Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Reservation v. Enbridge Energy Co., ___ F. Supp. 3d ___, 2022 WL 4094073 (W.D. Wis. Sept. 7, 2022)

- **Holdings:** Tribe was granted summary judgment in the liability phase of a suit as to trespass and unjust enrichment claims related to an oil pipeline crossing tribal trust allotments, but the energy company was granted summary judgment as to state law nuisance, ejectment, and tribal regulatory authority claims. The energy company's motion for summary judgment as to a federal-common-law nuisance claims was denied because questions of material fact existed as to the imminence of the claimed environmental injury and the adequacy of proposed abatement measures. Injunctive relief requiring the company to remove the pipeline was withheld subject to the parties' consultation over the court's suggested remedy.
- **Summary:** Defendant Enbridge Energy Co. operates a pipeline that transports Canadian oil and natural gas into the United States. Twelve miles of the pipeline, or 1.9% of its total length, crosses the Bad River Reservation. When constructed in 1953, the pipeline route included parcels held in trust for the Plaintiff Band or its members by the United States, lands owned in fee by the Band or its members, and lands owned in fee by non-Indians. The Bureau of Indian Affairs issued a 20-year lease as to the trust and tribal fee lands. When that lease expired, two new leases were approved in 1993 by the BIA: one for 13 parcels held in trust for the Band (covering approximately 20.1 acres) and another for 15 "allotment parcels" held in fractional trust ownership for tribal members and, as to several parcels, for the Band. The first lease's term was 50 years; the other for 20 years. By the time that the latter lease expired in 2013, the Band had acquired complete ownership of two parcels and more than 45% ownership in another 10. What occurred next was predictable: The Band declined to enter into a new lease; Enbridge continued to transport oil and natural gas through the pipeline despite impasse in the lease negotiations; and the Band sued in 2019, "accusing Enbridge of trespass and unjust enrichment for continuing to operate across the Reservation without valid easements, as well as nuisance, ejectment, and a violation of the Band's regulatory authority." Enbridge counterclaimed, arguing "that the Band breached its [50-year] contract granting an easement and its related duty of good faith and fair dealing." The parties then cross-moved for summary judgment.

  In a lengthy opinion, the district court granted the Band's motion but refrained from issuing injunction relief. It further granted Enbridge's motion except as to one claim—federal-common-law nuisance—where it found an outstanding question of material fact. The court's analysis is fact specific and implicates few Indian law-related issues. The following will focus on those issues.

  The principal dispute as to the trespass claim was Enbridge's argument that the 50-year lease imposed on the Band an obligation to enter into a successor lease for the 15 parcels and thereby "'to avoid an absurd result.'" The court was unpersuaded because (1) nothing in the 50-year lease indicated that it dealt with anything other than the 13 parcels and (2) Enbridge could only blame itself for the ensuing difficulty, since it "knew full well at the time it signed the 1992 Agreement that there was a substantial risk its easements on the allotment parcels would expire after 20 years, having been apprised that the BIA would only grant 20-year easements on the allotment parcels, and that there was no guarantee these easements would be renewed, regardless of who owned them at that

time." Responding next to the Band's alleged failure to deal fairly and in good faith, the court stated in part:

> [T]he implied duty of good faith and fair dealing cannot be applied to deprive the Band of its sovereign authority over its land. Rather, the court must interpret all contracts in light of the Band's sovereign power and must construe contracts to avoid, if possible, foreclosing the exercise of sovereign authority. ... A sovereign will be found to have surrendered a sovereign power by contract only if the surrender was explicit and unambiguous. ... In this case, nothing in the 1992 Agreement clearly and unmistakably surrenders the Band's power to exclude Enbridge from parcels of land acquired after the agreement was signed; nor are there explicit or unmistakable terms in the 1992 Agreement by which the Band agreed to grant Enbridge a right-of-way across all parcels owned by the Band for the next 50 years.

The court buttressed this conclusion by pointing out that "[w]ith respect to right-of-way easements across tribal lands in particular, the Secretary of the Interior has the authority to grant an easement for a pipeline through a Reservation or individual Indian allotment, 25 U.S.C. § 321, but cannot authorize a right-of-way easement across land owned or co-owned by a tribe 'without consent of the proper tribal officials'" (quoting *id.* § 324). Consequently, "the Band's decision effectively to refuse additional, 30-year easements to Enbridge on allotment parcels was not just was the exercise of a sovereign power to which Enbridge was always subject, which the implied duty of good faith and fair dealing cannot waive, but to do otherwise would be effectively renewing these easements without BIA approval."

Turning to the Band's unjust enrichment claim, the court rejected Enbridge's contention that no federal cause of action exists for such relief, citing a Seventh Circuit decision that "recognized unjust enrichment claims under federal common law, equating them with common law principles of restitution." *See ConFold Pac., Inc. v. Polaris Indus., Inc.*, 433 F.3d 952 (7th Cir. 2006). It then held that the Band was entitled to a "profits-based" remedy given the intentional nature of Enbridge's trespass—i.e., "'consequential gains' in the form of profits that the trespasser achieved by violating the property owner's rights." The court also rejected Enbridge's laches defense, finding the facts "not remotely analogous to the circumstances" in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), or *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005). It characterized as "tone-deaf and meritless" the assertion "that permitting the Band to recover a profits-based remedy would be a 'windfall' to the Band because it obtained ownership of the allotment parcels 'at taxpayer expense through federal programs, and for a minute fraction of the amounts it is now seeking in damages as a result of its ownership in these lands.'" Nevertheless, the court declined to direct Enbridge at this time to cease operating the pipeline as it passed through the Reservation (although concluding that permanent injunction factors largely weighed in the Band's favor) in view of the international complexity attendant to the pipeline's operation. After sketching a possible work-around that would give Enbridge five years to reroute the pipeline, it stated:

> However, the court will not issue any permanent injunctive relief without further input from the parties. Specifically, the court will hold a status conference with the parties at which the parties should be prepared to provide input on: (1)

Enbridge's likelihood of completing the reroute within five years; (2) how to determine the appropriate measure of past and future rent and damages to the Band; and (3) what issues, if any, must be resolved by a jury or this court. After the court receives the parties' input on these issues, it will determine the type of trial necessary to resolve this case.

Finally, the court granted Enbridge's motion for summary judgment as three counts because the Band had not responded to the company's argument (state law nuisance); because the claim was duplicative of "the court's equitable analysis" (ejectment); and because the Band conceded lack of ripeness (Band regulatory authority). It denied the motion as to the federal-common-law nuisance claim because "there are genuine disputes of material fact regarding whether the threat of rupture is 'imminent,' as well as the adequacy of Enbridge's proposed abatement measures."

- **Relevant (2022) Deskbook Sections:** 3:14 n.9; 5:10 n.3