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' RESPONSE TO ENBRIDGE'S BENCH MEMORANDUM REGARDING THE TRANSIT TREATY

INTRODUCTION

Enbridge uses its Bench Memorandum ("Enb. Transit Treaty Mem."), Dkt. #593, to press its preferred remedy for its years of conscious trespass on the Band's lands: the ability to remain in trespass on those lands for a further, indefinite number of years in exchange for small monetary payments while it pursues a rerouting process whose duration and outcome are both highly uncertain. In response, the Band first outlines how fundamental principles of equitable relief and the protection of Tribal treaty and property rights require the rejection of Enbridge's proposed remedy—which would amount to a condemnation of Tribal lands flatly proscribed under federal law—in favor of the shutdown of Line 5 on the Band's lands on a fixed and circumscribed schedule consistent with the economic evidence adduced in this case. The Band then explains how the 1977 Transit Treaty, and Canada's out-of-court statements regarding the shutdown of Line 5, do not operate to alter this conclusion. Finally, the Band summarizes the key evidence regarding the time necessary for the markets to adjust to a Line 5 shutdown, and contradicting Enbridge's overconfident claims that a reroute can be accomplished in prompt fashion.

ARGUMENT

I. Established Equitable Principles Require the Shutdown of Line 5 on the Band's Reservation on a Circumscribed Schedule.

A. Enbridge's Presence on the Band's Lands Represents an Ongoing and Serious Violation of Federally Protected Rights.

The Court has indicated that it is giving serious consideration to an equitable remedy consisting of a permanent injunction against the continued operation of Line 5 on the Reservation, preceded by a period of delay before the injunction takes effect—with the question being how long and how definite that period of delay should be. Traditional principles of equity

should guide and bound that determination, among the most fundamental of which is this: "'Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'" *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 889 (7th Cir. 1996) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

Here, it is settled that Enbridge is engaged in an ongoing invasion of the Band's federally protected rights, an invasion of sufficiently serious dimension as to necessitate an injunction against Enbridge's continued presence on the Reservation:

> [T]he Band has submitted ample evidence to show that an injunction is necessary to prevent irreparable harm, and that remedies available at law, such as monetary damages, would be inadequate compensation…. This is particularly true here, where the harm of a continuing trespass would dispossess the Band of its *sovereign* right to control its own land. For the same reason, interference with the Band's sovereignty cannot be adequately remedied with monetary damages.

Op. and Order ("Op."), Dkt. #360, at 40 (citation omitted). It is further settled that compelling public interests will be served by granting the injunction, *see id*. at 41 ("[T]he Band persuasively argues that the public interest is served by protecting the Band's treaty rights, sovereignty and rights of self-government, as well as advancing Congress's policy choices as articulated in the Nonintercourse Act's prohibition on unconsented conveyances of Tribal land."); and that no private interests of Enbridge weigh in favor of delaying it, *see id*. at 40 ("[T]he balance of hardship between the parties weighs heavily in the Band's favor since Enbridge's conduct was willful."). Instead, the purpose of the delay would be to avoid the "economic consequences" and "public policy implications" of an immediate injunction. *Id.* at 41. *See* Closing, Rough Trial Tr. ("Tr.") (11/01/22 a.m.) at 7:5–7 ("I'm struggling to find something which both is respectful of the Tribe's rights but also allows some reasonable transition to an alternative[.]").

B. Any Delay in Redressing Enbridge's Ongoing Violation of the Band's Federally Protected Rights Must Be No Longer Than Necessary To Allow for Appropriate Market Adjustments to the Shutdown of Line 5.

In considering how long and how finite the delay in according the Band equitable relief should be, it is critical to remember what that delay amounts to—an affirmative prohibition against the Band's exercise of its right to exclude, which is grounded in the Constitution, *see* U.S. Const. art. I § 8, cl. 3; *id.* art. II § 2, cl. 2; in the Treaty with the Chippewa, 10 Stat. 1109 (1854); and in federal statutes, *see* 25 U.S.C. §§ 177, 324. The delay would also operate in effect against the United States, which like the Band has a right to exclude trespassers on Indian lands in the exercise of its trust responsibility over the same. *See* 25 C.F.R. § 169.410 ("If a grantee remains in possession after the expiration … of a right-of-way … we may treat the unauthorized possession as a trespass …. [and] take action to recover possession … and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action."). In that sense, the remedial package contemplated by the Court would amount to two injunctions, a permanent one against Enbridge preceded by a temporary one against the Band and the United States. And as this Court has made clear, the temporary injunction would allow Enbridge's conscious trespass on the Reservation to continue. *See* Tr. (11/01/22 a.m.) at 47:16–17 ("THE COURT: If Enbridge stays [as a result of the Court's equitable remedy in this case] … it would be a conscious intentional trespasser.").

Any period of delay must also be assessed against Congress's evaluation of the public interest considerations implicated by this case. As the Seventh Circuit has explained, "[w]hen Congress passes a statute, it weighs the competing public interests that would be served." *Michigan v. U.S. Army Corps of Eng'rs*, 758 F.3d 892, 901 (7th Cir. 2014). In the 1948 Right of Way Act, which governs pipeline rights of way across Indian lands, Congress provided for

numerous circumstances under which "[r]ights-of-way over … lands of individual Indians may be granted without the consent of the individual Indian owners," while flatly prohibiting "a right-of-way over and across any lands belonging to a tribe … without the consent of the proper tribal officials." 25 U.S.C. § 324. It has likewise provided that lands of individual Indians "may be condemned for any public purpose" by pipeline operators, 25 U.S.C. § 357, but again has proscribed any such outcome for tribal lands, *see*, *e.g.*, *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1104 (10th Cir. 2017) ("federal law does not permit condemnation of tribal land").[1] This prohibition fully extends to lands in which a tribe holds fractional interests. *See*, *e.g.*, *Enable Okla. Intrastate Transmission, LLC v. 25 Foot Wide Easement*, 908 F.3d 1241, 1245 (10th Cir. 2018).[2]

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[1] Enbridge's "public interest" caselaw, Enb. Transit Treaty Mem. at 5–6, is not to the contrary. Neither *Guardian Pipeline, L.L.C. v. 295.49 Acres of Land*, No. 08-C-0028, 2008 WL 1751358 (E.D. Wis. Apr. 11, 2008), nor *Williams Pipe Line Co. v. City of Mounds View*, 651 F. Supp. 551 (D. Minn. 1987), nor *Tex. E. Transmission Corp. v. Giannaris*, 818 F. Supp. 755 (M.D. Pa. 1993), involved Indian lands, and Enbridge's citation to them demonstrates just how little cognizance it has of the public interest considerations involved in the protection of tribal land rights.

[2] The significance of the rights implicated here is no lesser because other parcels along the right-of-way, including those across thirteen tribal trust parcels, have easements lasting longer than those the Band decided not to renew when they expired in 2013. Tribes possess the inherent authority to make sovereign policy decisions in the face of new information. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (holding tribe had power to impose new tax on companies with which it had signed leases decades earlier, and such power derived from its sovereign authority both to control economic activity and to exclude non-Indians from tribal land). Especially in the wake of a series of pipeline ruptures into rivers, including the devastation of the Kalamazoo River caused by the release of oil from Enbridge's Line 6B, the Band's decision not to renew the easement for Line 5 was a quintessential exercise of its sovereign authority. *See* Trial Ex. 400 at PDF p. 1 (referencing several oil spills as sources of concern supporting the Band's decision).

The Band reacquired its interests in the trespass parcels pursuant to a federal law the very purpose of which is to allow tribes to restore their sovereign land base. *See* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 102, 114 Stat. 1991, 1992 (2000) ("It is the policy of the United States … to consolidate fractional interests in a manner that enhances tribal sovereignty[.]"); *see also* 25 U.S.C. § 2201(b)(1) (requiring Secretary of Interior to pursue same in implementing the Act). The Band owns a majority share in each of

Given that the period of delay in effectuating a shutdown of Line 5 would constrain the rights of the Band and the United States in protecting tribal lands, and given that Congress has decided that public interest considerations tip heavily in favor of those rights in the specific context of pipelines, the period of delay should be no longer than necessary for the market to make adjustments to a Line 5 shutdown. Beyond that point, "the public interest would not be disserved by a permanent injunction," *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), and there would accordingly be no justification for the suppression of the Band's federally protected rights and the ability of the United States and the Band to vindicate them. As detailed below, this means that far from tying the shutdown of Line 5 to a rerouting process of entirely uncertain duration and outcome, that shutdown should be set for a period of eighteen months from the Court's decision, which would not only provide the market with the time to make the necessary adjustments but would provide it with a highly beneficial incentive to do so.

C. Enbridge's Proposal That the Band Be Forced To Accept "Compulsory" Payments in Exchange for the Unconsented Use of Its Land Would Amount to an Illegal Condemnation.

Enbridge proposes instead to make payments to the Band for the period of time it remains in conscious trespass on the Reservation. The imposition of this "compulsory contractual relationship," Defs.' Bench Mem. ("Enb. Remediation Mem."), Dkt. #589, at 11, on the Band finds no support in the law. Enbridge cites two Federal Circuit cases applying the Patent Act and upholding ongoing royalties for future infringement. *See Paice v. Toyota Motor Co*., 504 F.3d

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those twelve parcels, a greater than seventy-five percent share in eight of them, and a seventy-seven-percent overall share in them. Trial Ex. 1456 at PDF pp. 15–16. That much of the pipeline right-of-way consists of non-Indian owned fee parcels surely cannot be held against the Band, which lost the land as the result of federal policies discredited long ago. Indeed, exemplary of the challenges the Band faces in this regard, Enbridge itself is now owns property on the Reservation, including along the right-of-way. *See, e.g.,* John McKay Testimony, Tr. (10/26/22 a.m.), at 62:10-63:8, 69:5-20.

1293 (Fed. Cir. 2007), and *Lucent Techns., Inc. v. Gateway, Inc*., 580 F.3d 1301 (Fed. Cir. 2009). But the Federal Circuit regards ongoing royalties awarded under the Patent Act as a remedy at law. *See*, *e.g.*, *ActiveVideo Networks, Inc. v. Verizon Commcns, Inc.*, 694 F.3d 1312, 1340 (Fed. Cir. 2012) (finding that the "infringement can be adequately remedied by an ongoing royalty" and therefore the district court's conclusion "that no adequate remedy at law exists is clearly erroneous"); *id*. at 1342–43 (repeatedly referring to ongoing royalty as "damages"). This Court has already determined that "interference with the Band's sovereignty cannot be adequately remedied with monetary damages," Op. at 40, and tellingly, Enbridge spends not one word attempting to explain how the Patent Act cases have any relevance here.

United States v. Imperial Irrigation District, 799 F. Supp. 1052 (S.D. Cal. 1992), likewise provides Enbridge no comfort. There, the United States brought suit on behalf of a tribe seeking an injunction (for possession) and damages from innocent trespassers on tribal land. The court denied the injunction and instead awarded past and future damages. While significant factual distinctions exist, the fundamental point here is that the Ninth Circuit has rejected Enbridge's reading of *Imperial Irrigation*. In *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998), the United States and numerous tribes sued the State of Washington seeking a declaration of the tribes' rights to harvest shellfish from privately owned tidelands under their treaties. "[T]he district court declared that 'it is incumbent upon this Court to use its equitable powers to effect a balance between the Tribes' Treaty shellfishing right and the [shellfish] Growers' and [private property] Owners' interest in the peaceful enjoyment and/or commercial development of their property,'" and relied on *Imperial Irrigation* for this purpose. *Id*. at 650.

But the United States (and the tribes) argued forcefully that *Imperial Irrigation* does not "support[] the proposition that Indian treaty rights may be diminished by equitable factors."

Brief for the United States, Appellee/Cross-Appellant, *United States v. Washington* (Nos. 96-35014, 96-35082, 96-35142, 96-35223, 96-35196, 96-35200), 1996 WL 33455966, at *91. The Ninth Circuit agreed, noting that none of the cases relied on by the district court, *Imperial Irrigation* included, "involve the use of equitable considerations" to diminish treaty rights, and "[a]t best, they condone the use of equity as a tool to calculate damages." *Id*. Enbridge's lone Indian law case, then, does nothing to salvage its arguments.

What Enbridge is in fact proposing is plainly an order of condemnation. But "[a] Court of equity cannot … create a remedy in violation of law," *I.N.S. v. Pangilinan*, 486 U.S. 875, 883 (1988) (citation omitted), and "federal law does not permit condemnation of tribal land," *Barboan*, 857 F.3d at 1104, including condemnation of an easement for a pipeline on lands in which a tribe holds fractional interests, *see*, *e.g.*, *Okla. Intrastate Transmission*, 908 F.3d at 1245. Enbridge's suggestion of monetary payments in lieu of an order requiring it to leave the Reservation on an appropriately circumscribed timetable should be squarely rejected.

D. Enbridge's Suggested Annual Payments Would Only Create an Incentive for Indefinite Trespass.

The legal infirmity of Enbridge's proposed condemnation scheme is only confirmed by the entirely inadequate nature of the payments it proposes. Far from deterring intentional trespass in this case or future ones, those payments would plainly incentivize such behavior. Enbridge proposes that it pay an "appropriate fee" to continue operating on the Reservation until relocation is complete, and that it pay a "higher fee" if its failure to diligently pursue the reroute causes the project to be delayed beyond the next five years. Enb. Transit Treaty Mem. at 7. During closing argument, Enbridge suggested that the Court select the "appropriate fee" from three possible numbers: the annual average under Dr. Olive's pro rata calculations ($252,608 per year), the annual average under Mr. Leistra-Jones's pro rata calculations (up to $562,959 per

year), and the annual value of an easement across all twelve parcels according to Enbridge's expert Ed Steigerwaldt ($4,300 per year). *See* Tr. (11/01/2022) Tr. at 45:15–47:25 (citing Updated Expert Report of Dr. Laura T.W. Olive, Dkt. #577, at PDF p. 24 (Table 9); Expert Rebuttal Report of Dan Leistra-Jones ("Leistra-Jones Report"), Dkt. #583, at PDF p. 70 (Table E-3); Expert Steigerwaldt Reports at Dkt. ##502–513).

Enbridge went so far as to suggest that the fair-market-value measure of $4,300 per year is the most appropriate of those measures, because "at this point Enbridge would be staying—under the Court's order, it wouldn't be a conscious trespasser." Tr. (11/01/22 a.m.) at 47:3–9.[3] Enbridge further suggested that any escalated fee would be "punitive," *id.* at 48:6–9, and thus would need to be capped at ten times the "actual damages" of the fair market value.[4] In essence,

[3] Enbridge's argument is an astonishing one. It reduces to the proposition that, as the consequence for consciously trespassing on tribal land since 2013, the Court has blessed Enbridge with the right to continue using tribal land for no more than the fair rental value of an easement. Such small payments would be deficient for any period of the trespass, given that fair market value is the proper measure of damages for *unintentional* trespass, whereas Enbridge has been *consciously* trespassing. *See* Op. at 32 ("Enbridge could neither have reasonably believed that the 1992 Agreement, nor that its incomplete renewal applications permitted Enbridge to continue operating on the allotment land owned by the Band. Instead, on this record, a reasonably jury would have to find that Enbridge was a conscious trespasser from whom the Band can recover a profits-based remedy."). And the brazen incorrectness of Enbridge's insistence on paying so little while earning over $150 million in profits from Line 5 each year is further underscored by the Court's holding that it is only the *public* interest, not any valid interest by *Enbridge* in further profiting from its pipeline while trespassing, that is the basis for allowing Line 5 to remain open. *See* Op. at 40–41.

[4] Enbridge's suggestion that future payments of more than ten times the starting payment would be improperly "punitive" is entirely contrary to the law. The Court is contemplating an equitable remedy, not damages. Disgorgement—not damages—provides the proper framework, and the remedy of disgorgement is based on the wrongful gain of the defendant, not the harm suffered by the plaintiff. As the Restatement explains, disgorgement "is not a punitive remedy" because, even when a wrongdoer is required to fully disgorge the gains resulting from its wrongdoing, the wrongdoer is "left in the position [it] would have occupied had there been no misconduct" and thus the remedy "imposes no net loss on the defendant." Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. k (2011). Accordingly, here there would be no punitive remedy—let alone an improperly large punitive remedy—unless the Court were to require that each year

Enbridge insists that it would be appropriate for it to pay only $4,300 per year to continue operating a trespassing pipeline that generates over $150 million dollars in after-tax net income (excluding depreciation) each year, *see* Leistra-Jones Report at PDF p. 49, and that, if the reroute is further delayed, it should have to pay at most $43,000 per year.

Enbridge's suggested remedy would do the exact opposite of what a remedy here should accomplish. Instead of creating an incentive for Enbridge to leave the Reservation and for the market to develop alternatives to the trespassing pipeline, Enbridge's suggested remedy would give Enbridge an incentive to remain indefinitely. As Mr. Leistra-Jones explained (using numerous conservative assumptions, including completion of the shortest possible reroute), Enbridge benefits by more than twenty million dollars each year simply by not spending money on the construction of the reroute. *See* Leistra-Jones Report, at PDF pp. 22–27 (calculating that Enbridge would gain $272 million by constructing the reroute in 2024 instead of 2013 and would gain $296 million by constructing the reroute in 2025 instead of 2013). Thus, under Enbridge's preferred approach, each year spent *not* constructing the reroute would be a boon: tens of millions of dollars of gains based on the time value of money of not spending on construction, in exchange for the minimal payments it proposes.[5] As was true in the disgorgement phase of this case, Enbridge has not even attempted to explain how its proposed monetary remedy would provide *any* deterrence against further trespass on tribal land.

* * *

Enbridge disgorge more than approximately $150 million of profit it earns each year by operating Line 5 in trespass.

[5] Evidence presented at trial establishes that Enbridge employees have been well aware of the financial benefit of delaying the reroute and even engaged in "assessing cost savings benefits possible through delay scenarios." Trial Ex. 376.

In sum, under well-settled principles any delay in effectuating the shutdown of Line 5 should be tightly tethered to that period of time necessary for the market to make appropriate adjustments. Public interest considerations in no way justify the open-ended suppression of the Band's rights proposed by Enbridge. And as discussed in the next section, nothing about the 1977 Transit Treaty or Canada's public pronouncements alters this conclusion.

II. Neither Canada's Out-of-Court Pronouncements Nor the 1977 Transit Treaty Should Inform This Court's Equitable Determination.

Enbridge seeks to marshal various out-of-court statements by the Canadian government, as well as the *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 ("1977 Transit Treaty"), in support of its position that this Court lacks the authority to enjoin the operation of Line 5, no matter how unlawful or unsafe that operation may be. Neither the statements nor the treaty serve as an appropriate guide to the Court's equitable decision-making.

A. Statements from the Canadian Government Cannot Substitute for the Record in this Case.

Enbridge invites this Court to adopt wholesale Canada's out-of-court statements concerning the economic impacts of a Line 5 shutdown, *see* Enb. Transit Treaty Mem. at 3–5, even though the scope of those impacts was the subject of extensive record development at trial. While the international negotiations (and potential arbitration) to follow may not be subject to the rules of evidence, this litigation is, and the Court's exercise of equitable discretion must be tied to the record developed in this case. *See e360 Insight v. Spamhaus Project*, 500 F.3d 594, 604 (7th Cir. 2007) (reversing permanent injunction and holding "the record should reflect an exercise of discretion based on the evidence and the applicable legal standard" (citation omitted)); *Betco Corp. v. Peacock*, No. 14-cv-193-wmc, 2015 WL 856603, at *11 (W.D. Wis.

Feb. 27, 2015) (Conley, J.) (determining appropriateness of equitable remedy based on "the record before this court"), *aff'd sub nom. Betco Corp., Ltd. v. Peacock*, 876 F.3d 306 (7th Cir. 2017). *Cf. Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir. 2001) ("[P]arties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena.… [A]rbitrators are not bound by the rules of evidence." (first brackets in original) (quotation marks omitted)). Enbridge's positing of extra-record evidence as a basis for equitable decision-making at this stage of the case is simply an invitation to commit error.

Canada is not a party to this matter. Nor has it filed an amicus brief or any other submission with this Court. And because Canada's out-of-court statements bear on contested issues that were squarely joined at trial, they are not a proper subject of judicial notice. *See Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1083 (7th Cir. 1997) (holding that judicial notice of facts in a court record was reversible error because the facts were not "beyond reasonable dispute"); *United States v. Bychak*, Case No. 18-CR-4683-GPC, 2021 WL 734371, at *7 (S.D. Cal. Feb. 25, 2021) ("The Court simply cannot take notice of the facts contained in a foreign government's document like this, though it can notice the existence, date, name, and other adjudicative facts concerning the document."). Enbridge is attempting to get in through the back door what it could not accomplish otherwise, and this Court should not place weight on Canada's contentions given the existence of a record developed through the adversarial process.

B. Canada Has a Distinct Forum for Making its 1977 Transit Treaty Claims.

As this Court has noted, Closing, Tr. (11/01/22) at 44:22–45:12, Canada's claims under the 1977 Transit Treaty are subject to a separate process between the signatory countries, a process that Canada has already invoked. *See Statement by Minister Joly on Line 5 transit*

pipeline (Aug. 29, 2022) ("Joly Statement"), Dkt. #357-2. There is no warrant to Enbridge's suggestion that this Court should assume the outcome of that process, especially given both this Court's holding that the 1977 Transit Treaty does not abrogate the Band's treaty rights and the serious infirmities in Enbridge's reading of the 1977 Transit Treaty text.

The treaty provides that disputes "regarding the interpretation, application or operation of this Agreement" must be resolved by negotiation or, if that fails, by arbitration. 1977 Transit Treaty art. IX. This tracks the bedrock principle that treaty disputes are to be resolved between the parties. *See*, *e.g.*, *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 376 (7th Cir. 1985) ("Individuals aggrieved by the failure of nations to implement the Helsinki Accords will have to be content with the principle that [alleged] violations of international agreements are normally to be redressed outside the courtroom." (quotation marks omitted)). Enbridge and Canada have acknowledged the Article IX process to be exclusive and distinct from this litigation. "The bilateral negotiation process, the first step in dispute resolution under Article IX [of the treaty], is currently underway. As the Government of Canada explained, Article IX is the process that the United States and Canada selected for resolving disputes "'over the [Treaty's] interpretation, application, or operation'—including any measures to impede the transmission of hydrocarbons in transit pipelines such as Line 5." Enb. Transit Treaty Mem. 4 (quoting Joly statement). It is through that separate process that Canada can press its views, including about this Court's ultimate decision. Enbridge's efforts to have Canada's views regarding the treaty inform this Court's decision-making in the first place put the cart before the horse and are especially misplaced given that, as explained in the Band's Resp. to Defs.' Bench Memo., Dkt. #595, at 13–14, the 1977 Transit Treaty supplies Enbridge with no private right of action.

C. Reliance on the 1977 Transit Treaty Would Be Particularly Inapposite Here.

Enbridge's suggestion that the 1977 Transit Treaty should serve as the Holy Grail for this Court's equitable decision-making sails particularly wide of the mark given (1) this Court's holding that the 1977 Transit Treaty does not operate to abrogate the Band's treaty rights, including the right to exclude; and (2) Enbridge's failure to grapple with treaty text that clearly militates against its proposed construction. While the adjudication of the 1977 Transit Treaty's provisions is not before this Court, the clear infirmities in Enbridge's conclusory reading of that agreement counsel squarely against placing any weight on it as this Court settles on an appropriate equitable remedy.

1. In its summary judgment ruling, this Court held that the 1977 Transit Treaty cannot be read to abrogate the Band's rights under its 1854 Treaty, which include the power to exclude, as "a court cannot find that Congress abrogated Indian treaty rights absent unambiguous language to that effect, Op. at 42, and "[t]here is no such abrogation language in the 1977 Transit Treaty, as the Transit Treaty does not mention Indian treaties or treaty rights at all, let alone the 1854 Treaty with the Chippewa," *id.* at 43. If—under fundamental principles of federal Indian law and the separation of powers—the 1977 Transit Treaty cannot be read to affect the Band's treaty rights, it follows that it cannot be utilized to curtail those rights in settling upon injunctive relief.

Enbridge barely grapples with this point. In a footnote, it appears to challenge the Court's original holding through citation to three Ninth Circuit cases, Enb. Remediation Mem. at 10 n.7, but none supports its position. Indeed, the most recent flatly contradicts it. *See Swinomish Indian Tribal Comty v. BNSF Railway Co.*, 951 F.3d 1142, 1157–60 (9th Cir. 2020) (upholding the tribal right to enforce easement conditions against railway operator, and rejecting

operator's arguments that the Interstate Commerce Commission Termination Act ("ICCTA") repealed the Indian Country Right of Way Act or abrogated the tribal treaty right to exclude). The other two cases hold that the tribal power to exclude does not preclude the application of the Occupational Safety & Health Act to tribal business ventures. *See U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182 (9th Cir. 1991); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). However, as the Seventh Circuit has explained, those holdings were predicated on the fact that the tribal activities subject to regulation were "of a commercial or service character, namely lumbering [and commercial farming], rather than of a governmental character." *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 495 (7th Cir. 1993). They in no way suggest that the Band's sovereign authority to exclude a conscious trespasser has been abrogated by an agreement that says nothing on the subject.

2. Enbridge's treaty arguments begin and end with Article II, which provides that "[n]o public authority in the territory of either Party shall institute any measures … which would have the effect of impeding, diverting, redirecting or interfering with in any way the transmission of hydrocarbon in transit." Enbridge's analysis entirely overlooks Article IV, which provides that "[*n*]*otwithstanding the provisions of Article II* … a Transit Pipeline and the transmission of hydrocarbons through a Transit Pipeline shall be subject to regulations by the appropriate governmental authorities having jurisdiction over such Transit Pipeline … with respect to … [matters including] environmental protection[.]" 1977 Transit Treaty art. IV (emphasis added). As Article IV(2) makes clear, the term "regulations" encompasses "[a]ll regulations, requirements, terms and conditions."

The Band's 2017 Resolution, confirming its decision to "not renew its interests in the rights of way across lands within the Reservation" and to "take all action permitted under the law for Line 5 removal," Trial Ex. 400 at PDF p.2, falls squarely within the ambit of Article IV. That decision rested on the Band's environmental and resource protection concerns. It noted recent pipeline ruptures involving river crossings, *id.* at PDF p. 1 ¶ 6, and expressed grave concern with the devastation that a similar rupture would cause for the Band's watershed, resources, and very way of life. *See id.* at PDF p.1 ¶ 7 ("WHEREAS, surface water studies demonstrate that a crude oil spill at the Waabishkaa-ziibi (White River) or Mashkiigon-ziibi (Bad River) would be catastrophic to the health and economy of the Odanah, WI community; [and] river currents would impact coastal wetlands and wild rice beds, and traditional fishing areas in Anishinaabeg-gichigami (Lake Superior]."). It expressed these concerns to be so overwhelmingly compelling as to warrant the removal of the pipeline from the Bad River watershed. *See id.* at PDF pp. 1–2 (declaring that "WHEREAS, a pipeline break at these places will nullify our long years of effort to preserve our health, subsistence, culture and ecosystems … IT IS RESOLVED that … the Bad River Band … shall not renew its interests in the rights of way … [and] [t]ribal staff [will] take all action permitted under the law for Line 5 removal project development on Bad River lands and watershed.").

Moreover, the Line 5 reroute remains subject to outstanding state and federal permitting requirements, virtually all of which relate to environmental protection and preservation and are therefore valid regulations under Article IV. *See* Molina Testimony, Rough Trial Tr. ("Tr.") (10/31/22 p.m.) at 34:7–11 (confirming that the U.S. Army Corps of Engineers must perform an environmental analysis under NEPA), 7:11–18 (confirming that Wisconsin's DNR must complete environmental impact statements), 32:6–7 (confirming that Enbridge is seeking a

Section 404 permit under the Clean Water Act). Further, Article VI of the treaty likewise makes clear that Enbridge is not guaranteed the right to construct a replacement segment of Line 5 if the federal permitting agencies decline consent to its proposed route. 1977 Transit Treaty art. VI ("Nothing in this Agreement shall be considered as waiving the right of either Party to withhold consent, or to grant consent … for the construction and operation on its territory of any Transit Pipeline construction[.]").

Thus, far from running counter to the 1977 Transit Treaty, an injunction here would be fully consistent with Articles IV and VI of that treaty. Enbridge can no more write those provisions out of law than it can the Band's 1854 Treaty. Even were the interpretation of the 1977 Transit Treaty properly before the Court, nothing about it would counsel against the proper effectuation of the Band's rights through equitable relief.

III. A Shutdown Date Within Eighteen Months Will Properly Effectuate the Band's Rights While Enabling the Market to Develop Adequate Supply Alternatives.

The record developed at trial establishes that a fixed timeline of eighteen months for the shutdown of Line 5 on the Reservation will best address the Court's concern about the economic impacts of a shutdown while respecting the Band's rights with respect to the conscious trespass on its lands.

A. There Will Be No Significant Crude-Oil Shortfall If the Market Is Given Eighteen Months of Notice.

Both parties' experts agree that, within months and with minimal investments, market actors can put in place alternatives to reduce the crude oil shortfall stemming from a Line 5 closure from about 440,000 barrels a day to about 79,000. This reduction could be achieved utilizing the Line 78, reactivating rail facilities that already exist at several refineries, and returning to the pre-2016 status quo in Quebec of receiving crude oil mostly by waterborne

delivery—all of which are commercially viable alternatives according to Enbridge's own expert, Mr. Neil Earnest. *See* Emerson Testimony, Tr. (10/31/22 a.m.) at 69:20–70:1; Earnest Testimony, Tr. (10/28/22 p.m.) at 94:19–95:3, 96:4–8, 96:15–97:8, 98:6–11.[6]

The remaining shortfall of about 79,000 barrels per day could be fully eliminated by building a rail terminal capable of unloading one unit train per day in Sarnia. Mr. Brisben identified several locations where such facilities can be built adjacent to refineries in Sarnia, *see* Expert Rebuttal Report of Graham Brisben ("Brisben Report"), Dkt. #440, PDF pp. 38–40, at least one of which was conceded by Enbridge's expert William Rennicke to be viable, *see* Rennicke Testimony, Tr. (10/31/22 a.m.) at 81:18–23. Mr. Brisben explained how such facilities are typically built within sixteen months and how take-or-pay contracts allow these facilities to pay for themselves within two or three years. *See* Brisben Report at PDF p. 30; Brisben Testimony, Tr. (10/28/22 a.m.) at 65:8–22, 68:20–69:25. Enbridge provided no meaningful evidence to the contrary on these points. The one facility identified by Mr. Rennicke with a longer payoff period is not a mere rail terminal—it is a sprawling complex that includes a refinery, deep-water docks, numerous pipelines, and millions of barrels of storage. *See* Rennicke Testimony, Tr. (10/31/22 a.m.) at 90:18–20, 103:5–16; Brisben Testimony, Tr. (10/31/22 p.m.) at 85:5–17. And although Enbridge's counsel repeatedly referred to a $100 million price tag for rail unloading terminals, *see*, *e.g.*, Opening, Tr. (10/28/22 a.m.) at 22:3–9, Mr. Rennicke

[6] Both parties' experts agree that, even if Enbridge's pipelines upstream of Line 78 were to fill up, Line 78 would be apportioned more than enough crude oil to utilize its full capacity in the event of a Line 5 shutdown. *See* Brisben Testimony, Tr. (10/31/2022 p.m.) at 85:18– 86:9; *see also* Earnest Testimony, Tr. (10/28/2022 p.m.) at 91:23–92:13. And there is no cause for concern that crude oil will be stranded in western Canada if those pipelines fill up. As Mr. Brisben explained, rail is already regularly used to move hundreds of thousands of barrels per day out of western Canada when outbound pipelines reach max capacity. *See* Brisben Testimony, Tr. (10/31/2022 p.m.) at 88:23–89:10.

acknowledged that terminals can cost significantly less, *see* Rennicke Testimony, Tr. (10/31/22 a.m.) at 78:23–79:5 (acknowledging that a particular rail facility capable of unloading about half a unit train per day cost 34 million Canadian dollars). And even if $100 million is the correct price tag, it pales in comparison to the $450 million cost Enbridge has attributed to the reroute and the $500 million Enbridge has attributed to the tunnel it intends to build under the Straits of Mackinac. *See* Trial Ex. 209 at PDF p. 8; *see also* Earnest Testimony, Tr. (10/28/22 p.m.) at 90:2–10.

The profitability of importing crude oil by rail is demonstrated by the fact that, in recent years, rail has served as a means of transporting hundreds of thousands of barrels per day from Canada to the United States during times when pipelines have been full. *See* Brisben Testimony, Tr. (10/31/22 p.m.) at 88:23–89:10. Ontario refineries would be especially able to develop rail unloading capacity if given notice of a Line 5 shutdown, because their high margins allow them to make a profit even when they must pay significantly more to obtain feedstock. Barber Testimony, Tr. (10/31/22 a.m.) at 32:18–25, 33:21–34:6; *see also* Expert Report of Chris Barber, Dkt. #388-2, at PDF pp. 33–34; Earnest Testimony, Tr. (10/28/22 p.m.) at 88:9–14 (agreeing that refineries with higher margins are "less likely to reduce crude oil rates if … the delivery [cost] of crude oil goes up.").

Given the evidence of a breadth of options for obtaining crude oil from sources other than Line 5 and the financial incentive to do so, refiners will not face substantial hardship if given advanced notice before a shutdown. Enbridge's expert Mr. Earnest stated as much. Earnest Testimony, Tr. (10/28/22 p.m.) at 108:11–18 (acknowledging "greater options" for obtaining crude oil while asserting that "[p]ropane is the key concern").

Finally, even if there were some shortfall and certain refiners were to end up temporarily reducing their output, importation of refined product would serve as a backstop protecting consumers. Under Mr. Earnest's analysis, greater reliance on refined product would raise gas prices in Ontario by just four to six cents per gallon and in the Midwest by just half a cent to a cent per gallon. *See* Expert Report of Neil K. Earnest ("Earnest Report"), Dkt. #495, at PDF pp. 72–74.

B. There Will Be No Significant Propane or Butane Shortfall or Price Increase If the Market Is Given Eighteen Months' Advance Notice for a Line 5 Shutdown.

An eighteen-month warning would also give the market enough time to prepare alternatives for the approximately 80,000 barrels of propane and butane produced by natural gas liquids ("NGLs") transported each day by Line 5.

Production of propane has more than doubled in the United States since 2010. *See* Expert Report of Jill Steiner ("Steiner Report"), Dkt. #439, at PDF p. 20. As Mr. Earnest testified, Canada, which has also experienced a dramatic increase in propane production, *see id.* at PDF p. 26, already exports a substantial amount of its propane by rail to the United States, *see* Earnest Testimony, Tr. (10/28/22 p.m.) at 102:18–22.

Mr. Earnest testified that it would take less than six months to set up portable transloaders to receive enough propane via rail to replace all the propane currently fractionated in Superior, Wisconsin, and Rapid River, Michigan (which serves the Upper Peninsula), *see* Earnest Testimony, Tr. (10/28/22 p.m.) at 104:19–24. This would avert the price increases of over eight cents per gallon predicted by Mr. Earnest in a scenario in which those areas must rely on trucks to import replacement propane, *see* Earnest Report at PDF pp. 104–105. Alternatively, a single $5 million propane-by-rail distribution center could supply far more than the entire volume of

propane consumed in the Upper Peninsula. *See* Earnest Testimony, Tr. (10/28/22 p.m.) at 116:7–117:19 (acknowledging that a $5 million rail facility can enable receipt of enough propane to supply 35,000 homes); Trial Ex. 265 at PDF p. 6 (stating that 23,000 households in the Upper Peninsula use propane). There is already one such new rail facility supplying propane just outside of Superior. *See* Brisben Report at PDF p. 58.

As for replacing the propane and butane fractionated in Sarnia, there already exists substantial infrastructure in the surrounding areas that will allow for the delivery and storage of propane and butane. There are expansive salt caverns and tankage capable of storing propane and receiving propane by rail in Sarnia, St. Clair, and Marysville. Brisben Testimony, Tr. (10/31/22 p.m.) at 82:10–25; Brisben Report at PDF pp. 25, 51. The newly bidirectional Ambassador Pipeline enables movement of propane from storage in Marysville across the Lower Peninsula. Brisben Testimony, Tr. (10/31/22 p.m.) at 81:3–29; Brisben Report at PDF pp. 49–50. And, as Ms. Steiner pointed out, there is also the possibility of reconfiguring the Sarnia fractionator so that it can receive and fractionate the type of NGLs produced in the nearby Marcellus shale. *See* Steiner Report at PDF pp. 48–49.

Advanced warning of eighteen months would be sufficient *even if* Mr. Earnest were correct that it will be necessary to invest in new unloading capacity for close to the full 78,200 barrels of propane and butane produced daily in Sarnia. *See* Earnest Testimony, Tr. (10/28/22 p.m.) at 116:7–16 (suggesting that such investment would have to be made in either a unit train terminal or in a series of smaller terminals); Steiner Report at PDF p. 17 (Sarnia fractionator produces 57,300 barrels per day of propane and 20,900 barrels per day of butane). Mr. Earnest provided no basis for his opinion that it could take up to three years to build such infrastructure. *See* Earnest Testimony, Tr. (10/28/22) p.m.) at 104:25–105:6. As discussed above, even large

rail terminals capable of handling multiple unit trains take less than eighteen months to develop, and Enbridge offered no evidence to the contrary.

And we are not simply in the land of theory here. In June 2012, Kinder-Morgan announced its intention to reverse the 76,000 barrel-per-day pipeline—which served Wisconsin and other Midwest states—as early as June 2014, and approval of the reversal was subsequently granted by the National Energy Board of Canada in June 2013. *See* Earnest Report at PDF p. 37; Trial Ex. 226 at PDF pp. 1–2. When the pipeline was reversed in 2014, it had no discernable impact on the price of propane in Wisconsin. *See* Grainger Testimony, Tr. (10/31/22 a.m.) at 122:8–123:18; Trial Ex. 241. Wisconsin, which receives propane via numerous rail facilities throughout the state, *see* Earnest Report at PDF p. 34, has continued to experience lower propane prices than Michigan despite relying less on pipeline as a mode of delivery, *see* Steiner Report at PDF p. 42.

C. An Earlier Shutdown Will Spur Investments Useful to the Public.

Perhaps due to the robust evidence that the market *can* adjust within eighteen months, Enbridge relied heavily at trial on the argument that the possibility of the reroute will halt such adjustments in their tracks.

But that argument suffers from many flaws. First, as discussed above, many of the market adjustments can be effectuated within months and with little or no capital investment. Refineries faced with potential termination of supply would have no reason not to pursue such adjustments. As for investment in a rail facility, Mr. Brisben testified that such facilities can pay for themselves within two or three years and that there have already been recent investments in propane-by-rail facilities even in areas currently served by Line 5. *See* Brisben Testimony, Tr.

(10/28/22 a.m.) at 68:20–69:25 (explaining timeframe for paying off crude-by-rail terminal); Brisben Report at PDF p. 58 (mentioning propane-by-rail facility outside Superior).

Moreover, to the extent this argument should be given any weight, it counsels in favor of an *earlier* fixed shutdown date—one set no later than necessary to allow the market to adjust. The earlier the shutdown date, the greater amount of time between the shutdown and the possible in-service date of the reroute—and thus the greater expected value for capital investments in alternatives. Mr. Earnest said so himself. Earnest Testimony, Tr. (10/28/22 p.m.) at 122:16–19 ("[T]he longer the period of time [before a shutdown] is[,] the more likely the reroute would be done [by the time of the shutdown], and to that extent, that would reduce the incentive by industry to do anything.").

Furthermore, even if a Line 5 reroute might be completed at some point, the public interest will be served by spurring investments in additional, more diversified sources of supply. Michigan and Ontario's heavy dependence on Line 5 for crude oil and propane is treacherous. For example, Enbridge's witness Marlon Samuel testified as to the panic that Enbridge's refinery customers found themselves in when Line 5 was shut down for 8 days in 2020 as the result of an anchor strike in the Straits of Mackinac. The potential impact of such an abrupt disruption will be lessened with investment in other forms of hydrocarbon delivery.

IV. Enbridge's Proposal to Tie the Court's Remedy to Consummation of a Reroute Would Eviscerate the Band's Rights

A remedy here cannot be tethered to Enbridge's proposed rerouting plans without doing significant injury to the Band's federally protected rights. Enbridge's assertion that the Court heard any sort of reliable, let alone "uncontroverted," testimony that the reroute will be built or operational by a date certain, Enb. Transit Treaty Mem. at 6, is as specious as it is brazen. The Court was crystal clear that Ms. Julie Molina (Enbridge's current Senior Environmental Advisor)

could not opine as to how long a reroute might actually take. Molina Testimony, Tr. (10/31/22 p.m.) at 3:3–20 (THE COURT: "You can [ask it] a different way, but you're not going to ask this witness how long it's actually going to take. You can ask what the current schedule is … but you're not going to—I don't see how you can lay the foundation for this witness to opine as to the length of time."); *see also id*. at 21:4–22:10 (Molina testimony demonstrating uncertainty of any "worst-case" projection). The testimony that Enbridge cites for the proposition that there is uncontroverted testimony for a "worst-case" timeline was actually as follows: "A: *After the receipt of permits*, the schedule allocates 12 to 18 months for construction." Molina Testimony, Tr. 10/31/22 (p.m.) at 3:24–25 (emphasis added); Enb. Transit Treaty Mem. at 6 (citing same). This is the crux of the issue: No one, including Enbridge, can say with any certainty when—or if—Enbridge will receive the multitude of permits it requires to construct the Line 5 reroute. Therefore, any "worst case" opinion offered by Enbridge's current Senior Environmental Advisor may be grounded in hope and desire, but it is not grounded in reality.

Mr. Matthew Kindred, Enbridge's Supervisor of Environment and its 30(b)(6) designee on the topic of the "status and anticipated timing" for acquiring "all permits and approvals from relevant government agencies necessary to complete the Reroute," Trial Ex. 416 at PDF p. 5 (30(b)(6) Deposition Notice, admitted by Pl.'s List of Exs. to be Admitted Via Dep. Designation, Dkt. #581), was candid on this topic. He acknowledged that Enbridge was not guaranteed to receive key permits and approvals required for the reroute. *E.g.*, Kindred Dep. Tr., Dkt. #529, at 107:21–108:5 (CWA § 404 Permit), 111:19–112:8 (CWA § 401(a)(2)). Notwithstanding Ms. Molina's testimony that Enbridge requires only three permits for the reroute, Tr. (10/31/22 p.m.) at 6:5–11, 25:12–16, the uncontroverted evidence shows that Enbridge cannot move forward without a multitude of permits and other agency approvals, *id*. at 28:2-23, 29:12-16; Trial Ex.

341 (Enbridge application to Wisconsin Department of Natural Resources ("WDNR")) at PDF pp. 22–23; Trial Ex. 350 (WDNR permit tracking website) at PDF pp. 2–4; Ex. 351 (Army Corps Public Notice) at PDF p. 10. And the uncontroverted testimony shows that Enbridge has "not received permits yet." Molina Testimony, Tr. (10/31/22) at 31:2–5; 32:21–33:3.

The testimonial and documentary record also reflects that Enbridge faces an uphill battle to obtain these various permits and approvals. *E.g.*, Molina Testimony, Tr. (10/31/22 p.m.) at 36:1–38:9 (examples of legal requirements); Trial Ex. 351 at PDF p. 7 (range of alternatives must include "[s]ystems alternatives including switching to another existing pipeline, construct a new pipeline, and alternatives modes of transport including trucks, rail cars, and barges"); *id*. at PDF pp. 11–12 (Corps must consider public interest factors). For instance, while Enbridge acknowledges that the Corps may only approve the "least environmentally damaging practical alternative" ("LEDPA") and asserts that its proposed reroute is the LEDPA, Molina Testimony, Tr. (10/31/22 p.m.) at 14:10–13, EPA has a decidedly different view, *see id*. at 38:12–40:2; Trial Ex. 353 at PDF p. 2 (EPA disagrees that Enbridge's proposed reroute is the LEDPA). EPA has also informed the Corps that the proposed reroute "'**will** result in substantial and unacceptable adverse impacts' on the Bad River and the Kakagon-Bad River Sloughs wetland complex," which EPA has identified as aquatic resources of national importance (ARNI). Trial Ex. 356 (EPA's "will result" letter) (emphasis in original); Trial Ex. 353 (EPA's "may result" letter and reasoning). What EPA says on this score matters because EPA's conclusions subject the proposed project to the Section 404(q) Memorandum of Agreement between the Army Corps and EPA, setting the stage even for a potential CWA Section 404(c) process. *See* Molina Testimony, Tr. (10/31/22 p.m.) at 40:10–41:11; Trial Ex. 435 (MOA). As Ms. Molina admitted,

it is a "rare" step indeed for EPA to invoke these processes, Molina Testimony, Tr. (10/31/22 p.m.) at 41:12–22, 43:4–9, suggesting the magnitude of potential harm from the Line 5 reroute.

Other federal agencies, like the National Park Service, have likewise expressed significant concern in both the Corps' Section 404/Section 10 scoping and WDNR's Environmental Impact Statement processes. Trial Exs. 348, 354 (expressing concern over oil spill reaching the Apostle Island National Lakeshore on Lake Superior). Overall, the proposed Line 5 reroute project has engendered an extraordinary level of public interest and comment, not only from federal agencies but also from numerous tribes and environmental NGOs. Trial Ex. 350 (indicating public commenters and that over 32,000 public comments were received); Trial Ex. 347 (EPA comments to WDNR); Molina Testimony, Tr. (10/31/22 p.m.) at 51:4–7, 51:18–24. And internally, at least, Enbridge is anticipating contested case hearings and litigation if permits ever are issued for the reroute. *E.g.*, Trial Ex. 331 at PDF p. 3; Trial Exs. 370, 371 at PDF pp. 6–8.

Moreover, as the record demonstrates, Enbridge's own history of inaccurate in-service date ("ISD") projections for the proposed forty-one-mile reroute and recent history of delay—and even abandonment—of other Enbridge proposed pipeline projects shows that little weight should be afforded Enbridge's self-serving testimony at trial. Enbridge's ever-shifting projections for the Line 5 reroute ISD from 2015 to today belies any unfounded "worst case" opinions offered. Trial Ex. 333 (summary depicting Enbridge ISD projections from 2015 to 2022 for Line 5 reroute). Enbridge's practice of establishing external timelines for the Line 5 reroute project that it shares with regulators and the public while separately maintaining its own internal timelines for the same project further calls into question the veracity and accuracy of such testimony. *E.g.*, Trial Ex. 331 at PDF pp. 2–3 (external and internal timelines). Finally,

Enbridge has experienced years-long delays beyond its projected ISDs for other pipeline projects, and the company has even been forced to abandon projects entirely for its inability to secure environmental permitting. Trial Ex. 336A (significant delays in Line 3 Replacement, abandonment of Sandpiper Pipeline and Northern Gateway Pipeline); Ploetz Dep. Tr., Dkt. #564, at 32:3–12 (stating "not all the permits were obtained" for Sandpiper pipeline project), *id*. at 48:22–50:5 ("To assume what happened on Sandpiper and Line 3 isn't the new norm, and was likely to happen here, seems naive of those in management."). In short, in the words of Enbridge's former Senior Environmental Advisor, Enbridge's projections reflect "more optimism than realism."[7] Ploetz Dep. Tr. at 47:4–5); *id*. at 10:14–12:8, 12:13–13:2), 158:14–23) (positions held). And such self-serving optimism supplies no appropriate guide for the determination of the appropriate equitable remedy in this case.

CONCLUSION

For the foregoing reasons, the Band urges the Court to reject Enbridge's incorrect invocation of the 1977 Transit Treaty and to adopt an equitable remedy that vindicates its federally protected rights while accounting for the Court's public interest concerns.

[7] *See also* Sara Ploetz Dep. Tr. at 44:15–17) (stating "[w]hile it's good to be positive, turning a blind eye to reality isn't good either" in relation to Enbridge's approach to project timeline development); *id* at 46:1–5) ("Q: So were you saying that Enbridge bases its decisions on environmental permitting timelines that are not always realistic? A. Potentially, yeah. I mean, there were instances where it seemed that way."); *id*. at 76:4–24, 77:3–21) (acknowledging uncertainty and potential for delay in environmental permitting process); *id*. at 81:19–25 (Enbridge considers public comment periods as a potential source of delay).

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Respectfully submitted,

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