. Yin Wall City, Inc.*, Case No. 16-CV-605, 2017 WL 3669616, at *4 (E.D. Wis. Aug. 25, 2017) ("Unlike monetary damages, the recovery of the defendants' profits is … [based] on … the need for deterrence.").

Nor does any principle of law or equity suggest that allowing a wronged plaintiff a recovery in furtherance of these policies would confer an objectionable windfall. The Restatement specifically contemplates "the possibility of recovering more than one's loss[.]" Restatement of Restitution § 3 cmt. b. Indeed,

> [w]hen the defendant has acted in conscious disregard of the claimant's rights, the whole of the resulting gain is treated as unjust enrichment, even though the defendant's gain may exceed … the measurable injury to the claimant …. *Restitution from a conscious wrongdoer may therefore yield a recovery that is profitable to the claimant*[.]

Id. cmt. c (emphasis added).

And yet again, the courts concur. As the Supreme Court has explained, where there has been unjust enrichment "[i]t is more appropriate to give the [wronged] party the benefit even of windfalls than to let the [wrongful] party keep them." *Randall v. Loftsgaarden*, 478 U.S. 647, 663 (1986) (quotation marks omitted); *Rowe v. Maremont Corp.*, 850 F.2d 1226, 1241 (7th Cir. 1988) (quoting same); *Pearson v. Target Corp.*, 968 F.3d 827, 831–32 (7th Cir. 2020) (ordering disgorgement and stating that "it has long been axiomatic that no person shall profit by his own wrong" (citing Restatement of Restitution § 3) (quotation marks omitted)); *In re PHC, Inc. S'holder Litig.*, 894 F.3d 419, 438 (1st Cir. 2018) ("If a windfall is in prospect, time-honored

principles of equity favor bestowing the windfall upon the wronged party as opposed to allowing the wrongdoer to retain it.").

In sum, Enbridge has raised no viable argument that a profits-based remedy in this case would be improper as a matter of law or equity. The opposite is true. If Enbridge is found in conscious trespass and its liability is limited to the fair market value of the easements, it will have lost nothing by its trespass. The deterrence value of such an award will be zero—indeed, less than zero because it will create an incentive for future trespass, as Enbridge will have gained retroactively what it lacked in 2013: a de facto right of condemnation over tribal land, *see Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1112 (10th Cir. 2017) (fractionally held tribal land is "beyond the reach of condemnation"), excusing it from a bargaining process in which, as a matter of federal law, "[t]ribes have the right, through self-governance and self-determination, to charge more than fair market value for their land," Rights-of-Way on Indian Land, 80 Fed. Reg. 72,492-01, 72,512 (Nov. 19, 2015), and effectively eviscerating the Band's sovereign power of consent and the statutes under which that fundamental dignity has been rendered inviolable by Congress, *see* 25 U.S.C. §§ 177, § 324. *Accord* Restatement of Restitution § 3 cmt. c ("[A] remedy limited to compensation does not vindicate the claimant's right to insist that the … use by the defendant of the claimant's property … take place by agreement with the claimant or not at all."). Enbridge has the principles governing the proper measure of damages in cases of conscious wrongdoing exactly backwards. A proper understanding of those principles calls for summary judgment in favor of the Band's entitlement to profits-based damages.

IX. An Injunction Should Issue Automatically.

The Band argued in its opening brief that, if the Court finds Enbridge to be in trespass on the Band's lands, an injunction should issue automatically against the continued presence and

operation of Enbridge's pipeline across those lands. Any order granting Enbridge the right, as a matter of equity, to maintain its use of the Band's property would violate the Non-Intercourse Act, 25 U.S.C. § 177, which declares that no conveyance of rights in Indian land "shall be of any validity in law or equity" absent the consent of Congress. *See also Tuscarora*, 362 U.S. at 119 ("[Section] 177 at the very least [also] contemplates the assent of the Indian nation or tribe."). Given this "clear and valid legislative command," *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (quotation marks omitted), a prohibition against further unauthorized use of the Band's lands is the only cognizable remedy. Enbridge's contrary arguments lack all force.

A. The Band has not alleged that a Non-Intercourse Act violation has occurred.

Enbridge contends that "[t]he Band never alleged an INA violation in its complaint[.]" Enbridge Br. at 105 n.61. That is correct, and is also of no moment. The Band's argument is not that there has been a Non-Intercourse Act violation. It is instead that there *will be* one if Enbridge is allowed by order of this Court to continue to operate absent the congressional and tribal consent required by the Act.

B. The Non-Intercourse Act is not limited to conveyances of title.

Enbridge further contends that allowing it to continue to operate would "not convey title in the land to Enbridge…. Thus, the INA is not implicated." *Id.* This argument does not even survive the first sentence of the statute. *See* 25 U.S.C. § 177 ("No 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, unless the same be made by treaty or convention entered into pursuant to the Constitution." (emphasis added)). *See also, e.g.*, *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 907 (9th Cir. 2014) (describing "rights-of-way" issued under the 1948 Act

as among the "transactions that fall within the scope of Section 177"); *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 698 (9th Cir. 1976) (§ 177 renders right-of-way easements over Indian lands void ab initio absent congressional consent); *Shoshone Indian Tribe*, 672 F.3d at 1038–39 (same for leases).

C. *City of Sherrill* is inapposite.

Enbridge next contends that

> [a]s the Supreme Court has explained, the "substantive question whether the plaintiff has any right" *under the INA* is very different from "the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is." *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 213 (2005)[.]

Enbridge Br. at 105 (emphasis added). This simply recycles Enbridge's misconception that the Band has asserted a Non-Intercourse Act violation. It has not. Moreover, Enbridge's splicing notwithstanding, *Sherrill* did not even involve an alleged Non-Intercourse Act violation. The Court was instead discussing the Oneidas' claim that because they possessed "aboriginal title to their ancient reservation land [the *right*] and because the Tribe has now acquired the specific parcels involved in this suit in the open market, it has unified fee and aboriginal title and may now assert sovereign dominion over the parcels [the *remedy*]." *Sherrill*, 544 U.S. at 213. Enbridge nowhere explains the connection between this issue and the Band's entitlement to an automatic injunction, and none exists.[17]

[17] The cases Enbridge cites for the proposition "that ejectment is not only not mandatory but is typically not even an appropriate remedy for an INA violation," Enbridge Br. at 106, are inapposite for the same reason: The Band is not seeking an injunction as a remedy for a Non-Intercourse Act violation, but as the sole means to *prevent* such a violation from occurring in the first instance. Moreover, when courts apply the equitable defenses recognized in *Sherrill* to Non-Intercourse Act claims, they do not equitably render *valid* a conveyance otherwise invalid under the Act. Rather, they decline to reach the merits of the validity of the conveyance in the first instance. *See, e.g.*, *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268, 277 (2d Cir. 2005) (stating that "[b]ased on *Sherrill*, we conclude that the possessory land claim *alleged* here is the

D. Congress has clearly commanded that an injunction should issue under the circumstances here.

Enbridge concedes that a federal statute may "require an injunction" if it constitutes a "clear and valid legislative command," Enbridge Br. at 106 (quotation marks omitted), but asserts that the Non-Intercourse Act "does *not* contain such a clear legislative command" because it "'is silent as to remedies, thus leaving courts to … formulat[e] a statutory [Nonintercourse Act] damages remedy,'" *id.* (quoting *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 276 (2d Cir. 2005) (second brackets in original)). Once again, Enbridge confuses the Band's argument for one it is not making. The Band has nowhere claimed that a Non-Intercourse Act violation has occurred or asserted a damages or any other remedy for such a violation. It is instead urging the Court to reject Enbridge's invitation to violate the statute by allowing Enbridge to continue operating on the Band's lands absent the requisite consents. The statutory command could not be clearer in this regard.

In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Court found an injunction mandatory under § 7 of the Endangered Species Act ("ESA") because

> [i]ts 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.

Id. at 173 (citation and emphases omitted). *See also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313–14 (1982) (discussing *Hill* and stating that "Congress had foreclosed the exercise of the usual discretion possessed by a court of equity" because "the statute … contains a flat ban on the destruction of critical habitats"); *Wisconsin v. Weinberger*, 745 F.2d 412, 426 (7th Cir. 1984) (in

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type of claim to which a laches defense can be applied" and finding that "the present case *must be dismissed*" because the "*claim is barred* by laches" (emphases added)).

light of ESA's "unequivocal ban," "refusal to enjoin the … dam would have ignored the explicit provisions of the Act").[18]

The *Hill* Court observed that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act." 437 U.S. at 173. Section 177 is in fact just such a provision. It commands that

> [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, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177. This language is, like § 7 of the ESA, a flat and unequivocal prohibition that "admits of no exception." And courts readily describe it as such. *See, e.g.*, *Cty. of Oneida*, 470 U.S. at 245 (Non-Intercourse Act "codified the principle … that a conveyance without the sovereign's consent was void *ab initio.*"); *Chemehuevi Indian Tribe*, 767 F.3d at 906 (9th Cir. 2014) ("Congressional intent is clear. Section 177 *prohibits* the 'grant, lease, or other conveyance of lands, or of any title thereto' from an Indian tribe unless approved by Congress," without which, "such conveyances would violate federal law" (emphasis added)).[19]

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[18] Enbridge attempts to cloud the clear holding of *Hill* by arguing that "lower courts have repeatedly recognized that courts should *continue to apply the traditional, four-factor injunction standards* for any ongoing violation of the ESA." Enbridge Br. at at 108 n.63 (emphasis added). The cases cited by Enbridge do not remotely support that proposition. They simply (and unremarkably) read *Hill* as leaving undisturbed the requirement that courts must still evaluate "the likelihood of future harm"—i.e., "that a violation of the ESA is at least likely in the future." *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994). *See also Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088 n.13 (9th Cir. 2015) ("[A]lthough the traditional test for injunctive relief does not apply in ESA cases, [t]he plaintiff must make a showing that a violation of the ESA is at least likely in the future." (quotation marks omitted) (second brackets in original)).

[19] *See also, e.g.*, *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 528 n.4 (1998) (§ 177 "rendered invalid any conveyance" not authorized by Congress); *Oneida Indian Nation v. Phillips*, 981 F.3d 157, 161 (2d Cir. 2020) (same); *Wolfchild v. United States*, 731 F.3d 1280, 1294 (Fed. Cir. 2013) ("prohibits"); *Greene v. Rhode Island*, 398 F.3d 45, 55 (1st Cir. 2005) ("expressly prohibits"); *Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039, 1046 (5th Cir. 1996)

What renders the Non-Intercourse Act an even more forceful foreclosure of the courts' equitable discretion than section 7 of the ESA is that the latter is aimed at federal agencies, *see* 16 U.S.C. § 1536 ("The Secretary shall…."; "Each federal agency shall…."), and thus forecloses judicial discretion by extension. Section 177, by contrast, is aimed directly at the courts. It says that no conveyances of tribal land interests "shall be of any validity *in law or equity*"—which plainly speaks to the authority of, determinations made by, and remedies available in, the courts. *See*, *e.g.*, U.S. Const., art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under …."); *Ellis v. Davis*, 109 U.S. 485, 497 (1883) (describing "the terms 'law' and 'equity,'" as "systems of jurisprudence" that "embrace … remedies to be administered in the courts of the United States" (citation omitted)). Indeed, the phrase "shall be of any validity in law or equity" was added to the Non-Intercourse Act at a time when Congress was focused intensively on delineating the powers of the federal courts and evinced a "widespread hostility" to the courts' equity jurisdiction. *Mitchum v. Foster*, 407 U.S. 225, 233 n.10 (1972).[20]

Here, Enbridge asks this Court to render valid, as a matter of equity, Enbridge's continued operation of its pipeline on the Band's lands despite the Non-Intercourse Act's unequivocal ban on such an outcome. Doing so would "ignore the ordinary meaning of plain language" enacted by Congress. *Hill*, 437 U.S. at 173. This the judiciary has no authority to

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(substantially same); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) ("forbids"); *United States v. 7,405.3 Acres of Land in Macon, Clay & Swain Ctys.*, 97 F.2d 417, 422 (4th Cir. 1938) ("expressly forbids"); *United States v. Bd. of Nat'l Missions of the Presbyterian Church*, 37 F.2d 272, 274 (10th Cir. 1929) ("sweeping prohibition").

[20] The original Non-Intercourse Act of 1790 had used "shall be valid to any person." Act of July 22, 1790, Pub. L. No. 1-33, § 4, 1 Stat. 137, 138. This was changed to "shall be of any validity in law or equity" by amendment on March 1, 1793. Act of March 1, 1793, Pub. L. No. 2-19, § 8, 1 Stat. 329, 330. *See Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 652 n.1 (D. Me. 1975). The following day, Congress enacted the Judiciary Act of March 2, 1793, Pub. L. No. 2-22, 1 Stat. 333, provisions of which "reflected the prevailing prejudices against equity jurisdiction." *Mitchum*, 407 U.S. at 232 n.10.

do—and certainly not by virtue of the hyperinflated, sky-is-falling economic arguments tendered by Enbridge and its amici. As the Court explained in *Hill*:

> Here we are urged to … shape a remedy "that accords with some modicum of common sense and the public weal." *Post*, at 2302. But is that our function? We have no … mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities[.]

Id. at 194.

This fundamental recognition of the proper allocation of authority between the legislative and judicial branches applies squarely here. Federal protection of tribal lands is "one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs[.]" *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 86 (1977) (quotation marks omitted). "The [Non-intercourse] Act's overriding purpose is the protection of Indian lands.… [It] imposes on the federal government a fiduciary duty to protect the lands covered by the Act." *United States for & on Behalf of Santa Ana Indian Pueblo v. Univ. of N.M.*, 731 F.2d 703, 706 (10th Cir. 1984).[21]

Enbridge and its amici urge this Court to break that statutory promise based on the allegedly dire economic consequences of honoring it—consequences (whatever their actual degree) brought on wholly by Enbridge's choice to trespass and to squander years of ample opportunity to make other plans regarding its pipeline operations, enamored as it was of its

[21] President Washington explained to the Senecas that the Act had "entirely altered" the law. Going forward, "[t]he general government will never consent to your being defrauded. But it will protect you in all your just rights…. That in future you cannot be defrauded of your lands. That you possess the right to sell, and the right of refusing to sell your lands. That therefore the sale of your lands in future, will depend entirely upon yourselves." George Washington, Address to Seneca Indians (Dec. 29, 1790), Washington's Address to the Senecas, 1790 (uoregon.edu).

profits and certain of its power to overwhelm any assertion of rights by the Band. *Hill* rejects such reasoning, just as the Supreme Court did in its recent landmark Indian law decision where Oklahoma and a raft of oil and gas interests urged that compliance with statutes enacted by Congress would have stark consequences and hence that the statutes should be ignored:

> [D]ire warnings are just that, and not a license for us to disregard the law….
>
> ....
>
> ... [M]any of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

McGirt, 140 S. Ct. at 2481–82. Enbridge's arguments should meet a similar fate. If this Court finds Enbridge to be in trespass on the Band's lands, an order enjoining further trespass should automatically follow.

X. Even If the Four-Part Injunction Test Applies, the Legal Principles Governing Its Application Overwhelmingly Favor the Band.

In its opening brief, the Band argued that even if the traditional injunctive relief test were applicable here, legal principles established by the courts in elucidating its four factors strongly favor the Band. Enbridge musters only the weakest of arguments in response to those principles. Instead, it launches into a multi-page discussion of how the public interest prong of the test weighs in its favor because of the purportedly dire economic consequences that would ensue if the pipeline were shut down. That discussion is both legally irrelevant and procedurally improper. The Band first discusses the injunctive relief factors for which Enbridge has little response, and then returns to the public interest factor for which it has only a misguided one.

A. Factors 1 and 2: Enbridge's trespass is causing the Band irreparable harm for which there is no adequate remedy at law.

The Band argued in its opening brief that any remedy allowing Enbridge to continue its trespass will irreparably harm the Band, because "[h]arm is irreparable if legal remedies are inadequate to cure it." Band Br. at 55 (quoting *Life Spine, Inc. v. Aegis Spine, Inc.*, 8 F.4th 531, 545 (7th Cir. 2021)). "As a general rule, interference with … possession of land is considered 'irreparable' since land is viewed as a commodity for which monetary compensation is an inadequate substitute." *Id.* at 55–56 (quoting *Pelfresne v. Vill. of Williams Bay*, 865 F.2d 877, 883 (7th Cir. 1989)). Here, the harm of a continuing trespass would be especially severe and impossible to quantify in monetary terms, because it would dispossess the Band of its sovereign right to control its own lands. *Id.* at 55 (citing cases).

Enbridge does not cite a single case undermining the Band's argument that the trespass is irreparably harming its sovereign rights. Instead, Enbridge concocts reasons for why the trespass is supposedly harmless: It is "on less than three miles," is "temporary," is on land "previously owned by individual Indians," and does not "prevent[] the Band from governing itself." Enbridge Br. at 121. None of these assertions has any basis in case law or relevance to whether the trespass harms the Band's sovereign rights.[22] None of these assertions addresses, let alone undermines, the Band's argument that allowing Enbridge to continue trespassing would infringe

[22] Enbridge does not endeavor to explain why the mileage of the trespass or the previous ownership of the relevant parcels matters to whether the Band is harmed here; or why a trespasser's alleged intent to stop trespassing at an unidentified time in the future matters to whether the trespass is harmful or compensable with monetary damages; or how dispossessing the Band of its power to foreclose a trespass would not "prevent[] the Band from governing itself."

the Band's "power to exclude non-Indians from Indian lands," a power that is "a hallmark of Indian sovereignty." *Merrion*, 455 U.S. at 141.[23]

Enbridge likewise fails entirely to rebut the Band's argument that the harm to the Band's sovereign rights cannot adequately be remedied with money damages. Enbridge cites just one trespass case in which a court held that monetary damages would be an adequate remedy. Enbridge Br. at 120–21 (citing *Sarkis v. Costley*, No. CV 17-01851-AB (PLAx), 2017 WL 7833609, at *3 (C.D. Cal. Apr. 5, 2017)). But that case was nothing like this one. It involved two tenants who were allegedly trespassing by refusing to temporarily leave their house to allow their landlord to fumigate wood-eating termites. *Sarkis*, 2017 WL 7833609, at *2–3. The court declined to issue a temporary restraining order, reasoning that "any potential damage caused by termites" would be "economic damages" that could "be remedied by an award of monetary damages." *Id.* at *3. Thus, *Sarkis* was the unique trespass case in which the harm alleged was purely economic. And certainly no federally recognized sovereign rights were being infringed by the termites or by denying the landlord access to the house to fumigate them.

Enbridge next cites *Diamondback Funding, LLC v. Chili's of Wis., Inc.*, 2007 WI App 162U, ¶ 26, 303 Wis. 2d 746, 735 N.W.2d 193 (Wis. Ct. App. 2007) (unpublished)), as supporting the proposition that "[a]ny alleged harm from a trespass … can be remedied by monetary damages." Enbridge Br. at 122. But *Diamondback* is not remotely on-point. There, the plaintiff restaurant owner sued to enforce a restrictive covenant that disallowed construction of competing restaurants on an adjacent parcel of land. 2007 WI App 162U, ¶1. The court held

[23] Enbridge cites the divided panel's opinion in *Davilla* for the proposition that a trespass is not always an irreparable harm as a matter of law. Enbridge Br. at 120 (citing *Davilla*, 913 F.3d at 973–74). But the trespass in *Davilla* occurred on allotted lands owned by individual Indians. *Davilla* says nothing about whether a trespass on *tribal land* harms a Band's *sovereign rights*, nor whether such a harm can be remedied with monetary damages.

that the plaintiff did not need to demonstrate past economic loss to show irreparable harm from the construction of a restaurant on the adjacent land, because "economic considerations are but one of many factors" to be considered in deciding on an injunction. *Id.* ¶ 27. *Diamondback* says nothing about trespass (or any other claim) being adequately remedied with monetary damages, and the fact that Enbridge chose to rely on an unpublished opinion light-years removed from its argument speaks volumes about the dearth of support for its position.

Enbridge also argues that the Band's request for monetary damages "demonstrate[es] that its harms can be remedied monetarily without the necessity for injunctive relief." Enbridge Br. at 122; *see also id.* n.78 ("By recognizing that monetary damages are available, the Band implicitly concedes that its harms can be remedied monetarily[.]"). It does no such thing. Injunctive relief is paired with monetary damages all the time. After all, a court cannot go back in time to enjoin past behavior, so monetary damages are often the best (albeit imperfect) option available to redress past harms. But a harm is still irreparable if it is "not *fully* compensable" by damages. *Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735, 740 (7th Cir. 2013) (emphasis added). Such is the case for trespass (all the more so when it involves the violation of a tribe's sovereignty), which causes a harm that is difficult to quantify or remedy with money. Hence, in the case cited by Enbridge for the proposition that monetary damages are available for trespass, Enbridge Br. at 122 n.78, the court observed that "unauthorized use of an easement is generally a trespass to the servient estate for which *damages and injunctive relief are normally granted*." *Grygiel v. Monches Fish & Game Club, Inc.*, 2010 WI 93U, ¶ 43, 328 Wis. 2d 436, 787 N.W.2d 6 (Wis. 2010) (unpublished) (quoting Restatement (Third) of Property (Servitudes) § 8.3 (Am. Law Inst. 2000)) (emphasis added) (alterations omitted).

Enbridge has no viable counter, then, for the principles counseling that if this Court finds the company in trespass, and applies the four-part injunctive relief test, the first two factors should tip heavily in favor of the Band.

B. Factor 3: A balancing of the hardships between the parties would be inappropriate because Enbridge's trespass has been willful.

As for the third factor, the Band argued in its opening brief that "a court does not have to balance the equities in a case where the defendant's conduct has been willful." Band Brief at 56 (quoting *Sierra Club v. Franklin Cty. Power of Ill., LLC*, 546 F.3d 918, 935 (7th Cir. 2008)). Moreover, the fact that any harms to Enbridge of a Line 5 shutdown would be self-inflicted is yet another reason that those harms should not factor into the balancing of hardships. *See id.* at 57–58.

Enbridge does not dispute these legal principles. It simply insists that the willfulness of its trespass is "a disputed issue of fact." Enbridge Br. at 124. As discussed above, though, there exists no genuine issue that Enbridge has consciously trespassed on the Band's lands for years. *See supra* pp. 54–58. And Enbridge does not dispute that it was aware in April 2013 that the easements "are set to expire in the next few months." Enbridge PFF ¶ 73, Nemeroff Decl. ¶ 32 & Ex. 30. *See, 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" (quotation marks omitted)); *Major Bob Music v. Heiman*, No. 09-cv-341-bbc, 2010 WL 1904341, at *4 (W.D. Wis. May 11, 2010) (finding defendant's conduct "willful" where it was on "notice that a license was necessary to avoid copyright infringement" but did not obtain one).

In its section on the balance of hardships, Enbridge also makes a confusing argument relating to its contention that "the Band only waived sovereign immunity for monetary damages

up to $800,000." Enbridge Br. at 123. Enbridge's argument seems to be that the Court should not enter a permanent injunction for the trespass claim because the resulting losses suffered by Enbridge would dwarf any damages it could recover from the Band on its counterclaim, as those damages would be limited to $800,000. *Id.* This argument hinges on a scenario in which Enbridge prevails on its counterclaims (to the tune of millions of dollars of monetary damages) after the Band prevails on its trespass claim. But such a situation cannot come to pass. Enbridge's counterclaims double as defenses to the Band's trespass claim, and thus they will necessarily fail if the Band prevails on the trespass claim.[24]

C. Factor 4: The public interest will be served by an injunction.

The Band argued in its opening brief that the public interest is served by advancing Congress's policy choices, including the Non-Intercourse Act's prohibition on unconsented conveyances of Tribal land. Band Br. at 58. The Band further cited numerous cases holding that the public interest is served by protecting a tribe's treaty rights, sovereignty, and rights of self-government, as well as numerous cases holding that the public interest is served by enjoining activity that violates federal law. *Id.* at 58–59.

Enbridge again counters none of this. Instead, it argues vociferously and at great length that a shutdown of Line 5 will cause widespread economic consequences such that the Court

[24] The case cited by Enbridge to support this argument relates to a very different situation. Enbridge Br. at 123 (citing *Wisconsin v. Stockbridge-Munsee Cmty.*, 67 F. Supp. 2d 990, 1019–20 (E.D. Wis. 1999)). That case involved a request for a preliminary injunction against an allegedly illegal gambling operation. *Stockbridge-Munsee Cmty.*, 67 F. Supp. 2d at 992. Not granting an injunction would likely cause harm to the plaintiff (the State of Wisconsin) by allowing illegal gaming to continue, and the defendant tribe's sovereign immunity precluded any monetary remedy for the harm if the State eventually prevailed on the merits. *Id.* at 1019–20. The court reasoned that the likelihood of an irremediable harm to the plaintiff before the case could be decided on the merits counseled in favor of a preliminary injunction. *Id.* Here, however, there is no plausible scenario in which the Band is granted a permanent injunction for its trespass claim and then Enbridge prevails on its counterclaim.

should deny an injunction in service of what Enbridge deems the public interest. Enbridge Br. at 109–119. This argument has several glaring problems.

First, Enbridge cannot plausibly claim that there exists no genuine issue of material fact with respect to its economic arguments, and yet it presents them as the undisputed truth. Enbridge spills page after page of ink reciting the views of its experts and its allies, while nowhere acknowledging to this Court that the points they have advanced are highly controverted. The Band has submitted expert reports from well-respected oil industry economists, natural gas liquid economists, and experts in the logistics of shipping crude oil and natural gas liquids (by means including other pipelines, tankers, and rail). Those experts have addressed a variety of viable mechanisms for replacing the energy products currently conveyed by Line 5.

The Band has, as required by this Court's rules, distilled its experts' testimony in its responses to Enbridge's Proposed Findings of Fact. *See* EPPF No. 102–132. But it will not disrespect the Court's time by spelling out their positions in detail in this briefing as Enbridge has done with its own. The parties are currently in the process of deposing each others' experts. If this Court ultimately decides that evidence regarding economic consequences is germane, a hearing will clearly be necessary for it to assess the relative strengths of the experts' arguments. Enbridge's efforts to have that hearing now, through a one-sided presentation in its briefing papers, are as misleading as they are premature.

This is all the more clear given the extent to which Enbridge's briefing overstates the conclusions even of its own experts. Enbridge's market expert, for example, has concluded that "[t]he existing northbound refined product [i.e. gasoline, jet fuel and diesel] pipelines are believed to have sufficient available capacity to accommodate the reduction in Michigan transportation fuel supply,... I estimate that a Line 5 shutdown will have a small impact on

Michigan gasoline, jet fuel, and diesel prices, likely less than 1 ¢/gallon." Band PFF Resp. No. 124.[25] For Wisconsin his corresponding estimate is "the same as that for Michigan gasoline prices, i.e., approximately 0.5 ¢/gal," and for Ontario it is "4 to 6 ¢/gal." *Id.* These figures hardly reflect the crisis from a Line 5 shutdown that Enbridge seeks to portray as established fact.

Second, the economic arguments Enbridge seeks to make are simply not cognizable under the public interest prong of the four-factor test. Enbridge makes no argument as to why the economic effects in another country should bear on this Court's exercise of equitable discretion. Nor does it explain how its single-minded (and clearly self-interested) focus on maintaining exactly the same level of fossil fuel conveyance as exists today can be squared with express governmental determinations (at the international, federal, and state levels, and including Canadian pronouncements) that fossil fuel dependence must be reduced significantly in coming years to avoid a true catastrophe of unprecedented proportions. *Id.* No. 136.

All of this highlights the perils of ignoring the relevant statutory framework in making equitable arguments. In *Oakland Cannabis*, 532 U.S. 483, the Supreme Court made clear that, even when a court is applying the four-factor test, there exist significant constraints on its exercise of equitable discretion. "A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." *Id.* at 497. When exercising its equitable discretion, a court's choice

> is simply whether a particular means of *enforcing the statute* should be chosen over another permissible means; *the[] choice is not whether enforcement is preferable to no enforcement at all. Consequently, when a court of equity exercises its discretion, it may not consider the advantages and disadvantages of nonenforcement of the statute*, but only the advantages and disadvantages of

[25] "Band PFF Resp." refers to Plaintiff's Replies to Defendant's Responses to Plaintiff's Proposed Findings of Fact and Its Responses to Defendant's Proposed Findings of Fact.

> "employing the extraordinary remedy of injunction" over the *other available methods* of enforcement. To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.

Id. at 497–98 (emphasis added) (footnote and citations omitted).

Enbridge fails entirely to heed this admonition in advancing its inflated economic claims. The North Star of the equitable inquiry is statutory compliance. The Supreme Court has properly cautioned against the courts—even acting within the full scope of their equity jurisdiction—"consider[ing] the advantages and disadvantages of nonenforcement of the statute[.]" *Oakland Cannabis*, 532 U.S. at 498. Such an approach can lead to misplaced reliance on inflated or biased claims of the costs of compliance, and contravenes Congress's primacy in making policy determinations. Here, there exist no "other available methods" or "mechanisms" of ensuring compliance with the Non-Intercourse Act for this Court to choose from besides an injunction. If this Court confers upon Enbridge the unilateral right to remain on the Band's lands, the statutory consent requirement will be violated. Full stop. Enbridge's arguments about economic harm are not only overheated but entirely beside the point.

D. The 1977 Transit Treaty has no application to this case.

Enbridge's public interest arguments are not bolstered by its references to the 1977 Transit Pipeline Treaty. *See* Enbridge Br. at 110 (citing *Agreement Between the Government of the United States and the Government of Canada Concerning Transit Pipelines*, Jan. 28, 1977, 28 U.S.T. 7449, 1977 WL 181731 ("Transit Treaty")). Enbridge contends that "any shut down order of the sort sought by the Band here *directly* conflicts with the express federal policies embodied in Articles II and IX of the Treaty," Enbridge Br. at 113, and is therefore preempted by the foreign affairs doctrine, *id.* at 112–13.

It is not surprising that Enbridge has not made a direct argument under the Treaty, but instead seeks to invoke it through the back door of its equitable arguments. "The interpretation of a treaty, like the interpretation of a statute, begins with its text," *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020) (quotation marks omitted), and Enbridge makes no attempt to establish that issuing an injunction under the facts and governing law of this case would fall within the ambit of Article II of the Treaty. That Article provides in part that "[n]o public authority" in either country may "institute any measures" that would impede the flow of oil in certain cross-border pipelines. 1977 WL 181731, art. II(1). Enbridge effectively argues that this provision would prevent this or any other court from ever issuing an injunction to enforce any legal rights, including property rights, against a pipeline operator if a consequence of the order were to impede the flow of oil. Enbridge Br. at 111–15.

That is a breathtaking argument, and Enbridge supplies no textual analysis or case law to support it. If the Treaty operated as Enbridge contends, then upon its ratification in 1977 it would have written the expiration provisions out of every right of way and easement instrument—federal, state, and private—for every operator of every transit pipeline, rendering them immune to trespass or any other legal enforcement mechanism in perpetuity; and it would have repealed every statute, regulation, treaty, and other law on which such mechanisms are based, and in the process divested courts of jurisdiction to apply them. Operators could simply let their easements expire, point to the Transit Treaty, and continue to operate with impunity.

Nothing in the text or context of the Treaty suggests it was intended to accomplish such a sweeping evisceration of existing law.[26]

Grappling with none of these implications, Enbridge contends that because it has invoked the Treaty, this Court must stay its hand because

> any dispute "over the [Treaty's] interpretation, application, or operation" shall be settled at the national level through negotiation and, if necessary, international arbitration. Art. IX. Thus, the express federal policy is to protect the uninterrupted flow of hydrocarbons between the United States and Canada and to funnel disagreements through the bilateral dispute resolution process.

Enbridge Br. at 111 (brackets in original) (quoting Transit Treaty art. IX). The additional problem with this argument is the text that Enbridge again omits. Article IX refers to "[a]ny dispute *between the Parties* regarding the interpretation, application or operation of this Agreement[.]" Transit Treaty art. IX(1) (emphasis added). Enbridge and the Band are not parties to the Transit Treaty. Article IX is accordingly irrelevant and does not "funnel" this matter out of this Court.

Enbridge's suggestion that the Treaty operates to preempt this Court from issuing an injunction because "[t]he Foreign Affairs doctrine preempts domestic public authorities from 'interfer[ing] with the National Government's conduct of foreign relations,'" Enbridge Br. at 112 (brackets in original) (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003)), is likewise misplaced. Preemption is not even the correct doctrine here. The Band brought its trespass claim under *federal* law. Federal law does not preempt federal law. *See, e.g.*, *Baker v.*

[26] *See, e.g.*, *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 443 (D. Me. 2017) ("[T]he Obama Administration's decision not to grant a Presidential Permit to the Keystone XL pipeline and the Trump Administration's counter-decision to do the opposite … indicate a less than consistent foreign policy when it comes to cross border pipelines. The foreign affairs cases require a greater conflict with a more consistent federal policy; they do not authorize preemption of local restrictions whenever an industry as a whole is economically powerful enough to affect this Country's national and by extension international interests.").

IBP, Inc., 357 F.3d 685, 688 (7th Cir. 2004) (stating that where district court held one federal statute to preempt another, "[t]his reasoning is hard to follow. Federal statutes do not 'preempt' other federal statutes"); *Ray v. Spirit Airlines, Inc.*, 767 F.3d 1220, 1224 (11th Cir. 2014) (same).

In *Swinomish*, 951 F.3d 1142, a railroad violating the terms of an easement on tribal land argued that a federal statute "'preempts' the treaty-based federal common law that allows tribes to exclude non-Indians from Indian land." *Id*. at 1154. The Ninth Circuit rejected the argument, explaining that when there is a conflict between a federal law "and another federal law, [courts] do not use the analytic framework applicable to federal preemption of state and local regulation. Indeed, the term 'preempt,' when applied to a conflict between federal laws, is a bit of a misnomer. The usual terms employed in analyzing a conflict between federal laws are repeal and abrogation." *Id.* at 1152–53. Thus, "we typically ask whether the later statute *repeals* the prior one." *Id*. at 1153.

As to that question, the answer here is crystal clear. As discussed above, *supra* pp. 32–33, the 1854 Treaty with the Chippewa created a permanent reservation for the Band with permanent rights of occupancy and possession, *see Hitchcock*, 201 U.S. at 214–15; *Thomas*, 151 U.S. at 582, including the power "to exclude non-Indians from the reservation" and "the lesser power to place conditions on entry, on continued presence, or on reservation conduct[.]" *Merrion*, 455 U.S. at 144. These are federal rights, *see Cty. of Oneida*, 470 U.S. at 235–36 & n.6, and "are 'the supreme Law of the Land,'" *McGirt*, 140 S. Ct. at 2462 (quoting U.S. Const. art. VI, cl. 2). *See also Swinomish*, 951 F.3d at 1154 (referring to the "treaty-based federal common law that allows tribes to exclude non-Indians from Indian land"). The clear and only implication of Enbridge's argument is that the 1977 Treaty abrogated these rights. Such an argument is devoid of all merit.

The Supreme Court has laid down a bright-line rule as to what is required before a court may conclude that Congress has abrogated an Indian treaty right:

> Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so. *There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty*."

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202–03 (1999) (emphasis added) (citations omitted) (quoting *United States v. Dion*, 476 U.S. 734, 740 (1986)). *See also Oneida Nation*, 968 F.3d at 674 ("Congress may exercise this power to break a treaty, but it must do so clearly, not by inference or indirection."). In *Mille Lacs*, the Court found no clear evidence that a subsequent statute abrogated a treaty right because the statute "makes no mention of Indian treaty rights; it provides no clue that Congress considered the reserved rights of the Chippewa and decided to abrogate those rights when it passed the Act," and there existed no "legislative history describing the effect of the Act on Indian treaty rights." 526 U.S. at 203. The situation is exactly the same here: The Transit Treaty contains no mention of tribal treaty rights, and neither does the Senate Report that accompanied the Treaty's ratification. There is absolutely no indication that Congress considered the Band's reserved rights (or those of any other tribe) and intended to abrogate them when it approved the Transit Treaty.

Nor can *Garamendi* save Enbridge's argument. According to Enbridge, "[h]ere, the express foreign policy is far more compelling than in *Garamendi*. Rather than the unilateral presidential statements and agreements at issue in *Garamendi*, this case concerns a federal policy expressed through a ratified treaty." Enbridge Br. at 112–13. Enbridge has things exactly backwards.

Garamendi emphasized "the weakness of the State's interest[.]" *Garamendi*, 539 U.S. at 425. Here, by contrast, the Band's treaty-based federal right to exclude trespassers from its land

"is a hallmark of Indian sovereignty," *Merrion*, 455 U.S. at 141, and that its preservation is a paramount public interest of the United States is rendered beyond doubt by the exacting abrogation standard set forth in *Mille Lacs*. *See also, e.g., United States v. Michigan*, 534 F. Supp. 668, 669 (W.D. Mich. 1982) (granting injunction and referring to "the protection of [Indian] treaty rights" as an "overwhelming public interest").

Given the gravity of the federal policies underlying the Band's rights in its Reservation lands, Enbridge has provided this Court no basis to assume that the United States views them as subordinate to, or otherwise in interference with, its policies underlying the Transit Treaty. In *Garamendi*, the United States filed an amicus brief asserting that the state statutes at issue "directly interfere with the national government's authority over foreign affairs and foreign commerce." Brief for the United States as Amicus Curiae Supporting Petitioners at 1, *Garamendi*, 539 U.S. 396 (No. 02-722), 2003 WL 721754, at *1. Here, by contrast, the United States has expressed no such concerns with the Band's claims. While Enbridge vociferously trumpets statements from the Government of Canada, it can cite to not a single statement of our federal government siding with the Canadian position regarding Line 5, whether in the context of this case or of the dispute between Enbridge and the State of Michigan over Line 5's crossing under the Straits of Mackinac. The foreign affairs doctrine exists to safeguard the foreign policy of the United States, not of its neighbor to the north. *See Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 324 & n.22, 327 (1994) (finding no preemption of state tax on international corporations despite twenty foreign governments opposing tax as amici, in part because the Court could not "conclude that the foreign policy *of the United States*—whose nuances ... are much more the province of the Executive Branch and Congress than of this Court—is [so]

seriously threatened by California's practice as to warrant our intervention" (emphasis added) (alterations in original) (quotation marks and citation omitted)).

XI. The Band's Requested Remedies Are Not Barred by Laches.

Finally, Enbridge contends that the Band's requests for (1) profits-based restitution and (2) an injunction are "'subject to equitable defenses, including laches,'" Enbridge Br. at 126 n.82 (quoting *Cayuga*, 413 F.3d at 277 (applying *Sherrill*)), and that because the Band purportedly delayed in bringing this action to Enbridge's prejudice, those remedies are barred, *id*. at 126–27. The argument again lacks merit.

A. The Band's request for profits-based relief is not subject to laches.

As the Seventh Circuit has explained, "an accounting of the profits … against a nonfiduciary would normally be a suit at law and the relief sought therefore legal." *Reich*, 33 F.3d at 755–56. And the "[a]pplication of the equitable defense of laches in an action at law would be novel indeed." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 678 (2014) (quoting *Cty. of Oneida*, 470 U.S. at 244, n.16). *Sherrill* (like *Cayuga*) does not hold to the contrary. *See* 544 U.S. at 221 n.14 ("No similar novelty exists when the specific relief OIN now seeks would project redress … into the present and future."); *Cayuga*, 413 F.3d at 275 (same). The Band's damages claim seeks past profits and projects no redress into the future. The equitable doctrine of laches recognized in *Sherrill* accordingly does not apply.[27]

B. The Band's request for an injunction is not barred by laches.

The Band's request for an injunction does, of course, seek redress into the future—but not in a way that implicates the equitable considerations outlined in *Sherrill*.

[27] As demonstrated below, even if it did, Enbridge has no remote hope of meeting the standards for a laches defense under *Sherrill*.

First, the lands at issue are held in trust for the Band by the United States. As then-Judge Gorsuch explained in a similar context, "it is far from clear whether the doctrine of laches could be used to determine the fate of this territory[.]" *Ute Indian Tribe of the Uintah & Ouray Reservation v. Myton*, 835 F.3d 1255, 1263 (10th Cir. 2016) (Gorsuch, J.) (also describing *Sherrill* as "approving laches on a very different record where the land was sold to nontribal members"). Enbridge has cited no case applying laches to a tribe's possessory claim to its own trust land, and none exists.

Second, *Sherrill* did not involve a possessory land claim. The Second Circuit, in cases such as *Cayuga* and *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010), extended *Sherrill* to such claims. No other Circuit has followed the Second Circuit's approach, and it has instead been called into question. *See, e.g.*, *Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1350 (Fed. Cir. 2015) (the Second Circuit could "reconsider its laches jurisprudence en banc" or the Supreme Court could "reverse or modify" it).

Third, even assuming the Second Circuit's approach were controlling, Enbridge's argument fails in resounding fashion. Enbridge is aware of this and accordingly attempts a sleight of hand that is both obvious and futile. It cites *Cayuga* for the proposition that the laches defense recognized in *Sherrill* may be applied to the Band's claims, Enbridge Br. at 126 n.82, and then pivots entirely to traditional laches cases having nothing to do with Indian lands for the elements it must prove, *see id*. at 126, 129–30, 132. But as the Second Circuit has admonished, "the equitable defense recognized in *Sherrill* and applied in *Cayuga* does not focus on the elements of traditional laches[.]" *Oneida Indian Nation of N.Y.*, 617 F.3d at 127. This is because applying those elements to Indian land claims would be "inconsistent with established federal policy." *Cty. of Oneida*, 470 U.S. at 244 n.16. *Cayuga* viewed *Sherrill* as opening the

way for a limited exception to this rule, such that the laches defense recognized in *Sherrill*, "can, *in appropriate circumstances*, be applied to Indian land claims," *Cayuga*, 413 F.3d at 273 (emphasis added). And *Cayuga* was explicit about what those "appropriate circumstances" are:

> We are here confronted by land claims of historic vintage—the wrongs alleged occurred *over two hundred years ago*….
>
> ....
>
> ... Based on *Sherrill*, we conclude that the possessory land claim alleged here is *the type of claim to which a laches defense can be applied*….
>
> ....
>
> ... [T]he same considerations that doomed the Oneidas' claim in *Sherrill* apply with equal force here. These considerations include the following: "*[g]enerations have passed* during which *non-Indians have owned and developed the area* that once composed the Tribe's historic reservation," *Sherrill*, 125 S.Ct. at 1483; "*at least since the middle years of the 19th century, most of the [Tribe] have resided elsewhere*," *id.*; "the longstanding, distinctly *non-Indian character of the area and its inhabitants*," *id.*; "*the distance from 1805 to the present day*," *id.* at 1494; "the [Tribe's] *long delay* in seeking equitable relief against New York or its local units," *id.*; and "*developments in [the area] spanning several generations.*" *Id.*

Id. at 267–68, 277 (emphases added). *See also id*. at 275 ("possessory land claims *of this type* are subject to the equitable considerations discussed in *Sherrill*" (emphasis added)). *Cf. Sherrill*, 544 U.S. at 211 ("over 99% of the population in the area is non-Indian" and the Tribe "owns … less than 1.5% of the … total area"); *id*. at 221 (claim involves "territory last held by the Oneidas 200 years ago").[28]

[28] *See also, e.g.*, *Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163, 165–66 (2d Cir. 2014) ("the Stockbridge have not resided on the lands at issue *since the nineteenth century* and its *primary reservation lands are located elsewhere* (in Wisconsin); the Stockbridge assert a continuing right to possession based [wrongs that] *occurred long ago, during which time the land has been owned and developed by other parties subject to State and local regulation. Such claims* are barred by the *Sherrill* equitable defense." (emphases added)).

This Court, on summary judgment, has forcefully rejected a party's similar attempt to shoehorn its case into the *Sherrill* mold in terms that apply with equal force here:

> *Critically,* … in all three of these cases [*Sherrill* and two New York district court cases applying it] … the tribes each effectively *abandoned the reservations for significant periods of time—two hundred years* in the case of *City of Sherrill*. In contrast, the County utterly fails to develop a record demonstrating *even marginally analogous facts* at issue here…. [where] *the Red Cliff Tribe and its members owned significant portions of the Reservation for the entire, relevant period of time*.

Red Cliff Band of Lake Superior Chippewa Indians v. Bayfield Cty., 432 F. Supp. 3d 889, 898 (W.D. Wis. 2020) (Conley, J.) (citations and footnote omitted). *See also, e.g.*, *Penobscot Nation v. Frey*, 3 F.4th 484, 523 n.42 (1st Cir. 2021) (Barron, J., concurring in part) ("Maine's arguments based on the doctrines of laches … fail. Maine relies on [*Sherrill*], but the lands in that case had been out of tribal control for over 200 years."), *cert. denied*, No. 21-838, 2022 WL 1131375 (U.S. Apr. 18, 2022).

It is beyond genuine dispute that not one of the *Sherrill* factors even marginally applies here. Enbridge makes no claim (nor could it) that the subject lands have ever been under state jurisdiction or are predominantly non-Indian in character. The only non-Indian development of the subject lands implicated by the Band's claim is Enbridge's pipeline, which is subject to easements with express termination dates of June 2, 2013. Enbridge may have had expectations of staying beyond that date, but they were not *justifiable* expectations, *see Sherrill*, 544 U.S. at 215–16 ("justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction … merit heavy weight here"), particularly where it repeatedly acknowledged it was operating in trespass and subject to ejectment. *See, e.g.*, PPFF ¶ 60, Tinker Decl. ¶ 36 & Attach. II (ENB00023512) (the easements "are expired and the Band has the ability to hold Enbridge in trespass and likely require removal of the pipeline"); *id.* (ENB00034222)

("the easements … expired in 2013" and "the tribe can require Enbridge to remove" the pipeline). Indeed, the timing alone is fatal to Enbridge's argument. The parties entered mediation in June 2017, just four years after the easements expired. EPFF ¶ 87. *See Groves v. United States*, No. 16 C 2485, 2017 WL 1806593, at *6 (N.D. Ill. May 5, 2017) (discussing *Cayuga* and stating "the difference between a ten-year delay and a 200-year delay is one in kind, not of degree").

In sum, this is simply not a case where *Sherrill* even arguably has a shred of relevance. Enbridge's contention that summary judgment "must be denied" because "[t]here are material facts (that the Band presumably disputes), namely the Band's 'lack of diligence' and prejudice to Enbridge," Enbridge Br. at 126–27, is accordingly meritless. "[A] factual dispute is 'genuine' only if a reasonable jury could find for either party," and "disputed facts that are not outcome-determinative are not material and will not preclude summary judgment." *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 389 (7th Cir. 2010) (quotation marks omitted). Enbridge can surmount neither hurdle here. If it wishes to allege laches, then *Sherrill* is the relevant framework, and no trial is needed to conclude that Enbridge has "utterly fail[ed] to develop a record demonstrating even marginally analogous facts," *Red Cliff Band*, 432 F. Supp. at 898 (Conley, J.), necessary to invoke, much less prevail under, that framework.

XII. The Band Has Not Waived Any Arguments Regarding Enbridge's Affirmative Defenses and Is Entitled to Summary Judgment on All of Them.

Enbridge suggests that the Band has waived any arguments in opposition to Enbridge's assertion of laches and its other affirmative defenses because it did not address them in its opening brief, and therefore "triable issues" remain on all of them. Enbridge Br. 126–27 and n.84. The argument, which cites to no authority, flips the law on its head. This Court has stated that "'when the plaintiff moves for summary judgment on an entire claim, it is *necessarily also*

moving for summary judgment on *any* affirmative defenses to that claim.'" *CAP Servs., Inc. v. Schwartz*, No. 16-cv-671-wmc, 2017 WL 6209918, at *6 (W.D. Wis. Dec. 7, 2017) (Conley, J.) (emphasis added) (quoting *United Cent. Bank v. Wells St. Apartments, LLC*, 957 F. Supp. 2d 978, 987 (E.D. Wis. 2013), *aff'd sub nom. United Cent. Bank v. KMWC 845, LLC*, 800 F.3d 307 (7th Cir. 2015)). *See also, e.g.*, *Frerck v. Pearson Educ., Inc.*, 63 F. Supp. 3d 882, 886 (N.D. Ill. 2014) ("[W]hen a plaintiff moves for judgment … he implicitly contends there is no genuine dispute about any fact material to the defendant's affirmative defenses."). This is for good reason. Enbridge raised *twenty-nine* affirmative defenses. As Judge Adelman has explained under similar circumstances, "it would be wasteful to require a plaintiff to include in its summary-judgment opening brief an argument directed to every affirmative defense that the defendant may have listed in its answer." *United Cent. Bank*, 957 F. Supp. 2d at 988.

The Band moved for summary judgment on the entire liability and remedial components of its trespass and unjust enrichment claims (save only for the specific amount of profits owed by Enbridge). Enbridge was accordingly on notice of the need to support its affirmative defenses with evidence and argument. Yet the majority of those affirmative defenses go unmentioned in Enbridge's response, and those that are mentioned (other than consent and laches) appear in a conclusory, four-sentence footnote without citation to authority. Enbridge Br. at 126 n.84. Enbridge fails to cite a single fact or other evidence in support of any of them. *See id*. This Court has left no doubt as to the proper disposition of the affirmative defenses under such circumstances:

> It is … incumbent on a defendant that wishes to prevent entry of summary judgment on the claim to come forward with evidence showing the existence of a genuine factual dispute concerning an affirmative defense that, if ultimately successful, would defeat the claim. If the defendant does not come forward with such evidence, and the plaintiff otherwise shows that it is entitled to judgment as a matter of law on its claim, then the

affirmative defense is extinguished.

Schwartz, 2017 WL 6209918, at *6 (quoting *United Cent. Bank*, 957 F. Supp. 2d at 987–88). *See also Design Basics, LLC v. Best Built, Inc.*, 223 F. Supp. 3d 825, 837 (E.D. Wis. 2016) ("Defendants have the burden of proof on their affirmative defenses, and summary judgment is the time for the party with the burden of proof to show it has some evidence such that a jury could find in its favor."); *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164, 1167 (S.D. Ind. 1992) (summary judgment motion places non-movant "on notice that *all* arguments and evidence opposing a finding of liability must be presented").

Enbridge's affirmative defenses of consent and laches should be rejected for the reasons elaborated upon above. Because Enbridge has likewise failed to raise a genuine issue of material of fact regarding its other affirmative defenses, the Band is entitled to summary judgment on all of them. *See Schwartz*, 2017 WL 6209918, at *6 (Conley, J.) (where party pled twenty affirmative defenses but raised only three at summary judgment, "[t]he other defenses are, therefore, waived"); *Nichols v. Mich. City Plant Planning Dep't*, 755 F.3d 594, 600 (7th Cir. 2014) ("The non-moving party waives any arguments that were not raised in its response to the moving party's motion for summary judgment.").

CONCLUSION

For the foregoing reasons, the Band respectfully requests summary judgment on all the claims encompassed in its motion for partial summary judgment and for summary judgment on Enbridge's counterclaims.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 26, 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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